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THE HINDU CODE BILL

(A CRITICAL STUDY)

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PREFACE

J. D. Mayne wrote about 70 years ago, ' I hardly expect to see a Code of Hindu Law which shall satisfy the trader and the agriculturist, the Punjabee, and the Bengalee, the Pundits of Benares and Rameswaram, of Amritsar and Poona.' Much water has flowed since and to-day we have gained a stage where profound changes in our social life will not so rudely shock us as they would have done in the early years of this century. And if we hear loud protests and big threats against the proposed Code which 'seeks to alter the fundamental structure of Hindu Society ', and which has evoked minutes of dissent from nine members of the Select Committee it is because the authors have gone too far and too fast in some respects. No society is conservative in the sense that a slow change, however imperceptible, must reshape it as a result of social interaction. It is only when the pace of this change becomes so great as to be obviously apparent that a stir is created and the reshuffling comes to be questioned, discussed and decided upon. But a change can be dubbed as radical or revolutionary only when it seeks to break with the continuity of the social life and its mores profoundly and suddenly. It is, therefore, the duty of the students of Social Sciences to come to the forefront when issues of such magnitude are being discussed by the nation as a whole, and examine threadbare the proposed change objectively and dispassionately and evaluate it in the context of the present social life.

Bombay,
April, 1950

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THE HINDU CODE BILL

ANY consideration of the Hindu Code Bill involves two questions. Is the codification of Hindu Law desirable? Is the proposed code acceptable to the Hindus in the context of their traditions and sentiments?

In the eastern part of India the law followed is the Dayabhaga system of inheritance which is markedly different from the Mitaksara system of inheritance followed in the rest of India except some part of Malabar and of South Canara. The law under the Mitaksara school is not the same everywhere, as the authorities relied upon for the interpretation of the Smrti law are different in different parts of India and the decisions of the High Courts have added to the variations in the interpretations of the law by their own interpretations of the authorities held valid by them and by their recognition of some usages as valid and authoritative against these sastric authorities. The result is Hindu law is not the same for the Hindus living in different parts of Bharat, and one cannot deny that the time is now ripe for a systematic and uniform code for the Hindu community throughout the length and breadth of Bharat. Only, it may be added, the legislature in its zeal for uniformity need not forget the important fact that Hinduism represents a synthesis of varied cultures of varied ethnic stocks integrated through the course of centuries into a fairly homogeneous community through the pattern of caste system, and as such it has recognised the manifold diversities of cultural-patterns as consistent with the prevailing unity of the fundamental Brahmanic pattern It is this aspect of Hinduism which reveals its

greatness and grandeur, and the legislature should not ignore it in its attempt to seek uniformity at all costs.

As for the second question the traditionalists oppose the present code on the plea that Hindu Dharma is *sanatana*, i. e., eternal and immutable, and, therefore, any interference with it on the part of the legislature is not justified. In view of the alarming nature of the protest against the code it becomes imperative to know in what sense Hindu Dharma is *sanatana*.

From very early times Hindu law has always been recognised to derive its sanction from the Vedas. Though it is true that all writers on the Hindu law have sought to justify their interpretation by either quoting a Vedic text or by interpreting a Vedic text in a way to yield the desired meaning, Hindu law has ever gone on changing in terms of time and place. From the very early times when the Vedas came to be studied in different Sakhas and Caranas, different traditions clustering round these Sakhas and Caranas came to be evolved under the stress of different localities in which these Sakhas were studied and of different historical epochs in their formation by the genius of the leader of the Sakhas or the Caranas. These traditions found expression in the Sutra literature of different schools and became law for the adherents of the particular school. It is this particular development of the Vedic learning which explains why Apastamba regarded the Vedas and the agreements of learned men as sources of Dharma. Besides, with the methods of interpretation of the Vedic texts evolved by the founders of the Mimamsa school some Vedic texts came to be regarded as *vidhis*, or obligatory injunctions, while some came to be looked upon as *arthavadas*, or merely recommendatory or laudable prescriptions, thus providing a

