CHAPTER 13 SOURCES OF LAW

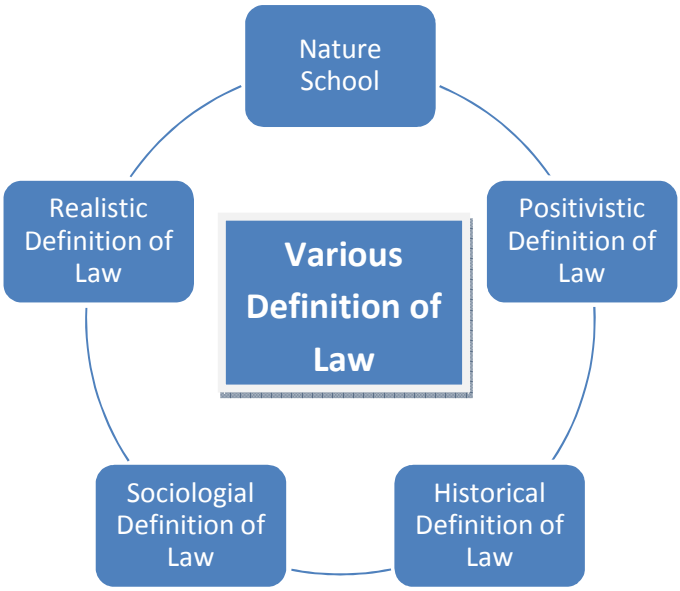
INTRODUCTION

The nature and meaning of law has been described by various jurists. However, there is no unanimity of opinion regarding the true nature and meaning of law. The reason for lack of unanimity on the subject is that the subject has been viewed and dealt with by different jurists so as to formulate a general theory of legal order at different times and from different points of view, that is to say, from the point of view of nature, source, function and purpose of law, to meet the needs of some given period of legal development.

Therefore, it is not practicable to give a precise and definite meaning to law which may hold good for all times to come. However, it is desirable to refer to some of the definitions given by different jurists so as to clarify and amplify the term ‗law'.

Law is the command of the sovereign, Law is an instrument to regulate human behaviour, be it social life or business life.

Law is a system of rules that are created and enforced through social or governmental institutions to regulate behaviour. Law is a system that regulates and ensures that individuals or a community adhere to the will of the state. The nature and meaning of law has been described by various jurists. However, there is no unanimity of opinion regarding the true nature and meaning of law. For the purpose of clarity and better understanding of the nature and meaning of law, we may classify various definitions into five broad classes:



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1. Natural School

Under this school fall most of the ancient definitions given by Roman and other ancient Jurists. "Justice" is the main and guiding element of law.

In other words, the law consists of rules recognised and acted upon by the courts of Justice. It may be noted that there are two main factors of the definition. First, that to understand law, one should know its purpose: Second, in order to ascertain the true nature of law, one should go to the courts and not to the legislature.

Ulpine defined Law as —the art or science of what is equitable and good.

Cicero said that Law is —the highest reason implanted in nature.

Justinian's Digest defines Law as —the standard of what is just and unjust.

In all these definitions, propounded by Romans, —justice is the main and guiding element of law.

Ancient Hindu view was that ‗law' is the command of God and not of any political sovereign. Everybody including the ruler, is bound to obey it. Thus, ‗law' is a part of —Dharma‖. The idea of —justice is always present in Hindu concept of law.

Salmond, the prominent modern natural law thinker, defines law as —the body of principles recognised and applied by the State in the administration of justice.

2. Positivistic Definition of Law

According to ***John Austin***, "Law is the aggregate of rules set by man as politically superior, or sovereign, to men as political subject." In other words, law is the "command of the sovereign". It obliges a certain course of conduct or imposes a duty and is backed by a sanction. Thus, the command, duty and sanction are the three elements of law.

3. Historical Definition of Law

- That law is a matter of unconscious and organic growth. Therefore, law is found and not made.
- Law is not universal in its nature. Like language, it varies with people and age.
- Custom not only precedes legislation but it is superior to it. Law should always conform to the popular consciousness.
- Legislation is the last stage of law making, and, therefore, the lawyer or the jurist is more important than the legislator.

4. Sociological Definition of Law

There are three essentials of this definition. First, in this definition law is treated as only one means of social control. Second, law is to serve social purpose. Third, it is coercive in character.

