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PERSONAL LAW – I: HINDU AND MUSLIM LAW



Notes

You 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.



OBJECTIVES

After completing this lesson you will be able to

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

- understand the rules relating to inheritance and devolution of property amongst Muslims.



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3.1 SOURCES OF THE HINDU AND MUSLIM LAW

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.



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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.



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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.



INTEXT QUESTIONS 3.1

1. What do you understand by the term 'Hindu'?
2. What do you mean by the term 'Muslim'?
3. Write down the names of sources of Muslim law.

3.2 LAWS RELATING TO MARRIAGE AND DIVORCE

It is said that marriages are made in heaven but the rules of marriage and divorce have been set by the society primarily and later in the course of time codified by the legislature. The codification of rules on marriage and divorce are nothing but cementation of basic customs and customary laws with the mixture of justice, equity and good conscience. Being two different sects of religion, naturally there is difference between customary and legislative procedures of marriage and divorce amongst the Hindu and Muslim.

3.2.1 Marriage and Divorce Under Hindu Law

Marriage

Hindus have always considered their marriage to be a sacrament, which has implication that it is permanent, indissoluble, eternal not only for this life but for lives to come and is also regarded as a holy union. The purpose of Hindu

marriage is not to beget children and get them legitimated but also to perform religious rituals. The essentials for valid Hindu marriage are as follows:

1. Neither party has a spouse living at the time of marriage;
2. At the time of marriage neither party- (a) is incapable of giving a valid consent due to unsoundness of mind, or (b) though capable of giving a valid consent has been suffering from mental disorder of such a kind as to be unfit for marriage and procreation of children, or (c) has been subjected to recurrent attacks of insanity or epilepsy;
3. So far as the age of marriage is concerned the bridegroom must have completed the age of twenty one years and the bride eighteen years; in other word neither of the party should be below the mariagable are, otherwise the marriage will be considered as 'child marriage', and thus being void.

Child Marriage: It is a form of marriage where bride and bridegroom has not attained the age of 18 years and 21 years respectively.

4. The parties are not within the degrees of prohibited relationships, unless the custom and/or usage permits such marriage;
5. The parties are not "Sapindas" of each others, unless the custom and /or usage permit such marriage.

Sapinda (Particle of same body): Two persons are said to be Sapindas of each other if one is a lineal ascendant of the other within the limits of Sapinda relationship or if both are Sapindas to the common ancestor. The Hindu Marriage Act, 1955 provides the extent of Sapinda relationship to five degrees in line of ascent through the father and three degrees in the line of ascent through the mother.

Prohibited Degree of Relationship: A person may be called in the degree of prohibited relationship –

1. If one is a lineal ascendant of the other; or
2. If one was the wife or husband of the lineal ascendant or descendant of the other; or
3. If one was the wife of the brother or the father's brother's wife, or
4. If the two are brother and sister, uncle and niece, aunt and nephew or children of a brother and sister or of two brothers or two sisters.

Divorce

With the advancement and progress in society it was discovered that if it is not possible to live together as husband and wife, then divorce may be an option for peaceful life amongst the Hindus also. Under the old Hindu law divorce was not recognized except as per the customs. Under the Hindu Marriage Act



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divorce is neither encouraged nor favored, it is permitted only on certain specific grounds which are as follows:

1. **Adultery** – Sexual intercourse between a married person and someone other than his spouse after solemnization of marriage.
2. **Cruelty** – Conduct of such a character as to have caused danger to life, limb or health, bodily or mental pain as to give rise to a reasonable apprehension of such danger.
3. **Desertion** – Permanent abandonment of one spouse by the other without any reasonable cause and without the consent of the other or against the wish of such party. Desertion is a total repudiation of all obligations of marriage.
4. **Conversion** – if one of the spouses seizes to be Hindu by conversion to another religion, divorce may be obtained.
5. **Insanity** – Where one of the spouses has been suffering from incurable unsoundness of mind or suffering from mental disorder of such a kind and to such an extent that the other spouse cannot reasonably be expected to live, divorce may be obtained.
6. **Leprosy** – Where one of the spouses has been suffering from virulent and incurable form of leprosy, divorce may be obtained.
7. **Venereal Disease** – where one of the spouses has been suffering from venereal disease in a communicable form divorce may be obtained.
8. **Renunciation** – where one of the spouses has renounced the world by entering into any religious order, divorce may be obtained.
9. **Presumption of Death** – Where a person who is not heard alive by his relations and near ones for a period of seven years or more is deemed to be legally dead. In such a case the other spouse can obtain a decree for dissolution of marriage.
10. **Divorce by mutual consent** – The Hindu Marriage Act provides for divorce by mutual consent. It has following essentials: (a) a joint petition for divorce by both the spouses is presented to the court, (b) the petition should state that they have been living separately for a period of one year and have not been able to live together, and that they have mutually agreed to live separately.
11. **Irretrievable Breakdown of Marriage** – When either party to a marriage presents a petition for divorce on following grounds: (a) there has been no resumption of co-habitation for a period of one year or more after passing of a decree for judicial separation, (b) that there has been no restitution of conjugal rights for a period of one year or more after the passing of a decree of restitution.

