**N A T I O N A L L A W C O L L E G E , L A H O R E .**

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P H I L O S O P Y O F L A W

**(Handout # 3)**

**Q2. Define Sources of Law in view of different jurists and also explain its kinds?.**

1. **I N T R O D U C T I O N :-**

Sources of law mean the sources from where law or the binding rules of human conduct originate. In other words, law is derived from sources. Jurists have different views on the origin and sources of law. As the term 'law' has several meanings, legal experts approach the sources of law from various angles. For instance, Austin considers sovereign as the source of law while Savigny and Henry Maine consider custom as the most important source of law. Natural law school considers nature and human reason as the source of law, while theologians consider the religious scripts as sources of law. Although there are various claims and counter claims regarding the sources of law, it is true that in almost all societies, law has been derived from similar sources.   
**2- M E A N I N G O F S O U R C E S O F L A W :-**

1. ***According to Oppenheim:-***

“Origin from which rules of human conduct comes into existence and acquire legal force”.

1. ***According to Vinogradoff:-***

“The process by which the rule of law may be evolved”.

1. **D E F I N I T I O N S B Y D I F F E R E N T J U R I S T S :-**
2. ***According to John Austin:-***

“Immediate author of law is the source of law”.

**Explanation:** John Austin defines the sources of law in three meanings, in the first place, he indicates immediate author of law which means the sovereign in the country and secondly, the term refers to the historical document from which the body of law can be known, e.g the Digest and Code of Justinian and lastly, it refers to the causes which have brought into existence the rules which later on, acquire the force of law, examples are customs, Judicial decisions, equity, legislation, etc.

1. **C R I T I C I S M O N A U S T I N:- (Analytical School)**

**Historical School**: -The analytical school of jurisprudence represented by John Austin is attacked by the historical school as represented by ***Von Savingny, Sir Henry Maine, Puchta etc.*** Their contention is that law is not made but is formed and they are of opinion that foundation of law lies in the common consciousness of the people which shows itself in the practices, usages and customs of the people.

**Sociological School:** The sociological school of law protests against John Austin’s view that Law emanates (Source) from the single authority in the state. According to this school, law is taken from many sources and not from one, as per this school of thought the center of gravity of legal development lies not in legislation, not in juristic science nor in juristic decisions, but in society itself.

1. ***According to Salmond:-***

The view of the salmond was that the two main sources of law were formal and material.

**Formal Source:** Formal sources are those sources from which rule of law derive its force and validity.

**Material Source:** Material sources are those from which is derived the matter, though not the validity of law. Material sources have been further categorized as;

1. **Legal Sources**
2. **Historical Sources.**
3. Legal sources are those sources which are the instruments or organs of the State by which legal rules are created. For example, Legislation and Custom. They are the gates through which new principles find admittance in the realm of law.
4. Historical Sources which rules subsequently turned into legal principles, they were first to be found in an un-authoritative form and they are not allowed by the law courts as of right. They operate only mediately and indirectly.

**Example:** Acts of Parliament and works of Bentham are material sources of English law, but Acts of Parliament become law automatically but what Bentham says may or may not become law. That depends upon its acceptance by the legislature or judiciary.

**Legal Sources of English Law:-**

Generally, law has following sources: from a written constitution, from legislation, from judicial precedent, from customs and from the writings of experts. English law proceeds chiefly from legislation and precedent.

Salmond refers in addition to legislation and precedent, there are custom and agreement which are the sources of customary law and agreement.

**Kinds of Legal Sources of Law:-**

1. Enacted law having its source in legislation.
2. Case law having its source in precedent.
3. Customary law having its source in custom.
4. Conventional law having its source in agreement.

In addition to above sources of law, professional opinions of eminent jurists may be called Juristic Law. Juristic writings and professional opinions have played a very important role in the evolution of law.

1. **C R I T I C I S M O N S A L M O N D:-**

Salmond’s classification of sources of law has been criticized by different jurists.

**Charles Allen:-** Allen criticizes Salmond for his attaching little importance to historical sources.

**Keeton:** According to Keeton, in modern times, the only formal source of law is the State and it is an organization which enforces law, therefore, it cannot be considered as source of law in technical sense.

**K I N D S O F S O U R C E S O F L A W**

1. **L E G I S L A T I O N:-**

#### LEGISLATION AS A SOURCE OF LAW

In modern times, legislation is considered as the most important source of law. The importance of legislation as a source of law can be measured from the fact that it is backed by the authority of the sovereign, and it is directly enacted and recognized by the State. The analytical school regards legislation as the sole source of law and does not attach any importance to custom and precedent and on the contrary, the view of historical school is that legislation is the least creative of the source of law.

The expression 'legislation' has been used in various senses. It includes every method of law-making. In the strict sense it means laws enacted by the sovereign or any other person or institution authorized by him. 

#### MEANING OF LEGISLATION.

The term 'legislation' is derived from the Latin word ***legis*** which means **'law'** and ***latum*** which means **"to make".** Therefore, the word 'legislation' means the making of law.

1. **Literal Meaning**: Act of process of legislating.
2. **Legal Meaning:** Process of making the positive law in written form.

