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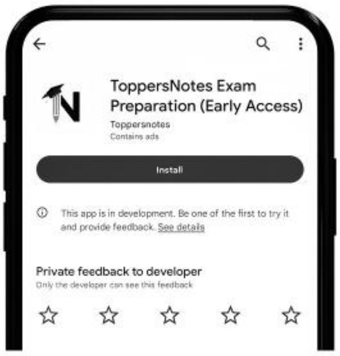

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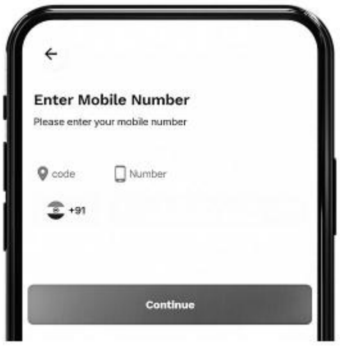

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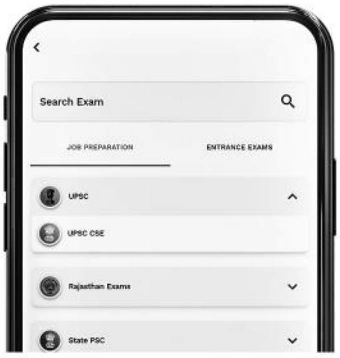

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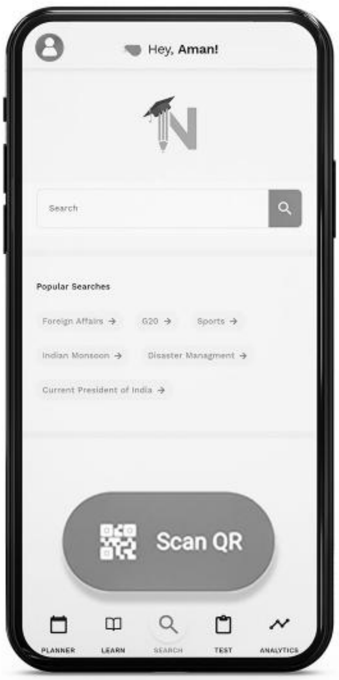

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Chapter – 1
Sources and schools

Hindu law is considered to be the most ancient and prolific law in the world. It has been around every phase. It is about 6000 years old. Hindu law has been established by the people, not for the purpose of removing any crime or transgression from society but it was established so that the people will follow it in order to attain salvation. Originally Hindu law was established so that the need of the people gets fulfilled. The concept was initiated for the welfare of the people.

Sources of Hindu law

There is the two-fold classification of the sources of the Hindu law

- Ancient sources
- Modern sources

Ancient source

Ancient sources are the source that developed the concept of Hindu law in ancient times. It is further classified into four categories

- Shruti
- Smriti
- Customs
- Digest and commentaries

Shruti

The term Shruti means what has been heard. It contains the sacred words of the god. This source is considered to be the most important and essential source of all. Shruti's are the sacred pure utterance that has been enshrined in the Vedas and the Upanishads. They have religious nexus with a person and helps him in a way to attain the knowledge of salvation and incarnation. It is considered to be the primitive source containing the knowledge of the law.

Smritis

Smritis are considered as text which has been remembered and then interpreted by the rishis throughout the generation. There is a further classification of the term Smrities which are as follows

- Dharma Sutra (Prose)
- Dharmashastras (Poetry).

Commentaries and digest

The third ancient source of Hindu law is commentaries and digestives. Commentaries and digestives have expanded the scope of Hindu law. It played a very major role in developing the very concept of Hindu law. It helped in the interpretation of the smritis. Single interpretation of the smritis is called as a commentary while different interpretations of the smritis is known as digestive. Dayabhaga and Mitakshara are considered to be the two most important commentaries.

Customs

Customs is the tradition that has been practiced in society since ancient times. It is the type of practice which is under the continuous observation of the people has been followed by the people.

Further, the customs have been classified into two categories-

- Legal customs
- Conventional customs

Legal customs

- Legal custom is those customs which are enforceable or sanctioned by law. It can't be deemed invalid until the law itself declares it invalid. There are two types of legal customs.

Local customs

- Local customs are the customs that are practiced in a local area. This type of custom is not highly recognized.

General customs

- General customs are the customs or traditions which are practiced in a large area. This type of custom is highly recognized by people.
- Conventional customs

Conventional customs are customs that are related to the incorporation of an agreement and it is conditional.

What are the essentials of a custom?

