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Legislation & Social Change Henry Maine's Approach to Progressive Society & Widow's Right to Re-Marriage

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ABSTRACT

Since the beginning of the twentieth century, legislation has been considered the desired route to achieve social changes in society. In the course of progressing as a welfare society, laws & policies have been formulated to achieve desirable social conditions, i.e., for the amelioration of vulnerable sections, the realisation of human rights, and abolition of detrimental age-old customs & traditions. Sir Henry Maine, too in his theory of the Movement of society from status to contract, has also formulated that legislation is one of a few mechanisms incorporated by progressive societies to move ahead from the stage of codification and to usher in radical changes. In the Indian scenario it has been believed that with legislation, substantial changes have been brought to the institution of property rights, inheritance & marriage for women in the State of Punjab. Therefore in this paper, the author shall reflect upon Sir Henry Maine's theory concerning the relevance of legislation as an agency for social change and shall try to decipher whether legislation of widow remarriage has actually helped in improving the status of women in the State of Punjab.

Keywords: *Sir Henry Maine's Legal Theory, Legislation, Customary Law, Widow Remarriage & Property Rights, Social Change*

I. INTRODUCTION

Primordial societies i.e., early or first in time human settlements are often characterised by lack of institutions and devoid of civilisation, struggling constantly to ensure survival. They are often marked as chaotic state of human affairs run with force or threat. However, in their ordeal, there was one thing that confirmed their cordial existence and it was a cooperative arrangement or agreement to maintain order in society. It was these arrangements that marked the beginning of a system of rules, and regulations. Therefore with the evolution of society from close-knit kinship groups to diverse and larger communities practising a wide array of activities, the need for written and formal rules was felt, and thus codes were framed. The Code of Hammurabi is

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one of such oldest known extant set of laws followed by the Twelve Tables of Roman law, Law of Manu, Justinian Code etc.² These codes were nothing but compilation of diverse customary practices and usages observed over the time to govern transactions and relationships among people. To achieve the universal application of rules the written codes were accepted as the norm of the state because customs and traditions vary across communities. However in the late nineteenth century codes were replaced by sovereign-created legislation and since then it has become a most important tool to ensure peace, order, and development in society. The importance of legislation has been recognised by everyone from Natural Law philosophers to Positivist thinkers, Historical and Sociological schools of law jurists to Legal Realists and it was only the origin and nature of law that had always been debated. The Historical school of law, however, has believed that law is found not made and it grows and evolves with the growth of society. It emanates from customs and its origin lies in the consciousness of people. It can't be artificially created rules imposed by a sovereign unknown to the traditions, customs, and historical background of the Nation. To understand the significance of legislation in ensuring social change it is imperative to understand the nature of law and society from the lens of Henry Maine, a prominent exponent of the Historical school of law.

II. HENRY MAINE'S IDEA OF A PROGRESSIVE SOCIETY

Henry Maine's comparative study of Indian, Irish, German, and Roman law had helped him in understanding similarities and differences in different legal systems. On this background he devised that a movement is observed in certain societies and it is progressive in nature accompanied by a transition from "status" to "contract". To explain this theory of movement he mentioned that every society passes through three stages of development of law and they are universal in nature i.e. have been seen with respect to every nation. He characterized them in the following stages; the First stage is marked as Divine law, at this time the law is the personal command of the King who is believed to be acting under divine inspiration; the Second stage is known as an era of Customary law, at this stage repeated application of King's rulings gave way to the basis of formation of customs and thus priestly class came into the picture for their interpretation and the last stage is marked by the formulation of Codes such as the Twelve Tables of Rome, Manusmriti, etc. To him, this era of codes is the stage from which many societies never proceed further thus giving up spontaneous social and legal development, and

² Britannica, T. Editors of Encyclopaedia (2018, December 6). Code of Hammurabi. Encyclopedia Britannica. Available at <https://www.britannica.com/topic/Code-of-Hammurabi> (last visited on May 24, 2022)

such societies are termed as “static societies”.³

The progressive societies on the other hand reflect a movement & inclination towards contract based approach and further series of evolutionary changes as they stay keen to adapt new changes for improvement of social and legal institutions with the help of legal fiction, equity, and legislation. In such societies, the administration of law is the function of public courts established by sovereign authority in contrast to static or primitive societies where it had always been the function of the family. The primitive procedure i.e. the unceremonious, unannounced attack of the tribe, or the man stung by injury, on the tribe or the man who had inflicted it, was slowly replaced by a system of adjudication. The sphere of civil law which was limited by the rigid social and legal relationships within the ancient family is now extended with the dissolution of the family and the emancipation of the individual in progressive societies.⁴ Thus the legal condition of static societies which had arrested development is characterized as “Status” by Maine, a fixed legal condition dominated by family dependency. It was supported by the fact of the established patriarchal family as the earliest social unit and smallest, indivisible unit as the subject matter of civil law.⁵ The members of such families were dominated by the patriarch or oldest male member. All the property of the group was held by him in trust, and all social relationships were fixed by each person's position within the family. Relationships within the family were even determined by agnation, and women were subject to the arbitrary will of their husbands or fathers. Sir Henry Maine's description of perpetual tutelage of women in the Roman Empire is similar to Manu's idea of womanhood where he stated that “As a child, she must remain under her father's control; as a young woman, under her husband's; and when her husband is dead, under her sons'. She must never seek to live independently,” and that's the status of women playing the most important role in primitive societies for determination of her rights and duties.⁶ He believed that the emancipation of an individual is only possible when he or she becomes the smallest functional unit and is liable for his or her actions and the only way to achieve it, is with the dissolution of the patriarchal concept of family.

