

# Topics to be Covered



Topic

Sources and Introduction to Hindu Marriage Act, 1955

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- 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 Dharmshatras Hindu law is sacrosanct, inviolable and immutable.
- According to Maine,

“ Hindu law is the law of Smritis as expounded in the commentaries and digests which are modified and supplemented by customs.”

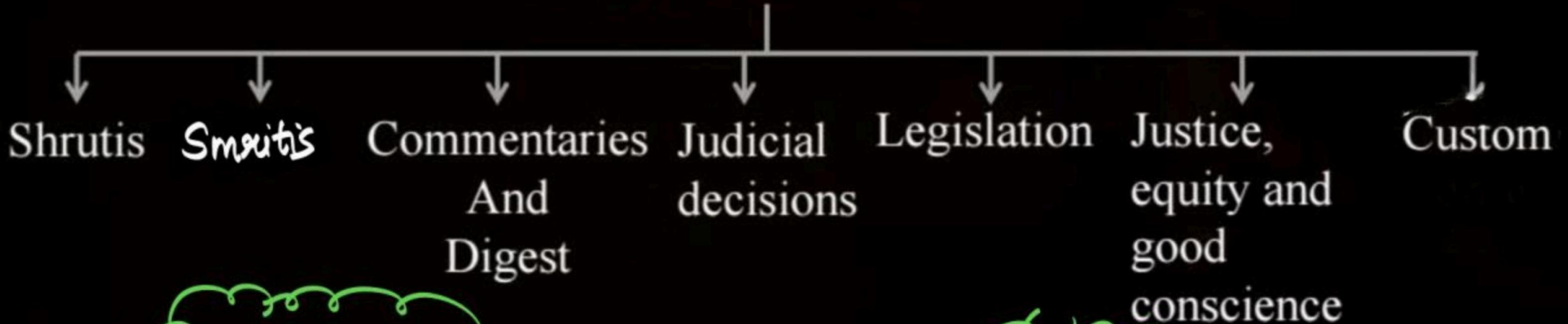




# Topic: Sources of Hindu Law



## Source of Hindu Law

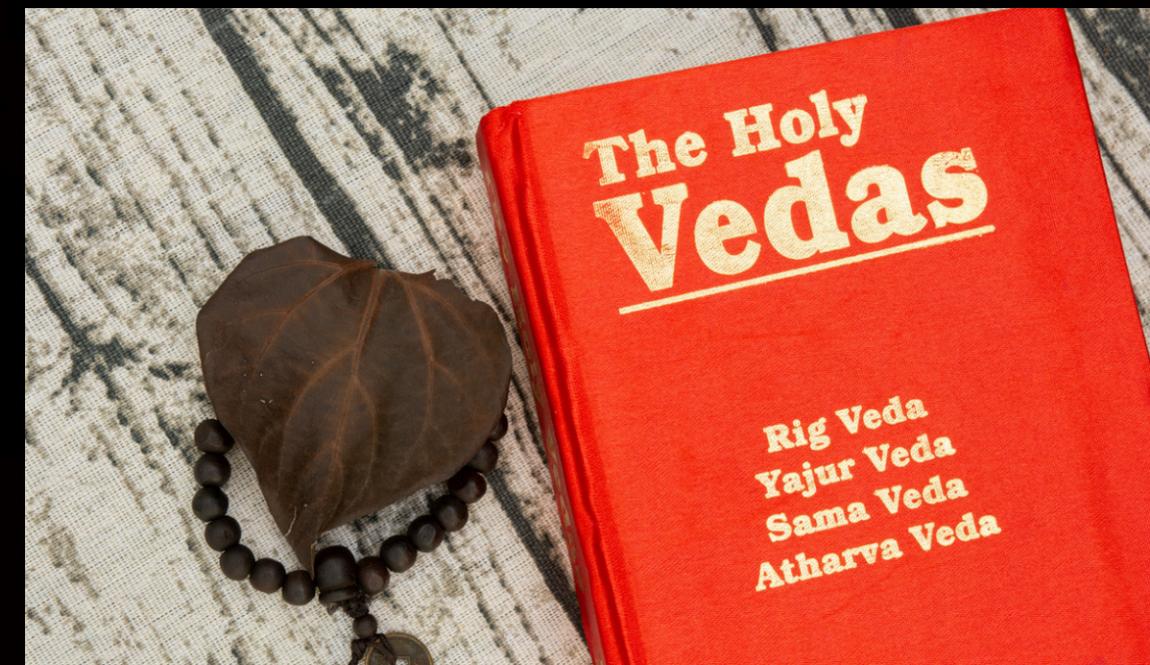
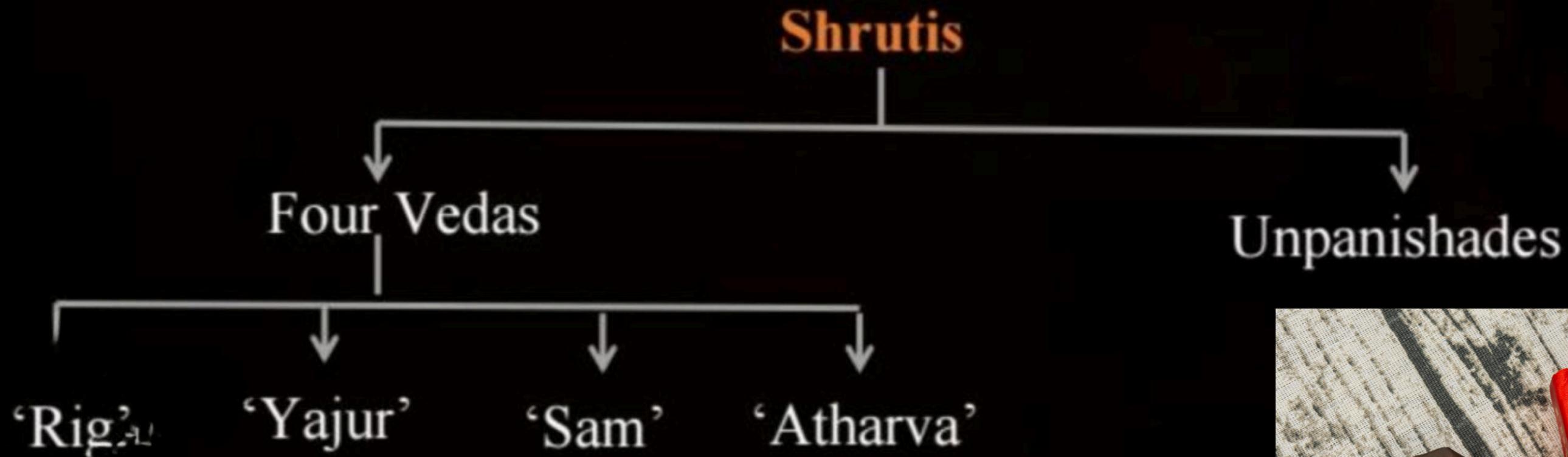


ANCIENT SOURCES  
PRIMARY

MODERN SOURCES  
SECONDARY SOURCES.

## (1) Shrutis

- The term 'Shruti' is derived from the word 'sbru' 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.



## (2) Smritis

- Smritis means ‘what was remembered’ . It is the recollections of Rishis containing principles of Hindu Law which were handed down to successive generations.
- Smritis are classified into Primary and Secondary Smritis.



- Primary Smritis are classified into Dharmasutras and Dharmashastras. Dharmasutras are prose in style and Dharmashastra are poetry in style.
- Principal authors of Dharmasutras are Gautama, Baudhyana, Apastamba.
- Principal authors of Dharmashastras are Manu, Yajnyavalkya, Narada Vishnu

### (δ) Commentaries and Digest

- Commentaries and Digest are records of customs contained in Smritis. They interpreted, explained and modified the customs contained in Smritis. While interpreting the laws contained in Smritis they also introduced changes to bring them in conformity with practices of current day.

