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5.1 Meaning of sources of law

"Source of law" means both the ultimate origin of legal authority (such as God, nature, custom, or the sovereign) and the tangible materials from which law is known, namely custom, judicial precedent, and legislation, which together form the foundation of a legal system.

The term *source of law* has two different meanings. First, from a philosophical or religious point of view, it refers to the **origin or authority** from which all laws ultimately come—such as God for

religious scholars or the sovereign (state) for secular scholars. Second, it refers to the **documents, texts, or records** from which law can be known and studied—like religious books, statutes, or case law. These sources provide the material that scholars and courts use to understand and apply the law.

From the viewpoint of *origin of law*, jurists are of divergent views:

- **John Austin**, a legal positivist, sees the sovereign (the state) as the sole source of law.
- **Savigny** and **Henry Maine**, from the historical school, believe that customs are the original source.
- **Natural law theorists** say law comes from human nature and reason.
- **Theologians** consider religious scriptures as foundational sources.

Despite the divergences, most modern legal systems recognize three main sources of law:

(i) **Custom** – Traditional practices accepted as binding.
(ii) **Judicial Precedent** – Past decisions by courts used as guiding rules.
(iii) **Legislation** – Laws formally enacted by a legislature.

These sources together help form the legal framework of a society, guiding how people behave and how justice is administered.

5.2 Custom

Custom, as a source of law, refers to long-established, continuous, reasonable, and morally accepted practices that have acquired binding force through public recognition and judicial sanction, though their significance has declined in

modern India with the supremacy of legislation and codified law.

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

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 take 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.

Requisites of a valid custom

All customs cannot be accepted as sources of law, nor can all customs be recognized and enforced by the courts. There are several requisites to the validity of a custom. [Broom 1874 p 917]

Certainty: First, it must be certain, or capable of being **reduced to a certainty**. Therefore, a custom that lands shall descend to the worthiest of the owner's blood, is void; for how shall this worth be determined? But a custom to descend to the next male of the blood, exclusive of females, is certain, and therefore good.

Reasonable: Secondly, the custom must **be reasonable** in itself; it is not, however, unreasonable merely because it is contrary to a particular maxim or rule of the common law, for custom, when grounded on a certain and reasonable cause, supersedes the common law. Further, a custom is not necessarily unreasonable

because it is prejudicial to the interests of a private man, if it be for the benefit of the commonwealth. So, a custom the exercise of which causes interruption to a highway for a beneficial purpose and during a limited time may be reasonable.

Antiquity: Thirdly, the custom must have **existed from time immemorial** so that, if anyone can show its commencement, it is no good custom. 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. 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.

Continuous: Fourthly, the custom must have **continued without any interruption**; for any interruption would cause a temporary cessation of the custom, and the revival would give it a new beginning, which must necessarily be within time of memory, and consequently the custom will be void. But this must be understood with regard to an interruption of the right; for an interruption of the possession only, for ten or twenty years, will not destroy the custom. As, if the inhabitants of a parish have a customary right of watering their cattle at a certain pool, the custom is not destroyed though they do not use it for ten years: it only becomes more difficult to prove; but, if the right be in any way discontinued for a single day, the custom is quite at an end.

Undisputed: Fifthly, the custom must have been **peaceably enjoyed** and acquiesced in, not subject to contention and dispute. For, as customs owe their origin to common consent, their being immemorially disputed, either at law or otherwise, is a proof that such consent was wanting.

Compulsory: Sixthly, a, custom, though established by consent, must, when established, **be compulsory**, and not left to the option

of every man, whether he will use it or no. Therefore, a custom that all the inhabitants shall be rated towards the maintenance of a bridge will be good; but a custom that every man is to contribute thereto at his own pleasure is idle and absurd, and indeed no custom at all.

Consistent: Seventhly, **customs existing in the same place must be consistent with each other**; one custom cannot be set up in opposition to another. For if both are really customs then both are of equal antiquity, and both established by mutual consent: which to say of contradictory customs is absurd.

Morality: Eighthly, **customs in derogation** of the common law, or of the general rights of property, must be strictly construed. Similarly, 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. EsuNaekin, (1880) ILR 4 Bom 545 held that, the custom of adopting a girl for immoral purposes is illegal.