#### DEFINITION OF LEGISLATION.

1. **According to Salmond:** “Legislation is that source of law which consists in the declaration of legal rules by a competent authority”.
2. **According to Austin:**“There can be no law without a legislative act”

#### Kinds of Legislation:

The kinds of legislation can be explained as follows: 

1. **Supreme Legislation:**

When the laws are directly enacted by the sovereign, it is considered as supreme legislation. One of the features of Supreme legislation is that, no other authority except the sovereign itself can control or check it. The laws enacted by the British Parliament fall in this category, as the British Parliament is considered as sovereign. 

#### Subordinate Legislation:

Subordinate legislation is a legislation which is made by any authority which is subordinate to the supreme or sovereign authority. It is enacted under the delegated authority of the sovereign. The origin, validity, existence and continuance of such legislation totally depends on the will of the sovereign authority. Salmond has further classified Subordinate legislation into the following types.

1. **Autonomous Law:**

When a group of individuals recognized or incorporated under the law as an autonomous body, is conferred with the power to make rules and regulation, the laws made by such body fall under autonomous law.

For instance, laws made by the bodies like Universities, Railway company etc. fall in this category of legislation.

**ii) Judicial Rules:**

In certain cases , legislative power has been given to the judiciary to make rules for their administrative procedures. The Supreme Court and High Courts have been conferred with such kinds of power to regulate procedure and administration.   
  
**iii) Local laws / Municipal Authorities :**

Municipal Authorities/Local Bodies are also allowed to make bye-laws for limited purposes within their areas. local bodies are recognized and conferred with the law-making powers. The rules and bye-laws enacted by them are examples of local laws.   
  
**iv) Colonial Law:**

Laws made by colonial countries for their colonies or the countries controlled by them are known as colonial laws. For a long time, However, as most countries of the world have gained independence from the colonial powers, this legislation is losing its importance and may not be recognized as a kind of legislation. 

1. **Delegated Legislation/ Laws made by the Executive:**

Another kind of subordinate legislation is executive legislation or delegated legislation. It is true that the main function of the executive is to enforce law but in certain cases, the power of making rules is delegated to the various departments of the government. This is technically called sub-ordinate legislation or delegated legislation and delegated legislation is becoming more and more important in modern times.

1. **P R E C E D E N T :-**

#### JUDICIAL PRECEDENT AS A SOURCE OF LAW

In simple words, judicial precedent refers to previously decided judgments of the superior courts, such as the High Courts and the Supreme Court, which judges are bound to follow. This binding character of the previously decided cases is important, considering the hierarchy of the courts established by the legal systems of a particular country. Judicial precedent is an important source of law, but it is neither as modern as legislation nor is it as old as custom. It is an important feature of the English legal system as well as of other common law countries which follow the English legal system. In most of the developed legal systems, judiciary is considered to be an important organ of the State. In modern societies, rights are generally conferred on the citizens by legislation and the main function of the judiciary is to adjudicate upon these rights. The judges decide those matters on the basis of the legislations and prevailing custom but while doing so, they also play a creative role by interpreting the law. By this exercise, they lay down new principles and rules which are generally binding on lower courts within a legal system.

#### MEANING OF JUDICIAL PRECEDENT

#### The word precedent is derived from the Latin Word *“Praecendentum”.*

#### Literal Meaning: to go before or prior in time.

#### Legal Meaning: The making of law by court in recognizing and applying new rules while administering justice.

#### DEFINITION OF JUDICIAL PRECEDENT

#### According to Austin: “Precedent is the judicial law”

#### According to Bentham: “Precedent is the judge made law”

#### According to Salmond: “Precedent means judgment or decision of the court of law cited as an authority for deciding a similar set of court” “

#### KINDS OF JUDICIAL PRECEDENT

1. **Authoritative Precedent**-

Judges must follow the precedent whether they approve of it or not. They are classified as Legal Sources.

1. **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.

1. **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.

1. **Ignorance of Statute**-

In such cases, the decision loses its binding value.

1. **Inconsistency with earlier decisions of High Court**
2. **Precedent that is *sub-silentio* or not fully argued.**
3. **Decision of equally divided courts**-

Where there is neither a majority nor a minority judgment.

1. **Erroneous Decision.**

#### Judicial decisions can be divided into following two parts:

**Ratio decidendi (Reason of Decision):**

Ratio decidendi' refers to the binding part of a judgment. 'Ratio decidendi' literally means reasons for the decision. It is considered as the general principle which is deduced by the courts from the facts of a particular case.

It becomes generally binding on the lower courts in future cases involving similar questions of law. 

**Obiter dicta (Said by the way):**

An 'obiter dictum' refers to parts of judicial decisions which are general observations of the judge and do not have any binding authority. However, obiter of a higher judiciary is given due consideration by lower courts and has persuasive value. 

1. **C U S T O M : -**

#### CUSTOM AS ASOURCE OF LAW

Custom can simply be explained as those long established practices or unwritten rules which have acquired binding or obligatory character. In ancient societies, custom was considered as one of the most important sources of law; In fact it was considered as the real source of law. With the passage of time and the advent of modern civilization, the importance of custom as a source of law diminished and other sources such as judicial precedents and legislation gained importance.   
  
