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RECKONING WITH THE PAST: ANCIENT HINDU LEGAL LITERATURE IN THE MODERN COURT

AUTHORED BY - YASHWARDHAN SINGH

Introduction

The Story of India's legal history is a lengthy and complex one. Despite the difficulties in tracing a definitive timeline, some historians believe that the earliest legal scriptures can be dated to as far as the 2nd millennium BCE. These scriptures and laws revolved around the central concept of 'dharma' and acted as pillars for public peace and advancements. Only a small fraction of this entire body of legal literature has withstood the test of time, yet even that portion that has survived is rather substantial.

Originating from the sutras and smritis, the early Hindu law is broadly classified under the 'Vedic age.' This law lay emphasis on the ideas of social welfare and explained elaborate rules for governing society, religion, domestic duties, and relations between members of society[1]. The earliest of these works are the Dharmasutras which provided a manual for human conduct and spoke of the relation of man to the state. This entire tradition of Dharmasutras and Dharmashastras, which include earlier and later writings respectively, contains several smritis which were written by learned Sanskrit scholars and laid down formulated and formal codes for the preservation of 'dharma.' The Manusmriti, also known as the Manav Dharmashastra[2], was one of the most significant and reputable legal scriptures used in Hinduism alongside other notable ones such as the Yajnavalkya Smriti and the Brihaspati Smriti.

The Gujarat High Court, despite having witnessed the passage of millenniums since the conception of the Manusmriti, has decided to invoke it to arrive at a judgment in the recent past. Justice Samir Dave, after hearing the plea of a 16 rape survivor seeking to terminate the resultant pregnancy, made the following oral observations.

[1] Visheshwar Dayal Kulshreshtha and Sumeet Malik, *V. D. Kulshreshtha's Landmarks in Indian Legal and Constitutional History* (12th edn., Eastern Book Co 2019) pp 4–6.
[2] Pranshu Vats, 'Manu's Laws and Social Order' (*legalserviceindia.com*) <https://www.legalserviceindia.com/legal/article-9786-manu-s-laws-and-social-order.html>.

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"Because we are living in the 21st century...Go and ask your mother or great grandmother, they will tell you that in the past, 14 to 15 years was the normal age for girls to marry. By the time they (girls) attain 17 years of age, they would deliver at least their first child,". "Girls get matured much before than boys. It is mentioned even in Manusmriti. I know you may not but at least for this, you must read it," the judge added.

Against the backdrop of these events, the place of the Manusmriti in today's legal landscape poses a tricky question and necessitates a revisit to the ancient legal document. This article aims to analyse the Manusmriti alongside other notable works in light of modern values to decipher whether it is a piece of timeless wisdom or outdated beliefs.

Guidepost for Subsequent Social Order

Law and judicial proceeding, alongside various other fields, experienced tremendous developments in ancient India. Works such as the Manusmriti lay down over 2500 codes and go into great depths when establishing the jurisdiction, titles of the law, and role of the state and the king in delivering justice. The fact that these codes laid down in the Manusmriti continued to influence subsequent laws made in the Mughal and the British Empire (where the laws of the Manusmrtiti were reinstated unchanged) is a testament to the advanced and sophisticated nature of ancient Hindu legal legislature. Several other South Asian nations including but not limited to Burma, Thailand, Cambodia, and Indonesia also took inspiration from the Dharmashastras to lay the foundations of their legal principles.

These fundamentals of legal principles, in the Dharmashastras, lay down a detailed structure spanning through several writings. The Manusmriti, in the initial chapters, gives the concept of a plaintiff and a defendant and who can bring a suit to the court. The Yajnavalkya then describes how a case proceeds. After the filing of the case, the documents are the first thing that is taken into consideration. The court required these documents to be precise, detailed, and authentic with the signatures of the witnesses. Then the witnesses were examined. These witnesses were supposed to be religious, generous, and descendants of a good family. The Brihaspati Smriti gives the minimum number of witnesses was three, but it is suggested that nine, seven, five, four, three or even two witnesses were sufficient, provided they were learned Brahmans. But a single witness should never be entertained[3]. The witnesses played a key part in the trial process and were

[3] Visheshwar Dayal Kulshreshtha and Sumeet Malik, *V. D. Kulshreshtha's Landmarks in Indian Legal and Constitutional History* (12th edn., Eastern Book Co 2019) pp. 4-6

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considered to have more weight than documents in all the smritis. The trials were divided into 18 categories to avoid confusion and delays which were further bifurcated into civil and criminal trials by the Brihaspati Smriti[4]. The bifurcations are as follows - The fourteen titles of law, according to him, comprised money lending, deposits, invalid gifts, concerns of partnership, non-payment of wages, non-performance of service, disputes about land, sale without ownership, rescission of sale and purchase, breach of contract, relations between husband and wife, theft and inheritance as well as gambling. These fall within the purview of civil law. On the other hand, the four titles of law comprising the two kinds of insult (parushya), violence (sahasa) and criminal connection with another's wife spring out of injury to others were within the domain of criminal law[5]. This division of jurisdiction along with some revolutionary trial procedures shows how progressive and streamlined the legal system was in ancient India.

