LEGAL STUDIES

UNIT 11

NATURE AND SOURCES OF LAWS

LEGAL STUDIES

Content

UNIT 02: CHAPTER 1

NATURE AND MEANING OF LAW

The Case of the Speluncean Explorers:

A famous hypothetical legal case used in the study of law, written by Lon Fuller in 1949 for the Harvard Law Review.

A team of the five explorers are trapped in a cave. Through radio contact with physicians they are informed that they will starve to death by the time they are rescued. They cast a dice and elect to kill and eat one of their own team members to avoid the death of all. The four remaining Spelunkers are rescued and are all accused for the murder of their fifth member.

In your opinion, should they be acquitted or convicted for murder?

I. INTRODUCTION

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.

Justitia, a Roman goddess of justice, wore a blindfold and has been depicted with sword and scales. Representations of the Lady of Justice in the Western tradition occur in many places and at many times. Like Justitia, She too usually carries a sword and scales. Almost always draped in flowing robes and mature but not old, she symbolizes the fair and equal administration of law. without corruption, avarice, prejudice, or favor.

Source www.commonlaw.com/Justice.html

In a layman's language, law can be described as' a system of rules and regulations which a country or society recognizes as binding on its citizens, which the authorities may enforce, and violation of which attracts punitive action. These laws are generally contained in the constitutions, legislations, judicial decisions etc.

Jurists and legal scholars have not arrived at a unanimous definition of law. The problem of defining law is not new as it goes back centuries. Some jurists consider law as a *'divinely ordered rule'* or as *'a reflection of divine reasons'*. Law has also been defined from philosophical, theological, historical, social and realistic angles.

It is because of these different approaches that different concepts of law and consequently various schools of law have emerged. Jurists hold different perceptions and understanding of what constitutes the law and legal systems. This chapter examines the various definitions of law as provided by different jurists.

II. HISTORICAL PERSPECTIVE

Plato (left) is carrying a copy of his *Timeus*, and pointing upwards, which symbolizes his concern with the eternal and immutable forms. Aristotle (384 BC - 322 BC)(right) is carrying a copy of his *Nicomachean* Ethics, and keeping his hand down, which symbolizes his concern with the temporal and mutable world. It depicts different approaches towards law from ancient times.

Source

The Critical Thinker (TM), 'Plato vs. Aristotle: The Classic Philosophical Duel',http://thecriticalthinker.wordpress.com/2009/01/12/plato-vs-aristotle/

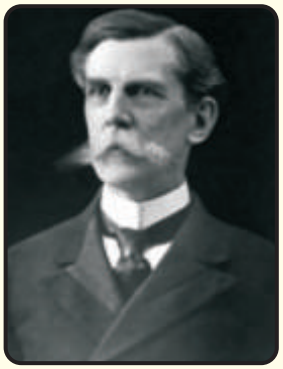
There are many definitions of law given by various jurists. Some of the important definitions of law are as follows:

Aristotle
(427 BC - 314 BC)

The ancient Greek Philosopher Aristotle defined law *'as an embodiment of reasons whether in individual or the community'*.

Source: http://commons.wikimedia.org/wiki/File:Aristotle_by_Raphael.jpg

 **Bentham (1748-1832)**	British philosopher Jereny Benthan defined the as *'A collection of signs declarative of a volition conceived or adopted by the sovereign'* Source: http://commons.wikimedia.org/wiki/File:Jeremy_Bentham_ by_J Wright.jpg
 **John Austin (1790-1859)**	Noted British Jurist John Austin says law is - A body of rules determined and enforced by a sovereign political authority. Source:http://commons.wikimedia.org/wiki/File:John_Austin.jpg
 **H. L. A Hart (197-1992)**	Well known British ugal philosopher Herbert Lionel Adolphess Hant defines law as: A system of rules, a union of primary and secondary rules. The Primary rules impose duties on people to behave in certain ways. Secondary rules, by contrast, pertain to the primary rules. Source: http://commons.wikimedia.org/wiki/File:H.L._Hart.JPG

 **Savigny** **(1779-1861)**	German jurict and historian Friendrich Carl Von Savigny said: Law is a product of the general consciousness of the people. Source: http://commons.wikimedia.org/wiki/Friedrich_ Carl_von_Savigny
 **Roscoe Pound** **(1870-1964)**	Distinguished American legal scholar Rosese Pound defined law as: An organised and critically controlled body of knowledge both of legal institutions and legal precepts and of the legal order, that is, of of the legal ordering of the society. Source:http://commons.wikimedia.org/wiki/File:Roscoe_Pound_ca_1916.jpg
 **Holmes** **(1841-1935)**	Oliver Wendell Holmes, noted American jurict said The prophecies of what Courts will do in fact, and nothing more pretentious, are what I mean by the law. Source:http://commons.wikimedia.org/wiki/File:Oliver_Wendell_Holmes,_1902.jpg

 **Ronald Dworkin (1931-2013)**	According to American philosopher Ronald Dworkin, Judges create a rationally integrated and coherent network of legal principles which is law. Sources:http://commons.wikimedia.org/wiki/File:RonaldDworkin. jpg
 **Joseph Raz (1939-)**	Israeli philosopher Joseph Raz says Law consists of authoritative positivist considerations enforceable by the courts. Source:http://commons.wikimedia.org/wiki/File:JosephRaz_-_20090224.jpg

On the basis of the definitions of law as phorided by jurists and legal philosopher over time, one can understand that there cannot be a universally accepted definition of law as different schools of law are characteristically different in their approach. For example, the positive school (which is explained later) does not consider moral values as part of the law, while the natural law school considers law and morality as inseparable.

III. SCHOOLS OF LAW

The various schools of law are as follows:

Natural Law School

Natural law is generally explained as the *'law of nature, divine law, a law which is eternal and universal'*. However, it has been given different meanings at different points in time. For instance, it was considered to be associated with theology but at the same time it was also used for secular purposes. Natural law is believed to exist independent of human will.

It is considered natural in the sense that it is not created by man but is found through nature. Natural law theory varies in its aims and content but there is one central idea. This central idea states that, there is a higher law based on morality against which the moral or legal validity of human law can be measured. At the heart of the natural law theory is a belief that there are certain universal moral laws that human laws may not go against, without losing legal or moral force.

Natural law theory asserts that there is an essential connection between law and morality. The law is not simply what is enacted in statutes, and if legislation is not moral, then it is not law. St. Thomas Aquinas called law without moral content, as *'perversion of law'*.

ACTIVITY:

Discuss the connection between law and morality in day-to-day life with examples.

Exponents of natural law believe that law and morality are linked. This view is expressed by the maxim Lex iniusta non est lex(an unjust law is not a true law). It was also asserted that, if it is not a true law then there is no need to follow it. According to this view, the notion of law cannot be fully articulated without some reference to morality.

While it appears that the classical naturalists believed that the law necessarily includes all moral principles, this argument does not mean that the law is all about moral principles. This is only to substantiate that the legal norms that are promulgated by human beings are valid only if they are consistent with morality.

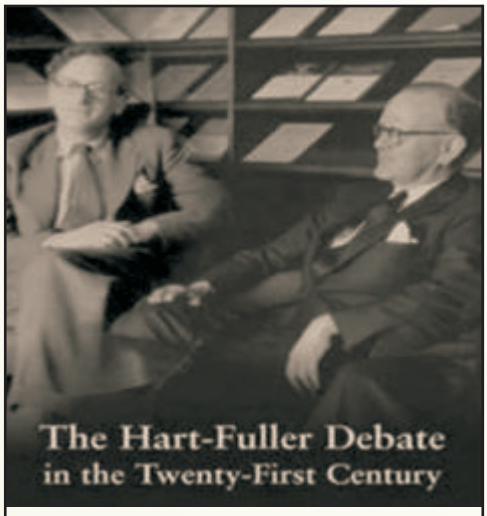
John Finnis (an Australian legal scholar and a Professor of Law at Oxford University [Lon Fuller (1902 - 1978, a noted legal philosopher and a Professor of Law at Harvard University] seemed to be against the conceptual naturalist idea, that there are necessary substantive moral constraints on the content of law. However, Fuller, in contrast to *Finnis*, believed that the law is necessarily subject to a procedural morality. Finnis believed that substantive human good may be grasped through practical reasonableness.

