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JURISPRUDENCE CONSTITUTIONAL AND ADMINISTRATIVE LAW AND IHL

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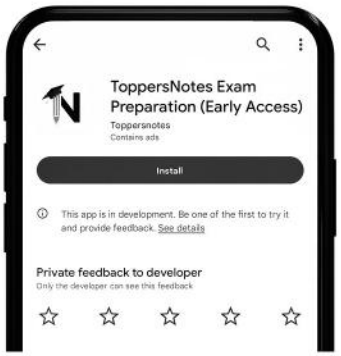

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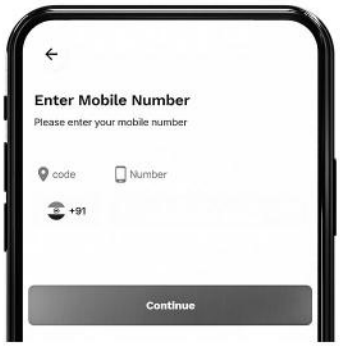

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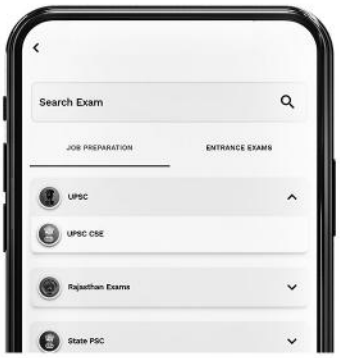

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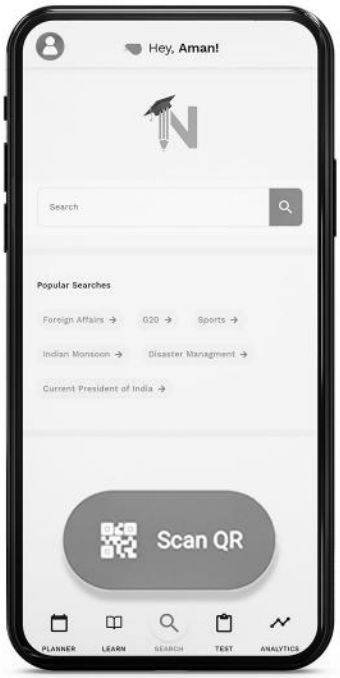

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1
UNIT

Chapter -1
Nature of Jurisprudence

Philosophers of law ask what is law? and what should it be? Nature and scope of Jurisprudence depends upon the ideology and nature of the society and the jurist according to their own notion, Growth of the Law is different and it differs according to social and political condition.

There are different meanings for the word Law for example in French, Jurisprudence means case Law. Due to the evolution of the society it is difficult to accept definition by all. The study of Jurisprudence started from Romans. Latin word Jurisprudence evolved knowledge of Law or skill in law.

Ulpian = The knowledge of things divine and human. The science of the just and unjust.

Paulus = The law is not to be deducted from the rule, but the rule from the law.

But these definitions are vague and inadequate but they put forth the idea of a legal science.

England: During formative period of the common law the word Jurisprudence was in use. Meaning is little more than the study of or skill in law. Early part of the 19th century the word began to acquire a technical significance among English lawyers.

Bentham distinguished

1. Expositorial Jurisprudence.
2. Censorial Jurisprudence.

Austin occupied himself with expository Jurisprudence. (His work consisted mainly at a formal analysis of the structure of English law).

Bentham analytical exposition or pioneered and Austin developed. Hence the word Jurisprudence has come to mean in English almost exclusively an analysis of the formal structure of law and its concepts.

Buckland: The analysis of legal concepts is what Jurisprudence meant.

Julius Stone: The lawyer's extraversion. It is the lawyer examination of the precepts, ideas and techniques of the law in the light derived from present knowledge in discipline other than the law.

Austin: He says the science of Jurisprudence is concerned with positive law. It is no matter whether it is good or bad law. Austin divides the law as general jurisprudence and particular jurisprudence. General Jurisprudence is common to all systems. Particular Jurisprudence confined only to the study of any actual system of law or any portion of it.

General Jurisprudence is science which is concerned with the exposition of the principles notions and distinctions which are common to all system of law.

Particular Jurisprudence is the science of any system of positive law actually obtaining in a specifically determined political society.

General Jurisprudence is a province of pure abstract jurisprudence to analyze and systematize the essential elements underlying the indefinite variety of legal rules without special reference to the institution of any particular country.

Particular Jurisprudence is a science of particular law General and particular jurisprudence differs from each other in this scope but not in its essence. Generally it takes data from the system of more than one state while particular takes the data from a particular system of law. Both are positive only. Example: Possession is one of the fundamental legal concepts recognised by all system of law.

