

**LL.B. (Hons.) (Second Year) III<sup>rd</sup> Semester**

**Paper - I**

**Subject – Jurisprudence - I**

**Unit – IV: Sources of Law**

**Topic: Custom**

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- **Sources of law:**

To have a clear and complete understanding of the law, it is essential to understand the sources of law. Sources of law mean the sources from where the law or the binding rules of human conduct originate. In other words, the law is derived from sources. Jurists have different views on the origin and sources of law, as they have regarding the definition of law. As the term 'law' has several meanings, legal experts approach the sources of law from various angles. For instance, Austin considers the 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 counterclaims regarding the sources of law, it is true that in almost all societies, the law has been derived from similar sources **Classification of Sources:**

- **According to Austin: The source of law includes three meanings –**
  1. Direct authority (sovereign)
  2. Historical documents (codes).
  3. Causes that make society's laws the force of law. (legislation, customs etc.)
- **Salmond, an English Jurist, has classified sources of law into the following categories:**
  1. **Formal Sources of Law:** These are the sources from which law derives its force and validity. A law enacted by the State or Sovereign falls into this category.
  2. **Material Sources of Law:** It refers to the material of law. In simple words, it is all about the matter from where the laws are derived. Customs fall in this category of law.

However, if we look around and examine the contemporary legal systems, it may be seen that most legal systems are based on legislations. At the same time, it is equally true that sometimes customs play a significant role in the legal system of a country. In some of the legal systems, court decisions are binding as law.

**These sources are further divided into two sources: legal sources and historical sources.**

**Legal sources:** Legal resources that are the sources which are not only in fact but also in law and officially.

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- i. Legislation (enacted law)
- ii. Precedents (case law)
- iii. Customs
- iv. Conventional law (based on agreements e.g., local law, treaties etc.)

**Historical sources:** Historical sources are those sources that are really in fact only and unauthorized.

- Example:
- Legal writings,
- Juristic opinions,
- Foreign judgements,
- Constitution etc.

#### **Common sources of law:**

Three major sources of law can be identified in any modern society are as follows:

1. Custom
2. Judicial precedent
3. Legislation

### **1.) Custom as a Source of Law:**

A custom, to be valid, must be observed continuously for a very long time without any interruption. Further, a practice must be supported not only for a very long time, but it must also be supported by the opinion of the general public and morality. However, every custom need not become law. For example, the Hindu Marriages Act, 1955 prohibits marriages which are within the prohibited degrees of relationship. However, the Act still permits marriages within the prohibited degree of the relationship if there is a proven custom within a certain community.

***Custom can simply be explained as those long-established practices or unwritten rules which have acquired binding or obligatory character.***

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In ancient societies, the 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.

### **Can Custom be the law:**

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 the law. Jurists such as Austin opposed custom as a 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.

**E.g.,** In India **Saptapadi** is an example of customs as a source of law. It is the most important rite of a Hindu marriage ceremony. The word, Saptapadi means "Seven steps". After tying the Mangalsutra, the newly-wed couple takes seven steps around the holy fire, which is called Saptapadi. **The customary practice of Saptapadi has been incorporated in Section 7 of the Hindu Marriage Act, 1955.**

### **Kinds of Customs:**

Customs can be broadly divided into two classes:

- i. **Customs without sanction:** These kinds of customs are non-obligatory in nature and are followed because of public opinion.
- ii. **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:
  - a.) **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.
  - b.) **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

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and tenant regarding the payment of the rent will be governed by 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. These tests are summarized as follows:

- 1. 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 the validity of customs. However, in India, there is no such time limit for deciding the antiquity of the customs. The only condition is that those should have been in practice since time immemorial.
- 2. 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.
- 3. 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.
- 4. 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.
- 5. 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. Bombay High Court in the case of *Mathura Naikon v. Esu Naekin*<sup>1</sup>, held that, the custom of adopting a girl for immoral purposes is illegal.
- 6. 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 in India. For instance, the customary practice of child marriage has been declared as an offence. Similarly, adoption laws have been changed by legislation in India.

<sup>1</sup> 1880 ILR 4 Bom 545

### **Importance of custom as a source of law in India:**

Custom was the most important source of law in ancient India. Even the British initially adopted the policy of non-intervention in personal matters of Hindus and Muslims.

After independence and the enactment of the Constitution, the Indian Parliament took many steps and abrogated many old customary practices by some progressive legislation. Hindu personal laws were codified and the Hindu Marriage Act, 1955 and the Hindu Adoption Act, 1955, were adopted. The Constitution of India provided a positive environment for these social changes. After independence, the importance of custom has definitely diminished as a source of law and judicial precedent, and legislation has gained a more significant place. A large part of Indian law, especially personal laws, however, are still governed by the customs

- i. Hindu Personal Laws
- ii. Hindu Marriage Act, 1955
- iii. Hindu Succession Act, 1956,
- iv. Hindu Minority and Guardianship Act. 1956 and
- v. Hindu Adoptions and Maintenance Act, 1956

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