

JURISPRUDENCE**CONTENTS**

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UNIT-I : NATURAL LAW

Objectives

After reading this unit the student should be able to:

- Understand various theories of natural law
- Understand intersection between law and morals
- Explain historical development of natural law theory
- Debate between natural law theory and legal positivism
- Evaluate the contribution of natural law thinking

Structure

1.1 Introduction

1.2 Meaning of Natural Law

1.3 Ancient theories

1.4 Medieval theories

1.5 Renaissance theories

1.6 Natural law and Social Contract theories

1.7 Immanuel Kant's legal philosophy

1.8 Fall of Natural Law theory in 19th century

1.9 Revival of Natural law theory in 20th century

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1.12 Self-Assessment Questions

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1.1 INTRODUCTION

Natural law is that branch of jurisprudence which is concerned with the validity of the law, rather than its structure or efficacy. Natural law thinking has 2500 years of history. The term 'Natural Law' has continuity but this does not mean that the concept has remained static. It has had different meanings and has served entirely different purposes. In jurisprudence the term 'natural law' means those rules and principles which are considered to have emanated from some supreme source other than any political or worldly authority. Various theories have been propounded since very early times about the source, authority and relation of these rules with law. Some say that these rules have come from God, some find their source in nature, others say that they are product of reason. Therefore, these rules have been given different names by different jurists such as Divine law, Moral law, Natural law, Universal Law, Higher law, Ideal Law and so on.

1.2 MEANING OF NATURAL LAW

The term 'natural law' like 'positivism' has been variously applied by different people at different times. Dias has tabulated them as follows:

- i) Ideals which guide legal development and administration.
- ii) A basic moral quality in law which prevents a total separation of the 'is' from the 'ought'.
- iii) The method of discovering perfect law.
- iv) The content of perfect law deducible by reason.
- v) The conditions sine quibus non for the existence of law.

Dias had drawn a distinction between two kinds of natural law thought: 'natural law of method' and 'natural law of content'. The former was the older dating from ancient times and was also prevalent in the early middle ages. It concerned itself with trying to discover the method by which just rules may be devised to meet ever-varying circumstances. It is a prescription for rule-making not a catalogue of rules. The 'natural law of content' was a feature of the 17th and 18th century and was characterised by attempts to deduce entire bodies of rules from absolute first principles.

Natural law theory has a history reaching back centuries BC. There is no one theory: many versions have evolved through out this enormous span of time. Natural law theory should not be dismissed simply on account of its variety. A brief discussion of natural law theories shall be presented in the historical order to give an idea of the various ideologies that it tried to establish from time to time and its effect on law. Natural law theories may be divided into four classes for the purpose of our study:

1. Ancient theories
2. Medieval theories
3. Renaissance theories
4. Modern theories.

1.3 ANCIENT THEORIES

Natural law thinking has occupied a pervasive role in the realms of ethics, politics, and law from the time of Greek civilization. If we start our survey of the legal theory of the Greeks rather than that of some other nation, it is because the gift of philosophical penetration of natural and social phenomena was possessed to an unusual degree by the intellectual leaders of ancient Greece. The legal conceptions of the archaic age of the Greeks are known to us through the epic works of Homer. Law at that time was regarded as issuing from the gods and known to mankind through revelation of the divine will. Law and religion remained largely undifferentiated in the early period. The forms of law making and adjudication were permeated with religious ceremonies, and the priests played an important role in the administration of justice. The King, as the supreme judge, was believed to have been invested with his office and authority by God himself. A burial of the dead was regarded by the Greeks as a command of the sacred law, whose violation would be avenged by divine curse and punishment.

The Greek thinkers developed the idea of natural law and laid down its essential features. Heraclitus (530 - 470 B.C.) was the first Greek Philosopher who found natural law in the rhythm of events. He turned to nature to say that in nature, all things - sun, moon, seasons, plants and animals - follow a certain definite order and deducible therefrom that nature must have rules for the orderly conduct of everything and therefore for man too, and it must be ideal law. This led to a conception of natural law as the higher law which the Greek philosophers declared should be the model for all man made laws.

The Greek concept of natural law may be explained thus: Animals act by instincts. Man as part of the nature must also have instincts, which set passions in him. But he is something more than an animal because he is endowed with a will governed by an intellectual faculty which is called reason. Man's power of reason enables him to suppress his instinct and act against its dictates. He can act or not, as he pleases. This faculty of reason is part of nature working in man. It inspires a sense of good and evil. It induces conduct, which is consistent with good conduct and forbids evil conduct. The criteria, which distinguish good from evil, right conduct from wrong conduct, are the instinctive laws of nature.

The instability of political institutions and frequent changes in law and government in a small city states of Greece made some jurists to think that law was for the purpose of serving the interests of the strong and was a matter of expediency. Against changing governments, arbitrariness and tyranny, philosophers started thinking of some immutable and universal principles. This gave them the idea of natural law.

Socrates (470-399 BC) was a great inquirer of truth and moral values. He said 'virtue is knowledge and whatever is not knowledge is sin'. A very systematic and logical expression of

the idea we find in Socrates. He said that like ‘natural physical law’ there is a ‘natural moral law’. Man possesses ‘insight’ and this ‘insight’ reveals to him the goodness and badness of things and makes him know the absolute and eternal moral rules. This human insight is the basis to judge the law. Socrates did not say that if the positive law is not in conformity with moral law it would be disobeyed. Perhaps that was why he preferred to drink poison in obedience to law than to run away from the prison.

Plato (429 - 348 B.C.) supported the same theory. In Plato’s philosophy, a clear cut distinction is there between his thinking about justice and his ideas about law. His approach to justice was metaphysical based on divine inspiration. This confounded law with religion and morality, and made law as a matter of faith and belief. Justice meant in Plato’s view that a man should do his work in the station of life to which he was called by his capacities. Every member of society has his specific functions and should confine his activity to the proper discharge of these functions. Some people have the power of command, the capacity to govern, others are capable of helping those in power to achieve their ends, as subordinate members of the government. Plato says “to mind one’s own business and not to be meddlesome is justice”.

Plato realised that even in his ideal commonwealth disputes will arise which must be decided by the public authorities. It is the theory of the Republic that in deciding such controversies, the judges of the state should have a large amount of discretion. Plato does not wish them to be bound by fixed and rigid rules embodied in a code of laws. The State of the Republic is an executive state, governed by the free intelligence of the best men rather than by the rule of law. According to Plato “Justice is to be administered without law”. The non-law state was upheld by him as the highest and most perfect type of government. Its effective operation required men of the highest wisdom and infallibility of judgment.

It is in Aristotle (384-322 BC) that we find a proper and logical elaboration of the theory. According to him, man is a part of nature in two ways: first, he is the part of the creatures of God; and second, he possesses active reason by which he can shape his will. By his reason man can discover the eternal principles of justice. The man’s reason being the part of the nature, the law discovered by reason is called natural law. Natural law is inherent in the nature of man. As nature is common to all races and nations, natural law must be the same for all.

Aristotle’s contributions to legal theory was considerable:

- 1) He conceived man to have a dual character, as part of nature man is apt to act under instinctive emotions, but he possesses a will of his own by which he can master nature and control his emotions according to his notion of right and wrong.
- 2) He conceived natural law as inherent in human reason and as the ideal to which all other laws should conform.
- 3) He stressed the need to supplement law with equity. Whenever a general proposition of law is found to work hardship in particular circumstances of a case, equity must be applied to mitigate and rectify its harshness.
- 4) He declared law to bind not only the people but the government as well.

5) He drew a distinction between 'distributive justice' and 'remedial justice'. The former connoted equal treatment of those equal before the law. Distributive justice has to classify persons as equals and non-equals. Injustice would arise when equals are treated unequally, and when unequals are treated equally. The practical significance of this proposition would depend on who are treated as equals before the law. It had long been held that freemen and slaves were not equals, nor blacks and whites, nor men and women, and with such discriminations equality for equals was held to rule. Even under Article 14 of the Constitution of India, courts have upheld classifications of different groups as equals and unequals.

Aristotle says of political justice part is natural, part legal - natural which everywhere has the same force and does not exist by people's thinking this or that; legal, that which is originally indifferent, but when it has been laid down is not indifferent.' He made a useful distinction between natural justice which is universal and conventional justice which binds only because it was decreed by a particular authority. However, the question as to the legal consequences of a collision between a rule of natural justice and a positive enactment of the state is left unanswered by Aristotle. He clearly admitted the possibility of an 'unjust law' but he does not say categorically that positive law which conflicts with natural justice is invalid.

An incisive change in Greek legal thought took place in the fifth century B.C. Philosophy became divorced from religion. Law came to be regarded not as an unchanging command of a divine, but as a purely human invention, born of expediency and alterable at will. The concept of justice was likewise stripped of its metaphysical attributes and analysed in terms of human psychological traits or social interests. The thinkers who performed this 'transformation of values' were called the Sophists. And they may be regarded as, according to Bodenheimer, the first representatives of philosophical relativism and skepticism.

Thus the philosophers and sophists in Greece developed a general omnibus theory of state, society and law as philosophers rather than as jurists.

In Rome, Stoics built up on the theory of Aristotle but transformed it into an ethical theory. According to them, the entire universe is governed by reason. Man's reason is a part of the 'universal reason'. Therefore, when he lives according to reason, he lives according to nature or lives naturally. Stoics used their famous phrase 'live according to nature'. The laws of nature are of universal application and are binding on all men. Positive law must conform to the 'natural law'. The Stoic philosophy greatly influenced the Roman theory of natural law.

Although the Greek philosophers and Stoics expounded the doctrine of higher law of nature based on reason in the philosophical sense, it was Romans who explained natural law as lawyers and jurists in a legal manner. Romans gave practical application to natural law. Roman jurists contributed for the scientific development of natural law strictly on legal basis which finally resulted in the famous Code of Justinian. By the time of Justinian the Roman jurists were able to distinguish the *jus naturale*, the *jus gentium* and the *jus civile*. Julius Stone rightly pointed out that natural law with the Greeks remained a philosopher's speculation whereas at Rome natural law was given a revolutionary role in legal development.

The creative period of natural law commenced when the Roman Practors began their compilation of *jus gentium*. The *jus civile* of the Romans applied only to the Roman citizens. It

did not apply to the foreign settlers in Rome or to other parts of the Roman Empire. The Roman Praetors made use of the *jus naturale* as a universal law, to apply it to all non-Romans. They adopted the usages and customs which were commonly observed by different people and were consistent with moral reason and were also in consonance with rules of the *jus naturale*. Thus they developed a code of laws applicable to foreigners under the name of *jus gentium*. In later ages, the *jus gentium* was used to moderate the rigidity of the *jus civile* and convert it into a refined legal system, which became subsequently a model law for many legal systems of the world. Thus, Roman jurists used natural law to modify, to refine and to expand their laws.

Cicero (104-43 B.C.) in his work *De Legibus* examined the basis of law. His major contribution to jurisprudence rests upon his concept of 'nature' as providing a source of rules by which man ought to live. To him law is the highest reason implanted in man. The highest form of reason may be discovered in nature. Law is the standard by which justice and injustice may be measured. Cicero stated:

"True law is right reason in agreement with the nature, it is of universal application, unchanging and everlasting.... It is a sin to try to alter this law, nor is it allowable to attempt to repeal any part of it, and it is impossible to abolish it entirely.... God is the author of this law, its promulgator and its enforcing judge".

According to Cicero, natural law is universal and immutable, it is higher law and is discoverable by reason.

1.3 MEDIEVAL THEORIES

Catholic philosophers and theologians of the middle ages gave a new theory of natural law. When Rome lost its supremacy, the Christian church began to assert its power. It became the universal religion of Europe and was organized on a hierarchical pattern with the Pope as its head. The Religious authorities began to claim supremacy over the political authorities and asserted that the Christian teaching was the embodiment of the supreme law. During the medieval period, natural law was given religious colour.

St. Augustine (354-430 A.D.) asserted that a king made law could be disregarded if it was contrary to the law of God. The Church as the exponent of divine law could interfere with and override the state. It implied that the ultimate interpreter of the law was the Pope, and not the Emperor. This led to a struggle for power between the Church and the state. As both the State and the church invoked the natural law to support their assertions, it marked a period of authority for natural law. St. Augustine believed that divine wisdom was revealed in the scriptures. The moral precepts of Holy Scriptures were the precepts of the natural law. According to him, man is governed by two laws, the law of nature and custom. The law of nature contained in the scriptures and the gospel. He said that natural law overrides customs and constitutions. Customs and constitutions which contradict natural law are void and of no effect. He asked 'what are States without justice, robber bands enlarged?'

St. Thomas Aquinas (1225-1274) propounded the scholastic theory of law in the middle of the 13th century. He defined law as "an ordinance of reason for the common good made by him who has the care of the community and promulgated". His theory may be summarized thus:

the world is ruled by divine providence and therefore the divine law is supreme in the world; a part of the divine law is given by God himself to man in the Scriptures; and they shall not be transgressed by any man made law; and another part of divine law is revealed in the inherent reason of man and is called the natural law. He asserted the supreme authority of the church as the custodian and interpreter of the divine laws.

Acquina's four categories of Law:

- i) Lex aeterna (eternal law): It is divine reason known only to God. It is God's plan for the universe. It is absolutely perfect.
- ii) Lex naturalis (Natural law): Participation of the eternal law in rational creatures. It is discoverable by human reason.
- iii) Lex divina (Divine Law): It is God's positive law for for mankind. It is revealed in the Scriptures like Ten Commandments.
- iv) Lex humana (Human Law): It is humanly posited law. Enacted for the common good. Supported by reason. It provides the details to solve day to day problems.

According to Aquinas, human law or positive law must remain within the limits of that of which it is a part. He pleaded for establishing the authority of the church over the law. In the words of Aquinas, 'The eternal law is the plan of Divine providence and, therefore, is absolutely perfect. The natural law on the other hand, is only imprint of the eternal law which is finite and cannot be absolutely perfect. The positive law or the human law is really an implementation of natural law and varies with changing circumstances and conditions of social life.

In the controversy for power, the State, which was organized on a feudal foundation conceded the right of private property to be a natural and inviolable right of the acquirer, but the Catholic church refused to recognize the private property to be natural right. This gave an impetus to the State over the Church, and consequently positive law came to prevail over religion and compelled divine law or natural law to recede to the background of social life. The position became stronger for positive law with the revolutions marked by the renaissance and reformation, which brought forth the spiritual emancipation of the individual and the emergence of the modern state. The individual wanted protection of their life and liberty. The Protestants denied authority of the church to expound the law of God. In this new set up the theory of natural law came again to prominence but was set on a new basis. It was no more a divine law with spiritual authority, it became the law of the reason with intellectual authority.

1.4 RENAISSANCE THEORIES

This period marks a general awakening and resurgence of new ideas in all the fields of knowledge. Rationalism became the creed of the age. The development in the field of commerce created new classes in the society which wanted more protection from the state. Colonization created a rivalry among the states. It gave birth to the conception of nationalization.

Hugo Grotius (1583-1645) built his legal theory on social contract. His view is that political society rests on a social contract. It is the duty of the sovereign to safeguard the citizen because the former was given power only for that purpose. The sovereign is bound by natural law. The law of nature is discoverable by man's reason. The reason is not the reason of Divine, it is a self supporting reason of the man. Grotius declared that natural law would exist and be valid even if there were no God. For him, the natural law is the dictate of right reason.

Grotius asserted that man always desired to live in peaceful society. This desire for peaceful society compels him to observe certain rules of conduct by intelligent reason. That reason constitutes rudimentary principles of natural law. Thus arose the obligation to fulfil promises, the respect for other's property, the liability to repair the damage caused by one's fault etc. The human reason and natural law are common to mankind. The rulers must also have a peaceful society. The society of rulers is the society of nations. The law of nations is originally no other than the law of nature applied to nations. In this way, Grotius conceived a system of international law. The greatest creative work done by the natural law theory was its giving birth to the international law in the 17th century.

Friedmann enumerates four legal principles as common to private law and international law.

- i) Pacta sunt servanda (agreements must be fulfilled), rebus sic stantibus (agreements must accord with real affairs)
- ii) Principle of Estoppel: which says that a person cannot deny what he has impressed on others by his own conduct. This rule may help to solve controversies on legal aspects of state promises to foreign investors.
- iii) The principle of unjust enrichment: which insists that none should enrich himself at other's expense without lawful cause.
- iv) The principle of Abuse of rights: which expresses a social duty in the exercise of private rights. It is an elastic principle which can be stretched even to nullify a right.

These principles which are called by Grotius as 'natural law' and modern jurists called 'general principles of law' will become the foundations of the international law.

1.5 NATURAL LAW AND SOCIAL CONTRACT THEORIES

The theory of Natural Law in the modern classical era became a theory of natural rights of man and States. Natural law was used for the emancipation of people from political tyranny. Struggles for emancipation rose in different ways in the English Revolution of 1688, the American Declaration of Independence of 1776, and the French Revolution of 1789. The Governments claimed unlimited power over the people, and the people claimed democratic rights to control the government. Both relied on social contract theories.

Hobbes, Locke and Rousseau had expressed various views on the origin of the State. From a state of nature with no law, no order, no government, men have at sometime passed to the state of peaceful society by a common agreement to respect one another to live in peace and

to obey a government set up by themselves to guarantee their life, liberty and property, and it was such agreement that gave rise to the organization of State. Social contract theory implies that the State is creation of the consensus of the people and the source of the political power is the will of the people. Natural law has been used to justify revolutions on the ground that the law infringed individual's natural rights.

1.7 IMMANUEL KANT'S LEGAL PHILOSOPHY

The close of the 18th century and the beginning of the 19th century was the watershed of the natural law philosophy. The period produced two greatest legal thinkers -Immanuel Kant and Jeremy Bentham. While Kant was the staunch supporter of natural law theory Bentham was the founder of analytical positivism. Kant conceived the law of nature as a principle of human reason; a kind of rational system capable of rational deductions on ethical lines. Such a pure reason cannot be derived from empirical observations or by a process of induction. According to Kant, the law of reason is purely logical category not influenced by external factors or ends or empirical choices or experiences. Law of reason is a moral imperative directing the human being to do what is morally good for all at all times and places irrespective of ends, considerations or selfish desires.

Kant made a distinction between hypothetical and categorical imperatives. He said that all imperatives command human will either hypothetically or categorically. Hypothetical imperatives present the practical necessity of possible action as a means to achieve something which one desires. Thus, hypothetical imperative is selfish, interest oriented and can never be a universal imperative. The categorical imperative would be one which presented an action as of itself objectively necessary without any particular regard. It is to be done for its own sake because it is a dictate of pure reason. It is obligatory and has to be complied with in all times and all places. Kant's test of rationality of an imperative is its universality. Accordingly he gave the content of categorical imperative as 'Act in such a way that maxim of your action can be made the maxim of a general action.'

1.8 FALL OF NATURAL LAW THEORY IN 19TH CENTURY

Two principal developments were responsible for the decline of natural law philosophy in 19th century. They are: the rise of legal positivism and non-cognitivism in ethics. In legal theory the overall hegemony of natural law had been overshadowed by Montesquieu's *Esprit Des Lois*. He emphasized that the efficacy of a law must be tested by its effects in societies. He conceived law to represent the relations of men in a society and therefore influenced by the circumstances and conditions of the society such as climate, soil, environment, religion, occupation, customs, commerce, riches of the people, etc.

It was David Hume in his 'Treatise of Human Nature' gave a decisive blow to the natural law philosophy which was based on the faculty of reason in man. According to Hume, reason cannot dictate a course of action. He conceived the moral sense as the force that induces right conduct. Law is to prescribe right conduct. Law must therefore be the formulation of moral sense. According to Hume, the moral sense is determined by popular pleasure and pain. That action is moral which causes pleasure in others, that action is immoral which causes pain in

others. This conception of moral sense is linked not with justice, but on popular approval. It upholds public interest.

In the 19th century the popularity of natural law theories suffered a decline. The historical and analytical approaches to the study of law were more realistic and attracted the jurists. 19th Century legal thinking gave prominence to certainty in law. The scientific outlook that dominated the era turned the attention to analytical positivism. In the changed climate of thought it became difficult for natural law theories to survive. Thus 19th century was, in general, hostile to the natural law theories. However, towards the end of the 19th century a revival of natural law theory took place.

1.9 REVIVAL OF NATURAL LAW THEORY IN 20TH CENTURY

With the dawn of the 20th century a reaction set in, and the search for an ideal justice commenced again. This time it is recognized that natural law can supply only a framework of principles, and it must be left to the positive laws to supply the flesh and blood to the legal system.

The emergence of ideologies such as Fascism and Nazism caused development of counter ideologies and contributed to the revival of natural law philosophy.

Stammler and Kohler hold important place among the philosophers who supported natural law theory in the 20th century. Stammler says that all positive law is an attempt at just law and what is just law or justice is a harmony of wills or purposes within the framework of the social life. He says law is valid even if it does not conform to this 'just' but attempt should be made to bring it near its aim. This concept has been called by Stammler as 'natural law with a variable content.'

Kohler says that legal interpretation should not be materialistic. He says that there is no eternal law. Taking the requirements of culture into consideration law can serve its purpose better. Kohler is convinced of Stammler's theory of 'natural law with variable content'. He says 'there is no eternal law. The law that is suitable for one period is not so for another period, we can only strive every culture with its corresponding system of law.'

The approaches of Stammler and Kohler are very scientific and logical and free from the rigid and a priori principles.

1.10 RESURGENCE OF NATURAL LAW - FULLER

Fuller makes attempts to argue against the separation of law and morals. In his 'The Morality of law' he expounded the relation between law and morality. He regards law as a purposive system and its particular purpose being that subjecting human conduct to the control and guidance of legal rules. According to Fuller, law has external and internal morality. External morality is 'morality of aspiration'. Inner morality comprising of 'irreducible minimum requirements' with which a law has to comply. He lays down eight requirements of inner morality of law which legal system must comply if it is to succeed as law. They are: 1) there must be rules 2) the rules must be published 3) rules must be given prospective operation 4) rules must be understandable 5) rules must not be contradictory 6) rules must not require conduct that

is impossible 7) the rules must not be changed frequently 8) there must be congruence between the rules declared and their actual application. These eight conditions constituting 'inner morality of law' are procedural version of natural law.

1.11 SUMMARY

The theory of natural law is based on a belief that there are principles of law stronger than any statute. Nature is considered to be the supreme legislator. Natural law is universal, immutable and discoverable by reason. The validity of positive law should be tested by reference to absolute values, which can be deduced by human reason, which is part of nature. There is a necessary connection between law and morality. Laws lacking moral validity are unjust. Unjust law is not a law. Aquinas interpreted law as an aspect of God's plan for mankind. Grotius observed that even if the God did not exist, there is a natural law with the same force and content. Due to the rise of legal positivism, 19th century was a dark period to natural law thinking. However 20th century has witnessed a revival of natural law philosophy. Stammler suggested a theory of natural law with a variable content.

1.12 SELF-ASSESSMENT QUESTIONS

1. Explain the nature, development and influence of natural law
2. Discuss St.Thomas Aquinas' scholastic theory of law
3. What are the reasons for the decline of natural law in 19th century and revival of natural law in 20th century?
4. Explain Fuller's contribution to natural law thinking.

1.13 FURTHER READINGS

Dias, Jurisprudence, Aditya Books Private Ltd., New Delhi

Edgar Bodenheimer, Jurisprudence, Universal Book Traders, Delhi

Friedmann, Legal Theory, Fourth Edn.Stevens and Sons, London

L.L.Fuller, The Morality of Law, New Heaven, London.

UNIT-II POSITIVISM

Objectives

After going through this unit you should be able to:

- Use the term positivism with caution
- Understand meanings of the term positivism
- Explain positive theories of Bentham and Austin
- Elaborate essentials of Austin's definition of law
- Discuss the merits and demerits of analytical positivism
- Understand the relationship between legal positivism and natural law theory

Structure

2.1 Introduction

2.2 Meaning of Positivism

2.3 Bentham's positivism

2.4 Austin's positivism

2.5 General and Particular Jurisprudence

2.6 Imperative Theory of Law

2.7 Command

2.8 Sovereignty

2.9 Criticism of Austin's theory of Sovereignty

2.10 The problem of locating sovereign under Modern Constitutions

2.11 Sanction

2.12 General Criticism of Austin's theory

2.13 Summary

2.14 Self-Assessment Questions

2.15 Further Readings

2.1. INTRODUCTION

In the legal literature of the 20th century the expression 'legal positivism' has been more and more frequently used. Unfortunately it has no generally recognised meaning. Considerable confusion has ensued from its being used in several different senses and from lack of distinction between these.

In its and traditional connotation the term 'positivism' signifies a view on the nature of law that all law is positive in the sense of being the expression of the will of a supreme authority, to the exclusion of the supposed law of nature.

Most often the characteristic feature of legal positivism is said to be that it separates law and morals, meaning that the rules of law are not fundamentally moral rules. Austin's theory is a clear case of legal positivism in this sense. Though Austin's theory has always carried the name of analytical jurisprudence now it is often referred to as a kind of legal positivism. Since Austin regarded the rules of law as commands of the actual holders of power, he could not reasonably maintain that they necessarily had a moral content. Salmond speaks of 'positivist law' meaning the interpretation of law by writers who have more or less accepted positivist philosophy derived from August Comte. C.K.Allen seems to make use of the term only with regard to Kelsen, whose theory is called positivistic because it is concerned exclusively with the actual and not with ideal law. Roscoe Pound mentions only the followers of August Comte as 'positivists'. Jerome Hall says, the heart of legal positivism and its great contribution to practical life is 'its separation of positive law from morals, mores, religion, fashion, the bye-laws of sub-groups and so on' and its corollary is 'the sanctioned command of a determinate sovereign or an equivalent formula'. The same separation of law from other systems of rules is found in the theory of Hans Kelsen. But the separation of law and morals is not bound up with either Austin's or Kelsen's view on the nature of law. An author who holds a different theory on the nature of law may very well be a positivist in the sense that he declines regarding a moral element as necessarily belonging to the concept of law.

2.2. MEANING OF POSITIVISM

Prof.H.L.A.Hart enumerated five separate meanings of the expression 'positivism'

- i) Laws are commands (This meaning is associated with the two founders of British positivism – Bentham and Austin)
- ii) The analysis of legal concepts is worth pursuing and distinct from sociological and historical inquiries
- iii) Decisions can be deduced logically from predetermined rules without recourse to social aims, policy or morality.
- iv) Moral judgments cannot be established or defended by rational argument, evidence or any other proof.

- v) The law as it is actually laid down, has to be kept separate from the law that ought to be.

Hart, who regards himself as a positivist, takes legal positivism to mean the simple contention that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they often do so.

2.3 BENTHAM'S POSITIVISM

The first positivist was Jeremy Bentham. His work 'The Limits of Jurisprudence Defined' contains the views on analytical jurisprudence. His whole outlook was determined by Hume's empiricism which he enthusiastically embraced. The Chimera of the social contract had been effectively annihilated by Hume, he thought, and he scorned Blackstone's attempt to find a basis for the common law in this formidable non-entity, the Law of Nature'. His purpose was to build a theory of law on 'experience only'. He condemned natural law as silt non-sense containing all kinds of silly ideas. He also condemned common law as mock-law, sham law, quasi law – a mischievous delusion. It was Bentham who destroyed and demolished natural law systematically by giving currency to the concept of utility as the principle of the greatest good of the greatest number. According to him the purpose of law is to promote pleasure and to avoid pain. The basis of law should be the maximum happiness of maximum number.

Bentham defined a law 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 class of persons, who in the case in question are or are supposed to be subject to his power.

In Bentham's view every law consists of command or prohibitions. Supreme power belonged to the King, Lords and Commons. They issued commands and prohibitions that were habitually obeyed. To ensure obedience, threats of evil consequences must be attached to the commands and prohibitions. The person or assemblage of persons possessing supreme power in a political community, Bentham called the sovereign. Strictly speaking law is what the sovereign wills with regard to the conduct of the subjects.

Bentham's theory of law is thus imperative one. Bentham defined a law in terms of sovereign and defined sovereign in terms of state. According to Bentham every law may be considered in eight different respects: Source, subjects, objects, extent, aspects, force, remedial appendages and expression. In his analysis of law, all considerations of justice and morality disappeared from his approach.

John Austin followed the footsteps of his teacher Bentham. Like Bentham, Austin defined law as commands by a political superior to those who are in a state of subjection to him. The 'separation of law and morals' is often regarded as the most prominent feature of Austin's theory.

2.4 AUSTIN'S POSITIVISM

John Austin, the famous English jurist, propounded his theory of law in his treatise 'Province of Jurisprudence Determined' which was republished posthumously by his wife Sarah

Austin under the title 'Lectures on Jurisprudence'. As Sarah Austin observed in her preface to the book his early life in the army though short appears to have had its own impact on Austin's approach to jurisprudence.

Austin defines jurisprudence as the philosophy of positive law. Austin meant by positive law the law laid down by a determinate human superior or sovereign for the purpose of regulating the conduct of his subjects. That is, Austin emphasized that jurisprudence deals not with every rule of action but only those rules, which are laws properly so called or what are called the laws of lawyers and law courts. By this emphasis on positive law, Austin wanted to determine the true scope and province of jurisprudence.

John Austin was born in 1790. At the age of sixteen he joined the army and served as lieutenant upto 1812. Then he resigned and began studying law. In 1818, he was called to the Bar. He practised for seven years without success. In 1826, when the University of London was founded, Austin was appointed as Professor of Jurisprudence. He delivered lectures there. First part of the lectures was published in 1822 under the title of 'The Province of Jurisprudence Determined.' The second edition of 'The Province of Jurisprudence Determined' was published by his wife in 1861. It cannot be denied that Austin took from Bentham the tool of analysis.

2.5 GENERAL AND PARTICULAR JURISPRUDENCE

Austin refers to two aspects of jurisprudence, general and particular. By general jurisprudence, he means the philosophy of positive law and by particular jurisprudence he means the science of particular law or the science of any system of positive law prevailing in any country. General jurisprudence is concerned with the study of those fundamental principles which are common to the different systems of law prevailing in various countries. Particular jurisprudence is concerned with the underlying principles of the legal system of a particular country. Particular jurisprudence is the science of any actual system of law or of any portion of it.

Austin while recognizing that every system has its specific and particular characteristic differences, yet he discovered certain common, similar general principles in all politically organized and developed or matured systems as distinguished from immature backward or crude systems. He describes these common basic laws and principles as 'general jurisprudence' as distinguished from specific local laws obtaining within one particular legal system as 'particular jurisprudence'. In this manner Austin classifies jurisprudence into two parts - general and particular jurisprudence.

A legal system is the entire structure of laws in a political society. Every legal system may be found to rest on certain basic concepts and to contain a mass of working details. The working details may vary widely from system to system; but the basic concepts are common to all legal systems. For example, one legal system may provide that theft shall be punished with death, while another system may provide that it shall be punished with imprisonment for three years. Here the concept of theft being a punishable crime is common to both legal systems. One system may hold marriage to be a sacrament and therefore not terminable by divorce, while another system may hold it to be a mere contract terminable by divorce; but a recognition of marriage as foundation for legitimacy of off-springs and for inheritance of property is common

to both. It may be found that certain legal concepts, as crime and punishment, right and property, are common to all legal systems. Such concepts are the basic elements of law. It is the province of jurisprudence to explore and explain such basic elements of law. That part of jurisprudence which deals with the basic elements of law, which are common to all legal systems is called General Jurisprudence.

Particular jurisprudence can be described as a specific national jurisprudence which is distinct, different and separate from other legal systems. Particular jurisprudence is, therefore, the study of positive law of an individual legal system. Austin said: "Particular jurisprudence is the science of any actual system of law or any portion of it. The only practical jurisprudence is 'Particular'. The proper subject of particular jurisprudence is concerned with specific state or national law or particular area of such state law."

Holland rejects Austinian division of jurisprudence into general and particular. According to him, science can never be particular. Assuming jurisprudence to be a science, he denies particularity to jurisprudence. Jurisprudence as a science should be treated as incapable of being divided into these two branches - general and particular.

2.6 IMPERATIVE THEORY OF LAW

According to Austin, law in its most general and comprehensive sense means a rule laid down for the guidance of an intelligent being by an intelligent being having power over him. He said: "A law, in the most general and comprehensive acceptation in which the term, in its literal meaning, is employed, may be said to be a rule laid down for the guidance of an intelligent being by an intelligent being having power over him." In this sense law may be classified as 'laws improperly so called' and 'laws properly so called'.

'Laws improperly so called' comprise 'Laws by analogy' and 'laws by metaphor'. 'Laws by analogy' are rules set out and enforced by mere opinion by an indeterminate body of men in regard to human conduct, such as the law of honour. Austin included under this heading much of what is usually termed 'international law'. 'Laws by metaphor' are laws such as are observed by the lower animals, or laws determining the movements of inanimate bodies.

Austin subdivided 'laws properly so called' into laws set by God to men which are called the Divine Law, and laws set by men to men which are called Human Laws. Human Laws are again classified by Austin into two types: They are (i) laws set by political superiors and (ii) the laws set by others who are not political superiors.

According to Austin the laws set by political superior are the laws in strict sense or the positive law. The laws set by person who are not political superiors are not laws strictu sensu. They are merely positive morality enforced by public opinion in any society. These rules of 'positive morality' are 'positive' because they are of human origin in contradistinction to those laws which are of Divine origin or the Divine Law and again these rules are called mere 'morality'. According to Austin 'Positive laws' are the subject matter of jurisprudence.

According to Austin, law strictly so called is a command of a political superior or sovereign addressed to the members of a political society followed by a sanction. In this sense every positive law consists of three elements: Command, Sovereign and Sanction.

2.7 COMMAND:

According to Austin 'Every law is command'. Austin defined command thus: "If you express or intimate a will that I shall do or forbear from some act and if you will visit me with an evil in case I comply not with your wish, the expression or intimation of your wish is a command." The command of the sovereign is a **general command** and not a particular command. A general command, according to Austin, relates to certain acts or forbearances of a class and not to certain specific acts or forbearances. A command directing the people "to get up at 6.00 a.m. tomorrow" is a particular command whereas a command requiring the people "to get up at 6.00 a.m. daily" is a general command. Command contains seven elements. They are: two parties, intention, intimation, duty, sanction, generality and superiority.

2.7 SOVEREIGNTY

Etymologically, the term 'sovereignty' is derived from the French word "soverain" which means superiority. In this sense, 'sovereignty' is relative in that it denotes the superiority of one as against the other, it is in this context that the higher courts are called 'Courts soverains'. Originally, the concept was applied to denote the supremacy of a tribal chief or a personal monarch without any implications of absolutism or arbitrary power. Its subsequent application to and association with State power caused considerable confusion and controversy. Sovereignty means supreme power or authority. A politically organized society within a territory to be called a State must have the sovereignty. It means that it must be free from external control and the people within it must render obedience to it.

The concept of sovereignty that emerge as an aftermath of Reformation was first articulated by the French philosopher Jean Bodin in 1576 in his book De Republica. Writing at a time when France was rent by faction and civil war, Bodin accutely felt that need for a strong and powerful monarchy. For him the essence of statehood was supreme power of the government. However, Bodin did not champion arbitrariness. He defined a state as "a multitude of families and their common possessions, ruled by highest power and reason." The inclusion of 'reason' as the basis of power clearly shows that Bodin was envisaging a governmental power that is subject to the control of the divine laws.

It is to Thomas Hobbes that one must look as the chief exponent of absolutism. With Hobbes the doctrine of sovereignty attained its full stature. In his famous work Leviathan (1651) Hobbes observed that man, in the state of nature, was nasty, brutish and selfish and everybody was at war with all. The men needed for their security common power to keep them in one and to direct their actions to the common benefit. 'Law is the word of him that has by right the command over others'. Law neither makes a sovereign nor limits his authority. It is might that

makes a sovereign and law is merely what he commands. Sovereign cannot be limited by anything humane or divine. His power is absolute and illimitable. It appeared plainly that the sovereign power is as great as possibly men can be imagined to make it. It is thus clear that while Bodin's sovereign was controlled at least by reason and divine laws, Hobbes sovereign was absolute and unbridled.

The high priest of sovereign power was, however, John Austin. Austin's sovereign has two hall marks he is internally the repository of supreme authority and, externally he is totally independent. Austin combined both these notions in the oft-quoted definition.

“If a determinate human superior, not in the habit of obedience to a like superior, receive habitual obedience from the bulk of a given society, that determinate superior is sovereign in that society, and the society, including the superior, is a society political and independent....”

By stating that the sovereign is a human superior, Austin excluded God as a repository of authority. Divine law is no law as it is not set and enforced by a human superior. The implications of 'determinate' superior are that Austin wants to keep out of purview vague and amorphous bodies like 'community' and public opinion. An individual like a monarch or a body of individuals like a Parliament can be sovereign but not an indeterminate body like 'people'. Sometimes it is fashionable to proclaim that sovereignty rests with the people. Dicey attempted a distinction between legal sovereign and political sovereign. Parliament can be the legal sovereign. The political sovereign will be people themselves i.e., the electorate. This view, however, attractive it may sound, is not immune to criticism. It may be recalled that Austin located sovereignty in England partly in the electorate. Locating political sovereignty in the people is purposeless. What matter is legal sovereignty? If people are sovereign, who are the subjects? This objection can be get over by pointing out that the people as a collectivity are sovereign and that the people as individuals are subjects. However, people here means electorate and from the stand point of election, it would be unrealistic to make a distinction. As most democratic countries insist on adult franchise, the so called people consists of only the eligible voters. Not all these voters would vote at any particular elections. Out of these who have actually exercised franchise, the way the majority of them has voted would be decisive. Thus, in the, ultimate analysis, 'people' means only the majority of the eligible voters. The so called majority in reality a minority of total population and sometimes a minority of even the eligible voters. In a country like India, the electorate comes into play once in five years barring mid term polls. Exercise of sovereignty by the electorate once only in five years would not fit into Austin's theory of sovereignty.

Austin's distinction between positive law and positive morality was that the former was set by a political superior and the latter was set by others who are not political superiors. In elaborating this notion he evolved his theory of sovereignty. According to Austin within a state there can be only one sovereign just as there cannot be two knives within a sheath. Sovereignty has a 'positive mark' and a 'negative mark'. The former is that as determinate human superior should receive habitual obedience from the bulk of a given society, and the latter is that the superior is not in the habit of obedience to a like superior. The sovereign receives obedience

from his people. The obedience so received need not be from all the people all the time, it is only habitual obedience from the bulk of a majority of the people. Thus the sovereign is internally supreme. Externally, the sovereign does not obey any other sovereign; he is totally independent.

Austin further lays down three chief characteristic features of sovereign authority. Sovereignty is unlimited, illimitable and indivisible.

Sovereignty is unlimited: It extends to every person and thing situated within the territorial limits of a State. A sovereign can make any law.

Sovereignty is Illimitable: Law is the command of a sovereign. There can be no de jure or legal limitations or de facto constraints on the exercise of that power. For instance, in specific cases no amount of application of force can secure total disobedience to law. Again the people can rebel against tyranny. But these limitations are intrinsic and not extrinsic. Austin went on to assert that a sovereign cannot command himself i.e., place himself under an obligation. The sovereign cannot be under a duty, since to be under a duty implies that there is another sovereign above the first who commands the duty and imposes a sanction; in which case the first is not sovereign. The power of sovereign is incapable of legal limitation

Sovereignty is indivisible: According to Austin, the sovereign enjoys plenum of sovereign power without sharing it with anybody. Division of sovereign authority amounts to destruction of the power itself. According to Austin theory, there can be only one sovereign in the state, that is to say, one person, or the body of persons in whom the totality of sovereign power is vested. Sovereign power, in other words, is indivisible and cannot be shared between two or more persons or bodies of persons.

The base of sovereignty is, according to Austin, the fact of obedience, which involves a relationship of sovereignty and subjection. Where there is no law there is no sovereign; where there is no sovereign there is no law. Law, is therefore, a command issued by a political superior to whom the majority of members of society are in the habit of obedience, and which is enforced by a threatened sanction.

2.9 CRITICISM OF AUSTIN'S THEORY OF SOVEREIGNTY

It has been questioned whether it is necessary to have sovereign in a State. A sovereign may be necessary because definition has made it so. In another sense the question is whether a sovereign is necessary as a practical matter. The short answer to the question is that there is no need for only one law making body, though in practice this might be convenient.

Salmond readily concedes that Austin's view that the sovereign must be determinate is correct. The repository of sovereign power should be ascertainable. But Austin's assumption

that sovereignty is unlimited is open to question. For instance, under Indian Constitution, the sovereign power is divided vertically between the Union and States and horizontally between legislature, executive and judiciary. The Union Legislature is sovereign in its own sphere. Apart from this, there are other limitations on both the Union as well as the State legislatures. For instance, neither of them can make law taking away or abridging the fundamental rights. Thus, the distribution of legislative power, the separation of powers and constitutional limitations clearly demarcate the spheres of competence of the respective authorities. This assignment or limitation of power is not a negotiation of sovereign power. It merely delineates the ambit or sphere of operation. What is necessary is that the authorities must enjoy full sovereign power within their respective spheres. Hence, sovereign power can be unlimited within limits; that is, sovereign power can be qualitatively unfettered within quantitative limits.

The attribute of indivisibility creates other difficulties. The question is whether sovereign authority can be vested in more than one body, not whether it can be exercised by more than one, which Austin would have admitted. Bentham showed how sovereignty could be divided. eg. the old Roman assemblies, the United States of America, and the concurrent powers of a colonial legislature and the Westminster Parliament. The doctrine of distribution of legislative power and the theory of separation of powers are clear refutation of Austin's view that sovereign power is indivisible.

Salmond points out that sovereign power is not illimitable. The Constitution lays down the limits of the exercise of sovereign power. These limitations are not merely de facto but de jure. Austin himself conceded that there are defacto limitations on sovereign power. If de facto limitations do not mitigate against the sovereign power, there is no reason why de jure restraints should detract from that power.

Dias and Hughes pointed out that Austin confused between the defacto sovereign or the body that receives obedience, and the de jure sovereign on the body that makes the law. Both need not be the same. In England the Crown receives obedience from its subjects, but the Parliament makes the law. Moreover, sovereign power may be vested in one but exercised by another by way of delegation. The status of the colonial legislation vis-a-vis the British legislature is a good example of this.

Finally, the attribute of continuity may be questioned by asking where sovereignty resides during dissolution of Parliament. Austin fell into contradiction in trying to anticipate the objection by saying that sovereignty lies with the Queen, Lords and Electorate. This is contrary to his assertion that it lies with the Queen, Lords and Commons.

2.10 THE PROBLEM OF LOCATING THE SOVEREIGN UNDER MODERN CONSTITUTIONS

Granting, without admitting, that Austin's concept of sovereignty is right, can we find and locate a body of individuals in modern democratic constitutions which would stand the test of Austin's theory.

It is now common place to refer to the British Parliament as 'sovereign' or omnipotent. It was De Lolme who said that the British Parliament can do everything but make a woman a man, and a man a woman. Jennings thought that the Parliament could do even what De Lolme thought to be impossible. The Parliament can make law treating women and men alike for certain legal purposes. Bryce says The British Parliament can make and unmake any and every law, change the form of government or the succession to the Crown, interfere with the course of justice, extinguish the most sacred rights of the citizen... and it is therefore within the sphere of law irresponsible and omnipotent. The question of 'sovereignty' of British Parliament would become problematical when we consider the possibility of a particular parliament making a law which is to remain unchanged by future Parliament or not. If it cannot, it necessarily follows that the present Parliament is not 'sovereign' and 'omnipotent'. For instance the Union of Scotland Act of 1706 contained some provisions which were to remain unchanged for ever. Nevertheless, some of these provisions were later repealed. Here, it must be borne in mind that it would be wrong to assess the sovereignty of Parliament with reference to a particular parliament as against future parliaments. The Scotland Act example would show that Parliament as an institution is sovereign.

But Austin himself was faced with a problem in locating the sovereign in the United Kingdom. He first thought that the Crown, the House of Lords and the House of Commons were together the sovereign. But the House of Commons is an elected body and hence it is the people who elect the House that have the last word. Hence, Austin corrected himself and said that it is the Crown, the House of Lords and the Electorate that are sovereign. As Dias and Hughes pointed out, treating the electorate as a part of sovereign authority would render Austin's theory meaningless as the subjects themselves would be transformed into a sovereign.

As Jennings observed, theoretically, it would be possible for the British Parliament to make law for the slaughter of all blue-eyed babies in England, or repeal for instance, the Indian Independence Act and convert India into a colony again. But practically, the sovereignty of Parliament could not reach those impossible limits.

The problem of locating the Austinian sovereign is more acute in the case of federal constitutions like those of the USA and India. Under both the Constitutions, powers are divided between the federal and state governments. Austin would not countenance the division of sovereign power and would hold that neither the federal nor the State Governments are sovereign. Within the federal as well as the State spheres, powers are again assigned separately to legislature, executive and judiciary. Hence, Austin thought that in a federal constitution sovereignty could be located only in the Constitution amending body. This view is however, open to criticism.

Under the US Constitution, for instance, an amendment to the Constitution can be made only by following procedure laid down in the Constitution itself. Thus the amending body itself is subject to the Constitution and cannot do as it pleases. The same is true under the Indian Constitution also.

Even if the above criticism is to be ignored as merely relating to procedure, it may be pointed out that the US Constitution amending body is subject to substantive limitations. It cannot for instance, deprive a state of its voting rights in the Senate, without that State's consent. In *Keshavananda Bharati's* case, the Supreme Court of India has held that the basic features of the Indian Constitution are beyond the reach of Constitution amending power. Thus, the amending bodies are subject to many limitations. Therefore, designating such a body as a repository of sovereign power is untenable.

Austin's theory of sovereignty cannot be brushed aside as irrelevant. It is a good starting point for identification of hall-marks of governmental authority as against lesser decision-making bodies. It is a good thumb-rule. The theory can, however, be misleading if one were to attribute absolute power to the sovereign and to assume that the totality of sovereign power can be found in the one individual or body of individuals. The theory fails when applied to modern democratic constitutions wherein modern trend is not towards concentration of irresponsible power but division and decentralization of power coupled with accountability.

2.11 SANCTION

Every command is also expression of a wish or desire but every expression of a wish or desire is not a command. The essential element of command, according to Austin, is the threat to inflict an evil or pain in the case the desire be disregarded. So sanction means, to borrow the words of Jerome Hall, the threat to inflict an injury, harm, loss or deprivation of life on the person who violates the command.

So what assumes the observance of law strictly so called is its enforcement by a sanction, and this is the acid test to distinguish it from rules, which are called 'law improperly'. But the compliance or observance of law strictly so called can be achieved not only by threat of evil consequences but also by promise or inducement of a reward. In fact some jurists have defined sanction to mean not only a threat of punishment but also a promise of reward. Austin rejects the connotation of sanction on the ground that it derogates from the conception of law as a command and not as an entreaty or requests.

2.12. GENERAL CRITICISM OF AUSTIN'S THEORY

Austinian theory of law has been subjected to severe criticism.

1. Henry Maine argues that Austin's theory of law is historically unsound and untrue. The theory postulates that law is a product of State or political organization. Without the State there is no law. But it is not true. Law is older than State. Customs are laws apart from the state

recognition. In primitive societies, where there was no political organization law did exist though of course, in a primitive form. Those primitive rules of law were also observed by those for whom they were intended. The observance of those primitive rules was secured by an enforcement machinery which was also equally primitive i.e., public opinion manifested through ex-communication etc. All the same, those primitive rules were also laws.

To the above criticism, Salmond has given a reply by way of defence of the Austinian theory. Salmond observes that the man in the modern sense might have evolved from the anthropoid ape. But we do not define a man so as to include an ape and like wise we need not define law in the modern sense so as to include the primitive rules. Salmond observes: "If there are any rules prior to, and independent of the State, they may greatly resemble law, they may be the primitive substitutes for law; they may be the historical source from which law is developed and proceeds; but they are not themselves law". So Salmond points out that Austin defined law in the modern sense and his definition was not intended to include primitive rules.

Salmond's analogy of ape and man is misleading and false. If one has to compare the development of law with the evolution of man, the analogy that has to be taken is that of primitive man and modern man and not of ape and man. So it is submitted that just as a definition of man should include the primitive human being, a definition of law should also be wide enough to include the primitive rules of conduct.

2. The Criticism that is levelled against Austin's theory is that even assuming that it is a definition of law in the modern sense, it is not comprehensive enough to include all modern kinds of law. International Law, not being a command of the sovereign, does not fit into the definition of law given by Austin. In fact Austin refused to recognize International law as law strictly so called and dubbed it as positive morality. The same is the case with customary law, Common law, Constitutional Law, and canon law. Uncodified Hindu and Mohammedan Laws are outside the scope of Austin's definition. Case law is missing from it. The fact is that so many branches of law do not fall within the scope of Austin's definition. His definition is too narrow and is applicable only to a statute passed by the omnipotent British Parliament with which he was so very familiar.

3. Austin's theory was also criticised by neo-Austinians. The Neo-Austinians are those jurists who while accepting Austin's definition of law as correct so far as it goes, believe that law is something more than a mere command of sovereign. Salmond observed that "Austin's theory of law is one-sided and inadequate - The product of incomplete analysis of juridical conceptions." By defining law as a command of the sovereign, Austin has ignored ethical purpose of law, namely, justice. Law is not just an arbitrary command. Law is also an instrument of justice. No doubt, an element of force is there but equally also an element of justice. Force and justice are the two horses that draw the great chariot of law. Law loses its real significance if either of the two elements is found lacking. As Blaise Pascal once observed: "Force without justice is tyrannical and justice without force is powerless". Emphasizing the point that law has two aspects, the aspect of force and the aspect of justice, Salmond observes: "Law is not right alone, or might alone, but the perfect union of the two."

Salmond further observes that it is not by a mere accident or coincidence that, in popular speech law is associated with justice. "Courts of law are also courts of justice, and the administration of justice is also the enforcement of law." Jus in latin, droit in French, Recht in German and Diritto in Italian connote not only law but also justice; those terms are ethical as well as juridical.

4. Not only that Austin ignored the ethical element, he also over emphasized the element of force or command. Austin's definition of law as a command of the sovereign is based on the assumption that every law confers rights and imposes duties. But, in reality, it is not invariably so. Laws, very often, are of permissive nature. For example, law permits but does not command a person to enter into a contract or write a will. Thus, permissive laws, are not commands but only permissions of sovereign.

Austin's definition depicts sanction as an essential element of law. Sanction as such is apparent only in criminal law. Civil law aims mostly at the proper maintenance of legal obligations. eg. the law of marriage, the law of contract, the law of succession, the law of property etc. Therefore, all laws cannot be characterized as commands.

