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JURIPRUDENCE

(Subject Code - LC 0802)

LL.B. – II (Sem. – IV), B.A.LL.B. – IV (Sem. – VIII) and
B. B.A.LL.B. – IV (Sem. – VIII) Pattern – 2017

By

Dr. More Atul Lalasaheb

(Asso. Prof.)
B.Sc. (Hons.), LL.M., Ph.D. (Law), NET (Law)

Associate Professor
New Law College,
Ahmednagar

Ph. D. Guide, Dept. of Law,
Member, BoS, Faculty of Law,
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Pune

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STUDY MATERIAL
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ADEMIC YEAR
2019-20

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Place: Ahmednagar

Date: 26th March 2020

Dr. More Atul Lalasaheb
(Asso. Prof. (Law))

Preface

The course of ***Jurisprudence*** Paper (Subject Code - LC 0802) of LL.B. – II (Sem. – IV), B.A.LL.B. – IV (Sem. – VIII) and B. B.A.LL.B. – IV (Sem. – VIII) Pattern – 2017 is designed on the basis of recommendations of Bar Council of India and UGC, New Delhi. I am glad to reveal that the syllabus of this paper which is framed by Committee of BoS (Faculty of Law), SPPU, Pune, I was a member of that Committee. The syllabus is aims at developing an analytical approach to understand the nature of law and the development of legal system. Jurisprudence seeks to answer fundamental questions about law. The concerns of jurisprudence are an inescapable feature of the law and legal system. Jurisprudence has generous frontiers. It accommodates copious subjects of intellectual enquiry. This course identifies and elucidates several of the major preoccupations of legal theory. This course also create an understanding of basic legal concepts like Rights, Person, Property, Title, Possession, Ownership, Liability, Obligation which are basic to the study of Law.

As it is said that the Jurisprudence it the science and philosophy of law so, it will be advantageous to study the content of this paper in the *Social, Economic and Political* context in which the philosophy of law plays whittle role. I would like to particularly mention about various provisions under the constitution viz., Socialism, Secularism, Unity and Integrity of the Nation, Affirmative Actions in the favour of SCs, STs, OBCs, Minorities and Women, Extension of Right to Know, Dynamic application of Right to Life and Personal Liberty, effective implementation of Directive Principles of State Policy and Fundamental Duties etc, follows the jurisprudential aspects of law. The Apex Court also being observing jurisprudential aspects while laying down important rulings. Hence, under this study material I have discussed most of the relevant and important components which are need to be studied in the respective Modules of the syllabus of this paper.

I would like to suggest to all law students, researcher and readers of this subject that in order to avoid lengthiness of study material I have mentioned only those relevant aspects which needs to be studied in each module, so you should read in detail those aspects from the reference material which I acknowledged at the end leaf of this study material. Really I appreciate the great work done by those authors in this subject.

I hope this study material will be useful to you, I will be happy to accept any relevant suggestions to improve the contents of this study material.

Dr. More Atul Lalasaheb
(Asso. Prof. (Law))

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MODULE - 01
INTRODUCTION TO JURISPRUDENCE

Nature and scope of jurisprudence

Salmond

Jurisprudence deals with those relations of the man society, which are regulated by law.

Jurisprudence is the name given to a certain types of investigation in to law, an investigation of an abstract general and theoretical nature, which seeks to lay bare the essential principles of law and legal system.

Jurisprudence broadly speaking is normative evaluation of basic legal values and ideals, which impart validity and recognition to a legal system. It is a conceptual analysis of theory of law correlated to socio-political goals of a society. Which provide explanation, justification and meaning to the totality of legal system.

In general sense jurisprudence include the whole body of legal doctrine.

When we breakdown the word jurisprudence into its Latin components, we find that it is made up of two Latin words **Juris** means legal and **Prudential** means knowledge. Therefore jurisprudence means **legal knowledge**.

