SYNOPSIS



# Jurisprudence

Jurisprudence is a body of knowledge which deals with Nature and scope of law, Sources of law, and Legal concepts. Jurisprudence explores what law fundamentally is, including its purpose, functions, and the philosophical questions surrounding it. For example, it investigates whether laws are merely rules enforced by authorities or if they have a moral foundation. It also explores the relationship between law and justice, ethics, and society.

This examines how broadly or narrowly laws should be applied and the extent of their influence. It asks questions about the boundaries of legal authority, the reach of legal institutions, and how law interacts with other disciplines like economics, politics, and sociology.

## Sources of Law

Jurisprudence seeks to understand where laws come from. Sources of law include **statutory laws** (laws made by legislative bodies), **case laws** (laws developed through court rulings and judicial precedents), **customary laws** (traditional norms accepted over time), and **constitutional provisions** (fundamental laws outlining a nation's governance).

It also includes analyzing the authority and legitimacy of these sources. For instance, jurisprudence examines why certain customs become legally binding or why judicial decisions influence future rulings, providing insights into legal evolution and adaptability.

## Legal Concepts

This aspect of jurisprudence addresses the abstract ideas that form the foundation of the legal system. Key legal concepts include **rights** (entitlements granted by law), **duties** (obligations imposed by law), **liability** (responsibility under the law), **justice** (fair and equitable treatment under law), and **sovereignty** (supreme authority within a territory).

Jurisprudence analyzes these concepts to define, classify, and apply them consistently across various legal systems and contexts, promoting a coherent understanding of complex legal issues.

## Why Study Jurisprudence?

Studying jurisprudence provides critical insight into how and why laws are made, interpreted, and enforced. It offers a foundation for legal reasoning, enabling scholars, practitioners, and legislators to evaluate the effectiveness, morality, and purpose of laws. This field not only enriches legal education but also supports the development of a more just and equitable legal system.

In essence, jurisprudence is more than just a study of existing laws; it is an exploration of the philosophies, principles, and reasoning that underpin the entire legal system.

## Nature of Law

Law embodies principles^[1] of self-preservation recognised and applied by the society through government.

Law in generic sense means an order in which the subjects interact. The concept of order implies the existence of some measure of uniformity, continuity in the operation of natural and social processes. The notion of disorder, on the other hand, indicates the prevalence of discontinuity and irregularity, an absence of intelligible patterns which manifests itself in the occurrence of unpredictable jumps from one state of affairs to another. Absence of law causes haphazardness (randomness) whereas presence of law reflects orderliness. Law incorporates both natural law as well as social law.

Natural law is the order in which all physical entities are arranged and interact among themselves. Revolution of earth around the sun in a definite periphery is an example of natural law. Natural law is the creation of nature and if breached or intervened then nature itself adjusts to harmonise and re-establishes the order.

Social law is the order evolved by the humans for interactions among themselves; they enforce their rights and honour their obligations towards others. Breach of social law is controlled by

[1] Principle: Universal facts that guides human behaviour.

the society which brings back the wrongdoer to the set order. Absence of social law is thought of as the cause of anarchy ruining the civilisation. Inspiration for social law is from the natural phenomena observed by the humans.

Social law may further be subdivided between **morality** and **jurisprudential law**. Moralities are the norms of primitive nature and its transgression does not bring much anomaly in the society; whereas jurisprudential laws are the norms of complex nature and its transgression carries comparatively graver consequence. Jurisprudential law is commonly referred to as law while studying jurisprudence and so its scope is limited than to the generic law which include natural and social law.

For evolving and enforcing the law a formal agency called government (State) is employed to which everybody concedes. A government may be formed either by a monarch or a body of elected representatives but it governs the state of affairs of the human beings composing that government so that the order prevails and the civilisation is nourished and enriched, ultimately leading to human happiness.

Law carries with it the legal sanctions of the government. Morality lacks this legal sanction and breach of morality is controlled directly by the society without the intervention of the government.

**Is and ought:** Opinions or thought about law may be seen as a continuum with naturalists (one who believes law as the dictates of reason) at the one end and positivist (one who believes law as the dictates of sovereign) on the other. Naturalists are often concerned about the what the law 'ought to be' whereas positivists are concerned about what the law actually 'is'. While interpreting taxing statutes it is advisable to be a positivist. So, our concern is about what the law 'is'.

**Body of law:** Law on a particular subject need to be seen in the context of the whole body of law (*Corpus Juris*). Any particular law cannot be studied as a stand-alone even if it is a self-contained code. So, while forming opinion about Income tax one must be well aware of the allied laws such as procedural laws, interpretive laws, constitutional laws, etc.

**Self-preservation:** Self-preservation implies keeping oneself alive, physically as well as psychologically. It is wider than self interest in the sense that existence of a human being, a social creature, depends largely upon the family, community or nation; and so, to keep oneself alive one must keep the society alive. [Richard F. Taflinger]

**Recognition:** In modern States law is recognised through legislation, that is, the rights and obligations are stated in statutory instruments to be respected by all.

**Application:** Application connotes administration as well as adjudication. **Administration** or enforcement of law is ensured by the executive wing of the government in the sense that rights and obligations are respected by all and any breach / transgression does not go unpunished. **Adjudication** balances the roles of parties involved in the enforcement of rights and obligations, and any excess than that provided in the statutory instrument is met with punishment.

## Definitions of Law by Various Jurists

**Aristotle (384–322 BC):** "Law is reason free from passion." [*Politics, Book III, Part XVI*]

**Cicero (106–43 BC):** "True law is right reason in agreement with nature; it is of universal application, unchanging and everlasting." [*De Legibus, Bk. I, Ch. VI*]

**St. Thomas Aquinas (1225–1274):** "Law is an ordinance of reason for the common good, made by him who has the care of the community, and promulgated." [*Summa Theologica, I-II, Q.90, Art. 4*]

**Thomas Hobbes (1588–1679:** "Law is the command of him or them that have the sovereign power, declaring publicly and plainly what may be done and what must be avoided." [*Leviathan (1651), Ch. XXVI*]

**Blackstone (1723–1780):** "Law, in its most general and comprehensive sense, signifies a rule of action, applied indiscriminately to all kinds of action, whether animate or inanimate, rational or irrational." [*Commentaries on the Laws of England (1765)*]

**Jeremy Bentham (1748–1832):** "Law is the assemblage of signs declarative of a volition conceived or adopted by the sovereign." [*Principles of Morals and Legislation (1789)*]

**John Austin (1790–1859):** "Law is the command of the sovereign, backed by sanctions." [*The Province of Jurisprudence Determined (1832)*]

**Savigny (1779–1861):** "Law is not made but is found; it is the manifestation of the common consciousness (Volksgeist) of the people." [*Of the Vocation of Our Age (1814)*]

