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Introduction

To the Study of Law

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The Concept of Law

I. Thinking about the Study of Law

Law, broadly defined, is a series of rules, often enforced by institutions, which govern the behavior of individuals and organizations in society. Law passed by a government through its legislature or parliament is called statutory law. You may also hear it called codified law or state law. As we will discuss later, *statutory law is not the only type of law*. A community may have its own rules and methods of enforcement that can be equally important or effective as statutory law. *We call these types of laws non-state law or informal laws*.

The word "Law" is used in several different senses .lt is those our duty to distinguish these different meaning so that we can arrive at the concept that lies within the lawyer's.

The word "law" is used in a figurative sense to express those uniformities which have been observed to run though external nature or social relation thus ,scientists speak of the "law of Gravity" and economists speak af the " law of offer an demand" the same word is , sometimes used to consequence as when philosophers talk about the "moral law" or the "law of nature" or " laws of beauty " Again in lraq as in other Islamic countries the term "sharia" is in common use . although it meaning the " Sacred law of Islam".

However, the various meaning of the term “law” cannot the idea of “order” or “Uniformity” if used more steictly, it also connotes the idea or “Authority” this second idea carries with it the notion of “Compulsion” or *“Enforcement*” these three idea could, in fact be said to forme the basis of any preliminary

2-Definition some of the concepts

A-Law

The body of general rules and principles regulating human conduct in society, the obedience to which is enforced by a supreme authority

B- Common Law

Common law is a body of unwritten laws based on legal precedents established by the courts. Common law influences the decision-making process in unusual cases where the outcome cannot be determined based on existing statutes or written rules of law.

C- Civil law

Is part of a country’s set of laws that is concerned with the private affairs of citizens, for example, marriage and property ownership.

. The Rule of Law

The term cannot be simply or universally defined. Generally speaking, however, law refers to a system of rules and guidelines, which are enforced through social institutions to govern behavior. The law critically shapes politics, economics, and society in numerous ways, and also governs the interactions and relationships between people. Law is often used to refer to the formal rules passed by a legislature.

But it must be recognized that law can also be informal and unwritten, enforced by the expectations of a community or social custom

The rule of law, at its core, requires that government officials and citizens are bound by and act consistently with the law. This basic requirement entails a set of minimal characteristics:

1- law must be set forth in advance (be prospective),
2- be made public,
3- be general,
4- be clear,
5- be stable and certain,
6- be applied to every one according to its terms.

In the absence of these characteristics, the rule of law cannot be satisfied.

While there may be disagreement about the exact definition of the rule of law, most scholars agree about several of the reasons why the rule of law is important. Fundamentally, the rule of law serves two important goals:

(1) It imposes limits on the power of government.

(2) It coordinates the behavior of citizens and other actors.

Implementing the rule of law is also important because it can make dealing between individuals more efficient and predictable.

When a country adopts a clear set of laws regulating both government *officials and private citizens*, individuals are able to know in advance what actions are permitted and which are not.

This can have *positive economic* effects; for example, foreign investors may be more likely to invest in countries with strong rule of law because they are confident that business contracts will be enforced.

This can also have *positive social effects*, as individuals are less likely to resort to violence to resolve disputes if they believe the government will prosecute offenders according to law.

The necessity of law

When we assert that law either is or is not, necessary to man, we are clearly engaged in process of evaluation. Implicit in this process is the assumption as to man's purposes, as to what is good for man, and what he needs for the attainment of those objectives.

Ever since the dawn of mankind, we have lived in tribes and groups due to our survival necessities. However, as we built more and more through

the course of time, societies, cultures, and civilizations started to emerge, hence how we live is always changing and is in flux.

n tribal societies, there aren't necessarily laws, but unwritten rules or certain mandates that are appointed by the group leader. Because a tribal group is so small, most people get along just fine without any social construct of rules and regulations.

Depending on the culture of the tribe, they may punish the rule-breakers or exile them, but most of the rules are in the form of common sense, superstition and the punishments in most cases is social ostracization

However as we started to advance in technology with more means of supporting a bigger population, there needed to be ways to protect individuals.

