Jurisprudence

Meaning, Nature and Utility

What is Jurisprudence

- Knowledge of Law
- Skill of Law
- Latin origin: Jurisprudentia
- Bentham:
  - Law as it is: Expository
  - Law as it ought to be: Censorial

What is Jurisprudence

- Austin
  - Concerned with positive Law: “Laws strictly so called”
  - Jurisprudence is divided into two parts
    - General Jurisprudence: which is an attempt to expound fundamental principles and broadest generalizations of two or more systems.
    - Particular Jurisprudence: Science of nay actual system of law or any portion of it
  - But Austin’s definition has been criticized by many jurists.

What is jurisprudence

- Holland:
  - A formal science of positive law
  - Positive law: a general rule of external human action enforced by sovereign political authority
  - Jurisprudence deals with various relations which are regulated by legal rules rather than rules which themselves regulate these relations.

What is Jurisprudence

- Salmond
  - Science of Law.
  - Law means the law of the land/ civil law
- Jurisprudence is of three kinds:
  - Expository / Systematic Jurisprudence: Which deals with the contents of the actual legal system as existing at any time
  - Legal History: which is concerned with the legal system in its process of historical development.
  - Science of legislation: to set fourth law as it ought to be

What is Jurisprudence

- Keeton:
  - The study and systematic arrangement of general principles of law.
  - Jurisprudence deals with the distinction between public and private laws and considers the contents of the principal departments of law

What is Jurisprudence

- Roscoe Pound:
  - “Science of Law”
  - Law means in a juridical sense as denoting the body of principles recognized of enforced by public and regular tribunals in the administration of justice.
  - Jurisprudence is the study of fundamental legal principles
  - It is multidisciplinary in nature and it includes political, social, economic and cultural ideas

Scope of Jurisprudence

- Varied Scope
- Earlier it was narrow, however it has widened to incorporate interdisciplinary approach

Significance and Utility of Jurisprudence

- Research
- Practical Value
- Educational Value
- “Eye of Law”/ “Grammar of Law”
- Logical approach enhances
- Provides precise and unambiguous terminology for legislators
- Helps judges and lawyers in ascertaining the true meaning of laws

Relation of Jurisprudence with other Social Sciences

- Jurisprudence and sociology
- Jurisprudence and Psychology
- Jurisprudence and Ethics
- Jurisprudence and Economics
- Jurisprudence and Politics
- Synthetic Jurisprudence

LAW

Meaning Characteristics Purposes and Classification

DEFINITION OF LAW

- Various schools of law have defined law from different angles:

1. Definition of Law in its broad sense:

- Blackstone: Law in its most general and comprehensive sense signifies a rule of action and is applied indiscriminately to all kinds of actions, whether animate and inanimate, rational or irrational.

2. Philosophical Definition:

- Kant: Law is the sum total of the conditions under which the personal wishes of one man can be combined with the personal wishes of another man in accordance with the general law of freedom.
- Hegel: Law is the abstract expression of the general will existing in and for itself.

DEFINITION OF LAW

3. Positivist definition

- Austin: Law is the aggregate of rules set by men as politically superior or sovereign to men as politically subject, i.e. It is the command of the sovereign. It imposes a duty and is backed by sanction. Thus, command, duty and sanction are the three elements of Law.

4. Historical Definition:

- Savigny: Law is the product of common consciousness of the people, which is the living and working spirit in all the individuals in common, which begets positive law.

DEFINITION OF LAW

5. Sociological definition

- Ihering: Law is the form of guarantee of the conditions of life of society assured by the state's power of constraint. Law is a means of social control. It is coercive in character, Obedience to law is secured by state through external compulsion.
- Roscoe Pound: Law is a social institution to satisfy social wants.
- Salmond: Law is the body of principles recognized and applied by the State in administration of justice.

DEFINITION OF LAW

6. Realist Definition

- Justice Holmes: Law is a statement of the circumstances in which the public force will be brought to bear upon men through courts.
- Cardozo: A principle of rule of conduct so established as to justify a prediction with reasonable certainty that it will be enforced by the courts if its authority is challenged is a principle or rule of law.

7. Ethical Definition:

- Del Vecchio: Law is the objective coordination of possible acts among men according to an ethical principle which determines them and prevents their interference

8. Synthetic Definition

- Prof. Sethna: Law in its widest sense means and involves a uniformity of behaviour, a constancy of happenings or a course of events, rules of action, whether in the phenomena of nature or in the ways of rational human beings. In a synthetic sense, civil law is all the body of principles, decisions and enactments made, passed or approved by the legally constituted authorities or agencies in a State for regulating rights, duties and liabilities and enforced through a machinery of judicial process, securing obedience to the sovereign authority in the State

DEFINITION OF LAW

DEFINITION OF LAW

- Paton: Law may be defined in the following manners:
  - Firstly, by its basis in nature, reason, religion or ethics;
  - Secondly, it may be defined by its source in custom, precedent or legislation;
  - Thirdly, it may be defined by its effect on the life of society;
  - Fourthly, it may be defined as the ends that it seeks to achieve
- Law may be described in terms of a legal order tacitly or formally accepted by a community considers essential to its welfare and which it is willing to securing compliance. A mature system of law normally sets up that type of legal order known as the state, but we cannot say *a priori* that without the State no Law can exist.

NATURE OF LAW

- Law is a prescription for conduct
- Law consists of ‘is’ (prescriptive) and also ‘ought’ (normative)
- Law has a ‘form’ / ‘manner’
- Uniformity
- Conformity with Principles of Justice
- Impartiality
- Law prescribes remedies
- Law is the dominant relationship between State and citizen

NATURE OF LAW

- Law consists of rule of conduct and procedure
- Law is a body / set of rules and principles
- Law is a rule of conduct
- Functional aspect of law
- Law in traditional societies (Predominance of Legal Spirit)
- Law presupposes State
- Law is territorial
- ‘The Law’ (Jus) and ‘A Law’ (Lex)

KINDS OF LAW (SALMOND)

- Imperative Law
- Physical or Scientific Law
- Natural or Moral Law
- Conventional Law
- Customary Law
- Practical or Technical Law
- International Law
- Civil Law

- Common Law
- Civil Law
- Canon Law
- Islamic Law
- Hindu Law

KINDS OF LAW (LEGAL SYSTEMS)

KINDS OF LAW (SUBJECT MATTER)

- Constitutional Law
- Administrative Law
- Martial Law
- Public International Law
- Private International Law
- Criminal Law
- Commercial Law
- Prize Law
- Mercantile Law

KINDS OF LAW (OTHER CLASSIFICATION)

- Autonomous Law
- Foreign Law
- Local Law
- General Law
- Special Law
- Moral Law
- Imperative Law
- Conventional Law
- Customary Law
- Procedural Law
- Substantive Law

FUNCTIONS OF LAW

- Justice
- Stability
- Peaceful Change
- Greatest happiness of Greatest number of people
- To win acceptance and tolerance of the vast majority
- Compromise between state and citizens
- Protection of Interests

RELATIONSHIP BETWEEN LAW AND MORALITY

MORALITY MEANING

- Å concepts of what is right or wrong in a particular society - what is acceptable or unacceptable conduct in the society ï known as moral attitudes.
- Å As rules of conduct that are associated with certain distinctive psychological and social attributes. Those who obey the moral rule will tend to feel the sentiment known as virtue and if he disobeys the rules of morality, he tends to feel guilty.
- Å Strawson (1961) as "rules or principles governing human behaviour which apply universally within a community or classò

MORALITY MEANING

- Å It is a code of behaviour that is innate and classified by a higher being
- Å Does not only refer to sexual morality or violence acts. It goes beyond that and encompasses beliefs, principles, standard or behaviour or codes in the society.
- Å Standard of morality may sometimes differ among subgroup of population.

SOURCES OF MORALITY

- Supernatural being ï God instruction through sacred documents: Quran, Bible.
- Nature ï environment, human nature.
- Human beings ï values created by a man, customary belief.

TYPES OF MORALITY

- RELIGIOUS MORALITY ï God revealed to human beings on how to be a good believers. ï The sanction by the God is in the form of sin/good deeds. ï Concern the relationship between human and the God.
- MORALITY AND NATURE ï Relationship between the human & nature.

TYPES OF MORALITY

- INDIVIDUAL MORALITY ï Individual-centered. The person himself choose to believe something is immoral or not and not being dictated or told by the society.
- SOCIAL MORALITY ï Relates the relationship between the members of the society as a whole. Most significant aspect of morality that cut across all of the other aspects and is found in more ethical systems than any of the others.

RELATIONSHIP BETWEEN LAW AND MORALITY

- Å The relation between law to morals is sometimes describe as two intersecting circles, the part inside the intersection representing the common ground between law and moral.
- Å The part outside representing the distinctive realms that each other holds (exclusive sway)
- Å Law and morality reinforce each other - misappropriate something belong to other ï there can be no security in life.

RELATIONSHIP BETWEEN LAW AND MORALITY

- By having moral code human are ought to refrain themselves from doing something that is against the code - supplement with law.
- Morality is the basis of law ï In a primitive society, there was no difference between law and moral rules as they share the same sources (custom, religion).

WHERE MORALS AND LAW DIVERGE

- Even when the act is considerd as immoral, but no legal consequences are imposed upon such act.
- CONSIDER THE FOLLOWING SITUATIONS:
- Scenario 1: Rules which are immoral but legal.
- Rules governing those acts which are wrong according to morals but no legal sanction will be imposed against those

WHERE MORALS AND LAW DIVERGE

- Scenario 2: Moral values but not legally enforceable.
- No formal organization to monitor the obedience of law. Usually strongly adhered to, but no form of sanction if a member of society does not follow it. E.g., Helping the poor
- Scenario 3: Immoral & illegal.
- They are social wrongs and at the same time we require law to render them illegal so that the authority may bring them to face the justice.

LEGALISING MORALITY

- Upgrading the status of moral rules into legal - certain immoral acts are picked up by the law-makers and enforced through legally enacted rules ï theft , murder.
- However, there are certain laws that are considered immoral and erodes the social values and moral of the society. e.g. legalizing homosexuality, abortion, upholding marriage of the same sex, animal testing, etc.
- Should we legalize morality? Isnôt morality is left best between closed door or two (or more) consenting adults?

LEGALISING MORALITY

- Moral Absolutism: No, because it derives from God. Human cannot change. Murder and terrorism are immoral because it against religions and human cannot change it totally.
- Moral relativism: Yes, because morality depends on groups, races, religions. Not all values can be same at all places and religions. The conflict between Western and Islamic world.

PUBLIC VS PRIVATE MORALITY

- Å Can someone commit something immoral which does not cause any harm to anyone?
- Å He or she may claim he has a right to his own body and anything done to his or her body is within her individual right.
- Å Anything he or she does behind closed door is her private matters (private morality). The public has no role in determining what is right or wrong for him or her.
- Å Which one carry more weight?

PUBLIC VS PRIVATE MORALITY

- Wolfenden Report on Homosexual Offences and Prostitution (1957) recommended for the decriminalization of homosexuality between consenting adults in private.
- Even if it is considered immoral, it will not affect the morality of the society as the function of criminal law is only to preserve public order.
- Whether immoral conduct committed in private will adverse affect the society

PUBLIC VS PRIVATE MORALITY

- Lord Devlin: The primary function of criminal law is to maintain public morality. Law should condone immoralities as all immoralities will erode social values. The society will be adversely affected.
- However, everyone has the freedom and privacy to behave in his own way. Tolerance should be granted to them as long as their acts are reasonable to any right-minded man; and not disgusting and intolerable ï If public think the immoral conduct is something disgust and intolerable then such conduct should be decriminalized though it in private.

PUBLIC VS PRIVATE MORALITY

- Hart: Immoralities do not necessarily affect the integrity of society. Criminalizing certain immoral acts will result in personal misery. Furthermore, how do one gauge what is the nature of general morality produced in the mind of a right- minded man?
- Devlinôs approach puts emphasis on society. Every immoral act starts from an individual. If not nabbed or controlled, it engulfs the whole society.

CASE STUDY ON MORALITY

- Victimless crime
- Euthanasia
- Abortion
- Surrogate motherhood
- Human cloning

LEGISLATION

AS A SOURCE OF LAW

INTRODUCTION

- In Modern State, Legislation is considered as the most important source of Law.
- Recent in origin
- Derived from Latin word 'Legis' which means Law. Legislation means making or setting the Law.
- The term Legislation is used in three senses:
  - All methods of law making
  - Every expression of the will of the legislature
  - Strict sense – rules or laws to be followed and enforced in the Courts
- It is in the third sense that we take legislation as a source of law here

MEANING

- Slamond: Source of law which consists in the declarationof rules by a competent authority
- Gray: Legislation is the formal utterances of the legislative organs of the society.
- The term ‘Legislation’ is applied to the deliberate creation of legal rules by an organ of government which is set up exclusively for articulation and promulgation of public policy in a formal document called ‘statute’ or ‘legislation’

DIFFERENCE BETWEEN LEGISLATION AND CUSTOM AND PRECEDENT

- Customary law is manifested into existence through actual observance by the members of a community.
- Judges create law only for the case in dispute. It may lack finality and authoritative formulation
- Legislation is accompanied by the authoritative approval of the governmental organ.

IMPORTANCE OF LEGISLATION

- Ranked as the first source in Modern State
- Most authoritative
- Well recognized
- Unambiguous
- It is the pre-declaration of the law to the citizens and State before it can be applied to the disputes or actions

ADVANTAGES OF LEGISLATION OVER CUSTOM

LEGISLATION

- Advanced method of legal development and marks a matured legal system.
- Existence of its authority is de jure.
- Superior and more authoritative than customs.

CUSTOM

- More used in the primitive society. Now they are either made into enactments or have been abrogated.
- Existence of its authority is de facto.
- Inferior and less authoritative than legislation

ADVANTAGES OF LEGISLATION OVER CUSTOM

LEGISLATION

- Legislation comes into existence only at the instance of the State.
- The State or any similar entity is a pre-requisite of legislation

CUSTOM

- Generally, customs describe the relationship between person and person.
- State as an agency has no role in formation of custom

ADVANTAGES OF LEGISLATION OVER PRECEDENT

- Salmond: "so great is the superiority of legislation over all other methods of legal evolution, that the tendency of advancing civilization is to acknowledge its exclusive claim and to discard the other instruments as relics of the infancy of law.
- Abrogative and Constitutive Power
- Efficiency
- Declaration
- Anticipation of future cases
- Direct and unambiguous
- Greater access and Reliability
- Concise and definite

DISADVANTAGES OF LEGISLATION

- Focuses on Totality and ignores individuality
- Cannot visualize every eventuality
- Rigidity
- Difficult Language
- Poorly drafted codes are misused by some.

KINDS OF LEGISLATION

- Supreme and subordinate Legislation
- Kinds of Subordinate Legislation
  - Colonial Legislation
  - Executive Legislation
  - Judicial Legislation
  - Municipal Legislation
  - Autonomous Legislation
- Direct and Indirect Legislation
- Delegated Legislation

Precedent

As a Source of Law

Meaning

- Broad Sense: A precedent is a decision of a court cited as authority for deciding similar facts on that principle or by analogy.
- Narrow Sense: A precedent is a statement of law found in a judicial decision of a Superior Court, which is to be followed by the same Court in future and also by the subordinate Courts in a similar case.

Theories of Judicial Precedent

- Declaratory Theory of Precedents:
  - According to this theory propounded by Blackstone The Court merely declares what the existing rule of Law is, it does not propound any new rule but only declares that the supposed law was never a law.
  - Judge is sworn to determine, not according to his own private judgement but according to the known laws and customs of the land, not delegated to pronounce a new law but to maintain and explain the old one.
  - *"Juris dicere et non jus dare"* Judges do not make the law, but they merely declare the law.
  - Many Jurists have criticized this theory including Austin, Bentham and Salmond.

Theories of Precedent

- Judges are Law Makers:
  - According to this theory, judges a re law makers.
  - Bacon: the points which the judges decide in cases of first impression are distinct contributions to existing law.
  - Dicey: The best part of Law of England is the Judge made Law.
  - Prof. Gray: Judges alone are law makers
  - Realist School: fully following this in its theory.

General Rules of application of Precedent

- Each Court is bound by the decision of the Courts above it.
- Decisions of the Supreme Court and High Courts are binding on the Administrative Tribunals
- Supreme Court's decisions are not binding upon itself.
- Full Bench of a High Court can reconsider a decision of an earlier full bench of the same High Court if the second full bench is of more judges.
- Any relevant judgement of any court, even a lower Court or a Foreign Court may be cited by the counsel, but these will have only persuasive value (not authoritative value)

General Rules of application of Precedent

- Antiquity of the precedent strengthens its authority. However, very ancient precedents may be inapplicable in modern times.
- There is no one single method of recording precedents. They may be drawn from any reliable source like law reports, news scripts. Historical documents, etc.
- The binding part of the precedent is the *Ratio decidendi* not the *obiter dicta.*
- The obiter dicta of the Supreme Court are binding on the lower Courts.

Doctrine of Stare Decisis

- Literal Meaning: Let the decision stand on its rightful place.
- Decisions of the superior courts are binding on the lower courts in later cases.
- When a decision contains a new principle, it is binding on the subordinate courts and has persuasive authority in equivalent courts.
- In India, there are two rules based upon this doctrine:
  - Each court is absolutely bound by the decisions of the courts above it
  - Higher courts are, to a certain extent, bound by its own decisions

Doctrine of Stare Decisis

- This doctrine has been recognized by the Constitution of India under Art. 141: Law declared by the Supreme Court shall be binding on all courts in India.
- In *Bengal Immunity Co. v. State of Bihar,* the Supreme Court has made it clear that "all courts" does not include the Supreme Court itself.
- Judges of coordinate jurisdiction should not overrule each other's decisions, they should refer the matter to a larger bench.

Kinds of Precedents

- Absolute Authoritative Precedents:
  - Binding character of the precedents is absolute, and the judge's discretion is altogether excluded.
  - E.g. Art. 141 of Indian Constitution
- Persuasive Precedent:
  - Those precedents which the judges are under no obligation to follow but which they may take into consideration.
  - E.g. Decision of one High Court persuasive on another High Court

Kinds of Precedents

- Conditionally authoritative Precedents
  - A precedent which though ordinarily binding on the court to which it is cited, is liable to be disregarded in certain circumstances.
  - E.g. where there is such an extreme or serious degree of error or unreasonableness that following it would be a mockery or absolute denial of justice.
- Declaratory and Original Precedents
  - Declaratory Precedent is one which is merely the application of an already existing rule of law.
  - Original Precedent is one which creates and applies a new rule.

Advantages of Precedent

- Enable Judges to reshape the law according to the needs of the time
- Binding authority o the precedents puts a check on the arbitrary discretion of the Judges.
- Precedents provide flexibility to the law to adopt itself to the new environments.
- Precedents are mostly based on customs, thus, by following precedents we follow customs and general practices of conduct of the people and not only the opinion of the Judge.
- They bring certainty and simplicity in the law.

Advantages of Precedent

- They provide useful guidelines to judges for decisions
- Judges are prevented from committing errors which they would have committed in absence of precedents
- They give rise to practical and perfect laws as they are the outcomes of actual problems faced by people.
- Precedents provide great convenience by barring to re-argue the same matter again and again.
- If precedents were not followed, every case would go from the court of first instance up to the Supreme Court causing delay, expense and inconvenience to public.

Disadvantages of Precedent

- The form of Law made by precedents is not systematic but scattered, law is to be discovered from different parts of the decision, unlike legislations which are very systematic.
- Laws made through precedents apply retrospectively, hence it overlooks the fundamental principle of natural justice that law must be known before it is enforced.
- Frederic Pollock: Law based on case law is incomplete because judges take into consideration only those facts which are involved in the case before them.

Disadvantages of Precedent

- Development of law through case-law is certain but more or less depends upon chance.
- Sometimes erroneous decisions of the Supreme Court create practical problems to the subordinate Courts.
- The validity of the law made by case law depends upon the number of factors, some factors weaken the authority of the precedents and then the subordinate courts have to face confusion in deciding the cases.

Precedent as a source of Law

- Judicial Precedent when speaks with authority. The underlying principle becomes binding for the future cases and thus becomes a source of law.
- Authoritative precedents are a legal source of law as they are binding on the Judges.
- Persuasive Precedents are a historical source of law as they have only a persuasive value, or they are used for guiding or providing efficacy, thus providing a historical background for the judge to build a law if he is inclined to that precedent or if he accepts it.

Precedent as a source of Law

- Original precedent sets a new pillar of law and each declaratory precedent further strengthens and confirms the original precedent thereby making the law certain and safe to be followed.
- There are two views about following of Precedents
  - Old view: prior to 19th Century that the reported Precedent may be followed by the subsequent courts
  - New view: developed in 19th Century which believes in the bindingness of the Precedents. i.e. the precedents are bound to be followed.
  - Both the views have supporters, however, in India except for the Supreme Court, the New view is followed

Circumstances which destroy or weaken the binding force of Precedents

- Abrogated Decision
- Reversal on different ground
- Precedent *Per in curiam*
- Inconsistency between earlier decisions of courts of the same rank
- Inconsistency with the earlier decision of Higher Courts
- Precedent *sub silentio* or not fully argued
- Decision in conflict with the Fundamental Principles of Law
- Decision of the Court equally divided

Ratio Decidendi

- Judicial decision is divided into two parts
  - Decision binding on the parties
  - Judicial principle which is the basis of the decision
- The general principle applied in the decision is called as ratio decidendi.
- Literal meaning: reason of decision
- Salmond: the concrete decision is binding between the parties; it is the abstract ratio decidendi which has the force of law as regards to the world at large.
- Prof. Keeton: ratio decidendi is the principle of law which forms the basis of decision in a particular case.

Ratio Decidendi

- Rupert Cross: it si the rule of law expressly or impliedly treated by the judge as a necessary step in reaching his conclusion.
- Prof. Goodheart: ratio decidendi is not necessarily the proposition of law stated in the judgement as it may be broader or narrower than necessary. Ratio Decidendi is the decision based on the material facts of the case.

Test for determining Ratio Decidendi

- Wambaugh Test (Reversal Test): Take the proposition of law put forward by the judge, reverse or negate it, and then see its reversal or negation could have altered the actual decision.
- If the reversal changes the actual decision, then the proposition is the ratio of the case, otherwise it is not.
- This test is not useful when the decision contains only the statement of facts with the order that was made.
- This test can tell us what is not the ratio, but it does not help in working out what is the ratio.

Test for determining Ratio Decidendi

- Prof. Goodhart's test: This test is also called as the material facts test.
- The ratio is to be determining by ascertaining the facts treated as material by the Judge together with the decision.
- A judge views certain facts, explicitly or impliedly, as material, and his decision is based on those facts, hence it is a binding ratio.
- Criticism: It is often difficult to tell which facts the judge took as material facts.
- The important question is what part of the judgement is relevant?

Test for determining Ratio Decidendi

- Prof. Julius Stone: There cannot be one or unique ratio of a case, but rather a choice of *rationes* available for the later judges to choose from.
- There are two possible rationes: Descriptive and Prescriptive.
- Common Law system is an example of these *rationes;*
- The descriptive ratio is ascertainable from the decision once given, but the prescriptive ratio is how a subsequent court treats the earlier decision

Test for determining Ratio Decidendi

- Prof. Dias: The Ratio should be viewed in a continuing framework, as the interpretation of the case given by the later judges.
- Montrose: Three possibilities for determining the ratio
  - The rule of law to be found in the actual opinion of the judge forming the basis of his decision
  - The rule of law for which the case is binding authority
  - Any reason which ultimately brings about the decision, essentially this relates to the reasons of the ratio

Problems in determining Ratio Decidendi

- Nobody has yet adequately defined Ratio Decidendi due to which there is always a confusion as to what exactly is the ratio.
- A judge looks for the principle of law as applied to the facts that appears to him to be appropriate and takes it as a ratio.
- Sometimes it is possible that a case may not have an ascertainable ratio at all.
- Judges can have a tendency to avoid a case that is binding on them by "distinguishing" i.e., taking it as not covering the facts of the present case.

Obiter Dicta

- In many cases the judges often express their legal opinion on issues which they are not asked to decide. These statements of law which are not necessary for the decision are termed as *obiter dicta*.
- Prof. Goodheart: a conclusion based on a fact, the existence of which has not been determined by the Court.
- Keeton: Obiter Dicta can be described as "statement of law made by a judge in the course of a decision, arising out of the circumstances of the case, but not necessary for the decision.

Importance of Obiter Dicta

- Lord Sterndale: Dicta are of different kinds and of varying degrees of weight. Sometimes they may be called as almost casual expressions of opinion upon a point which has not been raised by a case, and is not really present to the Judge's mind. Such dicta may be disregarded by the judges. Some dicta, howecer, are deliberate expressions of opinion given after consideration upon a point clearly brought and argued before the court. No doubt, it is open to other judges to give decisions contrary to such dicta but much greater weight attaches to them than to the former class."

Importance of Obiter Dicta

- *Mohandas v. Satanathan*
- "The Supreme Court has now taken the place of the Privy Council, and one must show the same respect for the obiter dicta of the Supreme Court as we did to the Privy Council… All the High Courts must accept as binding the obiter dicta of the Supreme Courtin the same spirit as the High Courts accepted the obiter dicta of the Privy Council"

How to find obiter dicta

- Some judges have a habit of illustrating their reasoning by reference to hypothetical situations, and then passing remarks about such situations.
- In other cases, after having decided the point in question, the judge may feel that it would be unnecessary to pronounce the other points raised by the parties, nevertheless he may indicate how he would have decided these points, if it were necessary.
- Both these observations may assume importance because
  - They rationalize the law
  - They suggest solutions to problems not yet decided by the Courts

Difference between Ratio Decidendi and Obiter Dicta

RATIO DECIDENDI

- Answers to the questions necessary for the determination of the case.
- General principle of the case
- It literally means reason of the decision

OBITER DICTA

- Opinion of the Court on other questions.
- What judges said something just by the way
- It literally means something said by the judge by the way

Difference between Ratio Decidendi and Obiter Dicta

- Chief Justice Chagla: "Now an obiter dictum is an expression of an opinion on a point which is not necessary for the ultimate decision of the case. The question which was necessary for the determination of the case would be the ratio decidendi; the opinion of the tribunal on the question which was not necessary to decide the case would be only an obiter dictum"

Difference between Ratio Decidendi and Obiter Dicta

- Allen: In practice, it is not always easy to distinguish between deliberate expressions of opinion given after due considerations (ratio decidendi) and statement made by the way (obiter dicta).
- Very often, the dividing line between them is very thin.
- Sometimes it may become extremely difficult to say what a mere ‘aside’ is and what is ‘one of the links in the chain of judicial reasoning’.

Doctrine of Precedent in India

- The doctrine of precedent is adopted in India from the Common Law Legal System of England.
- According to Article 141 the decision by the Supreme Court is binding on all the Courts in India.
- Hierarchy of the Courts in India
  - Supreme Court
  - High Courts
  - District Courts/ Sessions Courts

Doctrine of Precedent in India

- Article 141: Law declared by the Supreme Court will be binding on all Courts in India.
- Law declared includes Ratio Decidendi and Obiter Dicta
- Every statement contained in the judgement of the Supreme Court may not have binding force.
- Supreme Court is not bound by its own decisions except for the smaller bench is bound by the decision of the larger bench and a co-equal bench.

Doctrine of Precedent in India

- The doctrine of stare decisis is an important one and the Supreme Court does not depart from it usually.
- However, if an earlier decision is found to be erroneous and is thus detrimental to the general welfare of public, the Supreme Court will not hesitate from overruling it.
- The Supreme Court is also not bound by the decisions of the Privy Council or the federal Court. They have only persuasive value, and the Supreme Court can overrule them.

Doctrine of Precedent in India

- Bengal Immunity Co. v. State of Bihar: Reference is made to the doctrine of finality of judgements and it is pressed that we should not reverse our earlier decision, however, where material provision of law has been overlooked or when decision of the case has proceeded upon mistaken assumption of the continuance of a repealed or expired statute, we have to overrule such a judgement.
- This view has been reiterated in Sajjan Singh v. State of Rajasthan

Doctrine of Precedent in India

- Mamleshwar v. Kanhiay Lal: it has been noted by Justice Krishna Iyer that certainty of law, consisting of rulings and comity of courts – all flowing from the same principle converge to the conclusion that he decision once rendered once must later bind like cases. We do not intend to detract from the rule that, in exceptional instances, where, by obvious inadvertence or oversight a judgement fails to notice a plain statutory provision or obligatory authority running counter to the reasoning and the result reached, it may not have the sway of binding precedents. In changing socio-economic conditions, the courts must have the readiness to depart from rules and principles contained in earlier pronouncements if they no longer conform to the new conditions.

Doctrine of Precedent in India

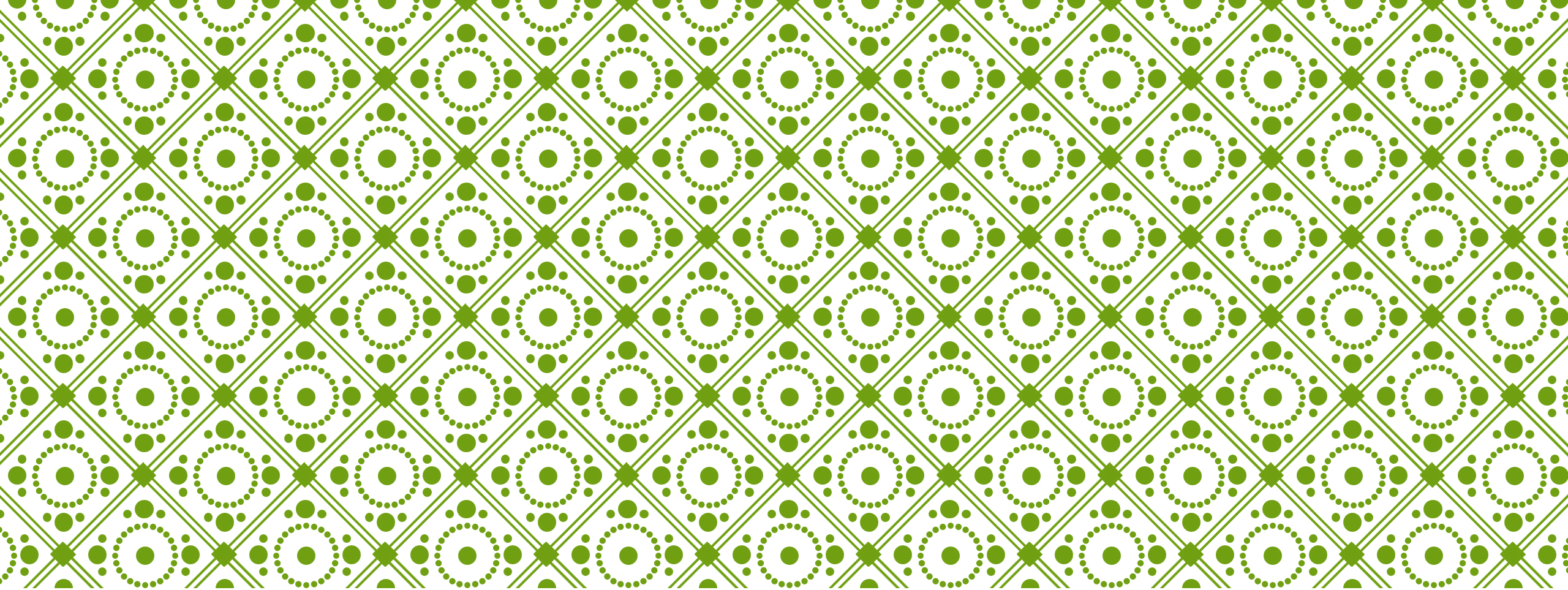
- Ambika Prasad v. State of U.P.
- It is fundamental that the nation's Constitution is not kept in constant uncertainty by judicial review every season because it paralyses, by perennial suspense, all legislative and administrative actions on vital issues deterred by the brooding threat of forensic blow-up. This, if permitted, may well be a kind of judicial destabilization of state action, too dangerous to be indulged in, save where national crisis of great moment to the life, liberty and safety of this country and its millions are at stake, or the basic direction of the nation itself is in peril of a shake up.

