Toppersnotes
Unleash the topper in you

UGC-NET

LAW

NATIONAL TESTING AGENCY (NTA)

PAPER – 2 || VOLUME – 3

FAMILY LAW ENVIRONEMT, HUMAN RIGHTS LAW INTELLECTUAL PROPERTY RIGHTS, INFORMATION TECHNOLOGY LAW COMPARATIVE PUBLIC LAW

SIERRA INNOVATIONS

UGC NET - LAW

1
CHAPTER

Sources and schools

Sources of Hindu law

Following are the sources of Hindu law

Ancient Sources

1. **Shruti/Srutis**

   It literally means that which has been heard. The word is derived from the root "shru" which means 'to hear'. 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,

   1. **Rigveda** (containing hymns in Sanskrit to be recited by the chief priest)
   2. **Yajurvaveda** (containing formulas to be recited by the officiating priest)
   3. **Samaveda** (containing verses to be chanted by seers)
   4. **Atharvaveda** (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).

   Manu has defined Shruti as "By Sruti or what was heard from above is meant the Veda". Veda is believed to contain the very words of Deity (God). It is the primary and paramount source of Hindu Law that Vedas are the ultimate and traditional sources of Hindu Law. It is the oldest and the primary source.

   Mayne pointed out that Shruti in theory is primary and paramount source of Hindu law and is believed to be the language of divine revelation. They are supposed to contain the direct words of revelation and are thus held to be infallible. But now they have little practical value.

2. **Smritis -**

   The word "Smriti" literally means "what is remembered" and is believed to be based on the last text on the Vedas, although not in the exact language of the revelation. Their authors do not claim to be divinely inspired but being perfectly familiar with the Vedas, they profess to compile from memory the divine rules handed down by tradition.

   It is of human origin and is believed to be the recollections handed down to us by rishis and sages of antiquity constituting the principal sources of Hindu Law. Smritis are Dharamsutras and DharmBoth Sruti and Smriti refer to the utterances and precepts of the Almighty which have been heard and remembered respectively and handed down by the Rishis from generation to generation.

   The Smritis are of two kinds,

   (a) **In Prose Style-** Those in prose called "Dharamsutras" and are inferior to those in verse. The principal authors thereof are Gautama, Vasishtha and others.

   (b) **In Poetry Style-** Those in verse are called the " Dharamashtra". The most eminent authors are Manu, Yajnavalkya, Narada, Vishnu and Vrihaspati etc.Vyasa observed that: "When there is a conflict between the Vedas and theSmritis, the Vedas should prevail."

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

(a) Achar (relating to morality)

(b) Vyavahar (signifying procedural and substantive rules which the King or the State applied for settling disputes in the adjudication of justice)

(c) Prayaschit (signifying the penal provision for commission of a wrong)

3. Digests and Commentaries -

After Shruti 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.

All the Smritis did not agree with one another in all respects, and this conflict led to several interpretations put upon them. This, in turn, gave rise to commentaries called Nibandhas.

Nibandhas are thus nothing but the interpretations put on the Smritis by various commentators. However, it is interesting to note that what these commentators did was not merely interpreting the Smritis, but they also recited the customs and usages which the commentators found prevailing around them.

In other words, while professing to interpret the law as laid down in smriti, these commentators introduced modifications in order to bring it in harmony with the current usages.

The authority of the several commentators varied in different parts of India giving rise to what are known as different Schools of Hindu Law.

4. Custom -

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.

Characteristics which need to be fulfilled for declaring custom to be a valid –

(a) The custom must be **ancient**. The particular usage must have been practiced for a long time and accepted by common consent as a governing rule of a particular society.

(b) The custom must be **certain and should be free from any sort of ambiguity**. It must also be free from technicalities.

(c) The custom must be **reasonable and not against any existing law**. It must not be immoral or against any public policy.

(d) The custom must have been **continuously and uniformly followed** for a long time.

Indian Courts recognize three types of customs viz -

(a) **Local custom** – These are customs recognised by Courts to have been prevalent in a particular region or locality.

(b) **Class custom** – These are customs which are acted upon by a particular class. E.g. 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.

(c) **Family custom** – these are customs which are binding upon the members of a family. E.g. There is a custom in families of ancient India that the eldest male member of the family shall inherit the estates.

5. **Puranas -** The Puranas are also a source of Hindu law. They are codes which illustrate the law by instances of its application. As observed by the Court in the Ganga Salai's case, the position of Puranas is as follows -

"Somewhere in order of prudence, either between the Srutis and the Smritis, or more probably after them, comes the Puranas, which the celebrated author Colebrooke states are reckoned as a supplement to the Scripture and as such constitute a fifth Veda."

