

Chapter : 1 Sources of Law

Meaning of Law

Law refers to specific and concrete laws laid down by specific legal system. Law includes any ordinance, bye laws, rules, regulation, notification, customs in the territory of India in the force of law.

Law in force includes laws passed before the commencement of constitution and not repealed. It may not be in operation either at all or particular areas.

Law is dynamic and changes according to the requirement of society, provides hope of security for the future.

Jeremy Bentham

He claimed nature has placed man under the command of two sovereigns — Pain and Pleasure

Based on principle of benevolence, function of law should be about the max. happiness of each individual and happiness of each will result in happiness of all.

The sovereign power of making laws should be wielded not to guarantee the selfish desire of individual but to secure common good.

Nature imposes man under to be imperative - plain and pleasures.

Functions of law is to bring happiness i.e pleasure to maximum, will result in happiness of all.

Law must consider - source, subject, extent, aspect. Remedial rules, objects, force.

Criticism ~

- > Does not take proper account of law
- > Didn't give consideration to custom as source of law
- > Didn't allow for judge to make laws.
- > Happiness of one become cost of another's happiness.

John Austin ~

Law is the command of sovereign that is backed by sanction. Law is a command which imposes a duty and the failure to fulfill the duty is met with sanctions (punishment)

Law has three main features -

- It is a command
- Given by sovereign authority
- has sanction behind it.

Criticism ~

- 1) State passes law sometime which do not command the people but gives rights and benefits among them
- 2) According to Austin sovereign doesn't have to obey any one but actually gov. cannot make laws that are violation of provision of constitution.
- 3) Austin does not provide for judges to made laws.

Natural school of Law

- 1) Natural law theory states that certain rights are inherent to human because of our nature.
- 2) Human creates law but but natural law is discovered through our unique personality
- 3) Religious influence
- 4) Natural law theory says law should reflect moral principles.

Ancient Theory

Roman

philosopher

Greek

philosopher

Ulpine

Cicero

Justinian
Digest

Heraclitus

Socrates

Plato

Ulpine : defines law as "the art of or science of what is equitable and good."

Cicero : said law is "the highest reason implanted in nature"

Justinian : defines law as "the standard of what is just and unjust"

In all these definitions "justice" is the main and guiding element of law.

Heraclitus: identified three main features of law of nature - destiny, reason, order. He said all these three elements are inter related and interconnected.

Socrates: He was the view that just like natural moral law, there is also 'human insight' that helps a man to distinguish between good and bad.

Plato: His theory of natural law was characterized by two main aspects - wisdom and reason.

Medieval Theory

Medieval theory is based on idea of god. According to this theory law of nature are seen as god's law this means laws given by god are considered the true way to understand what is right and wrong. So in this way law is a part of Dharma.

Renaissance Theory

Reason is the main foundation of this theory. It has two distinct features -

More secular, political and founded on human reasons

Advocates natural rights of man and state.

Hugo Grotius: He build theory on social contracts.

The duty of sovereign is to safeguard its citizen

Sovereign is bound by natural law.
Immanuel Kant: man is guided by his own conscience. According to him, natural law is not only based on reason but on right reason.

Modern Theory

It rejects the older theory and their concepts. Revival of Natural law in a modified manner. Stammler - Law of nature means the just law with harmonious purposes in the society.

Sources of Indian Law

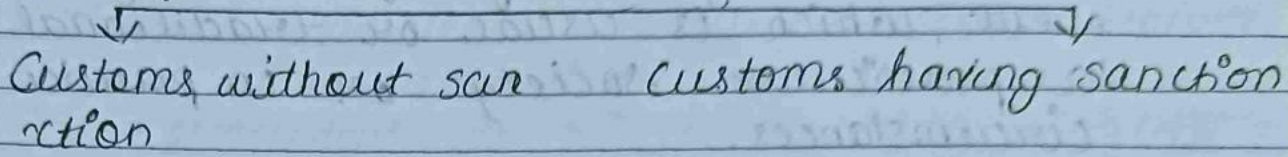
Indian Evidence Act 1872 also recognize custom as source of law. Section 13 of this Act deals with relevancy of facts when right or custom is in question.

As per Hindu Marriage Act 1955 Section 7 Hindu marriage may be solemnized in accordance with customary rites and ceremonies of either party.