5. Salmond makes a distinction between law in the concrete sense or 'a law' and law in the abstract sense or 'the law'. 'A law' means an act of legislature, statute, an enactment, a rule or ordinance. Thus Indian Penal Code is 'a law' But Indian Law is 'the law' and so also the law of crimes is 'the law'.

'The law' or law in the abstract sense has three sources, namely legislation, custom and precedent. Thus 'the law' is not made up of legislation or 'a law' alone. Salmond points out that "All laws do not produce law, and all law is not produced by laws." In England the system of obtaining divorce through a judgment of a court of law was introduced in 1857 by the Matrimonial Causes Act. Prior to that a couple could get divorce only by an Act of Parliament called private Acts. The purpose of a private Act was only to declare that Mr. and Mrs.X are divorced and are no more husband and wife. But this private Act though 'a law' or statute was applicable only to the parties concerned and not generally to all. Thus all laws (a law) do not produce 'the law' or law in general.

Salmond points out that Austin while defining law did not keep in mind the vital distinction between 'a law' or law in concrete sense and 'the law' or law in the abstract sense. Consequently, Austin defined law in the concrete sense whereas he ought to have defined law in the abstract sense.

6. If law is defined as the command of a sovereign to his subjects, constitutional law which purports to lay down stringent restrictions on the powers and the activities of the ruler himself cannot come within the definition. Austin's definition confronted with a problem i.e., whether state is bound by its own law. In fact, the position at present is state is bound by its own law unless exempted from the application of law either expressly or by necessary implication.

Austin held the view that even constitutional law is positive morality. But in modern states, constitutional law is regarded as a law governing the governments.

7. There are laws which are not commands but simply power conferring rules. Election statutes, Rent Acts etc. They confer rights on citizens to vote, to pay certain amount of rent and no more. In every state there exist some basic rules that define sovereignty, but these rules are not themselves the creation of the sovereign. Rules of succession in England prescribe who shall inherit the throne, before he issues any command.

2.13 SUMMARY

Bentham was the founder father of British analytical positivism. He defined law in terms of sovereign and defined sovereign in terms of state. For him, the purpose of law is to achieve the greatest happiness of the greatest number. Bentham rejected natural law and criticised judge-made law for its uncertainty. Austin borrowed the tool of analysis from Bentham. Austin defined jurisprudence as the philosophy of positive law. He defined law as command of sovereign attended by sanction. Command, sovereign and sanction are known as Austin's trilogy. He located sovereign power in legislative bodies. His imperative theory of law has been criticized on many grounds. Both jurists share a concern to limit the scope of jurisprudential enquiry.

2.14 SELF-ASSESSMENT QUESTIONS

1. What do you understand by the term Positivism?
2. Discuss the contribution of Bentham to analytical positivism.
3. Explain Austin's Imperative theory of law.

2.15 FURTHER READINGS

Dias, Jurisprudence, Aditya Books Private Ltd., New Delhi
 M.D.A. Freeman (ed.), Lloyd's Introduction to Jurisprudence, Sweet & Maxwell, London
 Raymond Wacks, Jurisprudence, Blackstone Press Ltd., London.
 L.B. Curzon, Jurisprudence, Cavendish Publishing Ltd., London.

UNIT III - HART'S CONCEPT OF LAW

Objectives

After reading this unit the student should be able to:

- Understand Hart's positivism
- Understand concepts of law, coercion and morality as different but related social phenomena
- Understand internal and external aspects of social rules
- Explain law as a union of primary and secondary rules
- Discuss Hart-Fuller controversy
- Examine Dworkin's criticism against positivism

Structure

- 3.1 Introduction
- 3.2 Definition and Theory in Jurisprudence
- 3.3 Rules of obligation
- 3.4 Law as system of Rules
- 3.5 Primary Rules
- 3.6 Secondary Rules
- 3.7 Rule of Recognition
- 3.8 Hart's view on Judicial function
- 3.9 Hart's view on Law and Morality
- 3.10 Dworkin's criticism
- 3.11 Fuller's criticism
- 3.12 Summary
- 3.13 Self-Assessment Questions
- 3.14 Further Readings

3.1. INTRODUCTION

Prof H.L.A.Hart in his Concept of Law (1961) has tried to reconcile the conflict between the theories of Austin and Kelsen that emphasize imperative authority as the essential element of a legal norm and the theories of Savigny and Ehrlich that emphasize social acceptance as essential characteristic of law.

Hart has revived interest in analytical positivism in 20th century. In his 'The Concept of Law' he expounded his legal theory as a system of rules by exploring the relationship between law and society. Hart differs from his analytical predecessors by clearly stating that his main

objective has been to further ‘the understanding of law, coercion and morality as different but related social phenomena.’ Hart’s concept of law emerged as a substitute to Austin’s theory. Hart has dealt exhaustively with the problems faced by Austin. Hart’s theory of law is entirely different from the orthodox analytical positivism of Austin and his views in regard to nature of law is different having moral and social implications. That is why Hart is styled as naturalist among positivists.

3.2 DEFINITION AND THEORY IN JURISPRUDENCE

In his inaugural lecture, published as “Definition and Theory in Jurisprudence” he observed that the questions such as “What is a State?” “What is law?” “What is right?” have great ambiguity. He believed that a fruitful approach would be to elucidate the conditions to which true statements are made in legal contexts about ‘state’, ‘law’, ‘rights’ etc. This project was pursued in his ‘The Concept of Law’. There is no definition of law or of a legal system as such in the concept. The aim is elucidation, elucidation of concepts like rule and obligation, which have puzzled generations of legal thinkers. For Hart, we cannot properly understand law unless we understand the conceptual context in which it emerges and develops.

The relationship between law and language pervades much of his thinking about law. He argues, for instance, that language has an ‘open texture’; words have a number of clear meanings, but there are always several ‘penumbral’ cases where it is uncertain of rules can provide predetermined answers to every case that may arise. This does not mean, however, that the meaning of words is completely arbitrary and unpredictable. In most cases judges have little difficulty in simply applying the appropriate rule without any need to call in aid moral or political considerations.

Hart objected to Austin’s command theory on the ground that it failed to encompass the “variety of laws”. The definition of law as a rule of conduct backed by a threat of sanction may be true of criminal law; but not of civil laws which mould many legal relations between individuals, such as contracts, wills, marriages. Punitive sanction cannot be said to be of essence of law in modern days. Hart believed the basis of legal norms to be social acceptance.

3.3 RULES OF OBLIGATION

For Hart the legal system is a system of social rules. The rules are “social” in two senses, first in that they regulate the conduct of members of societies; secondly, in that they derive from human social practices. They are not the only social rules. There are, for example, rules of morality. Like rules of morality, laws are concerned with obligations; they make certain conduct “obligatory”. But unlike rules of morality they have “systematic quality”. There is an interrelationship between two types of rules, called by Hart “primary rules” and “secondary rules.”

All societies have social rules. These include rules relating to morals, games etc., as well as obligation rules which impose duties or obligations. Obligation rules may be divided into moral rules and legal rules. Legal rules are divisible into primary rules and secondary rules.

Hart says that there is a need for obligation rules in all societies. Social acceptance predominated in primitive societies; organized authority predominates in developed societies. The reason is that rules of social conduct in primitive societies were uncertain and inefficient. According to Hart, the remedy for uncertainty is general acceptance of validity of the rules, and remedy for inefficiency is authoritative adjudications on breach of rules. These remedies necessitated the rise of a centralised authority to effectuate them, and thus arose the State. Enunciation of law by the State assured authority and certainty to it. When the government of the State was by the people through their elected representatives, the legislation involved social acceptance also.

3.4 LAW AS SYSTEM OF RULES

Natural law theorists look upon law as consisting of rules dictated by reason, positivists as rules decreed by the sovereign and realists as rules applied by courts. However, none of these theorists provides us with an adequate analysis of the term “rule” or the notion of a system of rules.

Rules are concerned not with what happens but with what ought to be done; they are imperative and prescriptive rather than indicative and descriptive. In some cases rules may be constitutive and they will define the activity in question. In others they regulate activities which activities would in any way take place whether there were rules or not. Examples of the former are rules for playing of bridge, football, tennis etc. and of the latter rules of grammar, spelling, etiquette, law etc. American realists identify the rules with regularities of judicial behaviour.

Rules involve two aspects, external behaviour such as for example, stopping at a traffic signal and internal attitude that such a behaviour is obligatory. But in order to ascertain whether a person accepts the existence of a rule we must look not to the inner workings of his mind but to what he says and how he acts.

Here there is a better explanation of compliance with law than that of Austin. Compliance arises not out of coercive process but out of a sense of obligation. And this is shown by the fact that even a person who cannot be compelled to obey the law is still considered as having an obligation to obey. Law and rules are concerned with obligation rather than coercion.

Coming now to the legal rules we find that in some respects they are analogous to the rules of games, clubs etc. But again moral and legal rules have also something in common. Both legal and moral rules are not optional. Rules of games may apply to players and that also during the time of the play. But not so the legal or moral rules. Morality may apply to every human act, while law, though narrower in scope, extends to a number of such acts. Secondly, games

and clubs are not compulsory, withdrawal and resignation are permanent possibilities. There is no such choice in the case of legal and moral rules. Law applies to a citizen whether he likes it or not. Of course, one may withdraw from a particular legal system and this involves emigration from a state but, even so, avoidance of legal systems altogether is not possible.

Hart's analysis of the term "rule" explaining the internal and external aspects of rule observance is really valuable.

3.4 PRIMARY RULES:

Hart asked us to imagine a community in which only primary rules exist without a legislature, courts or officials of any kind. Such a group lived in a pre-legal state. Hart says, such a primitive small community is closely knit by ties of kinship, common sentiment, and belief and placed in a stable environment. They could live successfully by such a regime of unofficial rules. According to Hart, primary rules are those that impose duty upon individuals and are binding because of social acceptance. In primitive community, there were only primary rules which imposed duties or obligations on individuals. Such a community suffers from three defects because of social control based on a regime of unofficial primary rules.

The first defect, in the simple social structure of primary rules, is uncertainty. In such a community there is no systematic procedure to identify as to what the rules are or what their scope is. There is no definitive test to distinguish legal rules from the other social rules.

The second defect is the static character. There is no instrument or authority in such a society for deliberately adopting the rules or introducing new rules and no way to modify the primary rules. Change is accomplished only by the slow process of growth and decay.

The third defect of the regime of primary rules is the inefficiency. There is no agency for determining the rule violations and for settlement of disputes. The rules are applied only by diffuse social pressure.

3.5 SECONDARY RULES

According to Hart, secondary rules are power conferring rules such as the laws that facilitate the making of contracts, wills, trusts, marriage etc. (Private power), or which lay down rules governing the composition and powers of courts, legislatures and other official bodies (Public power). These rules are secondary to primary rules. According to Hart, there are three kinds of secondary rules.

Hart says, the remedy for the three defects of the regime of primary rules is the supplementation of primary rules with secondary rules. The introduction of secondary rules is a step from the pre-legal state to legal state. The three defects were removed by the introduction of

three types of secondary rules. They are rules of recognition, rules of change and rules of adjudication.

The remedy for uncertainty of the regime of primary rules is the introduction of 'rule of recognition'. The rule of recognition authoritatively settles the doubts as to what the rules are and what their scope is. It provides criteria for how legal rules are to be identified, to be followed and enforced within the community.

The remedy for static character of primary rules is the introduction of rules of change. These rules regulate the process of change by conferring the power to enact legislation in accordance with specified procedures. These rules also confer power on ordinary individuals to produce changes in the legal relationships they have with others.

The remedy for inefficiency of the regime of primary rules is the introduction of the rules of adjudication. These rules confer competence on officials to pass judgment in cases of alleged wrongs and also to enforce the law. These rules provide a mechanism for effective adjudication of rule violations.

These secondary rules relate in various ways to the primary rules. Rule of recognition lays down criteria for identifying the primary rules. The rules of change provide mechanism for changing primary rules. Rules of Adjudication specify for determinations whether primary rules have been violated. Hart remarks: Law is a union of primary and secondary rules.

3.6 RULE OF RECOGNITION:

Hart's view is that a legal system arises from the combination of primary and secondary rules. Primary rules are those which simply impose duties; secondary rules are power conferring rules. Of secondary rules, the most important are those which confer power to make and unmake other rules in the system. In other words, rules that determine the criteria which govern the validity of the rules of the system. Hart called them as rule of recognition. These are rules of a higher order, being rules about the other rules of the legal system. They can be looked at from two different angles. We may regard them as prescribing the method and procedures for creating, annulling and altering rules of law. Or we may look on them as tests to discover whether a given rule is one of the legal system in question.

The English rule about parliamentary sovereignty at one and the same time lays down the procedure for legislation and serves as one means of identifying rules as rules of English law. It is these rules of recognition which in Hart's view transform a static set of unrelated rules into a unified dynamic legal system capable of adoption to social change. He parts company from Kelsen, however, in refusing to regard them as hypothesis. The basic rule of a legal system is not something which we have to assume or postulate. On the contrary it is itself a rule accepted and observed in the society in question. Unlike the other rules of the system it cannot, of course,

be derived from any more basic rule. It is nonetheless a rule - a customary rule, acceptance and observance of which finds expression in social practice and the general attitude of society.

Although the rule about parliamentary sovereignty in England cannot be derived from any other rule of English law, it is more than a hypothesis, it is a customary rule of English law, followed in practice and regarded as a standard requiring compliance. Certainly the basic secondary rules concerning the criteria for identification provide unifying force to a legal system. But are there not other factors of equal importance? Suppose for example, that the legislative sovereign is forcibly replaced by a new body, but that law remains in every other respect unaltered, and that the various rules in the different branches of private and public law retain their validity. Hart's analysis would suggest that in such a case the legal system must be said to have changed. But it might equally well be argued that what was changed is not the legal system but only the basic constitution of the State.

Well developed legal systems, such as English Law, contain both primary rules and secondary rules in Hart's sense. International Law is a less developed system, which lacks the basic rules relating to the criteria for identification, it therefore qualifies in Hart's view as a mere set of primary rules.

According to Hart, the rule of recognition is essential to the existence of a legal system. It determines the criteria by which the validity of the rules of a legal system are decided. He claims that for every developed legal system there is an 'ultimate rule of recognition', whose validity cannot be questioned and whose existence depends solely on the fact that it is accepted by officials 'from the point of view'. Hart says in order to identify the rule of recognition in a particular legal system, one has to see how the officials, judges, legislators and other public functionaries work and behave. He says in the United Kingdom the rule of recognition is 'What the Queen in Parliament enacts is law'. Where there is a written Constitution, the provisions of the Constitution are the rules of recognition. Validity of the rule of recognition cannot be questioned. It is neither be valid nor invalid but is simply accepted as appropriate for use in this way.

3.8 HART'S VIEW ON JUDICIAL FUNCTION

In developing his theory of a legal system as a union of primary and secondary rules, Hart seeks to reject both the strictly formalist view (with its emphasis on judicial precedent and codification) and the rule-scepticism of the American realist movement. In so doing, he strikes something of a compromise between these two extremes. He accepts that laws are indeed rules, but he recognises that in arriving at decisions, judges have a fairly wide discretion. And he is, in any event, driven to this conclusion by virtue of the rule of recognition: if there is some 'acid test' by which judges are able to decide what are the valid legal rules, then where there is no applicable legal rules or the rule or rules are uncertain or ambiguous, the judge must have a strong discretion to 'fill in the gaps', in such hard cases. Hart recognises that, as a consequence of the inherent ambiguity of language, rules have an 'open texture' and, are in some cases, vague. He accepts the proposition that in hard cases judges make law.

3.9 HART'S VIEW ON LAW AND MORALITY

Unlike Kelsen and Austin, Hart's positivism contains within it the content of natural law. His greatest contribution lies in his attempt to build explicitly the concept of natural law within positivism. He concedes that there is a 'core of good sense in the doctrine of natural law' and argues for what he calls a 'simple version of natural law.' According to Hart, the continued reassertion of some form of natural law doctrine is due in part to the fact that its appeal is both independent of divine and human authority, to the fact that despite a terminology and much metaphysics, which few could now accept, it contains certain elementary truths of importance for understanding of both morality and law. Hart makes an attempt to bring out certain facts what he calls 'natural facts' which are also common characteristics of both law and morals. Though it is not logically necessary for law (or morality) to have a certain content according to Hart, there are compelling reasons for it to do so. These reasons have to do with certain 'natural facts and aims' of 'being constituted as men are' and these facts and aims form a setting in which a certain content of natural law is a 'natural necessity.'

Prof.Hart expounds certain generalizations - indeed truism concerning human nature and the world in which men live, show that as long as these hold good, there are certain rules of conduct which any organization must contain if it is to be viable. Such rules do in fact constitute a common element in the law and conventional morality of all societies which have professed to the point where these are distinguished as different forms of control. Such universally recognized principles of conduct which have a basis in elementary truths concerning human beings, their natural environment and aims may be considered the minimum content of natural law.

Hart is of the view that there is close connection between certain natural facts and legal or moral rules in as much as both legal and moral rules pursue commonly and consciously such natural facts which Natural Law takes its starting points. These natural facts are : (i) Human vulnerability (the natural fact that human beings are vulnerable to bodily attack); (ii) Approximate equality (that men are approximately equal in strength, ability and intelligence, so that there can be no natural domination, and cooperation becomes necessary); (iii) Limited altruism (that human beings are neither predominantly selfish nor predominantly altruistic, but rather a bit of each); (iv) Limited resources (that the resources of the each are limited and scarce hence making the institution of property necessary - not necessarily individual property); and (v) Limited understanding and strength of will (need of rules to make people to respect persons, property and promises and the need of sanction). These natural aims are minimal; the desire for survival and the desire for social life. Given these facts and aims according to Hart, the law as well as morality must have certain content. But the necessity of this content is natural and not logical, it has only to do with there being good reasons for law and morality to have this content and nothing at all to do what the law is in any legal system.

Hart rejects the trilogy of command, sanction and sovereign which Austin describes as 'key to the science of jurisprudence.' Hart is of the view that there are no logical connections between law and morals and that there are no moral criteria for the validity of law, yet he

concedes there is a distinction between order and good order - latter implying justice, morality and fair mindedness. Moreover, law as a social rule like a rule of morality must contain a certain content of natural law. The law, therefore, has to be compatible with it. However, the connection between law and natural law is not logical and the former is perfectly valid even though it is incompatible with natural law. In short law is law even though it fails to satisfy moral test.

3.10 DWORKIN'S CRITICISM

Prof. Ronald Dworkin has criticised Hart's version of law as a set of rules that are to be identified by means of the rule of recognition. Dworkin says a legal system cannot be conceived merely as a code of rules. He says there are principles in a legal system besides rules. Dworkin makes a distinction between rules and principles. He says legal system has to be conceived as an institution based on certain standards, principles and policies. The question arises as to what is the difference between rules and principles. Principle is the reason for a rule. Rules are general. As Paton pointed out there is a vast gulf between the elasticity of a general principle such as public policy and rigidity of a detailed rule. A principle is the broad reason which lies at the base of a rule of law. Rules are more specific and detailed than principles.

Dworkin has elaborated the logical difference between principle and rule. He says a principle is a standard that is to be observed, because it is a requirement of justice or fairness or some other dimension of morality. For Example, "no one shall be permitted to profit from his own fraud, or to take advantage of his own wrong" is a principle. In *Riggs v. Palmer*, the defendant's right to inherit under the will of the man he murdered was challenged. The Court referred the principle cited above as one of the 'general fundamental maxims of common law' controlled the operation of legal rule and consequently held that Palmer was not entitled to the inheritance. Thus some times law does not permit people to profit from their legal wrong.

According to Dworkin, the difference between legal principles and legal rules is a logical distinction. Both sets of standards point to particular decisions about legal obligation in particular circumstances, but they differ in the character of the direction they give. Rules are applicable in an all-or-nothing fashion. Principles are a matter of more or less whereas rules are a matter of yes or no.

Hart holds that the judges have the discretion to create new legal rules through extra legal standards when the existing law is not ascertainable and provides no guidance to the judge to apply the law to certain situation. Hart is of the view that judges make a new rule by using their discretion. This view was rejected by Dworkin. He says judges do not have a discretion in the strong sense. Rather a judge has a duty to appeal to certain principles and not to others. Hence judicial discretion is a discretion in one of the weak senses. According to Dworkin, the principles are genuine, moral or political principles that judges are duty bound to take into account in their decisions. Though unwritten these principles are part of law. This aspect has been ignored by Hart in his 'the Concept of Law.'

3.11 FULLER'S CRITICISM

Hart is of the view that there are no logical connections between law and morals. Prof. Fuller argues against the separation of law and morals. He says morality is implicit in law and it is impossible to study and analyze law apart from its ethical or moral content. Fuller opines legal positivists have committed the mistake of assuming that a rigid separation of the 'is' and 'ought' i.e., separation of positive law and morality is possible and desirable. Fuller rejects Hart's distinction between order and good order - the former meaning devoid of morality and latter implying morality. Fuller says 'Law considered merely as an order contains, then, its own implicit morality. This morality of order must be respected if we are to create anything that can be called law, even bad law. Law by itself is powerless to bring this morality into existence.' He is of the view that 'the authority to make law must be supported by moral attitudes that accord to it the competency it claims - what Fuller describes as 'external morality'. But, this is not enough for law - without the internal morality of law itself. Fuller says Hart has completely ignored what he calls - 'the internal morality of law'.

According to Fuller, external moralities and internal moralities of law reciprocally influence one another, a deterioration of the one will almost invariably produce a deterioration in other'. In short, every law has its 'internal morality' and positivistic efforts to separate them are not just difficult but one fundamentally misconceived.

Fuller has shown some anomalies in Hart's doctrine of core and penumbra which is concerned with the role of judges in a given fact situation. The fact situation may be covered by definite, certain or authoritative law (core) or there may be uncertainty (Penumbra) where judges are called upon to interpret the law to achieve the desired social purposes. In plain cases (core) there is little need of interpretation and application of law is automatic, but problem arises where the case is problematic and uncertain. Thus, Hart does not favour liberal interpretation of a statute and is of the view that the judges should strictly adhere to the literal, formal or logical construction of the law and desist from judicial creativity. Fuller demonstrates, some of the anomalies in Hart's doctrines of core and penumbra by illustrating the following examples.

(i) Supposing by a rule the parking of vehicles is prohibited in public park. Obviously vehicle - a motor car is one and the rule is applicable to such situations. But there may be cases where it is not clear whether the rule applies to 'bicycles' or 'tricycles or toy plane - etc.'" Hart would not spare a child cycle, tricycle or toy plane while it should not be covered by the said rule. Fuller says the functional purpose of such a rule is that parking of vehicle may lead to accidents and to avoid such accidents the rule should be interpreted in the light of social aims.

(ii) Fuller demonstrates another instance of the untenability of Hart's doctrine of core and penumbra. Suppose there is an enactment. It shall be a misdemeanor punishable by a fine of five dollars, to sleep in any railway station. The purpose of this rule is to give comfort to weary passengers so that they may not keep standing on their feet and occupy benches of the station while they are in transit. Thus 'sleeps' is the standard or settled instance. Two persons are brought by the prosecuting police before the judge for violating the statutes. The first is a

passenger who was waiting at 3.00 a.m. for delayed train. He was sitting on the bench but dozing and snoring. The second is a man who brought a blanket and a pillow to the station and was intending to sleep on the bench to pass the whole night. He was arrested before he could sleep on the benches. The question arises which of the two cases presents the standard instance of the word 'sleep'. Hart would convict both while Fuller the only one who wants to pass the whole night. It is the duty of the judge, says, Fuller, to interpret the word 'sleep' used in the statute 'to spread oneself out on a bench or floor to spend the night, or as if to spend the night.' He says it is not possible to interpret the statute without knowing its aims and purposes - what evil it purports to avert and what good it is intended to promote. We must, in other words, be sufficiently capable of putting ourselves in the position of those who drafted the rule to know what they thought 'ought to be'. It is in this 'ought' that we must decide what the rule 'is'.

Retroactive Criminal Statute and the Grudge Informer case.

Another aspect of Hart - Fuller controversy is about the use of retro-active criminal statutes to invalidate certain illegal and essentially immoral actions of the Nazi regime in Germany. In the post World War II period, the German Courts were faced with difficult problems. It was neither possible for them to declare the whole dictatorship illegal nor to treat every decision or enactment emanating from Hitler as void. On the other hand it was equally impossible to carry forward into the new government the effects of every Nazi perversity that had been committed in the name of the law.

In Nazi Germany some persons were convicted with imprisonment or death sentence for their actions against the regime, at the instance of informers. When the new Federal Republic was established after the World War II, the informers were prosecuted for such crimes as murder, false imprisonment or unlawful deprivation of another's liberty. The informers' defence was that their actions were completely legal.

In 1944 a woman wishing to get rid of her husband so that she can move in with her lover, denounced him to the authorities for insulting remarks he made against Hitler while home on leave from German army. The wife was under no legal duty to report his acts though what he had said was apparently in violation of the statutes making it illegal to make statements detrimental to the government of the Third Reich or to impair by any means the military defence of the German people. The husband was arrested and sentenced to death - though the sentence was not executed but he was sent to the front.

3.12 SUMMARY

Hart is unquestionably a positivist particularly in the sense of maintaining, for analytical purposes, the separation of law and morality. He acknowledged the core of indisputable truth in the doctrines of natural law. He concedes that there is a minimum content of natural law shared by both law and morality. He says law, coercion and morality are different but related social phenomena. According to him, law is a union of primary and secondary rules. Primary rules are duty imposing rules. Secondary rules are power conferring rules. 'The rule of recognition exists

in every legal system' is the central theme of Hart's concept of law. Hart's concept has been criticised by Dworkin and Fuller.

3.13 SELF-ASSESSMENT QUESTIONS

1. 'Law is a union of primary and secondary rules' – Explain
2. Explain the importance of 'rule of recognition' in Hart's concept of Law
3. Discuss Hart-Fuller controversy with suitable illustrations.

3.14 FURTHER READINGS

H.L.A. Hart, The Concept of Law, Oxford University Press, Oxford.

Ronald Dworkin, Taking Rights Seriously, Universal Book Traders, Delhi

L.L.Fuller, The Morality of Law, New Heaven, London

UNIT IV PURE THEORY OF LAW

Objectives

After going through this unit you should be able to:

- Understand Kelsen's positivism
- Analyse Pure Theory of Law.
- Evaluate Kelsen's contribution to legal theory
- Distinguish Kelsen's theory from the theories of Austin and Hart
- Explain the relevance of grund norm theory

Structure

- 4.1 Introduction
- 4.2 Historical background of Pure Theory
- 4.3 Jurisprudence as Normative Science
- 4.4 Legal system as pyramid of norms
- 4.5 Grund norm
- 4.6 Distinction between Kelsen and Austin
- 4.7 Kelsen's theory and Revolutionary Regimes
- 4.8 Criticism of Pure theory
- 4.9 Summary
- 4.10 Self-Assessment Questions
- 4.11 Further Readings

4.1. INTRODUCTION

Hans Kelsen (1881-1973), who was professor of law at the University of Vienna propounded a theory of law which was an improvement upon Austin's theory, in his essay on 'The Pure Theory of Law' contributed to the Law Quarterly Review in 1934. This theory was further elaborated by him in 1945 in his 'General Theory of Law and State'.

The theory of Hans Kelsen represents development in two directions. On the one hand, it marks the most refined development in the analytical positivism, on the other hand it marks a reaction against the different approaches of the 20th century. Kelsen said a theory of law must deal with law as actually laid down, not as it ought to be. In this respect he agreed with Austin. This point earned him the title of positivist. A theory of law must be distinguished from the law itself.

While in the nineteenth century the dominant trend in jurisprudence was positivism, in the 20th century it was sociological jurisprudence. However, positivism has not died out in the

20th century, and the most important positivist theory of 20th century is Kelsen's pure theory of law also known as normatism.

The pure theory of law was advanced by Kelsen just before the First World War and it became dominant during the inter-war years. After the second World War its importance in Europe declined but it had a rebirth in Latin America. It never struck roots in the USA where sociological jurisprudence has held sway.

The pure theory is a beautiful logical construction. It has, what Einstein would call 'inner perfection'. However, it has also some fundamental defects. Before we consider the pure theory it is necessary to dwell upon its historical background in jurisprudence.

4.2. HISTORICAL BACKGROUND OF PURE THEORY

The 19th century was the hey-day of positivist jurisprudence, which was the counter part of the laissez-faire theory in economics. The basic idea of positivism was that law should be distinguished from morality, equity etc. Law is what it is and not what it ought to be. At the end of the 19th century two main schools of jurisprudence sprouted up: one was sociological jurisprudence, and the other was normatism. While the former emphasized a factual relationship in society and an activist role of the judiciary for harmonizing conflicting interests, the latter advocated a rigid exclusion of any social or moral evolution of the law.

The pure theory of Kelsen has taken positivism to the extreme. Kelsen was extremely critical of sociological jurisprudence. He said, "in an utterly unscientific way, jurisprudence has become a hotchpotch of sociology, biology, ethics and theology." Kelsen propounded 'principle of elimination'. In brief, this principle states that if we wish to understand the law we should eliminate all considerations of morality, equity, human nature and other meta-juridical ideas. We should see the law as it is and not as it ought to be.

Kelsen is particularly critical of sociological jurisprudence, natural law and Marxism. As regards sociological jurisprudence, Kelsen is of the view that it wrongly mixes up law with social sciences, and thus creates confusion. Natural law is condemned, as with it one can prove everything and nothing. Marxism is rejected as it introduces ideology in law. In this way, by discarding all extraneous considerations Kelsen has sought to create a pure system of law.

4.3 JURISPRUDENCE AS NORMATIVE SCIENCE

Kelsen regards jurisprudence as normative science as distinguished from a natural science. In natural sciences laws are statements of the sequence of cause and effect. eg. if Hydrogen and oxygen unite in the proportion of 2 to 1, they form water. There can be no question of infraction of such a law if really it is law, for a single infraction invalidates the law. In jurisprudence, laws do not have a causal connection. They have a normative connection eg. if

a person commits murder, he ought to be hanged. These laws remain valid even when they are infringed and even when the indicated consequence has not followed.

The legal order, according to Kelsen, is not based on the cause and effect principle. The crime is not the cause of the punishment. In fact a large number of crimes go unpunished. The punishment should be inflicted for violating a legal norm eg. a provision in the penal code, but whether it is in fact inflicted or not is not certain. Thus, there is no cause and effect relationship between the crime and the punishment. The law should be differentiated from sciences in as much as the former rests on a normative basis, whereas the latter apply the cause and effect principle.

Kelsen was of the view that law dealt with law as it is and not as it ought to be. His approach is to free the law from metaphysical mist with which it has been covered at all times by speculation of justice or by the doctrine of jus nature. He wanted to create a pure science of law completely divorced from the other social sciences. Jurisprudence is concerned with legal norms emptied of all political contents, all questions of ethics or social philosophy being beyond the jurist's ken. He based jurisprudence on the theory of norms, which he wished must be followed by the State. Kelsen left ideals of justice for the politician, and said that a theory of law must remain free from politics, ethics, sociology, history etc., in other words must be pure. He viewed law as a hierarchy of normative relations.

4.4. LEGAL SYSTEM AS PYRAMID OF NORMS

Kelsen wished to keep legal theory free from all extraneous, non legal factors. He said 'uncritically the science of law has been mixed with elements of psychology, sociology, ethics and political theory'. He sought to restore the purity of law by isolating those component of the work of a lawyer or judge which may be identified as strictly legal. According to Kelsen, the objects of science of law are those norms which have the character of legal norms and which make certain acts legal or illegal.

By the term norm Kelsen means that something ought to be or ought to happen, especially that a human being ought to behave in a certain way. This definition of norm is, however, also applicable to moral or religious norms. According to Kelsen, it is characteristic of legal norm that it prescribes a certain human behaviour by attaching to the contrary behaviour a coercive act as a sanction. The pure theory of law considers element of coercion as an essential ingredient of the concept of law. Kelsen says "Law is a coercive order of human behaviour."

A norm is a proposition in hypothetical form, if X happens then Y ought to happen. Proposition of law only deals with what ought to occur eg. if a person commits theft, he ought to be punished. Even though in a given case events may not work out according to the legal ought, that does not invalidate it. X may commit theft but go unpunished, for he may escape detection, he may bribe the officials who administer the law, or he may die. Even though any of these

things may happen, the proposition that if a person commits theft, he ought to be punished remains good.

According to Kelsen, the legal order is not a system of coordinated norms of equal level, but a hierarchy of different levels of legal norms. A legal norm is valid, if it has been authorised by another legal norm of higher rank. Only norms can validate a source of law, not social acceptance or actual use. Thus an administrative order is valid if it corresponds with the provisions of the Constitution. The Constitution is valid if its making was authorised by an earlier Constitution. But if a Constitution is, for example, the first Constitution of a new country, there is no positive source of law from which it can derive its validity. In that event Kelsen resorts to the notion of a 'basic norm'. Coercion of man against man ought to be exercised in the manner and under the conditions determined by the historically first Constitution. The 'basic norm' is considered by Kelsen as the ultimate source for the validity of all norms that belong to the same legal system.

According to Kelsen law is a specific technique of social organization. The concept of law has no moral connotation whatsoever; its decisive criterion is 'the element of force'. Any kind of content might be law, there is no human behaviour which, as such, is excluded from being the content of legal norm.

Kelsen agreed with Austin that a legal norm derives its validity from the State, and its force from the sanction attached to it. But he did not characterize law as a command. A rule of law represents the relation of a conduct and its sequence; that is to say, a particular legal consequence to follow a particular act. eg. if A Commits theft, he ought to be punished. Kelsen did not view sanction as something outside the law, which imparted force to law, as Austin did. Kelsen analysed sanction into rules of law eg. take the proposition, non 'shall steal lest he will be put into prison'. In Austin's analysis, prison-term is the sanction attached to the command 'none shall steal.' In Kelsen's analysis, 'non shall steal' is a legal norm, it does not stand alone, certain other legal norms are behind it, such as that if a man steals he shall be brought to trial, that trial shall be conducted such and such wise, that if he is found guilty the judge shall sentence him to prison, and that the prison officers shall carry out that sentence. Here the Austinian sanction is analysed into several norms of law. Kelsen observes that any legal rule can be thus analysed into a hierarchy of norms. Those norms are laid down by superior authority, but it is possible to trace the entire series of norms in a legal system from the initial or fundamental norm, which may be called the 'grund norm'. Grund norm is the ultimate legal principle that validates the entire legal system.

4.5 GRUND NORM

Kelsen characterized the grund norm as an 'initial hypothesis'. Kelsen says that a grundnorm is recognised when it has secured a 'minimum of effectiveness', that is to say, when it has support of an effective group of people in the State.

According to Kelsen's theory in every legal system there is hierarchy of norms leading up to a basic norm known as the grund norm. For instance, in India and in USA the grund norm is the Constitution, and every other norm (whether created by statute, subordinate legislation or executive order) in conflict with the Constitution will be invalid. In England the grundnorm is the principle of Parliamentary supremacy.

The chief merit of Kelsen's theory lies in the elucidation of the relation between the grund norm and the totality of legal norms derived from it. He characterised all laws as products of concretization of the grund norm. As the grund norm must reflect the basic political faith of the community, the conception that all laws are derived from the grund norm really means that law is concretization of the basic political faith.

Kelsen puts 'minimum of effectiveness' as an essential feature of a grund norm. But it is impossible to assess the minimum of effectiveness except by an inquiry into political and social facts. When such an enquiry is undertaken, law is related to politics or sociology, and the purity of the theory would disappear.

In National socialism and Fascism effectiveness was the will of the leader and nothing more. Under the former Nazi system the law courts were directed to disregard a statute and give effect to political ideology. Here, the grund norm is the supremacy of the leader's will. The tracing of a legal system as a pyramid of norms cannot apply to such a system, and Kelsen's theory cannot claim to cover it.

Kelsen's theory is different from positivism in two respects: It has a much wider sweep. It includes not only general norms like statutes and rules but also individual norms which are created by wills, contracts, and even court decisions. Kelsen calls a legal system as a system of norms instead of a system of rules. The word 'rule' has a general connotation, whereas Kelsen includes within the category of norms court decisions, wills, contracts etc. which create individual norms and not rules.

4.6 DISTINCTION BETWEEN KELSEN AND AUSTIN

Kelsen has recognised the broad similarities between his pure theory and the imperative theory of Austin but has equally emphasized the differences.

Norm and Command:

Austin, by saying that law is a command of sovereign punishable if disobeyed, ignores the normative character of legal rules. Kelsen does not regard law to be the command of the sovereign. First he rejected the idea of command, because it introduces psychological element into a theory of law which should, in his view, be pure. The most that he conceded was that a law is a de-psychologised command, a command which does not imply a 'will' in a psychological sense of the term....a rule expressing the fact that somebody ought to act in a certain way, without implying that anybody really wants the person to act in that way. Austinian

notion introduced a subjective, political element in the concept of law. Jurisprudence is not concerned according to Kelsen, with the source of law i.e., whether it has emanated from a sovereign or custom or some other source.

Sanctions:

Kelsen agrees with Austin that coercion is one essential feature of law but he rejects Austin's supposed reliance on motivation by fear. To Austin sanction was something outside a law imparting validity to it. To Kelsen such a statement is inadequate and confused. Austin would have said that the sanction behind the proposition 'you ought not to steal' is that if you do steal, you will be imprisoned. To Kelsen the operation of the sanction itself depends on the operation of other rules of law. One rule prescribes that if a man has committed theft, he ought to be arrested; another prescribes that he ought to be brought to trial; others prescribe how the trial ought to be conducted; another rule prescribes that if the jury brings into verdict of guilty, the judge ought to pass sentence; and another prescribes that some official should carry that sentence into execution. In this way the contrast between law and sanction in Austinian sense disappears. According to Kelsen, in the hierarchy of laws it is only those at the lower level (which are concrete) that possess the attribute of sanction, whereas those at the higher level (which are abstract) do not possess this attribute.

Legal Dynamics:

Austin ignored the dynamic process of law creating which occurs throughout the hierarchy of norms and which derives from the Constitution whether written or unwritten. Kelsen says, at each level of the hierarchy the content of norms may be developed on the basis of higher norms. This is a thoroughly dynamic principle.

No dualism between State and Law

Austin creates a dualism between the sovereign (or state) and the legal order (of law). To Austin law is subordinate to the sovereign. The law emanates from the sovereign and so cannot control the sovereign. To Kelsen the state is merely the 'personification' of the legal order. As a political organization the state is a legal order, and every state is governed by law. The State is nothing but the sum total of norms ordering compulsion, and it is thus coextensive with the law. Kelsen identified State with law, as the State is nothing but a system of human behaviour and social order, and every norm of social behaviour is law. He regarded law as imperative, and therefore the duties under law as absolute. Rights are concessions of law, and therefore no right is above law. In other words, he could not recognize fundamental rights or 'inalienable human rights.'

According to Kelsen, there can be no distinction between law and state. Therefore, the difficulty of treating Constitutional law, which purports to bind the State, as law *strictu sensu* which confronted Austin does not arise for Kelsen. While Austin says that the State creates the law, Kelsen would say that law regulates its own creation.

Customary Law:

Austin theory denies to custom the character of law as it has not been created by the sovereign. Kelsen however, is able to accommodate custom within his concept of law for all that is required to do so is an intermediate norm to the effect that popular practice may generate legal norms.

No dichotomy between Private Law and Public Law:

Austinians draw a distinction between public law and private law. Public law is supposed to deal with the rights and duties of the sovereign or State while private law is supposed to deal with the rights and duties of private persons. To Kelsen this distinction is not meaningful. He denounced the distinction between private and public laws as both are concretisations of the grund norm. Law is a pyramid of norms, concerning relations of state with subjects, relation of public authorities with subjects and ultimately relations between subjects themselves. Each subsidiary norm is a concretisation of its superior norm. Each norm constitutes a rule of law. In this analysis, Kelsen considered administrative acts of the State also as laws because each such act is a concretization of some law. Judicial decisions are obviously laws because they are only laws to factual situations and therefore clear cases of concretization of laws. To Kelsen the distinction between judicial and administrative acts is not real.

Nature of International Law:

Austin relegated international law to the realm of positive morality, contrary to the universally accepted usage of modern states and lawyers. Kelsen seeks to overcome this difficulty by demonstrating that state laws can be dovetailed into the international order of norms so as to form one monistic system.

Austin could not concede the status of law *strictu sensu* to International Law, because sovereign is not bound by law which is only his creation. Kelsen's theory clears off this difficulty. The International organization is regarded by Kelsen as superior to the legal order otherwise called the State so its norms are binding upon the state. The denial of concept of State sovereignty, has made this possible. Kelsen tried to establish international law as the real law of the states. He argued that the very recognition of two states as equals in law implied recognition of a higher authority which can bestow upon them the attribute of equality, which authority he called as the international order. To him war and reprisal are the sanctions of international law. But war is not as a sanction to enforce, but as a clear breach of international law.

Kelsen was of the view that there is a legal hierarchy and international law is at its top. Hence a municipal law in conflict with a principle of international law will be invalid. Kelsen thus seeks to create a monistic world legal order.

4.7 KELSEN'S THEORY AND REVOLUTIONARY REGIMES:

According to Kelsen, a revolution may destroy an old constitution and create a new one, but such matters are beyond the sphere of jurisprudence. To determine what is the initial hypothesis for

any country we must go beyond jurisprudence, examine the world of reality, and discover an hypothesis or grundnorm that has some measure of correspondence with the facts.,

Madzimbamuto v. Lardner-Burke (1969) is an interesting example by which to test Kelsen's theory is the Unilateral Declaration of Independence by Rhodesia. The Privy Council, as part of the English legal order, naturally decided against the validity of the Rhodesia emergency powers which had not been laid down in accordance with the grund norm the court accepted. The Rhodesia courts looked at the problem in the light of the new legal order created by the declaration of independence, and relied partly on the theory of necessity and of the actualities of politics. In other words, these courts in effect accepted a new grund norm for Rhodesia.

In Adams v. Adams (1970), where a divorce granted in Rhodesia was not afforded recognition in England, as the Rhodesia judge had not, according to the English grund norm, been validly appointed.

In State v. Dosso(1958) the Supreme Court of Pakistan accepted the revolutionary regime, which had usurped power unconstitutionally as legal on the ground of effectiveness. The Court held that the usurper was effectively in power and hence lawful on Kelsenian grounds (eventhough incidentally, he himself was deposed the day after the judgment was published.

In Jilani v. Government of Punjab (1972) the Supreme Court declared both the first and the second usurpers illegal. The Court held that revolutionary regimes were unlawful ab initio notwithstanding effectiveness. The Court repudiated Kelsenian theory of effectiveness. One Judge observed: "a perfectly good country was made into a laughing stock". It is to be noted that by the time of the later decision the usurpers had been overthrown. Judges sitting under the power of a regime may have like alternative but to accept it as legal; those who refuse will be replaced, or their judgments will be nullified.

The decision in Mir Hassan v. The State (1969) invalidating a Martial Law Regulation was promptly nullified by an order retrospectively depriving the courts of jurisdiction in a number of matters.

4.8 CRITICISM OF PURE THEORY

Kelsen's theory has not been free from criticism.

Lauterpacht's criticism:

Prof.Lauterpacht a former student of Kelsen, has criticized the theory of his teacher on the ground that by accepting the primacy of international law over national law, a backdoor entry has been permitted by Kelsen to natural law. How else can one predicate such primacy for international law? The lawness of international law cannot be derived from the grund norm itself.

So, Kelsen's pure science of law has not demonstrated the 'lawness' of international law but has only assumed such lawness without proof. This is really a drawback of Kelsen's theory.

Allen's criticism:

C.K.Allen points out that sources of law like custom, precedent and statute are coordinate and do not admit of arrangement in a hierarchial pattern adopted by Kelsen. It is submitted that custom, precedent and statute are no doubt coordinate sources but they are material sources. There can be only one formal source which confers the authority of law upon a given norm. That is the sovereign for Austin. It is the grund norm for Kelsen.

Friedmann's criticism:

Friedmann points out that the task assigned to the pure science of law by Kelsen is inadequate from the point of view of legal theory. The sphere of the law is now intersecting the spheres traditionally allotted to other social sciences such as Economics, psychology and sociology. So, analytical positivism is bound to give way to a new preoccupation with social justice. It is submitted that this is not really a criticism but an invitation to the Kelsenites to come out of their shells, throw off their self-imposed limitations and adopt the methods of sociological jurisprudence.

Scope of jurisprudence restricted:

The basic defect in Kelsen's theory is that it unduly restricts the scope of jurisprudence to a study of legal norms alone. But unless we are to know the social circumstances, origins etc. of a thing we cannot understand it fully. As a matter of fact in interpreting statutes Heydon's rule is ordinarily applied, which says that the historical background of the law should be seen. The pure theory of law without a sociological foundation is sterile attempt for defining law.

Origin of normative order unexplained:

No doubt the achievement of Kelsen was that he introduced order in plethora of rules, by suggesting the concept of hierarchy of norms headed by a grund norm. But Kelsen does not permit us to see how this normative order came about, or by what social circumstances it is conditioned. In particular, he does not allow us to enquire into the origin of the grund norm. Such an enquiry, he says, does not belong to the sphere of jurisprudence, but to politics, history or sociology.

Not universally applicable:

Kelsen's theory of grund norm is not universally applicable. What, for instance, is the grund norm in countries under army rule like Pakistan? And even in countries like USA and India the truth is that the Supreme Court has often changed the Constitution, though ostensibly pretending to only interpret it. Should we then regard the grund norm in USA and India to be the Constitution or the decisions of the Supreme Court?

4.9 SUMMARY

Kelson's Pure Theory is also a positive theory. He explained what the law is, not what it ought to be. His view is that jurisprudence should be free from the influence of other social sciences. Jurisprudence is a normative science. Legal system is a pyramid of norms. Legal order contains hierarchy of norms with a basic norm at the top. It is grund norm which validates the entire legal order. The existence of grundnorm is presupposed. Kelsen said state and law are identical. He denied state sovereignty. He rejected the distinction between private and public law. He also recognized the lawness of International Law. Kelsen's theory is not free from criticism.

4.10 SELF-ASSESSMENT QUESTIONS

1. Discuss Kelsen's theory of law
2. Explain how Kelsen's theory is an improvement over Austin's theory
3. Evaluate the contribution of Kelsen to positivism
4. What are the principal differences between Hart's rule of recognition and Kelsen's grund norm?

4.11 FURTHER READINGS

Dias, Jurisprudence, Aditya Book Private Ltd., New Delhi

Lloyd's Introduction to Jurisprudence, Sweet and Maxwell, London

Julius Stone, The Province and Function of Law, Universal Publishing Co.Pvt.Ltd., Delhi

UNIT V HISTORICAL AND ANTHROPOLOGICAL APPROACHES

Objectives

After going through this unit you should be able to

- Explain the contribution of Historical School to the development of Jurisprudence
- Distinguish historical jurisprudence from other methods of jurisprudence
- Evaluate contribution of Savigny
- Discuss contribution of Sir Henry Maine

Structure

- 5.1. Introduction
- 5.2 Montesquieu – Forerunner of Historical School
- 5.3 Savigny’s theory of Volksgeist
- 5.4 Criticism of Savigny’s theory
- 5.5 Sir Henry Maine: Anthropological approach
- 5.6 Movement from status to contract
- 5.7 Diamond’s Criticism
- 5.8 Summary
- 5.9 Self-Assessment Questions
- 5.10 Further Readings

5.1 INTRODUCTION

The historical school in jurisprudence reflects its belief that a deep knowledge of the past is essential for a comprehension of the present. A study of existing legal institutions and contemporary legal thought demands an understanding of historical roots and patterns of development. Two jurists are selected for comment, Savigny (1799-1861) and Sir Henry Maine (1822-1888). Savigny viewed law as reflecting a people’s historical experience, culture and spirit. For him, ancient custom guides the law; the growth of legal principles is evidence of ‘silently operating forces’ and not the result of deliberate decisions. Henry Maine suggested that legal ideas and institutions have their own course of development, and that evolutionary patterns of growth may be deduced from historical evidence.

Savigny of Germany and Henry Maine of England are the principal supporters of this school. Montesquieu, Puchta and Carter are the other contributors for the development of historical jurisprudence. The natural law philosophers of the 17th and 18th centuries had looked to reason as a guide for discerning the ideal and most perfect form of law. They were interested in the aims and purposes of the law, not in its history and growth. The Analytical school believes that law must be studied with reference to State. The Historical school emphasizes that law is

not invariably a product of State but a phenomenon that is to be found in every human society, primitive or modern. Law as it is cannot be understood in proper perspective without a study of the historical process which has evolved the law. Law as a living and dynamic instrument is not and never was a product of external imposition by a sovereign or State. Law is an outcome of social necessity.

According to Savigny, law cannot be understood without an appreciation of the social background. Law is as much a part of national inheritance as language or religion and it cannot be cast and recast by professional jurists or statesman according to their views. The formation of law is assigned to the gradual working of the customs and not to the arbitrary and deliberate will of the legislator. Though historical study of law existed previously the historical conception took its birth only with the historical school. The main reasons for the rise of Historical school in the 19th century are : (i) great political upheaval of the French Revolution (ii) change in the character of scientific speculation as a sequel to Darwin theory of evolution.

The merit of historical school is that it clearly brings out the fact that law is a product of social growth. Law 'as it is' is a product of law 'as it was' and the parent of law as it 'ought to be'. The drawback of Historical school is that it tends towards conservatism, and as Harrison points out one may develop excessive attachment to and undue reverence for the past ignoring the present in the process. Present is neglected and undue importance is attached to the past. The creative work of the judge and jury is treated lightly.

Historical school is a strong reaction and revolt developed against the unhistoric and sterile character of law expounded both by natural law thinkers and as well as analytical positivists. Historical jurisprudence, therefore, viewed law as a legacy of the past, a product of each individual community or people or nation embodying and reflecting its peculiar traits, unique customs, special habits and other peculiarities which are deeply rooted in its heritage and culture. Accordingly, historical jurists regard law a biological growth, an evolutionary phenomenon and not as an arbitrary, fanciful and artificial creation. As Pollock observes 'the historical method is nothing else than the doctrine of evolution applied to human societies and institutions. Historical school demonstrated the racial, ethnic and linguistic traits of law limited to a community well-knitted by shared culture and common past heritage.

