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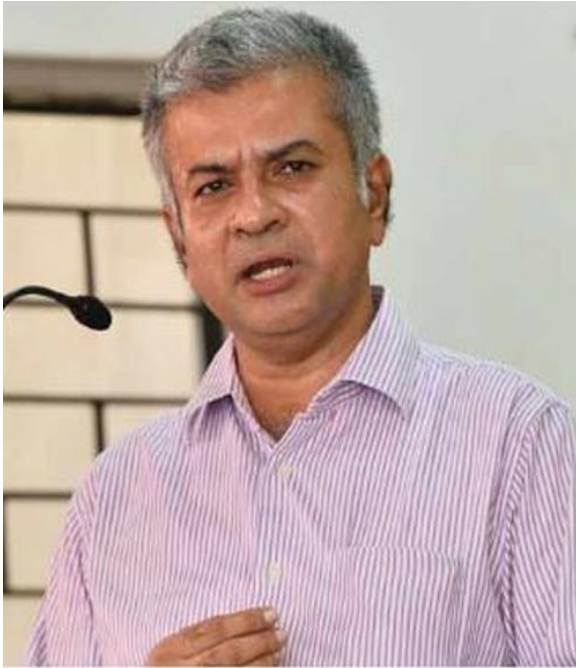
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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provided dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

SOURCES AND SCHOOLS OF HINDU LAW AND MUSLIM LAW – A NUTSHELL

AUTHORED BY - DR. S. MANJULA¹

ABSTRACT

The peculiarity of India is its Unity in Diversity. Hindu law is a complex system of laws that governs the lives of millions of people in India and other parts of the world. It has a rich history that stretches back thousands of years, and it has evolved and changed over time as society has changed. Hence, it is very much necessary to know about the various sources through which the present codified laws have emerged. It is also important to study the sources of law because in every personal legal system only that rule is law which has place in its sources. A rule not laid down or not recognised in the sources is not a rule in that legal system. This article is an attempt to summarise the sources and schools of Hindu Law and Muslim Law so as to enable the readers to understand the present codified personal laws.

Keywords: Sources, Schools, Hindu Law, Muslim Law.

INTRODUCTION:

The peculiarity of India is its Unity in Diversity. Hindu law is a complex system of laws that governs the lives of millions of people in India and other parts of the world. It has a rich history that stretches back thousands of years, and it has evolved and changed over time as society has changed. Hence, it is very much necessary to know about the various sources through which the present codified laws have emerged. This article is an attempt to summarise the sources and schools of Hindu Law and Muslim Law so as to enable the readers to understand the present codified personal laws.

The sources of Hindu law can be broadly divided into Traditional Sources and Modern Sources.

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SOURCES OF HINDU LAW	
Traditional Sources	Modern Sources
i. Vedas	i. Justice, Equity and Good Conscience
ii. Smritis	ii. Precedent
iii. Digests and Commentaries	iii. Legislation
iv. Customs	

Traditional Sources:

The Vedas:

Veda means Knowledge. There are four Vedas: Rig; Yajur; Sama and Atharvana. The four Vedas are the fountain-head of Hindu religion and law.

Rig Veda:

The oldest of them is the Rig Veda Samhita (Collection of Hymn Veda). It consists of 1028 hymns arranged into ten mandala (groups) some of which are sub-divided into smaller groups the compilation of each group being ascribed to some renowned saintly poet-priest (Rishi) of ancient times.

Yajur Veda:

Yajur Veda (sacrificial Veda) is a liturgical arrangement of part of the hymns of the Rig Veda, with additions, for intoning in the appropriate manner at sacrificial ceremonies. This Veda contains passages in prose containing explanations and directions for the guidance of the priests. It is grouped in two parts which are known as the "Black Yaju" (Taittiriya Samhita) and White Yaju (Vajasaneya Samhita).

Sama Veda:

The third Veda Sama Veda (Chant Veda) is also a liturgical arrangement of some of the hymns of the Rig Veda and is intended to be chanted at particular sacrifices in which the juice of the Soma plant was the principle offering.

Atharvana Veda:

The fourth and the last Veda, Atharvana Veda, has some hymns from the Rig Veda along with

original hymns of the same kind and consists chiefly of incantations, spells, charms and exorcisms.