It has been remarked by authors that Puranas are not authoritative on law. They are occasionally treated as authoritative.

Modern Sources

1. **Equity, Justice and Good Conscience -**

Justice, equity and good conscience is also regarded as a source of Hindu Law. In the absence of any specific law in Smriti, or in the event of a conflict between the Smritis, the principles of equality, justice and good conscience would be applied.

In other words, what would be most fair and equitable in the opinion of the judge would be done in a particular case.

It has been held by the Supreme Court, that in the absence of any clear Shastric text, the courts have authority to decide cases on principles of justice, equity and good conscience

2. **Precedent -**

About judicial decisions being a source of law there are two views. One view is that judges are makers of law while the other view is that judges do not make the law but they declare the law. First view is known as Judge-made-Law-Theory, second is known as Declaratory Theory.

Strictly speaking, it cannot be said that judicial decisions are a source of law. This is so because judge is supposed to interpret and explain the existing law, and not to create new law.

Nevertheless, since all the important aspects of Hindu Law have now found their way into Law Reports, these may be considered as a source of Hindu Law. Such decisions have played an important part in ascertaining and sometimes in developing and crystallizing Hindu Law.

The judicial decisions are regarded as precedents for future cases. The courts of Law are bound to follow the precedents.

3. **Judicial Decisions -**

Judicial decisions on Hindu law were sometimes taken as a source of law. In the Law Reports all important points of Hindu law are to be found. Sometimes the decisions of Hindu law have superseded the commentaries.

4. **Legislation -**

Legislation is also a source of Hindu Law. Several enactments had come into force with the advent of British Rule in India and kept coming with greater gusto after the British departure. These legislative enactments, which declare, abrogate or modify the ancient rules of Hindu Law, also form an additional modern source of Hindu Law. The Hindu Law Committee, appointed in 1941 recommended that this branch of Law should be codified in gradual stages and most

important enactments were those which came in force in 1955 and 1956, Indian Parliament passed four major enactments which made vital and dynamic changes in the law of marriage, succession, adoption, guardianship and maintenance.

The ancient Hindu Law stands substantially changed by passing of the following important enactments during British regime and by Indian Parliament.

- In 1856, Hindu Widows' Remarriage Act legalised the marriage of HinduWidows.
- In 1860, Indian Penal Code prohibited polygamy.
- In 1866, Native Converts Marriage Dissolution Act facilitated divorce for Hindus accepting Christian faith.
- In 1872, Special Marriage Act was passed but it excluded Hindus.
- In 1869, the Indian Divorce Act was passed but this too remained inapplicable to Hindus.
- In 1894, a penal Law enforced in the State of Mysore, punishment for men marrying girls below the age of eight years and for males above the age of fifty marrying girls below fourteen years.
- In 1909, the Anand Marriage Act legalised the marriage ceremony common among the Sikhs called Anand.
- In 1923, by an amendment of Special Marriage Act, inter-religious civil marriages between Hindus, Buddhists, Sikhs and Jains were legalized.
- In 1929, Child Marriage Restraint Act was passed.
- In 1937, Arya Marriage Validation Act recognised the legality of inter-caste marriages and marriages with converts to Hinduism among the followers of Arya Samaj.
- In 1946, Hindu Marriage Disabilities Removal Act legalized inter-marriage between the sub-divisions of same caste and those within one's gotra and pravara.
- In 1946, Hindu Married Women's Right to Separate Residence and Maintenance Act was passed**.**

Schools of Hindu law

Introduction

Schools of Hindu Law came into being when different commentaries appeared to interpret 'Smritis' with reference to different local customs in vogue in different parts of India.

Properly speaking there are two schools of Hindu Law, namely, Mitakshara School and the Dayabhaga School.

1. **Mitakshara**

   It is the supreme authority throughout India except in Bengal. It is the running commentary on the code of **Yajnavalkya** and was written by **Vijneshwara** in the latter part of the eleventh century. The Mitakshara School is thus divided into five sub-schools. They materially differ on the law of adoption and inheritance. All these schools acknowledge the supreme authority of the Mitakshara, but give preference to certain treaties and to commentaries which contains certain passages of the Mitakshara.

   The five sub-schools are namely -

   - Benaras School
   - Mithila School
   - Dravida School
   - Bombay or Maharashtra School
   - Punjab School

   Mayne writes that the variances between the sub-division of the Mitakshara Schools are comparatively few and slight. Except in respect of the Maharashtra School, this division serves no useful purpose; nor does it rest upon any true or scientific basis.

Reason of Difference between Various Schools of Mitakshara

(i) The glosses and commentaries upon the Mitakshara are received by some of the schools but are not received by all.

