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Analysis of law and sources of law

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Abstract
Morris writes: "To a zoologist, a horse suggests the genus mammalian quadruped, to a traveler a means of transportation, to an average man the sports of kings, to certain nations an article of food." Likewise, law has been variously defined by various individuals from different point of view and hence there could not be and is not any unanimity of opinion regarding the real nature of law and its definition. There is a lot of literature on the subject of law and spite of that, different definitions of law have been given. The term "sources of law" is used in different senses. The general meaning of the word "sources" is "origin". There is a difference of opinion among the jurists regarding the sources of law. C.K. Allen uses it in the sense of agencies through which the rules of conduct acquire the character of law by becoming definite, uniform and compulsory.

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Introduction
Law-Definition
In the words of Thurman Arnold: "Obviously, law can never be defined. With equal obviousness, however, it should be said that the adherents of the legal institution must never give up the struggle to define law, because it is an essential part of the ideal that it is rational and capable of definition. Hence, the verbal expenditure necessary in the unkeep of the ideal of 'law' is colossal and never ending. The legal scientist is compelled by the climate of opinion in which he finds himself to prove that an essentially irrational word is constantly approaching rationality." A similar view is expressed by Lord Lloyd: "Since much juristic ink has flowed in an endeavor to provide a universally acceptable duration of law, but with little sign of attaining that objective." R. Wollheim points out that much of the confusion in defining law has been due to the different types of purpose sought to be achieved.

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Various schools of law have defined law from different angles. Some have defined it on the basis of nature. Some concentrate mainly on its sources. Some define it in terms of its effect on society. There are others who define law in terms of the end or purpose of law. A definition which does not cover various aspects of law is bound to be imperfect.

According to Justinian: "Law is the king of all mortal and immortal affairs, which ought to be the chief, the ruler and leader of the noble and the base and thus the standard of what is just and unjust, the commander to animals naturally social to what they should do, the forbidder of what they should not do." Ulpian defined law as "the art or science of what is equitable and good." Cicero said that law is "the highest reason implanted in nature". Pindar called law as "the king of all, both mortals and immortals."

Demosthenes wrote: "Every law is a gift of God and a decision of sages." Again, "this is law to which all men yield obedience for many reasons and especially because every law is a discovery and gift of God and at a same time the decision of the wise men, a rightening of transgressions, both voluntary and involuntary, and a common covenant of a State, in accordance with which it beseeches all men in the State to lead their lives."

Blackstone writes: "Law in its most general and comprehensive sense signifies a rule of action and is applied indiscriminately to all kinds of actions, whether animate or inanimate, rational or irrational. Thus, we say the laws of gravitation, optics or mechanics, as well as the laws of nature and nations."

The view of Kant was that law is "the sum total of the conditions under which the personal wishes of one man can be combined with the personal wishes of another man in accordance with the general law of freedom." Hegal defines law as "the abstract expression of the general will existing in or for itself."

Kelsen defines law as the depsychologised command. Though Kelsen defines law in terms of command, he uses the term differently from Austin. The sovereign of Austin does not come into the picture in the definition of law given by Kelsen.

Ehrlich includes in his definition of law all the norms which govern social life within a given society. Pound defines law as "a social institution to satisfy social wants." According to

Bentham: "Law or the law, taken indefinitely, is an abstract or collective term, which when it means anything, can mean neither more nor less than the sum total of a number of individual laws taken together" Salmond defines law as "the body of principles recognized and applied by the State in the administration of justice."

