RMM LAW COLLEGE SAHARSA

JURISPRUDENCE

Part I

Paper -1

Topic- Administration of Justice

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Sources of Law

Analytical Positivist School of Thought- Austin said that the term *'source of law'* has three different meanings:

1. This term refers to immediate or direct author of the law which means the **sovereign in the country**.

2. This term refers to the **historical document** from which the body of law can be known.

3. This term refers to the causes that have brought into existence the rules that later on acquire the force of law. E.g. customs, judicial decision, equity etc.

Historical Jurists- ***Von Savigny, Henrye Maine, Puchta etc.*** – This group of scholars believed that **law is not made but is formed**. According to them, the foundation of law lies in the common consciousness of the people that manifests itself in the practices, usages and customs followed by the people. Therefore, for them, customs and usages are the sources of law.

Sociological Jurists- This group of scholars protest against the orthodox conception of law according to which, **law emanates from a single authority in the state**. They believe that law is taken from many sources and not just one.

Ehlrich said that *at any given point of time, the centre of gravity of legal development lies not in legislation, not in science nor in judicial decisions but in the society itself.*

Duguit believed that law is not derived from any single source as the basis of law is public service. There need not be any specific authority in a society that has the sole authority to make laws.

Salmond on Sources of Law- Salmond has done his own classification of sources of law:

1. **Formal Sources- A Formal Source is as that from which rule of law derives its force and validity**. The formal source of law is the **will of the state** as manifested in statutes or decisions of the court and the authority of law proceeds from that.

2. **Material Sources**- Material Sources are those from which is derived the matter though not the validity of law and the matter of law may be drawn from all kind of material sources.

a. **Historical Sources**- Historical Sources are rules that are subsequently turned into legal principles. Such source are first found in an Unauthoritative form. Usually, such principles are not allowed by the courts as a matter of right. They operate indirectly and in a mediatory manner. Some of the historical sources of law are:

i. **Unauthoritative Writings**

ii. **Legal Sources**- Legal Sources are instruments or organs of the state by which legal rules are created for e.g. legislation and custom. They are authoritative in nature and are followed by the courts. **They are the gates through which new principles find admittance into the realm of law**. Some of the Legal Sources are:

a. Legislations

b. Precedent

c. Customary Law

d. Conventional Law- Treatises etc.

Charles Allen said that Salmond has attached inadequate attention to historical sources. According to him, historical sources are the most important source of law.

Keeton said that state is the organization that enforces the law. Therefore, technically State cannot be considered as a source of law. However, according to Salmond, a statute is a legal source which must be recognized. Writings of scholars such Bentham cannot be considered as a source of law since such writings do not have any legal backing and authority.

Legal sources of English Law- There are two established sources of English Law:

1. **Enacted Law having its source in legislation**- This consists of statutory law. **A Legislation is the act of making of law by formal and express declaration of new rules by some authority in the body politic which is recognized as adequate for that purpose**.

2. **Case Law having source in Judicial Precedence**- It consists of common law that we usually read in judgments and law reporters. Precedent could also be considered as a source of law as a precedent is made by recognition and application of new rules by the courts whilst administering justice. Thus, Case Laws are developed by the courts whereas enacted laws come into the court *ab extra*.

3. **Juristic Law**- Professional opinion of experts or eminent jurists. These are also sources of law. Though, they are not much accepted.

Sources of Law: Are they sources of Right too?

A Legal Right means a fact that is legally constitutive of a right. A Right is the *de facto* antecedent of a legal right in the same way as a source of law is *de facto* antecedent of a legal principle.

Legislation- *'Legis'* means law and *'latum'* means making. Let us understand how various jurists have defined legislation.

1. **Salmond**- Legislation is that source of law which consists in the declaration of legal rules by a competent authority.

2. **Horace Gray**- Legislation means the forma utterance of the legislative organs of the society.

3. **John Austin**- There can be no law without a legislative act.

Analytical Positivist School of Thought- This school believes that typical law is a **statute** and legislation is the normal source of law making. The majority of exponents of this school **do not approve that the courts also can formulate law**. They do not admit the claim of customs and traditions as a source of law. Thus, they regard **only legislation as the source of law**.

Historical School of Thought- This group of gentlemen believe that **Legislation is the least creative of the sources of law**. Legislative purpose of any legislation is to give better form and effectuate the customs and traditions that are spontaneously developed by the people. Thus, **they do not regard legislation as source of law.**

Types of Legislation

1. **Supreme Legislation**- A Supreme or a Superior Legislation is that which proceeds from the sovereign power of the state. It cannot be repealed, annulled or controlled by any other legislative authority.

