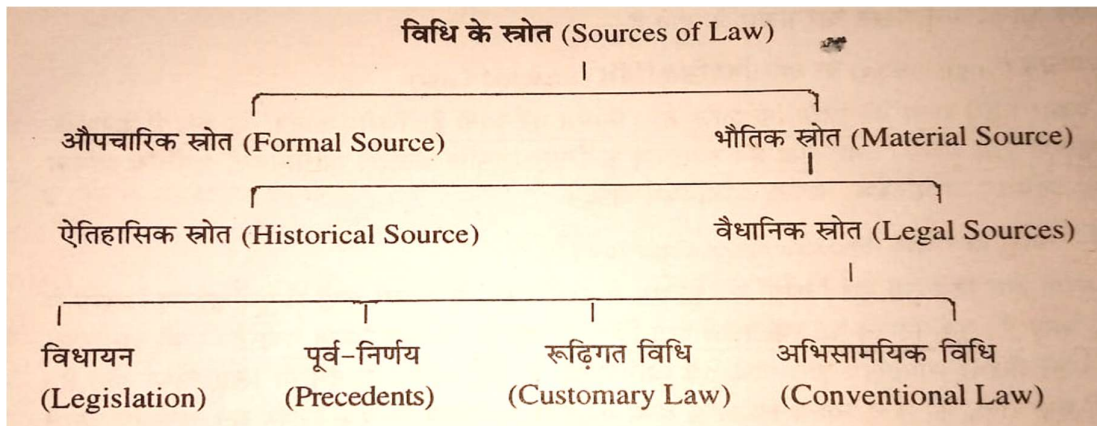


LL.M IInd Sem
Jurisprudence II (L- 2002)
Sources of law

Introduction

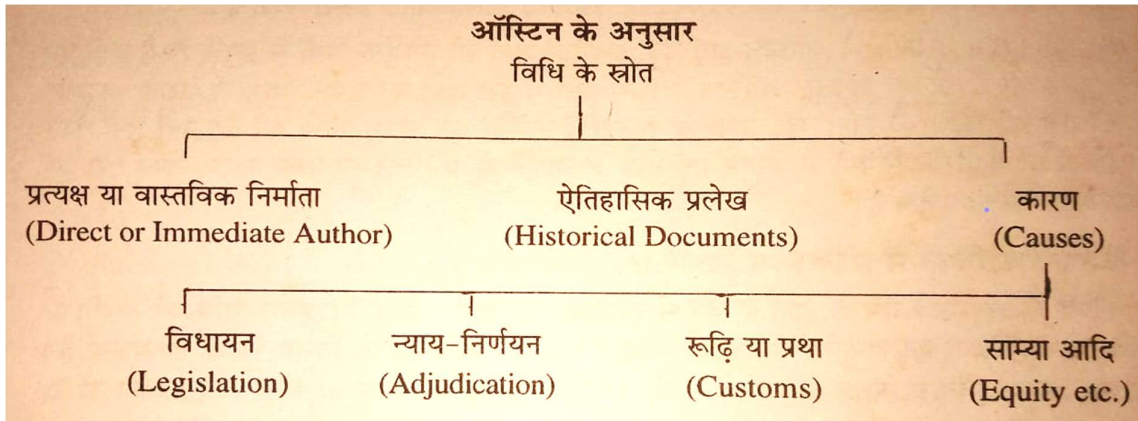
The meaning of the term “sources of law” differs from writer to writer. The positivists use the term to denote the sovereign or the State who makes and enforces the laws. The historical school uses the term to refer to the origins of law. Others use it to indicate the causes or subject matter of law. Prof. Fuller, in his “Anatomy of the Law”, states that a judge interprets and applies certain rules to decide upon a case. Such rules are obtained from various places which are known as “sources”. He further goes on to give examples of the common sources of law such as codified laws, judicial precedents, customs, juristic writings, expert opinions, morality and equity. Holland has defined the term to mean the sources of the knowledge regarding law.

Salmond’s Classification



According to Salmond, there are two main sources of law- formal and material. Formal sources are those from which law derives its validity and force, that is, the will of the State which is expressed through statutes and judicial decisions. He sub-divided the material sources into legal sources and historical sources. Legal sources comprise of legislations, precedent, custom, agreement and professional opinion.