The Vedic Religion as depicted in the Vedas is extremely simple, consisting of worship of trinity of Gods, the Fire-God Agni, the Rain-God Indra and the Sun-God Surya. The Vedas do not contain rules of law in a connected form. There are, however, Vedic passages dealing with such topics as marriage, different kinds of sons, adoption, partition, inheritance and Stridhana. The hymns of the Rig Veda as to marriage are used even to this day. The approximate period of Vedas is computed by historians to be 4000-1000 B.C. The period between Vedas and Smritis is marked with the development of Custom.

The Smritis:

Next to the Vedas, the Smritis are the most important source of Hindu Law. The early Smritis were termed as Dharma Sutras (800-200 B.C.). They were mostly in prose form and were written by the teachers expounding Vedas for the sake of their students. There are four smritis. Manusmriti, Yagnavalkya Smriti, Narada Smriti, Brihaspati Smriti.

The Manusmriti:

The oldest Smriti is the Manusmriti. The Code of Manu in its present form of 2694 slokas dates from 200 B.C. The Code deals with many matters, but the part bearing upon law deals with the subject under 18 titles².

The Yagnavalkya Smriti:

It contains 1010 slokas which is divided into Achara (Ritual); Vyavahara (Secular); and Prayaschitta (Expiation), Kandas or Parts. The chapter on marriage is found in Achara Kanda. In secular law the code deals with courts, procedure, ordeals, debts, pledges, partition, 12 kinds of sons, sales, defamation, assault, theft and adultery.

The Narada Smriti:

Narada Smriti recognized the power of the kings to make laws without going beyond the injunctions of Vedas. He gave paramountcy to custom even overriding sacred Laws. He was

² They are, debts, pledges, sales, deposits, partnership, gifts, wages, agreements, boundary disputes, master and servant, husband and wife, partition and inheritance, betting and gambling, assault, defamation, theft, robbery and adultery.

liberal in dealing with Women and Sudras.

The Brihaspati Smriti:

The Smriti of Brihaspati is fragmentary and has had to be compiled from the reference to that smriti in various commentaries on other smritis. Since Brihaspati is referred to as Smriti Karta by Yagnavalkya, the smritis of Brihaspati must be older than the Yagnavalkya Smriti.

Digests of Hindu Law:

Several Digests and Commentaries were written on smritis during the period between 700-1700 A.D. Some of them can be noted here under.

On Manu Smriti:

- Medhatithi had written Manubhashya (895-900 A.D.)
- Govinda Raja had written Manutika (1100 A.D.)
- Kulluka Bhatta had written Manavanta Muktavali (1250 A.D.)

On Yagnavalkya Smriti:

- Vijnaneswara had written the famous commentary Mithakshara (1100 A.D.)
- Vijnanruph had written Balakrida (900 A.D.)
- Apararka had written Aparaditya (1200 A.D.)

Customs as a source of Hindu Law:

Custom in common parlance is an act or behaviour which is followed or is traditionally accepted or can also be defined as a habitual practice that a person is uniformly following for a long time. It can also be termed as "Rule of Conduct", because, it is regarded as the highest of all 'Dharma'.

Authority of Custom:

Manu recognized custom to be transcendent law. Acharaha Paramodharmaha. Yagnavalkya defines custom as "That which a person practices whether it is Dharma or not, because it is the usage of the country". He definitely says that a person should not practice even what is ordained by the Smriti if it is opposed to custom. The Privy Council also recognized the supreme authority of custom in Hindu Law.

Kinds of Custom:

Under Hindu Law, custom can be broadly classified into three kinds. They are, Local Custom, Family Custom and Caste Custom.

Local Custom:

This is a custom prevailing in a particular locality. The Ramnad Case³ dealt with a custom of this kind. In the Dravida country it was proved in that case that widows can adopt but that they can do so only with the consent of the deceased husbands sapindas in accordance with local custom.

Family Custom:

A custom may govern only one particular family. The system of Zamindar is a glaring example for family custom.

Caste Custom:

There are some customs which prevail among particular castes, e.g., Brahmins, Sudras etc. Thus, in the law of adoption, among Brahmins a Homam is necessary for adoption but among Sudras giving and taking of the boy is sufficient.