➤ Principal Commentaries are :-

**Dayabhaga by Jimutavahana**

**Mitakshara (commentary on Yajnavalkya Smriti) by Vijnaneshwara**

**Vivada – Ratnakara by Chandeshwara**

**Dayatattwa by Raghunandana**

Mitakshara and Dayabhaga have very high acceptability as authoritative sources.

#### **(4) Judicial decisions**

➤ They constitute an important source of law. On every point of law there are large number of decisions which have interpreted various Commentaries, Smritis. Decisions of supreme court in large number of areas of Hindu law are binding as having authoritative force.

## (5) Legislation

- 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.
- Major legislations are :-
  - (i) Indian Succession Act, 1925
  - (ii) The Hindu Women's Right to Property Act, 1937
  - (iii) The special Marriage Act, 1954
  - (iv) The Hindu Marriage Act, 1955
  - (v) The Hindu Minority and Guardianship Act, 1956
  - (vi) The Hindu Succession Act, 1956
  - (vii)(vii) The Hindu Adoptions and Maintenance Act, 1956

## (6) 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.
- Supreme court in *Gurunath v. Kamlabai*, (1951) S.C.R held that in absence of any rule of Hindu Law, the courts have authority to decide cases on the principles of equity, justice and good conscience.

However, such decisions must not be inconsistent with any doctrine or theory of Hindu law.



## (7) Custom

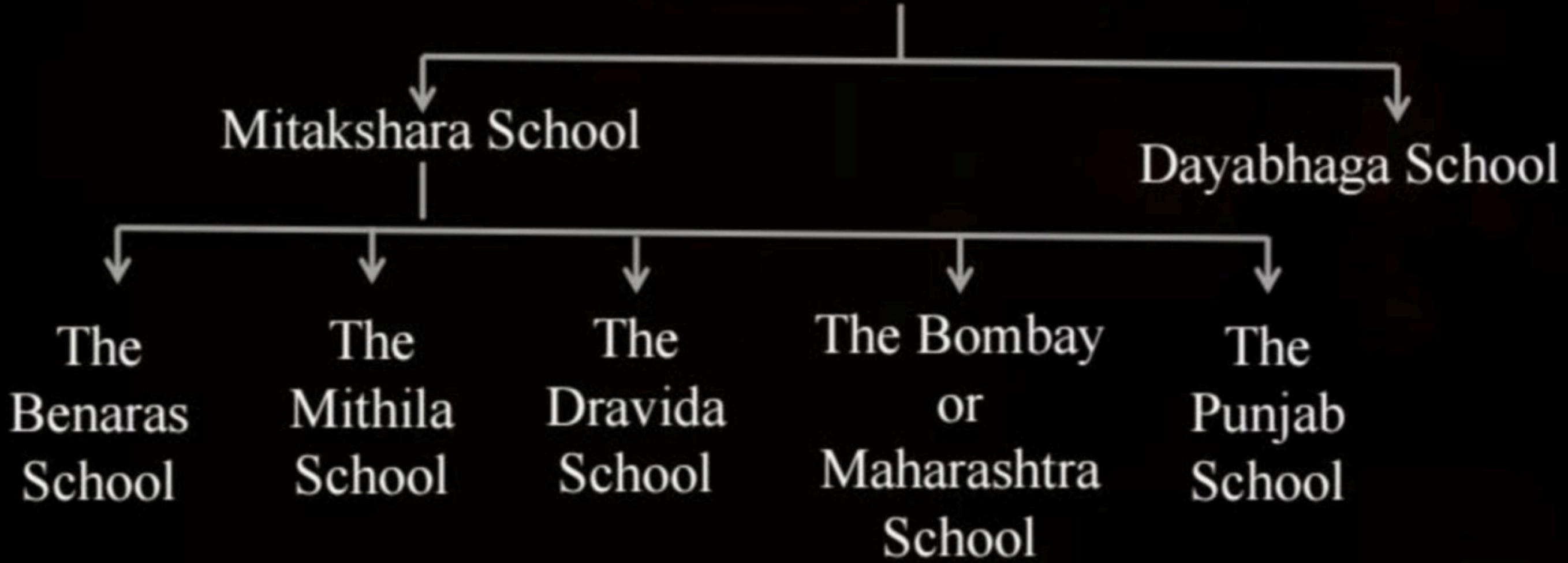
- Custom is a rule which, owing to prolonged usage has obtained the force of law. Section 3(a) of Hindu Marriage Act, 1955 defines ‘custom’ and ‘usage’. It provides that custom and usage signify any rule which having been continuously and uniformly observed for a long time, has obtained the force of law. The rule should not be unreasonable and should not be opposed to public policy.
- Essentials of custom : Following are the essentials of custom
  - (i) It must be ancient
  - (ii) It must be reasonable
  - (iii) It must be continuous
  - (iv) It must not be opposed to public policy.
  - (v) It must not be prohibited by express enactment.