Criticism by Salmond Holland

1. Impracticability.
2. Error in Austin's idea of general jurisprudence.
3. Jurisprudence is the integral social science and the distinction between general and particular jurisprudence is not proper.
4. There may be many schools of jurisprudence but there are not different kinds of Jurisprudence.
5. He says it is not correct to use English Jurisprudence as Hindu jurisprudence.
6. We are dealing with different systems of law and not different kinds of jurisprudence.
7. He says jurisprudence is a social science which deals with social institutions governed by law it studies them from the point of view of their legal significance.

Holland

1. Error on particular Jurisprudence.
2. We can classify a material into general and particular but we can't classify the science hence the study of particular legal system is not a science.
3. Example Geology of England Geology of India etc.

Lord Bryce

The law of every country is the outcome and result of the economic and social conditions of that country as well as the expression of its intellectual capacity for dealing with these conditions.

Savigny

Law grows with the growth and strengthens with the strength of people and its standard of excellence will generally be found of any given period to be in complete harmony with the prevailing ideas of the best class of citizens Progress in the formation of law keep pace with the progress in the knowledge of the people.

Holland

Jurisprudence is the formal science of positive law. It is a formal or analytical science rather than material science. He terms the positive law as the general rule of external human action enforced by a sovereign political authority. He follows the definition of auction but he adds the term formal which means that which concerns only the form and not its essence. A formal science is one, which describes only the form or the external side of the subject and not it internal contents.

Salmond

Jurisprudence as the science of law means civil law or law of the land.

Jurisprudence is of 3 kinds

Expository or systematic jurisprudence deals with the contents of an actual legal system as existing at any time whether past or present. Legal history says about the process of historical development which helps us to set forth law as it ought to be. It deals with the ideas of the legal system and the purpose for which it exists.

Salmond makes distinction as generic Jurisprudence and specific Jurisprudence.

Generic Jurisprudence includes the entire body of legal doctrines and specific jurisprudence deals with a particular department of those doctrines. He defines Jurisprudence as the science of the first principles of the civil law. Specific Jurisprudence has three branches:

1. Analytical Jurisprudence.
2. Historical Jurisprudence.
3. Ethical Jurisprudence.

Keeton:

Jurisprudence the study and systematic arrangement of general principles of law. Jurisprudence deals with the distinction between public and private laws and considers the contents of the principal departments of law.

Pound:

Jurisprudence the science of law using the term law in the juridical sense as denoting the body of principles recognized or enforced by public and regular tribunals in the administration of justice.

Gray:

Jurisprudence is the science of law the statement and systematic arrangement of the rules followed by the courts and principles involved in those rules. Jurisprudence is the study of fundamental legal principles it is any thought or writing about law and its relation to other disciplines such as philosophy, psychology, economics etc.

IMPORTANT BOOKS OF JURISPRUDENCE

1. Hugo Grotius - De Jure Belli ac Pacis (on the law of war and peace)
2. Bentham - The limits of jurisprudence Defined, Theory of legislation, An introduction to the principles of morals and legislation
3. Austin – The Province of Jurisprudence Determined
4. Julius Stone - The Province and function of Law: Law as logic, The Legal System and Lawyer Reasoning
5. Ihering - Law as a Means to an End
6. Salmond – Jurisprudence or The theory of the Law
7. Hart - The concept of law
8. Fuller - The Morality of Law
9. Maine - Old law
10. Friedman - The law in changing societies
11. Hohfeld - Basic Legal Concept

12. Paton - A textbook of jurisprudence
13. Goodhart - Case law and common law essays
14. Savigny - Das Recht Des Besitzes (The law of possession). Modern Roman law system
15. Buckland - Some thoughts on case law

Scope of Jurisprudence

No unanimity of opinion regarding its scope. However it covers moral and religious precepts but that has created confusion. Credit goes to Austin who distinguished law from morality and theology. He also restricted the term to the body of rules set and enforced by the sovereign or supreme law making authority within the realm. In the present view its scope includes all the conduct of human order and human conduct in state and society.

Nature of Law

The term law is used in two senses, namely, in abstract and concrete sense. The term 'law' when used in abstract sense means the system of law, such as the law of India, the law of defamation, law and justice etc. The law in its concrete sense means a statute, enactment, ordinance or other exercise of legislative authority.

In the abstract sense, we speak of 'law' or 'the law' whereas in concrete sense, we speak 'a law' or 'of laws'. Abstract law is 'jus' while concrete law is 'lex'. It is therefore, obvious that 'the law' and 'a law' are not identical in nature and scope.