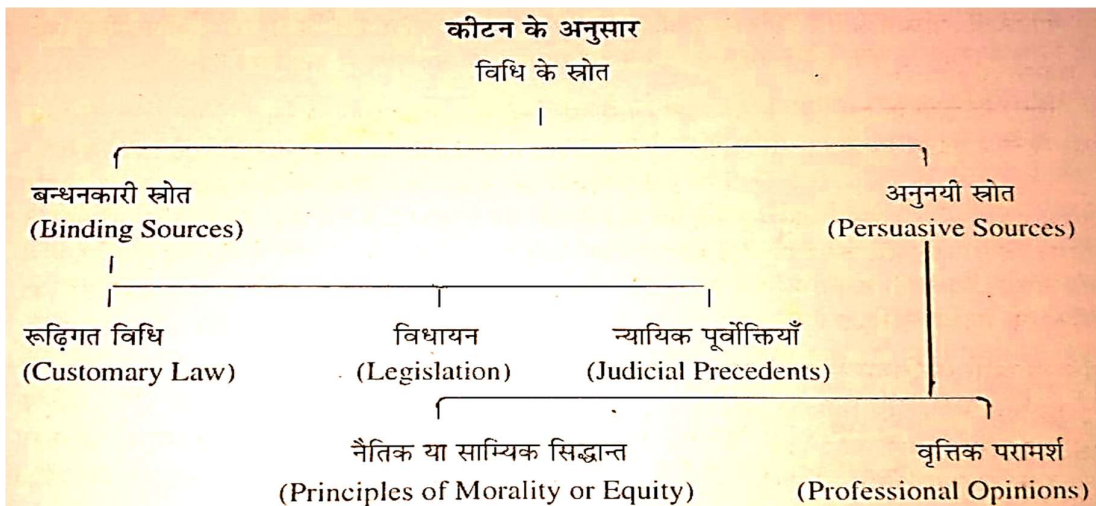
Austin's Classification: -



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 This term refers to the historical document from which the body of law can be known.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

Keeton's Classification: -



Keeton said that the sources of law has emerged as a critique of Salmond's classification. He defines the term as those materials from which law is eventually fashioned through judicial activity. He classified the sources of law into- binding sources and persuasive sources. Binding sources are those

which have to be necessarily followed by the courts. Legislations, judicial precedents and customs are examples of such source. Persuasive sources are those which come into play when there is absence of any binding source on any particular subject. Foreign precedents, professional opinions and principles of morality or equity are examples of persuasive sources of law.

Custom as A Source of Law

Introduction

The word 'custom' is derived from an old French word 'Costume'. Some says that the word 'custom' is based on Latin word 'Consuetudo'. In Hindi the word 'custom' means 'reeti', 'vyavahar', 'rasm', or 'riwaj'. Custom enjoys a very important place in every legal system.

Definition

According to Allen – 'custom as the uniformity of habits or conduct of the people under like circumstances'

Salmond: - custom as those principles that are acknowledged and approved not by the power of the state, but by public opinion of the society at large.

Holland: - He defined custom as "a generally observed course of conduct."

Austin: - According to Austin, "custom is a rule of conduct which the governed observe spontaneously and not in a pursuance of law set by a political superior".

Halsbury: - custom is some kind of special rule which is in actual existence and possible followed from time immemorial and which has acquired the force of law in a specified territory, although it may be contrary to or inconsistent with the general law of the land.

Harprasad v. Shivdayal:- In this case the judicial committee of the Privy Council observed, custom as a rule which in a particular family or in a particular district or in a particular sect, class or tribe, has from long usage obtained the force of a law.

Origin of custom: - some jurists are of the opinion that customs originate because of necessity or convenience. the opinion of the historical school that customs have their basis in the common consciousness of the people .In analytical school assert that judicial decisions are the basis of customs. Custom came into existence because of the tendency of human beings to imitate each other.

Essentials element of a valid custom

1) Reasonableness: - A custom ought to be reasonable. Whether a particular custom is reasonable or not, shall depend upon the discretion of the court. This is one of the most difficult question what is reasonable? Allen said seems to be not that a custom will be admitted if reasonable, but it will be admitted unless it is unreasonable . The divisional court of the king s bench defined as “fair and proper, and such as reasonable, honest and fair-minded men would adopt”.

2)Conformity with Statutory Law: - In order to be valid, a custom must be in conformity with statutory law. Most of the legal systems of the world have laid down. A rule that a custom can be abrogated by a law passed by the legislature. However, in some cases, a custom can even override the codified law.

3) Morality: - Mostly custom are on the basis of morality.

4) Certainty: -custom must be certain. A custom, however, ancient must not be indefinite and uncertain. Certainty is an indispensable condition of a valid custom. unless a custom is certain it cannot be proved to have been time out of mind. Jessel M,R, said “when we told that custom must be certain that relates to the evidence of a custom”.

