

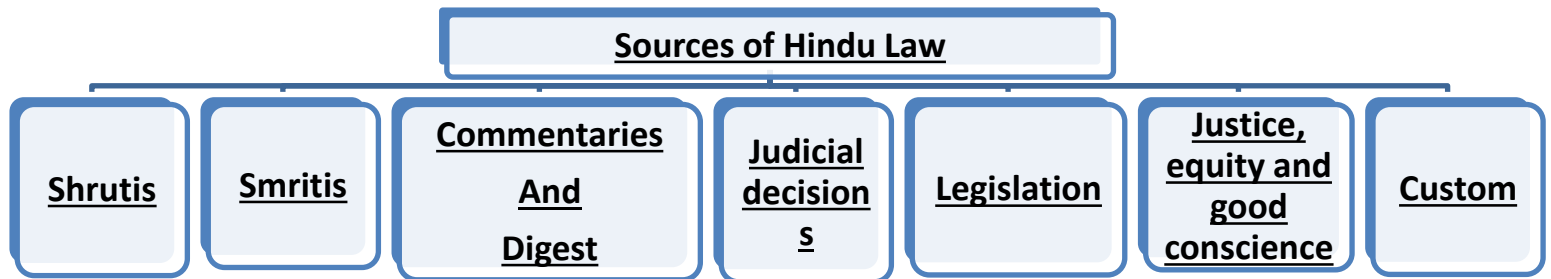
Sources and Schools of Hindu Law

- Hinduism is one of the oldest religions of the world; the Indian civilization is one of the oldest civilizations.
- Hindu law is said to be of divine origin. One theory suggests that it is derived from Vedas while western jurists believe that Hindu law is based on ancient custom and usages.
- According to our Dharmshastras Hindu law is sacrosanct, inviolable and immutable.
- According to Mayne Hindu law is the law of Smritis as expounded in the commentaries and dig which are modified and supplemented by customs.
- “Hindu law has the oldest pedigree of any known system of jurisprudence, and even now it shows no sign of decrepitude.”- Henry Mayne.
- Hinduism in the ancient period did not differentiate between religion, law and morality. They were all the same back then which was called ‘Dharma’ at that time
- ✓ Shruti (basically the Vedas)
- ✓ Smriti (which means the memorized word)
- ✓ Sadachara-which means the standards of morality and justice.

- **Modern Hindu Law**

The codified law and uncoded law are two types of Modern Hindu Law. Codified law administers every Hindu. The concepts of schools of Hindu Law does not exist in codified law, however, it exists in uncoded Hindu Law. Vedas and Smritis were the form of sources in which, many scholars all around India, wrote the commentaries which formed the basis for schools of Hindu Law.

Sources of Hindu law



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

1. Ancient sources	2. Modern sources
➤ Shrutis ➤ Smritis ➤ Commentaries and Digests ➤ Customs	➤ Judicial Decisions ➤ Legislative Enactments ➤ Rules of Equity, Justice and Good Conscience

1. Shrutis (Shruti means 'to hear')

- The term 'shruti' is derived from the word '**shru**' which means '**to hear**'. It is considered to be primary and paramount source of Hindu Law. It is believed that words of deity were revealed to sages. Shruti's are the sacred pure utterance that has been enshrined in the Vedas and the Upanishads. No written material was available at that time so the primary way to communicate the knowledge was

orally by sages to their families and disciples which supplemented it and carried it forward.

- Shrutis are made up of 4 Vedas.

1. Rigveda

2. Yajurveda

3. Samaveda

4. Atharveda

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

2. Smritis (which is remembered)

- Smriti refers to '**what is remembered**' The second source of Hindu Law which is a body of texts which can be attributed to an author, unlike Shrutis which are authorless because they were transmitted and supplemented solely through generations. There is a further classification of the term Smrities which are as follows

1) Dharma Sutra (Prose)

2) Dharmashastras (Poetry).