Following are the essential points which constitute a custom-

- A customs must be continuous in practice
- A custom should not be vague or ambiguous
- A custom must have time antiquity
- There must be a complete observation of the custom
- It should be certain and clear
- A custom must not oppose the public policy which will affect the interest of the general public.

Deivanai Achi v. chidambaram (1954) Mad. 667.

- In the instant case it was held that in order to become legally sanctioned by law and binding on the people a custom must be continuous in practice, it should not be vague and ambiguous and should not oppose the well established public policy. A customary rule must be in the complete observation of society.

Laxmi v. bhagwantbuva AIR 2013 SC 1204

- In the instant case, the supreme court stated that a custom becomes legally enforceable when the majority of people make the continuous use of such practice.

Onus

- Generally when a custom attains the judicial recognition no further proof is required, however in certain cases where the customary practices do not attain the judicial recognition, the burden of proving lies on the person who alleges its existence.

Munna lal v. Raj Kumar AIR 1972 SC 1493

- In the instant case the supreme court stated that a custom brought before a court several times, the court might hold that such custom has been enforced by the law with the necessity of its proof.

Modern sources

- **Judicial Decisions**
  - Judicial decisions are considered to be the most important ingredient of modern sources. Judicial decision is considered to be authoritative and binding. The doctrine of precedent was established and it was applied in the cases resembling the same facts and circumstances of a case already decided.
  - The legislation is considered to be the codification of customs which plays an essential role in expanding the concept of Hindu law. Legislations are enacted by the parliament.
- **Justice equity and good conscience**
  - Justice equity and good conscience is the basic rule of law. This rule of law applies when an existing law doesn't apply in a case before the court decides the particular matter by applying its rationality and the concept of justice equity and good conscience.
  - This rule is considered to be the fairest and reasonable option available to a person.

  In *Gurunath v Kamlabai* the Supreme Court held that in the absence of any existing law the rule of justice equity and good conscience was applied.

  Kanchava v. girimalappa (1924) 51 IA 368

  In the instant case, the Privy Council barred the murderer from inheriting the property of the victim.
- **Legislation**
  - The legislation is considered to be the most important source of Hindu law. It is considered as a base for the growth of Hindu law in the modern world. It has been stated that in order to meet the new conditions of the society it became a necessity to codify the law.

Schools of Hindu law

Schools of Hindu law are considered to be the commentaries and the digestives of the smritis. These schools have widened the scope of Hindu law and explicitly contributed to its development.
The two major schools of Hindu law are as follows-

- Mitakshara
- Daya Bhaga

Mitakshara

Mitakshara School: Mitakshara is one of the most important schools of Hindu law. It is a running commentary of the Smriti written by Yajnvalkya. This school is applicable in the whole part of India except in West Bengal and Assam. The Mitakshara has a very wide jurisdiction. However different parts of the country practice law differently because of the different customary rules followed by them.
Mitakshara is further divided into five sub-schools namely

- Benaras Hindu law school
- Mithila law school
- Maharashtra law school
- Punjab law school
- Dravida or madras law school

These law schools come under the ambit of Mitakshara law school. They enjoy the same fundamental principle but differ in certain circumstances.

Benaras law school

- This law school comes under the authority of the Mitakshara law school and covers Northern India including Orissa. Viramitrodaya Nirnyasindhu vivada are some of its major commentaries.

Mithila law school

- This law school exercises its authority in the territorial parts of tirhoot and north Bihar. The principles of the law school prevail in the north. The major commentaries of this school are Vivadaratnakar, Vivadachintamani, smritsara.

Maharashtra or Bombay law school

- The Maharashtra law school has the authority to exercise its jurisdiction over the territorial parts including Gujarat Karana and the parts where there is the Marathi language is proficiently spoken. The main authorities of these schools are Vyavhara Mayukha, Virmitrodaya, etc.

Madras law school

- This law school tends to cover the whole southern part of India. It also exercises its authorities under Mitakshara law school. The main authorities of this school are Smriti Chandrika, Vaijayanti, etc.

Punjab law school

- This law school was predominantly established in east Punjab. It had established its own customs and traditions. The main commentaries of this school are viramitrodaya and it established customs.

Dayabhaga School

- Dayabhaga School predominantly prevailed in Assam and West Bengal. This is also one of the most important schools of hindu laws. It is considered to be a digest for the leading smritis. Its primary focus was to deal with partition, inheritance and joint family. According to Kane, it was incorporated in between 1090-1130 A.D.
- Dayabhaga School was formulated with a view to eradicating all the other absurd and artificial principles of inheritance. The immediate benefit of this new digest is that it tends to remove all the shortcomings and limitations of the previously established principles and inclusion of many cognates in the list of heirs, which was restricted by the Mitakshara School.
- **In Dayabhaga School various other commentaries were followed such as:**
  - Dayatatya
  - Dayakram-sangrah
  - Virmitrodaya
  - Dattaka Chandrika

What is the difference between Mitakshara and Dayabhaga School?