³ H. Maine, *Ancient Law: Its Connection with the Early History of Society and its relation to Modern Ideas* 171 (John Murray, London, 13th edn., 1890).

⁴ Russell Kirk, *The Thought of Sir Henry Maine* 15 *The Review of Politics*, 86 (1953) available at: <https://www.jstor.org/stable/1404750> (last visited on May 23, 2022)

⁵ Brian Smith, *Maine's Concept of Progress* 23 *Journal of the History of Ideas* 407 (1963) available at: <https://www.jstor.org/stable/2708216> (last visited on May 23, 2022)

⁶ J. Starr, *The Invention of Early Legal Ideas: Sir Henry Maine and the Perpetual Tutelage of Women. History and Power in the Study of Law: New Directions in Legal Anthropology* (1989) available at: <http://www.jstor.org/stable/10.7591/j.ctt207g6xn.19> (last visited on May 22, 2022)

Sir Henry Maine was of belief that though customary law of people represents their true self but alterations are must to progress and it could be done with help of legal fictions, equity & legislation. The same approach was followed by him when he was acting as a Law member in the Council of Governor General of India during 1862-1869. He believed that imposition of British rules and policies on custom-regulated Indian society would not fetch desired results of westernisation and modernisation. Moreover, he quoted that “transformation of Indian laws according to English principles with the concealed motive of regulating Indian society functioning upon its ancient usages, was “lamentable” as it would merely allow that usage to stand, and confirmed rather mould otherwise.⁷ Further, it would be difficult for unwritten customs to evolve as they were not flexible enough and unnecessary stress had been placed on the religious character of Hindu law and its interpretation by Brahminical priests by British legal administration. However, to preserve the indigenous societal structure of India, the phenomenon of modern legal pluralism is adopted with colonialism as its basis i.e. western legal system with courts & tribunals, codified civil and criminal laws was enforced and customary laws in the case of State of Punjab especially and personal laws for Hindus and Mohammedans was kept intact to govern matters such as marriage, adoption, guardianship, divorce, inheritance and succession etc. Punjab was one of the last territories to be annexed by the British in 1849 with the prevalence of customs regulating various social groups. The underlying reason for the prevalence and acceptance of customs was the presence of village communities inhabited by Hindus and Muslims acting as repositories of their multifold castes and classes, sects, divisions and their respective customs. They never followed religious scriptures, and there was no presence of maulvis or pandits in secular matters. Due to this, the British administration set up a Board of Administration in Dalhousie where the Governor General, gave assurance to people of upholding their ‘native institutions and practices’ and that popular institution would be ‘improved and consolidated.’⁸ The Punjab Laws Act of 1872 was then enforced to place customs on front footing and it stated that the sacerdotal codes of Hindu and Muslim law were to be followed only to the extent that they coincided with, and had been absorbed within, customary practice.

⁷ Veronica Corcodel,” *The Governance Implications of Comparative Legal Thinking: On Henry Maine’s Jurisprudence and Liberal Imperialism*” available at: file:///C:/Users/hp/Downloads/The_Governance_Implications_of_Comparati.pdf (last accessed on May 22, 2022)

⁸ Sripati Roy, *Customs and Customary Law in British India* (Thare Press, Calcutta, 1911) available at: <https://www.indianculture.gov.in/rarebooks/customs-and-customary-law-british-india> (last visited on May 20, 2022).

III. CONCEPT OF WIDOW REMARRIAGE VIS-A-VIS SOCIAL CHANGE IN STATE OF PUNJAB

The concept of village community was preserved by the Colonial Government for erstwhile State of Punjab. To ensure that there shall be no political interference in matters of inheritance, marriage etc. *wajib-ul-urz* i.e. village administration papers, and *rivaj-i-am* i.e. records of customs were prepared by the settlement officers to guide judges during adjudication of disputes. However, for their formulation, only the village headman being considered as an actual repository of customs, traditions, and practices was consulted and women were excluded altogether. Thus British administration's decision of making customs as first-hand rule of decision in all civil matters has caused great damage to the inheritance rights of women in Punjab. Widowhood is a universal phenomenon but if we compare the position of widows in India with that of the erstwhile State of Punjab, we would find that due to the prevalence of local customs, remarriage of the widow was a common concept among the dominant agricultural tribes. The custom of remarriage was denoted by several words such as *Karewa Karao*, *Chadarandazi*, *jhanjarana* etc. and in such marriages, no religious rites were performed. The widow was accustomed to marrying the dead husband's elder brother, in his absence his younger brother, and in their absence some outsiders but with the consent of in-laws. Though it looked like a progressive approach it had often caused repressive effects for women such as forcible remarriage into mismatched and undesirable alliances; polygamy and the harsh reality of being a co-wife; and being deprived of her own inheritance rights.⁹ Therefore the custom that gained popularity during the British reign did nothing more than sanction the patriarchal needs of retaining control over property by restraining limited inheritance rights of the widow. It was observed that such marriages were generally performed with force and without the consent of women and one can find numerous instances where alliances with a younger brother who was a mere child had been made and thereby resulting in cases of social exploitation of such women at hands of other family members. The main reason behind the acceptance of *Karewa karao* or *chadarandazi* culture was the need for retaining property within the family, and colonial administrators of India realized the fact if they will accept or enforced the widow's right of inheritance of property then it would not be economical for the prosperity of province as it would lead to the fragmentation and sub-divisions of holdings.¹⁰