***Difference between jurisprudence and legal subject –**

Point of Difference	Jurisprudence	Legal Subjects
Source/Origin	Jurisprudence does not constitute a set of rules, is not derived from authority and is without practical application	Legal subject (e.g. Contract and Tort etc) consists of a set of rules and principals, derived from authoritative source and applied to factual situation in order to solve practical problem.
Method of Study	The method of inquiry apt for jurisprudence will not necessarily be one used in study of ordinary legal subject we look for the rule relevant to a given situation e.g. Crime. This in jurisprudence we ask what it is for a rule to be a legal to be a legal rule, what distinguishes law from morality, etiquette and other related phenomena.	Ordinarily in case of legal subject we look for the rule relevant to a given situation e.g. - Contract binding ness.

Thus jurisprudence comprises philosophy of law therefore it consists of the analysis of legal concept e.g. Right (Tort / Contract).

***Difference between Jurisprudence and Legal Theory**

Point of Difference	Jurisprudence	Legal Theory
Nature	But on the hand jurisprudence consider sociological, psychological aspects related to law. The law is studied in the background of	Legal theory is the study of law as it exists and function in society, the way in which it is created and enforced, influence of

	social deviation changing economic and political attitudes indeed in the way of life of the society in which it operates.	social opinion on law and Law on social opinion, the effectiveness of law and the part played by sanctions etc.

***Definition of Jurisprudence**

Dr. M. J. Sethana

Jurisprudence is a general theory discussion about law and its principles as opposed to the study of actual rules of law. It is the study of fundamental legal principles, including philosophical Historical and sociological bases and an analysis is of legal concepts.

C. K. Allen

Jurisprudence is the scientific synthesis of laws essential principle.

J. Hall

Jurisprudence includes the scratch for ultimate conception in terms of which legal knowledge can be significantly expressed.

Ulpian

The knowledge of things divine and human the knowledge of the just and unjust.

Karl Dewellyn

Any careful and sustained thinking about any phase of things legal, if the thinking seek to reach beyond the practical solution in hands.

Roscoe Pound

A consideration of the ethical and social merits of legal rules.

***Whether Jurisprudence is a science?**

As we know that

***Values of jurisprudence**

(1) Without theoretical base of jurisprudence there cannot be practical application of the law.
(2) It concern with what law ought to be and not what law is.
(3) The logical analysis of legal concept sharpens the lawyers' ability to think logically.
(4) With the help of jurisprudence the comparative studies between various legal systems can be carried out.
    Duty – Democratic country &
    Duty –communist
(5) By jurisprudence the context of text of law is provided e.g. political, social, economical etc.
(6) In absence precedence jurisprudence help to decide case.
(7) It makes the complexities of law more mage and rational i.e. improve applicability of law.
(8) It infuses ethics morality and philosophy in order to come out materialistic layering.

***Scope of Jurisprudence**

Initially the scope of jurisprudence was limited to the study of the concept of positive law and ethics and theology fall outside the province of jurisprudence.

But present modern view is that the scope of jurisprudence cannot be limited to positive law. It includes all concepts of human order and human conduct in state and society anything that concerns order in the state and society falls under the domain of jurisprudence.

P.B. Mukherji

New jurisprudence is intellectual and idealistic abstraction as well as behavouristic study of man in society. It includes political, social, Economical and Cultural ideas. It covers the study of man in relations to state and society.

Dr. Sethana

Every legal subject should be fully consider from all angles i.e. historically, philosophically analytically, comparatively and sociologically e.g. property means concept of property, property right, personal rights, legal and equitable rights (synthetic jurisprudence).

***Definition of Law**

Prof. Holland

It is formal science of positive law.

Criticism – science is controlled particular knowledge and having universal application. But it is not so in case of law.

Roscoe Pound

Law is -

I. Legal precepts (customs, usages),

II. Legal order (Law enacted by sovereign authority),
III. Judicial process (Doctrine of precedent) &
IV. Principles (Principles of natural justice)

***Nature and Theories of law**

We have to differentiate law of motion, gravitiation optics mechanics from the law of nature and nation

The term law used in legal field to express the abstract idea of the rules which regulate human action in the society therefore the purpose legal theories is to express science of human action and the Holland state legal theories help to determine a general rule of action taking in to consideration only of external acts enforce by a deter mine authority which authority is human and among human authority is that which is paramount in a political society.