5) Observance: - Custom must be followed by the all person.

6) Continuity: - In order to be recognized as a custom must be practice continuously.

7)Peaceful Enjoyment: - A custom should have been enjoyed peacefully in the society in order to be recognized as law.

8) Binding or obligatory force: - Blackstone stated that a custom must be supported by the opinio necessitatis. The public which is affected by the usage must treat it as obligatory and not a facultative one.

9)Public Policy :- A valid custom should not be opposed to public policy .in this sence ,public policy implies the principles on which the social laws are based .

Classification of custom

1. Legal Customs

2. Conventional Customs

1. Legal Customs: - These are those customs which are recognized by the courts and thus operate as the law of the land. They are divided into two categories,

A) General Customs: - These customs are prevalent throughout the territory of a state and the general customs constitute one of the sources of the common law of the land. They are considered to a part of the law of the land.

B) Local Customs: - These customs are applicable only to a particular locality, like, city village, district etc. These are geographical local customs and personal local customs. These customs of particular localities are recognised by the courts even in derogation of the common law.

2. Conventional Customs: -The authority of conventional customs or usages depends upon their implicit incorporation into contracts. These are those customs which are incorporated into an agreement and are applicable only to the parties to that agreement. Parties to an agreement may agree to follow then either expressly or impliedly. A conventional custom is also called 'usage'

When Custom Become Law: -There are two theories

1. Historical Theory.

2. Analytical Theory.

1) Historical Theory: -The main exponents of this theory are Karl Von Savigny, his disciple Puchta, Blackstone, and Sir Henry James Sumner Maine. According to Savigny, custom is per se law. He says law is based on custom. A custom carries its justification in itself. According to Puchta, the custom is independent of the law of sovereign. It is independent of any declaration or recognition by the state. Sir Henry Maine regards custom as source of formal law. According to Manu, “custom is transcendent law”. J.C.Gray also contends that great many laws were brought in not only without the wishes of the people but against the wishes of the great mass of them. Allen also pointed out that all customs cannot be attributed to the common consciousness of the people. According to this theory, the growth of law does not depend upon the arbitrary will of any individual. Custom is derived from the common consciousness of the people. It springs from an inner sense of right. Law has its existence in the general will of the people. The Historical theory has been criticized by Paton as “The growth of most of the customs is not result of any conscious thought but of tentative practice”

2) Analytical theory: - The main exponent of this theory is Austin. According to him, custom is not law in itself, but it is a source of law. If a custom is not recognized by the legislation and approved by the judiciary, it will not become a law. Gray also says that true view is that the law is what the judges declare. The legislation, precedents, customs and morality are all sources of law. According to Holland, customs are not laws when they arise but they are largely adopted into laws by State recognition. A custom is a law only to the extent to which, and from the time, when the sovereign sanctions it. According to him, custom is a legal material and source of law. This view is also supported by Salmond. Gray also concedes that custom is one of the sources of law but it is certainly not the sole source of law. The Analytical theory has been criticized by Allen in these words-“Customs grow by conduct and it is therefore, a mistake to measure its validity solely by the element or express sanction accorded by courts of law or by other determinate authority”

Difference Between Custom and Prescription: -

1. Custom is long practice operating as a source of law; prescription is long practice operating as a source of rights.
2. Historically, a prescription is a personal custom that is to say, a custom limited to a particular person or his predecessor in title, whereas, a local custom is limited to an individual place.

3. When a course of conduct is practiced for a time it gives rise to a rule of law known as custom, but if it gives rise to a right, it is called prescription.
4. In case of custom, the old rule as to time immemorial still subsists, but in case of prescription the fiction of lost grant operates and it is governed by Statutory prescribed time. Thus, a prescriptive right to air and light can be acquired by uninterrupted use for period of twenty years.
5. A custom originates from long usage, whereas, a prescription originates from waiver of a right.
6. A custom claim is based upon custom when it depends on a general rule of property. A prescriptive right, on the other hand, is personal to the claimant.
7. The limitation of reasonableness which, we shall see, applies to customary rights has no application to claim based on prescription.
8. Custom is based on long usage, but prescription is based on lost grant and operates as sources of right.
9. A custom must be reasonable and conform to justice, public policy and utility, but that is not necessary in the case of prescription.
10. Custom is a generally observed course of conduct and has the force of law on account of long usage. Prescription means the acquisition of right or title by user or possession in the manner laid down by law
11. Custom must be ancient to make it binding, whereas prescription requires only a period of 20 years.
12. Custom has given rise to law, whereas, prescription has given rise to legal rights.

For further clarification you may reach us via

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