Sources of Law

The term "sources of law" is used in different senses. The general meaning of the word "sources" is "origin". There is a difference of opinion among the jurists regarding the sources of law. C.K. Allen uses it in the sense of agencies through which the rules of conduct acquire the character of law by becoming definite, uniform and compulsory. Vinogradoff uses it as the process by which the rule of law may be evolved. Oppenheim uses it as a name for a historical fact out of which rules of conduct come into existence and acquire legal force. According to Holland, the expression "sources of law" is sometimes employed to denote the quarter whence we obtain our knowledge of the law, e.g., whether from the statute book, the reports or esteemed treaties. Sometimes it is used to denote the ultimate authority which gives them the force of law, i.e., the State. Sometimes it is used to indicate the causes which, as it were, automatically brought into existence rules which have subsequently acquired that force viz., custom, religion and scientific discussion. Sometimes it is used to indicate the organs through which the State either grants legal recognition to rules previously unauthoritative or itself creates new law, viz., adjudication, equity and legislation. Rupert Cross writes that the phrase "source of law" is used in several different senses. First, there is the literary source, the original documentary source of our information concerning the existence of a rule of law. In this sense, the law reports are a source of law, whereas a textbook on tort or contract, or a digest of cases falls into the category of legal literature. Next, there are the historical sources of law, the sources-original, mediate or immediate- from which rules of law derive their content as a matter of legal history. In this case, the writings of Bracton and Coke and the works of other great exponents of English Law are sources of law, for they enunciate rules which are now embodied in judicial decisions and Acts of Parliament. There are two main sources of law, FORMAL and MATERIAL SOURCES. Material sources can further be sub-divided into LEGAL and HISTORICAL SOURCES

Formal Source

According to Salmond, formal sources are those sources from which the law derives its force and validity. It is the will of the state, as manifested in statutes or, decisions of the Courts. Prof. Allen considers that the conception of a "formal source" is wholly unnecessary since it only means that the State will recognize as law that which is law.

Material Sources

According to Salmond, material sources are those sources from which the matter of law takes its shape. These are of two types:

- LEGAL MATERIAL SOURCES- Legal material sources are those sources which are recognized as such by the law itself.
- These sources are authoritative and are allowed by the courts as of right. The legal sources are the only gates through which new principles can find entrance into the law.
- Historical Material Sources- These sources are unauthoritative lacking formal recognition by the law. They have no legal recognition. They operate indirectly and mediatly. They influence more or less extensively the course of legal development, but they speak with no authority.
- Customs- Customs may be classified into (1) immemorial, and other than the immemorial. Immemorial customs are those which have stood the test of time and have become recognized all over the land.
- Customs which are not immemorial were accepted by the judges only when they felt it was desirable to do so and when they found those customs to be reasonable, but those customs didn't had that force of law as immemorial ones. Customs have given rise to customary law, and were recognized by the courts as compulsory rules of conduct.
- Judicial Decisions/Precedents- Decisions given by Judges marked a very important source of the law. Like the sculptors who work with chisel and marble or bronze and make beautiful works of art, so did the judges work on the raw material of custom supplied by merchants or other satisfactory evidence. The decisions given by the judges come to be known as precedents or case law. A precedent is that which is meant to be followed by others on subsequent occasions. What a judge says is followed by a brother judge in the same court, sitting as a single judge. The decision of a superior court, like the High Court, is binding on inferior courts, and conditionally binding upon judges sitting singly in the same High Court, i.e. of the same state. Such decisions are called binding precedents. But the judgements of foreign courts are not binding on our courts here, but they have a guiding efficiency. Our law courts here may follow or refuse to follow them. Such judgements are called persuasive precedents.
- Acts of Legislature- Acts passed by a law making body are an important source of law. Each law passed by a legislature is a contribution to law. But a particular law which is limited in its application to a particular person cannot be regarded as contribution to law.
- Equity- Soon the legal system was found too rigid to be good at all times and in all cases. In Rome, the Practor who was the supreme magistrate of the realm, and, in England, the Lord Chancellor who was the keeper of the conscience of the English Sovereign, and in India the King or the Rana who was the fountain of justice and the final and highest court before whom the subject could lay his grievances, came to supplement the rigid principles of law by the softening and graceful influence of the voice of conscience. If there is a conflict between equity and law, it is the law which must prevail. Equity can supplement the law when there is a gap in it, but it cannot supplement the law. { B. Parmanand V. Mohan Koikal, (2011)4 SCC 266}.
- Conventions: Conventions, contractual relations, and treaties between nations may also be regarded as an important source of law. What is in civil law may even be

overridden by treaty between two nations. Conventions create what is known as conventional law. If a conventional is ratified by India its contents become binding on the Indian Legal System. { Suchita Srivastava V. Chandigarh Administration, (2009)9 SCC 1}.