scope in its own way for the development of Hindu law. In the early Christian era the conflicting opinions given in the Vedic and the Smrti texts were found either to be too complex for the people or against the public opinion with the result that in the Mahabharata and Yajnavalkya smrti what was approved of by the people came to be defined as Dharma. One more channel for the development of the law was provided by custom. The caste system contemplated in Manu samhita at this period in Indian history was an attempt to integrate into Hindu community different tribes and peoples with different strata of culture under a hierarchial system which determined the social distance of these different groups on the standard of Brahmanic pattern of life. The Brahmanic law provided for the conduct of life of those who were looked upon as elite and entitled to the recital of the Vedic texts The rest who were outside the path of the sacred law followed their own law. Though the usages of these groups were not in conformity with the set of sacred laws, living in proximity for centuries and the consideration of status in the hierarchy of the caste could not have kept them aloof from culturally imitating the followers of the Brahmanic law and thereby assimilating gradually the Brahmanic pattern of life in their culture-complex. This process of acculturation cannot be one sided, though it can be intensive in its receptiveness on the part of one, the culturally inferior. While the lower groups always try to approximate to the pattern of the higher group, they in turn do influence, of course in a very measured proportion, the higher group in ideas and ideals and thus provide for synthesis of cultures instead of their conflicts. We thus find down from the time of the Vedas to the end of the eighteenth century Hindu Dharma expanding in scope and meaning under the stresses of

culture-contacts, local variations, historical changes, intellectual leaders provided by the community in different epochs, and all these changes have been incorporated under the various devices of Desa dharma, Apad dharma, Yuga dharma, Kali varjya, peculiar interpretation of old texts, quotations from the texts supposed to be once existent but now lost, etc. Hinduism is thus a growing tradition. But in as much as the content of Dharma at any time in Indian history was shown to be derived only on the authority of the Vedic texts it is sanatana.

If Hinduism thus stands for a progressive change, and if that is its very essence, nay the very vitality which has kept it firm-rooted over centuries in the teeth of attacks both from within and outside this land, there is no sense in saying that Hindu Dharma is in danger with the proposed codification of law. What one would, however, like to stress is the nature and degree of change, the strides taken at a time, because assimilation of new traits or incorporation of new ideas and ideals can be properly integrated into the existing culture-pattern only when there is a cultural compatibility and sufficiently long time for absorption. Let us review the provisions of the proposed code from this angle.

The proposed code contemplates very sweeping changes in matters of property and marriage. The proposed changes should be examined on the background of our achievements so far, as they are reflected in our traditions, sentiments and legal enactments, and our present aspirations.

II

The section on marriage deals with the forms of marriage, conditions of marriage and dissolution of marriage. Marriage can be dissolved on the ground of impotency of the husband if it is reported to the court within three years of marriage. If a girl marries at the age of fourteen which is the minimum age for marriage, and if she does not begin to live the family life immediately she may not know for two or three years after marriage that her husband is impotent. Much more serious than this is the fact that a Hindu girl who is brought up in a tradition of complete resignation to the will and pleasure of her husband will find it tremendously difficult for her to come forward to expose her husband as impotent within three years of marriage. Sentiments are sentiments: they are deep-rooted and one cannot pretend to ignore them with the tall talk of rationalism. One fails to understand why the authors have insisted on the period of three years while provincial legislation on divorce has been more liberal on that score. Again, for desertion of a wife for two years or for cruelty which renders it unsafe for the wife to live with the husband, for incurable venereal disease or a virulent form of leprosy, not to mention adultery or unsound mind since the date of marriage, the wife can ask for judicial separation which would enable her to ask for dissolution of marriage if marital intercourse for a period of two years or upwards after judicial separation has not been resumed. The present writer fails to understand why women who have applauded the code as a charter of liberty for the down-trodden Hindu women have not raised a word against these provisions of the code which render divorce almost improbable, if not impossible.