(ii) Commentaries in a particular province which follows the Mitakshara put a particular gloss on it and agree to collect it collectively.

2. Dayabhaga

This school prevails in West Bengal as well as is Assam with some variances based on the authority of customs. It was written by Jimutvahana. According to Dr. Jolly it is one of the most striking compositions in the whole department of Indian jurisprudence. According to Mayne, 'Dayabhaga' was written in the 13th century. The Dayabhaga has permitted the women to let in the coparcenary. The Dayabhaga is more dynamic and is definitely an improvement upon Mitakshara.

The following authorities are accepted in this school

- Dayabhaga
- Dayatatva
- Daya-Sangraha
- Viramitrodaya
- Dattaka-Chandrika

Difference between Mitakshara and Dayabhaga School

	Mitakshara	**Dayabhaga**
1. As regards Joint property	**1.** Right to property arises by birth (of the claimant); hence the son is a co-owner with the father in ancestral property. Father has a restricted power of alienation, and son can claim partition even against father. The interest of a member of the joint family would, on his death, pass to the other members by survivorship.	**1.** Right to property by death (of the last owner); hence son has no right to ancestral property during father's lifetime. Father has absolute power of alienation, and son cannot claim partition or even maintenance. The interest of every person would, on his death, pass by inheritance to his heirs, like widow or daughters.
2. As regards Alienation	**2.** Members of joint family cannot dispose of their shares while undivided.	**2.** Any members of joint family may sell or give away his share even when undivided.
3. As regards Inheritance	**3.** The principle of inheritance is consanguinity (i.e., blood-relationship). Cognates are postponed to agnates.	**3.** The principle of inheritance is spiritual efficacy (i.e., offering of pindas). Some cognates, like sister's sons are preferred to many agnates.
4. As regards Doctrine of Factum Valet	**4.** "A fact cannot be altered by hundred texts". It is recognized to a very limited extent.	**4.** Doctrine of factum valet is fully recognized.

The other basis of difference between Mitakshara and Dayabhaga arose out of their difference in the meaning of the word" Sapinda".

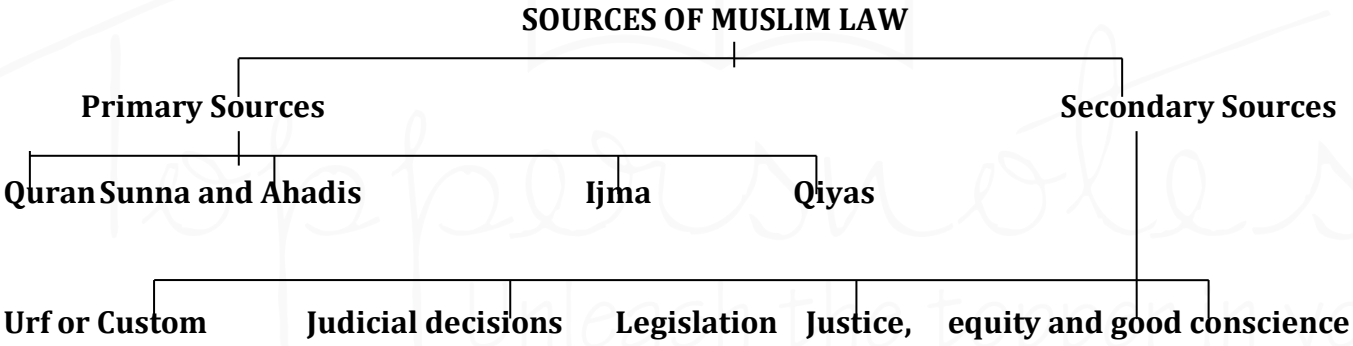
According to Dayabhaga - 'Sapinda' means of the same 'pinda' and pinda means a ball of rice which is offered by a Hindu as obsequies to their deceased ancestors. The term 'Sapinda' thus connotes those related by the duty of one to offer 'pinda' to other.

According to Mitakshara - Vijaneshwara defined 'Sapinda' relationship as the relationship arising between two persons through their being connected by particles of one body.

Migration and the Schools of Law

On migration the family continues to be governed by the law of locality of origin and the burden is heavy on the party alleging otherwise.

"Where a Hindu family migrates from one part of India to another, prima facie they carry with them their personal law, and if they alleged to become subject to a new local custom, this new custom must be affirmatively proved to have been adopted but when such a family emigrates to another country and being themselves Mohammedans, settle among Mohammedans, the presumption that they have accepted the law of the people whom they have joined seems to their Lordships to be one that should be much more readily made. The analogy is that of a domicile on settling in a new country rather than the analogy of a change of custom on migration within India."