Essentials of Custom:

A valid custom has to satisfy the following legal requirements:

- ❖ **Antiquity:** A valid custom should be ancient. In *Ramalakshmi Ammal v. Sivanatha Perumal Sethuraya*⁴, the Privy Council observed:

"It is of the essence of special usages modifying the ordinary law of succession that they should be ancient and invariable and it is further essential that they should be established to be so by clear and unambiguous evidence".

- ❖ **Certainty:** The evidence must establish unambiguously the usage set up. When the evidence is conflicting, a uniform custom cannot be established.
- ❖ **Reasonableness:** Unreasonable customs which are contrary to public policy are rejected by courts. A custom of polyandry allowing a woman to re-marry during the lifetime of her husband was held to be immoral.

³ Collector of Madura v. Muthu Ramalinga Sethupathy, 12 M.I.A. 397 (1868)

⁴ 14 Moo. Ind. App. 570 at p.585.

❖ Discontinuance:

Family customs which are applicable only to particular families may be discontinued. Disuse puts an end to them. But a local custom is not put an end by non-user.

Modern Sources:

Justice, Equity and Good Conscience:

It was ordained by smritis that any decision should be arrived based upon Yukthi or Nyaya. These aspects amply cover under Ancient law the modern concept of justice, equity and good conscience. The common law tradition of applying the principle of "justice, equity and good conscience". When the law is silent on a given point was conveniently applied by the Britishers in their administration of justice in India. Afterwards the Supreme Court of India recognized that in the absence of any rule of Hindu Law the courts have authority to decide cases on the principle of "justice, equity and good conscience".

Precedent:

Binding nature of previous judicial decisions on a subsequent similar case is of modern origin came into vogue during British period. The principle of Stare decisis is applied by the Indian Courts. The decisions of the Supreme Court are binding upon all courts except upon itself and of the High Court on all its sub-ordinate courts.

Legislation:

Legislation is a vital source of modern Hindu law. During British period, only very few legislations were passed touching personal laws of Hindus, in tune with the British policy of non-interference in the matters of personal status of native Indians.

SOURCES OF MUSLIM LAW

A votary of Islam recognizes only one God and acknowledges Mohammed as His Prophet. The children of such person are mahomedans. When only one parent is a mahomedan, the upbringing of the child in the mahomedan faith makes the muslim law applicable to the child. There can be conversion to Islam and such converts are governed by Mahomedan Law.

There are four sources of Muslim Law:

- ❖ The Quran;
- ❖ Sunna;

- ❖ Ijmaa; and
- ❖ Qiyas.

a) The Quran:

The Quran is the scripture of the Muslims and is of divine origin. It contains 6000 verses revealed to the Prophet by the angel Gabriel as the message of God. About 80 verses of the Quran deal with legal matters such as inheritance, guardianship, marriage, divorce, prohibition of usury etc. Since the Quran represents the voice of God and its authority is paramount.

b) Sunna (Tradition):

Sunna consists of the precedents or usage of the prophet. They deal more with the principles of Islamic religion rather than with positive law. The Sunna being divinely inspired ranks equal to the Quran.

c) Ijmaa:

Ijmaa is the consensus of the jurists. The efficacy of Ijmaa is based upon the following text: "God will not allow his chosen people to agree on an error". Ijmaa has validity so long as it is not opposed to Quran or to the Sunna.

d) Qiyas:

Qiyas is analogical deduction from the comparison of the other three sources. The Shias, one of the sects of Mahomedans, do not accept the binding authority of Qiyas as a source of law.

Place of custom in Muslim Law:

Custom as such has not been enumerated among the sources of Muslim Law. However, when mass conversions took place in India, the converts were allowed to follow their pre-existing law in matters relating to inheritance. Customary law was superseded by the Shariat Act, 1937. This means that contrary custom displacing the Shariat is swept away.

SCHOOLS OF HINDU LAW

Origin of the Schools of Hindu Law:

Different Schools of Hindu Law arose as a result of various commentaries on the smritis. The authority of the Vedas and the Smritis is accepted throughout India. The Smritis, however, have

been the subject-matter of commentaries by eminent scholars in different parts of the country. These commentaries seem to have imported local customs into the sacred texts by a process of interpretation. These customs being different in different parts of the country. It is in this way because of the varying authority of the commentators in different parts of the India, schools of law arose among Hindus.