According to *Fuller,* human activity is necessarily goal-oriented and people engage in various activities to realize some ends. Fuller also emphasized the fact that, particular human activities can be understood only in terms of their purposes and ends. Consequently, in view of the fact that law-making is essentially a purposive activity, it can be understood only in the light of its indispensable values and purposes.

The principles of Natural law were rejected by Jurists such as *Bentham* and *Austin* in the nineteenth century because of its vague and ambiguous character. However, undue emphasis on positivism and rejection of morality as an element of law reduced the law into a command of a

gunman and therefore, failed to satisfy the aspirations of the people. It was realised that over-emphasis on the historical approaches to law had led to the rise of fascism in Italy and Nazism in Germany.

The change in socio-political conditions of the world, like the rise of materialism after the First World War, shook the conscience of the western society. It compelled the twentieth century western legal thinkers to ponder over the existing legal regimes, so as to provide some alternatives based on value-oriented ideology and to check moral degradation ofthe society. These factors led to the revival of natural law theory in its modified form, which is different from its traditional form.



The Hart-Fuller debate is a famous scholarly exchange between Lon Fuller and H.L.A. Hart which was published in the Harvard Law Review in 1958 on morality and law. This debate depicted the general divide between positivists and natural theory of law.

Source:The Hart-Fuller Debate in the Twenty-First Century, Bookreview,

http://www.bsos.umd.edu/gvpt/lpbr/subpages/reviews/cane0411.htm

Natural law in its new form is value-oriented and value-conscious. It is neither permanent nor everlasting in character and it is relative, not absolute in nature. For instance, in modern times procedural as well as substantive laws have to be just, fair and reasonable. Generally, the *'rule of law'* and *'due process of law'* are considered as new incarnations of natural justice in the twentieth century. Rudolf *Stammler* (1856-1938), a German jurist, John Rawls (1921 - 2002), an American philosopher Kohler (1849 -1919), a German Jurist, and others, contributed to the revival of natural law in the twentieth century. The principles of natural law have also been inspired by the emergence of the modern philosophy of human rights.

THE PRINCIPLES OF NATURAL JUSTICE:

In India, the principles of natural justice are firmly grounded in Article 14 & 21 of the Constitution. With the introduction of the concept of substantive and procedural due process in Article 21, fairness, which is included in the principles of natural justice, can be read into Article 21. The violation of the principles of natural justice results in arbitrariness; therefore, violation of natural justice is a violation of the equality clause of Article 14.

The principle of natural justice encompasses the following two rules: -

1. *Nemo judex in causa sua* - No one should be a judge in his own cause or, the rule against bias.
2. *Audi alteram partem* - Hear the other party or, the rule of fair hearing or, the rule that no one should be condemned unheard.

Source: http://www.hreat.org/impletter/PRINCIPLESOFNATURALJUSTICE.pdf

Analytical School:

This school mainly aims to create a scientifically valid system of law, by analyzing legal concepts and ideas on the basis of empirical or scientific methods. It is also referred to, as the *positive* or *imperative* school of jurisprudence. It came as a reaction against the school of natural law. Most of the founders of this school like *Jeremy Bentham* (1748-1832), an English philosopher and jurist and *John Austin* (1790-1859), an English jurist and a student of Bentham (also popularly credited for founding the analytical school of jurisprudence) discarded and rejected natural law as 'vague and abstract ideas'.

The idea of positivism emphasizes the separation of law and morality. According to the exponents of this school, law is man-made, or enacted by the legislature. Natural law thinkers proposed that if a law is not moral, no one is under any duty to obey it, while positivists believe that a duly enacted law, until changed, remains law and should be so obeyed.


JOHN AUSTIN

Jeremy Bentham propounded the Utilitarian Principle whereby the law should aim at *"the greatest happiness of the greatest number"*. In his work, *"Introduction to the Principles of Morals and Legislation"*, *Bentham* expressed his views about morality and argued that the principle of utility should be the basis of morality and law. According to him *'utility'* promotes pleasure and prevents pain. He further held that all questions of right and wrong should be decided on the touchstone of utility.

John Austin propounded that law is the command of the sovereign, backed by threat of punishment. In his work, *'The Province of Jurisprudence Determined'* published in 1832, Austin made an effort to explain the distinction between law and morality. According to him, natural law doctrines were responsible for blurring the distinction between law and morality. To get rid of this confusion he defined law as *'species of command of sovereign'*.

Austin held that command is an expression of desire by a political superior (e.g. king, parliament etc.) to a political inferior (eg. subjects, citizens). The political inferior shall commit or omit an act, under an obligation to obey the command and if, the command is disobeyed, then, the political inferior is liable for punishment. Commands are prescribed modes of conduct by the 'sovereign'. He further viewed sovereign as a person or group of persons, to whom a society gives habitual obedience and who gives no such obedience to others.

This idea of command and punishment for disobeying the command is the most prominent and distinctive character of *'positive law'*. It differentiates positive law from the *'principles of morality'*, which consider law as *'law of God'*, and from 'positive morality', which considers law as

man-made rules of conduct, such as customary rules and international law, etc. *'Principles of morality'* and *'positive morality'* do not originate from a sovereign.

However, with the passage of time, the fatality of the analytical school of law was realized and it was rejected by jurists such as Ronald *Dworkin*, Fuller and *Finnis*. The analytical school was basically rejected because it gave too much emphasis on 'law as a command' and rejected morality and custom as a source of law. The most powerful criticism about legal positivism revolves around the premise that it *fails to give morality its due importance*.

Ronald *Dworkin,* one of the most noteworthy critics of positivism, rejected the whole institutional focus of positivism. *Dworkin* argued that there is one right answer even in hard cases. According to *Dworkin,* a legal system is more than just rules; there are principles, policies and binding legal standards which operate alongside rules.

Historical School

History is considered as the foundation of knowledge in the contemporary era. According to the followers of the historical school, laws are the creation of interactions between the, local situation and conditions of the people. The historical school suggests that the law should conform to the local needs and feelings of the society. It started as a reaction against natural law and positivism to grow as a form of law that emphasized the irrational, racial and evolutionary character of law.

Friedrich Carl von Savigny (21 February 1779 - 25 October 1861),a respected and influential jurist and historian of the 19th century, is considered as the main German proponent of this school. He propounded that the nature of any particular system of law was a reflection of the spirit of the people. This was later characterized as *'volksgeist'* (German word meaning *'spirit of the people' or 'national character')* by Georg Friedrich *Puchta* (1798 - 1846, a German jurist).

According to Friedman, a noted jurist, the main features of *Savigny's* historical school of jurisprudence can be summarized as follows:

- Law should be a reflection of the common spirit of the people and their custom.
- Law is not universal; it is particular like the language of a particular society.
- Law is not static; it has relationship with the development of the society.
- Law is not given by a political superior, but is found or given by the people.

*Sir Henry James Sumner Maine (A*ugust 15, 1822 - February 3, 1888), a British jurist and legal historian, who pioneered the study of comparative law, primitive law and anthropological jurisprudence, is the main exponent the of British Historical School of Jurisprudence. He was a Professor of civil law at the University of Cambridge. He was a member of the Council of the Governor General of India (1863-69) and he substantially contributed to codification of the

Indian law. He is famous for his notable work, *Ancient Law: Its Connection with the Early History of Society, and Its Relation to Modern Ideas* (1861). To trace and define such concepts, he drew upon Roman law, western and eastern European legal systems, Indian law, and Primitive law.