Primary Sources

1. **The Quran** - Quran is the primary source of Muslim law, in point of time as well as in importance, Quran is the first source of Muslim Law. It contains the very words of God and it is the foundation upon which the very structure of Islam rests. Quran regulates individual, social, secular and spiritual life of the Muslims.

   The contents of Quran may be classified under the four heads -

   (a) Metaphysical and abstract
   (b) Theological
   (c) Ethical and mystical
   (d) Rituals and legal

   The Quran has influenced the creation of Islamic legal system in following ways -

   (i) The prophet faced legal problems and so did his companions and the Quran provided guidance. It gave such texts which possesses definite legal element.
   (ii) Non-legal texts in the Quran moral exhortations and Divine promises have been construed by reasoning to afford legal rules. The texts proclaiming that God will not punish anyone save for one's own sins have been applied to debts which a person leaves unpaid at his death with for reaching results in the law of administration of assests.
   (iii) By pointing out that the previous revelations have been corrupted, the Quran declared the legal material with the people of the book unreliable and called people to abandon the customs of their ancestors which are outside the sphere of the Book and Sunnah.

2. Ahadis and Sunnat

Just as Quran is the express revelation through Mohammed, the Ahadis and Sunnat are implied revelations in the precepts and sayings and actions of the Prophet, not written down in his lifetime, but preserved by traditions and handed down by authorized agents. Sunnat means that 'what the Prophet did', while Ahadis means 'what he said'.

Classification of Sunnat

1. **Sunnat-ul-qual**- All words, counsel and precepts of the prophet.
2. **Sunnat-ul-fail**- His actions, words and daily practice.
3. **Sunna-ul-Taqrir-** His silence implying a tacit approval of what was done in his presence.

From the point of view of their importance and authority, Ahadis may be classified as under-

(i) Ahadis – i -mutwatra - are those traditions which are of public and universal notoriety and are held absolutely authentic. These traditions are accepted as genuine and authentic by all the sects of Muslims. Abdur Rahim aptly remarks that traditions of this class, like verse of the Quran, ensure absolute authenticity and demand implicit belief.

(ii) Ahadis – i - mushhura - is those traditions which though known to the majority, do not possess the character of universal notoriety.

(iii) Ahadis – i - Wahid - is those traditions which depend on isolated individuals. Most of the Muslim jurists do not accept these traditions as a source of law.

3. Ijmaa

It means the consensus of the companions and followers of the Prophet. Abdur Rahim defines it as "the agreement of the jurists among the followers of Mohammed in a particular age on a particular question." After the death of the Prophet, as the expansion of the Islamic influence took place, a large number of new situations and new problems cropped up this would not be decided by reference only to Quran and Ahadis.

The jurists then took the recourse to the principle of Ijmaa, that is, the consensus of opinion of jurists on any question. The authority of Ijmaa, as a source of law based upon tradition, "My followers can never agree upon what is wrong".

Classification -

(i) Ijmaa of the companions of the Prophet – It is that which is universally accepted throughout the Muslim world and is unrepealable. Though there is great difference of opinion among the important Muslim jurists with regard to the requirement of a valid Ijmaa, there is general agreement that Ijmaa of the companions of Prophet should invariably be accepted. The reason behind it was that those associated with the Prophet as his companions must have known, as by instinct, the policy of the Islamic law and whether a particular rule or decision was in harmony with its principles.

(ii) Ijmaa of the Jurists - It is the opinion of majority of the jurists that, Mujtahids, the learned in the traditions of the Prophet and well acquainted with the meaning of the Arabic words and the passages in the Koran alone are competent to participate in Ijmaa.

(iii) Ijmaa of the people – As a source of law, this kind of Ijmaa has not much importance.

Its place- Ijmaa is the third source. It owes its authority to the tradition, "My people can never agree upon what is s wrong". The Ijmaa of the companions of the Prophet Mohammed is deemed to be the best guide and is universally accepted as an authority next to the Quran and Ahadis. Ijmaa, as a matter of fact, was intended to be a source of law, for

all times to come, but the extreme uncertainty of the procedure to regulate it made it a thing of doubtful utility.

"Ijmaa cannot be confined or limited to a particular age or country. It is completed when the jurists after the deliberation came to a finding. It cannot then be questioned or challenged by any individual jurist. Ijmaa of any age may be reserved or modified by the Ijmaa of same or the subsequent age."

Note- The Shia jurists do not recognize Ijmaa as a source of law. They accept only those traditions which had come from the members of the Prophet's family.