Doctrine of Precedent in High Courts

- How far are the High Courts bound by their own decisions?
  - Single Judge Bench
  - Division Bench
  - Full Bench
  - Constitutional Bench

Doctrine of Prospective Overruling

- Overruling generally retrospective
- Concept of Prospective Overruling
  - I.C. Golaknath v. State of Punjab
- Application of Prospective Overruling in India



CUSTOM

AS A SOURCE OF LAW

WHAT IS CUSTOM

- Habitual course of conduct observed uniformly and voluntarily by the people concerned.
- When people find any act to be good and beneficial, which is agreeable to their disposition, they practice it ad in the course of time by frequent observance and on account of its approval and acceptance by the community for generations, a custom evolves.
- One particular behaviour establishes a pattern and then its continuation for a period of time, others follow the same path for similar reasons, eventually what emerges is a clear habit.
- Eventually the rule or practice becomes a habitual course of conduct in the society giving rise to a custom.

MEANING OF CUSTOM

- Custom is one of the oldest forms of law making.
- In primitive societies human conduct was regulated by practices which grew up spontaneously and were later adopted by people.
- The generally observed course of conduct, which is the main characteristic of custom, thus originated.
- Holland: The conscious choice of the more convenient of the two acts, though sometimes doubtless, it is the result of accidental adoption of one of the two indifferent alternatives. In either case the choice is either deliberately or or accidentally repeated till it ripens into habit.
- Thus, imitation of behaviour by people plays an important role in formation of custom.

ROLE OF CUSTOM IN ANCIENT LEGAL SYSTEMS

- Significant role as a source of law in ancient legal systems till modern sources like legislations and precedent were formed.
- Most potent force of ancient legal systems like ancient Hindu Law.
  - Madura v. Mattoo Ramalingam: in Hindu Law the clear proof of usage will outweigh the written text of law.
- Muslim Law: custom occupies important place;
  - Hedaya: Custom does not command any spiritual authority like ijma of the learned but a transaction sanctioned by custom is legally operative, even if it be in violation of a rule derived by analogy (Qiyas). It must not however, be opposed to a clear text of Quran.

ROLE OF CUSTOM IN ANCIENT LEGAL SYSTEMS

- English Law:
  - Chief Justice Coke: 'customs are the main triangles of the laws of England'
  - Blackstone: municipal Law of England may be divided into two classes: *lex non scripta* and *lex scripta*.
  - The lex non scripta includes not only general customs or the Common law properly so called but also particular customs of certain parts of the Kingdom.
  - Pollock: common Law is customary Law
  - The British Constitutional Law is described as the Law and Customs of Constitution.
  - Judges also gave due recognition to the prevalent customs.

CUSTOMS AS A SOURCE OF LAW

- Diverse views:
- Historical School:
  - Savigny: Custom itself is the authoritative Source of Law
  - Present cannot be understood without knowing the past.
  - True basis of the positive law has its existence, its reality in the common consciousness of people.
- Analytical School:
  - Austin: Custom itself is not an authoritative law.
  - If custom is transformed into a Legislation only then it has the authority of Law

REASONS FOR ACCEPTING CUSTOM AS A SOURCE OF LAW

- Salmond: there are two reasons:
  - Custom is frequently the embodiment of those principles which have commanded themselves the national conscience as principles of justice and public utility
  - Existence of an established usage is the basis of a rational expectation of its continuance in future.
- Keeton: the main reason for the admission of custom as a source of law seems to be that before State organs undertook the task of framing the laws for the community, this was done by people themselves, and the rules elaborated by habit were enforced in poplular courts

THEORIES OF CUSTOMARY LAW

- Analytical School:
  - Austin: Juridical recognition or sanction is required.
  - Law properly so called should be that which directly comes as a command of the sovereign.
  - At its origin custom is a rule of conduct which the governed observed spontaneously and not in pursuance of law set by the political superior
  - It is merely a political morality
  - All customs are not binding. Only those which have validity through juridical recognition are valid as law.
  - Other customs are merely positive morality
  - Holland: The state through its judges grants recognition to customs as law.

THEORIES OF CUSTOMARY LAW

- Historical School
  - Savigny, Putcha and Henry Maine
  - Customs are law per se
  - Law is the product of normal forces associated with the spirit of each particular people
  - Custom is the primary source of law from which all law derives
  - Savigny: Custom is not only self sufficient and independent of legislative authority but was a condition precedent of all sound legislation

KINDS OF CUSTOM

- Legal Custom
  - Customs which are operational per say as a binding rule of law, independently of any agreement on the part of those subject to it.
  - The legal authority of such customs is absolute
  - Kinds of Legal Customs:
    - General Customs
    - Local Customs
- Conventional Custom (Usages)
  - Salmond: A conventional Custom is one whose authority is conditional to its acceptance and incorporation into agreements between parties to be bound by it.
  - An established practice which is binding not because of any legal authority independently possessed by it but because it has been expressly or impliedly incorporated in a contract between the parties concerned.
  - Kinds of Conventional Customs:
    - General
    - Local
  - Examples: Joint Stock Companies Act, Negotiable Instruments Act, Sale of Goods Act, Partnership Act

ESSENTIALS OF A VALID CUSTOM

- Immemorial antiquity
- Continuity
- Reasonableness
- Not Immoral
- Not Illegal (In conformity with express law)
- Peaceful Enjoyment
- Opinio Necessitatis (Ethical obligation to follow custom, not optional)
- Certainty
- Consistency

Juristic Writings & Professional Opinion

As a source of Law

Introduction

- Legal Sources
- Historical Sources
- Literary Sources (Salmond)
- The Professional Opinion of eminent Jurists and their writings which is generally referred as juristic law ; it can also be called as literary source of law.
- Juristic writing and professional opinion have played a very important role in legal evolution

Literary Source Examples

- In England works of:
  - Bracton
  - Glanville
  - Coke
  - Blackstone
- Private International Law
  - Dicey
  - Cheshire
- Public International Law
  - Oppenheim
  - Starke

Literary Sources

- There are two main literary sources:
  - Juristic Writings
  - Professional Opinions of Highly Qualified Jurists
- To what extent Juristic writings and professional opinion have been accepted in a municipal legal system can be discussed in the light of the juristic opinion itself.
- Prof. Holdsworth: “In the course of time the practice of these conveyancers, who settled the common forms which carried out in practice the principles of law, tended to be treated by the courts as such cogent evidence of the law, that it can be regarded almost as a secondary source of law.”

Bindingness of Juristic Writings and Professional Opinions

- Juristic writings and professional opinion have not been accepted as a binding source of law
- But it has been treated as a persuasive source
- If it is a question whether a persuasive precedent should be followed, a court may be persuaded by the opinion of the profession concerning the correctness of the decision, so far appeared in the law reviews, or by the views expressed in the leading textbooks.

Value and Significance of the Textbook

- The textbook attempts to universalize, to reduce to an ordered unity and discover the deeper principles that underlie particular decisions.
- There are collections of cases together in a narrative fashion, but they are merely repositories and cannot be called as textbooks.
- The speculative and generalizing mind of an expert views particular decisions in their proper perspective and discovers principles which are latent in the line of cases.

Value and Significance of the Textbook

- Ehlrich: Roman Law owed its great systematic completeness and perfection of form to the teaching activities and jurists.
- Maitland: ‘taught law is tough law’ wherein he was referring to the strength given to a system when it is systematically expounded.
- Roman Law had greater influence in the European continent than in England because the teaching of the universities was confined to Roman Law alone and the native systems were rather despised, whereas in England, even if the earlier universities concentrated mainly on Roman Law, the Inns of Court established a learned tradition for the Common Law.

Value and Significance of the Textbook

- Paton: If a particular law can be explained, then it is remembered more easily, and the teacher tries to discover broad principles that are only implicit in the law.
- Thus, early textbooks of the law of tort attempted to organize the subject on the principle of ‘no liability without fault’. The generalization may have been premature, but it aided in transforming the law from a collection of forms of actions into a body of principles.

Value and Significance of the Textbook

- Textbooks are naturally influenced by the prevailing theory of law.
- In eighteenth century, natural law was drawn upon in order to fill the gaps of the law.
- In the nineteenth century this gap was filled by positivism/ analytical school in England.
- In America, the approach can be in favor of legal realism and sociological school of law

Value and Significance of the Textbook

- Pound: The text writer has much narrower creative function than the judge, for he holds no official position. His first task is to expound the law that is and to correlate the various rules.
- Manner in which textbooks should be written:
  - The limits of freedom left to a text-writer are narrow but within these limits there should be an attempt to create

Value and Significance of the Textbook

- Prof. Cohen: Cheshire while writing the book on Private International Law, while dealing with each topic concerning private international law first discusses what the theory of the law should be, and then deals with the actual decisions.
- This allows a textbook to be faithful record of the law that is, while pointing the way to further reform by providing a critical commentary of the cases that have been decided.

Value and Significance of the Textbook

- Pound: Doctrinal writing has had more influence in America than in England, especially in the earlier times. Even today, that influence is not wanting, because the lists of courts are congested, the authorities are many, and there is a strong natural temptation to turn to any text-book which states the law in clear and definite terms.
- The American Restatement of the Law is an interesting modern example of co-operation between the Bench, the Profession and the Law Teacher.

Importance of Textbook under International Law

- Article 38 (1)(d) of the statute of ICJ: The ICJ is empowered to apply judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rule of law.
- The pleadings in international cases before the ICJ are often full of references to case law and to legal literature

NATURAL LAW THEORY

INTRODUCTION

- The Natural Law theory is the oldest theory of jurisprudence dating back upto 2 B.C.
- However, the exact origin of these theories is not clear
- In ancient times there was a connection between natural law theories and religion
- There is no single scholar on natural law that has successfully included all the elements of natural law theory.
- Jurists of different ages assigned different meaning to the term ‘Natural Law’

INTRODUCTION

For Stoics: Natural Law = Divine Law

Cicero: Natural Law = Law of reason, as being established by that reason by which the world is governed and also as being addressed to the perceived by the rational nature of men.

Aristotle: It is unwritten law *(jus non scriptum)* but it may lie in the hearts of men.

St. Thomas Acquinas: Natural Law is the participation of humans in the eternal law and is discovered by reason.

INTRODUCTION

Hugo Grotius: The common principles prevailing among nations is natural law. It is a dictate of 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 baseness or moral necessity.

Thomas Hobbes: Main feature of natural law is the natural right of self preservation of personal property.

MAIN PROPOSITIONS AND CHARACTERISTICS OF NATURAL LAW THEORIES

Natural Law is unwritten law: It is basically opposed to written law. Naturalists treat written law as arbitrary.

Law is related to justice, reason, human nature and ethics

Rules of human conduct emanate from a Supreme Authority and are binding on all men everywhere .

Nature is an order of things: It demands equality for all men.

Rules of law can be studied on the basis of '*a priori*' method: i.e., to accept a thing without an enquiry or observation

Natural Law is based on values which come from an absolute source such as God or Nature

MAIN PROPOSITIONS AND CHARACTERISTICS OF NATURAL LAW THEORIES

Justice and morality are two pillars of Natural Law

Reason and common sense is the basis of natural law

Natural law is common to all states

Natural law propositions are self-evident and eternally valid:

- The principles of Natural Law are unchanging. Natural Law signifies truth and truth cannot change.

Unjust Law is no law according to Natural Law:

- It demands that positive law must be in consonance with the natural law principles based on justice, morality and reason
- *"Lex injusta no est lex"* (unjust law is no law)

REASONS FOR FINDING NATURAL LAW THEORIES ATTRACTIVE

Natural Law is based on morality:

This theory provides for sound principles of human conduct. Based on this theory it has been possible to find common principles among different religious and outlook and to that extent it creates a common bond between people of diverse religions and culture

- Revolutions and freedom struggles have been based upon natural law precepts

French and American political revolutions and even Indian Freedom struggle had their roots in the Natural Law concept of freedom and democracy

REASONS FOR FINDING NATURAL LAW THEORIES ATTRACTIVE

Numerous principles of law are based upon Natural Law precepts

Contemporary concepts of Law like quasi-contract, reasonableness, justice equity and good conscience, innocent until proven guilty, etc.

- Natural Law is the basis of fundamental rights:

Fundamental rights are guaranteed to us due to the impact of natural law. Theory also generated many natural rights such as Justice, Fraternity, brotherhood, liability and equality.

REASONS FOR FINDING NATURAL LAW THEORIES ATTRACTIVE

Justification to resist bad laws:

Naturalists believe that unjust or immoral law is not law. It propagates that any law made by man which is not in conformity with the principles of natural law should be resisted and removed.

Limits the power of the Legislature

It is a common principle of Constitutional Law that the power of legislature to legislate is subject to principles of natural justice. Thus, the court also is inspired by natural justice principles while exercising the power of judicial review.

REASONS FOR FINDING NATURAL LAW THEORIES ATTRACTIVE

Natural Laws serve as a guideline for positive laws:

The basic tenets of natural law in form of morality and justice provides guidelines for the law-making bodies of the nation to incorporate such principles in legislation.

Natural justice is also intended to administrative actions:

Natural justice is a great humanizing principle intended to invest law with fairness and to secure justice and over the years, it has grown into a widely pervasive rule effecting large area of administrative action.

CRITICISM OF NATURAL LAW THEORY

Natural Law has not maintained the distinction between law and morality:	Natural Law Theory has always made a confusion between Law and Morality. In reality, what may be immoral may not be illegal. This has created confusion and the identity of law could not be established.
Problem is what is morality in true sense	Natural law theory propagates that man's conduct is just when it is according to morality. However, morality is a relative term which changes from place to place and time to time which makes it vague.

CRITICISM OF NATURAL LAW THEORY

- It encourages disobeying laws:
  - Naturalisits believe that unjust law is no law and therefore it must not be obeyed. This encourages disobedience to law which may lead to chaos and anarchy. Another question is "who decided what is unjust and what is just?"
- Natural Law is static and unchanging:
  - It is alleged that natural law does not keep pace with development. It is extremely slow in adaptations. Thereby it may halt the progress of mankind. Some of the natural law concepts are even regressive in nature

CRITICISM OF NATURAL LAW THEORY

- Not all natural law ideas are self evident:
  - Salmond criticizes Natural Law by contending that attitudes to moral propositions unlike attitudes to truth and logic vary from time and culture and make it very difficult to contend that such propositions are self evident.
- Possibility of wrong interpretation:
  - Natural Law theories can be manipulated for providing base to any untoward interpretation.

SUMMATION OF NATURAL LAW THEORY

Dr. W. Freidman rightly points out that the history on Natural Law is a tale of the search of mankind for absolute justice and its failure.

Again and again the idea of natural law has appeared in some form or other as an expression of the search of an idea higher than positive law after having been rejected and divided in the interval.

With the changing social and political conditions, the notions of natural law have changed. The only thing that has remained constant is the appeal to something higher than positive law.

SUMMATION OF NATURAL LAW THEORY

Natural law has fulfilled many functions:

It was the principal instrument in the transformation of the old civil law of Romans

It was used as a weapon by both sides in the fight between medieval Church and the German Emperors.

In the name of Natural Law, the validity of international law was asserted.

An appeal as made to natural law to defend individual freedom against absolutism.

Natural law has helped various peoples and generations to formulate their ideals and aspirations.

At different times natural law has been used to support almost any ideology.

IDEALS OF NATURAL LAW

UNIVERSAL ORDER GOVERNING ALL MEN

INALIENABLE RIGHTS OF INDIVIDUALS

EVOLUTION AND HISTORICAL DEVELOPMENT OF NATURAL LAW

- GREEK LEGAL THEORY:
- In the Greek period the concept of law was developed by **Plato, Aristotle** and **Stoics Scholars**.
- They were not interested in explaining its philosophical foundations.
- In this process they evolved many fundamental principles of natural law.
- In olden days, in Greece, there were number of "city states" having laws of body of principles of their own which were fundamental, unchangeable and unwritten.

EVOLUTION AND HISTORICAL DEVELOPMENT OF NATURAL LAW

These could override the decree of law passed by the Assembly.

Through transformation from city states to empires and kingdoms "Natural Law as a universal system" came into existence.

According to Stoics: Where man lived according to 'reason' he was living "Naturally".

Zeno – founded the Stoic Law of Nature and made it identical to Law of Reason.

The Stoic philosophy greatly shaped and influenced the Roman theory of Natural Law and in modern times (17th and 18th Century) became the basis of ideal Natural Law philosophy.

EVOLUTION AND HISTORICAL DEVELOPMENT OF NATURAL LAW

- **Plato** created an idea of a utopian government but was doubtful of it coming into reality.
- His concept of 'Philosopher-King' whose education and wisdom was such that there was no need to shackle him by higher law has been given in his book 'The Republic'.
- **Aristotle** was one of **Plato's** students who strongly believed in his teacher. However, he believed that law and justice are moral in nature and derive from a divine source. He developed his theory by distributing the power of fate against all the established understanding about power of nature from the free will exercised by man.

EVOLUTION AND HISTORICAL DEVELOPMENT OF NATURAL LAW

- According to **Aristotle**, there was a distinction between laws of chance i.e. accidental occurrences and law of nature i.e. planned occurrence.
- **Aristotle** said: 'Man is a part of nature and the master of nature' Firstly man is a part of the creation, but secondly that man is endowed with active reason which distinguishes him from all other parts of nature.

EVOLUTION AND HISTORICAL DEVELOPMENT OF NATURAL LAW

- **Aristotle's** Theory of Justice:
- Justice is divided into two types:
  - Distributive Justice
  - Remedial Justice
- Distributive Justice deals with the distribution of honors and wealth among the citizens and works according to the merit of a particular society.
- Remedial justice: the Law looks to the nature of injury and attempts to restore the equality that existed before the wrong.

EVOLUTION AND HISTORICAL DEVELOPMENT OF NATURAL LAW

- ROMAN CONCEPT OF LAW
- Scholars systematically studied natural law on the basis of principles and practice expounded by Greeks and Stoics.
- They landed three categories of Law
  - *Jus civile:The* civil or positive law enforced by the court to regulate the relationship between Roman citizens themselves.
  - *Jus gentium:* A part of the positive law but it was much wider than *jus civile*.
  - *Jus naturale:* The Law of Nature. It had no legal validity in the courts unlike *jus gentium*

EVOLUTION AND HISTORICAL DEVELOPMENT OF NATURAL LAW

- **Julius Stone** on comparison between Greek Natural Law and Roman Natural Law:
  - "The Greek Law in general, scarcely survived as a system because it never found its class of legal specialists and never abandoned its lay administrators, its popular tribunals of distorted size, while Roman Law developed through the efforts of *juris consuls* and *praetors* into a permanent heritage of western society.
  - Natural Law with Greeks thus, remained a philosopher's speculation in the age of unsettled conditions and political disorders. At Rome on the other hand, Natural Law was given revolutionary role in legal development in the practical activities of *juris consuls*, in adopting the old *jus civile* in a developing commercial society.

EVOLUTION AND HISTORICAL DEVELOPMENT OF NATURAL LAW

NATURAL LAW IN MEDIEVAL PERIOD:

Natural Law acquired a new role in this period.

There was a domination of ecclesiastical, philosophical and legal doctrines by Christian Church Fathers.

The Church Fathers were deeply interested in maintaining law & order and avoiding chaos & conflict which had swept Europe after the end of the Roman civilization.

In order to maintain stability, status quo and peace, natural law was given a religious dimension.

EVOLUTION AND HISTORICAL DEVELOPMENT OF NATURAL LAW

- Somehow the Christian doctrine o one God, one Faith, one Church and one Empire enabled them to establish the supremacy of law with the help of Natural law doctrines in the middle ages.
- **Ambrose, Augustine** and **Gregory** postulated divine law over all laws by making divine law or Law of God as the ultimate criteria of divine reason.
- They further made efforts to identify law of Nature with law of God

EVOLUTION AND HISTORICAL DEVELOPMENT OF NATURAL LAW

- The divine character of Natural law is binding and overrules all other laws, particularly human laws and constitutions. Therefore, whatever has been recognized by usage or laid down in writing, if it contradicts natural law, it must be considered as null and void.
- But, Natural Law was itself a product of human reason. It was an attempt of man to recognize divine will in human affairs.
- Man availing himself to natural law was participating in the wisdom of God.
- St. Paul ad St. Augustine believed that man cannot get salvation without the help of God whose wisdom was incorporated in the Scriptures.
- Thus, moral precepts of Holy Scriptures were the precepts of Natural Law.

SAINT THOMAS ACQUINAS

- He Is the foremost classical proponent of natural Law theology, who made the classic attempt to harmonize the teachings of the church with those of natural laws.
- He emphasized that man's intellect and free will are the closest image of God in material universe.
- His book 'Summa Theologica' is his best work.
- Law is divided into four types
  - Eternal Law: Decree of God which governs creation
  - Divine Law: Specially revealed law in scriptures
  - Natural Law: Human Participation in the eternal law which is discovered by reason
  - Human Law: Positive law i.e., the Natural Law applied by the government to society

SAINT THOMAS AQUINAS

- ETERNAL LAW:
- It is the plan of divine wisdom as to directing all actions and motions. It is the rational guidance of created things on the part of God.
- Divine wisdom is the source of eternal law.
- There is a connection between divine relation and reason.
- Reason and faith are not incompatible.
- "Grace does not abolish nature but perfects it."
- There are some matters which are beyond man's comprehension and when willed by the deity they should be followed just for the reason of faith in the deity and not because the God of reason is superior to the other Gods.

SAINT THOMAS ACQUINAS

- DIVINE LAW
- It is the part of the eternal law which has been revealed in the scriptures of the Christian Church (Roman Catholic Doctrine).
- As divine law is only a part of the eternal law is only a part of the eternal law that is revealed, there still remains some eternal law that is not revealed.

SAINT THOMAS ACQUINAS

- NATURAL LAW
- It is the portion which is represented by the participation of rational creatures in the creation of eternal law.
- The element of religion is important in understanding the nature of Natural Law.
- According to him, rational creatures being themselves made participators in providence itself control their own action and the actions of others.
- This participation in the eternal law by rational creatures is called as natural law.
- Due to natural reason, only man is capable t decide good from evil and that this was based on the divine law which was revealed in the eternal law.
- The principles which are derived from this participation of rational creatures in the eternal law, are principles of natural law and these are based on deductions from nature.

SAINT THOMAS ACQUINAS

- HUMAN LAW
- Man, being a social and political animal, needs law which provides proper place to man and authority.
- Thus, human law is derived from natural law and divine law.
- Human law is directed towards common good. Therefore, law does not prescribe all virtues but only those that appeal to common good.
- The purpose of human law is to be useful to man to further the State or commonwealth while still being derived from natural or divine law.
- Human laws are valid within their province and within the limits of justice as ordained by higher law.
- The State, as the worldly authority, must regulate social life justly, to promote common good within the limits of the authority of the lawgiver.

SAINT THOMAS ACQUINAS

- HUMAN LAW
- Essence of human law is to be just.
- When Law is not just:
  - It is not just with respect to the objective
  - It is not conducive to common good but conducive to common good but conducive to the law giver
  - When it exceeds the legitimate power of person purporting to make the law
  - When it is contrary to the principles of distributive justice i.e., it imposes unequal burden of the community
- If a law is unjust, its disobedience may not only be a possibility but a duty.
- According to Acquinas, the law of nature is the foundation of all human Law. No positive enactment which runs contrary to the law of nature can be regarded as Law

SAINT THOMAS ACQUINAS

- Thus, the eternal law, natural law and human law form a continuous series. This may be compared to a tree with eternal law as the root, natural law as the trunk and different systems of human law as its branches.
- For Acquinas himself, the law of nature was not merely a matter of expediency, but it often deteriorated to that function in the controversies, which accompanied the bitter struggle between the Pope and Emperor for supremacy.
- The law of nature also served as a powerful weapon in the later struggle between Catholics and Protestants when either side appealed to it for the true interpretation of the scriptures or the right of the State to spiritual jurisdiction.

EVOLUTION AND HISTORICAL DEVELOPMENT OF NATURAL LAW

- NATURAL LAW IN MODERN PERIOD AND ITS SECULARIZATION FROM RELIGION:
- Renaissance & Reformation in the 14th and 15th Centuries destroyed medieval feudal order by freeing individual from its clutches.
- With decline of the Church in Rome as the sole arbiter of politics in Europe, the protestant theorists sought to develop a doctrine of natural law which is not dependent on the primacy of Church.
- The Natural Law in the Modern Classical period was marked by its two distinctive characteristics:
  - It was more secularized, political and on-religious in form and content.
  - The emerging natural law became a theory of natural rights of man and States which dominated the British, French and the American Revolutions in the 17th and 18th Centuries.

EVOLUTION AND HISTORICAL DEVELOPMENT OF NATURAL LAW

- During this period the theory of natural law and natural rights was used by absolute rulers to justify their position, whereas the rising middle class used the principles of natural rights to democratize and expand concepts of property.
- The principle of natural rights stated that the rulers hold their stated position on trust and in event that they are in breach of the trust through violation of any of the inalienable rights of man identified in natural rights doctrine then there existed in the people an inalienable right to overthrow their rulers.
- Due to this antithesis Bentham called Natural law theory/ natural rights on as ‘nonsense on stilts’

HUGO GROTIUS (1583-1645)

- He was a Dutch scholar, statesman, philosopher, jurist and diplomat.
- He propounded the theory of functional natural law which became the basis of his pioneering work 'Laws of War and Peace'
- He propagated the principles of international law which he believed to be applicable on all states which are binding on them both in war and peace.
- These common principles prevailing among nations are natural law.
- The property peculiar to man is his desire for society, for life spent in peace in common with fellow-men and in correspondence with the character of his intellect.
- The nature of human intellect desires a peaceful society and from that are derived the principles of natural law which are independent of divine command.

HUGO GROTIUS (1583-1645)

- "Natural law is so immutable that it cannot be changed by God himself"
- Principles of reason can be deduced in two different ways:
  - By examining anything in relation to the rational ad social nature of man
  - By examining the acceptance of those principles among the nations
- Natural Law is based on the nature of man and his inward need of living in society.
- 'Human nature is the grandmother; natural law is the parent and law is the child'
- 'human nature impels us to desire a society which a peaceful and from this desire are deduced the principles of natural law which are quite independent from divine command.'

PUFENDORF (1639-1694)

- He was a German Philosopher
- He based Natural Law on the two sides of human nature which bid hm to protect his personal property but not to disturb the peace of society.
- “let no one bear himself towards a second person so that the latter can properly complain that his equality of right has been violated in his case”

THE CONCEPT OF SOCIAL CONTRACT

- In the beginning, men lived in the state of nature. They had neither government nor any law.
- The state of nature was described by some as the hardship and oppression while some others as that of bliss and joy.
- Men entered into an agreement for the protection of their rights and the authority guaranteed everyone of them protection of life, property and to certain extent liberty.
- It was in this way that the Government, Sovereign and Ruler cam into being.
- There are many implications of this theory of social contract.
- The main exponents of this theory are Hugo Grotius, Thomas Hobbes, John Locke and Rousseau.

HUGO GROTIUS N SOCIAL CONTRACT

- He used Social Contract for two purposes:
  - Internally for the justification of the absolute duty of obedience of the people to the Government.
  - Internationally to create the basis for legally binding ad stable relations among the States.
- He put forward social contract as an actual fact in human history.
- 'Each people had chosen the form of Government they considered most suitable for themselves by means of a social contract.'
- 'Once they transferred their right of government to the ruler, they forfeited the right to control or punish the ruler, howsoever bad his government may be.'
- The ruler was bound only by natural law which was valid even without a promise and the keeping of promise is the permanent principle of natural law.

HUGO GROTIUS ON SOCIAL CONTRACT

- The most fundamental principles is "*Pacta Sunt Servanda*" i.e., the respect for promises given and treaties signed.
- His main concern was the stability and orderliness of international society.
- His theory of social contract served that purpose by stressing the equivalence of different forms of Government established by different people, by freeing the ruler from any internal restriction or fetters and by stressing the absolute force of a promise once made.

THOMAS HOBBES (1588-1679)

- He witnessed during his time both the period of English Civil War and Cormwell's dictatorship which forced him to accept the basis of civilized society, is an absolute ruler and obedience from citizens.
- He was the author of two books 'De Live' (1642) and 'The Leviathan' (1651) and in the latter book, he expressed a view of natural law as a precept or general rule, found out by reason, by which man is forbidden to do that which is destructive to his life.
- He shifted the emphasis form natural law as an objective order to natural right as a subjective claim based non the nature of man and prepared the way for individualism in the name of "inalienable rights"
- He believed that the law had gained people's tacit content.
- He believed that the society was formed from a State of nature of war between mankind that exists otherwise.

THOMAS HOBBES (1588-1679)

- "Life is, without an ordered society 'solitary, poor, nasty, brutish and short'."
- Law of nature "*lex naturalis*" is a precept or general rule found out by reason, by which man is forbidden to do that which is destructive of life or takes away the means of preserving the same and to omit that by which he thinks it may be best preserved.
- The fundamental law of nature is that every man ought to endeavor to obtain peace as far as he has hope of obtaining it.
- When he cannot obtain it, he can seek and use all helps and advantages of war.
- The second law of nature is that if others are willing to follow the same rule, man should be content with so much liberty against himself
- The third law of nature is that men performed their covenants which were made.
- This was the origin of justice.

THOMAS HOBBES (1588-1679)

- Injustice is nothing else but the non-performance of covenants. The nature in justice consists in keeping of valid covenants which start with the constitution of a civil power sufficient to compel men to keep them.
- The main feature of natural law is the natural right of self preservation of a person and property.
- According to Hobbes, the natural law content is his concern of natural rights of man- securing life, property and happiness of subjects by the sovereign.
- However, in implementing these rights the sovereign is not bound by legal restraint or moral inhibition on his power.
- Therefore, his subjects should surrender all their rights and vet all liberties in the sovereign, for the preservation of peace, life and property of the subjects.
- It is in this way the natural law became a moral guide or directive to the sovereign for preservation of the natural rights of the subjects.

THOMAS HOBBES (1588-1679)

- In the State of nature there was a perpetual and devastating warfare which threatened everyone, but natural reason dictated to man the rule of self preservation for which he tried to escape from this state of permanent insecurity.
- That he did by transferring all his natural rights to the ruler from whom he promised to obey unconditionally.
- Once the individual transferred the whole of his natural rights to the ruler who became absolute, the subjects could not demand fulfillment of any obligation by the ruler.
- Therefore, he said. "The obligation of subjects to the sovereign is understood to last as long as no longer than the power lasts by which he is able to protect them"
- "Governments without the sword are but words, and of no strength to secure a man to all"
- All real law is civil law. It is commanded and enforced by the sovereign. There is no distinction between State and Society.