Where, then, continued custom, characterized as above mentioned, has acquired the force of an express law. Reference must of course be made to such custom in order to determine the rights and liabilities of parties, arising out of transactions which are affected by it.

Status of Custom with regard to Legislation

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.

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. The British courts, in particular, the Privy Council, in cases such as Mohammad Ibrahim v. Shaik Ibrahim (AIR 1922 PC59) observed and underlined the importance of custom in moulding the law. At the same time, it is important to note that customs were not uniform or universal throughout the country. Some regions of the country had their own customs and usages. These variances in customs were also considered a hindrance in the integration of various communities of the country. During our freedom struggle, there were parallel movements for social reform in the country. Social reformers raised many issues related to women and children such as widow re-marriage and child marriage. After independence and with the enactment of the Constitution, the Indian Parliament took many steps and abrogated many old customary practices with 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 customs.

Diminishing significance of custom as a source of law

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 as it is the will of the people and not the will of the sovereign; asserted by Savigny. 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.

5.3 Judicial precedents

Judicial precedents are authoritative judicial rulings—principally the *ratio decidendi* of higher courts, especially the Supreme Court under Article 141—that form binding law for subordinate courts through the doctrine of *stare decisis*, while obiter dicta and lower-court or tribunal decisions serve only persuasive value, and precedents may lose force when reversed, overruled, distinguished, rendered *per incuriam*, *sub silentio*, or dismissed *in limine*.

Nature of judicial precedents

Judicial precedents comprise rulings pronounced by the judges in the court of law. When assimilated the judicial precedents become common law.

A trial court that ascertains the facts in issue, examines the evidence, and decides the case by applying the law of the land to determine the rights and obligations of the litigating parties does not sets any precedents. They take up questions of fact and answer them.

A higher court that adjudicates upon the issues arising with respect to the meaning of law which has been doubted by the contestant and may impact the rights and obligations of the contesting parties sets the precedent. They take up questions of law and answer them.

One should keep in mind that the courts are not legislatures who promulgate the law; their role in respect of legislation is two-fold only:

(i) to examine the validity of the Act of Parliament through the touchstone of the Constitution and in case of delegated legislation through the touchstone of the Act.

(ii) to interpret (ascertain as well as determine) the meaning of the enactments through the canons of interpretation allowing scope for a discretionary, pragmatic approach to the particular problems that come before the courts.

Law declared by Supreme Court

Art 141 of the Constitution says that the law declared (interpretations made) by the Supreme Court is law of the land and is to be followed by all courts in India.

But it is not that everything of such decision binds the inferior courts. It is the *ratio decidendi* (the reason for deciding) ie the principle or rule on which a court's decision is founded without which the case must have been decided otherwise.

The Supreme Court, however, is not bound by its own precedent though it ordinarily does not depart from its earlier rulings. Moreover, to overrule an extant ruling a bench larger than the bench which gave the ruling is considered appropriate.

An *obiter dictum* (said by the way) is judicial utterance (remark or opinion) made incidentally or collaterally by way of illustration, argument, analogy, or suggestion may be persuasive only.

An obiter dictum of the Supreme Court may be binding on the High Courts only in the absence of a direct pronouncement on that question elsewhere by the Supreme Court; but as far as the

Supreme Court is concerned, though not binding, it does have clear persuasive authority. [Oriental Insurance Company Limited vs. Meena Variyal (2007) 5 SCC 428]

Stare decisis

To stand by things decided. A deliberate and solemn decision of court made after argument on question of law fairly arising in the case, and necessary to its determination, is an authority, or binding precedent in the same court, or in other courts of equal or lower rank in subsequent cases where the point is again in controversy unless there are occasions when departure is rendered necessary to vindicate plain and obvious principle of law and remedy continued injustice. It should be invariably applied and should not ordinarily departed from where the decision is long standing and rights have been acquired under it. [Krishna Kumar v UOI (1990) 4 SCC 207]

Precedents of High court

The doctrine of precedent (stare decisis) mandates that an exposition of law must be followed and applied even by coordinate or coequal benches and certainly by all smaller benches and subordinate courts. [State of UP v Ajay Kumar Sharma (2016) 15 SCC 289] So, a settled principle of law should not be unsettled; and in this way doctrine of stare decisis is wider than Article 141.