Definitions of Law

- **According to Austin**, "Law emanates and is enforced by the State. He firmly believed that there is a confluence of command, sanction and sovereignty in law."
- **According to Hegel**, "It is the abstract expression of the general will existing in and for itself."
- **According to Savigny**, "The rule whereby the invisible borderline is fixed within which the being and the activity of each individual obtains a secure and free space." He said that law grows with the growth of people, strengthens with the strength of people and finally dies away as the nation loses its nationality.
- **According to Ihering**, law emphasises on two basic elements, namely social control and social purpose. In his view "Law is the form of gurantee of the conditions of life in society, assured by state's power of constraint."
- **According to Friedmann,** "The law consists of norms of conduct set for a given community and accepted by it as binding by an authority equipped with the power to lay down norms of a degree of general application to enforce them by a variety of sanctions."
- **According to Duguit, '**"Law is essentially a social fact which regulates the conduct of each individual in the community."
- **According to Parker,** "Law is the body of principles enforced and applied by the state through judicial authorities by physical force in pursuit of justice."
- **According to Salmond,** "Law as the body of principles, recognised and applied by the State, in the administration of justice."

Salmond's Classification of Law

Salmond has given an exhaustive classification of laws. He has referred to nine kinds of laws, which are as follows:

Imperative Law:

It means "a rule which prescribes a general course of action imposed by some authority which enforces it by superior power either by physical force or any other form of compulsion." 'Austin' was the main exponent of imperative theory of law, which defines law as a command of the sovereign which persons are obliged to obey. It may be either divine or human.

The human laws may be of three kinds-civil law, law of positive morality and law of nations which is also called 'International law'. Civil law consists of commands issued by the State to its subjects and enforced by its physical power. The law of positive morality consists of rules imposed by society upon its members and enforced by public ridicule or disapprobation. International law consists of rules imposed upon State by the society of States and enforced partly by international option and partly by the threat of war. Imperative law has two essential elements.

Firstly, the command of the sovereign must be general and addressed to a particular person, secondly, the observance of law must not depend upon the pleasure of people, but it should be enforced by some authority.

Physical or Scientific Law

Physical laws are laws of Science which are expressions of the uniformities of nature. There is perfect uniformity and regularity in these laws and are not subject to change. For example, law of gravity, law of motion, law of air-pressure etc.

Natural or Moral Law

Natural law is based on the principles of right and wrong. It includes all forms of righteous action. Natural law has also been called universal law or eternal law. It is also called 'rational law' because it is based on reason. It embodies the principles of morality and is devoid of any physical compulsion. Hugo Grotius made use of natural law to formulate International law.

Other writers who based their legal philosophies on natural law principles are Aristotle, Cicero, Kant, Locke, Pufendorf, etc. Natural law embodies the principles of natural justice of which legal justice is more or less imperfect expression. Legal justice and natural justice represent two intersecting circles, i.e. justice may be legal but not natural or moral or it may be moral but not legal or it may be both legal and moral.

The three consequences of natural law are as follows:

1. It is in a position to render a human law void if it is repugnant to natural law.
2. During medieval period, natural law helped in development of judicial and legal process. Natural rights of an individual acquired great importance in this period.
3. It has given strength to the international law to develop as a law.

Conventional Law

According to Salmond, conventional law means, "any rule or system of rules agreed upon by persons for the regulation of their conduct towards each other."
It is a form of special law. For example, rules of a club or a co-operative society or any voluntary organisation are instances of a conventional law. According to some writers, law of nations which we call as International law is also a kind of conventional law because its principles are expressly or impliedly agreed upon by the member States.

Customary Law

There are many customs which have been prevalent in the community from time immemorial even before the states came into existence. They have assumed the force of law in course of time.
According to Salmond:
Any rule of action which is actually observed by men when a customs is firmly established, it is enforced by the state as law because of its general approval by the people."

For example, the whole of Hindu law of marriage, adoption, succession etc is based on customs prevalent in ancient Hindu society. There is a difference of opinion among jurists about the authority of custom as a law. Some regard it as a proper Jaw while others treat it simply as a source of law.

Particularly, the positivists do not accept custom as a proper law but treat it only as a source of law. But historical jurists like Savigny and Henry Maine have recognised customary law as far more superior to the law of the State.

Practical or Technical Law

Practical laws are rules meant for a particular sphere by human activity. The laws of sanitation and health, building construction and architecture etc may be included in this category.

International Law

The law of nations of the 18th century was named as International law by Bentham in 1780. It consists of rules which regulate relations between the states inter se. According to Oppenheim, "International law is the body of customary and conventional rules which are considered legally binding by civilised states in their inter course with each other." The Permanent Court of International Justice (PCIJ) in SS Lotus case defined International law as:
"Principles which are in force between all independent nations."

According to Starke, International law is defined as "Rules of conduct which States feel themselves bound to observe and therefore do commonly observe in their relations with each other, and which also includes:

1. The rules of law relating to functioning of international institutions and organisations, their relations with each other and their relations with states and individuals,
2. Certain rules of law relating to individuals so far as the rights and duties of such individuals are the concerns of the international community.