4. **Qiyas (Analogical Deductions)**

Meaning- Etymologically, Qiyas means "measuring", "accord" of "equality". In Muslim jurisprudence, it means an extension of law from the original text, by means of common sense. According to Jung, "it is a process of deduction applying the law of the text to the cases which, though not covered by the language of the text, are nevertheless covered by the reason of text."

Its place- Qiyas is analogical deduction derived from a comparison with law in one of the first three sources when they do not apply directly to a particular case and occupies a place next to Quran, Ahadis and Ijmaa. There are some jurists who do recognize Qiyas. This gave rise to a rigid school of law represented by Az-Zahir, who undertook the scientific study of the Quran and its interpretation. But the majority of the jurists agree to take recourse to the pure reasoning as a supplement to the three sources of law in of necessity.

Correctives to Qiyas

1. Istehsan- If the Qiyas was opposed to the habits of the people and was therefore inapplicable or otherwise likely to cause hardship. **Abu Hanifa** gave to the judges the option to override Qiyas and apply that law which suited the circumstances of a case in question. The use of option was known as Istehsan.
2. Istidlal- It is a doctrine of public good which enables a jurist to override Qiyas which is positively harmful to general public. Istidlal means inferring a thing from another thing (Abdur Rahim Mohammadan Jurisprudence, p. 166).

Note. Under Shia Law, the primary sources of law are:

1. Quran,
2. Traditions - Only such traditions which are handed down from the Prophet's household; and
3. Reason- Shia's do not recognize Ijmaa and Qiyas as sources of law.

Secondary Sources

1. **Custom (Urf)**

Meaning - A custom is a tradition passing on from one generation to another, which originally governed human conduct and has obtained the force of law in a particular locality. It is a natural source of law. The Muslim Jurists do not expressly describe it as a source of law but those customs and usages which were not modified or abrogated by the Prophet, remained good and valid. The primeval customs were regulated by Mohammed.

The customs are not independent sources of Muslim law. During the British regime, courts in India recognized the legal force of customs on some occasions in spite of the fact that they were opposed to the clear texts of a primary text of Muslim law. This caused great dissatisfaction among the orthodox Muslims and led to the passage of Shariat Act, 1937 which abolishes most of the customs from the Muslims Personal Law.

Section 2 of this Act lays down that if the parties are Muslims, only Muslim Personal Law will be applied to them in the following matters: -

(i) Inheritance, (ii) Special property of females,
(iii) Marriage, (IV) Dower,
(v) Divorce, (VI) Maintenance,
(vii) Guardianship, (viii) Gift,
(ix) Wakf (x) Trust

In respect of these matters, customs or usages have no place. But customs are still applicable in matters of agricultural lands, charities and religious and charitable endowments.

2. **Judicial Precedents**

   The interpretation of Mohammedan law by the judges of the Indian High Courts and Supreme Court continue in modern times to supplement and modify the Islamic law. As such they are continuing sources of Mohammedan law. These include the decision of the Privy Council, the Supreme Court, as well as of the High Courts of India. These decisions are regarded as precedents for future cases.

3. **Legislation**

   There have been many legislative enactments which have considerably amplified, altered or modified the original Muslim law.

   Examples -

   (i) The Guardians and Wards Act, 1890.
   (ii) The Mussalman Waqf Validating Act, 1913.
   (iii) The Mussalman Waqf Act, 1923.
   (iv) Child Marriage Restraint Act, 1939.
   (v) Shariat Act, 1937.
   (vi) The Dissolution of Muslim Marriage Act, 1931.
   (vii) The Muslim Women (Protection of Rights on Divorce) Act, 1986.

4. **Good Conscience and Equity**

   Sometimes, analogical deductions fail, to satisfy the jurists owing to the narrowness and inadaptability of the habits or due to hardship to the public. In such case, according to the Hanafi, a jurist could use good conscience.

2 CHAPTER Marriage and Dissolution of Marriage

Introduction

Marriage according to Hindu Law is a sanskar (sacrament) and not a contract unlike Muslim Law. The maxim "Virctunorconsentur in lege una pensona" means that the husband and wife are considered one in Law.

Kanyadan (formal donation of the daughter by her father to a groom) and **Saptpadi** (circumambulation of holy fire by the bride and the groom) have basic importance in Hindu Marriages.

Eight forms of marriages were described, four of which were dharmya (regular) forms and the rest were adharmya (irregular) forms.

The choice of life partner was limited only to one's own dharma (religion) and jati (caste) only. Polygamy was permitted in Hindu society but not polyandry. Widow remarriage was also not permitted.

Legislation of laws relating to Hindu marriage began from the year 1829 when sati was abolished by Law and declared an offence at the instance of Raja Ram Mohan Roy.