# Topic: Schools of Hindu Law



## Schools of Hindu Law





- Mitakshara school of law is supreme authority throughout India except Bengal and Assam.
- Dayabhaga school of law is supreme authority throughout Bengal and Assam
- In respect of those questions which are not in conflict with Dayabhaga School, the Mitakshara school is regarded as supreme authority even in Bengal and Assam.
- Mitakshara is a commentary on the code of Yajnavalkya and was written by Vijnaneshwara
- Dayabhaga is digest of all Codes and was written by Jimutavabana.

## Salient feature of Mitakshara School

- ➔ **Son has an interest in ancestral property since his birth. He is coparcener in the property along with his father. After commencement of Hindu succession (Amendment) Act, 2005 daughter is also considered to be a coparcener and has right in coparcenary property from birth.**
- ➔ **Members of coparcenary cannot dispose of their share if the coparcenary is not divided.**
- ➔ **Principal of inheritance is consanguinity.**
- ➔ **Son can claim partition anytime**
- ➔ **(Father has restricted power of alienation of joint family property.)**



## Salient feature of Dayabhaga School

- (1) Son has no interest in property of father by reasons of birth
- (2) Farther has power of alienation over self acquired property as well as ancestral property.
- (3) Any member of joint family can alienate his share even without partition.



## Topic: The Hindu Marriage Act, 1955



- The Hindu Marriage Act, 1955 (HMA) received the assent of the President on 18<sup>th</sup> May, 1955 and became law on that day.

### Overriding effect of the Act

- The Act has an overriding effect and it abrogates all the rules of marriage previously applicable.

Section 4 provides that any text, rule or interpretation, custom or usage of Hindu Law in force immediately before the commencement of this Act shall **cease** to have effect with respect to any matter for which provision is made in this Act.

Any other law in force immediately before the commencement of this Act shall cease to have effect in so far as it is inconsistent with any of the provisions contained in this Act.



## Extra – territorial application of the Act

- The Act will apply to Hindu domiciled in India even if they reside outside India.

Section 1(2) provides for the extra – territorial application of the Act. It lays down that the Act extends to the whole of India except the state of Jammu and Kashmir and also applies to Hindus domiciled in the territories to which the Act extends who are outside the said territories.

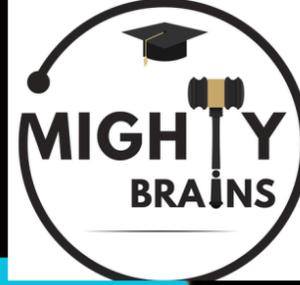
It is based on the principles of law that personal relations are governed by the law of domicile.



## Application of the Act

- **Section 2** provides for application of the Act. According to it the Act applies to the following persons : -
  - Persons who are Hindus by religion in any of its forms or development including Virashaiva, a Lingayat or a follower of the Brahmo, Prarthana or Arya Samaj.
  - Persons who are Buddhists, Jains or Sikhs by religion.
  - Any person who is domiciled in the territory to which the Act extends and is not a Muslim, Christian, Parsi or Jew by religion.