In a small community or a tribe, it is easy to find out who did what, because everyone knows everyone, but as the population rises, people have to deal with strangers most of the time.

While in smaller communities it is easier to punish those for wrongdoings because they don't necessarily have anywhere to hide unless they go on self-exile from the tribe, in bigger communities it is much easier to go unpunished.

Hammurabi's code was the first major step in civil protection, form of law, and regulation within a society. It ensured every individual received some form of protection against perpetrators.

From there, different cultures and different societies have developed their version of laws and regulations specifically geared towards their unique situation.

However, the act of killing, and stealing from others is severely punished in most countries and is a universal law in almost every country.

Having laws ensure that we as individuals are protected from others when it comes to actions that are unfair and unjust. As the world progresses and advances, there will be even more laws and regulations that are there to protect us and ensure our safety.

However, while laws are important, there is a trade-off between liberty and freedom VS safety. Some people will argue the guarantee of safety should never replace freedom and liberty, it's not as easy as stating things with such certainty.

We need the law for:

1-Setting standards and maintaining order

2-The law protects the rights and freedoms of the individual and assists in resolving disputes

3-The law is a rule of conduct for citizens

4-The law maintains justice and equality in society

5-Law has a major role in modernization and social change

6-Law plays a role in the progress of society

The Islamic Concept of law

The religion of Islam has the character of a jural order which regulates the life and thought of the believer according to an ideal set of revelation communicated to Muhammad the last of the Prophet.

Islam established its own order of right and wrong. embodying its own justice, as the correct and valid one. In Islamic legal theory, only “God” as the sources

Sources of law

The term “sources” is here used to connote those agencies by which rules of conduct acquire the character of law by becoming objectively definite, uniform, and above all, compulsory. ln other words, Sources of law is any fact which in accordance with any new rules as having the force of law.

The word Sources as applied to law has many meanings and is a frequent cause of error. Some writers distinguish between two kinds of Sources “legal” and “historical.

Legal Sources are those recognized as such by the law itself, as when we say that the applicable rule is such and such an article of the Iraqi civil code No.40. 1951.

Historical Sources are those which are such in fact but are nevertheless destitute of legal recognition.

We can determine the important sources of law generally as follow:

1-Legislation

2-Custom

3-Religion

4-Equality

5-Judicial Decision

6-Judicial Opinion

1-Legislation

Legislation: is the formulation of law by the appropriate organ or organs of state, in such a manner that the actual words used are themselves part of the law, the words not only contain the law, but in a sense, they constitute the law.

Legislation: includes the marking of new law, and the alteration or repeal of existing law . It is the easiest and most common way of developing Law in the modern system in particular can change the law which the courts cannot do.

Important of legislation . Legislation is the prime and most important source of law in civilized countries, Today a great and increasing part of the law of these countries it to be found embodied by the law-making authorities in decrees or statutes.

Legislation activity is of modern growth. The causes for its important many referred to three principle reasons these are:

1-The increased range of the activities of the modern State and its centralizing tendency.

2-The rise of democratic forms of government is also a reason for the popularity of legislation as a source of law.

3-Intervention state to resolve internal conflicts by law>

Advantage of Legislation

1-Clarity. By legislative enactments, the legislative organ states to citizen rules of law, normally , in an easy language .

2-Speed .A change in the law is effected by the simple process of repeal and substitution of new rules.

3-Universality, Once legislation is put into effect , its rules become the governing law in all parts of the legislating countries

Legislation Characteristics

- 1- A public authority competent to establish it.
- 2- It includes a rule in which all the characteristics of the legal rule are available in terms of generality, abstraction, obligation and regulation of the behavior of people in society.
- 3- Pouring the content of the rule embraced by the legislation into a written form.

Kinds of legislation

1-**Direct Legislation** is the making of law by means of the declaration of it(the theory of the Judicial process in England

2-**Indirect Legislation** on the other hands includes modern in which the law is made

Categories Legislation:

1-Constitutional Legislation: this is the most supreme kind. It is the constitution of the state which defines its political system, the forms of its government and the relationship among the state's public authorities.

