

# The Essential Attributes of Law

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**Abstract---** Today the law has to play a major role in a society because the human activity has expanded and consequently the role of the law has increased and has become more crucial. Not only the role has increased but it has also changed in a considerable manner. In the ancient period the nature of law and the functions of law were different; however, the nature and functions of law of today have changed because the law revolves around the society and the society is of dynamic nature which keeps on changing. Custom as a source of law is very important because customs and morality are regarded as internal agencies of control where as legislation is considered to be an external agency of control and that is why it is subject to limitation. The law has to perform some functions out of which justice, stability, and peaceful change are very important. Those stability and peaceful change are seemingly opposite concept still the law has to skillfully achieve and maintain both of them.

**Keywords---** Customs, Traditions, Morality, Religion, Principles of natural justices, Conventions, Precedent, Legal maxims, Legislation, Principles of equity, Constitution, Rights and liberties

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## I. INTRODUCTION

The term 'law' generally brings an apprehension of fear in the mind of a common man. In the ancient times when an individual uttered that "I will drag you to the court", it was regarded as a threat. Times have changed and so has the image of law changed and now going to the court has become right in itself and every now and then the law is sought to declare and enforce rights.

- The different legal systems of the world.

### 1) The common law legal system.

- i. Unwritten law: - The classic feature of common law legal system is that the law prevails in an unwritten form, that is the law is not enacted and codified. The provision of law is scattered in the various sources of law such as few legislation, customs, convention etc.
- ii. The sources of law: - The sources of law in the common law system are many such as legislation, customs, convention, morality, religion, precedent, legal maxims etc.
- iii. Bar and bench relationship: - In the common law system there is a unique relationship between the bar and bench. The lawyers of the bar can become judges and join the bench. Similarly, the judges can quit the bench and join the bar to commence legal practice in the court of law. In the common law legal system there is no prohibition from quitting the bar and joining the bench, and from quitting the bench and joining the bar.
- iv. Judicial activism: - In the common law system the judges play an active role in evolving and developing the law. The original of the judiciary is

to adjudicate and if necessary, interpret the law. Hence the judges can make the law through interpretation and indulge in judicial activism.

- v. No separate administrative courts: - In the common law legal system only one apex court prevails which is empowered to adjudicate upon all the matters and its decision is binding upon all.

India, United Kingdom, and United States of America follow the common law legal system.

### 2) The civil law legal system.

The features of civil law legal system are as follows.

- i. Written and codified law: - The main feature of the civil law legal system is that the law always prevails in a written and codified form. The civil law legal system recognizes legislation as the only source of law and no other source of law is considered to be a valid source of law.
- ii. No relationship between the bar and bench. In the civil law legal system, a lawyer cannot become a judge and so also a judge cannot become a lawyer. So, unlike the common law legal system, in the civil law legal system there is no relationship between the bar and the bench.
- iii. Inquisitorial system: - Absence of judicial activism. In the civil law legal system, the judges play an active role during the conduction of inquiry. Once the inquiry is over the judge has to only apply the law which exist in the statute. In the civil law legal system, the judges cannot make the law through interpretation, hence the judges play a passive role and do not indulge in judicial activism.
- iv. Separate administrative courts prevail: - The distinguishing feature of the civil law legal system is that two sets of courts prevail. One set of court

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deals with the ordinary matters which involve the individual's rights and the other set of courts deals with the administrative matters involving in the state.

v. Germany and France follow the civil law legal system.

3) The traditional legal system.

i. The traditional legal system was the most ancient legal system however in the recent times, this legal system does not exist independently.

ii. The traditional legal system is based on the religious tenets.

iii. The main feature of the traditional legal system is that it is founded on the duty notion. According to the traditional legal system the ruler and the subjects have to perform their duties sincerely and faithfully. The underlying principle is that if everybody performs the duties then automatically the corresponding and co-relative rights are enforced.

iv. The traditional legal system existed under the Hindu rule and the Mughal rule.

• The sources of law.

The source of law means the aspects from where the law originates or the source on which the law is based upon. The sources of law depend upon the nature of the legal system, that is whether a source is recognized as a legal source of law or not depends upon the nature of a legal system. So, it becomes necessary to identify the sources of law according to the nature of the legal system.

i. The sources of law recognized in the common law legal system: -

• Precedent: - In the common law legal system precedent is most important source of law. The majority of the English law is developed and evolved by the judiciary in the form of precedent. Even in India the precedent as a source of law plays an important role and much of the law is evolved by the judiciary in the form of precedent.

• Conventions: - In the United Kingdom many of the constitutional principles prevail in the form of conventions. In the common law legal system convention are regarded as important source of law, however convention play a less significant role in the Indian legal system.

