THE TAMIL NADU
Dr. AMBEDKAR LAW UNIVERSITY

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JURISPRUDENCE

(Common to Three Years and Five Years Law Courses)

STUDY MATERIAL

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MESSAGE

Knowledge is power. Legal Knowledge is a potential power. It can be exercised effectively everywhere. Of all the domains of reality, it is Legal Knowledge, which deals with rights and liabilities, commissions and omissions, etc., empower the holder of such knowledge to have prominence over the rest. Law Schools and Law Colleges that offer Legal Education vary in their stature on the basis of their ability in imparting the quality Legal Education to the students. Of all the Law Schools and Colleges, only those that educate their students to understand the nuances of law effectively and to facilitate them to think originally, excel. School of Excellence in Law aims to be in top of such institutions.

The revolution in Information and Communication Technology dump lot of information in the virtual world. Some of the information are mischievous and dangerous. Some others are spoiling the young minds and eating away their time. Students are in puzzle and in dilemma to find out the right information and data. They do not know how to select the right from the wrong, so as to understand, internalise and assimilate into knowledge. Hence in the present scenario, the role of teachers gains much more importance in guiding the students to select the reliable, valid, relevant and suitable information from the most complicated, perplexed and unreliable data.

The teachers of the School of Excellence in Law have made a maiden attempt select, compile and present a comprehensive course material to guide the students in various subjects of law. The students can use such materials as guidance and travel further in their pursuit of legal knowledge. Guidance cannot be a complete source of information. It is a source that facilitates the students to search further source of information and enrich their knowledge. Read the materials, refer relevant text books and case laws and widen the knowledge.

Dr.P.Vanangamudi
Vice-Chancellor

PREFACE

Introduction about the Subject

This subject guide has been written to show you how to lay a solid foundation of knowledge and critical understanding in Jurisprudence and Legal Theory. This will help prepare you, ultimately, for the examination. The guide is not intended as a primary source, or a textbook, and it would be a mistake to treat it this way.

The best way to study is to commit you to a sustained reading and writing programme from the beginning of the first term. It is typical for an internal student at the University of London to spend two hours in seminars each week for Jurisprudence throughout the academic year and, in addition, the equivalent of further full day's work in the library, reading and taking notes. In the two months before the examination, he or she would normally begin to formulate coherent thoughts in the subject by practising trial paragraphs, series of paragraphs, and finally essays. The activities and sample examination questions in this guide are designed to help you develop these skills.

If you follow this pattern and, better, if you are able to let someone else read what you write and discuss it with you, you will place yourself in the best possible position for achieving an excellent mark in the examination. Jurisprudence can be enjoyable. The questions it deals with are very important and they constantly impinge upon the consciousness of all lawyers. You really can go a long way with this subject by a relaxed reading of a variety of jurisprudential writing.

How to study Jurisprudence?

An initial problem in studying jurisprudence is the orientation of the subject. Come to it with an open mind and do not bother if at first it is not obvious why you should be studying it or what use it will be to in your future career. The answers to these questions will become clear to you during the year. If you study properly, you will gain a broad and flexible approach to legal questions of all sorts. Jurisprudence allows you to step back from the minutiae of what you're doing in the core subjects and speculate on more general, but equally pressing, questions of law. In popular language, you will learn how to think laterally.

Teachers of jurisprudence well understand that for first-comers to the subject, the initial orientation can be hard going. They are also used to the enthusiasm that frequently develops later, and which remains for a very long time. We frequently meet former students, some now distinguished practising lawyers, who at alumni functions tell us that they would 'like to have spent more time studying jurisprudence'. Our experience, too, is that this seemingly unpractical subject is not unpopular with practising lawyers. Don't be the unsuspecting interviewee who says 'I hated jurisprudence because it meant less time on commercial law, taxation, etc.' because that can strike just the wrong note with a future employer. Flexibility and breadth in thinking and writing are both sought after criteria of employability.

You should note early on that facts are much less important in jurisprudence. It is the ideas that are important. True, the subject has facts, and case-law type subjects are not devoid of ideas. Nevertheless, there is a far greater proportion of abstract, theoretical material in jurisprudence, and the single most common problem is failure to appreciate this. Read Fuller's 'The Case of the Speluncean Explorers' for an enjoyable way to see how a relatively simple set of facts lends itself to vastly different approaches, each characterised by certain abstract ideas. That article, by the way, is used as the introductory reading in jurisprudence in law schools all over the world.

1. How to think of Jurisprudence -Vs- Traditional Black Letter law?

- Understanding Jurisprudence as a Philosophy of "What law is -Vs- What law ought to be"
- Understanding that Jurisprudence looks at the same subject matter through different philosophical glasses.

2. Reading and Writing about Jurisprudence

(a) Once you identify the "subject" matter, that is "law", you should then move to the next issue of what you are trying to find or explain. Are you explaining what the law "is"? Are you explaining what the law "ought to be"? Are you explaining how the "legal system" works or should work? Are you observing the "structure of law", or has Austin described, "the Province of Jurisprudence Determined." One you grasp the essential question or inquiry, your next step is to organize your thoughts in terms of what the various theorists state or postulate.

(b) It is important to understand why Bentham, Austin, Kelsen, Hart, and others differ from each other. Are they asking the same question?

In writing about Jurisprudence, you will be expected to compare and contrast what the different theorists say about the same subject matter that will need to show the examiners that:

i. You have a firm understanding of the differences between the leading theorists

ii. That you understand the differences between theorists in a way that allows you to formulate your own conclusion about the same questions.

(c) Do not be sidelined by the linguistic nature of Jurisprudence. Be mindful that theorists rather than trying to write clearly, tend to use jargon of their own that develops into an opaque text of terms, Latin and strange usage of everyday words that take on totally new meaning when used in the Jurisprudence context.

3. Jurisprudence -Vs- Traditional Law Study

Unlike traditional courses in Criminal Law, Tort, Contract, etc., Jurisprudence is not built on rules and case law. In fact, Jurisprudence can be whatever it wishes to be. What appears to be a slippery fish in terms of being able to grasp the "essence" of the subject matter, Jurisprudence is a body of work based on countless view point's discussing similar questions. In fact, how you frame a question will

often dictate what kind of discussion will follow. For example, if you ask "What is Law", are you seeking a description of law? Are you asking if there is an essence to law? Are you assuming that law "properly so called" (John Austin) is static observation and capable of definition

Some in the Jurisprudence field refer to "legal positivism" as the value free definition of law or the value free description of law. In other words, some view or define "legal positivism" as observing "the law" without discussing morality. (Pay special attention to Thomas Hobbes, Jeremy Bentham and John Austin in this light. Later on you will review H.L. Hart's book "The Concept of Law," in light of these earlier theorist and their "legal positivism.").

Perhaps others who are reading the above debate will venture to state that while you can perhaps attempt to define "what is law", that such questions fail to take into account the value elements of law, namely, what law "ought to be." Once you start to understand the dynamics of how jurisprudence question are forms, and answered, you can start to appreciate how easy it is for writers and their critics to endlessly branch off each other with further inquires and additional questions about the "law."

Rather than seek to understand Jurisprudence as an entity like Criminal Law or Contract law, students should see Jurisprudence as a philosophy of law; a philosophy which seeks to provide difference perspectives on what law is, ought to be and most importantly, how those issues of "is and ought" play out in the real world not only today, but in the past. As you progress through this course, I will ask each student to be mindful of the historical context within which each theorist is writing from. As a brief prelude to this important point, be mindful of Hart's criticism of John Austin, in part, considering how Hart did not appreciate Hart's time, but rather chose to build up Austin only to tear him down as a "foil" for his own "Concept of Law."

4. Introduction to Natural law Theory and other theories of Law

Now, the issue of showcasing how several theorists discusses similar legal problems. The goal at this stage is not to necessarily define what each theorist is saying, but to underscore my belief that as a new student to Jurisprudence, you need to quickly observe the interplay between theorist. This course will ultimately ask you to contrast the different viewpoints of the theorists; therefore, I will conclude this lecture by demonstrating such contrasting.

Earlier, we discussed about the nature of Jurisprudence as compared to the more traditional LL.B. subjects like Criminal Law, Tort and others. Here I wish to develop that theoretical comparison with some hard examples, and using the Natural Law Theory is a good starting point.

Preparing for an examination in Jurisprudence

1) Content and orientation of your answer

This means stating clearly whether you agree or not, giving reasons. Giving reasons is important because it is typical for candidates to say in an examination that they either agree or disagree with some proposition without saying why. In a courtroom, as a future lawyer, would you think it was acceptable,

to your client, to the judge, simply to say 'I disagree' with the argument on the other side? Of course not! So we should criticize through proper reasoning by drawing conclusions.

2) Structure of your answer

The following remarks concern the structure that should be in the answer.

An opening paragraph or set of paragraphs should have impact. This sets out what you are going to do clearly and briefly and gets straight into it.

The middle section should contain argument backing up your views. The point is that these ideas must be yours and you must back them up.

A summing up in which you draw your conclusion. This should not be a repetition but a neat summary of your view.

This summary shows that your answer forms an argument in which you have set out to do something and that you have done it.

Finally, the following is designed to get you to see what would be very desirable in answering the question:

a) A jurisprudence answer must show knowledge, independent thought and the ability to argue. In addition, it must show an ability to cross-reference to other ideas and writers. This last is essentially the ability to think abstractly.

b) Use examples. It is always helpful to show your awareness that jurisprudential questions must be tested against real life.

I WISH YOU ALL THE BEST FOR YOUR SUCCESSFUL CAREER IN LAW

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JURISPRUDENCE

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NATURE AND SCOPE OF JURISPRUDENCE

What is Jurisprudence?

There is no universal or uniform definition of Jurisprudence since people have different ideologies and notions throughout the world. It is a very vast subject. When an author talks about political conditions of his society, it reflects that condition of law prevailing at that time in that particular society. It is believed that Romans were the first who started to study what is law.

Jurisprudence derived from the Latin word 'Jurisprudentia' means Knowledge of Law or Skills in Law. Most of our law has been taken from Common Law System. Jeremy Bentham is known as Father of Jurisprudence. John Austin took his work further.

Bentham was the first one to analyse what is law. He divided his study into two parts:

1. Examination of Law as it is - Expositorial Approach i.e., Command of Sovereign.
2. Examination of Law as it ought to be - Censorial Approach i.e., Morality of Law.

However, Austin stuck to the idea that Law is command of the Sovereign. The structure of English Legal System remained with the formal analysis of law (Expositorial) and never became what it ought to be (Censorial).

J. Stone also tried to define Jurisprudence. He said that it is a lawyer's extraversion. He further said that it is a lawyer's examination of the percept, ideas and techniques of law in the light derived from present knowledge in disciplines other than the law. Thus, we see that there can be no goodness or badness in law. Law is made by the State so there could be nothing good or bad about it. Jurisprudence is nothing but the science of law or grammar of law

According to John Austin, "Science of Jurisprudence is concerned with Positive Laws that is laws strictly so called. It has nothing to do with the goodness or badness of law.

This has two aspects attached to it:

1. General Jurisprudence i.e., such subjects or ends of law as are common to all system.
2. Particular Jurisprudence i.e.,the science of any actual system of law or any portion of it.

Basically, in essence both are same but in scope they are different.

Salmond's Criticism of Austin's definition, a concept to fall within the category of 'General Jurisprudence', it should be common in various systems of law. This is not always true as there could be concepts that fall in neither of the two categories.

Holland's Criticism of Austin's definition stating that, it is only the material which is particular and not the science itself.

According to Holland, Jurisprudence means the formal science of positive laws. It is an analytical science rather than a material science.

1. He defined the term positive law. He said that Positive Law means the general rule of external human action enforced by a sovereign political authority.
2. We can see that, he simply added the word 'formal' in Austin's definition. Formal here means that we study only the form and not the essence. We study only the external features and do not go into the intricacies of the subject. According to him, how positive law is applied and how it is particular is not the concern of Jurisprudence.

3. The reason for using the word 'Formal Science' is that it describes only the form or the external sight of the subject and not its internal contents. According to Holland, Jurisprudence is not concerned with the actual material contents of law but only with its fundamental conceptions. Therefore, Jurisprudence is a Formal Science.

4. This definition has been criticized by Gray and Dr. Jenks. According to them, Jurisprudence is a formal science because it is concerned with the form, conditions, social life, human relations that have grown up in the society and to which society attaches legal significance.

5. Holland said that Jurisprudence is a science because it is a systematized and properly co-ordinated knowledge of the subject of intellectual enquiry. The term positive law confines the enquiry to these social relations which are regulated by the rules imposed by the States and enforced by the Courts of law. Therefore, it is a formal science of positive law.

6. Formal as a prefix indicates that the science deals only with the purposes, methods and ideas on the basis of the legal system as distinct from material science which deals only with the concrete details of law.

7. This definition has been criticized on the ground that this definition is concerned only with the form and not the intricacies.

Salmond said that Jurisprudence is Science of Law. By law he meant law of the land or civil law. He divided Jurisprudence into two parts:

1. Generic - This includes the entire body of legal doctrines.

2. Specific - This deals with the particular department or any portion of the doctrines.

'Specific' is further divided into three parts:

1. Analytical, Expository or Systematic - It deals with the contents of an actual legal system existing at any time, past or the present.

2. Historical - It is concerned with the legal history and its development

3. Ethical - According to him, the purpose of any legislation is to set forth laws as it ought to be. It deals with the 'ideal' of the legal system and the purpose for which it exists.

Critics say that it is not an accurate definition. Salmond only gave the structure and failed to provide any clarity of thought.

According to Keeton, Jurisprudence is "the study and systematic arrangement of the general principles of law". Further, Jurisprudence deals with the distinction between Public and Private Laws and considers the contents of principle departments of law.

According to Dean Roscoe Pound, Jurisprudence is the science of law using the term 'law' in juridical sense as denoting the body of principles recognized or enforced by public and regular tribunals in the Administration of Justice.

According to Dias and Hughes, Jurisprudence is any thought or writing about law rather than a technical exposition of a branch of law itself.

Thus, we can conclude by saying that Jurisprudence is the study of fundamental legal principles.

SCOPE OF JURISPRUDENCE

After reading all the above mentioned definitions, we would find that Austin was the only one who tried to limit the scope of jurisprudence. He tried to segregate morals and theology from the study of jurisprudence. However, the study of jurisprudence cannot be circumscribed because it includes all human conduct in the State and the Society.

Approaches to the study of Jurisprudence

There are two ways:

1. **Empirical method**: In this method first we should analyse the facts and then we should apply to the general concept prevailing in the society. (Fact to Generalisation)
2. **A Priori method**: In this method, it starts with Generalization in light of which the facts are examined. (Generalisation to Fact)

Significance and Utility of the Study of Jurisprudence

1. This subject has its own intrinsic interest and value because this is a subject of serious scholarship and research; researchers in Jurisprudence contribute to the development of society by having repercussions in the whole legal, political and social school of thoughts. One of the tasks of this subject is to construct and elucidate concepts serving to render the complexities of law more manageable and more rational. It is the belief of this subject that the theory can help to improve practice.
2. Jurisprudence also has an educational value. It helps in the logical analysis of the legal concepts and it sharpens the logical techniques of the lawyer. The study of jurisprudence helps to combat the lawyer's occupational view of formalism which leads to excessive concentration on legal rules for their own sake and disregard of the social function of the law.
3. The study of jurisprudence helps to put law in its proper context by considering the needs of the society and by taking note of the advances in related and relevant disciplines.
4. Jurisprudence can teach the people to look if not forward, at least sideways and around them and realize that answers to a new legal problem must be found by a consideration of present social needs and not in the wisdom of the past.
5. Jurisprudence is the eye of law and the grammar of law because it throws light on basic ideas and fundamental principles of law. Therefore, by understanding the nature of law, its concepts and distinctions, a lawyer can find out the actual rule of law. It also helps in knowing the language, grammar, the basis of treatment and assumptions upon which the subject rests. Therefore, some logical training is necessary for a lawyer which he can find from the study of Jurisprudence.
6. It trains the critical faculties of the mind of the students so that they can dictate fallacies and use accurate legal terminology and expression.
7. It helps a lawyer in his practical work. A lawyer always has to tackle new problems every day. This he can handle through his knowledge of Jurisprudence which trains his mind to find alternative legal channels of thought.
8. Jurisprudence helps the judges and lawyers in ascertaining the true meaning of the laws passed by the legislators by providing the rules of interpretation. Therefore, the study of jurisprudence should not be confined to the study of positive laws but also must include normative study i.e. that study should deal with the improvement of law in the context of prevailing socio-economic and political philosophies of time, place and circumstances.
9. Professor Dias said that "the study of jurisprudence is an opportunity for the lawyer to bring theory and life into focus, for it concerns human thought in relation to social existence".

Relationship of Jurisprudence with other Sciences and Social Sciences

1. **Jurisprudence and Sociology**: There is a branch called as **Sociological Jurisprudence**. This branch is based on social theories. It is essentially concerned with the influence of law on the society at large particularly when we talk about social welfare. The approach from sociological perspective towards law is different from a lawyer's perspective. The study of sociology has helped Jurisprudence in its approach. Behind all legal aspects, there is always something social. However, Sociology of Law is different from Sociological Jurisprudence.

2. **Jurisprudence and Psychology**: No human science can be described properly without a thorough knowledge of Human Mind which the man often thinks rationally. Hence, Psychology has a close connection with Jurisprudence. Relationship of Psychology and Law is established in the branch of **Criminal Jurisprudence**. Both psychology and jurisprudence are interested in solving questions such as motive behind a crime, criminal personality, reasons for crime etc.

3. **Jurisprudence and Ethics**: Ethics has been defined as the science of Human Conduct. It strives for ideal Human Behaviour. This is how Ethics and Jurisprudence are interconnected:

a. Ethics is concerned with good human conduct in the light of public opinion.

b. Jurisprudence is related with Positive Morality in so far as law is the instrument to assert positive ethics.

c. Jurisprudence believes that Legislations must be based on ethical principles. It is not to be divorced from Human principles.

d. Ethics believes that no law is good unless it is based on sound principles of human value.

e. A Jurist should be adept in this science because unless he studies ethics, he won't be able to criticize the law.

4. **Jurisprudence and Economics**: Economics studies man's efforts in satisfying his wants and producing and distributing wealth. Both Jurisprudence and Economics are sciences and both aim to regulate lives of the people. Both of them try to develop the society and improve life of an individual. Hence it is called as **Economical Jurisprudence**. Karl Marx was a pioneer in this regard.

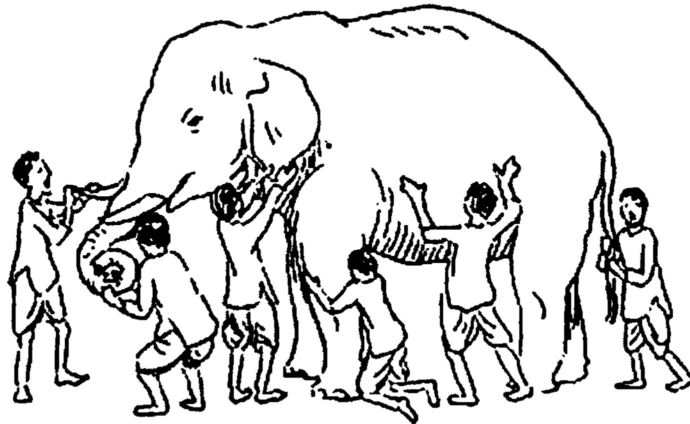
5. **Jurisprudence and History**: History studies past events. Development of Law for administration of justice becomes sound if we know the history and background of legislations and the way law has evolved. The branch is known as **Historical Jurisprudence**.

6. **Jurisprudence and Politics**: In a politically organized society, there are regulations and laws which lay down authoritatively what a man may and may not do. Thus, there is a deep connected between politics and Jurisprudence.

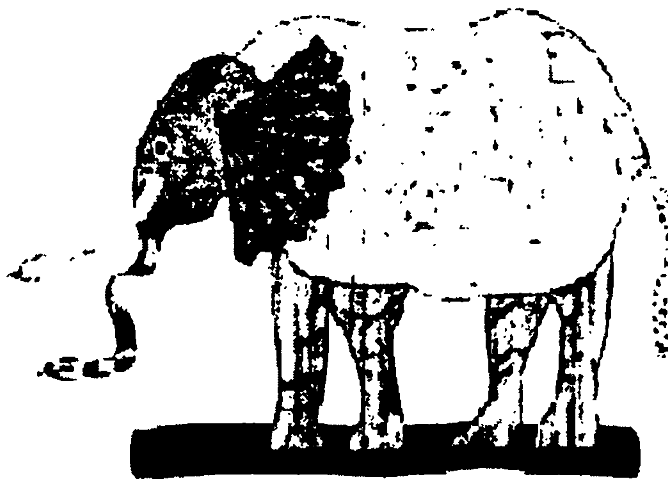
7. **Jurisprudence and Engineering**: Due to the emerging technology, it has been applied in all the fields of knowledge, at the same time there should be some regulations laid down to prevent of misuse of technological resources. Thus it is called as **Technological Jurisprudence**.

8. **Jurisprudence and Medicine**: In this era of LPG, so many ethical factors influence the use of medicines (i.e., biological and chemical) in all system. There is no proper law to regulate the medical field such as use of drugs, Down syndrome, euthanasia, organ transplantation, cloning, biodiversity, bioethics, etc. This may cause many issues which the existing law cannot provide solutions which may affect the future generational needs. Hence, it is called as **Medical Jurisprudence**.

9. **Jurisprudence and Feminism**: Even in this 21st century women hood still struggling for their basic rights in all over the world. The concept of equality is always a question mark in all religious traditions. To get rid from that, the women hood should go for long to empower themselves and be a part of this global system. This is called as **Feminist Jurisprudence**.



There were six blind men defined the structure of an elephant. One on them, by touching the trunk of that elephant and said that elephant is like a "python". Second man, by touching the tusk and says that elephant is like a "sword". Third man, by touching the ear and says that the elephant is like a "fan". Fourth man, touching the leg and says that elephant is like a "pillar". Fifth man, by touching the belly and says that elephant is like a "wall". Then the last man touched the tail and narrated that elephant is like a "rope". If we assume the words of those blind men, then we will derive the elephant as given below:



Likewise, each and every jurist defined the concept of "law" in their own view according to their brought up, their livelihood, their social and economic factors, their ideology, their prophecy, etc., but, there is no exhaustive definition for law which encompasses all the society. Hence, the law is very difficult to define, to understand the concept and apply in the respective arena. Thus, the concept of law is an interesting field to do research which never stops. This made the significant development of the human existence to enact this much of laws to regulate themselves.

What is Law?

Introduction

Law cannot be static by nature. In order to remain relevant, Law has to grow with the development of the society. In the same manner, the scope of law also cannot be kept static. The result is that the definition of law is ever changing with the change in society. The definition of law considered satisfactory today might be considered a narrow definition tomorrow. This view has been put forward by Professor Keeton. He said that

an attempt to establish a satisfactory definition of law is to seek, to confine jurisprudence within a Straight Jacket from which it is continually trying to escape.

