Unit 3

Jurisprudence, Nature and Sources of Law

CHAPTER 1

Jurisprudence, Nature and Meaning of Law

Contents

Learning Outcomes

After the completion of this chapter, the students will be able to:

- Describe the meaning, nature, essentials and objectives of law along with its multi-faced role
- Define Law and explain the meaning of jurisprudence
- State two rules that shows natural justice is firmly grounded in Articles 14 and 21 of the Constitution
- Write down two points each in favour of and against conviction in Speluncean Explorers Case
- Compare the five schools of law-Natural, Analytical, Historical, Sociological and Realist Schools of Law
- List the distinguishing features and sources of law for each school
- Discuss the need for law in society by assessing the function and purpose of law

I. Introduction

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

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.

In 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.

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

The Case of the Speluncean Explorers

The Case of the Speluncean Explorers is a *fictitious case created by Lon Fuller in 1949 for the Harvard Law Review*. The case takes place in the equally fictitious 'Commonwealth of Newgarth' in the year 4300. Fuller's article offers five possible judicial responses. Each has a different viewpoint on whether the survivors should be charged for breach of law. Fuller's account has been called a 'classic in jurisprudence' and an example of mid-20th century legal theory.

Facts

Five cave explorers (spelunkers) are trapped inside a cave following a landslide, one of them being Roger Whetmore. They have limited food supplies and no source of food inside the cave. The rescue was difficult, time-consuming, and costly due to the remote location. Ten workmen were killed in the rescue. Approaching starvation, a radio contact is eventually established with the rescue team on the 20th day of the cave-in. The explorers learn that another 10 days would be required in order to free them. After consultation with medical experts, they were told that they are unlikely to survive another

10 days without food. The explorers inquire the doctors about their chances of surviving if they killed and ate one of their own.

The doctors hesitantly stated that they would. No one on the rescue team said yes when asked if they should hold a lottery to decide who to kill and eat. The radio is turned off, and later a lottery is held. The explorers were initially hesitant to use this desperate step, but after hearing the radio chats, they agreed.

Roger Whetmore proposed casting lots, using a pair of dice he happened to have with him. Roger Whetmore backed out of the deal before the dice were rolled, indicating he would wait another week. The other accused him of betraying their trust and continued to cast the dice.

The defendants invited Whetmore to announce any concerns to the fairness of the dice throw before throwing it on his behalf. He didn't raise an objection, and the throw went against him. Whetmore was put to death and devoured.

In the Case of the Speluncean Explorers, the person to be eaten was chosen by throwing a pair of dice.

Following their rescue and recovery, the survivors were charged with murder of Roger Whetmore. In the Commonwealth of Newgarth, the mandatory sentence for murder is death by hanging.

On the facts as found by the jury, the trial judge ruled that the defendants were guilty of murder and sentenced them to be hanged.

Post-trial, both the trial judge and the jury joined in a petition to the Chief Executive of Newgarth, to commute the death sentence of surviving explorers to six months' imprisonment. The Chief Executive waits for the Supreme Court's disposition of the petition of error before making a decision regarding clemency.

Jury involved in Judgement

- Chief Justice Truepenny
- Justice Foster
- Justice Tatting
- Justice Keen
- Justice Handy

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

Opinion of Chief Justice Truepenny

Verdict: Guilty

Chief Justice Truepenny holds that in this extraordinary case, the course followed by the jury and trial judge was not only 'fair and wise' but the only one open to them to be taken under the law. He believes that the statute is unambiguous and must be applied by the judiciary. The public opinion and sentiment has no sway over the word of the law.

Moreover, granting mercy falls within the scope of the executive and not the judiciary. The Chief Justice depends on the possibility of executive clemency to mitigate the word of law. He proposes that the Supreme Court petitions the Chief Executive for clemency. Thus, by relying on the executive, justice can be done without violating the letter or spirit of the law.

Thus, Truepenny CJ upholds the conviction but recommends clemency.

Opinion of Justice Foster

Verdict: Innocent

Natural Law

Justice Foster makes two main points in determining whether the convictions should be overturned or not. Firstly, the explorers were not in a 'state of civil society' but in a 'state of nature'. Consequently, the laws of Commonwealth of Newgarth do not apply but laws of nature applied to them. Within the scope of the laws of nature, it is acceptable to sacrifice one person if it means the others (many) can survive.

Secondly, the purpose of the statute should be considered if it is assumed that laws of Newgarth did apply to the facts of the case. Therefore, a 'purposive approach' must be taken to the statute. The judges can find an exception to the law just like the courts had done earlier with self defence. The main aim of criminal law is punishing the criminals, and by that punishment, deterring further offenders. In this case, punishing the offenders will not serve the purpose of deterrence.

It is not necessarily judicial activism, as the judges have a certain leeway in interpretation of the law especially in cases that are extraordinary in nature. The decision made by the judges in this case would not be going against the will of the legislature, but ensuring that the legislative will is effective. Justice Foster concludes that the conviction should be set aside.

Opinion of Justice Tatting

Verdict: Uncertain; Recuses

Justice Tatting is torn between empathy for the defendants and the disgust over the horrible act that they had to commit to survive. Finally, he finds that he is unable to reach a decision. He criticizes the view under natural law that prioritises freedom of contract to kill above the right to life in state of nature.

He also notes the difficulty of applying the purposive approach to the criminal statute which has multiple purposes, including retribution and rehabilitation. He finds that the self-defence exception could not be applied to the present case as it would raise many challenges. The doctrine that is taught in law schools is that 'The man who acts to repel an aggressive threat to his own life does not act wilfully, but in response to an impulse deeply ingrained in human nature'. In the case of the explorers, they not only acted wilfully but deliberated before killing Roger Whetmore.

The judge cites the case of Commonwealth v Valjean, in which starvation was held not to justify the theft of a loaf of bread, let alone homicide (killing of a person). In this case the defendant was charged for theft of a loaf of bread, and he pleaded starving condition as a defense. The court refused to accept it. Thus, raising a question- If hunger cannot justify the theft of food, then how can it justify killing and eating of a man? Justice Tatting rejects J Foster's reasoning but he cannot decide due to competing legal rationales and emotions.

Justice Tatting makes the unprecedented decision of withdrawing from the case.

