SOURCES & SCHOOLS OF PERSONAL LAWS IN INDIA

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1. Sources of Hindu Law

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.

"Hindu law has the oldest pedigree of any known system of jurisprudence, and even now it shows no sign of decrepitude."- Henry Mayne.

The phrase "source of law" has several connotations. It may be the authority which issues rules of conduct which are recognized by Courts as binding. In this context, 'source of law' means 'the maker of law'. It may mean the social conditions which inspires the making of law for the governance of the conditions. In this context it means 'cause of law'. It may also mean in its literal sense the material from which the rules and laws are known. In this sense the expression means the 'evidence of law' and it is in this sense that the expression 'source of law' is accepted in Jurisprudence.

Vijnaneshwar (commentator on the Yajnavalkya Smriti and founder of Mitakshara School) has called it Jnapak Hetu i.e., the means of knowing law. It is 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 recognized in the sources is not a rule in that legal system.

The word 'Hindu' first appeared in the Old Persian language which was derived from the Sanskrit word Sindhu, the historic local designation for the Indus River in the north-western part of the Indian subcontinent. A Hindu is an adherent of Hinduism.

Hindu law is a set of personal laws governing the social conditions of Hindus (such as marriage and divorce, adoption, inheritance, minority and guardianship, family matters, etc.). It is not Hindus alone who must follow Hindu law but there are several other communities and religious denominations that are subject to its dominion such as Jains, Buddhists, Sikhs, Brahmo-Samajists, Prarthana-Samajists, the Virashaivas and Lingayats and the Santhals of Chhota Nagpur besides others.

In Sir Dinshah F.Mulla's 'Principles of Hindu Law', the learned editor has defined 'Hindu law' in the following words: "Wherever the laws of India admit operation of a personal law, the rights and obligations of a Hindu are determined by Hindu law, i.e. his traditional law, sometimes called the law of his religion, subject to the exception that any part of that law may be modified or abrogated by statute." Law as understood by Hindus is a branch of dharma.

Nature and scope: In the present article, the scope will be restricted to finding out the sources of Hindu law, and critique on some of the definitional aspects of the sources and a general critique of the sources.

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1.1. Ancient Sources

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

1.1.1. Shruti

It literally means that which has been heard. The word is derived from the root "shru" which means 'to hear'. In theory, it is the primary and paramount source of Hindu law and is believed to be the language of the divine revelation through the sages.

The synonym of shruti is veda. It is derived from the root "vid" meaning 'to know'. The term Veda is based on the tradition that they are the repository of all knowledge. There are four Vedas namely, Rig Veda (containing hymns in Sanskrit to be recited by the chief priest), Yajurva Veda (containing formulas to be recited by the officiating priest), Sama Veda (containing verses to be chanted by seers) and Atharva Veda (containing a collection of spells and incantations, stories, predictions, apotropaic charms and some speculative hymns).

Each Veda has three parts viz. Sanhita (which consists mainly of the hymns), Brahmin (tells us our duties and means of performing them) and Upanishad (containing the essence of these duties). The shrutis include the Vedas along with their components.

1.1.2. Smritis

The word Smriti is derived from the root "smri" meaning 'to remember'. Traditionally, Smritis contain those portions of the Shrutis which the sages forgot in their original form and the idea whereby they wrote in their own language with the help of their memory. Thus, the basis of the Smritis is Shrutis but they are human works.

There are two kinds of Smritis viz. Dharmasutras and Dharmashastras. Their subject matter is almost the same. The difference is that the Dharmasutras are written in prose, in short maxims (Sutras) and the Dharmashastras are composed in poetry (Shlokas). However, occasionally, we find Shlokas in Dharmasutras and Sutras in the Dharmashastras. In a narrow sense, the word Smriti is used to denote the poetical Dharmashastras.

The number of Smriti writers is almost impossible to determine but some of the noted Smriti writers enumerated by Yajnavalkya (sage from Mithila and a major figure in the Upanishads) are Manu, Atri, Vishnu, Harita, Yajnavalkya, Yama, Katyayana, Brihaspati, Parashar, Vyas, Shankh, Daksha, Gautama, Shatatapa, Vasishtha, etc.

The rules laid down in Smritis can be divided into three categories viz. Achar (relating to morality), Vyavahar (signifying procedural and substantive rules which the King or the State

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applied for settling disputes in the adjudication of justice) and Prayaschit (signifying the penal provision for commission of a wrong).