Austin said that law is the aggregate of the rules set by men as political superior or sovereign to men as politically subject. In short, Law is the command of sovereign. It imposes a duty and duty is backed by a sanction. He further said that there exist four elements in law:

a. Authority
b. Command
c. Duty
d. Sanction

However, Salmond defined law as the body of principles recognized and applied by the state in the administration of justice.

Austin's Theory of Law or Imperative Theory of Law

As we know, according to Austin, there are four elements in law:

a. It is a type of command
b. It is laid down by a political superior
c. It is followed by the respective subjects
d. It is enforced through sanctions.

He goes on to elaborate this theory. For him, Requests, wishes etc. are expressions of desire. Command is also an expression of desire which is given by a political superior to a political inferior. The relationship of superior and inferior consists in the power which the superior enjoys over the inferior because the superior has ability to punish the inferior for its disobedience.

He further said that there are certain commands that are laws and there are certain commands that are not laws. Commands that are laws are general in nature. Therefore, laws are general commands. Laws are like standing order in a military station which is to be obeyed by everybody.

He goes on to define who is a sovereign. According to him, "Sovereign is a person or a body or persons whom a bulk of politically organized society habitually obeys and who does not himself habitually obey some other person or persons". Perfect obedience is not a requirement.

He further goes on to classify the types of laws:

1. Divine Law i.e., Given by god to men
2. Human Law i.e., Given by men to men
    a. Positive Laws i.e., Statutory Laws
    b. Not Positive Laws i.e., Non- Statutory Laws such as Customs, Traditions, etc.

Criticism of Austin's Theory of Law

1. Laws before state: It is not necessary for the law to exist if the sovereign exists. There were societies prior to existence of sovereign and there were rules that were in prevalence. At that point of time, there was no political superior. Law had its origin in custom, religion and public opinion. All these so called 'laws' were later enforced by the political superior. Thus, the belief that sovereign is a requirement for law has received criticism by the Historical and Sociological School of Thought.

However, the above mentioned criticism is not supported by Salmond. He said that the laws which were in existence prior to the existence of state were something like primitive substitutes of law and not law. They only resembled law. Salmond gave an example. He said that apes resemble human beings but it is not necessary to include apes if we define human beings.

2. **Generality of Law**: The laws are also particular in nature. Sometimes, a Law is applicable only to a particular domain. There are laws which are not universally applicable. Thus, laws are not always general in nature.

3. **Promulgation**: It is not necessary for the existence of the law that the subjects need to be communicated. But, Austin thought otherwise.

4. **Law as Command**: According to Austin, law is the command of the sovereign. But, all laws cannot be expressed as commands. Greater part of law in the system is not in the nature of command. There are customs, traditions, and unspoken practices etc. that are equally effective.

5. **Sanction**: The phrase 'sanction' might be correct for a Monarchical state. But for a Democratic state, laws exist not because of the force of the state but due to willing of the people. Hence, the phrase 'sanction' is not appropriate in such situations. Also, there exists no sanction in Civil Laws unlike Criminal Laws.

6. **Not applicable to International Law**: Austin's definition is not applicable to International Law. International Law represents law between sovereigns. According to Austin, International Law is simply Positive Morality i.e. Soft Laws.

7. **Not applicable to Constitutional Law**: Constitutional Law defines powers of the various organs of the state. It comprises of various doctrines such as separation of power, division of power etc. Thus, no individual body of a state can act as sovereign or command itself. Therefore, it is not applicable to constitutional law.

8. **Not applicable to Hindu Law or Muslim Law or Canon Law**: Personal Laws have their origin in religion, customs and traditions. Austin's definition strictly excludes religion. Therefore, it is not applicable to personal laws.

9. **Disregard of Ethical elements**: The moment law is devoid of ethics, the law loses it colour and essence. Justice is considered an end of law or law is considered a means to achieve Justice. However, Austin's theory is silent about this special relationship of Justice and Law. Salmond said that any definition of law which is without reference to justice is imperfect in nature. He further said "Law is not right alone, it is not might alone, and it a perfect union of the two" and "Law is justice speaking to men by the voice of the State". According to Salmond, whatever Austin spoke about is 'a law' and not 'the law'. By calling 'the law' we are referring to justice, social welfare and law in the abstract sense. Austin's definition lacked this abstract sense. A perfect definition should include both 'a law' and 'the law'.

10. **Purpose of law ignored**: One of basic purposes of Law is to promote Social Welfare. If we devoid law of ethics, the social welfare part is lost. Again, this part has been ignored by Austin.

Merit in Austin's Definition

Not everything is faulty about Austin's theory of law. He gave a clear and simple definition of law because he has excluded ethics and religion from the ambit of law. Thus, he gave a paramount truth that law is created and enforced by the state.

Salmond's Definition of Law

According to Salmond, "Law may be defined as the body of principles recognized and applied by the state in the administration of justice". In other words, law consists of rules recognized and acted upon by the Courts of Justice. Salmond believed that law may arise out of popular practices and its legal character becomes patent when it is recognized and applied by a Court in the Administration of Justice. Courts may misconstrue a statute or reject a custom; it is only the Ruling of the Court that has the Binding Force of Law.

He further said that laws are laws because courts enforce them. He drew a lot of emphasis on Administration of Justice by the Courts. He was of firm belief that the true test of law is enforceability in the courts of law.

Thus, we see that Salmond has defined law in the abstract sense. His definition brings out the ethical purpose of law. In his definition, law is merely an instrument of Justice.

Criticism by Vinogradoff

Vinogradoff heavily criticized Salmond's definition. He said that the definition of law with reference to Administration of Justice inverts the logical order of ideas. The formulation of law is necessary precedent to the administration of justice. Law has to be formulated before it can be applied by a court of justice. He further said that the definition given by Salmond is defective because he thinks law is logically subsequent to administration of justice. Existence of a Rule of Law because Courts of Justice could apply it and enforce it while deciding cases, vitiates the definition of law.

Natural Law or Moral Law

Natural Law refers to the Principles of Natural right and wrong and the Principle of Natural Justice. Here, we must use the term 'justice' in the widest sense to include to all forms of rightful action. Natural Law is also called Divine Law or Law of Reason or The Universal Law and Eternal Law. This law is a Command of the God imposed on Men.

Natural Law is established by reason by which the world is governed, it is an unwritten law and it has existed since the beginning of the world and hence, is also called Eternal Law. This law is called Natural Law as its principles are supposed to be laid down by god for the guidance of man. It is called Rational Thought because it is based on reason. Natural Law is unwritten as we do not find it in any type of Code. Therefore, Natural law exists only in ideal state and differs from law of a State. Philosophy of Natural law has inspired legislation and the use of reason in formulating a System of law.

Purpose and function of law

Society is dynamic and not static in nature. Laws made for the people are also not static in nature. Thus, purpose and function of law also cannot remain static. There is no unanimity among theorists as to purpose and function of law. Thus, we will study purpose and function of law in the context of advantages and disadvantages.

1. Advantages of Law:

a. Fixed principles of law

i. Laws provide uniformity and certainty of administration of justice.

ii. Law is no respecter of personality and it has certain amount of certainty attached to it.

iii. Law avoids the dangers of arbitrary, biased and dishonest decisions because law is certain and it is known. It is not enough that justice should be done but it is also important that it is seen to be done.

iv. Law protects the Administration of Justice from the errors of individual judgments. Individual whims and fancies are not reflected in the judgment of the court that follows the Rule of Law.

b. Legislature represents the wisdom of the people and therefore a law made by the legislature is much safer because collective decision making is better and more reliable than individual decision making.

2. Disadvantages of Law:

a. Rigidity of Law: An ideal legal system keeps on changing according to the changing needs of the people. Therefore, law must adjust to the needs of the people and it cannot isolate itself from them. However, in practice, law is not usually changed to adjust itself to the needs of the people. Therefore, the lack of flexibility results into hardship in several cases.

b. Conservative nature of law: Both lawyers and judges favour in continuation of the existing laws. This creates a situation where very often laws become static and they do not respond to the progressive society because of the conservative nature of law.

c. Formalism of law: Most of the times, people are concerned with the technical operation of law and not the merits of every individual case. It creates delay in the Justice Delivery system. It also leads to injustice in certain cases.

d. Complexity of law: Sometimes, the laws are immensely intricate and complex. This causes difficulty in Interpretation of Statutes.

Thus Salmons says, advantages of law are many but disadvantages are too much.

THE SOURCES OF LAW

Analytical Jurist, Austin said that the term "source of law" has three different meanings:

1. This term refers to immediate or direct author of the law which means the sovereign in the country.
2. This term refers to the historical document from which the body of law can be known.
3. This term refers to the causes that have brought into existence the rules that later on acquire the force of law. E.g. customs, judicial decision, equity etc.

Historical Jurists such as Von Savigny, Sir Henrye Maine, Puchta, etc. believed that law is not made but is found. According to them, the foundation of law lies in the common consciousness of the people that manifests itself in the practices, usages and customs followed by the people. Therefore, for them, customs and usages are the sources of law.

Sociological Jurists scholars protest against the orthodox conception of law according to which, law emanates from a single authority in the state. They believe that law is taken from many sources and not just one.

Ehrlich said that at any given point of time, the centre of gravity of legal development lies not in legislation, not in science nor in judicial decisions but in the society itself. He propounded the concept of "Living Law". Whoever enacts the law, it will be applied only in the society. So the society should decide whether we should follow this law or not. Law cannot operate in a vacuum space. Hence there should be a subject and that subject is Society. Society alone makes a law to exist. If the society lives, then law to can live in that society. Thus the law emancipated from the society.

Duguit believed that law is not derived from any single source as the basis of law is public service. There need not be any specific authority in a society that has the sole authority to make laws.

Salmond has done his own classification of sources of law:

1. Formal Sources: A Formal Source is as that from which rule of law derives its force and validity. The formal source of law is the will of the state as manifested in statutes or decisions of the court and the authority of law proceeds from that.
2. Material Sources: Material Sources are those from which is derived the matter though not the validity of law and the matter of law may be drawn from all kind of material sources.
3. Historical Sources: Historical Sources are rules that are subsequently turned into legal principles. Such sources are first found in an Unauthoritative form. Usually, such principles are not allowed by the courts as a matter of right. They operate indirectly and in a mediatory manner.
4. Legal Sources: Legal Sources are instruments or organs of the state by which legal rules are created for e.g. legislation and custom. They are authoritative in nature and are followed by the courts. They are the gates through which new principles find admittance into the realm of law. Some of the Legal Sources are:

   a. Customs

   b. Legislations

   c. Precedent

Charles Allen said that Salmond has attached inadequate attention to historical sources. According to him, historical sources are the most important source of law. Keeton said that state is the organization that enforces the law. Therefore, technically State cannot be considered as a source of law. However, according to Salmond, a statute is a legal source which must be recognized. Writings of scholars such Bentham cannot be considered as a source of law since such writings do not have any legal backing and authority.

Legal sources of English Law

There are two established sources of English Law:

1. Enacted Law having its source in legislation: This consists of statutory law. Legislation is the act of making of law by formal and express declaration of new rules by some authority in the body politic which is recognized as adequate for that purpose.
2. Law Cases having source in Judicial Precedents: It consists of common law that we usually read in judgments and law reporters. Precedent could also be considered as a source of law as a precedent is made by recognition and application of new rules by the courts whilst administering justice. Thus, Case Laws are developed by the courts whereas enacted laws come into the court ab extra.
3. Juristic Law: Professional opinion of experts or eminent jurists. Though they are not much accepted, these are also sources of law.

Custom as a Source of Law

Salmond said that "Custom is the embodiment of those principles which have commended themselves to the national conscience as the principles of justice and public utility".

Keeton said that "Customary laws are those rules of human action, established by usage and regarded as legally binding by those to whom the rules are applicable, which are adopted by the courts and applied as a source of law because they are generally followed by the political society as a whole or by some part of it". However, Austin said that Custom is not a source of law.

Roscoe Pound said that Customary Law comprises of:

1. Law formulated through Custom of popular action.
2. Law formulated through judicial decision.
3. Law formulated by doctrinal writings and scientific discussions of legal principles.

Historical Jurist, Savigny considered that customary law is the law which got its content from habits of popular action recognized by courts, or from habits of judicial decision, or from traditional modes of juristic thinking, was merely an expression of the jural ideas of the people, of a people's conviction of right, its ideas of right and of rightful social control. However, it is the Greek historical School that is considered as the innovator of custom as source of law.

Otto Van Gierke, a German Jurist and a Legal Historian, said that "every true human association becomes a real and living entity animated by its own individual soul".

Ingredients of a valid Custom

1. Immemorial Antiquity
2. Conformity with the Statute law
3. Obligatory Force
4. Peaceful enjoyment
5. Reasonableness
6. Continuous is nature
7. Consistency
8. Certainty

Legislation as Source of Law:

'Legis' means law and 'latum' means making. Hence, Legislation means making of law and Legislature is law-making body. Let us understand how various jurists have defined legislation.

1. According to Salmond, Legislation is that source of law which consists in the declaration of legal rules by a competent authority.
2. According to Gray, Legislation means the forma utterance of the legislative organs of the society.
3. According to Austin, there can be no law without a legislative act.
4. Analytical School believes that typical law is a statute and legislation is the normal source of law making. The majority of exponents of this school do not approve that the courts also can formulate law. They do not admit the claim of customs and traditions as a source of law. Thus, they regard only legislation as the source of law.
5. Historical School believes that Legislation is the least creative of the sources of law. Legislative purpose of any legislation is to give better form and effectuate the customs and traditions that are spontaneously developed by the people. Thus, they do not regard legislation as source of law.

Types of Legislation

1. Supreme Legislation: A Supreme or a Superior Legislation is that which proceeds from the sovereign power of the state. It cannot be repealed, annulled or controlled by any other legislative authority.
2. Subordinate Legislation: It is that which proceeds from any authority other than the sovereign power and is dependent for its continual existence and validity on some superior authority.

Delegated Legislation:

This is a type of subordinate legislation. It is well-known that the main function of the executive is to enforce the law. In case of Delegated Legislation, executive frames the provisions of law. This is also known as executive legislation. The executive makes laws in the form of orders, by laws etc.

Sub-Delegation of Power to make laws is also a case in Indian Legal system. In India, the power to make subordinate legislation is usually derived from existing enabling acts. It is fundamental that the delegate on whom such power is conferred has to act within the limits of the enabling act.

The main purpose of such legislation is to supplant and not to supplement the law. Its main justification is that sometimes legislature does not foresee the difficulties that might come after enacting a law. Therefore, Delegated Legislation fills in those gaps that are not seen while formulation of the enabling act. Delegated Legislation gives flexibility to law and there is ample scope for adjustment in the light of experiences gained during the working of legislation.

Controls over Delegated Legislation

1. Direct Forms of Control

   a. Procedural Control: The Parliament safeguards its power over the executive or administrative authorities. Those powers are as follows:

   i. Prior consultation of interests which are likely to be affected by the proposed delegated legislation.

   ii. Prior publicity of proposed rules and regulations, and

   iii. Publication of delegated legislation.

b. Parliamentary Control: This is exercised through the committee on subordinate legislation on both the Houses of Parliament which maintains vigilance on Government's rule-making power and scrutinizes the rules framed by the Executive.

BLAZE

2. Indirect Forms of Control

a. Judicial Control: This is an indirect form of control. Courts cannot annul subordinate enactments but they can declare them inapplicable in special circumstances. By doing so, the rules framed do not get repealed or abrogated but they surely become dead letter as they become ultra vires and no responsible authority attempts to implement it.

b. Trustworthy Body of Persons: Some form of indirect control can be exercised by entrusting power to a trustworthy body of persons.

c. Public Opinion can also be a good check on arbitrary exercise of Delegated Powers. It can be complemented by antecedent publicity of the Delegated Laws.

It is advisable that in matters of technical nature, opinion of experts must be taken. It will definitely minimize the dangers of enacting a vague legislation.

Precedent as a Source of Law

In India, the judgment rendered by Supreme Court is binding on all the subordinate courts, High Courts and the tribunals within the territory of the country. In case of a judgment rendered by the High Court, it is binding in nature to the subordinate courts and the tribunals within its jurisdiction.

In other territories, a High Court judgment only has a persuasive value. In Indo-Swiss Time Ltd. -Vs- Umroo, AIR 1981 P&H 213 Full Bench, it was held that "where it is of matching authority, then the weight should be given on the basis of rational and logical reasoning and we should not bind ourselves to the mere fortuitous circumstances of time and death".

In the case Union of India -Vs- K.S. Subramanium AIR 1976 SC 2435 held that when there is an inconsistency in decision between the benches of the same court, the decision of the larger bench should be followed.

Precedent as a source of law:

Till the 19th Century, Reported Court Precedents were probably followed by the courts. However, after 19th century, courts started to believe that precedence not only has great authority but must be followed in certain circumstances. William Searle Holdsworth supported the Pre 19th century meaning of the precedence. However, Goodhart supported the Post 19th century meaning.

Declaratory Theory of Precedence: This theory holds that judges do not create or change the law, but they 'declare' what the law has always been. This theory believes that the Principles of Equity have their origin in either customs or legislation. However, critics of this theory say that most of the Principles of Equity have been made by the judges and hence, declaratory theory fails to take this factor into regard.

Types of Precedents

1. Original Precedent: The precedents which create law.
2. Declaratory Precedent: Applying the known and established rules of law to the particular facts of the cases arising for decision.
3. Authoritative Precedent: Judges must follow the precedent whether they approve of it or not. They are classified as Legal Sources.
4. Persuasive Precedent: Judges are under no obligation to follow but which they will take precedence into consideration and to which they will attach such weight as it seems proper to them. They are classified as Historical Sources.

Disregarding a Precedent:

Overruling is a way by which the courts disregard a precedent. There are circumstances that destroy the binding force of the precedent:

1. A decision when abrogated by a statutory law.
2. The judgment rendered by a lower court loses its relevance if such a judgment is passed or reversed by a higher court.
3. In case of Ignorance of Statute, the decision loses its binding value.
4. Inconsistency with earlier decisions of High Court
5. Precedent that is sub-silentio or not fully argued.
6. Where there is neither a majority nor a minority judgment.
7. Erroneous Decision

Difference between Legislation and Customary Law

1. Legislation has its source in theory whereas customary law grows out of practice.
2. The existence of Legislation is essentially de jure whereas existence of customary law is essentially de facto.
3. Legislation is the latest development in the Law-making tendency whereas customary law is the oldest form of law.
4. Legislation is a mark of an advanced society and a mature legal system whereas absolute reliance on customary law is a mark of primitive society and under-developed legal system.
5. Legislation expresses relationship between man and state whereas customary law expresses relationship between man and man.
6. Legislation is precise, complete and easily accessible but the same cannot be said about customary law. Legislation is jus scriptum.
7. Legislation is the result of a deliberate positive process. But customary law is the outcome of necessity, utility and imitation.

Salient Features of Legislation over Court Precedents

1. Abrogation: By exercising the power to repeal any legislation, the legislature can abrogate any legislative measure or provision that has become meaningless or ineffective in the changed circumstances. Legislature can repeal a law with ease. However, this is not the situation with courts because the process of litigation is a necessary as well as a time-consuming process.
2. Division of function: Legislation is advantageous because of division of functions. Legislature can make a law by gathering all the relevant material and linking it with the legislative measures that are needed. In such a process, legislature takes help of the public and opinion of the experts. Thus, public opinion also gets represented in the legislature. This cannot be done by the judiciary since Judiciary does not have the resources and the expertise to gather all the relevant material regarding enforcement of particular principles.

3. Prospective Nature of Legislation: Legislations are always prospective in nature. This is because legislations are made applicable to only those that come into existence once the said legislation has been enacted. Thus, once legislation gets enacted, the public can shape its conduct accordingly. However, Judgments are mostly retrospective. The legality of any action can be pronounced by the court only when that action has taken place. Bentham once said that "Do you know how they make it; just as man makes for his dog. When your dog does something, you want to break him off, you wait till he does it and beat him and this is how the judge makes law for men".

4. Nature of assignment: The nature of job and assignment of a legislator is such that he is in constant interaction with all sections of the society. Thereby, opportunities are available to him correct the failed necessities of time. Also, the decisions taken by the legislators in the Legislature are collective in nature. This is not so in the case of Judiciary. Sometimes, judgments are based on bias and prejudices of the judge who is passing the judgment thereby making it uncertain.

5. Form: Enacted Legislation is an abstract proposition with necessary exceptions and explanations whereas Judicial Pronouncements are usually circumscribed by the facts of a particular case for which the judgment has been passed. Critics say that when a Judge gives Judgment, he makes elephantiasis of law.

Advantage of Court Precedents over Legislation

1. Dicey said that "the morality of courts is higher than the morality of the politicians". A judge is impartial. Therefore, he performs his work in an unbiased manner.

2. Salmond said that "Case laws enjoy greater flexibility than statutory law. Statutory law suffers from the defect of rigidity. Courts are bound by the letter of law and are not allowed to ignore the law." Also, in the case of precedent, analogical extension is allowed. It is true that legislation as an instrument of reform is necessary but it cannot be denied that precedent has its own importance as a constitutive element in the making of law although it cannot abrogate the law.

3. Gray said that "Case law is not only superior to statutory law but all law is judge made law. In truth all the law is judge made law, the shape in which a statute is imposed on the community as a guide for conduct is the statute as interpreted by the courts. The courts put life into the dead words of the statute".

4. Sir Edward Coke said that, "the function of a court is to interpret the statute that is a document having a form according to the intent of them that made it".

5. Salmond said that "the expression will of the legislature represents short hand reference to the meaning of the words used in the legislature objectively determined with the guidance furnished by the accepted principles of interpretation".

ADMINISTRATION OF JUSTICE

Importance of Justice:

Salmond said that the 'Definition of law itself reflects that Administration of Justice has to be done by the state on the basis of rules and principles recognized'. Roscoe Pound believed that, it is the court that has to administer justice in a state. Both, Roscoe Pound and Salmond emphasized upon the Courts in propounding law. However, Roscoe Pound stressed more on the role of courts whereas Salmond stressed more on the role of the State.

Administration of Justice

There are two essential functions of every State:

a. War

b. Administration of Justice

Theorists have said that that if a state is not capable of performing the above mentioned functions, it is not a state. Salmond said that the Administration of Justice implies maintenance of rights within a political community by means of the physical force of the state. However, orderly society may be, the element of force is always present and operative. It becomes latent but it still exists.

Also, in a society, social sanction is an effective instrument only if it is associated with and supplemented by concentrated and irresistible force of the community. Social Sanction cannot be a substitute for the physical force of the state.

