

## THE „SOURCE OF LAW“CATEGORY

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### Abstract

At the end of the twentieth century and the beginning of the twenty-first century, processes of globalization led to significant changes in law and its sources. New sources of law - constitutions and international treaties, have an increasingly important role in law. The relative weight of the right created at the supranational level is growing. International law integrates into national legal systems and takes precedence over national law.

At the same time, written law is "cloned" into the digital space, creating the ultimate accessibility from anywhere in the globe. It can be assumed that in the future the digitization of the sources of law will lead to a significant reduction of their national and cultural specificities and limitations.

**Keywords:** principles of law, judicial precedent, positive law, constitutions, treaties, statutes, usage, and customs.

## 1. INTRODUCTION

Sources of law mean the sources from where law or the binding rules of human conduct originate. In other words, law 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 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. THE „SOURCE OF LAW“CATEGORY

### 2.1 Classification of Sources of Law

Formal Sources of Law:

These are the sources from which law derives its force and validity. Law enacted by the State or Sovereign falls into this category.

Material Sources of Law:

It refers to the material of law. In simple words, it is all about the matter from where the laws 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.

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

- Custom
- Judicial precedent
- Legislation

## **2.2 Custom as a Source 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.

### **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 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:

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 practice of child marriage has been declared as an offence.

### **2.3 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. It is important to understand the extent to which the courts are guided by precedents. It is equally important to understand what really constitutes the judicial decision in a case and which part of the decision is actually binding on the lower courts.

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 dictum of a higher judiciary is given due consideration by lower courts and has persuasive value.

LEGISLATION AS A SOURCE OF LAW

In modern times, legislation is considered as the most important source of law. The term 'legislation' derived from the Latin word legis which means 'law' and latum which means "to make" or "set". Therefore, the word 'legislation' means the 'making 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 recognised by the State. 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 authorised by him.

#### Kinds of Legislation

The kinds of legislation can be explained as follows:

##### 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. Subordinate legislation further can be classified into the following types

##### 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, incorporated companies etc. fall in this category of legislation.

##### Judicial Rules:

In some countries, judiciary is conferred with the power 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.

##### Local laws:

In some countries, local bodies are recognized and conferred with the law-making powers. They are entitled to make bye-laws in their respective jurisdictions. The rules and by-laws enacted by them are examples of local laws.

##### 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.

##### Laws made by the Executive:

Laws are supposed to be enacted by the sovereign and the sovereignty may be vested in one authority or it may be distributed among the various organs of the State. In most of the modern States, sovereignty is generally divided among the three organs of the State. The three organs of the State namely legislature, executive and judiciary are vested with three different functions. The prime responsibility of law-making vests with the legislature, while the executive is vested with the responsibility to implement the laws enacted by the legislature. However, the legislature delegates some of its law-making powers to executive organs which are also termed delegated legislation. Delegated legislation is also a class of subordinate legislation. In welfare and modern states, the amount of legislation has increased manifold and it is not possible for legislative bodies to go through all the details of law. Therefore, it deals with only a fundamental part of the legislation and wide discretion has been given to the executive to fill the gaps. This increasing tendency of delegated legislation has been criticized. However, delegated legislation is resorted to, on account of reasons like paucity of time, technicalities of law and emergency. Therefore, delegated legislation is sometimes considered as a necessary evil.

### **3. CONCLUSION**

The law and the legal system are very important in any civilization. In modern times, no one can imagine a society without law and a legal system. Law is not only important for an orderly social life but also essential for the very existence of mankind. Therefore, it is important for everyone to understand the meaning of law.

At the end of the twentieth century and the beginning of the twenty-first century, processes of globalization led to significant changes in law and its sources. New sources of law - constitutions and international treaties, have an increasingly important role in law.

At the same time, written law is "cloned" into the digital space, creating the ultimate accessibility from anywhere in the globe. It can be assumed that in the future the digitization of the sources of law will lead to a significant reduction of their national and cultural specificities and limitations (Bekariya, 1993a, s.32; Bogdanovskaya, 1993b, s.32; Boychev, 2009, ss.396-416; Buzov, 2010a, s.52; Chernichenko, 1999, s.290; Cruz, 1993s, p.62; David, 1996; Mac Carmick, Summers, 1997a, p.533; Manev, 2015, s.71; Milkova, 2002a, ss.180-182; Monteskyo, 1984, ss. 227-228; Pavlova, 1995a, ss.76-80; Smilkov, 2011, ss. 18-19; Stalev, 1997b, s.7; Stalev, 1997c; Spiridonov, 1995b, s. 92; Stoychev, 2002b, s. 46; Tashev, 2001, ss.165-170; Tashev, 2010b, s.21; Tunkin, 1986, s.43).

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