**Henry Maine (1822–1888):** "The movement of the progressive societies has hitherto been a movement from status to contract." [*Ancient Law (1861)*]

**Ihering (1818–1892):** "Law is the form of the guarantee of the conditions of life of society, assured by State power." [*Law as a Means to an End (1877)*]

**Holland (1835–1926):** "Law is a general rule of external human action enforced by a sovereign political authority." [*Elements of Jurisprudence (13th ed., 1924)*]

**Salmond (1862–1924):** "Law is the body of principles recognized and applied by the State in the administration of justice." [*Jurisprudence (10th ed., 1947)*]

**Eugen Ehrlich (1862–1922):** "The living law is the law which dominates life itself, even though it has not been posited in legal propositions. The source of law is society itself." [*Fundamental Principles of the Sociology of Law (1913)*]

**Duguit (1859–1928):** "Law consists of rules of conduct imposed by men upon themselves which correspond to the needs of social solidarity." [*Law in the Modern State (1919)*]

**Roscoe Pound (1870–1964):** "Law is a social engineering which means a balance between the competing interests in society." [*Interpretations of Legal History (1923)*]

**Benjamin Cardozo (1870–1938):** "The final cause of law is the welfare of society." [*The Nature of the Judicial Process (1921)*]

**Karl Llewellyn (1893–1962):** "What officials do about disputes is the law itself." [*The Bramble Bush (1930)*]

**Hans Kelsen (1881–1973):** "Law is a normative science; it is the science of norms stipulating how individuals ought to behave." [*Pure Theory of Law (1934, Eng. trans. 1960)*]

**Keeton (1888–1965):** "Law is the body of rules seen to operate as binding rules in a state because they are enforced by its authority." [*Introduction to Jurisprudence (1930)*]

**Paton (1902–1984):** "Law consists of rules which are recognized by courts and enforced by the State." [*Textbook of Jurisprudence (4th ed., 1972)*]

**M.C. Setalvad (1900–1973):** "Law is the body of rules which the courts recognize and enforce." [*The Common Law in India (1960)*]

**Dias (1907–1998):** "Law is a combination of principles, standards, rules and traditions which the society recognizes as regulating conduct." [*Jurisprudence (5th ed., 1985)*]

**Edgar Bodenheimer (1908–1991):** "Law is a means to serve social ends and promote human values; it derives its legitimacy from the moral order and its capacity to advance justice." [*Jurisprudence: The Philosophy and Method of the Law (1962)*]

**H.L.A. Hart (1907–1992):** "Law is a system of rules consisting of primary rules (obligations) and secondary rules (recognition, change, adjudication)." [*The Concept of Law (1961)*]

**Joseph Raz (1939–2022):** "Law claims authority; it is a system of authoritative norms purporting to guide the behavior of its subjects." [*The Authority of Law (1979)*]

**Upendra Baxi (b. 1938):** "Law is an instrument of both domination and liberation, depending on who wields it and in whose interest it operates." [*The Crisis of the Indian Legal System (1982)*]

## Schools of Jurisprudence

Based on their definitions the jurists have been categorised under several schools of law — natural, analytical (positivists), historical, sociological, real and critical — as can be seen below:

## Natural Law School (Law as Morality and Reason)

The Natural Law School sees law as rooted in morality, reason, and nature. It claims that there exists a universal and eternal law which human laws must conform to in order to be valid. Aristotle defined law as "reason free from passion," while Cicero called it "right reason in agreement with nature." St. Thomas Aquinas elaborated that law is an ordinance of reason made for the common good, and later thinkers like Grotius, Blackstone, and Bodenheimer carried this forward. This school emphasizes that true law derives its legitimacy from moral order and justice, and unjust laws are not real laws.

## Analytical / Positivist School (Law as Command of Sovereign)

The Analytical School, also called Positivism, separates law from morality and defines it as the command of the sovereign, enforceable through sanctions. Hobbes described law as the sovereign's command, Bentham stressed its utilitarian purpose, and Austin systematized it into the "command theory." Later thinkers like Holland, Salmond, Keeton, and Paton defined law as rules recognized and enforced by state authority. Hart refined positivism with his theory of "primary and secondary rules," while Raz emphasized law's claim to authority. In this view, law is valid because it is made and enforced by proper authority, not because it is moral or just.

## Historical School (Law as Tradition and Custom)

The Historical School views law as an organic growth of society, rooted in customs, traditions, and the spirit of the people (Volksgeist). It rejects the idea of law being suddenly created by sovereign will. Savigny argued that law is not made but found within the consciousness of the people. Henry Maine explained that legal development moves from status (family-based ties) to contract (voluntary relations). Ihering connected law to social purposes, seeing it as an instrument to secure life's conditions. This school highlights law as a cultural product, evolving gradually with the people.

### Sociological School (Law as a Social Institution)

The Sociological School emphasizes law's role in society and focuses on its actual social functions. It argues that law must be studied in its relation to social needs and interests. Ehrlich distinguished between "living law" found in society and "law in books." Duguit advanced the idea of law as rules ensuring social solidarity. Pound defined law as "social engineering," a way to balance competing interests in society. Cardozo emphasized the welfare of society as the final cause of law. This school presents law as a social institution designed to maintain order, fulfill needs, and promote harmony.

### Realist School (Law in Action, Not in Books)

The Realist School shifts focus from abstract definitions of law to its practical operation. It argues that real law is what judges and officials do in practice, not merely what statutes prescribe. Holmes declared that the life of the law has been experience, not logic. Llewellyn stressed that law is what officials do about disputes, and Jerome Frank highlighted the psychological and personal factors affecting judicial decisions. Cardozo too emphasized the creative role of judges. Realism thus defines law as "law in action," centering on judicial behavior and actual outcomes.

### Normative School (Pure Theory of Law)

Hans Kelsen's Pure Theory of Law presents law as a system of norms, distinct from morality, sociology, or politics. According to Kelsen, law derives validity from a foundational norm or "Grundnorm." Law is a hierarchy of norms, each deriving authority from a higher norm. This school seeks to study law in a scientific and value-free way, focusing purely on its normative structure. By excluding moral or social considerations, Kelsen sought to make jurisprudence an exact science of legal norms.

### Modern Critical / Postmodern Schools

Critical and postmodern perspectives argue that law is not neutral but reflects power structures, ideology, and inequality. Marxist thought treats law as a tool of class domination. Feminist jurisprudence highlights law's patriarchal bias. The Critical Legal Studies movement deconstructs law as a political instrument serving elites. In India, Upendra Baxi sees law as both domination and liberation, depending on whose interests it serves. This school stresses that law cannot be understood without examining the power relations and politics embedded within it.