Maine explained that the growth of law took place gradually in various stages under a static society in the following sequence:

1. Divine law (law of God/Themis Judgments of the Goddess of justice)
2. Custom- Priestly class as sole repository of customary law
3. Era of codification

However, in a progressive society, law evolved through three stages, namely:

- Fiction
- Equity
- Legislation

Themis was the Greek Goddess of Justice and was considered the embodiment of the divine order, law and custom. Themis signifies divine law in place of human ordinance. She was the goddess of divine law and sat beside Zeus, the Father of Gods, to offer advice. She was considered the divine voice who first instructed mankind in the primal laws of justice and morality.

Even the historical approach is not free from criticism. There are many problems with this approach and it was rejected on the ground of its vague, parochial and unscientific explanation of the law.

Sociological School

Exponents of this school consider law as a social phenomenon. It visualizes law from the perceptions of people in the society. This approach emphasizes on balancing the conflicting interests in society. The sociological school considers law as a *tool for social change*. Followers of this school insist on the fact that, law exists for the needs of the society. The philosophy of the sociological approach provides an opportunity to social and legal reformers. *Roscoe Pound* (1870-1964), an American jurist, was considered as the chief exponent of sociological jurisprudence in the United States.

Léon Duguit (1859-1928), was a French jurist who studied law at the University of Bordeaux and was appointed as a Professor in the faculty of law at Caen in 1883. Duguit had a significant influence on French Public Law. *Duguit* considered law as a tool for enhancing social solidarity i.e. interdependence of human beings on one another.

D. Rudolf von Ihering (1818-1892), a German legal scholar, developed a philosophy of social utilitarianism that emphasized on the needs of society, which is different from the individualist approach of the English utilitarian philosopher *Bentham*.

Eugene Ehrlich (1862-1922) who was an Austrian legal scholar and sociologist of law, emphasized the importance of social sciences to understand the law, He considered law as a social institution created to satisfy individual and social wants. Most of the thinkers of the sociological school also emphasized the fact that law is a tool of social engineering to balance conflicting interests.

According to Roscoe Pound, the main features of the sociological school can be summarized as follows:

- It highlights the *purpose and function* of law rather than its' content
- Law is a *social institution* designed for social need
- Law is a tool to *balance conflicting interests* of society

The main criticisms against the sociological school are the following:

- The terms *'social solidarity'* and *'social engineering'* are vague and create confusion
- Men and society can be compared with machine
- Jurists like *Duguit* overlooked the importance of the State

The concept of Social Engineering revolves around creating an efficient societal structure which results in maximum satisfaction of wants with minimum level of wastage. This theory was introduced by ***Roscoe Pound****. According to Pound, 'Law is social engineering which means a balance between the competing interests in society.'*

Realist School

Realists consider laws made by judges as the real law. They give less importance to the traditional rules and concepts as real sources of law. Realism is contrary to idealism. It is a combination of analytical positivism and sociological jurisprudence. Realists do not give much importance to laws enacted by legislative bodies and consider the judge-made laws as the actual law.

Realists place great emphasis on the role of judges in the implementation, interpretation and development of law. Realists believe that the social, economic and psychological background of a judge plays an important part in his decision-making.

Realist school can be further divided into two parts:

i. *American Realism*

ii. *Scandinavian Realism*

A prominent American jurisprudential scholar *Karl Llewellyn* (1893-1962), who was associated with the school of legal realism, had identified some of the main features of the realist school which are as follows:

- Law is not static as it keeps on changing
- Law is a means to a social end
- Society changes faster than the law
- Law cannot be certain. Decisions of the courts depend on many factors like the psychological, social and economic background of the judges
- Case studies are important and the court room is a laboratory of law

Major Criticisms of the Realist School are:

- It ignores the importance of legal rules and enactments which can lead to confusion
- It is incorrect to think that law evolves and develops only through courts
- Unwarranted emphasis on judge's behaviour in judicial decisions

Oliver Wendell Holmes

Justice *Oliver Wendell Holmes* was an Associate Justice of the U.S. Supreme Court. He wrote in his landmark article *The Path of Law which* appeared in *Harvard Law Review* [1897]: "the prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law". In making this statement, Holmes was suggesting that the meaning of any written law is determined by the individual judges interpreting them, and until a judge has weighed in on a legal issue, the law is ultimately little more than an exercise in trying to guess the way a judge will rule in a case.

Holmes explains, "The life of the law has not been logic; it has been experience... The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics."

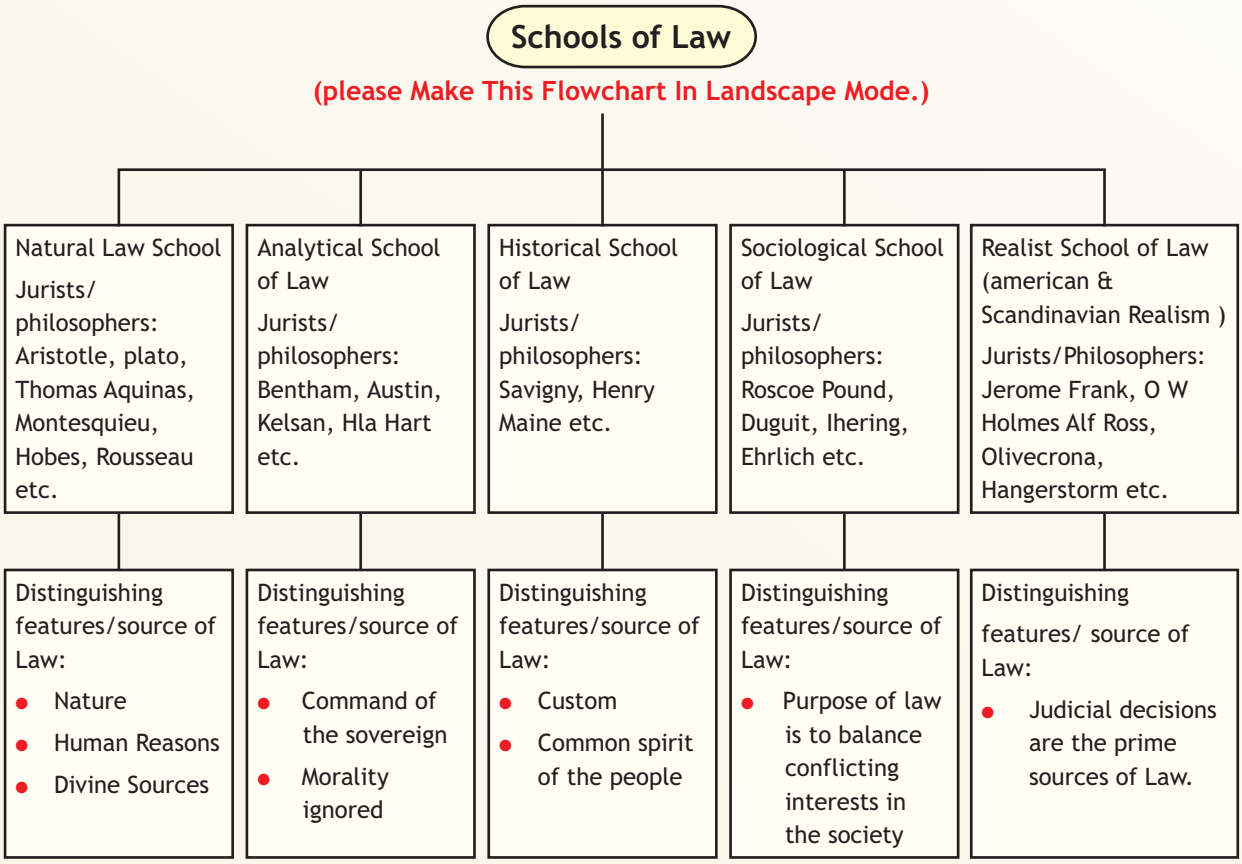
Justice Oliver Wendell Holmes, Jr.(The Common Law, 1881)

Conclusion:

From the above description of the major approaches or schools of law, it may be interpreted that these approaches can neither be accepted in totality nor rejected completely. Every school has its own approach of understanding and explaining law. These theories are products of certain times and places, which are relevant only in a given setting.