Through the application of this principle the law expounded by the High Court has got authoritative value and should be followed and applied even by coordinate or coequal benches and certainly by all smaller benches and subordinate courts even though the Constitution does not contain provision equivalent of Article 141 in respect of High Courts.

Judicial discipline

Doctrine of precedent should not be confused with the follow-up of the directives and decisions of the High Court by a subordinate court because of the power of superintendence under article 227 e.g. re-deciding by a single judge bench of the issue in a particular place already decided by the division bench of the same High Court is wrong. [State of U.P. v Sheo Nandan 1984 Supp SCC 190]

Precedential value of third tier judicial body

District courts and courts subordinate thereto are trial courts or court of facts and so their decision is binding to the litigating parties only.

Decisions of the tribunal are not precedents because they are only binding between the litigating parties even though it functions as a court of facts as well as of law; though it is referred for its persuasiveness. [Bindra 2017 p 957]

Advance rulings under taxing statutes are the legal opinions of the authority in respect of a particular provision and its application to the particular assessee in the stated situation and is binding between the government and the party who sought it.

Reversal, overruling and distinguishing of precedent

A precedent loses its binding effect if a statute or statutory rule inconsistent with it is subsequently enacted, or if it is reversed or overruled by a higher court.

Reversal - Reversal occurs when the same decision is taken on appeal and is reversed by the appellate court.

Overruling - Overruling occurs when the higher court declares in another case that the earlier case was wrongly decided and so is not to be followed. [Fitzgerald 2010 p 152]

Distinguishing - Precedents are distinguished when the demand of justice from the facts of the later case is materially different from the prior decision.

Prospective overruling: The fundamental rights could not be taken away or abridged by constitutional amendment in future but whatever already has been done under the First, Fourth and Seventeenth Amendments was not to be disturbed because holding earlier decisions and the consequent amendments as invalid from the previous date would have upset everything done so far in the agrarian field and would have created many complications and, therefore, the apex court came with the doctrine of prospective overruling to salvage the situation. [Glolak Nath case AIR 1967 SC 1643 quoted in Mahajan 2016 p 215]

Per incuriam: Through lack of care. A judicial decision that was rendered in ignorance of a statute or a statutory rule is per incuriam and has no binding effect as a precedent. The rule applies even when the court knew of the statute in question but had not taken notice of its precise terms or had not appreciated its relevance to the matter in hand. The mere fact that the court misconstrued a statute or ignored a rule of construction will not vitiate the binding force, however.

Similarly, whenever is a relevant prior decision is not cited before the court, or mentioned in the judgements, and the court acted in ignorance or forgetfulness of it then such decision is also termed as per incuriam and is not binding on a later court.

Sub silentio: Under silence. When the particular point of law involved in the decision was not consciously determined (neither perceived by the court nor present to its mind) then the decision is said to be arrived at sub silentio. [Purbanchal Cables and

Conductors Pvt. Ltd. v Assam State Electricity Board (2012) 7 SCC 462]

Such decision is not binding on later decisions with respect to that point of law since it was decided without argument, without reference to the crucial words of rule, and without any citation of authority on that point. [Fitzgerald 2010 p 152-4 quoted in D.J. Malpani v CCE (2019) 9 SCC 120]

In limine: At the threshold (outset). The dismissal of a special leave petition (SLP) *in limine* simply implies that the case before this Court was not considered worthy of examination for a reason, which may be other than the merits of the case. Such *in limine* dismissal at the threshold without giving any detailed reasons, does not constitute any declaration of law or a binding precedent under Article 141 of the Constitution. [State of Orissa v Dhirendra Sundar Das (2019) 6 SCC 270]

Leading and illustrative cases

The legal cases readily range themselves into two classes, namely, those that lay down new principles (leading cases), and those that merely illustrate the application of known rules (illustrative cases). This distinction between leading cases and illustrative cases is most important in reference to legislation. Leading cases constitute in effect judicial legislation, and admit of being codified by having their principles expressed in a legislative form. Illustrative cases are merely explanations or illustrations of the law, and may either be dismissed altogether by the draftsman, or have their influence on legislation expressed by the insertion of a few words in a section to remove a doubt or explain a difficulty. [Thring 1877 p 2]

5.4 Law reports

Law reports are published journals containing court judgements with publisher-added marginal notes explaining the case's legal principles (ratio decidendi and obiter dicta), cited in standardized formats such as SCC, AIR, ITR, GST, or ELT for general or subject-specific precedents.