## Who is Hindu?



- The term 'Hindu' denotes all those persons who profess Hindu religion either by birth or by conversion. A person who carries a Hindu way of life and who is known by others to be a Hindu can be said to be Hindu.
- Supreme Court in Chandrashekhar v. Kulandaivela, 1963 SC, held that any person who is a Hindu, Buddhist, Jain or Sikh by religion is a Hindu if:-
  - (a) He practices, professes or follows any of these religions; and
  - (b) He remains a Hindu even if he does not practice, profess or follow the tenants of any of these religions.
    - Explanation to Section 2 lays down that following persons are Hindus, Bhuddhist, Jains or Sikhs by religion:-
      - (i) Child (legitimate or illegitimate), whose both parents are Hindus, Buddhists, Jains or Sikhs.
      - {ii) Child (legitimate or illegitimate), one of whose parents is a Hindu, Buddhist, Jains or Sikhs by religion and who is brought up as a member of family to which such parent belongs.
      - (iii) Any person who is a convert or re-convert to Hindu, Buddhist, Jain or Sikh religion.





## **Non-application of the Act to Scheduled Tribes**

Section 2(2) provides that the Act is not applicable to the members of Scheduled Tribe within the meaning of Article 366(25) unless the Central Government by notification in the official gazette so declares.



## MAINS QUESTIONS WITH ANSWERS

**Q. 1.** What are the different sources of Hindu Law? Discuss custom and legislation in detail. Or  
Discuss the Sources of Hindu Law.

**Ans.** **Sources of Hindu law**

It would be convenient to classify the various sources of Hindu Law under the following two heads:

**1. Ancient Sources:** Under this head fall the following sources:

(i) Srutis (ii) Smrities (iii) Purana (iv) Digests and Commentaries and (v) Custom.

**2. Modern Sources :** Under this head fall the following three sources :

(i) Legislation (ii) Judicial decisions (iii) Equity, Justice and Good conscience.

**1. The Srutis Or Veda-** Vedas are four in number: Rigveda, Yajurveda, Samaveda and Atharvaveda.

Hindu Law, according to Hindu belief, is divine revelation in the utterances of the creator. "Shruti" is the synonym used for "Veda" and which means "what was heard" from God. Since Vedas are said to contain the utterances of God, they are considered to be the fundamental or paramount source of law.

Manu says "वेदोभखिलो धर्ममूलम्"

The whole Veda is the first and paramount source of Hindu law.

The word 'whole veda' here includes not only the direct texts themselves are authoritative but also those rules which are deducible from them.

Vedas are in theory the paramount source of Hindu law.

## 2. Smritis-

Rules, as distinct from instances of conduct are, for the first time, embodied in the Smritis. Smriti means "what was remembered" and is believed to contain the precepts of God but not in the language they had been delivered. The language is of human origin, but the rules are divine. The authors are not deemed to be in the position of legislators, but they compile the traditions handed down to them by those to whom the divine commands has been communicated.

Smritis are the principal sources of law, but they also contain matters other than law,

The smritis of Manu and Yajnavalkya deal with religious rites, positive law, penance, true knowledge and liberation. There are some Smritis which deal with positive law alone, such as, Smritis of Narada, Brihaspati, and Katyayana some. Traditionally there are eighteen Smritis and eighteen Sub-Smritis.

### 3. Commentaries and Digests-

Traditionally there are eighteen smritis and eighteen sub-smritis. But all the laws are not mentioned in every smriti.

Sometimes there is some dispute on a particular topic between the provisions of one smriti and the provisions of other smriti.

Dharmashastra writers tried to reconcile these conflicting texts of smritis or laws contained in those smritis. These learned writers on Dharmashastra either commented on particular smritis or made digests of the entire body of smriti material. These writers modified and supplemented the rules in the Smritis, in part by means of their own reasoning and in part in the light of usages that has grown up.

These Commentators and Digest-writers purport to expound the law almost exclusively with reference to texts of the Smritis which are supposed to be only interpreted by them.

These commentators while professing to interpret the law as laid down in the Smritis introduced changes in order to bring into harmony with the usage followed by the people governed by that law.

- An instance of this fact is to be found in the discussion on the validity of marriage with a maternal sister.

The commentators and Digest writers of Southern India support the validity of the marriage of maternal sister.