### Flow of Jurisprudence

- Natural Law: Law = morality & reason.
- Analytical / Positivist: Law = command of sovereign, enforceability.
- Historical: Law = customs & social evolution.
- Sociological: Law = social institution, serving society.

- Realist: Law = what courts and officials do.
- Pure Theory: Law = norms, separate from morality / politics.
- Critical / Postmodern: Law = power, ideology, domination vs. liberation.

## Sanctions of law^[2]

Sanctions of law ensures enforcement of rights and discharge of obligations. Sanctions are provided in order to guarantee the observance and execution of legal mandates, to enforce "behaviour conforming to the established order." The sanctions recognized by a legal order are usually of a diversified character. In primitive societies, they may take the form of self-help or social ostracism. In developed legal systems, the administration of sanctions is, as general rule, entrusted to the organs of political government. Among the means of coercive law enforcement are punishment by fine or imprisonment, the imposition of damage awards which may be carried out by executions into the property of the judgment debtor, the ordering by a court of specific acts or forbearances at the threat of a penalty, the impeachment and removal of a public officer for dereliction of duty.

As Kelsen has pointed out, the sanctions characteristic for developed legal orders go beyond the exercise of merely psychological pressure and authorize the performance of disadvantageous coercive acts, namely, "the forcible deprivation of life, freedom, economic and other values as a consequence of certain conditions." Such coercive theories of law assign to coercibility through sanctions a more far-reaching role than that of a means for promoting the effective observance and execution

[2] Bodenheimer Sec 59

of legal mandates. For such theories the attachment of a sanction is a *conditio sine qua non*, an essential criterion of the existence and validity of a legal norm, it becomes necessary to take issue with this assertion.

But there are in every legal order norm which possess a facilitative rather than mandatory character. Included in this category are norms which grant rights to individuals, confer powers on organizations, and assign spheres of policy-making discretion to government agencies. No sanction will attach to the non-exercise of the right, power, or discretion accorded by the law. Examples of norms which may be viewed as sanctionless in this sense are provisions authorizing persons to transfer ownership by conveyance, to dispose of property by will, to vote in a political election, to speak without restraint on matters of public interest. Duties of consortium flowing from the marriage relationship may also fall in this category. Constitutions sometimes contain provisions which cannot be enforced against certain high officials. Statutes or judicial decisions may recognize a doctrine of sovereign immunity which prohibits suits against the state for tortious acts and breaches of contracts, although an (often ineffective) remedy may be available against the individual officer responsible for the act. One must under these circumstances concur in the statement by Alf Ross that "compulsion cannot be a necessary part of the concept of law in the sense that every rule of law must be sanctioned by compulsion." Ross raises the further question, however, whether or not a system not based on compulsion *on any point* could qualify as a legal system. He answers this question in the negative, on the basis of his conclusion that compulsion is a "necessary integral part" of the institution of law *as a whole*.

# Contents of law

*Ignorantia juris non excusat,* in other words, ignorance of the law is no excuse. It is a legal principle holding that a person who is unaware of a law may not escape liability for violating that law merely by being unaware of its content. This legal maxim^[3] signifies importance of legal awareness. So, we need to be aware of prevailing laws.

Law is composed of Act of legislature, delegated legislation and judicial precedent laying down precepts enjoining rights upon and seeking obligations from members of the society.

## Act of legislature

Act of legislature (legislative enactments) is the deliberate creation of legal precepts by an organ of government which is set up for this purpose and which gives articulate expression to such legal precepts in a formalized legal document.

## Delegated legislation

In a modern, highly developed state, the tasks confronting a legislative body are so manifold and complex that they cannot be performed in all of their details and technical minutiae without putting an exorbitant burden and strain on the shoulders of such a body. Furthermore, some types of legislative activity in the area of specialized government regulation demand such a thoroughgoing acquaintance with the organizational and technical problems existing in the particular field that they can be discharged more adequately by a group of experts than by a legislative assembly lacking the requisite specialized knowledge. For these and other reasons, modern legislature frequently

[3] Maxims are sayings of law. These crispy Latin sayings are established principle or proposition of law derived through ages by jurists and recognised by the courts of law.

delegate some legislative functions to the executives or administrative agencies of the government.

Delegated legislation must be distinguished from **autonomic legislation**, even though the lines of demarcation between these two types of legislation sometimes become clouded. By autonomy we mean the power of persons or organizations other than the government to make laws or adopt rules essentially similar in character to laws.

## Judicial precedent

Judicial precedent is the normative pronouncements emanating from judiciary. The verbal expression of a legal rule or principle by a judge does not, however, have the same degree of finality as the authoritative formulation of a legal proposition by a legislative body. Although judiciary is also an organ of government but is not an organ set up primarily for the purpose of making law. Its main function is to decide disputes under a pre-existing law; and although, because of the necessary incompleteness and frequent ambiguity of this pre-existing law, the judiciary has never been able to restrict itself exclusively to its primary function and has always found it necessary to augment and supplement the existing law by something which may not inappropriately be called judge-made law (common law), such law-creating functions of the judges must be held to be incidental to their primary functions. Orders and decisions of the higher appellate authorities should be followed unreservedly by the subordinate authorities as a matter of judicial discipline.

The mere fact that the order of the appellate authority is ‘not acceptable’ to the department is in itself an objectionable phrase. Such order may be subject of appeal but can furnish no ground for not following it unless its operation has been suspended by a competent court.^[4]

## Municipal laws^[5]

Law may be municipal if it governs the relations of residents of a State within its boundary. They regulate the relationship between the State and its citizen and determines the relationship among citizens. Municipal law can be further classified into public law and private law.

### 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:

**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.

**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

[4] UOI v Kamlakshi Finance Corpn Ltd 1992 Supp (1) SCC 443

[5] CBSE Legal Studies XI 2016 p 91-93

whereby their actions can be controlled. It also provides for legal remedies in case of any violation of the rights of the people.

**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.

**Tax law:** Tax law is also an important class of law which deals with collection of revenue from the subjects of a State to meet the public expenditure. The revenue of a State is *sine qua non* for its sustenance and development. Examples of tax law are: Income Tax Act 1961, Goods and Services Tax Act 2017, etc.

### 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 (eg 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:

**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.

**Property Law:** This branch of law deals with the ownership and transfer 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.

**Law of Obligations:** This branch of the law pertains to an area where a person is required to do something because of his promise, contract or law. It puts an obligation on the person to perform certain actions which generally arise as a consequence of an enforceable promise or agreement. If someone violates his promise, that promise may be enforced in a court of law. According to the Indian Contract Act, 1872, a contract is an agreement which is enforceable by law. In other words, a contract is an agreement with specific terms between two or more persons in which there is a promise to do something in lieu of a valuable profit which is known as consideration. For example, A has offered his mobile phone to B for Rs.15,000. B agreed to purchase the same. This has created a legal relationship, both have made a promise which is enforceable by law.