2. **Subordinate Legislation**- It is that which proceeds from any authority **other than the sovereign power** and is dependant for its continual existence and validity on some superior authority.

Delegated Legislation- This is a type of subordinate legislation. It is well-known that the main function of the executive is to **enforce the law**. In case of Delegated Legislation, executive frames the provisions of law. This is also known as executive legislation. The executive makes laws in the form of orders, by laws etc.

Sub-Delegation of Power to make laws is also a case in Indian Legal system. In India, the power to make subordinate legislation is usually derived from existing enabling acts. It is fundamental that the delegate on whom such power is conferred has to act within the limits of the enabling act.

The main purpose of such a legislation is to supplant and not to supplement the law. Its main justification is that sometimes legislature does not foresee the difficulties that might come after enacting a law. Therefore, Delegated Legislation fills in those gaps that are not seen while formulation of the enabling act. Delegated Legislation gives flexibility to law and there is ample scope for adjustment in the light of experiences gained during the working of legislation.

Controls over Delegated Legislation

Direct Forms of Control

1. **Parliamentary Control**

2. **Parliamentary Supervision**

Indirect Forms of Control

1. **Judicial Control**- This is an indirect form of control. Courts cannot annul subordinate enactments but they can declare them inapplicable in special circumstances. By doing so, the rules framed do not get repealed or abrogated but they surely become dead letter as they become *ultra vires* and no responsible authority attempts to implement it.

2. **Trustworthy Body of Persons**- Some form of indirect control can be exercised by entrusting power to a trustworthy body of persons.

3. Public Opinion can also be a good check on arbitrary exercise of Delegated Powers. It can be complemented by antecedent publicity of the Delegated Laws.

It is advisable that in matters of technical nature, opinion of experts must be taken. It will definitely minimize the dangers of enacting a vague legislation.

Salient Features of Legislation over Court Precedents

1. **Abrogation**- By exercising the power to repeal any legislation, the legislature can abrogate any legislative measure or provision that has become meaningless or ineffective in the changed circumstances. Legislature can repeal a law with ease. However, this is not the situation with courts because the process of litigation is a necessary as well as a time-consuming process.

2. **Division of function**- Legislation is advantageous because of division of functions. Legislature can make a law by gathering all the relevant material and linking it with the legislative measures that are needed. In such a process, legislature takes help of the public and opinion of the experts. Thus, public opinion also gets represented in the legislature. This cannot be done by the judiciary since Judiciary does not have the resources and the expertise to gather all the relevant material regarding enforcement of particular principles.

3. **Prospective Nature of Legislation**- Legislations are always prospective in nature. This is because legislations are made applicable to only those that come into existence once the said legislation has been enacted. Thus, once a legislation gets enacted, the public can shape its conduct accordingly. However, Judgments are mostly retrospective. The legality of any action can be pronounced by the court only when that action has taken place. Bentham once said that *"Do you know how they make it; just as man makes for his dog. When your dog does something, you want to break him off, you wait till he does it and beat him and this is how the judge makes law for men".*

4. **Nature of assignment**- The nature of job and assignment of a legislator is such that he/she is in constant interaction with all sections of the society. Thereby, opportunities are available to him correct the failed necessities of time. Also, the decisions taken by the legislators in the Legislature are collective in nature. This is not so in the case of Judiciary. Sometimes, judgments are based on bias and prejudices of the judge who is passing the judgment thereby making it uncertain.

5. **Form**- Enacted Legislation is an abstract proposition with necessary exceptions and explanations whereas Judicial Pronouncements are usually circumscribed by the facts of a particular case for which the judgment has been passed. Critics say that when a Judge gives Judgment, he makes elephantiasis of law.

Difference between Legislation and Customary Law

1. Legislation has its source in theory whereas customary law grows out of practice.

2. The existence of Legislation is essentially *de Jure* whereas existence of customary law is essentially *de Facto*.

3. Legislation is the latest development in the Law-making tendency whereas customary law is the oldest form of law.

4. Legislation is a mark of an advanced society and a mature legal system whereas absolute reliance on customary law is a mark of primitive society and under-developed legal system.

5. Legislation expresses relationship between man and state whereas customary law expresses relationship between man and man.

6. Legislation is precise, complete and easily accessible but the same cannot be said about customary law. Legislation is *jus scriptum*.

7. Legislation is the result of a deliberate positive process. But customary law is the outcome of necessity, utility and imitation.

Advantage of Court Precedents over Legislation

1. Dicey said that *"the morality of courts is higher than the morality of the politicians".* A judge is impartial. Therefore, he performs his work in an unbiased manner.