According to Russel, International law is defined as, "the aggregate of the rules to which the nations have agreed to their conduct towards one another." Salmond, however, believes that "International law is essentially a species of conventional law and has its source in International agreements."

According to Austin, Willoughby and Holland, International law is a mere positive morality. They do not agree that it is law properly so-called. Austin defines law as a body of rules for human conduct set and enforced by a sovereign political authority. In the absence of any binding force, the validity of International law is solely dependent on the voluntary acceptance by the States and therefore, it cannot be called as 'law' in true sense of the term.

Holland also supports to this view of Austin and observes, "The rules of international law are voluntary, though habitually observed by every State in its dealings with the rest, can be called 'law' only by courtesy, Oppenheim defends international law as 'law' and says a Weak law nevertheless is still a law."

Professor Dias suggests that there is no doubt, that the respect which States pay to international law is far less than what individuals pay to municipal law, but still it is called 'law' to inspire a sense of obligation among States to follow it. Therefore, it is 'law', but indeed a weak law.

According to Harold Laski, "States consent to the rules of International law not because they so choose but really because they have no alternative." In Great Britain, International law is not ipso facto regarded as a part of the UK law as held by Chief Justice Coleridge in Franconia case.

Prize Law

That portion of International law which regulates the practices of the capture of ships and cargo in wartime, as applied by courts is called 'prize law'. It is meant for administering justice between the captors of ships or cargos and the persons interested in the property seized. Salmond, however, disagreed with the view that prize law should be regarded as a branch of International law in strict sense of the term.

Civil Law

The law enforced by the state is called 'civil law'. The force of state is the sanction behind this law. Civil law is essentially territorial in nature as it applies within the territory of the state concerned. The term 'civil law' is derived from the Roman word 'jus civile', Austin and Holland prefer to call civil law as 'positive law' because it is, enforced by the sovereign political authority. However, Salmond justifies the term 'civil law' as the law of the land.

Austin's Classification of Law

John Austin has classified law into following categories: Divine Law and Human Law.

Positive moralities which are rules set by non-political superior e.g. international law. Law metaphorically or figuratively so-called.

Austin regards only divine law and human law as proper law but does not consider positive morality and figurative law as law in real sense of the term as they lack binding force in the absence of a sanction and no evil consequences follow in the event of their breach or infringement.

Holland's Classification of Law

Holland classified law according to their functions. He classified law into following categories:

Private and Public Law

Statutes are of two kinds, namely, public and private. The distinguishing features of a public act is that judicial notice is taken about its existence. On the other hand, private is one which does not fall within the ordinary cognizance of the courts of justice and will not be applied by them unless specially called to their notice. The province of private law is the adjustment of relations between person and person, whereas the public law deals with relationship between person and the state. In case of private law, the parties to a case may either be natural or artificial persons and the state only acts as an arbiter through its courts. The laws of property, contracts, corporations, torts, trusts etc are examples of private law. Public law, on the other hand, seeks to regulate the activities of the state.

The important sub-divisions of public law are:

A. Constitutional law
B. Administrative law
C. Criminal law
D. Criminal procedure.

Broadly speaking, public law deals with the rights and obligations of the state towards its citizens and vice versa. Private and public law, taken together are called 'municipal law'. In public law, state is an interested and enforcing party whereas in private law, state is only the enforcing authority.

General and Special Law

The territorial law of a country is called 'General law'. It consists of all persons, things, acts and events within the territory of a country which are governed by it. For example, Indian law of crimes and law of contracts are the general laws of the country because they have general application throughout the territory of India. General law consists of those legal rules of which the courts take judicial notice whereas the special law consists of those legal rules which courts will not recognise and apply them as a matter of course but which must be specifically proved and brought to the notice of the courts by the interested parties.

Salmond has rightly pointed out that the true test of distinction between the general law and special law is judicial notice. Besides the general law, there are certain kinds of special laws which the court are bound to know. They are called 'jus specile'. The maxim 'ignorantia juris non excusat' applies to special laws in the same way as it applies in case of general laws.

The examples of special laws are the Bombay Prohibition Act, The Maharashtra Ownership of Flats Act, Tamil Nadu Gambling Act, The Calcutta Police Act etc.

There are several kinds of special laws, namely:

A. Local law
B. foreign law
C. conventional law
D. autonomic law

E. Martial law
F. International law
G. Mercantile law etc.

Substantive and Procedural Law

According to Salmond, substantive law is that which defines a right while procedural law determines the remedies. Procedural law is also called 'law in action' as it governs the process of litigation. Substantive law is concerned with ends which the administration of justice seeks to achieve while procedural law deals with the means by which those ends can be achieved. For example, Law of Contract, Transfer of Property Act, Negotiable Instrument Act, crimes etc. are substantive laws whereas the civil procedure or criminal procedure is procedural laws."