**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.

## International law^[6]

Law may be international if it governs the relations of States or their residents having foreign elements. International law is further classified as public international law and private international law.

### Public international law (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.

### Private international law (Conflict of laws)

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

## Civil and criminal law

Based on restitution and retribution of corrective justice, law may be classified as civil and criminal. A law providing restitution is

[6] CBSE Legal Studies XI 2016 p 90

categorized as civil or private law. A law providing for punishment is categorized as criminal or public law.

## Civil law

In civil law the responsibility of the wrongdoer (transgressor) is to the extent of loss sustained by the injured and is termed as civil liability. The case is processed at the discretion the injured under the civil procedure ie Civil Procedure Code 1908. The injured being the plaintiff and the wrongdoer being the defendant eg X (plaintiff) v Y (defendant). Examples of civil law are: Indian Contract Act 1872; Negotiable Instrument Act 1881, etc.

## Criminal law

In criminal law the responsibility of the wrongdoer (transgressor) is to the State (ie society at large) and is termed as criminal liability. The case is processed at the discretion of the State under the criminal procedure ie Criminal Procedure Code 1973. The injured being the victim, the State being the plaintiff and the wrongdoer being the defendant ie State (plaintiff) v Y (defendant). Example of criminal law are: Indian Penal Code 1860, Prevention of Corruption Act 1988, etc.

In criminal cases having regard to the severity of the sanctions the defendant is treated with greater indulgence than in civil cases. The procedures as well as rules of evidence are modified in order to reduce to a minimum the risk of an innocent person being punished. The accused in a criminal case is not called upon to prove anything. The accused is not bound to make any statement to the court; he is not compellable to answer any question or to give any explanation.

It is left to the prosecution to prove the existence of all the facts necessary to constitute the offence charged, and lastly, if there is any reasonable doubt regarding the guilt of a person charged with a crime, the benefit of it is always given to the accused.^[7]

## Severity of criminal cases

Severity of criminal cases necessitate two vital maxims to be fulfilled ie *Mens rea* and *Nulla poena sine lege*.

### *Mens rea* (guilty intention)

It is the guilty intention that transforms an act into a crime. The significance of guilty intention (*mens rea)* in criminal law is best captured by the maxim *actus non facit reum nisi mens sit rea* (the act itself does not make a man guilty unless his intention was so). This a dictum as old as criminal law itself. It is not an artificial principle grafted on any particular system of laws, but is a doctrine of universal application based on man's moral sense.^[8]

Words denoting guilty mind are found in the definition of an offence such as voluntarily, intentionally, knowingly, fraudulently, dishonestly, corruptly, malignantly, wantonly, rashly, negligently, heedlessly, etc. Eg:

> Where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded or where input tax credit has been wrongly availed or utilised by reason of **fraud**, or any **wilful misstatement** or **suppression** of facts to evade tax, he shall serve notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilised input tax credit, requiring him to show cause (within 5 years) as to why he should not pay the amount specified in the

[7] Huda 2011 p 6

[8] Huda 2011 p 168

> notice along with interest payable thereon under section 50 and a penalty equivalent to the tax specified in the notice.^[9]

In cases where the words denoting *mens rea* qualifies an offence, the prosecution must bring home to the offender either by direct or circumstantial evidence the precise and particular elements connoted by these terms, ie showing liability of a guilty mind based in the form of actual knowledge or connivance.

The absence of qualifying words connotes that the offence is intended to be one of absolute prohibition, calling for strict or absolute liability. Here, the liability is strict and *mens rea* need not be established by the prosecution.^[10] The prosecution in such cases need only prove the prohibited act and it is for the defendant to bring the statutory defence.^[11]

## *Nulla poena sine lege*

No punishment without a law authorising it. It is based on the elementary notion of justice that the criminal law should be as fixed and as certain as possible in order that man may know in advance what conduct is criminal. It is felt to be unfair to punish a man for conduct which was not criminal when the act was done – what is demanded is a rule of law as opposed to the caprice of an official.^[12]

The maxim of '*nulla poena sine lege*' has been recognised in Article 20(1) of the Indian Constitution which prohibits retrospective criminal legislation, commonly known as ***ex post facto* legislation.**

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[9] CGST Sec 74(1) [Determination of tax in intentional cases]

[10] Ranjit D. Udeshi v State Of Maharashtra AIR 1965 SC 881

[11] Jethmalani 2015 p 148

[12] Paton 2004 p 388

## Tax law

Tax is a compulsory unrequited payment on the part of citizens to the government. ^13

**Etymology:** Tax, a three letter Middle English word meaning to estimate or determine the amount of a penalty or damages, is said to be derived from the Greek word *tassien* (to fix) through Latin *taxare* (to censure, to charge, to compute) and Old French *taxer*. The Greek (Hellenistic) civilisation, however, is said to emerge circa 700 BC in Europe that ended by 146 BC when Greece fell to the Romans (Latin), in 146 BC. Old French was the language spoken in Northern France from the 8th century to the 14th century. Another view is that the word 'tax' first appeared in the English language only in the 14th century. It derives from the Latin *taxare* which means 'to assess'. Before that, English used the related word 'task', derived from Old French. For a while, 'task' and 'tax' were both in common use, the first requiring labour, the second money. 'Tax' then developed its meaning to imply something wearisome or challenging. So words like 'duty' was used to suggest a more appealing purpose [New Internationalist 2008]. The Indian term for tax as *kar*, a Sanskrit word meaning making or doing substantiates the view of tax as task or duty.

**Purpose of tax:** Taxes are levied in almost every country of the world, primarily to raise revenue for government expenditures, although they serve other purposes as well. Taxes differ from other sources of revenue in that they are compulsory levies and are unrequited ie they are generally not paid in exchange for some specific thing such as a particular public service, the sale of public property, or the issuance of public debt. Taxes are presumably collected for the welfare of taxpayers as a whole but individual taxpayer's liability is independent of any specific benefit received. Apart from raising of revenue for the public welfare, tax is a fiscal tool in the hands of the State to regulate the economy. Richard A. Musgrave has modelled the purposes of tax into three categories viz. resource allocation, income redistribution, and economic stability.

**Power to tax:** Constitution of a State grants power to the government to plan public expenditures and extract taxes from its subjects to meet those expenditures.

**Article 265** of the Constitution of India provides the power to tax in following terms:

> 'No tax shall be levied or collected except by authority of law.'

In other words, a tax may be levied by an authority of law available in the statutory instruments in that regard. And, to be more precise the term 'tax' has been defined in Article 366(28) of the Constitution in following terms:

> 'Taxation includes the imposition of any tax or impost, whether general or local or special, and 'tax' shall be construed accordingly.'