5.2 MONTESQUIEU – FORERUNNER OF HISTORICAL SCHOOL

Historical school is generally associated with the name of Savigny. However, there were other early forerunners of this school who heralded the evolutionary approach to law by undermining the 18th century natural law. Montesquieu (1689-1755) in France laid the foundation of historical school of jurisprudence. In his Spirit of Laws, which appeared in 1748, he advocated the thesis that all laws whether physical or positive do not spring from caprice but are the assertion of the cause and effect and must be framed in the light of entire social surroundings and biological environment. Indeed, the spirit of laws with each nation, according to Montesquieu, is conditioned by environmental factors. He said:

“Laws should be adopted in such a manner to the people for whom they are framed that it should be a great chance if those of one nation suit another. They should be in relation to the climate of each country, to the quality of its soil, to its situation and extent, to the principal occupation of the natives.... they should be in relation to the degree of liberty which constitution will bear, to the religion of the inhabitants, riches, numbers, commerce, manners and customs.”

Montesquieu was of the view that “there is not one best form of state or constitution: no law is good or bad in the abstract. Every law civil and political must be considered in its relation to environment”. He laid the foundation for comparative, historical and sociological jurisprudence.

5.3 SAVIGNY’S THEORY OF VOLKSGEIST

Savigny lived during an era dominated by the effects of the French Revolution and the Napoleonic conquests. Before 1814 Germany was divided politically, legally and linguistically into smaller states. Napoleon Bonaparte had launched war against German people and had conquered many parts of German States. He imposed French political and legal system on alien Germans much against their will. The Germans were fighting not only against a foreign invader who deprived them of national independence, but also imposition of foreign law and language over them which were alien to their culture. Thus French politico-legal system based on French culture and traditions were irksome, insulting and hurtful to German people whose law, language, history, heritage and requirements were different from that of the French. The slogan ‘Germany for the Germans’ became a powerful and uniting political force to unite all German people against French political and legal domination. Moreover 19th century has been the age of nationalism.

Although Napoleon had been defeated, yet Germany was still politically divided. The political unification of Germany was hanging in the balance. In 1814, Prof. Thaibaut a natural law jurist put forward a plan before German people for the legal unification of Germany on the pattern of Napoleonic Code 1802. During the 19th century French Code was copied throughout the world as a model code. The idea of Thaibaut was to give to Germany a Code perfect and complete in all respects - a natural law thinking. This proposal of Thaibaut invited a strong reaction from Savigny. Thaibaut’s proposal for a code on the pattern of Napoleonic Code for Germany was opposed by Savigny in his famous pamphlet “On the Vocation of our Age for Legislation and Jurisprudence”. In his thesis, Savigny had explained the origin and development of law and its relationship to society. It is said that because of Savigny’s concept the codification of German Law was delayed for more than half a century. As Julius Stone points out, “no single comparable essay, perhaps, ever affected so directly the course of a country’s legal development.”

Savigny attacked and rejected Thaibaut’s proposal on two grounds: (i) Thaibaut’s proposal betray lack of historical and evolutionary nature and perception of law. According to Savigny, a law made without understanding of a community’s deep roots of history and culture is likely to create more problems and difficulties. French Civil Code with all its defects,

inconsistencies, incongruities and above all unhistoric in character cannot be a good model for German people. (ii) Law is not an artificial, arbitrary, lifeless mechanical device designed by master jurists to be imposed from above. It is on the other hand, a complex, silent and invisible but dynamic experience manifesting itself in the 'common feeling of inner necessity' with which people regard it. Law in essence is coequal with society like its language, literature, grammar, folk music, folk culture etc. Law evolves and changes in the same fashion and direction as society evolves. According to Savigny, the law of any particular society is the embodiment and reflection of the spirit of the people. Law has its source and validity in the popular consciousness and inner feelings. Law did not make its first appearance in the form of logical rules. It existed within each society and evolved by manifesting in appearance in the form of customs and traditions. Accordingly, Savigny held that there is a need for study and research of German history and culture for any reform or codification of German Law. In simple words, according to Savigny, law should reflect nationality. German law should reflect customs, traditions and culture of the German people. The central theme of Savigny's thesis is that 'like language, culture, the constitution and manners of people, law is conditioned and determined by the peculiar character of people, by its national spirit i.e., Volksgeist.

According to Savigny, the law was not something that should be made arbitrarily and deliberately by a law-maker. He said, law is a product of internal, silently operating process. It was deeply rooted in the past of a nation, and its true sources were popular faith, custom and the common consciousness of the people i.e., volksgeist. Like the language, the constitution, and the manners of a people, law was determined above all by the peculiar character of a nation, by its national spirit.

Savigny pointed out, certain traditions and customs grow up which by their continuous exercise evolve into legal rules. Only by a careful study of these traditions and customs can the true content of law be found. Law in its proper sense is identical with the opinion of the people in matters of right and justice. Thus, in the view of Savigny, law like language, is a product not of an arbitrary and deliberate will but of a slow, gradual and organic growth. The law has no separate existence, but is simply a function of the whole life of a nation. Law grows with the growth and strengthens with the strength of the people, and finally dies away as the nation loses its nationality.

Basic approach of Savigny can be summarized as follows:

- 1) Law is found. It cannot be made.
- 2) Law like language grows, evolves and has deep roots in the social, economic and other factors.
- 3) Laws cannot be of universal validity nor can they be constructed on the basis of certain rational premises and eternal principles.
- 4) Legislation, as a source of law, has a subordinate place. Custom is the typical form of law.
- 5) Custom is the formal source of law. Precedent and legislation derive their force from custom.

6) Law primarily relies on common consciousness of the people, popularly known as *volksgeist*.

7) Law comes from the people, not from the State.

According to Savigny, *volksgeist* only formulates the rudimentary principles of a legal system. He saw clearly enough that it could not provide all the details that are necessary. He accordingly maintained that as society and consequently law, becomes more complex, a special body of persons is called into being whose business is to give technical detailed expression to the *volksgeist* in the various matters with which the law has to deal. Savigny maintained that legislation is subordinate to custom.

As law becomes more technical, with the advance of civilization, a division of labour emerges. In the matters of law, the people will be represented by specialists - like lawyers and jurists - whose task is to enunciate and elaborate legal principles in a formal style. Those principles remain rooted, however, in the consciousness of the people representing their opinion, beliefs and convictions. Thus Savigny held that the ultimate sources of law is *volksgeist*.

It is Savigny who made lasting and conspicuous contribution to the historical jurisprudence. He has been regarded as founding father of Historical Jurisprudence. He expounded the theory of growth and evolution prior to that of Charles Darwin's *The Origin of Species* (1860). That is why he has been called as Darwinian before Darwin.

Savigny was not as a matter of principle against codification of German law for all times to come. He opposed codification process dominated by natural law philosophy. He opposed codification of German law on the basis of French Code. Savigny observed that before embarking on codification process there should be adequate study and research into the historical past so as to cover the customs, traditions, culture and heritage of the people. According to Savigny, law binds the community without breaks and gaps. Law like the community has an unbreakable continuity and its present is founded on traditions of the past. Law cannot be superimposed or implanted from an alien source or foreign origin. Law, being a *geist* of the people, lives and flourishes with the community and dies only when community loses its vitality and existence. Law is *sui generis* - peculiar to a people like its language and heritage - a manifestation of its national spirit.

5.4 CRITICISM OF SAVIGNY'S THEORY

Savigny's view has been criticized on many grounds:

1) Some customs are not the outcome of common consciousness of the people. Hence, Savigny is wrong when he says that all customs are the product of common consciousness of the people. Prof.C.K.Allen says many customs are the outcome of the interests of strong and powerful minority or of the ruling class. Allen gives the example of slavery to support his own contention. Moreover, some rules of customary law may not reflect the spirit of the whole population e.g., local custom.

2) According to Julius Stone, Savigny ignored importance of legislation as an instrument of social change. In all modern developing societies legislation is an important instrument of social change and social reform. Abolition of the practice of Sathi, introduction of divorce, restraint on child marriages, dowry prohibition etc. are some of the many examples in India where gradual changes by legislation have been brought in, even though it meant changes in the age old customs and traditions.

3) Dias and Hughes pointed out that the volksgeist theory minimises the influence which individuals, sometimes of alien race, have exercised upon legal development. There are jurists who by their genius are able to give legal development new directions. The classical jurists were of Rome, Littleton, Coke may be cited as examples. The creative works of jurists undermined by Savigny's theory.

4) Savigny emphasized the national character of law but he himself took inspiration from Roman law. For Savigny the mixture of German Law and Roman law could provide an excellent base for juristic development of a unified system. The reception of Roman law in Germany and subordination of German law to Roman law is contrary to the theory of volksgeist. How Roman law could be a true reflection of the volksgeist of the German people?

5) The contemporary scene is inconsistent with 'volksgeist'. Following Roman law in Europe is inconsistent with 'volksgeist'. German Civil Code has been adopted in Japan, the Swiss Code in Turkey and the adaptation of English law in India and other Commonwealth countries are the examples. French Code was introduced in Holland.

6) Dias points out, there is an element of truth in Savigny's idea of volksgeist. However, Savigny extrapolated his volksgeist into a sweeping universal. But it is common experience that even in a small group, people hold different views on different issues.

7) Bodenheimer is of the view that Savigny was well aware of the fact that in an advanced system of law, legal scholars, judges and lawyers play an active part in shaping of legal institutions. He knew that popular spirit does not fashion codes of procedures, rules of evidence or bankruptcy laws. But he viewed the technical jurists less as members of a closed profession than as trustees of the people and as representatives of the community spirit authorised to carry on the law in its technical aspects.

8) The national character of law seems to manifest itself more strongly in some branches than in others, eg. in family law rather than in commercial and criminal law. The law of Trade Unions did not arise out of a popular consciousness of its righteousness, but out of a conflict of interests between two classes of people - the employees and employers.

5.5. SIR HENRY MAINE: ANTHROPOLOGICAL APPROACH

Anthropological investigations into the nature of primitive and undeveloped systems of law are of modern origin and might be regarded as a product of the Historical School. Pride of place will here be accorded to Sir Henry Maine (1822-1888), who was the first and still remains the greatest representative of Historical movement in England.

Sir Henry Maine was the founder of English Historical school of jurisprudence. He agreed with Savigny's view; but he went beyond Savigny in understanding law by comparative studies of legal institutions in primitive as well as progressive societies. In fact Maine departed from Savigny in two important respects. He believed in stages of legal evolution in the course of which primitive ideas may be discarded. He sought to discover by comparative studies of different legal systems the ideas which they had in common. He was aware of Roman Law, English Common Law and Hindu Law. His first and most important 'Ancient Law' was published in 1861.

Henry Maine observed that there had been a parallel and alike growth and development of legal institutions and law in the societies of the East and West upto a certain age. On the basis of the comparative studies he distinguished between static and progressive societies. The early development both in static and progressive societies was roughly the same. The early development, according to Maine falls into four stages. The first stage is that of law making by personal command, believed to be of divine inspiration. eg. Themistes of ancient Greece, and the Dooms of the Anglo-Saxon kings. The second stage occurs when those commands crystallize into customs. In the third stage the ruler is superceded by a minority who obtain control over the law eg. the pontiffs of ancient Rome. The fourth stage is the revolt of the majority against the oligarchic monopoly and the publication of the law in the form of a Code. eg. the XII Tables in Rome.

According to Maine Static societies do not progress beyond this point. Law is stable and society is also static. In progressive societies, a general proposition of some value may be advanced with respect to the agencies by which law is brought into harmony with society. These instrumentalities are three in number.

1. Legal fictions
2. Equity and
3. Legislation

The characteristic feature of progressive societies is that they proceed to develop the law by these three methods. These three instrumentalities constitute a machinery of change. Change may be effected judicially or through legislation. Judicial methods include use of fictions and equity.

Fiction: Maine defined fiction as ‘any assumption which conceals or affects to conceal the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified.

Fictions need to be distinguished from shifts in the meaning of words, for example, the word ‘possession’ was originally applied to physical control; then it came to be applied to situations where there was no physical control. There was no pretence about the facts of either situation.

‘Adoption’ on the other hand, is not a shift in meaning, but name for a pretended fact, namely, that the adopted child was born into the family. A more difficult case is that of the ‘corporate person’. One application of the word ‘person’ is to a human being, its application to a corporation is best treated as a shift in meaning. Prof.Fuller declared the following motivations behind the use of fictions:

- i) Policy: The point that most fictions in fact deceive no one weakens the charge of concealment. There are reasons of policy behind fictions. eg. the rule that husband and wife are one. Even the old rule that a wife was deemed to have committed a crime under her husband’s compulsion was not introduced originally to deceive any one.
- ii) Emotional conservatism: Fuller said this is the ‘judges’ way of satisfying his own craving for certainty and stability.
- iii) Convenience: This consists of making use of existing legal institutions.
- iv) Intellectual conservatism: Fuller said a judge may adopt a fiction, not simply to avoid discommoding current notions or for the purpose of concealing from himself or others the fact that he is legislating”.

Equity: In one sense equity is synonymous with justice. Maine defined it as “any body of rules existing by the side of original civil law, founded on distinct principles and claiming incidentally to supercede the civil law in virtue of a superior sanctity inherent in those principles.

One function of equity is to mitigate in various ways the effects of the strict law in its application to individual cases. Another function is to procure a humane and liberal interpretation of law.

In English law, the question of conflict between common law and equity has been the subject of some controversy. The Judicature Act, 1873 provided, generally in all matters not herein before particularly mentioned, in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail. It is clear, therefore, that equity arises out of the process of law applying. In Roman law, the rigidity and shortcomings of the civil law were remedied by the judges with the help of principles of equity.

Legislation: As a general inference, Maine believed that no human institution was permanent, and that change was not necessarily for the better. Unlike Savigny, he favoured legislation and codification. With the rapid changes now taking place, this is the only efficient way of dealing with the problem. He recognised that the advance of civilization demanded an increasing use of legislation and he often contended that the confused state of English law was due to its pre-eminently judge-made character. Codification is advanced form of legislative development.

Law Reform: There is a great deal of room for improvement, short of drastic change of the system itself.

Codification: This is a phenomenon which is found at various stages of development. Undeveloped systems often start with codes. Maine opened his classic work with the remark, “the most celebrated system of jurisprudence known to the world begins, as it ends, with a code.” Codification is said to provide a fresh start, but this must not be misunderstood. ‘Fresh start’ cannot mean an entirely new kind of law. Therefore, codification must be of the existing law and the question is what shape and form it should assume.

5.6 MOVEMENT FROM STATUS TO CONTRACT

Side by side with the above doctrines, Maine developed another thesis. In early societies, both static and progressive, the legal condition of the individual is determined by status, i.e., his claims, duties, liberties etc. are determined by law. The march of progressive societies witnesses the disintegration of status and determination of the legal condition of the individual by free negotiation on his part. This was expressed by Maine in the following dictum:

“The movement of progressive societies has hitherto been a movement from status to contract.”

According to Maine, the unit of ancient society was family but ‘individual’ is unit of the present society. The authority of the pater familia and dependency of the family become obsolete and dysfunctional yielding place to the growth of individual rights, individual personality and individual freedom and obligations. This led to disintegration of the family system, end of the dependency on the pater familia and emergence of contractual relations among individuals. Now the individual became the best judge of his own good. Law accordingly recognized the individual as the sole subject matter of rights and duties in place of pater familia which was previously the sole repository of power.

In England, the movement from status to contract began with the repeal of old laws which put fetters or restrictions on individual freedom by denying them rights. The new laws conferred contractual capacity on the individual’s enforcing rights for or against the individuals. In Roman law, there was the gradual amelioration of the condition of children, women and slaves, the freeing of adult women from tutelage, and the acquisition of a limited contractual capacity by children and slaves. In English law the bonds of serfdom were relaxed and

eventually abolished. Employment came to be based on a contractual basis between master and servant.

With the growth of commercial and industrial culture, law of contract acquired added significance during 18th and 19th centuries. Hence the theory of free contract came to extensive use in trading and commercial world. The introduction of free education; open system of voting; extending of representation to middle and lower classes; removal of disabilities on the basis of status; separation of married woman's personality from that of the husband; Benthamite doctrine of free contract for regulating relationship between individuals; social contract theories founded on the notion of free contract or agreement between people and the rulers; free will theory of Kant; the doctrine of liberty, equality and fraternity of the French Revolution; doctrine of inalienable natural rights of man of the American Declaration of Independence; philosophy of laissez faire in economic, political and legal theories; relationship between master and servant; employer and workmen, wife and husband, parents and children; annulment of the common law doctrine of common employment etc. are the examples to support the dictum 'movement from status to contract.'

5.7 DIAMOND'S CRITICISM

A.S.Diamond in his 'primitive law' expressed the view that Maine's theory of Themistes, the religious theory of the origin of law, is unsupported by the facts available about primitive society. Primitive religion, he says, contains, no rules for the conduct of man towards man sanctioned by a regard for the will of a moral God. The religion of savages is concerned chiefly with ceremonies calculated to gain the good will of supernatural powers, ancestors and fellow-men; it is not concerned to afford sanctions for rules of conduct between man and man. Diamond concludes: It is impossible to consider the rules of primitive law as either originating in or developing under the impulse of primitive religion; though when such rules of law have been evolved, they may and do later receive in some cases additional support and stability from taboos and other sanctions of religion and magic. He thinks that rules of primitive law are the true parents of corresponding rules of morality. In support of his views Diamond points out that the Code of Hammurabi, the Assyrian laws and the Anglo-Saxon laws of Aethelbert are all instances of purely secular laws with secular sanctions containing no admixture of rules of religion and morality.

Dean Pound observes in his 'Introduction to the Philosophy of Law': "Religion, the internal discipline of the organized kindred, and the laws of the state were there to coordinate agencies of social control in ancient society. Nor was the law for a time the chief of these nor the one which covered the widest field." There can be no doubt that religion was one of the earliest of the cohesive forces which kept primitive society together. Since the notion of law can arise only in an organized society, it must be posterior to notions of primitive religion and morality which were at the basis of that organization. So the theory of Henry Maine which derives legal duty from the concept of religious duty with which it was originally confounded and inextricably blended, does not appear to be historically unsound and cannot be lightly brushed aside.

5.8 SUMMARY

The historical approach to law is based upon the assumption that the key to an understanding of jurisprudential problems may be found in the analysis of the past. According to Savigny, law should reflect nationality. Law comes from the people, not from the State. Law should be based on customs, traditions, habits, culture and heritage of the community. The Volkgeist – the spirit of the people – created the living law. Legislation will be effective only when it is in harmony with the volksgeist of the community. Law is sui generis – peculiar to the community, like language and culture.

Henry Maine interpreted history as providing proof of the existence of stages in the evolution of law. Three distinct stages in legal development may be discerned in the history of the past. In the first stage law emerged from judgments of rulers i.e., era of Themistes. In the second stage those judgments transformed into customs i.e. era of Customs. In the third stage, the art of writing produced codes of law i.e., era or Codes. Henry Maine said that in progressive societies law proceeds to develop through three methods: fictions, equity and legislation. Maine argues, ‘the movement of progressive societies has hitherto been a movement from status to contract.’

5.9 SELF-ASSESSMENT QUESTIONS

1. Explain the distinguishing characteristics of Historical School of Jurisprudence?
2. Evaluate the contribution of Savigny to Historical Jurisprudence?
3. Discuss the contribution of Henry Maine to Anthropological Jurisprudence?

5.10 FURTHER READINGS

Dias, Jurisprudence, Aditya Books Pvt.Ltd. New Delhi

Sir Henry Maine, Ancient Law, Dorset Press, USA

Julius Stone, The Province and Function of Law, Universal Law Publishing Co. Pvt. Ltd., Delhi

Lloyd’s Introduction to Jurisprudence, Sweet and Maxwell, London

UNIT – VI MARXIST THEORY OF LAW

Objectives

After reading this unit the student should be able to

Understand juristic thought having its origin in the works of Marx and Engels

Distinguish communist legal theory from other theories and philosophies of Law

Explain Marxist theory of ‘law’ and ‘state’

Discuss Marxist doctrine of infrastructure and superstructure

Evaluate the contribution of Marx and Engels to ‘socialist legal theory’

Structure

6.1 Introduction

6.2 Dialectical Materialism

6.3 Laws of economic production

6.4 Historical materialism

6.5 Marxist concept of ‘class’

6.6 Infrastructure and Superstructure

6.7 Marxist concept of State and Law

6.8 Law as an instrument of class domination

6.9 State as the executive committee of the ruling class

6.10 Doctrine of withering away of the State

6.11 The State and the law of the period of transition from Capitalism to Communism

6.12 Marx and Ideology

6.13 Marx attacks on Justice notions

6.14 Criticism

6.15 Summary

6.16 Self Assessment Questions

6.17 Further Readings

16.1 INTRODUCTION

Marxist theory of law is mainly related to the doctrines of Karl Marx (1818-1883) and Friedrich Engels (1820 – 1895). It is partly historical and partly sociological. ‘Marxist theory of law’ is substantially different from other theories and philosophies of law which have been discussed in legal theory. While natural law principles have been aimed in various ways at the establishment in society of fundamental and sometimes unchanging values, it can hardly be said that any reasonably-sized community at the present day represents the practical implementation of natural law ideas. Doctrines of natural law have had their greatest effect on systems and

communities which have sought to improve their existing state or which have encountered some major practical problems which natural law can help to solve. Analytical positivism in its different forms, relies largely on existing juridical institutions upon which and out of which an analysis of law and legal system may be drawn. The main distinguishing feature of the 'socialist legal theory' is that a legal system has to be based upon the political and economic philosophy of Karl Marx and his successors.

One of the earliest documents of great importance in the development of communism in general, and of socialist legal theory in particular, was Karl Marx's Communist Manifesto, which was printed in London in 1848. At the time both Marx and Engels were just under thirty years. Within their strong partnership, Marx provided the philosophy and the determination to influence lives of the people, and Engels provided some substantial first hand experience of social and economic conditions in the industrial Lancashire of the early 1840s.

The contention of the Communist Manifesto is simple and is characterized by the early statement: "The history of all hitherto existing society is the history of class struggles." When Engels described conditions in Lancashire and subsequently took Marx on a visit there, Marx realised that he had found the key to historic change. The driving force was not in men's minds, but in the system of production.

Since class struggle lies at the base of social conflict and social and economic development, the typical stages of a community's development must be traced out. In a primitive stage of the exploitation of men by men there is slavery, an institution now a days universally condemned. Slaves were regarded as little more than things and there was a complete exploitation of slaves by the dominant class. The next stage in social development is the feudal system based on landholding and propriety and the domination of serfs. The rise of a merchant middleclass betokens the beginning of the bourgeoisie, and it is this stage of social and economic development which characterizes all non-communist communities. In this stage of development, the tool of economic domination has changed from landholding in the feudal sense to capital. Marx was substantially accurate in his foresight of the characteristics of a bourgeois dominated system of capitalist exploitation. The final stage of development, for Marx, is the socialization of society leading to the stage of perfect communism when all capitalist and bourgeois elements have been eliminated. This final stage may come about as a result of either of evolution or of revolution, the latter necessitating a positive and probably violent catalyst which the former does not.

Karl Marx fashioned a theory of law in strict accord with his carefully developed world outlook. For Marx, study was a means to an end. The end was the revolutionary transformation of society. An understanding of the nature of social phenomena such as economics, politics and law, would ensure that the path to revolution was chartered properly. Comprehension of the origins and nature of law and of its objective role within society had to go hand in hand with a determination to change that society. Marx said, "up till now philosophers have merely interpreted the world, the point, however, is to change it". An understanding of jurisprudence demands more than a static analysis. According to Marx, it must encompass a study of the

nature of law with in a society in flux. Marxist jurisprudence comprises three doctrines: dialectical materialism, laws of economic production, and historical materialism.

6.2 DIALECTICAL MATERIALISM

Hegel's philosophy of ideal-cultural evolution was one of the powerful mental constructs of the 19th century. It attracted not only philosophers but also politicians. Among them was Karl Marx, whose dialectical materialism became the philosophical basis of communism. Marx adopted Hegel's method but substituted for ideal evolution the material theory of evolution which became known as 'dialectical materialism' or economic determinism. Marx said that in every age the ruling ideas are the ideas of its ruling class; and the chief factor in determining the ruling class was the method of economic production. Under slavery it was the slave-owners; under feudalism it was feudal over-lords; under capitalism it was the bourgeoisie, or 'middle class', a term which includes everything from millionaire bankers and manufacturers down to petty tradesmen who employ one or two workers. In contrast with the bourgeoisie is the proletariat, which means those who are dependent on their labour for their living.

Marxist evolutionary theory patterned on the Hegelian dialectic history, provides the philosophic foundation and faith of its followers. The instrument of progress is social conflict, the conflict of opposites for which Hegel's logic provided the solution. In the feudal stage, the overlords were dominant, yet they were obliged to admit a third estate, a class who were not their subjects i.e, the merchants and tradesmen. Thus the feudal society, chiefly because of its defective method of production, gave rise to its antithesis, which led to its destruction and the rise of capitalism. Capitalism exploits the proletariat, the workers, who will rise to destroy it, and thus it will pass over into the dictatorship of the proletariat. Communists believe that this succession is inevitable. That is why they say: "History is on our side".

But the dictatorship of the proletariat was deemed to be only an antithesis, a temporary stage necessary to prepare for the classless society. When that synthesis is reached, law and the state will slowly disappear, because all internal struggle will disappear. Such was the view of Pashukanis, who was the leading Soviet legal philosopher.

Marx was profoundly affected by the philosophy of Hegel. Marx's approach to the phenomena of nature is dialectical; his interpretation of those phenomena is materialistic. Dialectics is, as a general mode of analysis, totally opposed to metaphysical speculation. Its essential features are as follows:

1. Nature is a connected and integral whole: Nothing exists as an isolate. Hence law cannot be understood 'on its own'; it is connected with, and, therefore, dependent on, many other phenomena.
2. Nature is in a state of continuous movement and change. A study of jurisprudence cannot ignore the changing character of the law.

3. Development in all phenomena is characterized by imperceptible, quantitative changes, which become fundamental, qualitative changes, as evidenced by the decay and eventual disappearance of some jurisprudential doctrines and the appearance of new forms of theory.

4. Internal contradictions are inherent in all phenomena, and ‘struggles’ between opposites, the old and the new, are inevitable. Thus, Marxist jurists would view some fundamental disputes within jurisprudence as reflecting a struggle between opposing modes of interpretation.

Materialism stands in direct opposition to philosophical idealism and rejects metaphysics. Matter is the basis of all that exists. Its essential features are as follows:

1. The world is material: its phenomena constitute different forms of matter in motion (motion is the mode of existence of matter). Hence marxist jurisprudence requires for its methodology no ‘universal spirit’ and no ‘categories of the unknowable’; it must be able to explain in their totality the phenomena which comprise the law.

2. Matter is primary, mind is secondary, derivative, because it is a reflection of matter. To divide thought from matter, in jurisprudence or in any other sphere of study, is to fall into error.

3. The world and its phenomena are entirely knowable; experiment and other forms of practical activity can produce authentic knowledge which has the validity of objective truth. The processes of discovering objectivity are difficult and never complete.

6.3 LAWS OF ECONOMIC PRODUCTION

Production under capitalism is regulated, according to Marx, by inexorable economic laws. Those who own the instruments of production (the capital class) derive surplus value from the labour of those who have nothing but their labour power to sell (the proletariat). The appropriation of surplus value is the key to an understanding of capitalism (and the legal rules which are created so as to support that system). In the drive for profit, the capitalist class must intensify the exploitation of the proletariat. Crises of overproduction develop and existing markets are exploited more intensively. Society is polarised; economic crisis deepens, immiseration of the workers intensifies. The workers learn from their struggles and are able to attain a level of organization which enables them to confront the capitalist class and to ‘expropriate the expropriators: The capitalist system, says Marx, produces its own grave-diggers.

6.4 HISTORICAL MATERIALISM

The Marxist doctrine, founded by Karl Marx and Freidrich Engels takes as its starting point the philosophical doctrine of materialism and the idea of evolution. The doctrine of materialism, simply stated, as follows: The material principles, nature, is the primary given factor; thought and intellect are simply properties of matter; consciousness is no more than a reflection of the material world. The idea of evolution is expressed thus: “motion is the mode of existence of matter”; there are no permanent, immutable things in the world, fixed once and for all; there are only processes and things undergoing change. Nature and its different phenomena are therefore

in perpetual evolution. The laws of this development are not established by God, nor do they depend on human will; they are peculiar to nature itself, discoverable and entirely comprehensible.

In 1859, Darwin, in his *Origin of the Species*, had put forward an explanation of the principles governing biological evolution. Marx and Engels thought that in the social as well as in the natural sciences, it was possible in similar fashion to discover the laws ruling the development of humanity. They believed they had discovered these laws; and thus were able to propose a scientific socialism in place of the dreams of the earlier utopian socialism. They took up the Hegelian thesis of the mechanics of evolution (the historical dialectic), but rejected Hegel's idealistic analysis of the causes which explain this evolution of society as based on advances made by human intellect. They on the contrary, applied materialism to social life (historical materialism): it is matter which commands the intellect, and Reality which give birth to ideas. Man is homofaber before he is homosapiens. Marx said: "It is not the consciousness of men that determines their being....The material productive forces of society condition the progress of social, political and spiritual life..... For me, ideas are merely the material world transposed and translated in the mind of Man..... The anatomy of civil society must be found in political economy."

6.5 MARXIST CONCEPT OF 'CLASS'

Marx saw history as the history of class struggles. But he neither invented the concept of 'class' nor does he offer much in the way of systematic analysis of it. He rejected the theory that classes are distinguished merely by wealth and poverty. He also rejected a definition of 'classes in terms of their sources of revenue. In *Capital* he writes that there are three large classes in a capitalist society: Wage labourers, capitalists and landowners. His reason for distinguishing these three classes is that he regards the conflicts of interest between them as fundamentally more and historically important than conflicts within them. He saw a process, however, whereby those land owners would be squeezed out and two classes would remain: bourgeoisie and proletariat. These are two great hostile camps. Marx was, of course, not describing a static society and his view was that, despite variations that then existed, the capitalists and the proletariat were essentially the only classes in a developed capitalist society.

6.6 INFRASTRUCTURE AND SUPERSTRUCTURE

Marxist doctrine is in no way fatalistic. Man plays an important part in the accomplishment of historical laws. But the probabilities open to him are limited. Engels writes "It is men who are the makers of their own history, but in established surroundings which condition them on the basis of inherited objective material conditions."

What is truly decisive in a society is its economic basis or infrastructure and the conditions in which the means of production are exploited. The superiority of the principles of political economy over those of private law is admitted. All else is superstructure closely

dependent on the economic infrastructure, whether one envisages ideas, social habits, morality or religion.

Law, in particular, is only a superstructure; in reality it only translates the interests of those who hold the reins of command in any given society; it is an instrument in the service of those who exercise their “dictatorship” in this society because they have the instruments of production within their control. Law is a means of oppressing the exploited class: it is of necessity, unjust or in other words, it is only just from the subjective point of view of the ruling class. To speak of a “just” law is to appeal to an ideology- that is to say, a false representation of reality; justice is no more than an historical idea conditioned by circumstances of class. The law of capitalist state, from their point of view, is really the negation of justice.

The way in which Marxists consider law is thus entirely opposed to our traditional views. According to Marx, the real basis of any given social order is its economic foundation, and, in particular, the relations created by the processes of production. How production is organized, who owns the instruments of production, who sells his labour power, under what conditions - these matters constitute ‘the basis of production’.

Upon this foundation society erects a legal and political superstructure. The mode of production of material life conditions the general process of social, political and intellectual life. This superstructure includes ideas, theories, ideologies, philosophy; it is corollary to economic structure.

Superstructure cannot be understood apart from its basis. A correct understanding of law and jurisprudence in a particular epoch requires an analysis of the relationships which men have entered into as a direct result of the processes of production within that epoch.

Ideologies, theories of law, do not exist in vacuum; to trace the fundamentals of a theory is a necessary stage in understanding it. Hence, argues Marx, an appropriate method for any social study, such as jurisprudence cannot neglect the economic foundations of society. Consider, for example, the significance of the fact that common law developed during the era of feudalism, and the resulting effects upon the law of tenures and estates.

According to Marx, legal rules, institutions, and jurisprudential theories arise not accidentally but in response to needs perceived by the ruling group within society. Religion, ethics, art, jurisprudence, perform functions which assist in the maintenance of social cohesion; their claim to reflect and portray ‘eternal categories’ is nonsense. As society changes, as the perceived needs of the ruling class change, so the theories of the social sciences will alter.

6.7 MARXIST CONCEPT OF STATE AND LAW

To grasp and understand the Marxist concept of State and Law, it is first necessary to be familiar with the Marxist theory of the origins and meaning of law and state as explained by Engels in his book the Origin of Family, Private Property and the State (1884). According to Engels, in the beginning there existed a classless society in which all persons enjoyed the same position with respect to the means of productions; individuals were equal and independent of each other, because the means of production were free and at the disposal of all. They respected rules of conduct but these rules, being founded simply on habits and corresponding to current behaviour, neither imposed nor sanctioned through the use of force, were not legal rules.

Later, primitive society became socially divided through the division of labour and split into classes. One of these classes appropriated the means of production itself, dispossessing the others which it then began to exploit. It was at this movement in time that law and State were born. For the Marxists, there is a close bond between these two ideas. Law is a rule of human conduct which differs from other rules of conduct because it involves coercion, that is the intervention of the state. The State is a social authority which, either by the threat or the use of force, assures that this rule is respected. There is no law without a state, and there is no state without law; state and law are two different words designating the samething.

Not every human society has a state organization and law. The state and the law are the results of a specific economic structure of society. They are only to be found in a certain form of society at a particular stage of its evolution. Law and the State only appear when society is divided into social classes, one of which economically exploits the other or others. In such a situation, the ruling class has recourse to law and the state in order to strengthen and perpetuate its domination.

The law is the instrument which, in the class struggle, safeguards the interests of the ruling class and maintains social inequality for its own profit. It can be defined as that series of social norms which regulate the dominating relationship of the ruling class to the subjugated class, in those areas of this relationship which cannot be maintained without recourse to the oppression wielded by a solidly organized state. And in itself the state is the organization of the exploiting class for the purpose of safeguarding its own class interests.

Law and the state have not always existed. The movement at which they appeared represents a “dialectical leap” in society’s development; the greatest social revolution humanity has ever known was the transition of a society without either law or state to a society possessing these institutions. All the later changes which have resulted from advances in the methods and means of production have been merely “quantitative changes” changes of lesser importance. They may have brought about changes in the existing law and state, but they left intact the characteristics of a class society, rooted in private ownership of the means of production. These may have changed hands and altered in nature, but whether one considers the periods of slavery, feudalism or capitalism -there is one observably permanent phenomenon: the exploitation by the “haves” of the “have-nots”.

The history of humanity is essentially the history of class struggle: in other words, it is the incessant struggle engaged in by one class or another in order to seize the means of production and thus establish its own dictatorship. The turning points of history are marked by the victories of the exploited class which in turns becomes the exploiting class. The advent of a new social class represents a step forward, because it corresponds to a type of production which is more advanced and more in line with technological progress and the general aspirations of society. Society will continue to suffer from a fundamental defect, however, so long as the means of production remain the property of only some and so long, therefore, as there are those who exploit and those who are exploited.

6.8 LAW AS AN INSTRUMENT OF CLASS DOMINATION

According to Marx, law represents superstructure which is used in bourgeoisie capitalist systems of regulation in order to further the ends of the economically dominant and exploiting class at the expense of the suppressed class – the proletariat. He saw the normative order of capitalist societies as a cloak for economic domination by a minority ruling groups, and assumed that the concepts of state and law were therefore, by their very nature, tools for the maintenance of such exploitation by systematic coercion.

Because of the very nature of capitalist society, exploitation and struggle are inevitable. Ideas concerning the law, its foundation and content, are mere reflections of the unrelenting class struggle which is at the basis of social activity. Objectively, jurists do not, because they cannot, stand aside from a struggle of which they are an integral part. Jurisprudence is to be interpreted as an aspect of the class interests served, consciously or unconsciously, by jurists.

Law is perceived by Marx as an instrument of class domination, allowing the ruling class to control the working class. Enactments, regulations, the legal apparatus, no matter how beneficial and disinterested they seem to be, are methods of ensuring the continuation of the economic and political status quo.

A ‘neutral’ ‘disinterested’ jurisprudence is a fiction. Marxist jurists have attempted to show that behind the tenets of jurisprudential movements in this century may be discerned a concern for the protection and preservation of the interests of the ruling class. Concern for ‘natural rights’, ‘the rights of property’, is a mask for intellectual activities aimed at the maintenance of a system based upon economic exploitation. Jurists become, in effect, ‘hired pugilists’, defending a ruling class, ‘indulging in a rhetoric of self-praise and dogmatism, and attempting to perpetuate patterns of class domination.

Jurisprudential theories are not ‘isolates’; they can be interpreted only within the context of economically determined relationships. The process of unraveling these relationships demands an awareness of the historical development of classes.

According to Marx, the law and jurisprudence implement what is required by the dominant economic group within society; jurisprudential ideas tend to legitimize the existing social structure. Property rights are exalted, attempts by the exploited to combine and improve their bargaining position are anathematized as interference with 'natural forces' and the withdrawal of labour, in the form of strikes, is categorized as 'anarchial'. The favoured form of jurisprudence, according to Marxists, is that which views the status quo as the result of the working of an invisible hand, guiding society towards freedom and prosperity.

6.8 STATE AS THE EXECUTIVE COMMITTEE OF THE RULING CLASS

In spite of its outward trappings of power and the support given to it by legal theories which tend to sanctify the basis of its operations, the State is viewed in Marxist Jurisprudence as no more than an aspect of superstructure, resting upon an economic basis whose contradictions it mirrors. The State did not exist, according to Marxists, before the emergence of classes; burgeoning of a class system.

Within capitalist society, the State is merely the Executive Committee of the bourgeoisie, ruling on its behalf and utilizing a legal apparatus which is based upon the threat of coercive action against those who seek to overturn the existing order. Jurisprudence assists the state by providing an ideology which, under the guise of an objective analysis of the role of the State, underpins its dominant, exploitative role and objections.

6.10 DOCTRINE OF WITHERING AWAY OF THE STATE

All phenomena are affected by change and eventual decay; the State is not, therefore eternal. Marxists have prophesied that it will wither away when a triumphant revolution replaces 'the government of persons by the administration of things'. When classes disappear, following the revolution, there will be no need for a legal apparatus which is the expression of class rule. Exploitation and poverty - the root causes of criminal conduct - will vanish in the classless society. The State will disappear gradually. During the transitional period from capitalism to socialism, new forms of law and a new jurisprudence will be required. As man develops into a 'group culture', he will have no need of codes and rules, and the very need for an institutionalised law will vanish.

If Marxism conceives of law and state as tools of exploitation, characteristic of capitalist suppression, why is there law and state, after the proletariat have assumed power? The answer to this question given by Marxians involves nice distinctions and ambiguity in this area. In a perfect communist society there will be no state, because there will be no need for one, and the existence of law and state would connote the continuance of class struggles and economic conflicts which would by them have ceased to exist. However in the stage of socialism which precedes communism, there will still be laws and there will still be a state which is referred to as a 'semi-state'. It will be a 'semi-state' only, since its aims will be different in kind from that of the state in the traditional sense; but it will nevertheless partake of the nature of a state in some

respects, systematic coercion or at least its possibility being a necessary adjunct to the moulding of social and economic relationships in the direction of communism.

In the period of transition between the overthrow of the capitalist system and the achievement of complete communism the traditional concepts of 'law' and 'state' are fashioned to Marxist ends. The transitional 'semi-state' is, in contradistinction to the ideological capitalist state, a non-ideological adjunct of the proletarian dictatorship. It is declared to be non-ideological since such a concept of state is merely a means to an end, a necessary tool in the fashioning of communism, to be used only insofar as it is necessary in order to protect the authority of the economically-dominant proletariat against invasions of any remaining capitalist elements in society. As and when such adverse elements are eliminated, the 'semi-state' together with laws, will wither away. A major contradiction in the Marxist theory thus arises, since the state is conceived of as at once the coercive machinery for the maintenance and also for the abolition of exploitation.

6.11 THE STATE AND THE LAW OF THE PERIOD OF TRANSITION FROM CAPITALISM TO COMMUNISM

The question of the period of transition from capitalism to communism was posed by Marx, and further exhaustively treated by Lenin and Stalin. As Marx showed, it occupies an entire period of history. A State of a special type – the revolutionary dictatorship of the proletariat – belongs to this period.

Having conquered and cast down the bourgeoisie, won political power, and established its revolutionary dictatorship, the proletariat is not limited to victories already achieved. To consolidate them, and further to develop its success, the proletariat requires a state, organized a new, and playing a most important part in the further proletarian struggle to realize its ultimate aims. In the course of this entire transitional period the state realizes its great mission of service in the building of socialism and the transition to communism.

The pseudo marxists have put the matter as if, with the overthrow of the bourgeoisie and the seizure of political power by the proletariat, the kingdom of universal freedom had come. Engels refuted this fanatic and sickly sentimentality when he pointed out that "the proletariat still needs state, needs it in the interest, not of freedom, but of crushing its adversaries" and "when it becomes possible to speak of freedom, then the state as such ceases to exist. "

After the proletariat has grasped power the class struggle does not cease. It continues, in new forms. The overthrown exploiters cannot resign themselves to their defeat, to the loss of their economic and political domination. They hurl themselves into battle and so not hesitate to use any means whatever to seek the return of the lost paradise, of lost privileges and former influence and significance. Stalin always warned against the danger of interpreting incorrectly the thesis of the abolition of classes, of creating a classless society and of the withering away of the state.

The state of the transition period from capitalism to communism is one which itself effectuates the political power of the proletariat, the dictatorship of the proletariat. It is differentiated sharply and fundamentally from the bourgeois state by a series of most important characteristics.

The proletarian state is a special form of leadership of the remaining masses of toilers by the proletariat. Lenin emphasizes that this is one of the most important points of Marxism. Why is the proletarian state 'not strictly a state'? Because any state other than the proletarian state is a 'special power' in the hands of the minority to repress the toiling masses, whereas the new proletarian state of the transition period is 'universal power' of the popular majority of workers and peasants to crush the exploiter-minority; it is the democracy of the oppressed classes. This is why Leninism affirms that Soviet democracy and the Soviet state are a million times more democratic than the most democratic bourgeois republics.

The transitional state is a form of the dominance of the proletariat. Without the state, the proletariat cannot secure its success and its victories – cannot guarantee to itself the success of the further movement towards communism. As Lenin said: "Socialism is unthinkable without the dominance of the proletariat in the State". In the Communist Manifesto, Marx and Engels emphasize very decisively precisely this aspect of the matter, showing that "the first step in the workers' revolution is turning the proletariat into the dominant class". Marxism teaches the necessities of using law as one of the means of the struggle for socialism – of recasting human society on socialist bases. Developing the doctrine of Marx and Engels, Lenin and Stalin teach proficiency in utilizing law and legislation in the interests of socialist revolution.

6.12 MARX AND IDEOLOGY

The concept of ideology does not begin with the Marx nor is it unique to Marxism. The concept is central to Marxian understanding of law. The concept of ideology has a number of different meanings:

- i) a system of beliefs characteristic of a class or group;
- ii) a system of illusory beliefs, false ideas, false consciousness as opposed to true or scientific knowledge;
- iii) the general process of the production of meanings and ideas.

There is concentrated treatment of ideology in the works of Marx and Engels. Marx held that social analysis can discern and help to actualise imminent tendencies in contemporary social development. After Marx the diagnosis of ideology became a mode of penetrating beyond the consciousness of human actors, of uncovering the 'real foundations' of their activity and using this for the purpose of social transformation.

In Marx, and especially in the German Ideology, ideology pre-eminently appears as a body of ideas or thoughts, which serve the ends of domination by the ruling class. Marx asserts that ideologies expressly justify the interests of dominant class.

One of the most interesting discussions on ideology and law is Sumner's 'Reading Ideologies: An Investigation into the Marxist Theory of Ideology and Law' (1979). He observes that legal ideology contains more than just capitalist economic ideology. Law reflects, he says, the ideologies of different fractions within the bourgeoisie and the ideologies of other classes. It also reflects the ideologies of occupational groups, minority groups and the ideologies related to family structure, political representation, etc. He saw law as an ideological form of the fullest complexity but observed it is not equally pluralistic: it is basically a reflection of class inequality, expressing the ideologies of the dominant class. He concludes: 'the legal system is first and foremost a means of exercising political control available to the propertied, the powerful and the highly educated. It is the weapon and toy of the hegemonic bloc of classes and class fractions whose rough consensus it sustains. As such it lies hidden beneath a shroud of discourse, ritual and magic which proclaim the wisdom and justice of the law.'

6.13 MARX'S ATTACKS ON JUSTICE NOTIONS

Marx had many good reasons for his attacks on notions of justice and morality. Marx claimed that morality is a form of ideology and that any given morality always arises out of a particular stage of the development of production and particular class interests. The Marxian critique of capitalism is not moral but scientific. Marx asserts that morality has no independence, no history. Marx and Engels wrote in *The German Ideology*, 'do not preach morality at all.' Marx scorned the anarchist Proudhon's appeal to an ideal of justice. Marx was impatient with those who put forward utopias as spurs to working class action. The working class, he wrote, have no ready-made utopias. Instead, emancipation would come through struggle, a series of historic processes. The working class have no ideals to realize, but to set free elements of the new society with which old collapsing bourgeois society itself is pregnant. According to Marx, the ideal society would be one in which, under conditions of abundance, human beings could achieve self-realization of social unity.

Marx's view of justice emerges most clearly in 'Capital' and 'The Critique of the Gotha Programme'. He writes of the content of justice as corresponding to the mode of production so that 'slavery on the basis of capitalist production is unjust; likewise fraud in the quality of commodities.'

Whether the Marxists believe in human rights? Some contemporary Marxists are using the language of human rights. The question is whether they can do so whilst remaining faithful to Marxism. Marx wrote of 'the so-called rights of man' as 'simply the rights of a member of civil society, that is, of egoistic man, of man separated from other men and from the community'. He saw 'liberty' as founded not upon the relations between man and man but 'rather upon the separation of man from man'. It is the right of such separation. Its practical application was the right of private property. According to Marx and Engels, the basic laws would furnish principles for the regulation of conflicting claims and thus serve to promote class compromise and delay revolutionary change. Upon the attainment of communism the concept of human rights would be redundant because the conditions of social life would no longer have

need of such principles of constraint. It is also clear that in the struggle to attain communism concepts like human rights could be easily pushed aside.

6.14 CRITICISM

The history of Marxist jurisprudence in the post 1917 era is the story of legal theory used to shore up regimes characterized by an absence of human rights and a denial of freedoms, in the name of historical necessity. The recent collapse of the Marxist regimes has drawn attention to what is widely perceived as an essentially flawed theory of law.

The excesses of legal systems which were fashioned from Marxist theory took place in political environments from which the rule of law and the rights of the accused had been banished as remnants of bourgeois dominance. The result was in practice, a denial of human dignity and the growth of legal theories which were often little more than ex post facto justification of State's political practice.

6.15 SUMMARY

Marxism viewed legal theory in the light of his one world outlook. An understanding of jurisprudence necessitated awareness of the class struggle and the class structure within capitalist society. In Marxian doctrine, they are three separate, but connected concepts of thought, they are dialectical materialism, laws of economic production, and historical materialism. According to Marx, the basis of society is its economic foundation. Upon this base, society erects a political and legal superstructure. Ideas, theories, ideologies reflect economic activity. Jurisprudence is no exception to this rule.

Legal institutions, rules, procedures, theories arise in response to the needs of the ruling class. Under capitalism jurisprudence safeguards the interests of the capitalists, because law is an instrument of dominant class to preserve their interests. The state came into existence only when classes appeared within society. In capitalist society, the state is the executive committee of the ruling class. In a classless society state and law will wither away. Marxist jurisprudence is criticized by those who argue that dialectical materialism is flawed.

6.16 SELF ASSESSMENT QUESTIONS

1. Write a note on dialectical materialism
2. "Superstructure is a corollary to economic structure" – Explain
3. Discuss the Marxist concept of Law and State
4. Explain the doctrine of withering away of the State and Law
5. Examine the merits and demerits of Marxian interpretation of Law.

6.17 FURTHER READINGS

Dias, Jurisprudence, Aditya Books Private Ltd., New Delhi.

Lloyd's Jurisprudence, Sweet and Maxwell, London

John D.Finch, Introduction to Legal Theory, Universal Law Publishing Co.Delhi.

Upendra Baxi: Marx, Law and Justice, Tripathi, Bombay

Vyshinsky: The Law of the Soviet State, The Macmillan Company, New York.

UNIT – VII SOCIOLOGICAL SCHOOL

Objectives

After reading this unit you should be able to

- Understand the scope and purpose of sociological jurisprudence
- Explain social origins of laws and legal institutions
- Discuss jurisprudence of interests
- Explain contribution of Sociological jurists especially Roscoe Pound
- Classify de facto human interests into individual interests, public interests and social interests.
- Illustrate jural postulates of civilized society

Structure

- 7.1 Introduction
- 7.2 The Scope and purpose of sociological jurisprudence
- 7.3 Iherings Jurisprudence of Interests
- 7.4 Duguit’s Social Solidarity Theory
- 7.5 Criticism of Social Solidarity theory
- 7.6 Eugen Ehrlich – Living Law
- 7.7 Roscoe Pound – Social Engineering
- 7.8 Classification of Interests
- 7.9 Jural Postulates
- 7.10 Summary
- 7.11 Self-Assessment Questions
- 7.12 Further Readings

7.1. INTRODUCTION

Sociological school which is particularly popular in the USA, believes that law is a social necessity with a social function. As Paton points out “the fundamental tenet of this school is that we cannot understand what a thing is unless we study what it does.” According to Keeton, this school is concerned not with “law in books” but with “law in action”. Borrowing analogy from other sciences, one can say that the sociological school deals with “applied jurisprudence” and not with “pure jurisprudence.” A jurist belonging to this school is concerned not merely with the rules of law but also with the social forces that brought those rules into existence and also with the social factors that contribute towards the observance or non-observance of those rules of law. To this school, the behavioural patterns produced by a principle of law are as important and

pertinent as the principle itself. Roscoe Pound, a proponent of this school calls this approach to jurisprudence as “social engineering.”

As ethical school is the meeting point and common ground for Ethics and Jurisprudence, the sociological school is the meeting point and common ground for sociology and jurisprudence. August Comte, Ihering, Duguit, Ehrlich and Roscoe Pound are the exponents of this school.