1.1.3. Digest & Commentaries

After Shrutis came the era of commentators and digests. Commentaries (Tika or Bhashya) and Digests (Nibandhs) covered a period of more than thousand years from 7th century to 1800 A.D. In the first part of the period most of the commentaries were written on the Smritis but in the later period the works were in the nature of digests containing a synthesis of the various Smritis and explaining and reconciling the various contradictions.

The evolution of the different schools of Hindu law has been possible on account of the different commentaries that were written by various authorities. The original source of Hindu law was the same for all Hindus. But schools of Hindu law arose as the people chose to adhere to one or the other school for different reasons. The Dayabhaga and Mitakshara are the two major schools of Hindu law. The Dayabhaga school of law is based on the commentaries of Jimutvahana (author of Dayabhaga which is the digest of all Codes) and the Mitakshara is based on the commentaries written by Vijnaneswar on the Code of Yajnavalkya.

1.1.4. Custom

Custom is regarded as the third source of Hindu law. From the earliest period custom ('achara') is regarded as the highest 'dharma'. As defined by the Judicial Committee custom signifies a rule which in a particular family or in a particular class or district has from long usage obtained the force of law.

Custom is a principle source and its position is next to the Shrutis and Smritis but usage of custom prevails over the Smritis. It is superior to written law. There are certain characteristics which need to be fulfilled for declaring custom to be a valid one. *They are:-*

i. The custom must be ancient. The particular usage must have been practised for a long time and accepted by common consent as a governing rule of a particular society.
ii. The custom must be certain and should be free from any sort of ambiguity. It must also be free from technicalities.
iii. The custom must be reasonable and not against any existing law. It must not be immoral or against any public policy and
iv. The custom must have been continuously and uniformly followed for a long time.

Indian Courts recognize three types of customs viz:

i. **Local Custom:** These are customs recognised by Courts to have been prevalent in a particular region or locality.

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ii. **Class Custom:** These are customs which are acted upon by a particular class. Eg. There is a custom among a class of Vaishyas to the effect that desertion or abandonment of the wife by the husband abrogates the marriage and the wife is free to marry again during the life-time of the husband.
iii. **Family Custom:** These are customs which are binding upon the members of a family. Eg. There is a custom in families of ancient India that the eldest male member of the family shall inherit the estates.

Following are the essential points which constitute a custom:

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

1.2. Modern Sources

1.2.1. Justice, Equity and Good Conscience

Occasionally it might happen that a dispute comes before a Court which cannot be settled by the application of any existing rule in any of the sources available. Such a situation may be rare but it is possible because not every kind of fact situation which arises can have a corresponding law governing it.

The Courts cannot refuse to the settle the dispute in the absence of law and they are under an obligation to decide such a case also. For determining such cases, the Courts rely upon the basic values, norms and standards of fair play and propriety.

In terminology, this is known as principles of justice, equity and good conscience. They may also be termed as Natural law. This principle in our country has enjoyed the status of a source of law since the 18th century when the British administration made it clear that in the absence of a rule, the above principle shall be applied.

1.2.2. Legislation

Legislations are Acts of Parliament which have been playing a profound role in the formation of Hindu law. After India achieved independence, some important aspects of Hindu Law have been codified. Few examples of important Statutes are The Hindu Marriage Act,

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1955, The Hindu Adoptions and Maintenance Act, 1956, The Hindu Succession Act, 1956, The Hindu Minority and Guardianship Act, 1956, etc.

After codification, any point dealt with by the codified law is final. The enactment overrides all prior law, whether based on custom or otherwise unless an express saving is provided for in the enactment itself. In matters not specifically covered by the codified law, the old textual law contains to have application.

1.2.3. Precedent

After the establishment of British rule, the hierarchy of Courts was established. The doctrine of precedent based on the principle of treating like cases alike was established. Today, the decisions of Privy Council are binding on all the lower Courts in India except where they have been modified or altered by the Supreme Court whose decisions are binding on all the Courts except for itself.

1.3. A Critique on the Sources

It is significant to note that the term 'Hindu' is not defined anywhere in terms of religion or in any statute or judicial decisions. For the purpose of determining to whom Hindu Law applies, it is necessary to know who is a Hindu and none of the sources expressly state so. At most from statutes, we can get a negative definition of a Hindu which states that Hindu law shall apply to those who are not Muslim, Christian, Parsi, Jew, etc. and who are not governed by any other law.

