

- ▶ DAYANAND COLLEGE OF LAW, LATUR
 - ▶ FAMILY LAW I
 - ▶ LLB 1ST YEAR
- 

Sources and Schools of Hindu Law

- ▶ Hinduism is one of the oldest religions of the world, the Indian civilisation is one of the oldest civilizations.
- ▶ Its origin is from a period when written material was not available and most communications were oral.
- ▶ Hinduism in the ancient period did not differentiate between religion, law and morality. They were all the same back then which was called 'Dharma'

The 3 sources of 'Dharma' at that time were

Shruti (basically the Vedas, To hear)

Smriti(which means the memorised word)

Sadachara- which means the standards of morality and justice.

Sources of Hindu Law

- ▶ 1. Shrutis
- ▶ 2. Smritis
- ▶ 3. Commentaries and Digests
- ▶ 4. Judicial Decisions
- ▶ 5. Legislative Enactments
- ▶ 6. Customs
- ▶ 7. Rules of Equity, Justice and Good Conscience

1. Shrutis (Shru means 'to hear')

➤ Shrutis is what was heard, no written material available at that time so the primary way to communicate the knowledge was orally by sages to their families and disciples which supplemented it and carried it forward.

Shrutis are made up of 4 Vedas.

1. Rigveda
2. Yajurveda
3. Samaveda
4. Atharveda

- Originally there were only the first three vedas and Atharveda was added later.
 - Rigveda is considered a tree of which the offshoots are Yajurveda and Samaveda.
 - Vedas described Hindu Society made up of patriarchal families. Each family was considered a unit of which the head was the oldest living ascendant called 'Grihapati.
- 

2.Smritis (which is remembered)

➤The second source of Hindu Law which is a body of texts which can be attributed to an author, unlike Shrutis which are authorless because they were transmitted and supplemented solely through generations.

There are many smritis but the well known Smritis are-

I) Manu Smriti

➤ oldest Smriti written by 'Manu' but was supplemented further by generations because writing was not invented and it was transmitted orally.

➤ Manu Smriti gave brahmins an eminent position in society and there were not any right for women or shudras.

II) Yajnavalkya Smriti-

- written between the period of Buddha and Vikramaditya.
 - It was more systematically arranged and was more concise than Manu Smriti and it also was more liberal than Manu Smriti, it recognized some rights for women in regard to inherit and hold property and also gave a better status to Shudras than Manu Smriti.
- 

III) Narada Smriti-

- Narada was a nepali sage and in this smriti we can see that he was very broadminded than Yajnavalkya and manu because in this Smriti he recognised widow's remarriage, a woman holding property etc also he postulated that king made law is higher than what is provided in Smriti's.
- This Smriti also laid down rules regarding pleadings, evidence of witnesses which was not mentioned at all in the previous smritis.

3. Commentaries and Digests

➤ Vedas are the highest source of 'dharma' but it doesn't contain law, All the Smritis are also considered of paramount importance and it contains law.

➤ But the problem is the Smritis have conflicting texts, for example, Manu smriti doesn't give rights to woman and Shudras at all but Yajnavalkya smriti and Narada Smriti do provide rights of varying degrees to both these communities.

➤ So, there was confusion in society as to whom to follow because in spite of contradictions all were considered supreme so one could not be chosen over another.

➤ Commentaries served that purpose; the purpose was to incorporate the true meaning of these texts uniformly by removing all contradictions. The two most important Commentaries are 'Mitakshara' And 'Dayabhaga.'

Mitakshara –

- The literal meaning of Mitakshara is 'A brief Compendium' Mitakshara is a commentary by Vijananeshwara on 'Yajnavalkya Smriti' which was written in later half of 11th century.
- By 11th Century the country was divided into states.

➤ Each state had its own customs, sometimes those customs were given more importance than the ancient sources like Smritis and Shrutis, but at the same time the public at large was not okay with the idea of ignoring the shrutis and smritis altogether.

➤ So different 'Sampradaya' came into being for different regions.



□ We could majorly divide these into five categories, which are now known as the five schools of Hinduism.

1. Mithila School
2. Benaras School
3. Dravida School
4. Maharashtra School
5. Bengal School

➤ Mitakshara and various other commentaries inspired by it were prevalent in the first 4 schools but in the Bengal School 'Dayabhaga' was the prevalent source of Hindu law.

➤ Dayabhaga Written by Jimutavahana in the later half of 12th century.