3.2.2 Marriage and Divorce under the Muslim Law

Marriage

In Muslim Law marriage is defined to be a civil contract unlike Hindu Marriage where it is regarded as sacrosanct. The object of Muslim marriage is procreation and legitimization of children. Following are the essentials of a valid marriage:

1. Every Muslim of a sound mind, who has attained the age of puberty i.e. age of 15 years, may enter into a contract of marriage.
2. There should be a proposal made by or on behalf of one of the parties and acceptance of that proposal by or on behalf of the other party.
3. Proposal and acceptance of marriage must be in presence and hearing of two male witnesses who must be Muslims and are of sound mind and major. In Shia law witnesses are not required.
4. The words used in proposal and acceptance must be clear and unequivocal which can convey the intention of marriage.
5. Neither writing nor any religious ceremony is required.
6. Proposal and acceptance must be reciprocal to each other i.e. to say, the acceptance must be exactly for the proposal and nothing else.
7. There must be consideration in terms of dower.

Divorce

Firm union of husband and wife is a necessary condition for a happy family life. Islam therefore, insists on subsistence of marriage. But under unfortunate circumstances the dissolution of marriage takes place and matrimonial contract is broken. Divorce may be given either by the act of husband or wife. A husband may divorce his wife by repudiating the marriage without giving any reason. Pronouncement of such words which signify the intention to divorce his wife is sufficient. Initially a wife could not divorce her husband of her own accord. She can divorce her husband only where husband has delegated such rights to her or under an agreement. But after enactment of the Dissolution of Muslim Marriage Act, 1939, Muslim wives also got right to dissolve their marriage by an order of the court



INTEXT QUESTIONS 3.2

1. What are the essentials of a valid Hindu Marriage?
2. Whether a Muslim woman has right to divorce her husband?
3. What do you understand by Child marriage?



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3.3 HINDU AND MUSLIM LAW ON SUCCESSION

3.3.1 Hindu Law of Succession

Succession is a method of the transfer of property from one person to other after the death of the former. After independence we have uniform secular laws of succession for all Hindus. The old Hindu Law and customary law of succession stand abrogated. The preferential treatment of male over females has been considerably removed with the codification of the Hindu Succession Act, 1956. The law of succession can be classified under two heads:

1. **Testamentary Succession** – The property (separate, divided, undivided) devolves according to the “will” of a person who has the ownership over the property or interest in the same. It deals with the rules relating to the devolution of the property on relations as well as others.
2. **Intestate Succession** – it is based on the rules which determine the mode of devolution of the property of the deceased on heirs solely on the basis of their relationship with the deceased, when the person dies without making his will or testament.

3.3.2 Muslim Law of Succession

The property of a deceased person may devolve either by testamentary or intestate succession. Testamentary succession takes place according to the will and testament of the deceased.

Intestate succession is called inheritance under which the legal heirs of the deceased succeed to his property. The Islamic law of inheritance (non-testamentary succession), like the rest of the Islamic Personal law is a combination of the pre-Islamic customs and the rules introduced by the Prophet. The greater part of the Islamic law of the inheritance is founded upon the Quran. After deduction of funeral expenses, expenses of obtaining Probate/Letters of Administration from the court, wages for personal service to the deceased within three months of his death, debts, and legacies, the remaining property (both movable and immovable) becomes worthy to be inherited.

3.3.3 Comparative Analysis of Muslim and Hindu Law of Inheritance

1. In Muslim Law, all property is one and there is no distinction between ancestral or self acquired or separate property, whereas in Hindu law there is separate and self acquired property.
2. There are no such things as joint family property in a Muslim family whereas, amongst Hindus the concept of joint family property is prevalent.



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3. The right of an heir, for the first time, comes into existence on the death of the ancestor. Right by birth is unknown in Muslim law but in Hindu law right in property is vested by birth.
4. Muslim law does not recognize the doctrine of representation. The estate of the deceased person devolves upon his heirs at the moment of his death. The estate vests immediately in each heir in proportion to the share provided by the Muslim law. As the interest of each heir is separate and distinct, one of a number of heirs cannot be treated as representing the others. Thus, if P's son R dies in the lifetime of P the son of R i.e. grandson of P cannot claim his father's share as representing him but in Hindu law the doctrine of representation is recognized.
5. Muslim law does not recognize any interest expectant on the death of another i.e. *spes successionis* (mere chance of succession) while in Hindu law the doctrine of *spes successionis* is well recognized.



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INTEXT QUESTIONS 3.3

1. What are the kinds of succession in Hindu law?
2. What is the difference between succession and inheritance?
3. What do you mean by doctrine of representation? Whether it is applicable in Muslim law?