The difference in relation to the joint property

- Under Mitakshara school right to ancestral property arises by birth. Hence the son becomes the co-owner of the property sharing similar rights as of fathers. While in Dayabhaga school the right to ancestral property is only given after the death of the last owner. It does not recognise the birth right of any individual over an ancestral property.

- Under the Mitakshara School the father does not possess the absolute right to alienate the property but in daya bhaga the father has absolute right of alienation of the ancestral property as he is the sole owner of that property during his lifetime.
- Under Mitakshara School the son attains the right to become the co-owner of the property he can ask for the partition of the ancestral property even against the father and can demand for his share but in case of Dayabhaga school son has no right to ask for the partition of ancestral property against his father.
- Under Mitakshara School the survivorship rule is prevalent. In case of the death of any member in the joint family, his interest shall pass to other members of the family. While in case of Dayabhaga School the interest of the member on their death shall pass on to their heirs like widow, son, daughters.
- Under the Mitakshara School the members can't dispose of their share of property while undivided while in daya bhaga the members of the family enjoys absolute right dispose off their property.

The difference as regards to inheritance

- Under Mitakshara the rule of blood relationship or consanguinity is followed in case of inheritance whereas in case of Dayabhaga school the inheritance is governed by the rule of the offering of pinda.
- Under Mitakshara school the cognates are postponed to agnates or not preferred upon agnates while in case of Dayabhaga cognates are preferred upon the agnates.
- Mitakshara school expanded its recognition to a very limited extent in regards to the recognition of the doctrine of factum valet but Dayabhaga, on the other hand, has expanded it recognition to the full extent.
- Under the Hindu law the difference between the Mitakshara school and the Dayabhaga school is not recognised as in the present scenario there exists one uniform law of succession for all the Hindus.

The doctrine of factum valet

- The doctrine of "factum valet quod fieri non debuit" means what ought not to be done becomes valid when done. This principle was formulated by the authors of the Dayabhaga school and was recognised to a limited extent by the followers of the Mitakshara school. The doctrine of factum valet states that once an act is done or a fact is accomplished it can't be altered by the written texts of laws. As the fact is considered to be a concrete establishment and is deemed to be legally binding.

<u>Sources and schools of muslim law</u>

- The Muslim Law is based on the teachings of the Quran and Prophet Mohammad. In all the circumstances where the explicit command is provided, it is faithfully provided but there have been many areas which are not covered by these sources and as a result, the great scholars had themselves devised their interpretation of what should be done in such a situation.
- As these scholars provided their interpretations (Qiyas) regarding the Muslim Law, it led to various opinions among many of them and out such difference, different schools of Muslim Law originated. Each school has its own explanation and reasons for their interpretation and it often leads to conflict in judgments.

- In the absence of express rules, it cannot be said that one school is better or higher positioned than other school and thus all the schools have been accepted as valid and if a person follows any of these schools, he is considered to be on the right path.

Schools under Muslim Law

In Islam, the people have been divided into two sects having different views regarding certain aspects of Islam. Thus, the schools of Muslim law can be broadly classified into two categories:

1. Sunni Schools
2. Shia Schools

Sunni Schools

In Sunni sect, there are four major schools of Muslim law which are as follows;

A. Hanafi School

- Hanafi School is the first and the most popular schools in Muslim law. Before being named Hanafi, this school was known as Koofa School which was based on the name of the city of Koofa in Iraq. Later, this school was renamed as Hanafi School based on the name of its founder Abu Hanafee.
- The Prophet had not allowed his words and traditions from being written, the Hanafi School relied on the customs and decisions of the Muslim community. Thus, Hanafi School codified the precedent which in prevalence during that time among the Muslim community.
- The founder of this school Abu Hanafee had not written any book for laying down the rules of this school and therefore this school had grown through his two disciples- Imam Muhammed and Imam Abu Yousuf. Both of them gave to the Juristic preference (Isthi Hasan) and codified the Ijma's of that period.
- This school became widely spread in various territories, as a result, the majority of Muslims in countries such as India, Pakistan, Syria, and Turkey belong to Hanafi School. In India, since the majority of Muslims are from Hanafi School, the Courts decide the case of a Sunni Muslim as per the Hanafi School unless it is specified that they belong to other schools.
- In Hanafi School, Hedaya is the most important and authoritative book which was created over a period of 13 years by Ali bin Abu Baker al Marghinani. This book provides laws on various aspects except for the law of inheritance. Lord Warren Hasting tries to translate the Hedaya to English. He appointed many Muslim Scholars to translate the book.
- But the Sirajiyya is considered as the authoritative book of the Hanafi Law of Inheritance. The book is written by the Sheikh Sirajddin, and the first English translation is written by Sir William Jones.