It is not a commentary on a specific Smriti or Shruti but it is a digest of all the codes.

DISTINCTION BETWEEN MITAKSHARA & DAYABHAGA SCHOOL

Mitakshara school

1. It is the running commentary on Code/ Smriti of Yajnavalkya.

2. It is written by Vijnyaneshwara in 11th century.

3. It is orthodox school.

4. It is followed throughout India except Bengal & Assam.

5. It is further divided into four sub-schools namely –

- a) Banarasa
- b) Mithila
- c) Bombay
- d) Dravida

Dayabhaga school

1. It is not a commentary on any particular code but it is a digest of all codes.

2. It is written by Jimutvahana in 12th century.

3. It is reformed school.

4. It is followed in Bengal & Assam.

5. No such further division is found under Dayabhaga school.

MITAKSHARA SCHOOL

6. Son do acquires right by birth, by survivorship.

7. The father cannot dispose off ancestral property absolutely, except u/s 30 of Hindu Succession Act, 1956.

8. Son can claim partition or of account against the father.

9. The foundation of coparcenary is first laid on the birth of son in family.

DAYABHAGA SCHOOL

6. Son do not acquire right by birth, but on the death of the father.

7. The father can dispose off ancestral property as he can dispose off his own property.

8. Father is absolute owner of the property and hence son cannot claim partition.

9. The foundation of coparcenary is laid on the dath of father.

MITAKSHARA SCHOOL

10. Coparcenary consists of only male members within four degrees.

11. The unit of ownership is the essence of coparcenary.

12. On the death of one coparcener his share will pass to other coparceners by survivorship.

13. For pindadan, rule of blood propensivity i.e. nearness in blood is applicable.

DAYABHAGA SCHOOL

10. Coparcenary consists of male and female members both.

11. The unit of possession is the essence of coparcenary Dayabhaga.

12. Every coparcenary under Dayabhaga law takes a defined share of the coparcenary property and on his death his share will pass to his heirs.

13. Rule of efficacy of religion is applicable. A person who is Hindu by religion can offer pindadan to his forefathers.

4. Judicial Decisions

- ▶ Under British regime the courts solved disputes by applying the Smriti law from the commentaries and digests and also adding their own interpretation and understanding of the law.
 - ▶ In future if a similar dispute arose the earlier judicial decisions were referred to solve that dispute.
 - ▶ So judicial precedents also got the same standing as law with time along with the religious texts like shrutis and smritis.
- 

5. Legislations

- ▶ Different parts of India had different diverse practises, and that created confusion when a conflict arose.
 - ▶ Legislations was the easiest way of making the law uniform. Legislations are concrete, easily accessible, ascertainable and have authority.
- 

➤ But the earlier legislations were made carefully so that they do not go against the established rules of Hindu Law.

➤ **The Caste Disabilities Removal Act, 1850-**

To protect rights over property of a person who has converted his religion or has been expelled from the caste or community

➤ **The Hindu Widows Remarriage Act, 1856-**

To give Hindu Widows a right to remarry

➤ **The Hindu Wills Act, 1870-** Hindus did not have any law which allowed them to make a will, this filled the gap.

➤ **The Special Marriage Act, 1872-** To allow inter-religious, inter-caste or intra caste marriages

Modern Legislations

- ▶ Modern times require modern solutions and as we learnt from history what is a better solution than legislations.
- ▶ In 1944 a Hindu Law Committee was made under the chairmanship of Sir Benegal Narsing Rau.
- ▶ The purpose of the committee was to make a uniform code for Hindus and bring all Hindus under this code.
- ▶ A draft code was made in 1948

- But Hindus said NOOOO, they said this new code would be an attack to their 'sacred law'
 - Jawaharlal Nehru decided to drop this idea, Ambedkar didn't like dropping this idea so he resigned in 1951 as protest.
- 

➤ The Code was anyway later implemented in 4 parts.

1. Hindu Marriage act, 1955
2. Hindu Succession Act, 1956
3. Hindu Minority and Guardianship Act, 1956
4. Hindu Adoptions and Maintenance Act, 1956

➤ These acts modernised the law applicable to Hindus by retaining the fundamental framework and by reforming the framework to a certain degree where needed.

Custom

- ▶ Customs are given force of law in many situations, though the Commentaries tried to include customs but taking in and compiling all customs in a country like India with varied practises and customs existing at Regional, Local and even family level is almost impossible.