5. Realist Definition of Law

Realists define law in terms of judicial process. According to Holmes, "Law is a statement of the circumstances in which public force will be brought to bear upon through courts." Law is nothing but a mechanism of regulating the human conduct in society so that the harmonious co-operation of its members increases and thereby avoid the ruin by coordinating the divergent conflicting interests of individuals and of society which would, in its turn, enhance the potentialities and viability of the society as a whole.

Separate rules and principles are known as 'laws'. Such laws may be mandatory, prohibitive or permissive.

- A mandatory law calls for affirmative act, as in the case of law requiring the payment of taxes.
- A prohibitive law requires negative conduct, as in the case of law prohibiting the carrying of concealed weapon or running a lottery.
- A permissive law is one which neither requires nor forbids action, but allows certain conduct on the part of an individual if he desires to act.

How Laws are made effective ??

- By administering some form of punishment
- By preventing disobedience
- By requiring one, in some instances, to complete an obligation he has failed to perform
- By requiring damages to be paid for an injury due to disobedience

SIGNIFICANCE OF LAW

- Law is not static. As circumstances and conditions in a society change, laws are also changed to fit the requirements of society. At any given point of time the prevailing law of a society must be in conformity with the general statements, customs and aspirations of its people.
- The object of law is order which in turn provides hope of security for the future. Law is expected to provide socio-economic justice and remove the existing imbalances in the socio-economic structure and to play special role in the task of achieving various goals enshrined in our Constitution.

SOURCES OF INDIAN LAW

The modern Indian law as administered in courts is derived from various sources and these sources fall under the following two heads:

- **Principle Sources of Indian Law**
- **Secondary Sources of Indian Law**

PRINCIPLE SOURCES OF INDIAN LAW

(i) Customs or Customary Law: Custom is the most ancient of all the sources of law and has held the most important place in the past, though its importance is now diminishing with the growth of legislation and precedent. The customs may be divided into two classes:

– Customs without sanction: are those customs which are non-obligatory and are observed due to the pressure of public opinion. These are called as "positive morality".

– Customs having sanction: are those customs which are enforced by the State. It is with these customs that we are concerned here. These may be divided into two classes:

(i) Legal Customs: These customs operate as a binding rule of law. They have been recognised and enforced by the courts and therefore, they have become a part of the law of land. Legal customs are again of two kinds:

(a) Local Customs: Local custom is the custom which prevails in some definite locality and constitutes a source of law for that place only. Thus, local customs may be divided into two classes:
  – Geographical Local Customs
  – Personal Local Customs

(b) General Customs: A general custom is that which prevails throughout the country and constitutes one of the sources of law of the land.

(ii) Conventional Customs: These are also known as "usages". These customs are binding due to an agreement between the parties, and not due to any legal authority independently possessed by them. Before a Court treats the conventional custom as incorporated in a contract, following conditions must be satisfied:

– It must be shown that the convention is clearly established and it is fully known to the contracting parties. There is no fixed period for which a convention must have been observed before it is recognised as binding.
– Convention cannot alter the general law of the land.
– It must be reasonable.

Requisites of a Valid Custom

(i) *Immemorial (Antiquity):* A custom to be valid must be proved to be immemorial; it must be ancient.

(ii) *Certainty:* The custom must be certain and definite, and must not be vague and ambiguous.

(iii) *Reasonableness:* A custom must be reasonable. It must be useful and convenient to the society.

(iv) *Compulsory Observance:* A custom to be valid must have been continuously observed without any interruption from times immemorial and it must have been regarded by those affected by it as an obligatory or binding rule of conduct.

(v) *Conformity with Law and Public Morality:* A custom must not be opposed to morality or public policy nor must it conflict with statute law. If a custom is expressly forbidden by legislation and abrogated by a statute, it is inapplicable.

(vi) *Unanimity of Opinion:* The custom must be general or universal. If practice is left to individual choice, it cannot be termed as custom.

(vii) *Peaceable Enjoyment:* The custom must have been enjoyed peaceably without any dispute in a law court or otherwise.

(viii) *Consistency:* There must be consistency among the customs. Custom must not come into conflict with the other established customs.

(ii) Judicial Decision or Precedents

Judicial precedents are an important source of law. They have enjoyed high authority at all times and in all countries. This is particularly so in the case of England and other countries which have been influenced by English jurisprudence. The principles of law expressed for the first time in court decisions become precedents to be followed as law in deciding problems and cases identical with them in future. The rule that a court decision becomes a precedent to be followed in similar cases is known as doctrine of *stare decisis*.