THOMAS HOBBES (1588-1679)

- There is no law between Sovereign and Subjects.
- All social and legal authority is concentrated in the sovereign
- Even the church is subordinated to the State
- It is just like any other corporation
- The sovereign of Hobbes is not instituted and legitimized by any superior sanction like that of natural law or divine origin
- According to him he is merely a utilitarian creation

IMPACT OF HOBBES

- He was an individualist, utilitarian and absolutist and all these three aspects had a great influence upon the legal and political thought of the next few centuries.
- From his political and legal theory emerged modern man who is self-centered, individualistic, materialistic and irreligious in the pursuit of organized power
- His individualism linked him with Locke, his utilitarianism with Bentham and Mill and his absolutism with all the theories which stand for the enhancement of the powers of the state.
- His approach to a great extent was followed by Bentham, Austin, Holmes, Gray and other American Legal Realists

JOHN LOCKE (1632-1704)

- He witnessed the spirit of individualism resulted by English revolution in 1688.
- He was the theoretician of the rising middle class which was individualistic, acquisitive and avoided conflict between ethics and profits.
- He restored the medieval concept of natural law insofar as he made it superior to positive law.
- He placed individua in the centre and invested him with inalienable natural rights focusing on right to private property.
- His theory of social contract is a kind of another version of doctrine of consent under which the authority of State rests on the consent of subjects.

JOHN LOCKE (1632-1704)

- Such an idea of popular consent has played an important role in the development of Parliamentary democracy of England.
- He used social contract to justify government by majority which held the power in trust, with the duty to preserve individual rights whose protection was entrusted to them by individuals.
- The individual had natural inborn right to "life, liberty and estate".
- He gave his chief attention to the right of private property
- His State of Nature was paradise lost. It was a State of "Peace, Goodwill, mutual assistance and preservation" . In that State of Nature, men had all rights which nature could give them. What they lacked was organization.
- The right to property existed prior to and independent of any social contract whose function was to preserve and protect not only the right to property but also other rights.

JOHN LOCKE (1632-1704)

- The social contract of Locke performs two functions:
  - Men agreed to unite into one political society and thereby created a commonwealth. A majority agreement is identical with an act of the whole society. A majority vote can take away property rights and other inalienable rights.
  - After that the majority vested its power in a government whose function is the protection of individuals. So long as the government is faithful to its pledge, it cannot be deprived of its power.
- "In the state of Nature, no one was supposed to harm another in his life, health, liberty and possession for, men being all the workmanship of one omnipotent and infinitely wise maker, all the servants of one sovereign master sent into the world by his order and about his business"
- Nobody could transfer anymore power to another than he himself (*nemo debet quod non habet*)

JOHN LOCKE (1632-1704)

- Nobody had an absolute arbitrary power over himself or over any other person. A man could not subject himself to the arbitrary power of another.
- The state can never have a right to destroy, enslave or impoverish the subjects.
- The Law of Nature stands as an essential rule to all men, legislators and others.
- The rules which they enact for others must be comfortable to the law of nature.
- The fundamental law of Nature is the preservation of mankind and no human sanction can be good or valid against it

IMPACT OF JOHN LOCKE

- The legal theory of Locke gave theoretical form of the reaction against absolutism and to the preparation of parliamentary democracy.
- He put emphasis upon the inalienable rights of the emancipated individual
- According to him life, liberty and property are the three conditional rights which greatly impacted and influenced the drafting of American Bill of Rights, 1776 and the American Declaration of Independence, 1776. these two treatises of Government became the Bible for American Revolutionaries who were fighting against the British.
- The combination of noble ideas and acquisitiveness of natural law philosophy and protection of vested interests in American History owes much to Locke.

JEAN JACQUES ROUSSEAU (1712-1778)

- Rousseau propounded the theory of natural rights based upon the doctrine of social contract.
- According to him, the State of Nature was an era of 'idyllic felicity'. Reason did not guide individuals but emotions did.
- "Man by nature never thinks and he who thinks is a corrupt creature"
- Every individual had unlimited liberty. There was no private property, no competition and no jealousy.
- Every individual lived free, knew neither right nor wrong and way away from the notion of vice and virtue.
- But the original freedom, happiness, equality and liberty which existed in primitive societies prior to contract was lost with modern civilization.

JEAN JACQUES ROUSSEAU (1712-1778)

- Increase in population and the dawn of civilization were mainly responsible for the change.
- Arts, agriculture and metallurgy were discovered which required working in cooperation and necessity of diversity of talents.
- The stronger man did more amount of work and the craftier got more of the product.
- Thus, appeared differences between the rich and poor which became the main source of inequality. Life became intolerable.
- To find a form of association which protects with the whole common force the person and property of each associate and the virtue of which everyone, while uniting himself to all, remains as before
- This was achieved by social contract

JEAN JACQUES ROUSSEAU (1712-1778)

- By social contract everyone surrendered to the community all the rights and as a result was that the community became sovereign. Even after the contract the individual remained as free as before.
- "Since each gives himself up to all, he gives himself up to no one; and as there is acquired over every associate the same right that is given up himself, there is gained the equivalent of what is lost, with greater power to preserve what is left."
- Law is the expression of general will . Sovereignty can never be alienated or represented or divided.
- The State is therefore an outcome of the general will.
- Sovereign is not only the source but the essence of the law, because the sovereign acts only through Law. The Sovereign has no force other than the legislative power.
- By this device while individual relinquishing his natural rights in return received civil liberties: freedom of speech, assembly, press, equality, etc.

JEAN JACQUES ROUSSEAU (1712-1778)

- Just as nature gives each man an absolute power over all his parts, likewise the social contract gives an absolute power to the body politic over all its parts. It is this power which is called aas sovereignty when it is directed by the general will.
- This absolutism is based not on the fear or compulsion but on consent
- Various powers such as legislative, executive, etc., are only emanations of sovereignty which is one and unified and which collectively belongs to the people
- Sovereignty is the source of all laws.
- Separation of powers is not the division of sovereignty but the exercise of it for the sake of convenience
- Individual is free form State because he does to surrender his rights to an outside authority but to the corporate body of which he himself is a member.

JEAN JACQUES ROUSSEAU (1712-1778)

- Restrictions on the liberty of individuals are self-imposed.
- The rights of liberty, equality and property are rights of a citizen and not the natural and inherent rights of an individual, i.e., men are equal by law and not by nature.
- An individual is free while following his real will. He is also free while following the general will and obeying the laws which proceed from it because his real will is the organic part of the general will and is in agreement with it.
- Liberty is not a licence. It is not an unrestricted conduct of an independent individual. It is the rational freedom of an individual who lives a common life with others and whose welfare is integrally related to the welfare of others.
- Law is an expression of general will. "A Law is a resolution of the whole people for the whole people toughing a matter that concerns all". The enactments of the government are merely a corollary of the general will.

JEAN JACQUES ROUSSEAU (1712-1778)

- GENERAL WILL:
- In any society, we start with what he calls the will of all, i.e., the particular wills of the members of society. Everybody is allowed to his own will and thus the majority will is found.
- When the majority will is found, those who did not vote with the majority just say to themselves that they did not will the general will and hence must will what the general will is. It is in this way the majority will becomes the general will.
- The general will is the expression of the highest will in every man. It is the spirit of citizenship taking a concrete form of shape.
- General will is the manifestation of sovereignty
- When sovereignty acts for the common interest, it is the exercise of general will

JEAN JACQUES ROUSSEAU (1712-1778)

- GENERAL WILL
- General will cannot be self-contradictory
- General will is a reasonable will
- It makes for unity in variety
- General will is permanent
- It is always the right will. It always tend to the welfare of the whole
- It is infallible
- There can be no justification for disobeying it

JEAN JACQUES ROUSSEAU (1712-1778)

- GENERAL WILL
- Whenever any individual differs from the general will, he is in the wrong because he is merely a selfish will and not a general will.
- There is no coercion when a man is made to do something which is against his will. Because his real will is to be found in the general will which is manifested in the authority of the state. He is free even when he is being coerced by the general will
- The general will is inalienable and indivisible. Therefore "as soon as a nation appoints representatives, it is no longer free, it no longer exists."
- General will cannot be delegated. The moment it is delegated, it loses its character. The moment there is a master, there is no longer a sovereign.

JEAN JACQUES ROUSSEAU (1712-1778)

- Rousseau stood for popular sovereignty.
- The state should be a small one so that all the people may be able to assemble at one place and make laws
- “The larger the State, the less the liberty”

CRITICISM OF ROUSSEAU'S GENERAL WILL

- Rousseau's doctrine of general will is too abstract and narrow to be found in the practical world.
- The general will is neither general nor will. It can be determined only by the majority vote and not otherwise.
- The doctrine of general will may lead to the state absolutism
- In the name of general will the worst kind of tyranny may be practiced
- The doctrine of general will is based upon the idea of common interests which are difficult to define
- Even the worst tyrants can justify their actions on the grounds of the common good.

IMPACT OF ROUSSEAU'S SOCIAL CONTRACT THEORY

Dr. Friedman points out that the most immediate and far reaching influence of Rousseau's doctrine was on the makers of the French Revolution who took up the theory of popular sovereignty to justify revolution without end or measure.

His doctrines of liberty and equality added to those of law exercised a strong influence upon the formative era of American independence and the rights of man. He glorified the collective will as the embodiment of what I good and reasonable and this line of thought was developed further by Fichte and Hegel

IMPORTANCE OF SOCIAL CONTRACT THEORIES

The social contract theories of the law of nature were both the causes and symptoms of profound changes in the European scene.

They involved a separation of law from moral duty by their new emphasis on rights rather than duties.

They liberated the individual from the ties of feudalism and Church

They prepared the ground for Modern theories to Government

They inspired the revolutions in the United States and France

They also eventually inspired totalitarian theories of government through Rousseau's doctrine of General Will

They spurred on the development of modern international law

DECLINE OF NATURAL LAW THEORIES

- The Natural Law theory, or rather the Social Contract Theory did not survive the 18th Century for the various reasons like:
  - Individualistic conception of society out forward by rationalism
  - Collective conceptions stimulated by the rising tide of Nationalism
  - The stupendous growth of natural science gave the strength and emphasis to empirical methods against deductive methods
  - New and increasingly complex European society demanded a comparative and sociological approach to the problems of society and not abstract one
- Montesquieu and David Hume destroyed the foundations of Natural Law:
- Montesquieu maintained that law must be influenced by environment and conditions such as climate, soil, religion, custom, commerce, etc.
- David Hume destroyed the theoretical basis of Natural Law

REASONS FOR EROSION OF NATURAL LAW PHILOSOPHY

- Rise of Sovereign Nation States:
  - The rise of sovereign State which set aside the restraints of Higher Law
  - Th development of the doctrine of Sovereignty by Bodin, Machiavelli, Thomas Hobbes ad Bentham who destroyed the organic concept of Christianism which led to the establishment of Sovereign, Independent States
- Development in Physical Science
  - 19th Century witnessed tremendous achievements in physical Sciences and the impact of Darwin's evolutionary hypothesis upon every field throughout profoundly affected social sciences as well as Jurisprudence
  - The scientific world was ushered by the August Comte which removed traditional shackles due to which jurists set before themselves greater use of induction which contributed to further erosion of Natural Law
  - It denied the existence of anything that could not be apprehended by the senses or broken down by analysis or reduced to formulae or weighed, counted or measured.

REASONS FOR EROSION OF NATURAL LAW PHILOSOPHY

- Rise of Positivism in Social Science
  - August Comte (1798-1857) also known as father of Sociology coined the term 'Positivism' which gave up all forms of vague and loose thinking about social phenomena.
  - He laid down that social phenomena including Laws should be approached through the process of observation, analysis and classification just as physical bodies are studied in physical sciences.
  - Comte rejected Nature's Law and such other abstractions which were believed to be working behind any social phenomena
- Natural Law was facing too many problems in the 19th Century. As a result of which positivism had reached at the highest stage of progress.
- Positivism could satisfy the demand of justice, rather its effectiveness as model of legal and political action, Law became more inhuman and cruder.

REVIVAL OF NATURAL LAW THEORY

There was a reaction against the 19th century Legal Theories which had exaggerated the importance of positive law

It was realized that abstract thinking or '*a priori*' assumptions were not completely fertile. The material progress and its effect on the society made thinkers look for some values and standards.

Western society was shattered by the first World War and there was a search for an ideal justice.

Youth rebelled against self satisfaction of the *bourgeoisie*, money worship and modern life

Social reformers and socialists attacked inequalities in the society.

Lawyers began to feel that Law was not simply a matter of applying statutes or precedent to any given case or situation by means of pure logic. The unsolved problems demanded a guide higher than positive law.

There was a search for ideals of justice. As the faith of certainty wavered, idealistic philosophy revived

REVIVAL OF NATURAL LAW IN THE 20TH CENTURY

It was necessary to have an approach to reconcile the conflicting demands of the society, State and individual which is based on right reason and the self-evident principle to dignity of the individual.

So, to deal with questions of rational and moral bases of law, new theories of Natural Law have emerged.

At the beginning of the 20th Century, Natural Law Theories have started reappearing for several socio-economic and political reasons.

The modern theory of natural law rejects the older conceptions of natural law according to which the natural Law was immutable, eternal and universal.

The modern conception has admitted the idea of relativity in Natural Law.

REVIVAL OF NATURAL LAW IN THE 20TH CENTURY

- Salmond has provided the main reasons of revival of Natural Law
  - Dissatisfaction with the command theory of Law (Austin) which has banished morality from its fold.
  - The desire to reestablish a closer relation between Law and Morality
  - Need for juristic basis of a progressive interpretation of positive law in cases where it could not be strictly applied (more prevalent in America).
  - Development of sociological theories and sciences and
  - The development of the idea of relativity of modern jurisprudence which means that laws are universal and vary in their content, time and place

REVIVAL OF NATURAL LAW IN THE 20TH CENTURY

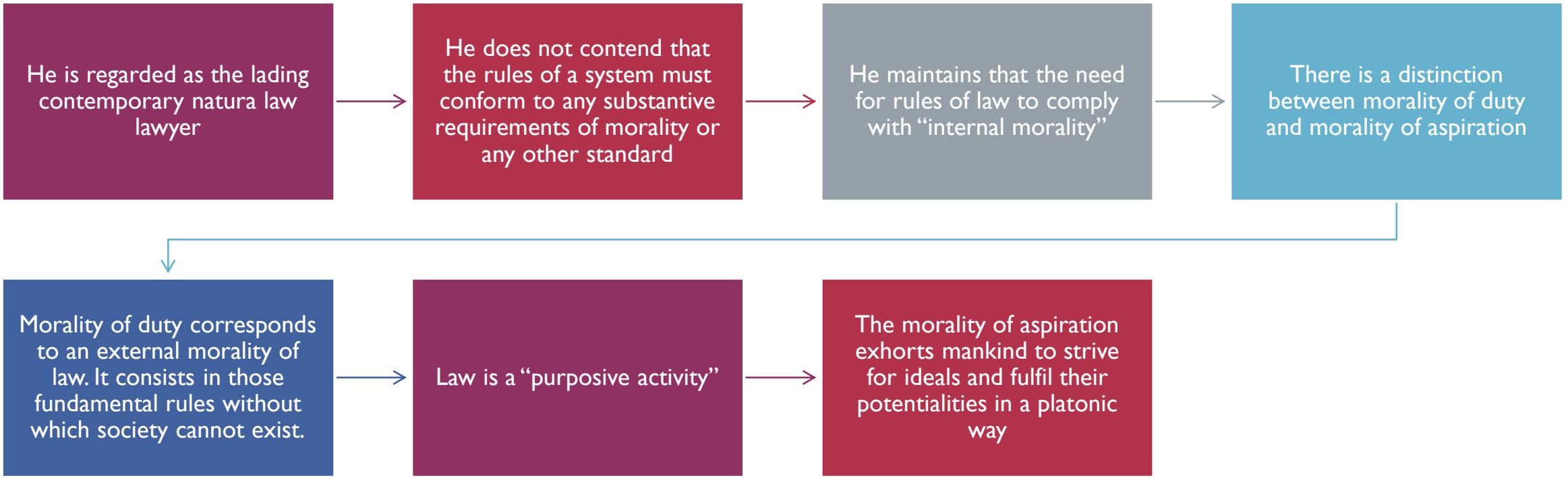
This revival has taken place by refining the doctrines of various older jurists of Natural Law

one form of such revival of natural law is the adaptations of doctrines of St. Thoman Acquinas, Neo-Tomists, followers of St. Thomas Acquinas are prepared to accept the descriptions of reality provided by scientists, but they maintain that it is for the philosophy to give full explanation of reality through reason and reflection

They adopt the humanism of Acquinas to steer a course between an exclusively individualist view of man and the totalitarian view of society in which the individual counts nothing.

Natural Law is both anterior and superior to positive law.

PROF. LON F. FULLER (1902-1978)



PROF. LON F. FULLER (1902-1978)

- Typical ideals or formal virtues to which a legal system should strive
  - Generality
  - Promulgation
  - Absence of retroactive legislation and certainly no abuse of retractive legislation
  - No contradictory rules
  - Congruence between rules as announced and their actual administration
  - Clarity
  - Avoidance of frequent changes
  - Absence of laws requiring the impossible

PROF. LON F. FULLER (1902-1978)

These principles of legality are not basic conditions which every system necessarily fulfils but are constant pole stars guiding his progress.

The greater its success, the more fully legal such a system is.

Fuller is critical of the assertion of Dworkin that while boldness is a matter of degree, a line can be drawn between law and non-law

"Law does not fade away, but goes out with a bang"

Fuller did not develop a relationship between the form and content of legal rules.

He believed that form has a direct bearing on content

PROF. LON F. FULLER (1902-1978)

Fuller rejected the Christian doctrines of Natural Law in the 17th and 18th centuries' rationalist doctrines

His analysis was based on the writings of Aristotle.

He described two main trends in legal philosophy called as legal positivism and natural law and denied that there could be any rigid separation between is and ought

Legal positivism and natural law are two different directions of legal thought and are two rival systems which claim superiority.

Legal positivism is that direction of legal thought which insists on drawing a sharp distinction between the law that 'is' and that 'ought to be'. This distinction is intended to purify legal positivism by removing it.

PROF. LON F. FULLER (1902-1978)

He did not subscribe to a legal system of absolute values.

In all theories of natural law, it was assumed that "the process of moral discovery is a social one and there is something akin to a 'celebrative articulation of purposes' by which men come to understand better their own ends and discern more clearly the means for achieving them"

The most fundamental tenet of natural law is an affirmation of the role of reason in legal ordering.

CRITICISM AGAINST LON FULLER

Fuller betrays confusion between efficacy and morality

- According to Hart: "the designation of these legal principles of good craftmanship should not be treated as morality, in spite of the qualification "inner" as pertaining to a confusion between two notions that it is vital to hold apart the notions of purposive activity and morality

His principles of legal system are "compatible with very great inequity" even to totalitarian massacres, etc.

To which Fuller replied : Iniquitous regimes have not continued to exist, nor could they continue to combine evil policies with fidelity to "internal morality"

JOHN FINNIS (1940-)



He wrote a treatise Natural Law and Natural Rights (1980) which is treated as the most important contribution on Natural Law in the modern period.



In his book, he made an attempt to destroy some myths about natural law thinking and reformulate Natural Law in an innovative and interesting manner.



His attempt to restate and provide modern analysis of the concept of natural law restated the importance of Natural Law.

PRIOR TO FINNIS

- Scholars, by applying reason and by applying it to human condition were to arrive at moral principles. These moral principles were treated universal
- If a government transgresses against these principles its action, statute or whatever is invalid.
- They also believed that certain objective moral values can be discovered by reason.
- The human law that violates the moral principles is not a law
- These two positions of natural law came throughout the history of natural law

JOHN FINNIS (1940-)

Finnis in his restatement for the first time denied that these two elements are not central to Natural Law

He admitted that Stoics, some medievalists and some rational Natural Rights thinkers may have held them

He denies that they are basic element either of Aristotle or Acquinas

He disposes two important misconceptions about Natural Law Theory:

- He denies that natural law derives from objectively determinable patterns of behaviour but instead asserts it is ascertainable from inward knowledge of innate motivation
- Natural law does not claim the view that law is not law if it contradicts morality

BASIC GOOGS OF HUMAN NATURE

The basic principles of natural law are pre-moral

Natural law is a set of principles of practical reasonableness in ordering human life and human community

There are certain basic goods for human beings. These basic goods are objective values in the sense that every reasonable person must assent to their value as objects of human striving

These seven basic goods are not derived or inferred from facts at all, but arrived at by a process of non-inferential understanding

Although there is no inference, the process involves intelligence, and is rational

These goods are self-evident, and can be grasped by anyone who is of the age of reason

JOHN FINNIS (1940-)

- These forms of goods which exist are not simply products of human passions and feelings, it is not a question of psychology, but the things which are in an un-derived, absolute way 'good' in themselves
- These basic goods are not an 'is-ought' derivation. They are more like 'ought' in the beginning and 'ought to follow' more specifically
- The basic goods are:
  - Life
  - Knowledge
  - Play
  - Aesthetic experience
  - Sociability (friendship)
  - Practical reasonableness
  - religion

JOHN FINNIS (1940-)

- He establishes knowledge as a basic good
- Play is something which is engaged in purely for it, no ulterior motives
- Other values and wishes are merely modes of participating in these basic goods
- Practical reasonableness is also one of the basic good which is able to bring one's intelligence to bear on choosing a lifestyle and a character. It is 'practical' in that it dictates action; it is basic good which involves individual autonomy and freedom
- Practical reasoning involves a consideration of all the basic goods, and a decision (followed by action) on which means to use to attempt which goods (ends)
- He has not considered money or power as basic goods, and people holding them as common good, or derivation of law are mistaken ad corrupt

HOW DO WE GET FROM THE BASIC GOODS TO LAW

- Practical reasonableness required a just and well-organized society, because it is in society that a man can maximize his potential, can achieve most of the basic goods
- The best position is when the communities give individual freedom and justice
- An individual first recognizes the need for a well-organized society and there is an obligation on him to work for the common good of the community
- Disagreements are inevitable, but even political opponents can be seen working towards the common good
- One of the requirements of a well-ordered society is a legal system to enforce and amend the common code of behaviour which is necessary for communal living
- Only in legally and politically ordered societies can the basic goods be realized

JOHN FINNIS (1940-)



Many scholars have criticized Finnis' Theory on many grounds including his position about 'unjust law is no law'



Inspite of all the criticism, Finnis' theory has been considered as a challenging one

ANALYTICAL POSITIVISM

INTRODUCTION

- The word positivism is itself subjective to various meanings, therefore it has been used in different senses by different theorists in their theories.
- Dias: positive movement started at the beginning of 19th Century. It represented a reaction to the methods of thinking which turned away from realities of actual law in order to discover in nature or reason the principles of universal validity
- Positivism flourishes best in stable social conditions

H.L.A HART

- Laws are Human Commands
- Analysis of legal concepts is worth pursuing, distinct from sociological and historical enquiries and critical evaluation
- Decisions can be deduced logically from pre-determined rules without recourse to social aims, policy and morality
- Moral judgements cannot be established or defended by rational argument, evidence or proof
- Law as it is load down has to be kept separate from law that ought to be.

DIFFERENT NAMES OF ANALYTICAL SCHOOL

- Positive school: Concerned with law as it exists i.e., law as it is (positum)
- English School: Dominant in England
- Austinian School: Founder was Austin

POSITIVISM

- The term “positivism” was invented by August Comte – A French thinker
- Focus on systematic analysis of legal concepts
- To understand the structural nature of the legal system. So, discussion of justice are irrelevant and confusing
- Purpose is to analyse the first principles of law without reference to their historical origin or development or ethical significance or validity.

POSITIVISM

- Main task of analytical school is the lucid and systematic exposition of the ideas pertinent to ampler and mature system of law.
- To gain accurate and intimate understanding of the fundamental working concepts od all legal reasoning.
- In general, positivism means that the law is something ‘posited’: laws are validly made in accordance with socially accepted rules.
- Laws may seek to enforce justice, morality or any other normative object, but their success or failure in doing so does not determine their validity and that law is nothing more than a set of rules to provide order and governance of society

ACCORDING TO FRIEDMANN:

- The analytical lawyer is a positivist. He is not concerned with ideals; he takes the law as a given matter created by the State whose authority he does not question.
- On this material he works, by means of a system of rules of a legal logic, apparently complete and self-contained.
- In order to be able to work on tis assumption, he must attempt to prove to his own satisfaction that thinking about the law can be excluded from the lawyer's province.
- Therefore, the legal system is made watertight against all ideological intrusions and all problems and concluded in terms of legal logic.

ACCORDING TO JULIUS STONE:

- Analytical jurisprudence as the study of logical relations within law serves a useful purpose. Its main tasks are to deter and define the terms actually employed, to state the axioms actually employed; to determine whether legal propositions ostensibly from them do follow in logic and to enquire what definitions and axioms might yields a maximum of self-consistency in the body of legal prepositions

REASONS FOR EMERGENCE OF LEGAL POSITIVISM

- Legal Identity on new National States
- Reaction against Natural Law
- Impact of progress in Physical Sciences
- Political Factor
- Modern Doctrine of Sovereignty
- Positive Law is ascertainable without subjectivity (separate morals)

MAIN PROPOSITIONS OF POSITIVISM

- Law is descriptive
- Legal Positivism as liberal doctrine
- Distinction between is and ought – between law and morals
- Concentration of positive law
- Law in terms of and a product of State
- Logic is the main instrument
- Typical Law is Statute

PROF. ROBERT SUMMERS

Laws are human commands

What counts as law in any particular society is fundamentally a matter of social fact or convention

There is no necessary connection between law and morality

A commitment to the idea that a phenomena comprising the domain of law must be accessible to the human mind.

The study of law as meaning distinct from psychology, history and evaluation

PROF. ROBERT SUMMERS

- The contention that a legal system is closed system, which is sufficient to justify legal decisions
- Analysis of existing conceptual framework of and about law;
- Construction of new conceptual frameworks with accompanying terminologies
- Rational justifications of institutions and practices, existing and proposed
- The tracing out of what the acceptance ‘implies’ in terms of social arrangements and social ordering

MERITS OF POSITIVISM

- It is a declaration of the limits of State requirements
- It tells us where the law 'stops' and 'ideology' starts
- In a culture where there is little homogeneity of political opinion and where there are irreconciliable ideological and fundamental conflicts of view, legal positivism will be attractive because of its liberalism
- According to positivism, since there can be little controversy about what the State requires, ideology cannot be covertly introduced under the guise of law
- Even without the training of lawyer, we can easily think of examples of law where our ability to identify a rule as a rule of law does not, at first blush, require us to make moral judgement. E.g. homosexual act.

CRITICISM OF POSITIVISM

- Positivist kept ideals of law out of its consideration
- Maine: Austin has unduly generalizes from the particular
- The proponents of historical and sociological theories of the law criticized Austin for his too much focus on command and sanction as essential elements of law
- Austin describes the legal relations (which include legal power, rights, privileges and so on) as commands made by one having superiority over the addressee

CRITICISM OF POSITIVISM

Gray: he believes that the real rules of a political society cannot be discovered, moreover while State must be accepted as fundamental in law to which the machinery of government attaches, the interposition of other entity, namely the sovereign, is quite relevant

Hart: he says hat the habit of obedience to a sovereign with an unlimited power which is a defining characteristic of Austin's sovereign, does not account the continuity of the law making authority possessed by succession of different legislators

CRITICISM OF POSITIVISM

- One of the essential elements of law in Austin's theory is sanctions, since it naturally follows from the notion of command that there be a fear of evil. However, this does not account for the bulk of law that is enabling in nature rather than restrictive. Moreover, sanction is not a satisfactory explanation of obedience to law.
- It seems that while sanction has its own role to paly for those do not wish to obey the law, there are other factors such as respect of law as such or the desire to have an advantage of a system of legal protection of acts that significantly explain the phenomena of obedience of law.

CRITICISM OF POSITIVISM

Kelsen: he considers that the analytical purity of a theory of law is compromised by introducing into the psychological element.

Prof. Hart: he points out that laws are to be defined in terms of the notion of rules so that it is dogmatic to insist that the status of a law as law is derived from a prescription whether express or tacit

JEREMY BENTHAM (1742-1832)

- His works are created prior to Austin but were published after him, otherwise he could possibly e called as the “Father of English Jurisprudence” if his works would be published in his lifetime.
- He believed that no reform of substantive law could be brought about without a reform of its form and structure. A thorough scientific framework is a prelude to reform
- He advocated imperative theory with key concepts being sovereignty of command

JEREMY BENTHAM (1742-1832)

- But these ideas or concepts are far more subtle and flexible.
- His sovereign is neither illimitable nor indivisible, this was because he accepted between social desirability and logical necessity
- “The business of the ordinary sort of law is to prescribe to the people what they shall do & the business of the transcendent class of laws is to prescribe to the sovereign what he shall do”
- Sanctions generally play a less prominent part in the in Bentham’s theory.

JEREMY BENTHAM (1742-1832)

- “A Law may be defined as an assemblage of signs, declarative of a volition conceived or adopted by the Sovereign in a State, concerning the conduct to be observed in a certain case by a certain person or a class of persons who in the case in question are or are supposed to be subject to his power.
- This definition is flexible enough to cover a set of objects so intimately allied to which there would be such continual occasion to apply the same propositions .

JEREMY BENTHAM (1742-1832)

- Every law may be considered in eight different aspects:
  - Source: will of the sovereign
  - Subjects: may be persons or things
  - Objects: may be an act, situation or forbearance
  - Extent: a portion of land - on persons or on circumstances
  - Aspects: directive and sanctional part
  - Force: dependent on the motivations of obedience
  - Remedial appendages: a further set of subsidiary laws for curing the evil/ preventing future evil
  - Expression: the way in which the sovereign's will may be expressed.

JEREMY BENTHAM (1742-1832)

- Every law has a “directive” and a “sanctional” or “inciitative” part. The former concerns with the aspects of sovereign’s will towards an act or situation and the latter concerns with the force of law.
- Also called as “Utilitarian Individualism”
  - Emancipate the individual from bondage and restrain upon his freedom
  - The end of legislation is the “greatest happiness of the greatest number”
  - The nature has placed man under the empire of pleasure and pain
  - Purpose of law is to bring pleasure and avoid pain

UTILITARIAN INDIVIDUALISM

- The individual's purpose of life is to enhance pleasure and avoid pain constantly in his life.
- The task of the government was to promote the happiness of the society by furthering enjoyment and affording security against pain.
- Nature has placed man under the empire of pleasure and pain
- The principle of utility subjects everything to these two motives

UTILITARIAN INDIVIDUALISM

- The purpose of law is to bring pleasure and avoid pain.
- Pleasure and pain are the ultimate standards on which law has to be judged
- He wished to attain the happiness of the community by attaining four major goals: subsistence, abundance, equality and security for citizens.
- Security was the most important legal regulation as it was related to the protection of honour, property and status of a person
- According to him, it is not the liberty but security and equality which should form the main objective of legal regulation.