2-Ordinary Legislation:the greatest part of legislative enactments being to this category it includes all legal rules enacted by the legislature in accordance with the principle of the constitution .

3-Subordinate legislation: this category describe the legal rules enacted by the "executive" acting upon a delegated authority from the legislature . as is the case with enacting "regulation" or when it acts on the legislature's behalf, as is the case with enacting executive order.

2-Custom

When we talk of custom as a source of law , we mean legal custom, legal custom , is distinct from other social custom in that its obligatory action is complete and uniform.

Although custom is an important source of law in early times, its importance continuously diminishes as the legal system grows. However , it is a misunderstanding of the evolution of law and the condition of primitive societies to regard custom merely as 'positive morality' until thy have been expressly ratified by some determinate law-making authority.

The great majority of custom are non-litigious in origin, and their rise and observance depend on de facto conduct and repetition.

The importance of custom as a source of law is not entirely confined to the early stages of social growth; in all civilized jurisprudence it had always been recognized as greatly influencing the development of legal institutions ,

Custom are often the product not or a widespread conviction but of the convenience or interests of a ruling class that imposes its will on the majority of society. Many are purely legal in origin, and many are the result of mingled influences that cannot be called peculiarity popular or national.

Kinds of Custom

All custom which has the force of law :

1-legal custom: which is the custom operative per se as a binding rule of law independently of any agreement on the part of those subject to it.

2-Conventional Custom: which is the one operating only indirectly through the medium of agreements whereby it is accepted and adopted in individual instances as conventional law between the parties.

Advantage custom

1- So long as the mere existence of a society , the mere plurality of individuals , give rise to custom from which no single member of the totality can completely divorce himself, it is nature to find that customs reflect the true needs of the community . Thus , it is difficult , generally , to imagine a custom contrary to general will of the community , while legislation , for instance , may be imposed by an absolute sovereign or a dictatق.
2- Custom is more flexible than writing law , for it develops with the development of social conditions of life.
3- Custom implements legislation, for the latter , however perfect it may seem, cannot provide all needed solutions for infinitely variable needs and transactions .

Disadvantage Custom

1-customary rules are often ambiguous . Thus , they are difficult to determine, and often, raise complex litigation.
2-Customary rules develop very slowly , and need a long time to become established. Thus, custom may be important in the fact of new circumstance, Again once establishe, Custom becomes right and very difficult to change.
3-Custom may not facilitate the evolution of complete harmony in one country due to the existence of difficult local customs .Thus, individuals in one country will govern by different customary rules each having the face of law.

Condition of custom
In order to be a source , custom must fulfill certain condition:
1-custom must be general, that is, it shoud be followed by the majority of individuals in society .
The generality of custom, however , dose not preclude the existence of either a “local custom” prevalent and having the force of law in a particular locality only a “ particular custom” followed by a certain group of individuals in society , as for instance, members of a trade or craft.

2-Custom must have existed for so long a time to be immemorial antiquity , recent or modern custom Is of no account, Although it is difficult to fix the period sufficient for the birth of custom, it is nevertheless , immemorial when its origin was so ancient that the beginning of it was beyond human memory , so that no testimony was available as to a time when it did not exist.

3-Custom must be constant, that is, its observance must be continuous and unchanged , Non- observance of it by some individuals, if it is confined within the exceptional limits allowed by law, dose not extinguish the character of custom as a source of law.

4-Custom should not be against the rules of public policy, This is natural for no rule of is allowed application if such contravenes the fundamental principle of life and morality in society.

5-Custom should not run counter to the "written provision of the law", Once there is a legislative rule of law, resort to custom is not allowed.

6- Custom must have been observed of right . This dose not mean that custom must be acquiesced in as a matter of moral right .

What the condition means is that the custom must have been followed openly m without the necessity for recourse to force; and without the permission of those adversely affected by the custom being regarded as necessary,

Differences between Custom and Law

1- Law is a make; custom is a growth.

