CONCEPT OF LAW

Countless schools of law have defined law from distinctive perspectives. Some have outlined it on the basis of its nature, some focus primarily on its sources and some define in terms of its effect on the civilisation.

You will not mistake my meaning or suppose that I depreciate one of the great humane studies if I say that we cannot learn law by learning law. If it is to be anything more than just a technique it is to be so much more than itself: a part of history, a part of economics and sociology, a part of ethics and a philosophy of life. ~ Lord Radcliffe, The Law and Its Compass (1961)

Law is a social science which grows and develops alongside the growth and development of the community. Modern developments in the community create new problems and law is required to enforce with such problems.

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Matrix based on the theories of famous worldwide jurists, formulates the basic permutation.

In accordance with the above referred table, many worldwide jurists have distinct approaches and observations within the domain of law. Many formalists have stronger belief on the natural principles of equilibrium and justice whereas many realists are co-relating their methodologies with administration of justice as well as with the community welfare and safety. Some of notable jurists, however, from US, UK, Germany and former Soviet Union are portraying the snapshot of ‘law’ as under:

Law is the speech of him who by right commands somewhat to be done or omitted. ~ Thomas Hobbes

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, or optics or mechanics, as well as the laws of nature and of nations. ~ William Blackstone

The word ‘law’ has come down to us in close association with two notions, the notion of order and the notion of force. ~ Henry Maine

A set of rules imposed and enforced by a society with regard to the distribution and exercise of powers over persons and things. ~ Paul Vinogradoff

Law is the aggregate of rules set by men as politically superior, or sovereign, to men as politically subject. ~ John Austin
The form of the guarantee of the conditions of life of society, assured by State’s power of constraint. ~ Rudolf von Jhering

Law is a statement of the circumstances in which the public force will be brought to bear upon men through courts. ~ Oliver W. Holmes

Law is general rule of eternal human action enforced by a sovereign political authority. All other rules for the guidance of human action are laws merely by analogy; and propositions which are not rules for human action are laws by metaphor only. ~ Thomas E. Holland

Law or the law, taken indefinitely, is an abstract or collective term, which when it means anything, can mean neither more nor less than the sum total of a number of individual laws taken together. ~ Jeremy Bentham

The body of principles recognised and applied by the State in the administration of justice. ~ John Salmond

Law may be described in terms of a legal order tacitly or formally accepted by a community, and it consists of the body of rules which that community considers essential to its welfare and which it is willing to enforce by the creation of a specific mechanism for securing compliance. A mature system of law normally sets up that type of legal order known as the State, but we cannot say a priori that without the State no law can exist. ~ George W. Paton

Law is a species of social engineering whose function is to maximise the fulfilment of the interests of the community and its members and to promote the smooth running of the machinery of society. ~ Roscoe Pound

CONCLUSION

The concept of law fulfils as a central role within the sphere of jurisprudence, no simple definition will, however, satisfy us in the absence of a clear grasp of the upshots of the concept throughout its domain alongside an acceptable norm of adequacy.

Law seems to require a certain minimum degree of regularity and certainty, for without this it would be impossible to assert that what was operating in a given territory amounted to a legal system. Clearly, however, no exact criterion can be applied for determining what degree of regularity or certainty is necessary to achieve this aim, and states may vary from arbitrary tyrannies where all are subject to the momentary caprices of a tyrant, to the elaborate and orderly governed states associated with Western democracies. ~ Lord Dennis Lloyd of Hampstead, Introduction to Jurisprudence (1979)

In order to keep step with the society, the definition and scope of law must continue to change / upgrade. The outcome is that a definition of law presented at a specific timeline can’t remain effective for all times to come. A definition which is reflected adequate today may be found constricted tomorrow.

Sources of Law

Means the origins of law, i.e. the binding principles / rules governing the human conduct. Such sources may be international, national, regional or religious. It also refers to the sovereign or the state from which the laws descends its enforcement or authority. In civil law systems, one has only to look at the appropriate code or
statute; but in common law systems one needs to look at legislation (primary and secondary) and at the judicial precedents.

**MATERIAL SOURCES**
The material sources of law are those from which is derived the matter, though not the validity of the law. The matter of law may be drawn from all classes of material sources. Material sources of law are of two kinds i.e. historical and legal.

**HISTORICAL SOURCES**
Historical sources are sources where rules, subsequently turned into legal principles, were first to be found in an unauthoritative form. These are not allowed by the law courts as of right. These operate only mediately and indirectly.
LEGAL SOURCES

Legal sources are those sources which are the instruments or organs of the State by which legal rules are created, e.g. legislation and custom. These are authoritative and are followed by law courts as of right. These are the gateways through which new principles find access into the realm of law.