APPRAISAL OF BENTHAM'S THEORY

He linked philosophical premises with practical legal prepositions

He placed individualism on a new materialistic basis

He subordinated rights of self-contained individuals to the happiness of the greatest numer of individuals in a community

Aims of law to practical social purposes instead of abstract propositions

According to him, the main functions of law is to provide subsistence and to aim at abundance; to encourage equality and to maintain security

APPRAISAL OF BENTHAM'S THEORY

- He put emphasis on the need and developed a technique of conscious law making by codification as against judicial law making or evolution by custom.
- There were certain scientific principles of codification which could be applied in every country irrespective of national and historical differences.

CRITICISM TO BENTHAM'S THEORY

- Freidmann: he points out two criticisms:
  - The doctrinaire rationalism which prevents him from seeing man in all his complexity, in his blend of materialism and idealism, of nobility and baseness, of egoism and altruism. This leads Bentham to an overestimate of the powers of the legislator and an underestimate of the need for the individual discretion and flexibility in application of the law
  - Bentham's failure to develop clearly his own conception of the balance between individual and community interests.

CRITICISM TO BENTHAM'S THEORY

- Benthanm advocated that the law should be made exclusive by legislations which was supposed to remove restrictions upon individual's freedom which may result in providing opportunities for development of self. But, in the later period, it was found that the legislations itself was used to restrict individual freedom in many fields.
- Divorce between the form and content of the law: i.e., difference between law and morality; therefore, analytical positivism loses its usefulness in promoting peace and order.

CRITICISM TO BENTHAM'S THEORY

- He equates good with pleasure and right with conduciveness to pleasure this subverts the moral content in terms of good and right.
- The purpose of law is to serve utility. The ethics of the principle of greatest happiness of the greatest number is either universally accepted or derived as a logical necessity from his definition.

CRITICISM TO BENTHAM'S THEORY

- For Bentham, the greatest happiness principle is the only absolute or universal rule. Since this is the only rule that promotes happiness, he argues, it ought therefore to be followed. However, he commits the logical fallacy of deriving ought from is, for he suggests that from something that is universally desired it follows that we ought to aim at it.
-

CRITICISM TO BENTHAM'S THEORY

- Bentham believes that the interests of the individuals composing a community automatically promote the interests of the community. However, he fails to explain why this should be so. He fails to grasp the problem of balancing the interests of the individual with the interests of the community.

JOHN AUSTIN (1790-1859)

- Is most important contribution to legal theory was his substitution of command of the sovereign for any ideal of justice in the definition of law.
- Positive law has four elements:
  - Command
  - Duty
  - Sanction
  - Sovereignty

JOHN AUSTIN (1790-1859)

- His theory can also be called as imperative theory. There are three main features in his theory:
  - Law is a type of command
  - Load down by political sovereign
  - Enforceable by sanction

JOHN AUSTIN (1790-1859)

- According to him laws are of two types:
  - Divine Law
  - Human Law: which is further divided into
    - Positive Law which is laid down by political superior
    - Rules of club and voluntary associations
- Laws strictly so called consist only of those rules which are set by a sovereign to a member or members of an independent political society wherein that sovereign is supreme.
- “Law is law because it is made by the sovereign and the sovereign is sovereign because he makes the law”.

JOHN AUSTIN (1790-1859)

- “Laws properly so called” are a species of commands.
- Every sanction properly so called is an eventual evil annexed to a command.
- Every duty properly so called supposes a command by which it is created and duty properly so called is obnoxious to evils of the kind.
- All positive law is deduced from a clearly determinable law-giver as sovereign.

JOHN AUSTIN (1790-1859)

- Every positive law is set by a sovereign or a sovereign body of persons, to a member or members of the independent political society wherein that person or body is sovereign or supreme.
- The fear of sanction supplies the motive for obedience.
- However, there are some problems created due to defining law as a command

PROBLEMS IN DEFINING LAW AS A COMMAND

- Civil laws do not command nor forbid things to be done
- Command suggests existence of a personal commander
- Command conjures up the picture of one particular commander on a particular occasion to a recipient; in reality however, the scenario is not the same.
- Judicial decisions don't necessarily fit into this categorization disregarding precedent to be law.

PROBLEMS IN DEFINING LAW AS A COMMAND

- What about non-command laws – like declaratory statutes, repealing statutes, etc?
- No answer to why commands of previous sovereign become binding on the successor
- If the laws are commands, then why are there procedural requirements to pass the law?

CRITICISM OF AUSTIN'S THEORY

- Laws existed before creation of State – According to Historical School
- Generality of law is not practicable in every sphere of law
- Promulgation (i.e., bringing into force by declaring) cannot always be true
- Law cannot be always be expressed as a command
- Sanction behind the law is not the force of the people to obey it
- Not applicable to international law, Constitutional Law, Hindu Law, etc.

CRITICISM OF AUSTIN'S THEORY

- Ethical element (to provide justice) is missing in his theory
- Another criticism is with reference to the powers of the sovereign; According to Austin, sovereign should be illimitable, indivisible and continuous, but in truth that is not possible
- International law cannot be accepted as law as it does not have the sovereignty, sanction command aspects which constitute a law.

MERITS OF AUSTIN'S THEORY



PROVIDED A SIMPLE AND CLEAR DEFINITION OF LAW



SEPARATED LAW FROM MORALITY



IT CONTAINS IMPORTANT ELEMENT OF TRUTH



CIVIL LAW IS THE PRODUCT OF STATE WHICH DEPENDS FOR ITS EXISTENCE ON THE PHYSICAL FORCE OF THE STATE EXERCISED THROUGH THE AGENCIES OF JUDICIAL TRIBUNALS

APPRAISAL OF AUSTIN'S CONTRIBUTION

- English Jurisprudence is predominantly analytical due to Austin.
- His defects in theorizing law have been a source of further enlargement on the subject.
- He removed many false notions which had obscured the true meaning of law and legal terms.
- Sir Henry Maine: "no conception of law and society has ever removed such a mass of undoubted delusions"

APPRAISAL OF AUSTIN'S CONTRIBUTION

- Prof. C.K. Allen: for a systematic exposition of the methods of English jurisprudence we will have to turn to Austin.
- Most of the successors of Austin follow the conception and arrangement even if they opposed his doctrines.

PROF. H.L.A. HART (1907-1992)

- “Where there is a law, there human conduct is made in some sense non-obligatory”
- Thus, the idea of obligation is at the core of the rule. Significance of rules have been neglected.
- The concept of rule can be on the basis of the difference between “being obliged” and “having an obligation”; for having an obligation, a person needs to be bound by some rule, but no such rule is required if someone is being obliged

PROF. H.L.A. HART (1907-1992)

- Rules are conceived and spoken of as imposing obligations wen the general demand for the conformity is insistent and the social pressure brought to bear upon those who deviate or threaten to deviate is great.
- Rules exert two types of pressures:
  - Feelings of shame, remorse and guilt: then such rules would be moral rules
  - Physical sanctions are prominent as a form of pressure: then such rules can be accepted as primitive, rudimentary form of law.

PROF. H.L.A. HART (1907-1992)

- Primary Rules: They are the rules which human beings are required to do or abstain from doing certain actions whether they wish or not.
- Secondary Rules: these provide that human beings may, by doing or saying certain things of the primary type, extinguish or modify rules or in various ways determine their incidence or control their operations.

PROF. H.L.A. HART (1907-1992)

- Primary rules impose duties whereas secondary rules confer power, public or private.
- Primary rules concern actions involving physical movement or changes whereas secondary rules provide for operations which may lead not merely physical movement but to the creation or variation of duties and obligations.

PROF. H.L.A. HART (1907-1992)

- Defects in primary rules:
  - Uncertainty
  - Static character of primary rules
  - Inefficiency
- Hart provided for the remedies to each of these defects. According to Hart, the remedy for each of the three main defects in the simplest form of social structure consists in supplementing the primary rules of the obligation with secondary rules.

PROF. H.L.A. HART (1907-1992)

- The remedy for uncertainty of the regime of primary rules is in the introduction of “Rule of Recognition” which will recognize all the existing primary rules for the conclusive identification.
- Remedy to the static quality is by introducing “Rules of Change”. This can help to cater to the changing needs of the contemporary.
- Remedy to inefficiency is by introducing “Rules of Adjudication” which will define issues relating to judge or court, jurisdiction and judgement.

PROF. H.L.A. HART (1907-1992)

- If we consider the structure which results from the combination of primary rules of obligation with the secondary rules of recognition and change and adjudication, we have the heart of the Legal system.
- Thus, a legal system consists of two types of rules –
- primary rules and
- secondary rules

PROF. H.L.A. HART (1907-1992)

- Primary rules lay down standards of behaviour and impose obligations and secondary rules specify the ways in which primary rules may be ascertianed, introduced, eliminated or varied and the mode in which their violation may be conclusively determined
- The union of primary and secondary rules constitutes a legal system.

PROF. H.L.A. HART (1907-1992)

- Internal Aspect of Law:
- Law depends not only on the external social pressures which are brought to bear on human beings to prevent them from deviating from the rules but also on an inner point of view that human beings take towards a ruelimposing an obligation.
- In a primitive society having no secondary rules the Internal Aspect is necessary for the members of the society to be held together in terms of obligations.

PROF. H.L.A. HART (1907-1992)

- In the advanced society where the secondary rules are developed and mechanism of state is in place, it is not necessary for the members to have internal aspect, but the officials are under an obligation to have an internal aspect of Law for the proper implementation of the primary rules.

CRITICISM OF H.L.A. HART'S THEORY

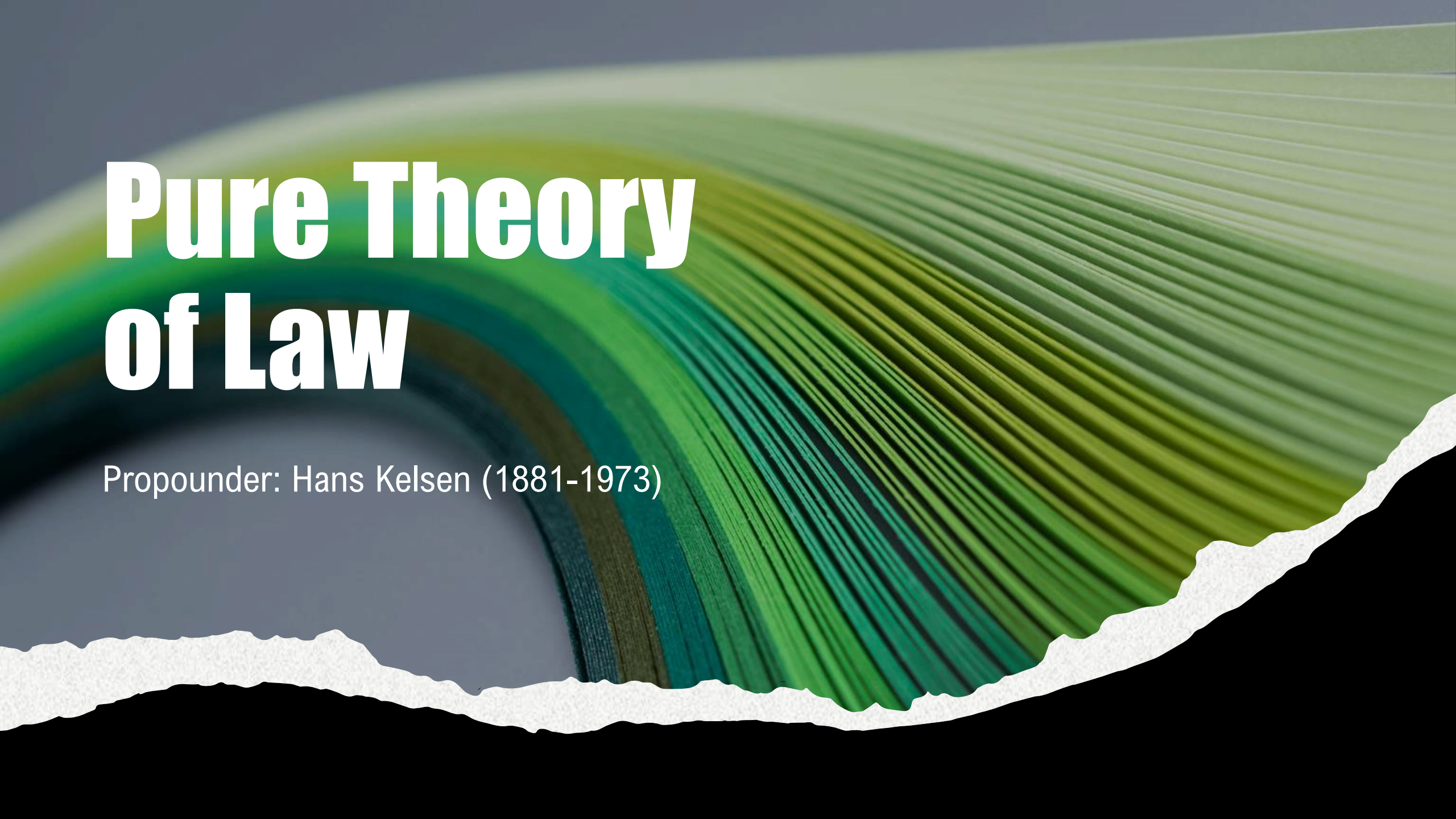
- Legal system is complex than just having a combination of primary and secondary rules. Hart himself speaks about "open texture" of the legal rules as well s the relationship pf law to morality and justice.
- Full detailed taxonomy of the verities of law still remains to be accomplished.
- Discretion of judges while adjudging the cases shows legislative role which has not been justified in Hart's legal system, yet it is very much existing in the reality.

CRITICISM OF H.L.A. HART'S THEORY

- Positivist models of judicial process like that of Hart cannot accommodate "principles" and that makes them fall back on discretion.
- Oversimplification of the concept of "internal aspect". Officials are influenced by all the conflicting and mixed motives which move humanity
- The concept of "institution" seems missing in Hart's concept of legal system.
- Hart's view on continuity of laws cannot be explained purely on terms of obedience or habit of obedience.

CRITICISM OF H.L.A. HART'S THEORY

- Distinction between legal and pre-legal state of affairs is not clear
- Hart's concept is based on giving distinction between rules imposing duties and rules conferring powers as a legal system, but such sharp distinction cannot be drawn many times. Same rules can confer power and impose duty
- Social and moral considerations may set limits on the rule of recognition at the time of acceptance
- For limited purposes of identifying laws, his concept seeks to accomplish more than is necessary. For the purpose of portraying law in continuum, it does not go far enough.



Pure Theory of Law

Propounder: Hans Kelsen (1881-1973)

Introduction

A theory of law must deal with law as it is actually laid down and not as it ought to be – positivist approach

A theory of law must be distinguished from law itself

Law consists of amass of heterogenous rules and the function of the theory of law is to organize them into a single ordered pattern.

A theory of law should be uniform, it should be applicable to all times at all places

Pure Theory

Kelsen advocated general jurisprudence

A theory of law must be free form ethics, politics, sociology, history, etc.

IT MUST BE PURE

Law is a normative science and not a natural science. As a theory of norms legal theory is not concerned with the effectiveness of legal norms.

Pure Theory

Knowledge of laws is knowledge of norms

Norm is a proposition in hypothetical form, e.g.: if X happens, then Y should happen.

The science of law consists of the examination of nature and organization of normative propositions

A dynamic system is one in which fresh norms are constantly being created on the authority of an original norm or basic norm called the “Grundnorm”

Pure Theory

Propositions of law deal with what ought to happen. Even if a person is not punished for committing an offence that does not disprove the proposition because ideally, he “ought to” be punished

Both Kelsen and Austin agree that “legal oughts” are backed by sanction

However, Kelsen does not accept “law is a command” aspect of Austin.

Command introduces a psychological element which would not keep his theory “pure”.

Pure Theory

Austin's sanction is something outside law which imparts validity to law, however, Kelsen maintains that the legal "ought" cannot be derived from any fact outside law.

The validity of any legal "ought" is derived from some other legal "ought"

The Basic Norm

- Every legal system has some hierarchy of “oughts” tracable to some fundamental “ought” from which all others emanate. This norm is called as “Grundnorm” or the basic fundamental norm
- Every rule derives its efficacy from some other rule standing behind it, but the Grundnorm has no rule behind it.
- Grundnorm is the initial hypothesis upon which the whole system rests

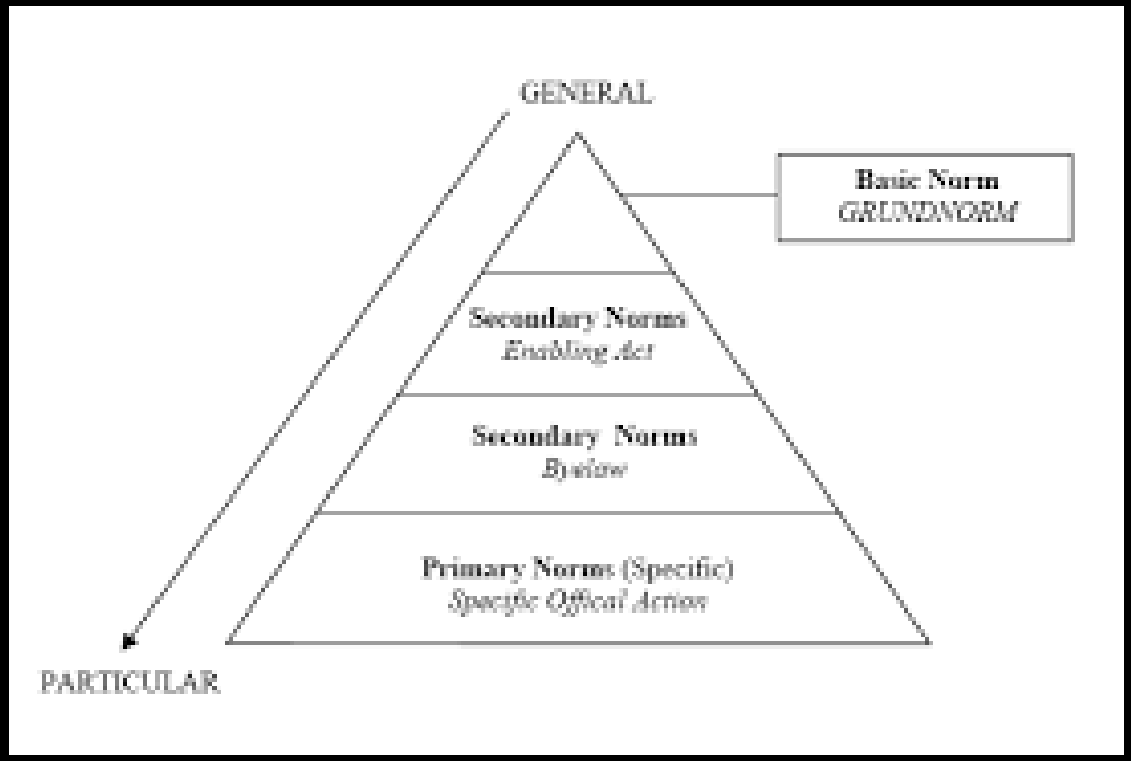
The Basic Norm

- Grundnorm is said to be accepted when it has secured for itself minimum effectiveness.
- There must not be total disregard of the grundnorm, but there need not be universal adherence to it.

The Basic Norm

- When a grundnorm ceases to derive a minimum support, it ceases to be the basis of the legal system and some other grundnorm which obtains the support of the people
- Grundnorm is the starting point for the philosophy of Kelsen. Rest of the system is considered as broadening down in gradations from it and becoming more and more detailed and specific.

The Basic Norm



Implications of Pure Theory

- Certain conclusions which were drawn by Kelsen are as followe:
- There is no distinction between public law and private law as they both emanate from the single process of concretization.
- Legal system is an ordering of human behaviour. The idea of duty is the essence of law. The idea of right is not essential
- The idea of right is merely a byproduct of law

Implications of Pure Theory

- The idea of individual rights is not a foundation of criminal law today as formerly the machinery of law was set in motion by the injured person but now the same is set in motion by the State.
- The idea of “personality” is simply a step in the process of concretization. “person” is meant a totality of rights and duties.
- The state is a system of human behaviour and an order of social compulsion.

Implications of Pure Theory

- Law is also a normative ordering of human behaviour backed by force. Thus, state and law are identical. The State is simply the personification of Law.
- Once the hierarchic character of law is grasped, the distinction between law making or legislation on one hand and execution or application of law on the other hand has not the absolute character which the traditionalists attribute to it. With every such act the norm of superior degree id put into execution and a norm of the inferior degree is set up.

Implications of Pure Theory

- Legislative, executive and judicial processes are all norm creating agencies.
- When applied to international law, Kelsen's Pure theory revealed many limitations.

Criticism to Pure Theory

- Though Kelsen's theory provides a formal structure of law as a heiearchial system of norms and has removed some of the perplexities of Austin's theory, yet a legal system is not an abstract collection of bloodless categories but a living fabric in a constant state of movement.
- Lord Lloyd: The Grundnorm is a troublesome feature of his theory. The kingpin of the whole structure rests upon a shaky foundation of a loose concept.

Criticism to Pure Theory

- C.K. Allen: Without the examination not only of law but of the implication of the law as a functioin of society, the ‘pure’ essence dictilled by the jurist is a colourless, tasteless and un-nutritious fluid which soon evaporates.
- Kelsen in his just anxiety to repudiate the muddled jurisprudence which has confounded law with ethics, does less than justice to some of the theories which he attacks.

Criticism to Pure Theory

- A legal order not only consists of laws but includes doctrines, principles and standards, all of which are accepted as legal" and which operate by influencing the application of rules. Their validity is not tracable to grundnorm of the order.

- Forced legal theory to reconsider its position
- Elucidation of the relation between the initial hypothesis and the totality of legal relations derived from it
- The conception of law as a dynamic process of concretization is a very fruitful one

Contribution of Kelsen

- The basic theses underlying the Pure Theory that legal rules are to be equated with norms and that the legal system is a collection of such norms interpreted as a non-contradictory field of meaning, appears to be basically sound
- He demonstrated the unity of the legal system as well asl the machines of its operation (organs)

Contribution of Kelsen

SOCIOLOGICAL SCHOOL

Introduction

- The relations between individual, society and state have been changing and various theories regarding them have been propounded from time to time. The sociological school gained ascendence in the first decade of the 20th century.
- The sociological school focuses on the actual circumstances which give rise to legal institutions, and which condition their scope and operation.
- This is the functional view of law and regarded as one of the factors in the morphology of society.
- This school is essentially concerned not with man as an individual but with "man-in association"

Introduction

- Law is a social function, an expression of human society concerning the external relations of its individual members. The jurist should concentrate as a "willing agent" on the social purposes and interests served by law
- Law must seek to attain certain ends; What it needs is:
  - Philosophy which will explain its method and furnish it with a rationale
  - One which will provide the sociological jurist with tools and show him how to use them by furnishing him with some scale of values by which he can hew and weigh through the experimental flux of the same legal order.
  - Roscoe Pound: "Sociological movement in jurisprudence is a movement for pragmatism as a philosophy of law… for putting the human factor in the central place and relegating logic to its true position as an instrument"

Introduction

- Ehlrich: "at the present as well as at any other time, the centre of gravity of legal development lies not in legislation, nor in juristic science, nor in judicial decision, but in society itself. This sentence perhaps, contains the substance of every attempt to state the fundamental principles of the sociology of law."

- Sociological approach has resulted out of the change in political shift from doctrine of lassiez faire to social welfare state.

Roscoe Pound (1870-1964)

- Sociology of law in the United States has its most elaborate and detailed, most broadly conceived and subtle expression in the rich ad scientific productions of Dean Roscoe Pound. His thought was formed by a constant confrontation of sociological problems, philosophical problems, problems of legal history and problems of the work of American Courts.
- He was not purely pragmatic or utilitarian, he was not an enemy of abstract philosophy of law, he did not underestimate the part played by the speculative idealism in the developments of legal institutions. He was impressed by certain limitations of legal philosophy which had constantly illustrated.

Roscoe Pound (1870-1964)

- The trend of Pound's legal philosophy is cautiously experimental and essentially one of practical compromise.
- He has been responsible for the growth and functional attitude in juridical science, the attitude of looking to the working of law rather than its abstract content and regarding law as a social institution which it should endeavour to improve by conscious and intelligent effort along lines which jurists shall determine as the most efficacious for achieving the ends and purposes to be served.

Roscoe Pound (1870-1964)

- "Law is the body of knowledge and experience with the aid of which a large part of social engineering is carried on. It is more than a body of rules. It has conceptions and standards for conduct and for decision, but also doctrines and modes of professional thoughts and professional rules of thought by which the precepts of conduct and decision are applied, developed and given effect."
- "Like an engineer's formulae, they represent experience, scientific formulations of experience and logical development of the formulations, but also inventive skill in conceiving new devices and formulating their requirements by means of a developed technique."

Roscoe Pound (1870-1964)

- Sociological jurisprudence should ensure that the making, interpretation and application of laws take account of social facts. In order to achieve that end, there should be a factual study of the social effects of legal administration, social investigations as preliminaries to legislation, a constant study of the means for making laws more effective.
- In order to achieve the purposes of the legal order, there has to be a recognition of certain interests, individual, public and social; a definition of the limits within which such interests will be legally recognized and given effect to and securing of these interests within the limits as defined.

Roscoe Pound (1870-1964)

- While defining scope and object of matter of the system, five things have to be done:
  - Preparation of an inventory of interests & classifying them.
  - Selection of interests which should be legally recognized.
  - Demarcation of the limits of securing the interests so selected.
  - Consideration of the means whereby laws might secure an interest when those have been acknowledged and delimited, and
  - Evolution of the principles of valuation of the interests.

Theory of Social Engineering

The job of a lawyer is of engineering

The aim of social engineering is to build an efficient structure of society which requires the satisfaction of the maximum wants with the minimum friction and waste.

This involves balancing of conflicting and competing interests.

Interests are “claims”, “wants”, “desires” or “expectations” which men assert de facto about which law must do something if organized societies are to endure.

For facilitating the tasks of social engineering, Pound classified various interests which are protected by law under three heads – Private interest, Public interest and Social Interest.

The problem which juridical science faces is evaluation and balancing of these interests.

Private Interest

- Individual's interests of personality
- Physical integrity, reputation, freedom of volition, freedom of conscience
- They are safeguarded by law of torts, criminal law, law of contract and by limitations upon the powers of the Government to interfere in the matter of belief and opinion
- Individual's interests in domestic relations include marriage relations of husband and wife and parents and children & claims to maintenance.
- Interests of substance include property rights, inheritance, testamentary succession, occupational freedom, freedom of association, freedom of industry and contract, continuity of employment, etc.

Public Interest

- The claims or demands or desires asserted by individuals involved in or looked at from the standpoint of political life.
- There are two kinds of public interests:
  - Interests of the State as a juristic person
  - Interests of State as a guardian of social interests.
  - They include integrity, freedom of action and honour of the State's personality and claims of politically organized society as a corporation to property acquired and held for corporate purposes

Social Interest

- Claims or demands or desires thought of in terms of social life and generalized as claims of political life.
- These interests include:
  - Social interest in general security
  - Social interest in security of social institutions
  - Social interest in general morals
  - Social interest in conservation of social resources
  - Social interest in general progress
  - Social interest in individual life

Social interest

- Social interest in general security: general safety, general health, peace and order, security of acquisitions and security of transactions
- Social interest in security of social institutions: domestic institutions, religious institutions, political institutions and economic institutions
- Social interest in general morals: laws dealing with prostitution, drunkenness and gambling.
- Social interest in conservation of social resources: conservation of human resources, natural resources, etc.
- Social interest in general progress: economic progress which includes freedom of use, sale of property, free trade, free industry and encouragement of inventions by grant of patents; & cultural progress which includes free science, free arts, free letters, promotion of education and learning and aesthetics
- Social interest in individual life: self assertion, opportunity and conditions of life

Jural postulates

Jural postulates of civilized society must be able to take it for granted that:

- He can appropriate for his own use what has created by his own labour and what he has acquired under the existing economic order
- That others will not commit an intentional aggression upon him
- That others will act with due care and will not cast upon him an unreasonable risk ot injury
- That the people with whom he deals will carry out their undertakings and act in good faith
- That he will bear the burden of supporting him when he becomes aged
- That the society as a whole will bear the risk of unforeseen misfortunes auch as disablement

Jural Postulates

- The jural postulates are to be applied both by the legislators and the judges for evaluating and balancing the various interests and harmonizing them
- Justice Cardozo: "if you ask how he is to know when one interest outweighs another, I can only answer that he must get his knowledge from experience and study and reflection; in brief from life itself."

Criticism

- Classification of interest is in the nature of a catalogue to which additions and changes needs to be made from time to time
- What us individual interest and what is social interest is a matter of changing political conceptions. Many interests come under different categories
- His metaphor "engineering" has been criticized on the ground that is suggests mechanical expedients, mechanically administered to social exigencies
- Law in the modern state is very dynamic which needs to cater to the society, so there will be a constant process of engineering going on…
- "wants and desires" are very wide, so wide that it becomes difficult to draw a line of demarcation between the scope of sociological jurisprudence and any other kind of jurisprudence

Criticism

- The theory is no better if wants are interpreted to include potential or possible wants
- A judge is not compromising interests are trying to conserve as many wants as possible – he is judging the right
- Pound's theory shifts the centre of gravity in the legal order from legislation to court judgements, but judiciary has its own limitations
- The concept of harmonizing conflicting interests raises several problems
- Justice without law can result in total lawlessness and arbitrariness. The rule of law was the greatest attainment of the positivists, to abandon it would be a retrograde step.

Criticism

Dias: Pound assumed that de-facto claims pre-exist laws which are required to "do something" about them. However, it can be contended that claims are consequent to law. "Recognition" of a claim has many gradations which makes it necessary to specify in what sense the interest is recognized.

It two interests are to be balanced then there is a requirement of some scale/ yardstick. Also, they cannot be brought "on the same plane" in true sense.

It is difficult to see how balancing of interests will produce a cohesive society where there are minorities whose interests are irreconcilable with those of the majority.

Pound on Social Justice

"in general, sociological jurists stand for what has been called as equitable application of law, i.e., they conceive of the legal rule as a general guide to the judge, leading him towards just results but insist that within wide limits he should be free to deal with the individual case so as to meet the demands of justice between the parties and accord with the general reason of ordinary men."

We come to an idea of a maximum satisfaction of human wants or expectations. What we have to do in social control and so in law is to reconcile and adjust these desires/wants or expressions, so far as we can, so as to secure as much of the totality of them as we can."

Pound's Contribution

- He helped in bringing home the vital connection between laws, their administration and the life of society.
- His work set the seal on prior demonstrations of the responsible and creative task of lawyers, especially the judges.
- His philosophy was free from all dogmas. He took a middle-way avoiding all exaggeration.
- He put emphasis on "engineering" but did not forget the task of maintaining a balance.
- He stressed the importance of social research for good law-making.

Contribution of Sociological School

- Greatest practical contribution has been fieldwork in examining the interaction between law and social milieu (setting).
- Evolution of ideals on an empirical basis.
- The study of law from sociological point of view has made a synthesis between the two by restoring ideals in a way that could satisfy and give life to positivist discipline.

AMERICAN LEGAL REALISM

INTRODUCTION

Realist movement is a part of the sociological approach, and it is sometimes called as “Left Wing Functional School”.

Called as “realist” as it studies Law in its actual working and rejects the traditional definition of law that is a body of rules and principles which are enforced by courts.