Thus, any compulsory exaction of money by Government amounts to imposition of tax. However, such exaction or taxation is not permissible except by or under the authority of a statutory provision.^[14] Said as follows:

> 'Statutory backing is essential for imposition of tax.'^[15]

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[13] OECD 1996 p 3

[14] Commr of Central Excise v Kisan Sahkari Chinni Mills, AIR 2001 SC 3379 cited in Singh 2021 p 611

[15] Tata Iron & Steel Co Ltd v Collector Central Excise, (2002) 8 SCC 338 cited in Singh 2021 p 611

The items of public expenditure and the source to garner revenue to meet those expenditures are listed in Schedule VII of the Constitution which has been categorized under three lists, namely, –

1. List I (Union)
2. List II (State)
3. List III (Concurrent)

A scrutiny of List I and II of Schedule VII of the Constitution would show that there is no overlapping anywhere in the expending and taxing power of the government and the Constitution gives independent sources of taxation to the Union and the state governments.^[16]

The taxing entries in those Lists have to be construed with clarity and precision so as to maintain this exclusivity. On this principle, a tax on "Luxuries" in Entry 62 of List II was construed to mean a tax on "the activity of enjoyment of or indulgence in that which is costly or which is generally recognised as being beyond the necessary requirements of an average member of society" and not a tax on articles of luxury.^[17]

List III, on the other hand, enlists those items of expenditure and taxation whereupon both Union and the state government may legislate concurrently though the Union law prevails over that of the state government.

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[16] State of West Bengal V Kesoram Industries Ltd, (2004) 10 SCC 210 cited in Singh 2021 p 613

[17] Godfrey Phillips India Ltd v State of Uttar Pradesh, (2005) 2 SCC 515 cited in Singh 2021 p 613

The courts have conceded greater latitude to the Legislature in formulating its tax policy either directly^ [18] or by delegated legislation.^[19]

**Charity:** Tax as impost may be distinguished from charity for the former is a compulsory payment while the latter is a voluntary payment though both are intended for public welfare.

**Fee:** In a broad sense a fee being compulsory imposition of money is also a tax. The constitution, however, makes a distinction between tax and fee which are impositions made by a State for raising revenue. A tax imposed for public purpose for raising general revenue of the State. A fee in contrast is imposed for rendering services and bears a broad correlation with the services rendered.^[20]

A taxing statute must be distinguished from those where a duty or fee is charged by the State for parting with its privilege of dealing in deleterious commodities such as opium and liquor.^[21]

Thus, in tax the element of *quid pro quo* (something in return) is absent while in fee the element of *quid pro quo* is present.

Power to levy fee is conferred by the last entry in each List in general terms in respect of any of the matters in the List.^[22]

**Cess:** Cess means a tax augmented for specific purpose, and thus it is a fee. For instance, the levy of cess on the cost of construction incurred by the employers on building and other construction works under the Building and Other Construction

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[18] R K Garg v UOI, (1981) 4 SCC 675 cited in Singh 2021 p 614

[19] Satnam Overseas Export v State of Haryana (2003) 1 SCC 561 cited in Singh 2021 p 614

[20] Dhenkanal Municipal Council v Rajarao, 1993 Supp (3) SCC 543 cited in Singh 2021 p 612

[21] Organon (India) Ltd v The Collector of Excise, (1995) Supp (1) SCC 53 cited in Singh 2021 p 614

Workers' Welfare Cess Act, 1996, was held to be a "fee" and not a "tax", as the cess was imposed for ensuring sufficient funds for the Welfare Boards to undertake social security schemes and welfare measures for building and other construction workers, as provided under the Building and Other Construction Workers' (Regulation of Employment and Conditions of Service) Act, 1996, and was set apart for that specific purpose and not merged with public revenues for the benefit of the general public.^[23]

**Surcharge:** Surcharge is levied in addition to tax, and so it is a tax.

## Taxing statutes

Taxing statutes is composed of Act of legislature and delegated legislations for raising of revenue by the State and matters related therewith.

Courts, and so its precedents, have got a limited role of reviewing constitutionality of the tax laws, that is, the tax levied by the government is as per the statutory instruments available in that regard and that the statutory instruments are in conformity with the powers given to the government under the Constitution.

**Acts of legislature:** Income Tax Act 1961, Central Goods and Services Tax Act 2017, Custom Act 1962, Finance Acts, etc.

**Delegated legislations:** Delegated legislation issued by the taxing department is very common. These are notified in the official gazette and may be in the collective form of **Rules** or Regulations eg Income Tax Rules 1962, Central Goods and Service tax Rules 2017, Custom Brokers Licensing Regulations

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[22] Singh 2021 p 613

[23] Dewan Chand Builders and Contractors v UOI, (2012) 1 SCC 101 cited in Singh 2021 p 613

2018, etc. or in the stand alone form of **Notification** eg Notification No.1/2017 - Central tax dated 19 June 2017 enforcing provisions of CGST Act 2017. These are read with the concerned Act but are subordinate in authority to the taxing Act. So, any Rule in contravention of the provision of the taxing Act is held as ultra vires and void.

**Circulars** are internal instructions and issued by the departments to its field formations. They are circulated but neither notified nor led before the Parliament or State legislature, and so do not have much force of law for the assessee who is free to follow it. The tax department, however, are bound by such circulars as a matter of instructions from their superiors and by dint of principle of estoppel but the subject ie assessee is free from such obligation.

**Judicial precedents:** Unlike the civil laws where the rule of law is recognised by the courts too, the role of judiciary with respect to taxing statutes are limited ie validating the taxing Act against the Constitution of India or validating the delegated legislations against the concerned taxing Act and the Constitution; or clarifying the ambiguities in the provisions of the taxing Act and the delegated legislation thereunder. The judicial discipline, however, is maintained and the lower courts cannot alter the meaning ascertained by a higher court.

## Self-contained code

Tax statutes are generally a self-contained code as they provide for: charge, payment, return, assessment, and adjudication.

**Charge:** Charge implies the quantum of tax payable, the event on which the liability arises, and the person liable.

**Payment:** Payment implies method and frequency of payment of tax by the tax payer to the exchequer including the recovery and refund by the exchequer.

Regarding payment through cheque, the date of submission of the cheque to the officer concerned is treated as the date of deposit.^[24]

**Return:** Return implies provision of information by the tax payer to the exchequer regarding the tax liability and its disposal.

**Assessment:** Assessment implies determination by the exchequer of the correctness of the tax liability and its disposal.

**Adjudication:** Adjudication implies resolution of disputes arising between the tax payer and the exchequer in respect of charge, payment, return or assessment.

**Charging and machinery provision:** Provisions levying the tax or fixing the liability of tax is called as charging provisions. Provisions in respect of payment, return, assessment, and adjudications which effectuate (bring into effect) the charging provisions are called as machinery provision.