Every legal system contains rules of recognition determining the construction of new law and the evaporation of old. It is a principle of English law that any principle involved in a judicial decision has the force of law. Similar legal recognition is extended the law-producing effect of statute and ancient customs. These rules construct the sources of law. A source of law is any fact which in accordance with such basic rules determine the recognition and acceptance of any new rule as having the force of law.

In general, law may be found to proceed from one or more of the following legal sources: from a written constitution, from legislation, from judicial precedent, from customs and from the writings of experts. English law proceeds primarily from legislation and precedent.

The corpus juris is divisible into two parts by reference to the source from which it proceeds. One part consists of enacted law, having its source in legislation. The other part consists of case law, having its source in judicial precedents. Legislation is the making of law by some authority in the body politic which is recognised as adequate for that purpose. A precedent is the making of law by the recognition and application of new rules by the courts themselves in the administration of justice. Enacted law comes into the courts ab extra whereas the case law is developed within the courts themselves.

Customary law is that which is constituted by those customs which fulfil the requirements laid down by law as the condition of their recognition as obligatory rules of conduct. Conventional law is that which is constituted by agreement as having the force of special law inter partes, in derogation of or in addition to the general law of the land.

By reference to their legal sources, there are six kinds of law:

1. Enacted law having its source in legislation;
2. Case law having its source in precedent;
3. Customary law having its source in custom;
4. Conventional law having its source in agreement;
5. Equity having its source concurrently in common law; and
6. Professional opinions of eminent jurists, appearing as juristic law.

NOTE: For International Source of Law, please see the Lecture Notes on International Law

SOURCES OF LAW AND SOURCES OF RIGHTS

The sources of law may also serve as sources of rights. By a source of law is meant some fact which is legally constitutive of right. It is the de facto antecedent of a legal right in the same way as source of law is de facto antecedent of a legal principle. Experience shows that to a large extent, the same class of facts which operate as source of law also operate as sources of right. Some facts create law but not rights. Some facts create rights and not law. Some facts create both law and rights at the same time. the decisions of inferior courts are not sources of law but they are nevertheless sources of right. Immemorial custom gives rise to rights and law at
the same time in certain cases. An agreement operates as a source of right. It is not exclusively a title of rights but also operates as a source of law.

**ULTIMATE LEGAL PRINCIPLES**

These are self-existing principles of which no legal origin is known though it may be possible to trace them to some historical source. All rules of law have historical sources but all of them do not have legal sources. If that were so, the search for tracing the origin of legal principles will continue *ad infinitum*. It is necessary that in every legal system there should be found certain ultimate principles from which all others are derived but which are self-existent.

**LEGISLATION**

Legislation is the prime source of law and comprises in the declaration of legal rules by a competent authority. Legislation may have many objectives i.e. to regulate, to authorise, to enable, to prohibit, to provide resources, to sanction, to grant, to declare or to restrict.

A parliamentary legislature frames new laws, such as Acts of Parliament, and amends or repeals old laws. The legislature may delegate law-making powers to lower bodies. In UK, such delegated legislation includes Statutory Instruments, Orders in Council and Bye-laws. Delegated legislation may be open to challenge for irregularity of process; and the legislature usually has the right to withdraw delegated powers if it sees fit.

The term legislation includes every expression of the legislature whether the same is directed to the making of the law or not. An act of Parliament may amount to nothing more than establishing a uniform time throughout the realm or altering the coinage.

The view of the analytical school is that typical law is a statute and legislation is the normal process of law-making. The exponents of this school do not approve of the usurpation of the legislative functions by the judiciary. They also do not admit the claim of custom to be considered as a source of law. The view of the historical school is that legislation is the least creative of the source of law.

**SUPREME AND SUBORDINATE LEGISLATION**

Legislation is either supreme or subordinate. Supreme legislation is that which proceeds from the sovereign power in the State. It cannot be repealed, annulled or controlled by any other legislative authority. On the other hand, subordinate legislation is that which proceeds from any authority other than the sovereign power. It is dependent for its continued existence and validity on some superior authority. The parliament, for example, possesses the power of supreme legislation. However, there are other organs which have powers of subordinate legislation.

**DELEGATED LEGISLATION**

Another class of legislation is known as executive or delegated legislation. It is true that the primary function of the executive is to enforce laws but in certain cases, the power of making rules is delegated to the various departments of the government. This is technically called subordinate or delegated legislation. Delegated legislation is becoming more and more imperative in modern times.

Modern legislation is becoming highly technical and it is too much to expect that the ordinary members of Parliament will appreciate all the implications of modern legislation. Except a few experts in certain lines, the
other members of Parliament are bound to spoil if they attempt to do the impossible. Under the circumstances, it is considerably safe to the approval of general principles of legislation and leave the details to the ministries concerned.