Some part or parts of the above enlisted theories might have become outdated or unacceptable in the present day scenario, but all of those cannot be totally rejected.

The various schools of law are represented diagrammatically in the following manner.



IV. FUNCTION AND PURPOSES OF LAW

After discussing and understanding the meaning of the term 'law', it is a natural question to ask the following questions: Why is there law in the society? What is the need for law? Can a society be governed smoothly without any kind of law? What is the function and purpose of law? etc.

Functions and purpose of law have been changing with time and place. They depend on the nature of the state. However, at present in a welfare and democratic state, there are several important functions of law.

It can be stated that law starts regulating the welfare and other aspects of human life, from the moment a child is conceived in her mother's womb. In fact, the State interacts with and protects its citizens throughout their lives, with the help of law.

Some of the major functions and purposes of law are listed below:

i. To deliver justice.

ii. To provide equality and uniformity.

iii. To maintain impartiality.

iv. To maintain law and order.

v. To maintain social control.

vi. To resolve conflicts.

vii. To bring orderly change through law and social reform.

ACTIVITY:

Can you name other functions and purposes of law? Discuss.

UNIT 02: CHAPTER 2

Classification of Law

The classification of law is important for the correct and comprehensive understanding of the law. The following are the benefits of classifying law:

i. Useful in understanding the interrelation of rules.

ii. Useful in the systematic arrangements of rules.

iii. Useful for the profession and students of law.

There are several ways of classifying law and the idea of classification of law is not new. Even in ancient civilizations, the jurists were well aware of the difference between civil and criminal laws. However, with the passage of time, many new branches have come into existence and therefore, the old classification has become outdated. Law can be classified in many ways with respect to time and place. However law may be broadly divided into the following two classes in terms of its usage:

i. International Law

ii. Municipal Law

These classes of law are discussed briefly hereafter.

I. INTERNATIONAL LAW

International law is an important branch of law. It deals with those rules and regulations of nation which are recognized and are binding upon each other through reciprocity. Many jurist however, do not give much importance to this branch. In recent times, this branch of law has grown manifold and has acquired increasing importance on account of globalization and other related factors.

International law has been further classified as follows:

i. Public International Law

This branch of law relates to the body of rules and regulations which governs the relationship between nations. Countries mutually recognise these sets of rules which are binding on them in their transactions on a reciprocal basis.

ii. Private International Law

Private international law is that part of law of the State, which deals with cases having a foreign element. Private international law relates to the rights of private citizens of different countries. Marriages and adoption of individuals belonging to different nations fall within its domain.

International Court of Justice, Hague, Netherlands

Source: http://en.wikipedia.org/wiki/File:International_Court_of_Justice.jpg

Established: 1945

Jurisdiction: Worldwide, 193 member States

Location: The Hague, Netherlands

Authorizing Statute: UN Charter, ICJ Statute

Judge term: 9 years

Number of positions: 15

Current President: Justice Peter Tomka

Indian Member: Justice Dalveer Bhandari

Website: www.icj-cij.org

II. MUNICIPAL LAW

Municipal laws are basically domestic or national laws. They regulate the relationship between the State and its citizen and determines the relationship among citizens. Municipal law can be further classified into two segments:

I. Public Law

Public law *chiefly regulates the relationship between the State and its' subjects*. It also provides the structure and functioning of the organs of States. The three *important branches of public law* are the following:

(a) Constitutional Law: Constitutional law is considered to be the basic as well as the supreme law of the country. The nature of any State is basically determined by its Constitution. It also provides the structure of the government. All the organs of states derive their powers from the Constitution. Some countries, such as India, have a written Constitution, while countries such as the United Kingdom have an 'uncodified Constitution'. In India, the fundamental rights are granted and protected under the Constitution.

(b) Administrative Law: Administrative law mainly deals with the powers and functions of administrative authorities - government departments, authorities, bodies etc. It deals with the extent of powers held by the administrative bodies and the mechanism whereby their actions can be controlled. It also provides for legal remedies in case of any violation of the rights of the people.

(c) ***Criminal Law:*** Criminal law generally deals with acts which are prohibited by law and defines the prohibited act as an offence. It also prescribes punishments for criminal offences. Criminal law is very important for maintaining order in the society, and for maintaining peace. It is considered a part of public law, as crime is not only against the individual but against the whole society. Indian Penal Code, 1860 (also known as IPC) is an example of a criminal law legislation, in which different kinds of offences are defined and punishments prescribed.

ACTIVITY:

Collect information on any one recent/ongoing case pertaining mainly to criminal law. Make a portfolio.

II. Private Law

This branch of law defines, regulates, governs and enforces relationships between individuals and associations and corporations. In other words, this branch of law deals with the definition, regulation and enforcement of mutual rights and duties of individuals. The state intervenes through its judicial organs (e.g. courts) to settle the dispute between the parties. Private or Civil law confers civil rights which are administered and adjudicated by civil courts. Much of the life of a society is regulated by this set of private laws or civil rights. This branch of law can be further classified into the following:

(a) ***Personal Law:*** It is a branch of law related to marriage, divorce and succession (inheritance). These laws are based on religion, ritual and customs of marriage, divorce, and inheritance. In such matters, people are mostly governed by the Personal laws laid down by their religions. For example, the marriage of Hindus is governed by Personal laws like the Hindu Marriage Act, 1955 while Muslim marriages are governed by the Muslim personal law based on a Muslim customary law which is largely un-codified.

(b) ***Property Law:*** This branch of law deals with the ownership of immovable and movable properties. For example, the Transfer of Property Act, 1882, deals with transfer of immovable property, whereas the Sales of Goods Act, 1930, deals with movable property.

(c) ***Law of Obligations:*** This branch of the law pertains to an area where a person is required to do something because of his promise, contract or law. It puts an obligation on the person to perform certain actions which generally arise as a consequence of an enforceable promise or agreement. If someone violates his promise, that promise may be enforced in a court of law. According to the Indian Contract Act, 1872, ***a contract is an agreement which is enforceable by law.*** In other words, a contract is an

agreement with specific terms between two or more persons in which there is a promise to do something in lieu of a valuable profit which is known as consideration. For example,'A' has offered his mobile phone to 'B' for Rs.15,000. 'B' agreed to purchase the same. This has created a legal relationship" both have made a promise which is enforceable by law.

A valid contract should have the following elements:

LAW OF OBLIGATIONS: LAW OF CONTRACTS

a) An offer

b) An acceptance of that offer which results in a meeting of the minds

c) A promise to perform

d) A valuable and legal consideration (which can be a promise or payment in some form)

e) A time or event when performance must be made (meet commitments)

f) Terms and conditions for performance, including fulfilling promises

g) Performance

Law of Torts: **Tort is a civil wrong.** This branch of law creates and provides remedies for civil wrongs that do not arise out of contractual duties. A tort deals with negligence cases as well as intentional wrongs which cause harm. An aggrieved person may use Law of Tort to claim damages from someone who has caused the wrong or legal injury to him/ her. Torts cover intentional acts and accidents.