Antecedent and Remedial Law

Antecedent law relates to independent specific enforcement without any resort to any remedial law. The law relating to specific performance of a contract is the best example of antecedent law. The remedial law, on the other hand provides for a remedy. For example, law of torts, writs etc. come within the category of remedial laws.

Law in Rem and Law in Personam

Law in rem relates to enforcement of rights which a person has against the whole world or against the people if general, whereas law in personam deals with enforcement of right available against a definite person or persons. For example, law of inheritance, succession, ownership etc comprise the subject matter of law in rem while the law contract, trust etc.

Sources of Law

In the modern Jurisprudence 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 'sources of law' includes the material from which the Judge obtains rules for deciding cases. In this sense, it includes statutes, judicial precedents, customs, opinions of legal experts, jurists etc.
According to natural law philosophers, the 'law' has a divine origin. It is a gift of God contained in Holy Books. Vedas and Smritis are sources of law according to Hindu Jurisprudence as they have originated from the sages. In the same manner, 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.

John Austin, the exponent of analytical school of Jurisprudence refers to three different meanings of the term 'sources of law'.

1. Firstly, the term refers to the authority from where the law emanates, namely, the sovereign.

2. 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.
3. 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.

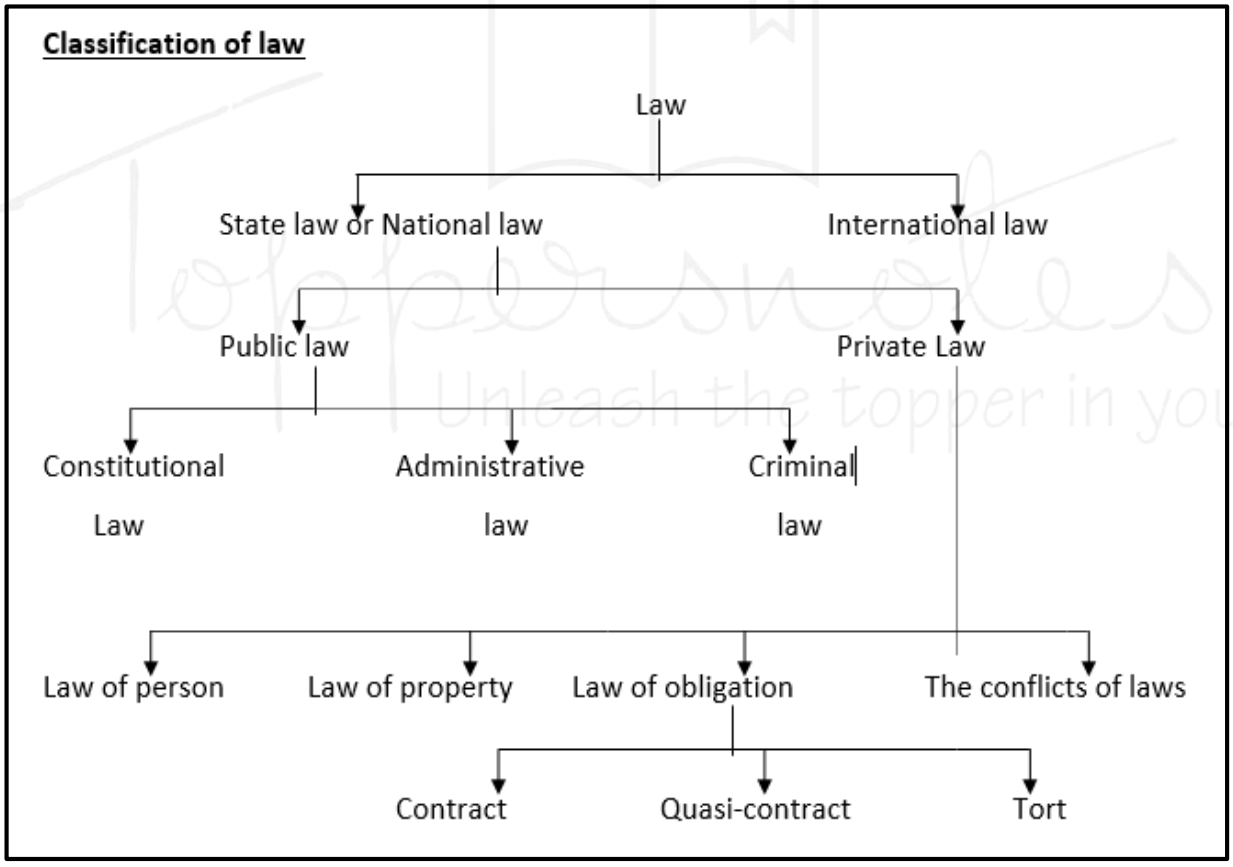
Thus, Austin's three meanings, of 'sources of law' may include:

A. Direct authority;
B. Historical documents; and
C. Causes.

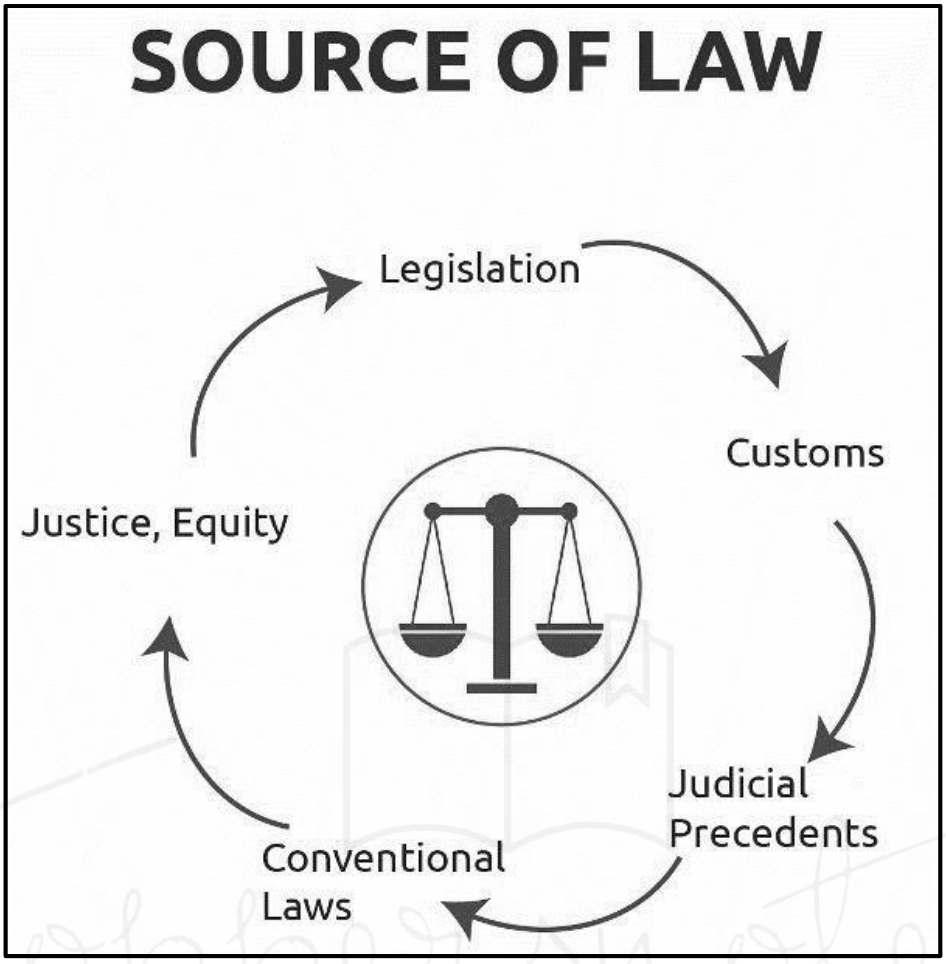
Duguit rightly pointed out that law is not derived from any single source and the real basis of law is public service.

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."

According to Salmond, "Legal sources are those sources which are recognised as such by the law itself, while historical sources are those sources which lack formal recognition by the law. The legal sources of law are authoritative and historical sources are unauthoritative."



Kinds of Sources of Law



Some of the important sources of law are as follows:

1. Custom

- The term 'custom' has been defined in the Webster's New International Dictionary as a long established practice considered as in written law and resting for authority on long consent, a usage that has, by long continuance has acquired a binding force in law.
- According to Herbert Spencer, "'before any definite agency for social control is developed, there exists a control arising partly from the public opinion of the living and more largely from the public opinion of the dead."
- Thus, it is a tradition passing on from one generation to another that originally governed human conduct. This tradition is called 'custom'.
- According to Salmond, "Custom is to society what law is to the state. Each is the expression and realisation to the measure of men's insight and ability of the principles of right and justice."

Nature and Origin of Custom

Custom has its origin in the usage or practice of people in doing certain things in a certain way and one of its characteristics is that it is not consciously formed. Usage developing into customary law is the oldest form of law making and in its early stages depends for its validity on willingness of those who generally follow the usage to submit to it.

According to Holland, "Usage is the spontaneous evolution by the people or part of them of rules of conduct, the existence and general acceptance of which is proved by their regular observance."

According to Savigny the main founder of German historical school, "Custom is essentially a product of natural forces associated with popular spirit of acceptance by the people. When people repeat the same action again and again, it assumes the form of 'habit' and when habit continues to be in practice for a long time, it becomes custom."