Hindu Law is considered to be divine law as it is strongly believed that the sages had attained some spiritual dominion and they could communicate directly with God form whom we get the divine law. But this is only an assumption and no concrete proof for the same is shown that the sages could communicate with God (whose very existence is challenged by atheists). Due to this, many communities are also suffering from the misapprehension or delusion that their forefathers and messiahs had revelations from God.

Justice A.M. Bhattacharjee strongly states that according to him he cannot think that "even a staunch believer in any divine existence, transcendent or immanent, can believe in the 'divine origin' of Hindu law, unless he has a motive behind such profession of belief or has not read the Smritis or is ready to believe anything and everything with slavish infidelity."

According to Justice Markandey Katju, Hindu law does not originate from the Vedas (also called Shruti). He vehemently asserts that there are many who propound that Hindu law originated from the Shrutis but this is a fiction and in fact Hindu law originated from the Smriti books which contained writings from Sanskrit scholars in ancient time who had specialized in law.

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The Shrutis hardly consist of any law and the writings ordained in the Smriti do not make any clear-cut distinction between rules of law and rules of morality or religion. In most of the manuscripts, the ethical, moral and legal principles are woven into one. It is perhaps for this reason that according to Hindu tradition, law did not mean only in the Austinian sense of jurisprudence and is objectionable to it; and the word used in place of 'law' was the Sanskrit word 'dharma' which connotes religion as well as duty.

Although Dharmasutras dealt with law, they did not provide an anthology of law dealing with all the branches of law. The Manusmriti supplied a much needed legal exposition which could be a compendium of law. But according to Kane, "It is almost impossible to say who composed the Manusmriti." The very existence of Manu is regarded to be a myth by many and he is termed as a mythological character.

Many critics assert that the word Smriti itself means that what is remembered and therefore the validity or proof of the existing Smritis could be challenged. It cannot be said for certainty that what the sages remembered was actually what was propounded.

Hindu law has generally been critiqued on the grounds that the Smritis and other customs were generally extremely orthodox and against the favours of women. Hindu society thus has always been a patriarchal society and women have always received subdued importance over men. Some also disapprove of the notions of caste-based system created by ancient Hindu law from which emerged the ill-perceived practices of untouchability, etc.

The Smritis are admitted to possess independent authority but while their authority is beyond dispute, their meanings are open to various interpretations and has been and is the subject of much dispute. Till date, no one can say for sure the exact amount of Smritis which exist under Hindu law. It is due to the abovementioned problems that the digest and commentaries were established and various schools of Hindu law started to give birth.

The modern sources of Hindu law such as Justice, equity and good conscience have been critiqued on the grounds that it paves the way for personal opinions and beliefs of judges to be made into law. We have seen catena of cases where the decisions of the Court have been criticised for want of proper reasoning. This also signifies the incompleteness of the laws which exist.

The Supreme Court in most matters has ascertained the rules of Hindu law successfully but there are couple of cases where they have interpreted the rules in their own light. One of the gravest cases of the Supreme Court which deserves much criticism is the case of Krishna Singh v. Mathura Ahir. The Allahabad High Court had rightly held that the discriminatory ban imposed on the Sudras by the Smritis stands abrogated as it contravenes the Fundamental Rights guaranteed by the Constitution.

However, the Supreme Court contradicted the above view and held that "Part III of the Constitution does not touch upon the personal laws of the parties. In applying the personal laws of the parties one cannot introduce his own concepts of modern times but should enforce the law as derived from recognised and authoritative sources of Hindu law....except where such law is altered by any usage or custom or is modified or abrogated by statute."

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It can be submitted with ease that the above view is contrary to all Constitutional theories and is expressly in contradiction with Article 13. It is shocking to note that this judgment is yet to be over-ruled in express terms.

Since the aegis of time, Hindu law has been reformed and modified to some extent through legislations but these reforms have been half-hearted and fragmentary. The problem with fragmentary reforms is that though reforms were made to change some aspects, their implications on other aspects were over-looked. For example, the Hindu Women's Right to Property Act, 1937, was passed with a view to granting property rights to women but its repercussions on the law of joint family was over-looked. The result was that fragmentary reforms through legislations solved some problems but resulted in others.