B. Maliki School

- This school gets its name from Malik-bin-Anas, he was the Mufti of Madeena. During his period the Khoofa was considered as the capital of Muslim Khaleefa where Imam Abu Haneefa and his disciples flourished with Hanafi Schools. He discovered about 8000 traditions of Prophet but complied only about 2000 of them. When the disciples of Imam Abu Haneefa codified their law based on Ijma'a and Isthihsan.
- The maliki school gives the importance to the Sunna and Hadis whereas the Hanafi school gives the importance to the people and Isthihsan. As per Maliki School and Law, they rarely accept the Ijma'a. As per the Law, the person gave Fatwa challenging the sovereign authority of Khaleefa, he

faced enmity and of lack of support from Muslim governments. Thus, this Maliki school did not get much popularity.

- In India, there are no followers of this school but when the Dissolution of Muslim marriage act 1939 came in the picture, some of the laws and provision of this school was taken in account as they are giving more rights to the women than any other school. In Hanafi School, if the women not get any news of her husband, she has to wait till 7 years for Dissolution of the marriage, whereas in Maliki School the women have to wait 2 years for Dissolution of the Marriage.
- Mu-atha of Imam Malik is considered as the most authoritative book of the Maliki School. This book is also the first book written on the Hadis in Islam and this book is considered as the authority over all Muslims in the World.

C. Shaffie School

- The Shaffie School gets its name on the name of Muhammad bin Idris Shaffie, his period was between 767 AD to 820 AD. He was the student of Imam Malik of Madeena. Then he started working with the disciples of Imam Abu Haneefa and went to Khoofa.
- He conclude the idea's and the theories of Hanafi School and Maliki School in a friendly manner. The Imam Shaffie was considered as one of the greatest jurist of Islam. He created the classical theory of the Shaffie Islamic Jurisprudence.
- According to this school, they considered Ijma'a as the important source of the Muslim law and provide validity to the customs of the Islamic people and follows more methods of Hanafi School. the main contribution of Shaffie School is the Quiyas or Analogy.
- The Al-Risala of Imam Shaffie was considered as the only authoritative book of Islamic Jurisprudence. In that book they discuss and interpret the Ijma'a (Consensus), Quiyas (Analogy), Ijthihad (Personal reasoning) Isthihsan (Juristic preference) and Ikhthilaf (Disagreement) in separate chapter in his book Risala. His other book Al-Umm is the authority on Fiqh (science of way of life).
- The followers of Shafie School are spread in Egypt, Southern Arabia, South East Asia, Indonesia and Malaysia.

D. Hanbali School

- The Ahmad bin Hanbal is the founder of the Hanbali School. He found the Hanbali school in 241 (AD 855). He is the disciple of Imam Shaffie and supports Hadis. He strongly opposed the Ijthihad methods. He introduced the theory of tracing the root of Sunna and Hadis and try to get the answer all his question. His theory was to return to the Sunna of the Prophet. When the Imam Shafie left for Baghdad, he declared that the Ahmad bin Hanbal was the only one after him who is the better jurist after him. The followers of Hanbali school found in Syria, Phalastine and Saudi Arabia.

Shia Schools

As per Shia Sect, there are three schools of law. Shia Sect is considered as the minority in the Muslim world. They enjoy the political power only in Iran though they don't have the majority in that state also.

A. Ithna-Asharis

- These schools are based on the following of Ithna-Ashari laws. The followers of these schools are mostly found in Iraq and Iran. In India also there is the majority of the shia muslim who follows the principles of the Ithna-Asharis School. They are considered political quietists. This school is considered as the most dominant school of the shia muslims. the ja'fari fiqh of the shias in most cases indistinguishable from one or more of the four sunni madhahib, except mutah is considered as the lawful marriage. The people who follow the Ithna Asharis school believe that the last of the Imams disappeared and to be returning as Mehdi (Messiah).

B. The Ismailis

- According to Ismailis school, in India there are two groups, the Khojas or Western Ismailis represents the followers of the present Aga Khan, who they considered as the 49th Imam in this line of Prophet, and the Bohoras i.e. the Western Ismailis are divided into Daudis and Sulaymanis.
- The Bohoras and Khojas of Mumbai are considered as the followers of this school. It is considered that the follower of these schools has special knowledge of religious doctrine.