In course of time several Commentaries and Digests were written on it, composed in different parts of India a number of these gained ascendancy in those parts of the country where the authors were accepted as of pre-eminent authority. In different parts of the country different works came to be referred to as the chief guides on law. The result was that two schools of Hindu law Mitakshara and Dayabhaga sprang into existence.

Commentaries and Digests have in effect superseded the Smritis in very large measure.

In *Atmaram v. Bajirao* the Privy Council emphatically laid down that in the case of a conflict between the ancient text writers and the commentators, the opinion of the latter must be accepted."

The principal commentaries are :

1. Mitakshara, by Vijnaneshwara. 2. Dayabhaga, by Jimutavahana.

✓ **4. Custom-** Custom is a rule which in a particular family or in a particular class of persons or in a particular locality, has from long usage, obtained the force of law. "Custom is a rule which in a particular family or in a particular district has from long usages obtained the force of law. It must be ancient, certain and reasonable and being in the derogation of general rules of law, must be construed strictly.

The obligatory character of customs is so much recognized by the ancient text-writers that every custom is supposed to be based on a lost text of the revelations.

The modern authorities are equally emphatic in their acceptance of the binding force of customs. For instance, the Privy Council have remarked: "Clear proof of usage will outweigh the written text of the law" [Ramanand's case, A.I.R. 1942 All.].

This is said that Smritis and digests were largely based upon customary laws. On matters not covered by the Smritis and commentaries, usage supplements the law laid down in them.



According to Section 3 (a) of the Hindu Marriage Act, 1955 the expression 'custom' and 'usage' signify any rule which having been continuously and uniformly observed for a long time, has obtained the force of law among Hindus in any local area, tribe, community, group or family," provided that the rule is certain and not unreasonable or opposed to public policy; provided further that in the case of a rule applicable only to a family it has, not been discontinued by the family.

In *Dr. Surjamani Stella Kujur v. D. C. Hansdah*, [2001 S.C.], the Supreme Court observed. For custom to have the colour of a rule or law, it is necessary that it must be ancient, certain and reasonable.

The custom to be applicable should have the following essentials:

(i) The custom must be ancient. (ii) It must be certain and uniform. (iii) It must be continuous. (iv) It should not be immoral or against the public policy. (v) It should not be unreasonable. (vi) It should not be opposed to statutory law.

**5. Legislation** - Enactments of the Legislature declaring, abrogating, amending or modifying rules of Hindu law are additional and modern source. No longer do we look to the Smritis and commentaries for the Hindus law but to the legislature. Most of the enactments are in the direction of reform of Hindu law and some of them supresede Hindu Law.

**6. Precedent or Judicial Decisions-** Precedent means previous judicial decision. Strictly speaking precedent is not the source of law in the sense in which the Legislature is. Because the function of a judge is not to make law but only to interpret it. In interpreting and applying the law to particular cases, the judges expressly or by necessary implication enunciate what the law is, and the view of the law expressed and acted upon by them serve as a guide in similar cases arising subsequently, and is taken to have a binding force.



The judicial decision is a source of law in the sense that it is binding on the subordinate courts. If the decision is by the Supreme court of India or by There is now large bulk of cases on Hindu law covering all its aspect that they have almost settled the law. In such matters recourse to the original source is no necessary.

The judicial decisions have amended and altered the Shastric Hindu law mainly on the matters relating to stridhan, adoption, coparcenar property, partition, alienation, debt, will, endowment and guardianship.

The decision of the Privy Council in Hanuman Prasad pandey V. Mst. Babooee has ruled over our Hindu law for about a century until it has been amended by the provisions of the Hindu Minority and Guardianship Act 1956.

## 7. Equity, justice and good conscience-

In India the origin of equity is traced to the Hindu period when jurists explained the old laws and gave new rules of interpretation and equitable solutions in cases of a conflict between the rules of various laws. In case of a conflict between the rule of S'mriti that one should be followed which is based on reason, justice and principles of equity.

In view of the above observations and its practical application it will not be incorrect to mention equity, justice and good conscience as the next source of Hindu Law.