High Courts

(i) The decisions of High Court are binding on all the subordinate courts and tribunals within its jurisdiction.

The decisions of one High Court have only a persuasive value in a court which is within the jurisdiction of another High Court. But if such decision is in conflict with any decision of the High Court within whose jurisdiction that court is situated, it has no value and the decision of that High Court is binding on the court. In case of any conflict between the two decisions of co-equal Benches, generally the later decision is to be followed.

(ii) In a High Court, a single judge constitutes the smallest Bench. A Bench of two judges is known as Division Bench. Three or more judges constitute a Full Bench. A decision of such a Bench is binding on a Smaller Bench.

(iii) The High Courts are the Courts of co-ordinate jurisdiction. Therefore, the decision of one High Court is not binding on the other High Courts and have persuasive value only.

(iv) The Supreme Court is the highest Court and its decisions are binding on all courts and other judicial tribunals of the country. Article 141 of the Constitution makes it clear that the law declared by the Supreme Court shall be binding on all courts within the territory of India. The words “law declared” includes an obiter dictum provided it is upon a point raised and argued (*Bimladevi v. Chaturvedi, AIR 1953 All. 613).* However, it does not mean that every statement in a judgement of the Supreme Court has the binding effect. Only the statement of ratio of the judgement is having the binding force.

Supreme Court

The expression _all courts' used in Article 141 refers only to courts other than the Supreme Court. Thus, the Supreme Court is not bound by its own decisions. However, in practice, the Supreme Court has observed that the earlier decisions of the Court cannot be departed from unless there are extraordinary or special reasons to do so (AIR 1976 SC 410). If the earlier decision is found erroneous and is thus detrimental to the general welfare of the public, the Supreme Court will not hesitate in departing from it.

English decisions have only persuasive value in India. The Supreme Court is not bound by the decisions of Privy Council or Federal Court. Thus, the doctrine of precedent as it operates in India lays down the principle that decisions of higher courts must be followed by the courts subordinate to them. However, higher courts are not bound by their own decisions (as is the case in England).

Kinds of Precedents

(i) *Declaratory and Original Precedents:*

- A declaratory precedent is one which is merely the application of an already existing rule of law. A declaratory precedent is as good a source of law as an original precedent.
- An original precedent is one which creates and applies a new rule of law. In the case of a declaratory precedent, the rule is applied because it is already a law. In the case of an original precedent, it is law for the future because it is now applied.
- In the case of advanced countries, declaratory precedents are more numerous. The number of original precedents is small but their importance is very great. They alone develop the law of the country. The legal authority of both is exactly the same.

(*ii*) *Persuasive Precedents:* A persuasive precedent is one which the judges are not obliged to follow but which they will take into consideration and to which they will attach great weight as it seems to them to deserve. A persuasive precedent, therefore, is not a legal source of law; but is regarded as a historical source of law. Thus, in India, the decisions of one High Court are only persuasive precedents in the other High Courts.

(iii) Absolutely Authoritative Precedents: An authoritative precedent is one which judges must follow whether they approve of it or not. Its binding force is absolute and the judge's discretion is altogether excluded as he must follow it. Such a decision has a legal claim to implicit obedience, even if the judge considers it wrong. An authoritative precedent is a legal source of law.

Every court in India is absolutely bound by the decisions of courts superior to itself. The subordinate courts are bound to follow the decisions of the High Court to which they are subordinate. A single judge of a High Court is bound by the decision of a bench of two or more judges. All courts are absolutely bound by decisions of the Supreme Court.

(iv) Conditionally Authoritative Precedents: A conditionally authoritative precedent is one which, though ordinarily binding on the court before which it is cited, is liable to be disregarded in certain circumstances. The court is entitled to disregard a decision if it is a wrong one, i.e., contrary to law and reason. In India, for instance, the decision of a single Judge of the High Court is absolutely authoritative so far as subordinate judiciary is concerned, but it is only conditionally authoritative when cited before a Division Bench of the same High Court.

Doctrine of *Stare Decisis*

The doctrine of stare decisis means "adhere to the decision and do not unsettle things which are established". It is a useful doctrine intended to bring about certainty and uniformity in the law. Under the stare decisis doctrine, a principle of law which has become settled by a series of decisions generally is binding on the courts and should be followed in similar cases. In simple words, the principle means that like cases should be decided alike. This rule is based on public policy and expediency.

