

Part 1

INTRODUCTION TO LAW

1 The nature of law

Chapter 1 The nature of law

Learning objectives

After studying this chapter you will understand the following main points:

- nature of law;
- object of law;
- functions of Law;
- ways in which the law may be classified, including the differences between public and private law, civil and criminal law, Substantive and Procedural Law.

NATURE OF LAW

- **Law is powerful**
 - Affects all people, from cradle to grave
 - Affects most of life, from work to leisure
- **Law is important**
 - Virtually all known civilizations throughout history have had some kind of law.
 - But which is more important -- written law or the people who enforce it?
- **Law is fascinating**
 - Complex, but never just theoretical

The law affects every aspect of our lives; it governs our conduct from the cradle to the grave and its influence even extends from before our birth to after our death. We live in a society which has developed a complex body of rules to control the activities of its members. There are laws which govern working conditions (e.g. by laying down minimum standards of health and safety), laws which regulate leisure pursuits (e.g. by banning alcohol on coaches and trains travelling to football matches), and laws which control personal relationships (e.g. by prohibiting marriage between close relatives). So, what is 'law' and how is it different from other kinds of rules? The law is a set of rules, enforceable by the courts, which regulate the government of the state and govern the relationship between the state and its citizens and between one citizen and another. As individuals we encounter many 'rules'. The rules of a particular sport, such as the off-side rule in football, or the rules of a club, are

designed to bring order to a particular activity. Other kinds of rule may really be social conventions, such as not speaking ill of the dead. In this case, the 'rule' is merely a reflection of what a community regards to be appropriate behaviour. In neither situation would we expect the rule to have the force of law and to be enforced by the courts.

DEFINITION AND MEANING OF THE TERM 'LAW'

What is Law?

- **System of Rules**
- **Lays down standards to which we ought to conform**
- **Legal rule, moral rule and social convention**
- **Law is never static, it is always changing**

It is very difficult to state a single and accurate definition of the term 'LAW' as it is a general term and has different connotation for different people. For example, a common man may think of law as a set of rules he has to obey whereas for a judge, it is nothing but a set of guiding principles to be applied in deciding cases. Likewise law has been variously defined by various individuals from different point of view and hence there could not be and is not any unanimity of opinion regarding the real nature of the law and its definition.

'Law' in simple term implies 'rules' and as such includes different sets of rules which govern or regulate various external human action and conduct of individuals, institutions and the

Government with each other. But, merely rules or sets of rules do not mean law, they must be enforced by the sovereign state and must receive due recognition.

The term 'Law' has been defined by many authorities. It has been defined as 'rules of human action'. It denotes different kinds of rules and principles. In order to understand its meaning clearly, let us consider the definition stated by some of the Jurists:

The ancient Greek Philosopher Aristotle defined law 'as an

Jurisprudence, or "What is Law?"



embodiment of reasons whether in individual or the community'.

British philosopher Jeremy Bentham defined the law as 'a collection of signs declarative of a volition conceived or adopted by the sovereign'

Noted British Jurist John Austin says 'law is a body of rules determined and enforced by a sovereign political authority'. Well known British philosopher H.L.A.Hart 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.'

Von Savigny said, 'Law is a product of the general consciousness of the people.'

According to Salmond, 'Law is the body of principles recognised and applied by the state in the administration of justice.' According to Holland, 'Law is a rule of external human action enforced by the sovereign political authority.'

According to Blackstone, "Law in its most general and comprehensive sense signifies a rule of action and is applied indiscriminately to all kinds of actions whether animate or

inanimate, rational or irrational. Thus we say, the laws of gravitation, of optics, of mechanics, as well as the laws of nature and of nations."

According to Anson, "The object of Law is order, and the result of order is that men are enabled to look ahead with some sort of security as to the future. Although human actions cannot be reduced to the uniformities of nature, men have now endeavoured to reproduce by law something approaching to this uniformity."

According to Woodrow, Wilson- "Law is that portion of established habits and thoughts of mankind which has gained distinct and formal recognition in the shape of uniform rules backed by the authority and power of the government."

According to Article 13(3) of Constitution of India, 1950, "Law includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India, the force of law."

On the basis of the definitions of law as provided 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 does not consider moral values as part of the law, while the natural law school considers law and morality as inseparable. The analysis of the above definitions suggests that law is a body of rules recognised and maintained by the state to regulate the human behaviour and conduct in a society. A law will present the following characteristics.