C. Zaidy

- The followers of this school are not found in India but are maximum in number in South Arabia. This sect. of the shia school is the most dominant among all in Yemen. The followers of these schools are considered as political activism. They often reject the twelver shia school philosophies.

Other schools

Besides the schools under Shia and Sunni sects, there are some other schools which are also present which are:

Ibadi School

- Ibadi is a school which belongs neither to the Shia nor Sunni sect and this school claim that its history traces back to the times of 4th Khaleefa Ali. The Ibadi school gives more preference to the Quran and they do not give the Sunna much importance. This school has its followers in Oman. One of the most important points about this school is that besides the Quran, it has provided principal consideration to Ijtihad (personal reasoning) which has been partially accepted by the Sunnis and has been completely rejected by the Shias.

Ahmadiya School

- The followers of Ahmadiya school claim to be Muslims but they do not follow Prophet Muhammed. This school has a recent origin and they are followers of one Ahmed who was alive in the 19th century.
- This school is said to have a British-Indian origin and Mirza Ghulam Khadiani is the founder of this school, who served the British Government. Even though this school claims to be a follower of Islam, none of the Muslim Government has accepted them as Muslims because they believe this school's faith is completely against the faith of Muslims.
- The Khadiyan village which is situated in Punjab in India is said to be the birthplace of Ahmed and thus it is their holy place and the followers are also known as Kadhiyani. There is no authoritative book of this school and because its origin is also recent, it has no recognition by the other authoritative books of Islam.
- There are many differences between the Ahmadiya School and Muslims therefore, they are not regarded as part of Islam. The major points of difference between them are as follows:

1. The Muslims believe that Prophet Mohammad was the Messenger of God on Earth and he was the last Prophet who had spoken with God. Thus, his teachings are an important part of the lives of Muslims but the Ahmadiyas believe that God still communicates with his holy servants even after Prophet Mohammad.
2. The Ahmadiyans claim that the list of Prophets before Mohammad includes Buddha, Krishna, Zoroaster and Ramchandra and they claim it is according to the Quran but the non-Ahmadiyans do not accept such claims and refuse to acknowledge them as Prophets.
3. Unlike the Muslims, the Ahmadiyans do not accept the claim of the Sultan of Turkey as the Caliphate and they claim that every Muslim person should remain loyal to the Government of their country.
4. While Muslims believe that Mahdi will have a holy war or Jihad and Islam will be spread by the sword, the Ahmadiyas believe that it will be spread by arguments and heavenly signs and not through violence.

SOURCES OF MUSLIM LAW

Primary Sources

1. **The Quran** - Quran is the primary source of Muslim law, in point of time as well as in importance, Quran is the first source of Muslim Law. It contains the very words of God and it is the foundation upon which the very structure of Islam rests. Quran regulates individual, social, secular and spiritual life of the Muslims.

The contents of Quran may be classified under the four heads:

a. Metaphysical and abstract
b. Theological
c. Ethical and mystical
d. Rituals and legal

The Quran has influenced the creation of Islamic legal system in following ways:

i. The prophet faced legal problems and so did his companions and the Quran provided guidance. It gave such texts which possesses definite legal element.
ii. Non-legal texts in the Quran moral exhortations and Divine promises have been construed by reasoning to afford legal rules. The texts proclaiming that God will not punish anyone save for one's own sins have been applied to debts which a person leaves unpaid at his death with for reaching results in the law of administration of assests.
iii. By pointing out that the previous revelations have been corrupted, the Quran declared the legal material with the people of the book unreliable and called people to abandon the customs of their ancestors which are outside the sphere of the Book and Sunnah.

2. **Ahadis and Sunnat**

- Just as Quran is the express revelation through Mohammed, the Ahadis and Sunnat are implied revelations in the precepts and sayings and actions of the Prophet, not written down in his lifetime, but preserved by traditions and handed down by authorized agents. Sunnat means that 'what the Prophet did', while Ahadis means 'what he said'.
- **Classification of Sunnat**
    - **Sunnat-ul-qual**- All words, counsel and precepts of the prophet.

- **Sunnat-ul-fail**- His actions, words and daily practice.
- **Sunna-ul-Taqrir-** His silence implying a tacit approval of what was done in his presence.

