Chapter 1

The Nature and Sources of Law

LAW AND LEGAL PROCESS

In order to function free from the tyranny of the largest numbers, the straightest shooters, or the most cunning schemers, society needs rules for conduct. Rules can create stability and safety so that social existence takes on an aura of predictability. Rules for social governance emanate from society's needs and evolve into a set of social values or ethics. At some stage in human social existence, some of these values or ethics are formalized into rules called law.

Law provides a framework for social action. If an individual knows the rules, and is guided by them in decision-making, he or she can better assess the risks of that action. A person knows that if you build a house on your residentially zoned land, there is little or no risk that society will demand that you take it down. Conversely, if you build an office building on residentially zoned land, there is a significant probability that society through the law will demand that you take the building down, or that you be punished in some manner for ignoring the law.

In the United States there are several distinct sources of law. The sources are briefly recited here, and are discussed in an applied fashion in Chapter 3. Some legal rules, such as the power of eminent domain and the right of the state government to regulate conduct so as to protect the public health, safety, and welfare, are deeply rooted in Anglo-American legal history. These powers of government are held to be inherent in the nature of sovereignty.

Most bodies of rules in our legal system are easier to trace. The federal Constitution is the product of a compact among the states to surrender some of their sovereignty to a central government so that they could function as an economic, political, and legal unit. It contains the most fundamental attributes of our governmental structure, and of our social beliefs. The roles of the legislative, the executive, and the judicial branches of the federal government are detailed therein. Basic beliefs, like freedom of speech, of religion, and of the press, and the broadly applicable concepts of due process and equal protection of the law are contained in the Constitution. Each of the states has a constitution that to some degree mirrors federal provisions and is applicable solely within the state.

With the constitutional framers having determined the basic structure and principles of the legal system, law-making was turned over to the three branches of the government. The Congress (and the state legislatures) is assigned the basic responsibility for converting desired public policy into written rules or statutory laws. State legislatures delegate some of their constitutional law-making powers to local governments through "enabling acts." For example, state enabling laws authorize municipal governments to adopt zoning codes, to enact laws to protect natural resources located in the community, and to regulate in order to preserve the aesthetic qualities of the area.

Frequently, legislation does not provide the many details necessary to implement the policy underlying the intent of the legislators. The job of filling in the details, or putting the flesh on the legislative skeleton, is given to an administrative agency. Usually, administrative agencies are created by the legislature, and are part of the executive branch of government. Theoretically, agencies do not create law in an original sense. It is undeniable, however, that the modern legislative practice of adopting skeletal legislation allows agencies
a great deal of latitude in fleshing out the law. Within the framework of the legislation, the agencies are very important lawmakers.

Courts make laws, too. As with administrative agencies, when courts interpret the constitution or legislation or administrative regulations, they are not making law in an original sense. It is difficult, however, to underestimate the importance of the U.S. Supreme Court in determining the meaning of fundamental but vague constitutional concepts like due process and equal protection of the law. Insofar as there is ambiguity in the federal and state constitutions, legislation, and administrative regulations, the courts play a critical role in making the law.

The courts make law in an original sense, too. The common law is judge-made law. Under our legal system, judges are free to make new laws in areas not regulated by existing constitutional provisions or legislation. For example, many areas of law that affect land use, such as nuisance, trespass, and negligence, are primarily products of the common law. Once a court makes a common law ruling, it establishes a precedent in that jurisdiction for future cases. Common law rules an area until superseded by subsequent legislation or, less frequently, constitutional change.

Confluence of State and Federal Law
As indicated previously, sovereignty, or supreme law-making power, is divided under our form of federal government. The federal government is sovereign in areas expressly or implicitly covered in the federal Constitution. All other areas of sovereignty are retained by the states. In areas of federal sovereignty, conflicts between state and federal law are resolved in favor of the federal law under the Supremacy Clause in the federal Constitution.

Regulation by the federal government in an area, such as aesthetics, does not automatically preclude the states from regulating it. The Supremacy Clause prohibits state regulation only when the area of regulation is preempted by the federal government. Preemption occurs when the federal legislation expressly excludes state activity, or when the federal government has so pervasively regulated in the area that it clearly intends for the states to be excluded, or there is a conflict between state and federal law. For instance, the National Environmental Policy Act (NEPA) requires the preparation of environmental impact statements (EIS) under certain circumstances. Many states have similar statutes, some requiring broader coverage in their EIS. There is no conflict between such laws. An EIS can be written that contains the federal requirements, and more inclusively, discusses the additional concerns mandated under state law.