Origin and Growth of the concept of Administration of Justice

It is the social nature of men that inspires him to live in a community. This social nature of men demands that he must reside in a society. However, living in a society leads to conflict of interests and gives rise to the need for Administration of Justice. This is considered to be the historical basis for the growth of administration of justice. Once the need for Administration of Justice was recognized, the State came into being. Initially, the so called State was not strong enough to regulate crime and impart punishment to the criminals. During that point of time, the law was one of Private Vengeance and Self-Help.

In the next phase of the development of Administration of Justice, the State came into full-fledged existence. With the growth in the power of the state, the state began to act like a judge to assess liability and impose penalty on the individuals. The concept of Public Enquiry and Punishment became a reality. Thus, the modern Administration of Justice is a natural corollary to the growth in the power of the political state.

Advantages and Disadvantages of Legal Justice

a. Advantages of Legal Justice

i. Uniformity and Certainty: Legal Justice made sure that there is no scope of arbitrary action and even the judges had to decide according to the declared law of the State. As law is certain, people could shape their conduct accordingly

ii. Legal Justice also made sure that the law is not for the convenience of a particular special class. Judges must act according to the law. It is through this that impartiality has been secured in the Administration of Justice. Sir Edward Coke said that the wisdom of law is wiser than any man's wisdom and Justice represents wisdom of the community.

b. Disadvantages of Legal Justice

i. It is rigid. The rate of change in the society is always more rapid than the rate of change in the Legal Justice.

ii. Legal Justice is full of technicalities and formalities.

iii. Legal Justice is complex. Our society is complex too. Thus, to meet the needs of the society, we need complex laws.

iv. Salmond said that "law is without doubt a remedy for greater evils yet it brings with it evils of its own".

Classification of Justice

It can be divided into two parts

a. Private Justice: This is considered to be the justice between individuals. Private Justice is a relationship between individuals. It is an end for which the court exists. Private persons are not allowed to take the law in their own hands. It reflects the ethical justice that ought to exist between the individuals.

b. Public Justice: Public Justice administered by the state through its own tribunals and courts. It regulates the relationship between the courts and individuals. Public Justice is the means by which courts fulfill that ends of Private Justice.

Concept of Justice According to Law

Justice is rendered to the people by the courts. Justice rendered must always be in accordance with the law. However, it is not always justice that is rendered by the courts. This is because the judges are not legislators; they are merely the interpreters of law. It is not the duty of the court to correct the defects in law. The only function of the judges is to administer the law as made by the legislature. Hence, in the modern state, the administration of justice according to law is commonly considered as "implying recognition of fixed rules".

Civil and Criminal Justice

Civil Justice and Criminal follow from Public Justice and Private Justice. Looking from a practical standpoint, important distinctions lie in the legal consequences of the two. Civil Justice and Criminal Justice are administered by a different set of courts.

A Civil Proceeding usually results in a judgment for damages or injunction or restitution or specific decree or other such civil reliefs. However, a Criminal Proceeding usually results in punishment. There is myriad number of punishments ranging from hanging to fine to probation. Therefore, Salmond said that 'the basic objective of a criminal proceeding is punishment and the usual goal of a civil proceeding is not punitive'.

Theories of Punishment

a. Deterrent Theory: Salmond said that the deterrent aspect of punishment is extremely important. The object of punishment is not only to prevent the wrongdoer from committing the crime again but also to make him an example in front of the other such persons who have similar criminal tendencies. The aim of this theory is not to seek revenge but terrorize people. As per this theory, an exemplary punishment should be given to the criminal so that others may take a lesson from his experience.

Even in Manu Smriti, the Deterrent Theory is mentioned. Manu said "Penalty keeps the people under control, penalty protects them, and penalty remains awake when people are asleep, so the wise have regarded punishment as the source of righteousness". However, critics believe that deterrent effect not always leads to a decrease in crime.

b. Retributive Theory: In primitive societies, the punishment was mostly retributive in nature and the person wronged was allowed to have his revenge against the wrongdoer. The principle was "an eye for an eye". This principle was recognized and followed for a long time. Retributive theory believes that it is an end in itself, apart from a gain to the society and the victim, the criminal should meet his reward in equivalent suffering.

c. Theory of Compensation: This theory believes that punishment should not only be to prevent further crime but it should also exist to compensate the victim who has suffered at the hands of the wrongdoer. However, critics say that this theory is not effective in checking the rate of crime. This is because the purpose behind committing a crime is always economic in nature. Asking the wrongdoer to compensate the victim will not always lower the rate of crime though it might prove beneficial to the victim. Under this theory, the compensation is also paid to the persons who have suffered from the wrongdoing of the government.

d. Preventive Theory: This theory believes that the object of punishment is to prevent or disable the wrongdoer from committing the crime again. Deterrent theory aims at giving a warning to the society at large whereas under Preventive Theory, the main aim is to disable the wrongdoer from repeating the criminal activity by disabling his physical power to commit crime.

e. Reformative Theory: This theory believes that Punishment should exist to reform the criminal. Even if an offender commits a crime, he does not cease to be a human being. He might have committed the crime under circumstances which might never occur again. Thus, the main object of Punishment under Reformative theory is to bring about a moral reform in the offender. Certain guidelines have been prescribed under this theory.

While awarding punishment, the judge should study the characteristics and the age of the offender, his early breeding, the circumstances under which he has committed the offence and the object with which he has committed the offence. The object of the above mentioned exercise is to acquaint the judge with the exact nature of the circumstances so that he may give a punishment which suits those circumstances.

Advocates of this theory say that by sympathetic, tactful and loving treatment of the offenders, a revolutionary change may be brought about in their character. However, the Critics say that Reformative Theory alone is not sufficient; there must be a mix of Deterrent Theory and Reformative Theory in order to be successful. Critics believe that in a situation of deadlock between the two theories, the Deterrent Theory must prevail.

Distinction between Deterrent Theory and Reformative Theory

1. Reformative Theory stands for the reformation of the convict but the Deterrent Theory aims at giving exemplary punishment so that the others are deterred from following the same course of action.

2. Deterrent Theory does not lead to a reformation of the criminal as it imposes harsh punishments. Whereas, Reformative Theory believes that if harsh punishment is inflicted on the criminals, there will be no scope for reform.

3. Deterrent Theory believes that the punishment should be determined by the character of the crime. Thus, too much emphasis is given on the crime and too little on the criminal. However, Reformative Theory takes into consideration the circumstances under which an offence was committed. Reformative Theory further believes that every effort should be made to give a chance to the criminal to improve his conduct in the future.

Kinds of Punishment

a. **Capital Punishment**: This is one of the oldest forms of punishments Even our Penal Code prescribes this punishment for certain crimes. A lot of countries have either abolished this punishment or are on their way to abolish it. Indian Judiciary has vacillating and indecisive stand on this punishment. There have been plethora of cases where heinous and treacherous crime was committed yet Capital Punishment was not awarded to the criminal.

b. **Deportation or Transportation**: This is also a very old form of punishment. It was practiced in India during the British Rule. The criminal is put in an isolated place or in a different society. Critics of this punishment believe that the person will still cause trouble in the society where he is being deported.

c. **Corporal Punishment**: Corporal punishment is a form of physical punishment that involves the deliberate infliction of pain on the wrongdoer. This punishment is abolished in our country but it exists in some Middle Eastern Countries. Critics say that it is highly inhuman and ineffective.

d. **Imprisonment**: This type of punishment serves the purpose of three theories, Deterrent, Preventive and Reformative.

   i. Under Deterrent Theory, it helps in setting an example.

   ii. It disables the offender from moving outside, thus serving the purpose of Preventive Theory.

   iii. If the government wishes to reform the prisoner, it can do so while the person is serving his imprisonment, thus serving the purpose of Reformative Theory.

e. **Solitary Confinement**: Solitary confinement is a form of imprisonment in which a prisoner is isolated from any human contact. It is an aggravated form of punishment. It is said that it fully exploits and destroys the sociable nature of men. Critics say that it is inhuman too.

f. **Indeterminate Sentence**: In such a sentence, the accused is not sentenced for any fixed period. The period is left indeterminate while awarding and when the accused shows improvement, the sentence may be terminated. It is also reformative in nature.

g. **Fine**: It will be imposed when the wrong doer of any case which is of non-cognizable in nature and it should be done where the things can be retrieved which makes the offender not to commit the same offence.

INTERPRETATION OF STATUTES

Statutory Interpretation

1. **Rule of Literal Construction:** 'The first and most elementary rule of construction is that it is to be assumed that the words and phrases of technical legislations are used in their technical meaning if they have acquired one, and otherwise in the ordinary meaning, and the second is that the phrases and sentences are to be constructed according to the rules of grammar'. Therefore, it is desirable to adhere to the words of the Act of the Parliament giving to them the sense which is their natural import in the order in which they are placed. The length and detail of modern legislation has undoubtedly reinforced the claim of Literal Construction as the only safe rule.

2. **Mischief Rule or Purposive Construction:** When the true intention of the legislature cannot be determined by the language of the statute in question, it is open to the court to consider the historical basis underlying the statute. The court may consider the circumstances that led to the introduction of the bill, also to the circumstances in which it became the law. However, when judges are allowed to probe into questions of policy in interpreting statutes, there is bound to be some uncertainty. It is maintained that the judges may look at the law prevailing before the enactment of the Act and the mischief in the law that the statute sought to remedy. The act is to be construed in such a manner as to suppress the mischief and advance the remedy. This rule is known as Mischief Rule. The Heydon's Case laid down following considerations while construing an Act:

a. What was the common law before the making of the Act?

b. What was the mischief or defect for which the common law did not provide?

c. What remedy the Parliament hath resolved and appointed to cure the disease?

d. What is the true reason of the remedy?

And then the office of all the judges is always to make such construction as shall suppress the mischief and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and pro private commando, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, pro bono public.

In the case Smith -Vs- Hughes, Lord Justice Parker tried to find out mischief in the Street Offences Act, 1959. Under the Street Offences Act, it was a crime for prostitutes to "loiter or solicit in the street for the purposes of prostitution". The defendants were calling to men in the street from balconies and tapping on windows. They claimed they were not guilty as they were not in the "street". The judge applied the mischief rule to come to the conclusion that they were guilty as the intention of the Act was to cover the mischief of harassment from prostitutes.

3. **Golden Rule:** It is a modified version of the Rule of Literal Construction. Although it is useful to adhere to the literal rule of construction, yet if the ordinary meaning is at variance with the intention of the legislature, it is to be collected from the statute itself. If it leads to manifest absurdity or repugnance, the language may be varied to avoid such inconvenience. Secondly, if the language is capable of more than one interpretation, one ought to discard the more natural meaning if it leads to absurdity and adopt that interpretation that leads to a practicable and reasonable result. Therefore, court when faced with two possible constructions of legislative language, looks at the result by adopting each of the alternatives in the quest for ascertaining the true intention of the parliament. Thus, the Golden Rule is that the words of a statute must prima facie be given their ordinary meaning "unless it can be shown that the legal context in which the words are used requires a different meaning".

4. **Construction ut res magis valeat quam pereat:** The Courts strongly lean against a construction which reduces the statute to a futility. A statute or any enacting provision therein must be so construed as to make it effective and operative ". It is an application of this principle that courts while pronouncing upon the constitutionality of a statute start with a presumption in favour of constitutionality and prefer a construction which keeps the statute within the competence of the legislature. Where alternative constructions are equally open that alternative is to be chosen which will be consistent with the smooth working of the system which the statute purports to be regulating; and that alternative is to be rejected which will introduce uncertainty, friction or confusion into the working of the system. Therefore, in accordance with these principles, the courts should avoid interpretations which would leave any part of the law to be interpreted without affect. The courts will not narrow down the enactments but it may give a wide sense to the words in the statute.

5. **Rule of Beneficial Construction:** If a section in a remedial statute is reasonably capable of two constructions that construction should be preferred which furthers the policy of the act and is more beneficial to those in whose interest the act may have been passed; and the doubt, if any, should be resolved in their favour. So, in case of an exception which curtails the operation of beneficent legislation, the court, in case of doubt, would construe it narrowly so as not to unduly expand the area or scope of operation. The court will also not readily read words which are not there and introduction of which will restrict the rights of persons for whose benefit the statute is intended. The construction of a statute must not so strain the words as to include cases plainly omitted from the natural meaning of the language. Therefore, Beneficial Construction is a way of relaxing the strict principles of interpretation and that is the reason why it is called beneficial construction.

6. **Restricted Construction:** Before adopting any proposed construction of a passage susceptible of more than one meaning, it is important to consider the effects or consequences which would result from it, for they often point out the real meaning of the words. There are certain objects which the legislature is presumed not to intend, and a construction which would lead to any of them is therefore to be avoided. It is not infrequently necessary, therefore, to limit the effect of the words contained in an enactment (especially general words), and sometimes to depart, not only from their primary and literal meaning, but also from the rules of grammatical construction in cases where it seems highly improbable that the words in their wide primary or grammatical meaning actually express the real intention of the legislature. It is regarded as more reasonable to hold that the legislature expressed its intention in a slovenly manner, than that a meaning should be given to them which could not have been intended. Sometimes the meaning of words is so plain that effect must be given to them regardless of the consequences; but more often a construction should be adopted with due regard to the consequences which must follow it.

7. **Construction to avoid collision with other provisions:** If two sections of an Act cannot be reconciled, as they may be absolute contradiction, it is often said that the last must prevail. But this should be accepted only in the last resort. "It is not doubt true that if two sections of an Act of Parliament are in truth irreconcilable, then prima facie the latter will be preferred. But these are the arguments of the last resort. The first duty of the court must be, if the result is fairly possible, to give effect to the whole expression of the parliamentary intention".

8. **Generalia Specialibus non derogant:** "Generalia specialibus non derogant" literally means "the general does not detract from the specific". Where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so. If a special provision is made on a certain matter, that matter is excluded from the general provision. Apart from resolving conflict between two provisions in the Act, the principle can also be used for resolving a conflict between a provision in the Act and a rule made under the Act.

9. General Clauses Act, 1897: The General Clauses Act, 1897, is a consolidating and amending act. The purpose of the act is to avoid superfluity and a repetition of language; and to place in a single Act, provisions as regards definitions of words and legal principles of interpretation which would otherwise have to be incorporated in many different Acts and Regulations. The definition and the rules of interpretation contained in the General Clauses Act have to be read in every Statute governed by it, provided the statute does not contain anything repugnant to them in the subject or context or does not exhibit a different intention. The Act is also applicable for interpretation of the Constitution.

Interpretative Process

Hermeneutics: Hermeneutics could be defined as a constructive process of Interpretation. This Constructive Process comprises of Theories that are universally accepted in the interpretative process.

Negative Hermeneutics Process: It starts from the assumption that very notion of Universal Valid Interpretation is not tenable.

Hans-Georg Gadamer's Approach:

He said that Statutory Interpretation involves creative policy making by judges and the courts figure out the answers that were put in the statute by the enacting legislature.

"We are the products of our history. We can never know historical work as it originally appeared to its contemporaries. It is not possible to ascertain the intention of the author or the original context of production of that historical work. These works pass through endless stages of changing interpretations, which gets richer and more complex as the time passes."

Gadamer claims that it is not really we who address the texts of tradition, but the traditional texts that address us. Our conceptions, prejudices, cultural horizon etc. are brought into the open in the encounter with the past.

The authority of a text is recognized by engaging with it in textual interpretation and explication, thereby entering into a dialogical relationship with the past. This movement of understanding has been termed by Gadamer as the "fusion of horizons". While interpreting, at first, the text appears alien, however with time we gain a better and more profound understanding not only of text but also of ourselves. But, in order to obtain fusion of horizons, one must engage with the text in a productive manner. There is no short cut trick for this. It is more like a tacit capacity, which we acquire by following the example of others. The knowledge at stake can only be exhibited in the form of path-breaking judgments and interpretations. However, the interpreter can never completely recreate or understand the text's horizon. Interpreter's goal is to find a common ground and such common ground is possible because the 'temporal gulf' is filled with traditions and experiences that inform the current horizon and link it with the previous one.

Gadamer further believed that "time is no longer primarily a gulf to be bridged, because it separates, but it is actually the supportive ground of process in which the present is rooted. Hence temporal distance is not something that must be overcome. It is not a yawning abyss, but is filled with the continuity of custom and tradition, in the light of which all that is handed down presents itself to us".

He also said that the one would not understand a legal text in abstract without application of the text to a specific problem. Finding the meaning of any provision in a Statute is not a mechanical operation. It often involves interpreter's choice among several competing answers. Therefore, this creative supplementing of interpreting the law is a task that is reserved for the judges.

Pragmatic Hermeneutics: This is also a type of constructive interpretation. It is mostly prevalent in the American School of Jurisprudence. William James and Charles Pierce are considered to be its pioneers. This branch of hermeneutics holds that Legal Interpretation is interpretive and revealing in character and it is different from other types of interpretation such as:

1. Scientific Interpretation - This is generally done by the scientists to give meaning to the phenomenon they observe.

2. Conversational Interpretation - It is a process by which the readers and the listeners understand their communicative utterances and a standard view of this kind of interpretation holds that the listener or the reader understands by duplicating or substituting themselves with the propositional attitude of the author. This method is commonly used in literature.

Ronald Dworkin also followed the line of Gadamer in Interpretative Process.

Pragmatic Hermeneutics and Dworkin

Dworkin said that the most important aspect of legal interpretation is creative or constructive interpretation. This form of legal interpretation has 2 characters:

1. Legal Practice
2. Legal Concepts

The need for creative interpretation arises when the community develops a complex interpretative attitude towards the rules and the interpretation is called for when a text or a practice is regarded as authoritative. The legal practice with regard to a statute in a legal system is interpretative precisely because it grants authority to the past political decisions that are represented by the statute.

Dworkin did not agree with many jurists. According to a lot of jurists, jurisprudence is not interpretative because there is no point in making the practices adopted by the judges authoritative for legal theories. However, Dworkin said that the general theory propounded by a legal philosopher involves a constructive interpretation because the philosopher tries to show the legal practice as a whole in its best light to achieve equilibrium between the legal practice and the justification of that practice. Hence, according to Dworkin, no firm line divides Jurisprudence from adjudication or any other aspect of interpretation such as Legal Practice. Thus, we see that there are three kinds of interpretations liable for the Interpretative Process.

1. The text that judges and others within a particular legal culture are obligated to interpret and obey.
2. The text created by judges within some particular legal culture which consists of judicial practices in construing statutes and constitutions.
3. The work of prior legal theories, some of whom seek to describe the judge's jurisprudence within some particular legal system and others who seek to do non-culture specific or general jurisprudence.

Neo-Pragmatism - This version of Pragmatism was developed by Richard Rorty. It was subsequently carried forward by Stanley Fish. Previously, Pragmatic Hermeneutics believed in the dualism of 'mind and matter' and 'soul and body'. But, this dualism has slowly vanished. Now, it is based more on interpreting in a practical manner. For a pragmatist, interpretation derives meaning not from the antecedents and perception but from the consequences of action.

While developing neo-pragmatism, Stanley Fish gave a new formula for interpretation. He said that, "Action is guided by the tacit knowledge and not by application of general rules, principles or theories". Thus, metaphysical theories are not essential for activities like judging. A judge is not a theorist of any kind while he is deciding a case.

It is in this context that Fish advanced his theory of "Interpretative Community". Fish believed that any written word derives its meaning from the society in which it is used. A Statute comes into operation in a society once it has been enacted by the legislature. Within this society, a community emerges that is so closely associated with the working of the said statute that it actually imparts meaning to the provisions of

that Statute. Stanley Fish believed that this meaning should be the governing factor in interpretation of the said Statute by the courts. In Stanley Fish's theory, the Community that gives the 'controlling meaning' to the Statute is called as the Interpretative Community.

However, critics of this theory say that if there is more than one Interpretative Community at same point of time, then it would lead to a lot of confusion in the mind of the judges as to the interpretation of said Statute.

Ratio Decidendi

The literal meaning of 'ratio decidendi' is "the reason for deciding". Black's Law Dictionary has provided many definitions of this term. Let us discuss some of them.

1. The principle or rule of law on which a court's decision is founded.
2. The rule of law on which a later court thinks that a previous court founded its decision.
3. It is a general rule without which a case must have been decided otherwise.
4. The phrase 'the ratio decidendi of a case' is slightly ambiguous. It may mean either (1) the rule that the judge who decided the case intended to lay down and apply to the facts, or (2) the rule that a later concedes him to have had the power to lay down".
5. There are two steps involved in the ascertainment of ratio decidendi. First, it is necessary to determine the facts of the case as seen by the judge; secondly, it is necessary to discover which of those facts were treated as material by the judge".

Goodhart's View on ratio decidendi

However, Goodhart did not accept the classical definitions mentioned above. His criticisms were:

a. That every case must contain an ascertainable principle of law, even though there may be no opinion delivered by the judge.

b. That the statement of law may be too wide or too narrow.

While defending his definition, he said that "the whole point of my article was based on the proposition that every case must contain a binding principle, but that this binding principle is not necessarily to be found in the statement of the law made by the judge". He also said that "the judges must interpret statutes, but it would be misleading to say that they are therefore constructing them".

He even said to the extent that "the phrase 'ratio decidendi' is misleading because the reason which the judge gives for his decision is not binding and may not correctly represent the principle".

He suggested that the 'principle of the case' could be found by determining

a. The facts treated by the judge as material, and

b. His decision was based on them.

The judge, therefore, reaches a conclusion upon the facts as he sees them. It is on these facts that he bases his judgment, and not on any others. It follows that our task in analysing a case is not to state the facts and the conclusion, but to state the material facts as seen by the judge and his conclusion based on them. It is by his choice of the material facts that the judge creates law. Thus, Goodhart placed all the emphasis on the material facts as seen by the judge, and not on the material facts as seen by anyone else.

Current Trends in the English Legal System

Most of contemporary English authors are of the view that it is not the decision that binds (or is overruled); it is the rule of law contained within the decision. This element of the decision is termed as the ratio decidendi, and not every statement of law made by a judge in the case forms part of this ratio.

Every decision contains the following basic ingredients:

1. Findings or material facts, both direct and inferential;
2. Statements of the Principles of law applicable to the legal problems disclosed by the facts; and
3. A judgment (or judgments) based on the combined effect of 1 and 2.

The inferential finding of fact is the inference that the judge draws from the direct or perceptible facts. For example, negligence may be inferred from the direct facts of the speed of a vehicle, the length of skid marks, and the state of the road. Negligence is thus as inferential finding of fact.

For the purposes of the parties, point number 3 is the material element in the decision, for it is what ultimately determines their rights and liabilities in relation to the subject matter of the case. However, for the purpose of the doctrine of precedent, point number 2 is the vital element in the decision, and it is this that is termed the ratio decidendi. Thus the ratio decidendi may be defined as the statement of law applied to the legal problems raised by the facts, upon which the decision is based.

Not every statement of law in a judgment is binding; only those statements that based upon the facts and upon which the decision is based are binding. Any other statement of law is superfluous and is described as obiter dictum (it means 'by the way'). It should not, however be concluded from this that obiter dicta are of little or no weight or importance.

