

LAW AND DEVELOPMENT

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Law is a term which does not have a universally accepted definition, but one definition is that law is a system of rules and guidelines which are enforced through social institutions to govern behaviour.^[3] Laws can be made by legislatures through legislation (resulting in statutes), the executive through decrees and regulations, or judges through binding precedents (normally in common law jurisdictions). Private individuals can create legally binding contracts, including (in some jurisdictions) arbitration agreements that exclude the normal court process. The formation of laws themselves may be influenced by a constitution (written or unwritten) and the rights encoded therein. The law shapes politics, economics, and society in various ways and serves as a social mediator of relations between people.

One definition is that law is a system of rules and guidelines which are enforced through social institutions to govern behaviour. In *The Concept of Law* Hart argued law is a "system of rules"; Austin said law was "the command of a sovereign, backed by the threat of a sanction"; Dworkin describes law as an "interpretive concept" to achieve justice; and Raz argues law is an "authority" to mediate people's interests. Holmes said "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." Aquinas said that law is a rational ordering of things which concern the common good that is promulgated by whoever is charged with the care of the community.^[19] This definition has both positivist and naturalist elements.

Law and development is an interdisciplinary study of law and economic and social development. It examines the relation between law and development and analyses how to use law as an instrument to promote economic development, democracy and human rights. This ensures that with the changing world the law is not violated.

Over the past two decades there has been a resurgence of interest, on the part of both academics and practitioners, in using law to promote development in Latin America, sub-Saharan Africa, Central and Eastern Europe, and Asia. The level of academic interest in the topic is reflected in the publication of three recent books on law and development by prominent American scholars: thomas carothers (ed.), *Promoting the Rule of Law Abroad: In Search of Knowledge*, kenneth dam, *The Law-Growth Nexus: The*

rule of law and economic development, and david trubek and alvaro santos (eds.), the new law and economic development: a critical appraisal.

Law plays a universal role in our society. It functions as a restraint for managing the evil and perfidious humans' actions, helps to keep discipline and order, and limits freedom to some extent. If not for law that maintains and supports our environment organized, our normal everyday life's activity would be destroyed by chaos, since the world we inhabit is disorganized and chaotic.

Law represents a social norm and its violation leads to imposing of punitive sanctions or application of physical force by the authorized institutions that possess this socially accepted privilege to act in this way. This brings about order and certainty and predictability to the society and helps settle disputes and problems by way of providing protection to individuals and their property, securing the general welfare and guaranteeing and protecting individual freedoms. However, law and all this order and predictability it backs up are unable to make our world we are living in an absolutely safe place. But it has power to create a climate that will help and inspire people and give them impetus to work and produce, to venture, to response to challenges whatever they are, to look optimistically in the future, to retain hope for the best, and live for tomorrow. But for laws our lives would be damaged by absolute anarchy and drowned in this sea of chaos and disorder being unable to cope with them. Nowadays we can notice that societies are more complex and act in a state of closer relation with each other. Keeping things in order within a society and maintaining discipline is very important as it has a definite impact on a society's well-being. It is laws that are on a daily service in all societies and work for providing protection and security to individuals, property, businesses and states.

Law offers a civilized and peaceable way of settling disputes and gives us an opportunity to benefit from collectively developed and carried out programs what would be hard and next to impossible or prohibitory anyway to do as individuals. Laws are aimed at securing and protecting of personal and civil rights human possess against anything and anyone who would have an intention to violate or impose any restrictions on them in any way.

Basic freedoms that are protected by law include freedom of speech, religion, the press, the right to a fair trial, the freedom from cruel and unusual punishment. In the United States paying respect for the law is considered to be of a great significance and very important. Any case of disobedience or violation is subjected to punishment. The laws in the country are ordained by such legal documents

and bodies as the Constitution, acts of Legislative bodies, orders of Rulings of Political Executives, Judicial Decisions and Decisions of Quasi-Legislative and Quasi-Judicial Bodies.

It is a common knowledge that most societies these days live in accordance with laws and rules in order to avoid the state of anarchy and chaos. It proves that law exercises very important and big impact on a society as a whole and each and every person's life in particular. The law is essentially a body of rules that society has created to ensure its safety and its quality of life. It was created with the use of reason and human nature. If you take a look at societies that are governed by a set of rules for the various processes that people undergo and go through in their daily lives, you'll see that laws have a particular effect on people. These effects are as diverse and as extensive as the number of laws people have to follow. In a way, you can look at laws as controlling powers. They define what's right and what's wrong and help people stay in line with the rules. While it already has a big effect on the way people think, different groups in society may find laws a good methods for protection and others will find laws as controlling and stifling. Laws were made as an expression of the common good, it's been said and it also shows the fundamental values that society has. In the eyes of the law, everyone is equal and each and every individual's interests are protected. In the making of a law, lawmakers put a big consideration on the interest of the masses and the will of the collective to formulate laws that work best.