Mithakshara and Dayabhaga Schools:

There are two main schools. Mithakshara School and Dayabhaga School. The Dayabhaga School is confined to Bengal and it takes its name after the work entitled the Dayabhaga written by Jimutavahana. The Dayabhaga is, in fact, only a chapter of a larger work of that author, but this chapter alone is now extant. The rest of India follows the Mithakshara School which was written by Vijnaneswara as a commentary on the Yagnavalkya Smriti. The Mithakshara (which means measured words) is regarded as authority even in Bengal in regard to all matters on which there is no contradictory opinion expressed in the Dayabhaga. The Mithakshara School is usually subdivided into four schools, namely, the Dravida School, the Maharashtra School, the Benaras School and the Mithila School.

Sub-Schools of the Mithakshara:

The Mithakshara School may be sub-divided into four schools:

❖ Dravida School:

In addition to the Mithakshara, in southern India certain law books are treated as of great authorities. They are Parasara Madhaviya, Smritichandrika, Saraswativilasa and Vyavahara Nimaya.

Parasara Madhaviya:

This great work written by Madhavacharya as a commentary on Parasara Smriti. The great Acharya was the guru and minister of Bukka and Harihara who were the founders of Vijayanagar Dynasty.

Smritichandrika:

This work by Devanna Bhatta deals with the subject of inheritance. It was also composed during the Vijayanagar Dynasty. It is a Nibandha or Digest of Law.

Saraswati vilasa:

This was the work of the great ruler Parataparudra Deva, who belonged to the Gajapathy Dynasty and ruled Orissa between 1497-1539. The probable date of Saraswati Vilasa is 1515. The Gajapathy rulers of Orissa were hostile to Vijayanagar. Krishna Deva Raya of the Vijayanagar Dynasty married the daughter of Gajapathy (Tukka Devi alias Jaganmohini) in 1516 and brought that hostility to an end.

Vyavahara Nimaya:

This is the work of Varadaraja who lived in the 17th century.

❖ Maharashtra School:

In addition to the Mithakshara, the Bombay School attaches great importance to the following works. They are Vyavahara Mayukha and Nirnaya Sindhu.

Vyavahara Mayukha:

Mayukha means a Ray. The author of Mayukha was Nilakanda Bhatta. The Vyavahara Mayukha is the part dealing with secular law. The entire work is an encyclopaedia of religious and civil law and was composed between 1610 and 1645.

Nirnaya Sindhu:

This was composed in 1612 by Kamalakara, who was the son of Nilakanda Bhatta's paternal uncle.

❖ Benaras School:

The Benaras School recognizes the following as authoritative in addition to Mithakshara. They are Viramitrodaya and Nirnaya Sindhu.

Viramitrodaya:

The author of this digest is Mitra Misra, who composed it between 1610-1640. The Viramitrodaya holds in western India a high position. The Viramitrodaya is properly receivable as an exposition of what may have been left doubtful by the Mithakshara and declaratory of the law of the Benaras School.

Nirnaya Sindhu:

This work is received as an authority not only in western India but also in the Benaras School.

- ❖ Mithila School: The important authorities of this School are: Vivada Chintamani, Vivada Ratnakara and Madanaparijata.

Vivada Chintamani: This is a Nibanda work of Vachaspati Misra and was written under the patronage of King Bairavendra of Mithila in the 15th century.

Vivada Ratnakara: This is a Nibanda work written by Chandeswara, who was the Chief Judge and Minister of king Harasimhadeva of Mithila. It was composed in the 14th century.

Madanaparijata: This was composed under the patronage of king Madanapala. It was composed between 1360 and 1390 by Visweswarabhata, who was also the author of Subodhini, a commentary on the Mithakshara.