Nature of law reports

Judgements of court are reported for their precedential values in legal journals popularly known as law reports. The matter being reported in the law report is the judgement of the case as pronounced by the court along with the marginal notes added by the publisher of law report. Thus, law report is the judgement of the case as pronounced by the court along with the marginal notes added by the publisher.

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Marginal notes explain in brief the principles applied by the court, in context of the case, to deliver justice. In other words, it culls out the ratio decidendi and the persuasive obiter dicta.

General v Specific law report: The law reports may be general covering cases on all the subjects (eg SCC, AIR etc) or specific to a particular subject (eg ITR which covers income tax cases only, GST which covers goods and service tax case only, or ELT which covers excise and custom case only, etc). The full name of the several law reports are as follows:

SCC = Supreme Court Cases

AIR = All India Reporter

ITR = Income Tax Reporter

GST = Goods and Service Tax Cases

ELT = Excise Law Times

Citation in SCC: The law reports have a specific citation through which they are referred eg Jindal Stainless Ltd. v State of Haryana (2017) 12 SCC 1 where 'Jindal Stainless Ltd.' is the plaintiff, 'v' indicates versus, 'State of Haryana' is the defendant, '(2017)' is the year in which the case was reported in the law report, '12' indicates the volume number of the law report of the year 2017, 'SCC' indicates the name of the law reports and 1 indicates the page number on which the abovesaid case is reported in that volume of the law reports.

Citation in AIR: The same case when reported in AIR had the citation as Jindal Stainless Ltd. v State of Haryana AIR 2016 SC 5617 where 'SC' represents Supreme Court for AIR published report of High Courts too, and in case of judgements of a High Court it may bear code such as PAT for Patna High Court, DEL for Delhi High Court etc. The number after the court name is the page number.

Citation in ITR: A case reported in ITR is cited as Alok Goenka v Commissioner of Income Tax [2021] 430 ITR 46 (Patna) where '[2021]' is the year of reporting '430' is the volume number, and '46' is the page number of that volume with additional information of the court in parenthesis '(Patna)'. The case may also be cited in brief as 430 ITR 46.

5.5 Legislation

Legislation, derived from the Latin words *legis* (law) and *latum* (to make), is the sovereign-backed process of making laws—classified into supreme legislation made directly by the legislature and subordinate legislation made under delegated

authority, including autonomous, judicial, local, and executive (delegated) laws, which collectively ensure detailed, efficient law-making in modern states.

Nature of legislation

In modern times, legislation is considered as the most important source of law. The term 'legislation' is 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 ways. 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.

Legislation may be categorised in two kinds:

- Supreme Legislation
- Subordinate Legislation

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 Parliament / State Legislature may be categorised as supreme legislation.

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. For instance, under the Constitution of India, 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. In India, local bodies like Panchayats and Municipal Corporations have been recognized by the Constitution through the 73rd and 74th Constitutional amendments. The rules and bye laws enacted by them are examples of local laws.

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 to delegate 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.

5.6 Personal law

Personal laws in India are religion-based civil laws—derived from respective religious scriptures and customs—governing matters like marriage, divorce, inheritance, adoption, and maintenance, and recognized by the State.

Nature of personal law

In India, personal laws continue to apply to individuals based on their religion, particularly in civil matters like inheritance, marriage, divorce, adoption, maintenance, and guardianship. These personal laws are derived from religious texts and practices and are recognized by the State. For example:

- **Hindu law** is based on *Shruti* (divine revelations), *Smriti* (remembered texts), and long-standing customs.

- **Muslim law** is drawn from the *Quran*, *Hadith* (sayings of the Prophet), *Ijma* (consensus of scholars), and *Qiyas* (analogical reasoning).
- **Christian law** finds its basis in the *Bible*, *traditions*, human *reason*, and *experience*.