Obiter Dicta

There are two types of obiter dicta.

1. A statement of law is regarded as obiter if it is based upon facts that either was not found to be material or was not found to exist at all.
2. Even where a statement of law is based on the facts as found, it will be regarded as obiter if it does not form the basis of the decision. A statement of law made in support of a dissenting judgment is an obvious example.

Although obiter dicta lack binding authority, they may nevertheless have a strong persuasive influence.

Important Supreme Court Cases

1. Krishna Kumar & another Vs. Union of India & Others:

The ratio decidendi has to be ascertained by an analysis of the facts of the case and the process of reasoning involving the major premise consisting of a pre-existing rule of law, either statutory or judge-made, and a minor premise consisting of the material facts of the case under immediate consideration. If it is not clear, it is not the duty of the court to spell it out with difficulty in order to be bound by it. Therefore, we find that it is the ratio decidendi which is a binding precedent. The other material part of a judgment is the Obiter Dictum. However, in the present article we are not concerned with it.

2. State of Orissa Vs. Sudhanshu Shekhar Mishra:

A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it.

3. Dalveer Singh Vs. State of Punjab:

Even where the direct facts of an earlier case appear to be identical to those of the case before the Court, the Judge is not bound to draw the same inference as drawn in the earlier case.

4. Fazlunbi Vs. K. Khader Vali & Another:

Precedents of the Supreme Court are not to be left on the shelves. Neither could they be brushed aside saying that precedents are an authority only "on its actual facts". Such devices are not permissible for the High Court when decisions of the Supreme Court are cited before them not merely because of the jurisprudence of precedents, but because of the imperatives of Article 141.

5. A.R. Antulay Vs. R.S. Nayak & Another:

Per incuriam are those decisions given in ignorance or forgetfulness of some inconsistent statutory provision or some authority binding on the Court concerned so that in such cases some part of the decision or some step in the reasoning on which it is based is found, on that account to be demonstrably wrong. If a decision is given per incuriam, the Court can ignore it.

6. Arnit Das Vs. State of Bihar:

A decision not expressed, not accompanied by reasons and not proceeding on conscious consideration of an issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141. That which has escaped in the judgement is not ratio decidendi in the technical sense when a particular point of law was not consciously determined (this is the rule of sub-silentio).

Let us discuss the three famous tests used by the courts to ascertain ratio decidendi.

1. Prof. Goodhart's Test
2. Prof. Wambaugh's Test
3. Lord Halsbury's Test

Prof. Goodhart's Test

In 1929, Prof. Goodhart had argued that the ratio of a case must be found in the reasons for the decision and that there is no necessary connection between the ratio and the reasons. He laid down following guidelines for discovering the ratio decidendi of a case:

1. Ratio decidendi must not be sought in the reasons on which the judge has based his decision.
2. The reasons given by the judge in his opinion are of peculiar importance, for they may furnish us with a guide for determining which facts he considered material and which immaterial.
3. A decision for which no reasons are given does not necessarily lack a ratio; furthermore, the reasons offered by a court in reaching a decision might be considered inadequate or incorrect, yet the court's ruling might be endorsed in later cases, a 'bad reason may often make good law'.
4. Thus, ratio decidendi is whatever facts the judge has determined to be the material facts of the case, plus the judge's decision was based on those facts. It is by his choice of the material facts that the judge creates law.

If we accept Prof. Goodhart's conception of ratio decidendi, we could explain why hypothetical instances are unlikely to be accorded the same weight as judicial precedents as hypothetical instances are by definition obiter dicta. Also, this conception of ratio decidendi links the doctrine of precedent with the principle that like cases be treated alike. Any court which considers itself bound by precedent would come to the same conclusion as was reached in a prior case unless there is in the case some further fact which it is prepared to treat as material, or unless fact considered material in the previous case is absent.

Prof. Wambaugh's Test

The Inversion Test propounded by Prof. Wambaugh is based on the assumption that the ratio decidendi is a general rule without which a case must have been decided otherwise. Inversion Test is in form of a dialogue between him and his student. He gave following instructions for this:

1. Frame carefully the supposed proposition of law.
2. Insert in the proposition a word reversing its meaning.
3. Inquire whether, if the court had conceived this new proposition to be good and had had it in mind, the decision could have been the same.
4. If the answer is affirmative, then, however excellent the Original Proposition may be, the case is not a precedent for that proposition.
5. But if the answer be negative, the case is a precedent for the Original Proposition and possibly for other propositions also.

Thus, when a case turns only on one point the proposition or doctrine of the case, the reason for the decision, the ratio decidendi, must be a general rule without which the case must have been decided otherwise. A proposition of law which is not ratio decidendi under the above test must, according to Prof. Wambaugh, constitute a mere dictum.

However, Rupert Cross criticized the Inversion Test on the ground that "the exhortation to frame carefully the supposed proposition of law and the restriction of the test to cases turning on only one point rob it of most of its value as a means of determining what was the ratio decidendi of a case, although it has its uses as a means of ascertaining what was not ratio".

Thus, the merit of Wambaugh's test is that it provides what may be an infallible means of ascertaining what not ratio decidendi is. It accords with the generally accepted view that a ruling can only be treated as ratio if it supports the ultimate order of the court.

Lord Halsbury's Test

The concept of precedent has attained important role in administration of justice in the modern times. The case before the Court should be decided in accordance with law and the doctrines The mind of the Court should be clearly reflecting on the material in issue with regard to the facts of the case. The reason and spirit of case make law and not the letter of a particular precedent.

Lord Halsbury explained the word "ratio decidendi" as "it may be laid down as a general rule that that part alone of a decision by a Court of Law is binding upon Courts of coordinate jurisdiction and inferior Courts which consists of the enunciation of the reason or principle upon which the question before the Court has really been determined. This underlying principle which forms the only authoritative element of a precedent is often termed the ratio decidendi".

In the famous case of Quinn Vs. Leathem, Lord Halsbury said that:

"Now, before discussing the case of Allen Vs. Flood and what was decided therein, there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all." Thus, according to Lord Halsbury, it is by the choice of material facts that the Court creates law.

LEGAL CONCEPTS

Legal Rights and Duties

Legal rights are, clearly, rights which exist under the rules of legal systems or by virtue of decisions of suitably authoritative bodies within them. According to positivists, legal rights are essentially those interests which have been legally recognized and protected. John Austin made a distinction between legal rights and other types of rights such as Natural rights or Moral rights. By legal rights, he meant rights which are creatures of law, strictly or simply so called. He said that other kind of rights are not armed with legal sanction and cannot be enforced judicially.

On the other hand, Salmond said that a legal right is an interest recognized and protected by rule of law and violation of such an interest would be a legal wrong. Salmond further said that:

1. A legal duty is an act that obliges to do something and act, the opposite of which would be a legal wrong.
2. Whenever law ascribes duty to a person, a corresponding right also exists with the person on whom the duty is imposed.
3. There are two kinds of duties are Moral Duty and Legal Duty.
4. Rights are said to be the benefits secured for persons by rules regulating relationships.

Salmond also believed that no right can exist without a corresponding duty. Every right or duty involves a bond of legal obligation by which two or more persons are bound together. Thus, there can be no duty unless there is someone to whom it is due; there can be no right unless is someone from whom it is claimed; and there can be no wrong unless there is someone who is wronged, that is to say, someone whose right has been violated. This is also called as vinculum juris which means "a bond of the law". It is a tie that legally binds one person to another.

On the other hand, Austin said that Duties can be of two types:

a. Absolute Duty – There is no corresponding right existing.
b. Relative Duty – There is a corresponding right existing in such duties.

Austin conceives this distinction to be the essence of a right that it should be vested in some determinate person and be enforceable by some form of legal process instituted by him. Austin thus starts from the assumption that a right cannot vest in an indeterminate, or a vague entity like the society or the people. The second assumption with which Austin starts is that sovereign creates rights and can impose or change these rights at its will. Consequently, the sovereign cannot be the holder of such rights.

According to Salmond, there are five important characteristics of a Legal Right:

1. It is vested in a person who may be distinguished as the owner of the right, the subject of it, the person entitled, or the person of inherence.

2. It avails against a person, upon who lays the correlative duty. He may be distinguished as the person bound, or as the subject of duty, or as the person of incidence.

3. It obliges the person bound to an act or omission in favour of the person entitled. This may be termed the content of the right.

4. The act or omission relates to something (in the widest sense of that word), which may be termed the object or subject matter of the right.

5. Every legal right has a title, that is to say, certain facts or events by reason of which the right has become vested in its owner.

Some jurists hold that a right may not necessarily have a correlative duty. They say that legal rights are legal concepts and these legal concepts have their correlatives which may not necessarily be a duty.

Roscoe Pound also gave an analysis of such legal conceptions. He believed that legal rights are essentially interests recognized and administered by law and belong to the 'science of law' instead of 'law'. He proposed that such Rights are conceptions by which interests are given form in order to secure a legal order.

Salmond on Rights and Duties

Salmond said that a perfect right is one which corresponds to a perfect duty and a perfect duty is one which is not merely recognized by law but also enforced by law. In a fully developed legal system, there are rights and duties which though recognized by law are not perfect in nature. The rights and duties are important but no action is taken for enforcing these rights and duties. The rights form a good ground for defence but duties do not form a good ground for action. However, in some cases, an imperfect right is sufficient to enforce equity.

Classifications of rights are as follows:

1. Positive and Negative Rights
2. Real and Personal Rights
3. Right in rem and right in personam
4. Proprietary and Personal Rights
5. Perfect and Imperfect Rights
6. Vested and Contingent Rights
7. Primary and Sanctioning Rights
8. Principal and Accessory Rights
9. Rights in re propria and rights in re aliena
10. Public and Private Rights
11. Legal and Equitable Rights

Positive and Negative Rights

	Positive Rights	Negative Rights
1	A positive right corresponds to a corresponding duty and entitles its owners to have something done for him without the performance of which his enjoyment of the right is imperfect.	Negative rights have negative duties corresponding to them and enjoyment is complete unless interference takes place. Therefore, majority of negative rights are against the entire world.
2	In the case of positive rights, the person subject to the duty is bound to do something.	Whereas, in case of negative rights, others are restrained to do something.
3	The satisfaction of a positive right results in the betterment of the position of the owner.	Whereas in case of a negative right, the position of the owner is maintained as it is.
4	In case of positive rights, the relation between subject and object is mediate and object is attained with the help of others.	Whereas in case of negative rights, the relation is immediate, there is no necessity of outside help. All that is required is that others should refrain from interfering case of negative rights.
5	In case of positive rights, a duty is imposed on one or few individuals.	In case of negative rights, the duty is imposed on a large number of persons.

Real and Personal Rights

	Real Rights	Personal Rights
1	A real right corresponds to a duty imposed upon persons in general.	A personal right corresponds to a duty imposed upon determinate individuals.
2	A real right is available against the whole world.	A personal right is available only against a particular person.
3	All real rights are negative rights. Therefore, a real right is nothing more than a right to be left alone by others. It is merely a right to their passive non-interference.	Most personal rights are positive rights although in a few exceptional cases they are negative.
4	In real right, the relation is to a thing. Real rights are derived from some special relation to the object.	In personal right, it is the relation to other persons who owe the duties which is important. Personal rights are derived from special relation to the individual or individuals under the duty.
5	Real rights are right in rem.	Personal rights are right in personam.

Right in rem and Right in personam

	Right in rem	Right in personam
1	It is derived from the Roman term'actio in rem'. An action in rem was an action for the recovery of dominium.	It is derived from the Roman term'action in personam'. An action in personam was one for the enforcement of obligatory.
2	The right protected by an action in rem came to be called jus in rem.	A right protected by action in personam came to be called as jus in personam.
3	Jus in rem means a right against or in respect of a thing.	Jus in personam means a right against or in respect of a person.
4	A right in rem is available against the whole world.	A right in personam is available against a particular individual only.

Proprietary and Personal Rights

	Proprietary Rights	Personal Rights
1	Proprietary rights means a person's right in relation to his own property. Proprietary rights have some economic or monetary value.	Personal rights are rights arising out of any contractual obligation or rights that relate to status.
2	Proprietary rights are valuable.	Personal rights are not valuable.
3	Proprietary rights are not residual in character. after proprietary rights have been subtracted.	Personal rights are the residuary rights which remain
4	Proprietary rights are transferable.	Personal rights are not transferable.
5	Proprietary rights are the elements of wealth for man.	Personal rights are merely elements of his well-being.
6	Proprietary rights possess not merely judicial but also economic importance.	Personal rights possess merely judicial importance.

Perfect and Imperfect Rights

	Perfect Rights	Imperfect Rights
1	Perfect right is one which corresponds to a perfect duty	Imperfect rights are the rights which has no corresponding duty
2	It is recognized and enforced by law	It is not enforced by law

Vested and Contingent Rights

	Vested Rights	Contingent Rights
1	A right vests when all the facts have occurred which must by law occur in order for the person in question to have the right.	A right is contingent when some but not all of the vestitive facts have occurred.
2	It crested immediate interest and it is transferable and heritable	It does not create immediate interest and it can be defeated when the required facts have not occurred i.e., a right which is contingent upon the happening of some event.

Primary and Sanctioning Rights

	Primary Rights	Sanctioning Rights
1	Primary rights are performing something lawful primary rights	Sanctioning rights originates from the violation of
2	It can either be a right in rem or right in personam	It is only a right in personam

Principal and Accessory Rights

	Principal Rights	Accessory Rights
1	This right is vested in a person under the law out of the principal right	It is the secondary right which is connected to or arises

Rights in re propria and right in re aliena

	Rights in re propria	Rights in re propria
1	It is the right over one's own property encumbrances	It is the right over the property of someone else i.e.,

Private and Public rights

	Private Rights	Public Rights
1	Right vested with individuals are called private rights	Right vested with the State and it is possessed by every member of public

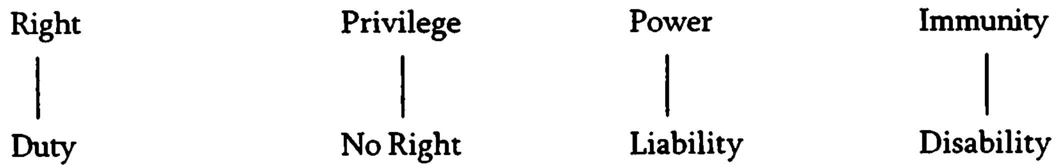
Legal and Equitable Rights

	Legal Rights	Equitable Rights
1	It is recognised by the Courts of Common Law	It is recognized solely in Court of Chancery
2	It exists under the law or substitute of law	It exists under the grace or supplement of law
3	If both legal and equitable rights coincides then the legal right will prevail	If both legal and equitable rights coincides then the legal right will defeat the equitable right

Hohfeld's System of Fundamental Legal Concepts or Jural Relations

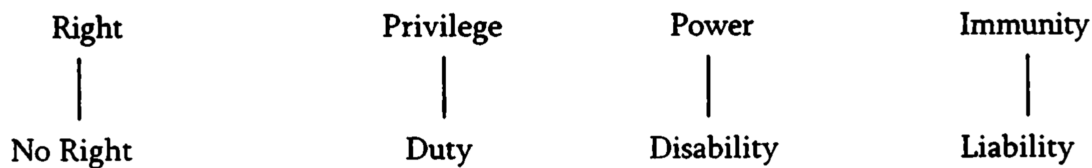
Jural Correlatives

Jural Correlatives represent the presence of in another. Thus, right is the presence of duty in another and liability is the presence of power in another.



Jural Opposites

Jural Opposites represent the absence of in oneself. Thus, no right is the absence of right in oneself and disability is the absence of power in oneself.



Conclusion derived from Hohfeld's System

a. As a person's right is an expression of a wish that the other person against whom the right or claim is expressed has a duty to obey his right or claim.

b. A person's freedom is an expression of a right that he may do something against other person to change his legal position.

c. A person's power is an expression of a right that he can alter other person's legal position.

d. A person's disability is an expression of a wish that another person must not alter the person's legal position.

OWNERSHIP

Salmond on Ownership

Ownership denotes the relationship between a person and an object forming the subject-matter of his ownership. It consists in a complex of rights, all of which are rights in rem, being good against the entire world and not merely against specific persons.

Incidence of Ownership

1. The owner has the right to possess things that he owns.
2. The owner normally has a right to use or enjoy the thing owned, the right to manage it, the right to decide how it shall be used and the right of income from it. However, Right to possess is not a right strictu sensu because such rights are in fact liberties as the owner has no duty towards others and he can use it in any way he likes and nobody can interfere with the enjoyment of his ownership.
3. The owner has the right to consume, destroy or alienate the things. The right to consume and destroy is again straight forward liberties. The right to alienate i.e. the right to transfer the existing rights involves the existence of power.
4. Ownership has the characteristic of being 'indeterminate in duration' and Ownership has a residuary character. Salmond contrasted the rights of the owner with the lesser rights of the possessor and encumbrancer by stating that "the owner's rights are indeterminate and residuary in a way in which these other rights are not".

Austin's Concept of Ownership

Ownership or Property may be described accurately enough, that "The right to use or deal with some given subject, in a manner, or to an extent, which, though is not unlimited, is indefinite". Now in this description it is necessarily implied, that the law will protect or relieve the owner against every disturbance of his right on the part of any other person. Changing the expression, all other persons are bound to forbear from acts which would prevent or hinder the enjoyment or exercise of the right.

Austin further said that "Ownership or Property, is, therefore, a species of Jus in rem. For ownership is a right residing in a person, over or to a person or thing, and availing against other persons universally or generally. It is a right implying and exclusively resting upon obligations which are at once universal and negative".

Dias on Ownership

After referring to the views of Salmond and other Jurists, Dias came to the conclusion that "a person is owner of a thing when his interest will outlast the interests of other persons in the same thing". This is substantially the conclusion reached by many modern writers, who have variously described ownership as the 'residuary', the 'ultimate', or 'the most enduring interest'.

According to Dias, an owner may be divested of his claims, etc., to such an extent that he may be left with no immediate practical benefit. He remains owner nonetheless. This is because his interest in the thing, which is ownership, will outlast that of other persons, or if he is not presently exercising any of his claims, etc., these will revive as soon as those vested in other persons have come to an end.

In the case of land and chattels, if the owner is not in possession, "ownership amounts to a better right to obtain the possession than that of the defendant". It is 'better' in that it lasts longer. It is apparent that the above view of Dias substantially agrees with that of Salmond. According to Dias it is the outlasting interest and according to Salmond, ownership has the characteristic of being indeterminate in duration and residuary in nature.

Types of Ownership

1. Corporal and Incorporal Ownership

	Corporal Ownership	Incorporal Ownership
1	Corporeal Ownership signifies ownership in a physical object.	Incorporeal Ownership is a right or an interest.
2	Corporeal things are things which can be perceived by senses.	Incorporeal things cannot be perceived by senses and are in tangible.

2. Sole and Co-ownership

	Sole Ownership	Co-ownership
1	When an individual owns, it is sole ownership	When there is more than one person who owns the property, then it is co-ownership

3. Trust and Beneficial ownership

	Trust Ownership	Beneficial Ownership
1	There is no co-ownership.	There can be co-ownership.
2	The person on whom the responsibility lies for the benefit of the others is called the Trustee.	The person for whom the trust is created is called the Beneficiary.
3	The trustee has no right to the beneficial enjoyment of the property.	The Beneficiary has the full rights to enjoy the property.
4	Ownership is limited. A trustee is merely an agent upon whom the law has conferred the duty of administration of property.	Ownership is complete.
5	Trusteeship may change hands.	Beneficial Owners remain the same.

4. Legal and Equitable Ownership

	Legal Ownership	Equitable Ownership
1	Legal ownership is that ownership which has its basis in common law.	Equitable ownership comes from equity divergence of common law. Thus, distinction between legal and equitable ownership is very thin.

5. Vested and Contingent Ownership

	Vested Ownership	Contingent Ownership
1	Ownership is vested when the title is perfect. perfect after fulfilment of certain condition.	Ownership is contingent when it is capable of being
2	Vested ownership is absolute.	Contingent ownership becomes vested when the conditions are fulfilled.

6. Absolute and limited Ownership

	Absolute Ownership	Limited Ownership
1	Ownership is absolute when possession, enjoyment, disposal are complete and vested without restrictions save as restriction imposed by law.	Limited Ownership is subjected to the limitations of use, disposal or duration.

POSSESSION

Salmond on Possession

Salmond said that in the whole of legal theory there is no conception more difficult than that of possession. The legal consequences which flow from the acquisition and loss of possession are many and serious. Possession, for example, is evidence of ownership; the possessor of a thing is presumed to be the owner of it, and may put all other claimants to proof of their title. The transfer of possession is one of the chief methods of transferring ownership. Therefore it is said to be that Possession is nine out of ten points of law.

Salmond also said that possession is of such efficacy that a possessor may in many cases confer a good title on another, even though he has none himself.

There are two elements of possession:

a. Corpus possessionis i.e., physically possess

b. Animus possidendi i.e., intention to possess

Corpus Possessionis:

The claim of the possessor must be effectively realized in the facts; that is to say, it must be actually and continuously exercised. The corpus possessionis consists in nothing more than the continuing exclusion of alien interference, coupled with ability to use the thing oneself at will. Actual use of it is not essential.

Animus Possidendi:

The intent necessary to constitute possession is the intent to appropriate to oneself the exclusive use of the thing possessed. It is an exclusive claim to a material object. Salmond made following observations in this regard.

1. It is not necessarily a claim of right.
2. The claim of the possessor must be exclusive.
3. The animus possidendi need not amount to a claim of intent to use the thing as owner.
4. The animus possidendi need not be a claim on one's own behalf.
5. The animus possidendi need not be specific, but may be merely general. It does not necessarily involve any continuous or present knowledge of the particular thing possessed or of the possessor's relation to it.

He also made a distinction between possession in fact and possession in law.

1. Possession may and usually does exist both in fact and in law. The law recognizes as possession all that is such in fact, and nothing that is not such in fact, unless there is some special reason to the contrary.
2. Possession may exist in fact but not in law. Thus the possession by a servant of his master's property is for some purposes not recognized as such by the law, and he is then said to have detention or custody rather than possession.
3. Possession may exist in law but not in fact; that is to say, for some special reason the law attributed the advantages and results of possession to someone who as a matter of fact does not possess. The possession thus fictitiously attributed to him is termed constructive.

In Roman law, possession in fact is called possessio naturalis, and possession in law as possessio civilis.

Corporeal and Incorporeal Possession

Corporeal Possession is the possession of a material object and Incorporeal Possession is the possession of anything other than a material object. Corporeal possession is termed in Roman law possessio corporis. Incorporeal possession is distinguished as possessio juris, the possession of a right, just as incorporeal ownership is the ownership of a right.

Salmond further said that "corporeal possession is clearly some form of continuing relation between a person and a material object. It is equally clear that it is a relation of fact and not one of right".