Many people make the mistake of considering various text books written by erudite scholars as sources of Hindu law. This is because the Courts have decided many cases relying on these text books and quoted them for reference. For example, Mulla's Hindu Law has been quoted by many judges. In Bishundeo v. Seogani Rai, Justice Bose giving the majority judgment stated that "The rule laid down in Mulla's book is expressly stated to be in cases where the position is not effected by a decree of a competent Court." The same has been the case with many other text books. It should be made clear that text books are not sources of Hindu law and the authors have no authority to lay down the law.

It has been seen that Hindu law has been critiqued for its orthodoxy, patriarchal character and does not bear a very modern outlook of society. There are many areas where the Hindu law needs to upgrade itself, for example, the irretrievable breakdown theory as a valid ground for divorce is still not recognised under the Hindu Marriage Act, 1955, and even the of Supreme Court have expressed their concern on this.

The most valid concern is that the very definition of a 'Hindu' is still not given in any of the sources. Statutes give only a negative definition which does not suffice the test of time. The very proponent that Hindu law is divine law has been challenged by scholars and atheists.

There are many Smritis which are yet to be found according to Historians and many conflicts of opinions and interpretations have arisen for the existing ones, thus creating a window of ambiguity under Hindu law. There are also several areas where Hindu law is silent.

Most of the ancient sources of Hindu law is written in Sanskrit and it is well known that in the present times there is a dearth of Sanskrit scholars. There is hardly any importance left of the ancient sources since the time the modern sources have emerged and been followed.

It can be said that proper codification of Hindu law without room for ambiguity is the need of the hour. It can be said that where the present sources of Hindu law are uninviting the Legislature could look into sources and customs of other religions and incorporate them into Hindu law if it caters to the need of the society and meets the test of time.

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2. Schools of Hindu Law

The two main schools of Hindu Law are the ”Mitakshara” and the `Dayabhaga’. These two schools of Hindu Law are marked by a vital difference of opinion and interpretations of the Smritis. The Mitakshara written by Vijnaneshwara is a running commentary on the Smriti of Yajnavalkya and ‘the Dayabhaga’ written by Jimulavahana is not a commentary on any particular Code, but professes to be a digest of all the Codes. The Mitakshara School prevails throughout India except Bengal where the Dayabhaga School prevails.

Mitakshara School prevails throughout India except in Bengal. It is a running commentary on the code of Yagnavalkya. Mitakshara is an orthodox School whereas the Dayabhaga is Reformist School.

As to the causes which have given rise to these different schools, it should be noted that originally there were no schools of Hindu Jurisprudence. Schools of Hindu Law came into being when different commentaries appeared to interpret the Smritis’ with reference to different local customs that were in vogue in different parts of India. In Rutcheputty v. Rajendra, it has been observed by the Privy Council that the different schools of Hindu Law have originated due to different local customs prevailing in different provinces of India. The commentators on the Smritis could not ignore the local customs and usages and while interpreting the texts, they eventually incorporated different local customs. The local conditions and customs of the different provinces have, therefore, gone to mould the principles of law prevailing in each province. Process of development.— ln the case of Collector of Madras v. Moottoo Rantalinga, [(1968) 12 MIA 397], the Privy Council has held, “The remoter sources of the Hindu Law (that is Smritis) are common to all the different schools. The process by which those schools have been developed seems to have been of this kind. Works universally or very generally received became the subjects of subsequent commentaries. The commentator put his own gloss on the ancient text; and his authority having been received in one and rejected in another part of Indian schools with conflicting doctrines arose”. The variances between the sub-divisions of the Mitakshara school are comparatively few and slight.

Following are the reasons for these differences :

i. One reason which used to be given for this division is that “the glosses and commentaries upon the Mitakshara are received by some of the schools but are not received by all”.
ii. Another reason given for this division into schools is that the commentaries in a particular province which follow the Mitakashara put a particular gloss on it and are agreed upon it among themselves.

2.1. 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

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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

I. Benaras Hindu law school
II. Mithila law school
III. Maharashtra law school
IV. Punjab law school
V. 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.

2.1.1. 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.

2.1.2. 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.

2.1.3. 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.

2.1.4. 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.

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2.1.5. 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.

2.2. 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.

2.3. Differences between Mitakshara school & Dayabhaga school.

We know that the Mitakshara is anterior to dayabhaga and it is a running commentary or the code of Yajnabalka written by Vijaneswara. The Dayabhga is the digest of all the codes while giving performance to the Code of Manu.