Various schools of law have defined term law from different angles, like Its nature, its source, its effect on society, end or purpose of law. Therefore it is very difficult to give exact definition of law.

***Functions and purpose of law**

Law is variable in nature as per time and social values.

The law has following important functions, which are recognized by every Legal System in the world.

I. Justice – It is important function of law to establish Justice. It is a mean to an end and not an end in itself.

The justice has two meaning

1) **Wider sense** – It is equate with morality i.e. Natural Law propositions. St. Thomas Aquinas state unjust is not law.
2) **Narrower sense** – It means equality or impartiality
   a) Distributive Justice
   It means fair division of social benefits and burdens among the member of community. It is achieved through Legislation. It helps to prevent class conflict, procuring welfare of all classes i.e. summon bonum (greatest good) therefore it has linkage with social engineering of law.
   E.g. 1) Reservation means Balance competing interest, 2) Right to Business means Balance monopolies and restrictive trade practice.

   b) Corrective Justice
   It means Correct the violation of distributive justice in the form of penalty or punishment.

II. Stability & Uniformity - It means certainty, stability is sanction v Internationalization of law.

III. Flexibility - It must be capable of being changed modified or altered so as to adopt social changes means peaceful change i.e. stability with flexibility otherwise revolution.

IV. Greatest Happiness of the greatest number.

V. To win acceptance or tolerance of the vast majority i.e. Enforcement.

VI. Compromise means rulers and ruled (fundamental rights) i.e. liberty

VII. Protection of Interest

***Defect of Law**

1. Rigidity
2. Conservatism
3. Formalism means importance to technique requirement than to sustentative rights and wrongs.
4. Needless and undue complexity

***Jurisprudence and Sociology**

It means influence of law on society i.e. social welfare means causes of crime.

***Jurisprudence and psychology**

Psychology means science of mind and behavior e.g. guilty mind means helps to execute law.

***Jurisprudence and Economy**

Which satisfying wants and producing and distributing wealth e.g. economic factor responsible for crimes, betterment of life e.g. Industrial dispute Act, workmen's compensation Act.

***Jurisprudence and History**

It provides background in which the correct idea of jurisprudence can be realized

***Jurisprudence and politics**

Friedman said that jurisprudence is the connecting link between philosophy and political theory. Philosophy gives purpose or object of law while political theory gives principles governing governmental organization and let down authoritative law.

The Relationship between law and morality

The relationship between law and morality is not an easy one. Moral rules and legal rules have some similarities: like all rules, according to Hart, they share a general (though not necessarily universal) habit of obedience within the society to which they apply, and a "critical reflexive attitude" (a sense of "oughtness"). Moral rules and legal rules are certainly not the same: there are some legal rules that are not moral rules and vice versa. In some cases the moral view and the legal view overlap, this will be discussed later.

There are several differences between law and morality. Firstly, in general, the law applies to everyone in society whereas morals are more of a personal opinion and can apply to individual groups of people. For example, the practice of Christianity and other denominations holds many moral views and lessons such as 'thou shall not commit adultery' but this is not a law and does not bind society as a whole.

The law is laid down in statute and enforced by the judiciary and police whereas moral rules are difficult to find an absolute and are enforced through social pressure and supported by an appeal to respect them.

Another comparison between law and morality is that moral rules are not subject to deliberate creation or change. Moral views in religious groups have been created over thousands of years and overall they remain the same to this day. Moral views held by the majority of society however, change gradually over time; an example of this is drink driving. This makes it incredibly difficult to resolve disagreements to moral views. In contrast, legal rules can be changed by enactment and even the date of the change can be fixed to a certain date. Disagreements as to the content of legal rules can be resolved by references to the statutes.

Over the past thirty years there has been a considered development over societies view on drink driving. In the past it was considered to be acceptable for someone to spend an evening in a pub, consuming alcohol and then driving home. These days, society frowns on those who drive under the influence of alcohol and consider it morally wrong. This example is slightly different to the previous one however, as there has now been laws set down to try and prevent people from drink driving. This is therefore an example of the influence of societies moral views on the creation of law.