1. It is a set of rules.
2. It regulates the human conduct.
3. It is created and maintained by the state.
4. It has certain amount of stability, flexibility and uniformity.
5. It is backed by coercive authority.
6. Its violation leads to punishment.
7. It is the expression of the will of the people and is generally written down to give it definiteness.
8. It is related to the concept of 'sovereignty' which is the most important element of state.
9. Law creates legal rights.
10. Law is essentially of a territorial nature and it applies with-

in the territory of the State.

All definitions and characteristics of law hang between two extreme positions:

- a. Its coercive character.
- b. Social acceptance of the community.

It can also be said that:

1. Law is related to external human actions. Many times, internal human actions can also be the subject of law. For example, if A is killed in an accident caused by the action of B and if it is proved that B purposely killed A, he can be prosecuted under Section 302 of the Criminal Procedure Code. But if it is proved that B had no intention to kill A, the law may take lenient view. Thus, the cognizance of both actions, external as well as internal, is taken by the law.
2. Law is rule of conduct imposed and enforced by the sovereign. The Government regulates the conduct of the citizen by passing necessary acts. It ordains a general course of conduct to be followed by the citizen of the country. Such rules or Acts enforced by the Government are termed as 'Law'.
3. The rules of conduct are very essential for peaceful and prosperous living of the people in the country. In a sense, they help all people to have maximum freedom.
4. Law is supreme and is applicable to all. It is the same for the poor and for the rich, for the rulers as well as for the subjects of the country.

Thus, law includes all the rules or Acts enforced by the sovereign which regulate the relations between the citizens and also the relations with the Government or State. It is the body of principles of which regard to human behaviour as determined by the legislature from time to time. All these principles are interpreted and enforced by the judiciary of the country.

OBJECT OF LAW

A long standing problem of legal philosophy is the clash between the interest of an individual and the interest of the group. It is true that law is an instrument of society. The law assures to an individual the maximum freedom for the exercise of his rights, at the same time an unrestricted exercise of free will by an individual may clash with the interest of the group to which he belongs. That group may be his family, his village or a tribal group or a club which may be recreational, professional or religious. This group may demand from the

individual certain sacrifice of the freedom in the interest of the larger group. The unrestricted freedom enjoyed by the primitive man does not and cannot exist in an organised society as society functions on the mutual dependence between the society and the individual. Here the role of law is to act as a regulator to strike balance between the rights of the individual and the rights of the group. According to Manusmriti, an orderly society would be in existence if everyone acts according to Dharma and thereby protects Dharma. Such an orderly society in turn protects the rights of an individual. Therefore, it can be said that the object of law is to enforce standards of the social behaviour, to provide rules whereby the relations of individual to individual, group to group, government and citizens may be such that conflict is avoided; where conflict cannot be avoided the law provides the means of adjudication through courts.

FUNCTION AND PURPOSE OF LAW

Law is not static. It changes with change in society. 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. In fact, the State interacts with and protects its citizens throughout their lives, with the help of law.

According to Hindu Law, the purpose of law is that "it should aim at the welfare of the people in this world and also from salvation after death."

According to Muslim law, "the purpose of law is the discipline of the soul, the improvement of morals and the preservation of life, property and reputation."

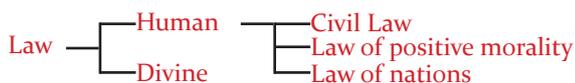
According to Bentham, the purpose of law is the maximisation of the happiness of the greatest number of members of the community.

According to Salmond, the purpose of law is justice. Law is those principles which are applied by the State in the administration of justice.

1. To maintain law and order within a given society.
2. To maintain the status quo in the society.
3. To enable and guarantee enjoyment of the maximum freedom to the individual.
4. To obtain security and fair play for every individual.

5. To achieve highest good of the individual and society.
7. To deliver justice.
8. To provide equality and uniformity.
9. To maintain impartiality.
10. To maintain social control.
11. To resolve conflicts.
12. To bring orderly change through law and social reform.