It concentrates on decisions given by the courts. Not only judgements but also judges and lawyers i.e., the human factors.

It is a combination of analytical and positivist school and sociological approaches.

INTRODUCTION

Lord Lloyd: American Realism is a revolt against formalism

Dr. Friedmann: no country would offer a richer material for study of law as it worked in fact than the Uniter States, with Federal and forty-eight State Jurisdictions producing innumerable precedents with the function which the Supreme Court exercised in the political and Social life of the country. Various factors contributed to develop a skepticism symptomatic of the crisis which affected the nineteenth century's outlook on life in the law no less than in other fields.

INTRODUCTION

They put too much emphasis on judges.

Approach of realists is essentially empirical

The Supreme Court in the United States is the final authority not only to interpret the law but also decide its validity.

The judges in the United States at the lower courts are elected and they are influenced by extraneous considerations while deciding the cases.

JOHN CHIPMAN GRAY (1839 – 1915)

Although distinguished exponent of analytical tendency in jurisprudence, he relegated statutory legislation from the centre of the law to one of several sources and placed the judge in the centre instead.

He emphasized the great influence of personality, prejudice and other non-logical factors upon making of law.

Illustrations given by him show how political sympathy, economic theory and other personal qualities of particular judges have settled matters of the gravest importance for millions of people and hundreds of years.

He prepared the ground for a more skeptical approach.

JUSTICE OLIVER WENDELL HOLMES (1841 – 1935)

"The prophesies of what the courts will do in fact and nothing more pretentious are what I mean by the Law"

Both in his writing and in his long tenure as a judge of the Supreme Court of America, Holmes played a fundamental part in bringing about a changed attitude to law

He stressed on the empirical and pragmatic aspect of law

Legal History should be studied primarily as the first step towards a deliberate reconsideration of the worth of rules developed historically.

JUSTICE OLIVER WENDELL HOLMES (1841 – 1935)

- Law must be distinguished from morals
- He relied more on practical than on pure science
- He accepted the possibility of scientific valuation of law, but he did not go far in the view that the choice between different values can also be verified scientifically.
- His emphasis on what courts may do, rather than on abstract logical deduction from general rules, focused attention of the empirical factors which constitute a legal system.

JEROME FRANK (1889 – 1957)

- He called himself a “constructive legal skeptic” rather than a realist
- There are two groups of realists
  - Rule skeptics : these rejected legal rules as providing uniformity in the law and tried instead to find uniformity in rules evolved out of psychology, anthropology, sociology, economics, politics, etc.
  - Fact Skeptics: these depart not only from the idea of rule certainty but also point out that the uncertainty of establishing facts in the trial courts.

JEROME FRANK (1889 – 1957)

- Legal decision is the result of the application of the rule of law to the facts as found by the judge.
- If the facts are wrongly found, the decision must be erroneous and an appellate court on which jurisprudence was tended to concentrate, not having seen the witness, is unwilling to interfere with the findings of fact.
- Thus, the facts of the case cannot be ignored as they alone could cause uncertainty in decisions.
- In actual practice, all legal arguments have litigious setting. There is always the opponent prepared to come forward with an argument founded upon divergent authorities.

JEROME FRANK (1889 – 1957)

- “Certainty of law is a myth”. It is a “father complex” which makes man think in terms of certainty of law.
- It is not proper for judges and lawyers to stick to the myth of certainty in the name of precedents and codification
- The quest for certainty of law is in fact a search of a “father symbol” to provide an aura of security
- Rules are merely word formulae. If they are to have any meaning at all, that meaning has to be sought in the facts of real life to which they correspond.

CRITICISM TO JEROME FRANK'S THEORY

- He shows no acquaintance as all with formal logic.
- The logic of probability which Frank mentions very often as antithetical to logic of certainty is only a special branch of formal deductive logic.
- The logic of probability is the formal analysis of the deduction of opposing predictions from opposing hypotheses in terms of available knowledge.
- He failed to distinguish law in action and discourse and to appreciate the logical pluralism which is at the same time a source of both certainty and fertility.

CARL LEWELLYN (1893 – 1962)

- Realism distrusts traditional legal rules and concepts.
- It concentrates more on what courts and people are actually doing.
- It does not accept theory that the legal rules are the only operative influence in te decision of a case
- Law is a means to achieve social ends.
- Realism involves the acceptance of law in flux (charge) and a society which changes faster than the law..

CARL LEWELLYN (1893 – 1962)

- When the judges make a decision, they are guided by a “situation sense” and the following factors:
  - Responsibility of justice: justice no only done but seen to be done.
  - Judicial security and honesty
  - Issues limited in advance
  - Adversary arguments of counsel
  - Legal doctrines and concepts

JUSTICE BENJAMIN CARDOZO (1870 – 1938)

- “Law never is, but is about to be”
- “One principle or even a precedent ushed to the limit of its logic, may point to one conclusion, another principle or precedent followed with like logic, may point with equal certainty to another. In this conflict we must choose between the two paths selecting one or the other, or perhaps striking on a third…”
- Even when the facts of a case are similar, the outcome may be different due to the personality and individuality of the judge or some compelling sentiment of justice or social utility
- It is the judge and his personality coupled with his life experiences and thinking that shapes the written law.
- Since each judge thinks differently, there is always a chance that the same facts may lead to a different decision. It is this that brings in unpredictability in law and a lot of colour to it.

CRITICISM TO AMERICAN LEGAL REALISM

It causes confusion in the public mind as to what the law really is.

If law is what the court decides, then statutes are not law and also judge made law / precedent is also not law because they can be overrules

Prof. Allen accepts the prejudices, bias, emotions, hunches, temperament, up-bringing, etc. as factors having impact on the decision making of the judge, but only personal vagaries and idiosyncrasies of the judge. These may be exceptions, but not rules

In modern days, national as well as international law has been so well developed in the form of statutes as well as precedents hat judges hardly have any place left to maneavour.

CRITICISM TO AMERICAN LEGAL REALISM

Hart: The fact that the judge has the last word does not mean there is no rule.

Uncertainty of language and consequent interpretations is valid only on borderline and rare cases.

Modified form of Austin's theory, wherein law is a command of sovereign but here the sovereign is judge and not the parliament.

Realists have neglected the part of law which never comes before the court.

CONTRIBUTION OF AMERICAN LEGAL REALISM

The main contribution lies in the fact that they have approached law in a positive spirit and demonstrated the futility of the theoretical concept of justice and natural law.

the realist introduces studies of case law from a point of view which distinguished between rationalization

They rightly point out that certainty of law is a myth

Recent trends among realists' writings is to recognize the importance of principles and rules.

The point out that society is changing and therefore the law must change with it. Law is like a living organism

SCANDINAVIAN REALISM

INTRODUCTION

- Scandinavian Realism is essentially a critique of the metaphysical foundations of law
- The Scandinavians, like American Realists both rejected metaphysical thinking or any kind of natural law thinking.
- But Scandinavians were interested in the development of a formal philosophy of law, seen as a body of rules which will explain law logically and scientifically as a necessary part of the organization of society as a whole.
- Like American Realists, Scandinavian Realists adopt an empiricist attitude towards law and life and give more weight to the social effects of law with emphasis on judicial decisions.
- They are more speculative in their approach to legal problems. And do not attach as much attention to the psychological behaviour of the judges.

BASIC PRINCIPLES OF SCANDINAVIAN REALISM

- In law there is no place for 'a priori' pre-conceptions:
  - Alf Ross: the legal notions must be interpreted as conceptions of social reality that is behaviour of men in the society and nothing else. There is no place for 'a-priori' pre-conceptions for which there is no scientific basis. Prof. Olivercrona considered law as a "set of facts".
- They are against metaphysics and confirmed the verifiability principle:
  - Realists subscribed to the verifiability principle of the logical positivists, whereby if a statement cannot be proved by empirical evidence, it is meaningless.

BASIC PRINCIPLES OF SCANDINAVIAN REALISM

- Normative statements are of Psychological Occurrences:
  - The meaning of normative statement is psychological and ought to do something because he feels bound to, or he has a right because he has a feeling of power, so on… The concepts of normativity as a binding quality of law can be explained with reference to psychological occurrences. The argument from a realist is that such legal thought found in the mind of the individual in psychology. There is no objective criterion of good or bad or just, only different subjective views.
  - According to them right is a sensation of power and duty is a sensation of constraint and compulsion.
- Empirical Realism: Law is an observable fact:
  - There is a cause – effect relationship; therefore, legal science is a science of causality.
  - The method of enlargement of knowledge was through empirical observation.

BASIC PRINCIPLES OF SCANDINAVIAN REALISM

- Rule of law is viewed as telling a Judge how to decide a case, not as telling a subject how to conduct himself.
- Law creates its own morality and NOT vice-versa.
  - Promulgation of legal rules and the threat of sanctions are 'internalized' and when prohibited activities spring to our mind, they are imprinted with the symbols of communal disapproval and punishment. We are 'good' because of the law.
- Law is obeyed because of our psychological conditioning, not because of any 'inherent quality of the law'.
- Law is not for protection of rights and duties, but it is indispensable for the maintenance of human society
  - The content of law must be determined by the requirements of 'social welfare'. Rights and duties are by-poducts of the maintenance of law and not things protected by law nor can they justify law itself.
  - Judges should think in terms of social aims, not rights

BASIC PRINCIPLES OF SCANDINAVIAN REALISM

- Law as rules about force:
  - Legal system has a monopoly of force and that all laws are ultimately backed by the threat of force.
- Legal rules as predictions of official's behaviour
  - Rule will not be valid unless they are effective predictions of how officials will behave, unless they are followed in practice. Also, to be valid, a rule must also be felt to be binding and therefore be the motivation for obedience.
- 'Magic Words': Legal Ritual
  - Hagerstorm and Olivercrona both are concerned with the effect of legal formulae in changing the legal position, for e.g., in marriage ceremony the words uttered are "I do" which has the effect in the real world by changing our legal status.
  - The change is not rel but it is a change in the attitudes
  - Realists explain this fact as that there is a body of rules which establishes standards.

HAGERSTORM (1868 – 1939)

- Founder of Scandinavian Realism movement in Sweden
- He rejected the idea of existence of objective values like "goodness" and "badness" in the world. They represent the emotional attitudes of approval and disapproval respectively towards certain facts and situations.
- He denied the possibility of any science of "ought"
- All questions of justice, aims and purposes of law are matters of personal evaluation and not susceptible to any scientific process and examination
- He ash extensively explained the legal use of magic words and its effect on the legal position

KARL OLIVERCRONA (1897 – 1939)

- He approached the question of validity of law from the angle of bindingness.
- He rejected metaphysical ideas surrounding the laws. He considered the factual circumstances of law
- A legal rule has two elements:
  - Ideatum: imagined pattern of conduct which the rule is meant to bring out
  - Imperatum: this is a form of expression of ideatum.
- He rejects the idea of the will of the State

KARL OLIVERCRONA (1897 – 1939)

- Legislation and judge made rules are effective because officials and individuals feel bound by them, although the effect of judge-made rules, because of its uncertainty inherent in them, is less formalized and certain.
- The law and the fear of the sovereign which is the force which ultimately enforces the law, are the main source of our moral standards.
- The performatives or power conferring rules seem to work in the same way as legislation.
- He spoke of internalization of norms which leads to the development of moral standards.

VILHELM LUNDSTEDT (1882 – 1955)

- Most extreme Scandinavian
- Law is simply the fact of social existence in organized groups and the conditions which make possible the existence of masses of people
- Law at any place, time and society is determined by 'social welfare' which is guiding motive for legal activities
- Judge should therefore think in terms of social welfare and not in terms of rights and duties.
- The sense of security is the main force behind social welfare and therefore he was inspired to extend the principle of strict liability in matters relating to disputes concerning torts, contract and criminal law with a view to preventing disruption of the Society.

ALF ROSS (1899 – 1979)

- He was a Danish philosopher who admitted the normative character of law
- Law are normative and statements about law in books are descriptive
- "A norm is a directive which stands in relation to correspondence of social facts.
- Norms of law may further be divided into 'norms of conduct' which deal with behaviour and 'norms of competence or procedure' which direct the norms brought into existence according to a declared mode of procedure.
- He defined valid law means the ideas which serve as a scheme of interpretation for the phenomenon of law in action
- He is criticized for ignoring the regulative function of norm by saying that they are only addressed to courts.

COMPARISON BETWEEN ALR AND SLR

According to Bodenheimer, two major aspects are different in both:

Scandnavian Realism is more speculative n its approach to legal problems;

Scandinavian Realism does not attach as much attention to the psychological behaviour of Judges as much as American Realists do.

However, both adopt an empiricist attitude towards law and life and give more weight to the social effects of law with the emphasis on judicial decisions.



HISTORICAL SCHOOL

INTRODUCTION

The branch of legal philosophy which is termed as historical jurisprudence is the general portion of legal history.

It bears the same relation to legal history at large as analytical jurisprudence bears to the systematic exposition of the legal system.

Salmond: It deals with:

- General principles governing the origin and development of law
- 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 – which are dealt with in notheer manner and from another point of view by analytical jurisprudence

INTRODUCTION

G.G. Lee:

- Historical Jurisprudence deals with Law as it appears in its various forms as its several stages of development. It holds and analyses the thread which connects the modern and primitive conception of law.
- It seeks to discover the first emergence of those legal conceptions which have become a part of the world's common store of law to them, to trace their spreading and development and to point out those conditions and influences which modified them in the varying course of their existence.
- Prof. Dias: Historical School arose contemporaneously to analytical school and also came as a reaction to Natural Law Theories.

VARIOUS THINKERS OF HISTORICAL SCHOOL

Montesquieu:

- He was the first Jurist who followed the historical method. He concluded that “laws are the creation of climate, local situations, accident or imposture”.
- He however did not go further to lay down a philosophy. But he suggested that law should answer the needs of time and place.

Hugo:

- “Law, like language and manners of people, forms itself and developd as suited to the circumstances”.
- The essence of Law is its acceptance, regulation and observance by the people.

Burke:

- He believed that it is futile attempt to deduce a Constitution from abstract principles.
- It could only be possible as a result of gradual and organic growth.

VARIOUS THINKERS OF HISTORICAL SCHOOL

Herder:

- Universalizing tendencies of French philosophers was rejected by him. He stressed upon the unique character of every historical period, civilization and nation.
- Every nation possesses a unique character and qualities and none is intrinsically superior to others.
- Any attempt to bridge these innumerable manifestations under one general command of universal natural law based on reason was inimical to the free development of each national spirit (*Volkgeist)* and could result in imposing a crippling uniformity.

F.K. VON SAVIGNY (1779 – 1861)

He is the Founder of Historical School

According to him, law is a product of times the germ of which like the germ of State, exists in the nature of men as being made for society and which develops from this germ various forms according to the environing influences, which paly upon it.

Law grows with the growth of the people and strengthens with the strength of the people and finally dies as the nation loses its nationality.

The sum of his theory is that all law is originally formed in the manner in which, in ordinary but not quite correct language, customary law is said to have been formed, i.e., that it is first developed by custom and popular faith developed by custom and popular faith, next by jurisprudence – everywhere, therefore, by internal silently operating powers, not by the arbitrary will of the law giver.

F.K. VON SAVIGNY (1779 – 1861)

The nature of any particular system of law was a reflection of the spirit of the people who evolved it. This was later characterized as “Volkgeist” by Puchta, a disciple of Savigny.

Law is a matter of unconscious growth.

The broad principles of the system re to be found in the spirit of the people and they manifest themselves in customary rules

Custom not only precedes legislation but is superior to it.

F.K. VON SAVIGNY (1779 – 1861)

Law is not of universal application, It varies with peoples and ages.

Volkgeist is a unique, ultimate and often mystical reality, which is linked to the biological heritage of a people/

Law is the product of the Volkgeist.

Savigny sees a nation and its states as an organism which is born, matures, declines and dies.

Law is a vital part of that organism,

CRITICISM OF SAVIGNY'S THEORY

He gave too much emphasis on the stream of continuity and tradision

Transplanting Roman Law in the alien climate of Europe nearly a thousand years later is inconsistent with Savigny's idea of Volkgeist.

Volkgeist theory minimizes the influence which individuals, sometimes of alien race have exercised upon legal development

The national character of law manifests itself more strongly in some branches than in others

Sometimes law is deliberately used to change the existing ideas, volkgeinst does not explain this

CRITICISM OF SAVIGNY'S THEORY

Savigny underrated the significance of legislation for modern society

Some customs are not based on an instinctive sense or right in the community as a whole but on the interests of a strong minority

Certain invariable traits like the mode of evaluation and development noticeable in all the systems of the world, are left unexplained in his theory - juristic pescimism

SAVIGNY' CONTRIBUTION

Greatest jurist of 19th century

Probably the originator of Modern jurisprudence

He made the juristic world perpetually conscious of the iceberg quality of law with its present pinnacle concealing and denying the hidden nine-tenths of its past. The only defect is that he exaggerated that aspect.

Savigny's Definition of Law:

Law is a rule whereby the invisible borderline is fixed within the being and activity of each individual obtains secure and free space.

VARIOUS THINKERS OF HISTORICAL SCHOOL

Puchta:

- He made improvements upon the theory of Savigny by making it more logical
- The idea of law came due to the conflict of interests between individual will and general will.
- That automatically forms the state which delimits the sphere of the individual and develops into tangible and workable system

Gierke:

- He was interested in 'association'
- He denied that the recognition of an association depends upon the State
- The reality of social control lies in the way in which autonomous groups within society organize themselves
- He classified associations
- Legal and Social History is more accurately portrayed as a perpetual struggle
- He represented collectivist rather than individualist approach.

SIR HENRY MAINE (1822-1888)

He inaugurated the comparative approach to the study of law and of history in particular

He made a comparative study of the various legal systems and traced the course of their evolution

“Law develops through four stages:

- In the beginning, law was made by the commands of the ruler believed to be acting under divine inspiration
- In the second stage, commands crystallize into customary law
- In the third stage, the knowledge and administration of customs goes into the hands of a minority, usually religious in nature due to the weakening of power of original law makers.
- the fourth stage was the time of codes. Law is promulgated in the form of a code.

SIR HENRY MAINE (1822-1888)

Societies which do not progress beyond the fourth stage which closes the era of spontaneous legal development are called static societies and their legal condition is called as “status”.

Few progressive societies progress beyond the phase of codes are in historical sequence legal-fiction, equity and legislation.

- By use of legal fiction, law is altered in accordance with the changing needs while it is pretended that it remains what it was
- Equity is then used to modify the law as a set of principles invested with higher sacredness than those of original law
- Final stage is that of legislation

Progressive societies are characterized by increasing legal freedom of movement of individual.

SIR HENRY MAINE (1822-1888)

The development is summed up by Maine in the following celebrated phrase:

“if then we employ status to signify the personal conditions as the immediate or remote result of agreement, we may say that the movement of the progressive societies has hitherto been a movement from statue to contract.” in other words, the movement is from personal conditions to Agreement.

He did not reject the rationalizing development for the small number of progressive societies

His theory of the development of personal legal conditions from status to contract was a theoretical corollary to the freedom of labour and contract demanded by an expanding industrial and capitalist society.

SIR HENRY MAINE (1822-1888)

According to Maine, status is a fixed condition in which an individual finds himself without reference to his will and of which he cannot divest himself by his own efforts. It is indicative of a social order in which the group, not the individual, is the primary unit o social life; every individual is enmeshed in a network of family and group ties.

With a progress of civilization, this condition gradually gives way to a social system based on Contract.

This system is characterized by individual freedom, in that, 'the rights, duties and liabilities flow from voluntary action and are consequences of exertion of the human will.

The last stage of development of law in progressive societies is legislation – the stage which prevails in almost all modern societies.

SIR HENRY MAINE (1822-1888)

Dr. Friedmann refers to the dialectic development by which the very removal of fetters imposed by the status conditions of freedom of contract created the conditions for a new status.

Another factor which has greatly modified the freedom of contract is the standardization of contract terms which substitute for freedom of bargaining, status-like conditions in the great majority of modern transport, insurance, mortgage or landlord and tenant contracts. The terms are largely fixed, and the parties face each other as members of social classes and not as individuals

Another type of contract which is standard contract between government departments and private firms.

CRITICISM TO HENRY MAINE' THEORY

Dr Friedmann: He points out that the trends in the world are not uniform. It is an oversimplification to assert that a 'progressive civilization' is marked by movement from subjection to freedom from status to contract and from power to law and a 'retrogressive civilization' is characterized by a reverse process.

Many jurists criticized Maine on various aspects of his theory which though careful in its generalizations reflects the belief in progress through the emancipation of the individual which reached its climax in the first half of the 19th Century.

However, in one sense Maine's theory still holds good. The trend of legislation in countries which are underdeveloped is still to remove personal disabilities which arise due to the membership of a class (status)

CONTRIBUTION OF MAINE

The work of Maine stands out as the important and fruitful application of comparative legal research to a legal theory inspired by the principles of historical evolution.

His great contribution to legal theory lies in the combination of what is best in the theories of both Montesquieu and Savigny.

His theory avoids the danger of an excessive disintegration of theoretical laws of evolution inherent in Montesquieu's comparative and factual approach to the development of legal institutions.

His theory is also free from abstract and unreal romanticism which vitiates much of Savigny's theory about evolution of law.

CONTRIBUTION OF MAINE

He blazed a scientific trail into the field of Law, a field hitherto dominated by philosophizing the speculative thought

He did not say about what the law is, but he taught us many things of immense value about the way law grows up.

He provided a balanced view of the history of law

He used his knowledge of the history of law to understand what had been in the past and not to determine its future course.

CONTRIBUTION OF THE HISTORICAL SCHOOL

Emphasized on the social milieu to understand the boundaries of law

A movement for fact against fancy, a call for a return from myth and reality

If law evolves, the historical school tells us how it evolves.

HISTORICAL SCHOOL AND ANALYTICAL SCHOOL

Historical School

It concentrates its attention on the primitive legal institutions of the society

Law is found and not made. Law is self existent.

Law is an antecedent to the state and exists before the State comes into existence.

Analytical School

It confines itself to mature legal system

Law is an arbitrary command of sovereign. It is the deliberate product of legislation.

If there is no State, there can be no law.

HISTORICAL SCHOOL AND ANALYTICAL SCHOOL

Historical School

Law is independent of political authority and its enforcement. Law does not become law merely because of its enforcement by the sovereign.

Law rests on the social pressure behind the rules of conduct which it enjoins.

Law is a rule by which the invisible borderline is fixed within which each individual obtains secure and full space.

Analytical School

The hallmark of Law is its enforcement by the sovereign.

Law rests upon the force of politically organized society.

Law is the command of the sovereign.

HISTORICAL SCHOOL AND ANALYTICAL SCHOOL

Historical School

Typical law is a custom. “Human nature is not likely to undergo a radical change and therefore that to which we give the name of law always has been, still is, and will forever continue to be custom.” – Carter.

While interpreting a statute, judges should also take into consideration its history.

Analytical School

Typical law is a statute.

While interpreting a statute, judges should confine themselves to a purely syllogistic method.

HISTORICAL SCHOOL AND ANALYTICAL SCHOOL

Historical School

Custom is the formal source of law. It is transcendental law and other methods of legal evolution, i.e., precedent and legislations derive their authority from custom. At any rate, custom derives its binding force from its own intrinsic validity and not from judicial precedent or legislation purporting to follow or legalize it.

Analytical School

Custom is not law until its validity is established by a judicial decision or an Act of Legislature. It is only a source of law.

Feminist Jurisprudence

Introduction

- Feminist jurisprudence is a philosophy of law based on the political, economic, and social equality of sexes.
- As a field of legal scholarship, feminist jurisprudence began in 1960s.
- Feminist jurisprudence is the feminist perspective on the methodology of law.
- Feminists believe that law is not neutral or impartial.
- It systematically maintains and legitimates "patriarchy"
- Phenomenon of power being male hands.
- Mainstream is "malestream".
- Male-written history has created a bias in the concepts of human nature, gender potential, and social arrangements.

Influences on feminist jurisprudence

- Feminist jurisprudence has been inspired by
  - Realists
  - Marxist Theories
  - Critical Legal Studies
  - Post Modernist Legal Studies

Feminism and Critical Legal Studies

- Common Approaches of both the theories include:
  - Condemnation of injustice
  - Skepticism as to the alleged neutrality of law
  - The purported separation of law from politics
  - The role that law had played in conferring legitimacy on a society's existing institutions and social ordering.

Feminism and Critical Legal Studies

- Common intention to challenge existing distribution of power, but feminist jurisprudence does not travel the whole way along with CLS,
- because feminists allege that CLS presents oppression and discrimination in the abstract mostly from a male perspective and it looks down upon those problems from an academic point of view these problems from an academic point of view.
- Feminism, on the other hand, looks upwards from the position of the oppressed women, and is more concrete and specific in its approach

Schools of feminist jurisprudence

- Liberal feminism,
- Difference or Cultural feminism,
- Radical feminism,
- Postmodern feminism,
- Black feminism,
- Lesbian feminism,
- Marxist feminism.

Liberal Feminism

- Challenge the assumption of male authority and superiority and seek to erase gender-based distinctions recognized by law.
- Asserts that women are similar to men in their ability to operate in public world.
- Focuses on equal opportunity to make their own choices.

Criticism of Liberal Feminism

- Liberal feminism as a study allows too much of its forces to fall on a metamorphosis of women into men hence disregard the traditional role of women.
- By focusing on the individual, it puts over emphasis on the rational instead of the emotional state whereas a human is intrinsically both, and in doing so discredits the importance of a community.

Difference or Cultural feminism

- Focuses on women's differences from men.
- Differences on physical and physiological aspect. – Women are part of men and men are separate from women.
- Challenges the idea of patriarchal male domination.
- Claims that law reflects male values and needs to incorporate ignored women's values.
- Some argues there should be separate law for men and women.
- If the law recognizes special rights for women, women can enter the public world on equal terms. Among the sexed rights: – Right to dignity. – Right to virginity – Right to motherhood

Criticism on difference or Cultural feminism

- The picture of women's separate identity supports the stereotyped view about women.
- It relies on women's differences from men as the basis for treating them more favorably than men. Because genuine sexual equality will not be until women's social and economic status is on par with men's.
- Argues special treatment as means to compensate the disadvantages that women suffer.

Radical feminism

- Power and sexuality are the central focus on radical feminism.
- Believes that women is a class dominated by men as another class.
- Emphasizes the patriarchal roots of inequality between men and women.
- Radical feminism views patriarchy as dividing rights, privileges and power primarily by gender, and as a result oppressing women and privileging men.
- Radical feminists tend to be more militant in their approach (radical as "getting to the root") than other feminists are.
- Radical feminism opposes existing political and social organization in general because it is inherently tied to patriarchy.

Postmodern feminism

- Postmodern feminism is an approach to feminist theory that incorporates postmodern and post-structuralist theory
- It sees itself as moving beyond the modernist polarities of liberal feminism and radical feminism.
- Believes that there is no universal standards of truth and justice discovered by human reason.
- There are only different, socially conditioned and subjective interpretations.
- They wish to make feminist jurisprudence more inclusive and pluralistic.

Common Characteristics of Different Schools

- All share one common aim – the betterment of women
- Katherine Bartlect: three basic elements which characterize Feminist Legal Theory
  - The extent of the presence and recognition of women's experience in law ('women question')
  - A reasoning which proceeds from context and value difference and the experience of the un-empowered ('feminist practical reasoning')
  - An exploration of the collective experience of women through a sharing of individual experiences (consciousness raising)
- Upon these basic elements, feminist theory seeks to articulate women's perspective, and thereby empower women in the future development of law.

Critical Race Theory

Central Tenets of Critical Race Theory

- The Centrality of Race and Racism in Society
- CRT asserts that Racism is a permanent component of American life
- The Challenge to Dominant Ideology
- CRT challenges the claims of neutrality, objectivity, colorblindness, and meritocracy in society
- The Centrality of Experiential Knowledge
- Critical Race Theory asserts that the experiential knowledge of people of color is appropriate, legitimate, and an integral part to analyzing and understanding racial inequality

Central Tenets of Critical Race Theory

- The Interdisciplinary Perspective
- CRT challenges ahistoricism and the unidisciplinary focuses of most analyses and insists that race and racism be placed in both a contemporary and historical context using interdisciplinary methods
- The Commitment to Social Justice
- CRT is a framework that is committed to a social justice agenda to eliminate all forms of subordination of people

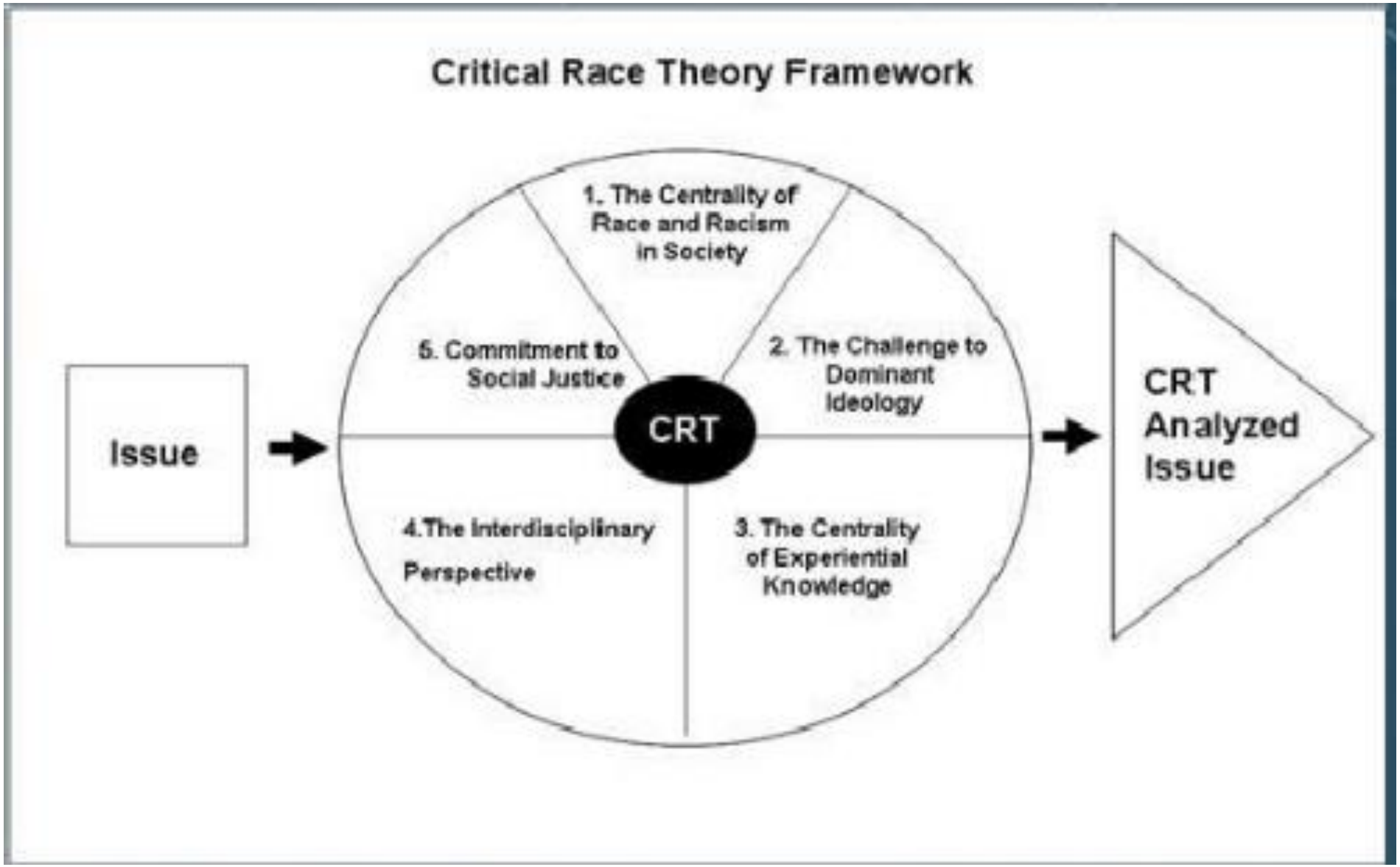

Critical Race Theory Framework
Issue
1. The Centrality of Race and Racism in Society
2. The Challenge to Dominant Ideology
3. The Centrality of Experiential Knowledge
4.The Interdisciplinary Perspective
5. Commitment to Social Justice
CRT
CRT Analyzed Issue

TABLE 1: CRITICAL RACE THEORY CORE PRINCIPLES AND COMPONENTS		
CRT Core Principles	**Components of CRT**	**What To Look For**
1. The Centrality of Race and Racism in Society	• Race and racism are a defining characteristic of American Society	• Race and Racism i. Macro and Micro Components. ii. Takes on Institutional and individual forms. iii. Has conscious and unconscious elements iv. Has a cumulative impact on both the individual and group • Disparate Impact • Microaggressions

Rights

Concept

Introduction

- Most important idea in legal concepts
- People recognize the need for law primarily as a means to protect their rights.
- Rights imply corresponding duties
- Rights can be discussed in variety of contexts
- Rights can be claims

Introduction

- The idea of rights enable us to understand our enforceable claim distinguished from moral claims.
- It is an indispensable element of any acceptable social order
- Concept of right can be interpreted by two views:
  - That rights have a metaphysical and moral status. This is a classical view expressed in the doctrines of Natural Law and Natural Rights
  - That rights are strictly legal entities or notions. They owe their basis and their nature exclusively to law

Historical Background

- Ancient Greek Philosophers did not recognize the concept of rights but recognized the idea of duty.
- Ancient Hindu philosophers also talked about duty. According to them the observance of duty id essential for one's own development.
- Under Mohammedan Jurisprudence, rights (*haq)* and obligations *(wujub)* are the media through which the law functions.
- Roman Law made distinction between actions in *rem* and *personam* where the action in rem was an action for a physical thing and action in personam was an action against one who is judicially or formally condemned to a payment so that there was a claim to this person.