As to the conditions of marriage, marriage with a relative within the degrees of prohibited relationship or within the degree of sapinda relationship renders it void. The authors of the code must be congratulated for doing away with, at one stroke, the restrictions of caste endogamy and of gotra-exogamy. An attempt in the direction of the former was made by the Special Marriage (Amendment) Act of 1923, and the latter was scrapped off by legal decision only recently. The authors have merely removed some restrictions in the way of utilising the facilities provided by the Act of 1923. If the authors could go to the length of doing away with the gotra-exogamy and caste endogamy one wonders why they should uphold sapinda exogamy within five generations on the father's side. If we go to the history of sapinda exogamy in the Hindu scriptures we find that it was not very rigidly enforced, and very often writers were satisfied with its observance within four generations. The Sraddha which occupies such an important place in the life of every Hindu contemplates the family unity of four generations. The present code has done away with that basis of the family in the law of inheritance, though it has upheld the family unity of four generations. Marriage outside the family should therefore mean marriage in the fifth generation and sapinda relationship must extend as far as the fourth (inclusive) in the line of ascent through the father. While this family relationship serves as a restriction in the choice of a mate in the sacramental form of marriage, it is narrowed down to three generations on both the sides in the civil form of marriage. Two persons are said to be within the degrees of prohibited relationship (and therefore ineligible for marriage) if one is a lineal ascendant of the other or was the wife or husband of a lineal ascendant or descendant of the other, or if the two are brother

and sister, uncle and niece, aunt and nephew, or the children of two brothers, or of two sisters. One does not understand the exact significance of the pairs, uncle and niece, aunt and nephew; whether they are restricted to the father's side only or include both the sides. On the latter interpretation marriage with a sister's daughter or with the wife of the mother's brother is prohibited. When the code contemplates marriage with the children of two brothers or of two sisters as incestuous the marriage of children of brother and sister should be equally incestuous. The distinction sought to be drawn here is, if anything, antediluvial biology. If the authors have conceded here in favour of usage at the cost of rationality or logic they should have equally conceded in favour of marriage with a sister's daughter prevalent among some Dravidas. And it may be further inquired whether a code supposed to be more in the nature of a civil code should seek after accommodating local usages as exceptional provisos in the body of the text. The present writer does not convey the idea that the religious susceptibilities of a major section of the community for whom the code is devised should be completely ignored. People may be allowed to avoid as many generations as they choose in their daily practice. The code should take note of the minimum degrees, preferably of three degrees on both the sides or four on the father's side and three on the mother's. Again, marriage within the prohibited degrees should be rendered voidable, and not void, on petition from members of the group who, by custom, allow at present marriage within the third generation. Left to time and the will of the people these restrictions are likely to be obliterated in the near future, and the code should not, therefore, give a new lease of life when our present knowledge of biological facts has no-

thing to say against these unions from the point of view of the health of the community.

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III

Looking back to the traditions we find that the widow and the daughter came to be recognised as heirs as early as the third century. In the eleventh century Vijnanesvara recognised daughter's son as an heir and Jimutavahana accorded this right even to a sister's son, father's sister's son and some of the relatives through the mother. In the seventeenth century even sister came to be recognised as an heir. In the eighteenth century Balambhatta pleaded in favour of daughter's daughter, brother's daughter and sister's daughter as heirs. Though all these near relatives were not recognised as preferential heirs by the British courts public opinion forced them to do so by the Hindu Law Inheritance (Amendment) Act of 1929. Nay, by the Hindu Women's Rights to Property Act of 1937 the widow came to be recognised as a co-heir with her son, and the widows of the pre-deceased sons or grandsons were made representatives of their husbands and as such entitled to the shares, intead of maintenance, of the joint property. By a legal decision a coparcener was allowed to transfer for value his share in the joint family property and by the Hindu Gains of Learning Act of 1930 a part of the acquisition of an individual was set off from being pooled together in the family fund. It must be stressed here that while the traditional authorities on the Hindu law were in favour of extending the right to property to descendants of either sex within three generations, they were insistent on the preservation of the structure of the joint family. Public opinion on the other hand, not only accorded to this tradition a legal sanction but did away with a very

fundamental characteristic of the joint-family, viz., the theory of survivership.