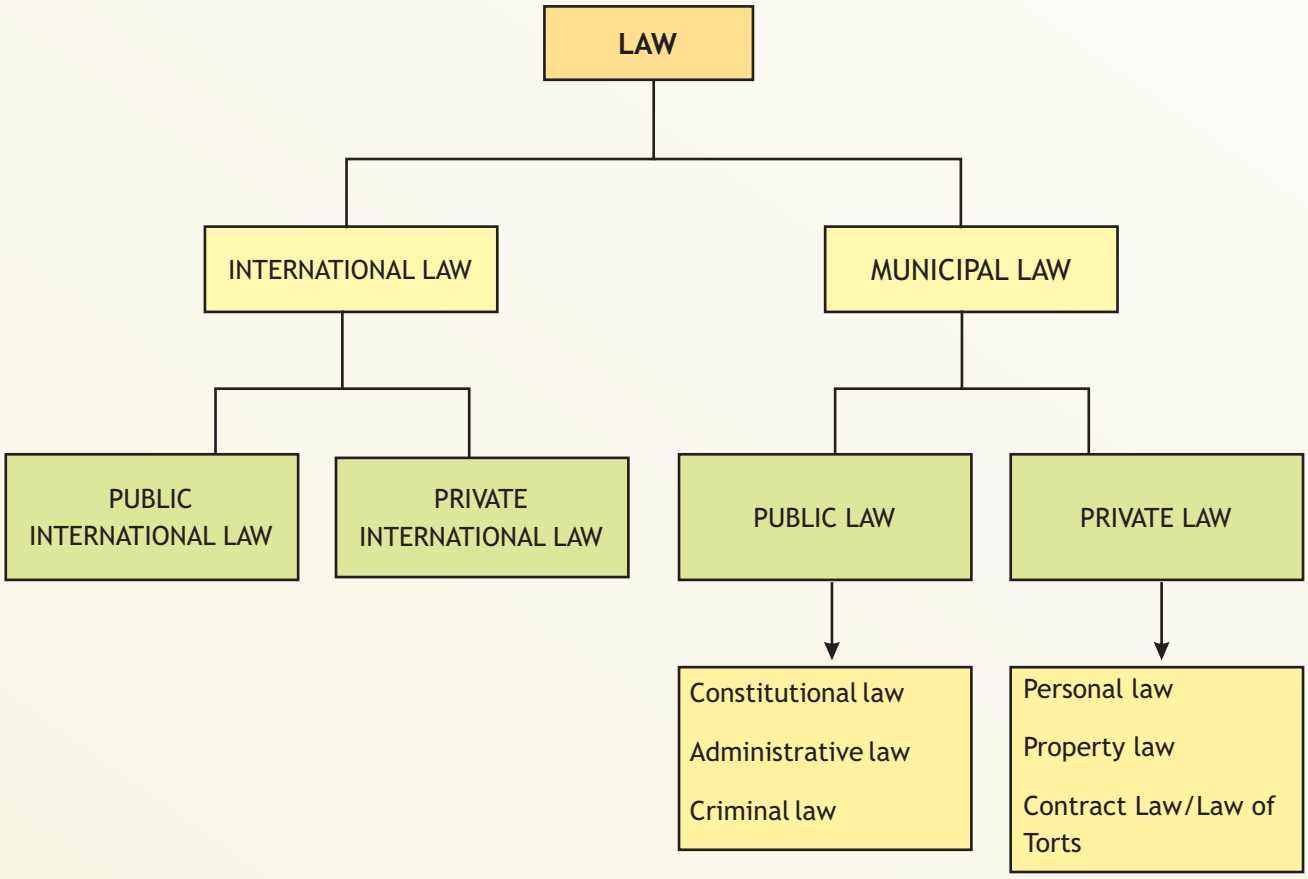
For instance, if 'A' throws a stone and it hits another person namely 'B' on the head, 'B' may sue 'A" for the injury caused by the accident.

ACTIVITY:

Discuss examples concerning law of obligations and law of torts from everyday life.

CLASSIFICATION OF LAW

(Please present this flowchart in landscape mode)



The classification, provided is not an exhaustive and conclusive one. It is just an attempt to develop a basic understanding of the classification of law. With the passage of time, many new branches of law have emerged and there is always scope for revising and classifying laws based on the new developments in the field of law.

UNIT 02: CHAPTER 3

SOURCES OF LAW

I. WHERE DOES LAW COME FROM?

To have a clear and complete understanding of law, it is essential to understand the sources of law. Sources of law mean the sources from where law or the binding rules of human conduct originate. In other words, 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 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.

II. CLASSIFICATION OF SOURCES

Salmond, an English Jurist, has classified sources of law into the following categories:

- **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.
- **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.

On the basis of the above discussion, three major sources of law can be identified in any modern society are as follows:

i. Custom

ii. Judicial precedent

iii. Legislation

III. 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 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.*

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.

Can Custom be 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 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.

Saptapadi is an example of customs as a source of law. It is the most importantrite 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.

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 and tenant regarding the payment of the rent will be governed by convention prevailing in this regard.

ACTIVITY:

Think of a popular custom which is not translated into law. What are its merits and demerits?

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. 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:** 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. Bombay High Court in the case of *Mathura Naikon v. Esu Naekin,* ((1880) ILR 4 Bom 545) held that, the custom of adopting a girl for immoral purposes is illegal.

- **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.

ACTIVITY:

Trace the developments relating to the Property Rights of Women with special reference to the Hindu Women's Right to Property Act, 1937; Hindu Succession Act, 1956 and Hindu Succession (Amendment) Act, 2005.

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 PC 59) 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 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. Hindu Personal Laws that have been codified are as follows:

Hindu Personal Laws

a) Hindu Marriage Act, 1955
b) Hindu Succession Act, 1956,
c) Hindu Minority and Guardianship Act. 1956 and
d) Hindu Adoptions and Maintenance Act, 1956

IV. 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. In the case of India, this hierarchy has been established by the Constitution of India.

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.

ACTIVITY:

Find out the name of countries which follow the English Common Law 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.

Given this background, 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.

DOCTRINE OF PRECEDENT IN INDIA - A BRITISH LEGACY

Pre-Independence:

According to Section 212 of the Government of India Act, 1919, the law laid down by Federal Court and any judgment of the Privy Council was binding on all courts of British India. Hence, Privy Council was supreme judicial authority - AIR 1925 PC 272.

Post-Independence:

Supreme Court (SC) became the supreme judicial authority and a streamlined system of courts was established.

1) **Supreme Court:**
   - Binding on all courts in India
   - Not bound by its own decisions, or decisions of PC or Federal Court - AIR 1991 SC 2176

2) **High Courts:**
   - Binding on all courts within its own jurisdiction
   - Only persuasive value for courts outside its own jurisdiction.
   - In case of conflict with decision of same court and bench of equal strength, referred to a higher bench.
   - Decisions of PC and federal court are binding as long as they do not conflict with decisions of SC.

3) **Lower Courts:**
   - Bound to follow decisions of higher courts in its own state, in preference to High Courts of other states.

Source: http://www.hcmadras.tn.nic.in/jacademy/article/Law%20of%20Pre%20by%20MSK%20Adv.pdf

Judicial decisions can be divided into following two parts:

(I) 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.

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

Having considered the various aspects of the precedent i.e. *ratio* and *obiter*, it is clear that the system of precedent is based on the hierarchy of courts. Therefore, it becomes important to understand the hierarchy of courts in order to understand precedent.

Every legal system has its own distinct features. Therefore, the doctrine of precedent is applied

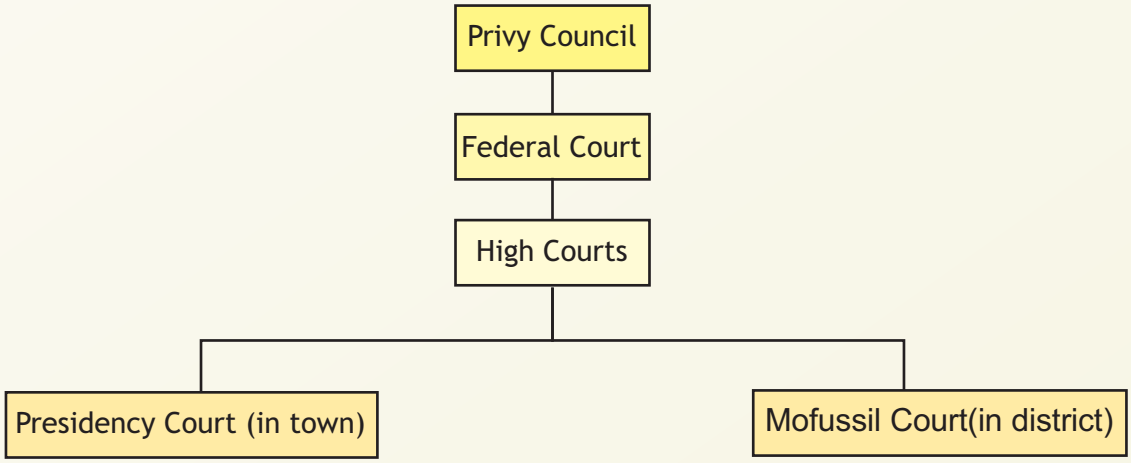
differently in different countries. In India, the doctrine of precedent is based on the concept of hierarchy of courts.