A central debate is whether law should attempt to shape morality of whether it should stay on the sidelines. The Hart v Devlin (1957) debate was trying to answer this very question. Devlin believed that the law should reflect morality and said society has the right to punish any act that offends against its shared morality, but that it should exercise this right only sparingly. In particular, individual privacy should be respected wherever possible. He recognised that some immoral acts might be tolerated. Hart on the other hand, thought that there is little or no shared morality in the modern pluralist society beyond his "minimum content" for the protection of persons and property and there is no freedom if we can do only these acts that others approve of. Hart doubted whether suffering by punishment added to the wrong of immorality could ever make a right.

The key views of the link between law and morals are illustrated in the liberal view, the liberal influence on law, the conservative view, the conservative view on law and Natural law.

The liberal position essentially involves the protection of minority views. The liberals would say that the protection of minority views leads to the overall benefit of all. The liberal view is more possibly associated with the left of the political spectrum represented by the Labour Party and the Liberal Democrats. The political and moral movements in society are often reflected in legal change. A good example of this can be seen in legislation that prohibited and controlled private sexual behaviour.

The Wolfenden Committee on Homosexual Offences and Prostitution explored and made recommendations on important areas of adult life. The Committee argued that the law should not interfere with private behaviour unless it corrupted or injured others. This "harm no others" principle has several problems. It did not say what harm is, it did not say who 'others' were and should you use law to prevent 'harm' in all cases? For example, adultery and suicide: both would cause 'harm' to others, however the law will say nothing about the behaviour. Also, the subjective language of the report meant that those who had their own moral and legal agenda easily manipulated its findings. The laws on prostitution are still very restrictive and often

heavily penalise the prostitute and are light on the client. In terms of homosexual rights, it is only in the past few years that the law began to reflect equality between homosexual and heterosexual citizens.

The conservative view on the Wolfenden Committee was Lord Devlin. He believed that the law should have a direct input into the moral life of its citizens. The conservative influence on law was seen in some of the legislation during Margaret Thatcher's leadership in the eighties. The most important yet controversial influence was known as Clause 28 and prohibited the promotion of homosexual lifestyles as normal family life.

For many religious groups, moral rules are to be found in the scriptures and traditions of their religion and the teachings of respected figures in the past. The Catholic Church and non-religious people tend to look to the so-called "natural law" as a guide. For example, Catholics look at the natural consequences of sexual intercourse is conception: if this is what is in nature, this is what should be, and anything that interferes with this natural process is contrary to morality.

Realists see moral assertions as inherently true or inherently false. There may be uncertainty and argument about their truth but they have an eternal truth or falsity independent of changes in society.

Relativists argue that moral truths may change from time to time and from place to place. Three hundred years ago it was morally acceptable for a husband to beat his wife if she misbehaved. In fact, he would have been failing his duty if he did not. Such a thing would be clearly immoral today.

Whether we are relativists or realists we must decide what the moral rules are, morality itself may or may not change but the public understanding of morality certainly does. We take it for granted now that all human beings are entitled to the same human rights, but only two hundred years ago the prevailing morality of Western Europe and America was that black people were less than human.

Unless we accept the inherent existence of moral views, it makes no sense to criticise as immoral anything that anyone else does.

There are some long-established rules that are legal rules as well as moral ones and were probably adopted as part of common law as much for moral as for practical reasons. For example, "thou shalt not kill" finds its legal expression in the common law offence of murder and the moral rule against stealing coincides with the legal prohibition of theft, another very ancient crime even though now codified.

Nearly all western countries prohibit the practice of euthanasia, thereby giving effect to the supposed moral rule that deliberately killing another human being is wrong even when that other has consented to or asked for the killing. Some of these countries (excluding the United Kingdom) have no qualms about killing criminals who have not consented to the killing, but the moral exception justifying capital punishment is not easy to identify and is open to debate.