- **From the point of view of their importance and authority, Ahadis may be classified as under-**
  - **Ahadis-i-mutwatra**are those traditions which are of public and universal notoriety and are held absolutely authentic. These traditions are accepted as genuine and authentic by all the sects of Muslims. Abdur Rahim aptly remarks that traditions of this class, like verse of the Quran, ensure absolute authenticity and demand implicit belief.
  - **Ahadis-i-mushhura** is those traditions which though known to the majority, do not possess the character of universal notoriety.
  - **Ahadis-i-Wahid** is those traditions which depend on isolated individuals. Most of the Muslim jurists do not accept these traditions as a source of law.

3. **Ijmaa**

- It means the consensus of the companions and followers of the Prophet. Abdur Rahim defines it as "the agreement of the jurists among the followers of Mohammed in a particular age on a particular question." After the death of the Prophet, as the expansion of the Islamic influence took place, a large number of new situations and new problems cropped up this would not be decided by reference only to Quran and Ahadis.
- The jurists then took the recourse to the principle of *Ijmaa*, that is, the consensus of opinion of jurists on any question. The authority of Ijmaa, as a source of law based upon tradition, "My followers can never agree upon what is wrong".
- **Classification:**
  - **Ijmaa of the companions of the Prophet –**It is that which is universally accepted throughout the Muslim world and is unrepealable. Though there is great difference of opinion among the important Muslim jurists with regard to the requirement of a valid Ijmaa, there is general agreement that Ijmaa of the companions of Prophet should invariably be accepted. The reason behind it was that those associated with the Prophet as his companions must have known, as by instinct, the policy of the Islamic law and whether a particular rule or decision was in harmony with its principles.
  - **Ijmaa of the Jurists-**It is the opinion of majority of the jurists that, *Mujtahids*, the learned in the traditions of the Prophet and well acquainted with the meaning of the Arabic words and the passages in the Koran alone are competent to participate in Ijmaa.
  - **Ijmaa of the people** – As a source of law, this kind of *Ijmaa* has not much importance.

    - **Its place-** Ijmaa is the third source. It owes its authority to the tradition, “My people can never agree upon what is s wrong”. The Ijmaa of the companions of the Prophet Mohammed is deemed to be the best guide and is universally accepted as an authority next to the Quran and Ahadis. Ijmaa, as a matter of fact, was intended to be a source of law, for all times to come, but the extreme uncertainty of the procedure to regulate it made it a thing of doubtful utility.
    - “Ijmaa cannot be confined or limited to a particular age or country. It is completed when the jurists after the deliberation came to a finding. It cannot then be questioned or

challenged by any individual jurist. Ijmaa of any age may be reserved or modified by the Ijmaa of same or the subsequent age."

Note- The Shia jurists do not recognize Ijmaa as a source of law. They accept only those traditions which had come from the members of the Prophet's family.

4. Qiyas (Analogical Deductions)

- ***Meaning-*** Etymologically, *Qiyas* means "measuring", "accord" of "equality". In Muslim jurisprudence, it means an extension of law from the original text, by means of common sense. According to Jung, "it is a process of deduction applying the law of the text to the cases which, though not covered by the language of the text, are nevertheless covered by the reason of text."
- *Its place*- Qiyas is analogical deduction derived from a comparison with law in one of the first three sources when they do not apply directly to a particular case and occupies a place next to *Quran, Ahadis* and *Ijmaa*. There are some jurists who do recognize Qiyas. This gave rise to a rigid school of law represented by Az-Zahir, who undertook the scientific study of the Quran and its interpretation. But the majority of the jurists agree to take recourse to the pure reasoning as a supplement to the three sources of law in of necessity.

Correctives to Qiyas

(1) Istehsan- If the Qiyas was opposed to the habits of the people and was therefore inapplicable or otherwise likely to cause hardship. **Abu Hanifa** gave to the judges the option to override Qiyas and apply that law which suited the circumstances of a case in question. The use of option was known as Istehsan.

(2) Istidlal- It is a doctrine of public good which enables a jurist to override Qiyas which is positively harmful to general public. Istidlal means inferring a thing from another thing (Abdur Rahim Mohammadan Jurisprudence, p. 166).

Note. Under Shia Law, the primary sources of law are:
(1) Quran,
(2) Traditions - Only such traditions which are handed down from the Prophet's household; and
(3) Reason- Shia's do not recognize Ijmaa and Qiyas as sources of law.

Secondary Sources

1. Custom (Urf)

- **Meaning -** A custom is a tradition passing on from one generation to another, which originally governed human conduct and has obtained the force of law in a particular locality. It is a natural source of law. The Muslim Jurists do not expressly describe it as a source of law but those customs and usages which were not modified or abrogated by the Prophet, remained good and valid. The primeval customs were regulated by Mohammed.
- The customs are not independent sources of Muslim law. During the British regime, courts in India recognized the legal force of customs on some occasions in spite of the fact that they were opposed to the clear texts of a primary text of Muslim law. This caused great dissatisfaction among the orthodox Muslims and led to the passage of Shariat Act, 1937 which abolishes most of the customs from the Muslims Personal Law.

