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CUSTOM AS A SOURCES OF LAW

The term 'sources of law' has been interpreted by different writers in various ways and it has been used in different senses. It is, therefore, necessary to distinguish between its various meanings and determine the premises of each.

Sources of Law—Meaning

In the Indian context, the expression "sources of law" is generally used in two senses. In the first, according to Hindu scriptures—duty is the foundation head of all law; while according to modern jurisprudence, it is the sovereign from where the law emanates. In the second sense, the expression 'sources of law' means where one must resort to get at law. In other words, the evidence of records of land or books or reports *etc.* have to be looked into for the purpose of learning or knowing law. In the latter sense, the sources of Hindu law are the *Sruti*, the *Smriti* and the immemorial customs by which the divine will or the 'reasoning'—which is law, is evidenced.[1] In fact, *Sruti* contains very little of lawyer's law. It comprises four *Vedas*, six *Vedangas* and the *Upanishads* which deal with religious rites, true knowledge and liberation. There are, however, a few passages containing incidental collusion to a rule of law. The *Smritis* are the principal sources of lawyer's law. The Code of *Manu* and *Yajnavalkya* deal with religious rites, positive law, penance, true knowledge and liberation. The Code of *Narada* exclusively deals with positive law alone.

In the modern jurisprudence also the term "sources of law" is broadly used in two senses. Sometimes it is used in the sense of State or the sovereign from which the law derives its force and validity. In other sense, it is used to denote the causes of law or the contents or matter of which law is composed. Dr. C.K. Allen asserts that the true sources of law are agencies through which the rules of conduct acquire the character of law because of their certainty, uniformity and binding force. According to Fuller, the "source of law" includes the material from which the Judge obtains rules for deciding cases. In this sense, it includes statutes, judicial precedents, customs, opinion of legal experts, jurists *etc.*[2]

According to natural law philosophers, the "law" has a divine origin. It is a gift of God contained in Holy Books. As stated earlier, *Vedas* and *Smritis* are sources of law according to Hindu Jurisprudence as they have originated from the sages. Likewise, Quran is the word of God and therefore, a positive source of Muslim law. The *hadis* contains the precepts of the Prophet as inspired and suggested by God.

T.E. Holland also supports the view that the term "sources of law" has been used in a variety of senses. Sometimes it denotes the material from which

1. Justice Panda, K.B. : *Sanatan Dharma and Law*, (1977) p. 28.
2. Fuller L. : *Anatomy of the Law*, p. 69.

all knowledge of law is obtained. This may include statute books, treatises or law-reports *etc.* In another sense, the "source of law" denotes the ultimate authority which gives law its binding force. Such authority is undoubtedly the State which is sovereign. Sometimes the term is used to denote the causes which were responsible to bring into existence the rules which eventually acquired the force of law *e.g.*, religion, custom *etc.* and sometimes the agency of organ through which State creates law or grants legal sanction to existing rules is also called the source of law, *e. g.*, legislation *etc.*[3]

John Austin, the exponent of analytical school of jurisprudence refers to three different meanings of the term "sources of law". *Firstly*, the term refers to the authority from whence the law emanates, namely, the sovereign. *Secondly*, it may refer to historical material from which the existence of rules of law may be known, *e.g.*, the Code of *Manu*, Commentaries of *Yajnavalkya*, Code of *Justinian*. *Thirdly*, the term sometimes refers to the causes which give the rules of society the force of law *e. g.*, legislation, custom, equity, law *etc.* Thus Austin's three meanings of "sources of law" may include (i) direct authority; (ii) historical documents; and (iii) causes.[4]

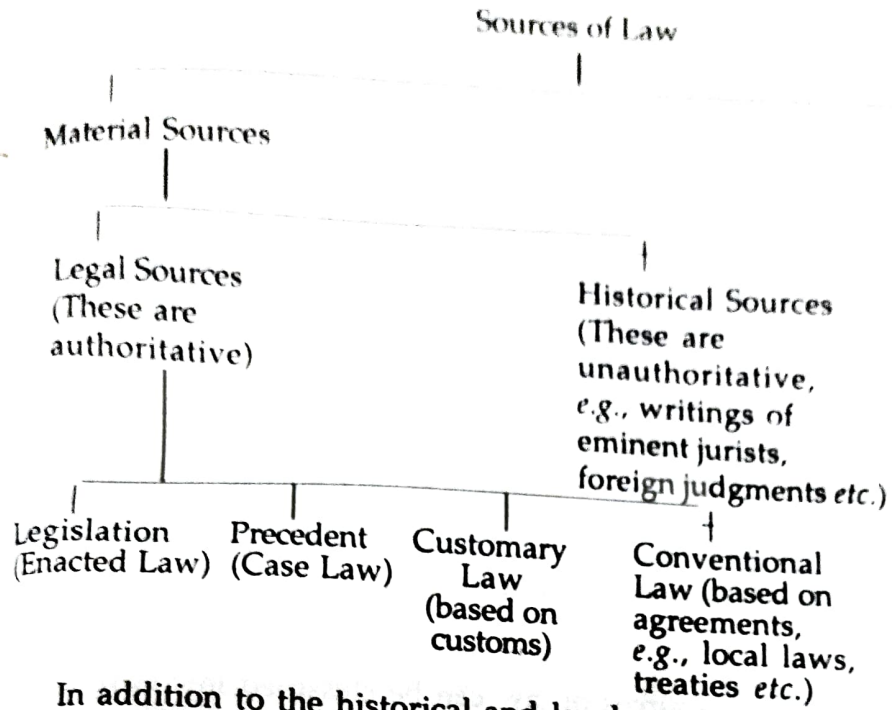
According to Allen, sources of law are those agencies by which rules of human conduct acquire the character of law by becoming objectively definite, uniform and above all, compulsory.[5]