WHAT YOU HAVE LEARNT

- After the completion of the lesson you may have learnt the basics about the Personal Law of the Hindus & Muslims and their meanings.
- The present lesson also deals with various sources of the Hindu and Muslim law and its development up to modern times. It also makes one understand about the importance of personal laws in day to day affairs of life.
- Marriage and divorce are two important issues in the life of almost every person having faith in different religions. The importance of marriage is obvious as it validates the procreation of children and their legitimization. Whereas divorce talks about the mechanism regarding the repudiation of marriage and conjugal rights, when matrimonial life is not smooth. By this lesson you may develop these concepts in Hindu and Muslim law respectively.
- Succession is a set of principles by which property devolves according to the will and testament of the deceased or as per the rules of the personal laws by which he is governed at the time of death as intestate i.e. without making will or testament.



TERMINAL QUESTIONS



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1. Explain the significance of Personal Laws in our day to day life.
2. Write a comprehensive note on the various sources of Hindu Law.
3. What are the important sources of Muslim Law?
4. What do you mean by Sapinda relationship? Also explain the prohibited degrees of relationship.
5. Discuss the essentials of a valid marriage under Muslim Law.
6. What are the grounds for divorce under the Hindu law?
7. Write a short note on the Hindu Law of Succession.
8. Explain the distinction between the principles of inheritance under Hindu and Muslim law.
9. What are the differences on rules of inheritance between the Hindu & Muslim Law?
10. Match the following according to their correct option:

A	B
(a) Sapinda	(i) Hindu Law
(b) Doctrine of representation	(ii) consensus of the founders of law
(c) Testamentay Succession	(iii) ground of divorce
(d) Desertion	(iv) devolution of property by will
(e) Ijmaa	(v) Particle of same body

Project

Survey your ten neighborhood families and try to gather the information about the applicability of the personal law in their daily life.

Serial No.	Various aspects of personal law	Remarks
1.	Marriage	
2.	Divorce	
3.	Succession	
4.	Inheritance	
5.	Customs	



ANSWER TO INTEXT QUESTIONS

3.1

1. According to Hindu Law, the definition of a 'Hindu' is as under:
 - a. Any person who is Hindu, Jain, Sikh or Buddhist by religion, i.e. Hindu by Religion
 - b. Any person who is born of Hindu Parents (viz. when both the parents or one of the parents is Hindu, Jain, Sikh or Buddhist by religion) i.e. Hindus by birth, and
 - c. Any person who is not a Muslim, Christian, Parsi or Jew and who is not governed by any of other law.
2. A Muslim is person whose religion is Islam. As per judicial opinion, a person may be Muslim either by birth or through conversion.
 - a. Muslim by birth- a person whose both the parents were Muslim at the time of his birth is regarded as Muslim by birth.
 - b. Muslim through conversion- any person of any religion, who is of sound mind and has attained the age of majority, can become follower of Islam after renouncing his original religion.
3. Following are the sources of Muslim law, namely – Quran, Sunna, Ijmaa, Qiyas, Custom, Legislation, Judicial decision and Justice, Equity and good conscience.

3.2

1. The essentials for valid Hindu marriage are as follows:
 1. Neither party has a spouse living at the time of marriage;
 2. At the time of marriage neither party- (a) is incapable of giving a valid consent due to unsoundness of mind, or (b) though capable of giving a valid consent has been suffering from mental disorder of such a kind as to be unfit for marriage and procreation of children, or (c) has been subjected to recurrent attacks of insanity or epilepsy;
 3. The bridegroom has completed the age of twenty one years and bride is aged eighteen years;
 4. The parties are not within the degrees of prohibited relationships, unless the custom and/or usage permits such marriage;
 5. The parties are not Sapindas of each others, unless the custom and / or usage permit such marriage.



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2. Initially Muslim wife cannot divorce her husband of her own accord. She can divorce her husband only where husband has delegated such rights to her or under an agreement. But after enactment of the Dissolution of Muslim Marriage Act, 1939 Muslim wives also got right to dissolve their marriage by an order of the court.
3. Child Marriage is a form of marriage where bride and bridegroom has not attained the age of 18 years and 21 years respectively.

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1. The Hindu Law of succession can be classified under two heads:
 - a. Testamentary Succession – The property (separate, divided, undivided) devolves according to the will of a person who has the ownership over the property or interest in the same. It deals with the rules related to the devolution of the property on relations as well as others.
 - b. Intestate Succession – it is based on the rules which determine the mode of devolution of the property of the deceased on heirs solely on the basis of their relationship with the deceased, when the person dies without making his will or testament.
2. Testamentary Succession takes place according to the will and testament of the deceased whereas intestate succession is called inheritance under which the legal heirs of the deceased succeed to his property.
3. Muslim Law does not recognize the doctrine of representation. The estate of the deceased person devolves upon his heirs at the moment of his death. The estate vests immediately in each heir in proportion to the share provided by the Muslim Law. As the interest of each heir is separate and distinct, one of a number of heirs cannot be treated as representing the others. Thus, if P's son R dies in the lifetime of P, the son of R i.e. grandson of P cannot claim his father's share as representing him but in Hindu law the doctrine of representation is recognized.