The modern system of precedent developed in India during the British rule. It was the British who introduced the system of courts in India. By the Regulating Act of 1773, a Supreme Court was established at Calcutta (Kolkata). Later on, other Supreme Courts were established in other presidency towns also. After that, High Courts were established in provinces. However, there was no hierarchy of courts between the Supreme Court and High Courts, and they were independent of one another.

The hierarchy of courts could be established only when the judicial committee of the Privy Council became the final appellate tribunal. Another milestone regarding the hierarchy of courts was the Government of India Act, 1935, which established the Federal Court. Therefore, as far as hierarchy of courts in India before Independence was concerned, the Privy Council was the final appellate court while other courts below it like the Federal Court, High Court, the Presidency and Moffussil courts were bound to follow the decisions of their superior courts.

The flow chart below shows the general hierarchy of courts in British India.

HIERARCHY OF COURTS IN BRITISH INDIA



However, post-independence, India adopted its own Constitution, which provided for a hierarchical judicial system that is pyramidal in nature. Under the Constitution of India, a single monolithic unified command of the judiciary has been established. The Supreme Court of India, which was established by the Constitution of India, came into existence on 28 January 1950, under Article 124(1) of the Constitution of India.

The Supreme Court replaced the Federal Court established by the Government of India Act, 1935. The Supreme Court of India is the Apex Court in the hierarchy of courts, followed by the High Courts at the State level. Below them are the District Courts and Sessions Court. The

structure of the judiciary in all states is almost similar, with little variation in nomenclature of designations.

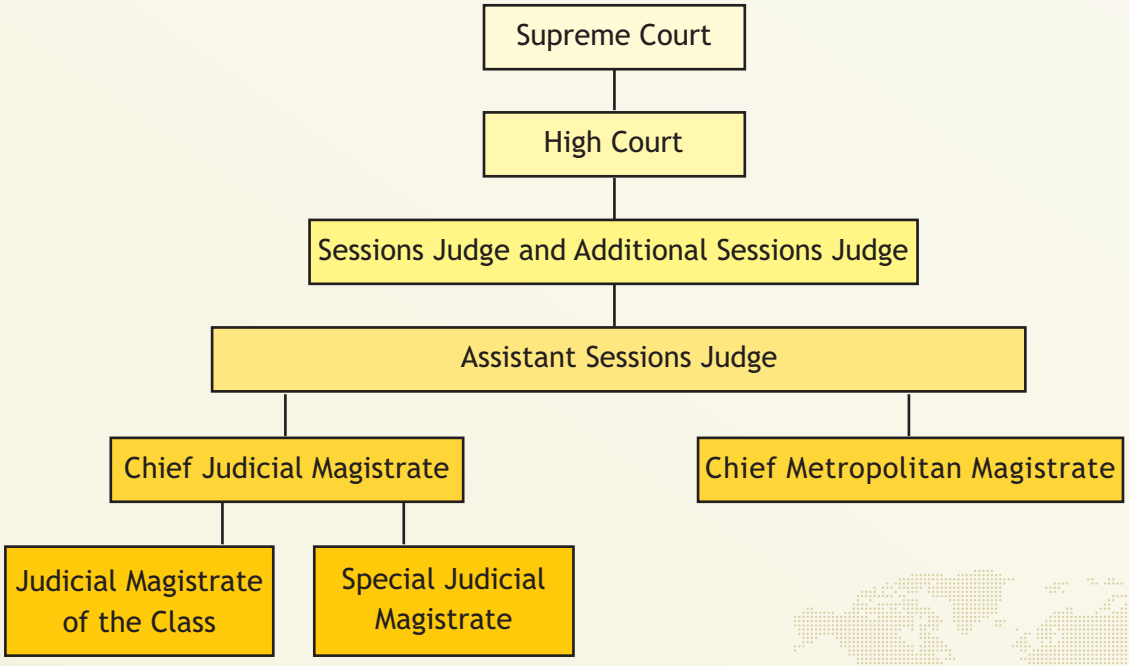
Court 3 in Middlesex Guildhall, the normal location for Privy Council hearings

Source:http://en.wikipedia.org/wiki/Judicial_Committee_of_the_Privy_Council

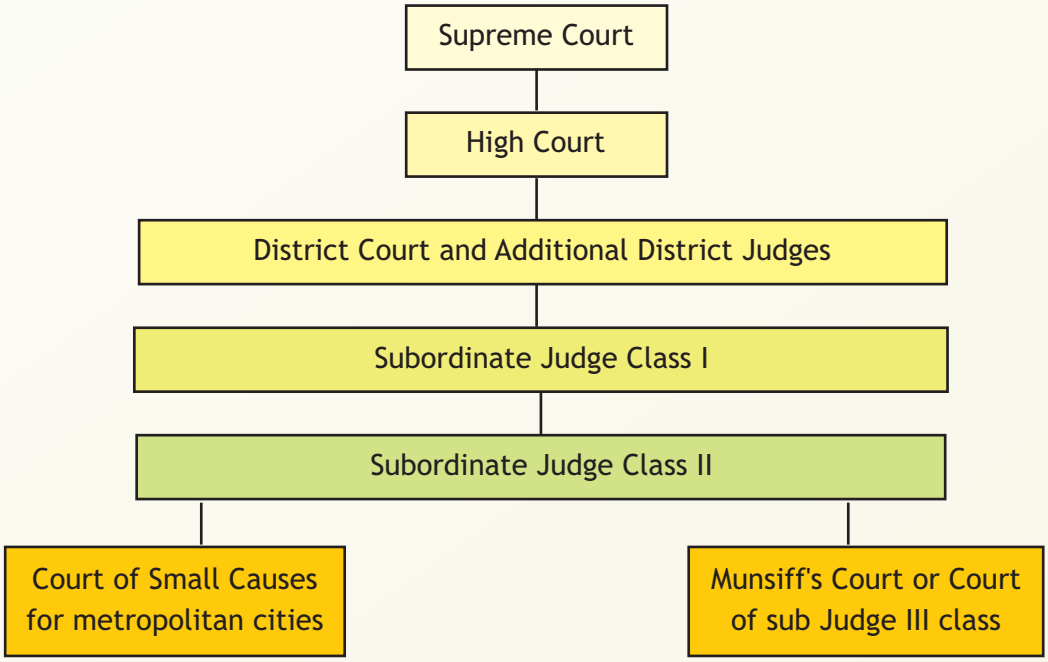
The Judicial Committee of the Privy Council (JCPC) is one of the highest courts in the United Kingdom. Established by the Judicial Committee Act, 1833, to hear appeals formerly heard by the King in Council (s. 3), it is the highest court of appeal (or court of last resort) for several independent Commonwealth countries, the British Overseas Territories and the British Crown dependencies. It is often referred to as the Privy Council, as in most cases appeals are made to "Her Majesty in Council" (i.e. the British monarch as formally advised by her Privy Counsellors), who then refers the case to the Judicial Committee for 'advice'.The 'report' of the Judicial Committee is always accepted by the Queen in Council as judgment. The panel of judges (typically five in number) hearing a particular case is known as 'the Board'.