Opinion of Justice Keen

Verdict: Guilty

Positivism

Justice Keen raises two questions that are not matters for the court: that of executive clemency and that of morality. Justice Keen stated that it is not for the judiciary to decide whether executive clemency

should be extended to the defendants.

The morality of the defendants' actions is not something that the courts should concern themselves with or judge, as this falls outside their scope and ambit and is in violation of the doctrine of separation of powers. The Chief Executive should be petitioned for clemency and the decision should be left up to him. Keen J states that the difficulties in deciding the case arise from a failure to separate the legal and moral aspects of the case.

Justice Keen maintains that he does not concern himself with questions of 'right' and 'wrong'. He agrees that the defendants have gone through extreme suffering, but that is his opinion as an individual and not a Judge.

Judges are not to apply their conceptions of morality, but to apply the 'law of the land'. In this case, the sole question before the court to decide is purely one of applying the legislation of Newgarth and determining whether the defendants willfully took the life of Roger Whetmore. Everything outside of that is outside their consideration.

He criticises his fellow judges because he believes that they are being influenced by their personal emotions and prioritizing that over the word of the law and he is determined to put personal views aside. He is averse to Justice Foster's purposive approach to statutory interpretation that would allow the court to justify a result it considers proper. He emphasizes that laws may have many possible purposes, with difficulties arising in divining the actual "purpose" of a piece of legislation.

The actions of the defendants clearly fall within the scope of the statutory provision. A hard decision is never a popular decision. Justice Keen affirms the conviction.

Opinion of Justice Handy

Verdict: Innocent

Legal Realism; Common Sense

Justice Handy holds the case to be one of application of practical wisdom. As per him, court should take account of public opinion and 'common sense'. For him, it is a simple decision. He is aware that a vast majority want the sentence to be mitigated or pardoned. He criticizes his fellow judges for hiding behind the technical wording of the law. He emphasizes the need for the courts to maintain public confidence, which requires them to follow 90% majority opinion. Government is 'a human affair' in which people 'are ruled well when their rulers understand the feelings and conceptions of the masses'. Judiciary is one branch of the government that is most likely to lose its contact with the common man. Justice Handy states that to preserve the harmony between the judiciary and public opinion, the defendants should be declared innocent. If these men are pardoned no one will think that the statute was stretched any more than our ancestors did when they created the excuse of self-defence. He is aware that his fellow judges will without doubt be troubled by the suggestion of taking into account the emotional public opinion.

Justice Handy taking a common-sense approach, concludes the defendants are innocent and states that the conviction should be set aside.

Verdict by the Court:

The Supreme Court, divided evenly, affirmed the conviction. Fuller provides no further details as to the outcome.

Both the trial judge and members of the jury petition the Chief Executive to commute the sentence of the surviving spelunkers from the death penalty to six months' imprisonment.

Activity

Activity 1: Write a paper in 500 words on *'Killing an innocent life to save one's own does not justify murder even if it's under extreme necessity of hunger' in light of the judgment in Rv Dudley and Stephens case.*

Activity 2: In the Plank of Carnedaes thought experiment, the scenario envisioned was the following-

- *There are two shipwrecked sailors, A and B. They both see a plank that can only support one of them and both of them swim towards it. Sailor A gets to the plank first. Sailor B, who is going to drown, pushes A off and away from the plank and thus, causes A to drown. Sailor B gets on the plank and is later saved by a rescue team.*
- Do you think Sailor B can be tried for murder because if B had to kill A in order to live, then it would arguably be in self-defence? Explain your reasoning in 500 words.

Activity 3: *Read the following case study from sinking of William Brown Ship-*

Trial of Alexander Holmes:

- Holmes knew that killing people was wrong, but he faced a dilemma. Holmes was a member of the crew onboard the ship The William Brown, which sailed from Liverpool to New York in early April 1842. During its Atlantic crossing, 'The William Brown' ran into trouble. The crew and half the passengers managed to escape to a lifeboat. Once there, tragedy struck again. The lifeboat was too laden with people and started to sink. Something had to be done.
- The captain made a decision. The crew would have to throw some passengers overboard, leaving them to perish in the icy waters, but raising the level of the boat. It was the only way anyone was going to get out alive. Holmes followed these orders and was complicit in the death of 14 people. But the remaining passengers were saved. Holmes and his fellow crew were their saviours. Without doing what they did, everyone would have died.

What is your opinion on this paradoxical case? Do you think the captain's decision was justified or not? Explain your reasoning within 500 words.

Activity 4: *Two movies, Souls at Sea and Seven Waves Away, based on similar theme can be shown to students.*

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 points in time. For instance, it was considered to be associated with theology but at same 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'.

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.

The principles of Natural law were rejected by Jurists such as Bentham and Austin in the 19th century because of its vague and ambiguous character. However, undue emphasis on 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 of the society. These factors led to the revival of natural law theory in its modified form, which is different from its traditional form.

RULE OF LAW AND PRINCIPLES OF NATURAL JUSTICE

'Rule of Law' essentially means that law carries supremacy over all individuals,even those in the position of power. The notions of equality and non-arbitrariness are also important and non-detachable components of rule of law.

The rule of Law is one of the basic and general principles of the Constitution. It is characterized in the words of Max Weber as "legal domination as an idea of government of law rather than an idea of men''.

So, in essence rule of law means that everyone from the government to its officials, together with citizens should act according to the law.

The doctrine of rule of law has been described as supremacy of the law. This means that where there is rule of law no person can be said to be above the law, even the functions and actions of the executive organ of the state shall be within the ambit of law.

Rule of law imposes a duty on all citizens in a parliamentary democracy to obey the law and for such obedience the law itself must be just law and not arbitrary or oppressive law.