2-Law is explicitly and deliberately made by the definite power of the state, whereas custom "is a group of procedure that has gradually emerged, without express enactment, without any constituted authority to declare it; to apply it and to safeguard it." Custom emerges spontaneously without any guide or direction. Law is consciously created and put into force at the moment of its enactment. In other words, law is a make, custom is a growth.

3-Law needs a special agency for enforcement, custom does not. Law is applied by a special agency and is sanctioned by organized coercive

authority. Custom does not need any special agency for its application it is enforced by spontaneous social action.

4-No physical penalty visits a violator of custom; whereas punishment is meted out to one who violates the law.

5- Law is specific, customs are not. Law is specific, definite and clear.

6-One can know what the laws of the land are. But as Maine opined, it is only known by a privileged minority. Customs, on the other hand, are not definite or clear. They are not codified in any single book so that it becomes difficult to know all the customs of the land.

7-Law is more flexible and adaptable than custom. Law can readily adjust itself to changing condition: whereas customs cannot be readily changed.

Customs are relatively fixed and permanent. In times of crisis a law can be immediately enacted to meet the emergency. A sudden change cannot be brought about in custom.

3-Religion

The religion practiced by Primitive communities played a decisive role in evolving the laws of the state later. Religion was a basis of law for most of the nation.

HOW DOES RELIGION AFFECT LAW AND PEOPLE'S LIFES

1-Allowing religion to affect laws limits people's freedoms. Religious influence should remain out of laws and out of politics.
2-However some laws such as laws against murder or thievery are also

found in religion, they are basic moral and ethical codes that address issues that are wrong.

3-Religion is a belief held by certain people not everyone, thus allowing religions to affect the forces of the law religions on uninterested parties.
4-Religion should remain what it truly is,a voluntary belief not science and law.
5-Religion should simply be looked upon as a tradition or belief and not a science and certainly not law.

PURPOSE OF RELIGION

- Religious law tells people what to believe.
- To achieve the goals of salvation
- It tells people how to behave whereas law deals with our actions and how they affect others.
- It brings the society together.
- It prevents undesirable behavior in society by associating it with negative spirits.
- Explaining the unexplained.

PURPOSE OF LAW

- maintaining order
- protecting individual rights and liberties
- establishing standards
- maintaining peace
- promoting social justice
- facilitating orderly change

Differences between Religion and Law

1-Law is defined as the system of rules which a particular country or community recognizes as regulating the actions of its members and which may enforce by the imposition of penalties. But Religion is defined as a specific fundamental set of beliefs and practices agreed upon by a number of persons or sects.

2-One can practice religion without being forced to practice it or forcing others to follow religious beliefs. However, laws require everyone to follow the rules or laws.
3- In religion morals and ethics represent the will of the people which unlike laws which are sort of drafted by the government not the will of all the people in a country or state.

4-Religion is the first source of Law, however, its mission was to teach people about God and ways of worshiping him, to teach people managing and organizing their lives by a set of rules.

5- Law involves the use of threat or force while religion is voluntary.
6-Law is what protects the right to practice your faith and Religion is just a set of beliefs.
7-Ethics is about moral practices and Laws are defined by a State.
8-Law is above all, even Kings are bound by certain laws.
9-One can also say that religion is just a way of living.
10-Religion has God’s laws and Law has rules made by men.

4-Equity

Until recent times, when the technical elaboration of law has reached and advanced stage of development , a sharp line between the formal administration and the ethical idea of justice had not been dawn, in the

growth of legal system a conscious toward a ‘constant’ of fairness in legal relationships has played a large part in shaping substantive rules.

Equity has stood to strict law as ‘ supplementary ‘ residuary jurisdiction. This has been necessary because legal rule are formulated generalizations and such are necessarily incomplete, So , a margin of discretionary interpretation must be left.

Thy may take the form of equity in general- a general disposition towards a human and liberal interpretation of law, or ‘particular equity ‘- a discretionary modification of the strict law in individual exceptional cases which are not covered by the general rule.

The popular or natural sense of justice cannot be disregarded it has a real meaning in law, since it represents an average element in the community with which , it is necessary that law should harmonize ;and most of the equitable or discretionary ingredients which are constantly found in legal system are based upon this primary sense of justice inherent in the average moral sense of the community.