In 1955, the Hindu Marriage Bill was introduced in the Parliament which was passed by both the Houses of Parliament.

Nature of Hindu Marriage

According to Vedas, a marriage is, "the union of flesh with flesh and bone with bone". So long as the husband is alive, the wife is enjoined to regard him as her God, similarly the wife is declared as half the body of her husband (Ardhangini) who shares with him equally the fruits of all his acts whether they be good or bad.

The Vedic rules expressly declare that a man may have several wives but a woman cannot have many husbands. Husband was treated as God for the wife. Wives were always associated in all the religious offerings and rituals with their husbands. The women were respected and honoured. Manu said, "Women must be honoured and adored by their fathers, brothers, husbands and brothers-in-law who desire their own welfare. Where women are honoured, there the Gods are pleased, but where they are not honoured, no sacred rite yields rewards". Many old writers said, "A woman is half of her husband and completes him".

The object of marriage according to Hindus is the procreation of children and the proper performance of religious ceremonies. The sanctity of marriage was held to be so great that it was regarded to have some divine origin and was thought to be predestined.

Marriage as a sacramental union implies several things first the marriage between man and woman is of religious or holy character but not a contractual union. It is not a mere contract in which a consenting mind is indispensable. For a Hindu, marriage is obligatory not merely for begetting a son in order to discharge the debt of his ancestors but also for the performance of other religious rites, and Manu has commented "In the Vedic period, the sacredness of the marriage tie was repeatedly declared the family ideal was decidedly high and was often realized.

Only the present Hindu Marriage Act has no divorce, Manu disapproves divorce and remarriage of women. None can trace out divorce in ancient Hindu Law. According to Narada and Kautilya "If the husband, be missing dead, or retired from the world, or impotent, or degraded, in these five calamities a woman may take another husband". But Manu had opposed this idea

Doctrine of Factum Valet

The maxim 'que fieri non debuit' which is popularly known as factum valet means "what should not be done, yet being done, shall be valid." From this maxim emerges the Hindu doctrine that "a fact cannot be altered by a hundred texts".

The help of this doctrine was sought where certain irregularities such as want of consent of guardian, etc., occurred in a marriage in order to get the deficiency condoned and to save the marriage from becoming invalid.

In Rajammal v. Mariyammal, it was held that when the marital relation has been accepted by the caste and relatives the doctrine of factum valet protects it from being declared null and void.

The doctrine of factum valet has been indirectly adopted by the Hindu Marriage Act, 1955 in this way that marriages in contravention of clauses (iii) and (iv) of section 5 will not become invalid due to irregularity in respect of the conditions provided in these clauses.

Custom before The Court and Hindu Marriage

In case of R.B.S.S. Munnalal v. S.S. Raj Kumar, AIR 1962 SC 1493 the Supreme Court held that "It is well settled that where a custom is repeatedly brought to the notice of the courts of a country, the courts may hold that custom introduced into law without necessity of proof in each individual case".

Validity of Hindu Marriage

Hindu Marriage-Essential Conditions -

Section 5 of Hindu Marriage Act, 1955, provides "Ceremonies for a Hindu Marriage. A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely:

(i) Neither party has a spouse living at the time of marriage;

(ii) At the time of the marriage, neither party
   - (a) Is incapable of giving a valid consent to it in consequence of unsoundness of mind; or
   - (b) Though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or
   - (c) Has been subject to recurrent attacks of insanity or epilepsy.

(iii) The bridegroom has completed the age of twenty-one years and the bride, the age of eighteen years at the time of marriage;

(iv) The parties are not within the degrees of prohibited relationship, unless the custom or usage governing each of them permits of a marriage between the two;

(v) The parties are not sapindas of each other, unless the custom or usage governing each of them permits of a marriage between the two.

(vi) In case of S.P.S. Balasubramanyam v. Surultayan, AIR 1992 SC 756, apex court held that man and woman living under the same roof and cohabiting for a number of years; the law would raise presumption that they living as husband and wife.

Section 5(ii) the conditions under this clause have been re-asserted by Andhra Pradesh High Court in Balakrishan v. Lalitha, AIR 1984 AP.

Section 5(iii) Contravention of this clause does not vitiate the marriage and does not make it null and void under **section 11**: Duryodhan v. Bengabati, AIR 1977 Ori 36. According to Act 2 of 1978, the bridegroom must have completed the age of twenty-one years and the bride must have completed age of eighteen years at the time of marriage.

Section 5(iv) If the parties to marriage are related to each other within prohibited degrees or within sapindas relationship, the marriage is void and such parties are liable for punishment under section 18 of the Act.