As per section 29(2) of Hindu marriage Act nothing contained in this Act shall be deemed to affect any right recognized by customs.

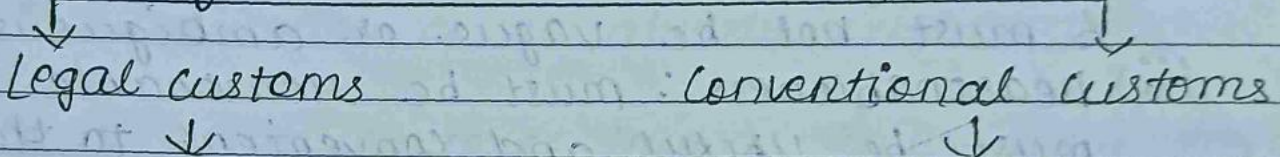
Custom or Customary law: Custom is the most ancient sources of law and has held the most important place in the past, through its

importance is now diminishing with the growth of legislature.



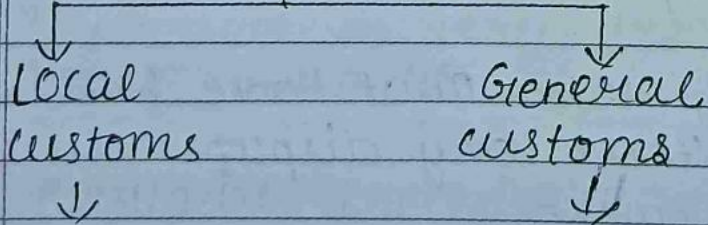
These customs are non-obligatory and are observed due to the pressure of public. called as "positive morality."

These customs are enforced by the state or law.



Operates as a binding rule of law. They have been recognised and enforced by the court. They have become a part of the law.

These customs are binding due to an agreement between the parties & not due to any legal authority. Before a court treats the conventional customs as incorporated in a contract.



Local customs
↓
customs which prevails in some definite locality & constitute source of law for that place only.

General customs
↓
General custom that prevails throughout the country & constitute one of the source of law.

Must show that convention is clearly established & known to parties

→ Cannot alter general law
→ must be reasonable.

As Oxford dictionary a custom is an action activity, way of behaving or an event, which is usual or traditional in a particular society or in particular circumstances.

Requisites of a valid Custom ↪

- i) Immemorial (Antiquity): Custom must be proved to be immemorial it must be ancient.
- ii) Certainty: must be certain and definite & must not be vague or ambiguous
- iii) Reasonableness: must be reasonable and must be useful and convenient to the society.
- iv) Compulsory observance: must be continuously observed without interruption from times.
- v) Conformity with law and public morality must not be opposed to morality or policy nor must it conflict with law
- vi) Unanimity of opinion: must be general or universal
- vii) Peaceable Enjoyment: must have been enjoyed peaceably without any dispute in a court or otherwise
- viii) Consistency: must be consistency among the customs. it should not conflict with other established customs.

Judicial Decision or Precedents ↵

Judicial precedents are an important source of law. The rule that a court decision becomes a precedent to be followed in similar cases is known as doctrine of stare decisis.

Kinds of Precedents ↵

1. Declaratory and original precedents -

A declaratory precedent is one which is merely the application of an already existing rule of law.

It is a good source of law as an original precedent, rule is applied because it is already a law.

An original precedent is one which creates and applies a new rule of law, it is law for the future because it is now applied.

In advance countries, declaratory precedents are more numerous.

No. of original precedents is small, but their importance is very great.

Legal authority of both is exactly same.

2. Persuasive Precedents -

Judges are not obliged to follow. It's not a legal source of law, but is regarded as a historical source of law. H.C are only

persuasive precedents in the other H.C.

3. Absolutely Authoritative Precedents -

Judges must follow whether they approve of it or not. Its binding force is absolute and the judges must follow it.

Every court in India is absolutely bound by the decision of court superior to itself. Subordinate courts are bound to follow the decision of H.C.

H.C. is bound to follow the decision of SC.

4. Conditionally Authoritative Precedents -

Ordinarily binding on the court before it is liable to be disregarded.

The court is entitled to disregard a decision if it is a wrong way i.e. contrary to law and reason.