Ratio Decidendi

When we say that a judicial decision is binding as a precedent, what we really mean is that a rule or principle formulated and applied in that decision must be applied when similar facts arise in future. This rule or principle is the ratio decidendi which is at the centre of the doctrine of precedent. The expression ratio decidendi has different meanings. The first meaning which is the literal translation of the expression is 'the reason for deciding'. Ratio decidendi is as 'the rule of law proffered by the judge as the basis of his dicisions.

Where an issue requires to be answered on principles, the principles which are deduced by way of abstraction of the material facts of the case eliminating the immaterial elements is known as ***ratio decidendi*** and such principle is not only applicable to that case but to other cases also which are of similar nature.

It is the ***ratio decidendi*** or the general principle which has the binding effect as a precedent, and not the ***obiter dictum***

Obiter Dicta

The *literal* meaning of this Latin expression is "said by the way". The expression is used especially to denote those judicial utterances in the course of delivering a judgement which taken by themselves, were not strictly necessary for the decision of the particular issue raised. These statements thus go beyond the requirement of a particular case and have the force of persuasive precedents only. The judges are not bound to follow them although they can take advantage of them. They some times help the cause of the reform of law.

(iii) Statutes or Legislation

Legislation is that source of law which consists in the declaration or promulgation of legal rules by an authority duly empowered by the Constitution in that behalf. It is sometimes called Jus scriptum (written law) as contrasted with the customary law or jus non-scriptum (unwritten law). Statute law or statutory law is what is created by legislation, for example, Acts of Parliament or of State Legislature. Legislation is either supreme or subordinate (delegated).

Supreme Legislation is that which proceeds from the sovereign power in the State or which derives its power directly from the Constitution. It cannot be replealed, annulled or controlled by any other legislative authority.

Subordinate Legislation is that which proceeds from any authority other than the sovereign power. It is dependent for its continued existence and validity on some superior authority. The Parliament of India possesses the power of supreme legislation.

In our legal system, Acts of Parliament and the Ordinances and other laws made by the President and Governors in so far as they are authorised to do so under the Constitution are supreme legislation while the legislation made by various authorities like

Corporations, Municipalities, etc. under the authority of the supreme legislation are subordinate legislation.

(iv) Personal Law

In many cases, the courts are required to apply the personal law of the parties where the point at issue is not covered by any statutory law or custom. In the case of Hindus, for instance, their personal law is to be found in:

(a) The ***Shruti*** which includes four ***Vedas.***
(b) The ***'Smritis'*** which are recollections handed down by the Rishi's or ancient teachings and precepts of God, the commentaries written by various ancient authors on these ***Smritis***. There are three main ***Smritis***; ***the Codes of Manu***, ***Yajnavalkya and Narada***.

The personal law of Mohammedans is to be found in:–
(a) The holy ***Koran***.
(b) The actions, percepts and sayings of the Prophet Mohammed which though not written during his life time were preserved by tradition and handed down by authorised persons. These are known as ***Hadis***.
(c) ***Ijmas***, i.e., a concurrence of opinion of the companions of the Prophet and his disciples.
(d) ***Kiyas*** or reasoning by analogy. These are analogical deductions derived from a comparison of the Koran, Hadis and Ijmas when none of these apply to a particular case.
(e) Digests and Commentaries on Mohammedan law, the most important and famous of them being the Hedaya which was composed in the 12th century and the Fatawa Alamgiri which was compiled by commands of the Mughal Emperor Aurangzeb Alamgiri.

Mohammedans are governed by their personal law as modified by statute law and custom in all matters relating to inheritance, wills, succession, legacies, marriage, dowry, divorce, gifts, wakfs, guardianship and pre-emption.

SECONDARY SOURCE OF INDIAN LAW

(i) Justice, Equity and Good Conscience

In the absence of any rule of a statutory law or custom or personal law, the Indian courts apply to the decision of a case what is known as "justice, equity and good conscience", which may mean the rules of English Law in so far as they are applicable to Indian society and circumstances.

In its modern version, justice, equity and good conscience as a source of law, owes its origin to the beginning of the British administration of justice in India. The Charters of the several High Courts established by the British Government directed that when the law was silent on a matter, they should decide the cases in accordance with justice, equity and good conscience. Justice, equity and good conscience have been generally interpreted to mean rules of English law on an analogous matter as modified to suit the Indian conditions and circumstances. The Supreme Court has stated that it is now well established that in the absence of any rule of Hindu Law, the courts have authority to decide cases on the principles of justice, equity and good conscience.