Kinds of Custom

It is not necessary that a custom should be practised all over the country. There may be a custom which is practised authoritatively only in a particular locality. Broadly speaking, there are two kinds of custom, namely, legal custom and conventional custom.

According to Salmond, a legal custom is one which is operating per se as a binding rule of law, independently of any agreement on the part of those subject to it. A legal custom is one whose authority is absolute. A conventional custom is one which operates only indirectly through medium of agreements, whereby it is accepted and adopted in individual instances as conventional law between the parties.

Conventional custom is one whose authority is conditional on its acceptance and incorporation in agreements between the parties bound by it. Usually conventional custom is referred as usage and legal custom as custom simpliciter. A valid legal custom should have existed from time immemorial; such antiquity is, however, not needed to support the validity of usage. Conventional customs are implied, if they are not in conflict with the general law of the land. In case of conflict, however, such usage may be made applicable by the express agreement between the parties.

Legal customs are of two kinds, namely, local custom and general custom. A local custom is a usage which has obtained the force of law and is binding within a particular area. In practice, a plaintiff or defendant relying upon a local custom must plead it and give particulars of it.

Essentials of a Valid Custom

The custom must have existed since time immemorial. The custom must have been continuously in operation without any interruption. This does not mean that custom should have been continuously exercised but that at all times, it must have been possible to exercise it lawfully. If it were legally unenforceable for even a short time it would not be recognised as a valid custom. The custom must have been exercised peaceably, openly and as of right.

The basis of custom is that it is exercised by consent and any secret or forciable exercise cannot be with consent. Furthermore, an exercise of a right which depends on the granting of permission cannot be a valid custom, for clearly, if there had been a right, permission would have been necessary. The custom must not be unreasonable in the eyes of law. The period for ascertaining whether a custom is reasonable is the period of its inception.

The element of certainty evinces the existence of a custom therefore, a custom cannot be said to be in existence from the time immemorial unless its certainty and continuity is proved beyond doubt. A custom to be legally recognised as a valid custom, must be observed as of right. It means that custom

must have been followed by all concerned without recourse to force and without the necessity of permission of those who are adversely affected by it.

It must be regarded by those affected by it not merely as an optional rule but as an obligatory or binding rule of conduct. If a practice is left to individual choice, it cannot be treated as a customary law. A custom must not be contrary or inconsistent with a legislative enactment.

A legislative enactment can reject a custom and it must necessarily yield where it militates against or is inconsistent with enacted law. Allen in his 'law in making' observes, "Age cannot whither an Act of Parliament and at no time so far as I am aware has it every been admitted that a statute might become inoperative through obsolescence."

The custom must be consistent with other customs, otherwise they cannot at all be good. It must not conflict with other established customs. Custom must apply to a definite locality. Local customs apply only to the things or inhabitants.

2. Precedent

- Judicial precedent is another important source of law. It is a distinguishing feature of the English legal system because most of the common law is unwritten and owes its origin to judicial precedents. Precedents have a binding force on judicial tribunals for deciding similar cases in future. A precedent is a statement of law embodied in the decision of a Superior Court, which decision has to be followed by the court and by courts subordinate to it. As such the theory of precedent plays a significant and important role in the jurisprudence of every country.
- According to Salmond, the doctrine of precedent has two meanings, namely, in a loose sense precedent includes merely reported case-law which may be cited and followed by the courts, in its strict sense, precedent means that case-law which not only has a great binding authority but must also be followed.
- Holdsworth supports the doctrine in its loose sense. It is true that in common law countries, new laws and law reforms have increasingly been brought about through Acts of Parliament, usually inspired by the policies of the Government of the day, but even then the development of case law still remains a potent source of law.
- A statement of law made by a judge in a case can become binding on later judges and other subordinate courts and in this way may become the law for everyone to follow. Whether or not a particular decision, i.e. precedent becomes binding depends on two main factors, namely it must have been pronounced by a court which is sufficiently senior. It is only the ratio decidendi i.e. reasoning behind the decision which is binding.
- According to Jeremy Bentham, precedent is a Judge-made law while Austin calls it as judiciary's law. Keeton holds precedents as those judicial pronouncements of the court which carry with them certain authority having a binding force.

Kinds of Precedents

Broadly speaking, precedent may either be authoritative or persuasive. An authoritative precedent is one which has a binding force and the judge must follow it whether he approves it or not. Authoritative precedents are the decisions of superior court of justice which are binding on subordinate courts.

Persuasive precedent, on the other hand, is one which the judges are under no obligation to follow, but which they may take into consideration. Thus, authoritative precedents are the legal sources of law while persuasive precedents are merely historical sources.