Jurisprudence is the science of law. It is concerned with the study of the entire body of legal principles. Jurisprudence and Sociology are intimately related to each other. Sociology is the study of man in society. Law controls and regulates actions of human beings in society and it is, therefore, a subject of great importance for the sociologists. There is however difference of approach of a sociologist and of a lawyer to the subject of law. A lawyer is concerned with the rules that men ought to obey, he is not interested in knowing how and to what extent these rules govern the behaviour of ordinary citizens. A sociologist on the other hand, is interested in law as a social phenomenon. His chief concern is not with the rules themselves but with whether they are observed or not and in what way. A sociologist’s study of law from this angle has been given title of ‘Sociology of law’ or ‘Sociological Jurisprudence.’”

‘Sociological Jurisprudence’, according to Roscoe Pound, should ensure that the making, interpretation, and application of law take account of social facts. Consequently jurisprudence has assumed a new role that laws are to be made for men and the law makers and its executors are to take into consideration of human and the social aspect while making or executing it.

‘Sociological Jurisprudence’ investigates how far the laws promote social welfare and also the people’s reaction towards the laws. It deals with the law in action and their effects and defects in relation to social progress. In an era of vast social reforms such an enquiry deserves the utmost importance. Sociological Jurisprudence may be said to make a pragmatic approach to what the legal theory makes a theoretical approach.

The sociologists look more to the working of the law than to its abstract content. They regard law as a social institution which may be improved by intelligent human effort. They lay stress upon the social purposes which law subserves rather than upon sanction. For example, criminology is concerned with the systematic study of crime and criminal behaviour from the social point of view. Penology studies the effects of various penal systems of punishments and the efficacy of reform and rehabilitation schemes in changing criminal behaviour. These branches of legal sociology have rendered great service to the lawmakers and law executors by adding to their knowledge how the laws actually work and how the crime can be effectively dealt with. Sociology has thus shed considerable light and understanding on the various problems that the society has to solve, particularly, from the point of view of criminal jurisprudence.

Sociological school attaches great importance to judicial action than legislative action. Consequently this school emphasizes that law must be interpreted not merely with reference to

the bare bonds of the letter of the law but with reference to the spirit and purpose of law. For this reason, judge must not be hidebound by the letter of the law and he should be permitted the widest latitude in statutory interpretation.

7.2 THE SCOPE AND PURPOSE OF SOCIOLOGICAL JURISPRUDENCE

Sociological Jurists insist upon eight points. They are the practical objectives of the study of law in society. Roscoe Pound had given the programme of sociological school as follows:

1. Study of the law in action:- a study of the actual social effects of legal institutions, legal precepts and legal doctrines; of the law in action as distinct from law in the books.
2. Sociological study as a basis for law making:- The programme called for socio-legal study as an essential preliminary step in preparation for law-making.
3. Sociological study as a basis for effective law enforcement:- study of the means of making legal precepts effective in action.
4. Study of juridical method: Study of legal reasoning and especially the judicial process in relation to legal development.
5. A sociological legal history: The study of legal history in its social context - study of the actual past relations of legal institutions, precepts and doctrines to the then existing social conditions.
6. Study with a view to the individualisation of justice: Recognition of the importance of individualised application of legal precepts; a reasonable and just solutions of individual cases.
7. A ministry of Justice: Establishment of ministries of justice in common law countries for the purpose of law reforms.
8. The end of juristic study is to make effort more effective in achieving the purposes of law.

7.3 IHERING'S JURISPRUDENCE OF INTERESTS

The German School of Jurisprudence of interests founded by Ihering can be considered as an important contribution to the sociological Jurisprudence. The German School believes that in every society there is a continuous conflict of interests. Law seeks to resolve the conflict by providing a compromise and this is done by law by selecting some interests for legal protection. These legally protected interests are called as rights. So in the ultimate analysis, law resolves the social conflict by conferring rights and imposing duties.

Ihering rejected the view of the Historical school that law develops peacefully and spontaneously in every society. According to him, the development of law like its origin is neither spontaneous nor peaceful. "It is the result of constant struggle or conflict with a view to attain peace and order." Ihering says "law is the guarantee of the conditions of life of society, assured by the State's power of constraint."

Ihering found in Roman Law a progressive adaptation of concepts to suit the changing needs of the society. From it he deduced a theory that every legal institution must be inspired by a social purpose. He also recognized the purpose of every human action to be the acquisition of some happiness and the avoidance of some misery. That is why he was styled as a social utilitarian. He takes law as a means to an end. The end of law is to serve purpose. This purpose is not individual but social purpose. When individual purpose comes into conflict with social purpose, the duty of the State is to protect and further social purposes and to suppress those individual purposes which clash with it. This end may be served either by reward or by coercion and it is the latter which is used by the State. Therefore, law is a coercion organized in a set form by the State.

If we name the purpose of an act as the interest in every human act - whether done by an individual or by a body of individuals or by the State - is the pursuit of a happiness or the evasion of a misery. Man in society has a double role - as an individual and as a member of the society. In both characteristics he has interests. The collective society has interests. The State also as the ultimate collective society has interests. These interests may converge or conflict. Convergence of interests leads to cooperation, and results in commerce, family relations, associations and the State organization. When interests conflict, an adjustment or balancing of interests becomes necessary. When interests of an individual conflict with interests of another individual, a *via media* that concedes a fair share of interest to each individual relieves the conflict. When interests of an individual conflict with interests of the society, a balancing of interests becomes necessary on a comparison of the good and evil that may follow the acceptance of one against the other. That interest, whether individual or social, whose upholding would result in a lesser evil or larger good must prevail over the other.

The social inducement for observance of this principle are Reward and Coercion. Thus a soldier is induced to serve in the Army, and a trader is induced to distribute his store of goods to the people by the principle of reward (remuneration and profit). A profiteer is induced to desist from adulteration of his merchandise and a businessman is induced to pay tax by the principle of coercion. Friedmann says "the desire for reward produces commerce, and the threat of coercion makes law." Sometimes the balance of interests may be guided by a sense of Duty and love. These four Reward, Coercion, Duty and Love are the factors that make society stable. As social conditions vary, the balance of interests varies, and therefore law which represents the principle of coercion in the balance of interests also varies.

Ihering would say that to insist that law must be the same for all times is no whit better than to insist that medical treatment should be the same for all patients. Thus in Ihering's conception law emerges out of a struggle in assertion of interests. As the founder of the theory of law being a balance of conflicting interests, Ihering has been styled by Friedmann as the father of modern Sociological Jurisprudence.

7.4 DUGUIT'S SOCIAL SOLIDARITY THEORY

Leon Duguit (1859 -1928) was another great jurist of sociological jurisprudence in the continent. He was professor of Constitutional Law at the University of Bordeaux. He belonged to the age of the collectivist legislation. He developed the theory of social solidarity at a period when the doctrine of individualism was crumbling in Europe being replaced by a new philosophy of collectivism.

Duguit was influenced by August Comte, the noted French positivist who had expounded law as a fact and had rejected the theory of subjective rights. Comte's notion that 'the only right which man can possess is the right always to do his duty' greatly influenced Duguit's theory.

Duguit was also influenced by Emile Durkheim's work 'Division of Labour in Society' (1893). Durkheim distinguished between two types of social solidarity, what he calls mechanical solidarity and organic solidarity. Within early, undeveloped society, men recognised the need for mutual assistance and the combining of their aptitudes. People are bound together by the fact that they have shared a common conscience. Cohesion of a kind existed which is called mechanical solidarity or solidarity by similitude. In such a society because of the collectivist attitude, individualism would exist only at a low level. In more advanced societies in which the division of labour was widespread, collectivism was replaced by individualism. A strong social conscience would produce an organic solidarity or solidarity by division of labour which reflected the functional interdependence of men. Law is an index of social solidarity. Because law tends to reflect different types of social cohesion, different types of solidarity produced their own forms of law.

Duguit propounded a new approach to law based on the interdependence of individuals in social life. As life is lived today, social interdependence has become unavoidable eg. our food, houses, clothes, recreation, entertainment etc. Duguit made a distinction between two kinds of needs of men in society. Firstly, there are common needs of individuals which are satisfied by mutual assistance. Secondly, there are diverse needs of individuals which are satisfied by the exchange of services. Therefore, the division of labour is the most important fact of, social cohesion. He named it 'social solidarity'. With the development of free individual activities the social solidarity develops. This 'social solidarity' is a fact and it is necessary for social life.

In the present day society man exists by his membership of the society. Each man cannot manufacture and procure the necessities of life himself. The end of all human activities and organization should be to ensure the interdependence of men. This is Duguit's doctrine of social solidarity. Law also is to serve this end. Duguit says 'Law is a rule which men possess not by virtue of any higher principle whatever (good, interest or happiness) but by virtue and perforce of facts, because they live in society and can live in society.'

Duguit launched a vigorous attack on the myth of state sovereignty. The 'social solidarity' is the touchstone of judging the activities of individuals and all organizations. State is

also a human organization. They too are under a duty to ensure social solidarity. Therefore, the State stands in no special position or privilege and it can be justified so long as it fulfils its duty. Duguit's theory of minimization of state function leads him to deny any arbitrary power to legislator. Legislator does not create law but merely gives expression to judicial norm formed by the consciousness of the social group.

Another important point in Duguit's theory is that he denies the existence of private rights. The only right which any man can possess is the right always to do his duty. Individuals working in any capacity are the parts of the same social organism and each is to play his part in furtherance of the same end i.e., social solidarity. According to him, the essence of law is duty.

7.5 CRITICISM OF SOCIAL SOLIDARITY THEORY

1. Social solidarity, a natural law principle: The facts of social life to which he confines his study in practice, tend to become a theory of justice. Like natural law theories he established a standard to which all positive laws must conform. It is nothing but natural law in a different form.
2. Social solidarity, to be decided by judges. Again a question may arise as to who is to decide whether a particular Act or Rule is furthering the 'social solidarity' or not? Naturally, the judiciary will have the power to decide it. The judges too have their weaknesses and limitations, and this process may lead to judicial despotism.
3. Social solidarity, a vague expression: The idea of social solidarity is very vague and an analysis would reveal that it is not free from metaphysical notions.
4. Social solidarity, interpreted to serve divergent purposes. Social solidarity may be subjected to different interpretations which may be used to serve divergent purposes. Fascists used it to suppress trade unions. Soviet jurists used the theory to establish that individuals have no rights. His denial of distinction between private and public law was great attraction to Soviet Jurists.
5. Duguit confused 'is' with 'ought'. While defining law he confused with what the law ought to be. According to him, if law does not further 'social solidarity' it is no law at all.
6. Duguit overlooked the growing state activity. He overlooked the fact that social problems of modern community can be solved better by state activity. In modern times, with the development of society the sphere of state activity has much more widened and the State has grown very strong.

Despite defects and weaknesses in Duguit's theory his approach is very comprehensive. Though his theory ultimately becomes a theory of natural law, the idea of justice that we find in him is perfectly in social terms and derived from social facts. He shaped a theory of justice out of the doctrines of sociology. Later jurists took inspiration from him.

7.6 EUGEN EHRLICH – LIVING LAW

Professor Eugen Ehrlich of Austria is another sociological jurist who expounded the organic concept of living law. Ehrlich while following the Savigny's line of thinking does not hang on the past but has his views on the present society. The 'living law' as conceived by Ehrlich is the 'inner order of associations' that is the law practiced by society as opposed to law enforced by the State. As *volksgeist* was the central theme of Savigny's theory, the 'living law of the people' was the pivot of Ehrlich's theory.

The central point in Ehrlich's theory is that 'the law of a community is to be found in social facts and not in formal sources of law'. He says: "At 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."

The law in the formal sources, like legislation and precedent, does not reflect the actual life of the people. By reading the Advocates Act one cannot have a full knowledge of the actual rules of conduct observed by the legal profession. There are many norms followed by the people and deemed binding on them which are not embodied in the law. State is an organization of the people, but it is not the only one, there are several others like the family, the village, the chamber of commerce, the trade union. These organizations also have norms to regulate the conduct of individuals. They are strictly observed by the individual because of the social pressure behind them. They also form rules of conduct and therefore part of 'the living law of the people'

Ehrlich says "the law is much wider than legal regulations". He illustrated the gap between the formal law (law in legislation and precedent) and the living law (law as it actually lives or functions in society). A commercial usage comes into practice as a matter of convenience and usefulness, normally it takes a long time for the court to declare it in a precedent, and a longer time for legislation to embody it in a statute, very probably, by that time new usage may have grown in practice. The 'formal law' thus lags far behind the 'living law'.

Friedmann says that Ehrlich theory relates law more closely to life in the society. It concerns to present rather than the past, and tries to analyse the social function of law. In giving too much prominence to social facts, Ehrlich has confused custom as a source of law with custom as a type of law. In primitive societies, customs were the laws, but in a modern society, a custom does not become an enforceable law merely because it is observed in practice. It ignores the fact that legislation does very often, and case law does at times, impose a new principle which the society follows thereafter in practice, eg. Prohibition Act, and *Donoghue v. Stevenson*. As the Welfare State extends its activities, new legislations are made to cover all possible aspects of the social life.

7.7 ROSCOE POUND – SOCIAL ENGINEERING

According to Pound, sociological jurisprudence should ensure that the making, interpretation and application of laws take account of social facts. Pound linked the task of the lawyer to engineering. The aim of social engineering is to build a scientific structure of society as possible, which requires the satisfaction of the maximum of wants and with the minimum of friction and waste. It is the task of the jurist to assist the country by identifying and classifying the interests to be protected by law.

Roscoe Pound's social engineering theory is the American correlative to the German jurisprudence of interests. Roscoe Pound described the task of modern law as social engineering. By social engineering he meant the balancing of competing interests in society. He observed: "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 body of rules. It has conceptions and standards for conduct and for decision, but it has also doctrines and modes of professional thought and professional rules of art by which the precepts for conduct and decision are applied 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."

Jurisprudence thus becomes a science of social engineering which means a balance between the competing interests in a society. Pound entrusts the jurist with a commission. He lays down a method which a jurist shall follow for social engineering. He should study the actual social effects of legal institution and legal doctrines, study the means of making legal rules effective, sociological study in preparation for law making, study of juridical method, a sociological legal history.

Pound's theory is that the interests are the main subject matter of law and the task of the law is the satisfaction of human wants and desires. It is the function of law to make a 'valuation of interests', in other words to make a selection of socially more valuable interests and to secure them. This all is nothing more than an experiment. That is why Prof.C.K.Allen describes Pound's approach as 'Experimental Jurisprudence'.

7.8 CLASSIFICATION OF INTERESTS

Roscoe Pound defined an 'interest' as a claim or a want of a person or group of persons, which the person or group of persons seeks to satisfy. For facilitating the task of social engineering, Pound classified the various interests which are to be protected by law under three heads - individual, public and social interests.

Individual Interests: These are claims or demands or desires involved in and looked at from the stand point of the individual life. However, it is proper to recall that such claims may also be stated as social interests. They play a vital role in social living, and exist within its frame work.

The classification of individual interests adopted by Pound distinguishes three main groups. Firstly, interests of personality which touch the individual physical and spiritual existence. Secondly, domestic interests which affect the expanded individual life in the family. And thirdly, interests of substance which touch the individual economic life.

i) Interests of Personality: Personal physical integrity, Immunity of the will from coercion, from injury, Immunity of the feelings and susceptibilities and the claim to privacy, honour and reputation, freedom of belief and opinion and their expression, etc.

ii) Interests of domestic relations: Parent and child, Husband and wife.

iii) Interests of substance: Claims to control corporeal things, claims to freedom of industry and contract, claims to promised advantages, claims to economically advantageous relations with others, right of property, right of succession, right of association.

Public Interests: These are claims or demands or desires asserted by individuals involved in or looked at from the stand point of political life.

i) Interests of the State as a juristic person: They include the integrity, freedom of action and honour of the State's personality and claims of the politically organized society as a corporation to property acquired and held for corporate purposes.

ii) Interests of State as guardian of social interests: Public interests are interests of the State as such - the maintenance of its integrity, and the maintenance of just balance between conflicting interests of the people.

Social Interests: These are claims or demands or desires in terms of social life and generalised as claims of the social group. Social interests are interests of the society as such. Pound enumerated six categories of social interests as paramount.

i) Social interest in general security: maintenance of peace and order, health and safety, security of transactions and acquisitions.

ii) Social interest in the security of social institutions, domestic, political, religious, cultural and economic institutions.

iii) Social interest in general morals: provisions against fraud, corruption, gambling, prostitution, drunkenness, violation of trusts etc.

iv) social interest in the conservation of general resources: gas, oil, mines and minerals, environment, food grains, forests, ecological balance, claim to aesthetic surroundings.

v) social interest in general progress: economic progress, political progress, cultural progress.

vi) social interest in individual life: each individual be able to live a human life according to the individuals political, physical, cultural, social and economic life.

The purpose of classification of interests is only to inspire consciousness, in a political way, of the values involved in a particular case. Such grading of interests should not be taken as rigid or else the interests will lose their utility as instruments of social engineering. What is an individual interest, what is social interest, and what are respective weights are matters of changing political philosophy. The fact is that values of a civilized society are not absolute postulates, independent of time and social experience. They are constantly shifting. In days when analytical jurisprudence had no rivals in the field of legal thinking, judges used to boast of their aloofness from consideration of any matter other than law. Pound's elaboration of interests had caused a change in the general approach to law and has impressed on conscientious judges the need to inquire into the social facts underlying any legal problem and to maintain a fair equilibrium between competing interests involved therein.

7.9 JURAL POSTULATES

The problem which juridical science has to face is the evaluation and balancing these interests. For facilitating this progress, Pound has provided what he calls the jural postulates of civilized society must be able to take it for granted that:

- i) he can appropriate for his own use what he has created by his own labour, and what he has acquired under the existing economic order;
- ii) that others will not commit any intentional aggression upon him;
- iii) that others will act with due care and will not cast upon him an unreasonable risk of injury;
- iv) that the people with whom he deals will carry out their undertakings and act in good faith;
- v) that he will have security as a job-holder;
- vi) that society will bear the burden of supporting him when he becomes aged;
- vii) that society as a whole will bear the risk of unforeseen misfortunes such as disablement;
- viii) that others will keep under proper control property that is likely to inflict damage if it escapes;
- ix) that it is the responsibility of industrial concerns to make compensation for human wear and tear.
- x) that, as a minimum matter, a standard human life shall be assured to every citizen.

These jural postulates are to be applied both by the legislators and by the judges for evaluating and balancing the various interests and harmonizing them.

7.10 SUMMARY

The Sociological approach to jurisprudence regards law as a social phenomenon reflecting human needs and social facts. According to Ihering, the essence of law could be expressed by reference to its very purpose, which was social. Law existed to protect the interests of individuals and society by balancing and coordinating interests. The law should attempt to achieve an equilibrium of individual and social purposes.

Ehrlich differentiated 'living law' from 'formal law'. In other words, he brought a distinction between 'norms for decision' and 'norms of conduct'. The task of legislators, judges and jurists is to discover the 'living law', he said. Critics have found a number of flaws in the theory of 'living law'. It involves studying much extra-legal data and the province of jurisprudence becomes boundless.

Duguit propounded the theory of social solidarity which is based on the interdependence of individuals in society. He says social solidarity is necessary for social life. Law is an index of social solidarity. Social Solidarity is the touchstone of deciding validity of law. Law must promote and further 'social solidarity'. The theory of social solidarity is not free from criticism.

According to Roscoe Pound, jurisprudence is a science of social engineering. Law is more than a set of abstract norms or a legal order. Law is a process of balancing conflicting interests and securing the satisfaction of the maximum of wants with the minimum of friction. Pound classified interests into three groups: individual, public and social interests. He enumerated juristic postulates of civilized society so as to know the value of conflicting interests. To him law is an adjustment of conflicting interests in a society.

7.11 SELF ASSESSMENT QUESTIONS

1. Write the scope and purpose of sociological jurisprudence?
2. Write a note on jurisprudence of interests?
3. Discuss Roscoe Pound's theory of Social Engineering?
4. Examine the merits and demerits of Duguit's Social Solidarity theory?

7.12 FURTHER READINGS

Dias, Jurisprudence, Aditya Books Pvt.Ltd., New Delhi

G.W.Paton, A Text Book of Jurisprudence, Clarendon Press, Oxford

Julius Stone, The Province and Function of Law, Universal Law Publishing Co.Pvt. Ltd., Delhi

Roscoe Pound, Jurisprudence, Vol. I-V, West Publishing Co., USA.

UNIT –VIII MODERN REALISM

Objectives

After reading this unit the student should be able to

- Grasp the views of the three leading members of the American Realist Movement: Holmes, Llewellyn and Jerome Frank
- Explain the contribution of Scandinavian realists
- Compare American and Scandinavian realism

Structure

- 8.1 Introduction
- 8.2 Salmond's view
- 8.3 Gray – American Realism
- 8.4 Holme's Realism
- 8.5 Llewellyn's Realism
- 8.6 Frank's Realism
- 8.7 Drawbacks of American Realism
- 8.8 Scandinavian Realism
- 8.9 Axel Hagerstrom
- 8.10 Lundstedt
- 8.11 Olivecrona
- 8.12 Alf Ross
- 8.13 Criticism against Scandinavian Reaslim
- 8.14 American and Scandinavian Realism
- 8.15 Summary
- 8.16 Self- Assessment Questions
- 8.17 Further Readings

8.1 INTRODUCTION

Paton calls this school as the left wing of the functional school. Like sociological jurisprudence the realism also pointed out the gap between 'law in books' and 'law in action'. Justice Oliver Wendall Holmes is considered to be its spiritual father. According to this school law is the product of judicial interpretation. Moreover, law is not what the judges say it is, law is what the judges actually do in deciding a case. Law is uncertain until it is decided by judicial action. The judgement, in its turn, is dependent not merely upon the statutory rules but also upon such other factors like whether the judge is liberal or not, the influence of socio-economic, political forces and even corruption and general state of health of the judge and his partiality for the opposite sex.

The theory of legal realism, like positivism looks on law as the expression of the will of the state but sees it as made through the medium of courts. Law no doubt is the command of the sovereign, but the sovereign to the realist is not the legislature but the court. The term 'American Realists' serves to describe a number of American legal theorists, who, though in no way constituting a formal school of jurisprudence, share the view that the law consists of the pronouncements of the courts. Homes, Gray, Cardozo, Llewellyn and Jerome Frank were the chief exponents of the American Realism.

8.2 SALMOND'S VIEW

One version of realism was held by Salmond. All law, according to Salmond, is not made by the legislature. In England, much of it is made by the law courts. It is, therefore, to the courts and not to the legislature that we must go in order to ascertain the true nature of law. Accordingly he defined law as the body of principles recognized and applied by the state in the administrative of justice; as the rules recognized and acted on by the courts of justice.

This raises the question about the meaning of the word 'court'. Will it include administrative tribunals. In many cases the decision of an administrative officer is final. Will he be considered as court and his decision as law. Again there are other persons and bodies besides the law courts and administrators who enforce rules of conduct. Legislature will take up questions of their own privileges and also of contempts against the House. In the Sheriff of Middlesex's case, the Sheriff was imprisoned by order of the House of Commons for attempting to enforce the judgment of a court of law. The act done by the Sheriff was in accordance with the law enforced by the law courts. Could it be said to be against a system of law enforced by the House of Commons?

To this the reply is that these are marginal cases and all words will have a central core of meaning and also some hazy marginal sense.

Though Salmond's definition may be appropriate about case law, it is not appropriate to statute law. Statute is law as soon as it is passed, it does not have to wait for recognition by the courts before becoming the law. Statutes are recognized by the courts because they are law, they are not law simply by virtue of judicial recognition. To this the reply is that so long as the legislature and courts function in harmony it does not matter whether we say a statute is law because the courts recognized it or the courts recognize and apply a statute because it is law. The statements are simply two aspects of a single truth.

A practical problem may arise when a statute passed by the Legislature is declared void by the courts. A political issue may then arise. This will be a case of disharmony between the legislature and the courts and so long as the state of equilibrium is not reached no one can answer whether such a statute will fall within law. But according to Salmond it is a marginal case which cannot influence the definition.

8.3 GRAY – AMERICAN REALISM

Gray, an American jurist conceded that law is not an ideal but an existing thing and that it may not accord with morality. He regarded statutes only as one source of law, and declared law to be what the courts lay down as rules of conduct for the observance of the people. He denounced it as ‘childish fiction’ to say that judges do not make laws but only state the law as it is. Law enunciated by legislature loses its force if the court denies its validity. Law not enunciated by legislature binds the people if the court rules so.

According to Gray, “the law of state of any organized body of men is composed of the rules which the courts, that is, the judicial organ of that body lays down for the determination of legal rights and duties”. Law is not laid down by the sovereign but by the courts. The ultimate criterion to judge whether a rule is law or not is its enforcement by the courts.

8.4 HOLMES’ REALISM

A much more version of legal realism is that which originated with Holmes and which has wielded enormous influence in the United States. This is the theory that all law is in reality judge made. Several factors contributed to the prevalence of this realistic approach to law in the United States. Firstly, in many states judges are elected to office by popular vote and accordingly decisions are likely to be influenced by political considerations. Secondly, the federal courts have the powers of judicial review, whereby they can declare void any statute or federal legislation contrary to the constitution. Thirdly, multiplicity of jurisdictions which resulted in conflicting or inconsistent judicial decisions on the same subject matter. Fourthly, judicial interpretation or application of legislations to particular cases in which the courts give different meanings to statutory words or language, i.e., flexibility in judicial process.

Holmes begins by considering the situation, not of the judge or lawyer, but of what he calls the ‘badman’, the man who is anxious to secure his own selfish interests. In order to know the true nature of law we must look through the eyes of a badman. What such a person will want to know is not what the statute book or text books say but what courts are likely to do in fact. Holmes said that the “prophecies of what the courts will do in fact, and nothing more pretentious are what I mean by law.” But what the courts will do in fact cannot necessarily be deduced from the rules of law in text books or even from the words of statutes themselves since it is for the courts to say what those words mean. As Gray observed, “the courts put life into the dead words of the statute”. Question of law, could not be answered by purely logical inference, they must be decided by reference to social, moral, political and other factors. As Holmes remarked “the life of the law has not been logic, it has been experience.”

Even before Gray spoke, Holmes had expressed that the emphasis on the concept of law must be in judicial declaration rather than in legislative enactment. The court may accept statute as good law or reject it as invalid. In this view, an enactment can only be said to contain the “probable law” meaning thereby the law which the court may very probably declare as valid, but

carrying no assurance that it is real law. But to say that until a court has pronounced on a matter, there can only be 'probable law' but not 'real law' is an exaggeration. Even when a matter is covered by a judicial decision, there is no guarantee that another case of the same type will be decided in the same way. Overruling and dissenting decisions are not so rare as to be ignored.

Today as we are living in the era of codified law, it may be thought that the creative days of the judges are largely past. It is also said that even though in modern times law is more and more statutory in nature, still the days of judge made laws are not over. In fact, for the courts the necessity of choice still remains. For example, in England the unlawful and intentional killing of another is the common law crime of murder. But what if A intentionally inflicts on B a mortal wound and then mistakenly thinking him dead, throws his body into a lake, with the result that B dies by drowning. Is this murder? Certainly A intended to murder B, who would have died from the wound had not been thrown in the lake. On the other hand while the wounding was intentional the actual killing was not. In 1954 the existing law had no answer to this problem, which arose in the case of *Thabomeli v. R* (1954) where the court was forced to develop further the law of murder.

Legislation is concerned with the general, judge with the particular situation. Legislatures use words for general application. Judges see whether the case falls within the framework of those words and, if not, whether an extended or restrictive meaning should be given to those words. For example, in *State v. Ardeshir Hormosji* (1956) a division bench of Bombay High Court gave an extended meaning to the word 'premises' in Section 2(m) of the Factories Act, 1948 to include open lands as well. Generally the word 'premises' should mean in this context, buildings of a factory together with the compound in which they are located. But the Court opined that salt making works situated upon open lands would come within the meaning of the word 'premises' and would be 'factory' within the meaning of the Factories Act. Though the legislatures could enact rules that were absolutely clear in application, but they could not foresee every possible situation that may arise. So legal uncertainty is counter balanced by judicial flexibility. Therefore, law in practice must differ from the law stated in statute. Where courts must choose between alternatives, much will depend on the personality and background of the judges. A conservative minded judge may differ with a progressive minded judge. For example, a statute may provide contributory negligence as a complete defence to an action in torts in cases of road traffic accidents. Yet the sympathy of the judge for the plaintiff and antipathy towards the defendant's insurance company may lead to the end result that contributory negligence will for the most part become a defence in theory only.

Therefore, realists said that a statement of law is nothing more than a prediction of what the courts will decide. This is what a lawyer does when advising a client whether or not to bring proceedings. A lawyer, out of his knowledge of the law and his experience in the court room, estimates the chances of success and assesses the amount of damages likely to be awarded by the court, and advises his client. A text book writer who expounds the rules of law which have been made, examines the practice of the courts in applying them.

The realists approach to law is partly analytical and partly sociological. To the extent they considered law as it is without reference to ideals, their approach resembles analytical positivism. To the extent they examined law as a product of social forces and evaluated law by its effects on society, their approach is sociological. There is an element of truth in the arguments of realists. The distinction that the realists draw between law in the books and law in practice is a valid one. Realists' contribution is used in legal theory to highlight the creative role of judiciary, to debunk the 'slot machine' deductions to provide solutions to legal problems and to show that the decisions often involve complex problems.

8.5. LLEWELLYN'S REALISM

Karl Llewellyn has been a professor of Jurisprudence at Columbia and an important thinker of realist movement. According to him realism is not a philosophy, but a technology. In his article, *Some Realism about Realism* (1931), he enumerates the basic common points on which all realists seem to agree. They are:

- i) Law is not static and should be considered and investigated as if in flux.
- ii) Law is to be considered as a means to a social end.
- iii) Society is in a continuous process of change and is in a state of even faster flux than the law, therefore, continuous re-examination and revision of the law is essential.
- iv) 'Is' and 'ought' must be divorced temporarily for the purposes of legal study. The jurists should look at what courts, officials and citizens do without reference to what they ought to do.
- v) Traditional legal concepts and legal rules cannot provide a full description of what the courts do.
- vi) Law has to be evaluated in terms of its impact and effects on society.

Llewellyn says jurisprudence must expand its ken beyond the rules of law to consider the techniques of their application. He said that the legal research should be shifted from the study of rules to the observance of the real behaviour of law officials particularly the judges. The most significant aspect of Llewellyn's contribution to realism is his functionalism. He perceives law as serving certain fundamental functions 'law-jobs'. He has identified six 'law-jobs'. They are:

- i) adjustment of trouble cases;
- ii) preventive channeling of conduct and expectations;
- iii) preventive rechannelling of conduct and expectations to adjust to change;
- iv) allocation of authority and determination of procedures for authoritative decision making;
- v) provision of direction and incentive within the group;
- vi) the job of the juristic method.

According to Llewellyn, the most important job the law has is the disposition of trouble cases. In one of his major works, *the Bramble Bush* (1930) he said:

“This doing of something about disputes, this doing of it reasonably, is the business of law. And the people who have the doing in-charge, whether they be judges or sheriffs or clerks or jailors or lawyers, are officials of the law. What these officials do about disputes is, to my mind, the law itself”.

8.6 FRANK’S REALISM

Jerome Frank (1889-1957) was the most radical of the American realists. He was a practising lawyer, a judge in United States circuit court and also visiting professor at Yale Law School. *Law and the Modern Mind* (1930) contains Frank’s jurisprudential thought on realism. In this work Frank makes an attempt to demolish what he calls the basic myths about law.

According to him, certainty of law is a basic myth. He questioned the basic myth that judges do not make law, but they only discover it. Frank observes that law could not be separated from the decisions of the courts; hence it was necessary to understand the bases of judicial decisions, and this required an investigation of a variety of factors, often of an irrational nature such as emotions and hunches. The law is, in relation to a set of facts, a decision of the court relating to those facts. Until the court has given its decision, no law concerning those specific facts is in existence. Before the making of such a decision, the only relevant law available is a lawyer’s opinion out of his guess work as to what the court will decide. Frank said:

“No one knows the law about any case or with respect to any given situation, transaction or event, until there has been a specific decision (judgment, order or decree) with regard thereto.”

Frank asserts that the law is essentially uncertain. Rules are no more law than statutes are law. Rules are mere words and it is for the courts to indicate what rules mean. Rules are not to be found at the basis of a judge’s decisions. Those decisions may be arrived at before a judge finds a reason for them. The reasons he gives later may be no more than a rationalization of his intuitive feelings. Frank believes that a judge may start with conclusions and work back to suitable premises and in this way judge feels or hunches out his decision.

Frank observes that the knowledge of the rules alone is of limited value in predicting the outcome of a trial; it is necessary to turn out for guidance to a study of other matters. Thus, the prejudices of judges may be significant factors affecting the outcome of legal proceedings. He observes that a judge’s decisions are the outcome of his entire life history. His friends, his family, vocations, schools, religion, economic background, political ideology, likes and dislikes, etc., are influential factors. In fact judge is unaware of his prejudices. According to Frank, the court room, not the library should be our laboratory to study the law in action.

The fact finding process in the trial courts is the key factor in the administration of justice. Frank observed that there is an element of uncertainty in the determination of the facts by a trial court. Frank probed into innumerable sources of error which may enter into a

determination of the facts by a trial court. There may be perjured witnesses, coached witnesses, biased witnesses, witnesses mistaken in their observation of the facts to which they testify, missing dead witnesses, missing destroyed documents, crooked lawyers, stupid lawyers, stupid jurors, trial judges who are stupid or biogated or biased.

The main thrust of Frank's attack was directed against the idea that certainty could be achieved through legal rules. This in his view, was absurd. If it were so, he argued, why would anyone bother to litigate? Even where there is an applicable rule, one of two opposite conclusions is possible. How does a judge arrive at his decision? He does so by a hunch as to what is fair and just or wise or expedient. The lawyer's task then is the determination of what produces the judge's hunches. The personality of the judge and the judicial hunch are not and cannot be described in terms of legal rules and principles.

American realism, as Hunt pointed out, is powerfully informed by a behaviourist view of law. This behaviour orientation is evident in the works of all the leading exponents of the realist movement. Llewellyn observed that the focus of the study should be shifted to the area of interaction between official regulatory behaviour and the behaviour of those affected by official regulatory behaviour. Similar observations are found in the contribution of Frank. Behaviourism concentrated on the attempt to describe and explain outward manifestations of mental processes and other phenomena that are not directly observable and measurable. Thus behavioural psychology is concerned principally with judicial behaviour. American realism is a method of the application of psychology to the sociological study of law.

8.7 DRAWBACKS OF AMERICAN REALISM

Realism, like other theories, has many drawbacks. The realist movement can relate only to a system that concedes large power and wide discretion to the judiciary including the power of judicial review even to strike down legislations as invalid. A totalitarian system, wherein judiciary is subordinate to the administration affords no room for realist's view. Theoretically it is possible to conceive of a state where the courts are completely free to decide any point as they wish and resolve each dispute on its merits. But in that state no man could ever say what the law was. One could only predict what the judges might do. But this is not the position in ordinary legal system. The judges are the discoverers of law but not the creators.

Secondly, statute is law as soon as it is passed, it need not wait for judicial recognition from the courts before becoming entitled to the name of the law. In fact, statutes are recognized by the courts because they are law, it is not judicial recognition that makes them law.

Thirdly, the realists forget the fact that the judicial decisions creating new law represent only a fraction of the total body of law. Law is so certain that a great number of disputes never reach courts and even in disputes which go before the tribunals the major part of law is certain, clear and settled and is automatically applied.

Fourthly, the uncertainty of language which no doubt exists in some cases is not an universal malady of legislation. For the most part, language is certain. Comparatively it will be only in very few cases that we shall have anomaly arising because of language. The fact that a country's boundaries are unclear means that uncertainty will arise concerning borderline territory, but not that all that land within the country, and all outside, is in dispute.

And lastly, most of the layman's activities in private, commercial and industrial life is undertaken without legal advice. People act according to law as they understand it. To see what the law is then is to discover the rules which actually govern our lives and for this we must not only look to the judicial practice, which the realists emphasize, but also statutes of the legislature and the rules made thereunder by other bodies.

8.8 SCANDINAVIAN REALISM

Hagerstrom (1868-1939), Lundstedt (1882-1955), Oliverona (1897-1980) and Alf Ross(1899-1979) were the chief exponents of the Scandinavian realist movement. Like American Realists they were concerned to explain the law as it is. But unlike the American Realists, the Scandinavian Realists did not concentrate on the working of the courts. Scandinavian realists insisted on disassociating all legal phenomena from metaphysics. As C.K.Allen pointed out, "If American realism is rule skeptic, Scandinavian realism may be described as metaphysical skeptical." A deep mistrust of metaphysical concepts which was exhibited by both the legal positivists and American realists, reached its apogee with the writing of the Scandinavian Realists. In the words of Alf Ross 'all metaphysics are a chimera and there is no cognition other than empirical.' The essential features of Scandinavian realism are as follows:

- i) Metaphysical speculation is to be rejected. Reality may be discovered and analysed only through an investigation of the fundamental facts of the legal system.
- ii) Jurisprudence must be a natural science based on empiricism. Assertions which are incapable of proof are nonsense. Hence jurisprudential propositions which cannot be verified are unacceptable.
- iii) Our morality is created by law and our law does not emerge from our morality.
- iv) Natural law is an illusion and the jurisprudential arguments derived from it are unacceptable.
- v) Law is determined by social welfare which includes the minimum requirements of material life, security of person and property and freedom of action.
- vi) Values such as 'goodness' are no more than the embodiment of reactions expressing approval of a stimulus.
- vii) Law can be understood in terms of sets of psychological responses to groups of stimuli.

8.9 AXEL HAGERSTROM

Hagerstrom, a Swedish philosopher, is the founder of the Scandinavian realist movement. He believed that empirical analysis, which involves the acceptance of sense-data would provide answers to questions concerning the origin, nature and functions of the law. He wanted to establish a real legal science which could be applied to the reorganization of society in just the same way as the natural sciences had been used to transform the natural environment. To do this, legal science had to be emancipated from mythology, theology and metaphysics.

Hagerstrom contended that 'Rights' 'duties' 'obligations' are, in themselves, meaningless concepts. He subjected the basic concepts of law to a critical analysis, especially the concept of 'right'. The traditional view of a right has been that of a non-physical power enabling a person to have or do something lawfully. Hugo Grotius described a right as a moral power. According to Hagerstrom, such a conceptualization carried no meaning because it has no counterpart in the physical world. He pointed out that a right of ownership had no empirical significance unless and until it had been infringed and become the subject matter of a judicial proceeding. Even in that event, the litigant's claim to ownership was unreal and speculative until he had proved his title. In Hagerstrom's opinion the term 'rights' has meaning only when associated clearly with remedies and legal enforcement procedures.

Hagerstrom also investigated the historical and psychological bases of the idea of right. He sought to trace the notion historically to the legal magic practiced by ancient systems of law and psychologically to the emotional strength of the feeling of a person who believes that he has a good and valid claim.

According to Hagerstrom, the term 'justice' represents, in reality, no more than a personal, highly subjective evaluation of some states of affairs of which we generally approve. He denied the existence of such things as 'goodness' and 'badness' and remarked that they represent simply emotional attitudes of approval or disapproval respectively towards certain facts and situations. He said that all questions of justice, aims, purposes of law are matters of personal evaluation not susceptible to any scientific process of examination. His refusal to regard legal concepts as anything more than fantasies of the mind is at the heart of the philosophies of his disciples, Alf Ross, Karl Olivecrona, and A.V.Lundstedt.

8.10 LUNDSTEDT

Lundstedt followed the path of Hagerstrom in rejecting the pretensions of metaphysical interpretations of the law. According to him nothing exists which cannot be proved as fact. Judicial concepts such as 'rights' 'justice' are illusory and there is no scientific method of evaluating their basis. He says, feelings of justice do not direct law, on the contrary, they are directed by law. Law is not founded on justice, but on social needs and pressures. Law in any society is determined by 'social welfare', which is the guiding motive for legal activities.

Lundstedt says, law should be interpreted as simply the facts of social existence: all else is illusion. Judges should think in terms of social aims not rights. He opposed the 'method of justice' and insisted the 'method of social welfare'. He said that the method of social welfare was free from all ethical evaluation, since the notion of social welfare referred merely to arrangements considered useful by men in a certain society at a certain time. Socially useful is that which is actually evaluated as a social interest.

The most obvious criticism of Lundstedt is that his concept of 'social welfare' is no less metaphysical than any of the notions he attacks. Friedmann says there is little new in Lundstedt's view except the author's claim to originality.

8.11 OLIVERCRONA

Olivercrona observed that 'law is nothing but a set of social facts'. The rules of law are in no sense the will of the State in the sense of commands but are 'independent imperatives' issued from time to time by various constitutional agencies. He propounds the view that rules of law are 'independent imperatives, that is propositions in imperative form but not issued like commands from particular persons. Imperative statements found in the law must be distinguished from 'commands' in the accepted sense of that term. According to Olivecrona, a command, properly called, implies some personal relationship arising where X gives an order directly to Y in the form of words, gestures, intended to affect Y's will and subsequent actions. Even in the absence of a personal relationship between X and Y, the words may have a similar intention and effect as compared with those used when a personal relationship does exist. Thus, an Act of Parliament is not issued by any individual, nor is addressed specifically to any one person. It is an imperative statement issued independently. It functions as an 'independent imperative' ordering actions and attracting obedience.

According to Olivecrona the rules of law within a legal system are largely 'independent imperatives' that have passed through a series of recognized formal activities. Citizens assume 'independent imperatives' to be orders which demand obedience because individuals have been conditioned and trained to think and respond in this manner. The perceived power of the state is surrounded by august ceremonies and met with a traditional and deep rooted reverence. This has a profound impact upon the individual's mind so that he takes to heart the command of the law as objectively binding. Custom, tradition, feelings of social solidarity and duty, and the residue of generations of historical development, combine to assure the binding and non-optional character of 'independent imperatives'.

Olivecrona says morality is founded by the law. From the earliest days of our lives we are in the grip of the law and our moral views are moulded by its influence. Imperatives are inculcated by our awareness of the consequences, often a stigmatic nature, which attend the failure to act in accordance with an imperative. Hence, our morality is formed by the law.

8.12 ALF ROSS

Alf Ross, like other Scandinavian Realists, insists that laws should be interpreted in the light of social facts by excluding all metaphysical ideas. According to him, jurisprudence is an empirical social science. He says legal notions must be interpreted as conceptions of social reality, the behaviour of man in society and as nothing else. Like American Realists, Ross tends to highlight the position of courts. Law takes the form of a system of normative rules. A noun is a directive which stands in relation of correspondence to social facts. He says, the validity of law does not rest upon any transcendental notions, but merely upon the possibility of one's being able to predict that the rules are likely to be applied appropriately in future disputes

Non-cognitivism in matters of morality and justice was elaborately defended by Ross. According to him, the fundamental postulates concerning the nature of man which underlie the natural law philosophy are entirely arbitrary. We cannot know objectively what is right or wrong. Such judgments are based on subjective and emotional feelings, and justice can be appealed to for any cause. To invoke justice is the same as banging on the table: an emotional expression which turns one's demand into an absolute postulate. The only meaning that might possibly be assigned to the concept of justice is that of a reminder addressed to the judge that he should apply the general rules of law correctly and impartially.

Ross was strongly influenced by Hagerstrom's view that statements have meaning only if the propositions they express are capable of proof or verification. This is how he was hostile to metaphysical questions. Unlike his scandinavian colleagues, he focuses a good deal of his analysis on judicial behaviour and its predictability. In this regard he seems to be working along with his American counterparts. However, Ross differs from American realists by his insistence that decisions which concur with pre-existing rules demonstrate that the rules effectively control the decisions. Harris pointed out the distinction between Ross and Frank: Ross and Frank agree that it is my lawyer's business to predict what courts will do; but Frank says that they are to beware of rules as grounds for prediction, whilst Ross says rules exist just because they are good grounds for prediction.

According to Ross, legal rules govern the entire set of institutions and agencies through which actions ascribed to the State in its legal capacity are undertaken. The primary rules, which may exist as psychological facts only, informing citizens as to how they are expected to behave, become binding. The secondary rules specify sanctions and the conditions under which they will operate. Predictability of the operation of the rules induces confidence in them. To know the secondary rules is to know everything about the existence and content of law.

8.13 CRITICISM AGAINST SCANDINAVIAN REALISM

Critics point out that the Scandinavian realists lack a rigorous methodology. Speculation replaces thorough investigation and there is a general lack of the disciplined enquiry which characterizes much psychological research. Secondly, 'rights', 'justice' are powerful and real

concepts which affect the law and its enforcement. To reduce them to the level of 'non-verifiable concepts' is to undermine their importance in the administration of law. Thirdly, the view that 'law creates morality' seems to be contrary to historical evidence. There is little proof of law creating and conditioning morality. The history of law contained many examples of the moral imperatives resulted in strict legal rules.

8.14 AMERICAN AND SCANDINAVIAN REALISM

1. Lloyd points out, American realists are mainly interested in the practical working of the judicial process, whereas the Scandinavians are more concerned with the theoretical operation of the legal system as a whole.
2. While the American realists are, in general, pragmatist and behaviourist emphasising 'law in action' the Scandinavian realists launch a philosophical assault on the metaphysical foundations of law.
3. American realists are 'rule sceptics' Scandinavian realists are 'metaphysics-sceptics'.
4. American realists were more empirically minded than the Scandinavians.
5. Lloyd said that the Scandinavian movement for all its positivism, remains essentially in the European philosophical tradition, whereas the American movement bears many of the characteristics of English empiricism.

8.15 SUMMARY

American Realism is a study of law in action. Law is as law does. Law is the product of judicial determination. Law is what officials (Judges) do. It is not to be found in mere statutory rules. According to Holmes, the life of the law has not been logic, but experience. He says, "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law". Llewellyn argues that realism is a technology, not a philosophy, law is never static; it is to be considered as a means to a social end; continuous examination of law is essential; 'is' and 'ought' must be divorced for purposes of legal theory; and law has to be evaluated in terms of its social impact.

Frank argued that certainty of law is a basic myth. Law is uncertain. Paper rules do not produce legal certainty. Law cannot be separated from the decisions of the courts. It is necessary, therefore, to investigate the factors which enter into the making of a decision. Knowledge of the rules is of limited value in predicting the outcome of legal proceedings.

The Scandinavian Realists opposed metaphysical speculation in jurisprudential thought. They are in favour of the investigation and empirical analysis. Hagerstrom viewed legal concepts as meaningless unless their interpretation is associated with remedies and other legal procedures.

Lundstedt argues, law is simply the facts of social existence, all else is illusion. Feelings of justice do not direct the law, on the contrary they are directed by the law. Olivercrona argues, our morality is formed by the law, and not the other way round. Ross believes that jurisprudence is an empirical science and acknowledges the normative character of law.

8.16 SELF ASSESSMENT QUESTIONS

1. In what ways may the realists be regarded as having developed a 'psychological school of jurisprudence'?
2. What are the principal contributions of the American realists to legal theory?
3. Explain critically the following statement of C.K.Allen: 'If American Realism is rule skeptic, Scandinavian realism may be described as metaphysical - skeptical'

8.17 FURTHER READINGS

Dias, Jurisprudence, Aditya Books Private Limited, New Delhi

Lloyd's Introduction to Jurisprudence, Sweet and Maxwell, London

Edgar Bodenheimer, Jurisprudence, Universal Book Traders, Delhi

Benjamin N.Cardozo, The Nature of the Judicial Process, Yale University Press, London.

UNIT – IX CUSTOM AS A SOURCE OF LAW

Objectives

After reading this unit you should be able to

- Understand the place of custom among various sources of law
- Explain theories of customary law
- Discuss the requisites of a valid custom
- State the present position of customary law

Structure

- 9.1 Introduction
- 9.2 Reasons for the reception of customary law
- 9.3 Origin of custom
- 9.4 Theories as to the nature of customary law
- 9.5 When does custom become a law?
- 9.6 Essentials of custom
- 9.7 Kinds custom
- 9.8 Custom in various legal systems
- 9.9 Present position of customary law
- 9.10 Summary
- 9.11 Self-Assessment Questions
- 9.12 Further Readings

9.1 INTRODUCTION

The socially accredited ways of acting are the customs of society. Customs and traditions are group accepted techniques of control that have become well established, that are taken for granted and that are passed along from generation to generation. According to Manu, the greatest law giver of Hindu Jurisprudence, usage is the highest Dharma. Immemorial custom is transcendental law. “Custom meets us at the cradle and leaves us only at the grave.” Custom is a rule of conduct obligatory on those within its scope, established by long usage. A valid custom has the force of law.

Custom is the older and original source of law. Precedent and legislation are comparatively of later origin. James Carter observes that “Custom is the uniformity of conduct of all persons under like circumstances”. But it must be observed that custom is something more

than “uniformity of conduct” or usage. The uniformity of conduct must be coupled with the conviction that what is done uniformly is also done as a matter of obligation and not of option.

9.2 REASONS FOR THE RECEPTION OF CUSTOMARY LAW

Salmond observes that there are two important reasons for attributing to custom the force of law.

1. Embodiment of justice and utility: Custom is law because it is “embodiment of those principles which have commended themselves to the national conscience as principles of justice and public utility.” Custom consisting of uniform practice reflects the notions of right and justice which appealed to the conscience of the members of a society at large. Thus custom is manifestation of national conscience. On the basis of the maxim “via trita via tuta” (beaten path is safe path) the courts also must accept as valid what has been accepted as valid by the society at large. Thus Salmond observes “custom is to society what law is to the state.”

2. Created rational expectations: When a course of conduct is followed consistently for a long time, people expect that the same will continue in future also. Thus, custom raises expectations among the members of the society as to its continuance and their expectations must, as far as possible, be maintained. The courts must be slow in rejecting a customary practice even if such practice appears to be irrational or unjust because upsetting of expectations creates uncertainty and chaos.

9.3 ORIGIN OF CUSTOM

Two theories are of particular importance in regard to the enquiring into the origin of custom. The two theories are that of Savigny and Henry Maine, both belonging to Historical School.

Savigny’s Theory of Volksgeist:

According to Savigny, custom has its origin in volksgeist or national spirit. Custom is an expression and realisation of the will of the people.

Criticism:

1. Custom need not always reflect the will of the people at large; very often customs are created even by a minor section of the people.
2. The theory assumes that custom is a product of well reasoned convictions and notions of justice prevalent in a society. Not infrequently, custom is a product of force of sheer habit and imitation than logic. Again, unjust and irrational customs are uncommon.
3. If custom is a product of national spirit of the people, there can only be general customs and not local customs. But instances of local customs are many.