The next flow chart explains the general hierarchy of courts in India:

HIERARCHY OF CRIMINAL JUSTICE SYSTEM



HIERARCHY OF CIVIL JUDICIAL SYSTEM



Under the mentioned hierarchy of courts, the decisions given by the Supreme Court are binding on all the courts throughout the territory of India. While the decision given by the High Courts are binding on the subordinate courts within the jurisdiction of that particular High Court, the decisions of the High Courts are not binding beyond their respective jurisdictions.

The decisions of the High Courts, however, have persuasive value for the other High Courts and the Subordinate Courts beyond their jurisdiction. It is important to note that the Supreme Court is not bound by its previous decisions; with an exception that a smaller bench is bound by the decision of the larger bench and that of the co-equal bench.

Do Judges make Law?

Discussion in the foregoing paragraphs regarding the hierarchy of courts and the binding authority of decisions of the Supreme Courts in the lower courts raises another important question regarding the role of judges in law-making. This part of the topic deals with the fundamental question. Do judges make law?

The Indian Constitution confers power on the legislature to make law, while the judiciary has the power to examine the constitutionality of the law enacted by the legislature. The courts also adjudicate upon the rights and duties of citizens, and further interpret the provisions of the Constitution and other statutes.

Justice Harilal Jekisundas Kania was the First Chief Justice of India Source: http://supremecourtofindia.nic.in/judges/rcji/01hjkania.htm

Through these processes, the Courts create new rights for the citizens. By this exercise, the judiciary makes additions to the existing laws of the country. It is argued that while doing this, judges actually make law. There are two views regarding this issue. One set of jurists say that judges do not make the law but that they simply declare the existing law. Another set of jurists say that judges do make the law.

Jurists like *Edward Coke and Mathew Hale* are of the opinion that judges do not make law. According to them judicial decisions are not sources of law but, they are simply the proof of what the law is. Judges are not law-givers, but they discover law. At the same time jurists like *Dicey, Gray, Salmond* are of the opinion that judges do make law. They hold the view that judges, while interpreting the law enacted by the legislative bodies, contribute to the existing body of law. A large part of the English law is judge-made law.

The above arguments seem to be complementary. It can be inferred that judges do not make the law in the same manner in which, legislative bodies do. Judges work on a given legal material passed as law by the legislature. While declaring the law, judges interpret the *'legislation'* in question and play a creative role. By this creative role, judges have contributed significantly to the development of law.

In the Indian context, former judges of the Supreme Court of India like Justice *P.N. Bhagwati* and *Justice Krishna* Iyer enlarged the meaning and scope of various provisions of the Constitution through their creative interpretation of the legal text. The Supreme Court, too in its role as through an activist, has created many new rights such as the: right to privacy, right to live in a pollution free environment, right to livelihood etc.

The Right to Education has received considerable impetus during the last decade as a result of the concerted effort of many groups and agencies towards ensuring that all children in India receive at least minimum education, irrespective of their socio-conomic status and their ability to pay for education, in a situation of continuous impoverishment and erosion of basic needs. In a way, the right to education is the culmination of efforts made possible by judicial interpretations and a Constitutional amendment.

Source:http://www.ncpcr.gov.in/Acts/Fundamental_Right_to_Education_Dr_Niranjan_Aradhya_ArunaKashyap.pdf

These new rights were created only by way of interpreting Article 21 (Right to Life) of the Constitution of India. These rights developed by the courts are not in any sense lesser than the laws enacted by the legislative bodies. Therefore, it can be concluded that the ***judicial precedents are important sources of law in modern society and judges do play a significant role in law-making.***

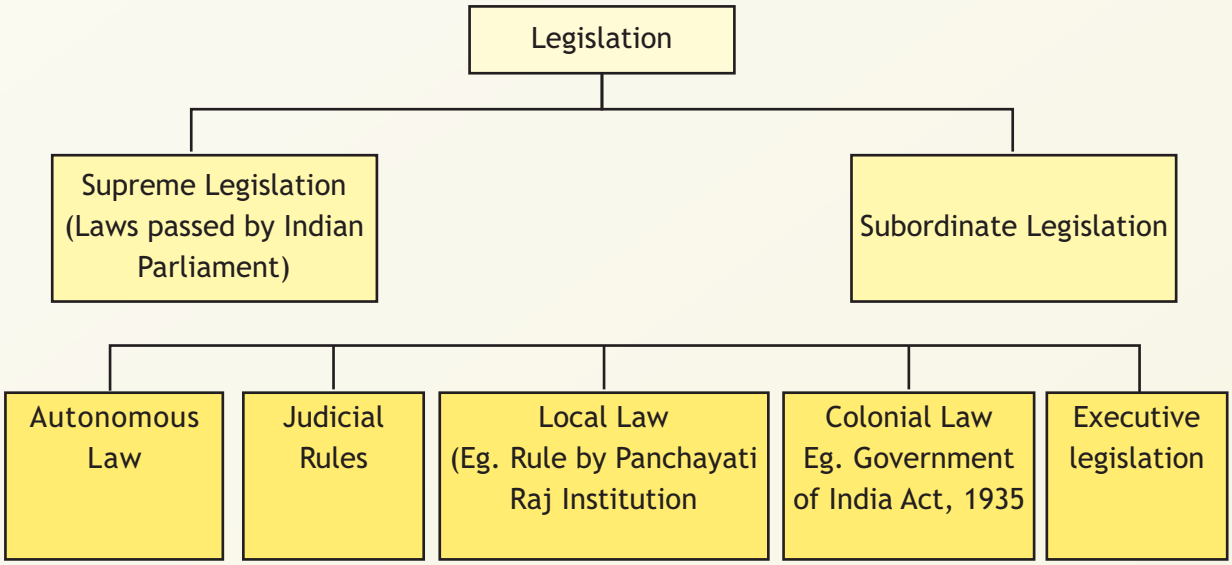
V. LEGISLATION AS A SOURCE OF LAW

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 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 chart below explains the types of legislation:



The kinds of legislation can be explained as follows:

(i) **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. The law enacted by the Indian Parliament also falls in the same category. However in India, powers of the Parliament are regulated and controlled by the Constitution, through the laws enacted by it are not under the control of any other legislative body.

Indian Parliament

Source:
http://www.parliamentmuseum.org/greetings/greetings.php?id=4

(ii) **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:-

(a) **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.

(b) **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.

(c) **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.

(d) **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, India was governed by the laws passed by the British Parliament. 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.

(e) **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.

UNIT 02: CHAPTER 4

LAW REFORM

I. Need for Law Reform

There is a strong relationship between the law and the society. Law has to be dynamic. It cannot afford to be static. In fact, law and society act and react upon each other.

Law reform is the *process by which the law is adapted and advanced over a period of time* response to changing social values and priorities. The law cannot remain stagnant. Law has to respond to the social concerns and has to provide amicable solutions to the problems that keep coming up before the society. It has to respond to social, economic or technological developments. Law reforms also help to shape democracies to suit changing political and legal environments. Law reform is not a one-time process but a tedious and gradual process.

II. Law reforms in India

Law reforms in India can be broadly classified into two periods, which are as follows:

i) Pre-independent India law reforms

ii) Post-independent India law reforms

Before the advent of British rule, the Indian society was by and large governed by its customary law, either based on Hindu Dharmashastra or Islamic religious scripts. These customary laws were followed by the rulers and the ruled. Customary laws were considered as rigid and averse to the idea of social change.

The East India Company introduced the western legal system as well as legal reforms in India. Prior to the First War of Independence in 1857, the East India Company ruled India under the permission of the British crown, and later on the British crown governed India till 1947. During the British Raj, i.e. from 1600 A.D to 1947 there were major changes in political, economic, administrative and legal fields.