Persuasive precedents may be of various kinds, namely:

Foreign judgments, Decision of superior courts to other parts of British Empire, Judgments of the Privy Council when sitting as the final court of appeal from the colonies, Judicial dicta, Authoritative text books and commentaries.

Binding Force of Judicial Precedents

Once a decision is overruled by any subsequent ruling, it loses all its binding authority. But there are certain other circumstances which also destroy or weaken the binding force of judicial precedents either partially or totally. They are as follows:

1. **Ignorance of Statute:**
   A precedent is not binding, if it be rendered in ignorance of any statute or any other rule having the force of statute. It is also not binding, if the court had the knowledge of the existence of the statute, but it failed to appreciate its relevance to the matter in hand due to negligence or ignorance.

2. **Inconsistency between Earlier Decision of the Court of the Same Rank:**
   A court is not bound by its own earlier decisions which are conflicting with each other. The conflict may arise due to inadvertence, ignorance or forgetfulness in not citing earlier decisions before the court. In such a case the earlier decisions are not binding on the court.

3. **Inconsistency between Earlier Decision of Higher Court:**
   A precedent loses its binding force completely, if it is inconsistent with the decision of a higher court. Thus, the Court of Appeal in Young v. Bristol Aeroplane Corporation limited, observed that it is bound to follow its own previous, decisions as well as those of courts of co-ordinate jurisdiction. However, the court is bound to refuse to follow a decision of its own which, though not expressly overruled, cannot, in its opinion, stand with a decision of the House of Lords or if it finds that there is inconsistency between its earlier decision.

4. **Decision of Equally Divided Court:**
   There may be cases where the Judges of Appellate Court are equally divided. In such a case, practice is to dismiss the appeal and hold that the decision appealed against is correctly decided. But, this problem does not arise nowadays because Benches are always constituted with uneven number of judges.

   In India, however, where the judges in a Division Bench of a High Court are equally divided, the practice is to refer the case to a third judge whose decision shall be treated as final unless it is set aside by the Supreme Court.

5. **Precedent Sub Silentio:**
   A decision is said to be sub silentio when the point of law involved in it is not fully argued or not perceived by the court. The decision in Gerard v. Worth of Paris Ltd, is a good illustration to explain a precedent sub silentio.

6. **Erroneous Decisions:**
   The decisions which are founded on misconceived principles or in conflict with the fundamental principles of law lose their binding force totally.

7. **Affirmation or Reversal on a Different Ground:**
   When a higher court either affirms or reverses the judgment of the lower court on a ground different from that on which the judgment rests, the original judgment is not deprived of all the authority, but the subsequent court may take a view that a particular point which the higher court did not touch, is rightly decided.

8. **Abrogated Decisions:**
   A decision ceases to be binding, if statute inconsistent with it is subsequently enacted. So, also it ceases to be binding if it is reversed, overruled or abrogated. If a decision is wrong or irrational, it may be abrogated by a subsequent enactment or decision of a higher court.

Binding Elements in Precedents

The Ratio Decidendi

Each judge in a case will give his judgment and it is not that every part of the judgment that acts as judicial precedent. It is therefore important that a judge who is using a case as a precedent should be able to recognise that part of the previous judgment which is binding upon him. The portion of a previous judgment that is binding is called the 'ratio decidendi' (the reason for deciding). This consists of the portion of law which was essential to the judge in coming to his decision. Thus, three shades of meaning can be attached to the expression 'ratio decidendi', which are as follows:

1. The first is the translation of it, it is the reason for deciding.
2. Secondly, it may mean the rule of law preferred by the judge as the basis of his decision.
3. Thirdly, it may mean 'the rule of law' which others regard as being of binding authority.

Obiter Dicta

Pronouncements of law, which are not part of the ratio decidendi, are called as 'obiter dicta' and they are not authoritative or binding on subordinate courts. Obiter dicta may be defined as more casual expressions by the court which carry no weight. In the course of judgments, a judge may make various observations which are not precisely relevant to the issues before him. For instance, he may illustrate his reasoning by reference to hypothetical situations.

Whatever said by the court by the way of statements of law which lay down a rule, but which is unnecessary for the purpose in hand, are called 'obiter dicta'. These dictas have the force of persuasive authority and are not binding upon the courts. The courts may seek help from them but they are not bound to follow them. Obiter dicta literally means something said by the judge by the way, which does not have any binding authority. Goodhart defines obiter dictum as, "A conclusion based on a fact the existence of which has not been determined by the court."

Legislation

The term 'legislation' is derived from Latin words, legis meaning law and latum which means 'to make' or 'set'. Thus, the word 'legislation' means 'making of law'. The term 'legislation' has been used in different senses. In its broadest sense, it includes all methods of law-making. However, in its technical sense, legislation includes every expression of the will of the legislature, whether making law or not.