⁹ Gurmit Kaur, *Customary Law and Widow Remarriage: its implications and effects on colonial punjabi women* 72 *Proceedings of the Indian History Congress* (2011)

¹⁰ Mytheli Sreenivas, *Conjugal and Capital: Gender, Families, and Property under Colonial Law in India* 63 *The Journal of Asian Studies* 2004, available at: <https://www.jstor.org/stable/4133196> (last accessed on May 21,

The customary practice of widow remarriage was then codified with enactment of Widow Remarriage Act, 1856. The preamble of act stated that its objective is to remove all legal obstacles to the marriage of Hindu widows and to secure legitimacy and inheritance rights to the offspring of such widows procreated out of second marriage. Though it did not bring any great changes in the situation of Punjab as such a form of remarriage which was legalised under this act had already been prevalent and recognised by the Court of law, but it ensured patrilineal hold over property by taking away from the widow her limited right over it in case of remarriage by virtue of Section 2. It provided that all proprietary rights or interests that a widow may inherit from her deceased's husband property in form of maintenance or inheritance shall cease on her remarriage and it shall be passed on to the next heirs of her husband considering as if she were dead. Thus the act didn't make the widow an absolute owner of her deceased's husband estate. Further Section 4 of the act was a glaring example to show that welfare measures initiated by Britishers for women were actually superficial and baseless since it provided that nothing in this act shall make a childless widow eligible to inherit any share or interest in deceased's husband estate. The present act doesn't state anything specific concerning unchaste widows and its implication on their rights and there had been different customary practices dealing with this issue across tribes. However, generally, it was prevalent that mere unchastity doesn't absolve a widow from inheriting limited life estate from her deceased husband's property. It was observed in *Partaba vs. Mst. Phango* that "It by no means follows that mere ordinary unchastity would cause forfeiture. A remarriage causes the widow to pass into another family, where she acquires other rights and ceases to require her husband's share for her support; she cannot take that share with her for the benefit of her second husband, or introduce new male members into her first husband's family to whom he would no doubt make over the management of her share, and thus cause a contention which would end in the breaking up of the family. That remarriage should cause a forfeiture is therefore a most reasonable and a very general custom. But ordinary unchastity is a mere personal act of the widow, disgracing herself, but not prima facie causing material injury to anyone else. It is for her husband's relatives to prove that this act, by custom, involves forfeiture of the widow's rights, and they certainly cannot do this by merely showing that remarriage, an entirely different act, causes forfeiture."¹¹ In *Ram Devi vs. Shiv Devi*, a distinction was drawn between the nature of the forfeiture of a widow's estate by a widow who remarries and by a widow who is proved to be unchaste. It was observed that: "In the case of

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¹¹ SIR W.H. RATTIGAN, A DIGEST OF CIVIL LAW FOR THE PUNJAB CHIEFLY BASED ON THE CUSTOMARY LAW AS AT PRESENT ASCERTAINED available at: <http://nasirlawsite.com/laws/punind.html> (last accessed on May 20, 2022).

forfeiture by remarriage throughout the province the woman ceases altogether to be the widow of her deceased husband, loses all rights and every kind of interest in his estate, and becomes a member of another family. The case of forfeiture by unchastely, where it is established, is different. The woman does not cease to be the widow of her deceased husband nor does she become a member of another family. By custom, she forfeits a special form of maintenance recognized in this Province i.e. the possession for the life of her husband's estate, and it is a question more often answered perhaps in the alternative in the negative, whether, she is not even then entitled to maintenance from her husband's relatives."¹² Therefore it then became a general practice among widows to be called unchaste in order to retain life possession of the property of their deceased husband, and it got recognised as a general custom by the Courts too. However, in some cases with the help of special customs even forfeiture of a life estate has been affected by bringing in entries from *Riwaj-i-ams*.

IV. CONCLUSION

The need to satisfy bureaucratic interest had actually made the British administration to look past the need for social progress. In the quest for achieving uniformity in judicial procedure and legal system through the codification of customary law in the State of Punjab they have actually done what Sir Henry Maine had been afraid of i.e. freezing such customs and traditions that are regressive in nature. Moreover once codified they lost their element of continuous evolution with time and were established as a standard norm impacting the socio-economic lives of people.

¹² Ibid