Continuing the narrative of progressive endeavours, both the Brihaspati Smriti and the Yajnavalkya Smriti mention the existence of several courts which varied in importance[6]. This system provided for lower courts that served as the first step in delivering justice. Appeals against the judgements of these courts could be taken up to higher courts if the subject of their matter was valuable. The highest court at the time was the King's court where all matters were heard by a committee that embodied the idea that 'multiple brains make better judgement than one'. This committee was called a Sabhya. How it worked was that besides the king, who is the fountainhead of justice, the court of justice consists of members appointed by the king to assist him (valkya). The premise behind this was that "The king can shoulder the greater responsibility of administration of justice if he is attended by good assessors." The Yajnavalkya sets forth that the king should appoint as members of the court of justice such persons, who are possessed of Vedic learning and study, who know *dharma* or law, who are the speaker of truth and who are impartial to friend and foe (valkya). However, the power to give the final verdict was always in the hand of the king. Yajnavalkya has not given the number of sabhyas to be appointed by the king[7][8]. The Manusmriti mentions that *sabhya* is formed by three Brāhmaṇas, well versed in Vedas, and one learned Brāhmaṇa appointed by the king. A learned Brahmin could even be appointed by the king to take charge of a day's judicial proceedings to avoid backlogs and delays.

[4] 'Administrative and Institutional Structures' <https://egyankosh.ac.in/bitstream/123456789/22029/1/Unit-17.pdf> accessed 26 April 2023.
[5] Ibid., 5
[6] Visheshwar Dayal Kulshreshtha and Sumeet Malik, *V. D. Kulshreshtha's Landmarks in Indian Legal and Constitutional History* (12th edn., Eastern Book Co 2019) pp. 4-6
[7] Kalita Nabanita, *Yajnavalkya-Smriti (Vyavaharadhyaya)—Critical Study (*2017).
[8] Yajnavalkya and others, *Yajnavalkya Smriti : With the Commentary of Vijnanesvara Called the Mitaksara : And Notes from the Gloss of Balambhatta.* (Ams Press 1974).

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Pertinence of Ancient Hindu Laws

Upon a superficial reading of Ancient Hindu law scriptures including the likes of the Dharmashastras, what jumps out is that these texts are built on the foundations of discrimination with the aim of preserving social hierarchy. The laws contained in these writings reinforce all forms of birth-based inequalities by reducing one's social status and individuality to their caste, race, and gender. These caste boundaries are also portrayed to be inescapable.

Thus, even though texts such as the Manusmriti provide an extremely detailed and intricate structure, they build on a bedrock that itself has been rendered obsolete over the years by society. Concepts such a equality before the law and fundamental rights which are cardinal to the modern idea of law find no space in the vast expanse of ancient Hindu law. The very first chapter of the Manusmriti bolsters these ideas and sets the tone for what to expect from the remaining voluminous text. It states that "For the growth of these worlds, moreover, he (the Creator) produced from his mouth, arms, thighs and feet, the Brahmin, the Kshatriya, the Vaisya and the Sudra"[9]. The discrimination starts from the very moment of one's birth as the infants are given threads to wear that demarcate their place in the hierarchical social arrangement. The Brahmins, Kshatriyas, and Vaishyas (also known as the twice-borns) received threads of varying quality while the Shudras (the once-borns) were excluded from these rituals[10]. The names given to these infants were also in accordance with their roles in society. Shlokas 30 to 32 of chapter 2 of the Manusmriti states that 'For the Brahmin, the name should connote auspiciousness; for a Kshatriya, strength; for a Vaisya, wealth and for a Sudra, disdain…'[11]. These employment opportunities were also governed by caste hierarchies where the Shudras were by law mandated to do 'unclean' work and were thus subject to contempt and hatred. *Chapter 8, shloka 410,* says, "A king should make Sudras engage in the service of twice-born people"[12], and *shlokas 413, 414,* say "the Sudra was created by the self-created one solely to do slave labour for the Brahmin. Even when he is released by his master, a Sudra is not freed from his slave status for that is innate in him; and who can remove it from him?"[13]. *Chapter 8, Shloka 129*: "Even a capable Sudra must not accumulate wealth; for when a Sudra becomes wealthy, he harasses Brahmins."[14] The punishments were also brutal at the time and were decided based on one's caste. According to the Shlokas, if a 'once-

