



Personal Law-I: Hindu and Muslim Law and Role of Legal System

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1. Introduction

We might be familiar with the term “personal law” in your day-to-day life, but may not know how to define it. Personal law may be defined as that branch of law which deals with matters pertaining to a person and his or her family. In other words, Personal Law is the law by which an individual is governed in respect of various matters such as, principles relating to marriage, divorce, maintenance, adoption, inheritance, guardianship, succession, etc. All these things are related to validity of a marriage, the effects of marriage on the proprietary and property rights of husband and wife, divorce or nullity of marriage, illegitimacy, legitimation and adoption and testamentary (where a “will” is made) and intestate (where a “will” is not made) and succession to property rights. India is a country with varied religions; thus the applicability of Personal Law here depends entirely on the basis of separate religious affiliations. Hindus, Muslims, Christians, Parsis, Jews are governed by their own Personal Laws, such as the Hindu law, Muslim Law, Christian Law, Parsi Law, and Jewish Law respectively. From the religion point of view, the Personal Law is defined as “that body of law which apply to a person or to a matter solely on the ground of his/her belonging to or its being associated with a particular religion”. In this lesson, you will understand only Hindu and Muslim law and in the next lesson Christian, Parsi and Jewish Law.

2. Objectives

- 1.To understand the meaning of personal law along with the sources of the Hindu and Muslim Laws;
- 2.To explain the concepts of marriage and divorce amongst Hindus & Muslims;
- 3.To illustrate the rules relating to succession and devolution of property amongst the Hindus; and
- 4.To understand the rules relating to inheritance and devolution of property amongst Muslims.

3. Sources of the Hindu and Muslim Law

3.1 Meaning of the Terms

Before discussing the various aspects of the Hindu and Muslim Law, it is very important to know the meaning of the terms “Hindu” and “Muslim”. A Hindu is (a) any person who is a Hindu, Jain, Sikh or Buddhist by religion (in short, they may be called ‘Hindus by religion’), (b) any person who is born of Hindu parents, either when both the parents are Hindus or only one of the parents is Hindu (in short, they may be called ‘Hindus by birth’), (c) any person who is not a Muslim, Christian, Parsi or Jew and who is not governed by any of the other law,. A Muslim is a person who practices Islam religion. As per judicial opinion, a person may be Muslim either by birth or through conversion. A Muslim is Muslim by birth when both the parents were Muslims at the time of his birth. A Muslim is Muslim by conversion when a person of different religion, on attaining the age of majority and acting with full consciousness, renounces his religion and converts into a Muslim.

With these conceptual clarities, you can understand the different facets of the Hindu and Muslim Law in a better way.

3.1.1 Sources of Hindu Law

The study of sources of Hindu Law is the study of various phases of its development which gave it new drives and vigour, that enabled it to conform to the changing needs of the society. Originally, it came to subserve the needs of the pastoral people and now it has come to subserve the needs of modern society. Therefore, it would be convenient to classify the various sources under the following heads:

1. Ancient Sources

Under this head, following four sources are important because Hindu Law is considered to be divine law which are revealed by the God Himself. These revelations are contained in (1) Vedas or Sruti and (2) Smritis. Vedas are the primary texts of Hindu religion. Smritis provide supplementary exposition of rules contained in the Vedas. Smritis were not always clear and they did not cover all situations. Thus, the need was felt for further analysis, systematization and assimilation of law. This need was satisfied by (3) Commentaries and Digest. Finally (4) Customs as ancient source of law, cannot be ignored which has been discussed at length in lesson 1 of the Module.

2. Modern Sources

Among the modern sources of Hindu Law are : (1) Equity, Justice and Good Conscience – It owes its origin to the beginning of British administration. In the absence of any specific law or in the event of conflict, the principle of equity, justice and good conscience would be applied. In other words, what would be most fair and equitable in the opinion of judges would be done in a particular case. Thus, a rule of English law founded on public policy that a murderer is to be disqualified from succeeding to the property of the victim found expression in the Hindu Succession Act, 1956. (2) Judicial Decisions – These are considered to be the most fertile and practical source of Hindu law. However, in application judges should introduce those laws derived from recognized and authoritative source i.e. Smritis and Commentaries as interpreted in the judgements of the courts. (3) Legislation – There are four major enactments on Hindu Law viz. The Hindu Marriage Act, 1955, The Hindu Succession Act, 1956, The Hindu Minority and Guardianship Act, 1956, The Hindu Adoption and Maintenance Act, 1956. These legislative enactments which declare, abrogate or modify the ancient rules of Hindu law, form an additional source of Hindu law.