The two schools mainly differ or the following points:

- Inheritance
- Devolution of Property
- Joint Family Property
- Factum Valet

2.3.1. Inheritence:

Inheritance under the Mitakshara school:

a. The right of inheritance arises from propinquity.

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b. There are there classes of heirs:
    i. Sapinddas,
    ii. Samanadakas
    iii. Bandhu
c. So long there are gotraja sapindas or samanadakas, no bandhu or bhinn-gotra sapindas can generally inherit.
d. A large number of cognate (born of the same family) heirs are recognized in Mitakshara than Dayavhaga

Inheritance under Dayabhaga school:

a. The right of inheritance depends on spiritual efficacy.
b. There are three classes of heirs:
    i. Sapindas
    ii. Sakulyas
    iii. Samanodakas
c. Both agnates and cognates come in the list of sapindas and inherit before sakulyas or samanodakas.
d. Sapindas are those who can confer spiritual benefit on the deceased by offering pindas and include both agnates and cognates.

2.3.2. Devolution of Property

Under Mitakshara school property devolves in two ways:

- Survivorship, and
- Succession.

Under Dayabhaga no living Hindu has got any heir; succession opens after his death. But survivorship is not recognized death.

2.3.3. Joint Family Property

Joint family property under Mitakshara school:

a. A son, born to one of the coparceners acquires an interest in the property from the moment of this birth and he cannot be ousted from such interest which he is alive.
b. The karta or manager has got a restricted right of transfer.
c. Property devolves on the male survivors only.

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Joint family property under Dayabhaga school:

a. Succession opens to a son only after the death of the father. A Dayabhga father is competent to make a tesatamentory disposition of the whole of property. A son has got no right to object to it. A son cannot claim partition during the lifetime of his father.
b. Succession once opens, share of each heir becomes fixed, and every member can alienate his share in any way he likes.
c. Property passes by inheritance only and may go to female heirs like widows, daughter etc.

2.3.4. Factum Valet

It is recignised by Dayabhaga school to a greater extent than Mitakshara school. But factum valet is no defense when the act is immoral or against public policy or prohibited by any Act of Legislature or against express principles of Hindu law.

3. Sources of Muslim Law

Islam is one of the oldest major religions in the world. Although it originates from Arabia, people from all countries of the world follow it now. Due to its largely uncodified nature, we must look at the sources of Muslim personal law to understand it. This also helps in understanding various customs of Islam relating to marriage, divorce, succession, etc.

Unlike the personal laws of other religions, Muslim personal law in India is largely uncodified. This basically means that it is not based on laws made by the legislature. Instead, it originates from several other sources of traditional law dating back several years.

Since Prophet Mohammed had proclaimed Muslim law to be the commandment of God, most Muslims adhere to it strictly. It dictates several spiritual, religious, social and even legal activities of many Muslims in India. This is also probably why the legislature did not draft separate personal laws for followers of Islam in India.

The personal laws of Muslims provide guidance in matters of marriage, divorce, succession, inheritance and even adoption. They are highly nuanced and even sometimes apply differently to different factions of Muslims. For example, the Islamic law of divorce is slightly different for Shias and Sunnis.

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3.1. Ancient Sources of Law

3.1.1. Quran

It is the original or primary source of Muslim Law. It is the name of the holy book of the Muslims containing the direct revelations from God through Prophet. The direct express or manifest revelations consist of the communications which were made by the angel, Gabriel, under directions from God, to Mohammed, either in the very words of God or by hints and of such knowledge which the Prophet has acquired through the inspiration (Ilham) of God. All the principles, ordinances, teachings and the practices of Islam are drawn from Quran. The contents of Quran were not written during the lifetime of the Prophet, but these were presented during the lifetime of Prophet, in the memories of the companions.

There is no systematic arrangement of the verses in the Quran but they are scattered throughout the text. It contains the fundamental principles which regulate the human life. The major portion of the Quran deals with theological and moral reflections. The Quran consists of communications of God; it is believed to be of divine origin having no earthly source. It is the first and the original legislative code of Islam. It is the final and supreme authority.

In the 200 odd verses of law in the Quran, only 80 or so deal with the personal law. Hence, we say that it is not a complete code of Muslim personal law; it only lays down the basic principles. It is believed that the verses relating to law were revealed at Medina while the ones relating to religion and mortality were revealed at Mecca. In some places in the book, all three can't be separated at all. Thus, the whole of Quran cannot be source of a law, instead we refer to the 200 odd law-making ayats scattered all over the book as the basic source of Muslim Law.