Delegated legislation gives flexibility to law and there is ample scope for adjustment in the light of experience gained during the working of any particular legislation. Delegated legislation, however, can be controlled by the following ways:

(a) **Parliamentary Device**: Parliament has always general control. When a bill is before it, it can modify, amend or refuse altogether the powers which the bill proposes to confer on a minister or some other subordinate authority.

(b) **Parliamentary Command**: A second way of controlling delegated legislation is that laws made under delegated legislation should be laid before the legislature for approval and the legislature may amend or repeal those laws if necessary.

(c) **Judicial Control**: While parliamentary control is direct, the control of court is indirect. Courts cannot annul subordinate enactments, but they can declare them inapplicable in particular circumstances. Courts also possess certain direct powers over the acts and procedures of public authorities. The most important of them are called writs. The other methods are injunctions and declarations.

(d) **Trustworthy Organisation**: An internal control of delegated legislation can be ensured if the power is delegated only to a trustworthy person or body of persons.

(e) **Publicity**: Public opinion can be a good check on the arbitrary exercise of delegated statutory powers. Public opinion can be enlightened by antecedent publicity of the delegated laws.

(f) **Experts’ Opinions**: in matters of technical nature, opinions of experts should be taken. That will minimise the danger of vague legislation and ‘blanket’ delegation.

All delegated legislation must be subject to judicial control and review. It must not be unacceptable to the statute under which it is framed. It must not be vague, uncertain or unreasonable. It must be allowed to be controlled by the courts by means of appropriate writs.

**JUDICIAL PRECEDENT**

Judicial precedent (aka: case law, or judge-made law) is based on the doctrine of *stare decisis*, and mostly associated with jurisdictions based on the English common law, but the concept has been adopted in part by civil law systems. Precedent is the accumulated principles of law derived from centuries of decisions. Judgements passed by judges in important cases are recorded and become significant source of law. When there is no legislature on a particular point which arises in changing conditions, the judges depend on their own sense of right and wrong and decide the disputes from first principles. Authoritative precedent decisions become a guide in subsequent cases of a similar nature. In comparison with other sources of law, precedent has the advantage of flexibility and adaptability, and may enable a judge to apply "justice" rather than "the law".
A precedent is purely constitutive and in no degree abrogative. This means that a judicial decision can make a law but cannot alter or amend it. Where there is a settled rule of law, it is the duty of the judges to follow the same. They cannot substitute their opinions for the established rule of law. Their function is limited to supplying the vacancies of the legal system, filling up with new law the gaps that exists in the old and supplementing the imperfectly developed body of legal doctrine.

The reason why a precedent is recognised is that a judicial decision is presumed to be correct. That which is delivered in judgment must be taken for established truth. In all probability, it is true in fact and even if it is not, it is expedient that it should be held to be true. The practice of following precedents creates confidence in the minds of the litigants. Law becomes certain and known and that in itself is a great advantage. It is conducive to social development, administration of justice becomes even-handed and fair. Decisions are given by judges who are experts in the study of law.

**Kinds of Precedents**

(a) **Authoritative and Persuasive**: An authoritative precedent is one which judges must follow whether they approve of it or not. A persuasive precedent is one which the judges are under no obligation to follow but which they will take into consideration and to which they will attach great weight as it seems to them to deserve. Authoritative precedents are the legal sources of law and persuasive precedents are merely historical. Authoritative precedents form law in fulfilment of a definite rule of law which confers upon them that effect. If persuasive precedents succeed in forming law at all, they do so indirectly by serving as the historical ground of some later authoritative precedent. They do not possess any legal force or effect in themselves.

(b) **Absolute and Conditional**: Authoritative precedents are of two kinds, absolute and conditional. In the case of absolutely authoritative precedents, they have to be followed by the judges even if they do not approve them. They are entitled to implicit obedience. In the case of authoritative precedents having a conditional authority, the courts can disregard them under certain situations. Ordinarily, they are binding but under special circumstances, they can be disregarded. The court is entitled to do so if the decision is a wrong one.

A conditional precedent can be disregarded either by dissenting or by overruling. In the case of overruling, the precedent overruled is authoritatively pronounced to be wrong so that it cannot be followed by courts in the future.

(c) **Declaratory and Original**: A declaratory precedent is one which is merely the application of an already existing rule of law. An original precedent is one which creates and applies a new rule. In case of declaratory precedent, the rule is applied because is already existing as law. In the case of an original precedent, it the law for the future because it is now applied. In the case of advanced countries, declaratory precedents are more numerous. The number of original precedents are small but their importance is very high.