Historical Background

- Natural Law philosophy which was responsible for articulation of natural right, postulated its precepts as of universal validity, speak of moral qualities of man by virtue of certain ideals to be achieved in individual's life.
- The doctrine of natural rights was developed in 17th century in England formulated philosophically by Locke
- Enumerated in the American Declaration of Rights of Man (1791)
- Under natural law these claims, and interests were treated as binding beyond the reach of any law-making body.

Definition of Legal Rights

- Hugo Grotius: Right is a moral quality by which a person is competent to do or have a thing justly.
- Austin and Gray: Right is a faculty or power residing in determinate party or parties. This faculty or power enables the person to contract the action of such other person or persons.
- Salmond: legal right is an interest recognized and protected by a rule of justice. Interest here implies any interest, respect for which is a duty and disregard for which is a wrong.
  - This definition contains two essential elements: Legal recognition and legal protection

Definition of Legal Rights

- Holland: A capacity residing in one man of controlling, with the assent and the assistance of the State, the actions of others. That which gives validity to a legal right is, in every case, the force which is lent to it by the State.
- Ihering: right is a legally protected interest.
- Allen: Right is neither a legally protected interest alone nor a legally guaranteed power alone. A correct definition of right must therefore, incorporate both the elements of power and interest.
- 'Right is a legally guaranteed power to realize an interest'

Definition of Right

- Roscoe Pound: Right is a noun which is used in the following senses:
  - An interest which holds out to be recognized and secured
  - It may mean the interest recognized and delimited with respect to other recognized interests and secured
  - It is to designate a capacity of creating, diverting or altering duties; in this sense it becomes a power
  - It is to designate certain conditions of general or special non-interference with natural faculties of action. These are better called as liberties and privileges.
  - It is used as an adjective to mean that which accords with injustice or that which recognizes and gives effect to moral rights.

Essential elements and characteristics of a Legal Right

- The owner of right: There has to be an owner of right
- The person of incidence: the legal right always operates against some person who is under the duty to obey or respect that right.
- Matter of Content: content of a legal right may be an obligation to do or not do something
- Object: the right (act or omission) must relate to some 'thing'. It can be both tangible or intangible
- Title: every legal right has a title, i.e., certain facts or events due to which the right has become vested in its owner

Theories of Legal Rights

- Will theory
- Interest Theory
- Synthetic Theory by Prof. C.K.Allen
- Dworkin's Theory of Rights as Trumps

Will or Choice Theory of Rights

- Right is an inherent attribute of human will
- Purpose of law is to grant individual the means of self expression
- Legal right is a permission to exercise certain natural powers to obtain protection under certain conditions.
- Hart: Rights are legally protected choices
- Holder has a choice whether to waive the duty owed to him

Interest Theory

- The purpose of law is to protect the interests and not the will of the person.
- Salmond: Right is an interest recognized and protected by a rule of law.
- Right is an interest, the respect of which is a duty and the disregard of which is a wrong.
- Right need not be enforceable, it being recognized and protected is sufficient.

Synthetic Theory of Prof. C.K. Allen

- Synthesis of both Will Theory and Interest Theory
- Prof. Allen tried to combine both the extreme theories to obtain the best approach.
- Human will is always directed towards certain ends which are nothing but interests.
- Legal Right is the will power of man applied to a utility or interest recognized and protected by a legal system.

Dworkin's Theory of Rights as Trumps

- Individual, minority rights and rights which cannot be overridden by the legislature on policy grounds.
- Judicial process, and judges act as the protectors of individual rights against the state as well as between individuals.
- Special place to rights calling them 'trumps' over general utilitarian justifications.
- The more entrenched or institutionalized a right is in a legal system, the less the government is able to enact legislations, which undermine that right.

Kinds of Rights

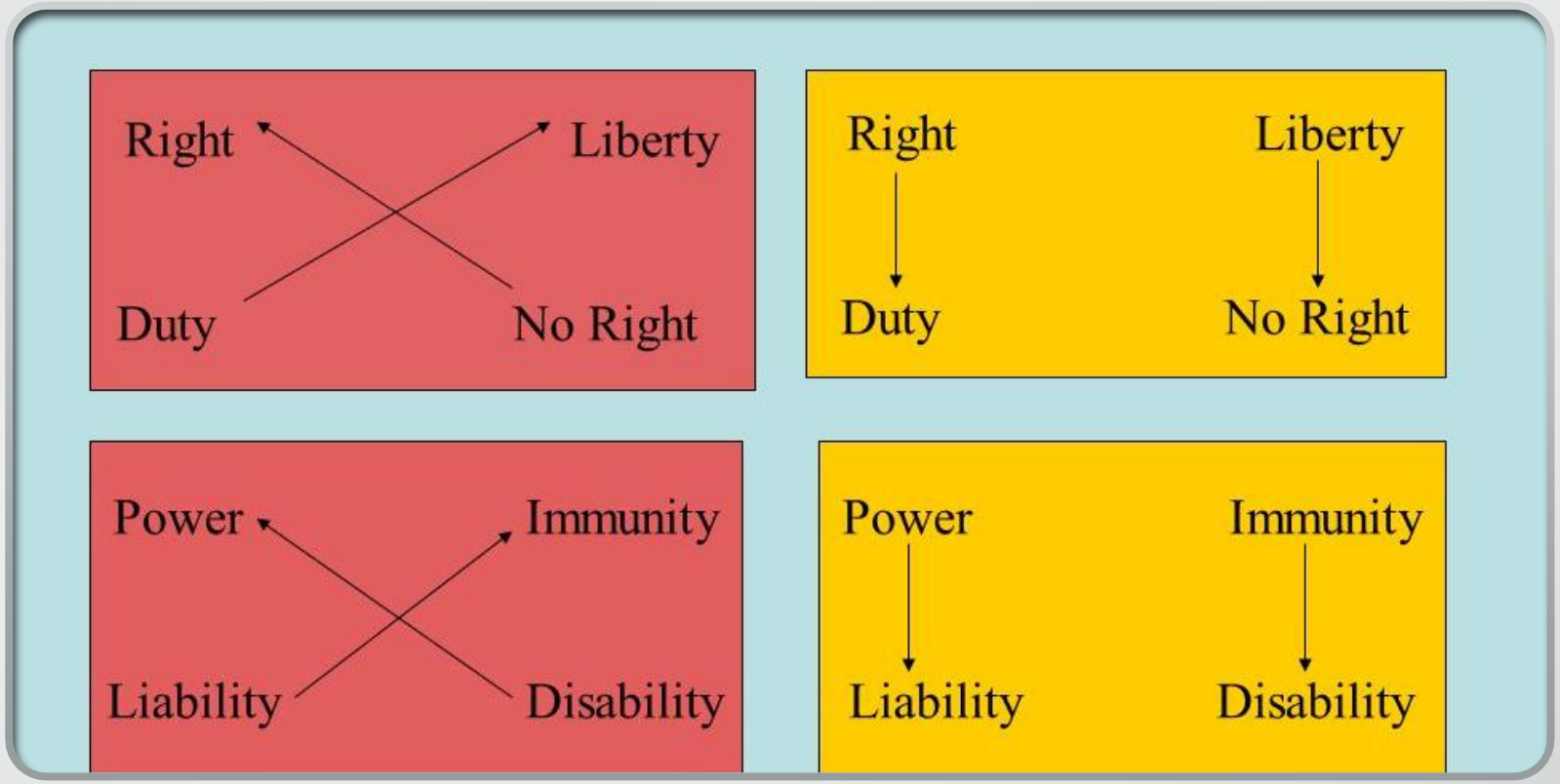
- Legal Rights and Fundamental Rights
- Moral Rights and Legal Rights
- Rights in *re propria* and rights in *re aliena*
- Perfect rights and imperfect rights
- Rights in rem and rights in personam
- Proprietary rights and Person Rights
- Inheritable Rights and Heritable





Kinds of Rights

- Primary and Sanctioning Rights
- Principal and Accessory Rights
- General Rights and Special Rights
- Legal and Equitable Rights
- Vested Rights and Contingent Rights
- Public and Private Rights
- Active and Passive Rights



Hohfeldian Analysis

Hohfeldian Analysis

Jural Correlation	Jural Opposites
If 'A' has a right, 'B' has a duty	The presence of right in 'A' implies the absence of no-right in 'B'
If 'A' has a liberty, 'B' has no right	The presence of liberty in 'A' implies the absence of duty in 'B'
If 'A' has a power, 'B' has a liability	The presence of power in 'A' implies the absence of disability in 'B'
If 'A' has immunity, 'B' has a disability	The presence of immunity in 'A' implies the absence of liability in 'B'

JURAL OPPOSITES

Right	Privilege	Power	Immunity
No-right	Duty	Disability	Liability

A privilege is the opposite of a duty; a no-right is the opposite of a right. A disability is the opposite of a power; an immunity is the opposite of a liability

JURAL CORRELATIVES

Right	Privilege	Power	Immunity
Duty	No-right	Liability	Disability

"Correlatives" signifies that these interests exist on opposing sides of a pair of persons involved in a legal relationship. If someone has a right, it exists with respect to someone else who has a duty. If someone has a privilege, it exists with respect to someone else who has no-right. If someone has a power, it exists with respect to someone else who has a liability. If someone has an immunity, it exists with respect to someone else who has a disability.

Property



Introduction

- The term property is derived from the Latin term *'propertietat'* and the French equivalent *'proprious'* which means a thing owned.
- The objects over which the right of ownership extends and over which the right of ownership extends, and over which one has exclusive right of control and disposal.
- Any object which is owned is property

Meaning of Property

- **The whole of substantive civil law is divided into three main parts:**
  - **The law of obligations**
  - **The law of Status**
  - **The Law of property**
- **The term property covers a wide range of rights. These rights are exercised by persons and enforced by State.**

Meaning of Property

- **The term Property is used in following senses:**
  - **Corporal Property: narrowest meaning; physical objects. Material object subject to immediate power of a person. E.g. house, car, etc.**
  - **Proprietary Rights: it includes a person's proprietary right as opposed to his personal right which constitutes his status or personal condition. E.g. land, furniture, shares house, debts due to him, etc.**
  - **Proprietary rights *in rem:* Narrower meaning, not all proprietary rights but only those enforceable against all. E.g. patent, copyright; as against proprietary rights *in personam,* like debt or a benefit of a contract.**

Meaning of Property

- All legal rights: Widest meaning. It means the sum total of a man's fortune including not only the objects of which he is owner but also the value of any claims which he may have against other persons.
- Locke says: "A man has a right to preserve his property, that is his life, his liberty and estate"

- Property is not a thing but a rights which extend over the thing.

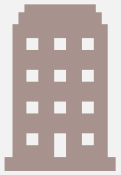
Concept of Property in Modern Times

- The meaning has been further expanded.
- There were many reasons for this:
  - The jurists who propounded the social contract theory of the origin of state, attempted to give wide meaning to the term property.
  - State and Law had come into existence only for the protection of property.
  - Due to the Constitutional protection given to property in many legal systems

Concept of Property in Modern Times

- The State restrained from arbitrary interference in the individual's enjoyment of his property or taking it without payment of reasonable compensation.
- The extension of the meaning has also been due to the growth of new forms of property in the modern times. It also includes intellectual property and intangible property.

Kinds of Property



Corporeal and incorporeal property



Movable and Immovable property



Real and Personal property

Corporeal and Incorporeal Property

Corporeal property means material things whereas incorporeal property is any other proprietary rights *in rem*.

Corporeal property can also be called as tangible property as it has tangible existence in the material world.

Examples: movables, land and all things permanently attached to it.

Corporeal and Incorporeal Property

Incorporeal property is divided into two classes

First includes those rights which are recognized by law in immaterial things.

It is also termed as intellectual property as it is the outcome of one's intellect.

Justification of accepting this types of property lies in the fact that what a man produces belongs to him, be it material things or immaterial product of a person's intellect.

Examples: patents, trademarks, copyrights, goodwill, etc.

Corporeal and Incorporeal Property

Second class of Incorporeal rights are rights *in re aliena*.

Examples:

- Lease
- Servitude
- Securities
- Trust

Lease

- It is that form of encumbrance which consists in the right to the possession and use of property owned by some other person.
- It is the outcome of separation of ownership and possession.
- ‘A lease of immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied in perpetuity, in consideration of a price paid or promised or of money, a share of crops, service or any other thing of value to be rendered, periodically or on specified occasions to the transferor by the transferee who accepts the transfer on such terms.’

Servitudes

- A servitude is that form of encumbrance which consists in a right to the limited use of a piece of land without the possession of it.
- Example: right of way on the land of the other.
- Servitudes are of two kinds:
  - Public: e.g.: right of public over a highway over the land in private ownership.
  - Private: e.g.: Easmentary right

Securities

- This form of encumbrance ensures or facilitates the fulfillment or enjoyment of some other right vested in the same person.
- Securities are of two kinds:
  - Mortgages: The transfer of interest in specific immovable property for the purpose of payment of money
  - Lien: It is a right which is in it own nature a security or a debt and nothing more. E.g. right to retain possession of the goods sold until payment of the price is made. Charge is a kind of Lien.

Trust

- It is an equitable obligation, binding a person (trustee) over which he has control (trust property), for the benefit of persons(beneficiaries), of whom he may himself be one, and anyone of whom may enforce the obligation.
- Section 3 of Indian Trust Act: Trust is an obligation annexed to the ownership of property arising out of a confidence reposed in and accepted by the owner or declared and accepted by him for the benefit of another, or of another and the owner.

Movable and Immovable Property

Material things are divisible into two kinds:

Movable: all property which is not attached to land or permanently fastened to land or building, and things severed from the land, for example, earth dug out of land and used for agricultural or building or other purposes.

Immovable Property means and includes land, buildings, things permanently fastened to the land and the things planted on land.

Real and Personal Property

This division is recognized in England only.

The real property includes all rights over land with such conditions and exceptions as the law has deemed fit to make.

The law of personal property includes all other proprietary rights whether they are *in rem* or *in personam*.

Modes of Acquiring Property

- Possession
- Prescription
- Agreement
- Inheritance

Modes of Acquiring Property

- Possession
  - Possession in certain circumstances may lead to title of ownership of the thing possessed. E.g. possession of *res nullis;* or by adverse possession.
  - Even wrongful possession is protected by law against everyone except the person who can show a better title than the possessor.
  - The possessor who is wrongly deprived of the property by a person other than the true owner, can recover it from him.

Modes of Acquiring Property

- Prescription
  - This is a mode of creating or destroying rights by the effect of lapse of time. It is of two types:
    - Positive or acquisitive Prescription: this results in creation of a right by lapse of time.
    - Negative or extinctive Prescription: it is the destruction of right by the lapse of time; for e.g. right to sue for non-payment of debt within a prescribed period is extinguished after the lapse of limitation period.
      - Perfect Negative Prescription: where the principal right itself gets extinguished.
      - Imperfect Negative Prescription: only the right of action is destroyed and not the principal right.

Modes of Acquiring Property

- Agreement
  - In agreement a title is acquired with the consent of the previous owner.
  - It is not only limited to contracts but to all kinds of bilateral acts which create an interest.
  - They are of two kinds:
    - Assignment
    - Grant

Modes of Acquiring Property

- Inheritance
- Cardinal Rule of Property Law is that at any given point of time there should be a living owner to any property.
- On death of the owner, the successor/ legal heir is the owner of the property.
- Inheritance is of two types:
  - Intestate Succession
  - Testamentary Succession

Natural Law Theory

Grotious, Blackstone, Pufendorf, Locke were the exponents of this theory.

According to this theory property originated by taking control of a *res nullis* i,.e., ownerless object.

He who first takes possession of such property has the best justifications for remaining in control.

Originally temporary control and in later times with the growth of civilization and enactment of law temporary acquisition became a complete and permanent control and thus gave rise to private property.

Theories of Property

Labour Theory

Karl Marx and Engel were the exponents of this theory.

Property is a result of individual labour. Any property that is created by the toil of labour belongs to him.

Incentive should be provided for the toil and labour so that the labourer should receive a just return.

In modern society, it is impossible to say in majority cases what is the result of the labour of one individual.

Theories of Property

Metaphysical Theory

This theory is supported by Kant and Hegel.

According to this theory, some control of property is necessary for the proper development of personality.

The community has been slowly evolving from status to contract and from group holding to individual property.

Property is an important constituent of liberty.

A person wholly dependent on property controlled by others in their own interest can hardly live for the life of a free man.

Theories of Property

State Theory

This theory is supported by Jenks and Rousseau

Private Property is a creation of State.

In pre-political society, it appears that property was regarded as belonging to the society rather than an individual.

Later on, it has been extended to the personality of the proprietor.

There are many elements in the modern concept of property other than simple fact of physical control long continued, e.g. fiscal policy, jurisdiction, protection of bodily security, desire to dissolve social groups

Theories of Property

Sociological Theory

Prof. Harold Laski is the supporter of this theory.

Modern tendency should be to build doctrines on an analysis of the functioning and social effects of the institution of property.

Any attempt to justify the institution of private property is today futile.

Also called as functional approach as it lays down that property is a result of effort or involves the giving of service is ethically justifiable but property which is an undeserved claim on the wealth produced by others is not.

If property is to be effective in encouraging production, then society should see that it is distributed in proper principles.

Theories of Property

POSSESSION AND OWNERSHIP



POSSESSION

Possession

It is the most basic relationship between man and things.

A society in which possession is not protected would be a very unsecured place to live in a and may lead to violence, chaos and disorder.

Possession is the prima facie evidence of ownership and anyone desiring to disturb a possessor must show their title or a better possessory right.

It creates ownership either by occupying a *res nullis* or by user and possession amounting to prescription.

Possession

Bentham: Actual Possession of the property which precedes all others and may hold a place of them. It will always be good against everyone who has no other to oppose it.

The necessities of personal existence drove man in a state of nature to seize physical things within his grasp over which he tried to exercise continuous control excluding everybody else.

In this natural instinct then people found the gem of the idea of possession, which as civilization advanced becme more developed and crystallized.

Concept of Possession

Paton: English Law has never worked out a completely logical and exhaustive definition of possession.

In India, Supreme Court in *SRLA v. Anil Kumar* has opined that it is impossible to work out a completely logical and precise definition of 'possession' uniformly applicable to all situations in the context of all the statutes.

In law, possession means a capacity or condition of person having such control of property that he may legally enjoy it to the exclusion of other having no better right than him.

Definition of Possession

- Oxford English Dictionary: The relation of a person to a thing over which he ay at his pleasure exercise such control as the character of the things permits, to the exclusion of other person.
- Savigny: Intention coupled with physical power to exclude others for the use of material object”
  - This definition consists of two essential elements
  - *Animus domini* (intention to hold the goods)
  - *Corpus possessionis* (physical control of such goods)

Definition of Possession

- Salmond: The continuing exercise of a claim to the exclusive use of an object. Possession is corporeal or incorporeal.
- Corporeal possession is the possession of a material thing whereas incorporeal possession is the possession of anything other than a material object.
- Possession is a de facto relation between a person and a thing, it is not a right. Thus, corporeal possession is a title of right but not the right itself.

Definition of Possession

- Justice Holmes: To gain possession a man must stand in a certain physical relation to the object and to the rest of the world and must have certain intent.
- In this respect, Markby has pointed out that the legal notion of possession is not confined to this simple physical condition.
- Possession is treated in law not only as a physical condition which is protected by ownership but as a right itself.

Elements of Possession

- *Corpus possessionis*: Physical control or power over the object possessed
- *Animus Possidendi:* Intention or will to exercise that power of physical control.
- Salmond: both corpus and animus must be present to constitute possession.

Corpus Possessionis

- It suggests that there exists such physical contact of a person with a thing as to give rise to a reasonable assumption that others will not interfere with it.
- This physical contact has two aspects:
  - The relation of the possessor to other persons:
  - Possessor can be under a reasonable expectation that he will not be interfered with in the use of the thing.
  - Corpus consists only of apparent control
  - Possession does not cease to be possession merely because there is a chance for external interference.
  - If possessor lacks ability to resist external interference with the thing possessed, he is still said to be in possession of the thing.

Corpus Possessionis

- Relation of the possessor with the thing possessed:
- The relation between the possessor and the thing possessed is such that he can make use of the thing as he likes, consistent with the nature of the thing.
- There must be no barrier between him and the thing he possesses
- The test to determine is if the user can make use of the object as its nature admits.
- If he can make such use, he is considered to be in possession.

Animus Possidendi

- Animus mans that there must be intention on the part of the possessor to exclude any interference by others except the true owner.
- Animus is the conscious intention of an individual to exclude others from the control of an object.
- The corpus of the possession is not synonymous with the physical power to exclude others, even the weakest person may have the corpus element.

Legal Consequences of Possession

Possession is nine points of law: Possession is prima facie evidence of title of ownership.

Adverse possession: long adverse possession confers title even to property which originally belongs to another.

Transfer of possession is the chief mode of transferring ownership

Res Nullis: the first possession of a thing which as yet belongs to no one is a good title of right.

Legal Consequences of Possession

Even wrongful possession of property is a good title against the entire world except the true owner.

Finder of a lost thing obtains possession and hence title to it as against those who have no claim to it prior to him.

Possessor may confer a good title to another in the absence of it: Exception to the general maxim *nemo debet quod non habet.*

Goods can be handed over without passing possession as animus also needs to be passed.

Legal Consequences of Possession

Possession does not pass if there is no intention to fulfil specific purpose

If the lost thing is found in the course of employment, the finder of goods does not obtain possession, but the employer gets the possession of the goods.

Owner of the land is entitled to chattels when ownership is in doubt

Why Possession is Protected by Law

Kant's Theory:

- Men are born as free and equal. Freedom includes freedom of will.
- Possession is to be protected because a man by taking possession of an object has brought it within the sphere of his will.

Savigny's Theory:

- Protection of possession is a branch of protection to person and as any act of violence to person is unlawful, so is the act which disturbs possession by fraud or force.
- Possession is protected not because it is so intimately connected to ownership, but in the interests of public order and safety.

Why Possession is Protected by Law

Ihering's Theory:

- Protection of possession is necessary as the protection of the right to property.
- Romans devised to benefit owners by protecting their holding of property and so placing them in the advantageous position of defendants in any action as to title.
- English Law: Possession is a good title of right against anyone except the true owner.

Holland's view:

- He adds that the predominant motive was probably to regard for the preservation of peace.

Why Possession is Protected by Law

Prevent the evils of self help and preserve the peace: Possession aids criminal law by preserving the peace. Interference with possession almost inevitably invites violence.

Protection as a part of the tort: “These rights of action are given respect of the immediate and present violation of the possession of the bankrupt independently of his rights – they are an extension of that protection which the law throws around the person.”

Why Possession is Protected by Law

To remedy serious imperfection of early proprietary remedies:

- Under early law, the procedure by which an owner recovered his property was cumbersome, dilatory and inefficient.
- The possessor is now in an advantageous position and the law forbids any person to take advantage by force.

To remedy the difficulty of the proof of ownership:

- It is easy to prove that one has been in possession of a thing but difficult to prove that one is the owner of it. Therefore, it is considered unjust that a man should be allowed by violence to transfer the heavy burden of proof from his shoulder to his opponent.

Possessory Remedies under English Law

- Prior possession is prima facie proof of title.
  - Even in the ordinary proving action a claimant need do nothing more than prove that he had an older possession than that of the defendant, for the law will presume from this prior possession a better title.
- A defendant is always at the liberty to rebut this presumption by proving a better title is in him.
- The defendant will not be permitted to set up the defence of *jus tertii* (to set up a title of a third person other than himself and the plaintiff.)

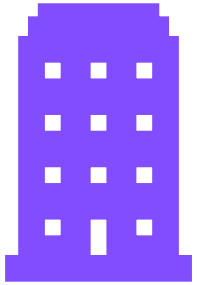
Kinds of Possession



Possession in fact and possession in Law:

De facto Possession: Relation between the peron and the thing

De jure Possession: Legal Relation. It implies manifest intention to exclude the world at large from interfering with the thing in question and to do so, on one's own account and in one's own name.



Corporeal Possession and Incorporeal Possession

Corporeal possession: of material objects

Incorporeal Possession: anything other than material objects

Kinds of Possession

Mediate Possession and Immediate Possession

- Mediate: possession of a thing through another person.
- Immediate: direct possession

Adverse Possession:

- Possession by a person holding the land on his own behalf of some other person and setting up his claim the true owner of the land. (18 years for adverse possession and 12 years of limitation period)

Kinds of Possession

- Essentials of adverse possession:
  - Possession must be adequate and in continuity
  - In publicity
  - Possession must be to the extent to show that it is possession adverse to the competitor.
- Constructive Possession
  - Right to recover Possession
  - Example: to give the keys of the house.

Modes of Acquiring Possession

- Taking
- Delivery
  - Actual Delivery
  - Constructive Delivery
    - Surrender of the mediate possession of a thing to a person who is already in immediate possession: *tradition bravi manu* (delivery by brief hand over)
    - Transfer of the mediate possession while the immediate possession remain to the transferor: *constitutum possessorium* (agreement touching possession)
    - Transfer of the mediate possession while the immediate possession is with a third person: *attornment* (usually a tripartite contract)

OWNERSHIP

Evolution of the Idea of Ownership

The concept of ownership evolved at much later stage in primitive society.

Ownership is a kind of relationship between person and any right that is vested in him.

The transition from a pastoral to an agricultural economy and then later to industrial society facilitated the development of the idea of individual right to property which is the basis of the concept of ownership in a developed society.

Definitions of Ownership

- Literal sense: ownership is the right of exclusive control over and disposal of a thing at will
- Legal sense: The term ownership carries the connotation of right over a thing to the exclusion of other persons. This implies non-interference by others in the exercise of this right and must be distinguished from mere holding od a thing in one’s possession.

Definitions of Ownership

Austin: Ownership is a right which avails against the world (in rem), in indefinite in point of user, unrestricted in point of disposition and unlimited in point of disposition.

- But this definition is criticized on all aspects

Holland: Ownership is the plenary control over an object. This implies complete control, unrestricted by any law or fact. This implies Possession, Enjoyment and Disposition.

Salmond: Ownership denotes the relation between a person and an object forming the subject matter of his ownership.

Salmond specifies certain attributes of ownership:

Attributes of Ownership

- Ownership is a relation between a person and rights that is vested in him
- Ownership is incorporeal
- Ownership has a residuary character
- Ownership has the characteristics of being indeterminate in duration
- Owner has the right to consume, destroy or alienate the thing
- Owner has the right to use and enjoy the thing owned
- Owner shall have a right to possess the thing which he owns; he may however be not in the actual possession of the thing.

Common Elements in definitions

- It is a right which comprises of powers, claims, privileges, etc.
- It is in respect of a thing which may be corporeal or incorporeal
- The rights relating to or connected with ownership are subject to state regulation, i.e. it can be limited or restricted by law
- Owner is he who is entitled to the residue of rights with respect to an object left after the limitation resulting from the voluntary acts of the owner or those imposed by law are exhausted.
- It does not imply or indicate absolute or unlimited rights regarding use, disposal or duration

Incidents of Ownership

Right	Right to Possess
Right	Right to Use
Right	Right to Manage
Right	Right to Dispose and Alienate
Right	Right to Indome

Kinds of Ownership

- Corporeal and Incorporeal Ownership
- Legal and Equitable Ownership
- Vested and Contingent Ownership
- Sole and Co-ownership
- Trust and Beneficial Ownership
- Absolute and Limited Ownership

Corporeal and Incorporeal Ownership

Corporeal:

- Derived from the Latin word *'corpus'* which means something has a body or a physical nature.
- Ownership of material objects and tangible things
- It is the ownership which relates to corporeal property which may consist of movable and immovable property.

Incorporeal:

- Incorporeal suggests something which does not have a body or a material existence. The object abstract and formless.
- Ownership of intangible object which cannot be perceived and felt by touch.
- Salmond: Incorporeal ownership is the ownership of all kinds of rights

Legal and Equitable Ownership

This classification is available only in England.

Legal Ownership:

- Rights recognized by Common Law Courts: Legal Rights
- Ownership accepted according to the Common Law Courts was Legal ownership.
- These Courts did not recognize Equitable Ownership.

Equitable Ownership

- Rights recognized by Chancery Courts: Equitable Rights
- Ownership recognized by the Chancery Courts was equitable Ownership.
- These Courts recognized Legal owner like a trustee which was against the concept of ownership under the Common Law Courts.

Vested and Contingent Ownership

- **Vested Ownership**
  - It is vested when the entire events essential to vest property in the owner have happened and the owner's title is already perfect.
  - A vested ownership does not depend upon the fulfilment of any condition but creates an immediate right though its enjoyment may be postponed to a future date.
  - Section 19 of the Transfer of Property Act:
    - Where on a transfer of property an interest therein is created in favour of a person without specifying the time when it is to take effect, or in terms specifying that it is to take effect forthwith or on the happening of an event which must happen such interest is vested, unless a contrary intention appears from the terms of the transfer.