5.7 Sources of Hindu Personal Law

Hindu law, believed to be of divine origin, evolved from Sruti (divine revelations), Smriti (remembered traditions), and Puranas (mythological precedents), supplemented by customs, commentaries, legislative enactments, and judicial precedents, forming diverse schools like Mitakshara and Dayabhaga that collectively shaped its legal and social framework.

Major sources

Major sources of Hindu law are Sruti, Smriti, and Puranas. The Hindus believe their law to be of divine origin, and they believe this not only of what Austin calls the laws of God, but positive law also is believed by them to have emanated from the Deity. The idea of Sovereign in the modern juridical sense was unknown to them. They had kings, but their function was defined by the divine law contained in the Smritis, and they were bound to obey the same law, equally with their subjects. By this original theory of its origin, the law was independent of the state; or rather the state was dependent on law, as the king was to be guided in all matters connected with Government, by the revealed law, though he was not excluded from a control over the administration of justice. The king being theoretically the administrator of justice his decrees must have been recognized as binding on suitors from the very earliest times. And this gradually introduced the view recognized by commentators that royal edicts in certain matters have as much

binding force as divine Law, should the former be not repugnant to the latter. The earlier notion of law was gradually modified to a certain extent, as may be gleaned from the remarks of the commentators. And the conception of positive as distinguished from divine law, presented to us by the commentators, nearly approaches the ideas of modern jurisprudence.

Sruti: The Sruti is believed to contain the very words of the deity. The name is derived from the root *sru* to hear, and signifies what was heard. The Sruti contains very little of lawyer's law: they consist of hymns, and deal with religious rites, true knowledge and liberation. There are, no doubt, a few passages containing an incidental allusion to a rule of law, or giving an instance from which a rule of law may be inferred. The Sruti comprises the four Vedas, the six Vedangas, and the Upanishads. The Upanishads embody the highest principles of Hindu religion. But the Vedas are rather theoretical than practical: of the Vedas, the Rik consists of hymns in praise of Gods and things; the Saman consists of hymns intended to be sung ; the Yajus describes sacrifices and their ceremonial ; and the Atharvan is disapproved as it prescribes ceremonies that may be performed for causing injury to an enemy or the like; the Upanishads deal with theology and the means, implying esoteric Hinduism, whereby a person may attain *moksha* or liberation of the soul from the necessity of repeated births and deaths, and its restoration to its original state of Existence, Knowledge and Beatitude—the *Summum Bonum* of the Hindus.

Smriti: The Smriti means what was remembered, and is believed to contain the precepts of God, but not in the language they had been delivered. The language is of human origin, but the rules are divine. The authors do not arrogate to themselves the position of legislators, but profess to compile the traditions landed down to

them by those to whom the divine commands had been communicated. The Smritis are the principal sources of lawyer's law and is referred to as *dharma-shastra* for practical purposes. But they also contain matters other than positive law. The complete Codes of Manu and Yajnavalkya deal with religious rites, positive law, penance, true knowledge and liberation. There are some that deal with positive law alone, such as the Code of Narada, now extant. Many others contain nothing of civil law. The exact number of the Smritis cannot be stated, many of them are not extant, being either lost or unprocurable. From the quotations in the various commentaries you may make a list of the Codes. Most of them are written in metre, and a few in both prose and metre. They do not appear to have been written at the same time, nor do they lay down the selfsame law; and a process of development may be perceived in them. Thus there is conflict of law as laid down in the different Codes on various matters. Though Smritis are the principal source of lawyer's law but are of secondary importance for these are based on lost or forgotten Sruti, the precept of Sruti prevails over that of Smriti.

Puranas: Puranas are voluminous mythological poems professing to give an account of the creation, to narrate the genealogy of gods, of ancient dynasties and of sacerdotal families, to describe the different ages of the world, and to delineate stories of Gods, ancient kings and sages; and in doing so they also relate religious rites and duties. These works are said to have been composed by the celebrated Veda-Vyasa or compiler of the four Vedas, and are enumerated in some of the Puranas to be eighteen in number. But there are many other works of the same kind, the authorship of which is not attributed to Vyasa which appear to have been written subsequently, and which are on that account styled Upa-Puranas, and are respectively deemed supplementary to one or other of the

eighteen Puranas. The Puranas are not considered authoritative so as to override the Smritis, but are deemed to illustrate the law by the instances of its application and are looked upon as precedents, and are therefore considered by the few later commentators as a source of law.