Every taxing statute has a charging section and provisions laying down the procedure to assess the tax and penalties and method of their collection and may also contain provisions to prevent pilferage of revenue.^[25]

A penalty provision in a taxing Act has to be specifically provided and cannot be inferred.

[24] Shiva Paper Mills Limited v Commissioner of Sales Tax (2003) 133 STC 4 (All)

[25] Tripura Goods Transport Association v Commissioner of Taxes, (1999) 2 SCC 253 cited in Singh 2021 p 614

The nature of the tax imposed by a state has to be determined by examining the pith and substance of the statute and by paying more attention to the charging section than to the basis or machinery adopted for assessment and collection of tax^[26] for, the nature of tax is different from the measure of tax.^[27]

There are three components of a taxing statute, viz., subject matter of the tax, person liable to pay the tax and the rate at which the tax is levied.^[28] If there be any real ambiguity in respect of any of these components which is not removable by reasonable construction, there would be no tax in law till the defect is removed by the Legislature.^[29]

In terms of Article 265 all acts relating to the imposition of tax providing inter alia for the point at which the tax is to be collected, the rate of tax as also the recovery must be carried out in accordance with law.^[30]

If a tax has been paid in excess of the tax specified, save and except the cases involving the principle of "unjust enrichment", the excess tax realised must be refunded.

In Article 265 and also in taxing statutes the words "levy" and "collect" are not used as synonymous term. Though the term "levy" may include "imposition" and "assessment", it does not include "collection".^[31]

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[26] Rallaram v Province of East Punjab, AIR 1949 FC 81 cited in Singh 2021 p 614

[27] State of West Bengal v Kesoram Industries Ltd, (2004) 10 SCC 201 cited in Singh 2021 p 614

[28] State of Kerala v Alex George (2005) 1 SCC 299 cited in Singh 2021 p 614

[29] Mathuram Agarwal v State of Madhya Pradesh (1999) 8 SCC 667 cited in Singh 2021 p 615

[30] Corp Bank v Saraswati Abharansala, (2009) 1 SCC 540 cited in Singh 2021 p 615

[31] CCE v National Tobacco Co of India Ltd, (1972) 2 SCC 560 cited in Singh 2021 p 615

"Exemption" from tax comes later to levy for "exemption" can only operate when there is a valid levy; if there was no levy at all, there would be nothing to exempt.^[32]

There are three stages in the imposition of a tax, viz. (1) declaration of liability in respect of persons or property; (2) assessment of tax that quantifies the sum which the person liable has to pay; and (3) methods of recovery if the person taxed does not voluntarily pay. The expression "tax due" usually refers to an ascertained liability on assessment but its meaning may vary according to context.^[33]

## Charging provision

A taxing statute cannot stand in absence of charging provisions. Charging provisions stipulates: (a) person liable, (b) tax base, (c) taxable event, (d) taxable amount, and (e) tax rate.

**Person liable:** The first and foremost thing which is prescribed is the person who is liable for the tax; the person may be natural or artificial.

**Tax base:** After identifying the person liable to tax, it is significant to specify the subject matter of tax ie on what amount the person is liable to tax. It may be the income earned by the person, or the value of goods and services provided by the person, or the value of consumption made by the person, or the value of property held by the person, etc.

**Taxable event:** After specifying the tax base, the next important specification is the point which will trigger the tax liability. For example, the income earned or goods sold.

[32] Peekay Re-Rolling Mills (Pvt) Ltd v Assistant Commissioner (2007) 4 SCC 30 cited in Singh 2021 p 615

[33] Harshad Mehta v Custodian (1998) 5 SCC 1 cited in Singh 2021 p 615

**Taxable amount:** The next come the determination of taxable amount on which to ley the tax. For example, the total amount of income earned during a year, or the total value of goods sold during a month.

**Tax rate:** Once the taxable amount is determined, the next remaining thing is to apply the tax rate to decide the quantum of tax payable by the person. Issue often arises in application of tax rate when there is a change in rate. In case of income tax it has been statutorily fixed that the tax rate on the first day of the assessment year will be applicable for the taxable income earned during the previous year. In GST it is fixed as the date on which advance consideration received, goods provided, or amount billed whichever is earlier.

### Illustration of charge of tax:

| Elements | Income Tax | Goods & Service Tax |
|---|---|---|
| Person liable | Individual | Individual |
| Tax base | Income earned | Value of goods sold |
| Taxable event | Earning of income | Sale of goods |
| Taxable amount | Total income during a year | Total value of goods sold during a month |
| Tax rate | 10% | 5% |

## Machinery provision

A machinery provision is a procedural part of the law that explains how assessments or reassessments are to be carried out. However, it cannot, under any situation, override the charging provision—which is the part of the law that actually imposes the tax liability. Charging provisions create the tax obligation, while machinery provisions are meant only to help implement and enforce it. If machinery provisions were to modify or conflict with charging provisions, it would lead to legal inconsistency.

**Interpretation of Machinery provisions:** The Supreme Court, in *CIT v. Calcutta Knitwears (2014) 362 ITR 673 (SC)*, reiterated that **fiscal statutes must be interpreted using the rule of strict construction**, especially when it comes to charging sections. The Court held that if the statutory language is clear and unambiguous, it should be given its plain meaning. Courts are not allowed to add to or subtract from the text of the law, even if applying the law causes inconvenience or hardship. Departure from the literal interpretation is only permitted in rare and exceptional cases, and with utmost judicial caution.

However, **machinery provisions are interpreted differently**. Their purpose is to implement and give effect to the tax liability created by the charging section. Courts have consistently held that such provisions should be interpreted *liberally and practically*, to support the enforcement of the law rather than hinder it. This principle was emphasized in landmark cases such as *Whitney v. Commissioner of Inland Revenue (1926) AC 37*, *CIT v. Mahaliram Ramjidas (1940) 8 ITR 442*, *India United Mills Ltd. v. Commissioner of Excess Profits Tax (1955) 27 ITR 20 (SC)*, and *Gursahai Saigal v. CIT (1963) 48 ITR 1 (SC)*.

Legal scholars like G.P. Singh and Bennion have explained that **strict interpretation ensures clarity and legal certainty**, comparing it to daily communication where words mean exactly what they say. Just as calling an object a "pencil" should not be misunderstood to mean "elephant", statutes should also be interpreted as they are written.

Still, when it comes to procedural aspects like assessment and recovery of taxes, **courts adopt a commonsense approach**. In

*Mahim Patram (P) Ltd. v. Union of India (2007) 3 SCC 668* and *J.K. Synthetics Ltd. v. CTO (1994) 4 SCC 276*, the Supreme Court held that the machinery provisions must be read in a way that makes the tax law work effectively. If interpreted too rigidly, the very intent of the law could be defeated.