Section 2 of this Act lays down that if the parties are Muslims, only Muslim Personal Law will be applied to them in the following matters: -

(i) Inheritance,	(ii) Special property of females,
(iii) Marriage,	(iv) Dower,
(v) Divorce,	(vi) Maintenance,
(vii) Guardianship,	(viii) Gift,
(ix) Wakf	(x) Trust

In respect of these matters, customs or usages have no place. But customs are still applicable in matters of agricultural lands, charities and religious and charitable endowments.

2. Judicial Precedents

- The interpretation of Mohammedan law by the judges of the Indian High Courts and Supreme Court continue in modern times to supplement and modify the Islamic law. As such they are continuing sources of Mohammedan law. These include the decision of the Privy Council, the Supreme Court, as well as of the High Courts of India. These decisions are regarded as precedents for future cases.

3. Legislation

- There have been many legislative enactments which have considerably amplified, altered or modified the original Muslim law.

Examples:

(i) The Guardians and Wards Act, 1890.
(ii) The Mussalman Waqf Validating Act, 1913.
(iii) The Mussalman Waqf Act, 1923.
(iv) Child Marriage Restraint Act, 1939.
(v) Shariat Act, 1937.
(vi) The Dissolution of Muslim Marriage Act, 1931.
(vii) The Muslim Women (Protection of Rights on Divorce) Act, 1986.

4. Good Conscience and Equity

- Sometimes, analogical deductions fail, to satisfy the jurists owing to the narrowness and inadaptability of the habits or due to hardship to the public. In such case, according to the Hanafi, a jurist could use good conscience.

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UNIT

Chapter – 2
Marriage and Dissolution of Marriage

Introduction

- Marriage according to Hindu Law is a sanskar (sacrament) and not a contract unlike Muslim Law. The maxim "Virctunorconsentur in lege una pensona" means that the husband and wife are considered one in Law.
- **Kanyadan (**formal donation of the daughter by her father to a groom) and **Saptpadi** (circumambulation of holy fire by the bride and the groom) have basic importance in Hindu Marriages.
- Eight forms of marriages were described, four of which were dharmya (regular) forms and the rest were adharmya (irregular) forms.
- The choice of life partner was limited only to one's own dharma (religion) and jati (caste) only. Polygamy was permitted in Hindu society but not polyandry. Widow Remarriage was also not permitted.
- Legislation of laws relating to Hindu marriage began from the year 1829 when sati was abolished by Law and declared an offence at the instance of Raja Ram Mohan Roy.
- In 1955, the Hindu Marriage Bill was introduced in the Parliament which was passed by both the Houses of Parliament.

Nature of Hindu Marriage

- According to Vedas, a marriage is, "the union of flesh with flesh and bone with bone". So long as the husband is alive, the wife is enjoined to regard him as her God, similarly the wife is declared as half the body of her husband (Ardhangini) who shares with him equally the fruits of all his acts whether they be good or bad.
- The Vedic rules expressly declare that a man may have several wives but a woman cannot have many husbands. Husband was treated as God for the wife. Wives were always associated in all the religious offerings and rituals with their husbands. The women were respected and honoured. Manu said, "Women must be honoured and adored by their fathers, brothers, husbands and brothers-in-law who desire their own welfare. Where women are honoured, there the Gods are pleased, but where they are not honoured, no sacred rite yields rewards". Many old writers said, "A woman is half of her husband and completes him”.
- The object of marriage according to Hindus is the procreation of children and the proper performance of religious ceremonies. The sanctity of marriage was held to be so great that it was regarded to have some divine origin and was thought to be predestined.