4. The notion of volksgeist or genius of people is rather too vague to be a definite origin of custom.

Henry Maine's theory of Themistes:

According to Henry Maine custom was created by Themistes or judgments of kings in older societies. These royal decisions, one following the other, developed a systematic pattern of rules which resulted in custom.

Criticism:

As Vinogradoff pointed out, custom is historically older than kings and their courts and so it is an anachronism to say that custom originated in the decisions of kings. Paton observed: "Indeed, custom is coeval with the very birth of the community itself."

9.4 THEORIES AS TO THE NATURE OF CUSTOMARY LAW

There seems to be a wide divergence of juristic opinion as to the nature of custom as a source of law. Some jurists believe that custom is a formal source and some others go to the other extreme and consider custom as only historical material source. But the correct opinion appears to be that custom is a legal material source. We shall now consider the different view points and their demerits.

Custom is a Formal source

The jurists of the Historical School in conformity with their general approach to jurisprudence, believe that custom is the real source of all law and that the judicial precedent and the enacted law derive their validity from custom. The judicial precedent only evidences or declares an already existing principle of customary law; and legislation or enacted law can only supplement custom and cannot be substitute for it. Thus, custom is transcendental and supercedes all other forms of law making.

Criticism:

1. The theory is patently false and unfounded. It is now well established that custom is binding only when it is recognised by a court of law or incorporated in a statute. Custom is not law, *proprio vigore*, whereas legislation and judicial decisions are laws by themselves.
2. The old customary principle of Hindu law that "a clear proof of custom outweighs the written text of law" is now obsolete. In fact, the converse is true in that legislation always supercedes custom in case of conflict between the two.
3. A judge cannot ignore a statutory principle even if it appears to him to be an unreasonable one. But a custom may be ignored if it is unreasonable or against public policy.

Custom is a Historical Material Force

According to Austin law is a command of the sovereign and no rule can be considered to have the force of law unless it emanates from the sovereign. Consequently, Austin came to the conclusion that custom cannot have any intrinsic validity and binding force unless and until that customary rule is sanctioned by the sovereign expressly by incorporating it in a statute, or tacitly by way of recognition by a court of law. Either by legislative incorporation or by judicial recognition, custom is transformed into law, but then, custom ceases to be custom and becomes legislation or judicial decision as the case may be. Thus, custom is not automatically binding. Hence, custom is only a historical material source and at best it can be only persuasive.

Criticism

1. Though custom becomes law by the express or tacit recognition of the sovereign, such recognition dates back to the inception of custom.
2. Austin's opinion that custom has no intrinsic validity is derived from his narrow and inadequate definition of law as a command of the sovereign. The fact that Austin also is compelled to accept that custom may be recognised by legislature or court of law only confirms the view that custom is accorded such recognition because of its inherent binding force.

Custom is a Legal Material Source

According to Salmond and some other jurists custom is to be treated as legal material source provided it satisfied certain legal requirements. Whether or not a particular custom fulfils the tests of law is to be decided by the court of law. If the court comes to the conclusion that a custom is legally valid, then the court has no option but to recognize it.

Criticism:

1. Jethro Brown puts forth a seemingly formidable argument that if custom is valid only when it satisfies certain legal requirements, it means that custom is not valid by itself which is exactly what Austin has said. So, Brown argues further, custom is valid not ipso facto but only if the courts say it is valid.

Criticism of Criticism:

The Brown's argument is absolutely untenable can be clearly seen from the following. If custom is not intrinsically valid because it has to satisfy the tests of law, then one has to say that a statute is not valid intrinsically because it has to stand the test of constitutionality. Of course, a custom can be ignored by a court of law if it is illegal or unreasonable. But so also a precedent. Again a statute may be struck down if it is unconstitutional. Hence, it is submitted that custom also shares the field with the precedent and legislation as a legal material source.

9.5 WHEN DOES CUSTOM BECOME A LAW?

Salmond observes that law originating in custom passes through three successive historical stages:

1. Proof in a Court of Law:

First the existence of custom has to be proved in a court of law as a question of fact. Section 13 of the Indian Evidence Act contains a provision to this effect. When the existence of a custom is thus proved, the court accepts it and declares it to have been established.

2. Judicial Notice:

When once the existence of custom is judicially established, subsequently courts of law take judicial notice of the custom and no more proof of it is necessary. Then, the law derived from custom has accordingly passed out of its first stage of being customary law, pure and simple, and has now become part of case-law originating in judicial decisions.

3. Legislative incorporations

After passing through the stages of proof and judicial recognition, custom may reach third and last stage of legislative incorporation when it is embodied in an enactment passed by the legislature. The law of negotiable instruments is an illustration to the point.

9.6 ESSENTIALS OF CUSTOM

Now, we shall consider the legal requirements which must be fulfilled by a custom before it can become a source of law.

1. Immemoriality

Custom, to have the force of law, must be immemorial. It must have existed for so long a time that, in the language of law, “the memory of man runneth not to the contrary”(Blackstone), which means that no one at a given time remembers its origin. The custom must be so very old that it is beyond human memory. Recent or modern custom is of no use. The phrase “beyond human memory” being vague and uncertain, it was thought necessary and convenient in England to fix the limit of immemoriality at 1189 AD which is the year of coronation of Richard I. Thus, a valid custom must be so very old that it should have originated some time before 1189. If it has its origin after 1189, the custom is not immemorial and so not valid.

This idea of immemorial custom was derived by the law of England from the Canon Law, and by the Canon law from the Civil law. ‘Time immemorial’ means in the civil and canon law and the systems derived therefrom, and originally meant in England also, time so

remote that no living man can remember it or give evidence concerning it. Custom was immemorial when its origin was so ancient that the beginning of it was beyond human memory so that no testimony was available as to a time when it did not exist.

In the course of the development of English Law, however, a singular change took place in the meaning of this expression. The limit of human memory ceased to be a question of fact and was determined by a curious rule of law which still remains in force. Time of legal memory became distinguished from time of human memory.

Statute of Westminster which was passed in the year 1275, imposed a limitation upon actions for the recovery of land. It provided that no such action should lie, unless the claimant or his predecessor in title had possession of the land claimed at some time subsequent to the accession of Richard I. The original common law rule of limitation for such actions was the rule as to time immemorial. The enactment in question was accordingly construed as laying down a statutory definition of the term 'time of memory', and this definition was accepted by the courts as valid.

This English rule of Legal memory (1189 AD) is not applicable in India, but it must be proved that a custom is an ancient one.

A custom cannot come into existence by agreement. Similarly, no new custom can be recognized. In *Deivain Achi v. Chidambara Chettiar* (1954) the question was whether a group or organisation was free to lay down new ceremonies of marriage.

A Hindu marriage can be solemnized only with ceremonies prescribed by Sastras or by custom. If the parties do not observe any ceremonies whatever, there is no valid marriage.

The 'Self Respectors cult' in the State of Tamil Nadu organised a movement under which traditional ceremonies were substituted by simple ceremonies. The basic idea was to abandon the Brahminical ceremonies of marriage. The marriage ceremony consisted of an exchange of garlands between the bride and bridegroom. In this case the parties belonged to Anti-Purohit Association. The Association was opposed to having priests officiating at marriages. Accordingly the parties exchanged garlands in the presence of their friends and invitees. It was contended that this was sufficient for a valid marriage. The contention was rejected and held that the marriage was void. The main question before the court was, could this ceremony be considered as established by custom? Marriage took place in 1925. The court said that 25 years is not a sufficiently long period to elevate a practice to the rank of custom. Court was of the view that, in modern times, no one is free to create a law or custom. Customs cannot be created by associations or organizations or even by the State.

In *Baby v. Jayanth*, the 'Mahr' community of Maharashtra embraced Neo-Bhuddism being the followers of Dr.B.R.Ambedkar. They introduced a marriage ceremony of exchanging garlands before the statue or a photograph of Ambedkar, in the presence of invitees. The

Bombay High Court held the marriage as valid considering that ceremony as customary ceremony. The Court held that there is social acceptance behind custom, and the community itself has adopted it, and hence such a custom is valid one.

2. Reasonableness:

Custom to be valid must be reasonable. It should, at any rate, be in conformity with the notions of justice and public utility. That does not mean that a judge can ignore a custom if he is not satisfied as to its absolute rectitude and wisdom. With human beings, nothing is absolutely perfect and to expect such perfection in custom is to deny it all validity. As we have seen above, custom creates rational expectations and judges must be slow in upsetting them. Thus, custom to be denied legal efficacy must be so patently unjust and unreasonable that its recognition and enforcement is more detrimental to the society, that is, the upsetting of rational expectations of the people.

In *Raj Varma v. Ravi Varma*, the question arose whether a custom recognizing the sale of trusteeship of a temple was a valid custom. The Privy Council held that the sale of trusteeship for the pecuniary advantage of the trustee was not a valid custom.

The period for ascertaining whether a custom is reasonable is the period of its inception. A custom then should not be repugnant to reason. The reason is not to be understood of every unlearned man's reason but of artificial and legal reason warranted by authority of law. The reasonableness of a custom should be judged with reference to the general principles which are at the root of the legal system. A custom is contrary to reason if it is opposed to the principles of justice, equity and good conscience.

Annon:

If a tenant was two years in arrears with his rent, the lord might enter and dispossess him until agreement was made for the arrears. It was held as bad.

Anon:

Trespass for digging in the plaintiffs land, which was four acres adjoining the sea: It had been used from the time immemorial, when fishing in the sea, to dig in order to pitch stacks to hand out and dry their nets. This custom is against reason, if one digs in one place, another may dig in another place. By this custom they could destroy the whole meadow.

3. Conformity with Statute Law:

It is now very well established that custom must not be contrary to a legislative enactment and, in case of conflict, legislation invariably supercedes custom. This is a fundamental principle of the legal systems of the common law countries which is not recognized by continental legal systems based on Roman law. According to them, the maxim is, "lex posterior derogat priori" (the latter law supercedes the earlier law) and even if the latter law is custom it would supercede earlier legislation.

But even in common law countries legislation may, and does often, explicitly permit a contrary custom to follow. Thus Section 5 (iv) of Hindu Marriage Act, 1955 while invalidating marriages within the degrees of prohibited relationship, specifically provide that a contrary custom wherever prevalent is unaffected. Thus, the custom permitting marriage between children of brother and sister which is prevalent in some parts of the country, though falling within the 'degrees of prohibited relationship' as defined in Section 3(g)(iv) is saved under Section 5 (iv) of the Hindu Marriage Act.

Ramnad Case: (1868)

In Collector of Madura v. Mootoo Ramalinga Sethupathy, the Zamindar of Ramnad died without sons. No authority was given to the widow Rani Parvathavardhini, to make an adoption. Still the widow made the adoption with the consent of some of the sapindas of her husband. If such an adoption was not valid, the zamindari would have escheated to the Government. The Collector notified that on the death of Rani Parvathavardhini the zamindari would escheat to the State. The suit was brought by the adopted son for a declaration of the validity of the adoption. The question was whether under the Dravida School of Hindu law an adoption made by a widow without the husband's authority was valid when there was consent of sapindas. The Privy Council held that in the Dravida Country in the absence of authority from the husband, a widow may adopt a son with the assent of his kindred. The Privy Council observed: "For under the Hindu system of Law, the clear proof of usage will outweigh the written text of the law."

4. Observance as of right

As has been observed at the outset, custom is something more than uniformity of conduct or usage. It must be coupled with the conviction that what is done uniformly is also done as a matter of obligation or right. This requisite is expressed by the maxim that custom must be followed "nec vi, nec clam, nec precario" - peacefully, openly and without interruption. What the rule means is that custom must have been followed openly, without the necessity for recourse to force, and without the permission of those adversely affected by the custom being regarded as necessary. These requisites are expressed in the form of the rule that the user must be nec vi, nec clam, nec precario - not by force, nor by stealth, nor at will.

A custom to operate as source of law must be supported by *opinio necessitatis*. It must be regarded by those affected by it not merely as a facultative or optional rule, but as an obligatory or binding rule of conduct. If a practice is left to individual choice it can have no claim to recognition as customary law.

5. Peaceableness

The custom must have been peacefully observed. Its validity must have been voluntarily recognised by the generality of people in the locality.

6. Certainty and continuity

What is sought to be proved as valid custom must be a continuous and certain course of conduct. It should not be sporadic or ambiguous. The incidents of custom must not be vague or indefinite. They shall be certain and known.

7. Consistency

One custom will not be allowed to be set up in opposition to another. Evidence of the existence of two inconsistent customs would only show that neither of them had an imperative authority on the people. Neither of them can then claim to have been observed as of right.

9.7 KINDS OF CUSTOM

Custom may be classified as follows:

1. Legal custom and conventional custom:

A legal custom, according to Salmond, is one whose legal authority is absolute - one which is itself and proprio vigore possesses the force of law. This is custom proper. A conventional custom is one which is not automatically binding but becomes binding only when it is accepted and incorporated in to the terms of a contract. A conventional custom is also called usage. Thus, a legal custom is binding whether one accepts it or not but a conventional custom or usage is binding only when it is accepted by the parties to a contract.

An example of conventional custom is the law merchant or mercantile usage. Most of the agreements of businessmen contain two parts, namely, the terms expressed and the terms implied. The implied terms, generally, are part of the usages that are developed in business transactions. Unless the parties to such contracts specifically exclude them, the mercantile usages are binding.

1. The usage must be so well established as to be notorious.
2. No period of longevity is necessary.
3. The usage cannot alter the general law of the land, whether statutory or common law.
4. Usage derives its force from its incorporation into an agreement.
5. It can have no more power to alter the law than express agreement.
6. The usage will have to be reasonable one.
7. Usages may be local or general or international.
8. Its sole function is to imply a term when the contract is silent.

2. General Custom and Local Custom:

Legal custom is itself of two kinds, being either general custom or local custom. General custom is the custom prevalent throughout the territory of a country, and in England it means the common law. On the other hand, local custom is that which is prevalent in some defined locality only, such as a borough or county in England. For our purpose, custom means local custom only.

3. Custom and Prescription:

Custom is a source of law whereas prescription is a source of right to the claimants. To express the same thing in a different way, custom confers rights on the people of a locality generally and prescription confers rights to persons individually.

Historically, custom and prescription were classed as two species of the same thing. They are originally governed by essentially similar rules of law. The requisites of a valid prescription were in essence the same as those of a valid custom. Both must be reasonable, both must be immemorial, both must be consistent with statute law. At present in the case of custom the old rule as to time immemorial still subsists. But now, after a process of gradual differentiation between the two, prescription need not be immemorial it can be established by continuous user for the period prescribed by law. Prescription is also referred to as personal custom. Limitation Act of 1963, under Sections 25-27, deal with acquisition of ownership by possession. Sec.25 deals with acquisition of easements by prescription. Sec.27 deals with extinguishment of right to property.

9.8 CUSTOM IN VARIOUS LEGAL SYSTEMS

Roman Law:

In Roman Law customs played a very important part before the Code, but after the promulgation of the Code, Roman law was less sympathetic to customs. The tests laid down by the Roman jurists for recognising a custom as law were reasonableness and antiquity, but they did not fix any period which must elapse before a custom is to be recognized as law.

Hindu Law:

1. According to Aswalayana, a man cannot marry his wife's sister or sister's daughter. It is now held that such a marriage in South India is perfectly valid because there is a custom permitting such an alliance.

2. The text of Sakhala prohibits the adoption by a person of his daughter's son or sister's son, or mother's sister's son. In South India, a custom permitting the adoption of daughter's son or sister's son by a Brahmin has been upheld.

3. According to Shastras, the performance of vivaha Homa and other ceremonies is essential to the validity of a marriage. Still in the Kavaraal community non-performance of ceremonies will not invalidate the marriage as there is a custom dispensing with them.

Custom has now been defined by statutes and they are referred to in Section 3 of Hindu Marriage Act 1955, Section 3 of Hindu Succession Act 1956, Section 3 of Hindu Adoptions and Maintenance Act, 1956. The provisions of these Acts are given over-riding effect over all existing laws. It is interesting to note that custom is given still further over-riding effect over the provisions of the so called overriding Acts.

Enumerating the conditions of a Hindu Marriage, clause (iv) and (v) of Section 5 of Hindu Marriage Act 1955 enact that the parties should not be either within the degrees of prohibited relationship or sapindas of each other, unless the custom permits a marriage between the two. So marriage of maternal uncle's or maternal aunt's daughter is permissible in Southern India where such custom exists. Section 7 of the Hindu Marriage Act retains the customary rites and ceremonies for solemnization of Hindu Marriage. Section 29(2) provides that nothing contained in the above Act shall be deemed to affect any right recognized by custom to obtain the dissolution of a Hindu Marriage, whether solemnized before or after the commencement of the Act.

“The expressions ‘custom’ and ‘usage’ signify any rule which, having been continuously and uniformly observed for a long time, has obtained the force of law among Hindus in any local area, tribe, community, group or family”.

“Provided that the rule is certain and not unreasonable or opposed to public policy; and Provided further that in the case of a rule it has not been discontinued by the family”.

Section 10 of the Hindu Adoptions and Maintenance Act 1956 also gives predominance to custom by providing that the person to be taken in adoption is unmarried and is below 15 years of age, unless there is a custom or usage applicable to the parties which permits persons who are married and persons who have completed the age of 15 years being taken in adoption.

Mohammedan Law:

Joseph Schacht, a German jurist, in his work “Origins of Mohammedan Jurisprudence” says that even the traditions of the Prophet, whose authority as a source of law is next only to Koran, are nothing but living traditions of the people, in other words, customs of the people. In India, many sects of Mohammedans, on many matters, are governed by local customary law.

English Law:

The Common law is customary law. The British Constitutional Law is described as “The law and customs of Constitution”

9.9 PRESENT POSITION OF CUSTOMARY LAW

Custom is the oldest and original source of law and was the only instrument of law-making in the primitive societies. But after the advent of legislation, the importance of custom has been steadily waning and may altogether disappear in future. The main reasons for the decline and fall of custom is that it is tediously slow and cumbersome as an instrument of law-making, and the rule of immemoriality is a great drag on the efficacy of custom as a method of social change. In the present jet age, custom is bound to be a misfit.

9.10 SUMMARY

In primitive societies custom is the only law. Though custom is an important source of law in early times, its importance continuously diminishes as the legal system grows. As Salmond rightly observes ‘custom is to society what law is to the state’. There are three views as to the nature of customary law: custom is a formal source, custom is a historical material source, and custom is legal material source. All social customs are the legal customs. In order to be valid and operative as a source of law, custom must conform to certain requirements laid down by law. They are: immemoriality, reasonableness, conformity with statute law, observance as of right, peaceableness, certainty, continuity and consistency. The law-creative efficacy of custom is now on the decline.

9.11. SELF ASSESSMENT QUESTIONS

1. What is the place of custom among various sources of law?
2. What are the requisites of a valid custom?
3. Is Custom a living and operative source of law?
4. Explain the statement of Salmond: ‘custom is to society what law is to the State’.

9.13 FURTHER READINGS

C.K.Allen, Law in the Making, Universal Law Publishing Co.Ltd. Delhi
 P.J.Fitzgerald (ed.), Salmond on Jurisprudence, Sweet and Maxwell, London
 G.C.V.Subba Rao, Jurisprudence and Legal Theory, Eastern Book Company, Lucknow.

UNIT – X PRECEDENT

Objectives

After reading this unit you should be able to

- Explain the importance of judicial precedent as a source of law
- Trace the development of doctrine of stare decisis
- Examine theories of judge-made law
- Analyse different kinds of precedents
- Enumerate the circumstances destroying the binding force of precedent
- Discuss ‘ratio decidendi’ and ‘obiter dicta’

Structure

- 10.1 Introduction
- 10.2 Doctrine of stare decisis
- 10.3 Theories as to the nature of judicial function
- 10.4 Kinds of Precedent
- 10.5 The Modes and Effect of disregarding a precedent
- 10.6 Circumstances destroying or weakening the binding force of precedent
- 10.7 Ratio Decidendi and Obiter Dicta
- 10.8 Reversal Test of Prof.Wambaugh
- 10.9 Material Facts test of Dr.Goodhart
- 10.10 Summary
- 10.11 Self-Assessment Questions
- 10.12 Further Readings

10.1 INTRODUCTION

Precedent means a judgment or decision of a court of law cited as an authority for deciding a similar set of facts; a case which serves as an authority for the legal principle embodied in its decision. The common law of England has developed by broadening down from precedent to precedent.

In Oxford dictionary, precedent is defined as a previous instance or case which is, or may be taken as an example of rule for subsequent cases, or by which some similar act or circumstances may be supported or justified. A number of jurists have also given their definitions of precedent. The general use of the term ‘precedent’ means some set pattern guiding

the future conduct. In the judicial field it means the guidance or authority of past decisions for future cases.

Gray: A precedent covers everything said or done, which furnishes a rule for subsequent practice.

Keeton: A judicial precedent is a judicial decision to which authority has in some measure been attached.

Simply, precedent means a judgment given by a competent court of law on a previous occasion. Judges, it is said, make law by a chain of uniform judicial decisions and that law is called judge-made law. Such law making power of the judges owes its importance to the doctrine of precedent or stare decisis. According to this doctrine, a judgment delivered by a competent court on a previous occasion becomes a binding precedent for deciding similar cases that may arise subsequently. Adherence to a precedent contributes immensely to the uniformity and certainty of law.

10.2 DOCTRINE OF STARE DECISIS

Stare Decisis is the most commonly used term for designating the Anglo-American doctrine of precedent. This term is an abbreviation of the latin phrase 'stare decisis et non quieta movere' which means to stand by precedents and not to disturb the settled points. In general form 'stare decisis' signifies that when a point of law has been once settled by a judicial decision, it forms a precedent which is not to be departed from afterwards. Differently expressed, 'a prior case being directly in point, must be followed in a subsequent case.'

10.3 THEORIES AS TO THE NATURE OF JUDICIAL FUNCTION

There seems to be a theoretical controversy as to whether judges really make the law or they simply declare and evidence an already existing legal principle. There are two schools of thought regarding the judge-made law.

Declaratory theory: It is the emphatic opinion of Hale and Blackstone that judges do not make the law but only discover and declare an already existing legal principle. When a judge is said to have created a precedent it only means that he is the first to find the law and not that he has created a new principle. 'Jus dicere et non jus dare' is the maxim which means law finders rather than law makers. Judges do not invent but only discover the law.

Creative theory : A.V.Dicey, the well known English jurist, is a great supporter of the theory that judges do make the law. He observes that the common law of England is completely a product of the genius of the English Judges. Prof.Gray goes a step further and asserts that judges alone are the law-makers. This is so, Gray observes, because it is ultimately the judge who interprets and determines what the law really is.

Realists held the view that law is what the judges declare it is. Law made by the legislature is ostensible law and law declared by a court is real law. It is for the court to decide whether a particular custom is valid or not to attach the force of law. Similarly, it is for the court to decide the validity of a legislative enactment. For that reason realists observed that law is product of judicial determination.

Reconciliation of two theories: We may agree with the theory that the judges are also law makers without going to the extreme to which Prof.Gray is prepared to go and say that the judges only are law-makers. If a statute is not law because it has to be interpreted by the judges, then even a precedent is not law because it may be overruled.

10.4 KINDS OF PRECEDENTS

Precedents may be classified as follows:

Original and Declaratory Precedents.

An original precedent is one which creates and applies a new rule; a declaratory precedent is one which is merely the application of an already existing rule of law. Thus an original precedent, by creating for the first time a new principle of law, contributes to the development of legal doctrines. A declaratory precedent, being merely reiteration of old law, has no such claim. However, an original precedent suffers from the demerit of frustrating the expectations of the people because by introducing an entirely new principle of law it unsettles the law. A declaratory precedent on the contrary contributes to the steady and certain development of law.

Authoritative and Persuasive Precedents:

An authoritative precedent is one which is binding and must be followed, a persuasive precedent is one which need not be followed, but which is worthy of consideration. Thus, an authoritative precedent is one which judges must follow whether they approve of it or not. A persuasive precedent is one which the judges are under no obligation to follow, but which they will take into consideration, and to which they attach such weight as it seems to them to deserve.

An authoritative precedent is a legal source of law while a persuasive precedent is merely a historical source. Legal source is source in fact as well as source in law. Historical source is source in fact but not source in law, because it has no binding force.

An authoritative precedent as the name itself suggests is a precedent created by a court of higher authority in the judicial hierarchy. It binds all the lower courts. A persuasive precedent is a decision given by a court of coordinate or equal authority. eg. A decision of one High Court is a persuasive precedent for another High Court. A decision of the US Supreme Court has only persuasive value before the Indian Supreme Court. A persuasive precedent can only persuade and not command and it depends for its influence upon its own merits and not on any legal claim for judicial recognition. A persuasive precedent may or may not be accepted and in case it is accepted, it is done so not because it is binding but because its logic and merit are compelling.

Absolutely authoritative and conditionally authoritative precedents:

Salmond further classified authoritative precedents into ‘absolutely authoritative precedents and ‘conditionally authoritative precedents’. An absolutely authoritative precedent commands implicit and unquestioning obedience from the lower courts and it is absolutely binding however unreasonable and erroneous it may appear to be. In India, the following are absolutely authoritative precedents:

- i) The decisions of the Supreme Court
- ii) Every Court is bound by the decisions of the Court superior to it.
- iii) The judges of the High Court sitting alone are bound by the decisions of the Division Bench
- iv) A Division Bench of a High Court is bound by the decisions of its Full Bench.

Till 1966, the decisions of the House of Lords in England are binding not only upon all inferior courts but also upon itself. A judicial error once committed by the House of Lords would perpetuate itself because even the House of Lords had no power to overrule its decision. However this legal throttle on the House of Lords has been done away with in 1966 and now the House of Lords can overrule its own decision if it deems necessary.

A conditionally authoritative precedent, according to Salmond, is one which is ordinarily binding but may be disregarded under exceptional circumstances. But the same decision may be absolutely authoritative in regard to another. Thus, the decision of a single judge of a High Court is an absolutely authoritative as regards the lower courts but is only a conditionally authoritative precedent as to a Division Bench of same High Court.

10.5 THE MODES AND EFFECT OF DISREGARDING A PRECEDENT**Overruling and Dissenting:**

A precedent may be disregarded in two ways. The judge may overrule a precedent or he may simply refuse to follow it or what is called ‘dissenting’. Overruling is an act of superior authority. A precedent overruled is definitely formally deprived of all authority. Like a repealed statute, an overruled precedent becomes null and void and a new rule is substituted for the old one. ‘Dissenting’ on the other hand, is an act of coordinate jurisdiction. Two courts of equal and coordinate authority cannot overrule each other.

Thus, for instance, the High Court of AP cannot overrule a decision of the High Court of Tamil Nadu; it can only dissent from it and it cannot supercede the other. The effect of such a situation is that the decisions of both the High Courts stand side by side conflicting with each other. This legal conflict can be resolved only when a higher authority nullifies one decision and sanctions the other. This higher authority could be the Supreme Court or even the legislature.

Overruling and Repealing:

Overruling is a judicial act whereas repealing is a legislative act. Overruling is generally retrospective in that overruled decision becomes null and void abinitio. However, for consideration of expediency, courts have, at times, resorted to the so called 'prospective overruling'. The American doctrine of prospective overruling has been for the first time applied by the Supreme Court in *Golaknath v. State of Punjab*.

On the other hand, the repealing of a statute is generally prospective in that the repealed statute is not deemed to be void abinitio. The repealed statute is not erased out of the statute book but only rendered unenforceable after the date of repeal. In regard to matters arising before the date of repeal, the Act continues to be applicable.

Doctrine of Prospective Overruling:

The judges should be given authority to set aside former decisions which are hopelessly obsolete or thoroughly ill-advised and contrary to the social welfare. In granting courts the power to overrule their decisions, it should be made clear, however, that in exercising this power they should make certain that less harm will be done by rejecting a previous rule than by retaining it.

An unfortunate consequence of discarding a precedent under the still-prevailing doctrine is the retroactive effect of an overruling decision. The problem is well illustrated by the decision in the case of *People v. Graves*. In 1928 the United States Supreme Court decided that a state had no right to tax income from copyright royalties. In 1932 this decision was overruled on the ground that it was erroneous. During the three intervening years Elmer Rice, a dramatist living in New York, had received large royalties from his plays on which he had paid no New York income tax. After the overruling of the 1928 decision, the New York authorities demanded three years back taxes from Mr. Rice on these royalties. The New York Courts supporting the tax authorities, made Mr. Rice liable not only for the back taxes but also for the payment of interest at six percent for being late. In order to avoid this hardship and injustice the US Supreme Court has expressly given constitutional authorisation to the courts of the states to deny a retroactive effect to their overruling decisions.

In the case of *Golaknath v. State of Punjab* (AIR 1967 SC 1643), the Supreme Court of India adopted the doctrine of prospective overruling. In that case the validity of the first, fourth and seventeenth amendments of the Indian Constitution was challenged and it was contended that those were invalid. Prior to that case, the Supreme Court held in the cases of *Shankari Prasad v. Union of India* (AIR 1951 SC 458) and *Sajjan Singh v. State of Rajasthan* (AIR 1965 SC 845) that those Amendments were valid. The earlier decisions enabled the government to put an end to the Zamindari system and distribute land among the peasants. In the case of *Goalkanth*, the Supreme Court held by a majority of 6 to 5 judges that the above amendments were invalid as they prejudicially affected the fundamental right to property. Ordinarily, this would have upset everything done so far in the agrarian field and would have created many

complications. The result was that the Supreme Court restricted the effect of its decision to future cases. It was laid down that the fundamental rights could not be taken away or abridged by constitutional amendment in future but whatever had already been done under the first, fourth and seventeenth Amendments was not to be disturbed. This is called the doctrine of prospective overruling. The Supreme Court laid down certain limits to the doctrine of prospective overruling as mentioned hereunder:

- i) the doctrine can be invoked only in matters arising under the Indian Constitution
- ii) it can be applied only by the Supreme Court;
- iii) the scope of the operation of the doctrine is left to the Supreme Court's discretion to be moulded in accordance with the justice of the cause or matter before it.

10.6 CIRCUMSTANCES DESTROYING OR WEAKENING THE BINDING FORCE OF PRECEDENT

It will be convenient to consider the various ways in which a precedent may lose all or much of its binding force.

1. Abrogated decisions:

A decision ceases to be binding if a statute or statutory rule inconsistent with it is subsequently enacted, or if it is reversed or overruled by a higher court. Reversal occurs when the same decision is taken on appeal and is reversed by the appellate court. Overruling occurs when the higher court declares in another case that the precedent case was wrongly decided and so is not to be followed.

Since overruling is the act of a superior authority, a case is not overruled merely because there exists some later opposing precedent of the same court or a court of coordinate jurisdiction. In such circumstances a court is free to follow either precedent, whereas when a case is overruled in the full sense of the word the courts become bound by the overruling case not merely to disregard the overruled case but to decide the law in the precisely opposite way. Overruling need not be express, but may be implied. The doctrine of implied overruling is a comparatively recent development.

2. Affirmation or reversal on a different ground:

It sometimes happens that a decision is affirmed or reversed on appeal on a different point. As an example, suppose that a case is decided in the Court of Appeal on ground A, and then goes on appeal to the House of Lords, which decides it on ground B, nothing being said upon A. In such circumstances what is the authority of the decision on ground A in the Court of Appeal. Is the decision binding on the High Court, and on the Court of Appeal itself in subsequent cases?

In such case it is submitted that original judgment is not deprived of all authority but the subsequent court may think that the particular point which the higher court does not touch is rightly decided. It can, if it thinks fit, follow the decision.

Although this is sometimes a correct reading of the state of mind of the higher court, it is not so always. The higher court, may, for example, shift the ground of its decision because it thinks that this is the easiest way to decide the case, the point decided in the court below being of some complexity.

The argument that the higher authority finding a better ground on which the lower court's judgment can be supported does not take upon itself the disagreeable task of reversing the lower court's judgment is not always correct.

It is submitted that the true view is that a decision either affirmed or reversed on another point is deprived of any absolute binding force it might otherwise have had; but it remains an authority which may be followed by a court that thinks the particular point to have been rightly decided.

3. Ignorance of Statute:

A precedent is not binding if it was rendered in ignorance of a statute or a rule having the force of statute i.e., delegated legislation. It is also not binding if the earlier court, though knowing of the existence of the statute, did not refer to, or failed to appreciate its relevance to the matter in hand. Even a lower court can impugn a precedent on such grounds.

However, the mere fact that the earlier court misconstrued a statute, or ignored a rule of construction, is no ground for impugning the authority of the precedent. A precedent on the construction of a statute is as much binding as any other, and the fact that it was mistaken in its reasoning does not destroy its binding force.

4. Inconsistency with earlier decision of higher court:

It is clear that a precedent loses its binding force if the court that decided it overlooked an inconsistent decision of a higher court. If for example, the Court of Appeal decided a case in ignorance of a decision of the House of Lords which went the other way, the decision of the Court of Appeal is *per incuriam*, and is not binding either on itself, or on lower courts, on the contrary, it is the decision of the House of Lords that is binding. The same rule applies to precedents in other courts.

5. Inconsistency between earlier decisions of the same rank:

There may at first seem to be a difficulty here: how can a situation of conflict occur, if the court is bound by its decision? At least two answers may be given.

i) the conflicting decisions may come from a time before the binding force of precedent was recognised.

ii) secondly and more commonly the conflict may have arisen through inadvertence, because the earlier case was not cited in the later. Whenever a relevant prior decision is not cited before the court, or mentioned in the judgments, it must be assumed that the court acts in ignorance or forgetfulness of it.

If the new decision is in conflict with the old, it is given *per incuriam* and is not binding on a later court. Perhaps in strict logic the first case should be binding since it should never have been departed from and was only departed from *per incuriam*.

However, this is not the rule. The rule is that where there are previous inconsistent decisions of its own, the court is free to follow either. It can follow the earlier, but equally if it thinks fit, it can follow the later.

The earlier case can be disregarded because of the subsequent inconsistent decision on the same level of authority, and the later case can be disregarded because of its inherent vice of ignoring the earlier case.

Where authorities of equal standing are irreconcilably in conflict, a lower court has the same freedom to pick and choose between them as the schizophrenic court itself. The lower court may refuse to follow the later decision on the ground that it was arrived at *per incuriam*, or it may follow such decision on the ground that it is the latest authority.

Which of these two courses the court adopts depends, or should depend, upon its own view of what the law ought to be.

6. Precedents *sub silentio* or not fully argued:

In some cases the court may make no pronouncement on a point with regard to which there was no argument, and yet the decision of the case as a whole assumes a decision with regard to the particular point. Such decisions are said to pass *sub silentio*, and they do not constitute a precedent.

A precedent is said to pass *sub silentio* when the particular point of law involved in the decision is not perceived by the court or present to its mind.

The court may consciously decide in favour of one party because of point A, which it considers and pronounces upon. It may be shown, however, that logically the court should not have decided in favour of the particular party unless it also decided on point B in his favour, but point B was not argued or considered by the court. In such circumstances, although point B was logically involved in the facts and although the case had a specific outcome, the decision is not an authority on point B. Point B is said to pass sub silentio.

A good illustration is *Gerard v. Worth of Paris Ltd.* (1936) 3 All ER 905 (C.A.). There, a discharged employee of a company who had obtained damages against the company for wrongful dismissal, applied for a garnishee order on a bank account standing in the name of the liquidator of the company. The only point argued was on the question of priority of the claimant's debt, and on this point only the court granted order. No consideration was given to the question whether a garnishee order could properly be made on an account standing in the name of the liquidator. When, therefore, this point was argued in a subsequent case before the Court of Appeal, the court held itself not bound by its previous decision. Because the previous decision has been passed sub silentio.

The rule that a precedent sub silentio is not authoritative is expressed in the statements: "An hundred precedents sub silentio are not material" and "Precedents sub silentio and without argument are of no moment."

7. Decisions of equally divided courts:

When an appellate court is equally divided, the practice is to dismiss the appeal. The problem may be illustrated by the treatment of *R.v. Millis* (1844), 10 Cl. & F.534, in *Beamish v. Beamish* (1861), 9 H.L.C.274. In *R v. Millis*, the House of Lords adopted the rule that the presence of an episcopally ordained priest is essential, at common law, to a valid marriage in England or Ireland with the result that a marriage was held void. The members of the House of Lords who voted whether to accept the advice of the judges were evenly divided. The decision of the Irish Appellate Court, which was against the validity of the marriage, was accordingly only affirmed on the principle of *praesumitur pro negante*. A motion had been proposed, and as it had not been carried, it was deemed to have been defeated. This decision was followed in *Beamish v. Beamish*.

This kind of problem is in fact rare, since it is now the invariable practice of the House of Lords to sit with an uneven number of members, and this is also general practice of other appellate courts.

8. Erroneous decisions:

Decisions may also err by being founded on wrong principles or being in conflict with fundamental principles of common law. Though logic may suggest that such decisions should be ignored, yet in practice perfection may have to be sacrificed for certainty.

Where the decision has stood for some length of time and been regarded as establishing the law, people will have acted in reliance on it, dealt with property and made contracts on the strength of it, and in general made it a basis of expectations and a ground of mutual dealings. In such circumstances it is better that the decision, though founded in error, should stand. *Communis error facit jus.* (common error makes the law)

10.7 RATIO DECIDENDI AND OBITER DICTA

We have so far discussed about the binding nature of a decision. Now we must see what we mean by decision. A decision has to be seen from two aspects: (i) what the case decides between the parties and (ii) what principle does it lay down.

First we must distinguish what a case decides generally and as against all the world, from what it decides between the parties themselves. What it decides generally is the ratio decidendi or rule of law for which it is authority; what it decides between the parties themselves includes far more than just this.

If A sues B in negligence relating to a motor accident, each will be bound as against the other by the findings in the case. Third parties not involved in the original case, however, will not be bound, nor will either of the parties be bound in a subsequent dispute with a third party. So if B is later prosecuted for careless driving, neither he nor the prosecutor will be bound by any findings of fact in the original case.

In certain circumstances the findings in an action may be conclusive even as against third parties. In the case of petition for declaration of nullity of a marriage, the court's decision will be valid not only against the petitioner and respondent but against the petitioner and respondent but against all third parties.

This rule of proposition, the ratio decidendi, may be described roughly as the rule of law applied by and acted on by the Court, or the rule which the court, regarded as governing the case.

Once a case has been heard and all aspects have been taken, all parties to the dispute and their successors are bound by the court's findings on the issues raised between them and on questions of fact and law necessary to the decision of such dispute. According to this principle these matters are now *res judicata* between them and cannot be the subject of further dispute. But the Court's findings will not be conclusive except as between the same parties. Only in certain circumstances such findings may also be binding on third parties. An example is that of declaration of nullity of marriage between two parties. As against persons not parties to the suit the only part of the case which is conclusive is the general rule of law for which it is authority. This rule of law is called as ratio decidendi.

One of the essential features of the doctrine of precedent in the common law is that rules of law are developed in the very process of application. This means that they are created by judges and not by teachers and other academic lawyers, however learned they may be. It also means that they are created by judges only when acting as judges, i.e., when deciding cases and not for example when giving lectures or other addresses; statements made by judges in their extra-judicial capacity, like other extra-judicial opinions, are without binding authority. The fundamental notion is that the law should result from being applied to live issues raised between actual parties and argued on both sides.

Suppose a judge illustrates his reasoning by reference to some hypothetical situations and conditions the law applicable to those situations (or) suppose he decides a case on one ground only and then gives his decision on other grounds; if they are needless for his decision, these observations are called obiter dicta i.e., observations by the way, and are not binding. But nonetheless they are important. They suggest solutions to problems not yet decided by the courts. Indeed, the obiter dicta of judges who are masters of their field may in practice enjoy very great prestige.

In *Bishan v. Maharashtra Watch & Gramophone Co.* it has been held that if the Supreme Court of India has considered and decided a point, the observations on that point will bind High Courts even if the point did not directly arise for decision. The point should, however, have been considered, whether or not it was necessary to consider it for deciding the particular dispute, in order that it may become a precedent.

In *Trieufts & Co. Ltd. v. Post Office*, the Court of Appeal held that Lord Mansfield's observation to the effect that the acceptance of parcels for transmission through the post does not give rise to a contract between the sender and the Post-Master General, was clearly obiter dictum, but it had been accepted since 1778 as good law.

As we have seen, the parties are bound by findings of fact and law necessary for the resolution of issues between them. A problem that can arise is the following:

A applies for judicial relief against B. The court held that while it has general jurisdiction to grant the relief sought, it should not do so in the present case on account of A's failure to take certain preliminary steps. A remedies the defect and reappplies. Is B bound by the original finding that the Court had general jurisdiction to grant the relief in question?

In *Penn-Texas Corporation v. Mural Anstalt and Others*, the plaintriff, a foreign company, applied for an order that an English company should produce certain documents. The Court held that there was power in the Court to order a limited company to produce documents but only if they were specifically identified, and since this was not the case no order was made. Subsequently the plaintiff remedied the defect and applied again. At this point the English company wished to contend that the Court had no such general power as was previously decided, but was met by the argument that this had already been decided in the first application and was

res judicata. The Court of Appeal rejected the plaintiff's contention on this point. Lord Denning held that the earlier finding was in the event unnecessary to the decision.

Ratio Decidendi as opposed to obiter dicta is the rule of the court. The difficulty, however, lies in finding out this rule. Firstly, a ratio decidendi may be too widely stated or it may not stipulate exceptions to this rule. Later judges will definitely fill in this lacunae. But then the question arises whether we shall have to await later decisions to know what exactly the ratio decidendi was. In *Bridges v. Hawkesworth* (1851) it was held that where a customer found some money on the floor of a shop he should have possession of it rather than the shop-keeper applying the rule of 'finder-keepers'. In *Southstaffordshire Water Works Company v. Sharman* (1896) it was held that where the defendant found two gold rings in a mud pool owned and occupied by the plaintiff and to which the public had no access, the court refused to apply the rule expressed in the earlier case. The ground of this refusal was that in that case the money had been found in a public part of the shop, whereas in the present case the pool was not open to the public. We can look at either way as narrowing the rule or an exception to the general rule.

Secondly, difficulty may arise when an order or judgment is delivered unsupported by any reasoning.

Thirdly, where the judgment or order is supported by different propositions, which proposition will be the ratio decidendi will be difficult to state.

Lastly, there may be a large number of judgments delivered in the same case each supporting the decision but on different grounds.

A dissenting judgment, valuable and important though it may be, cannot count as part of the ratio decidendi.

While it is fairly simple to describe what is meant by the term ratio decidendi, it is far less easy to explain how to determine the ratio of any particular case. Various methods of determining the ratio decidendi have been advanced by jurists.

10.8 REVERSAL TEST OF PROF. WAMBAUGH

Here, it is advocated that we should take the propositions of law put forward by the judge, reverse or negate it, and then see if its reversal would alter the actual situation. If so, then the proposition is the ratio or part of it; if the reversal would have made no difference then it is not.

But this reversal test is of no use where the judge arrives at a decision unsupported by any reasoning, that is to say in cases where the judge gives several reasons for his decision. Each proposition may be reversed and yet the decision would remain because it is based on many.

10.9 MATERIAL FACTS TEST OF DR.GOODHART

According to this test the ratio is to be determined by ascertaining the facts treated as material by the judge together with his decision on those facts. This test directs us away from what judges say towards what in fact they do, and indeed it is the only way of deriving a ratio in cases where no judgment is given. Where a judgment is given, however, it is from this that we must discover which facts the judge deemed material and which not.

The 'material facts' test is valuable in stressing that propositions of law are only authoritative in so far as they are relevant to facts in issue in a case: a judicial statement of law therefore must be read in the light of the facts of the case. And of course in the light of the issues raised in the pleadings. In *Dann v. Hamilton*, a passenger in a car sued the driver for damages suffered in an accident by the driver's intoxication. The defendant's plea of *volenti non fit injuria* was rejected. It was later suggested that the defendant could have succeeded on contributory negligence, but the judge in the case pointed out that this defence was never pleaded and could not therefore arise. While it provides a very useful method of ascertaining the ratio decidendi of a case, unfortunately current practice is otherwise than the 'material facts' test. For in practice the courts seem to pay more attention to the judge's own formulation of rule of the case.

It is already stated that the rules of law based on hypothetical facts are mere *obiter dicta*. Cases may, however, be decided on assumed facts. It is open to the parties in a civil action to have a point of law decided as a preliminary matter, and here the only facts are hypothetical ones. This was the case in *Donoghue v. Stevenson* (1932). The facts are that the defendant manufactured a ginger beer bottle, let it go out in the market with the remains of a snail inside and in such circumstances that there was no likelihood of intermediate inspection. The bottle was sold by a retailer to a customer. The customer's friend drank some of the ginger beer and became ill as a result. The court gave a ruling in law without disposing of all the facts. This is how the court may deal first with the law and enunciate a certain rule, but then find that on the facts this rule does not apply because the defendant comes within an exception to it.

There are cases where several points are raised, success on any one of which will decide the case in favour of one party. Suppose the court decides one point in favour of the defendant since success on any point means success for him. In this case the decision on the first point was strictly unnecessary to the decision and had no part in the court's arriving at it. In these cases the rules stated are not necessary for the decision. To regard them as *obiter dicta*, however, would be unrealistic and contrary to current practice.

10.10 SUMMARY

Precedent is an important source of English law. The Common law was entirely product of judicial decisions. There are two theories as to the nature of judicial function: declaratory theory and creative theory. According declaratory theory, judges are not the law-makers. According to

creative theory, judges do make the law. Precedents are classified into: original and declaratory, authoritative and persuasive precedents. There are certain circumstances destroying or weakening the binding force of precedent: abrogated decisions, affirmation or reversal on a different ground, ignorance of statute, inconsistency with earlier decision of higher court, inconsistency between earlier decisions of the same rank, precedents not fully argued, decisions of equally divided courts, and erroneous decisions. A decision of the court has to be seen from two respects: ratio decidendi and obiter dicta, Ratio decidendi may be described as the rule of law applied by the court. Obiter dicta means observations by the way. Two tests have been advanced by jurists to determine ratio decidendi of a case: Reversal test and Material facts test.

10.11 SELF ASSESSMENT QUESTIONS

1. How far it is true to say that judges are the law-makers?
2. Explain the importance of precedent as a source of law?
3. What are the circumstances destroying or weakening the binding force of precedent?
4. What is ratio decidendi? How to determine ratio decidendi of a particular case?.

10.12 FURTHER READINGS

P.J.Fitzgerald (ed), Salmond on Jurisprudence, Sweet and Maxwell, London
C.K.Allen, Law in the Making, Universal Law Publishing, Delhi
Rupert Cross, Precedent in English Law, Clarendon Press, Oxford.

UNIT – XI LEGISLATION

Objectives

After reading this unit you should be able to

- Explain the place of legislation among the sources of law
- Distinguish between the supreme and subordinate legislation
- Discuss the chief forms of subordinate legislation
- Compare case law with statutory law
- Explain the growing importance of codification

Structure

- 11.1 Introduction
- 11.2 Supreme and Subordinate legislation
- 11.3 Direct and Indirect legislation
- 11.4 Delegated legislation
- 11.5 Reasons for the growth of delegated legislation
- 11.6 Restraints or Limitations upon delegation of legislative powers
- 11.7 Conditional legislation
- 11.8 Place of legislation among the various sources of Law
- 11.9 Relative merits and demerits of legislation and precedent
- 11.10 Codification
- 11.11 Summary
- 11.12 Self Assessment Questions
- 11.13 Further Readings

11.1 INTRODUCTION

The term ‘legislation’ is derived from two latin words ‘legis’ and ‘latum’. ‘Legis’ means law and ‘latum’ means to make. Etymologically legislation means the making of the law. The common meaning of legislation is the making of law. Legislation as an instrument of social change is the most modern and efficacious source of law. According to Salmond, Legislation may be used in two senses, in a wide sense and loose sense or in a restrictive and strict sense. Legislation, in a wide sense, means all methods of law making including not only the law made by the legislature but also the rules laid down by the courts of law in deciding cases that come before them. In that wide connotation, one may construe the maxim ‘modus et conventio vincunt legum’ (by contract, law is changed) to mean that the parties to a contract have made law to themselves by laying down the terms of agreement which will bind them for the future. In a restrictive and strict sense, legislation means the law made only by the legislature. In this sense,

the judiciary even though a wing of the State machinery, is not a legislative body and, hence, the rules laid down by the courts are not legislations. So also, the terms of a contract, though they are binding on the parties, are not law because on the one hand they are not derived from the legislature, and on the other hand, the terms of an agreement bind only the parties and none other. Generally 'legislation' is used in the strict sense and not in the loose sense.

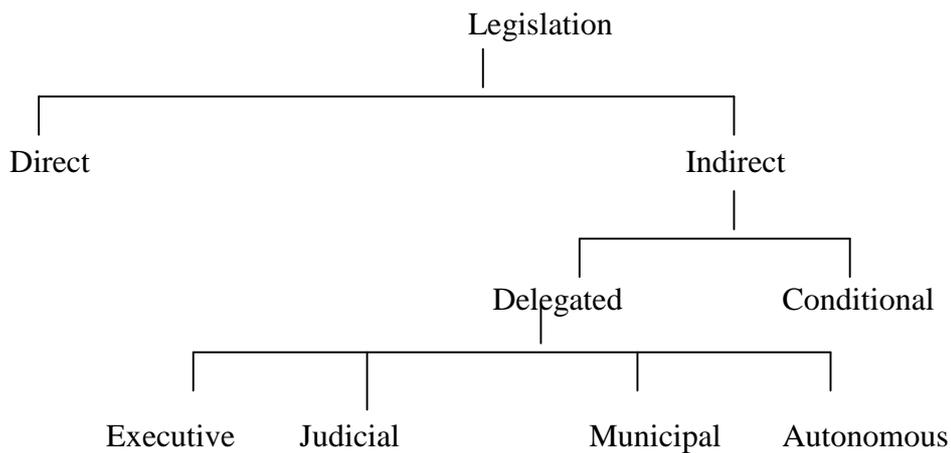
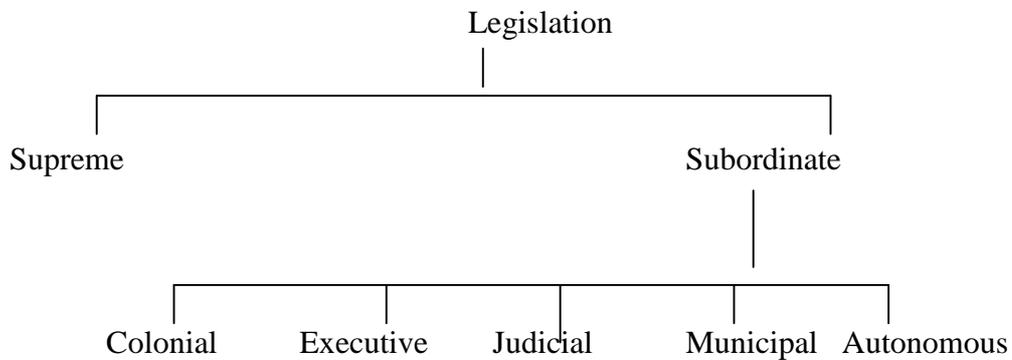
Definition of Legislation:

Salmond: Legislation is that source of law which consists in declaration of legal rules by a competent authority.