There is no doubt about the fact that custom is an important source of law. Broadly, there are two views which prevail in this regard on whether custom is law. Jurists such as Austin opposed custom as law because it did not originate from the will of the sovereign. Jurists like Savigny consider custom as the main source of law. According to him the real source of law is the will of the people and not the will of the sovereign. The will of the people has always been reflected in the custom and traditions of the society. Custom is hence a main source of law. 

#### ORIGIN OF CUSTOM:

#### Custom is the oldest form of law making. A study of ancient law shows that in primitive society, the lives of the people were regulated by customs which developed spontaneously according to circumstances. It was felt that a particular way of doing things was more convenient than others and when the same thing was done again and again in a particular way, it assumed the form of custom.

#### MEANING OF CUSTOM:

#### Literal Meaning: Particular way of doing again and again.

#### Legal Meaning: A generally observed course of conduct.

#### DEFINITION OF CUSTOM:

#### Salmond:

#### Custom is the embodiment of those principles which have commended themselves to the national conscience as principles of justice and public utility.

#### Keeton:

#### Those rules of human action, established by usage and regarded as legally binding by those to whom the rules are applicable.

#### Kinds of Customs

Customs can be broadly divided into two classes:

**Customs without sanction:**

These kinds of customs are non-obligatory in nature and are followed because of public opinion. 

**Customs with sanction:** 

These customs are binding in nature and are enforced by the State. These customs may further be divided into the following categories:

* **Legal Custom:**

Legal custom is a custom whose authority is absolute; it possesses the force of law. It is recognized and enforced by the courts. Legal custom may be further classified into the following two types:

* + **General Customs:**

These types of customs prevail throughout the territory of the State.

* + **Local Customs:**

Local customs are applicable to a part of the State, or a particular region of the country.

* **Conventional Customs:**

Conventional customs are binding on the parties to an agreement. When two or more persons enter into an agreement related to a trade, it is presumed in law that they make the contract in accordance with established convention or usage of that trade. For instance an agreement between landlord and tenant regarding the payment of the rent will be considered under convention prevailing in this regard.

#### Essentials of a valid custom:-

#### All customs cannot be accepted as sources of law, nor can all customs be recognized and enforced by the courts. The jurists and courts have laid down some essential tests for customs to be recognized as valid sources of law which are given below;

#### Antiquity:

#### In order to be legally valid customs should have been in existence for a long time, even beyond human memory. In England, the year 1189 i.e. the reign of Richard I King of England has been fixed for the determination of validity of customs.

#### Continuous:

#### A custom to be valid should have been in continuous practice. It must have been enjoyed without any kind of interruption. Long intervals and disrupted practice of a custom raise doubts about the validity of the same.

#### Exercised as a matter of right:

#### Custom must be enjoyed openly and with the knowledge of the community. It should not have been practised secretly. A custom must be proved to be a matter of right. A mere doubtful exercise of a right is not sufficient to a claim as a valid custom.

#### Reasonableness:

#### A custom must conform to the norms of justice and public utility. A custom, to be valid, should be based on rationality and reason. If a custom is likely to cause more inconvenience and mischief than convenience, such a custom will not be valid.

#### Morality:

#### A custom which is immoral or opposed to public policy cannot be a valid custom. Courts have declared many customs as invalid as they were practised for immoral purpose or were opposed to public policy.

#### Status with regard to:

#### In any modern State, when a new legislation is enacted, it is generally preferred to the custom. Therefore, it is imperative that a custom must not be opposed or contrary to legislation. Many customs have been abrogated by laws enacted by the legislative bodies. For instance, the customary practices of Female Infanticide in India (Rajistan) , custom of Satti and child marriage have been declared as an offence.

1. **PROFESSIONAL OPINION AND RELIGION: -**

#### The professional opinions are also a source of law. These can be discussed under the heads of the Obiter Dicta of judges, general opinions of legal profession and opinions of writers.

#### Professional Opinion.

1. **Obiter dicta (Said by the way):**

An 'obiter dictum' refers to parts of judicial decisions which are general observations of the judge and do not have any binding authority. However, obiter of a higher judiciary is given due consideration by lower courts and has persuasive value.

1. **The Legal Profession:-**

The legal profession consists of the judges, the practicing lawyers and teacher of law. These branches of profession exercise powerful influence upon the development of law and many existing rules of law have their origin to the support of these legal profession.

1. **The opinion of Writers:-**

The opinion of writers of text books also help the growth of law and in international law, contributions of the jurists by writing cannot be under-mind like Grotius. The writers played a pivotal role in moulding and educating the people in the development of law

**Religion.**

Religion is also a source of law and according to Sir Henry Maine and Sir James Frazer, the religious fear of evil was the principal instrument in securing uniformity of conduct in primitive society when law did not enjoy an independent existence.

**Agreement.**

According to Sir Salmond, an agreement is also a source of law as it gives rise to conventional law.

**Conclusion.**