Vested and Contingent Ownership

- **Contingent Ownership**
  - Contingent ownership is always conditional.
  - Transfer of interest in property is subjected to certain conditions.
  - The vesting of the right in such cases depends upon happening of such event or fulfillment of such condition.
  - Condition can be a condition precedent or a condition subsequent.
    - Condition Precedent: it is one by the fulfillment of which a title is completed.
    - Condition Subsequent: it is one by which a title already completed is extinguished.
  - Section 21 of the Transfer of Property Act:
    - Where on a transfer of property an interest therein is created in favour of a person to take effect only on the happening of a specified uncertain event or if a specified event shall not happen, such a person thereby acquires a contingent interest in the property.

Sole and Co-ownership

When the right of ownership is exclusively vested in a single person, it is sole ownership

When property is jointly held by several person at the same time it is called co-ownership.

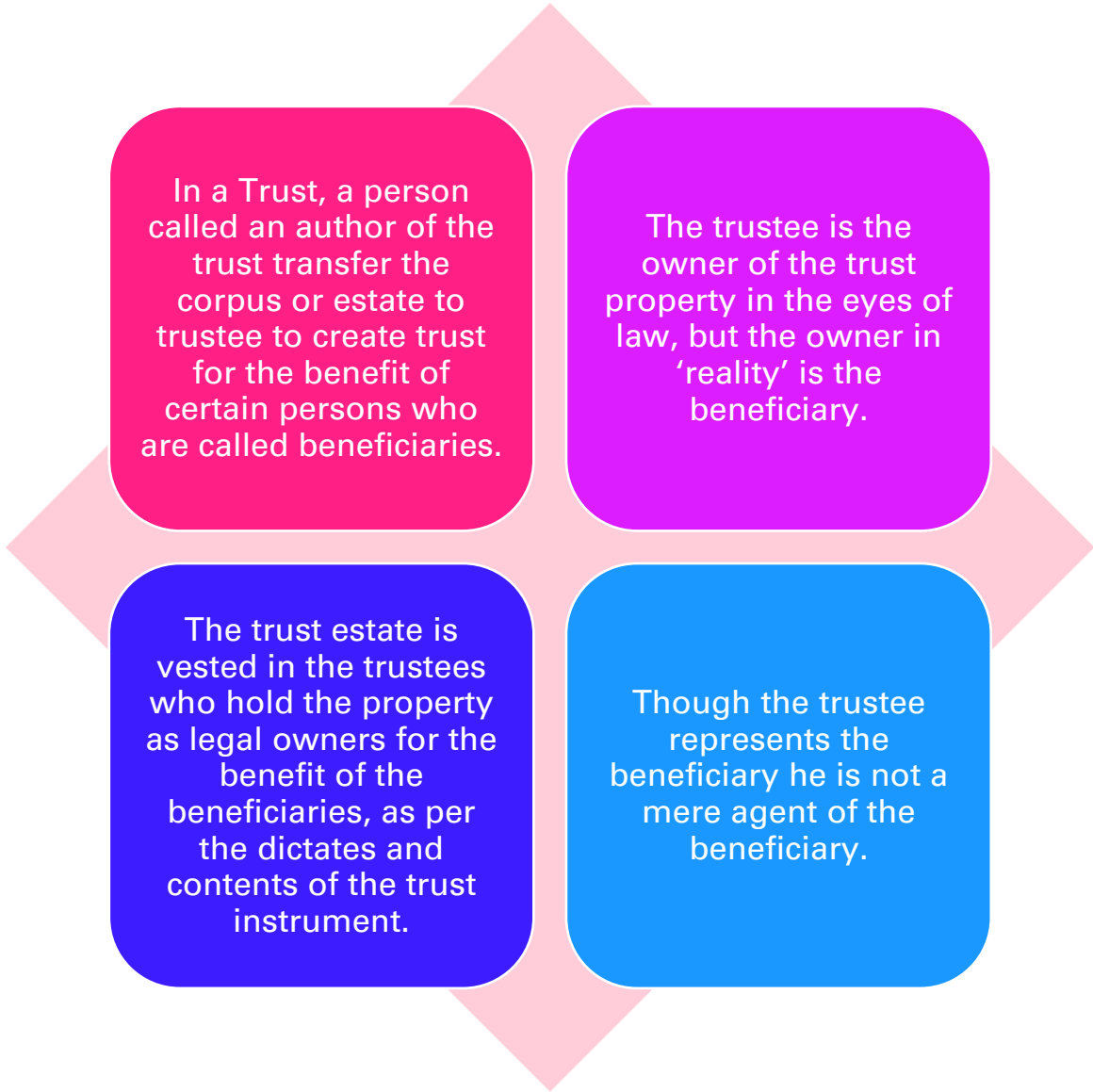
Examples of co-ownership:

- Partners in a firm
- Members of Hindu Undivided Family
- Co-authors of a copyrighted Book

Co-ownership under English Law

- Tenancy in common
- Joint Tenancy

Trust and Beneficial Ownership



Absolute and Limited Ownership

When in a person all the rights of ownership are vested without any restriction (except that imposed by law in the interest of society) his ownership is called as absolute ownership.

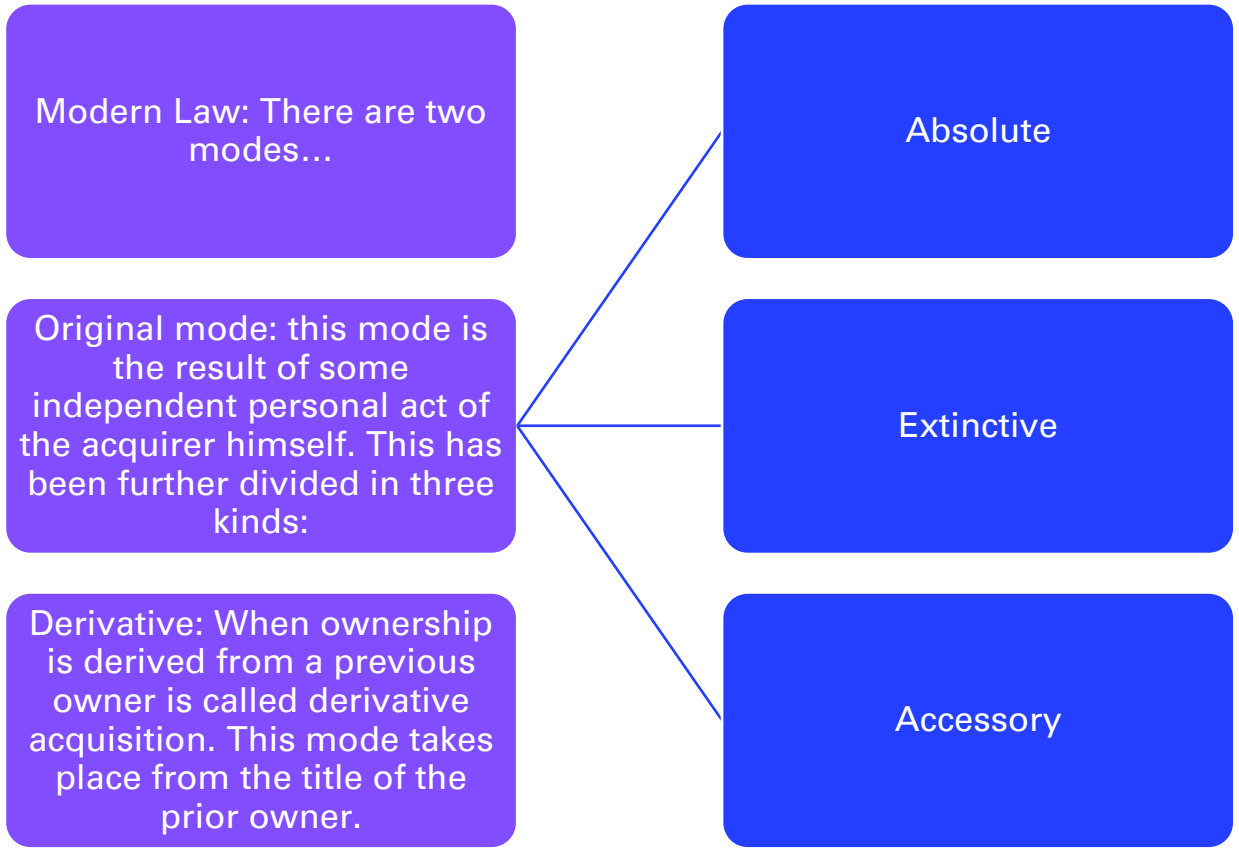
When there is limitation on the use, disposal or duration of the ownership, it is called as limited ownership.

Examples: Life Tenancy, Life interest, woman's limited interest in property before the Hindu Succession Act,1956

Modes of Acquisition of Ownership

- Under Roman Law
  - *Occupacio:* Acquisition of ownership of hunted animals, it was immaterial to see whether a man took wild beast or bird upon his own ground or that of another.
  - Finding of Treasure trover: If any treasure was found by the owner of the land where it lay concealed, he could keep the whole of it, if it is found by another person then the finder and owner of the land take it with equal distribution
  - Consequent by War: Property of enemy is regarded as *res nullis* so the victorious party could deal with it in any way they liked.
  - Accession: accession or application of already existing property was a mode of acquiring ownership.

Modes of Acquisition of Ownership



TITLE



INTRODUCTION

- THE TERM TITLE ORIGINATED FROM THE ROMAN WORD *TITULUS* OR THE FRENCH WORD *LITRE*.
- EVERY RIGHT INCLUDES PRIVILEGES, POWERS AND IMMUNITIES AND INVOLVES A TITLE OR SOURCE FROM WHICH IT IS DERIVED.
- SALMOND: TITLE IS THE FIFTH ELEMENT OF A LEGAL RIGHT.
- TITLE IS THE DE FACTO ANTECEDENT OF WHICH THE RIGHT IS DE JURE CONSEQUENT.
- WHEN THE LAW CONFERS RIGHT UPON A PERSON AND NOT ON ANOTHER, THIS MEANS THAT CERTAIN FACTS ARE TRUE OF HIM WHILE THEY ARE NOT OF ANOTHER, AND THESE FACTS ARE THE TITLE OF THE RIGHT.

DEFINITION OF TITLE

- AUSTIN: TITLE IS NOT THE RIGHT ITSELF, BUT IT IS MERELY AN ELEMENT OF RIGHT
- HOLMES: EVERY RIGHT IS A CONSEQUENCE ATTACHED BY THE LAW TO ONE OR MORE FACTS WHICH THE LAW DEFINES AND WHEREVER THE LAW GIVES ANYONE SPECIAL RIGHT, NOT SHARED BY THE BODY OF PEOPLE, IT DOES SO ON THE GROUND OF CERTAIN SPECIAL FACTS, NOT TRUE OF THE WORLD, ARE TRUE OF HIM.
- HOLLAND: TITLE IS THE SOURCE FORM WHICH THE RIGHT ORIGINATES.

CLASSIFICATION OF TITLES

- ORIGINAL: THOSE WHICH CREATE A RIGHT *DE NOVO*
- DERIVATIVE: THOSE WHICH TRANSFER AN ALREADY EXISTING RIGHT TO A NEW OWNER. HERE NO NEW RIGHT IS CREATED. THE RIGHT WHICH ACQUIRED BY THE PURCHASER IS SAME AS THE RIGHT LOST BY THE ORIGINAL OWNER.
- DERIVATIVE TITLE IS WHEN THERE IS SOME TRANSFER OF AN ORIGINAL RIGHT SO THAT ITS OWNER GETS DIVESTED THE MOMENT THE TRANSFEREE GETS THE RIGHTS.

CLASSIFICATION OF TITLES

- DERIVATIVE TITLES CAN BE FURTHER CLASSIFIED INTO:
  - ALIENATIVE TITLE: FOR EXAMPLE, THE TITLE TRANSFERRED ON SALE. HERE THE ORIGINAL OWNER ALIENATES HIS TITLE IN FAVOUR OF THE PURCHASER.
  - EXTINCTIVE TITLE: TITLE CREATED IN CASE WHEN A DEBTOR PAYS UP THE DEBT, THE CREDITOR'S RIGHT AGAINST HIM IS EXTINGUISHED BY SUCH PAYMENT.

DERIVATIVE TITLES AND ALIENATIVE FACTS

- DERIVATIVE TITLES AND ALIENATIVE FACTS ARE SAME FACTS LOOKED AT FROM DIFFERENT POINTS OF VIEW.
- BENTHAM CALLS THEM AS TRANSLATIVE FACTS.
- FOR EXAMPLE, THE TRANSFEROR LOSES THE RIGHT WHICH IS ACQUIRED BY THE TRANSFEREE.
- THE VESTATIVE FACT WHEN CONSIDERED WITH REFERENCE TO THE TRANSFEREE IS A DERIVATIVE TITLE WHILE WHEN CONSIDERED WITH REFERENCE TO THE TRANSFEROR, IT IS AN ALIENATIVE FACT.

FACTS ESTABLISHING TITLE ACCORDING TO SALMOND

- VESTATIVE FACTS: THEY ARE ONES WHICH DETERMINE POSITIVELY OR NEGATIVELY THE VESTING OF A RIGHT IN ITS OWNER. THE RELATE TO THE CREATION, EXTINCTION AND TRANSFER OF RIGHT. BENTHAM PREFERS THE NAME DISPOSITIVE FACTS TO THESE FACTS.
- INVESTATIVE FACTS: AN INVESTITIVE FACT IS ONE WHICH SHOWS HOW THE RIGHT IN QUESTION CAME TO BE CREATED OR VESTED. THAT IS TO ANSWER THE DE-FACTO ANTECEDENT OF THE CONFERRING OF RIGHT. E.G., SALE-DEED IS THE INVESTITIVE FACT OF TRANSFER OF OWNERSHIP .
- DIVESTATIVE FACTS: THE FACTS WHICH CREATE RIGHTS, IN THE SAME WAY THEY CAN ALSO BE TAKEN AWAY. DIVESTATIVE FACTS ARE THOSE WHICH EITHER DESTROY RIGHTS OR TRANSFER THEM TO SOMEONE ELSE.

KINDS OF VESTATIVE FACTS

- THE CLASSIFICATION IS ACCORDING TO HOW THEY OPERATE IN PURSUANCE OF THE WILL OF THE PERSONS CONCERNED OR INDEPENDENTLY OF IT.
- CREATION, TRANSFER AND EXTINCTION OF RIGHTS ARE EITHER VOLUNTARY OR INVOLUNTARY
- THEY ARE VOLUNTARY WHEN THEY ACT IN PURSUANCE OF THE WILL OF THE PERSONS CONCERNED AND INVOLUNTARY WHEN THEY ACT INDEPENDENTLY OF THE WILL OF THE PERSONS CONCERNED.
- VOLUNTARY ACTS ARE CALLED AS “ACTS IN THE LAW”
- INVOLUNTARY ACTS ARE CALLED AS “ACTS OF THE LAW”

ACTS IN THE LAW

- THE ACT OF PARTY IS TECHNICALLY KNOWN AS ACT IN THE LAW
- SALMOND: AN ACT OF PARTY IS ANY EXPRESSION OF THE WILL OR INTENTION OF THE PERSONS CONCERNED, DIRECTED TO THE CREATION, TRANSFER OR EXTINCTION OF A RIGHT.
- ALSO CALLED AS *ACT JURIDIQUE* OR JURIDICAL ACT.
- HOLLAND: IT IS THE ACT, THE INTENTION OF WHICH HE IS DIRECTED TO THE PRODUCTION OF A LEGAL RESULT. IT IS A MANIFESTATION OF THE WILL OF A PRIVATE INDIVIDUAL DIRECTED TO THE ORIGIN, TERMINATION , OR ALTERATION OF RIGHTS.

ACTS IN THE LAW

- ACTS IN THE LAW ARE OF TWO KINDS:
  - UNILATERAL: WHERE ONLY ONE PARTY IS INVOLVED
  - BILATERAL: AN ACT WHICH INVOLVES THE CONSENTING WILLS OF TWO OR MORE DISTINCT PARTIES. THESE ARE ALSO CALLED AS AGREEMENTS.
  - KINDS OF AGREEMENTS:
    - CONTRACTS: AN AGREEMENT WHICH CREATES AN OBLIGATION OR RIGHT *IN PERSONAM* BETWEEN THE PARTIES TO IT.
    - GRANTS: AN AGREEMENT WHICH CREATES A RIGHT OF ANY OTHER KIND, E.G., LEASE, CHARGE, LICENSE
    - ASSIGNMENTS: AGREEMENT WHICH TRANSFERS A RIGHT.
    - RELEASE, DISCHARGE OR SURRENDER: AGREEMENTS WHICH EXTINGUISH A RIGHT.

ACTS OF THE LAW

- AN ACT OF LAW IS THE CREATION, EXTINCTION OR TRANSFER OF A RIGHT BY OPERATION OF LAW ITSELF, INDEPENDENT OF ANY CONSENT THERETO ON THE PART OF THE PERSON CONCERNED.
- EXAMPLE: DEVOLUTION OF PROPERTY OF A PERSON DYING INTESTATE, DECREE OF INSOLVENCY

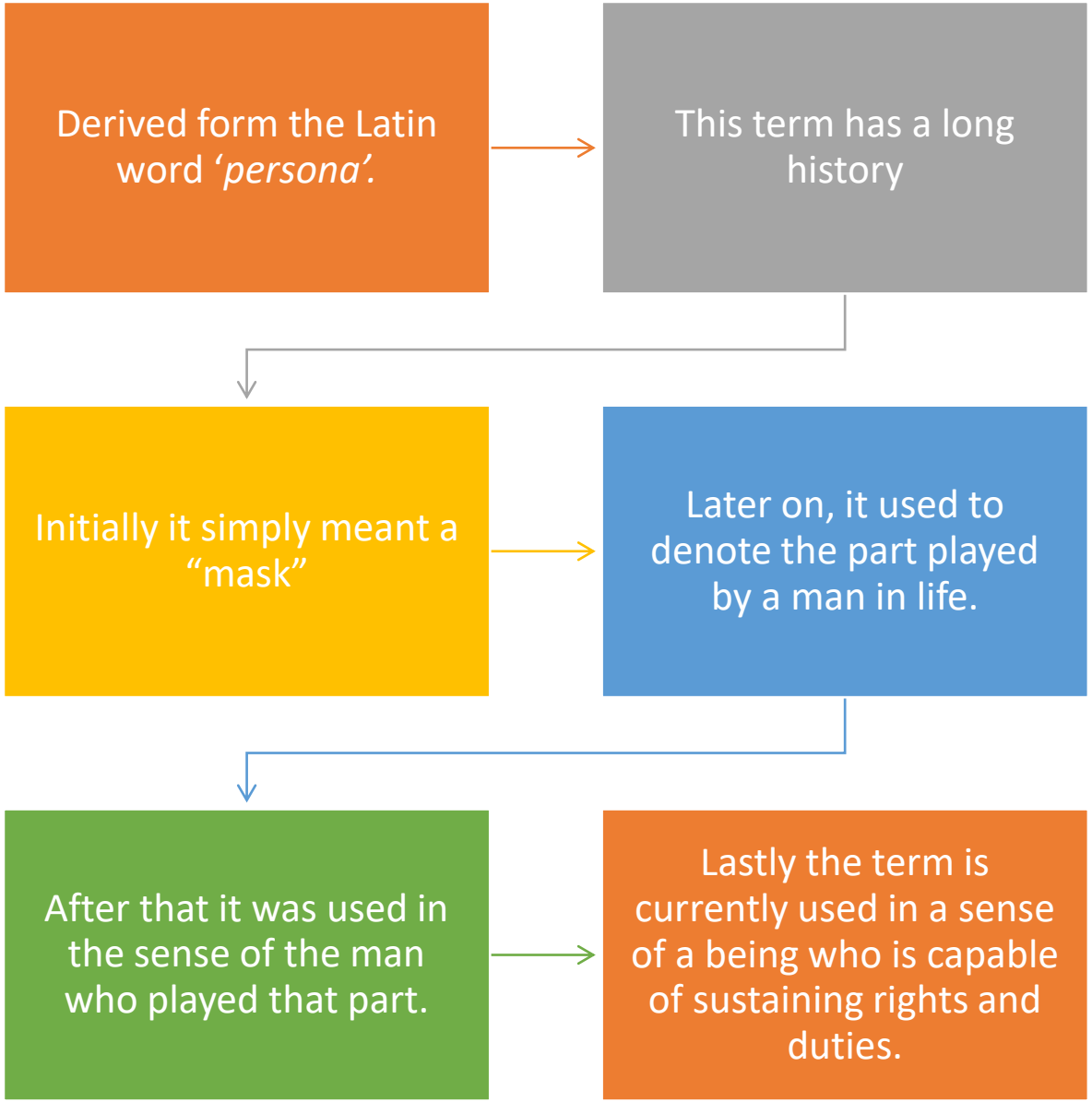
KINDS OF DIVESTATIVE FACTS

- EXTINCTIVE :
  - THEY ARE EXTINCTIVE WHEN THEY DIVEST A RIGHT BY COMPLETELY DESTROYING IT.
  - EXAMPLE: THE SURRENDER OF LEASE TO THE LESSOR DIVESTS THE RIGHTS OF THE LESSEE, BY DESTROYING THE LEASE AND THEREFORE, IT IS AN EXTINCTIVE FACT. PAYMENT OF DEBT TO THE CREDITOR TO EXTINGUISH THE DEBT.
- ALIENATIVE:
  - THEY ARE ALIENATIVE WHEN THEY DIVEST AN OWNER OF HIS RIGHT BY TRANSFERRING IT TO SOMEBODY ELSE.
  - EXAMPLE: THE TRANSFER OF PROPERTY BY SALE OR GIFT. HERE THE ORIGINAL OWNER IS DIVESTED FROM THE RIGHT OF OWNERSHIP AND THE RIGHTS ARE VESTED IN A NEW OWNER.

Person

Natural, Legal, Theories of Personality, etc.

Introduction



Concept of Person

- Karlowa: “The body is not merely the house in which the human personality dwells; it is together with the soul which now for this life is inseparably bound with it, the personality. So, not only as a being which has the possibility of willing, but as a being which can have manifold bodily and spiritual needs and interests as a human, centre of interests, is a man, a person.”

Definitions

According to German scholars, “will” is the essence of Personality. A legal person is one who is capable of will.

Zitelmann: “Personality is the legal capacity of will. The bodiliness of men is for their personality is a wholly irrelevant attribute.”

Meurer: “The juristic conception of the juristic person exhausts itself in the will and the so-called physical persons are for the law only juristic persons with a physical *super fluim.”*

Definitions

Savigny: Person is the subject or bearer of right.

Holland rejected this view and held that Persons are not only subject to right alone but in duties as well.

Kelsen: The totality of rights and duties is the personality; there is no entity distinct from them.

Definitions

Salmond:

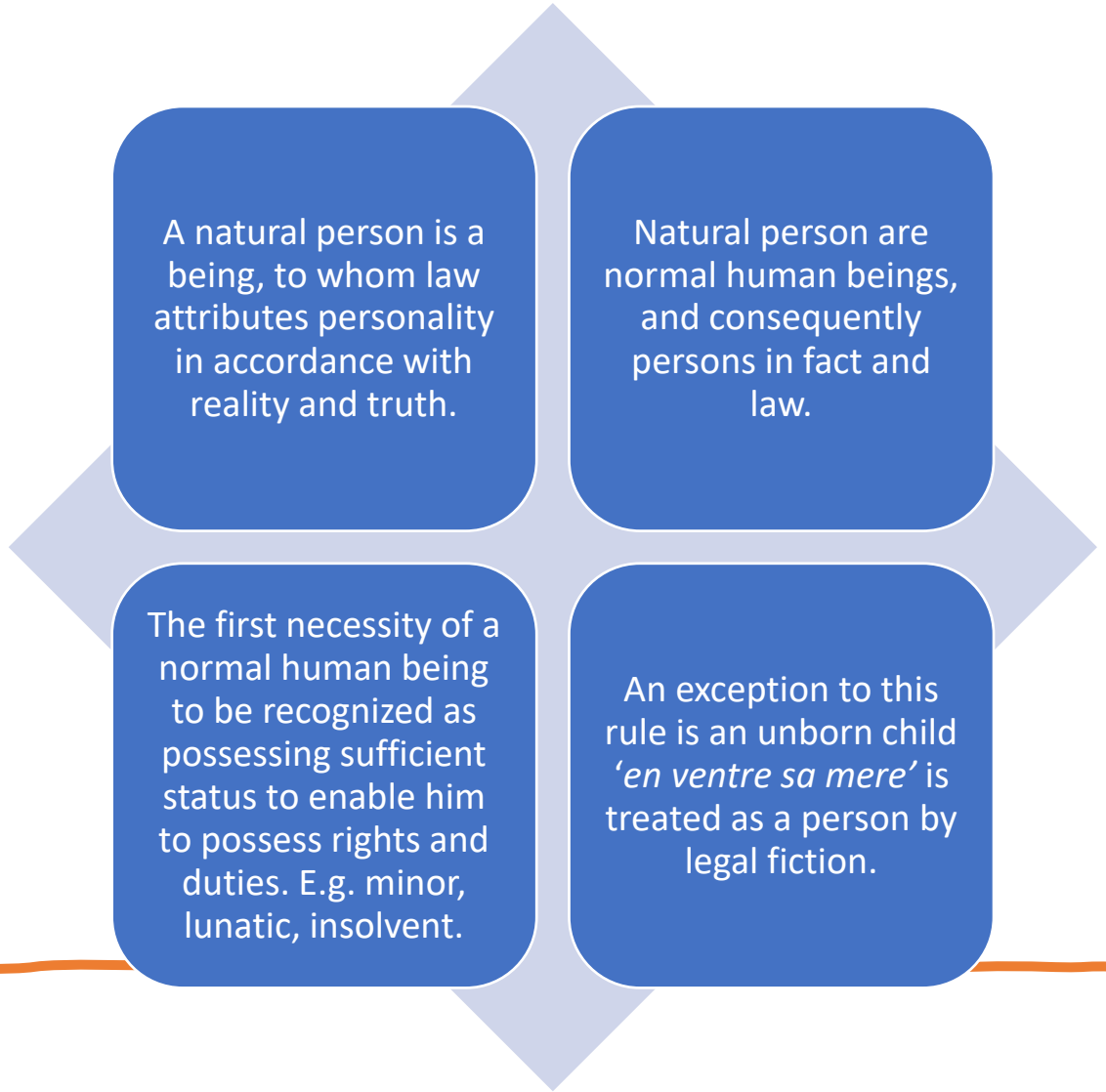
- So far as the legal theory is concerned, a person is a being whom the law regards as capable of rights and duties. Any being that is so capable is a person, whether a human being or not and no being that is not so capable is a person, even though he be a man.
- A Legal person is any subject-matter other than a human being to whom the law attributes personality. This extension for good and sufficient reasons of conception of personality beyond the class of human being is one of the most noteworthy features of legal imagination.

Kinds of Persons

Natural Person

Legal or Artificial Persons

Natural Person



Legal Person

Salmond: Legal person is any subject matter other than human beings to which the law attributes legal personality.

Holland: Legal persons are such masses of property or groups of human beings which are the eye of the law capable of rights and liabilities, in other words, to which the law gives a status.

Generally legal personality is granted by law to all human beings, and as it is a creation of law, it may be conferred on entities other than individual human beings.

Legal Person

- The law, in creating legal persons, always does so by personifying some real thing.
- Though it is not necessary for law to personify, generally law attributes the quality of personality to a purely imaginary being too.
- Law may, if it so provides, withdraw personality from certain human beings
- Being the arbitrary creation of law, legal persons may be of as many kinds as the law pleases.
- The conception of legal personality is not limited in its application.

Kinds of Legal Person

- Corporation: A corporation is a group or series of individuals, which by a legal fiction, is regarded, and treated as a person.
- Kinds of corporation:
  - Corporation Aggregate: It is a group of co-existing persons, a combination of persons who are united together with a view to promote their common collective interest, which is generally the business, or commercial interest.
  - Corporation Sole: A corporation sole is an incorporated series of successive persons. It implies two persons to exist under the same name, the one human being and the other Corporation sole, which is the creation of law an continues to exist though the human beings change.



Corporation Aggregate

- It has been defined as a collection of individuals united into one body under a special denomination, having perpetual succession under an artificial form and vested by the policy of the law with the capacity of acting in several respects as an individual, particularly of taking and granting property, of contracting obligations and of suing and being sued, of enjoying privileges and immunities, in common and of exercising a variety of political rights, more or less extensive, according to the design of its institution or the powers conferred upon it, either at the time of its creation or any subsequent period of its existence.

Corporation Aggregate

- Under Indian Law, corporation aggregate are all those bodies or associations, which are incorporated under a statute of Parliament or state legislature.
- The intention to incorporate is the most important and essential characteristic of a corporation aggregate.
- A corporation aggregate has one main capacity, i.e., the corporate capacity.
- Another essential feature is that its identity is continuous and has perpetual succession.

Corporation Aggregate

- Essence of a corporation consists in:
  - Lawful authority of incorporation
  - The person to be incorporated
  - A name by which the persons are incorporated
  - A place, and
  - Words sufficient in law to show incorporation .
- No particular words are necessary for the creation of a corporation; any expression showing an intention in corporation will be sufficient.

Characteristics of Corporation Aggregate

- Corporate Personality:
  - A personality distinct from its members
  - *Saloman v. Saloman* (1897) The company was in law a person distinct from Saloman and that, therefore, Saloman was preferentially entitled to the assets as the secured creditor
  - *Farrar v. Farrar* (1898) a sale by persons to a corporation of which he is a member is not, either in form or substance, a sale by a person himself. To hold that it is, would be to ignore the principle which lies at the root of legal idea of corporate body and that idea is that the corporate body is distinct from the person composing it. A sale by a member of a corporation itself is in every sense a sale, valid in equity as well as at law.

Characteristics of Corporation Aggregate

Limited Liability:

- In case of limited companies, no member is bound to contribute anything more than the nominal value of the shares held by him.

Perpetual Succession:

- An incorporated company has perpetual succession, which means “members may come and go but the company can go forever.”

Transferable Shares:

- Shares of the companies are movable property transferable in the manner provided by the articles of association of the company.

Characteristics of Corporation Aggregate

Restriction on purchase by a company of its own shares:

- The companies are prohibited to purchase their own shares, with some exceptions, especially by companies with liabilities limited by shares or guarantee.

Separate Property:

- Company is a legal entity capable of owning its funds and assets. Property od the company is not the property of the shareholders.

Capacity to Sue:

- As a juristic person, company can sue and be sued in its own name.

Characteristics of Corporation Aggregate

- Flexibility and Autonomy:
  - Company has an autonomy and independence to form its own policies and implement them, subject to the general principles of law, equity and good conscience and in accordance with the provisions contained in the Companies Act from time to time, the Memorandum of Association and the Articles of Association.

Purpose of Incorporation

- The most important purpose of incorporation is to enable traders to embark upon commercial ventures with limited liability.
- This is possible by the incorporation of a limited liability company which is formed by a number of persons becoming shareholders and registering the Company under the Companies Act.
- By becoming a shareholder, the member contributes or promises to contribute a stated amount of money for the furtherance of a common objects of the Company.
- His liability is limited to the share that is the contribution made by him. If the company goes in loss, he will not be called upon to meet the claims of the creditors from his other assets.