Gray: The formal utterances of the legislative organs of the society

Classification of Legislation:

Legislation may be classified into various types as follows:



11.2 SUPREME AND SUBORDINATE LEGISLATION

Supreme legislation is that which proceeds from the highest law-making body and is not capable of being repealed, annulled or controlled by another legislative authority.

Subordinate legislation, on the other hand, is that which proceeds from subordinate law-making body and is, hence, liable to be abrogated or amended by the supreme law-making body. The law passed by the British Parliament is an example of Supreme legislation, but, under the Indian Constitution which is federal in nature, both the parliament and state legislatures are supreme in their own legislative spheres. Hence the law passed by the Indian Parliament and also the State Legislatures are examples of Supreme legislation.

It must be borne in mind that the distinguishing features of supreme legislation is that it cannot be nullified by judicial authority. Thus, the legislation made by the Congress of the USA or Parliament of India is supreme even though such legislation is capable of being declared as null and void by the judiciary on the ground of constitutional invalidity.

However, Prof.A.V.Dicey has expressed the opinion that the legislatures under Federal Constitutions are only subordinate law-making bodies because they are liable to be controlled by their constitutions which are made by constituent assemblies which are to be treated as the really supreme law-making bodies.

Subordinate Legislation:

The legislation made by the bodies other than the supreme law-making body is subordinate legislation. The chief forms of subordinate legislation are the following:

i) Colonial legislation: The law made by the legislatures of the erstwhile self-governing colonies of British Empire are illustrations of colonial legislation. For instance, the legislation made by the British Indian Parliament was subordinate legislation which was liable to be annulled by the British Imperial Parliament.

ii) Executive Legislation: Under the modern conditions when law-making has become a very complex affair, legislature very often makes legislation only in its broad outlines, leaving the details to be worked out by the executive. Such executive rule-making is an example of subordinate legislation.

iii) Judicial legislation: Certain rule making power is delegated to superior courts for the regulation of their own procedure, and the rules made in the exercise of such power are really the 'judicial legislation' which is to be distinguished from the so called judge-made law or case law. Under Article 145 of the Constitution, the Supreme Court may, with the approval of the President, make rules for regulating generally the practice and procedure of the Court.

iv) Municipal legislation: The bye-laws made by Municipal corporations etc are subordinate legislation which is liable to be superceded by the legislature that has conferred such law-making power on the municipal authorities.

v) Autonomous legislation: The law passed by autonomous bodies like the Universities, registered companies and Road Transport corporation are examples of such subordinate legislation.

11.3 DIRECT AND INDIRECT LEGISLATION

The legislation made by the legislature itself is direct legislation whereas laws passed by other bodies to whom the law-making power is delegated by the legislature are called indirect legislation. The executive, judicial, municipal and autonomous legislation discussed above are illustrations of indirect legislation. Colonial legislation which is a form of subordinate legislation is not an example of indirect legislation because it is made by the legislature itself directly.

11.4 DELEGATED LEGISLATION

As mentioned above, delegated legislation is a kind of subordinate legislation. Generally, the delegated legislation means the law made by the executive under the powers delegated to it by the supreme legislative authority.

One of the significant developments of the present century is the growth in the legislative powers of the executive. This is due to two reasons: change in the concept of state from police state to welfare state, and due to frequent emergencies declared in countries throughout the world.

As we know the legislature, represented by the will of the people, is the appropriate body to legislate and to make laws. In the Parliamentary system of government like UK and India, however, the executive plays an important role in initiating legislation. With the growth in the functions of the State and consequent growth in the number of enactments each year by the legislature, the executive has come to play a much more dominant role. Legislation, therefore, includes law-making by the legislature or subordinate legislation by the executive.

Subordinate legislation or delegated legislation with which we are concerned here must not be confused with the executive legislation. For instance under Art.123 or 213 of the Constitution the Parliament or the Governor can issue Ordinances which have the force of law. An Ordinance can be issued only when Parliament or the State legislature is not in session. The nature of such legislation is very similar to subordinate legislation. However, since the Ordinance making power is derived directly from a constitutional provision, it is a kind of original legislation.

Definition and meaning of Delegated Legislation

According to Salmond, delegated legislation is that which proceeds from any authority other than the sovereign power and is therefore dependent for its continued existence and validity on some superior or supreme authority.

Such authority may be the central government or the state government depending upon whether the statute is a central or state law. The term delegated legislation is used in two senses. It may mean (i) exercise by a subordinate agency the legislative power delegated to it by the legislature, (ii) the subsidiary rules themselves, which are made by the subordinate authorities.

11.5 REASONS FOR THE GROWTH OF DELEGATED LEGISLATION

In spite of the violation of well settled constitutional norms, delegation of legislative power has become the need of the day. The causes for the growth of delegated legislation are the following:-

- i) Pressure upon Parliamentary time: The legislatures in 20th century have become so busy that they hardly find time to discuss matters of details. Hence, it formulates legislative policy and gives power to the administration to make subordinate legislation in the form of rules, regulations, notifications, etc.
- ii) Technicality of the subject matter: As some of the acts require technical expert's advice, it becomes necessary to obtain the assistance of the experts in providing matters in detail. For instance if the Parliament decides to restrict the use of dangerous drugs, it must be left to the medical experts to decide which drugs should be considered as dangerous.
- iii) The need for flexibility: A statutory provision cannot be amended except by an amendment passed in accordance with the legislative procedure. Delegated legislation requires less formal procedure and can be a good device for flexibility.
- iv) State of Emergency: In times of emergency the need for delegation of legislative powers to the executive is more. Thus, delegated legislation showed substantial growth during the times of the two world wars.
- v) Need for regulation and control of economic enterprises: In the modern welfare state the legislature cannot discharge the enormous tasks and hence, the executive has to play a dominant role and legislate in this regard.

Because of the above factors, delegated legislation is now regarded as useful, inevitable and indispensable.

11.6 RESTRAINTS OR LIMITATIONS UPON DELEGATION OF LEGISLATIVE POWERS

Position in UK: The limitations upon delegation of legislative power vary according to the nature of the Constitution. In England where there is no written constitution and where doctrine of parliamentary sovereignty is recognized, the Parliament has unlimited power to make law. The courts are not authorised to question the power of Parliament on any ground. The result is, the Parliament can delegate any amount of legislative power to the executive and no restriction exists on the capacity of the parliament to delegate its powers.

Position in USA: In the United States, on the other hand, the position is quite different. The US Congress functions under a written Constitution and the courts have the power to interpret the Constitution and declare the act of congress as unconstitutional. There the courts have invoked the doctrine of 'delegatus non potest delegare'. The doctrine means that a delegate cannot further delegate its powers. Thus the Congress being delegate of the people, cannot further delegate its power to another agency. Another Constitutional impediment upon the delegation emanates from the doctrine of separation of powers. The Constitution of US vests the legislative power in Congress and the executive power in President. It can therefore be said that the executive cannot perform the legislative function which is the sole business of the Congress. Thus in the USA the question of delegation of the legislative powers involves a conflict of principles.

On the one hand, the doctrine of separation of powers insists that the legislative and executive functions be kept separate and distinct from each other. On the other hand, the need of the modern state makes it impossible to vest all legislative power in the hands the Congress. A compromise can be affected by laying down certain standards, guidelines for each delegation. Further the Congress should not delegate essential legislative functions.

Position in India: The position in India can be demarcated into two periods. Prior to the independence the powers of the Indian Parliament were expressly limited by the Act of Imperial Parliament which created it. Hence, delegation of legislative power is permissible to certain extent. However, the position of the Parliament in free India is quite different. The powers of Parliament are limited by the constitutional provisions. The Courts were given power of judicial review and could question the unlimited exercise of the power by the legislature.

Thus, the Indian Constitution has some features of the US Constitution. However in some other respects it differs from it and follows the British pattern. For instance the theory of separation of powers has not formed the basis of Indian Constitution. The Parliamentary system of government has been followed under which the legislature and executive work in cohesion.

Therefore, the difficulty before the Indian courts is to evolve independent and original formula. The leading case which came before the Supreme Court in 1951 (In Re Delhi Laws Act) dealt with the above complexities and laid down certain propositions:

- a) The delegation of legislative power is essential in the present day society in order to face various problems.
- b) Since the Indian legislatures derive power from the written constitution, they should not be allowed the same freedom as the British Parliament in the matter of delegation, and some limits should be set on their capacity to delegate.
- c) The legislature should not delegate its essential legislative function
- d) The legislature must declare the policy of the law, lay down principles and provide standards for the guidance of the delegate in the delegating Act.

11.7 CONDITIONAL LEGISLATION

Frequently the legislature enacts a law conditionally leaving it to the Executive to decide as to when will it operate after having been placed in the statute book. Its prospective operation, or territorial extension or both depend upon the fixation of a date of commencement of the Act by the Government by notification to this effect. Its operative effect in relation to time and place depends on the fulfilment of a condition. The condition is laid down in it by the legislature but the Government is given discretion to decide or determine whether the condition is fulfilled.

Hart defines conditional legislation as a statute that provides controls but specifies that they are to go into effect only when a given administrative authority fulfils the existence of conditions defined in the statute.

In the conditional legislation, legislature itself makes the law. It is full and complete. No legislative function is delegated to the executive. But the Act or any portion of the Act is not brought into force and it is left to the executive bring to the same into operation on fulfilment of certain conditions. For that reason it is called 'conditional legislation'. Sir Cecil Carr remarks: "the legislature provides the gun and prescribes the target, but leaves to the executive the task of pressing the trigger".

11.8 PLACE OF LEGISLATION AMONG THE VARIOUS SOURCES OF LAW

There is a difference of opinion among the jurists about the importance and the place of legislation among the sources of law. Analytical jurists emphasize the importance of legislation. They say that law is made only through legislation. They regard the judge-made law as an unauthorised encroachment upon the powers of a legislator to make law. About customs, they say that they are not law, but only a source of law.

On the other hand, Historical jurists attach no importance to legislation. According to them, it is not possible to make law by legislative action. At the most, we may say that legislation only furnishes an additional motive to influence conduct. The function of legislators, according to these jurists, is only to collect customs and give a better form to them.

But in modern times, legislation is the most potent source of law. In the early times there was no legislation. Legislation takes its birth when the state comes into being. In civilized societies it becomes the extensive source of law. Henry Maine rightly observed that “the capital fact in the mechanism of modern states is the energy of legislature.” Thus, in modern times, legislation is the most important source of law.

According to analytical jurists, legislation is formal source of law. According to Historical jurists, legislation is historically inferior to custom as sources of law. Salmond holds the view that legislation is a legal material source.

11.9 RELATIVE MERITS AND DEMERITS OF LEGISLATION AND PRECEDENT

Merits of Legislation:

1. Abrogative power: The first merit of legislation vis-a-vis precedent, is its abrogative power. Legislation, as an instrument of social reform, can, not only make new law, but can also amend, modify, abolish and abrogate the existing law. On the other hand, precedent possesses merely constitutive efficacy, it cannot amend or abrogate the pre-existing law with the same ease with which it can create new law. Thus Salmond observed that “as a destructive and reformative agent legislation has no equivalent and without it all law is as that of the Modes and Persians.”
2. Division of Labour: Legislation is more efficient than precedent because the business of the legislature is to legislate and it is its sole function, whereas judiciary is there to interpret and apply the law. Precedent on the contrary, combines in the hands of a judge the business of law-making and also of applying it.
3. Formal Declaration: Legislation contains legal principles that are formally declared and made known to people before hand. Thus, in the order of time, legislation is made first and then applied to the facts of a case. But, in case of precedent, the legal principle is created and declared in the very act of applying and enforcing it to the facts of a case; the case comes first and then the legal principle is evolved and applied simultaneously. Unless and until a judgment is delivered we do not know what the law is but in case of legislation the law is made known to us before hand. A precedent can never create law for the future.
4. Prospective Operation: A corollary to the merit of legislation discussed above, is that legislation is generally applied prospectively, whereas precedent is always retrospective. Legislation is made applicable to future cases only, and on the contrary, precedent applies to the

facts of a case that have already occurred. Hence, legislation is in consonance with the principle of natural justice that the law must be made known before it is applied. The maxim 'ignorance of law is no excuse' has no relevance unless the law is made known before hand. Precedent, on the other hand, is invariably *ex post facto* (after the facts have occurred) and hence, it militates against the canons of natural justice.

However, the statement that legislation operates Prospectively is controlled by the following considerations:

i) In some cases, statutes are also given retrospective effect though it is not done in the criminal law.

ii) Even if statutes are not given retrospective effect, they may, still, upset the expectations of the people. For example, a house-owner's expectations of getting high rent for his house are frustrated by the passing of a Rent Control Act.

iii) The unwieldy growth of modern legislation is so great that an ordinary individual comes to know of his legal duties only when he has broken them.

iv) Even if the existence of a law is known, its actual meaning may be doubtful. In such a case, the meaning must be established by the judgment of a court which being a precedent, has the disadvantage of retrospective operation.

5. Anticipation: Legislation can be made so as to meet situations that are likely to develop in future whereas precedent has to wait until an actual case is brought before a court of law. Judges do not make law for hypothetical cases and even a decision given in a particular case binds only the parties and none else.

6. Accessibility: According to Salmond, Legislation is superior to precedent in point of form. Legislation is coherent, certain and clear as it reduces the rule of law to simple abstractions. Thus a statutory principle is easily accessible. But a precedent is often submerged in a maze of voluminous reports of hundreds of cases.

After going through the reports painstakingly, one has to pick up the precedent that is applicable to the facts of a particular case. Even then, the precedent might have been overruled by a later decision or distinguished from it. Only the *ratio decidendi* or the reason of the decision is really binding. The *obiter dicta* or 'things said by the way' in that judgment do not constitute the precedent. All this discriminating process can be gone through only by an accomplished lawyer and not by an ordinary layman. A legislative principle, on the contrary, can be found out easily by a reference to the relevant statute or enactment. Thus Salmond observes that "case law is gold in the mine, a few grains of the precious metal to the tons of useless matter, while statute law is coin of the realm ready for immediate use."

Merits of Precedent:

1. **Flexibility:** As has been pointed out above, the merit of legislation is the statement of legal principles in a clear and concise form. But the merit of legislation also brings with it a defect of substance from which case law is free. Thus legislation is rigid and inflexible because it is made in a mould of codified legal principles. Case law, on the contrary, has no authoritative verbal expression. In interpreting legislation, the emphasis is on the words and their true meaning. In the case of precedents there is not so much of pre-occupation with words and their meaning and the judge makes an attempt to understand and apply the legal principles contained in the case law. It is impossible for the legislature to foresee all the permutations and combinations of cases that may arise in future under a particular enactment or statute. Thus the legislature is content with enunciating legal principles in a general and abstract form because it is neither possible nor desirable to enact a law to each and every case. Case law, on the other hand, is free from this defect because the judges make law, not in abstract forms, but in the process of application of legal principles to concrete cases. Thus case law is more individualized and is capable of adopting itself to new and unforeseen cases.

2. **Workmanship:** Case Law is made by judges who are well acquainted with the intricate problems of law because of their special training in laws. On the other hand, the legislators who are the elected representatives of the people, do not generally possess the same skills in legal learning that are associated with judges.

3. **Ethical content:** Legislation is made by politicians who are very much tied to the apron strings of their constituencies, vested interests. Judges, on the other hand, are free from such influences and the decisions given by them are intrinsically of better ethical content than legislation.

11.10 CODIFICATION

According to Oxford dictionary 'Code' means a systematic collection of statutes, body of laws, so arranged as to avoid inconsistency and overlapping. By legislation, some times, a new law is made, sometimes a custom or usage is embodied in a statute, and is put in a coherent and systematic form. The law put in this form is called Code. The law making and putting it in this form is called codification. Thus, codification means promulgation, compilation, collection and systematization of the body of law in a coherent form by an authority in a state competent to do so.

Conditions for codification:

For codification a certain background and a certain stage of general development are necessary. There are certain conditions which lead to codification. Roscoe Pound has laid down the following important conditions which lead to codification.

- i) Non existence of law and legal material: The exhaustion for the time being of the possibilities of juristic development of existing legal materials, or, in other words, where the legal institutions have become completely mature, or where the country has no juristic past, the non-existence of such material.
- ii) The unwieldy, uncertainty and archaic character of the existing law.
- iii) The development of an efficient organ of legislation; and
- iv) The need for one uniform law in a political community whose several sub divisions had developed or received divergent local laws.

Codification in India:

In India, during medieval period people were governed by their personal laws and customs. When the Britishers came here, they too, recognised personal laws and local customs. Later they paid their attention to codification.

Under the provisions of the Charter Act of 1833 the First Law Commission was appointed with Lord Macaulay as its chairman. They drafted the codes - IPC, C.P.C.

Second Law Commission was set up under the Charter Act of 1853. Cri.P.C. and some other Acts were drafted and passed. Law Commissions were set up again in 1861 and 1879 which drafted and reviewed many Acts.

After the nation became independent the government set up a Law Commission to make recommendations about laws and its administration. For the national unity and integrity, the uniformity of the laws is very much necessary, which can be achieved only through codification.

Uniform Civil Code

Under Article 44 of the Constitution of India “The State shall endeavour to secure for the citizens a Uniform Civil Code through out the territory of India.”

Classification of Codes

- i) Creative Codes: Creative Code is that code which makes a law for the first time without any reference to any other law. It is law making by legislation eg. IPC, 1860.
- ii) Consolidating Code: Consolidating Code is that code which consolidates the whole law - statutory, customary and precedent on a particular subject and declares it. This is done for systematization and simplifying the law. eg. Transfer of Property Act, 1882
- iii) Creative and Consolidating Codes: The Code which makes new law as well as consolidates the existing law on a particular subject falls under this class. eg. Hindu Marriage Act 1955.

Merits and demerits of Codification:**Merits:**

1. Certainty: By Codification law becomes certain.
2. Simplicity: The Codification makes law simple and accessible to everybody.
3. Logical Arrangement: In the code law is logically arranged in a coherent form. There are little chances of any conflict or inconsistency.
4. Stability: The codification makes the law stable.
5. Uniformity: Codified laws have uniform application.
6. Planned Development: The planned development in a country is possible only through codification.
7. Social Reforms: Even for the social reforms, the codification is proving greatly useful. eg. Dowry Prohibition Act, 1961.

Demerits:

1. Rigidity: The Codification causes rigidity in the law. It is essential that the law must keep pace with the time and should adopt itself to new conditions. When law is once codified, there is little scope for such change.
2. Incompleteness: The Codes are generally incomplete. It is not possible to anticipate all the problems that might arise in the future.
3. Hardship: The Code generally gives uniform laws, applicable to all within the territory of the country or a part of it. Its application rarely varies on the grounds of convictions, customs and the habits of the individuals. Thus, in some cases causes hardships.
4. Defective Codes: Certain defects are bound to remain in a code. They cannot be removed except by a legislative amendment. It causes great delay and inconvenience.

11.11 SUMMARY

According to Analytical school, legislation is the formal source of law. The term 'legislation' is applied to the deliberate creation of legal rules by legislative organ of government which is set up for this purpose. In a modern and highly developed state, the task of law making cannot be performed by such a body alone. For many reasons, modern legislatures delegate some legislative functions to other agencies of the government.

Legislation may be classified into supreme and subordinate legislation. The chief forms of subordinate legislation are five in number: colonial, executive, judicial, municipal and autonomous. As a source of law legislation has certain advantages over precedent. Legislation has abrogative power; a statute can lay down the law in advance; legislation is compatible with the traditional theory of separation of powers; legislation is generally applied prospectively; legislation can make law for the future; in a statute rules are logically arranged and may easily be discovered; certainty, uniformity and accessibility are the advantages of statutory law.

11.12 SELF ASSESSMENT QUESTIONS

1. Define legislation and discuss the growing importance of legislation as an instrument of social reform?
2. Distinguish between supreme and subordinate legislation?
3. What are the advantages of legislation as a source of law over other methods of lawmaking?
4. Write a note on codification?

11.13 FURTHER READINGS

P.J.Fitzgerald (ed.), Salmond on Jurisprudence, Sweet and Maxwell, London

G.W.Paton, A Text Book of Jurisprudence, 4th edition, Clarendon Press, Oxford.

Edgar Bodenheimer, Jurisprudence, Universal Book Traders, Delhi

G.C.V.Subba Rao, Jurisprudence and Legal Theory, Eastern Book Co., Lucknow

C.K. Allen, Law in the Making.

UNIT XII INTERPRETATION OF STATUTES

Objectives

After reading this unit the student should be able to

- Understand the meaning of interpretation and the subject matter of statutory interpretation
- Enumerate internal and external aids to interpretation
- Explain the nature, scope and application of literal rule of interpretation
- Discuss the purpose of golden rule of interpretation
- Explain Mischief Rule
- Discuss the beneficial construction of statutes

Structure

12.1 Introduction

12.2 Meaning of Interpretation

12.3 Internal and External aids to interpretation

12.4 Literal Rule

12.5 Golden Rule

12.6 Mischief Rule

12.7 Beneficial Construction

12.8 Summary

12.9 Self-Assessment Questions

12.10 Further Readings

12.1 INTRODUCTION

The three sources of law are custom, precedent and legislation. Among them, legislation is the most important source of modern times. The law which comes into being through legislation is called enacted or statute law. It is laid down in the form of authoritative formulae on the paper. It is for the courts to apply these formulae to the specific disputes. The court has to ascertain the meaning of the letters and expressions of the enactment for its application. This process of ascertaining the meaning of the letters and the expressions by the court is called interpretation.

One of the characteristic features of legislation is its embodiment in written language. Chambers and Hood Phillips observed that in legislation, the actual words used are themselves part of the law, the words not only contain the law, but in a sense they constitute the law. That is why custom is called *jus non scriptum* or unwritten law whereas legislation is *jus scriptum* or written law. Thus legislation contains *litera scripta* or written words. The words of the law or

litera legis are the expressions of the sententia legis or the spirit of the law. Hence, the judge who is to interpret and administer the law can understand the spirit of the law or the sententia legis by resorting to a process of interpretation of the litera legis or the words of the law. Thus statutory interpretation means, according to Salmond, the process by which the courts seek to ascertain the meaning of the legislation through the medium of the authoritative forms in which it is expressed.

12.2 MEANING OF INTERPRETATION

Interpretation of the statute means giving effect to the intention of the legislature by examining the litera scripta in which the point concerned, in the statute, is clothed. According to Maxwell, the dominant purpose of interpretation is to determine what intention is conveyed either expressly or impliedly by the language used so far as is necessary for determining whether the particular case or state of facts presented to the interpreter falls within it. Interpretation is the process of which the court seeks to ascertain the meaning of a particular legislation.

Interpretation is a very important function of the court. It is through this function that judiciary evolves the law and brings changes in it, and thus keeps the law abreast of time. Interpretation of statutes changes with time and place. However, interpretation is not an arbitrary act of the judge. There are certain fixed principles and rules which judges consider in the matters of interpretation. These rules and principles came into being through various sources in course of time. Some of them are based on maxims of Roman Law, some are reflecting the natural law principles, some were laid down by courts in their decisions, and some are the creations of eminent jurists. All these principles and rules of interpretation have been collected, systematized and consolidated and have been arranged in a coherent form. These books are considered as great authority in matters of interpretation such as Maxwell on the Interpretation of Statutes. The Lawyers and Judges take help from these books. But this does not mean that these rules are mechanical or static in their operation. A judge enjoys a good degree of latitude in these matters and this itself is a rule of interpretation.

12.3 INTERNAL AND EXTERNAL AIDS TO INTERPRETATION

A statute is an act of legislature. It contains many parts. The important parts of a statute are: Short title, long title, preamble, interpretation clause, headings of chapters, marginal notes, illustrations, sections, punctuation, explanations, provisos, exceptions, saving clauses, non-obstante clause, schedules, etc.

Whenever a provision contains clear and unambiguous terms, and gives only one meaning, then there is no necessity for interpretation. Whenever a provision leads to two constructions, it becomes necessary to interpret such provision. In such circumstances, 'statute must be read as a whole' comes into play. 'Statute must be read as a whole' is one of the important basic and functional rules of interpretation. According to this rule, the interpreter should read entire statute to know the legislative intent. Therefore, the courts read entire statute from short title to schedules i.e., all parts of the statute. Every part of the statute is an important one for the proper and efficient function of the statute. The parts of the statute are also helpful in interpretation. These internal parts of the statute are called internal aids to interpretation.

Statutory language is not read in isolation, but in its context. To some extent external circumstances may be taken into account in interpreting an Act of legislature. They are called 'external aids' to interpretation. Historical setting; Parliamentary debates, International Conventions; Dictionaries and text books; social, political and economic developments; statutes in *pari materia*; *contemporanea expositio*; Foreign decisions, etc. are external matters to the statute. These are also helpful to certain extent to understand and interpret the statutes.

12.4 LITERAL RULE

The first and the most elementary rule of interpretation is that the words and phrases of technical legislation are used in their technical meaning if they have acquired one, otherwise in their ordinary meaning. The second is that the phrases and sentences are to be construed according to the rules of grammar. According to literal rule, statute must be construed in the ordinary and natural meaning of the words and sentences.

According to Salmond, interpretation is either Grammatical or Logical. Glanville Williams prefers to call as literal and free interpretation. According to literal rule, a judge must go by the words of the law or the *littera legis* for the purpose of ascertaining the spirit of the law or *sententia legis*. The general rule is that the judge must take it for granted that the legislature has said what it meant and meant what it said. A judge should not, generally, go beyond the words of law and try to discover its spirit from extraneous sources.

The traditional English view is that the duty of the judges is to discover and to act upon the true intention of the legislature. In all ordinary cases, the courts must be content to accept the *littera legis* as the exclusive and conclusive evidence of the *sententia legis*. *Ita scriptum est* (as the words are) is the first principle of interpretation. Thus the judges are not at liberty to add or to take from or modify the letter of the law simply because they believe that the spirit of the law is not adequately expressed by the *littera legis* or that the spirit could have been better expressed in a more appropriate language.

In order to determine the literal meaning of a statute the courts make use of various rules of interpretation. They are rough principles or guides rather than strict rules. To ascertain the meaning of a word in a statute the court may look at dictionaries or scientific or other technical works in which they are used. The courts may also interpret statutory words in the light of the definitions provided in the interpretation clause of the statute itself.

The meaning of a word is also affected by its context. Hence the legal maxim '*noscitur a sociis*' which means that the meaning of a word is to be judged by the company it keeps. It is another rule of language. The context may consist of the surrounding sections, the whole Act, or indeed the whole area of legislation. Context may even give the word a meaning which is not to be found in the dictionary. For example, several instances are to be found in the reports in which the technical term 'void' as used in a statute has been considered as if it were voidable, since this was the meaning required to give effect to the evident requirement of the legislature. On the

other hand, the courts are quite ready to extend the statutory words to cover new inventions. Thus the Engraving Copyright Act was held to cover not only engravings but photography. The Telegraph Act was held to extend to the telephone.

In dealing with the matters relating to the general public, statutes are presumed to use words in their popular, rather than their narrow, legal or technical sense. *Loquitor ut vulgus* (according to the common understanding and acceptance of the terms) is another maxim. If an Act is directed to dealing with matters affecting everybody generally, the words used have the meaning attached to them in the common and ordinary use of the language. Thus in Unwin v. Hanson (1891) the question was whether the words ‘pruned’ or ‘lopped’ included cutting of the top of trees. The power given under Section 65 of the Highways Act 1835, to lop trees growing near a highway was construed in the popular sense as confined to cutting of lateral branches, and not exceeding to topping. Lord Esher M.R. of the Court of Appeal held that the word ‘lop’ was to be understood in its ordinary meaning of cutting of branches. However, Lord Esher pointed out that certain words may be attributed some special or technical meaning if the context justifies it. For instance ‘waist’ or ‘skin’ are used with reference to ships and hence the maxim ‘*noscitur a sociis*’ is applicable to such cases.

In Lee v. Knapp (1967), Section 77(1) of the Road Traffic Act, 1960 requires that the driver of a motor vehicle shall stop after an accident. Winn L.J. said that he would not wish to give the impression that a momentary pause after an accident would exempt the driver of a car from the necessity of stopping to give particulars. The phrase ‘the driver of the motor vehicle shall stop’ is properly to be construed as meaning the driver of the motor vehicle shall stop it and remain where he has stopped it for such a period of time as in the prevailing circumstances, having regard in particular to the character of the road or place in which the accident happened, will provide a sufficient period to enable persons who have a right so to do, and reasonable ground for so doing, to require of him direct and personally the information which may be required under the Section.

Another legal maxim which in reality merely enshrines a rule of language is the maxim ‘*expressio unius est exclusio alterius*’ which means express mention of one thing excludes the other alternative. Suppose, for example, that a statute refers both to land and buildings, and then makes a provision for land without mentioning buildings. Here the provision may be construed not to cover buildings, even though the word ‘land’ would normally be taken to include buildings. However, the maxim is not a compelling rule of law, but only a principle that may be used by the court in expounding the probable intent of the legislature.

Another example of a rule of language in a legal maxim is the *ejusdem generis* rule which serves to restrict the meaning of general words to things or matters of the same kind as the preceding particular words. For example, the Sunday Observance Act, 1677 provided that “no tradesman, artificier; workman, labourer or other person whatsoever” should do certain things. The general phrase “other person whatsoever” was held to refer only to persons within the class indicated by the previous particular words and not therefore to include such persons as farmers or barbers. This, however, is only a common-sense rule of language. For example, if a man tells

his wife to go out and buy butter, milk, eggs and anything else she needs, he will not normally be understood to include in the term “anything else she needs” a new hat or an item of furniture.

The *casus omissus* rule provides that omissions in a statute cannot, as a general rule, be supplied by construction. It means where a statute contains gaps or omissions, such deficiencies cannot, as a rule, be corrected by the judges. This rule is well illustrated by the case of *Parkinson v. Plumpton* (1954). The Catering Wages Act, 1943 prescribed minimum wages payable to workers in catering establishments. The Schedule of the Act provided for minimum wages payable to two categories of workers in catering establishments. The first category of workers are those who are given full boarding and lodging by the employer. The second category of workers are those who are not given either full boarding or lodging by the employer. The plaintiff in this case was a worker in a catering establishment. She was provided with full boarding but not with lodging. The plaintiff did not fall under either of the two categories. She claimed that she was paid less than the minimum wages payable under the Act. The court held that it was a case of *casus omissus* and she was not entitled to minimum wages under the Act.

If the enacted law by the legislature could be applied mechanically by the courts in specific cases, there would have been no need for trained judges and lawyers. But, as the meaning of the words change from time to time and depend also upon the persons concerned, the interpretation of statutes passed by the legislatures becomes important. This has increased the judicial power tremendously. To discipline this power of wide discretion, to avoid arbitrariness in judicial process and to provide precedents, the courts themselves have evolved in the course of judicial process principles, theories, rules and doctrines for the interpretation of statutes so as to provide guidelines in that process.

12.5 GOLDEN RULE

We have seen above that the primary duty of a judge in interpreting statutes is to adhere to the letter of the law or the *litera legis*. This is called literal interpretation and where there is no ambiguity in the language of the statute, no other form of interpretation is permissible. However, in some cases, the *litera legis* may be manifestly defective and consequently, the judge may be at a loss to know the real spirit of the law. Under these circumstances the judge may do away with literal interpretation and resort to logical interpretation. By logical interpretation is meant interpretation of a statute, not with reference to the *litera legis* or the letter of the law, which is found defective, but with reference to the *sententia legis* or the spirit with which the law has been enacted. Where the statute suffers from logical defects and absurdity, the grammatical and ordinary meaning of the words may be modified by judges so as to avoid the logical defects and absurdity. This rule is called by Lord Wensleydale as the Golden Rule of Interpretation.

In *Grey v. Pearson* (1857) Lord Wensleydale carefully laid down the circumstances which justify the abandonment of the rule of Grammatical interpretation. He observed:

“In construing wills and indeed statutes, and all other written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the

grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, but no further.”

The letter of the law is considered to be defective in two cases: Logical defects and absurdity. A statute may suffer from three different types of logical defects. They are ambiguity, repugnancy and incompleteness. Ambiguity arises if a statute instead of meaning one thing may mean two or more different things. In such a case, the judge has to go beyond the letter of the law and ascertain which of the meanings is truly in consonance with the spirit of the law.

Ambiguity is of two kinds: Semantic and syntactic ambiguities. A word in an Act of legislature may be ambiguous as a result of the open texture of language. It is a case of semantic ambiguity. For example, in England, the Road Traffic Act 1930 made it an offence to drive a motor vehicle in a manner dangerous to the public. Is a person who steers a broken down vehicle on tow a driver? Since Parliament had not defined the term ‘driving’ the word must presumably bear its ordinary meaning. But the ordinary usage of the word is not built to cope with this kind of marginal situation, for it draws no very clear line between what is, and what is not driving. Faced with this question, then the Court had to draw an arbitrary line and further define the term ‘driving’ (Wallace v. Major, 1946).

A second type of ambiguity arises from the ambiguity of formal words like ‘or’ ‘and’ ‘all’ and so forth. It is called as syntactic ambiguity. For example, a court is empowered to ‘fine or imprison’ does this mean that the court can fine or imprison but not both? Or does it mean that the court can either fine, imprison or both? Syntactic ambiguity may also arise from the unfortunate juxtaposition of words and phrases. In all such cases of ambiguity whether semantic or syntactic, the letter of the statute provides no solution. In such a case the courts must decide between two alternatives. It is the duty of the courts to go beyond the letter of the law and to ascertain the spirit of law from other sources.

Repugnancy or inconsistency: If in the case of ambiguity a statute has more than one meaning, in the case of repugnancy a statute has no meaning at all because different parts of the statutes are mutually contradictory and conflicting. It is the duty of the courts to avoid “a head on clash” between the two provisions of the statute. The court has to reconcile the conflict between two provisions of the statute, by giving effect to both the provisions. In such a case the court may resort to logical or free interpretation so as to overcome the problem of repugnancy or inconsistency.

Incompleteness: Where the statute ought to have provided for two alternatives, it may make provision for only one of them and remain silent in regard to the other. However it must be borne in mind that such incompleteness must be such that it renders the statute wholly illogical. Hence, it is not sufficient that the judge personally believes that the legislature could have provided for two or more alternatives but has not done so. The real criterion is whether there is anything in the statute to justify the presumption that the legislature, by error, has failed to provide for the alternatives in regard to which it ought to have provided. If not, the

legislature's failure to provide for other alternative must be taken by the judge as intentional omission.

Absurdity: The other case where the *litera legis* not to be taken as conclusive is where literal interpretation would lead to such absurdity and unreasonableness as to make it self evident that the legislature could not have meant what it said.

In the above, we have seen that a judge may correct the letter of the law in cases where it is logically defective or leads to absurdity. However, it happens very often that the *litera legis* is illogical and defective because of a corresponding confusion in the mind of the legislature itself. Thus, the *litera legis* may be defective because the *sententia legis* itself is defective. Salmond suggests that in such cases the judge may and must supply the *sententia* which the legislature would have properly expressed if it were not labouring under such a confusion. Since a statute, under English Law, is made for the purpose of declaring or modifying the law of the land, the judges will look to the general legal principles to fill up the gaps in a defective statute.

According to Rupert Cross, the rule permits departure from the literal rule by recourse to the consequences of applying the natural golden rule to distinguish it from the literal and mischief rules.

In *Suthendran v. Immigration Appeal Tribunal (1976)*, Lord Simon stated the scope and purpose of the golden rule in the modern context. He said:

“Parliament is *prima facie* to be credited with meaning what is said in an Act of Parliament. The drafting of statutes, so important to a people who hope to live under the rule of law, will never be satisfactory unless courts seek whenever possible to apply ‘the golden rule’ of construction, that is to read the statutory language, grammatically and terminologically, in the ordinary and primary sense which it bears in its context, without omission or addition. Of course, Parliament is to be credited with good sense; so that when such an approach produces injustice, absurdity, contradiction or stultification of statutory objective, the language may be modified sufficiently to avoid such disadvantage, though no further.”

12.6 MISCHIEF RULE

A completely different approach to statutory interpretation is enshrined in the mischief rule. English courts do not permit themselves to consider the preliminary discussions that took place before the enactment was made law. Thus the courts will not look at debates in Parliament, or the reports of the law commissions to which effect was given in framing of the legislation. The reason for excluding the first is that the views of different Members of Parliament vary, the reason for excluding the second is it may not have been the intention of Parliament to give precise effect to the report of the commission. Whereas in the United States courts will look at the legislative history of an Act of Congress.

The rule which is known as ‘purposive construction’ or ‘mischief rule’, enables consideration of four matters in construing an Act of Legislature: (i) what was the law before the making of the Act, (ii) what was the mischief or defect for which the law did not provide (iii) What is the remedy that the Act has provided, and (iv) What is the reason of the remedy. The rule then directs that the courts must adopt that construction which “shall suppress the mischief and advance the remedy.”

Mischief Rule is also called as the Rule in Heydon’s case (1584). In Heydon’s case, certain lands were the copyholds of a college. The Warden and Canons of the college granted a part of the land to W and his son for their lives and the rest to S and G at the will of the Warden and Cannons in the time of King Henry VIII. While so, the Warden and Cannons granted all the lands to Heydon on lease for 80 years. Thereafter, the warden and Cannons surrendered their college to the King. The Attorney General filed an information, on behalf of the Crown, for obtaining satisfaction in damages for the wrong committed in the lands, against Heydon, as an intruder on the lands.

The Statute 31 Henry VIII, provided that if a religious or ecclesiastical house had made a lease for a term of years, of lands in which there was an estate and not determined at the time of the lease, such lease shall be void.

It was decided by the Barons of the Exchequer that for the sure and true interpretation of all statutes in general, be they penal, or beneficial, restrictive or enlarging of the common law, four things are to be discerned and considered:

- (a) What was the common law before the making of the Act.
- (b) What was the mischief and defect for which the common law did not provide.
- (c) What remedy the Parliament hath resolved and appointed to cure disease of the commonwealth, and
- (d) the true reason of the remedy?

In this case, the common law was that religious and ecclesiastical persons might have leases for as many years as they pleased, the mischief was that when they perceived their houses would be dissolved, they made long and unreasonable leases; now the Statute 31 Henry VIII, both provide the remedy and principally for such religious and ecclesiastical houses which should be dissolved after the Act, such as the college in the instant case, that all leases of any land, whereof any estate or interest for life or years was then in being, should be void; and their reason was, that it was not necessary for them to make a new lease, so long as a former had continuance; and therefore the intent of the Act was to avoid doubling of estates, and to have but one single estate in being at a time; for doubling of estates implies itself deceit, and private respect, to prevent the intention of the Parliament. If the copyhold estate for two lives and the lease for 80 years shall stand together there will be doubling of estates, which will be against the true meaning of the Act.

Mischief Rule as laid down in Heydon's case was applied in many cases. To mention a few, in *Gorris v. Scott* (1874), the court was concerned to interpret a statute providing that animals carried on board ships should be kept in pens. The defendant carrier had failed to enclose in pens the plaintiff's sheep which had accordingly, during a storm, been washed overboard. Had they been safely penned, this could not have happened. The plaintiff's suit for breach of statutory duty was rejected by the court on the ground that this statute had been enacted in order to prevent infection spreading from one owner's animals to those of another, and should not therefore be used to provide a remedy for a totally different mischief.

In *Smith v. Hughes* (1960), it was held that prostitutes who attracted the attention of passers by from balconies or windows were soliciting in a street within Section 1(1) of the Street Offences Act 1959. Lord Parke C.J. said: "I approach the matter by considering what is the mischief aimed at by this Act. Everybody knows that this was an Act intended to clean up the streets, to enable people to walk along the streets without being molested or solicited by common prostitute. Viewed in that way, the place from which a prostitute addressed her solicitations to somebody walking in the street became irrelevant.

The mischief rule was applied by the Supreme Court of India in the case of *Bengal Immunity Co. v. State of Bihar* (AIR 1955 SC 661), in construction of Article 286 of the Constitution. After referring to the state of law prevailing in the provinces prior to the commencement of Constitution and also to the chaos and confusion that was brought about in inter state trade and commerce by indiscriminate exercise of taxing powers by the different provincial legislatures, S.R.Das C.J. observed: "It was to cure this mischief of multiple taxation and to preserve the free flow of inter state trade or commerce the Union of India be regarded as one economic unit without any provincial barrier that the constitution makers adopted Art.286 of the Constitution.

The case of *CIT, M.P.S. Bhopal v. Sodra Devi* (AIR 1957 SC 832) is another example of application of the mischief rule, in the construction of Section 16(3) of the Indian Income Tax Act, 1922. The sub-section reads: "In computing the total income of any individual for the purpose of assessment, there shall be included (a) so much of the income of a wife or minor child of such individual as arises indirectly or directly...." The question before the Supreme Court was whether the word 'individual' as used in the aforesaid sub-section meant only a male or also included a female. Justice Bhagwati found that the word 'individual' in the context was ambiguous. He observed: "In order to resolve this ambiguity, therefore, we must of necessity have resort to the state of the law before the enactment of the provisions, the mischief and the defect for which the law did not provide; the remedy which the legislature did not provide; the remedy which the legislature resolved and appointed to cure the defect; and the true reason of the remedy." He further observed: "It is clear that the evil which was sought to be remedied was the one resulting from the wide spread practice of husbands entering into nominal partnerships with their wives and fathers admitting their minor children to the benefits of the partnerships of which they were members. This evil was sought to be remedied by the enactment of Section 16(3) in the Act. If this background of the enactment of Section 16(3) is borne in mind there is no room for any doubt that howsoever that mischief was sought to be remedied by amending the Act, the

only intention of the legislature in doing so was to include the income derived by the wife or minor child, in computation of the total income of the male assessee, the husband or the father, as the case may be, for the purpose of assessment.” Therefore, the words ‘any individual’ were construed as restricted to males.

In *Sodra Devi’s* case, Justice Bhagwati expressed the view that the rule in Heydon’s case is applicable only when the words in question are ambiguous and are reasonably capable of more than one meaning. Similarly in *Kanailal Sur v. Paramnidhi Sadhukhan* (AIR 1957 SC 907) Justice Ganjendragadkar said that the recourse to object and policy of the Act or consideration of the mischief and defect which the Act purports to remedy is only permissible when the language is capable of two constructions.

It is submitted that for deciding whether the language used in the statute is plain or ambiguous it has to be studied in the ‘context’, embraces the previous state of the law and the mischief which the statute was intended to remedy. Therefore, it is not correct to say that the Rule in Heydon’s case is not applicable when the language is not ambiguous. The correct position is that after the words have been interpreted in their context and it is found that the language is capable of bearing only one interpretation, the rule in Heydon’s case ceases to be controlling and gives way to the plain meaning rule. Lord Simon explained this aspect in *Maunsell v. Olins* (1975) by saying that the rule in Heydon’s case is available at two stages, first before ascertaining the plain and primary meaning of the statute and secondly at the stage when the court reaches the conclusion that there is no such plain meaning.

The rule which is also known as purposive construction has very often been employed in the interpretation of laws enacted to implement international agreements or conventions and regulations made to give effect to the directions of the Council of European Communities, Purposive construction has also been applied to penal statutes to avoid a lacuna and to suppress the mischief and advance the remedy.

12.7 BENEFICIAL CONSTRUCTION

If the words of a statute are interpreted in accordance with their usual and popular meaning, it is called strict interpretation. Where the usual meaning of the words falls short of the object of the legislature, a more extended meaning may be attributed to them, if they are fairly susceptible of it. This relaxation of strictly literal principles of interpretation has been referred to as beneficial construction. The modern cases provide many instances of the judges’ reluctance to stand upon the letter of the law. According to literal rule, the construction of a statute must not so strain the words as to include cases plainly omitted from the natural meaning of the language and Judges should not supply omissions. However, where judges are faced with a choice between a wide meaning which carries out what appears to have been the object of the legislature more fully, and a narrow meaning which carries it out less fully or not at all, they will often choose wide meaning rather than a narrow one. This extension of the letter of the law is an aspect of beneficial construction. According to Maxwell, Beneficial construction is a tendency, rather than a rule.

Examples of beneficial construction are many. Statutes conferring powers are sometimes broadly construed. For instance, a New Zealand statute which empowered a corporation to “construct water works for the supply of pure water”. The Court said that it would be “an unnecessarily restrictive construction to hold... that because the supply of water was already pure that there is no power to add to its constituents merely to provide medicated pure water.” (See *Attorney-General of New Zealand v. Lower Hutt City Corporation* (1964))

Industrial legislation provides a fruitful field for the application of the tendency towards beneficial construction. *Nisbet v. Rayne and Burn* (1910) is an interesting illustration of beneficial interpretation. In this case the question arose as to whether the widow of an employee of a firm, who was murdered in the course of his employment could claim the benefit of the Workmen’s Compensation Act, 1906, which permitted compensation to workers killed in ‘accident’. The court gave extended meaning to the word ‘accident’ and held that it includes death by violence. Nisbet was a cashier of the defendants, a firm of coal owners. It was part of his duties to take every week from the office to the colliery the cash of which the wages of the employees at the colliery were paid. While so engaged he was robbed and murdered. His widow claimed damages under Section 1 of the Workmen’s Compensation Act, 1906. The section provides that when a workman has met his death by an ‘accident’ arising out of and in the course of his employment, his widow may claim compensation from the employer. It was argued that murder could not be considered as an accident within the meaning of the Act. Rejecting the contention the court gave wider meaning to the word ‘accident’ which included any unforeseen and untoward event producing personal harm. This kind of interpretation may be described as beneficial construction.

In *State of Bombay v. Ardeshir Hormusji Bhiwandiwala*, a Division Bench of the Bombay High Court gave an extended meaning to the word ‘premises’ in Section 2(m) of the Factories Act, 1948, to include open lands as well. Generally speaking the word ‘premises’ should mean, in this connection, buildings of a factory together with the compound in which they stand. But the court opined that salt works situated upon open lands would come within the meaning of the word ‘premises’ and would be factory within the meaning of the Act.

The language of a statute is generally extended to new things which were not known and could not have been contemplated when the Act was passed, when the Act deals with a genus and the thing which afterwards comes into existence was a species of it. For example, in *Attorney General of Quebec v. Blaike*, the Legislature of Quebec passed a law making “French” as the sole official language for legislation and for use in the courts of Quebec. Under Section 133 of the British North America Act 1865, the Act of Parliament of Canada and of the legislation of Quebec should be published in both languages. It was held that the word ‘Act’ should not be confined to legislative enactments and should be extended to delegated legislation. Though in 1865 when British North America Act was passed, the subsequent phenomenal growth of delegated legislation could not have been foreseen. The Court gave flexible interpretation so as to cover the changed circumstances.

The words of a remedial statute must be so construed as to give the most complete remedy which the phraseology will permit. The relief contemplated by the statute shall not be denied to the class intended to be protected. In the field of labour and welfare legislation which have to be broadly and liberally construed the court ought to be more concerned with the colour, the content and the context of the statute rather than with its literal import. The Courts must have due regard to the Directive Principles of State Policy and any international convention on the subject and a teleological approach and social perspective must play upon the interpretative process. In case of a social benefit oriented legislation like the Consumer Protection Act, 1986, the provisions of the Act have to be construed in favour of the consumer to achieve the purpose of the enactment but without doing violence to the language. The rule of beneficial construction is that if a section in a remedial statute is reasonably capable of two constructions that construction should be preferred which furthers the policy of the Act and is more beneficial to those in whose interest the Act may have been passed, and the doubt, if any, should be resolved in their favour.

12.8 SUMMARY

One of the characteristics of enacted law is its embodiment in authoritative formulae. Hence, in the case of enacted law a process of judicial interpretation or construction is necessary. According to Salmond, interpretation is of two kinds: literal and functional. There are three fundamental rules of interpretation: literal rule, Golden rule and mischief rule. The literal rule is that, if the meaning of a section is plain, it is to be applied whatever be the result. The golden rule is that the words should be given their ordinary sense unless that would lead to some absurdity or inconsistency with the rest of the statute. The mischief rule emphasizes the general policy of the statute and the interpretation should promote the remedy and suppress the mischief. Remedial and welfare statutes are liberally construed so as to extend the operation of the Act. According to Maxwell, beneficial construction is a tendency, rather than a rule.

12.9 SELF ASSESSMENT QUESTIONS

1. What is meant by 'statutory interpretation'?
2. What are internal and external aids to interpretation of statutes?
3. Explain literal rule.
4. Examine the scope and purpose of Golden Rule.
5. What is mischief Rule?

12.10 FURTHER READINGS

P.J. Fitzgerald, Salmond on Jurisprudence, Sweet and Maxwell, London
 Dias, Jurisprudence, Aditya Books Private Limited, New Delhi
 Rupert Cross, Statutory Interpretation, Butterworths, London
 Maxwell on the Interpretation of Statutes, Tripathi, Bombay

UNIT XIII LEGAL RIGHTS

Objectives

After reading this unit you should be able to

- Analyse definition of right
- Discuss the characteristics of a legal right
- Explain various kinds of legal rights

Structure

- 13.1 Introduction
- 13.2 Legal and Moral rights distinguished
- 13.3 Rights as the essence of law
- 13.4 Definition of right
- 13.5 Characteristics of legal right
- 13.6 Classification of rights
- 13.7 Legal Rights in Wider sense
- 13.8 Summary
- 13.9 Self-Assessment Questions
- 13.10 Further Readings

13.1. INTRODUCTION

As Salmond points out, the conception of a right is one of fundamental significance in legal theory. Law aims at maintaining orderly relations between individuals constituting an organized society. Every human society exhibits a conflict of interests between individuals or groups of individuals or individual and the society at large. Law strikes a golden mean between the competing and conflicting interests. This it does by choosing some interests for protection and ignoring the other interests which do not further the social policy. What interests deserve protection is determined by law-makers in terms of prevailing values, policy goals and the modalities of their regularization. The interests that are chosen for legal recognition are called rights. These legal rights would remain mere pious principles unless they are legally protected. The legal protection is effected by imposing the necessary duties on others. If these duties are violated the law guarantees legal enforcement of a rights by imposing sanctions. The concept of a right is a complex idea that includes within itself the notions of interests, social policy, legal recognition, protection and enforcement. Various jurists have emphasized on the different aspects of the complex notion of a right.