CLASSIFICATION OF LAW



For a proper understanding of law, a classification of laws is not only desirable but also necessary. Classifications of law have been made from time to time. However, no classification of law is permanent as law keeps on changes according to the needs and changes of society. In modern times, the law is

Classification of Law

CATEGORIES	EXAMPLES
LAW	General Law <i>Territorial Law or Ordinary Law of the Land</i>
	Special Law
	Local Law
	Foreign Law
	Conventional Law
	Autonomic Law
	Martial Law
	International Law

classified into following categories:

International and Municipal Law: Law may be broadly divided into two classes: international law and municipal law. International law is not only law but also a very important branch of law. International law is divided into two classes: Public international law and private international law. Public international law is that body of rules which governs the conduct and relations of the States with each other. By private international law it means those rules and principles according to which cases

having foreign element are decided. Private international law applies to individuals and not to States. Moreover, the rules and principles of private international law vary from State to State and there is no uniformity. Private international law is enforced by municipal courts which apply municipal law and not international law. Municipal law is the law applied within a State. Municipal laws are basically domestic or national laws. They regulate the relationship between the State and its citizen and determine the relationship among citizens.

Public Law and Private Law: Public law determines and regulates the organization and functioning of the State and determines the relation of the State with its subjects.

Public law is divided into three classes: Constitutional Law, Administrative Law and Criminal Law.

Constitutional law determines the nature of the State and the structure of the government. It is superior to the ordinary law of land. Constitutional law is written in India and the United States but it is unwritten in England. The modern tendency is to have written constitutions.

Administrative law deals with the structure, powers and functions of the organization of administration, the limits of their powers, the methods and procedures followed by them and the methods by which their powers are controlled including the legal remedies available to persons whose rights have been infringed.

Criminal law defines offences and prescribes punishments for them. It not only prevents crimes but also punishes the offenders. Criminal law is necessary for the maintenance of law and order and peace within the State. In criminal cases, it is the State which initiates proceedings against the wrongdoers. The State is always a party in criminal case.

Classification of Law

CATEGORIES	EXAMPLES
LAW	PUBLIC LAW <i>(relationship between the state and its citizens)</i>
	Constitutional
	Administrative
	International
PRIVATE OR CIVIL LAW <i>(rights and duties of individuals towards each other)</i>	Contract
	Tort
	Property
	Trusts
	Family

Private law regulates and governs the relations of citizens with one another. The parties are private individuals and the State decides the disputes among the people. There is great difficulty in classifying private law. A general classification of private law is the law of persons, law of property, the law of obligations, the conflict of laws, contracts, quasi-contracts and tort. Civil and Criminal Law: There are two types of law and justice, civil and criminal. It means there are two types of wrongs – civil wrongs and criminal wrongs.

Civil wrongs are private wrongs while criminal wrongs are public wrongs.

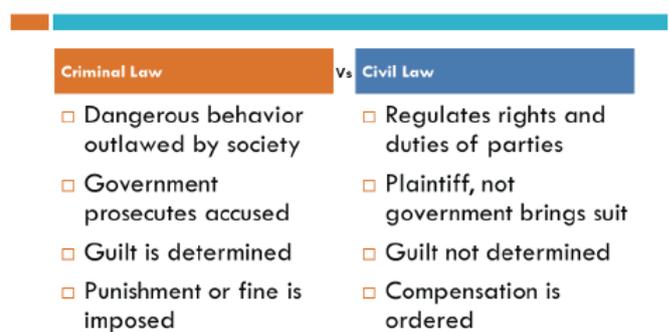
Civil wrong is an infringement or deprivation of private or civil rights belonging to individuals which are generally termed as civil injuries whereas a breach and violation of public rights and duties which affect the whole community are distinguished as the harsher appellation of crimes.

A crime is an act which is deemed by law to be harmful to

the society in general, even though its immediate effect is on an individual. Here proceedings against such persons who commit crime are done by the State and if convicted, they are punished.

The law regulating the criminal wrongs are defined as crim-

Classification of Law



	Criminal law	Civil law
Concerns	Offences against the state	Disputes between private individuals
Purpose of the action	To preserve order in the community by punishing offenders and deterring others	To remedy the wrong which has been suffered
The parties	A prosecutor prosecutes a defendant Prosecutions are brought in the name of the State Case title: Mithu vs State of Punjab	A Plaintiff sues a defendant Case title: Mohiri Bibi vs Dhramodas Gosh
Where the action is heard	The criminal courts, i.e. magistrates' court or Sessions Court	The civil courts, i.e. District Court or High Court
Standard and burden of proof	The prosecutor must prove his case beyond a reasonable doubt	The claimant must establish his case on the balance of probabilities
Decision	An accused may be convicted if he is guilty and acquitted if he is innocent	A defendant may be found liable or not liable
Sanctions	Imprisonment, fine	Damages, injunction, specific performance, rescission
Examples	Murder, theft, driving with excess alcohol, engaging in an unfair commercial practice	Contract, tort, trusts, property law