[9] Lawgiver Manu and Patrick Olivelle, *The Law Code of Manu* (Oxford University Press 2009).
[10] *Ibid., 11*
[11] *Ibid., 11*
[12] *Ibid., 11*
[13] *Ibid., 11*
[14] *Ibid., 11*

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born' man aggressively instructed or insulted a 'twice-born' their tongues could be cut off while if the roles were reversed it elicited no punishment[15]. The fines also varied for different castes. These examples are small scratches on the surface when it comes to the number of Shlokas that perpetrate the caste hierarchies. The nature of punishments was also extremely cruel which is a trend that is now changing. In those times, capital punishment could be pronounced for offences as small as stealing. Today's punishments are in striking contrast to these times as now the belief in the idea of a 'second chance' and 'repentance' has reduced the severity of the punishments.

Shlokas concerning women's rights and upliftment are also few and far between in the smritis. The Manusmriti throughout its course goes against the notion of giving women any right to her life, her body, or her property. Chapter 5, shlokas 148, 149 states that "Even in her own home, a female – whether she is a child, a young woman, or an old lady – should never carry out any task independently. verse 9(3) of the Manusmriti, which when translated into English says about a woman, "The father guards her during virginity, the husband guards her in youth, the sons guard her in old age; the woman is never fit for independence."[16] The Manusmriti also does not grant women the prerogative to exercise autonomy over their own bodily rights as they are depicted as objects of sexual satisfaction for men. This is enough evidence to establish the fact that the Manusmriti is not the most ideal instrument to define women's rights as was done by Justice Dave in the High Court judgement. This has also been outlined by the Supreme Court time and time again in judgements such as the Sabrimala judgement or the Suchitra Srivastava judgement where the Court dealing with reproductive health specifically said that "there should be no restriction whatsoever on the exercise of reproductive choices such as a woman's right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods." Thus to pronounce a judement saying that abortion in the case of a rape survivor because 'girls in older times used to be married at 14 or 15 and had children by 17' could be seen as a view divergent from the Apex Court's.

On the 25th of December in the year 1927, Dr. Ambedkar set fire to the Manusmriti. This day is observed in dual reverence as Manusmriti Dahan Din and Stree Mukti Din. To allude to the Manusmriti as a foundation for women's rights would stray from the principal's enshrined by the Indian Constitution and also begs the question of where personal biases such as religion of the judges might tend to overpower their oath to the country. Such jurisprudence which might find

[15] *Ibid., 11*
[16] Lawgiver Manu and Patrick Olivelle, *The Law Code of Manu* (Oxford University Press 2009).

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roots deep inside one religion, some practices of which we consciously chose to leave behind in stride for equality and empowerment, could potentially prove to cause injustice keeping in mind the modern landscape of law. Having the apex defender of rights resort to a subjective view of the law tinted by the lens of their religion also might dampen the credibility of the historically illustrious institutions.

These laws reflected the ideologies prevalent in the Vedic age. I believe the power of creating the laws was misused by the Brahmins and the Upper-classes. What they created was not the law that ought to be but one that protected their social status and power. They used the law as an instrument to exercise undue influence over helpless people who had no way of escaping the vicious cycles of poverty and impotence.

Conclusion

In conclusion, the ancient Hindu law literature is a sophisticated and nuanced body of writing that paints a comprehensive picture of Indian civilization at the time. It stands out for its depth and intricate structure and reflects the ideologies prevalent in India in the Vedic age. However, as advanced and ground-breaking as it might be, it served the purpose of preserving the discriminatory social order where upper-caste men used it as an instrument to maintain their monopoly over honourable jobs and valuable resources. Since then, with an upsurge in education and awareness and through the views of several modern revolutionaries, we as a society have shifted the ideals of social order from subjugation to freedom and from discrimination to inclusion. This paradigm shift has brought with it the concepts of human rights, fair opportunities, propulsion of growth for all and meritocracy. These concepts unfortunately found no place in the Manusmriti. Thus reading the ancient text to pronounce judgments today would be taking a leap backwards on this lengthy road to justice.

It is extremely important to appreciate the tremendous contributions of the Dharmashastras to India's intellectual and cultural history but not while turning a blind eye to its problematic aspects. We need to understand that the times then were different from ours where equality eluded reality and that such vestiges of the traditional world order must not be allowed to plague today's social order.