An example of a case illustrating laws on debatable moral issues is that of Pretty v DPP (2002). This fairly recent case is an example of a case on euthanasia and the views both morally and legally. Mrs. Pretty had contracted motor neurone disease and was confined to a wheel chair. She required no direct medical intervention to keep her alive but did receive pain-killing drugs to ease the considerable discomfort she found herself in. She had great difficulty in talking, eating and sleeping. She was concerned that her husband would be convicted of a serious offence if he helped her to end her life and therefore sought permission of the court for euthanasia. The courts in the United Kingdom reluctantly refused her request, as did the European Court of Human Rights. The Netherlands, in 2001, enacted a law making euthanasia lawful in certain circumstances. For this to apply, the patient must be suffering continuous, unbearable and incurable pain, must be of sound mind and must voluntarily and persistently have been asked to be killed. In the case of R v Pretty she may well have qualified for euthanasia had she been in the Netherlands.

Some moral rules have been given effect by statute. The moral censure of those who deal in pornography is given legal effect by the Obscene Publications Act 1959. This makes it illegal to possess any obscene material with a view to its sale or other publication. An example of this put into action is in the case of Shaw v DPP (1961). In this case the defendant had published a booklet of the names, addresses, photographs and other details of prostitutes and was charged with conspiracy to corrupt public morals. The House of Lords later upheld his conviction.

Also, the widespread condemnation of incest (seen by many people as morally wrong even when both parties are adult and consenting) led to it being criminalised by the Punishment of Incest Act 1908.

Another example of moral rules being given effect by statute is the moral views on racism. The moral rule of discrimination based on a person's colour is seen as being morally wrong. The Race Relations Act 1966 brought in the creation of new offences of inciting racial hatred and a new tort of unlawful racial discrimination and setting up of a Race Relations Board to combat unfair practices.

In conclusion, law and morality have an interesting general relationship in the sense that moral views over time have a significant influence on the creation and enactment of legislature. Law and morals do however have distinctive differences. Where moral rules change gradually over time, legal rules can change almost instantly by the enactment of new laws. Some types of rules require that we do something, others that we do not. Criminal laws are predominantly the 'do not' type. Negative rules in that they prohibit certain activities because they offend dominant values within a group, or because they are simply an affront to basic social existence. How dominant must a value be before it is wrong to go against it? With so many conflicting moralities in our multicultural society, which of them when transgressed leads to sanctions? Rape is seen as morally wrong and is a crime, however adultery is morally wrong, and in the eyes of certain religious groups is a worse transgression, but it is not a crime.

Society's attitudes to specific areas of crime demonstrate that we have a collective morality, more diverging than converging to any conclusion. If there is a close alliance between crime and moral sentiment, and if we acknowledge that the association is a healthy one, it seems clear-cut in acts that are a menace to the system we support and the rules we are set to serve. The morality or immorality of acts such as murder, rape and theft did not change over night, but their legal nature did. The test of a crime against immorality is an ongoing one. Many summary offences are crimes but the question of are they immoral is not so straight forward. When adultery is compared to having a faulty break light on a car or the license disk is on the wrong side of a car windscreen the test of morality becomes less helpful. Although it is seen that adultery is the worst act in this case, only the car driver would actually be committing an illegal offence.

Therefore, although the law is continuously seeking to uphold and promote moral values it remains a continuous battle to find a balance between the legal applications and moral views in such a diverse pluralist society.

MODULE - 02
SOURCES OF LAW

Different writers have used the term sources of law in different senses & different views have been expressed from time to time. Some time it is used in the sense of the sovereign or state from which law derives its force or validity. Some it is used to denote the causes of law or matter of which law is composed. Some time it is used to point out the regime or the beginning, which gave rise to the stream of law.

C. K. Allen

They are the agencies through which the rules of conduct acquire the characteristics of law by becoming definite, uniform & compulsory.

Vinogradoff

It is the process by which the rule of law may be evolved.

Oppenheim

It is the name for a historical fact out of which the rules of conduct come into existence & acquire legal force.

Prof. Fuller

'Source' in the literature (Anatomy of Law) of jurisprudence relates to the question where does the judge obtain the rules by which to decide cases? In this sense, among the sources of law will commonly be listed statutes, judicial precedent, custom, the opinion of experts' morality & Equity.

