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FACULTY OF JURIDICAL SCIENCES

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LECTURE: 1

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Lecture-21

Lecture-21: Sources of Law

Sources of Law

The term "sources of law" is used in different senses. The general meaning of the word "sources" is "origin". There is a difference of opinion among the jurists regarding the sources of law. C.K. Allen uses it in the sense of agencies through which the rules of conduct acquire the character of law by becoming definite, uniform and compulsory. Vinogradoff uses it as the process by which the rule of law may be evolved. Oppenheim uses it as a name for a historical fact out of which rules of conduct come into existence and acquire legal force. According to Holland, the expression "sources of law" is sometimes employed to denote the quarter whence we obtain our knowledge of the law, e.g., whether from the statute book, the reports or esteemed treaties. Sometimes it is used to denote the ultimate authority which gives them the force of law, i.e., the State. Sometimes it is used to indicate the causes which, as it were, automatically brought into existence rules which have subsequently acquired that force viz., custom, religion and scientific discussion. Sometimes it is used to indicate the organs through which the State either grants legal recognition to rules previously unauthoritative or itself creates new law, viz., adjudication, equity and legislation.

Rupert Cross writes that the phrase "source of law" is used in several different senses. First, there is the literary source, the original documentary source of our information concerning the existence of a rule of law. In this sense, the law reports are a source of law, whereas a textbook on tort or contract, or a digest of cases falls into the category of legal literature. Next, there are the historical sources of law, the sources-original, mediate or immediate- from which rules of law derive their content as a matter of legal history. In this case, the writings of Bracton and Coke and the works of other great exponents of English Law are sources of law, for they enunciate rules which are now embodied in judicial decisions and Acts of Parliament.

There are two main sources of law, FORMAL and MATERIAL SOURCES. Material sources can further be subdivided into LEGAL and HISTORICAL SOURCES.

Formal Source

According to Salmond, formal sources are those sources from which the law derives its force and validity. It is the will of the state, as manifested in statutes or, decisions of the Courts. Prof. Allen considers that the conception of a "formal source" is wholly unnecessary since it only means that the State will recognize as law that which is law.

Material Sources

According to Salmond, material sources are those sources from which the matter of law takes its shape. These are of two types:

LEGAL MATERIAL SOURCES-

Legal material sources are those sources which are recognized as such by the law itself.

 These sources are authoritative and are allowed by the courts as of right. The legal sources are the only gates through which new principles can find entrance into the law.

 Historical Material Sources- These sources are unauthoritative lacking formal recognition by the law.

They have no legal recognition. They operate indirectly and mediatly. They influence more or less extensively the course of legal development, but they speak with no authority.

 Customs- Customs may be classified into (1) immemorial, and other than the immemorial. Immemorial customs are those which have stood the test of time and have become recognized all over the land.

 Customs which are not immemorial were accepted by the judges only when they felt it was desirable to do so and when they found those customs to be reasonable, but those customs didn't had that force of law as immemorial ones.

Customs have given rise to customary law, and were recognized by the courts as compulsory rules of conduct.

 Judicial Decisions/Precedents- Decisions given by Judges marked a very important source of the law. Like the sculptors who work with chisel and marble or bronze and make beautiful works of art, so did the judges work on the raw material of custom supplied by merchants or other satisfactory evidence. The decisions given by the judges come to be known as precedents or case law. A precedent is that which is meant to be followed by others on subsequent occasions. What a judge says is followed by a brother judge in the same court, sitting as a single judge.

The decision of a superior court, like the High Court, is binding on inferior courts, and conditionally binding upon judges sitting singly in the same High Court, i.e. of the same state. Such decisions are called binding precedents.

But the judgements of foreign courts are not binding on our courts here, but they have a guiding efficiency. Our law courts here may follow or refuse to follow them. Such judgements are called persuasive precedents.

 Acts of Legislature- Acts passed by a law making body are an important source of law. Each law passed by a legislature is a contribution to law. But a particular law which is limited in its application to a particular person cannot be regarded as contribution to law.

 Equity- Soon the legal system was found too rigid to be good at all times and in all cases. In Rome, the Practor who was the supreme magistrate of the realm, and, in England, the Lord Chancellor who was the keeper of the conscience of the English Sovereign, and in India the King or the Rana who was the fountain of justice and the final and highest court before whom the subject could lay his grievances, came to supplement the rigid principles of law by the softening and graceful influence of the voice of conscience. If there is a conflict between equity and law, it is the law which must prevail. Equity can supplement the law when there is a gap in it, but it cannot supplement the law. { B. Parmanand V. Mohan Koikal, (2011)4 SCC 266}.

 Conventions: Conventions, contractual relations, and treaties between nations may also be regarded as an important source of law. What is in civil law may even be overridden by treaty between two nations. Conventions create what is known as conventional law. If a conventional is ratified by India its contents become binding on the Indian Legal System. { Suchita Srivastava V. Chandigarh Administration, (2009)9 SCC 1}.

 Criticism By Allen: The classification of sources of law into formal and material sources made by Salmond has been criticized by many jurists including Allen. Allen has criticized Salmond for his attaching little importance to the historical sources.

 Criticism By Keeton: According to Keeton, the only formal source of law is the State in modern times but the State is an organization enforcing law. Therefore, it cannot be considered as a source of law in the technical sense.

 Keeton's Classification of Law

1. The binding source of law: They are binding on the Judge, and he is not independent in their application. They are legislation, judicial precedents and customary law.

2. Persuasive sources: They are useful when there are no binding sources on a particular point. Some of such sources are professional opinions and principles of morality or equality

SELF-TEST QUESTIONS

S.NO	Question	Option (a)	Option (b)
1.	Salmond, formal sources are those sources from which the law derives its force and validity	True	False
2.	**Legal material** sources are those sources which are recognized as such by the law itself.	True	False
3.	sources are authoritative and are allowed by the courts as of right	True	False
4.	Customs may be classified into (1) immemorial, and other than the immemorial.	True	False
5.	Decisions given by Judges marked a very important source of the law	True	False

Answers: 1-(b),2-(a), 3-(a),4-(a), 5-(a)