The sociological view, however, makes a departure from the orthodox view about law and suggests that law is derived from many sources and develops in society itself. Therefore, there is no specific authority which has power to make law but it takes shape as the society evolves. Duguit rightly pointed out that law is not derived from any single source and the real basis of law is public service. Expressing a similar view Ehrlich writes, "at present as well as any other time, the centre of gravity of legal development lies not in legislation, not in juristic science not in judicial decisions, but in society itself".

Salmond's View

Salmond preferred to emphasise on two main sources of law. He calls them (i) material source, and (ii) formal source of law. The material sources are further sub-divided into legal sources and historical sources. He defined a formal source of law as that from which a rule of law derives its force and validity. He, however, clarified that from the material source, the law derives only its matter and not the validity. Thus the will of the State as manifested in the Statute Book or decisions of Courts are the formal source of law while legislation, customs, agreements and professional opinion of jurists *etc.* are the material sources of law. Salmond's classification of sources of law can be briefly summarised as under :

3. Holland T.E., *Elements of Jurisprudence*, (13th ed.) p 55.
4. Austin : *Jurisprudence*, Vol. II, p. 508.
5. Allen C.K. : *Law in the Making*, p. 85.



In addition to the historical and legal sources of law, Salmond also talks about literary source of law which refers to original and authoritative sources of knowledge of law. It consists of all text books, commentaries and law reports from where we trace any rule of law.

Of the two kinds of material sources, namely, legal and historical, the first is authoritative while the second is unauthoritative. To quote a concrete example, an Act passed by the Legislature becomes a law which has a binding force therefore, it is a legal material source of law. On the other hand, opinions of eminent jurists have only a persuasive value and are not binding upon the courts. Therefore, they are a historical material source which are unauthoritative. They are sources in fact but they have no legal recognition. They operate indirectly and mediately. Writings of eminent jurists and foreign judgments are also included in the category of historical sources of law. Historical sources may become legal if they are recognised by law or incorporated as a part of law.

Salmond further pointed out that historical sources pertain to legal history and not to legal theory. It is for this reason that Salmond has discussed only legal and not the material sources and even among the legal sources he has included only legislation, precedent and custom and not others.

The above classification of sources of law into formal and material sources has been criticised by some jurists, notably, Allen and Keeton. Dr. Allen objected to Salmond's assertion that "legal sources are the only gates through which new principles can find entrance into the law and historical sources operate only mediately and indirectly...they are merely links in the chain of which ultimate link must be some legal source to which law is directly attached".[6] He alleged that Salmond has undermined the importance of

6. P.J. Fitzgerald : *Salmond on Jurisprudence*, (12th ed.) p. 112.

historical source. Keeton has also criticised Salmond for his views on formal source of law which in modern time is the State. In his view, the State cannot be termed as law in modern technical sense because it is only an agency to enforce law. In real sense it is the public opinion which finds expression through legislature which gives law its authority and force.

It seems that perhaps P.J. Fitzgerald, the editor of Salmond's Jurisprudence was himself not satisfied with the Salmond's classification of sources of law into formal and material and this is why in the twelfth edition of the Book he omitted this classification and discussed only the legal and historical sources of law.

G. W. Paton, however, considers that the division of sources into formal and material is usually accepted. But Dr. Glanville Williams prefers to distinguish the legal and historical sources of law; the legal sources being legislation and precedent while the historical source is the actual origin of the rule adopted by the Court in arriving at a decision.

Keeton's view

According to Keeton, the sources of law can be classified into two broad categories, namely, (i) Binding sources of Law; and (2) Persuasive sources. Binding sources may further be classified as (i) Legislation, (ii) Judicial precedents, and (iii) Customary law. Likewise, persuasive sources may also be of three kinds, namely, (i) Principles of equity, (ii) Professional opinions, (iii) Writings of jurists *etc.* He asserts that in modern time, the only formal source of law is the State, but it being an organisation which enforces law, it is not correct to consider it as a source of law in real sense of the term. In his opinion, persuasive sources are useful only when there is no binding source of law.