Section 5(v) The rules relating to Sapinda relationship' are prescribed in the definition clause Further, section 7 of the Hindu Marriage Act, 1955 provides

Ceremonies for a Hindu Marriage

(i) A Hindu Marriage may be solemnized in accordance with the customary rites and ceremonies of either party thereto.

(ii) Where such rites and ceremonies include the saptapadi (that is, taking of seven steps by the bridegroom and the bride jointly before the sacred fire), the marriage becomes complete and binding when the seventh step is taken.

In case of Ashok Kumar v. Usha Kumari, AIR 1984 Del 347, it was held that if the parties are recognised as husband and there is a strong presumption in favour of validity of marriage form and ceremony of the marriage and the legitimacy of the offspring.

Following are the conditions of a valid Hindu Marriage in detail

Monogamy Section 5(i)

This clause provides the rule of monogamy and prohibits polygamy and polyandry. Before the Act of 1955, a Hindu could marry any number of wives, even if he had a wife or wives living (Viraswami v. Appaswami, (1865) 1 Mad HC 375), although this practice was always looked with disfavor.

The condition laid down in this clause for a valid marriage is one of those conditions, contravention of which would make the marriage void under section 11 of the Act.

Registration of Marriage

Registration of Hindu marriage has not yet been made compulsory, though the State Governments have been empowered to frame rules for compulsory registration of marriages.

Shahji v Gopinath

The interesting aspect of the law is that even when the State Government makes the registration of marriage compulsory, non-registration does not render the marriage invalid, though any person contravening the rules relating to compulsory registration of marriage may be punished with a nominal fine of up to Rs. Twenty-five. Mere registration is no proof of marriage.

Presumption of Marriage

In the Hindu law it is the solemnization of marriage by performance of certain ceremonies and rites that confer the status of husband and wife and not the mere intention or agreement of parties to live together as husband and wife. However, it is the policy of law to lean in favour of the validity of marriage once it is proved that it has existed de facto.

Thus, Sec. 114 of the Indian Evidence Act lays down that where independent evidence of solemnization of marriage is not available, it will be presumed to be valid marriage by continuous cohabitation between the parties unless contrary is proved. The presumption is rebuttable if there are such circumstances. It may be noted that this presumption does not apply to cases of restitution of conjugal rights and bigamy where the solemnization of marriage as a fact has to be proved.

Nullity of Marriage

There are two types of impediments or bars to a marriage: absolute and relative. If an absolute bar exists, a marriage is void while if a relative bar exists, a marriage is voidable.

Void Marriages

A void marriage is void ab initio i.e. does not exist from its very beginning. A void marriage is no marriage and no legal consequences flow from it. It can neither be approbated nor can it be ratified. A decree of nullity is not necessary in case of a void marriage. Even when the court passes a decree it merely declares an existing fact i.e. the marriage is null and void. It is not the court's decree which renders such a marriage void.

It may be noted that only either party to the marriage can file a petition for nullity, and if one of the parties dies, the other cannot file such a petition.

The grounds of void marriage under the Hindu Marriage Act (Sec. 11) are -

1. Bigamy.
2. Parties sapindas to each other.
3. Parties are within the prohibited degrees of relationship.
4. Essential ceremonies of marriage are not performed.

Voidable Marriages

It is a perfectly valid marriage so long as either party to the marriage does not avoid it on a petition and a decree of the court annuls it. If one of the parties dies before the marriage is annulled, no one can challenge the marriage. The parties to a voidable marriage cannot perform another marriage without first getting a decree declaring their first marriage as void; otherwise they will be guilty of bigamy. Once a voidable marriage is annulled the decree is given retrospective effect from the 'date of the marriage'. The marriage is deemed to have been void for all purposes from its inception and parties are deemed to have never been husband and wife. The effect of a decree of nullity of marriage has been almost equated with the effect of a divorce decree.

A wife of void marriage cannot claim maintenance under **Sec. 125** of the Criminal Procedure Code of India, though a wife of voidable marriage can.

The grounds of voidable marriage under the Hindu Marriage Act are laid down in Sec. 12(1).

1. Impotency of the respondent.
2. Respondent's incapacity to consent and mental disorder.
3. Consent of the petitioner obtained by fraud or force.
4. Concealment of pre-marriage pregnancy by the respondent.