So far the ground is already covered and the question now is confined only to those provisions which go beyond this. They are; (i) the joint-family is done away except in respect of the agricultural land (for which no explicit provisions are given), (ii) daughter is recognised as co-heir with a son. Women have been given absolute control, instead of limited estate, over the property in their charge, (iii) descendants of either sex in the fourth generation are given preference to the brother. The first proposal seeks to remove the other characteristic of the joint-family system, viz., the vested interest in property by birth and consequent distinction between the ancestral and the self-acquired property. In view of the enormous litigation that we have on the basis of this right, and in view of the fact that this distinction is a creation of the British courts as the Hindu legislators stressed distinction between movables and immovables, the proposed change is in the right direction. Recognition of daughter as a co-heir with a son and her absolute control over her property are the rights which should be conceded ungrudgingly. The traditionalists may be reminded here that as early as the eleventh century Vijnanesvara invested females with absolute control over her property. The only question that may be raised in this connection is about the devolution of property after the woman's death. According to the proposed code the heirs in order of preference are (i) husband and children as co-heirs, (ii) mother, father, (iii) husband's heirs, (iv) mother's heirs, (v) father's heirs. One has nothing to object to the claims of the first two heirs, but one would like to question the propriety of the claims of the third over those of the fourth and the fifth. When,

under the new law, a large bulk of a female's property comes to consist of the gains she makes from the property of her father's family equity demands that it should revert back to the same family. The proposed arrangement ignores this consideration and conduces to the fragmentation of the family property by transferring the daughter's share once for all to the family of her husband, a step the rationality of which one fails to understand and which the authors of the code have not tried to explain.

It is the third provision, however, which the present writer does not agree with and for valid reasons. It seems that the authors of the code have provided for descendants in the fourth generation in preference to a brother by working out logically blood-propinquity on the basis of the family unity of four generations. This unity of family is recognised in the Hindu scriptures only in the Dayabhaga school mainly on the religious ground, viz , the offering of pindas at a Sraddha. In all schools which stand for blood propinquity, in the Smrti law of property and in the culture-complex predominantly, the family contemplated is the family of three generations. And if the present code ignores completely the religious basis of family and stresses natural love and affection as the basis of devolution of property one naturally expects the authors to make out a case why they should set aside the traditional pattern of life in favour of family of four generations. In the days in which we live there are very few possibilities for a person to see his or her third descendant. Under the circumstances even sentiments, if they are to be catered for, will be in favour of a brother. Again, with the business community in particular this shunting off of the brother in favour of such an heir as the daughter's daughter's daughter is likely to

have considerable repercussions, as one would not like to part with a big slice in favour of such a remote relative only because of the fact that he had accommodated his brother in the joint-business either out of necessity or filial considerations. Both the tradition and practical wisdom demand of the authors of the code a very serious consideration for the justification of a scheme outlined only on the consideration of being logically schematic.

The code seeks to destroy the joint-family. It may be admitted that the joint-family is outmoded in the context of our present social setting. It is fast dying out and there is no sense in pleading for its revival. What the present writer desires to stress is that it should be left to die its natural death and legislature need not destroy it by an enactment. Even when we find all around air surcharged with individualistic tendency, we find as yet some sentiments which render it familistic individualism. Even when a person is separated from his brother, may be after quarrelling with him, he would wish, if he dies without leaving his widow or any descendant, his property to go to his brother or to a brother's son and not to his wife's relatives or to the daughter's farther descendants or to any charitable institutions. Similarly, if a person is poor, or if a person dies leaving his family without enough means of subsistence, his brother, father or such other relatives do feel as yet moral obligations, backed up by social opinion, to run to the help of the needy within the bounds of their means. The social security which was provided by the joint-family in the old times has been a striking feature of the even deteriorated joint-family of the present day. In the days when we have not succeeded in providing social security to the masses by state agencies, the legislature must give very serious consideration to these familistic sentiments

which are as yet enthroned in Hindu heart, and the law must not attempt to tamper with them adversely. The present writer's objection to the third provision discussed above thus gets further support.