Customs

Divine will is evidenced also by immemorial customs, indicating rules of conduct; in other words, such customs are presumed to be based on unrecorded revelation. Manu and Yajnavalkya declare approved custom or usage to be evidence of law. Some of the other sages use the term 'usage of the learned' instead of 'approved usage' or 'usage of the virtuous' prevailing in a particular locality. Antiquity, certainty, reasonableness and continuity are essential to the validity of a custom. Whatever is beyond a century (one hundred year) is said to be immemorial or out of mind of man whose span of life according to the Sruti extends to one hundred years only ; accordingly everything previous to it must be beyond human memory and as such immemorial. The evidence of custom should be unambiguous and such as to prove the antiquity, uniformity and continuity as well as of the publicity of the usage, and the conviction of those following it that they were acting in accordance with law. The statements of experienced and competent persons of their belief that acts done in accordance with the usage are legal and valid are admissible as evidence, provided they are supported by actual examples of the usage asserted. Instances in which the custom or usage was followed, especially judicial decisions, in which the same was recognized, afford evidence of its existence. But a few instances of recent date are not sufficient to establish a custom that must be shown to have existed from time immemorial. But an agricultural or mercantile usage

that need not be ancient may be proved by statements of persons who are in a position to know of its existence in their locality. Although the terms custom and usage are often used as convertible terms, still sometimes a distinction is drawn between them, and the former is applied to those rules of which antiquity is an essential incident, and the latter is used to designate those that may be of recent origin, such as those relating to trade or agriculture.

Commentaries

The Sruti and the Smriti are, theoretically speaking the sources of law. But all these are now practically replaced by the Nibandhas or digests or commentaries that are accepted as authoritative expositions of Hindu law in the different provinces. The commentators profess to interpret the law enunciated by the Smritis (Code of Hindu law). A critical reader of the different commentaries on Hindu law will be impressed with the idea, that the positions maintained by them respectively, which are at variance with each other, cannot all be supported by the texts of the Smritis, which they profess to interpret, but which appear to have been made subservient to their views, by ringing changes upon the language of the texts, rather than correctly interpreted. This fiction of interpretation is found in every system of law. A rule of law is sometimes enlarged in its operation so as to include a base not covered by its language, or curtailed so as to exclude the base that falls within its terms: and this is designated rational interpretation based upon intention. Whenever you have a rule that is rigid in theory and you wish to get out of its terms, you must have recourse to the fiction mentioned above. This mode of changing law is not peculiar to Hindu law, but is common to many systems of jurisprudence. The commentaries, however, have replaced the Smritis; and it is not open to anyone to examine

whether a particular position maintained by an authoritative commentary accepted as such in a locality, is really supported by the Shastras. But it must not be supposed that the commentators have no respect for the Smritis, and have always disregarded or discarded them for the sake any principle introduced by them. On the contrary while there is a clear and unambiguous text laying down a particular rule, effect is given by them to it, although the same may be inconsistent with any principle referred to by them. In fact, they refer to common feature while dealing with individual cases, from which a general principle may be deduced.

Legislations and judicial precedents

The Hindu law has to a certain extent, however, been modified and supplemented by legislative enactments and judicial decisions. The prominent Acts relating to Hindus are: Hindu Marriage Act 1955, Hindu Succession Act 1956, Hindu Minority and Guardianship Act 1956, and Hindu Adoption and Maintenance Act 1956.

Schools of Hindu law

The different commentaries have given rise to the several schools of Hindu law, which are ordinarily said to be five in number. But properly speaking there are only two principal schools, namely the Mitakshara and the Dayabhaga School. The Mitakshara which is undoubtedly anterior to Dayabhaga is a running commentary on the Institutes of Yajnavalkya by Vijnanesvara called also Vijnana-Yogin who cites texts of other sages and reconciles them where they seem to be inconsistent with the Institutes of Yajnavalkya. This concise commentary is universally respected throughout the length and breadth of India, except in Bengal where it yields to the Dayabhaga, on those points only in which they differ but it may be consulted as an authority even in Bengal regarding matters on

which the Dayabhaga is silent. The Dayabhaga, however, is not a commentary on any particular code, but professes to be a digest of all the codes, while it maintains that the first place ought to be given to the code of Manu. This commentary, or that portion of it which is now extant, is confined to the subject of partition or inheritance alone, whereas the Mitakshara is a commentary on all branch of law in its widest sense, professing as it does to elucidate the Institutes of Yajnavalkya.