(ii) Sources of English Law: The chief sources of English law are:

(a) Common Law: The Common Law, in this context is the name given to those principles of law evolved by the judges in making decisions on cases that are brought before them. These principles have been built up over many years so as to form a complete statement of the law in particular areas.

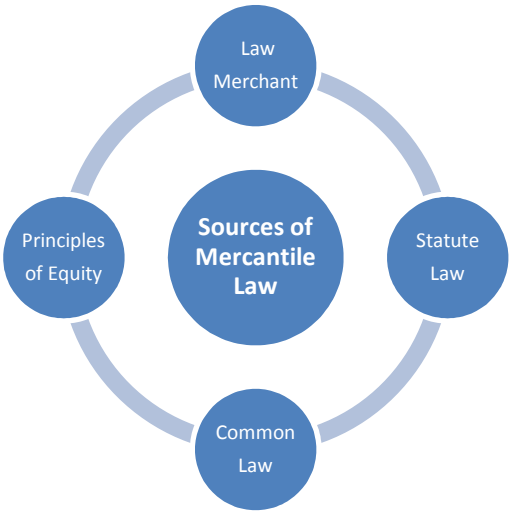
(b) Law Merchant: The Law Merchant is the most important source of the Merchantile Law. Law Merchant means those customs and usages which are binding on traders in their dealings with each other. But before a custom can have a binding force of law, it must be shown that such a custom is ancient, general as well as commands universal compliance. In all other cases, a custom has to be proved by the party claiming it.

(c) Principle of Equity: Equity is a body of rules, the primary source of which was neither custom nor written law, but the imperative dictates of conscience and which had been set forth and developed in the Courts of Chancery. The procedure of Common Law Courts was very technical and dilatory. Action at Common Law could be commenced by first obtaining a writ or a process.

The Equity Courts had their separate existence from the Common Law Courts in England until the passing of the Judicature Act of 1873, when the separate existence of such courts was abolished and all High Courts were empowered to grant either or both the remedies (Common Law as well as Equity) according to the circumstances of each case.

(d) Statute Law: "Statute law is that portion of law which is derived from the legislation or enactment of Parliament or the subordinate and delegated legislative bodies." It is now a very important source of Mercantile Law. A written or statute law overrides unwritten law, i.e., both Common Law and Equity.

MERCANTILE OR COMMERCIAL LAW - Sources of Mercantile Law



Mercantile Law in India

Prior to 1872, mercantile transactions were regulated by the law of the parties to the suit (i.e., Hindu Law, Mohammedan Law etc.). In 1872, the first attempt was made to codify and establish uniform principles of mercantile law when Indian Contract Act, 1872 was enacted. Since then, various Acts have been enacted to regulate transactions regarding partnership, sale of goods, negotiable instruments, etc. The main sources of Indian Mercantile Law are:

1. **English Mercantile Law:** The Indian Mercantile Law is mainly an adaptation of English Mercantile Law. However, certain modifications wherever necessary, have been incorporated in it to provide for local customs and usages of trade and to suit Indian conditions.

2. **Acts enacted by Indian Legislature:** The Acts enacted by the Indian legislature from time to time which are important for the study of Indian Mercantile Law include, (i) The Indian Contract Act, 1872,(ii) The Sale of Goods Act, 1930, (iii) The Indian Partnership Act, 1932, (iv) The Negotiable Instruments Act, 1881, (v) The Arbitration and Conciliation Act, 1996, (vi) The Insurance Act, 1938.

3. **Judicial Decisions:** Judges interpret and explain the statutes. Whenever the law is silent on a point, the judge has to decide the case according to the principles of justice, equity and good conscience. It would be accepted in most systems of law that cases which are identical in their facts, should also be identical in their decisions. That principle ensures justice for the individual claimant and a measure of certainty for the law itself.

4. **Customs and Trade Usages:** Most of the Indian Law has been codified. But even then, it has not altogether done away with customs and usages. Many Indian statutes make specific provisions to the effect that the rules of law laid down in a particular Act are subject to any special custom or usages of trade.

JURISPRUDENCE

The word Jurisprudence is derived from the word ‘juris’ meaning law and ‘prudence’ meaning knowledge. Jurisprudence is the study of the science of law. The study of law in jurisprudence is not about any particular statute or a rule but of law in general, its concepts, its principles and the philosophies underpinning it.