Principles of Natural Justice:

Natural Justice in simple terms means the minimum standards or principles which the administrative authorities should follow in deciding matters which have the civil consequences. 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: -

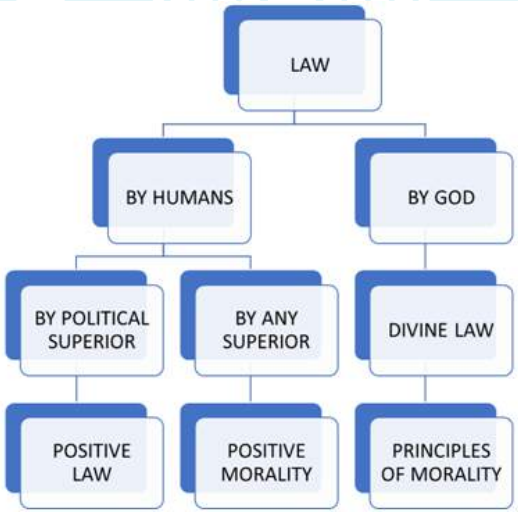
1. *Nemo judex in causa sua* - No one should be a judge in his own cause or, the rule against bias.
2. *Audi alteram partem* - Hear the other party or, the rule of fair hearing or, the rule that no one should be condemned unheard. Generally, the *'rule of law'* and *'due process of law'* are considered as new incarnations of natural justice in the twentieth century.

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 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.

With passage of time, analytical school was rejected by jurist such as Dworkin, Fuller and Finnis because it gave too much emphasis on 'law as a command' and rejected morality and custom as a source of law. It failed to give morality its due importance.

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.

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 (August 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.

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.

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.

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.

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.

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.

Schools of Law

Natural Law School Jurists/ philosophers: Aristotle, plato, Thomas Aquinas, Hobbes Montesquieu, Rousseau etc.	Analytical School of Law Jurists/ philosophers: Bentham, Austin, Kelsan, HLA Hart etc.	Historical School of Law Jurists/ philosophers: Savigny, Henry Maine etc.	Sociological School of Law Jurists/ philosophers: Roscoe Pound, Duguit, Ihering, Ehrlich etc.	Realist School of Law (American & Scandinavian Realism) Jurists/ Philosophers: Jerome Frank, O W Holmes Alf Ross, Olivecrona, Hangerstorm etc.
Distinguishing features/source of Law: • Nature • Human Reasons • Divine Sources	Distinguishing features/source of Law: • Command of the sovereign • Morality ignored	Distinguishing features/source of Law: • Custom • Common spirit of the people	Distinguishing features/source of Law: • Purpose of law is to balance conflicting interests in the society	Distinguishing features/ source of Law: • Judicial decisions are the prime source of Law

IV. Function And Purpose of Law

After discussing and understanding the meaning of the term 'law', it is natural 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

V. Exercises

Based on your understanding, answer the following questions:

Q-1 Provide one point of difference between the following-

1. Natural law school and Analytical school.
2. Sociological school and Realist school
3. Original and revived Natural Law School

Q-2 Answer the following questions briefly-

1. On what grounds historical approach to law was criticized?
2. What do you understand by the maxim "lex iniusta non est lex"?
3. State the two important rules of natural justice principles.
4. State two examples of the principles of natural Justice grounded in the Constitution of India.

Q-3 Answer the following questions in detail-

1. Explain the purpose of law.
2. Explain the viewpoint of analytical Law School. Also state the reasons for its rejection.

Q-4 Imacia, a country follows laws which appeal to the conscience of people only. They strongly believe in the principles of natural justice and due process of law. Which school of law do they follow? Explain the school.

CHAPTER 2

Classification of Laws

Contents

Learning Outcomes

After the completion of this chapter, the students will be able to:

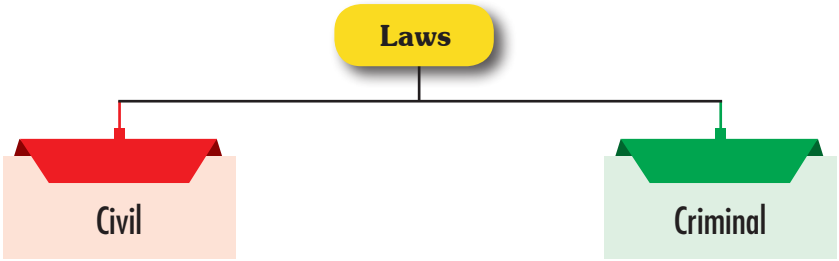
- Classify the various branches of law
- Summarise the purpose behind classification of law
- Compare International Law and Municipal Law
- Compare Public and Private International Law
- Compare Public and Private Municipal law
- Identify the sub types of each branch
- Analyse the difference between civil and criminal law
- Differentiate between substantive and procedural laws

The classification of law is important for the correct and comprehensive understanding of 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.

I. Classification of Laws Based on Subject Matter



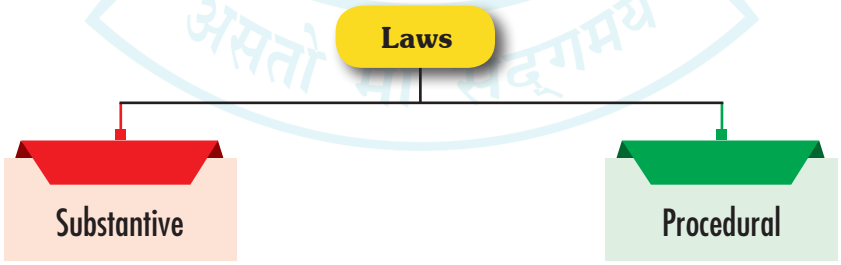
Criminal Laws

- Any act which is considered to be an offence/prohibited by the laws in force in India is covered under criminal law
- Crimes affect the society as a whole
- In crimes, action is initiated by the state on behalf of the individual
- Remedy- imprisonment or fine or both
- Examples – theft, murder, rape etc.

Civil Laws

- All acts which are not specifically defined as a crime are civil in nature
- Private in nature-affects only an individual and not the society as a whole
- A civil action is initiated by the individual himself/herself
- Remedy- compensation (monetary relief), damages (monetary relief), injunction (court orders asking a person to do or not do what he/she is legally obliged to do/not do)
- Examples – property disputes, family matters etc.

II. Classification based on Scope of Law



Legislative acts are classified as 'substantive acts,' on the basis of the subject matter of the law; and 'procedural acts', on the basis of the procedure to be followed by the executive and judiciary in implementation of those laws.

Substantive Laws

- Laws which define rights and liabilities of an individual
- Eg- consumer protection act; right to information act, etc.

Procedural Laws

- Laws which define the procedures and protocols for enforcing substantive law or filing a case
- Eg - code of civil procedure for civil cases
- Eg - code of criminal procedure for criminal cases

Amending Acts modify/ amend the existing laws on the statute book, taking into account the changing social, political and economic conditions of the country.