As noted earlier, federal and state constitutions generally contain many of the same basic protections. A state or local legislative enactment or an administrative regulation, for example, one protecting a scenic vista, may be challenged in court as a violation of similar provisions in both the state and federal constitutions. If the law is found unconstitutional under the interpretation of either constitutional provision, it is invalid. Due to the vague nature of certain constitutional protections, such as due process and equal protection of the law, reasonable courts may disagree as to whether a law violates the constitution. As a result, a law may be held constitutional by a federal court applying federal law, but still be held unconstitutional by a state court applying the state constitution.

This principle has importance in the land use area today. The U.S. Supreme Court is dominated by judicial conservatives who have a tendency to defer to the decisions made by the legislature. Some state high courts are less judicially conservative and are more likely to overturn legislative enactments on constitutional grounds. When a case is litigated and appealed in one of these state courts, the courts are inclined to declare a law unconstitutional solely on state constitutional grounds. It is irrelevant therefore that the U.S. Supreme Court might have found to the contrary under federal law.

Classifications of Law
There are some basic legal classifications that need to be understood in dealing with lawyers and legal matters.

Civil versus Criminal
When used in the context of civil versus criminal law, civil law refers to the rules that determine the rights and duties of private individuals engaged in a transaction or a dispute. For example, rules dealing with contracts or property rights are part of the civil law. The term “civil law” is, however, sometimes used, especially in many foreign countries, to refer to code or statutory law.

Criminal law refers to the legal rules that pertain to protecting society’s interest from antisocial behavior, such as murder, arson, and rape. A criminal wrong is considered to be a wrong against society; it is then prosecuted by a public official (e.g., the district attorney) and the punishment is public in nature (e.g., fine and/or imprisonment). A civil wrong by contrast is brought to court by a private party alleging the wrong and the penalty benefits the private individual (e.g., money damages or an injunction).

Procedural and Substantive Law
Procedural law refers to the rules for administering the law. It does not pertain to the legal rights and duties
themselves. Procedural rules deal with how a defendant must be served with process, or the period of time the defendant has to respond to the plaintiff's complaint. Procedural rules can affect rights. For instance, if the victim of a civil wrong fails to file suit prior to the expiration of the statute of limitations, the person loses the right to assert the claim.

Substantive law is the law pertaining to the legal rights and duties of the parties. For example, an applicant seeking a variance from the setback requirements of the zoning code must prove, among other things, that denial of the variance will create an unnecessary hardship. Both the setback requirement in the zoning code and the need to prove unnecessary hardship are substantive rules.

**LEGISLATIVE PROCESS**

As discussed previously, courts are lawmakers. Their law-making is passive in nature in that they must wait for disputes to come to them, and they are constrained by constitutional, legislative, and prior-case language in creatively resolving a current dispute. By way of contrast, legislatures are self-activating lawmakers. Legislatures can convert desired policy into rules of law. Congress is confined in large measure only by the U.S. Constitution. The state legislature is limited by its constitution, and the need to have a public health, safety, or welfare purpose. Municipal legislatures are constrained by state enabling legislation that grants them their powers. Within these broad boundaries, legislatures are free to make law on their own initiative.

The Congress enacts laws by obtaining bicameral approval of both houses and the signature of the president upon presentment of the bill. The president does not have to sign the bill and may choose to veto it. If the president vetoes the bill, the Congress can override the veto by an affirmative vote of two-thirds of each house.

State legislatures have a very similar procedure. Municipal legislatures, which adopt much of the aesthetic-based regulations, often have a simpler procedure. Any policy proposal within the purview of their state-granted powers can be made law by the approval of the majority of a unicameral legislative body, which includes the chief executive (e.g., mayor, supervisor).

Since legislatures often deal with complex policy considerations in seeking a legislative solution to social problems, there is seldom a clear, correct legislative path to take. For example, the legislature may face the dilemma of whether to restrict development along its beautiful beachfront in order to protect the public's interest in it, or to leave the beach unregulated to allow private property rights and free market forces to control its destiny. If it decides that the public interest demands some regulation, should it ban development, or limit density, or simply require greater setbacks to protect the dunes from erosion? There is no right answer to these questions, but the legislature is the one empowered to select among the options available.

The controls on legislatures and their decision-making are twofold: political and legal. Voters can exercise political control by refusing to reelect legislators with whom they have policy differences. Citizens can exercise legal control over legislatures by asking the courts to declare laws invalid. Citizens will not be successful in court if their basis for attacking a law's validity is that they disagree with the policy underlying it. Courts do not, or at least they claim they do not, review the wisdom of the law. The grounds for courts exercising legal control over legislation are that it lacks constitutionality, that the legislature failed to observe standards of fairness in adopting the law, or that the manner selected to address the problem was not among the array of reasonable alternative methods. The burden of proving invalidity of legislation is a heavy one and rests on the person attacking its validity.