It is in form of verses, each verse is called an 'Ayat'. There are 6237 ayats in 114 chapters, each called 'Sura'. The holy book is arranged topic wise with respective titles. The first chapter praises the almighty God. Other chapters include, surat-un-nisa (chapter relating to women), surat-ul-noor (rules relating to home-life) and surat-ul-talaq (the rules relating to divorce).

It is the first and fundamental source of Muslim law and Islamic principles. It is ultimate source of laws. The religious book has a divine origin. It is believed that these were the words of God himself and the Prophet mere uttered these words. Thus, it is unchangeable and its authority is beyond reproach. The Quran is the Al-furqan, the one that shows the truth from falsehood and the right from the wrong.

3.1.2. Sunna (Traditions or Ahadis)

The literal meaning of the term 'Sunna' is 'the trodden path.' It denotes some practice and precedents of the Prophet, whatever the Prophet said or did without reference to God, and is treated as his traditions. It is the second source of Muslim law. Traditions are injunctions of Allah in the words of the prophet. Where the words of Allah could not supply an authority for

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a given rule of law, Prophet's words were treated as an authority because it is believed that even his sayings derived inspiration from Allah.

According to Muslim law, there are two types of revelations i.e. manifest (Zahir) and internal (Batin). Manifest or express revelations were the very words of Allah and came to the Prophet through the angel Gabriel. Such revelations became part of the Quran. On the other hand, the internal revelations were those which were the 'Prophet's words' & did not come through Gabriel, but Allah inspired the ideas in his sayings. Such internal revelations formed part of Sunna. Traditions, therefore, differ from Quran in the sense that Quran consists of the very words of God whereas a Sunna is in the language of Prophet.

Sunna or traditions consists of:

- Sunnat-ul-Qual (word spoken)
- Sunnat-ul-Fail (conduct)
- Sunnat-ul-Tahrir (silence)

The traditions noticed by competent and qualified person were treated as authoritative if they were found to be reliable. The competence was judged by the mental understanding, power of retention, righteous conduct of a person and on the basis of whether he was a Muslim or not.

- **Companions of the Prophet:** The Muslims who lived with the Prophet during his lifetime and were close to him are called the Companions. Their testimonies are the most reliable ones.
- **Successors of the Companions:** The Muslims who came in contact with the Companions of the Prophet are called the Successors. They stand second in reliability.
- **Successors of successors:** The Muslims who were in constant companionship of the Successors come last in the line.

The further a narrator from the Prophet, the lesser authority is given to his narration.

Drawbacks:

Some of the traditions have a doubtful origin and some are even contradictory to each other. There are no uniform or certain rules on certain issues. Mixture of law and religious or moral principles makes the extraction of the actual law a rather tedious task. Traditions derive authority from the writers, with the death of successors and others; this means could no longer be practised. In addition, the Shias followed only those traditions that came from the Prophet's family.

The importance and role of traditions is immense but another source of law was needed to deal with the expanding Islamic Society.

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3.1.3. Ijma (Consensus)

With the death of the prophet, the original law-making process ended, so the questions, which could not be solved either by the principles of the Quran or the Sunna, were decided by the Jurists with the introduction of the institution of Ijma. Ijma means agreement of the Muslim Jurists of a particular age on a particular question of law, in other words, it is the consensus of Jurist's opinion.

Those persons who had knowledge of law were called Mujtahids (Jurists). When Quran and traditions could not supply any rule of law for a fresh problem, the jurists unanimously gave their common opinion or a unanimous decision and it was termed as Ijma. Not each and every Muslim was competent to participate in the formation of Ijma, but only Mujtahids could take part in it.

There are three kinds of Ijma:

1. **Ijma of Companions:** The concurrent opinion of the companions of Prophet was considered most authoritative and could not be overruled or modified.
2. **Ijma of the Jurists:** This was the unanimous decision of the jurists (other than companion).
3. **Ijma of the people or masses:** It is the opinion of the majority of the Muslims which was accepted as law. But this kind of Ijma has little value.

Once a valid Ijma is constituted, it is regarded equal to Quranic verse i.e. it is equally binding on people. Without Ijma, these rules of Islamic law would have been diffused and incomplete. Its principles cover the vast subject. Ijma authenticated the right interpretation of the Quran and the Sunna.