III. Classification based on Jurisdiction

A. 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 fall within its domain.

B. 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.

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 contact 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 where both have made a promise which is enforceable by law.

d. **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.

IV. Exercises

Based on your understanding, answer the following questions:

Q-1 Provide brief answers for the following-

1. Why is classification of law important? What are its benefits?
2. What is International Law? Explain the two types of International Law.
3. Differentiate between International and Municipal Law.
4. What is a contract?
5. Discuss the different types of Public and Private Municipal Laws.

Q-2 Identify the branch of law and define-

1. Antilla and Portico are two countries who have a border dispute.
2. Shefali was aggrieved because her passport was refused by the Passport Department without any reason.
3. Gita died intestate and her kids don't know how to divide the property.
4. Ajit was in an agreement to supply 50 kgs of rice to Bittu but did not do so.

Q-3 Sheena was a victim of sexual harassment at workplace. Explain why her criminal case is a part of public municipal law.

Q-4 Halestina and Xina, two Countries are bound by some laws which foster their relations by following some rules based on reciprocity. Identify the branch of law and explain its two sub types.

Q-5 The Government of India introduced a new law whereby the passport of any person could be revoked on mere suspicion of fraudulent financial transactions without providing a chance of hearing. Identify and define the branch of law under which such a law can be challenged.

CHAPTER 3

Sources of Laws

Contents

Learning Outcomes

After the completion of this chapter, the students will be able to:

- Discuss the three main sources of law- Customs, Legislation and Judicial Precedent
- Explain the essential tests laid down by jurists/ courts for customs to be recognized as sources of law
- Evaluate the importance of custom as an important source of law in India
- Differentiate between the two parts of judicial decisions- Ratio decidendi and Obiter dicta
- Critically evaluate the importance of different sources of law
- Enumerate and explain different kinds of legislation

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 scriptures 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.

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

i. Custom

ii. Judicial precedent

iii. Legislation

II. 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 important rite of a Hindu marriage ceremony. The word, Saptapadi means 'Seven steps'. After tying the Mangalsutra,the newly-wed couple take seven steps around the holy fire, which is called Saptapadi. The customary practice of Saptapadi has been incorporated in Section 7 of the Hindu Marriage Act, 1955.

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

Essentials of a valid custom

All customs cannot be accepted as sources of law, nor can all customs be recognized and enforced by the courts. The jurists and courts have laid down some essential tests for customs to be recognized as valid sources of law. These tests are summarized as follows:

Antiquity : In order to be legally valid, customs should have been in existence for a longtime, 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. EsuNaekin*, ((1880) ILR 4 Bom 545) held that, the custom of adopting a girl for immoral purposes is illegal.

Status of Custom with regard to Legislation : In any modern State, when a new legislation is enacted, it is generally preferred to the custom. Therefore, it is imperative that a custom must not be opposed or contrary to legislation. Many customs have been abrogated by laws enacted by the legislative bodies in India. For instance, the customary practice of child marriage has been declared as an offence. Similarly, adoption laws have been changed by legislation in India.

III. Importance of custom as a Source of Law in India

Custom was the most important source of law in ancient India. Even the British initially adopted the policy of non-intervention in personal matters of Hindus and Muslims. The British courts, in particular, the Privy Council, in cases such as Mohammad Ibrahim v. Shaik Ibrahim (AIR 1922 PC59) observed and underlined the importance of custom in moulding the law. At the same time, it is important to note that customs were not uniform or universal throughout the country. Some regions of the country had their own customs and usages.

These variances in customs were also considered a hindrance in the integration of various communities of the country. During our freedom struggle, there were parallel movements for social reform in the country. Social reformers raised many issues related to women and children such as widow re-marriage and child marriage. After independence and with the enactment of the Constitution, the Indian Parliament took many steps and abrogated many old customary practices with some progressive legislation. Hindu personal laws were codified and the Hindu Marriage Act, 1955 and the

Hindu Adoption Act, 1955, were adopted. The Constitution of India provided a positive environment for these social changes. After independence, the importance of custom has definitely diminished as a source of law and judicial precedent, and legislation has gained a more significant place. A large part of Indian law, especially personal laws, however, are still governed by customs.

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 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.

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 Privy Council 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

3) Lower Courts:

- Bound to follow decisions of higher courts in its own state, in preference to High Courts of other states

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.

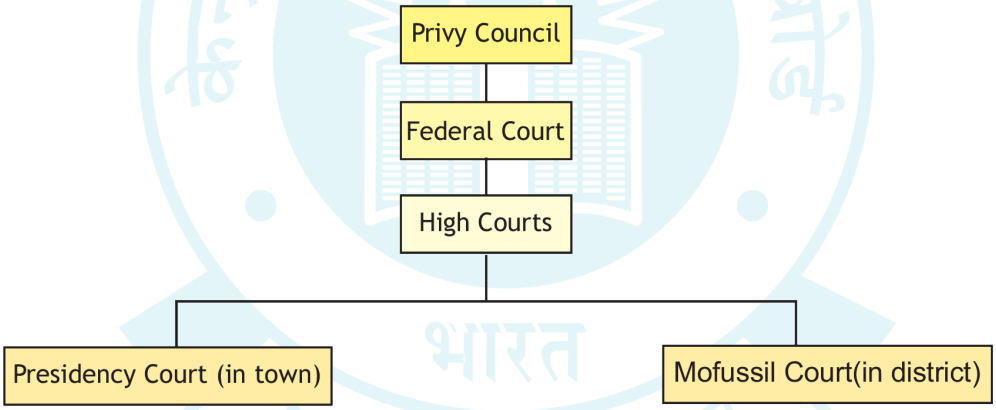
(ii) **Obiter dicta (Said by the way):** An 'obiter dictum' refers to parts of judicial decisions which are general observations of the judge and do not have any binding authority. However, obiter of a higher judiciary is given due consideration by lower courts and has persuasive value.

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.

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.