13.2 LEGAL AND MORAL RIGHTS DISTINGUISHED

A legal right must be distinguished from a moral or natural right. A legal right is an interest recognized and protected by a rule of legal justice. Moral or natural right means an interest recognized and protected by a rule of natural justice. The difference between the two lies in the sanctions behind them. The violation of a legal right is redressed by the State whereas behind the moral rights there are only moral and social sanctions. A man may have a legal right to do an act which may be against morals. But it does not mean that the legal rights are always opposed to morals. In most cases, moral rights and legal rights coincide.

13.3. RIGHTS AS THE ESSENCE OF LAW:

For some jurists, the essence of law is to be discovered in the enunciation, interpretation and protection of rights. They view jurisprudence as the 'science of rights', involving a search for a unified theory of nature and significance of rights within legal systems. 'Law' is considered from this point of view as involving little more than recognition by the courts of rights and correlative duties, together with procedural systems aimed at the resolution of disputes stemming largely from the consequences of failing to acknowledge rights, that is to say, failing to carry out duties. Jurists of this persuasion would view the separate sections of the substantive law -- contract, torts, succession etc.-- as, fundamentally, sets of rights related to particular types of social activity and grouped solely for purposes of convenience.

13.4 DEFINITION OF RIGHT

The following definitions are typical of juristic approaches to the nature of rights.

Austin: "A party has a right when another or others are bound or obliged by law to do or forbear towards or in regards to him". Austin's definition of a right is in tune with his definition of law as the command of the sovereign. His definition implies that, A is said to have a right when the law 'commands B to do or not do certain acts with regard to A.' Thus a right is nothing more than a necessary corollary of a legal duty. Austin properly emphasizes the co-relationship between right and duty and the element of legal compulsion to observe the duty.

Austin's definition of legal right has been criticized on the following grounds:

- i) Austin ignored the element of beneficial interest of the bearer of the right.
- ii) Austin's definition implies that the concept of right is correlative inference from the idea of duty, right follows a duty. As Roscoe Pound observes, Austin derives the idea of duty from that of command, the idea of a right from that of duty and the ideas of punishment and redress from sanction.
- iii) As Mill pointed out, Austin's definition can lead to strange conclusions. If a criminal is sentenced to death, the jailor is under a legal duty to hang him. Can it be said that the criminal has a right to be hanged because the jailor is under legal obligation towards or in regards to the criminal? In this example, jailor's duty is relatable to the authority that has passed the sentence

of death. In fact it is the criminal who is under the disability to be hanged. A right is a beneficial interest and not a detrimental interest.

Ihering defined rights as legally protected interests. Ihering stresses the essential element in the idea of a right i.e., beneficial interest. The hall-mark of a right is its legal protection and enforcement. "Ubi jus ibi remedium" is a fundamental principle of jurisprudence. Its protection by a rule of law that is crucial. An interest recognised and protected by a rule of moral principle is not a legal right. As Paton observes, enforceability by legal process has been said to be sine qua non of a legal right. Ihering's definition clearly demarcated the distinction between a legal right and a moral or natural right. Ihering's definition of legal right is not free from criticism.

i) Salmond observes that an interest in order to become a legal right, it must obtain not merely legal protection, but also legal recognition. The law relating to cruelty towards animals protects the interests of animals by making cruelty towards them an offence. But, it cannot be said for that reason that animals are endowed with rights. No legal relationship between man and the animal is established by such law. The duty not to show cruelty towards a beast is a duty not owed to the beast but to the society in general.

ii) Sometimes law protects a man against himself and in the case of laws making suicide or drunkenness a crime. That does not mean that a man has a right against himself.

iii) Paton points out that the law will not always enforce a right but may grant the injured party only a remedy in damages. For instance, in the case of breach of promise to marry, specific performance will not be granted but only an award of damages.

iv) In certain cases, the law may refuse only to provide a remedy. The best example is a time-barred debt. Here, the right to get back the money is not extinguished but only that the remedy is extinguished.

Salmond improves upon Ihering's definition by saying that right is an interest recognised and protected by a rule of legal justice. It is not enough that an interest is protected by a rule of law, it should also be legally recognized as an interest inhering in an individual. Law might punish cruelty towards animals and protect their interest but law does not recognize their interest as constituting a right vested in them. Salmond also views the question of definition of a right in the context of administration of justice. He says right is an interest, respect for which is a duty and the disregard of which is a wrong. Law enforces rights by enforcing the corresponding duties. Every violation of a duty amounts to a disregard of right and hence amounts to a wrong. Thus, every wrong is in the final analysis an attack on some interest or right. But every attack on some interest is not wrong.

In *Bradford Corporation v. Pickes*, it was held that a land owner would not be committing a wrong (tort) by tapping even maliciously the underground sources of water in his land even if it meant that it would affect the interests of neighbouring land owner. Thus interests may exist

defacto but not necessarily de jure. Again, refusal to pay a time barred debt is an attack on creditor's interest but that interest is not protected by law. Such a refusal may be a violation of a moral duty but not a legal duty.

Roscoe Pound: comes somewhat closer to Salmond by defining a right as a legally recognized and delimited interest which is secured by law.

Paton also prefers a simple test to distinguish a legal right 'as the right recognised and protected by the legal system itself.

Holmes defines legal right as "nothing but permission to exercise certain natural powers and upon certain conditions to obtain protection, restitution, or compensation by the aid of public force." This definition stresses the individual's reliance for the exercise of his powers upon the possible threat of sanctions applied to those who ignore or invade the rights.

Gray and Holland, for these two jurists right and interest are not synonymous. For them right is the power to invoke the means of protecting and securing an interest. In fact it was Austin who conceived of a legal right as "the capacity or power of exacting from another or others acts or forbearances". According to Holland a right is "a capacity in one man of controlling, with the consent or assistance of the State, the actions of others." Gray distinguishes right and interest and defines right as "the means by which the enjoyment of interests secured." For example, if I lend money to X under a promissory note, my right under the note is not money itself, but my capacity to get back the money. Definitions of Gray and Holland were criticized on the following grounds:

- i) Markby and Salmond have criticized the above definitions on the ground that capacity to enforce a duty is not invariably the case and does not pertain to the essence of the conception of right.
- ii) Paton observes that such a definition is too narrow. Rights recognized by International law would be excluded by this definition because the International Court of Justice lacks power to enforce its decrees.
- iii) Roscoe Pound points that the definition is postulated in terms of right-duty relationship and the Austinian concept of threat to enforce.
- iv) Jellinck observes that the definition ignores the utilitarian point of interest.

C.K.Allen, in his treatise 'Legal Duties', points out, "the essence of a legal right seems to be not legally guaranteed power by itself, nor legally protected interest by itself but the legally guaranteed power to realise an interest."

Jellinck also observes in the same vein. "A right is the will-power of man applied to utility or interest recognised and protected by a legal system."

These two definitions (C.K.Allen and Jellinck) appear to synthesise the views of Ihering and Salmond on the one hand, and Gray and Holland on the other. Thus, a right is neither the power in itself nor interest in itself but a power to secure an interest.

13.5 CHARACTERISTICS OF A LEGAL RIGHT

According to Salmond every legal right has the following characteristics:

- i) The person of inherence: or the person in whom the right inheres or resides. He is the owner of the right, the subject of the right or the person entitled.
- ii) The person of incidence: or the person on whom the corresponding duty is imposed. He is the subject of the duty.
- iii) The content of the right: or the act or omission which the duty-bound person ought to do in favour of the person entitled to the right.
- iv) The object of the right: or the thing which is the subject matter of the right, and
- v) The title of the right: or the source of the right.

The application of the above ingredients may be verified with the help of an example. A buys a piece of land from B. A is the person of inherence or the owner of the right so acquired. The incidence of the correlative duty is not only on B but on all persons in general because this is a case of rights in rem. The content of the right consists of non-interference with the purchaser's exclusive use of the land. The object of the right is the land. Lastly, the title of the right is the conveyance by which the right was acquired by the purchaser.

Thus a right involves a three fold relation in which owner of a right stands:

- i) It is a right against some person.
- ii) It is a right to some act or omission of that person
- iii) It is a right over or to something to which that act or omission relates.

Every right has an owner: Regarding the ownership of a right, it may be stated that law does not recognise ownerless right. However the following qualifications of this proposition must be kept in view.

1. Ownership need not be in praesenti but may be contingent or uncertain.
2. The Owner may be an indeterminate person.
3. He may be a person who is not yet born. The Transfer of Property Act, however requires that for transfers to unborn persons to be valid an intermediary estate in favour of a person in case must be created.

Every right has an object: Holland observes that in the case of some rights there may not be any object. He gives an illustration to substantiate his view. B is A's servant. Here A is the person of inherence, B is the person of incidence, reasonable service is the act to which A is entitled. The object of right is wanting. Holland appears to have come to the conclusion because he considers that the object of a right must be a material thing. But as Paton points out the term

'res' is very wide and covers much more than material things. Salmond also observes that there cannot be a right without an object. The object or the thing may be material or immaterial. In Holland's illustration, the object of the master's right is the skill of the servant. Thus objects may encompass a variety of things. Salmond classifies rights in relation to their objects as follows:

1. Rights over material things: These cover typical objects like land, house etc.
2. Rights in respect of one's own person: As a right not to be killed has his life as its object. Similarly, right not to be physically injured, bodily health is the object; right not to be imprisoned unjustifiably, personal liberty is the object.
3. Right of Reputation: The right of a person not to be defamed has his reputation as its object.
4. Right in respect of Domestic Relations: A husband's right in respect of his wife, or a father's right in respect of his children has as its object the society, affections and security of his family.
5. Right in respect of other rights: Sometimes a right has another right as its object. This is also called jus ad rem. If A and B enter into a contract to sell, A's present right is to acquire the right of ownership on a future date.
6. Rights over immaterial property: Examples of these are patent rights, copy rights, trade marks and commercial goodwill. In the case of a patent right, the object is an invention i.e., the idea of a new process, instrument etc.
7. Right to services: The object of the right of a master in respect of his servant is the latter's skill. So also in the case of doctor-patient, lawyer-client and employer-workman relationships. It is the skill, expertise or knowledge which forms the object of the right.

13.6 CLASSIFICATION OF RIGHTS

Stressing on different aspects, legal rights have been classified into different kinds. The following kinds of rights are of significance.

- i) Perfect and Imperfect rights
- ii) Positive and Negative Rights
- iii) Rights in rem and Rights in personam
- iv) Proprietary and personal rights
- v) Rights in repropria and rights in realiena
- vi) Principal and Accessory Rights
- vii) Legal and Equitable rights
- viii) Primary and Secondary rights.
- ix) Public and private rights
- x) Vested and contingent rights
- xi) Municipal and International rights
- xii) Rights in rest and rights in motion
- xiii) Ordinary and Fundamental rights
- xiv) Real and Personal rights.

i) Perfect and Imperfect Rights:

A perfect right is one which corresponds to a perfect duty. A duty is perfect when it is not only recognized by the law but is apt to be enforced by the courts. Ought, in the mouth of law, commonly means must. If law says A ought to do a thing, it really means A must do it, or else, law will make him do it.

There are rights and duties recognised but not enforced by law. Such rights are called imperfect rights. They are exceptions to the maxim *ubi jus ibi remedium*. For example, debts barred by lapse of time. The statute of limitation does not provide that, after a certain time, the right to a debt shall become extinct, it merely says no action shall thereafter lie for its recovery. Here lapse of time does not destroy the right, but merely bars enforcement, and therefore makes the right imperfect.

An imperfect right may be a good ground for a defence. For example, if some money of the debtor comes lawfully to the hands of creditor he may appropriate the same under Sec.60 of Contract Act towards the barred debt and successfully defend any claim for its recovery by the old debtor.

An imperfect right is sufficient to support any security that has been given for it. For example, even after a debt is barred by limitation, the mortgagee can hold the mortgaged property in his possession till he is actually paid off.

An imperfect right can sometimes be made perfect. For example, A bond which is defective in stamp-duty and hence unenforceable, can be made enforceable by paying the prescribed penalty therefor.

An important class of imperfect rights is said to be rights against state. The impossibility of enforcement in the case of rights against the state has misled some jurists to hold that there can be no legal right against the state. We have already seen that unenforceable rights are not to be ignored outright. They are useful for several legal purposes. The rights against the State are now adjudicated by courts according to moral principles of law.

ii) Positive and Negative Rights:

Positive rights are those which correspond to positive duties. A positive duty is the duty to do something i.e., to do some overt act in favour of other. Negative right corresponds to a negative duty. Negative duty is a duty to forbear from doing something. Positive duty connotes an act, negative duty connotes an omission.

When person is bound to do a particular act, his duty is positive, and when he omits to do that act, that omission is a negative wrong. Thus negative wrongs correspond to positive duties.

A positive duty, and its violation will be a negative wrong. A negative right corresponds to a negative duty and its violation will be a positive wrong.

Generally speaking, law inclines towards negative duties, it would enforce a positive duty only on special grounds such as contracts, conjugal relation. Law does not generally command that one shall do an act for the benefit of another, but it strictly interdicts one to forbear from harming others. One is forbidden from pushing another into the water, but one is seldom bound to pull another out of the water. Positive duties are mostly matters of contractual obligations, but they may arise otherwise also as in the case of a father's duty to maintain his minor child.

iii) Rights in rem and Rights in personam:

A right in rem is one which is available against the world. A right in personam is one which is available against particular persons only. A right in rem corresponds to a duty imposed upon persons in general, a right in personam corresponds to a duty imposed upon a particular individuals.

The right of ownership of property is one which avails against the world at large. Everybody else is under a duty not to interfere with the owner's use and enjoyment of the property, hence it is a right in rem. On the other hand, a right to the return of a debt is one which avails against a particular person only, namely, the debtor - he alone is under a duty to respect that right of the creditor, hence it is a right in personam. Right to reputation is a right in rem, right to damages for defamation is a right in personam.

The distinction between rights in rem and rights in personam bears close connection with that between positive rights and negative rights. All rights in rem are negative, and most rights in personam are positive.

A right in rem can be nothing more than a right to be left alone - to be undisturbed by anybody. Rights in personam on the other hand are generally the result of some special relation between the person entitled and the person bound, the latter being thereby under an obligation to do some act in favour of the former. Hence as a rule rights in personam are positive.

But there can be right in personam which are of a negativae character. eg. On the sale of a commercial good will, the vendor is under a duty not to compete with the vendee in the identical business. The corresponding right of the vendee to an exemption from competition in trade is a right in personam, and is a negative right.

State's right to collect tax from all its citizens is not a right in rem. It is not one right in the state as against all the citizens; it is a collection of as many rights as there are individual taxpayers. The State's right to a tax of Rs.50/- from A is different from its right to a tax of Rs.100/- from B. These rights are different because their objects are different. Each individual is under a duty to pay his tax only.

In the case of right in rem, it must be the same interest that avails against one and all. eg. the right of reputation. It is one interest asserted against the generality of people. It is not one reputation protected against A, and another against B, but it is one and the same as against all.

A right in rem is otherwise termed as real right. it is also called a jus in rem. Likewise, a right in personam is called a personal right or jus in personam. Jus means thing. Literally therefore, jus in rem means a right in respect of a thing, jus personam is a right in respect of a person.

In fact every right is a right in respect of a thing (namely the object of the right) and a right in respect of a person (namely the person bound). Hence every right is real as well as personal in a literal sense. But when a right is available against all persons without distinction the personal aspect of such a right is directly related to the thing. In the case of a personal right, it is available against a particular person only. So, a right in which the prominent idea is the thing is named a right in rem, and a right in which the personal aspect is conspicuous is named a right in personam.

The terms jus in rem and jus in personam are derived from the Roman terms actio in rem and actio in personam. An actio in rem was an action for the recovery of dominium; one in which the plaintiff claimed that a certain thing belonged to him and ought to be restored or given up to him. An actio in personam was one of the enforcement of an obligatio; one in which the plaintiff claimed the payment of money, the performance of a contract, or the protection of some other personal rights vested in him as against the defendant.

Naturally enough, the right protected by an actio in rem came to be called jus in rem, and a right protected by an action in personam as jus in personam.

The term 'jus ad rem' literally means right to a thing. Right to a thing in contradistinction with a right in a thing, suggests that in the former case the thing belongs to another. 'Jus ad rem' therefore denotes a right to have that other's right in the thing. It is therefore a right to a right. A right to get a right which is vested in another can only be a personal right. Hence 'jus ad rem' is a species of 'jus in personam'.

iv) Proprietary and Personal rights:

Proprietary rights are those which constitute a man's property or wealth. Any right that has an economic value is included in this category eg. rights in land, movables, debts due, benefits of a contract, commercial good will, patent rights, copyrights.

Rights which have no economic value are termed personal rights. They relate to one's personal condition or status eg. conjugal rights, parental rights, rights of reputation, citizenship, personal liberty.

Proprietary rights have both economic and juridical significance, while the personal rights have only a juridical significance. According to Salmond, if a right is valuable, that is to say, worth a money equivalent, it is proprietary, if not it is personal.

Some jurists are of opinion that the true test of a proprietary right ought to be the alienability. Proprietary rights are alienable, but personal rights are inalienable. (eg. parent rights and conjugal rights). Ordinarily this is so but there are several proprietary rights which are inalienable eg. right to maintenance, right to pension.

Violation of a personal right may give rise to proprietary rights. Right to reputation is a personal right, but the sanctioning right that arises on its violation is a proprietary right to damages.

Personal right in this classification should not be confused with personal right as opposed to real rights. They denote two different classes altogether. A proprietary right may be real (eg. right of ownership over land) or personal (right to a debt). Similarly, a personal right may also be real (eg. right to reputation) or personal (eg. conjugal rights)

Proprietary rights constitute a person's wealth, whereas personal rights relate to a person's well being. Proprietary rights are usually inheritable, personal rights are not usually inheritable.

v) Rights in repropria and rights in re aliena:

Proprietary rights may be either in one's own property (eg. right of ownership) or over another's property (eg. right of mortgagee). Rights over one's own property are termed as rights in repropria; Rights over another's property are called rights in realiena.

It often happens that the rights of a person over his property become subject or subordinate to a right vested in another person. Thus the right of a land owner may be subject to, and limited by a right of way of the neighbour. The owner's right in such a case is not in its full scope. It has to make room for the superior right that is vested in the other person. This later right is a right in realiena, an encumbrance. The general right which is subject to an encumbrance is therefore referred to as the servient, while the encumbrance is called as the dominant right.

A servient right need not necessarily be one of full ownership. An encumbrance may become subject to another encumbrance. A tenant may sublet, a lessee may grant a lease of his leasehold, a mortgagee may grant a sub mortgage. The lease or mortgage will then be a dominant right in respect of ownership of the land, but a servient right in respect of the sub-lease or sub-mortgage.

When the servient right changes hands the encumbrance may follow it in the hands of new owners. A change of owners may not free the ownership from the encumbrance imposed upon it. Whoever takes the ownership shall then take it subject to the encumbrance. The encumbrance is then laid to run with the right encumbered.

vi) Principal and Accessory rights:

One right may affect another right either adversely or beneficially. It is adverse when one right is limited by another vested in a different person. It is beneficial when one right has added to it a supplementary right vested in the same person eg. the owner of the Whiteacre may have a right to way to it over the adjoining compound Blackacre. Here the right of way over Blackacre is an addition to the right of ownership of whiteacre.

Similarly, a right to a debt due from A may be supplemented by a guarantee for payment by B. Thus the right which is supplementary to another right is called an Accessory right, and the right to which it is attached is called the Principal right.

vii) Legal and Equitable right:

This division is peculiar to English law. Certain rights which had no recognition at common law, came to be recognised and protected by the courts of Equity. Rights protected by the courts of law were termed legal rights, and rights protected by the courts of Equity were termed as equitable rights.

The right of specific performance of a contract, the right to avoid a contract entered into by mistake or fraud, the right to redeem a mortgaged property etc. were equitable rights. They had no recognition in the Courts of Common Law. The Court of Common Law would only award damages. Right to repayment of a debt, right to evict a lessee on termination of lease etc. were recognised by Court of Law and were therefore legal rights.

viii) Primary and Sanctioning rights:

We have already seen that a sanctioning right is one which arises as a sanction imposed by law on a wrongdoer for his wrong. All others are primary rights. Sanctioning rights are termed by some writers as Remedial rights. Primary rights as Antecedent rights. eg. right to reputation is a primary right and right to damages for defamation is a sanctioning right.

ix) Public and Private Rights:

Rights vested in the State are generally termed as public rights, because the State holds them as the representative of the community or the public. Private Rights are rights belonging to individuals.

The Right to vote in the election of representatives to public bodies is styled as a public right. A right which one exercises for his own benefit would then be a private right. eg. ownership of a house.

x) Vested and Contingent Rights:

Another division of rights is the vested and contingent rights. Every right is created by a title. The title comes from the happening or not happening of a certain facts. Therefore, this happening or not happening of certain facts affects the nature of the right. A right is a vested right when all the facts, happening and not happening of which it is necessary to vest the right, have occurred. If only some of such facts have occurred then the right is a contingent right. It would become vested when all the facts have occurred.

A vested right creates an immediate interest. It is transferable and inheritable. A contingent right does not create an immediate interest, and it can be defeated when the required facts have not occurred.

xi) Municipal and International Rights:

Municipal rights are conferred by the law of a country. International rights are conferred by International Law. All Municipal rights are enjoyed by the individuals living in a country. The subjects of a International rights are the persons recognized as such by International Law.

There is no unanimity of opinion as to who are the persons recognized by International Law. According to one view, only the States are the subjects of International Law. According to another view individuals can also be the subjects of International Law.

xii) Rights in rest and Rights in motion:

This classification of rights had been given by Holland. According to him, when a right is stated with reference to its 'orbit' and its 'infringement', it is a right at rest. The meaning of the term 'orbit' is the sum or the extent of the advantages conferred by the enjoyment of the rights. The term infringement means an act which interferes with the enjoyment of these advantages. Causes by which rights are either connected or disconnected with persons are discussed under rights in motion.

xiii) Ordinary and Fundamental Rights:

Some rights are ordinary rights and some are fundamental rights. The Constitution of India has guaranteed certain fundamental rights to the citizens of India like the right to equality, right to life and liberty, right to freedom, right against exploitation, right to freedom of religion, cultural and educational rights and right to constitutional remedies.

Fundamental rights can be enforced by the Supreme Court under Art.32 or by High Courts under Art.226, whereas ordinary rights can be enforced under Article 226 and other provisions in procedural codes. Fundamental right cannot be abrogated by legislative action. It can only be abrogated by constitutional amendment. Ordinary right can be deprived by legislative act. Fundamental right is guaranteed by the Constitution. Ordinary right is conferred either by Constitution or by other enactments.

xiv) Real and Personal rights:

According to Salmond, a real right corresponds to a duty imposed upon persons in general, A personal right corresponds to a duty imposed upon determinate individuals.

A real right is available against the whole world. A personal right is available only against a particular person.

My right to the possession and use of money in my purse is a real right. However, my right to receive money from a person who owes me, is a personal right. According to Salmond, all real rights are negative and most personal rights are positive, although in a few exceptional cases they are negative. It is to be observed that real rights are rights in rem, but personal rights are rights in personam.

13.7 LEGAL RIGHTS IN WIDER SENSE

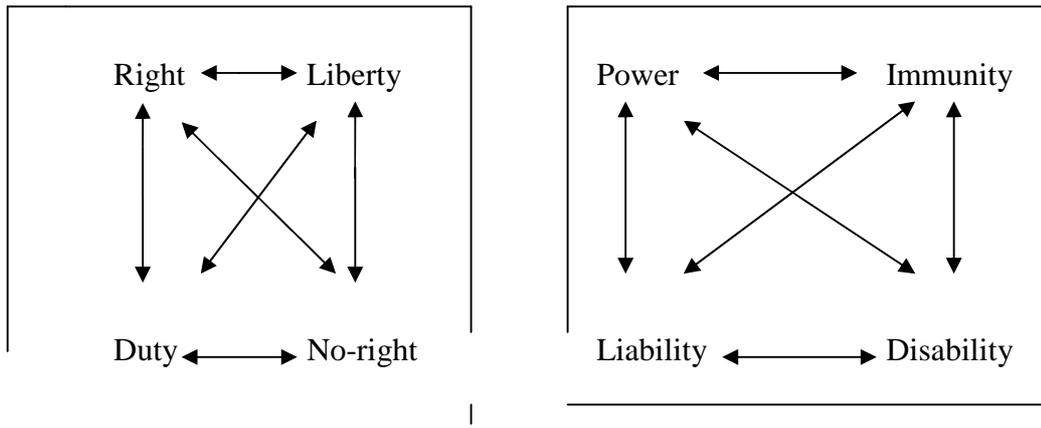
A legal right may be understood in a narrow or wider sense. In the narrow sense it means the correlative of a duty. In a wider sense a right means any legally recognized interest whether it corresponds to a legal duty or not. In this generic sense, according to Salmond, a legal right may be defined as any advantage or benefit which is in any manner conferred upon a person by a law. Some writers prefer to call a right in the narrow sense as a claim or demand and it is distinguished from a right in the generic sense.

Hohfeld, an American jurist, attempted to analyze various concepts in the field of legal rights and to present them systematically. There are four kinds of rights in the widersense. Rights (stricto sensu); Liberties; Powers; and Immunities. He also worked out a table of correlatives and opposites.

Hohfeld's table

Jural Correlatives:	Right	Liberty or	Power	Immunity
	Duty	Privilege	Liability	Disability
		No-right		
Jural Opposites:	Right	Privilege	Power	Immunity
	No-right	Duty	Disability	Liability

The four pairs of jural correlatives and jural opposites are arranged in a tabular form as follows:



In this table the vertical arrows connect jural correlatives, and may be read either way as ‘Right is the presence of duty in another’ or ‘Duty is the presence of right in another’.

The diagonal arrows connect jural contradictories and may be read either way as ‘Right is the absence of No-right in oneself; or ‘No-right is the absence of Right in oneself’.

The horizontal arrows connect the contradictories of correlatives and may be read either way as ‘Right is the absence of Liberty in another’ or ‘Liberty is the absence of right in another’.

13.8 SUMMARY

The concept of right is one of fundamental significance in legal theory. A legal right may be distinguished from moral right. The difference between the two lies in sanction attached to them. Different jurists defined ‘right’ differently. Salmond identified the following characteristics of a legal right: the person of inherence, the person of incidence, the content of the right, the object of the right and the title of the right. Rights have been classified into different kinds: Perfect and imperfect rights, positive and negative rights, rights in rem and rights in personam, proprietary and personal rights, rights in repropria and rights in realiena, principal and accessory rights, legal and equitable rights, primary and secondary rights, public and private rights, vested and contingent rights, municipal and international rights, rights in rest and rights in motion, secondary and fundamental rights and Real and personal rights.

13.9 SELF ASSESSMENT QUESTIONS

1. Define a legal right and discuss the essentials of a legal right.
2. Discuss the various kinds of legal rights.

13.10 FURTHER READINGS

P.J. Fitzgerald (ed), Salmond on Jurisprudence, Sweet and Maxwell, London
G.W.Paton, A Text Book of Jurisprudence, Clarendon Press, Oxford.

UNIT – XIV LEGAL DUTIES

Objectives

After Reading this unit you should be able to

- Explain concept of duty and classification of duties
- Discuss function and structure of duty
- Examine the tests to determine the presence of a duty

Structure

- 14.1 Introduction
- 14.2 Classification
- 14.3 Function of duty
- 14.4 Structure of duty
- 14.5 Approval and disapproval
- 14.6 Enforceability
- 14.7 Sanction
- 14.8 Conflicting duties
- 14.9 Breach of duty
- 14.10 Binding force of duties
- 14.11 Summary
- 14.12 Self-Assessment Questions
- 14.13 Further Readings

14.1 INTRODUCTION

A duty is roughly speaking an act which one ought to do, an act the opposite of which will be a wrong. Duty is a species of obligation. To ascribe a duty to a man is to claim that he ought to perform certain act. The principal function of laws is to prescribe how people ought or ought not to behave.

Duties like wrongs are of two kinds: Moral and legal. These two classes are partly coincident and partly distinct. Adulterated milk may not be sold whether knowingly or otherwise – it is a legal duty. But surely it is not a moral duty if the selling takes place without the owner knowing that it is adulterated. There is both a moral and a legal duty not to steal.

When the law recognizes an act as a duty, it commonly enforces the performance of it, or punishes the disregard of it. But this sanction of legal force is in exceptional cases absent. A

duty is legal because it is legally recognised not because it is legally enforced or sanctioned. There are legal duties of imperfect obligation

Law protects human interests by compelling individuals to do or forbear from doing particular acts. Prof.Gray says, “the acts or forbearances which an organized society commands in order to protect legal rights are the legal duties of the persons to whom those commands are directed.” It is thus duty is the correlative of right.

The concept of rights and duties are of fundamental significance in legal theory because law consists of certain types of rules regulating human conduct and the administration of justice is concerned with enforcement of rights and duties created by such rules.

14.2 CLASSIFICATION OF DUTIES

Legal duties may be classified as follows:

1. Positive and negative duties
2. Primary and Secondary duties
3. Absolute and Relative duties

Positive and Negative duties:

When the law obliges us to do an act the duty is called positive, when the law obliges us to forbear from doing an act, the duty is called negative. If A has a right to a land, there is a corresponding duty on persons generally not to interfere with A’s exclusive use of the land. Such a duty is negative duty. If A owes a sum of money to B, the former is under a duty to pay the sum when due. This is a positive duty. In positive duties performance extinguishes both duty and right. A negative duty can never be extinguished by fulfilment.

Primary and Secondary Duties:

A primary duty is that which exists per se and independent of another duty. The duty not to cause personal injury to another is a primary duty. A secondary duty is one which has no independent existence but exists only for the enforcement of other duties. The duty to pay damages for the injury already done, is a secondary duty.

Absolute and Relative Duties:

Austin distinguished between absolute and relative duties. According to him, while every right is relative and has a correlative duty, every duty need not necessarily have a correlative right. In Austin’s opinion some duties are absolute duties to which no corresponding rights are attached. According to Austin’s analysis, there are four kinds of such duties:

- i) duties not regarding persons (those owed to God and the lower animals),
- ii) duties owed to persons indefinitely (duties towards the community eg. Duty not to commit nuisance),

- iii) self regarding duties (duty owed to one self eg. Duty not to commit suicide or duty not to become intoxicated.).
- iv) duty towards State.

As indicated above absolute duties are those which have no corresponding or correlative rights. Relative duties are those to which there is a corresponding right in some person or definite body of persons eg. duty to pay one's debt to the creditor.

According to Salmond, all duties are relative and there can be no absolute duties, for there must be a right in another when one is under a duty.

All these four kinds of absolute duties as mentioned by Austin are really reducible to one head - Duties towards the State. Man's relation to God is a matter of religion and not of law. If the legal system protects certain religious duties with a sanction, then that duty is part of the law and amenable to same analysis as other legal duties. So far as duties towards animals are concerned, if the law prohibits cruelty, one may owe a duty to the State. In case of duties towards the community or the public, duty is merely the correlative of the right inhering in each member of the community. As for self-regarding duties, there cannot be a legal duty owed to oneself. The duty not to commit suicide is not a duty I owe to myself but is part of the criminal law and subject to the same analysis as any other duty imposed by the criminal law. In Austin's view, the duties of the subjects towards the State are absolute. This argument leads to the rejection of the notion that there can be a right-duty relationship between the subject and the state. Austin maintained that when the state imposes a duty on a subject, it is a misuse of language to say that the State has a corresponding legal right. The state has physical power. The exercise of a legal right is regulated, whereas the power of the sovereign is not.

Austin's thesis of 'absolute duties' is generally rejected in modern times. However, Prof. C.K.Allen supported Austin's view. He was of the view that where the State imposes duties in virtue of its sovereign character, the duties are absolute without correlative rights in the State. For example, a State compels children to go to school, or to be vaccinated, prohibits the sale of liquor. In these cases there are no corresponding rights. According to Allen, the duties imposed by the criminal law are absolute duties.

14.3 FUNCTION OF DUTY

According to Dias, "In its most abstract form the idea of duty may be stated simply as a prescriptive pattern of conduct that is recognized by courts". Duties continue to exist due to various factors. The first and obvious requirement is the continuance of the purpose for which duty was introduced. Duty has also to be consonant with prevailing moral ideas; or at least not diverge too much from moral ideas. It may happen that after a duty has been created, its moral source changes or even disappears, in such a case the duty separates itself from the prevailing morality. Or it may happen that considerations other than morality gave rise to a duty, in which

case again the duty is independent of morality. Where the conflict between duties and moral ideas becomes acute, the duty has to be either altered or extinguished.

Another factor in the continuance of a duty is its ability to fulfil its function. The two functions of duty are : to prescribe a pattern of behaviour and to serve as a norm with reference to which judges decide the legality of actual behaviour. The general conditions for regulating behaviour were stated by Fuller, in his 'The Morality of Law'. According to Fuller, a duty has to be i) general ii) promulgated iii) prospective iv) intelligible v) consistent in itself vi) capable of fulfilment, viii) constant through time and viii) congruent with official action. These eight requirements constitute 'inner morality of law'. Without complying with these requirements, the task of regulating behaviour could not be performed by legal duties.

It has been stated that, apart from regulating behaviour, a duty has to serve as a norm of judicial decision. It is here that the last condition 'congruence with official action' comes in. It means that there has to be a satisfactory degree of conformity between the prescription and the action of the judge or official. The extent to which this is achieved depends as much on the structure of the duty as on the ability, integrity of the judge.

14.4 STRUCTURE OF DUTY

According to Dias, behaviour is regulated through duties; to conceive of them except in relation to conduct is impossible. Since duties do not describe, but only prescribe behaviour, it follows that they express notional patterns of conduct to which people ought to conform. Thus they exist only as ideas, and they remain expressions of 'oughts' even though they may be expressed imperatively as 'must' or 'shall'. In Austin's view this imperative phraseology has given rise to the view that duties have been commanded. Prof. Olivecrona maintains that the connection between the imperative form and command is purely psychological. He points out that duties are not commanded, but only expressed in command form, and for that reason refers to them as 'independent imperatives: therefore, Dias concludes that duties are notional patterns of conduct that are phrased in an imperative form.

All legal rules do not create duties, but even when they do not, they always address an additional duty to officials to treat them as law. Rules conferring powers may confer mandatory or discretionary powers. In case of mandatory power there is a duty in officials to exercise them.

A duty prescribes a person's behaviour primarily for some purpose other than his own interest. eg. the duty to pay debt to creditor, the duty to perform contract are other regarding duties; the duty not to steal A's property is not only protecting A's interest but also in the interest of society; the duty not to be cruel towards animals is imposed in the interests of the community. Austin recognised a category of absolute duties which he called self-regarding duties. According to Austin, some duties are imposed in the interest of the person obliged by them. Dias concludes that some duties exist not only for the benefit of other persons, but also in one way or another for the benefit of the person obliged.

Dias points out that the conduct envisaged in duties need not necessarily refer to the future, although this is in fact the case with the majority of them. A duty can be created with reference to past conduct. Such ex post facto creation of duties represent a notional pattern of conduct as to people ought to have behaved. If the behaviour of any person is found to have been contrary to what it ought to have been, he is regarded as having committed a breach of that duty. Creation of duties with reference to past conduct is on the whole disfavoured.

Conduct can be conceived as an omission, an action by itself, an action in relation to circumstances, or an action in relation to both circumstances and results. Thus, there may be: duties which contemplate behaviour alone; duties which contemplate behaviour in specified circumstances; duties which contemplate behaviour with relation to specified circumstances and consequences.

14.5 APPROVAL AND DISAPPROVAL

Dias points out that where a duty is embodied in a judicial precedent, the approval or disapproval is traceable to the policy decision of the judge or judges who laid it down. Where a duty is embodied in a statute, the policy that ultimately finds expression in the statute book is the result of an inextricable interplay of many factors. Where it is embodied in custom, the approval of the community is generated out of established practice, there is at least the absence of disapproval on the part of some judge. The approval and disapproval in the context signifies the official acceptance of the 'ought' and 'ought not' patterns of conduct as laws. To say that a pattern of conduct is required or prohibited by a duty implies that it is approved or disapproved by one or other of the law-making methods. Duty becomes legal if it is finding expression in any one of the law-making media.

Sometimes the attitude of the law expressed in duties is one of the approval and at others of disapproval. The performance of a contract is approved and there is a duty to perform the contract, on the other hand, stealing is disapproved and there is a duty not to steal. A duty is positive when approval is given to the conduct eg. duty to perform contract. A duty is negative when disapproval of the conduct contemplated in it eg. duty not to steal. The attitude of the law, whether of approval or disapproval, is based on the purpose to be achieved, which in turn is governed by social values, morality, justice etc.

14.6 ENFORCEABILITY

This is another idea associated with duty. Duty has two alternative meanings: 1) prescriptive pattern of conduct which is enforceable (2) prescriptive pattern of conduct even if unenforceable. Enforceability cannot be essential to the concept of duty. Enforceability itself mean one of two things: either compelling observance of the pattern of conduct enjoined by the duty, or the indirect method of inflicting penalty or sanction, in the event of a failure to observe it. In the context it is necessary to distinguish between primary and secondary duties. Primary

duties have an independent existence. Secondary duties only come into existence on the breach of the primary duties.

The carrying out of primary duties is called 'specific enforcement'. When the primary duty is negative i.e., not to do something, there is no convenient method of ensuring its continued observance. All one can do is hedge the prohibition with deterrent sanctions with the hope that fear of them may succeed in securing obedience. Even where the primary duty is positive i.e., to do something, it is generally not possible to ensure that it is carried out. Only in exceptional cases primary positive duties are specifically enforced. If the primary duty is to pay debt, the property of the party obliged can be sold in execution and made to pay it. In very special cases of contract, specific performance of it may be ordered. A person may be compelled to repay money received by mistake. A person may be compelled to restore lands and chattels wrongfully detained.

Secondary duties, on the other hands, can be carried out. Most secondary duties which are one form of sanctions, consist of the payment of money. The attachment of some sanction, whether in the form of a secondary duty or otherwise, leads to the question, how far the presence of a sanction should be taken as a test of duty.

14.7 SANCTION

A number of authorities contended that a duty can be distinguished as legal whenever a sanction is attached to its breach. The corollary of this view is that the presence of a sanction can be made the test of existence of legal duty. It is undoubtedly true that sanctions attend most duties, but it is submitted that the ideas of duty and of sanction should be kept separate and that, therefore, sanction is no test of a legal duty.

There are several objections to the view that sanction is a test of duty. It may mean that a duty exists whenever something called sanction actually happens, or will probably happen, or can be made to happen. But the sanction may fail to operate, as where the culprit escapes from detection, dies or becomes bankrupt. But the duty remains nonetheless.

Courts do not decide the presence of a duty from a sanction. On the contrary, they apply the sanction because they first recognise that a duty has been broken. For example, in *Haynes v. Harwood* (1935) the Court of Appeal did not recognize a duty of care towards rescuers because they decided to award damages; they awarded damages because they decided to recognize the duty. The Judges and lawyers do think in terms of duty even when there is no sanction. The case law on 'sanctionless duties' is overwhelming and a few of them can be referred to as illustrations of judicial thinking: Dias enumerated a few relevant cases:

- i) Statutes of limitation only bars the action and do not extinguish the duty, which continues to be sanctionless. Statute barred debts are due, though payment of them cannot be enforced by action. A cause of action does not cease to exist

because a limitation period has expired. It is trite law that the Limitation Act bars the remedy and not the right, and they do not even have this effect unless and until pleaded.

ii)

ii) Acknowledgement or partpayment of a statute-barred debt makes it actionable again. If it is argued that the statute, by removing the sanction, thereby extinguished the duty, then acknowledgement or part payment can only result in the creation of a wholly new duty. This is not so. The fact that no new consideration is required is consistent with the idea that acknowledgement operates only as a waiver of the procedural bar rather than with the creation of a new duty; and courts have said that it only revives the old duty. If it is so, it is the original duty, which is rendered actionable again, lapse of time can only have made it unenforceable.

iii) It is because a sanctionless duty is still conceived of as a duty that payment under it can not be recovered, whereas payment under a void transaction can be. The reason is that even though the duty is sanctionless the party who pays fulfils the requirement that he ought still to pay.

iv) A duty, the performance of which is postponed, is in the meantime a sanctionless duty. In *Midland Counties Motor Finance Co.Ltd v. State* (1951), speaking of an agreement to give time to a debtor, Lord Denning said 'the effect of it was that the debt remained due, but not enforceable.

v) There has to be an existing duty before a payment or part payment can be appropriated to it. For this purpose, a sanctionless duty is recognized as a duty. In *Seymour v. Pickett* (1905), one part of the creditor's claim was actionable, the other was not. The debtor, who was aware of this, paid only sufficient money to cover the actionable part without specifically saying so. The creditor thereupon appropriated the payment to the non-actionable part and sued in respect of the actionable part. It was held that he was legally entitled to do so.

vi) Security can only be given in support of an existing duty, and a sanctionless duty will suffice for this purpose.

vii) An unenforceable contract, in which the duty is sanctionless, is valid in the sense that it may be used to discharge a prior contract, provided there is an intention to rescind it even though the new contract is itself unenforceable.

viii) Where work has been done under an unenforceable contract, the question has arisen whether reimbursement can be claimed on the basis of an implied contract. It has been held that the unenforceable contract is an existing contract, and that where an express contract already exists no other contract can be implied.

ix) The position of diplomats is a good example of how the idea of sanctionless duty is used to give effect to the conflicting demands of policy. International courtesy requires that diplomats should be protected, but the claims of private persons also deserve satisfaction. The solution is to recognize sanctionless duties in diplomats so that, although no action can be brought against them without waiver of the immunity; others, can be made responsible collaterally.

In *Empson v. Smith* (1965) it has been observed that the diplomat will himself be answerable on the expiry of a reasonable time after the termination of his mission if he remains within jurisdiction. This is not a new duty which suddenly emerges, it is his original duty which becomes actionable.

In *Shaw v. Shaw* (1979) a petition under the Matrimonial Causes Act 1973 against a husband, who enjoyed immunity at the time, was valid even though the suit could not be heard; but by the time matter came to court the husband lost his immunity so there was no longer a procedural bar.

x) The position in tort of husband and wife before 1962 was another instance of sanctionless duty. One spouse was not able to sue the other, but the other's employer was vicariously liable. In vicarious liability, no one can be liable vicariously unless his servant has committed a tort. Unless a servant is liable the master is not liable for his acts, however, the master cannot take an advantage of immunity from suit conferred on the servant. Though there was an unenforceable tort committed between spouses, an employer was liable vicariously for one of the spouses.

In *Broom v. Morgan* (1953), Denning LJ observed that the liability of master is, properly speaking, a vicarious liability only so that he is only liable if his servant is also liable. Law disables the wife from suing her husband for a tort, but it does not alter the fact that the husband has been guilty of tort. His immunity is a mere rule of procedure and not a rule of substantive law. It is an immunity suit and not an immunity from duty or liability. He is liable to his wife, though his liability is not enforceable by action: and, as he is liable so also is his employer, but with the difference that the employer's liability is enforceable by action. This shows how the sanctionless duty will be utilized in order to reach a particular decision.

xi) A joint obligation consists of one duty which rests on more than one person. Anything which ends the duty of one, such as release, ends the duty of all. A mere agreement not to sue one party does not free the others, because such an agreement does not extinguish the duty, but only makes it unenforceable against him.

xii) In criminal law, there was a sanctionless duty not to commit suicide (before the Suicide Act 1961 effected a change). It is absurd to say that, because in the nature of things there could be no sanction, therefore there was a liberty to commit suicide. The policy of the law was to forbid, not to permit, suicide. Attempt at suicide was a punishable offence.

xiii) The Statute of Frauds provided that in the absence of a note or memorandum in writing signed by the party to be charged 'no action shall be brought' and 'no action may be brought'. Thus the Statute of Frauds prevents a party from suing in a contract which is not in writing. It does not render the contract as void, but renders the kind of evidence required indispensable when it is sought to enforce the contract. It shows that the duty remains notwithstanding the absence of an action.

xiv) Where acts of part performance are relied on in place of a note or memorandum in writing to make the transaction actionable, the courts do not treat these as creating the duty, but only as supplying the necessary evidence.

xv) The fact that property rights pass under non-actionable transactions shows that they do create legal relationships.

The above discussion shows that a legal duty is the expression of an 'ought' reinforced no doubt by sanctions in the majority of cases, and that a duty is conceived as such even though the sanction is withdrawn or may not exist. Then, why sanction is so persistently thought of as essential to the concept of duty. An obvious reason is that most duties do possess the attribute of sanction. In case of general duties which each person owes to everyone else, such as those in criminal law and tort law, which are duties not to do certain things, it is the sanction arising out of their breach that attracts attention. In case of positive duties, which are duties of active performance, one thinks primarily of what ought to be done and that the fear of sanction is a factor in securing obedience, but it is wrong to assume that this is exclusive, or even of paramount importance. One more reason is that it is necessary to distinguish legal from moral duties and a good deal of comfort appears to be derived by fastening on sanction as the distinctive feature.

14.8 CONFLICTING DUTIES

Conflict of duties may arise in two situations. The first is where the two duties are in opposition to each other, one duty says in effect 'you ought to do X', and the other duty says in effect "you ought not to do X"; the second is where the duties are not containing opposite content, but the fulfilment of one duty involves a breach of the other duty.

Duties of opposite content may be found in different systems of law. For example, conflict between municipal and international law or conflict between civilian and military duties of a soldier. In the case of the Sheriff of Middlesex (1840), the sheriff who was a court officer, who performed his duty of execution of a decree against the property of Hansard in pursuance of a judgment of the court, found himself committed for contempt by the House of Commons for having done so. No system of law will tolerate such situations for long. The conflict was resolved shortly afterwards by the Parliamentary Paper Act 1840.

Although the duties themselves may not be in conflict, their performance may not be reconcilable. In *R. v. Larsonneur* (1933), the defendant was deported under police escort and placed in custody at Holyhead, and was then held guilty of being found in the United Kingdom without having a permit to land. Had he refused to be brought there so as not to commit a breach of the duty for which she was found guilty, she would have committed a breach of her other duty not to resist the police in the discharge of their duties. Whichever duty she complied with, she was bound to commit a breach of the other.

In *Daly v. Liverpool Corporation* (1939) it was acknowledged that the fulfilment of the duty by an omnibus driver to drive with due care and attention was not reconcilable with the discharge of his duty to adhere to a reasonable time-schedule.

In *Eyre v. Johnson* (1946) the defendant by virtue of a pre-war tendency contract was under a duty to keep the premises in repair and to restore them eventually in a state of repair. At the end of the tenancy he applied for a licence under the Defence (General) Regulations 1939, to effect the necessary repairs, but was refused permission. If he carried out the repairs, it would have amounted to a breach of the regulations. If he did not carry out the repairs it would have been a breach of the contract. He was under two duties and both cannot be fulfilled. The Court held him liable in contract. The Court found that had he maintained the premises in repair over the years, as he should have done, no licence would have been needed. It should be noted that the breach of the contractual duty here was not inevitable.

14.9 BREACH OF DUTY

Duty is a prescriptive pattern of conduct. The breach of duty occurs as a result of conduct in a given situation. 'Is there a breach of duty or not' is always a question of fact. Dias points out that what amounts to a breach of any given duty must follow from the formulation of that duty. If the duty is simply to behave or not to behave in a certain way, then the breach of it is not behaving or behaving in that way. If the duty is to produce or not to produce a given result, the breach of it is the failure to produce or the production of that result. If the duty is not to produce a given result in a particular manner, the breach of it is constituted by the production of that result in the manner specified.

14.10 BINDING FORCE OF DUTIES

Duties do by and large succeed in regulating the conduct of the people. This leads to the question 'why duties are in fact obeyed?' The jurisdiction of certain institutions, such as the legislature and courts, extends to all spheres of behaviour and such jurisdiction is supreme. Their decisions cannot be ignored by officials or citizens, even when they are thought to be wrong. Officials have duties in respect of law i.e., to apply it, whether they like it or not. Citizens have duties under the law and they are powerless to change them. This gives rise to the idea of the 'bindingness of duties'. There are many reasons why people comply with duties. Bryce long ago tabulated them in the following order, indolence, deference, sympathy, fear and

reason. This list, as Dias pointed out, does not take sufficient account of psychological, social and moral pressures.

14.11 SUMMARY

Rights and duties are tools of law. Law maintains order by conferring rights on some and imposing duties on others. Duties are either moral or legal. Legal duties may be classified into: positive and negative duties, primary and secondary duties, and Absolute and Relative duties. According to Dias, the function of duty is to prescribe a pattern of conduct that is recognised by courts. The continuance of duty depends upon its ability to fulfil its function. Enforceability cannot be essential to the concept of duty. It is undoubtedly true that sanctions attached to most of the duties. Courts do not decide the presence of a duty from a sanction. The case law on 'sanctionless duties' is overwhelming.

Conflict of duties may arise in two situations: where the two duties are in opposition to each other; where the duties are not containing opposite content, but the fulfilment of one duty involves a breach of the other duty.

There are many reasons for the 'bindingness of duties'. Bryce tabulated them in the following order: indolence, deference, sympathy, fear and reason.

14.12 SELF-ASSESSMENT QUESTION

1. What is legal duty? What are the different kinds of legal duties?
2. What are the tests to decide the presence of a legal duty?