Importance:

A major chunk of the fiqh or actual Muslim law came through Ijma. It explained the Quran and traditions in terms of actual applicability as well as laid down new principles of law so as to help the society to cope up with growth and progress. It was through Ijma that the real opportunities for interpretation of the hereto rigid Quran and Traditions came up. It is even referred to as the 'living tradition' at times.

Drawbacks:

The Ijma lead to various reading and versions or interpretation of the Quran, Sunna, custom etc. As a result, different sub-sects were formed. The choice of unanimous opinion or majority opinion is another bone of contention. The Ijma of the jurists and the people could be overruled

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at any time; thus, they were not able to contribute substantially to certainty in law. With the spread of Islam and lack of a well- established communication network, obtaining consensus of all the jurists was a major problem. Again the stock of learned and accepted scholars ran short of the requirement and by 10th century, the Ijma had to be abandoned.

3.1.4. Qiyas (Analogical deductions)

The word Qiyas was derived from term 'Hiaqish' which means 'beat together.' In Arabic Qiyas means 'measurement, accord, and equality.' In other words, it means measuring or comparing a thing to a certain standard, or to 'establish an analogy.' If the matters which have not been covered by Quran, Sunna or Ijma, the law may be deducted from what has been already laid down by these three authorities by the process of analogy (Qiyas).

The Qiyas is a process of deduction, which helps in discovering law and not to establish a new law. Its main function is to extend the law of the text, to cases which do not fall within the purview of the text. For valid Qiyas, the following conditions must be fulfilled:

I. The process of the Qiyas can be applied only to those texts which are capable of being extended. The texts should not be confined to a particular state of facts or rules having a specific reference.
II. The analogy deduced should not be inconsistent with the dictates of the Quran and authority of Sunna.
III. The Qiyas should be applied to discover a point of law and not to determine the meanings of the words used in the text.
IV. It must not bring a change in the law embodied.

If there is a conflict between two deductions, a jurist is free to accept any one of the deductions from a text. Hence one analogy cannot abrogate the other.

Compared with other sources, Qiyas is of much lesser significance. The reason is that on the analogical deductions, resting as they do, upon the application of human reasons, which is always liable to error.

It may be concluded that the superstructure of Islamic Jurisprudence is founded on Quranic verses and traditional utterance of Prophet, yet other sources have also helped a lot in developing the sacred law in its present form. It is due to the contribution of all the sources of Islamic law that an orderly and systematic theory of the personal laws of Islam came into existence, which governs the Muslim community.

3.2. Customs: Urf or Taamul

Before Islam, customary law governed Arabia. Then the Prophet abolished most of them, as they were un-Islamic and bad. Some customs, however, were continued due to the Prophet's

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silent approval. Some were even included in his traditions. Otherwise, some customs survived due to their incorporation in the Ijma.

Importance:

It is not a formal source, yet, in the absence of rule of law in the texts of the primary sources, the customary practices are regarded as law. The British Courts in India held that a custom would prevail over a written text provided that the custom was ancient and invariable.

Present Position:

The Shariat act, 1937 has abolished most of the customs. Section 2 lists ten matters including inheritance, marriage, divorce, wakf and, maintenance wherein customs and usages cannot be applied anymore. Customs are still applicable to Muslims with regard to agricultural lands, charities and religious endowments. Even in matters of wills, adoption and legacies, the customary law will apply unless a Muslim expressly states that the Shariat should regulate them.

Additionally, the Shariat Act is not applicable to the state of Jammu and Kashmir. Thus, the rules of Muslim law there are subjected to customs and usages.

3.3. Modern Sources

3.3.1. Justice, Equity and Good Conscience

Occasionally it might happen that a dispute comes before a Court which cannot be settled by the application of any existing rule in any of the sources available. Such a situation may be rare but it is possible because not every kind of fact situation which arises can have a corresponding law governing it.

The Courts cannot refuse to the settle the dispute in the absence of law and they are under an obligation to decide such a case also. For determining such cases, the Courts rely upon the basic values, norms and standards of fair play and propriety.

In terminology, this is known as principles of justice, equity and good conscience. They may also be termed as Natural law. This principle in our country has enjoyed the status of a source of law since the 18th century when the British administration made it clear that in the absence of a rule, the above principle shall be applied.