According to Salmond, the possession of a material object is the continuing exercise of a claim to the exclusive use of it. It involves two distinct elements, one of which is mental or subjective, the other physical or objective. The mental element comprises of the intention of the possessor with respect to the thing possessed, while the physical element comprises of the external facts in which this intention has realised, embodied, or fulfilled itself. The Romans called the mental element as animus and the subject element as corpus. The mental or subjective element is also called as animus possidendi, animus sibi habendi, or animus domini.

In Incorporeal Possession as well, the same two elements required, namely the animus and the corpus. In the case of incorporeal things, continuing non-use is inconsistent with possession, though in the case of corporeal things it is consistent with it.

Incorporeal possession is commonly called the possession of a right, and corporeal possession is distinguished from it as the possession of a thing. The distinction between corporeal and incorporeal possession is clearly analogous to that between corporeal and incorporeal ownership.

Corporeal possession, like corporeal ownership, is that of a thing; while incorporeal possession, like incorporeal ownership, is that of a right. In essence, therefore, the two forms of possession are identical, just as the two forms of ownership are.

Hence, Possession in its full compass and generic application means the continuing exercise of any claim or right.

Immediate and Mediate Possession

The possession held by one man through another may be termed mediate, while that which is acquired or retained directly or personally may be distinguished as immediate or direct.

There are three kinds of Mediate Possession:

1. Possession that is acquired through an agent or servant who claims no interest of his own.
2. The direct possession is in one who holds both on the actual possessor's account and on his own, but who recognizes the actual possessor's superior right to obtain from him the direct possession whenever he choose to demand it.
3. The immediate possession is in a person who claims it for him until sometime has elapsed or some condition has been fulfilled, but who acknowledges the title of another for whom he holds the thing, and to whom he is prepared to deliver it when his own temporary claim has come to an end.

Paton on Possession

Paton said that even though Possession is a concept of law still it lacks a uniform approach by the jurists. Some jurists make a distinction between legal and lawful possession. Possession of a thief is legal, but not lawful. In some cases, where possession in the popular sense is meant, it is easy to use some such term as physical control. Possession is also regarded as prima facie evidence of Ownership.

According to Paton, for English law there is no need to talk of mediate and immediate possession. The Bailee and the tenant clearly have full possession; Salmond's analysis may be necessary for some other systems of law, but it is not needed in English law.

Oliver Wendell Holmes and Von Savigny on Possesion

Savigny with other German thinkers (including Kant and Hegel) argued that "possession, in the eyes of the law, requires that the person claiming possession intend to hold the property in question as an owner rather than recognize the superior title of another person, so that in providing possessory remedies to lessees, Bailees, and others who lack such intentions, modern law sacrifices principle to convenience".

To this Holmes responded that he "cannot see what is left of a principle which avows itself inconsistent with convenience and the actual course of legislation. The first call of a theory of law is that it should fit the facts. It must explain the observed course of legislation. And as it is pretty certain that men will make laws which seem to them convenient without troubling themselves very much what principles are encountered by their legislation, a principle which defies convenience is likely to wait some time before it finds itself permanently realized."

Holmes also criticised Savigny and other German theorists by saying that "they have known no other system than the Roman". In his works, Holmes proved that the Anglo-American Law of Possession derived not from Roman law, but rather from pre-Roman German law.

One of Holmes's criticisms of the German theorists, signally including Savigny, is that they "have known no other system than the Roman, ' .6 and he sets out to prove that the Anglo-American law of possession derives not from Roman law, but rather from pre- Roman German law.

PERSON

The word "person" is derived from the Latin term "persona" which means "mask". Gray defines a person as "an entity to which rights and duties may be attributed"

Persons are of two kinds. They are:

1. Natural person
2. Legal person or Artificial person or Juristic person

1. Natural person:

A natural person is a human being capable of rights and duties. They are both person in fact and person in law.

2. Juristic Personality or Corporate Personality

Ethical Natural law philosophers of the 17th and 18th centuries as well as the metaphysical theorists of 19th century postulated the concept of will as an essential requirement for exercising legal right. They also believed that **personality is the subjective possibility of a rightful will.**

Legal personality is an artificial creation of law. Entities recognized by law are capable of being parties to a legal relationship. A natural person is a human being whereas "legal persons are artificial persons, such as a corporation, created by law and given certain legal rights and duties of a human being; a being, real or imaginary, which for the purpose of legal reasoning is treated more or less as a human being". All legal persons can sue or be sued.

Legal Status of Lower Animals

The only natural persons are human beings. According to salmond beasts are not persons, either natural or legal. They are merely things often the objects of legal rights and duties but never the subject of them. Although the beasts are incapable of legal rights and duties and their interests are not recognized by law but the legal history reveals that archaic codes contained provisions regarding punishment to animals if they were found guilty of homicide. Sutherland refers to certain instances where bulls were punished. If an ox gore a man or a woman that they die: then the ox shall be surely stoned and flesh shall not be eaten".In the ancient Hindu jurisprudence, killing of harmless animals like swans, squirrels, cows, bulls, etc. was made punishable with fine.Today, an animal cannot be punished but if it is extremely dangerous then only certain laws allow shooting down. In India, the cattle trespass act has been passed for animals doing trespass.

A beast is incapable of legal rights as of legal duties, for its interests receive no recognition from the law. However, there are two cases in which beasts may possess legal rights. In the first place, cruelty to animals is a criminal offence, and the second place, a trust for the benefit of particular classes of animals, as opposed to one for individual animals, is valid and enforceable as a public and charitable trust.For example, a provision can be made for the establishment and maintenance of a home for stray dogs or broken-down horses.

Salmond says that the duties towards animals are in fact duties towards the society itself. The society does have an interest in the protection and well-being of animals.

Legal Status of Unborn Persons

Unborn persons have given the legal status by law. There is nothing in law to prevent a man from owning property before he is born. His ownership is real and present ownership but it is contingent because he may never be born at all.Paton has observed that, "the child in womb is not a legal personality and can have no rights". This view is based upon the fact that the child should be born alive and should be completely extruded

from the mother's body before it can have any benefits under the law. It is submitted that this view is not tenable. Now only children in utero, but even unborn children in the sense of children not yet conceived have legal personality. Thus, in the law of property, there is a fiction that a child en ventresa mere is a person in being for the purposes of

i) The acquisition of property by the child itself, or

ii) Being a life chosen to form part of the period in the rule against perpetuities.

The Hindu law of partition requires a share to be allotted to a child in mother's womb along with the other living heirs. But if the child is not born alive, his share will be equally partitioned between the surviving heirs. Thus, proprietary rights of children in utero are fully recognized by the law. Injury to the child in womb has been made a punishable offence by the criminal law. Causing death of a child in womb has been made a punishable offence by the Indian penal code a punishable offence. Thus, children in the womb have rights protected by law and have legal personality. Criminal law also protects the unborn child.The personality of an unborn person is contingent to his birth because if he dies in the womb or is still- born, no right will be deemed to have been vested in such a child.

Legal Status of Dead Man

According to Salmond,"Dead man are no longer persons in the eye of the law. They have laid down their legal personality with their lives, and are now as destitute of rights as of liabilities. They have no rights because they have no interests. They do not even remain the owner of their property until their successors enter upon their inheritance."

In law dead men are 'things" and not 'persons". They have no rights and no interests. The criminal law provides that any imputation against a deceased peson, if it harms the reputation of that person, if living, and is intended to hurt the feelings of his family or other near relatives, shall be an offence of defamation under section 499 of the Indian Penal Code.Salmond says that there are three things, more especially, in respect of which the anxieties of living men extend beyond the period of their death in such sort that the law will take notice of them. These are a man's body, his reputation and his estate.

Dead persons are not recognized as legal persons but the testamentary dispositions of the dead are carried out by law. A person can, by his will, made a valid trust for repairs and maintenance of the graveyard because it amounts to a charitable or public trust but he cannot, by a direction in his will, provide that certain part of his estate shall be permanently used for the maintenance of his own grave.

Williams Vs. Williams it was laid down that a person cannot during his lifetime make a will disposing of his body, for e.g., giving his brain to the museum or giving any part of his body to the medical college. However, now a days one can legally donate his eyes during his lifetime for another person after his death.

Double Capacity and Double Personality

Law recognizes many different capacities in which a man may act. A man may have power to act in an official or representative capacity or he may act in his private capacity or on his own account.

The fact to be noticed is that if a man has two or more capacities it does not give him the power to enter into a legal transaction with himself. Double capacity differs from double personality. Law does not recognize double personality of the individual. For e.g. At common law, a man could not sue himself or contract with himself or convey property to himself even if he was acting on each side in a different capacity.

Theories of Juristic Personality

1. Fiction Theory:

This theory was forwarded by Von Savigny, Salmond, Coke, Blackstone, Holland, etc. According to this theory, the personality of a corporation is different from that of its members. Savigny regarded corporation as an exclusive creation of law having no existence apart from its individual members who form the corporate group and whose acts are attributed to the corporate entity. As a result of this, any change in the membership does not affect the existence of the corporation.It is essential to recognize clearly the element of legal fiction involved in this process. A company is in law something different from its shareholders or members. The property of the company is not in law the property of the shareholders. The company may become insolvent, while its members remain rich.

Gray supported this theory by saying that it is only human beings that are capable of thinking, therefore it is by way of fiction that we attribute 'will' to non-human beings through human beings who are capable of thinking and assign them legal personality.Wolf said that there are three advantages of this theory. It is analytical, more elastic and it makes easier to disregard juristic personality where it is desirable.

2. Concession Theory:

This theory is concerned with the Sovereignty of a State. It pre-supposes that corporation as a legal person has great importance because it is recognized by the State or the law. According to this theory, a juristic person is merely a concession or creation of the state.

Concession Theory is often regarded an offspring of the Fiction Theory as both the theories assert that the corporation within the state have no legal personality except as is conceded by the State. Exponents of the fiction theory, for example, Savigny, Dicey and Salmond are found to support this theory.

Nonetheless, it is obvious that while the fiction theory is ultimately a philosophical theory that a corporation is merely a name and a thing of the intellect, the concession theory is indifferent to the question of the reality of a corporation in as much as it focuses only on the source (State) from which the legal power of the corporation is derived.

3. Group Personality Theory or Realist Sociological Theory:

This theory was propounded by Johannes Althusius and carried forward by Otto Van Gierke. This group of theorists believed that every collective group has a real mind, a real will and a real power of action. A corporation therefore, has a real existence, irrespective of the fact, whether it is recognized by the State or not.

Gierke believed that the existence of a corporation is real and not based on any fiction. It is a psychological reality and not a physical reality. He further said that law has no power to create an entity but merely has the right to recognize or not to recognize an entity.A corporation from the realist perspective is a social organism while a human is regarded as a physical organism. This theory was favoured more by the sociologists rather than by the lawyers. While discussing the realism of the corporate personality, most of the realist jurists claimed that the fiction theory failed to identify the relationship of law with the society in general. The main defect of the fiction theory according to the realist jurists was the ignorance of sociological facts that evolved around the law making process.Horace Gray, however, denied the existence of collective will. He called it a figment. He said that to get rid of the fiction of an attributed by saying that corporation has a real general will, is to derive out one fiction by another.

4. The Bracket Theory or the Symbolist Theory:

This theory was propounded by Rudolph Ritter von Jhering (also Ihering). According to Ihering, the conception of corporate personality is essential and is merely an economic device by which we can simplify the task of

coordinating legal relations. Hence, when necessary, it is emphasized that the law should look behind the entity to discover the real state of affairs. This is also similar to the concept of ***lifting of the corporate veil.***

This group believed that the juristic personality is only a symbol to facilitate the working of the corporate bodies. Only the members of the corporation are 'persons' in real sense of the term and a bracket is put around them to indicate that they are to be treated as one single unit when they form themselves into a corporation.

5. **Purpose Theory or the theory of Zweck Vermogen:**

The advocates of this theory are Ernst Immanuel Bekker and Alois von Brinz. This theory is also quite similar to the fiction theory. It declared that only human beings can be a person and have rights. This theory also said that a juristic person is no person at all but merely a "subjectless" property destined for a particular purpose. There is ownership but no owner. Thus a juristic person is not constructed round a group of persons but based on an object and purpose.

The assumption that only living persons can be the subject-matter of rights and duties would have deprived imposition of rights and duties on corporations which are non-living entities. It therefore, became necessary to attribute 'personality' to corporations for the purpose of being capable of having rights and duties.

6. **Hohfeld's Theory:**

He said that juristic persons are creations of arbitrary rules of procedure. According to him, human beings alone are capable of having rights and duties and any group to which the law ascribes juristic personality is merely a procedure for working out the legal rights and jural relations and making them as human beings.

7. **Kelsen's Theory of Legal Personality:**

He said that there is no difference between legal personality of a company and that of an individual. Personality in the legal sense is only a technical personification of a complex of norms and assigning complexes of rights and duties.

THE CONCEPT OF PROPERTY

Lawyers recognise that the notion of property refers not to the things which are usually objects of property, land, chattels and the like, but to the rights the law confers in regard to those things. Property is created by law granting rights against the world, or rights in rem in regard to particular things. To say that, I own my car or home is a shorthand way of claiming a bundle of rights in regard to the car or land in question. The bundle of rights, giving one property in something which includes

i. The right to possession

ii. The right to use

iii. The right to manage

iv. The right to the income from the thing

v. The right to the capital or to increases in its value

vi. Immunity from expropriation

vii. The power of transmissibility

viii. The absence of a term

In addition to the above rights, one usually has certain obligations flowing from ownership, in particular: -

a. The duty to forebear using the thing harmfully

b. Liability to have the thing taken in execution by creditors

We also recognise that the type of rights conferred by law which we regard as property rights may attach not merely to land and chattels but to intangibles such as intellectual property rights. This field is expanding to include such things as genetic patents and computer programs

Many jurists have proposed a general theory explaining and supporting the grant of property rights. Such a theory would almost certainly be a moral theory.

Utilitarian arguments for property

a. Some argue that the greatest happiness of the greatest number or the maximisation of satisfied preferences will be achieved by organising society in such fashion that individuals have rights to private allocations of property.

b. This argument does not suggest that we have any moral right to either property in general, or to particular items of property, simply, that society will go better if we maintain the institution of private property.

c. Appeal is often made to a psychological argument to the effect that people work harder or more productively if they have a private stake in the outcome, and this is best done by the institution of private property.

Private property as a liberty protecting institution

Some jurists argue that if we seek to abolish or ban private property or organise society without it there will of necessity be far more interference by government in peoples' lives and the way they live. In this view private property is not itself virtuous but a condition of living in a fashion which protects individual liberty and privacy.

Locke's labour theory of value

The most influential attempt at providing a moral argument for a right to property was tha
great English philosopher (1632-1704). His views on natural law and government were
treatises' on government written in 1679 and 1680 but not published until 1690, and hi
Human Understanding, also published in 1690.

Locke argued for a right to property in the following steps:

1. Everyone owns his own person
2. It follows from Step 1 that each person owns the labour of his body and mind
3. When you mix your labour with something you have acquired that existed in
   have joined something you owned with something you did not own.
4. If Step 3 is satisfied then a person owns that thing that they have mixed with t
5. A proviso to the argument is that when one has appropriated something that
   state, one must leave enough in common for others.

One difficulty with the argument is that it is unclear why, even if I own my labour, I sho
mix it with. As Robert Nozick has argued, it is just as consistent that I should lose what I
with something I do not own. The second version of Locke's argument overcomes some o
referred to. The argument proceeds after Step 3 in the following new steps:

4. When I add my labour to something I did no previously own, I add to the va
   previously existing in a natural state.
5. It would be unjust for others to gain the value which I have created by adding
   previously existed in a natural state.
6. I am entitled to the product with which I have mixed my labour since it would l
   else to appropriate that added value.

A. Ownership Concepts

1. Generally, we don't own things. We own "rights" to use things.

   a. The right to use something can be virtually unlimited and can include the r
   owned thing. This is true for most personal property.

   b. Other rights to use things can be sharply limited as to time, location & manne
   true for real property, which can be thought of as having rights in 5 dimensic

      i. The three dimensions of space (length, width, & height)

      ii. The dimension of time.

      iii. The dimension of use (one person can own rights to remove timber, anoth
      property, another to live there, etc)

2. Some ownership rights can be exercised & enforced by the owner (the right to use
manner desired generally doesn't require any outside help). Other ownership rights a
enforced by the government. (the rights to lateral and subjacent support)

3. A right to use a thing in a particular manner which the government will enforce is a legal or enforceable "interest".

4. "Title" is evidence of possessing a legal interest which is sufficient to get the government to enforce that interest.

a. Title is not necessary to exercise some ownership interests, such as the right to use an ink pen. It is necessary to exercise other interests, such as the right to register a motor vehicle for use on public roads

B. Types of Property: Personal property -Vs- Real property

1. Personal property - anything which is not attached to the earth.

a. Means of acquiring title to personal property

i. Purchase

ii. Finding

iii. Accession / confusion. (Accession occurs when one person adds value to another's property with their consent. It generally results in a lienholder's interest) (Confusion occurs when fungible goods are co-mingled. This results in a tenancy in common to the entire lot of fungible goods.)

iv. Capture (applies only to "common" property). The elements are: -The capture must be intentional.

- The captured object must be "free" prior to capture (wildlife, water, air oil, gas, fluids)

- The captured object must remain in captivity. It control is relinquished, or if the object escapes, then the property rights are relinquished as well.

v. Gift. The three elements of a gift are:

- There must be intent to make a present gift

- Not an intent to make a gift in the future.

- The given object must be delivered to the done either actually or constructively.

- The donee must accept the gift.

b. Means of losing title to personal property

i. Sale

ii. Gift

iii. Accession / confusion

iv. Loss / destruction / escape of captured objects

v. Forfeiture (criminal forfeiture)

vi. Fixture (attachment to real property). Personal property is converted to real property when it becomes "attached" to the real property. It is considered to be attached, and hence, a fixture if:

- Removal will injure the real property, or

-Removal will injure the personal property,

-Removal will result in the personal property becoming worthless.(paint scraped off of a building), or

-It was attached with intent to become a permanent part of the real property.

2. Real property - the earth and all things attached to it

a. Means of acquiring title to real property

i. Voluntary conveyance (Generally, voluntary conveyances are by written ir deed, a will, an easement, etc This is because the Statute of Frauds is avai void out voluntary unwritten conveyances)

ii. Involuntary operation of law. (This includes intestate rules, adverse posses partition actions, divorce, etc. These are generally thought of as unwritten co the substantive law which provides for them is written, and title isn't convey is granted.)

b. Means of losing title to real property

i. Voluntary conveyance

ii. Involuntary operation of law

iii. Severance (When crops, trees, minerals, oil, gas, etc. are removed (severed) f cease being real property and become personal property.

C. Dimensions of real property ownership - interests in land

1. The dimension of time

a. Real property is indestructible. As long as the earth supports human life, r outlast any individual. Therefore, one method of categorizing real property ov categorize them according to their duration.

b. "Freehold" estates have an infinite duration. Leasehold estates have a finite estates that are inheritable are called "Fee" estates.

- Some "Fee" estates are subject to being lost if a specified condition occurs or future. These are called " Defeasible Fees".

- The highest "Fee" estate is called a "Fee Simple Absolute". A "Fee Simple Abs to being taken in the future (except for non-compliance with certain criminal laws). It can only be transferred by voluntary conveyance, by operation of la something like abandonment (adverse possession).

c. Life estates are leasehold interests which generally are not inheritable. The land which terminates upon someone's death. If the estate terminates upon the it is not inheritable and can be thought of as a lease which ends upon death. T If the life estate is for the life of someone other than the holder and the holde estate expires, then the remaining time is inheritable.

d. Leasehold estates have a finite duration, which may or may not be fixed a created.

e. "Future interests" refer to ownership rights currently held by someone else, b the holder in the future. For example, the person who gets the rights under a lif when the life estate or leasehold ends has a type of future interest called a "re

2. The dimensions of space and person

a. Real property rights can be divided according to spatial location (geography) as well as by time or use.

b. What is to be discussed here is the manner in which the rights to use an entire spatial area in the same way and at the same time can be allocated amongst several different persons. (Concurrent ownership)

c. Concurrent ownership types are referred to as "tenancies". Sole ownership by one person or entity is called "severalty". Don't ask why!

d. Three types of tenancies:

i. Tenancy in Common - Similar to stock ownership.

ii. Joint Tenancy - Very different from stock ownership.

3. The dimension of use

a. Rights to use real property can be conveyed in bulk, or in almost infinitely detailed bits and pieces.

b. Because conflicts between land use rights can develop readily and because of their potentially destructive consequences, a vast body of substantive and remedial law has been developed to resolve and prevent land use conflicts. This body of law is the heart of this course.

c. Common law doctrines affecting land use include those relating to:

- Easements
- Servitudes and restrictive covenants
- Nuisance

d. Statutory provisions affecting land use include:

- local zoning and land use regulations
- local subdivision and density control ordinances
- various state and federal land use statutes

e. A conveyance of a right to use land includes an implied conveyance of all things necessary to exercise the right (implied easements / easements by necessity)

f. Easements are limited rights to use land owned by others in fee.

i. Easements in gross are held by persons. They detach rights from land and attach to a person. Unless somehow limited in time they can be conveyed separately from the holder's other lands. Mineral rights, timber rights, hunting rights, and public road and utility easements are examples.

ii. Appurtenant easements are held by land. They detach rights from one parcel of land (the servient tenement) and attach to another parcel of land (the dominant tenement). Appurtenant easements "run with the land; that is the easement becomes part of the dominant tenement and cannot be conveyed separately from it.

iii. Easements are created by written grant, by implication, and by prescription An easement holder not only has the right to use the easement, but to perform maintenance activities on the easement.

SCHOOLS OF JURISPRUDENCE

ANYLATICAL JURISPRUDENCE

The jurists of analytical school consider that the most important aspect of law is its relation to the State Law is treated as an imperative or command emanating from the state. Hence, this school is known as the Imperative school.

The exponents of this school are concerned neither with the past nor with the future of law but with law as it exists, i.e. 'as it is' (positus). For this reason this school is termed the positive school. Its founder is John Austin who was the professor of jurisprudence in the University of London.

He is also considered as the father of English jurisprudence. He studied the Roman Law in Germany. Roman law is very systematic and scientific whereas English Law is not systematic and scientific. So he tried to make English law in well manner. For this purpose he wrote a book 'Province of English Jurisprudence'. In this book he defined English law and made it in a systematic way.

Austin said that only positive law is the subject matter of jurisprudence. He separated both the morals and the religion from the definition of the law. Prior to Austin the law was based upon customs and morals but Austin reduced all things from the definition of law. He divided law into two parts. They are:

(ii) Law propriety so called

(iii) Law impropriety so called.