Equity as a source of law may be defined as ‘ any body of rules existing by the side of the original positive law of the country founded on distinct principle of reason or the positive law in virtue of a superior sanctity inherent in those principles..

Clearly , therefore , principles of equity are strongly interwoven with the idea of natural law.

5- Judicial Decision

When a judge decided a case he issues an order giving effect to his decision which is entered on the record of the court. This is a judicial decision or judgment in the strict sense , and is binding only on the parties to the case (resjudicata) . But the judgment will have been based on some legal principle . Is it , therefore , to be expected that the legal principle is to be applicable to all cases of a similar kind? Is it evitable that

judges should to a greater or less degree follow there former decision of themselves and their colleagues and predecessors ? An affirmative answer to these two questions makes judicial decision a legal source of law, and , so the doctrine of the binding forces of judicial precedents will have to occupy a prominent place in the judicial system.

6- Juristic Opinion

One of the most important sources in law is the juristic opinion, some legal systems consider the juristic opinion as an original source of law others consider it as a subsidiary source of law, and as a The Iraqi legal system stands on basic similar in principle to those of France. As a source of law, Juristic opinion in Iraq is an 'interpretative' source of law. This is emphasized by Article 1 of Civil Law No 40, 1951. The Iraqi law gave the juristic opinion a big important as a source of law and consider the juristic opinion as a subsidiary source of law The juristic opinion mean.

The importance of scientific or professional legal opinion upon the development of the law has attracted the attitude of all legal historians . so soon as a community has goy beyond the sage at which law is confined to mere customary rules the law becomes the possession of a professional class . It is to the efforts of this professional class that the development of the law has been principally due.

In countries in which the administration of the law has become the business of an organized profession the members of the profession are usually divided into two classes , the Bench and the Bar, On the Bench sit

the judges , at the Bar plead the advocates of the suitors to the court. In the previous section , we have outlined the importance attached to the Bench and its ruling in different legal system .In the present section , we shall attempt to expose the importance of the members of the Bar in different legal systems from the point of the influence thy have had upon the development of the law.

The body of opinion set forth by jurists in their books.

The characters of the juristic opinion

1- The opinion of the jurist is not an authoritative source of law.

2- It is not binding to the judge.

3- It interprets the codes.

4-Expound the principles upon which the codes are based

Why did the Juristic opinion considered as an important source of law in France?

Because the great lawyers in France influenced the law not by decisions given by the Bench, but by their writings that interpret the codes and expound the principles upon which the codes are based.

What is the situation of the Islamic law from Juristic opinion?

The jurisprudence has also influenced to a very great extant the development of Islamic law. The founders of great school of thought both Sunni and Shi'i expound the law in a way to make it more 'consonant' with social needs in society. In fact the respect paid to:

1- 'Consensus' (Jima)

2- - 'Analogy' (Qiyas)

What is the situation of the Iraqi legal system form the Juristic opinion?

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Interpretation of Law

Definition

Interpretation, generally, means the elucidation of obscurity in the law, filling the gap in its structure m and the reconciliation of its conflicting provisions, In other words, interpretation is the determination of the content of a legal rule, and the definition of its elements and characteristics.

Kinds of Interpretation

1-legislative:

legislative interpretation emanates from the legislative authority. it takes place when a legislative enactment is wrongly understood by the court and , so the legislature feels obligated to enact a new law to clarify the meaning aimed at in the previous legislation.

2-Judicial :

from the point of view of practice, judicial interpretation is the more common. it is exercised by the courts, in which judges are required to exert every effort to deduce the meaning of the terms used by the legislature. In most cases, the judge in order to arrive at the actual meaning. use all the means of interpretation, be it linguistic, logical, or rational. He often refers to the material and historical sources, and the preparatory materials of the law to be interpreted.

3-Juristic.

Undoubtedly, juristic interpretation is the widest model, because of the unrestricted freedom of the jurist to build his understanding of the law thy way he deems fit, The jurist is not tied down by certain actual cases, not is his effort fettered by strict standards to be adopted.