HIERARCHY OF CRIMINAL JUSTICE SYSTEM

In case of criminal court hierarchy is as follows:

Supreme Court

⇧

High Court

⇧

Sessions Court / Additional Sessions Court

⇧

Asst. Sessions Judge

⇧

Chief Judicial Magistrate or Chief metropolitan Magistrate

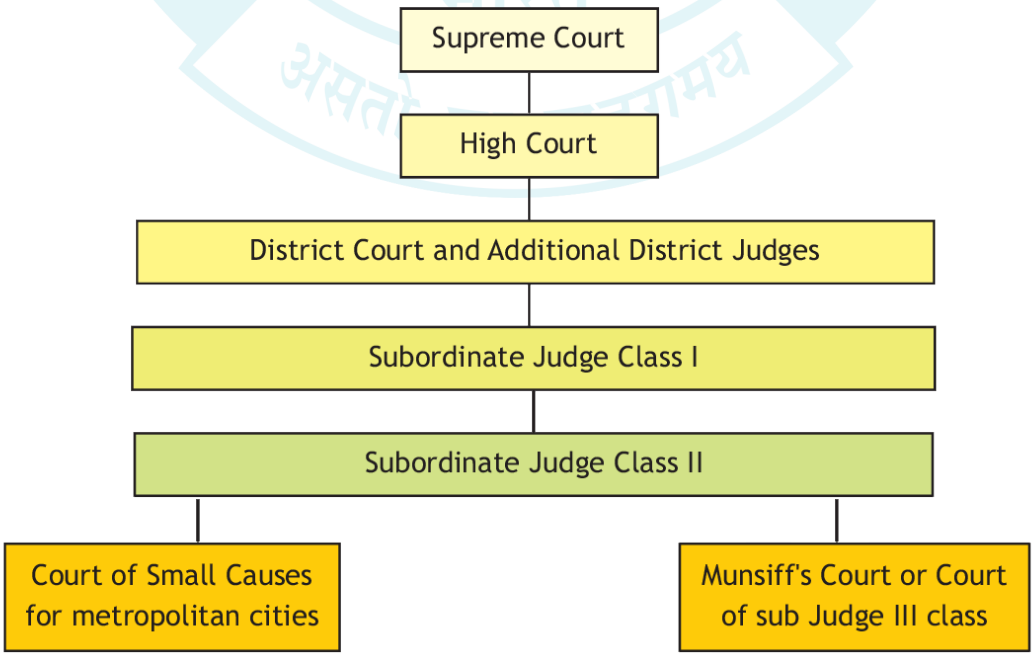
⇧

Judicial Magistrate First class

⇧

Judicial Magistrate Second class

HIERARCHY OF CIVIL JUDICIAL SYSTEM



In a nutshell, 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?

Justice Kania

was the First Chief Justice of India.
Source: http://supremecourtofi ndia.nic.in/judges/rcji/01hjkania.htm

The Constitution of India confers power on the legislature to make law, while the judiciary has the power to examine the constitutionality of the laws 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.

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 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-economic 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.

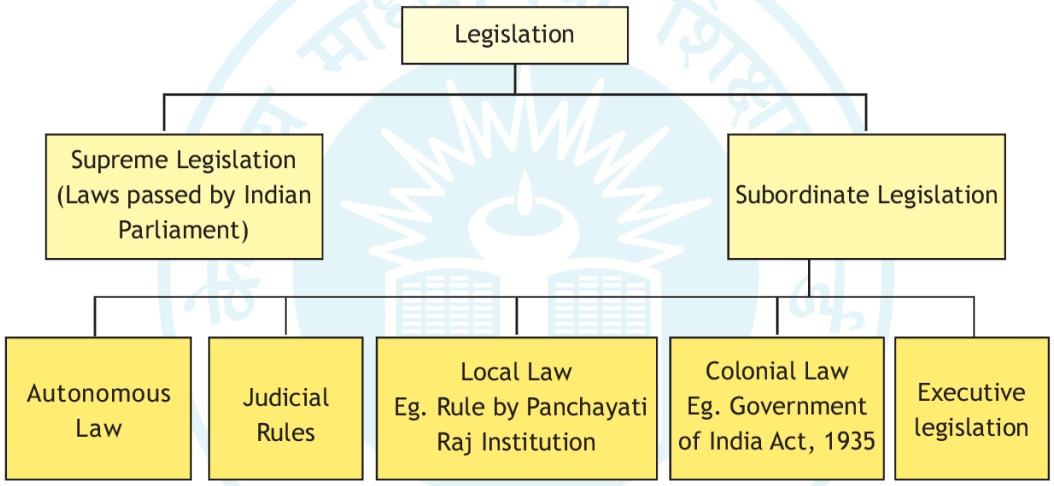
Source:http://www.ncpcr.gov.in/Acts/Fundamental_Right_to_Education_Dr_Niranjan_Aradhya_ArunaKashyap.pdf

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 ways. It includes every method of law-making. In the strict sense, it means laws enacted by the sovereign or any other person or institution authorised by him.

The chart below explains the types of legislation:



The kinds of legislation can be explained as follows:

Kinds of Legislation

- Supreme Legislation (Laws passed by Indian Parliament)
- Subordinate Legislation

Types of Subordinate Legislation

- Autonomous Law
- Judicial Rules
- Local Laws (Eg. Rule by Panchayati Raj Institution)
- Colonial Law (Eg. Government of India Act, 1935)
- Laws made by the Executive

(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, though the laws enacted by it are not under the control of any other legislative body.

(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 to delegate legislation has been criticized. However, delegated legislation is resorted to, on account of reasons like paucity of time, technicalities of law and emergency. Therefore, delegated legislation is sometimes considered as a necessary evil.

VI. Exercises

Based on your understanding, answer the following questions:

Q-1 Write one point of difference between the following-

1. Ratio decidendi and Obiter Dicta
2. Custom and legislation as a source of law
3. Supreme legislation and Subordinate legislation
4. Judgements of Supreme Court and High Court
5. General customs and Local customs

Q-2 Write short notes on the following-

1. Custom as a source of law
2. Subordinate legislation
3. Parts of Judicial decision

Q-3 Identify the following legislations-

1. The law made by sovereign
2. Law made by Municipal corporation
3. Law made by universities
4. Law made by executive
5. Laws made by colonial rulers

Q-4 Provide brief answers for the following-

1. How did Austin and Savigny view custom as a source of law?
2. What are the two parts of Judicial decisions?
3. Do judges make law? Comment.
4. What is the importance of custom as a source of law in India?
5. Enumerate the legislations that are based on customs.
6. What is the hierarchy of civil and criminal justice system in India?