Complex social problems require equally complex legislative solutions. It is difficult for a large, politically sensitive body to draft legislation that anticipates and makes provision for all situations. In recent years it has become popular for the U.S. Congress and state legislatures to enact skeletal legislation and to create administrative agencies to do the detail work and carry out enforcement. Agencies are confined to the "four walls" of the legislation in adopting their regulations, but with skeletal legislation there is generally a significant opportunity for agency creativity or law-making within the bounds of the legislation.

**ADMINISTRATIVE PROCESS**

Although they can be created by executive order, administrative agencies are generally the product of legislation. Broadly speaking, their function is to implement and enforce the mandate of the legislation assigned to them. More specifically, they exist because they perform certain functions more efficiently than a legislature. They have or can acquire technical expertise in their area of specialization; they are relatively speedier; they can provide oversight for activities that have a relatively small impact on individuals but a large aggregate social impact (e.g., regulating the octane rating in gasoline); and they protect weak enterprises from the predatory practices of stronger enterprises (e.g., antitrust laws).

Administrative agencies have three categories of powers. They have investigative powers that allow them to gather facts to carry out their substantive functions. Their investigations may take the form of mandating reports or production of records, carrying out inspections, and conducting hearings to inquire into
issues. Legislatures, like administrative agencies, generally have investigative powers but courts do not.

Agencies often have rule-making powers. Rules or regulations provide the details and specifics necessary to implement the policy contained in legislation. They add the flesh to the legislative skeleton. Administrative rules must be confined to matters contained within the four walls of the legislation. Federal rules must be published in the Federal Register prior to taking effect in order to provide the public with notice.

Some agencies have adjudicatory powers. These agencies have powers similar to trial courts in that they conduct hearings to determine facts so that they can decide the legal rights and duties of the parties. Since they perform the function of trial courts, the party who loses at the administrative hearing stage and wishes to appeal takes the appeal to an appellate court, not a trial court.

Controls of administrative agencies, like the controls of legislatures, are political and legal in nature. Since administrators are not elected, political control is indirect and limited. Generally, political pressure must be brought on the chief executive or authority who appointed the administrator, rather than directly on the administrator. The party aggrieved by an administrator's action can seek legal recourse in the courts. A complex set of rules has evolved governing the rigorousness of judicial review of administrative decisions. A brief but limited insight into the process of judicial oversight of administrative actions is that courts will closely scrutinize an agency's conformity to procedural requirements but grant significant deference to decisions on substantive matters within the expertise of the administrator.

JUDICIAL PROCESS

When disputes arise between parties over their legal rights and they cannot resolve them, they have access to the courts. Trial courts hear the facts in a case, apply the legal rules to the facts as the judge determines them, and decides the case. The losing party has access to one or more appellate courts. The appellate court reviews the trial decision and determines whether or not the trial judge made a mistake in applying the law, and then either reverses or affirms the lower court's decision.

Just as the bodies of law are bifurcated into state and federal, so are the courts that resolve disputes arising under those laws. For purposes of this book it is unnecessary to delve too deeply into the functioning of the court systems, but some basic explanation is in order.

Federal Courts

The federal government has a three-tier system of courts. The federal district courts are the trial courts. The least populous states have a single federal district court for the entire state. States with larger populations may have up to four district courts operating regionally throughout the state. For instance, Pennsylvania has an Eastern Distric Court sitting in Philadelphia, a Central District Court in Harrisburg, and a Western District Court in Pittsburgh.

The federal district courts have jurisdiction over cases involving federal law and cases involving diverse citizenship. A plaintiff may opt to sue in a federal court even though the dispute concerns state law if the parties are from different states (e.g., the plaintiff is from Ohio and the defendant is from Virginia) and the amount in controversy exceeds $50,000. Once the suit is filed in federal court, the trial is held there and appeals are made through the federal court system.

Initial appeals go to regional courts called courts of appeals. These three-judge panels will listen to the argument of counsel for each side and decide whether or not the federal district court judge made a legal error in deciding the case at trial. The party losing at this intermediate appellate court may seek review from the nine-member U.S. Supreme Court. Today, the U.S. Supreme Court, a court of last resort on questions of federal law, determines its own docket and can decide to grant a writ of certiorari (hear the appeal) or deny the writ (refuse to hear the appeal). All appellate courts rule by majority vote.

State Courts

A description of the state court systems is more problematic because there are fifty separate court systems with some variations from state to state. In addition to having the three-tier structure of trial court, intermediate appellate court, and court of last resort, the states generally have a fourth, lower tier that deals with both minor civil and minor criminal matters.

There is also considerable variation in names among the state courts. The lowest-level courts are usually justices of the peace or municipal courts. The trial courts for important matters are called circuit courts, courts of common pleas, or county courts. The intermediate appellate courts are generally named superior courts or courts of appeals. The highest courts are predominantly called supreme courts. The vast majority of disputes involving state law is resolved by these state courts.

References