Custom to be law must be

- 1) **Ancient**
- 2) **Reasonable**
- 3) **Certain**
- 4) **Uniform**
- 5) **Obligatory**
- 6) **observed continuously without interruption**

- 7) should not be immoral or opposed to public policy or written rule of law or a statute unless and until it is expressly saved by the statute and should be construed strictly**
- 8) Rules of Equity, Justice and Good Conscience**
- 

➤ The Supreme court has also opined that in absence of any rule in Hindu Law, the courts have the authority to decide cases on the principles of equity, justice and good conscience.

➤ And it is common sense that mechanical application of Law without Equity, Justice and Good Conscience is bound to fail the whole purpose of law.



Who is a Hindu-

- ▶ **HINDUS UNDER CODIFIED LAW**
- ▶ Under Section 2 (1) of Hindu Marriage act, 1955 any person would be considered a 'Hindu' for the purpose of law if he is:
- ▶ A person who is Hindu by Religion in any of its forms or developments, which includes a Virashaiva, a Lingayat or a follower of the Brahma, Parthana or Arya Samaj.
- ▶ a person professing the Hindu, Buddhist, Jain or Sikh religion.

(Also mentioned in Constitution of India- Article 25, Explanation II)

➤ a person who is not a Christian, Muslim, Parsi or Jew by religion will be governed by Hindu law unless it is proved that such person will not be governed by Hindu Law.

➤ Any Child legitimate or illegitimate both of whose parents are Hindus, Buddhists, Jains or Sikhs is Hindu.

➤ Any person who is a convert to the Hindu, Buddhist, Jain or Sikh Religion

❑ **Perumal v. Ponnuswami (1971)**

- Perumal(Hindu man) married Annapazham (Christian lady), they were married as per Hindu ceremonies and rights and they also entered into an agreement that they shall be, henceforth, governed by Mitakshara Law.
- Later they got separated and Annapazaham started living separately with their son (ponnuswami)

➤ Ponnuswami later filled a suit for half of the property of his father Perumal, Perumal contended that the marriage with Annapazaham was illegal as she was Christian and Ponnuswami which was brought up by her cant claim Joint Family Rights.

➤ Supreme court said that Annapazaham and ponnuswami both are hindus because Annapazaham was still living as a hindu after separation and ponnuswami was also raised as a hindu.

➤ Supreme court held that Intention to become Hindu and further conduct shall be proof of conversion to hinduism, no formal ceremonies are necessary for conversion.

➤ In case there is a difference of religion as between the spouses in the Indian patriarchal set-up, usually the father's religion is appended to the child.

➤ That however is not the requirement of law and it is merely a customary practice that is not obligatory

➤ If only one of the parents of a child is a Hindu then the pointer for determination of his religion is not the time of birth but the upbringing of the child.

➤ if he is being brought up as a member of only his Hindu mother's tribe or community, then notwithstanding that his father was a non-Hindu, he will carry his mother's religion and Hindu law can be applied to him.

➤ For example, Sanjay Gandhi, son of a Parsi father and a Hindu mother was a Hindu at the time of his death as he was brought up as a member of his mother's (Indira Gandhi's) community.

Marriage Under Hindu Law

- ▶ Marriage in Hinduism is one of the 16 sacraments (Samskara).
- ▶ It is an Indissoluble bond which goes on in each birth. No concept of Divorce before 19th Century.
- ▶ Primary Legislation for Hindu Marriage-Hindu Marriage Act,

8 types of Hindu Marriages

4 approved-

1) Brahma-

When boy has completed his student hood (brahmcharya) he is married with the girl on basis of his knowledge of vedas.

2) Daiva-

Daughter given in lieu of Dakshina if she gets over the age of marriage and doesn't get husband.

3) Arsha-

The Groom(sage) presents a bull or a cow to girls father because the Groom doesn't have special qualities.

(this is not considered a noble marriage because noble marriages don't have monetary transactions involved)

4) Prajapatya -

The Father of Bride goes looking for groom and not the other way round.

4 unapproved

1) Gandharva-

love marriage, without consent of parents

2) Asura-

Groom is not at all compatible with bride but the father of the bride likes wealth and the Groom is happy to give him that.

3) Rakhsa-

Groom will battle the brides family, take away the bride and convince her to marry.

4) Paischacha -

Worst kind of marriage, the groom will forcefully marry the bride and wont even give money or anything for it.