Q-5 Provide detailed answers for the following-

1. Explain different kinds of customs.
2. What are the essentials of a valid custom?
3. Explain legislation as a source of law.
4. Explain different kinds of legislation.

Q-6 Why is delegated legislation sometimes considered as a necessary evil?

Q-7 Which is the most relevant source of law in today's time? Define.

(i) Give any two difference between its two types.

(ii) Also explain which of its form is a necessary evil and why?

Q-8 What are judicial precedents? Also answer the following questions:

(i) The Chennai High Court gave a decision in the year 2005 which was overturned by SC in 2011.

Which of the two decisions should be followed by a district court in Chennai.

(ii) Kerala High Court and Calcutta High Court gave contradicting decisions in the year 2009 and 2017 respectively.

Which decision should Kerela District Court follow?

(iii) In the year 2018, a division bench of SC and Constitutional bench of SC gave two contradicting decisions. Which decision should be followed?

Q-9 The Supreme Court of India passed a judgment in the year 2015 which banned diesel cars registered before the year 2005 from plying on the road. The rationale behind the judgment was the deterioration of engine and hence poor performance and increased pollution. While writing the judgment the judges made many remarks on other sources of pollution too like construction, fires, etc.

(i) What is the relevance of this judgment in the creation of laws?

(ii) What two parts of this judgment are being talked above?

(iii) Can the Delhi High Court overturn this judgment?

Q-10 "All customs cannot be accepted as sources of law, nor can all customs be recognized and enforced by the Courts".

(i) Explain any three factors which are taken into consideration for deciding any custom as a valid source of law.

(ii) What is the relevance of customs as a source of law in the present day context?

Activities

Q-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.

Q-2 You may also watch some of the videos posted by Professor Michael Sandel at http://www.justiceharvard.org/watch/in guiding your debate.

CHAPTER 4

Law Reforms

Contents

Learning Outcomes

After the completion of this chapter, the students will be able to:

- Discuss the meaning of law reform
- Critically analyse the need for law reform in India
- Explain the role of British administrators in improving the Civil and Criminal justice system in pre-independent India
- Describe the role of law commissions in law reforms in pre-independent India
- Enumerate recent law reforms in Independent India

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* in 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 laws, 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 the reforms in the Judicial System in pre-independent India.

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.

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.

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.

The Law Commission of India has dealt with wide range of issues. 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.

III. Recent Law Reforms in Independent India

A. The Right to Information Act, 2005

The Right to Information Act, 2005 also known as RTI Act, aims to promote transparency in government institutions in India. The Act came into existence in 2005 after continuous struggle by anti-corruption activists.

It is a revolutionary Act as it opens public authority for scrutiny by an ordinary citizen. An Indian citizen can demand information from any government agency, who in turn is bound to furnish the information within 30 days, failing which the officer concerned is fined. As a common person it is important to be equipped with the knowledge of RTI.

B. Information Technology Act, 2000

This Information Technology Act, 2000 is based on the United Nations UNCITRAL Model Law on Electronic Commerce, 1996.

Information Technology Act is most important law in India dealing with Cybercrime and E-Commerce. It provides legal recognition for transactions carried out by means of electronic data interchange and other means of electronic communication, commonly referred to as electronic commerce.

C. Muslim Women (Protection of Rights on Marriage) Act, 2019

Muslim Women (Protection of Rights on Marriage) Act, 2019 was passed by the Parliament of India criminalizing triple talaq to protect the rights of married Muslim women and to prohibit divorce by pronouncing talaq by their husbands.

In 2017, the Supreme Court of India declared triple talaq, which enables Muslim men to instantly divorce their wives, to be unconstitutional.

D. The Consumer Protection (Amendment) Act, 2019

The Consumer Protection (Amendment) Act, 2019 came into effect in July 2020. It repeals and replaces the Consumer Protection Act, 1986. The purpose of the amendment act is to prevent unfair trade practices in e-commerce to protect consumers.

The Act also protects the consumers from misleading and deceptive advertisements. Now, an advertising code gives customer protection against false advertisements, especially protecting them from celebrities, who do paid reviews of the products and services. The advertising code is applicable throughout all mediums of communication like social media, print media etc.

The Act also provides for settlement of consumer disputes in India and strict penalties, including jail terms for adulteration and for misleading advertisements. It now prescribes rules for the sale of goods through e-commerce.

The Consumer Protection (Amendment) Act, 2019 provides greater transparency and gives more power to the customer for redressal of disputes.

Highlights of the Act:

- An aggrieved consumer can file complaints about a defect in goods or deficiency in services from where she/he lives, instead of the place of business or residence of the seller or service provider.
- One can now do an e-filing of consumer complaints.

- No fees is required to be paid if the claim is within Rupees 5 lakhs.
- The consumer need not engage a lawyer and can conduct her/his own case via video conferencing.
- A concept of product liability now allows aggrieved consumers to claim compensation due to the negligence of the manufacturer or service provider.
- A class action suit can now be filed by a group of aggrieved consumers who can now join hands to reduce costs and improve chances of redressal or settlement. (like in the US)
- Producers of spurious goods may be punished with imprisonment.
- Those celebrities who now endorse a product can now be barred from endorsing if the advertisement is misleading.
- E-commerce is tightly regulated. E-commerce companies now have to disclose all relevant product information, including country of origin and address all of consumer grievances within prescribed timelines.
- Settlement of consumer disputes through mediation is encouraged thus saving time and resources of disputing parties.

IV. Exercises

Based on your understanding, answer the following question:

Q-1 What is the need for Right to Information Act in today's context?

Activity

Q-1 Research paper/ PPT on Law reforms that took place due to recommendations by various law commissions, for instance, Passive Euthanasia.

CHAPTER 5

Cyber Laws, Safety and Security in India

Contents

Learning Outcomes

After the completion of this chapter, the students will be able to:

- Define Cyber Space and list its features
- Analyse the importance of Cyber Security and Safety
- Explain the meaning of Cyber-crime and the need for Cyber Laws
- Evaluate Cyber Laws in India
- Explain types of Cyber-crimes
- Analyse Cyber-crime and Cyber bullying
- Critically analyse the judicial pronouncement repeating Section 66A of the Information Technology Act, 2000

I. Introduction

We live in a world where we see rapid technological advances on a day-to-day basis. The emergence of advanced digital innovations are providing new opportunities for people from all over the world to connect and communicate. All these opportunities and advances are possible because of the internet. The Internet is defined as, *'a system architecture that has revolutionized communications and methods of commerce by allowing various computer networks around the world to interconnect'.*

This computer-generated world of the internet that involves interactions between people, software and

services is known as cyberspace. It is a dynamic, exponential and undefined space. As information and the Internet become more complex and large, it has become critical to maintain systems up and running all the time for safety and security.