It further divided into two parts. They are:

(i) Law of God (Divine Law)

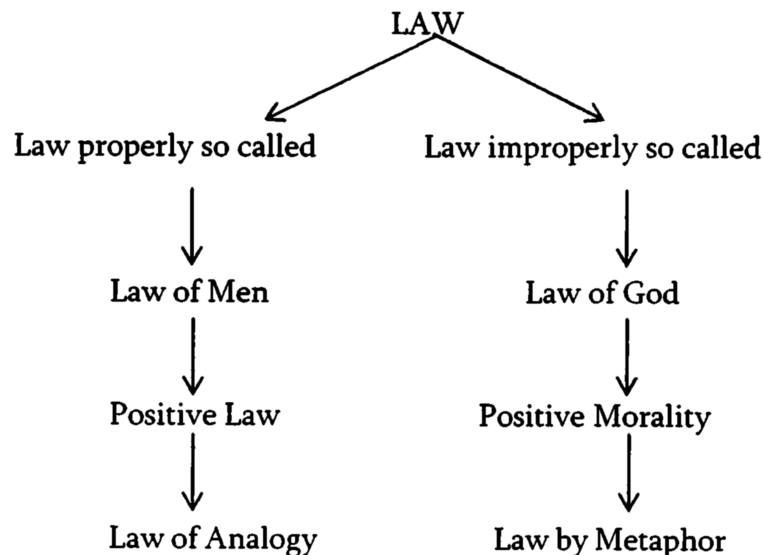
(ii) Law of Men (Human Law)

Law of God is also called as divine law. It is a law set by God for human beings on earth. Law of men is made by men, so it is called human Law. This law makes a relationship between persons and the Law. This law is imposed upon persons and is made by persons. Human law is further divided into two parts. They are:

(i) Positive Law

(ii) Positive Moral Law

Positive Law is main subject of jurisprudence. This classification can be seen as under:



Law improperly so called are certain laws, which are called improperly laws e.g. Divine Law, Moral Law and Religious Law. But his law is not the subject of jurisprudence. This law is concerned only with the administrations of jurisprudence. The law is the subject matter of jurisprudence. Analytical school of jurisprudence deals with the following matters:

(1) An Analysis of the conception of civil law.

(2) The study of various relations between civil law and other forms of law.

(3) An inquiry into the scientific arrangement of law.

(4) An account of legal sources from which the law proceeds.

(5) The study of the theory of liability.

(6) The study of the conception of legal rights and duties.

(7) To investigate such legal concepts as property, contracts, persons, acts and intention, etc.

Definition of the Law

Austin has defined the law is his 'Command Theory'. He says that, "Law is the command of sovereign backed by sanctions". Sovereign here means a politically superior body or a determinate person or determinate body of persons like king of council. The command of these persons shall be the law in the country. This law must be obeyed by certain persons. If it is not obeyed hen the order of these persons shall not be law. It means there must be politically inferior persons. If the command is disobeyed then the political superior should have the power to punish, those persons who have disobeyed the law.

Characteristics of Command Theory

From the above facts we find that the following characteristics of Analytical School:

1. **Sovereign** - It means the political superior person or a determinate person or body of person or intelligent persons. This may be compared with the kind or the head of state in monarchy system and parliament in democracy system.

2. **Command** - There must be some order of the Sovereign. This order may be oral or written. The Sovereign which is followed by force, is called command.

3. **Duty** - This command must be followed by some persons, it means the political inferior persons who are under the control of Sovereign, are under a Duty to follow the order of the Sovereign.

4. **Sanction** - There must be sanction or the power of force behind the command of Sovereign and it there is no force or sanction then such command shall not be law. The sovereign must have power to punish those who do not obey this command.

In this way the above mentioned things are essential then it will be the law. But Austin excluded some commands from the concept of the law. These are:

a. **Explanatory Law** : If there is a command for the explanation of already existed law command shall not be the law.

b. **The Repeal Law** : If there is a command for the repealing of already existed law then the second command shall not be law.

Austin adopted analytical method which excluded all types of morals and religion from Law. His school is also called analytical school or imperative school. Imperative means force behind law.

Criticism of Analyical School

Various writers have criticised the command theory of Austin on the following ground:

1. **Customs ignored:** Analytical school is based upon the law. According to Austin the law does not include customs but we see that customs are a very important part of the society. There were customs by which the society and later on state came into existence. In state also customs played an important role in the administration of justice. Even in the modern times the customs play an important role in the formation of law. So we cannot ignore customs from law.

2. **Conventions Ignored:** There are certain conventions or methods, which are observed or followed by the coming generation. These conventions or methods later on take the form of law. The become law afterwards by their regular observance. In England the base of English Law is conventions, which is very popular in the World. So we cannot ignore conventions. But Austin did not include conventions in his concept of law.

3. **Precedents ignored:** Precedent means the decisions of the court, which are also called as judge made laws. Judge made laws because these laws were not the command of the Sovereign. These laws were not enforceable at that time, so he excluded these laws from his concept of the law.

4. **International Law ignored:** Austin did not include international law in his law. According to his law there is no sovereign for enforcing the international law. But in modern days we cannot exclude international law from the field of law because it plays an important role in maintaining peace and society at international level. In other words it is also a form of municipal law of civil law.

5. **Command Theory is not suitable:** It is not easy to understand the 'Commands Theory' for common persons. It is not necessary that all should be enforceable or all common people should be considered as law. Only those commands which are related with law and order should be law. It is difficult to separate those commands from others by the common people or persons. So this theory is not suitable in modern times. It is also an artificial theory having no sense in the modern world.

6. **Only power is not necessary:** According to the 'Command Theory', law can be imposed only with the help of power, but we have the result of the tyrants or forced rules which were thrown away by the people of French Revolution, of Panamaeto. Law can be enforced even without power, it they are suitable to the society.

7. **Moral Ignored:** The Command Theory has also excluded morals from the field of law. But we have observed that morals have also an important role in the formation of law. We cannot ignore morals from law because laws are meant for the society and such laws must be according to the feelings of society. The feelings of society are based upon morals. So we can't ignore morals from the field of law.

Conclusion:

In this way, his theory of command has been criticised and which is not considered as suitable in the modern time. But we also can't ignore the contribution of Austin for giving the meaning of law in a systematic way. He gave the concept of law in scientific manner. These views became the base for the coming writers, jurists and philosophers. So we can say that Austin contributed a lot in the field of jurisprudence.

The sociological school is one of the important branches of law. It comes after the Analytical school and Historical school. Its seeds were found in the historical school. Duguit, Roscopound and Camta are the supporters of this school. This school is related with society. According to this school, law is numerator of society. Law and society both are the two sides of the same coin, one cannot exist without the other. If there is law there should be society and if there is society there should be law. Law is very necessary for regulating the society. Many writers like Duguit, Rosco Pound and Ihering gave these view in the sociological school.

The theory of Duguit under sociological school is a social solidarity. Social solidarity means the greatness of society. Duguit said that there are mainly two types of needs of the society:

1. **Common Needs**: Those are fulfilled by mutual assistance.
2. **Adverse Needs**: Those are fulfilled by the exchange of services. No one can live without the help of other. Even a state cannot exist without the help of other state. One cannot produce all things required for him. So, he has to depend upon others. The dependency is called social solidarity. For this purpose the division of labour is necessary. Division of labour will fulfill all requirements for the society. This philosophy or views is called social solidarity.

Essential elements of Duguit's Theory of Law

6. **Mutual Inter-Dependence**: In society all persons are depending upon each other. Individual cannot fulfill his ambitions alone.
7. **No difference between State & Society**: State and society are a group of persons. Main purpose of the society is to save the people. This responsibility is also lies upon the state. So state does not have a special status or above status from people. State should make law for the welfare of the people.
8. Sovereign and will of people: Sovereign is a politically superior person. Duguit says that sovereign is not superior to people. The sovereign of a state lives in people or in the will of people.

Difference between Public & Private Law

Duguit says that there is no difference between public law and private law because the aim of both the law is to develop the social solidarity. Pubic law and private law are meant for people. Public right and private right or people have only duties and not any right. There is no difference between public right and private right. According to Duguit there is only one right that is to serve the people. It means person have only duties not rights.

Criticism of Duguit's Theory

1. **The theory of social solidarity is vague**: This theory is not clear for a common person. One cannot gain anything from this theory so this is vague theory.
2. **No authority is in social solidarity**: Duguit has not given the authority to explain the solidarity, because Duguit did not recognize sovereignty. We can imagine that Judge will explain the standard of social solidarity. But there are no guidelines for the Judges.
3. **Public law and Private law are not same**: There must be an authority which passes the law. In Duguit theory there is no place for such authority.
4. **Public right and Private right are also not same**: The right of society is public right and the right of common people is private right.
5. **Custom ignored**: Custom is the base of any law but Duguit ignore these customs. In this way the theory of Duguit is not suitably in modern times.

No doubt that Duguit was a sociologist because he gave a lot of development to society. The social solidarity itself contains the welfare of the people. Duguit said that law should be according to the social solidarity. Here he discards natural principal but the theory of the social solidarity itself is based upon natural law, which demands that the people should serve properly according to their needs. In this way Duguit put out the natural law principal from the door and accepted through the window. However the contribution of Duguit is accepted by many writers and some of them also adopted this theory.

Pound's Theory of Social Engineering

Dean Roscoe pound is considered to be the American Leader in the field of Sociological Jurisprudence. He was a great academician from Harvard law School. According to him, "the end of law should be to satisfy a maximum of wants with minimum of friction". He defined law as containing the rules, principles, conceptions and standards of conduct and decision as also the precepts and doctrines of professional rules of art. He considered law as a means of a developed technique and treats jurisprudence as "Social Engineering"

The main propositions of Roscoe Pound theory of Social Engineering are as under:

1. **Pound concentrates on the Functional Aspect of Law**: Pound concentrates more on the functional aspect of law which made some writers named as "functional school". The law is an ordering of conduct so as to make the goods of existence and the means of satisfying claims go round as far as possible with the least friction and waste.

2. **The task of Law is "Social Engineering"**: He says, "for the purpose of understanding of law of today. I am content with a picture of satisfying as much of the whole body of human wants as we may with the least sacrifice. I am content to think of law as a social institution to satisfy, social wants, the claims and demands involved in the existence of civilized society.

3. **Social Engineering means a balance between the Competing Interest in Society**: He lays down a method which a jurist should follow for 'social engineering'. He should study the actual social effects of legal institution and legal doctrines, study the means of making legal rules effective sociological study in preparation of law-making, study of judicial method, a sociological legal history and the importance of reasonable and just solutions of individual cases." He himself enumerates the various interests which are to be protected by the law. He classifies them under three heads:

a) **Private Interests**: Such as interest of physical integrity, reputation, Freedom of volition and freedom of conscience. They are safe-guarded by law of crimes, contracts.

b) **Public Interests**: Main public interests are preservation of the State, State as a guardian of social interests such as Administration of trusts, charitable endowments, protection of Natural environment, territorial waters, sea shores, regulation of public employment and so on.

c) **Social Interests**: Preservation of peace, general health, preserving of Social institutions such as religion, political and Economic institutions, general morals, promotes Human personality, cultural and economic life.

Pound tackled the problem of interests in term as of balancing of individual and social interests. It is through the instrumentality of law that these interests are sought to be balanced. Justice Cardozo remarked that, "Pound attempted to emphasize the need for judicial awareness of the social values and interests." Roscoe Pound regarded law as a basic tool of social engineering. How in India the society and law are acting and reacting upon each other can be adjudged from the following enactments passed after India became Independent:-

1. The Special Marriage Act, 1954
2. The Hindu Marriage Act, 1955
3. The Hindu succession Act, 1956
4. The Hindu Minority and guardianship Act, 1956
5. The Hindu Adoptions and Maintenance Act, 1956
6. The Dowry Prohibition Act, 1961
7. Child Marriage Restraint (Amendment Act), 1978
8. The Consumer Protection Act, 1986
9. The S.C & S.T.(Prevention of Atrocities) Act, 1989
10. Commission of Sati (Prevention) Act, 1987
11. Bonded labour(Abolition) Act, 1976

BLAZE

Interests as the Main Subject-Matter of Law:

Pounds theory is that interests are the main subject matter of law and the task of law is the satisfaction of human wants and desires. It is the duty of law to make a valuation interests in other words to make a selection of socially most valuable objectives and to secure them. To concluding the theory, Pound says that the aim of 'Social Engineering' is to build an efficient structure of the society as far as possible which involves the balancing of competing interests.

Criticism against Pound's Theory:

1. Engineering not a happy word: It suggests a mechanical application of the principles to social needs but really the word engineering is used by Pound metaphorically to indicate the problems which the law has to face.

2. Classification of interests not useful: Freidmann doubts the value of classification of interests and the value of such classification.

3. Ihering & Bentham concludes the theory of Pound's that, "such classifications greatly helps to make legislature as well as the teacher and practitioner of law conscious of the principles and values involved in any particular issue. It is an important aid in the linking of principle and practice."

Pound's Contribution

Social Engineering stands on a practical and firm ground. He points out the responsibility of the lawyer, the judge and the jurists and gives a comprehensive picture of the scope and field of the subject.

HISTORICAL JURISPRUDENCE

Jurisprudence is a subject in which the definition nature and the sources of law are studied various writers under various schools have defined law. Austin under Analytical school says that law is the command of sovereign. He added only the law in the study of jurisprudence. But under historical school, Savigny says that law is the general consciousness of the people i.e., spirit of the people (Volksgeist). It means what the common people think or behave is the base of law. Law shows the general nature of the common people. This theory of Volksgeist is based on the historical method. Savigny is the father of it. According to Savigny, "Law is the General consciousness of the people."

Historical School is a branch of Law, which studies law from the past history. It says that law is based on the General Consciousness of people. The consciousness started from the very beginning of the society. There was no person like sovereign for the creation of law.

The law in the ancient times was based mainly upon simple rules, regulation, custom, usages, conventions etc. These things were later on developed by the jurists and lawyers. These things were later on converted into set form of law.

The Historical school is just opposite to the Analytical school in 18th and 19th century, the concept of individualism came into existence. Due to this concept the revolutions came like French revolution, Russian revolution, etc. At that time Savigny, Montesquieu, Grotius were the writers who said that law is the general will of the people or law is based upon common people and the feelings of the common people.

Law develops like the language and manners of the society. So law has a natural character. Law has no universal application. It differs from society to society and state to state. In the same way, the languages differ from society to society and locality to locality.

Montesquieu has said, "Law is the creation of climate, local situations and accidents." According to Grotius, "Law develops like language and the manners of the society and it develops according to suitable circumstances of the Society. The necessary thing is the acceptance and observance by society. According to Burke, "Law is the product of the General process. In this sense it is dynamic organ which changes and develops according to the suitable circumstances of society.

SAVIGNY:

Savigny is considered as the main expounder or supporter of the historical school. He has given the Volksgeist theory. According to this theory, law is based upon the general will or free will of common people. He says that law grows with the growth of nations increases with it and dies with the dissolution of the nations. In this way law is national character i.e., Consciousness of people. In other words, according to this theory law is based on will or free will of common people. He says that law grows with the growth of nation. A law which is suitable to one society may not be suitable to other society. In this way law has no universal application because it based upon the local conditions local situations, local circumstances, local customs, elements etc. Al these things effect law and make it suitable to the society.

The main features of the Savigny's theory are as follows:

1. Law has a national character.
2. Law is based upon the national conditions, situations, circumstances, custom etc.
3. Law is pre historic. It means law is found and is not made, the jurists and the lawyers make it into set form.
4. Law develops like language and manner of the society. In ancient society law was not in a natural stage or no in a set form. Later on with the development of the society the requirements and the necessities of the society increased. Due to this it was necessary to mould law in a set form.

Importance of Customs

According to Savigny customs are more important than legislation because customs come before legislation. In other words the customs are the base of legislation.

Criticism of Savigny's Theory:

Savigny's theory has been criticised on the following grounds:-

1. Inconsistency in the Theory: Savigny asserted that the origin of law is in the popular consciousness, and on the other hand, argued that some of the principles of Roman law were of universal application. Thus, it is a clear cut inconsistency in his ideas.

2. 'Volksgeist' not the Exclusive Sources of law: There are many technical rules which never existed in nor has any connection with popular consciousness.

3. Customs not always based on Popular Consciousness: Many customs are adopted due to imitation and not on the ground of their righteousness. Sometimes customs completely opposed to each other exist in different parts of the same country which cannot be said to be reflecting the spirit of the whole community.

4. Savigny ignored other factors that influence law: The law relating to trade unions is an outcome of a long and violent struggle between conflicting interests within a society.

5. Juristic Pessimism: Savigny encouraged juristic pessimism. Legislation must accord with popular consciousness. Such a view will not find favour in modern times. No legal system would like to make compromise with abuses. People are accustomed to it.

From the facts mentioned above to see the history of the society to check that what the position of law in the ancient time was. How and in what form law was prevailing in the society? To find the solution of the questions the supporter of Historical school found that law is the general consciousness of the common people or it is the free will of common people on which law developed and converted into a set of form of law.

NATURAL LAW THEORY

Hugo Grotius, a Dutch Jurist called as Father of International Law, formulated the doctrine of social life of men as its unique characteristics for peace and tranquillity with fellowmen according to the measure of the intelligence with the intelligence of other fellow men with whom he has to live with. This unique characteristic is to be found in natural law because natural law is directly proportional to human intelligence. Natural Law is superior to all law as it is dictated by reason and any law which is not in conformity with rational nature is either irrational or immoral. He believed whole universe is regulated by the law of nature.

He also developed the concept of "pacta sunt servanda". He conceptualized the notion of a state as an association of the freemen joined together for the enjoyment of rights and for their common interest. This association is a result of a contract in which people have transferred their sovereign power to a ruler who has acquired it as his private power and whose actions under ordinary circumstances are not subject to legal control. However, the ruler is bound to observe the natural law and the law of nations.

Grotius uses the construction of social contract for a twofold purpose, internally for the justification of the absolute duty of obedience of the people to the government, internationally to create a basis for legally binding and stable relations among the states. Grotius puts forward social contract as an actual fact in human history. The constitution of each state, Grotius thinks, had been precedent by a Social Contract by means of which each people had chosen the form of government which they consider most suitable for themselves.

The law of war and peace:

Natural law is the dictate of the right reason which points out that an act, according as it is or is not in conformity with rational nature has in it a quality of moral base and moral necessity.

Immanuel Kant:

He gave modern thinking a new basis which no subsequent philosophy would ignore. In 'Critique of Pure Reason', he set for himself the task of analysing the world as it appears to human consciousness. Nature follows necessity but human mind is free because it can set itself purposes and free will. Compulsion is essential to law and a right is characterized by the power to compel. The aim of Kant was a universal world state, the establishment of a republican constitution based on freedom and equality of states was a step towards league of states to secure peace. Kant was doubtful of the practical possibility of the state of nations and he saw no possibility of international law without an international authority superior to the states.

He was a German Idealist. He based his theory on pure reason. He says man is a part of reality and is subject to its laws (sovereign's laws). Though, it is through will of the people, the sovereign comes into existence, but still the man is not free. His reason and inner consciousness makes him a free moral agent, so the ultimate aim of the individual should be a life of free will and it is when free will is exercised according to reason and uncontaminated by emotions, that free willing individuals can live together.

People are morally free when they are able to obey or disobey a moral law but since morality and freedom are same, an individual can be forced to obey the law without forcing the freedom provided by law in conformity with morality.

He talks about proclamation of autonomy of reason and will. Human reason is law creating and constitutes moral law. Freedom in law means freedom from arbitrary subjection to another. Law is the complex totality of conditions in which maximum freedom is possible for all.

The sole function of the state is to ensure observance of the law. The individual should not allow himself to be made a means to an end as he is an end in himself, if need be he should retire from society if his free will would involve him in wrong doing.

Society unregulated by right results in violence. Men have an obligation to enter into society and avoid doing wrong to others. Such a society has to be regulated by compulsory laws. Those laws are derived by pure reason of the idea of social union; men will be able to live in peace.

What is needed is a rule of law and not of man. Kant's ideal of laws does not bear any relation to any actual system of law; it is purely an ideal to serve as a standard of comparison and not as a criterion for the validity of law. Kant considered political power as conditioned by the need of rendering each man's right effective while limiting it at the same time through the legal rights of others. Only the collective universal will armed with absolute power can give security to all. This transfer of power is based on social contract which is not a historical fact but it is an idea of reason. The Social Contract is so sacred that there is an absolute duty to obey the existing legislative power. Rebellion is not justified. Therefore, he considers a republican and representative state is an ideal state. Only the united will of all can institute legislation and law is just only when it is at least possible when the whole population should agree to it. He was in favour of separation of power and was opposed to privileges of birth and established church and autonomy of corporations. He was in favour of free speech. The function of the state was essentially that of the protector and guardian of that law.

George Wilhelm Frederick Hegel:

He developed a theory called ideal dialectism i.e., Theoretical explanation of the universe. It is a way of investigating the truth of opinions by discussion and logical argument. Later on, Karl Marx converted this into material dialectism and political idea and statecraft. The basic tenets of Hegel philosophy is Neo-Kantian natural law. His system is a monistic one. The idea unfolds from the simple to the complex by means of the dialectical process and any face of reality is based on reason. The history of civilization does not depend on unfolding of events but there is an objective spirit as standard bearer of reason unfolding human civilization. What is reasonable is real and what is real is reasonable. The moving spirit of civilization is the "idea". This idea is responsible for the movement of the civilization both in terms of leadership thrown up in the movement of the civilization. All the social systems are on a move from one stage to another.

The first stage of conceiving the idea is thesis which is from the standpoint of the one's observation, a given concept of the civilization from that standpoint. However, by the time thesis is conceived, the opposite of idea of thesis is hidden within the idea. The principle or doctrine which is taken at the first starting point would be thesis but these rules and principles have a counter point inbuilt in them which when reduced to tangible categories may become 'anti-thesis' of them. However, the antithesis of idea of the doctrines, rules would before becoming concrete and metamorphosed would enter into synthesis, new phase and the synthesis would again become thesis as the content and structure of these rules, principles and doctrines. This is an endless circle and is true human history.

The history of civilization does not depend upon unfolding of events but there is an objective spirit. The nations are on a move to achieve this freedom. Once the nations achieve these ideals, the young nations would strive to do the same. Law essentially is made to understand the idea of freedom from its external manifestations. He used the metaphor of natural law that man is free, passions, irrational desires and material interest which have to be subordinated to his rational and spiritual self. The mandate of natural is that man should lead a life governed by reason and respect the reason of others.

Georgio Del Vecchio:

He talked about Ideals of Law as compared to positive law. Ideals of law should correspond to natural law is higher law and provides criteria for evaluating positive law and to measure its elements of justice. It is the basic principle which guides legal and human evolution. The respect for human autonomy should be there.

His theory takes experience from Kantian metaphor which is the basis of justice. Earlier conceptions of natural law such as consent, liberty, representative democracy and conscience which have to a great extent recognized in positive law will further impact the evolution of positive law. The law faces a struggle and this struggle leads again to evolution of law.