3.1.2 Sources of Muslim Law

The following are the important sources of Muslim Law:

1. The Quran

Muslims consider the 'Quran' as the basis of their law. They believe that the 'Quran' is the one, that shows the truth as distinguished from falsehood, and the right from the wrong. It is the most fundamental and sacrosanct source of muslim law. It is the Holy book for the Muslims. It contains express revelations of the Prophet which came to him through angel Gabriel.

2. Sunna or Hadis

Prophet made some implied revelations, which contained some holy and pious ideas. Such implied or internal revelations are believed to be made on the inspiration of God. These revelations formed part of the Sunna. In other words, Sunna means traditions of the Prophet, whatever Prophet said or did, are treated as his traditions. These traditions are the second source of Muslim Law. Sunna is the precept of the Prophet i.e rule of law while Hadis (Hadith) is tradition of Prophet i.e. saying or occurrences.

3. Ijmaa

When 'Quran' and 'Sunna' could not supply any rule of law for a new problem then the persons having knowledge of Muslim Law used to agree unanimously and gave their common opinion over that point. Therefore, consensus of the founders of law or of the community as expressed by the most learned members is another important source of Islamic law.

4. Qiyas

It is collection of rules or principles deducible by the methods of analogy and interpretation from the first three sources.

5. Custom

In the absence of a rule of law the text of any of the four sources mentioned above the customary practices has been regarded as law. Custom is not an independent source of Muslim Law. However a customary law exists in Islam either because it has got the approval of the Prophet or, has been incorporated in Ijma.

6. Legislation

Although Muslim law in India is not codified, yet some aspects of it have been regulated by the legislations like the Shariat Act, 1937, the Dissolution of Muslim Marriage Act, 1939 and Muslim Women (Protection of Rights on Divorce) Act, 1986 etc.

7. Judicial Decisions

There is not much scope for the judicial decisions as source of Muslim Law but in absence of any clear text of Muslim Law, the court may interpret rule of law according to their own concept of justice. However, judicial decision played an important role in laying down Muslim law in accordance with the socio-economic condition of the Indian Muslims. The courts has given some important verdicts in this regard.

8. Justice, Equity and good conscience – Like in Hindu law, here also in the absence of any specific law or in the event of conflict, the principle of equity, justice and good conscience would be applied.

4. Role of Legal System

A Legal System is a set of legal principles and norms to protect and promote a secure living to its people in a society. In this way, it plays an important role by recognizing rights and prescribing duties for the people and also by providing the way to enforce these rights and duties.

To enforce these rights and duties, the Legal System considers the socio-economic and political conditions in the society and makes its own goal and then makes a set of rules or principles and laws which help the society to achieve its identified goals.

4.1 Judges

The Judges, who are the crusaders of Justice are independent of both Executive and Legislature in a Democratic set up. Therefore, they are the persons who administer justice without fear or favour. They adjudicate the matters before them after proper inquiry in accordance with just, fair and reasonable principles of law to provide justice.

4.2 Advocates

Advocates are the key functionaries assisting the judges in the administration of justice. They are the officers of the Court and are constituted into an independent profession under the Advocates Act, 1961. Without the expert assistance of the advocates or lawyer on either side of a dispute, judges will find it difficult to find the truth on disputed facts in issue and interpretation of law.

4.3 Civil Society

In democracy, 'we the people' i.e. citizens and their particular groups play pivotal role in good governance. They create 'Pressure Groups' for seeking attention of the legislature and the government, For example several movements led by Mahatma Gandhi during the freedom struggle. People's effective participation brings transparency, accountability and responsiveness in the government.

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