Substantive Law and Procedural Law: Statute law can be either substantive or procedural. The substantive law defines the rights while the procedural law deals mainly with the procedure or remedies. Most part of the Code of Criminal Procedure and the Law of Evidence pertains to the procedural law whereas the Indian Penal Code, the Law of Contract, etc are the examples of substantive law. In case of Code of Civil Procedure, the first part is mostly substantive law

whereas the second part consisting of Orders mainly pertains to procedural law. According to Salmond, "the law of procedure may be defined as that branch of the law which governs the process of litigation. It is the law of actions. It includes all legal proceedings – civil or criminal. All residue is substantive law which relate not to the process of litigation, but to its purposes and subject matter." Salmond has given the following points of distinction between the Substantive

Substantive Law	Procedural Law
It determines the conduct and relations of the parties inter se in respect of the matter litigated.	It regulates the conduct and relations of the courts and litigants in respect of the litigation.
It deals with the ends which the administration of justice contemplates.	It deals with the means and instruments by which the ends of administration of justice are to be attained.
The question as to what facts constitute a wrong is determined by the substantive law.	What facts constitute the proof of wrong is procedural law.
Substantive law defines the rights.	Procedural law defines the modes and conditions of the application of one to the other.
It relates to the matter outside the courts.	Procedural law regulates the affairs inside the courts.

Critics point out many defects in the above classification of laws. Many of the classes of laws do not exist in many legal systems of the world. Those branches of law which have recently been developed cannot be put under any classification. The result is that classification given above is

neither universal nor exhaustive. Many jurists have attempted classification on different principles. New branches of law are growing and developing rapidly in different parts of the world and provision has to be made for them in any classification of laws. Industrial law and commercial law are such

MEMORY TICKERS

1. 'Law' in simple term implies 'rules'.
2. 'Law' includes different sets of rules which govern or regulate various external human action and conduct of individuals, institutions and the Government with each other.
3. The function of law is to achieve justice, stability and peaceful changes in the society.
4. In the wider sense, Justice is synonymous with morality.
5. In the narrower sense, Justice means impartiality or equality.
6. According to Article 13(3) of Constitution of India, 1950, "Law includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law."
7. In modern times, the law is classified into International and Municipal Law; Public and Private Law; Civil and Criminal Law; and Substantive and Procedural Law.

Self-test questions/activities

1. What is law and why is it necessary?
2. Explain the difference between the following pairs:
 - (a) public law and private law;
 - (b) civil law and criminal law;
 - (c) contract and tort;
 - (d) common law and equity;
 - (e) ownership and possession.
3. Consider the following legal actions and indicate whether civil or criminal proceedings would result:
 - (a) A decides to divorce her husband, B, after 10 years of marriage;
 - (b) C is given a parking ticket by a traffic warden for parking on double yellow lines;
 - (c) D returns a faulty steam iron to the shop where she bought it, but the shop manager refuses to give her a refund;
 - (d) E drives at 50 mph on a stretch of road where there is a 30 mph limit. He fails to see F, who is crossing the road. She is knocked down and sustains severe injuries;
 - (e) G takes a copy of Business Law from the reference section of the library, with the intention of returning it when he has finished his first assignment. He finds the book so valuable that he decides to keep it;
 - (f) H returns to England after working abroad for three years. While abroad, she rented her flat to Ian. She now gives him notice to quit, but he refuses to move out.

Specimen examination questions

1. Discuss the meaning and Definition of Law.
2. Explain the Concept of Law ?
3. David, a farmer, supplies organic free range eggs on a regular basis to the Peak Park Hotel and Country Club. David's hens, and the eggs they produce, have become infected with salmonella. The hotel uses the infected raw eggs to prepare a mayonnaise for Ian and Janet's wedding reception. Many of the guests are taken ill after the reception and Sybil, Janet's 90-year-old grandmother, dies.
 - (a) Identify the different types of legal proceedings which might arise from these facts.
3. Elaborate on the various function of Law.