Modern courts were established by the enactment of various Acts such as the Regulating Acts, 1773, the Government of India Act 1935, etc. Further, well accepted principles of English law like justice, equity, and good conscience were used by the courts in India for their decisions. British administrators like *Warren Hastings* (1732-1818), the first Governor-General of India, *Cornwallis* (1738-1805), a British Army officer and colonial administrator, who served as a civil and military governor in India, and is known for his contribution to the policy for the Permanent Settlement and *William Bentinck* (1774-1839), a British statesman, who served as Governor-General of India from 1828 to 1835, played crucial roles in improving the Civil and Criminal Justice System in pre-independent India.

A major milestone in law reform during the *British Raj*, was the establishment of the Law Commission. The first Law Commission was established in 1834 under the Charter Act of 1833, under the Chairmanship of *Thomas Babington Macaulay.*

The major contribution of the Law Commission was the recommendation on the codification of the penal code and the criminal procedure code. Thereafter, the Second, Third and Fourth Law Commissions were established in the years 1853, 1861 and 1879 respectively. The Indian Code of Civil Procedure, 1908, the Indian Contract Act, 1872, the Indian Evidence Act, 1872 and the Transfer of property Act, 1882, are major contributions of these above Law Commissions.

Lord Macaulay, 1800-1859, came to India in 1834 as a member of the Supreme Council of India when William Bentinck was the Governor-General of India. He stayed in India till early 1838. However, during his short stay Macaulay had left his unforgettable imprint on the Indian legal system which made a long term impact on the Indian society.

Post-Independent India:

Freedom brought the winds of change and an ideological shift in post-colonial India. This change was very visible in the field of law reform as well. In Independent India, the newly enacted Constitution and Principles enshrined under it were the main guiding forces of law. The Fundamental Rights and Directive Principles of State Policies are now the basis for any social change. After Independence, the constitution under Article 372, recognized the pre-constitutional laws. However, there were demands from various quarters to have a fresh look at the colonial laws. Responding to the feeling of the Indian masses, the government constituted the First Law Commission of India under the chairmanship of the then Attorney General, Mr. *M.C Setalvad*. Since then, twenty Law Commissions have been constituted. As many as 243 reports have been submitted by the Law Commissions till 2012. The Twentieth Law Commission has been set up by the Government in 2013, under the chairmanship of Justice D. K. Jain. The term of the Twentieth Law Commission will be upto 2015. Some of the important reports submitted by the various Law Commissions are shown in the table below:

REPORT NO.	SUBJECT OF THE REPORT	LAW COMMISSION AND THE YEAR IN WHICH REPORTS WERE SUBMITTED
14	Reform of Judicial Administration.	1st Law Commission(1958)
15	Law Relating To Marriage And Divorce Amongst Christians In India.	2nd Law Commission(1960)
27	The Code Of Civil Procedure, 1908.	3rd Law Commission(1964)
35	Capital Punishment.	4th Law Commission(1967)
42	Indian Penal Code.	5th Law Commission(1971)
59	Hindu Marriage Act, 1955 And Special Marriage Act, 1954.	6th Law Commission(1974)
69	The Indian Evidence Act, 1872.	7th Law Commission(1977)
71	The Hindu Marriage Act, 1955- Irretrievable Breakdown Of Marriage As A Ground for Divorce.	8th Law Commission(1978)
84	Rape And Allied Offences-Some Questions Of Substantive Law, Procedure And Evidence.	9th Law Commission(1980)
101	Freedom Of Speech And Expression Under Article 19 of The Constitution: Recommendation to extend it to Indian Corporations.	10th Law Commission(1984)
131	Role Of Legal Profession In Administration Of Justice.	11th Law Commission(1988)
135	Women In Custody.	12th Law Commission (1989)
152	Custodial Crimes.	13th Law Commission (1994)
157	The Narcotics Drugs And Psychotropic Substances Act, 1985(Act No. 61 Of 1985).	14th Law Commission (1997)
170	The Reform Of Electoral Laws	15th Law Commission (1999)
177	Law Relating To Arrest	16th Law Commission (2001)
200	Trial By Media: Free Speech Vs. Fair Trial Under Criminal Procedure (Amendments To The Contempt of Court Act, 1971)	17th Law Commission (2006)
230	Reforms In The Judiciary - Some Suggestions	18th Law Commission (2009)
241	Passive Euthanasia - A Relook	19th Law Commission (2012)

A survey of the subject of the tabulated reports reflects the wide range of issues that the Law Commission of India has dealt with. It also indicates that the government is equally aware and concerned about the need for timely reform in laws, in order that law may respond to the changing needs of society. However, in recent years, economic reforms have brought about many changes in the Indian society. New categories of crimes including white-collar crimes, crimes against women and economic inequality in particular have to be tackled on an urgent basis. The Law Commission therefore occupies a central role in law reforms in India.

UNIT 02: CHAPTER 5

Major Works of Jurists

I. Natural Law School:

1. St. Thomas Aquinas- Commentary on the Sentences; On Being and Essence; Against Those Who Assail the Worship of God and Religion.
2. Lon Fuller- Law in Quest of Itself; Basic Contract Law; Problems of Jurisprudence; The Morality of Law; Legal Fictions; Anatomy of Law.
3. Rudolf Stammler- The Theory of Justice.
4. John Rawls- A Theory of Justice; Political Liberalism; The Law of Peoples;Justice as Fairness.

II. Analytical School of Law:

5. Jeremy Bentham- Fragment on Government; An Introduction to the Principles of Morals andLegislation; The limits of jurisprudence defined.
6. John Austin -The Province of Jurisprudence Determined; Lectures on Jurisprudence.
7. H.L.A Hart -The Concept of Law; Liberty and Morality; The Morality of the Criminal Law; Punishment and Responsibility; Essays in Jurisprudence and Philosophy.
8. Mathew H.Kramer -Defense of Legal Positivism: Law Without Trimmings.

III. Historical School of Law:

9. Savigny - The law of possession; On the vocation of our ages for legislation and jurisprudence.
10. Henry Maine - Ancient Law; Village-Communities; Early History of Institutions; Popular.

IV. Sociological School of Law:

11. Roscoe Pound - Outlines of Lectures on Jurisprudence; The Spirit of the Common Law; Law and Morals; Criminal Justice in America.
12. Duguit -Treatise on Constitutional Law.
13. Eugene Ehrlich -Fundamental Principles of the Sociology of Law.
14. Rudolf von Ihering -Law as a Means to an End; The Struggle for Law.

V. Realist School of Law:

15. Jerome Frank - Law and the Modern Mind; Courts on Trial.
16. Justice Oliver Wendell Holmes -The Common Law

Comprehension Questions

1) Differentiate between The Natural Law School and the Analytical Law School.

2) What is the need for law in a society? Can a country and its citizens be governed without any kind of law?

3) Discuss the philosophy of the Sociological approach to law.

4) What are the main features of the Realist School?

5) What are the benefits of classifying law? How many units are they classified into? Describe each, briefly.

6) Do you think custom as a source of law in India is relevant even during present times? Support your answer with appropriate reason and examples.

7) What do you understand by the term judicial precedent?

8) Define : i) Ratio Decidendi ii) Obiter Dicta.

9) Do judges play an important role in law-making? Discuss.

10) What do you understand by the term legislation? Briefly describe the types of legislation.

11) Why is delegated legislation considered a necessary evil?

12) Law reform is a tedious and gradual process. Discuss.

13) Trace the law reforms in Pre and Post-Independence India.

ACTIVITIES

1) How do you find out whether a society has a very good legal system or not? What criteria should inform your opinion? Divide your class into two sections and hold a discussion. You may also watch some of the videos posted by Professor Michael Sandel at http://www.justiceharvard.org/watch/in guiding your debate.

Case Study:

2) Trace the historical development of Lok Pal Bill. Is there a need for Lok Pal bill in our country?

3) What is the need for the Right to Information in today's context?

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