II. Why do we need Cyber Laws?

When internet was developed, the founding fathers hardly had any idea that it could transform itself into an all pervading revolution which could be misused for criminal activities. Internet usage has significantly increased over the past few years.

The anonymous nature of the internet makes it possible for it to be used for many criminal activities. Cyber Law is important because it touches almost all aspects of transactions and activities on the internet. Every action and every reaction in the cyber space has cyber legal perspectives. Cyber law concerns every individual using the internet like booking a domain name, disputes relating to online intellectual property etc.

III. What is Cyber law?

Cyber law deals with legal issues related to use of inter-networked information technology. It provides the legal rights and restrictions governing technology. In short, cyber law is the law governing computers and the internet.

Cyber law encompasses laws relating to Cyber crimes, Electronic and digital signatures Intellectual property, Data protection and privacy etc.

The Internet was initially developed as a research and information sharing tool and was unregulated. As the time passed by it became more transactional with e-business, e-commerce, e-governance and e-procurement etc. All legal issues related to internet crime are dealt with through cyber laws. As the number of internet users is on the rise, the need for cyber laws and their application has also gathered great momentum.

IV. What is Cyber safety and security?

Cyber safety is the safe and responsible use of information and communication technology.

It is not only about keeping information safe and secure, but also about being responsible with that information and being respectful of other people online. Cyber safety and security can be ensured by enacting laws, and use of technologies, processes and practices that are designed to protect networks, computers, programs and data from attack, damage or unauthorized access.

V. What is Cyber-crime?

Cyber-crime refers to an activity done with criminal intent in cyberspace. In other words, any offence or crime in which a computer is used is a cyber-crime. Even a petty offence like stealing can be brought within the broader purview of cyber crime if the basic data or aid to such an offence is a computer or information stored in a computer used (or misused) by the fraudster. Cyber crimes can be against persons, property or government. For example, cyber stalking, computer vandalism, stealing of data, hacking, phishing, mail fraud etc. The term cyber-crime is not defined in Information Technology Act, 2000 neither in the National Cyber Security Policy 2013 nor in any other regulation in India.

However, 'Cybercrime' has been defined by the National Cyber-crime Reporting Portal (a body set up by the government to facilitate reporting of cyber-crime complaints) to 'mean any unlawful act where a computer or communication device or computer network is used to commit or facilitate the commission of crime'.

VI. Categories of Cyber-crime

Cyber-crimes can be divided into three major categories:

1. **Cyber Crime against person-** It includes crimes like cyber stalking, cyber harassment, transmission of child pornography etc.
2. **Cyber Crime against property-** It includes computer trespassing, vandalism and unauthorised possession of computerised information etc.
3. **Cyber Crime against Government-** Cyber terrorism is a distinct kind of crime in this category.
4. **Cyber Harrassment-** Various kinds of harassment can occur in cyber space or by use of cyber space. It can be sexual, racial, religious or others. It can also take within its ambit violation of privacy of netizens (online citizens). Internet makes it easy to invade the privacy of any person which can result in harassment.
5. **Cyber Bullying-** Cyber Bullying is bullying with the help of cyber space and use of devices like cell phone, tablets, laptops etc.

   It can occur through SMS, email, social forums as well as gaming. It means sending, sharing or posting false, derogatory, harmful or negative content about any person. It includes sharing personal information about a person without his or her consent causing humiliation. Cyber bullying can even result in unlawful or criminal behaviour online.

Cyber Bullying and online gaming

Playing video games is a popular past time for children these days. It therefore becomes a platform for cyber bullying. If someone doesn't perform well in a game, he or she becomes a victim of negative remarks and even excluded from the game altogether. This results in cyber bullying.

Sometimes, the bully may use the game as a medium to obtain personal information of the gamers, thereby compromising not just the child's information but also their parents. This tactic is known as Doxing, and makes children more vulnerable to harassment by the bully.

Hacking as a cyber-crime

It is one of the gravest cyber-crimes known. It happens when a stranger breaks into a person's computer system without that person's knowledge or consent and tampers with confidential information. Hacking into government or military owned website results in Cyber Terrorism.

Attack on World Trade Centre- The September 11, 2001 attack on the Pentagon and the World Trade Centre, USA demonstrated the use of cyber space for terrorism. The terrorists gained access to intellectual resources of the government and used it as weapons of destruction. The terrorists hijacked the flight procedures and schedules and executed the ghastly September 11 attack.

Cybersecurity

Under the Act, 'cybersecurity' means protecting information, equipment, devices, computers, computer resources, communication devices and information stored therein from unauthorised access, use, disclosure, disruption, modification or destruction.

VII. Cyber Law in India

In India, cyber laws are contained in the Information Technology Act, 2000 which came into force on October 17, 2000. The main purpose of the Act is to provide legal recognition for transactions carried out by means of electronic data interchange and other means of electronic communication, commonly referred to as electronic commerce and to facilitate filing of electronic records with the Government.

History of Cyber Law in India

In 1996, the United Nations Commission on International Trade Law (UNCITRAL) adopted the Model Law on Electronic Commerce to bring uniformity in the law in different countries.

The Model Law on Electronic Commerce aims to enable and facilitate commerce conducted by electronic means by providing countries with a set of universally acceptable rules that are aimed at removing legal obstacles and increasing legal predictability for electronic commerce. This model law provides for equal treatment which is essential for enabling paperless communication and fostering efficiency in international trade.

India became the 12th country to enable cyber law after it passed the Information Technology Act, 2000.