**Customs**

A custom as a law is not in written form, but considerably a rule whereby a practice can be shown to have existed for a very long time, it becomes the part of sources of law. These are known as general customs. Specific (or “private”) customs may arise when a family or a district or a group of tribe, has from long usage attained the force of law.
Custom is the embodiment of those principles which have commended themselves to the national conscience as principles of justice and public utility. Custom is the oldest form of law-making. A research on ancient law demonstrates that in primitive societies, the lives of the people were regulated by customs which developed spontaneously according to situations. It was perceived that a particular way of doing things was more convenient than others. When the same thing was done again and again in a particular way, it assumed the form of custom.

**BINDING FORCE OF CUSTOM**

There are many reasons why custom is given the force of law:

1. **Custom is the embodiment of those principles which have commended themselves to the national conscience as principles of truth, justice and public policy.** The very fact that any rule has the sanction of custom raises a presumption that it deserves the sanction of law as well. Judges are inclined to accept those rules which have in their favour the prestige and authority of long acceptance. Custom is the external and visible sign of the national conscience and as such is accepted by the courts of law as an authoritative guide.

2. **Another reason for the binding force of custom is that the existence of an established usage is the basis of a rational expectation of its continuance in the future.** Justice demands that this expectation should be fulfilled and not frustrated. The observance of a custom may not be ideally just and reasonable, but it cannot be denied that it brings stability and certainty in the legal order.

3. **Sometimes a custom is observed by a large number of persons in society and in course of time the same comes to have the force of law.** Reference may be made in this connection to the custom of giving three days of grace on bills of exchange.

4. **Custom rests on the popular conviction that it is in the interests of society.** This conviction is so strong that it is not found desirable to go against it.

5. **Custom is useful to the law-giver and codifier in two ways.** It provides the material out of which the law can be fashioned – it is too great an intellectual effort to create law de novo. Psychologically, it is easier to secure reverence for a code if it claims to be based on customs immemorially observed and themselves true even though historically the claim cannot be substantiated.

There is inevitably a tendency to adopt the maxim, “Whatever has been authority in the past is a safe guide for the future”.

**EQUITY**

Equity is a source of law peculiar to England and Wales. Equity is the case law developed by the (now defunct) Court of Chancery. Equity prevails over common law, but its application is discretionary. Equity’s main achievements are trusts, charities, probate and equitable remedies. There are a number of maxims based on the concept of equity, such as: “He who comes to equity must come with clean hands”.

Jurisdictions which have inherited the common law system differ in their current treatment of equity. Over the course of the 20th century some common law systems began to place less emphasis on the historical or
institutional origin of substantive legal rules. In England, Australia, New Zealand and Canada, Equity remains a distinct body of law with specialised practitioners. Modern equity includes, amongst other things:

(a) *The law relating to express, resulting and constructive trusts*;

(b) *Fiduciary law*;

(c) *Equitable estoppel (including promissory and proprietary estoppel)*;

(d) *Relief against penalties and forfeiture*;

(e) *The doctrines of contribution, subrogation and marshalling; and*

(f) *Equitable set-off*.

The latter part of the 20th century saw an increased debate over the utility of treating Equity as a separate body of law. These debates were labelled as the "fusion wars". A particular flashpoint in this debate centred around the concept of unjust enrichment and whether areas of law traditionally regarded as equitable could be rationalised as part of a single body of law known as the law of unjust enrichment.

**AGREEMENT**

An agreement is also an essential source of law as it gives rise to conventional law. That an agreement operates as a source of rights is a face too familiar to require illustration. If X and Y enter into an agreement which is a lawful one, the courts of law recognise that agreement and enforce the same on X and Y. The same is the case if A and B enter into an agreement with a lawful purpose. However, such agreements bind only the parties to the agreement and not others. Law is a rule of conduct and generality is the test of law. There is no generality in an agreement between two parties. An agreement is recognised so long as it exists, and when it is dissolved, it has no further effect.

**PROFESSIONAL OPINIONS**

Professional opinions are also a considerable part of sources of law. These can be discussed under the heads of the *obiter dicta* of judges, general opinions of the legal profession and opinions of writers upon legal subjects.

1. *The obiter dicta are the statements of law made by a judge in the course of a decision, arising naturally out of the circumstances of the case, but not necessary for the decision. The value of these dicta as a source of law depends upon the reputation of the judge and the relation of the rest of the law upon the specific point in question and upon similar topics.*

2. *The legal profession consists of the judges, the practising lawyers and teachers of legal studies. These branches of the legal profession exercise a powerful influence upon the development and progress of law. Although the influence of professional opinion is not so great in England as against the case of Rome, yet their influence is considerable.*

3. *The opinions of the writers of text-books also help the growth of law. It has been particularly so in the case of international law. Its rules have frequently depended upon the opinions of jurists. The influence of*
writers of text-books was greater in Roman law than in English law. That is partly due to the fact that the study of law occupied a very vital position in the lives of the educated Romans.

In medieval and modern Europe, the writings of great jurists proved a very significant source of law. They actually decided what system of law should prevail in a particular civilisation.

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