Children of void and voidable marriage

The position regarding the children of void and voidable marriages under **the Hindu Marriage Act (Sec. 16)** and **Special Marriage Act (Sec. 26)** is as follows:

1. Children of annulled voidable marriage are legitimate in the same way as children of an otherwise valid marriage are.
2. Children of annulled,voidable and void marriages are legitimate but they will inherit the property of their parents alone and of none else. Under Sec. 16, by a fictio juris (legal fiction), a child born of a void or voidable marriage is deemed to be the legitimate child of his parents (as if such a marriage had been valid). Sec. 16 comes into play only if a marriage was proved to have taken place, but which is otherwise void or voidable. So, where there has been no marriage at all, Sec. 16 cannot be invoked, and legitimacy cannot be conferred on any child.
3. If the marriage is void or voidable under any other provision of the law, except Sections 11 and 12 (which lays down the grounds of void and voidable marriages), the children will be illegitimate. Such a case will be, for instance, when the marriage is void for lack of performance of valid ceremonies.

Position of Illegitimate Children under the Modern Hindu Law

1. **Maintenance -** Both, father and mother, are under an obligation to maintain illegitimate children up to the period of minority.
2. **Inheritance -** An illegitimate child is not entitled to succeed to his father. But he can inherit the property of his mother or of his illegitimate brother or sister.
3. **Joint family Property and Partition** - An illegitimate son does not acquire any interest in the ancestral property in the hands of his father, nor does he form a coparcenary with him. During the lifetime of his father, his right is only limited to maintenance. But the father may give him a share of his (separate) property.
4. **Guardianship** - A mother had a preferential right of guardianship. After her, the father becomes the natural guardian of such a child.
5. **Adoption -** The mother of an illegitimate child has power to give the child in adoption. Thus, such a child may be validly adopted. Existence of an illegitimate son is not a bar in respect of adoption of a son.

Muslim Law

Unlike Hindu where marriage is a sacrament, marriages in Muslims have a nature of civil contract. Marriage is necessary for the legitimization of a child. When the marriage is done in accordance to the prescribed norms it creates various rights and obligations on both the parties.

Validity of Marriage

The essentials of a valid marriage are as follows -

1. There should be a proposal made by or on behalf of one of the parties to the marriage, and an acceptance of the proposal by or on behalf of the other party.
2. The proposal and acceptance must both be expressed at once meeting.
3. The parties must be competent.
4. There must be two male or one male & two female witnesses, who must be sane and adult present& hearing during the marriage proposal and acceptance. (Not needed in Shia Law)
5. Neither writing nor any religious ceremony is needed.

Classification of Marriage under Sunni Schools -

1. **Valid or Sahih Marriage -** Under the Muslim law, a valid marriage is that which has been constituted in accordance with the essential conditioned prescribed earlier. It confers upon the wife; the right of dower, maintenance and residence, imposes on her obligation to be faithful and obedient to her husband, admit sexual intercourse with him & observe Iddat.
2. **Irregular or Fasid Marriage -** Those marriages which are the outcome of failures on part of parties in non-fulfillment of prerequisites but then also are marriages; to be terminated by one of the parties is termed to be Irregular marriages. They are outcome of
   - A marriage without witness (Not under Shia Law)
   - Marriage with a fifth wife.
   - Marriage with a woman undergoing Iddat.
   - Marriage with a fire-worshipper.
   - Marriage outcome of bar of unlawful conjunction.

   An irregular marriage has no legal effect before consummation but when consummated give rise to several rights & obligations.

3. **Void or Batil Marriage -** A marriage which is unlawful from its beginning. It does not create any civil rights or obligations between the parties. The offspring of a void marriage is illegitimate. They are outcome of
   - Marriage through forced consent.
   - Plurality of husband.
   - Marriage prohibited on the ground of consanguinity.
   - Marriage prohibited on the ground of affinity.
   - Marriage prohibited on the grounds of fosterage.

Effects of valid Marriage (Sahih) -

The lawful obligations which arise after marriage are as follows

1. Mutual intercourse legalized and the children so born are legitimate.
2. The wife gets power to get 'Mahr'
3. The wife entitled to get maintenance.
4. The husband gets right to guide and prohibit the wife's movement(for valid reasons only)
5. Right of succession develops.
6. Prohibition of marriage due to affinity.
7. Women bound to complete Iddat period & not to marry during Iddat period; after divorce or death of husband.

The obligations and rights set between the two parties during and after the marriage are to be enforced till legality. On the basis of a marriage husband and wife do not get the right on one another's property.

Registration of marriage

Registration of marriage is not compulsory but Mutawalli of Jamayat / Jamat can issue Marriage Certificate in the States of Bihar and West Bengal under the Muslim Marriage and Divorce Registration Act, 1935.

Presumption of Marriage

Presumption of Marriage is established through following points -

1. Prolonged continuous cohabitation is established between husband and wife who have no legal barrier against their marriage
2. When a man acknowledges a woman to be his wife.
3. When a man acknowledges a child as his legitimate offspring.