Let it be further noted here that the history of Hindu law clearly indicates that whenever a concession came to be made in favour of individual rights in the family property, the legists in so doing aimed at maintaining the corpus of the joint-family. It is this facet of the Hindu mind which regards the present code as un-Hindu.

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IV

Having so far dealt with the main provisions of the code, a few minor points may now be reviewed.

(a) The main achievement of the Code is the raising up of the status of woman almost on equality with man by giving the daughter an equal share with a son, by giving the female absolute control over her property, by penalising bigamous marriage and by conceding her the privilege of obtaining judicial separation or dissolution of marriage. One would, therefore, like to raise a fingure at some of the discriminating points which find place in the Code. In distribution of property amongst preferential heirs in class I, the share of the widow is said to be equal to that of a son, but the share of the widow of a pre-deceased son who has no son or son's son alive is half that of a son. The widow of a pre-deceased son represents the dead son and inherits his share as such. It is hence that this share is divided equally by his (the pre-deceased son) widow and son, if any. The widow gets only half of the share (of the

pre-deceased son) if the latter has left a son, but that is no reason why she should get only half of her due share when the pre-deceased son has left no son or grandson. Again, though the property held by woman is said to be absolutely owned by her, her share as tenants-in-common under section 87 of the Code is said to be only limited estate. One fails to realise why this right conferred by this very Code should operate with limited incidence. Nay, this provision furnishes a striking illustration of inconsistency in the Code. Estate acquired by women before as well as at the commencement of the Code is governed by the old law. Pious obligation for debt of the ancestors continues as under the old law. But 'on and after the commencement of this Code, no right to claim any interest in any property of an ancestor during his life time, which is founded on the mere fact that the claimant was born in the family of the ancestor shall be recognised'; nor shall any court 'recognise any right to or interest in any joint-family property, based on the rule of survivorship; all persons holding any joint-family property on the day this Code comes into force shall be deemed to hold it as tenants-in-common as if a partition had taken place between all the members of the joint-family as respects such property on the date of the commencement of the Code.' That means even when the Code contemplates to nullify the existing interest, which involves divesting of property already vested in an individual, in case of a male, it does not guarantee the interest, it *confers* elsewhere, in case of a female though it involves no question of vested right being affected because no such right accrues to the reversioner, under the old law, before the death of the female. Whether this is due to anti-joint family bias of the authors of the Code, or due to some vague discrimination between a male and a female lurking in their

minds, or due to some legal or other necessity cannot be definitely said. Yet it remains a deplorable fact. In the order of succession amongst agnates and cognates preference is based on a number of factors one of which is the sex of the heir. Between a sister's daughter's son and a sister's daughter's daughter the former is preferred on the consideration of his male sex. This discrimination between a male and a female lends support to the contention of the present writer that the authors have gone too far in their recognition of descendants, males and females alike, within four generations in the list of preferential heirs.