The Mitakshara School may be sub-divided into six minor or subordinate schools that differ in some minor matters of detail, and are severally accepted in the different provinces, where the Mitakshara is concurrently with some other treatises or with local customs, accepted as authority the former yielding to the latter, where they differ. The schools, and the commentaries that are respected as authorities respectively, may be stated thus:

(1) Bengal School – Dayabhaga, Mitakshara, Dayatattwa, Daya-Krama-Sangraha, Viramitrodaya
(2) Benares School – Mitakshara, Viramitrodaya
(3) Mithila School – Mitakshara, Vivada-Ratnakara, Vivada-Chintamani
(4) Bombay School – Mitakshara, Vyavahara-Mayukha, Viramitrodaya
(5) Madras School – Mitakshara, Smriti-Chandrika, Parasara Madhava,Viramitrodaya
(6) Punjab School – Mitakshara, Viramitrodaya, The Punjab customs compiled in the Riwaz-i-am

Village community system

It may be interesting to enquire into and trace the etymological meaning of some of the terms, and the probable connection of the same with the Village Community System, and with their

explanation as given above. The words *sapinda, sakulya, samanodaka, sagotra* and *samana-pravara* mean, respectively, those whose *pinda, kula, udaka, gotra* and *pravara* are common. *Gotra* is derived from *go* a cow and *tra* to protect, and means that which protects the cow, such as a pasturage ; *Udaka* water or a reservoir of water such as a tank or well ; *Kulya* may be derived from *kula* (similar to Latin *colo*) to cultivate, and means a field or cultivated land ; and *pinda* means food. According to the rules laid down by Manu and Yajnavalkya relating to the establishment of villages, there should be a belt of uncultivated land, set apart for pasture, at least four hundred cubits in breadth, immediately round that part of a village, where the dwelling houses are situated, separating the same from the cultivated land; and on that side of this belt, which is contiguous to the fields, hedges should be erected so high that a camel might not see over them, so that the cattle might not trespass into the fields. Assuming that a single family established a new village, and bearing in mind that pasturage, and a reservoir of water indispensable in a tropical country, are not divisible according to Hindu Law, we may take the words *sagotra* and *samanodaka* to mean all members of the family, holding in common the pasturage and the reservoirs of water used for domestic or agricultural purposes ; the word *sakulya* to signify those members that jointly carried on cultivation ; and the word *sapinda* to comprise those that lived in common mess. When a family increased in the number of its members, they would separate in mess first, and might still continue to hold in common their *kulya* or property, consisting mainly of land, by jointly carrying on the cultivation and dividing the produce according to their shares ; And when this was felt to be inconvenient, they divided the family land, continuing, however, to use and occupy jointly the *gotra* or the land reserved for grazing the cattle, and the

udaka or reservoirs of water, which remained common to the most distant agnatic relations.

5.8 Sources of Muslim Law

Muslim law derives from four primary sources—the Quran, Sunnat, Ijma, and Qiyas—forming a divine, traditional, and rational legal framework developed into distinct Sunni (Hanafi, Maliki, Shafei, Hanbali) and Shia (Ithna Ashari, Ismaili, Zaidi) schools, each interpreting revelation, consensus, and analogy within their jurisprudential traditions.

Nature of sources of Muslim Law

Muslim personal law consists of the express injunctions of the Quran, the Sunnat, the Ijma, and the Qiyas.

Quran (revelation): The word of Quran revealed by Allah to the prophet of Islam is the first source of Muslim law. Quran is Al-furqan (criterion) ie one showing truth from falsehood and right from wrong. Apart from establishing religion, Quran regulates the individual and social life by repealing objectionable customs such as usury, unlimited polygamy and gambling, etc and by effecting social reforms, such as raising the legal status of women and equitable division of the matters of inheritance and succession.