To sum up, while charging sections must be strictly interpreted to define tax liability, machinery provisions are to be liberally interpreted to ensure that the liability is enforced effectively. This balanced approach ensures that tax laws function efficiently without undermining the rights or obligations clearly expressed in the statute.

## Categorisation of tax law as criminal one

A tax law may be categorised as criminal law for it contains the mandatory provisions for assessment and payment of tax and the penal provisions for imposing interest, penalty, and imprisonment in case of non-compliance of the mandatory provisions. Aspect of criminal law is evident in offences as non-payment of taxes, concealment of income, failure to comply with notice, etc. Even methods of recovery under tax laws reflects its criminal nature (infliction of pain): such as (a) recovery as arrears of land revenue, (b) deduction from salaries and other payments by the employer, (c) attachment (process analogous to garnishee proceeding by collecting the dues from persons who owe money to the assessee), etc. [Mukharji 2016 p 277]

Criminal procedure code, however, is not directly applicable to the taxing statutes because taxing statutes are self-contained one as these incorporate provisions for charging as well as machinery of implementation.

### Aluminium Corporation of India Limited v. Union of India (1975) — The rule of law and good governance

Justice Krishna Iyer held that the rule of law, as the bedrock of democracy, loses its meaning if citizens—most of whom cannot afford legal counsel—are unable to understand legislative language and therefore cannot comply. He observed that legislation governs almost every facet of national and personal life, from local authorities and public corporations to private commerce, affecting individuals from birth to death. Laws that are difficult to comprehend frustrate administrators, alienate the public, and hinder the objectives of quick justice and reduced litigation. He stressed that legal authority gains respect through simplicity in legislation, and in taxation especially, statutes, rules, and notifications must be drafted with clarity and ease of understanding. [*Aluminium Corporation of India Limited v. Union of India, (1975) 2 SCC 472*]

## Customary law

Customs are conducts observed by a group of people.^[34] These are habits of action or patterns of conduct which are generally observed by classes or groups of people. They may relate to dress or to etiquette or to rites surrounding important events of life, such as birth, marriage, or death. They may also pertain to the conclusion of transactions or the fulfillment of obligations.

**Social custom:** There exist customs in every society which are concerned with the less important aspects of social life. Most societies have certain usages with respect to the kind of dress one is expected to wear on various occasions. It is the custom in many countries to give wedding presents to friends and relatives.

[34] Bodenheimer 2018 p 300

Well-established customs are observed at burials and other solemn ceremonies. When a custom of this type is violated, society usually reacts by showing social displeasure or disapproval; and if the norms of social intercourse are repeatedly or constantly violated by some person, he may soon find himself outside the pale of society.

**Customary law:** There may be other kinds of customs which in a more definite and stringent sense are regarded as the specific duties and obligations of men. Such customs may regulate the obligations of marriage and the upbringing of children, the transmission of property at death, or the modes of consummating and fulfilling agreements. Such customs do not pertain to the sphere of social formalities, outward decorum, or aesthetics; rather, they are concerned with the serious business of society, the work that must be accomplished in order to secure and guarantee satisfactory conditions for collective life. There is every likelihood that such customs will become absorbed and incorporated into the body of the law, and their violation might be met by the typical sanctions employed by the legal order, including perhaps the use of direct constraint by governmental authorities. The term customary law will hereafter be used to designate customs which, although they have not been authoritatively promulgated by a legislative or judicial body, have become transformed into rules or arrangements to which a legal character is attributed.

**Usage:** Usage is the legal evidence of custom.^ [35] There is substantial agreement among legal historians and anthropologists that primitive law was to a large extent based on customary rules which were not promulgated by a legislator or formulated in

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[35] Broom 1874 p 917

written form by professionally trained judges. Customary rules were established by long usage and the consent of our ancestors; and hence it is said that usage is the legal evidence of custom.

## Customary law distinguished from common law

Where a law is established by an implied consent, it is either common law or custom; if universal, it is common law, if particular to this or that place, then it is custom. When any practice was, in its origin, found to be convenient and beneficial, it was naturally repeated, continued from age to age, and grew into a law, either local or national. A customary law may, therefore, be defined to be a usage which has obtained the force of law, and is, in truth, the binding law within a particular district, or to a particular place, of the persons and things which it concerns.

## Law merchant

The law merchant, it has been observed, forms a branch of the law of England, and those customs which have been universally and notoriously prevalent amongst merchants, and have been found by experience to be of public use, have been adopted as a part of it, upon a principle of convenience, and for the benefit of trade and commerce; and, when so adopted, it is unnecessary to plead and prove them.

In cases, also, relating to mercantile contracts, courts of law will, in order to ascertain the usage and understanding of merchants, examine and hear witnesses conversant with those subjects; for merchants have a style peculiar to themselves, which, though short, yet is understood by them, and of which usage and custom are the legitimate interpreters. And this principle is not confined to mercantile contracts or instruments, although it has been more frequently applied to them than to others; but it may be stated generally, that where the words used by parties have, by the known usage of trade, by any local custom, or amongst particular classes, acquired a peculiar sense, distinct from the popular sense of the same words, their meaning may be ascertained by reference to that usage or custom. And the question in such cases usually is, whether there was a recognised practice and usage with reference to the transaction out of which the written contract between the parties arose, and to which it related, which gave a particular sense to the words employed in it, so that the parties might be supposed to have used such words in that particular sense. The character and description of evidence admissible for that purpose being the fact of a general usage and practice prevailing in that particular trade or business, not the judgment and opinion of the witnesses, for the contract may be safely and correctly interpreted by reference to the fact of usage, as it may be presumed such fact is known to the contracting parties, and that they contract in conformity thereto; but the judgment or opinion of the witnesses called affords no safe guide for interpretation, as such judgment or opinion is confined to their own knowledge.

## Morality

Morality is a normative pattern which aims at the augmentation of good and reduction of evil in individual and social life. In the age of hedonism where self-interest is all pervading, the discussion on morality appears nonsensical; but one should not forget that morality is the foundation of law. In the primitive society, where there was no concrete rule of recognition, ethical system caused social ordering and co-existence. An ethical system is composed of morality to create tolerable conditions of social existence.

## Kant's theory of morality

Morality is autonomous (coming from within man's soul), while the law is heteronomous (being imposed upon man from outside). The moral imperative demands that men act from praiseworthy intentions, above all from a sense of ethical duty, and that they strive after good for its own sake. No outward physical compulsion and threats, but the inner conviction of inherent rightness brings about the realization of moral norms. Law regulates the external relations of men, while morality governs their inner life and motivations. Law requires external compliance with existing rules and regulations, regardless of the underlying motive, while morality appeals to the conscience of man.