14.13 FURTHER READINGS

P.J.Fitzgerald (ed), Salmond on Jurisprudence, Sweet & Maxwell, London
Dias, Jurisprudence, Aditya Books Private Ltd., New Delhi

UNIT –XV LIABILITY

Objectives

After reading this Unit you should be able to

- Explain the nature and kinds of liability
- Discuss theories of remedial and penal liability
- Explain meaning of ‘act’, two classes of wrongful acts, the place and time of act
- Discuss ‘mensrea’ as a condition of penal liability
- Illustrate the relevance and irrelevance of motive in determining the liability

Structure

- 15.1 Introduction
- 15.2 Kinds of Liability
- 15.3 The theory of Remedial liability
- 15.4 The theory of Penal liability
- 15.5 Acts
- 15.6 Classification of Acts
- 15.7 Two classes of wrongful acts
- 15.8 Damnum sine injuria
- 15.9 The place and time of act
- 15.10 Causation
- 15.11 Mens rea
- 15.12 Intention
- 15.13 Motive
- 15.14 Malice
- 15.15 Relevance and Irrelevance of Motive
- 15.16 Jus necessitatis
- 15.17 Summary
- 15.18 Self-Assessment Questions
- 15.19 Further Readings

15.1 INTRODUCTION

Liability is the correlative of a legal remedy. A synonym for it is responsibility. He who commits a wrong is said to be liable or responsible for it. Liability or responsibility is the vinculum juris that exists between the wrongdoer and the remedy of the wrong. It is not one of the mere duty or obligation. It pertains not to the sphere of ought but to that of must. It has its source in the supreme will of the State. A man's liability consists in those things which he must do or suffer, because he has already failed in doing what he ought to do. Salmond calls it the ultimatum of the law. In modern civil societies the rights and duties of individuals are regulated by the law of the land. A breach of these rights and duties is called a wrong. One who commits a wrong is said to be liable for it. Thus, liability may be for a wrongful act or omission.

15.2 KINDS OF LIABILITY

Liability may be either civil or criminal and may be either remedial or penal. Civil liability is the liability in civil proceedings whose direct purpose is the enforcement of a right vested in the plaintiff. Criminal liability is the liability in criminal proceedings whose direct purpose is the punishment of the wrongdoers. Penal liability is that in which the purpose of the law, direct or ulterior, is the punishment of a wrongdoer; eg. the liability of a thief to be imprisoned is penal. Remedial liability is that in which the sole intent of the law is the enforcement of the plaintiff's right and the idea of punishment is entirely unknown; eg. the liability of a debtor to repay the money to the creditor is remedial. All criminal liability is penal, civil liability is sometimes penal and some times remedial.

The classification of liability into civil and criminal is based on the division of wrongs into civil and criminal. Austin says "an offence which is pursued at the discretion of injured party or his representative is a civil wrong, and an offence which is pursued by the sovereign or by the subordinates of the sovereign is a crime". Salmond's view is that "the distinction between criminal and civil wrong is based not on any difference in the nature of the right infringed, but on a difference in the nature of the remedy applied". Generally four points of distinction between the two have been put forward:

- i) Crime is a wrong against the society but a civil wrong is a wrong against a private individual or individuals.
- ii) The remedy against a crime is punishment but the remedy against the civil wrong is damages.
- iii) A third difference between the two is that of the procedure. The proceedings in case of crime are criminal proceedings and proceedings in case of civil wrong are called civil proceedings. Civil and criminal proceedings take place in two different set of courts.
- iv) The liability in a crime is measured by the intention of the wrongdoer, but in a civil wrong the liability is measured by the wrongful act and the liability depends upon the act and not upon the intention.

The distinction between remedial and Penal liability has been made on the basis of the legal consequences of the action against the wrong. If after a successful proceeding the defendant is ordered to pay damages, or to pay a debt, or to make a specific performance of contract etc. the liability is called 'remedial liability'. When after a successful proceeding, the wrongdoer is awarded punishment which may be the fine, imprisonment, death sentence etc. it is called 'penal liability'.

15.3 THE THEORY OF REMEDIAL LIABILITY

The theory of remedial liability lays down that whenever the law creates a duty, it should enforce the specific fulfillment of it. The sole condition of the existence of remedial liability is the existence of a legal duty binding upon the defendant and unfulfilled by him. What a man ought to do by a rule of law, he is made to do by the force of law. In law ought is normally equivalent to must, and obligation and remedial liability are in general coexistent. To this general principle there are three exceptions:

i) Duties of imperfect Obligation: the breach of such a duty gives no cause of action, that is to say, creates no liability at all eg. a time barred debt is a legal debt, but the payment of it cannot be compelled by any legal proceeding.

ii) Where the duty violated is in its nature incapable of specific enforcement. There are duties which cannot be specifically enforced, once they are broken. Thus, it is the duty of every one to refrain from doing anything that is likely to injure the reputation of others. But once a libel on somebody is perpetrated, it becomes impossible in the nature of the things, to enforce specifically, on the miscreant the duty of refraining, for the simple reason that it is too late. Wrongs of this nature cannot be remedied, they can only be punished.

iii) Where the specific enforcement of a duty is inexpedient: There are duties, the specific performance of which the law can but will not enforce, because it is neither advisable nor expedient to do so. Thus, the law will categorically refuse to enforce specifically many contracts, particularly contracts of service and promises of marriage, for obvious reasons. In such cases, it will only provide pecuniary compensation.

It is only in special cases that the law will compel the specific performance of a contract, instead of the payment of damages for the breach of contract.

15.4 THE THEORY OF PENAL LIABILITY

The purposes of punishment is the protection of society or else the punishment is looked on as an end in itself. The aim of protecting society is sought to be achieved by deterrence, prevention and reformation. Of these three methods the first, deterrence, is usually regarded as the primary function of punishment, the others being merely secondary. Salmond says: "the

primary purpose of punishment is that it should be deterrent.” In discussing the theory of penal liability Salmond confined his attention to this purpose chiefly.

Where the law finds it impossible or inexpedient to enforce a duty specifically, it fulfills its purpose by inflicting punishment on the wrongdoer. The liability of a wrongdoer in such a case is penal liability. Punishment, however, is not inflicted on the wrongdoer for merely doing a wrongful act, unless he has done it with a guilty mind. In other words, two conditions must be satisfied before the punishment can be imposed on a person, viz. that he has committed a breach of his duty and he has committed the breach either intentionally or negligently. Inevitable accident or bonafide mistake will exempt the wrongdoer from penal liability.

These two conditions of penal liability are included with sufficient accuracy in the legal maxim ‘actus non facit reum nisi mens sit rea’. The act alone does not amount to guilt: it must be accompanied by a guilty mind. They are called respectively the material and formal conditions of liability. The material condition is the doing of the wrongful act, the formal condition is the mens rea or guilty mind with which the act is done. These two conditions of liability are analyzed separately, first, the conception of an act, and secondly, the conception of mens rea in its forms of intention, recklessness and negligence.

15.5 ACTS

By an act is meant, in law, any event which is subject to the control of human will. Every act is made up of three distinct factors.

1. Its origin in some mental or bodily activity or passivity of the doer.
2. Its circumstances
3. Its consequence

Not all circumstances and consequences are relevant to the question of liability. Out of the infinite array of circumstances and the endless chain of consequences the law selects some few as material (i.e. as constituent parts of the wrongful act,) others are rejected for being without legal significance. It is for the law, as its own good pleasure, to select and define the relevant and material facts in each particular species of wrong. In theft the hour of the day is irrelevant, in burglary it is material. It may be suggested that the only consequences which form part of an act are those which are direct and immediate. Salmond, however, observes that any such distinction between direct and indirect, proximate and remote consequences is nothing more than an indeterminate difference of degree, and cannot be made the basis of any logical distinction. There is no logical distinction between the act of killing a man and the act of doing anything which results in his death.

15.6 CLASSIFICATION OF ACTS

1. Positive and Negative Acts
2. Voluntary and involuntary Acts

3. Internal and external Acts
4. Intentional and unintentional acts.

1. Positive and Negative acts: the former are acts of commission, the latter are acts of omission. A wrongdoer either does that which he ought not to do, or leaves undone that which he ought to do.

2. Voluntary and involuntary acts: If the act is a willed act, it is called a voluntary act but if the act is not a willed act, it is an involuntary act. The penal liability is only for voluntary acts. The most important distinction for legal purposes is that between voluntary and involuntary acts. Examples of involuntary acts are:

- i) activities outside normal human control (the beating of one's heart)
- ii) automatic reflexes, such as sneezes and twitches, which though normally spontaneous, can sometimes with difficulty be controlled.
- iii) acts performed by persons suffering from some abnormal condition (acts done in sleep).

It would be unjust and unreasonable that he should be penalised for them. Voluntary act is divisible into:

- i) willed muscular contraction
- ii) its circumstances; and
- iii) its consequences

Therefore an involuntary act is regarded as one where the muscular contraction is not willed.

This theory creates more difficulties than it solves. The theory is utterly inappropriate for the problem of omissions. Negative acts may be either voluntary or involuntary. I may fail to perform an act required by law through forgetfulness or by design. For example, I may just forget to make a return of income to the tax authorities or I may refuse to do so. Alternatively, my failure to carry out my legal duty may result from some condition which prevents me. For example, I may fail to rescue my child from danger because I have fallen asleep. But in neither case is there any question of muscular contractions. We cannot contend that the difference between the two kinds of omission is that muscular contraction was willed in the first case and unwilled in the second case. If I just forget to file a return of income, my omission will not qualify as involuntary because I could have filed a return had I remembered. We may say then that involuntary acts are those where the actor lacks power to control his actions, and involuntary omissions are those where the actor's lack of power to control his actions renders him unable to do the act required.

3) Internal and External Acts: The former are the acts of the mind. While the latter are the acts of the body. To think is an internal act, to speak is an external act. Every external act involves an internal act, but the converse is not true. The term act is sometimes restricted to external acts, but this is inconvenient. A wrongful act may either be act of commission or of omission.

4) Intentional and unintentional acts:

It is intentional when it was foreseen and desired by the doer, unintentional when and, in so far as, it is not the result of any determination of the will towards what actually takes place as the desired issue. Intention is not a necessary condition of legal liability.

15.7 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, however, are of two kinds, being either merely anticipated or actual. In other words, an act may be mischievous in two ways, either in its tendencies or in actual results. Considered in respect of their consequences, wrongful acts are therefore of two kinds.

i) Those which are actionable without proof of actual damage or harm resulting from the act. These are cases in which the act is wrongful by reason of its mischievous tendencies, as recognized by the law, irrespective of the actual loss. The loss, if any, incurred by the plaintiff is relevant to the measure of damages, but not to the existence of the cause of action. Examples of such wrongful acts are trespass, libel, and breach of contract.

ii) Those in which there is no wrong or cause of action without proof of actual damage. The mere dangerous tendency of acts in such cases is not considered as sufficient ground of liability. For example, slander is in general not actionable per se.

Criminal liability usually depends on the tendency of the act, even though the act in issue is in fact harmless. Thus, an unsuccessful attempt is a ground of penal liability, no less than a completed offence. However, there are some exceptional cases in which the law demands proof of actual harm for criminal liability. If by negligent use of firearms, I kill somebody I am criminally liable, but if my negligence results in harm to nobody, I incur no criminal liability.

No general principle can be laid down as to civil liability. In some cases proof of actual damage is required, while in other cases there is no such necessity.

15.8 DAMNUM SINE INJURIA

In legal theory and in fact all wrongs are mischievous acts but all mischievous acts are not wrongs. All damage done is not wrongful. There are cases in which the law will permit a man knowingly and wilfully to inflict harm upon another, and will not hold him accountable for it. Harm of this description, mischief that is not wrongful because it does not fulfil even the material conditions of responsibility, is called *damnum sine injuria*. The term *injuria* is used here in its true sense of an act contrary to law and not in its corrupt sense of harm/damage.

Salmond divided such cases of *damnum sine injuria* into two groups:

- i) Those in which the harm done to the individual is nevertheless a gain to the society at large. For example, competition in trade, extraction of water from one's own land in such a manner as to affect the water resources of neighbour, excavation on one's land in such a manner as to withdraw the support required by the buildings on the adjoining land etc. These things are harmful to individuals, but it is held to serve public interest to allow a man, with wide limits, to do as he pleases with his own.
- ii) Those cases in which, although a real harm is done to the community, yet, owing to its triviality, or to the difficulty of proof, or to any other reason, it is considered inexpedient to attempt its prevention by the law. The mischief is of such a nature that the legal remedy would be worse than the disease.

15.9 THE PLACE AND TIME OF ACT

Place of the Act : In consequence of the territorial limits of the jurisdiction of the courts, it is material to determine the place in which the act is done. There are two cases in which there is some difficulty in the matter.

- i) Where the act is done partly in one place and partly in another. There are three possible ways to determine where an act is done. It may be said that:
 - a) the act is committed in both places, or
 - b) solely in that in which it has its commencement, or
 - c) solely in that in which it is completed.

The law is free to choose such one of these three alternatives as it thinks fit in the particular case. In English law, in such cases the locality of the act is deemed to be the place where the act is completed. It has been held that murder is committed in the place in which death occurs, and not in the place in which the act causing the death is done, but the law on these points is not free from doubt. A contract is made in the place where it is completed, i.e., where the offer is accepted or the last necessary signature to the document is fixed. The offence of obtaining goods by false pretences is committed in the place in which the goods are obtained, and not in the place where the false pretence is made.

ii) A negative act, such as omission to pay a debt or to perform a contract, takes place where the corresponding positive act ought to have taken place. An omission to pay a debt occurs in the place where the debt is payable.

Time of the Act: The law may date an act from its commencement, or from its completion, or it may regard it as continuing through both the periods. For most purposes the date of an act is the date of its completion, a negative act is done at the time at which the corresponding positive act ought to have been done. Thus, the date of the non-payment of the debt is the day on which it becomes payable.

15.10 CAUSATION

The law may hold a man liable either for performing acts which are dangerous in tendency or for causing actual damage or injury. In the latter case, liability is imposed on a man for the damage in fact resulting from his act. Normally a man will not be held accountable for damage in no way caused by his own behaviour. Causation then is an important concept in legal theory. However, it is a difficult concept and the common law cases on causation make the problem more difficult. Common law courts readily agreed that questions on causation must be decided on common sense principles rather than on the basis of a particular theory. It was suggested that lawyers should discard inquiries into causation and concentrate rather on the question of liability. Instead of investigating whether the defendant's act was the cause of the plaintiff's injuries, they should inquire whether the defendant ought to be held responsible. And it is said that this type of question can be answered according to policy and without regard to the conceptual difficulties inherent in the notion of cause.

Salmond said that it is hard to see how a question of responsibility can be decided without first deciding questions of causation. For example, if A carelessly drops a lighted match on the floor of B's house and the house is burnt, A should not be held liable if it is found that C had simultaneously been setting fire to another part of the house or that the house had at that very moment been struck by lightning. If A is to be held liable for the damage to B's house, he must first be shown to have caused it. Similar principle applies to the criminal law. For example, if X shoots at Y and Y falls dead, we should not convict X, despite his wrongful intention, for the murder of Y if we found that the death had been caused by a shot fired from some other gun or by a sudden heart attack occurring before the shot was fired.

Thus, in criminal and civil cases responsibility often depends on causation. In civil law a man could be held liable to another whenever he is careless and regardless of whether he has caused damage to him or not. In criminal law a man could be held equally guilty whether he has succeeded or not in his intentions. But this is not the position adopted by the common law.

The legal concept of causation is often said to be based on the common sense notion of cause. Salmond made three observations on this point. First, while this notion plays a considerable part in common speech, common speech itself provides no neat analysis of the

concept. Secondly, the legal concept of causation, though based on the ordinary notion, will diverge from it on account of the need for lawyers to provide answers to questions for which common sense has no solution. Thirdly, a distinction must be drawn between explanatory and attributive inquiries both of which are involved in causal investigations.

Salmond said that the law courts often have to engage in both kinds of investigation. First evidence may have to be heard to establish how the accident happened. Then in the light of its findings of fact, the court may have to decide whether the defendant's act or omission should be regarded as the cause of the plaintiff's damage or the victim's injury. And it is this second sort of question which constitutes the legal question about causation. It involves the problem of defining what counts as a cause for legal purposes.

15.11 MENS REA

Salmond observed that the general conditions of penal liability are indicated with sufficient accuracy in the legal maxim 'actus non facit reum nisi mens sit rea' which means the act alone does not amount to guilt, it must be accompanied by a guilty mind. Thus penal liability arises out of the two essential elements: 1. Actus or Act and 2. Mens rea or mental element, guilty mind.

A man is legally responsible for his conduct not for his acts in themselves but for his acts coupled with means rea or guilty mind with which he does them. Very often, penal codes define offences not just with reference to wrongful results that an act produces but also make an element of guilty mind a necessary constituent element of crime. The laws employ terms like 'bad faith', 'malafide' 'intention' 'motive' 'fore knowledge' 'negligently' 'fraudulently' etc., to indicate the mental element required for the commission of a crime or tort. For instance killing a man becomes murder if it is done with 'intent' to kill or with the 'fore-knowledge' that the death will follow. Similarly, malicious prosecution is a tort with a constituent mental element of malice. On the other hand, a surgeon who performs an operation in good faith is not guilty of murder if the patient dies. This is so even if the surgeon expects the patient to die. Again a person is not guilty of murder if his conduct leads to the death of another if it is due to an accident. An accident is the antithesis of intention.

Salmond observes that mens rea may consist of wrongful intention as well as culpable negligence. A person may do the wrongful act intentionally or carelessly but he is liable for both. As a rule, a man is not liable for his acts if he has not done them either intentionally or negligently. The principal exception to this rule is the wrong of strict liability. Thus, there are three different kinds of wrongs.

1. Intentional or wilful wrongs
2. Wrongs of negligence and
3. Wrongs of strict liability

It must however be stated that the application of the test of mens rea is not uniformly inflexible. The exact degree of subjective guilt required varies in different offences. For instance, in bigamy it is a valid defence that the accused honestly thought that his or her spouse was dead (R v. Tolson). But in the case of abducting a girl under the age of sixteen, the honest belief that the girl was over sixteen was no defence (R v. Prince).

In some crimes, the test of mens rea is objective and not subjective. The court can draw the inference of guilty mind from the conduct itself. For instance rape cannot be committed accidentally or negligently. A man cannot stab another in his chest and still say he intended only to cause injury. The law also expects a man of ordinary prudence to know the consequences of his act.

There is an increasing number of crimes where mens rea is not required. As Paton observes, the growing tendency to use the sanctions of the criminal law as means of a social regulation has led to the creation of new offences, the penalty for the breach of which is slight and involves no moral stigma. Violations of traffic laws and food adulteration laws are good examples of this new trend. One effect of this kind of legislation would be to shift the burden of proof from the prosecution to the defendant and to presume guilt unless the accused can prove his innocence.

It is evident from the foregoing discussion that a crime is complete only when the two constituent elements of actus and mens rea are present. It must, however, be pointed out that more often than thought only 'a lip service' is paid to this rule in actual practice. The ignorance of law is no excuse and the man may be held guilty in spite of lack of mens rea. Again noblest of the motives do not render a crime an innocent act particularly where the act bears the stamp of guilt on its face. Often, guilty mind is presumed from circumstantial evidence.

15.12 INTENTION

Intention is defined by Salmond as the purpose or design with which an act is done. It is the foreknowledge of the act coupled with the desire of it, such knowledge and desire being the cause of the act, in as much as they fulfil themselves through the operation of the will.

Kenny has also stated that the intention is used to denote the state of mind of a man who not only foresees but also wills the possible consequences of his conduct.

To take an example, if A throws B from a high tower or cuts off his head, it would appear plain that he both foresees the victim's death and also desires it. The desire and the foresight will also be the same if a person knowingly leaves a helpless invalid or infant without nourishment or other necessary support until death supervenes. It may be noted that there cannot be intention unless there is also foresight. Thus it has been stated that intention may not possibly exist without foresight, whereas foresight may exist even without intention.

An act is intentional if and so far as it exists in idea before it exists in fact. Holmes says that there are two elements of intention: foresight that certain consequences will follow from an act; and a desire or the wish for those consequences working as a motive which includes the act.

15.13 MOTIVE

Intention must be distinguished from other similar terms. Intention must be carefully distinguished from motive. Very few acts are done for their own sake. Almost every act has both an intention and a motive behind it. A person who does an act, especially a wrongful act, has almost invariably some ulterior object which he desires to fulfil by means of it. If a thief robs a person, his immediate intention is, of course, to deprive that person of his belongings, but the thief would have no interest in robbing a person merely for the sake of depriving that person of what belongs to him. His ulterior object is to enrich himself by so much. This object is his motive. Nobody intends to harm or injure another person merely for the sake of doing him harm or injury. He does so because his motive is to derive directly or indirectly some benefit out of doing so. This ulterior intent, as distinguished from the immediate, is called the motive of the act. The result is that I desire to bring about by doing an act is my intention, the purpose for which I desire to bring about that result is my motive. In short, the intent of a wrongdoer is divisible into two portions which may be distinguished as immediate and ulterior. The former relates to the wrongful act itself. It is the purpose to commit the wrong. The ulterior intent, called motive, is the purpose in committing the crime. A person's ulterior intent may be complex instead of simple, one may act from two or more concurrent motives instead of from one only. One may institute a prosecution partly from a desire to seek justice but partly also from the ill-will towards the defendant.

The average man would find no difficulty in distinguishing between intention and motive but it is not easy to discover a precise criterion. But literally speaking motive is that which moves a person to a course of conduct. Salmond treated motive as the 'ulterior intention' distinct from 'immediate intention'. Motive is not usually essential to liability.

Though intention and motive are very close to each other, they are not the same. Motive is called the ulterior intent. It is seldom a man commits a wrongful act for his own sake. The wrongdoer has some end in his mind, which he tries to achieve through his wrongful act.

For example, if A fires upon B, his intention is to kill B. A intended to kill him due to the reason that B was a contestant against A in an election, and he is likely to win it. A intended to kill him for ensuring his success by removing B from the election field. The idea of removing B from an election field is motive of A for doing the wrongful act.

15.14 MALICE

Sometimes malice is also used in law to indicate a similar meaning. It denotes various things. Sometimes it is used to indicate a wrongful intention, and sometimes it means motive.

Paton says that malice is the most unfortunate term in English law. In a narrow and popular sense the term 'malice' means ill-will, spite or malevolence; but its legal signification is much wider. The latin 'malitia' means badness, physical or moral wickedness in disposition or in conduct - not specifically or exclusively ill-will or malevolence, hence the malice of English law, includes all forms of evil purpose, design, intent or motive.

15.15 RELEVANCE AND IRRELEVANCE OF MOTIVE

Though most of the wrongful acts are done with a motive, it is not very relevant in determining the liability. It is the immediate intent (intention or negligence) that is material in the determination of the liability. With some exceptions, a man's motive is irrelevant in determining his liability.

An act which is not unlawful otherwise will not become so because it was done with a bad motive. In the same way an act which is unlawful would remain the same although it might have been done with a good motive. For example, If a person has stolen a single rupee from the pocket of a man, the law will not exonerate him from the liability although he stole it to purchase milk for his newly born baby whose mother is dead.

Motive is relevant in the following cases:

i) Where motive is the evidence of the evil intent: Though the proof of the existence of motive is not necessary for a conviction, where it is proved as an evidence of the evil intent, it is relevant in showing that the person who had a motive to commit the offence, actually committed it. Under Section 8 of the Evidence Act, any fact is relevant which shows or constituted a motive or preparation for any fact in issue or relevant fact....

ii) Criminal attempts: Motive is relevant in cases of criminal attempts also. Attempt is an act done with intent to commit the offence so attempted. A person is liable for his criminal attempts as they show the existence of motive or ulterior intent and thus motive becomes relevant.

iii) Cases in which the intent is a part or ingredient of the offence: In most of the offences a particular intent forms part of the definition of the offence. For example, theft consists of 'intending to take dishonestly any movable property out of the possession of any person without that person's consent and moving that property in order to such taking' In such cases, the ulterior intent is the source, in whole or in part; of the mischievous tendency of the act, and is, therefore, material in law.

iv) In cases of jus necessitatis:- Where an act has been done under necessity, the motive is the all material consideration, and it operates as the ground of excuse. Where one is to make an option between two acts, both of them causing harm, the act which is to cause lesser harm should be opted without minding the letter of law. It would be lawful in an emergency to imperil one or two lives in order to save a score of lives.

Under Section 81 of IPC, nothing is an offence merely by reason of its being done with the knowledge that it is likely to cause harm, if it be done without any criminal intention to cause harm, and in good faith for the purpose of preventing or avoiding other harm to person and property.

v) Motive is taken into consideration in determining the punishment:- Though a good motive is no defence against conviction it is considered in determining the sentence, and if a good motive is there a lighter punishment is awarded.

vi) Bad motive can certainly weaken a particular defence: such as a qualified privilege and fair comment in defamation.

15.16 JUS NECESSITATIS

‘Necessitatis non habet legem’ which means necessity knows no law is a well known maxim of the law. An act which is necessary is not wrongful, even though done with full and deliberate intention. A person may be compelled to do an unlawful act under coercive pressure. Though in one sense the act is done intentionally it is not possible to attribute mens rea to the doer of the act. For example it would be lawful in an emergency to damage the property of another to save the life. The common illustration of jus necessitatis where punishment would be ineffective is the case of two shipwrecked sailors, A and B, were drowning, they catch hold of a plank not large enough to hold both of them, and for self preservation A pushed B into the water, A cannot be held guilty of a crime.

Another familiar case of necessity is R.V. Dudley V. Stephens(1834) wherein two sailors and a boy were adrift on the open sea on small boat without food. After starving for nine days, the sailors were driven to chose between death by starvation on the one side and murder and cannibalism on the other. They killed and ate flesh of the boy for their own self-preservation. They were subsequently rescued and were prosecuted for killing the boy. They pleaded jus necessitatis as a defence and relied on Bacon’s illustration of the two shipwrecked sailors. However, they were held to be guilty of murder. Lord Coleridge said: “To preserve one’s life is generally speaking, a duty, but it may be the plainest and the highest duty to sacrifice it.” In this case normal punishment of death sentence for homicide was not awarded. Thus jus necessitatis is a relevant factor in determining the punishment, though it may not be an absolute defence to liability.

15.17 SUMMARY

A liability is the correlative of a legal remedy. Liability is the vinculum juris that exists between the wrongdoer and the remedy of the wrong. Liability may be either civil or criminal and may be either remedial or penal. The theory of remedial liability is that, whenever the law creates a duty, it should enforce the specific fulfilment of it. To this general principle there are

three exceptions: duties of imperfect obligation, where the duty violated is in its nature incapable of specific enforcement, and where the specific enforcement of a duty is inexpedient.

Where the law finds it impossible or inexpedient to enforce a duty specifically, it fulfills its purpose by inflicting punishment on the wrongdoer. The liability of a wrongdoer in such a case is penal liability. The general conditions of penal liability are indicated with sufficient accuracy in the maxim, “actus non facit reum, nisi mens sit rea” – the act alone does not amount to guilt; it must be accompanied by a guilty mind.

Act is the basis of liability in crime and tort. Salmond defined an act as any event which is subject to the control of the human will. Acts are classified into four kinds: positive and negative acts, voluntary and involuntary acts, internal and external acts, intentional and unintentional acts. It is often material to determine the place and time of an act.

Salmond observes that there are three different kinds of wrongs: intentional wrongs, wrongs of negligence and wrongs of strict liability.

Intention is defined by Salmond as the purpose or design with which an act is done. Intention must be distinguished from motive. Motive is called the ulterior intent. Motive is irrelevant in the determination of the liability. However, there are some exceptions to this general rule. Motive is relevant in the following cases: where motive is the evidence of the evil intent; criminal attempts; cases in which the intent is a part of the offence; in cases of jus necessitatis; in determining the punishment; in weakening a particular defence.

15.18 SELF ASSESSMENT QUESTIONS

1. Explain the nature and kinds of liability.
2. Discuss ‘mens rea’ as an essential condition of penal liability.
3. Distinguish between intention and motive.
4. Discuss the relevance and irrelevance of motive in the determination of the liability.

15.19 FURTHER READING

P.J.Fitzgerald (ed), Salmond on Jurisprudence, Sweet & Maxwell, London
G.W.Paton, A Text Book of Jurisprudence, Clarendon Press, Oxford.

UNIT – XVI LIABILITY (CONTD.)

Objectives

After reading this unit you should be able to

- Discuss the two theories of negligence
- Explain the rational basis of vicarious liability
- Discuss the theory of strict liability
- Explain measures of civil and criminal liability

Structure

- 16.1 Negligence
- 16.2 The duty of care
- 16.3 The Standard of care
- 16.4 Theories of Negligence
- 16.5 Theory of Strict liability
- 16.6 Mistake of Law
- 16.7 Mistake of fact
- 16.8 Accident
- 16.9 Vicarious liability
- 16.10 The measure of criminal liability
- 16.11 The measure of civil liability
- 16.12 Summary
- 16.13 Self Assessment Questions
- 16.14 Further readings

16.1 NEGLIGENCE

Negligence is the second form of mens rea. Negligence is defined as the absence of such care as it was the duty of the defendant to use. Negligence is of two kinds. Advertent Negligence and Inadvertent Negligence.

Advertent Negligence is called wilful negligence or recklessness also. In this type of negligence the harm done is foreseen as possible or probable, but it is not willed, eg. a person who drives furiously in a crowded street and causes injury or harm to persons commits it by advertent negligence. The negligence which is a result of ignorance, thoughtlessness or forgetfulness is called inadvertent negligence. In this type of negligence, the harm caused is

neither foreseen nor wilful, eg. a doctor who treats a patient improperly through negligence or forgetfulness is guilty of inadvertent negligence.

Negligence is culpable carelessness. What then is meant by carelessness? It is clear that it excludes wrongful intention. Intention and negligence are two contrasted and mutually inconsistent mental attitudes of a person towards his acts and their consequences. If the consequences were not intended, they have been due to carelessness.

Negligence is failure to use sufficient care, and this failure may result from a variety of factors. A) Negligent motorist may be careless in several different ways. Through inadvertence he may fail to notice what is happening and also the probable consequences of his conduct. Through miscalculation he may misjudge the speed and the conditions of the road. He may drive carelessly due to poor vision or lack of driving skill. He may know the risks involved but decide to face them. This latter type of negligence differs from the others in that the actor foresees the consequences but does not care them. This type of state of mind is known as recklessness. Recklessness is classed with intention for legal purposes.

16.2 THE DUTY OF CARE

Carelessness is not culpable, or a ground of legal liability, except in those cases in which the law has imposed a duty of carefulness. As the negligence is the omission to take such care as under the circumstances it is the legal duty of a person to take, where there is no such duty there can be no negligence. No general principle can be laid down with regard to the existence of legal duty of carefulness. This is a matter pertaining to the details of the concrete legal system. In different legal systems different duties are imposed upon individuals. In Criminal law generally speaking crimes are wilful wrongs, liability for negligence is quite exceptional eg. negligent homicide is a criminal offence. Negligence as an alternative form of mens rea is deemed to be insufficient for the rigour of criminal justice. In civil law, no such distinction is commonly drawn between the two forms of mens rea i.e., the intention and negligence. Whenever an act would be a civil wrong if done intentionally, it is also a civil wrong if done negligently. When there is a legal duty not to do a thing on purpose, there is commonly a legal duty to take care and not to do it accidentally. To this rule, however, there are certain exceptions - instances in which wrongful intent, or at least recklessness, is the necessary basis even of civil liability. In these cases a person is civilly responsible for doing harm wilfully, but is not bound to take any care not to do it. For example, one must not deceive another by any wilful or recklessness falsehood, but unless there are special circumstances giving rise to a duty of care, he is not answerable for false statements which he honestly believes to be true, however, negligent he may be in making them.

16.3 THE STANDARD OF CARE

Carelessness may exist in different degrees, and in this respect it differs from intention. Intention either exists or it does not, there can be no question of the degree in which it is present.

The degree of carelessness varies directly with the risk to which other persons are exposed by the act in question. The risk depends on two things: first, the magnitude of the threatened evil, and second, the probability of the evil. The greater the evil is, and the nearer it is, the greater is the carelessness of the person who created the danger. Therefore, carelessness varies in degree.

The standard of care which the law requires from a person is the care of a 'reasonable man' or of an ordinary prudent man. It has been said that "negligence is the omitting to do something or the doing something which a reasonable man would not do." In determining the standard to be required, there are two chief matters for consideration. The first is the magnitude of the risk to which other persons are exposed, the second is the importance of the object to be attained by the dangerous form of activity. The reasonableness of any conduct will depend upon the proportion between these two elements. Reasonableness does not mean uniform standard in every case, but it varies according to the nature of the act. For example, the standard of care for a doctor is what a reasonable doctor would do, and if he does not take care of the standard, he is guilty of negligence. Similarly, the standard of care required from a driver is what a reasonable driver would do. If a person practices a particular profession without having the competence and skill of that profession and causes harm, he is guilty of negligence. Thus the standard of care is the care that is expected from a reasonable or prudent man, and a person who does not keep this degree of care is guilty of negligence.

16.4 THEORIES OF NEGLIGENCE

There is controversy as to whether negligence is a state of mind or a course of conduct. Thus, there are two theories of negligence - Subjective and Objective.

Subjective Theory

According to Austin, want of advertence, which one's duty would naturally suggest is the fundamental or radical idea in the conception of negligence. Thus negligence results from inadvertence or failure to apply one's mind to the nature and consequences of one's wrongful act. In this sense, the negligent act is the opposite of an intentional act.

Austin's view has been criticized that negligence may be inadvertent or wilful. One may cause harm, not necessarily by intending it but because of thoughtlessness towards the consequences of the dangerous act or because of a foolish assumption that the evil consequences will not follow. This is inadvertent negligence. This is what Austin meant and is the commonest form of negligence. But there is another form of negligence where there is no thoughtlessness or inadvertence. If a person drives a car at a greater speed in a crowded street, he may be fully conscious of the risk involved and the danger to which others are exposed, but yet if harm results to somebody it cannot be said that he intended it, he may not be guilty of murder but only negligent homicide.

According to Salmond, negligence is the mental attitude of undue indifference with respect to one's conduct and its consequences. A careless person is one who does not care.

Though negligence is not the something as thoughtlessness or inadvertence, it is basically an attitude of indifference. As Salmond points out the essence of negligence is not inadvertence which may or may not be due to carelessness, but carelessness which may or may not result in advertence.

Acts are sometimes classified into intentional and negligent acts. An intentional act is one whose consequences are foreseen and desired by the doer. Not doing something intentionally is called forbearance. So, forbearance is intentional negative act. Omission, on the other hand, is not doing something without applying the mind to it. Hence, omission is unintentional negative act, while forbearance is also a product of intention, omission is the outcome of negligence. If intention is a state of mind, the absence of intention or negligence is also a state of mind.

The merit contained in the subjective theory is that in certain situations any conclusion as to whether a man had been negligent will depend partly on his state of mind. In criminal law a sharp distinction is drawn between intentionally causing harm and negligently causing harm, and in deciding whether the accused is guilty of either, one must have regard to his knowledge, aims, motives and so on. Cases of apparent negligence may, upon examination of the party's state of mind, turn out to be cases of wrongful intention. A trap door may be left unbolted in order that one's enemy may fall through it and so die. Poison may be left unlabelled, with intent that some one may drink it by mistake. A ship's captain may wilfully cast away his ship by the neglect of the ordinary rules of good seamanship. A father who neglects to provide medicine for his sick child may be guilty of wilful murder, rather than a mere negligence. In none of these cases, can we distinguish between intentional and negligent wrongdoing, except by looking into the mind of the offender and observing his subjective attitude towards his act and its consequences. Externally and objectively, the two classes of offences are indistinguishable.

The subjective theory then has the merit of making clear the distinction between intention and negligence. The wilful wrongdoer desires the harmful consequences. The negligent wrongdoer does not desire the harmful consequences. The wilful wrongdoer is liable because he desires to do the harm, the negligent wrongdoer may be liable because he does not sufficiently desire to avoid it.

Objective Theory:

According to some jurists, negligence is not a state of mind but a particular kind of conduct. In this view, negligence is due to failure to take reasonable precautions.

According to Clark and Lindsell, negligence consists in the omission to take such care as under the circumstances it is the legal duty of a person to take.

According to Pollock, negligence is the opposite of deligence and no one describes deligence as a state of mind.

According to objective theory, negligence is not a subjective but an objective fact. It is not a particular state of mind or form of mens rea at all, but a particular kind of conduct. Negligence is a breach of the duty of taking care. To take care means take precautions against harmful results of one's actions. Negligence consists in pursuing a course of conduct that an ordinary prudent man would not. To drive at night without light is negligence because carrying light is an act of a prudent man. To take care, therefore, is no more a mental attitude or state of mind.

This view (objective theory) receives strong support from the law of torts where it is clearly settled that negligence means a failure to come up to the objective standard of the conduct of a reasonable man.

Salmond criticized the objective theory on the following grounds:

- i) Total identification of negligence with failure to take care is the product of incomplete analysis.
- ii) Failure to take care need not always be due to negligence. Failure to take precautions may be accidental or wilful.
- iii) By merely looking at the conduct of a man, it is not possible to assert whether the lack of care is negligent, intentional or accidental.
- iv) One can identify of the negligent act only by looking into the mental attitude of the man that produced the conduct in question.

Reconciliation of the two theories:

Glanville Williams attempts to reconcile both the theories by saying that the term negligence has two meanings and each of the two theories represents one of them. Negligence may be contrasted with intention on the one hand and inevitable accident on the other. As contrasted with intention, negligence is subjective (a state of mind). Poison may be left unlabelled with an intention that some one may drink it and die. It is difficult to distinguish in this case whether the act is intentional or negligent unless we peep into the offender's mind. Leaving the poison like that may be due to accident.

As contrasted with inevitable accident, negligence is a particular type of conduct. If the question is whether the defendant caused the harm without any fault on his part or by his unintentional fault, it can be answered only by looking into whether his conduct came up to the standard of a reasonable man.

Hence, it may be said that the subjective and objective theories operate in different fact situations and would be erroneous to postulate any intrinsic conflict between them.

16.5 THEORY OF STRICT LIABILITY

The requirement of fault is generally through out the civil and criminal law, but there are numerous exceptions to the rule. The acts for which a man is responsible irrespective of the existence of either wrongful intent or negligence are described by the name of wrongs of strict liability. In criminal law, they are the exceptions to the rule ‘actus non facit reum nisi mens sit rea’. A man will be punished for committing these wrongs even if he had not a guilty mind. The law will not inquire whether he did them intentionally, negligently or innocently; it will presume the presence of the formal conditions of liability. The considerations on which the concept of ‘strict liability’ is based are numerous, but the most important of them is the evidential difficulty involved in procuring adequate proof of intention or negligence. Salmond observes whenever the strict doctrine of mens rea would too seriously interfere with the administration of justice by reason of the evidential difficulties involved in it, the law tends to establish a form of strict liability. The chief instances of strict liability fall into three classes: Mistake of law, Mistake of Fact and Accident.

16.6 MISTAKE OF LAW

The maxim ‘ignorantia juris neminem excusat’ is recognized by almost every legal system. It means ignorance of law is no excuse. If a person has committed a wrong, the law will not permit him to say that he had no guilty mind and that but for his ignorance of law he would not have done it. The reasons for this rule, Salmond observes, are three in number:

i) The law is in legal theory definite and knowable, and it is the duty of every man to know that part of it which concerned him, therefore innocent and inevitable ignorance of the law is impossible. There is a conclusive presumption that every one knows the law of the land.

ii) Even if ignorance of the law is in fact possible, the evidential difficulties in ignorance are inseparable. Who can say of any man whether he knew the law, or whether during the course of his past life he had an opportunity of acquiring a knowledge of it by the exercise of due diligence?

iii) The law is in most instances derived from and in harmony with the rules of natural justice. A person committing a wrong may not be aware that he is breaking the law, but he knows very well that he is violating a rule of right. He has little ground of complaint, therefore, if the law refuses to recognize his ignorance as an excuse.

While each of these considerations is value and weighty, they do not afford a sufficient justification for the stringent and rigorous application of the doctrine. That the law is knowable throughout by all whom it concerns is an ideal rather than a fact. That it is impossible to distinguish invincible from negligent ignorance of the law is by no means wholly true. That the law is based on principles of natural justice is in many instances far from the truth.

16.7 MISTAKE OF FACT

A distinction between law and fact, viz. that while ignorance of the law is no excuse at all, inevitable ignorance of fact is a good defence, has come down from the Roman law. In English law, mistake of fact is an excuse only in criminal law, while in civil law liability is commonly absolute in this respect.

So far as civil liability is concerned, it is a general principle of English law that he who intentionally interferes with the person, property, reputation, or other rightful interest 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 his act. If, intending to arrest A, I arrest B by mistake instead, I am absolutely liable to him, notwithstanding the greatest care taken by me to ascertain his identity. If I trespass upon another man's land, it is no defence to me that I believed it on reasonable grounds and in good faith to be my own.

In the criminal law, the contrast between mistake of law and mistake of fact finds its true application. Absolute criminal liability for a mistake of fact is quite exceptional. If a woman marries during the life time of her husband, but believing him to be dead, she does not wilfully commit the crime of bigamy, for one of the material circumstances lies outside her intention. On the other hand, where a man kidnaps a girl under the legal age of consent, he is liable for it. Inevitable mistake as to her age is no defence, he must take the risk.

16.8 ACCIDENT

Inevitable accident is commonly recognized as a ground of exemption from liability both in the civil law and in the criminal law. It is necessary to distinguish accurately between accident and mistake, for they are related. An act which is not done intentionally is done either accidentally or by mistake. It is done accidentally, when it is unintentional in respect of its consequences. It is done by mistake, when it is intentional in respect of its consequences, but unintentional in respect of some material circumstance. If I drive over a man in the dark, because I do not know that he is in the road, I injure him accidentally. But if I procure his arrest, because I mistake him for some one who is liable to arrest, I injure him not accidentally but by mistake.

Accident, like mistake, is either culpable or inevitable when the avoidance of it would have required a degree of care exceeding the standard demanded by the law. As Salmond observes, culpable accident is no defence, save in those exceptional cases in which wrongful intent is the exclusive and necessary ground of liability. On the other hand, inevitable accident is a good defence, both in the civil law and in the criminal law.

To this rule, however, Salmond observes there are, at least in the civil law, important exceptions. These are cases in which the law insists that a man shall act at his peril, and shall take his chance of accidents happening. If he desires to keep wild beasts, or to light fire, or to

construct a reservoir of water, or to accumulate upon his land any substance which will do damage to his neighbours if it escapes, or to erect dangerous structures by which passengers in the highway may come to harm, he will do all these things suo pericule (though none of them are per se wrongful), and will answer for all ensuing damage, notwithstanding consummate care.

There is one case of absolute liability for accident which deserves special notice by reason of its historical origin. Every man is absolutely responsible for the trespass of his cattle. If my house or my cow escapes from my land to that of another man, I am answerable for it without any proof of negligence. Such a rule may probably be justified as based on a reasonable presumption of law that all such trespasses are the outcome of negligent keeping.

16.9 VICARIOUS LIABILITY

Normally and naturally the person who is liable for a wrong is he who does it. When a person is made liable for the acts of another, it is an instance of vicarious liability. In primitive societies it was nothing extraordinary to make a man answerable not only for his own deeds but also for the deeds of his kinsmen. Even Bible speaks of the sins of the fathers visiting their children.

The principle of vicarious liability is almost foreign to the present day notions of justice. At present criminal responsibility is never vicarious except in very few special circumstances. It is said that vicarious liability is unknown to criminal law. Modern civil law, however, recognises vicarious liability in two chief classes of cases.

- i) Masters are liable for the acts of their servants, done in the course of their employment.
- ii) Living representatives are liable for the acts of deadmen whom they represent.

Master's Liability for the Acts of his servants:

The rule has its origin in the legal presumption that all acts done by a servant in and about his master's business are done by the master's express or implied authority, and are, therefore, in truth the acts of the master for which he may be justly held responsible.

This legal presumption has now been replaced by the legal principle that master will be held absolutely liable for such acts, and will not be allowed to say that his servant committed such acts without his authority or notwithstanding his express orders to the contrary. According to Salmond, the rational basis of this form of vicarious liability is two fold.

- i) In the first place, it would be very difficult to prove actual authority, and very easy to disprove it, in all cases. There are such immense difficulties in the way of proving actual authority that it is necessary to establish a conclusive presumption of it. A word, a gesture, or a tone may be a sufficient indication from a master to his servant that some lapse from the legal standard of care or honesty will be deemed acceptable service. Yet who could prove such a

measure of complicity? Who could establish liability in such a case, were evidence of authority required, or evidence of the want of it admitted.

ii) In the second place, masters usually are, while their servants are not, financially capable of the burden of civil liability. It is felt, probably with justice, that a man who is able to make compensation for the hurtful results of his activities should not be enabled to escape from the duty of doing so by delegating the exercise of these activities to servants or agents from whom no redress can be obtained.

Liability of Living representatives for the acts of deadmen.

The common law maxim was ‘*actio personalis moritur cum personam*’ which means a personal cause of action dies with the person. A man cannot be punished in his grave. It was held, therefore, that all actions for penal redress, being in their true nature instruments of punishment, must be brought against the living offender and must die with him. This old rule has been in great part abrogated by statutory provisions. Two reasons have been advanced for this departure.

i) Penal redress, being the nature of compensation, is a valuable right of the person wronged; and it is expedient that such rights should be held upon a secure tenure, and should not be subject to extinction by the death of the offender. There is no sufficient reason for drawing any distinction in point of survival between the right of a creditor to recover his debt and the right of a man who has been injured by assault or defamation to recover compensation for the loss so suffered by him. In short, according to the modern opinion the liability once originated creates a valuable right in the person wronged.

ii) It is not strictly true that a man cannot be punished after his death. Punishment is effective not at the time it is inflicted, but at the time it is threatened. A threat of evil to be inflicted upon a man’s descendants at the expense of his estate will undoubtedly exercise a certain deterrent influence upon him.

According to the common law an action for penal redress died with the person wronged. The rule has been abrogated by statute in part only. There can, however, be little doubt that in all ordinary cases, if it is right to punish a person at all, his liability should not cease simply by reason of the death of him against whom the offence was committed. The right of the person to receive redress should descend to his representatives like any other proprietary interest.

Criminal responsibilities die with the wrongdoer himself. As regards civil responsibilities it is recognised that the right of succession is merely the right to acquire the dead man’s estate subject to all charges which may justly be imposed upon it.

16.10 THE MEASURE OF CRIMINAL LIABILITY

In modern times, the principle is that all the offences do not involve equal guilt on the part of the wrongdoer and all the offenders are not of equal guilt for the same offence. Different offences have different punishments. If the punishment is same for assault and murder, a person who intends to cause injury to his enemy would prefer to cause his death.

In the administration of criminal justice, the judge is left with ample discretion in awarding punishments. The law has generally fixed the maximum punishment that can be awarded in a particular offence and the judge awards the punishment within this limit taking into consideration the nature of the guilt, character of the offender etc.

In determining the measure of liability for criminal offences, the law directs its attention mainly to the deterrent efficacy of punishment. From this point of view there are three elements in every crime to be taken into account. They are:

1. The motive of the offence
2. The magnitude of the offence
3. The character of the offender.

1. The Motive of the Offence:

Other things being equal, the greater the temptation to commit a crime, the greater should be the punishment. This principle is subject to a reservation that in many cases extreme temptation is a ground of extenuation rather than of increased severity of punishment; eg. where a person is driven to the wrongful act not by the strength of bad disposition, but by that of his social or sympathetic impulses, or when he injures another in retaliation for some intolerable insult.

2. The Magnitude of the Offence:

Other things being equal, the greater the offence, that is to say, the greater the sum of its evil consequences or tendencies, the greater should be its punishment. For this the reason is two fold. It is profitable that the measure of prevention should increase with the magnitude of the offence. If the punishment varies with the magnitude of the offence, then, in those cases in which different offences offer themselves as alternatives to the offender, an inducement is thereby given for the offence of the least serious.

3. The Character of the Offender:

The last factor that is taken into consideration is the character of the offender. The worse the character or disposition of the offender, the more severe the punishment he deserves. If a man's emotional constitution is such that normal temptation acts upon him with abnormal force, it is for the law to supply in double measure the counteractive of penal discipline.

Any fact, which indicates depravity of disposition, is a circumstance of aggravation, and calls for a penalty in excess of that which would otherwise be appropriate to the offence. One of the most important of these facts is the repetition of crime by one who has been already

punished. The law rightly imposes upon habitual offenders penalties which bear no relation either to the magnitude or to the profit of the offence. On the same principle wilful offences are punished with greater rigour than those which are due merely to negligence.

Badness of disposition is commonly accompanied by deficiency of sensibility. Punishment must increase as sensibility diminishes. The more depraved the offender, the less he feels the shame of punishment, therefore, the more he must be made to feel the pain of it.

16.11 THE MEASURE OF CIVIL LIABILITY

In measuring civil liability the law attaches more importance to the principle of compensation to that of fault. It is measured exclusively by the magnitude of the offence, that is to say by the amount of loss inflicted by it. It does not take account of the character of the offender, the motives of the offence, or probable or intended consequences. The measure of wrongdoer's liability is not the evil which he meant to do, but that which he has succeeded in doing. Thus, penal redress involves both the compensation of the person injured and the punishment of the wrongdoer. As an instrument of punishment penal redress has merits as well as demerits.

It is true that the law of penal redress, taken by itself falls so far short of the requirements of a rational scheme of punishment that it would by itself be totally insufficient. In all modern and developed bodies of law its operation is supplemented, and its deficiencies made good, by a co-ordinate system of criminal liability.

16.12 SUMMARY

Negligence is the second form of *mens rea*. Salmond observed that negligence is culpable carelessness. Negligence is the state of mind of undue influence towards one's conduct and its consequences. There are two divergent theories of negligence: subjective theory and objective theory. Some writers assert that negligence is a state of mind while others consider it as a type of conduct. Negligence may be of two kinds: advertent and inadvertent. Advertent negligence is generally called as wilful negligence. In inadvertent negligence, the harm is neither foreseen nor willed.

Generally a person is held liable for his negligence which results in harm to others. But there are certain exceptions to this rule. A person may be held liable for his act though he did not do it intentionally or negligently. Such cases are covered under the doctrine of strict liability. Salmond has grouped cases of strict liability under three heads: mistake of law, mistake of fact and accident.

Normally, it is the wrongdoer himself who is held liable for his act. But there may be certain circumstances when a person is made liable for the acts of another. It is an instance of vicarious liability. Modern civil law recognizes vicarious liability in two classes of cases:

master's liability for the acts of his servants; liability of living representatives for the acts of dead men.

The measure of criminal liability is mainly based on three major considerations. They are: the motive for the commission of the offence, the magnitude of the offence, and the character of the offender. In measuring civil liability law attaches more importance to the principle of compensation to that of fault.

16.13 SELF ASSESSMENT QUESTIONS

1. Define negligence and discuss subjective and objective theories of negligence.
2. Write a note on the theory of strict liability.
3. What is vicarious liability? What is the rationale behind it?
4. What are the factors to be taken into account in determining the measure of liability for criminal offences?

16.14 FURTHER READINGS

P.J. Fitzgerald (ed), Salmond on Jurisprudence, Sweet and Maxwell, London
G.W.Paton, A Text Book of Jurisprudence, Clarendon Press, Oxford.