Though, he basis his thesis on Kant but he differs in one aspect. The state is not only concerned with making of law but also with enforcement of law and should concern with social, political and economic well-being of social life of human beings.

The contribution of Vecchio in reviving of natural law is that search of ideals for reforming positive law lies in natural law as natural law is part of the human nature. His work displays a profusion of philosophical, historical and juristic learning. Law is not only formal but has a special meaning and an implicit faculty of valuation. Law is a phenomenon of nature and collected by history.

American Realist School of Jurisprudence:

American Realism is not a school of jurisprudence but it is pedagogy of thought. They are concerned with the study of law as it works and functions which means investigating the social factors that makes a law on the hand and the social results on the other. The emphasize more upon what the courts may do rather than abstract logical deductions from general rules and on the inarticulate ideological premises underlying a legal system.

John Chipman Gray:

The real relationship of jurisprudence to law depends not upon what law is treated but how law is created. Gray stresses the fact that the statutes together with precedents, equity and custom are sources of law but the law itself is what the persons acting as judicial organs of the state laid down as rules of conduct. To determine, rights and duties, the judges settle what fact exists and also lay down rules according to which they deduce legal consequences from facts.

Gray emphasizes the role which judges play in laying down the law because it is the judge who while interpreting the statute, custom or equity create law rather than discovering the law. The law as expressed in statutes or customs gets meaning or precision only after the judge expresses his opinion. The judge depend on the sources of the law such as statute, judicial precedent, opinion of experts, customs and public policies and principles of morality, the law becomes concrete and positive only in the pronouncements of the court. Judge made law is the final and authoritative form of law. He suggests that the judicial pronouncements of law are the true subject matter of jurisprudence for evaluations. Gray's contribution lies in the fact that judicial decisions often have been responsible for giving not only content but direction to political, social and economic thought.

The contribution of Gray in formulating the principle that the judges or the courts have the first and the final say as to what the law is and obviously the role of jurisprudence is to understand and evaluate the law made by judges is the realist approach to understanding law and legal institutions.

Justice Oliver Wendell Holmes:

Scope of Jurisprudence has an enhanced effect on American Realist thinking. The concept of law traditionally is a collection of rules from which deductions can be made. Holmes observed that life of the law has not been logic, it has been experience. The law embodies the story of a nation's development through many centuries and it cannot be dealt with as if it contained only the axioms and corollaries of mathematics. Law must be strictly distinguished from morals. Holmes definition of law and the scope of jurisprudence led to future developments in constructing American Realism which focused attention on empirical factors underlying legal system.

Jerome Frank:

Rule Sceptics believe that the lawyer should be able to predict to his clients, the decisions in most law suits not yet commenced but legal rules enunciated in court's opinions sometimes called paper rules, too often proved unreliable as guides in the prediction of decisions.

The Fact Sceptics also engage in rule scepticism and tear behind the paper rules. The Fact Sceptics are primarily interested in trial courts, yet they too cannot predict future decisions.

The conventional description how the courts render decision from the application of legal rules does not describe the picture of judicial law making correctly and fairly, especially when testimony of witnesses are to be recorded in the trial where the chances making of mistakes on part of the witnesses as to the correctness of what they saw or heard in their recollection of what they observe may be at variance with the reality.

Similarly, Trial judges and jurists, also human, may have prejudices of an unconscious unknown even to themselves for or against some judges, lawyers, witnesses. These prejudices can even be racial, religious, economic, and political or gender biased. He laid emphasis on understanding the working of the lower courts as he believed points of law emerge from fact situation of the lowest situation of the court hierarchy. The textbook approach of law is misleading as the working of the court system is uncertain and misty.

Instead of taking precedence, emphasis should be there in training in fact-finding, evaluation of prejudices, psychology of witnesses both for the trial judges and for the prospective jurors to give effect to the empirical analysis of law and legal institutions.

John Rawls:

He was a political scientist and one of the most influential moral philosophers. He gave Theory of Justice and said that political thought is distinct from natural law. This society is self-sufficient association of persons who in their relations to one another recognize rules of condition as biding and act in accordance. They specify co-ordination designed to advance well of those who are taking part in it.

The society is witnessing a conflict of interest both in terms of sharing of benefits as well as making a better life. A set principle is required in determining the limits of individual advantages and social arrangement for proper division of heirs. It is called as "Social Justice". It provides a way of assigning rights and duties in basic institution of society. It also defines appropriate distribution of benefits and burdens of social co-operation.

The main idea is to carry it to higher level of abstraction, the familiar theory of social contract. These can regulate all agreements and they specify co-operation that can be entered into and forms of government that can be established. Thus, justice is termed as fairness.

He conceives that basic structure of society distributes primary goods. They are liberty, opportunity, income and wealth, health and vigour, intelligence and imagination.

Theoretical explanation of the universe -

1. Each person is to have equal right to most extensive total system of basic liberties compatible with a similar system for all.
2. Social and economic inequalities are to be arranged so that both are greatest benefit of the least advantage consistent with the just saving principle.
3. Attached to offices and persons open to all under fair equality for the protection of liberty itself.

a. Maximization of liberty subsists only to such constraints as are essential for the protection of liberty itself.

b. Equality for all, both in basic liberties of social life and also in distribution of all other forms of social good. It is subject only to the exception that the inequalities may be permitted if they produce greatest possible benefit for those least well-off in given scheme of inequality.

4. Fair equality of opportunity and elimination of all inequalities of opportunities based on birth or wealth.

Karl Llewellyn:

He recognized the functional approach to law and delineated certain positions as common
He summarized it as follows:

1. The conception of law is in a constant state of flux.
2. The conception of law is a means to social ends and not an end in itself so that constantly examined for its purposes and for its effect and to be judged in the their relation to each other.
3. The conception of society is in flux and in flux it is typically faster than the la is always given that any portion of law needs re-examination to determin society it purports to serve.
4. For the purpose of these enquiries, the jurist should look at what courts and without reference to what they ought to do. There should be a temporarily di for the purposes of study.
5. Juristic enquiry must regard with suspicion the assumptions that legal rules enunciated or inscribed in books represent what courts and people are actua
6. Jurist must regard with equal suspicion that rules of law formally enunciated the decisions which purport to be based on them.
7. There must be recognition of the necessity of grouping cases in narrower cate tries to indicate explicitly which criterion is being applied in any particular
8. Jurists must insist on evaluation of any part of law in terms of its effects ar worthiness of crime to find these effects.
9. Jurist must insist on sustained and programmatic attacks on the problems these lines.

Scandinavian Realist School of Jurisprudence:

The approach which they have developed over the centuries is peculiar and has very littl countries. The law is Judge made law and little codification happens in Scandinavian co explained only in terms of observable facts and the study of such facts which is the scienc law is a true science with any other concern with facts and events in the realm of casualty the very life of mankind in organized groups and the conditions which make possible pea mass of individuals and social groups and the co-operation for the other ends than propagation.

Axel Hagerstrom:

He is considered to be the spiritual father of the Scandinavian Realists. He mastered the essentially a jurist of philosophical times. Legal Science is important tools in reorganizati the same way as natural sciences depict the natural phenomenon. The rights, duties, prop were all word play. Legal Philosophy is a sociological dispensation based on Historica Analysis. The idea of rights and duties expressed in the imperative form is really about s legislator had in mind too been actualized by means of the law.

The claims and assertions of rights and duties is basically what in fact a person claimin from the party who is under an obligation through the process of law. Judges while appl

'it shall be so' is nearly a phrase which does not express any kind of idea but serves as a psychological means of compulsion in a certain case.

It is only from the ideas that logical content can be drawn. On the other hand the ideal content of law is arrived at for psychological associative reasons.

The legal enactments concerning rights and duties are powers which fall outside the physical world. Even if, the legislator also understands why rights and duties are certain social state of affairs which he aims at realizing, yet the idea of rights and duties are supernatural powers and bonds present and active throughout. The essence of Hagerstrom's thesis is the extrapolation of the idea of rights and duties as they are odd propositions but there content is something of supernatural power with regard to things and persons.

The second aspect of his thesis is that rights and duties have a psychological explanation found in the feelings of strength and power associated with the conviction of possessing a right. Therefore, one fights better if one believes that one has right on one's side.

Karl Olivecrona:

Rules of law are independent imperatives that are propositions in imperative form but not issuing like commands from particular persons. Law is a link in the chain of cause and effect. The binding force of law is a reality merely as an idea in human minds. The content of a rule of law looking at both substantive and procedural aspects may be defined as an idea of imaginary action by people, for e.g. judges in imaginary situations. The application of law consists in taking these imaginary actions as models for actual conduct when the corresponding situations arise in real life.

Rule of Law is not command in the proper sense. Its innermost meaning is to range law among the facts of actual world and the commands if there are any are natural facts. State as an organization cannot issue commands as it is the individuals who may issue commands. The rules of law are independent imperatives as they are propositions which function independently of any person who commands. Law chiefly consists of rules about force. The rules of civil and criminal are at one and at the same time, the rules for private citizens as well as the use of force by the officials.

He asserts that the belief that moral ideas are the primary factors that the law is inspired by them and justice is represented by rules of law is incorrect as they are not based on facts rather are superstitions. He held that the purpose of all legal enactments, pronouncements, contracts and other legal acts is to influence man's behaviour and direct them in certain ways.

The contribution of Olivecrona is multi-fold. He says,

1. By Stressing that Law as fact is something which has to be observed and the legal conception such as command - duty, legal rights - duties are fantasies of mind.

2. The Psychological Pressures are the real reason for law.

3. Rules of Law are imperatives distinct from commands.

A.B. Lundstedt:

He contends that natural justice is an external factor for balancing the interests of the parties based on evaluation. The entire substratum of legal ideology, the so called material law and its basis, natural justice lacks the character of reality. Even legal rights, legal obligations, legal relationships and the likes lack such a character. The common sense of justice is far from being able to support the material law, on the contrary, receives its entire bearing through the maintenance of law i.e. legal machinery which takes the common sense of justice into its service and directs it in groves and furrows advantageous to society and its economy and consequently,

legal ideology does not and cannot perceive those realities appertaining to legal machinery but places them right on their head. Legal conceptions such as wrongfulness, guilt and the like are operative only in the subjective conscience and could not have objective meaning.

To contend that the defendant has violated a duty was a judgment of value and thus, an expression of feeling. The only realistic significance that could be assigned to such terms was in connection with the coercive legal machinery of the state called into action for the purpose of enforcing a contract or punishing a wrong-doer. The idea of law is to achieving justice. It is not founded on justice but on social needs and pressures. He promoted the method of social welfare which is a guiding motive for legal activities.

In the case Rylands -Vs- Fletcher, the court decided what the rules as to damages should be for cases in which something dangerous had escaped from land. The fact that the court reasoned in terms of obligation on the property owner was illusionary, superfluous and because it mystifies, also harmful.

Legal activities are indispensable for the existence of society. Social Welfare as a guiding principle of legal activities are decent food, clothing, shelter, all conceivable material comforts as well as the protection of spiritual interests. The contribution of Lundstedt in developing a value neutral realist theory is remarkable as it stresses that concepts such as right and duty, liability etc. are tools of thought used in deciding the cases.

Alf Ross:

The Concept of valid law on the analogy of a game of chess being played by two players and who does not know the rules of the game will be an onlooker. Human social life acquires the character of community life from the very fact that a large number of individual actions are relevant and have significance on set of common conceptions of rules. They constitute a significant whole bearing same relation to one another as move and counter move.

A norm is a directive which stands in relation of correspondence to social facts. The norm is said to be the directive in the sense of a meaning contained is a norm only if it corresponds to certain social facts. The fundamental condition for an existence of a norm must be that it is followed by in the majority of cases; the pattern of behaviour presented in the directive is followed by members of the society

On Law and Justice - Legal Sanction:

They are applied as per the decisions of the courts. Therefore, the existence of a legal norm would have to be derived from an observed regularity in the court's decision. A norm may derive from a past decision and it follows from this view that all norms include those of legislation, should be viewed as directives to courts. Legal rules are rules about the exercise of force and as such are directed to officials.

Directives and Norms:

He contends that from a psychological point of view, there is another set of norms directed to individual which are followed by them and felt to be binding. The test of validity of law lies in the predictability of decisions. So, valid law means the abstract set of normative ideas which serves as a scheme of interpretation for the phenomenon of law in action which again means that these norms are effectively followed. His contribution is multi-dimensional.

1. He is concerned to divest legal validity from all meta-physical necessities.
2. His thrust is that the legal norms are valid if courts would enforce and predict them. Norms are essentially addressed to courts rather than to private individuals.
3. The natural law philosophy in recognizing the relationship between law and morals is fallacious.

R. P. ROBAN

THE PURE THEORY OF LAW

The Pure Theory of Law was given by Hans Kelson. This theory is also known as "Vienna School" because Kelson is the product of Vienna University. This theory resembles with Austin's command theory because in Kelson's theory there must be sanction behind law. Austin gave it the name of command theory and Kelson gave it the name of Grundnorm theory. Kelson is affected by local conditions, natural condition and international condition. After studying all these conditions he gave this theory of Law, which is known as pure theory of law and grundnorm theory.

Concept of Pure Theory of Law:

At the time of Kelson, there are first world was which destructed the property of human beings at international level. So, he gave power to the international law and avoiding the destructions of the world. Secondly during that time many countries adopted written constitution. So, Kelson also get influenced from these written constitutions and gave his own theory which is based on grundnorm.

Grundnorm:

'Grund' means 'basic' or 'great' and 'norm' means 'law'. So, it means a great law the superior authority from which law comes out. He compared the grundnorm with written constitution. According to him written constitution is the highest authority in the country which is known as grundnorms. In England the Parliament is a grundnorm, in USA written constitution is grundnorms and in India too written Constitution is grundnorm. State is not above the grundnorm. Sovereignty also liven in grundnorm. Accoding to Kelson, law is a neither motive nor science, it means science of norms. In laws only those rules are taken which are related with legal aspects. Any others like moral rules, religious rules and ethical rules do not come under the concepts of grundnorm.

System of Normative Rules:

System of normative rules was Hierarchy. In hierarchy system there is one highest authority and all other are lower authorities. This highest authority was grundnorm which was in the form of written constitution and other authorities are below the constitution. The source of power in a state for all bodies is written constitution.

International Law:

Kelson says that norms have a force behind it. This force lies in the grundnorm. If this legal norm is not obeyed then one person will be punished for it. He also says that at this time international law is immature. It is in primitive stage. It is developing.

Nature of Grundnorm:

According to Kelson each country has the formation of grundnorm according to local conditions. The duty of jurists is to interpret the grundnorm in their own language. They are not concerned with the goodness or badness of the grundnorm. They are not concerned with the origin of the grundnorm. In this way the grundnorm is the main source of all the laws in the country.

Elements of Pure Theory:

Kelson gave his view under this theory about State, sovereignty, international law, public and private law, public and private rights, private and juristic law.

Feature of Kelson's theory:

1. **Grundnorm as a source of law:** Grundnorm is the source of all laws. Grundnorm is in the form of written constitution any such body, which contains rules, or any such legal system in a country.

2. **No difference between law and state:** Kelson says that, there is no difference between law and State between because they get power from the same grundnorm. Law comes from the grundnorm and the state also comes from the grundnorm.

3. **Sovereign is not a separate body:** Austin says sovereign is a politically superior person which keeps controls over the politically inferior persons. But, Kelson says that the power of sovereign lies in the people. So, the Sovereign is not separate and superior from the people of the country.

4. **No difference between public law and private law:** The public law is related with the state and the private law is related with the individuals as Kelson says that there is no difference between public law and private law. The law which creates a contract between individuals is called private law.

5. **Supremacy of international laws:** The main aim of Kelson is to decrease the tension at world level because there was First World War and Second World War which destroyed millions of persons and property. He also said that the international law is in primitive stage or immature stage. It means it is in developing stage. One day will come when international law will get equal to that of municipal law. So this is also enforceable.

Criticism of Kelson's theory:

Inspite of having good concept of pure theory given by Kelson some of the criticism faced by him, which are as follows:

1. **Grundnorm is a vague concept:** The concept of grundnorm is not clear. It cannot be applied where there is no written constitution. The base of grundnorm in the form of positive norms or the rules based only on legal order is not clear. The rules, which are not, linked with morals ethics. Customs and religion are not the norms. But we cannot ignore the role of these norms in the development of law.

2. **International Law is a weak law:** Kelson advocated the supremacy of international law. But even up to now, we see that is no force behind international law.

3. **No difference between state and law:** This point is also criticised by various writers. Law as a separate thing from the State, which State is a body, which law is a rule that regulates the state.

4. **Difference between public law and private law:** Kelson says that there is no difference between public law and private law which is also not right in the modern days.

5. **Customs and Precedents ignored:** He said customs are also a source of law, while we see that customs are the source of all laws

Although Kelson has been criticised from various angles yet he had contributed a lot in the development of the society. Thus the concept of grundnorm gave power to the public at large as well as at national level. His main purpose was to stop destruction of any world war. This can resemble to Austin also Kelson is also limited with the law.

ECONOMICAL JURISPRUDENCE

Marxist Theory of Law

Karl Marx and Fredreich Engels were the founders of the greatest social and political movement which began in 19th century and flourished in 20th century as a political philosophy in Eastern Europe which is the erstwhile Soviet Union and influenced all the decolonized colonies of the world and is practised in China's Political Philosophy. Marx's view of state and law was co-terminus with the understanding of society and social process. Marx's originality of thought lies in the fact that he synthesized almost entire philosophical thought from Aristotle to Hegel.

The sociological understanding of the society led Marx to pronounce that the desired system would be a Communist Society based on rational planning, co-operative production and equality of distribution and most importantly, liberated from all forms of political and bureaucratic hierarchy.

Marx condemned and rejected the state and money as Bourgeois concept and the proletariat has a historical mission of emancipating the society as a whole. Law seems to be nothing than a function of economy without any independent existence. His classification of society into various classes -

1. The Capitalists
2. The Wage Labourers
3. The Land Lords

This conflict will eventually have to be resolved. The resolution of the conflict will take the shape of a Proletarian revolution. Once this revolution takes place, it will seize the power of the state and transform the means of production in the first instance into the state property. The earlier state of exploitation and representative of class antagonism will be replaced by a state truly representative of society as a whole which means taking possession of means of production in the name of society is at the same time its last independent act of a state. The interference of the state in social relation becomes superfluous in one's sphere after another and then ceases off itself. The government of persons is replaced by administration of things and directs the process of production. However, the Proletarian revolution in order to reach the stage of Communism shall have to pass through various stages.

1. Establishment of a Proletarian Dictatorship which is essential to convert the capitalist modes of production to the Proletariat mode of production.
2. Stage of Nationalization of the property and all the capital modes of production.
3. Stage of Socialism as the property is in common ownership, the society at large shall be responsible for the production and distribution of goods.

As the production of goods in common ownership, the distribution of commodities will have to follow "from each according to his ability to each according to his needs". Inequalities will remain and hence, the need to distribute the goods is inevitable. The ultimate stage is that of Communism and this state he imagined in his work called "Critique of Gotha Program - 1875". Communist society will have to develop and emerge from capitalist society and in respect will carry with it some marks of capitalist society. If a labourer has worked for fixed hours of a day, he is entitled to the amount of wages for which he has worked. He receives a certificate from society that he has furnished such and such amount of labour and with this certificate he draws from the social stock of means of consumption as much as costs same amount of labour.

Higher Communist State:

Concept of power and labour gets vanished. After production force increases, then there will be all round development of individual. This we get from "Communist Manifesto". In higher form of communist state after enslaving subordination of the individual to the division of labour and anti-thesis between mental and physical labour has vanished after labour has become not only a means of life but life's prime want, after the productive forces have also increased with the all-round development of individual. And all the springs of the co-operative wealth flows more abundantly.

The concept of state is a super structure in a capitalist state to organize and uphold class oppression. The bureaucracy and the executive in a state are for the managing common class and struggle waged by the society against each other. Law is not based on will but once the bourgeois state is overthrown by a proletariat, the proletariat state comes into existence. This state is representative of social will of all the classes. The nexus between safeguarding the private property by a capitalist state is replaced by a proletariat state which has nationalized all the private property. However, state and statecraft remains important and integral in the proletarian society.

E. Pashukanis:

He tried to remove the gloss on law and Marxism as experimented by the Marxist state. He believed that proletariat law practised in erstwhile Soviet Union needs alternative general concepts to reinforce Marxist theory of law. Power is collective will as the rule of law is realized in the bourgeois society to the extent that this society represents a market.

Karl Renner:

The institutions of private law and their social functions utilized the Marxist theory of sociology to develop a theory of law. Socialists and Marxists have failed to understand that new society has always pre-formed in the womb of the old and that is equally true for law. The process of change from one given order to another is automatic. Renner confesses that the concept of property in terms of Marx has not remained the same but the property whether in socialism and capitalism has not remained an instrument of exploitation rather the natural forces of change have put property into various restrictions be it tenants, employees or consumers. However, the power of property remains whatsoever the political character of the state may be.

FEMINIST JURISPRUDENCE

The feminist jurisprudence movement appears to have originated in the US in the 1970s, it seems to have taken the form, in its earlier years, of a considered theoretical response by women jurists and lawyers to a widely-held perception of American jurisprudence as the product of an exclusively male ideology which, by its origins and nature, effectively excluded women from significant participation in legal affairs and institutionalised their formal and informal subservience to men. The growth of the movement was recognised by the CLS Conference of 1983 which included in its programme an examination of the basis of feminist jurisprudence.

Feminist jurisprudence is, essentially, a body of legal theory and comment associated with jurists who accept the view that the progress of society as a whole requires an intensive, informed struggle against the legal ideologies and practices associated with the patriarchal form of society. Within that society has been created and institutionalised, in a variety of forms, discrimination against, and the consequent oppression of, half of humanity i.e., women. The movement's ideologists argue for the analysis and ultimate rejection of a jurisprudential ideology which serves, objectively, the specific interests of men, whose dominance is assumed and asserted, by jurists and legislators alike, to be a 'natural phenomenon'. In the words of Lorenne Clark, the movement is concerned with 'the dominance of those who are naturally stronger and freer from the grinding necessities of biological reality'.

The movement's ideologists call for scholarship which will produce a basic challenge to the fictions and myths propagated largely by male jurists, consciously or unconsciously, and derived solely from a male perspective. In place of a 'gendered jurisprudence', the movement seeks to build the foundations of a legal theory which will neither exclude nor marginalize the historical experience and the contemporary situation of women.

The growth of academic research in the areas favoured by feminist jurists in the field of the history of women, the development of the concept of equality in jurisprudence, the struggle for women's rights, contemporary aspects of sex discrimination, etc. which has, almost inevitably, produced a variety of approaches to the tasks of the movement's scholars in relation to jurisprudential investigation and interpretation. In the essay, Feminism and the Limits of Equality (1990), Professor Patricia Cain notes the existence of separate strands of feminist theory which are at the basis of contemporary schools of feminist jurisprudence.