There are two sides of a coin with the way law affect people. While it's deemed an instrument for protection, it can also be an instrument of discrimination. What of the minorities when it comes to the law that considers the mass? As for its protective effects, let's take for example a person accused and convicted of DUI. This is seen as a big offense in that it's a threat to people's lives and property. When the law punishes offenders, it's fortifying the society's protection. Dictatorship, authoritarianism, totalitarianism in governance that is it prevents the ruler from acting in a despotic fashion and rulings the society on his own whims and fancies. It has been seen in some landmarks cases where law has acted as an instrument to bring about social change in the society. For instance the Shah Bano case was a milestone in the Muslim women's search for justice and the beginning of the political battle over personal law. A 60-year-old woman went to court asking maintenance from her husband who had divorced her. The court ruled in her favour. Shah Bano was entitled to maintenance from her ex-husband under Section 125 of the Criminal Procedure Code (with an upper limit of Rs. 500 a month) like any other

Indian woman. The judgment was not the first granting a divorced Muslim woman maintenance under Section 125. But a voluble orthodoxy deemed the verdict an attack on Islam. By going through this case, it shows that how can law bring about social change in society even if it has to go against the established customs, traditions, mores and beliefs of the society for the sake of delivering justice in the society.

Another explanation could be the *Golaknath v. The State of Punjab*¹ Where in 1967, in a bench of 11 judges (constituted for the first time) of the Supreme Court deliberated as to whether any part of the fundamental constitutional rights could be revoked or limited by amendment to the Constitution. This question had previously been considered in *Shankari Prasad v. Union of India*² and *Sajjan Singh v. State of Rajasthan*³ In both cases, the power to amend the rights had been upheld on the basis of Article 368. Chief Justice Subba Rao writing for the majority (5 Judges dissenting) held that:

- a) A Law to amend the Constitution is a Law for the purposes of Article 13.
- b) Article 13 prevents the passing of Laws which "take away or abridge" the Fundamental Rights.
- c) Article 368 does not contain a power to amend the Constitution but only a Procedure.
- d) The power to amend comes from the normal legislative power of Parliament.
- e) Therefore, amendments which "take away or abridge" the Fundamental Rights cannot be passed. Six years later in 1973, 13 judges of the Supreme Court, including then Chief Justice Sikri, heard arguments in *Kesavananda Bharati v. The State of Kerala*⁴, and thus considered the validity of the 24th, 25th and 29th amendments, and more basically the correctness of the decision in the *Golak Nath* case.

Nani Palkhivala, assisted by Fali Nariman, presented the case against the government in both cases. The following can be said: 1. All the Judges held that 24th, 25th and 29th amendments acts are valid. 2. 10 Judges held that *Golak Nath's* case was wrongly decided and that an amendment to the Constitution was not a Law for the purposes of Article 13. 3. 7 Judges held

¹ AIR 1967 SC 1643

² (1952) SCR 89

³ 1965 AIR 845 1965 SCR (1) 933

⁴ AIR 1973 SC 1461

that the power of amendment is plenary and can be used to amend all the articles of the Constitution (including the Fundamental Rights).⁴ 7 Judges held (six Judges dissenting on this point) that "the power to amend does not include the power to alter the basic structure of the Constitution so as to change its identity". 7 Judges held (two Judges dissenting, one leaving this point open) that "there are no inherent or implied limitations on the power of amendment under Article 368." However 9 Judges (including 2 dissentients) signed a summary stating that "the view of the majority" in the case was that:

1. Golak Nath's case was overruled.

2. Article 368 did not enable Parliament to alter the basic structure or framework of the It follows, therefore, that this case established the principle that the basic structure cannot be amended on the grounds that a power to amend is not a power to destroy. This shows how law not only enforces the rules and regulation and delegates duties to the constituents of the society but even guarantees as well as safeguards their rights and protect them from the harsh edges of the legislature, executive and even judiciary itself. In the above mentioned cases we see impact of law on the society where the court seven overrules its own judgement, for safeguarding the fundamental rights to the citizens. The way law safeguards its citizens shows the concern of law for the society. The question arises as to how the judiciary can safeguard the rights of the individuals against it. The answer to this is the power of judicial review, which confers each court the power to intervene when the executive or the legislature tries to overstep their power. The statutory provisions that give rise to the jurisdiction to consider claims for judicial review do not, however, define its scope. it is 'a remedy invented by the judges to restrain the excess or abuse of power' and 'secure that decisions are made by the executive or by a public body according to law'⁵.

⁵ Hugh Southe, Adrian Fulford, *Judicial Review: A Practical Guide*.