High Courts

The decision of HC are binding on all subordinate courts and tribunals within its jurisdiction.

The decision of one HC have only a persuasive value in the jurisdiction of another court.

In case of any conflict between the two decisions of co-equal benches, generally the later.

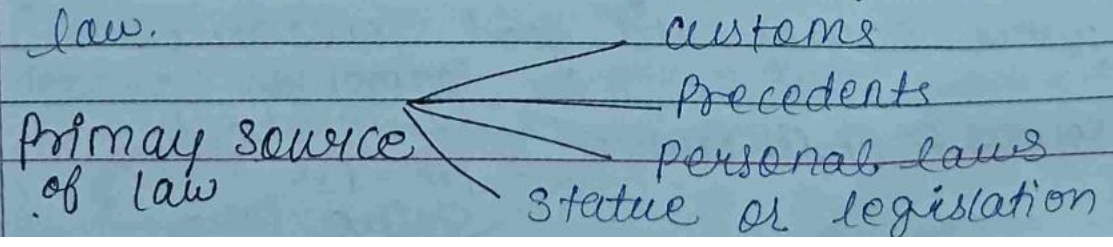
decision is to be followed.
 H.C with single judges constitutes the smallest Bench, bench of two judges is known as Division bench, Three or more judges constitute a full bench.
 S.C is the highest court and its decision are binding on all the courts.

Doctrine of stare Decisis

to follow the (adhere) the decision and do not unsettle things which are established.
 Doctrine intended to bring about certainty and uniformity in the law.
 The settled decision is generally binding on court and should be followed in similar cases like cases should be treated alike
 This rule is based on public policy and expediency.

obiter Dicta

Latin expression which means "said by the law"
 This statements thus go beyond the requirements of case.
 The judges are not bound to follow them although they can take advantage of them sometimes help the cause of the reform of law.



Ratio Decidendi -

When we say that a judicial decision is binding as a precedent, what we really mean is that a rule or principle formulated and applied in that decision must be applied when similar facts arise in future.

Where an issue requires to be answered on principles, the principles which are deduced by way of material facts and eliminating immaterial elements is known as Ratio Decidendi.

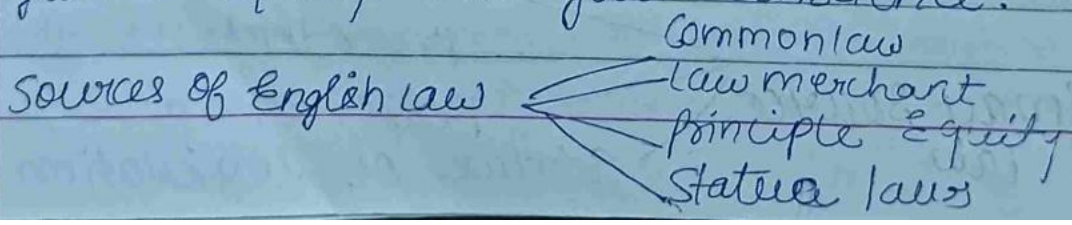
Such principle is not only applicable to that case but to other cases also which are of similar nature.

Secondary Source of Indian Law

Justice, Equity and Good conscience

In absence of any rule of a statutory law or custom or personal law, the Indian courts apply to the decision of a case known as "justice, equity and good conscience".

The charter of several HC established by British Government directed that when the law was silent on a matter, they should decide the case ^{on} the accordance with justice equity and good conscience.



How laws are made effective

By requiring damages to be paid for an injury due to disobedience.

By requiring to complete an obligation he has failed to perform.

By preventing disobedience

By administering some form of punishment.

Roscoe Pound's classification of interest.

1. Individual Interest:-

(a) Interest of personality - It includes reputation, honour, privacy etc.

(b) Interest in domestic relation this etc includes relationship of parents children.

(c) Interest of substance - includes freedom of association, freedom of industry in contract, continuity of employment etc.

2. Public Interest

(a) Interest of state as a juristic person This includes integrity, freedom of action and honour of state's personality.

(b) Interest of state as a guardian of social interest.

3. Social Interest

(a) social interest in general security include general safety, peace and order

(b) social interest in general morals like laws dealing with prostitution, gambling, begami.

(c) social interest in general progress

(d) social interest and individual life.