Jurisprudence also improves the use of law by drawing upon insights from other fields of study. Different jurists/ legal philosophers have used the term in different ways. The meaning of ‘jurisprudence’ has changed over a period of time as the boundaries of this discipline are not rigid. This amorphous nature is a subject of intense controversy among the scholars. But as dissatisfaction with their conception of law grew in the later years and alternative conceptions were offered, the term ‘jurisprudence’ came to acquire a broader meaning but a concrete delineation of the boundary of the subject has proved elusive.

Howsoever the term jurisprudence is not defined; it remains a study relating to law. The word ‘law’ itself is used to refer more than one thing. Hence one of the first tasks of jurisprudence is to attempt to throw light on the nature of law. However, various theorists define law in their own ways and this leads to a corresponding jurisprudential study. For example, law has two fold aspect: it is an abstract body of rules and also a social machinery for securing order in the community. However, the various schools of jurisprudence, instead of recognizing both these aspects, emphasize on one or the other.

Analytical jurisprudence concentrates on abstract theory of law, trying to discover the elements of pure science which will place jurisprudence on the sure foundation of objective factors which will be universally true, not on the shifting sands of individual preference, of particular ethical or sociological views.

Sociological jurisprudence highlights the limitations of pure science of law and says that since the very purpose for the existence of law is to furnish an answer to social problems, some knowledge of these problems is necessary if one seeks to understand the nature of law.

The **teleological school of jurisprudence** emphasizes that a mere collection of facts concerning social life is of no avail. Law is the product of human reason and is intimately related to the notion of purpose. Hence, this school seeks to find the supreme ends which law should follow.

Legal Theory

Legal theory is a field of intellectual enterprise within jurisprudence that involves the development and analysis of the foundations of law. Two most prominent legal theories are the normative legal theory and the positive legal theory. Positive legal theory seeks to explain what the law is and why it is that way, and how laws affect the world, whereas normative legal theories tell us what the law ought to be. There are other theories of law like the sociological theory, economic theory, historical theory, critical legal theory as well.

Legal Theory given by	Particulars of Theory
John Austin	Law is the command of sovereign that is backed by sanction. Austin has propagated that law is a command which imposes a duty and the failure to fulfill the duty is met with sanctions (punishment). Thus Law has three main features: 1. It is a command. 2. It is given by a sovereign authority. 3. It has a sanction behind it.
Roscoe Pound	He emphasized taking into account of social facts in making, interpretation and application of laws. The goal of this theory was to build such a structure of society where the satisfaction of maximum of wants was achieved with the minimum of friction and waste. According to him, any legal order to be successful in structuring an efficient society, there has to be: 1. A recognition of certain interests- individual, public and social. 2. A definition of the limits within which such interest will be legally recognized and given effect to. 3. Securing of those interests within the limits as defined.
John William Salmond	Law is the body of principles which are recognized and applied by the state in the administration of justice. His other definition said that law consists of a set of rules recognized and acted on in courts of justice. 'Law' in this definition is used in its abstract sense. The constituent elements of which the law is made up are not laws but rules of law or legal principles. He argued that the administration of justice was the primary task of a state and the laws were made to achieve that objective.

	Administration of justice was thus antecedent to the laws. Laws thus are secondary, accidental, unessential. Law consists of the pre-established and authoritative rules which judges apply in the administration of justice, to the exclusion of their own free will and discretion. He further said that the administration of justice is perfectly possible without laws though such a system is not desirable. A court with an unfettered discretion in the absence of laws is capable of delivering justice if guided by equity and good conscience.
Hans Kelsen	He described law as a "normative science' as distinguished from natural sciences which are based on cause and effect, such as law of gravitation. The laws of natural science are capable of being accurately described, determined and discovered whereas the science of law is knowledge of what law ought to be. Like Austin, *Kelsen* also considered sanction as an essential element of law but he prefered to call it 'norm'. According to *Kelsen*, 'law is a primary norm which stipulates sanction'.
Jeremy Bentham	He said that *c*oncept of law is an imperative one. He claimed that nature has placed man under the command of two sovereigns- pain and pleasure. 'Pleasure' in *Bentham's* theory has a somewhat large signification, including altruistic and obligatory conduct, the 'principle of benevolence'; while his idea of 'interest' was anything promoting pleasure. The function of laws should be to bring about the maximum happiness of each individual for the happiness of each will result in the happiness of all. The justification for having laws is that they are an important means of ensuring happiness of the members of community generally. Hence, the sovereign power of making laws should be wielded, not to guarantee the selfish desires of individuals, but consciously to secure the common good.