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3.3.2. Legislation

God is the Supreme legislator as per Islam. Thus, sometimes, legislative modifications are also treated as encroachment. Still, there are a few acts that modify or lay down principles of Muslim law and serve as a source of law for the courts with respect to the content covered by them.

a. **The Mussalman Waqf Validating Act, 1913:** It merely re-established the validity of family-wakfs.
b. **The Child Marriage Restraint Act:** It makes the marriage of a boy under 21 years of age and a girl under 18 years a 'child marriage' and punishable without affecting the validity of it.
c. **The Muslim Personal Law (Shariat) Application Act, 1937:** It reiterated the Muslim Stand that custom couldn't be an independent source of Muslim law all the time
d. **Dissolution of Muslim Marriage Act, 1939:** It provided rights to judicial divorce under the grounds mentioned in it to women who traditionally had no independent right to seek divorce.
e. **Muslim Women (protection of Rights on Divorce) Act, 1986:** The issues of maintenance after divorce, maintenance during idddat are dealt with comprehensively.
f. Punjab and Haryana's Muslim in Muslim Shrine's Act, 1942.

There are other Acts too which deal with Muslim personal Law. Some lay down the procedure rather than altering substantive rules of Muslim personal Law. Acts like the following replaced or restricted the application of those personal law principles with reference to the Act's objectives and aims:

a. The Caste Disabilities Removal Act, 1850 changed the laws of the pre-existing rights of converts;
b. The Indian Evidence Act, 1872 changes the traditional outlook on legitimacy via Section 112;
c. The Indian Majority Act, 1875 differed on its definition of majority; and
d. The Dowries Prohibition Act, 1961

Similarly, alternate legislation available to all religions have made its impact felt on the Muslim personal law. For example, a couple that marries under the Special Marriage Act, 1954 will be regulated by this Act for matters concerning the martial life and not by the personal laws of the party. The inheritance and intestate succession of the spouse or heirs will also be governed under the Indian Succession Act, 1925. It does not matter whether the persons getting married under this law are from the same religion or sect or not.

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3.3.3. Precedent

The Privy Council decided many a case related to Muslim law. These cases continue to have a binding force on all the High courts and the lower courts of India and a persuasive value in the Supreme Court of India. This box of precedents will lose its binding force only if the Supreme Court overrules a particular decision. Elsewhere, an opinion seems to be forming that judges are now making the law the way the early Muslim jurists did.

Judgements of a superior Court are an authority for the lower courts. Plus the judgements of the higher court become the law of the land and thus are binding on all the lower courts. This is called the principle of Precedents. Law of pre-emption, validity of gifts to minor wife, additional grounds of dissolution of marriage and even interest on unpaid dower are few of the fields where courts have stepped in with new interpretations or discretion on the basis of justice, equity and good conscience to develop the law further.

Many a times, legislations have overruled or negated the rules; they are still a source of law.

4. Schools of Muslim Law

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.

4.1. Sunni School

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

4.1.1. 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

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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.

4.1.2. 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.

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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.

4.1.3. 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.

4.1.4. 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.

4.2. Shia Schools

Among Shia sect, there are three important schools of law. They are Isna Ashari or Ja-afari, Ismaili and Zayadi. Shia sect is a minority in the Muslim world. They have political power

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only in Iran though they were not a majority in that state also. In India, they are microscopic minority.

4.2.1. Ibadi

Ibadi is a school which neither come under Sunni nor Shia sect. They claims history from the time of the 4th Khaleefa Ali. Their method is giving more importance to Qur-an and least consideration to Sunna. They are giving principal importance to Ijthihad or personal reasoning which are partially admitted by Sunni's and totally rejected by Shia. The followers of this school found mainly in Oman.

4.2.2. Ahmadiya

Ahmadiya is a recently originated religion claiming to be Muslim but not the true followers of Prophet Muhammed and thus they are not Mohammedan, but Ahmadiya as the follower one Ahmed who lived in the 19th century A.D.

This is the most recent sect of Muslims. The founder of this religion was a certain Mirza Ghulam Ahmad Khadiani who died in 1908. This religion is said to be a British Indian origin. The said Ghulam Ahmed was a servant of the British Government. Though they are claiming as Muslims, none of the Muslim governments are accepting them as Muslim because their faith is totally against Muhammedan belief.

The said Ghulam Ahmed is claming on the same time as a Prophet after Prophet Muhammed, the reincarnation of Jesus Christ and the predicted Mahadi of Muslim belief. The village Khadiyan of Punjab in India, the birth place of the said Ahmed is their holy place and thus they are also called as Khadiyani.

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