• Legislation: - Legislation is the most important source of law in the present times, because it is made by the people's representatives. In England after The Crown's Proceedings Act legislation has secured a conspicuous position as a source of law. In India also legislation is considered to be a prime

source of law. The legislation made by the legislature is called as a supreme legislation and the legislation in the form of rules, bye laws, made by the executive is called as the subordinate legislation. The supreme legislation as well as the subordinate legislation is a considered to be a source of law.

• Customs: - Customs play a prominent role as a source of law in the legal system. A valid custom is recognized as a source of law independently, that is it does not require the legal coverage.

• Religion: - Like customs religion is also considered to be a dominant source of law. India was a traditional legal system previously and hence religion played a very important role as it was considered to be the form of law.

• Legal maxims: - the principles of law are considered to be embodied in the legal maxims. Today also many common law principles prevail in the legal maxims.

• Opinion of the legal scholars: - some times the opinion of the legal scholars is referred to ascertain the exact or the perfect meaning of the ambiguous or vague legal terminology.

• Principles of equity: - The principles of equity have played a very crucial role in dispensing justices in the past times. In the present times also the principle of equity is recognized as a valid source both in the United Kingdom as well as in the Indian legal system.

ii. The sources of law recognized in the civil law legal system.

The civil law legal system recognizes only one source of law that is the written and codified statutory enactments. The civil law legal system dose not recognize any other source of law. If a particular custom or a religious tradition is considered to be important for the society then it necessarily has to be incorporated in a statutory enactment. The judges are prohibited from making the law while adjudicated and hence there is no place for the precedent to be recognized as a valid source of law.

iii. The sources of law recognized in the traditional legal system. The traditional legal system is essentially based upon traditions and customs. Hence obviously customs, traditions, morality, religion, principles of natural justices are considered to be the sources of law. In fact, the law prevails in the form of customs, tradition etc. Legislation in the form of royal orders played a very insignificant role.

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- The functions of law.
  - i. Justice: - Justice is the prime object of every law. In fact, all the legal systems exist in order to achieve justice. If no justice was to prevail then there would be no purpose of any law or legal system. The connotations of justice differ from place to place's and from time to times; hence the concept of the justice differ from legal system to legal system. So also, what was regarded as an essence of justice may be injustice latter on, never the less every legal system is founded on the fundamental object of justice.

The concept of justice has essentially originated from the principles of natural law as it was stated to be in consonance with the consciousness of a human being. Hence sometimes the principle of justice was described to run parallel with the principles of morality. Where as other times justice was used in a narrow sense to mean what the courts do. It means here that; every order of court is in consonance with the principles of justice. The main theme of justice is to protect rights and to enforce duties. Corrective justice demands the enforcement of imposing of penalties or granting of civil and criminal remedies. Distributive justice ensures the equitable distribution of benefits and burdens.

- ii. Stability: - The second function of law is to achieve and maintain stability. Stability is an inherent desire of a human being, because chaos and confusion or ambiguity and insecurity are essentially disliked by human beings. The law has to provide stability to the society.
- iii. Peaceful change: - The third function of law is to provide a peaceful change. Stability to the point of monotony is undesirable, and hence some change is aspired by the people. This change has to be channelized by law so also it has to be a peaceful change. For instance, the provision of elections after every five years ensures peaceful change.
- iv. Limits of law: - The basic function of law is to enforce limitations on the powers, rights, liberties so that justice prevails. Justice demands that every concept in a legal system should be bridled with limitations. Even the law is subject to limitation.
  - Constitution: - The constitution imposes limits on law and no law can prevail which is violative of the constitutional provisions.
  - Rights and liberties: - The law has to protect the rights and liberties and hence any law which violates the rights and liberties is set to be invalid law.
  - Public opinion: - Is also a limitation on the law

because the law has to consider the public opinion especially in England where the public opinion is very strong and organized.

- Religion and tradition: - Religion and tradition is also a limitation on law. However, sometimes a law may be made in contravention to the religion for some social cause.

### II. CONCLUSION

Today law has gained tremendous importance as it has influenced all actions of humans. The sources of law depend upon the nature of legal system and hence defer from legal system to legal system. The precedent as a source of law play's a dominate role to evolve and develop the law in the common law legal system; whereas precedent is not recognized as a source of law. The law has to perform substantial functions such as justice, stability, and peaceful change. The law exists to perform the prime function of achieving justice. Another precarious function which the law has performed is to achieve stability and peaceful change simultaneously. The law imposes limits on the individual as well as the state officials but are there any limitation on the law itself ? The answer is in the affirmative because no concept can prevail limitless in a legal system so the law is also subject to limitations.

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