- Criticism By Allen: The classification of sources of law into formal and material sources made by Salmond has been criticized by many jurists including Allen. Allen has criticized Salmond for his attaching little importance to the historical sources.
- Criticism By Keeton: According to Keeton, the only formal source of law is the State in modern times but the State is an organization enforcing law. Therefore, it cannot be considered as a source of law in the technical sense.
- Keeton's Classification of Law
  1. The binding source of law: They are binding on the Judge, and he is not independent in their application. They are legislation, judicial precedents and customary law.
  2. Persuasive sources: They are useful when there are no binding sources on a particular point. Some of such sources are professional opinions and principles of morality or equality.

Legislation as a Source of Law

The term "Legislation" is derived from two Latin words, 'legis' meaning 'law' and 'latum' meaning 'to make'. Etymologically, legislation means the making or the setting of law.

It may be defined as the promulgation of legal rules by an authority which has the power to do so. According to Gray, legislation means "the formal utterances of the legislative organs of the society." According to Austin: "There can be no law without a legislative act."

The view of the analytical school is that typical law is a statute and legislation is the normal process of law-making. The exponents of this school do not approve of this usurpation of the legislative functions by the judiciary. They also do not admit the claim of custom to be considered as a source of law. The view of the historical school is that legislation is the least creative of the sources of law. To quote James Carter: "It is not possible to make law by legislative action. Its utmost power is to offer a reward or threaten a punishment as a consequence of particular conduct and thus furnish an additional motive to influence conduct. When such power is exerted to reinforce custom and prevent violations of it, it may be effectual and rules or commands thus enacted are properly called law; but if aimed against established custom they will be ineffectual. Law not only cannot be directly made by human action, but cannot be abrogated or changed by such action." According to this view, legislation has no independent creative role at all. It's only custom spontaneously developed by the people.

Legislation and Custom

a. The existence and authority of legislation is de jure, whereas the existence of custom is de facto.
b. The authority of legislation lies in the express will of the state. Customs are generally based on the will of the people. They have only an implied authority of the state.
c. Legislation is the advanced method of legal development and is the characteristic mark of mature legal systems. Customs have their sway mainly in the primitive society. With the advancement of civilization, either they are abrogated or embodied in legislation.
d. Generally, customs deal with relationship between man and man. Legislation always beings into picture, the State.
e. Legislation is considered to be a superior and more authoritative source of law than customs.

Legislation and Precedent

a. In precedents, rules and principles are laid down by inductive method. In legislation, the deductive method is resorted to. The Courts take rules from the statute and apply it to particular areas.
b. Legislation has abrogative power. Constructive power is there in precedents.
c. Statute law is definite, brief, clear and easily understandable. Therefore, in form it is superior to precedent. In precedent, to know principles and rules one will have to look into the details of the case.
d. Legislation is general and comprehensive. Precedent has none of those merits.
e. Statute can makes rules for future cases which may arise, in other words, a statute can lay down beforehand. A precedent can lay down a rule when a case comes before it. Thus, its emergence depends on litigation.
f. The very aim of the legislation is to make law. The main purpose of the precedents is to interpret and to apply the law.
g. Legislation is prospective and retrospective in nature. Precedents are only prospective in nature.

Superiority between Legislation and Case Law

It depends on the definition of law. - Whether precedent is superior to legislation or legislation is superior to precedent is a controversial question. It, more or less, depends on as to how one defines law- puts the legislature, or the courts in the centre of legal system.

Analytical Jurists. - Analytical jurists as Austin and Bentham contend that legislation is always superior to precedent. A statute is made after due deliberation and not in the haste in which a judge disposes his cases. Other grounds have also been given in support of the superiority of statute. It is certain, clear, comprehensive, and easily assessable. It passes through the scrutiny of a great number of men before it becomes law. The case law is the result of the whim of certain individuals. A planned progress of society is possibly only through statute law.

The other view; Salmond; Gray. – The supporters of case law have also presented weighty grongings in support of their contention. They say that it causes an organic development of law, and can easily adapt law to the changing conditions. The matters which receive so much calm and patient consideration in court cannot receive the same by busy legislatures. Case law is more practical because it is laid down after a careful study of facts and the various circumstances, whereas the statute law is of an abstract and rigid nature.