(b) Secondly, in its attempt to seek uniformity for all sections of the Hindu community the Code has, it seems, sought to abrogate all customs. And it is necessary to consider whether such an attitude is desirable. To illustrate, there are many castes and tribes in India which allow divorce by merely declaring one's intention before the panchayat and payment of a fixed amount of money or what the panchayat would ask by way of compensation to the party concerned. The Code, however, lays down that no marriage can be lawfully dissolved except by a decree pronounced by a competent court in accordance with the provisions of the Code. The authors of the Code have only the Brahmanic pattern in view which does not allow divorce under any circumstances, and have therefore failed to take congnisance of the hardships, expense and psychological reactions of those sections of the Hindu community who have for ages rough yet ready method, admirably suited to the conditions of the people of this land, of dissolving undesirable match. Much more serious than this is the case of the people following the matrilineal social organization and of those governed by the M. M. A. of 1932 which recog-

nises the mother, widow and children as the nearest preferential heirs. Though they have been slowly evolving a pattern of family, individual as well as patrilineal, we have no definite knowledge of the progress made in that direction and hence some caution is necessary.

(c) The age for marriage in case of a female under the Child Marriage Restraint Act of 1929 is 14 years, and the Code has kept it up. Looking to the progress made within the last 20 years in raising up the age of marriage one can understand, though cannot appreciate, the lukewarm attitude of the authors of the Code towards this question. Yet the present writer shall be failing in his duty if one or two important facts which have bearings on this aspect of Hindu Marriage are not stressed here. From a statistical survey of 4462 marriages in the Nagar community it appears that the marriage age in case of a female has changed from 11.4 to 12.7 to 14.2 in the three consecutive generations. But the age of the mother at the first delivery does not show any corresponding change as it varies from 17.59 to 17.11 to 17.52. On the other hand, miscarriage has gone from .0233, to .04 and .07 and mortality under five years has increased from 20% to 22% to 23.25%. Secondly, the survey of 294 samples in respect of the sex-habits of the Hindus shows that at least with 50% of the married couples in the sample sex life begins immediately after marriage or within one month. The average frequency of sex-intercourse works out to be 10.2 per month of 24 days, though it must be actually higher when a number of factors, viz., multiple-coitus on the same night, season, woman's absence from the house for some reason or the other, etc., are considered. If these facts are in any way a pointer to the health of the woman and of the child, our legislators must give very serious considera-

tion to the age of marriage, though the innate prejudices against any reform on the part of the traditionalists and the unconcerned attitude of a large section of the Hindu population are bound to prove a very stubborn handicap in the way of achieving this long-awaited and highly-cherished rationalisation.

V

The authors of the Code have been actuated, it should be conceded, by the laudable spirit of evolving a simple, secular, rational and uniform Code for the vast majority of the people of this land, and, therefore, they have applied this Code, based on Hindu Law, even to the Jains, the Buddhists, the Sikhs, the tribalists and even the matrilineal peoples of Malabar. But the very attempt implied abrogation of different customs prevailing in different parts, compromise with or even scrapping off of some basic concepts of Hindu Law and deep-rooted sentiments of the Hindus, and hence the authors had to ride roughshod in some respects ignoring the realities of Indian life.

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While in some cases the reforms contemplated by the Code are not adequate in others it has gone too far and too fast. The view-point of the authors of the Code in going slow in marriage reforms is quite intelligible because the legislation to be effective must be in a greater degree acceptable to the people. If this is accepted by the authors of the Code it makes out a case in favour of those who do not want to rush through with the Bill but wait a little for better consideration. The present writer does not thereby indicate that the Code should not be brought before the legislature in the

coming session. The present writer has already indicated how much of the ground of the Code has already been covered by now, and how some of the changes contemplated by the Code, though not as yet achieved, are in keeping with the traditions of the Hindu scriptures. An act codifying these aspects will be and should be readily accepted by the Hindu community. Those reforms which are likely to prove more of retrogressive than of progressive character or which are in the nature of not being easily integrated into the existing patterns of cultures found in the united Bharat, may be reserved for the present for consideration. That is necessary, and perhaps to a greater extent, from another view-point also. When we conceive of one Bharat and of a secular state, it must be our cherished goal to think of one uniform civil code for the whole of India and not for the Hindu community. That goal may be achieved within two years or so, and for that very reason the framer of the Code should keep it flexible and within the ambit of its renovation with the least adjustment in the near future.

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