Differences between Mithakshara and Dayabhaga Schools:

- ❖ Joint Family: Under the Mithakshara the father's power are qualified by the son's equal right by birth. But, there is no right by birth under Dayabhaga. The father has uncontrolled power of alienation over the family property.
- ❖ Survivorship: Brothers who have inherited property from their father have a right of survivorship in the Mithakshara joint family. The Dayabhaga does not recognize any right of survivorship.
- ❖ Widow's Rights: When one of the brothers dies, his widow can succeed to his share under the Dayabhaga but under the Mithakshara her rights are excluded by the right of survivorship of the brothers. The widow can then have only a right to maintenance.
- ❖ Sapinda Heirship: The relationship of Sapinda arises according to Mithakshara by community of blood. Under the Dayabhaga it arises by means of Pinda offerings to deceased ancestors.

Effect of migration from one sub-school to another sub-school:

Hindu Law being a system of personal law, it attaches to a person even he shifts from one place to another. So, if a Hindu migrates from a place comprised in one sub-school to another place where a different sub-school of law prevails he carries his personal law with him. In *Balwantrao v. Bajirao*, parties from Poona had settled down in Central Provinces. The Privy Council held that

it was not the Benaras School but the Maharashtra School of Law that would apply to such a case.

SCHOOLS OF MUSLIM LAW

The Mahomedan brotherhood split into two great sects on the death of the Prophet which occurred in 632 A.D. The Prophet was both temporal ruler (Caliph) and the Supreme Preceptor (Imam). On his death, father-in-law, Abu Bakkar was elected as the first Caliph. The supporters of the principle of filling the office by election came to be called as Sunnis. The opponents of this procedure regarded the office as not open to election. It had to devolve on Ali (Son-in-law of the Prophet) who was his nearest relation as paternal uncle's son. The supporters of succession to the office by inheritance to the prophet are known as Shias.

In the field of law a separate Shia School was founded by their sixth Imam Jafar-as-Sadik. The Shias accept only such traditions of the Prophet as have been endorsed by the Prophet's household. They do not accept Qiyas as a source of law. In the field of intestate succession there are radical differences between the Shias and the Sunnis. The Shias are in a majority in Persia (Iran). In India they are in a minority.

Sub-Schools among Sunnis:

The Sunnis are the preponderant majority among Muslims in India. The presumption in India is that a mahomedan is governed by the Sunni School of Law (Hanafi Sub-School). The Sunni School is sub-divided into four schools as follows.

Hanafi School:

This school is named after the great jurist Abu Hanifa (699-767 A.D.) who was a pupil of Jafar-as-Sadiq, founder of the Shia School. It was founded in Kufa (which is now modern Iraq). The doctrines of the Hanafi School were elaborated in the Hedaya. During the period of Aurangazeb, the Sunni doctrines were collected in the Fatwa-i-Alamgiri. this was translated into English by Bailee and is known as Bailee's digest.

Maliki School:

Malik-ibn-Anas (713-795 A.D.) founded a School attaching great importance Ijmaa as a source of law. He propounded his doctrines in his great work Kitab-at-Muwatta.

Shafei School:

Muhammad-ibn-Idrisash-Shafei (767-820 A.D.) a pupil of Malik-ibn-Anas, founded this School in Egypt. He gives greater prominence to Ijmaa even than Malik.

Hanbali School:

Ahmed-ibn-Hanbal (780-855 A.D.) a pupil of Shafei founded this School. He was born at Baghdad and his followers are to be found largely in Syria and Palestine.

The Jafari School (Ithna Ashari School):

The founder, Imam Jafar was the 6th Imam of the Shias and he died in 765 A.D. The 11th Imam in the line of succession died in 873 A.D. His son, aged 5, entered a cave near their house and was never seen again. He was to be the 12th Imam. The followers of this School believe that the 12th Imam who disappeared will one day re-appear. This School, thus, came to be called the Ithna Ashari School or the School of Twelvers. The Shias belong to this School.

In India the Sunnis belong either to the Hanafi or the Shafei School. The Shias follow the Ithna Ashari School. The Maliki and Hanbali Schools have no followers in India.

Conclusion:

Unity in Diversity is the accepted principle of India. The personal laws are enacted keeping in mind with the traditional values of various religious groups of the country. Before the codified laws came into effect, the abovementioned sources were the guiding principles for the respective religious groups. Hence, it is very much necessary for everyone to know and understand various sources of the respective religions.