Legislation and Jurist Law

Points of distinction between the two. – Legislation is, sometimes, compared with the jurist law, or the legal principles enunciated in juristic writings. There are a number of points of distinction between the two: First, the legal principles laid down in juristic writings are of a very general and abstract nature while in statute they are concrete, precise and specific. Second, the statute law possesses a positive sanction from the sovereign authority of the state, whereas there is no such sanction behind the jurist law.

Relationship between the two. – The statute law is greatly helped by the jurist law. Sometimes, the latter ushers the former and the legal principles enunciated by jurists are embodied in the statute law.

Precedent as a Source of Law

Creative role of the judges-Every developed legal system possesses a judicial organ. The main function of the judicial organ is to adjudicate the rights and obligations of the citizens. In the beginning, in this adjudication the courts are guided by customs and their own sense of justice. As society progresses, legislation becomes the main source of law and the judges decide the cases according to it. Even at this stage, the judges perform some creative function. In the cases of first impression, in the law made by the legislature, the judges depend on their own sense of right or wrong.

Inductive and Deductive methods: In the English legal system, a great reliance is places upon the decisions of the judges. Before deciding a case, the judges look into the previously decided cases of the similar nature by their own court or by superior court. From particular cases they deduce general rules and apply them on the cases before them and decide them accordingly. This is known as 'Inductive Method'.

There are legal systems where most of the law is embodied in legislation (known as 'Civil Law Systems'). The judges decide the cases according to the law laid down in the code, and they are not to look for the previously decided cases of the similar nature. This is called the 'Deductive Method'.

Nature of Precedent

A precedent is purely constitutive and in no degree abrogative. This means that a judicial decision can make a law but cannot alter it. Where there is a settled rule of law, it is the duty of the judges to follow the same.

The Importance of Precedents

Ancient Law –The importance of the decisions as a source of law was recognized even in very ancient times. In theological books we can find numerous instances of it. Sir Edward Coke, in the preface to the sixth part of his report, has written that the Moses was the first law reporter. In ancient legal systems of Babylonia and China, the judicial decisions were considered to be of great authority and later on, they were embodied in the code law.

Modern Legal System – Among the modern legal systems, the Anglo-American law is judge made law. It is called 'common law'. It mainly developed through judicial decisions.

Precedents in Various Legal Systems

Res-Judicata; Justinian's Declaration – In Roman Law, there was never any theory of binding precedents. Though the orators have included res-judicata among the sources of law, it was not a precedent in the modern sense of term. Under the Roman system, much of the development of law took place by the Bar and not by the Bench. However, an attempt was always made for judicial uniformity and there was much uniformity. In the substantive law, decisions were not considered as an authority for the subsequent cases. Justinian declared that the decisions will not have any obligatory force except that which were given by the Emperor himself 'Non exemplis, sed-legibus indicandum est' (Decisions should be based on laws, not on precedents).

New Researches – The researches made in the recent years, especially the study of Papyri, have disclosed that in Egypt, in the period corresponding to the classical era of Roman jurisprudence, the use of precedents was made in the courts in daily practice.

Gray's View – In Gray's opinion, the idea of judicial precedent was familiar in the Roman Law, at least in some periods of its development and most of the decisions of the judges and the opinions of the juris consultas were incorporated and embodied in the code.

French Law – In France, courts are not bound by decisions of the superior courts. Even the decisions of the 'Court de cassation' the highest court of appeal, are not binding on the courts of the first instance, nor that court is bound by its own decisions.

German Law – The lower courts are bound with the decision of the highest court.

The English Theory of Precedent

Great Authority of Precedents – The great importance attached to the judicial precedents is a distinguishing feature of the English legal system. The edifice of the common law is made up of judicial decisions. Though the present English doctrine of the precedent came into being in the 19 century, its history goes many centuries back. The power and authority of judges, legal thought, and the publication of the law reports all helped in the growth of the doctrine of precedent in English Law.