**Criticism of Kantian theory:** Critics of Kantian theory of morality says that the primary source of moral commands cannot be found located in the autonomous reason of individuals. Ethical systems owe their origin to the strong desire of organized groups to create tolerable conditions of social existence. Tenets of social morality are devised in order to curb intragroup aggressiveness, reduce predatory and unconscionable practices, cultivate concern for one's fellow men, and thereby increase the possibilities of a harmonious coexistence. Social morality may with good reason be looked upon as the recognition of an objective hierarchy of values which are to guide the conduct of human beings towards one another in a given society.

## Category of moral values

Within this hierarchy of moral values, we may distinguish two categories of postulates and principles.

The first category consists of requirements of social ordering which are deemed indispensable, necessary, or highly desirable for an effective discharge of the tasks an organized society has to cope with. Avoidance of violence and injury, the keeping of faith in the performance of agreements, regulation of family relations, and perhaps some degree of loyalty towards the group may be counted among these basic requirements. This basic moral rightness is considered imperative for social intercourse and are transformed into law eg the prohibition of murder, rape, robbery, and physical assaults, the interdiction of fraud and bad faith in the conclusion and performance of consensual agreements, etc.

The second category of moral norms includes principles which add greatly to the quality of life and the establishment of closely-knit bonds among men, but which demand more of human beings than is regarded necessary for the preservation of the essential conditions of social existence. The values of generosity, benevolence, charity, unselfishness, and loving kindness belong to this second category. These precepts of pure morality require lesser obligations; the degree of autonomy accorded to men in such matters is greater than the sphere of free volition allowed by regulatory norms of law.

### Moral rule v legal rule

One may feel a moral obligation to release the debt of a person in financial straits, but the debtor has no right to demand such generosity. Purely moral postulates are not covered by whatever enforcement system is available for the vindication of legal rights. Moral precepts are distinguished from legal rules but the boundaries between these two categories of social norms cannot always be drawn with sharpness and precision.

# Equity

Equity is the moral virtue of fairness applied for the sake of justice where the law failed to deliver justice because of subtle defect (or lacuna) in law, and its crafty evasion on account of such subtlety, whereby undoubted rights were made remediless. Equity should not be confused with equality. Both have completely different meaning. Equity is a kind of justice whereas equality is the state of being equal.

## Evolution of equity

Equity owes its origin to mercy. In England when the legal rule was not sufficient enough to deliver justice, the aggrieved approached the King, fountain of justice, for mercy. King, being above the law, delivered justice by going beyond the law using his good conscience. With the rise in number of mercy petitions, the King of England established a **Court of Chancery** to dispose of these petitions. The Court of Chancery was freed from the constraints of legal rules. It disposed of the petitions using 'Justice, Equity and Good conscience'. Before its fusion with Common Law court in 1875, it delivered a number of decisions which became rules of equity. Now the Common law court in England is imbued with equity. It can decide the case in accordance with the legal principles in consonance with the principle of 'Justice, Equity, and Good conscience' so that the justice gets delivered without any frustration.

## Maxims of equity

There are certain general principles upon which the Court of Chancery exercised its jurisdiction known as maxims.^[36] They are summarised as follows:

a) Equity will not suffer a wrong to be without a remedy.
b) Equity follows the law, ie it is supplementary to law.
c) He who seeks equity must do equity.
d) He who comes into equity must come with clean hands.
e) Delay defeats equities, ie equity aids the vigilant and not the indolent.
f) Equality is equity, ie common thing shall be divided in equal proportion.
g) Equity looks to the intent rather than to the form, also known as substance over form.
h) Equity looks on that as done which ought to be done.
i) Equity imputes an intention to fulfil an obligation.
j) Where there is equal equity, the law shall prevail.
k) Where the equities are equal, the first in time shall prevail.
l) Equity acts *in personam*.

## Equitable rights and remedy

The rules of equity enunciated by the Court of Chancery have been recognised by the legal system with the passage of time in the form of equitable rights and remedies. Instance of equitable right may be given of the beneficial interest which a beneficiary of trust has against the trustee who has the legal interest over the trust property.^[37] Instance of equitable remedy may be given of quantum meruit whereby a party may recover the reasonable

[36] Snell 1966 p 30 (reproduced in Gandhi 2015 p 41)

[37] Chapter VI of the Indian Trust Act 1882

value of services rendered to another when such service was non-gratuitous and the another party enjoyed the benefit.^[38]

## Recognition of equity in India

Several equitable rights and remedies evolved by the equity (chancery) court has been recognized in following Indian legislation:^[39]

a) Specific Relief Act 1877
b) Indian Trust Act 1882
c) Guardians and Wards Act 1890
d) Indian Contract Act 1872
e) Transfer of Property Act 1882
f) Indian Divorce Act 1869

## Equity and Indian courts

Indian Courts are a court of law as well as of equity; and whenever they find a lacuna or defect in law frustrating justice, they apply the principles of 'Justice, Equity and Good conscience'.^[40]

## Taxing statute and equity

Taxing statutes are to be construed strictly without giving place to equity. In a taxing Act, one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.^[41] So, equity is out of place in tax law; a

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[38] Indian Contract Act 1872 Sec 70

[39] Gandhi 2015 p 28

[40] Indira Bai v Nand Kishore (1990) 4 SCC 668

[41] Cape Brandy Syndicate v. IRC (1921) 1 KB 64

particular income is either eligible to tax under the taxing statute or it is not.^[42]

Strict construction, however, has been limited to the charging sections. Machinery provisions which are to effectuate the charging provision owe an ordinary construction.^[43]

**Substantial compliance -** The doctrine of substantial compliance is a judicial invention, equitable in nature, designed to avoid hardship in cases where a party does all that can reasonably expected of it, but failed or faulted in some minor or inconsequent aspects which cannot be described as the "essence" or the "substance" of the requirement.^[44]

### Fiscal equity

Equity from the viewpoint of an economist implies fairness in the distribution of burden of taxes on the subjects. Equity is further classified by the economists into horizontal and vertical. **Horizontal equity** is maintained by ensuring the distribution of tax in such a way that those who are essentially equal should be taxed equally. Whereas **vertical equity** is of treating (taxing) people differently with different levels of income. Such abstract principles of equity, however, cannot determine the complex tax structure of the State.^[45]

## 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.

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[42] CIT, Madras v MR. P. Firm AIR 1965 SC 1216

[43] Murarilal Mahabir Prasad v B.R. Vad (1975) 2 SCC 736

[44] CCE, New Delhi v Hari Chand Shri Gopal (2011) 1 SCC 236

[45] Samuelson 2013 p 389

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.

## 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

**Pre-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

**Law Commission:** 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.

## Recent Law Reforms in Independent India

**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.

**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.

**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.

**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.

- 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.