Liberal feminism appears to concern itself largely with matters such as equal rights and opportunities and the extension and intensification of constitutional rights for American women. It emphasises the concept of women as autonomous members of society; its theorists have expressed much sympathy with the need to liberate women from the private domestic sphere so as to expand opportunities for them in other areas of social endeavour.

Radical feminism, as it relates to jurisprudential thought, stresses the importance of perceiving women as one class dominated by another, with a resulting class struggle. Changes in laws which favour the male class are urgently required if inequalities of power are to be brought to an end. Sex equality demands for its attainment a correctly motivated struggle in which the existing law will be utilized in deliberate fashion so as to provide affirmative action which will result, for example, in the suppression of pornography, which denigrates women.

Cultural feminism recognises the essentially unique nature of women which has contributed to their life experience. Feminist jurisprudence is welcomed as a method of effecting a substantial change in the conditions and overall cultural patterns of women. The movement wishes to utilise in its campaigns the 'different voices' of women which will testify to an understanding of the significance of women's comprehension of relationships and the 'essential connectedness' of the human experience.

Post-modern feminism rejects equality and views it as 'a construct which must be reconstructed'. The very idea of 'a woman's point of view' is cast aside as a fiction which, in practice, merely serves to bind the individual to her identity as a woman. Practical solutions to concrete legal situations involving women are required rather than elegant abstract notions of the nature of law. In particular, to indulge in arguments with the upholders of a male-dominated jurisprudence on terms of its own choosing can never be to the advantage of women as a group.

Feminist jurists have cited the almost universal prevalence of the myth of women's innate weakness as an example of a sedulously cultivated legend which has been central to 'the long government of male over female' which characterises the patriarchy. The arguments advanced by the jurist, Stephen, in Liberty, Equality, Fraternity (1873) against the concept of the equality of women resulted in his advocating that 'if marriage is to be permanent, the government of the family must be put by law and by morals in the hands of the husband'. Dicey's Law of the Constitution (1885) inveighs against the claim of votes for women ('which is in reality a claim for the absolute political equality of the two sexes') because it ignores 'the difference of sex...which can distinguish one body of human beings from another... It means that Englishwomen should share the jury box and should sit on the judicial bench'.

The Australian feminist, Mary Daly, argues in her essay, The Spiritual Dimension of Women's Liberation (1970), that 'the Judaic Christian tradition has been patriarchal down through the millenia, although sometimes this has been modified or disguised'. Women who strive for emancipation from their 'abject condition' should be aware, Daly claims, that 'brotherhood, even when it attempts to be universal, means a male universalism'.

The destruction of patriarchal ideology involves the creation of a new jurisprudence by women who view society, law and legal institutions from their specific, unique perspective. In pursuance of this task they will find ideological allies, but they themselves must provide the necessary impetus for change. A new perspective demands new tasks and a new methodology of jurisprudential investigation. In Feminist Legal Methods (1990), Professor Kathleen Bartlett outlines a scheme of enquiry appropriate to the aims of feminist jurisprudence, which requires 'the organisation of the apprehension of truth'. The existing formal methods of legal reasoning (deduction, induction, analogy, etc) should be utilized but should be supplemented by the following specific modes of investigation.

'Equality' is rarely perceived by feminist jurists as a desirable end in itself. In Reconstructing Sexual Equality (1987), Professor Christine Littleton states categorically that 'equality', which has been 'the rallying cry of every subordinated group in American society', can no longer be accepted un ambivalently by those who have embraced the principles of feminism. A victory for women in a campaign for equal pay is not necessarily to be perceived as a blow against patriarchy; the admission of women to the marine corps does not affect the fundamental pattern of male.

The rejection of the formal ideology of 'equality' domination of society; the passing of a Parliamentary bill which seeks to make sexual harassment at the place of work an offence is not necessarily to be interpreted as a successful assault on the commanding heights of masculine domination. Feminist jurisprudence is opposed generally to the political and legal theories of Marxism. The thesis forecasting that the disappearance of classes will bring true equality between the sexes is rejected as simplistic and, when judged by the history of the 20th century, unsound. In his tract, Women and Society (1912), Lenin outlined the Marxist solution to problems of women's inequality within capitalist society:

'As long as women are engaged in housework their position is still a restricted one. In order to achieve the complete emancipation of women and to make them really co-equal with men, we must have social economy, and the participation of women in general productive labour. Then women will occupy the same position as men.'

Early contributors to feminist jurisprudence forecast that the intensity of opposition to the very concept of a legal theory based upon the goal of a non-patriarchal society would grow as the radical nature of its proposals became evident: in the event this has happened. The justification for a jurisprudence which totally rejects 'male-dominated law' has been rejected as lacking any basis in legal history and practice. Male and female jurists and practitioners have cautioned against attempts to present sectional interests in terms of universals, and have urged a rejection of the divisive nature of 'jurisprudence from women's perspective'.

A changed society and an appropriate jurisprudence will emerge, it is argued, only from the united activities of men and women. The presumption that the 'new perspective' advocated by feminist jurists will be free from the type of distortion which is held to characterise the ideology of patriarchy is arguable. There is criticism, too, of the tendency of some prominent theoreticians of the feminist movement to write off the intention and effect of legislation which diminishes discrimination against women.

A jurisprudence which is concerned with long-term goals to the exclusion of short-term gains is likely to be ineffectual in providing a guide for action. Professor Catherine Mackinnon and Andrea Dworkin, attorney and radical feminist, were able to inspire and direct a highly publicized campaign with the object of making the publication and sale of pornography a violation of women's civil rights. Here, it could be claimed, is a jurisprudential ideology in the service of society as a whole.

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BIBLIOGRAPHY

1. Lloyd's Introduction to Jurisprudence
2. Friedman: Legal Theory
3. H.L.A Hart's "The Concept of Law."
4. Fuller, Lon L.:Anatomy of Law, 1968.
5. Fuller, Lon L.: Problems of Jurisprudence, Brooklyn, Foundation Press, 1949.
6. Henry Maine,Ancient law, 1946.
7. Holmes: The Common Law, 1963.
8. Paton, G.W.: Text Book of Jurisprudence, 3rd ed., Oxford University Press, 1964.
9. C.K.Allen, Law in the Making.
10. Paranjape N.V.: Studies in Jurisprudence and Legal Theory, 5th ed.,Allahabad LawAgency, 2008.
11. Sir Frederick Pollock: Jurisprudence and Legal Essays
12. Roscoe Pound, Jurisprudence, 1952.
13. Dias, jurisprudence, 5th ed., 1985.
14. RatanapalaSuri, Jurisprudence, 1st SouthAsian ed. 2011, Cambridge.
15. B,N. ManiTripathi:An Introduction to Jurisprudence(Legal Theory).
16. Avatar Singh, Jurisprudence
17. ICLS Lectures will build on the University of London Subject Guide, 2004 Edition.
18. John Austin, The Providence of Jurisprudence Determined (1831)
19. H. Rackham, trans., Nicomachean Ethics, Loeb Classical Library; J. A. K. Thomson, trans. (revised by Hugh Tedennick), Nicomachean Ethics, Penguin Classics.
20. Joseph Raz, *The Authority of Law* (1979) Oxford University Press
21. Joseph Raz, The Authority of Law: Essays on Law and Morality (1983).
22. Ronald Dworkin, *Law's Empire* (1986) Harvard University Press
23. "Jurisprudence". West's Encyclopedia of American Law. Ed. Jeffrey Lehman, Shirelle Phelps. Detroit: Thomson/Gale, 2005.
24. Friedrich Carl von Savigny, *On the Vocation of Our Age for Legislation and Jurisprudence* (Abraham A. Hayward trans., 1831)
25. Cotterrell, R. (1995). *Law's Community: Legal Theory in Sociological Perspective.* Oxford: Oxford University Press.
26. Cotterrell, R. (2003). *The Politics of Jurisprudence: A Critical Introduction to Legal Philosophy,* 2nd ed. Oxford: Oxford University Press.

27. Hartzler, H. Richard (1976). *Justice, Legal Systems, and Social Structure.* Port Washington, NY: Kennikat Press.

28. *Engle, Eric (July 2010).* LexNaturalis, IusNaturalis: Law as Positive Reasoning & Natural Rationality

29. Hutchinson, Allan C., ed. (1989). Critical Legal Studies. Totowa, NJ: Rowman& Littlefield.

30. Kempin, Jr., Frederick G. (1963). *Legal History: Law and Social Change.* Englewood Cliffs, NJ: Prentice-Hall.

31. Llewellyn, Karl N. (1986). *Karl N. Llewellyn on Legal Realism.* Birmingham, AL: Legal Classics Library. (Contains penetrating classic "The Bramble Bush" on nature of law).

32. Murphy, Cornelius F. (1977). *Introduction to Law, Legal Process, and Procedure.* St. Paul, MN: West Publishing.

33. John Rawls, (1999). *A Theory of Justice*, revised ed. Cambridge: Harvard University Press(Philosophical treatment of justice).

34. Wacks, Raymond (2009). *Understanding Jurisprudence: An Introduction to Legal Theory* Oxford University Press.

35. Washington, Ellis (2002). *The Inseparability of Law and Morality: Essays on Law, Race, Politics and Religion* University Press of America.

36. Heinze, Eric, *The Concept of Injustice* (Routledge, 2013)

37. Bentham, J., (1789), *An Introduction to the Principles of Morals and Legislation.*

38. Feldman, F. (2004) *Pleasure and the Good Life* (Oxford: Clarendon Press).

39. Griffin, J. (1986) *Well-being* (Oxford: Clarendon Press).

40. Kraut, R. (2007) What Is Good and Why: The Ethics of Well-Being (Cambridge: Harvard University Press).

41. Mill, J.S., (1863), *Utilitarianism.*

42. Nozick, R., (1974), *Anarchy, State, and Utopia* (Oxford: Basil Blackwell).

43. Nussbaum, M and A. Sen (ed.) (1993) *The Quality of Life*, Oxford: Clarendon Press.

44. Scanlon, T. (1998) *What Do We Owe to Each Other?*, Harvard: Belknap Press.

45. Sumner, W. (1996) *Welfare, Happiness, and Ethics* (Oxford: Clarendon Press).

46. Jules Coleman, The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory

47. Scott Shapiro, Legality (Harvard University Press 2011).

48. John Finnis, Natural Law and Natural Rights (1980)

49. William Twining, General Jurisprudence: Understanding Law from a Global Perspective (2009)

50. Larry Alexander, "Law and Formalism".

51. Brian Z. Tamanaha, Law as a Means to an End: Threat to the Rule of Law (Cambridge University Press 2006).

52. Scott Brewer, Figuring the Law: Holism and Tropological Inference in Legal Interpretation (1988).

53. Andrei Marmor, Coherence, Holism, and Interpretation: The Epistemic Foundations of Dworkin's Legal Theory, Law and Philosophy (1991).

54. Chapin Cimino, Public Law, Public Consequences, and Virtue Jurisprudence (2010).

55. KyronHuigens, Nietzsche and Aretaic Legal Theory (2003)

56. Lawrence B. Solum, Virtue Jurisprudence: An Aretaic Theory of Judging (2003).

57. Plato's "The Republic"

58. Aristotle and The Philosophy of Law: Theory, Practice and Justice (IusGentium: Comparative Perspectives on Law and Justice) (Edited by LiesbethHuppes-Cluysenaer&Nuno M.M.S. Coelho, Springer 2013.

59. Black's Law Dictionary

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Model Questions and Answers

Q. No. 1 Explain the nature and scope of Jurisprudence. (12 Marks)

The study of Jurisprudence started with Romans. The Latin equivalent of "Jurisprudence" is Jurisprudentia which means either "Knowledge of law" or "Skills in law".

1. It studies the Meaning of the term "rights" and various kinds of rights which are theory possible under a legal system.
2. It is not generally used in other languages in the English sense.
3. In French, it refers to something like "case law" it an analysis of the formal structure of law and its concepts.
4. It is confined only to law touching every aspect of law and study of fundamental legal principles. "Juris" means law (legal) and prudentia" means skill or knowledge.
5. It includes the philosophical, historical and sociological basis and an analysis of legal concepts.
6. In France, it is called 'philosophia du droit", (that is the philosophy of Rights).
7. In Germany, it is called 'Rechtsphilosophie' (that is the philosophy of Rights), that is of law in the abstract sense.
8. An India (NeedhiShastra) that is knowledge of law.

Definitions:

According to ULPIAN Definition: "Jurisprudence is the knowledge of things divine and human, the science of the just and unjust".

According to PAULUS: "It is the law and the law is not to be deduced from the rule but the rule from the law".

According to AUSTIN: It is a positive law. Every law is command, obtains its force from its sovereign. The positive law which is termed by him as "laws strictly so called". It is study of law as it is and not what it, "ought to be". He says, "law is the command of sovereign and not of divine". According to him, there is no distinction between good law and bad law. He divided it into 2 kinds. They are

1. General Jurisprudence
2. Particular Jurisprudence.

Branches of Jurisprudence

It can be divided several branches. They are

1. Historical Jurisprudence deals with general principles governing the origin and development of law, with influences that affect the law, with the origin and development of those legal conceptions and principles which are so essential in their nature as to deserve a place in the philosophy of law.
2. Analytical Jurisprudence which analyses the first principles of law as they exist in a legal system.
3. Ethical or philosophical Jurisprudence deals with the first principles of ethical significance and adequacy of law.
4. Realists Jurisprudence deals with the laws made by the Judiciary
5. Sociological Jurisprudence deals with the law and application of law in different society which are distinct in thier practice.

The Nature and Value of Jurisprudence

Irrespective of the serious and severe criticisms on the utility of the subjects "Jurisprudence', it has its own merits, values, benefits in the legal field.

WurzusOpines : "Jurisprudence is classed as social sciences first of kind ever born".

1. Reflection of Rules:

The Jurisprudence comparises philosophy of law and is a second order subject which object is not to discover new rules, but to reflect on the rules already known. It is just like a philosopher in law. The Philosopher does not discover any new law. He is concerned with the Scientific law already discovered.

2. Analysis:

It is analyses of legal concepts several times the legal rules overlap with another. Eg. The legal rules of penal code overlap with torts, contract, family laws, civil, etc. Then it analyse them, separate them and show a right path to the lawyers, jurists, administrators, legislators etc.,.

3. Salmond says, "Jurisprudence studies the meaning of the terms for example 'Right' in the abstract and seeks to distinguish the various kinds of Rights which are the theory possible under a legal system. Similarly it investigates such other legal concepts as 'act', 'intention', 'Negligence', 'ownership', 'possession' etc.

All of those are equally rigorously studied in the ordinary branches of law, but since each of them functions in several different branches of law, Jurisprudence tries to build up a general and more comprehensive picture of each concept as a whole".

4. Clarification : It clarifies the legal position correctly, pin-point, whenever there arises a situation of confusion, ambiguous, uncertain in language of the law.

5. Connection with other Disciplines:

Law treats the legal position only. But Jurisprudence concerns with all other disciplines such as sociology, economic, political, philosophy, physiology, psychology, history etc., it is the only subject 'Jurisprudence' which can link law with other disciplines and give a wider social context and aspect.

6. Intrinsic Interests: It has 'Intrinsic Interest" in its own subject. The Jurisprudence analyses, investigations, enquire into the law. It goes to the depth of the society and law. It reaches the roots of the elements of law. It is the only person to evolve a new theory of law can approach for the remedy of evils. Therefore, researches into Jurisprudence may well have re-echos on the whole of legal, political and social thought.

7. Rational: Sawer in his 'Law in Society' explains the value of benefit of Jurisprudence. He says, "It is to construct and elucidate organizing concept serving to render the complexities of law more manageable and more rational and in this way theory can help to improve practice".

8. In Practice: Practically by studying 'Jurisprudence' a lawyer can develop his professional skills. He can sharpen his own professional and logical techniques.

9. Salmond says, "Jurisprudence can teach lawyer to look, if not forwards, at least sideways and around him and to realize that the answers to new legal problems must be found by consideration of present social needs rather them in the distilled wisdom of the past".

Scope of Jurisprudence

1. It has widened considerably over the years.
2. It includes all concepts of human order and human conduct.
3. Anything which concerns order in the state and society will be within the domain of Jurisprudence.
4. According to Redcliffe. It is a part of history, a part of economics and sociology, a part of ethics and a philosophy of life.
5. According to Mukherjee, "Jurisprudence is both an intellectual and idealistic abstraction as well as behaviour study of man in society".
6. It includes political, economic and cultural ideas. It covers the study of man in relation to state and society.
7. Karl Llewellyn Observes, Jurisprudence is as big as law and bigger.

Utility of Jurisprudence

Jurisprudence is not without practical value. It is the "eye of law" and its main uses are follows:

1. A study of those fundamental principles which are common to all systems of law is of great advantage in the study of a particular system of law.
2. The Aim of Jurisprudence is to develop those fundamental principles, the knowledge of which is essential for the practical work of the registrar and the advocate and which are adopted by the Society to adjust the relations between man and man.
3. A study of Jurisprudence is of immense value to the closely allied sciences of legislation.
4. Jurisprudence also has great educational value. The logical analysis of legal concepts widens the (outlook) of lawyers and sharpens their logical technique.
5. It can also help to improve practice. It is to construct and elucidate concepts serving to sender the complexities of law more manageable and more rational.
6. It can teach the people to look, if not forward, at least sideways and around them and realize that answers to new legal problems must be found by a consideration of the present social needs and not in the wisdom of the part.
7. It said to be "The eye of law". It is the grammar of law.
8. It can find out the Actual rules of law, by understanding the Nature of law, its concepts and distinctions.
9. It also helps in knowing the language, grammar, the basis of treatment and assumptions upon which subjects rests.
10. It can help to tackle new and difficult problems which he can handle through his knowledge of Jurisprudence which trains his mind into legal channels of thought in his practical work.
11. It relieves again and again in each Act certain expressions such as right, duty, possession, ownership, liability, negligence, etc.
12. It enlightens students and helps them in adjusting themselves in society without causing injuries to the interests of other citizens.
13. It helps the judges and the lawyers in ascertaining the true meanings of the laws passed by the legislatures by providing the rules of interpretation.
14. It exams the consequences of laws its administration on social welfare and suggesting changes for the betterment of the superstructure of laws.
15. It confined to the study of positive law and also includes normative study.
16. It is social engineering regarding which improve its quality at every stage.
17. It came to recognize the social and rational nature of man. Law was adapted to human nature.

Q.No.2 Discuss the idea of legal personality and examine the status of unborn persons (7 Marks)

LEGAL PERSONALITY

The main object of law is to regulate the relationship between individuals in the society. The law imposes certain duties on individuals for the protection of interests of mankind. The law being concerned with regulating the human conduct, the concept of legal personality constitutes an important subject-matter of jurisprudence because there cannot be rights and duties without a person.

Origin of the concept of legal personality

The word " person" is derived from the Latin word persona which meant a mask worn by actors playing different roles in a drama.Generally, there are two types of person which the law recognizes, namely,Natural and artificial.One of the most recognized artificial person is corporation.

Definition of "legal person"

Salmond defines, " any being to whom the law regards as capable of rights or duties. Any being that is so capable, is a person whether human being or not and nothing that is not so capable is a person even though he a man."

Gray defines, "entity to which rights and duties may be attributed".

Paton defines, legal personality is a medium through which some such units are created in whom right scan be vested.

Kinds of Persons

1. **Natural Persons**- A Natural person is a human being capable of rights and duties. They are both persons in fact and in law.
2. **Legal persons**- " legal persons are being, real or imaginary, who for the purpose of legal reasoning are treated in greater or less degree in the same way as human beings." they are persons in law, but not in fact. Legal persons are also termed fictitious, juristic, artificial or moral.
   - i) **Corporation** : a corporation is a group or series of persons which, by a legal fiction, is regarded and treated as a person.
   - ii) **Institution** : the object selected for personification is not a group or series of persons, but an institution, for eg., a church or university.
   - iii) **Fund or Estate** : the corpus is some fund or estate devoted to special of uses, for eg., a charitable fund or a trust estate.

Legal Status of Unborn Persons

Unborn persons have given the legal status by law. There is nothing in law to prevent a man from owning property before he is born. His ownership is real and present ownership but it is contingent because he may never be born at all. Paton has observed that, "the child in womb is not a legal personality and can have no rights". This view is based upon the fact that the child should be born alive and should be completely extruded from the mother's body before it can have any benefits under the law. It is submitted that this view is not tenable. Now only children in utero, but even unborn children in the sense of children not yet conceived have legal personality. Thus, in the law of property, there is a fiction that a child is a person in being for the purposes of

i) The acquisition of property by the child itself, or

ii) Being a life chosen to form part of the period in the rule against perpetuities.

The Hindu law of partition requires a share to be allotted to a child in mother's womb along with the other living heirs. But if the child is not born alive, his share will be equally partitioned between the surviving heirs. Thus, proprietary rights of children in utero are fully recognized by the law. Injury to the child in womb has been made a punishable offence by the criminal law. Causing death of a child in womb has been made a punishable offence by the Indian penal code a punishable offence. Thus, children in the womb have rights protected by law and have legal personality. Criminal law also protects the unborn child. The personality of an unborn person is contingent to his birth because if he dies in the womb or is still- born, no right will be deemed to have been vested in such a child.

Q.No.3 Write Short notes on Mens Rea. (4Marks)

Mens Rea

Meaning of mensrea is guilty mind. Any act alone does not constitute a crime. It requires a guilty mind behind it. Mensrea is defined as the 'mental element" necessary to constitute criminal liability". Slamond says that criminal liability may require the wrongful act to be done intentionally or with some further wrongful purpose in mind, or it may suffice that it was done recklessly; and in each cae the mental attitude of the doer is such as to make punishment effective. If a person does a wrongful act intentionally or even if committed the forbidden act without wrongful intent but knowing the harmful consequence of the act, he will be punished.

Mensrea must extend to all three parts of the act;

i) the physical doing or not doing;

ii) the circumstances

iii) the consequences

wrongs may be divided into three types;

i) Intentional or Reckless wrongs: in which mensrea is intention, purpose, or design.

ii) Wrongs of Negligence: in which the mensrea is mere carelessness, as opposed to wrongful intent or foresight.

iii) Wrongs of Strict liability: in which mensrea is not required. These wrongful acts by themselves are wrongs and punishable.

Exceptions to mensrea:

i) When the law imposes strict liability, the requirement of guilty mind or mensrea is dispensed with. In the interest of public safety, health, and social welfare, many measures imposing strict liability have been legislated. In matters concerning public health, food, drugs, etc.,such strict liability is imposed.

ii) Where mensrea is difficult to be proved, a guilty mind need not be proved in such cases; provided that the penalties are petty fines.

iii) In the interest of public safety, in deciding cases relating to public nuisance, it is not necessary to take mensrea into consideration.

iv) In those cases which are criminal in form but in fact they are only summary mode of enforcing a civil rights, mensrea is not necessary.

v) Ignorance of law is no excuse is the maxim of another exception.

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