Sunnat (tradition): The Quran can by no way altered or changed, thus, even the courts of law have no authority to change the apparent meaning of the verses as it does not have an earthly origin. This view was held in Aga Mohammad Jaffer v Koolsom Beebee (1897) 25 ILR Cal 9 (PC) Para 11. But whenever the Quran was silent on any particular matter, guidance was taken from the Sunnat, the model social behaviour allowed by Prophet

Muhammad. The narrations of what the Prophet Muhammad said, did, or tacitly allowed is called hadis or traditions.

Ijma (consensus): Ijma is a principle deduced from the legal texts (ie Quran and Sunnat) on which Muslim jurists (legal scholars) of any generation agree with respect to a particular question of law, and is thus binding on Muslims. The validity of Ijma, as a binding precedent, is based upon a hadis of the Prophet Muhammad which says that Allah will not allow His people to agree on an error. The law is something living and changing; since the possibility of further revelation is not admitted in Islam so Ijma is the only authority for legislation to cater the changing need of the Muslim society. Ijma of one age may be reversed or modified by the Ijma of the same or subsequent age.

Qiyas (analogy): Qiyas is a rule deduced by analogy from the precepts of Quran, Sunnat and Ijma. For example, deducing analogically from the Quranic injunction on prohibition one may imply banning not only of alcohol but also of things which intoxicates human mind such as narcotics, drugs, etc. Qiyas does not purport to create a new law, but merely to apply old established principles to new circumstances; the deduction must not be such as to involve a change in the law embodied in the legal texts and consensus. Qiyas results from Ijtihad (scholarly interpretation) which is underpinned by Taqlid (precedent), Istislah (public policy) and Istihsan (equity).

Schools of Muslim law

Abdur Rahim in his Muhammadan jurisprudence, following the usual classification, divides the course of Muslim law into four different periods. The first period is the one between AH 1 to 10, viz – the last 10 years of the prophet's life. Most of the legal verses of the Quran we are revealed at that time and some of the most

important judicial decisions and traditions relate to that period. The next period of great significance is the period AH 10 to 40, the 30 years of orthodox khilafat of the first four Caliph marked by close adherence to the Sunnah and de-vernacularisation of Quran and propagation of its standard authoritative texts. The third period of Islamic law from AH 40 to third century of Hijra is a great wherein the work of collecting the traditions place and the collections of Bukhari and Muslim etc. came to be recognised as authoritative. During this period appeared the four school of Sunni law viz – Hanafi, Maliki, Shafei, and Hanbali named after their Imam (exponent). [Fyzee 2009 p 20]

The four *Sunni* school

The Hanafi school named after Imam Abu Hanifa (80 AH to 150 AH) of Kufa; the oldest school with the largest following is characterised by the principle of qiyas. The next in time was the Maliki school named after Imam Malik bin Anas (90 AH to 179 AH) of Medina did not place much reliance on Qiyas and represents more the ijma and the practice of Medina. The next in point of time is the Shafei school named after Imam Shafei (150 AH to 204 AH) was a pupil of Imam Malik and Imam Muhammad, the pupil of Imam Abu Hanifa. The great jurists, Imam Shafei, generally regarded as the founder of the science of Usul perfected the doctrine of ijma. The next in point of time is the Hanbali school named after Imam Ahamad bin Hanbal (164 AH to 241 AH), a pupil of Imam Shafei. He represents the most extreme reaction from the school of what was called ahl-e-al-rai (the people of opinion) and strictly adhered to the principle of following the Hadith literally. [Fyzee 2009 p 21]

Shia

The terms '*Shia*' by itself means faction and being an abbreviation of the term '*Shia at Ali*', it means specifically that party which after the death of the Prophet attached itself to Ali, the son-in-law of the Prophet, considering in the successor of the Prophet both in temporal and in religious matters and denying the rightful succession of the first three Caliphs. Shias deny the principle of election by the people in the matter of Khilafat (rather *Imamat*; leadership) and hold that the Prophet appointed Ali as his vicegerent on a certain occasion. Shias are divided into several schools the prominent among which are the *Zaidis*, the *Ismaili* and the *Ithna Asharis*. The majority of Shias belong to *Ithna Ashari* school and, therefore, in India the word '*Shia*' is applied in general to the *Ithna Ashari* school of *Shia*. [Fyzee 2009 p 24]