2. Salmond said that *"Case laws enjoys greater flexibility than statutory law. Statutory law suffers from the defect of rigidity. Courts are bound by the letter of law and are not allowed to ignore the law."*

Also, in the case of precedent, **analogical extension** is allowed. It is true that legislation as an instrument of reform is necessary but it cannot be denied that precedent has its own importance as a constitutive element in the making of law although it cannot abrogate the law.

3. **Horace Gray** said that *"Case law is not only superior to statutory law but all law is judge made law. In truth all the law is judge made law, the shape in which a statute is imposed on the community as a guide for conduct is the statute as interpreted by the courts. The courts put life into the dead words of the statute".*

4. **Sir Edward Coke** said that *"the function of a court is to interpret the statute that is a document having a form according to the intent of them that made it".*

5. **Salmond** said that *"the expression will of the legislature represents short hand reference to the meaning of the words used in the legislature objectively determined with the guidance furnished by the accepted principles of interpretation".*

Precedent as a Source of Law

In India, the judgment rendered by Supreme Court is binding on all the subordinate courts, High Courts and the tribunals within the territory of the country.

In case of a judgment rendered by the High Court, it is binding in nature to the subordinate courts and the tribunals within its jurisdiction.

In other territories, a High Court judgment only has a persuasive value. In Indo-Swiss Time Ltd. v. Umroo, AIR 1981 P&H 213 Full Bench, it was held that *"where it is of matching authority, then the weight should be given on the basis of rational and logical reasoning and we should not bind ourselves to the mere fortuitous circumstances of time and death"*.

Union of India v. K.S. Subramanium- AIR 1976 SC 2435- This case held that when there is an inconsistency in decision between the benches of the same court, the decision of the larger bench should be followed.

What is the meaning of Precedent as a source of law?

Till the 19th Century, Reported Court Precedents were probably followed by the courts. However, after 19th century, courts started to believe that precedence not only has great authority but must be followed in certain circumstances. William Searle Holdsworth supported

the pre-19th century meaning of the precedence. However, Goodheart supported the post-19th century meaning.

Declaratory Theory of Precedence- This theory holds that judges do not create or change the law, but they 'declare' what the law has always been. This theory believes that the Principles of Equity have their origin in either customs or legislation. However, critics of this theory say that most of the Principles of Equity have been made by the judges and hence, declaratory theory fails to take this factor into regard.

Types of Precedents

1. **Authoritative Precedent**- Judges must follow the precedent whether they approve of it or not. They are classified as Legal Sources.

2. **Persuasive Precedent**- Judges are under no obligation to follow but which they will take precedence into consideration and to which they will attach such weight as it seems proper to them. They are classified as Historical Sources.

Disregarding a Precedent- Overruling is a way by which the courts disregard a precedent. There are circumstances that destroy the binding force of the precedent:

1. **Abrogated Decision**- A decision when abrogated by a statutory law.

2. **Affirmation or reversal by a different ground**- The judgment rendered by a lower court loses its relevance if such a judgment is passed or reversed by a higher court.

3. **Ignorance of Statute**- In such cases, the decision loses its binding value.

4. **Inconsistency with earlier decisions of High Court**

5. Precedent that is *sub-silentio* or not fully argued.

6. **Decision of equally divided courts**- Where there is neither a majority nor a minority judgment.

7. **Erroneous Decision**

Custom as a Source of Law

Salmond said that *'Custom is the embodiment of those principles which have commended themselves to the national conscience as the principles of justice and public utility'*.

Keeton said that *"Customary laws are those rules of human action, established by usage and regarded as legally binding by those to whom the rules are applicable, which are adopted by the courts and applied as a source of law because they are generally followed by the political society as a whole or by some part of it"*.

However, Austin said that Custom is not a source of law.

Roscoe Pound said that Customary Law comprises of:

1. Law formulated through Custom of popular action.

2. Law formulated through judicial decision.

3. Law formulated by doctrinal writings and scientific discussions of legal principles.

Historical School of Jurisprudence- Von Savigny considered that customary law, i.e. **law which got its content from habits of popular action recognized by courts, or from habits of judicial decision, or from traditional modes of juristic thinking**, was merely an expression of the *jural* ideas of the people, of a people's conviction of right – of its ideas of right and of rightful social control.

However, it is the Greek historical School that is considered as the innovator of custom as source of law.

Otto Van Gierke, a German Jurist and a Legal Historian, said that *"every true human association becomes a real and living entity animated by its own individual soul".*

Henry Maine believed that custom is the only source of law. He said that *"Custom is a conception posterior to that of themestes or judgment*."

Ingredients of Custom

1. Antiquity

2. Continuous in nature.

3. Peaceful Enjoyment

4. Obligatory Force

5. Certainty

6. Consistency

7. Reasonableness