VIII. Scope or Extent of The Information Technology Act, 2000

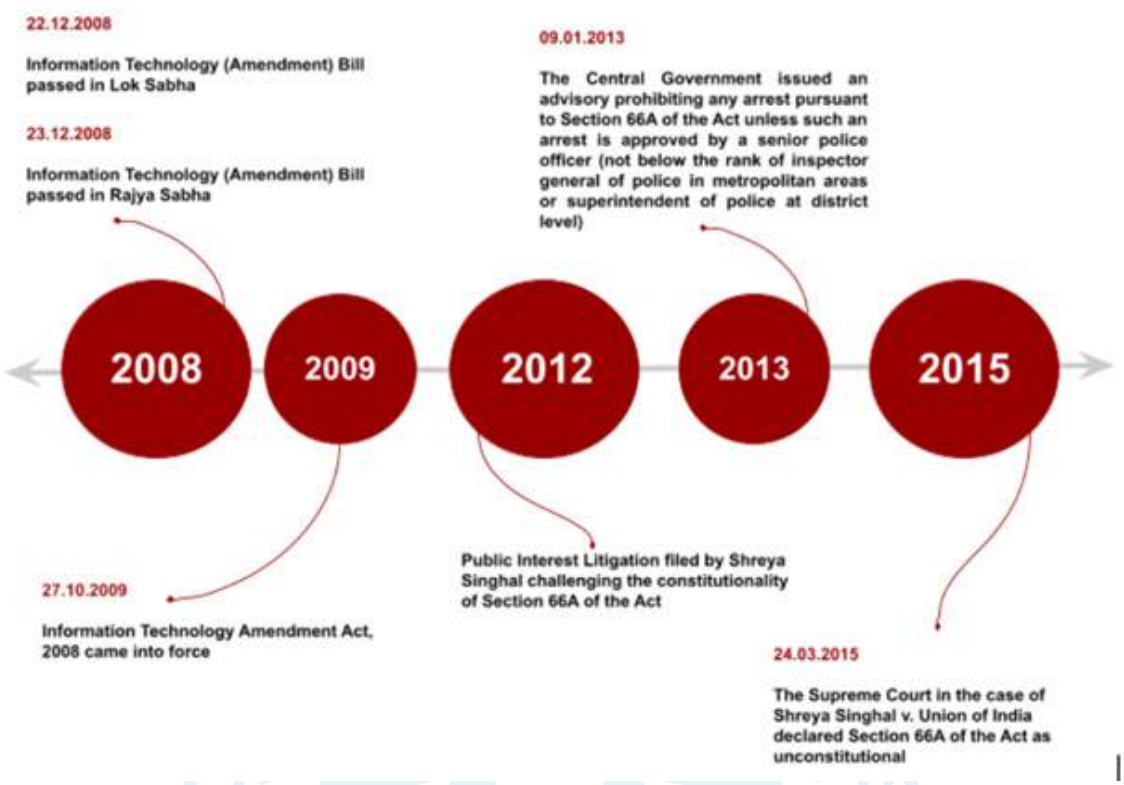
The Information Technology Act, 2000 extends to the whole of India. It also applies to any offence or contravention committed outside India by any person irrespective of his/her nationality, provided such offence or contravention involves a computer, computer system or network located in India.

The courts in India have also recognised cybercrime (eg, the Gujarat High Court in the case of *Jaydeep Vrujlal Depani v State of Gujarat R/SCR.A/5708/2018 Order*), to mean 'the offences that are committed against individuals or groups of individuals with a criminal motive to intentionally harm the reputation of the victim or cause physical or mental harm, or loss, to the victim directly or indirectly, using modern telecommunication networks such as Internet (networks including but not limited to Chat rooms, emails, notice boards and groups) and mobile phones (Bluetooth/SMS/MMS)'.

The Act provides legal infrastructure for e-commerce, electronic records (like online contracts) and other activities carried out by electronic means. It also deals with electronic governance and cyber crimes.

Interesting Fact : The Information Technology Act, 2000 defines Digital Signature as Authentication of any electronic record by a subscriber by means of electronic method or procedure.

SECTION 66A AND SHREYA SINGHAL



IX. What was Section 66 A IT Act, 2000?

Section 66 A of the IT ACT, 2000 made it a punishable offence for any person to send 'grossly offensive' or 'menacing information' using a computer resource or communication device.

Section 66A was inserted by way of an amendment in the year 2009. The reason behind the amendment was to address new forms of cyber crimes such as publishing sexually explicit materials in electronic form, video voyeurism and breach of confidentiality and leakage of data by intermediary, e-commerce frauds like personation commonly known as Phishing, identity theft and offensive messages through communication services. Therefore, the said Section 66 A IT Act, 2000 imposed punishment and criminalised the sending of offensive messages through a computer or other communication devices. However, the act used wide terms in this Section which were not defined under the Act and hence caused a lot of confusion as the perception of an individual in defining "grossly offensive" and "menacing information" varies from one individual to another.

In the year 2012, in the matter of Shreya Singhal v. Union of India, a batch of writ petitions were filed under Article 32 of the Constitution of India raising an important question relating primarily to the fundamental right of free speech and expression guaranteed by Article 19 of the Constitution of India. The immediate cause for concern in these petitions was Section 66A of the Information Technology Act of 2000. The petitioners argued that wordings of the section were too wide and ambiguous leading to misuse. Most of the terms used in the section had not been specifically defined under the Act. Further, the petitioners argued that the section restricted the right to free speech and expression prescribed under Article 19(1)(a) of the Constitution of India.

What did the Supreme Court decide?

On March 24, 2015, the Hon'ble Supreme Court struck down Section 66 A of the IT Act, 2000 and declared it unconstitutional for "being violative of Article 19(1)(a) of the Constitution of India.

Interesting Fact : Phishing- The fraudulent practice of sending emails purporting to be from reputable companies in order to induce individuals to reveal personal information, such as passwords and credit card numbers. (Source: Oxford Dictionary)

X. Exercises

Based on your understanding, answer the following questions:

Q-1 Answer the following questions briefly-

1. Explain the importance of cyber laws in current times.
2. What are the various categories of cyber crime? Give examples.
3. What is cyber bullying? How does it take place?

Q-2 Answer the following questions in about 150 words-

1. Trace the evolution of cyber laws in India.
2. Critically analyse the importance of Section 66A of the Information Technology Act, 2000.

Activities

Q-1 Divide the class into four groups and initiate a discussion on 'Legal problems that arise by use of Cyberspace'.

Q-2 Students can enact a street play making their peers aware of Cyber crime and safety.

Q-3 Debate on the topic 'Cyberspace- A Boon or a bane'.