Precedent as a Source of Law

Judicial precedent when it speaks with authority, the embodied principle becomes binding for future cases and it thus becomes a source of law. Blackstone has pointed out that it is an established rule to abide by the former precedents where the same points come again in litigation. Authoritative precedents are a legal source of law, in so far as they are binding on the judges and persuasive precedents are a historical source of law, in so far as they are only a persuasive or guiding efficacy, and thus provide a historical basis on which law may be built by the judge if he is favorably inclined to that precedent and accepts it.

Each original precedent laid a new pillar of law and helped in the growth and development of the common law of England. Each declaratory precedent strengthened and confirmed each

original precedent, thereby making the law certain and safe to be followed.

The doctrine of precedent as pointed out by Salmond, two meanings-a strict sense and a loose sense.

In the strict meaning, precedents have a great value and should be regarded as authoritative and should be followed except under certain circumstances. In the loose sense, the doctrine of precedent implies that precedents are reported judgements of law courts meant to be cited, and that these judgements will probably be followed by the judges.

Precedents carry some legal principles. The legal principle on which a case is decided is called the ratio decidendi of that case. The ratio decidendi means the reasoning factor behind the decision. The ratio decedendi refers mainly to questions of law-abstract questions. Ratio decidendi is that principle of law on which a judicial decision is based. A precedent has a ratio decidendi, i.e. the basic principle on which it rests. The ratio decedendi is the very heart of a precedent. This abstract principle laid down in a particular case is followed by judges thereafter on such issues.

A decision generally has two aspects

1. A concrete decision binding on the parties to the litigation and therefore having practical consequences and
2. A judicial principle which is general in nature and which is the basis of the practical and concrete decision operates as a precedent which has the force of law.

The case of Bridges V. Hawkescoonth is a good illustration of ratio decidendi. In this case, a customer found some money on the floor of a shop. The court applied rules of “finders-keepers” and awarded possession of the money to him rather than to the shopkeeper. The ratio decidendi of this case is that finder of goods is the keeper i.e. has the right of possession over it. However, in 1896, in South Staffordshire Water Company V. Sharman where the defendant found two gold rings in the mud in a pool owned and occupied by the plaintiffs, the court refused to apply the “finders-keepers” rule expressed in Bridge’s case on the ground that in that case money was found in a public place i.e. on the shop floor but in this case it was found in a pool which was private.

Authority of Precedent

The reason why a precedent is recognized in that a judicial decision is presented to be correct. That which is delivered in judgment must be taken for established truth. Decisions are given by judges who are expert in the study of law.

Circumstances Which Destroy or Weaken the Binding Force

Of Precedent – The operation of precedent is based on the legal presumption that judicial decisions are correct. A matter once decided is decided once and for all. What has been delivered in a judgement must be taken to an establishment truth. There are circumstances which destroy or weaken the binding force of a precedent. These are exceptions to the rule of the binding force of precedent.

1. Abrogated Decision – A decision ceases to be binding if a statute or statutory rule inconsistent with it is subsequently enacted, or if it is reversed or overruled by a higher court. Reversal occurs when the same decision is taken on appeal and is reversed by the appellate court. Overruling occurs when the higher court declares in another case that the precedent case was wrongly decided and so is not to be followed. Overruling is the act of a superior authority.
2. In India, the Twenty-Fourth Amendment of the constitution of India was passed to nullify the decision of the Supreme Court of India in the case of Golak Nath. Likewise, the Twenty-Fifth Amendment of the Constitution sought to remedy the situation resulting from the decision of the supreme court in the Bank Nationalization case.
3. Affirmation or reversal on a different ground – It sometimes happens that a decision is affirmed or reversed on appeal on a different point. Suppose a case is decided in the Court of Appeal on ground A and then goes on appeal to the House of Lords which decides in on ground B, nothing being said upon A. the view of Jessel, M.R. is that where the judgement of the lower court is affirmed on different grounds, it is deprived of all authority.
4. Ignorance of Statute – A precedent is not binding if it was rendered in the ignorance of a statute or a rule having the force of a statute i.e. delegated legislation. Similarly, a court may know of the existence of the statute or rule and yet not appreciate its relevance to the matter in hand. Such a mistake also vitiates the decision. Even a lower court can refuse to follow a precedent on this ground.

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