Legal Sources of English Law

The legal sources of law may not be necessarily the same in all the legal systems. In other words, different legal systems may have different sources of law. Even the same legal system may have different sources of law at different times. For example, the Hindu jurisprudence recognised : (1) *Dharmashastras*, (ii) *Commentaries & Digests*, and (3) *Custom* as three legal sources of Hindu law prior to codification of Hindu law but after its codification in 1955-56, enacted Hindu law and precedents have assumed importance as sources of Hindu law. So far English law is concerned (i) legislation, both supreme and subordinate, (ii) case law or judicial precedent, (iii) custom, and (iv) agreements or the conventional law, have been recognised as sources of law. However, English jurisprudence does not recognise literary source as legal source.[7]

The English *Corpus Juris* is divisible into two parts, namely, (1) statute law or legislation, and (ii) precedent having its source in judicial decisions, *i.e.*, the case law.

7. There is no written Constitution in U.K. Had it been so, it would have undoubtedly been a source of law.

Legislation is the making of law by formal and express declaration of new rules by some authority in the State which is recognised by the courts of law as competent for that purpose. A precedent, on the other hand, is making of law by application of new rules by the courts themselves in the administration of justice. This in other words, means that enacted law comes into the courts *ab extra* whereas case law is developed within the courts themselves.

In addition to legislation and precedent, English law also recognises custom and coventional law as two other legal sources of law. When custom fulfils the requirements laid down by law for their recognition, they become obligatory rules of conduct which are called the customary laws. The conventional law, on the other hand, is formed out of agreement between the parties and may be in addition to or in derogation of the general law of the land. To illustrate, autonomic law, having its source in subordinate legislation of private bodies, such as universities, municipalities *etc*, is conventional law. The local law which is in force in a particular part of State's territory also comes under this category.

From the above discussion it may be inferred that English legal system recognises four main sources of law. They are :—

(1) Custom which includes customary law.

(2) Legislation which consists of enacted law.

(3) Precedent comprising case law or judicial decisions.

(4) Conventions based on agreements.

Inter-relation between Sources of Law and Sources of Right

It is significant to note that a source of law may also serve as a source of right. A source of law is some fact which is legally constitutive of right. An Act of Parliament is a typical source of law, but there are several Acts which are also sources of rights, *e.g.*, The Consumers Protection Act, 1986, the Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985, the Minimum Wages Act, 1948, the Protection of Human Rights Act, 1993 *etc*. It must, however, be noted that all sources of law are not necessarily the sources of right. Thus a judicial decision is a source of law as regards the world at large, but it is only a source of right as regards the successful party. The decision of an inferior court is not a source of law but it is certainly a source of right.

Sources of Law : Indian Perspective

Prior to the British rule in India, Hindus and Muslims who constituted the major population of this country were governed by their personal laws, namely, Hindu law for Hindus and Mohammadan law for Muslims. It is interesting to note that original Hindu law recognised *four* sources of law, *i. e.*, (1) the *Sruti*, (ii) the *Smritis*, (iii) the conduct of the virtuous, and (iv) one's own conscience.[8] In course of time, the last two receded into the background.

8. *Manu*, 11 and 12.

The primary sources of Mohammedan law were also more or less similar, namely, (1) *Quran*, (2) *Sunnat* and *Ahadis* which meant traditions, (3) *Ijma* (consensus of opinion), (4) *Kiyas, i. e.*, analogical deductions. Both these laws claimed transcendental origin and recognised King as a magisterial official. The *Sruti* as a source of Hindu law and the Quran as a source of Mohammedan law are supposed to be a direct revelation from God but the language of both is of human origin. The two, however, differ on one major point—while Mohammedan law claims human being, namely, Prophet Mohammad as its founder, no such claim is made by Hindu law.

With the introduction of English common law in India, the English legal sources of law replaced the earlier sources of indigenous laws and they have now become an integral part of the modern Indian jurisprudence which owes its origin to the British legal system.

In the modern legal systems legislation occupies a prominent place as a source of law since most of the laws are made by the Union or the State legislatures. The role of custom as a source of law is diminishing day by day as the societies are changing fast adopting new ways of life and living. The role of precedent as a source of law is also limited because the Judges have to take the help of many other sources, such as juristic writings, foreign decisions, moral and social values of the time and place in deciding cases and handing down judgments.

Custom as a Source of Law

Custom occupies an important place in regulation of human conduct in almost all the societies. In fact, it is one of the oldest sources of law-making. A custom may be defined as a continuing course of conduct which by the acquiescence or express approval of the community observing it, has come to be regarded as fixing the norm of conduct for members of society.[9] However, the importance of custom as a source of law continuously diminishes as the legal system grows. The reason being that with the emergence and growing power of the State, custom is largely superseded by legislation as a source of law.

According to Manu, the roots of custom as a source of law in ancient India may be enumerated under four distinct stages, namely,

(i) Revelation, or the utterances and thoughts of inspired seers (*Rishi-Munis);*

(ii) The utterances of revered sages, handed down by words of mouth from generation to generation (*shruti*);

(iii) The approved and immemorial usages[10] of the people ; and

(iv) That which satisfies sense of equity and good conscience and acceptable to reason.

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9. Dias & Hughes : *Jurisprudence*, (1957) p. 34.

10. 'Usage' may be defined as spontaneous evolution by popular mind of rules the existence and general acceptance of which is proved by their customary observance. It marks the transition between morality and law and usage when continued for time immemorial assumes the form of custom.