- There are many smritis but the well known Smritis are
 - ✓ **Manu Smriti**- oldest Smriti written by 'Manu' but was supplemented further by generations because writing was not invented and it was transmitted orally. Manu Smriti gave Brahmins an eminent position in society and there were not any right for women or shudras.
 - ✓ **Yajnavalikya Smriti**- written between the period of Buddha and Vikramaditya. It was more systematically arranged and was more concise than Manu Smriti and it also was more liberal than manu smriti, it recognized

some rights for women in regard to inherit and hold property and also gave a better status to Shudras than manusmriti.

- ✓ **Naradas Smriti**- This smriti was much progressive than Yajnavalkya and manu because this Smriti recognized widow's remarriage, a woman holding property etc also postulated that king made law is higher than what is provided in Smriti's. This Smriti also laid down rules regarding pleadings, evidence of witnesses which was not mentioned at all in the previous smritis.

3. Commentaries and Digests

- 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 as it contains law.
- But the problem is the Smritis have conflicting tests, for example, Manu smriti doesn't give rights to woman and Shudras at all but Yajnavalkya smriti and Narada Smriti do provide rights of varying degrees to both these communities. So 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
- Dayabhaga and Mitakshara are considered to be the two most important commentaries and digests.

4. Custom

- 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.
- 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.

- Custom to be law must be ancient, reasonable, certain, uniform, obligatory and observed continuously without interruption and should not be immoral or opposed to public policy or written rule of law or a statute unless and until it is expressly saved by the statute and should be construed strictly.

- **Essentials of 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. Bhagwant Buva 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.
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5. Judicial Decisions

- Judicial decisions are considered to be the most important ingredient of modern sources. Judicial decision is considered to be authoritative and binding.
- Under British regime the courts solved disputes by applying the Smriti law from the commentaries and digests and also adding their own interpretation and understanding of the law. The doctrine of precedent was established and it was applied in the cases resembling the same facts and circumstances of a case already decided. So judicial precedents also got the same standing as law with time along with the religious texts like shrutis and smritis.

6. Legislations

- Legislation is an important source of Hindu law. They have largely reformed, altered and supplemented the old Hindu law. They have also tried to bring uniformity throughout the country in application and practice of Hindu law.
- But the earlier legislations were made carefully so that they do not go against the established rules of Hindu Law. Most legislation in the starting period were reformatory or were made to fill in on things which were not covered under the prevailing law.
- ✓ **The Caste Disabilities Removal Act, 1850-** To protect rights over property of a person who has converted his religion or has been expelled from the caste or community
- ✓ **The Hindu Widows Remarriage Act, 1856-** To give Hindu Widows a right to remarry.

- ✓ **The Hindu Wills Act, 1870**- Hindus did not have any law which allowed them to make a will, this filled the gap.
- ✓ **The Special Marriage Act, 1872**- To allow inter-religious, inter-caste or intra caste marriages.
- **Modern Legislations**
- In **1944** a Hindu law Committee was made under the **Chairmanship of Sir Benegal Narsing Rau**.
- The purpose of the committee was to make a uniform code for Hindus and bring all Hindus under this code. A draft code was made in 1948. But Hindus said did not agree, they said this new code would be an attack to their 'sacred law' Jawaharlar Nehru decided to drop this idea; Ambedkar didn't like dropping this idea so he resigned in 1951 as protest. The Code was anyway later implemented in 4 parts.
- ✓ Hindu Marriage act, 1955
- ✓ Hindu Succession Act, 1956
- ✓ Hindu Minority and Guardianship Act, 1956
- ✓ Hindu Adoptions and Maintenance Act, 1956
- These acts modernized the law applicable to Hindus by retaining the fundamental framework and by reforming the framework to a certain degree where needed.

7. Rules of Equity, Justice and Good Conscience.

- Equity, justice and good conscience is regarded as an important source of law. In case of conflict between two sources or in case of conflict between rules of Smritis and Commentaries the conflict is resolved by application of principles of equity, justice and good conscience.
- No law can be exhaustive and Equity, Justice and Good conscience are required for and law to be reasonable interpreted or created.
- The concept of 'Dharma' includes 'Nyaya' (Justice) and 'Yukti' (Equity)
- In **Gurunath v Kamlabai 1951** 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.