Doctrine of Piercing the Veil

- The Court sometimes has to reject the concept of distinct personality of corporation and pierce the veil in order to detect and redress frauds upon the creditors, the evasion of obligations or statutes or to suppress tax evasion.
- Under English Law, the Corporate Veil is pierced for:
  - To ascertain enemy character
  - Public Policy
  - To Prevent Tax Evasion
- In India Corporate veil is pierced for:
  - Benefit of Revenue
  - Fraud or Improper Conduct

Corporation Sole

Salmond: Corporation Sole is found only when successive holder of some public office is incorporated to constitute a single permanent legal person.

The living official comes and goes, “but this offspring of law remains the same for ever.”

Examples: Queen of England, Governor of Reserve Bank of India, Post-Master General, Comptroller and Auditor General of India, etc.

Corporation Sole

Corporation sole is not endowed with a separate legal personality. It is composed of one person only which is incorporated by law.

The same person has a dual character, one as natural person and the other as the Corporation sole, the latter being created by statute.

Maitland: The idea of Corporation originated under English Law to provide the legal capacity of possession and transfer on the bodies which can be said to be the example of corporation sole.

Kinds of Legal Person

- **Institutions**
- The Law may, if it pleases, regard a church, a hospital or a university or a library as a person.
- It may attribute personality not to any group of persons connected with the institution, but to the institution itself.
- Under Indian Law. Institutions like universities, temples, public authorities, etc. are considered as legal persons.
- Under Indian law, trade unions and friendly societies are legal entities.
- They own properties and suits can be brought in their names though not regarded as corporations.

Kinds of Legal Person

- Fund or Corpus
- The third kind of legal person is that in which the corpus is some fund or estate devoted to special uses, a charitable fund for example, or a trust estate, or a property of a dead man or a bankrupt.

Legal Status of Unborn Person

- Child in mother's womb is by legal fiction regarded as already born.
- If he is born alive, he will have legal status.
- Section 13 of Transfer of Property Act: Property can be transferred for the benefit of an unborn person.
- Section 114 of the Indian Succession Act also has a similar provision.
- Section 315 of IPC: infliction of a pre-natal injury on a child amounts to the offence of child destruction.
- Section 416 of Cr.P.C. If a pregnant woman is sentenced to death, it has to be postponed till a date after the delivery of the child.

Legal Status of Dead Man

- Dead man is not a legal person. As soon as the person dies, he loses the status of an unborn person.
- *Actio personalis moriter cum persona* – action dies with the death of a man.
- Yet Law takes into account the desires of a dead man to some extent.
  - Decent burial/ cremation
  - Respecting the wishes of the deceased regarding disposal of property
  - Protection of dignity

Legal Status of Lower Animals

- Animals are not capable of having rights and duties and hence they are not legal persons.
- However, in ancient times animals were regarded as having legal rights and being bound by legal duties.
- In certain cases, the law assumes the liability of the master for an animal as direct while in other cases, the liability is not direct.
- Thus, for keeping animals that are not of a dangerous nature the master is not liable for the damage it may cause, unless he knows that it was dangerous.
- The owner of animals of this class is also responsible for their trespass and the consequent damage

Theories of Corporate Personality

- Each of these theories contain element of truth, none can by itself, adequately interpret the phenomenon of legal juristic personality.
- The reason is the technical device, applied for very diverse aggregations, institutions and transaction which have no political and social denominator, whereas each of the many theories have been conceived for a particular type of juristic personality.
- None of these foresees the extent to which the device of incorporation will be used in modern business with a little skill it is possible to arrive at about any practical from any oarticular theory.

Fiction Theory

- Savigny, Salmond and Holland are the most ardent followers of this theory.
- Human beings are alone persons properly so called.
- There are certain fictitious, artificial or juristic persons and one species of this class is known as the corporation.
- Some groups or institutions are regarded ‘as if’ they are persons, however, such persons are purely fictional.
- This theory starts in the assumption that the corporation gets a personality only by virtue of law.



Fiction Theory

- Practical implications of this theory:
  - Corporation not being a ‘real’ person, cannot have a personality of own, it has no will, no mind and no ability to act.
  - It can only have so much will, mind or ability as the law imputes to it by fiction.
  - But most rule of law have words like ‘willfully’, ‘ intentionally’, ‘doing’, ‘acting’, ‘fraudulently’, etc. used frequently.
  - Since the corporation has only a fictional will imputed by law, it could only make itself liable for certain kinds of legal wrongs, i.e. not the ones involving mens rea.



Criticism of Fictional Theory

- It is alleged that the corporation does not have its own will, then how can we make the corporation accountable for unlawful act because law cannot attribute any unlawful will. Salmond replied: In such cases corporations bear only a vicarious liability.
- Generally, the right connotes one subject, and a fictitious subject cannot have rights. Here under the fiction theory fictitious entity has a personality and hence capable or holding right and duties, which seems unreal.
- Winfield says corporation has actual existence and is not merely a fiction



Criticism of Fiction Theory

- As on death of a human being the law only appoints the State as a successor, in the same way when a juristic person ceases to exist the persons most nearly connected with it should succeed, such as members or persons designated by the Articles of Association or by the founder. (Sometimes such property becomes *bona vacantia*.)
- It is argued that the fiction theory is incompatible with free exercise of the right od association.



Concession Theory

- This theory is supported by Savigny, Salmond and Dicey,
- This theory starts on the assumption that the sovereign and human beings are the only relatives.
- All intermediate groups which get personality are the result of a concession by the sovereign or the State.
- Legal requirements laid down by the State are to be followed or complied by all groups for their existence or continuance.
- This concession or grant of corporate existence can be withdrawn by the state if the entities violate the restraints placed upon them.

Concession Theory

- This theory is in fact a variant of the fiction theory with one difference. Under fiction theory the personality of the groups imposes itself as the most convenient way of dealing with a mass of rights and duties, while under the concession theory the personality is imposed or granted by the sovereign State or law depends on the will or discretion of the State or the sovereign.
- Implication of this theory has been used for political purposes to strengthen the state and to suppress the autonomous bodies or groups within the State.
- It states further that law is the only source from which legal personality may flow.

Criticism of Concession Theory

- This theory overemphasizes on the discretion of the State
- The consequence of such position is that it suppresses the autonomous bodies within the State and is used to strengthen the State for political purposes
- Maitland has commented that the object of the Concession Theory is to keep the personality under lock and key.

Realist Theory

- Supported by German jurist Gierke and English jurists Pullock, Maitland and Jethro Brown.
- According to this theory, a corporation is not a figment of imagination, it is a reality. But its reality is not a reality in the sense that it can run about or marry or fall sick as an ordinary individual can.
- The psychic influence generated by common human action like meetings and discussing is emphasized by the advocates of this theory.



Realist Theory

- The Realists say that a group has a will of its own; its decisions are not the decisions of its members,
- Dr. Murray: no one who has ever sat in a committee, or a board of directors can have failed to notice that every permanent organization has a feeling, a tradition, an atmosphere and an opinion of its own. In fact, there is a group mind which differs from that of every individual member and is certainly not the same as the sum total of the minds of the individual members.
- Corporation is a representation of physical realities that exist independently of the fiat of the state and are recognized rather than created by it.



Realist Theory

- This theory asserts that the group personality has the same features as a human personality.
- The groups have a real mind, a real will and a power of action.
- According to this theory the group does not owe its personality to State recognition or State concession.
- The practical implication of this theory opposes the implication of the concession theory that personality has to be conceded by the State.
- As human beings are persons without any concessions of the state – so also is the case with groups – like human beings, they too are automatically persons.



Realist Theory

- This theory represents a reaction against the omnipotence of state implied in the Fiction Theory.
- From a combination of many wills of the persons associated, there arises a single group or corporate will which is distinct from the totality of the wills of its members, and which inspires the action taken by the group just as an individual will of a man inspires the man’s own actions



Criticism of Realist Theory

- Realist theory asserts that the groups have real life. But this is not possible practically.
- Prof. Wolf points out that if it is true, a contract between two companies whereby one is to go into voluntary liquidation should be punishable as an agreement to commit suicide.
- ‘Group will’ is only the result of mutually influenced wills and as such is not a separate will.
- If groups are automatically persons, every group viz. family, class, society, etc. should automatically be legal persons, but this is not so.



Criticism of Realist Theory

- Gray: to deny the fiction theory by advancing the realist theory is an attempt to drive out one fiction with the help of another fiction
- Realist theory says that groups are like biological human beings. However, the implications of such biological comparison can lead to absurdity.
- Salmond: realist theory is inapplicable to corporation sole. The attribution of personality to the succession of the holders of certain office where there can be no pretense to psychological unity which is destructive of the realist theory of corporate personality.



Bracket Theory

- This theory is supported by Kelsen and Ihering.
- According to this theory, members of the corporation are the bearers of rights and being bound by duties which are for convenience referred to the corporation itself.
- As it is inconvenient to always refer to all the members of a corporation, a bracket is placed around it, to which a name is given.
- However, to understand the real nature of the corporation, we must remove the bracket to find out the actual position of the company.
- Wolf: The practical implication of the theory is that the law can remove the bracket at any time and can look behind the entity to discover the real state of affairs. It may be necessary to do so, if desired.

Criticism of Bracket Theory

- It is legally untrue to say that only individual men can be made the bearers of legal rights as law confers rights and imposes duties on corporation also, which is possible only if we accept that it is an entity completely separate from its members.
- The legal relations are fixed and certain, but if they are discovered by removing the brackets then they will be uncertain and always changing.
- Every time new separate entities are recognized as units by the system itself, and such distinction makes it possible to have a clear distinction between the property, rights and duties of a legal person.

Purpose Theory

- This theory has been supported by German jurist Brinz and Stoljar.
- According to this theory, personality is only enjoyed by human beings, they alone can be the subjects of rights and duties.
- The ‘so called’ juristic persons are not persons at all.
- Since they are distinct from the human substratum, if any, and since rights and duties can only vest in human beings, they are simply ‘subject-less properties’ designed for certain purposes.

Purpose Theory

The practical implication of this theory is that law protects certain purposes and the interests of individual human beings.

The property supposed to be owned by juristic persons does not belong to anything; but it does ‘belong for’ a purpose and that is the essential fact about it.

All juristic or artificial persons are merely legal devices for protecting or giving effect to some real purpose.

OBLIGATION

The nature of Obligations

In its popular sense, it is merely a synonym of duty.

In legal sense, they are only one class of duty, viz. those which are correlatives of *rights in personam*.

It is the *vinculum juris* i.e., a bond of legal necessity which binds together two or more determinate individuals.

The nature of Obligations

The term obligation is in law the name, not merely of the duty, but also of the correlative right.

It denotes the legal relation in its entirety, including the right of the party no less than the liability of the other.

Looked from the point of view of the person entitled, an obligation is a right; looked form the point of view of the person bound, an obligation is a duty.

The nature of Obligations

All obligations pertain to the sphere of proprietary rights.

They form a pert of the estate of him who is entitled to them.

Rights which relate to a person’s status, such as those created by marriage, are not obligations though they are rights *in personam.*

An obligation, therefore, may be defined as a proprietary right *in personam* or a duty which corresponds to such a right.

Solidary Obligations

When there is more than one debtors to a creditor, then in such cases any debtor is liable for the whole amount due.

The creditor is not obliged to divide his claim into parts just because there are more debtors. He may exact the whole amount from one debtor and leave him to recover from his co-debtors, if possible and permissible.

Solidary Obligations

These obligations are called as solidary obligations as in Roman Law each debtor is bound *in solidium* instead of *pro parte.*

A solidary obligation may be defined as one in which two or more debtors owe the same thing to the same creditor.

Under English Law there are three different kinds of Solidary Obligations:

- **Several**
- **Joint**
- **Joint and several**

Solidary Obligations

Solidary obligations which are several in nature:

1. The liability of the principal debtor and that of the surety, provided that the contract of suretyship is subsequent to, or otherwise independent of the creation of the debt so guaranteed.
2. The liability of two or more co-sureties who guarantee the same debt independently of each other.
3. Separate judgements obtained in distinct actions against two or more persons liable for the same debt.
4. The liability of independent wrongdoers whose acts cause the same damage.

Solidary Obligations

Examples of joint obligations are the debts of partners and all other solidary obligations *ex contractu* which have not been expressly made joint and several by the agreement between the parties.

Examples of joint and several obligatinos are the liabilities of those who jointly commit a tort or perhaps a breach of trust and also contractual obligations which are expressly made joint and several by the agreements of the parties.

Sources of Obligations

With respect of the sources, obligations can be classified into the following classes:

- **Contractual – *obligations ex contractu***
- **Delictal – *obligationse ex delicto***
- **Quasi-Contractual – *Obigationes quasi ex contractu***
- **Innominate**

Obligations arising out of Contracts

Contract is an agreement which creates rights *in personam* between the parties to it.

Contract cannot be complete without the obligation of the parties to perform.

The law of contract, therefore, is almost wholly comprised within the law of obligations.

Except the personal contracts (e.g., marriage) contract is simply a combination of the general theory of agreement with that of obligation

Obligations arising from Torts

This kind of obligation means the duty of making pecuniary satisfaction for that species of wrong which is classified as *tort.*

Etymologically this term is the French equivalent of the English term wrong i.e., *tortum.*

Tort may be defined as a civil wrong, for which the remedy is an action for damages, and which is not solely the breach of a contract or a breach of trust or other merely equitable obligation.

Obligations arising from Quasi-Contracts

Both in Roman and English law, there are certain obligations which are not in truth contractual in the sense of resting on agreement, but which the law treats as if they were.

They are contractual in law but not in fact, being the subject matter of a fictitious extension of the sphere of contract to cover obligations which in reality fall within it.

They are also called as implied contracts

Obligations arising from Quasi-Contracts

Blackstone: Implied contracts are such as reason and justice dictate, and which therefore, law presumes that every man undertakes to perform.

There are two main contractual obligations which are known to English Law:

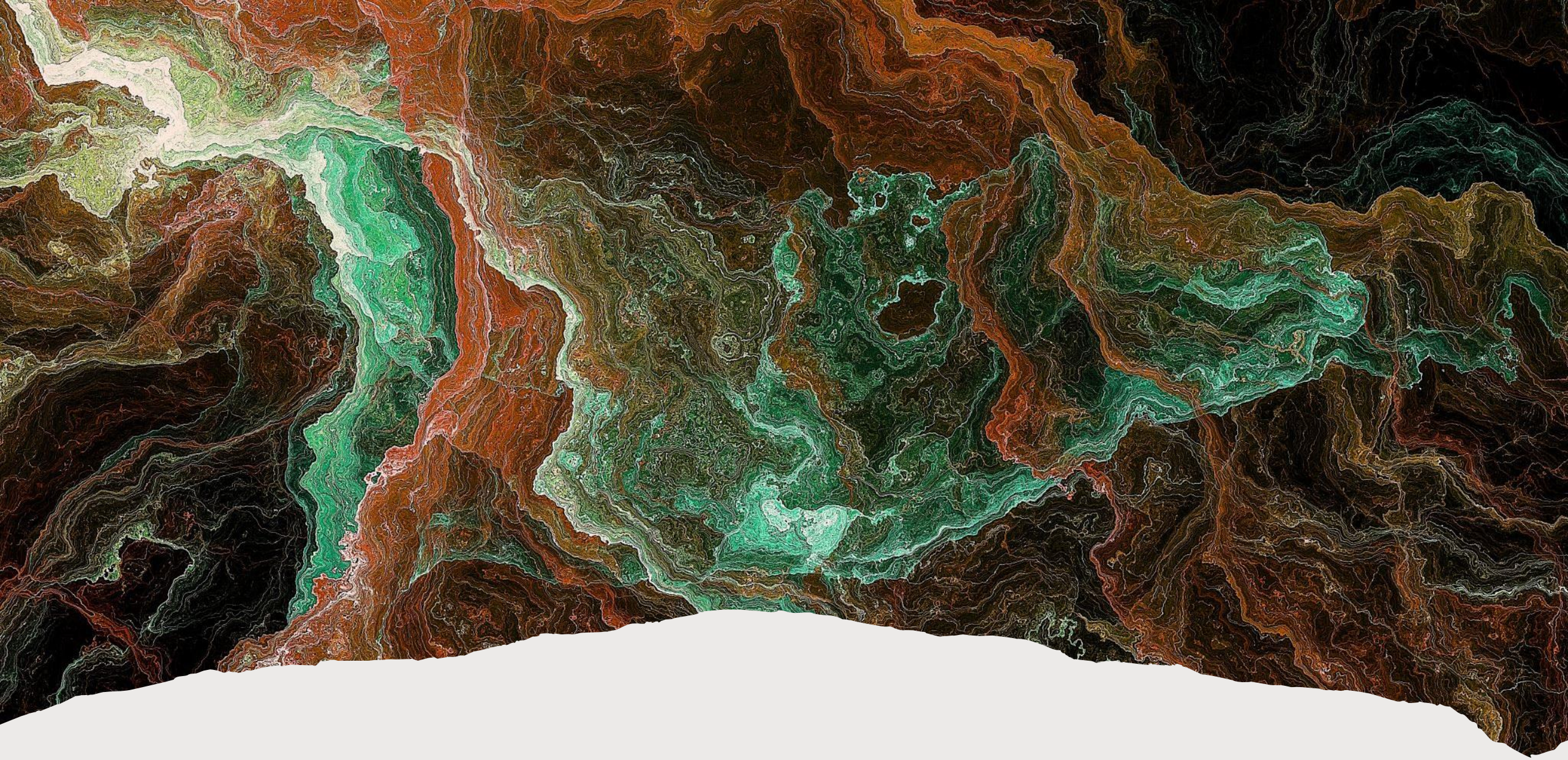
- **All debts are contractual in origin as they are an agreement to repay a liquidated sum as against an unliquidated amount under tort.**
- **All cases in which the person injured by a tort is allowed by law to waive the tort and sue in contract instead. (fictitious contract)**

Innominate Obligations

The last class of obligations are innominate obligations.

They are the residuary class of obligations which cannot be classified under any of the previous class of obligations.

This class includes the obligations like that of the Trustee towards their beneficiaries.



LIABILITY

INTRODUCTION

- He who commits a wrong is said to be liable and responsible for it.
- Liability or responsibility I the bond of necessity that exists between the wrongdoer and the remedy of the wrong.
- Liability in first place is either civil or criminal and in second place either penal or remedial.
- In case of penal liability, the purpose of law, direct or ulterior, is or includes the punishment of a wrongdoer; and in case of remedial liability, the law has no such purpose at all, its sole intent being the enforcement of the plaintiff's right, and the idea of punishment being wholly irrelevant.
- All criminal liability is penal; civil liability can sometimes be penal or sometimes remedial.

THE THEORY OF REMEDIAL LIABILITY

- Whenever law creates any duty, it should enforce the specific fulfilment of it.
- Cases where duties are not specifically enforced:
  - Duties of imperfect obligations – where the breach of which gives no cause of action and creates no liability at all.
  - Duties which from their nature cannot be specifically enforced after having once broken.
  - When specific enforcement is possible, but it may be more expedient to deal with it solely through punishment or penalty or compensation.

THE THEORY OF PENAL LIABILITY

- Penal liability applies to both criminal law and to those portions of civil law in which the idea of punishment is relevant and operative.
- There are three aspects relating to penal liability
  1. Relating to the conditions
  2. Relating to the incidence, and
  3. Relating to the measure of penal liability

CONDITIONS OF PENAL LIABILITY

The general conditions of penal liability are indicated in the maxim *Actus non facit reum, nisi mens sit rea.*

Thus, there are two conditions to be fulfilled before penal responsibility can rightly be imposed. They are

- Doing the act (*actus reus)*
- Guilty mind *(mens rea)*

Generally speaking, a man is penally responsible on;y for those wrongful acts which he does either willfully or recklessly.

But there are two qualifications to this:

- Criminal law may penalize mere negligence even though it resulted from mere inadvertence.
- Law may create offences of strict liability, where guilt may exist without intention, recklessness or even negligence.

ACTS

Human actions which are voluntary.

It also includes omissions of some legal duty

Acts can be further divided into involuntary and voluntary acts.

A voluntary act is said to consist in a willed muscular contraction, which incurs moral or legal liability only by virtue of the circumstances which it produces.

An involuntary act is regarded as one where the muscular contraction is not willed, its involuntariness consisting precisely in the absence of willing.

But there are three problems, firstly it is based on uncertain psychology; secondly the theory is inappropriate for the problems of omissions; and thirdly this theory imposes a limitation on the meaning on the term act which is inadmissible in the common usage of speech.

TWO CLASSES OF WRONGFUL ACTS

Every wrong is an act which is mischievous in the eye of the law – an act to which law attributes harmful consequences.

These consequences are of two kinds – either actual or merely anticipated.

Therefore, legal wrongs are of two types:

- The first consists of those in which the act is wrongful only by reason of accomplished harm which in fact ensues form it.
- The second consists of those in which the act is wrongful by reason of its mischievous tendencies, as recognized by the law, irrespective of the actual issue.

Criminal liability is usually sufficiently established by proof of some act which the law deems dangerous in its tendencies, even though the issue is in fact harmless.

There cannot be a general principle laid down as to civil liability.

DAMNUM SINE INJURIA

- Mischief that is not wrongful because it does not fulfill even the material conditions of responsibility is called a *damnum sine injuria.*
- The cases of *damnum sine injuria* fall under two heads

  Firstly, instances in which the harm done to the individual is nevertheless a gain to society at large.

  Secondly, all those cases in which, although real harm is done to the community, yet owing to its triviality, or to the difficulty of proof, or any other reason, it is considered inexpedient to attempt its prevention by law.

MENS REA

- A man is responsible, not for his acts in themselves, but for his acts coupled with the *mens rea* or guilty mind with which he does them.
- The form which mens rea assumes depends on the provisions of the particular legal system.
- With respect to the requirement of fault, wrongs are of three kinds:

1. Intentional or reckless wrongs in which the mens rea amounts to intention, purpose, design, or at least foresight. In such wrongs, defences like mistake operate to negative the existence of mens rea.
2. Wrongs of negligence, in which the mens rea assumes the less serious form of mere carelessness, as opposed to wrongful intent or foresight. With these wrongs, defences such as mistake will only negative the mens rea if the mistake itself is not negligent.
3. Wrongs of strict liability, in which the mens rea is not required, neither wrongful intent nor culpable negligence being recognized as a necessary condition of responsibility, and here defences like mistake are of no avail

INTENTION

- An intention is the purpose or design with which an act is done.
- This may consist of an intention to perform some further act, an intention to bring about certain consequences or perhaps an intention to do the act itself.
- An unintentional act is done lacking such purpose or design.
- To do something unintentionally is to do it without meaning to do it.
- Whether an act is to be termed intentional or unintentional must depend partly upon the description of the act itself.
- Where the intention consists of an intention to produce certain consequences, this is sometimes explained as a combination of foresight and desire.

INTENTION

- The phrase “with intent to” can be interpreted in four different ways:

1. That the intent referred to must be sole or exclusive intent;
2. That it is sufficient if it is one of the several concurrent intents;
3. That it must be the chief or dominant intent, any others being subordinate or incidental
4. That it must be a determining intent, that is to say, an intent in the absence of which the act would not have been done, the remaining purposes being insufficient motives by themselves.

MOTIVES

- A wrongdoer has in view some ulterior object which he desires to achieve/ obtain by means of a wrongful act.
- The evil which he does to another, he does and desires only for the sake of some resulting good which he will obtain for himself. The desire for this good is the motive of his act.
- Differences between intention and motive:

  An intention relates to the immediate objectives of an act while a motive relates to the object or series of objects for the sake of which the act is done.

  A man's motive for an act consists in a desire for something which will confer a real or imagined benefit of some kind to the actor himself, whereas his intention need not relate to some personal interest of this kind.

MALICE

- In a narrow and popular sense this term means ill-will, spite or malevolence; but its legal signification is much wider.
- Malice in law means wrongful intention or recklessness.
- Latin term *malitia,* means badness, physical or moral – wickedness in disposition or in conduct – not specifically or exclusively ill-will or malevolence.
- When we say that an act has been maliciously done, it means:

  It means either that it is done intentionally /recklessly, or

  that it is done with some wrongful motive.

JUS NECESSITATUS

- There are some cases where willful wrongdoing is considered as a special case in which motive operates as a ground of excuse and the wrongdoer cannot be held liable. Such cases are called as *jus necesitatus.*
- The situation of necessity is one in which there is a competition of values – on one hand, the value of obedience to the general principles of law and, on the other hand, some value regarded as possessing a higher claim in the particular circumstances.
- Here the law itself permits a departure from its general rules.
- Necessity also commonly involves the presence of some motive of such exceeding strength as to overcome any fear that can be inspired by the threat of legal penalties.

NEGLIGENCE

- Negligence is culpable carelessness.
- Willes, J.: It Is the absence of such care as it was the duty of the defendant to use.
- Carelessness excludes wrongful intention.
- Carelessness or negligence does not necessarily consist of thoughtlessness or inadvertence.
- Negligence is a failure to use sufficient care.

THE DUTY OF CARE

- Carelessness is not culpable, or a ground of legal liability, save in those cases in which the law has imposed a duty of carefulness.
- No general principle can be laid down, however, with regard to the existence of this duty, as this is a matter pertaining to the details of the concrete legal system.
- Carelessness is lawful or unlawful as per the law sees fit to provide.
- In criminal law, the liability for negligence is quite exceptional
- On the other hand, civil wrongs are often wrongs, even if negligently done.
- When there is a legal duty not to do a thing n purpose, there is commonly a legal duty to take care not to do it accidently.
- Exception to this rule is when wrongful intent, or at least recklessness, is the necessary basis even of civil liability.

THE STANDARD OF CARE

- Carelessness may exist in any degree, and in this respect it differs from mens rea.
- Mens rea can either be there or not be there; but carelessness varies directly with the risk to which other persons are exposed by the act in question.
- The risk depends on two things: firstly the magnitude of the threatened evil and secondly, the probability of it.
- The standard adopted by law with reference to this is:

  The amount of care which is reasonable in the circumstances of the particular case.

  This obligation to use reasonable care is very commonly expressed by reference to the conduct of a “reasonable man” or of an “ordinarily prudent man” .

  Negligence is the omitting to do something which a reasonable man would do, or doing something which a reasonable man would not do.

SUBJECTIVE AND OBJECTIVE THEORIES OF NEGLIGENCE

- There are two rival theories of the meaning of the tem negligence
- The subjective theory of negligence:

  Salmond's view was that a careless person is a person who does not care; i.e., an attitude of indifference has to be there. Thus, negligence essentially consists of the mental attitude of indue indifference with respect to one's conduct and its consequences.

- The objective theory of negligence:

  Negligence is not a particular state of mind or a form of mens rea, but a particular kind of conduct.

  It is the breach of duty of taking care, and to take care means to take precautions against the harmful results of one's actions, and to refrain from unreasonably dangerous kinds of conduct.

THE THEORY OF STRICT LIABILITY

- Strict liability arises in relation to the acts for which a man is responsible irrespective of the existance of either wrongful intent or negligence.
- They are exemptions to the requirement of fault.
- The principle of strict liability evolved in the case of *Rylands v Fletcher*. In the year 1868, the principle of strict liability states that any person who keeps hazardous substances on his premises will be held responsible if such substances escape the premises and causes any damage.
- If a person brings on his land and keeps some dangerous thing, and such a thing is likely to cause some damage if it escapes then such person will be answerable for the damaged caused. The person from whose property such substance escaped will be held accountable even when he hasn't been negligent in keeping the substance in his premises. The liability is imposed on him not because there is any negligence on his part, but the substance kept on his premises is hazardous and dangerous.

STRICT LIABILITY

- Essentials of Strict Liability

1. Dangerous Substance
2. Escape
3. Non-natural use

- Exceptions to the rule of Strict Liability

1. Plaintiff's Fault
2. Act of God
3. Act of third party
4. Consent of Plaintiff

ABSOLUTE LIABILITY

- According to the rule of absolute liability, if any person is engaged in an inherently dangerous or hazardous activity, and if any harm is caused to any person due to any accident which occurred during carrying out such inherently dangerous and hazardous activity, then the person who is carrying out such activity will be held absolutely liable.
- The exception to the strict liability rule also wouldn't be considered.
- The rule laid down in the case of MC Mehta v UOI was also followed by the Supreme Court while deciding the case of Bhopal Gas Tragedy case.
- If an industry or enterprise is involved in any inherently dangerous activity, then for any damage arising out of the conduction of that activity, the defendants (the owners of the industry) will have no access to any defence or exception and will be absolutely liable to pay compensation to the aggrieved parties.

ABSOLUTE LIABILITY

- The enterprise will be held responsible for all possible damages or consequences resulting from the activity. This will make such industries provide safety equipments to its workers to prevent any mishap. Therefore, this will safeguard the interests of the workers and will give them a refined, safe working atmosphere.
- The element of escape which is an essential in strict liability may be ignored here as this restricts the application of this Doctrine of Absolute Liability as often incidents may arise where escape of the dangerous thing like poisonous fumes may not take place outside the industry premises but may damage the workers inside. In this case, the workers' right to compensation will not be ignored. Therefore, the extent of this principle is to be applied in a wider context ruling out the element of escape.
- In cases where strict liability applies, compensation paid is according to the nature and quantum of damages caused but in cases of absolute liability, compensation or damage to be paid is exemplary in nature. The amount decided upon should be more than the damage caused as industrial hazardous accidents generally causes mass death and destruction of property and environment.

MISTAKE OF LAW

- *Ignorantia juris neminem excusat*
- ignorance of law is not an excuse.
- There is a legal presumption that everyone knows the law.
- Reasons for such presumption:
  - The law is in legal theory, definite and knowable; it is therefore the duty of every man to know that part which concerns him, therefore, innocent and inevitable ignorance is impossible.
  - Even if invincible ignorance of the law is in fact possible, the evidential difficulties in the way of the judicial recognition of such ignorance is insuperable
  - The law is in most instances derived from and in harmony with the rules of natural justice.

MISTAKE OF FACT

- No man is excused by reason of his ignorance of law, but it is a good defence to show inevitable ignorance of fact in the eyes of law.
- So far as civil liability is concerned, it is a general principle of our law that he who intentionally or semi-intentionally interferes with the person, property, reputation or other rightful interests of another does so at his peril and will not be heard to allege that he believed in good faith and on reasonable grounds in the existence of some circumstance which justified the act.
- In criminal law, on the other hand, the matter is otherwise, and it is here that the contrast between mistake of law and mistake of fact finds its true application.

VICARIOUS LIABILITY

- Vicarious liability means the liability of a person for an act committed by another person and such liability arises due to the nature of the relation between the two.
- Two main maxims:

  Qui facit per ailum facit per se

  Respondent superior
- These are the major relations in which vicarious liability of a person arises

  Master and Servant.

  Partners in a Partnership Firm.

  Principal and Agent.

  Company and its Directors.

  Owner and Independent Contractor.

THE MEASURE OF CRIMINAL AND CIVIL LIABILITY

- In every crime there are three elements taken into consideration in determining the appropriate measure of punishment. These are:
- The motives to the commission of the offence
- The magnitude of the offence
- The character of the offender
- In measuring civil liability, the law attaches more importance to the principle of compensation than to that of fault