- Marriage as a sacramental union implies several things first the marriage between man and woman is of religious or holy character but not a contractual union. It is not a mere contract in which a consenting mind is indispensable. For a Hindu, marriage is obligatory not merely for begetting a son in order to discharge the debt of his ancestors but also for the performance of other religious rites, and Manu has commented "In the Vedic period, the sacredness of the marriage tie was repeatedly declared the family ideal was decidedly high and was often realized.
- Only the present Hindu Marriage Act has no divorce, Manu disapproves divorce and remarriage of women. None can trace out divorce in ancient Hindu Law. According to Narada and Kautilya "If the husband, be missing dead, or retired from the world, or impotent, or degraded, in these five calamities a woman may take another husband”. But Manu had opposed this idea

Doctrine of Factum Valet

- The maxim 'que fieri non debuit’ which is popularly known as factum valet means "what should not be done, yet being done, shall be valid." From this maxim emerges the Hindu doctrine that "a fact cannot be altered by a hundred texts".
- The help of this doctrine was sought where certain irregularities such as want of consent of guardian, etc., occurred in a marriage in order to get the deficiency condoned and to save the marriage from becoming invalid.
- In Rajammal v. Mariyammal, it was held that when the marital relation has been accepted by the caste and relatives the doctrine of factum valet protects it from being declared null and void.
- The doctrine of factum valet has been indirectly adopted by the Hindu Marriage Act, 1955 in this way that marriages in contravention of clauses (iii) and (iv) of section 5 will not become invalid due to irregularity in respect of the conditions provided in these clauses.

Custom before the Court and Hindu Marriage

In case of R.B.S.S. Munnalal v. S.S. Raj Kumar, AIR 1962 SC 1493 the Supreme Court held that “It is well settled that where a custom is repeatedly brought to the notice of the courts of a country, the courts may hold that custom introduced into law without necessity of proof in each individual case”.

Validity of Hindu Marriage:

Hindu Marriage-Essential Conditions

Section 5 of Hindu Marriage Act, 1955, provides "Ceremonies for a Hindu Marriage. A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely:

(i) Neither party has a spouse living at the time of marriage;

(ii) At the time of the marriage, neither party
  - (a) Is incapable of giving a valid consent to it in consequence of unsoundness of mind; or
  - (b) Though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or
  - (c) Has been subject to recurrent attacks of insanity or epilepsy.

(iii) The bridegroom has completed the age of twenty-one years and the bride, the age of eighteen years at the time of marriage;

(iv) The parties are not within the degrees of prohibited relationship, unless the custom or usage governing each of them permits of a marriage between the two;

(v) The parties are not sapindas of each other, unless the custom or usage governing each of them permits of a marriage between the two.

- In case of S.P.S. Balasubramanyam v. Surultayan, AIR 1992 SC 756, apex court held that man and woman living under the same roof and cohabiting for a number of years; the law would raise presumption that they living as husband and wife.
- **Section 5(ii)** the conditions under this clause have been re-asserted by Andhra Pradesh High Court in Balakrishan v. Lalitha, AIR 1984 AP.
- **Section 5(iii)** Contravention of this clause does not vitiate the marriage and does not make it null and void under **section 11**: Duryodhan v. Bengabati, AIR 1977 Ori 36. According to Act 2 of 1978, the bridegroom must have completed the age of twenty-one years and the bride must have completed age of eighteen years at the time of marriage.
- **Section 5(iv)** If the parties to marriage are related to each other within prohibited degrees or within sapindas relationship, the marriage is void and such parties are liable for punishment under section 18 of the Act.
- **Section 5(v)** The rules relating to Sapinda relationship' are prescribed in the definition clause Further, section 7 of the Hindu Marriage Act, 1955 provides

Ceremonies for a Hindu Marriage

(1) A Hindu Marriage may be solemnized in accordance with the customary rites and ceremonies of either party thereto.
(2) Where such rites and ceremonies include the saptapadi (that is, taking of seven steps by the bridegroom and the bride jointly before the sacred fire), the marriage becomes complete and binding when the seventh step is taken.

In case of Ashok Kumar v. Usha Kumari, AIR 1984 Del 347, it was held that if the parties are recognised as husband and there is a strong presumption in favour of validity of marriage form and ceremony of the marriage and the legitimacy of the offspring.

Following are the conditions of a valid Hindu Marriage in detail:

Monogamy Section 5(i)

- This clause provides the rule of monogamy and prohibits polygamy and polyandry. Before the Act of 1955, a Hindu could marry any number of wives, even if he had a wife or wives living (Viraswami v. Appaswami, (1865) 1 Mad HC 375), although this practice was always looked with disfavor.
- The condition laid down in this clause for a valid marriage is one of those conditions, contravention of which would make the marriage void under section 11 of the Act.

Registration of Marriage:

- Registration of Hindu marriage has not yet been made compulsory, though the State Governments have been empowered to frame rules for compulsory registration of marriages.

  Shahji v Gopinath

  - The interesting aspect of the law is that even when the State Government makes the registration of marriage compulsory, non-registration does not render the marriage invalid, though any person contravening the rules relating to compulsory registration of marriage may be punished with a nominal fine of up to Rs. Twenty-five. Mere registration is no proof of marriage.