I. LEGISLATION

The concept of Legislation, which is one of the most important Legal sources of Law, can be viewed from 3 diverse perspectives.

(I) Broader sense

Legislation, which consists in the declaration of Legal rules by a competent authority therefore any act done with the effect of adding to or altering the law, is an act of Legislative authority.

Make law in new fashion e.g. Judge made law

(II) Narrow sense

Laying down of Legal rules by a sovereign subordinate legislature for the future & without reference to any actual dispute – written statute law & rules. Therefore judge made law is not legislation in this sense.

(III) Widest sense.

Every act of parliament is an instance of Legislation irrespective of its purpose & effect all function of parliament will amount to Legislation including function that are not law producing e.g. declaration of war, ratifying treaties, annexing territory, changing coinage etc.

***Meaning**

This derived from two Latin words. Legis – Law, & Latum – to make, put or set.

Thus legislation means the making or the setting of law.

Salmond

Declaration of Legal rules by competent authority.

***Kinds of Legislation**

I) Supreme Legislation

It is enacted by sovereign power of the state. It is enacted by the highest law making authority in a state. E.g. parliament of India possesses the power of supreme legislation.

II) Sub – ordinate Legislation or Delegated Legislation

Which proceeds from any authority other than the sovereign power. It is dependent for its continued existence & validity on superior authority such legislation is sub-ordinate in that it can be pealed by & must give way to sovereign legislation.

In any democratic state all forms of legislative activity recognized by law, other than the power of parliament are subordinate & subject to parliamentary control.

***Kinds or Types of subordinate Legislation**.

i) **Executive**

To conduct the administrative department of the state they have to enacted their own rules or regulation which constitute subordinate Legislation i.e. Delegated Legislation.

E.g. Rules in the Jail Manual, customs or Excise department etc.

ii) **Judicial**
Superior courts have the power of making rules for the regulation of their own procedure e.g. supreme court & High Court.

iii) **Colonial**
The powers of self government (Home rule) entrusted to the colonies & other dependencies of crown are subject to the control of imperial legislation. E.g. Australia.

iv) **Municipal**
Local bodies are entrusted with limited & subordinate powers of establishing by special law for the district under their control Law – Byelaws.
E.g. Municipal Corporation, Zillah Parishad or Borough councils (Panchayat Samity) etc.

v) **Autonomous**
Quasi or semi-government bodies having autonomy to formulate, their duties e.g. University, Railway, transport corporations, BCCI etc.

*** Merits of Legislation over other sources of Law**.

They are as follows

1) Abrogative powers or Amending power
As society changes law has to change & it can be done by amending, abrogating making new laws. Thus it has immediate result to the social changes.

2) Accessibility
Statute law is easily accessible & therefore everyone may consult the law affecting themselves. It helps to follow laws as per its provision.

3) Bulk is reduced
Statute law is in general; brief while case law or precedent is buried from sight & knowledge in the mass of records of bygone litigation.

Salmond
Case law is gold in mine a few grains of the precious metal to the ton of useless matter. While statute law is a gold coin of the realm ready for immediate use.

4) Benefits to lawyers or profession
The codified legislation makes it easy to extract the principle of law not only to profession but also to lawyers.

5) Certainty
Case law or precedent produces gaps & uncertainties, while legislation makes the law certain.

Lord McCauley 1833
The importance of codification is that it helps the Magistrate to know what the law is?

6) Collective or socialist measures can be undertaken
Legislation allows the government to undertake collective welfare schemes through welfare laws.
E.g. 1) provisions for free medical services, 2) Unemployment allowance, 3) Minimum wages, 4) Reservation policies etc.

7) Democratization of Law
The pro-legislation proponents argue that it is the people who elect the parliament, which in turn makes the law therefore indirectly it, is the person who makes the law. What you yourself make, you tend to obey.

8) Easy to Amend
If the system of parliament is working efficiently amendment of past legislation becomes easy.

9) Formulated in advance
Parliament enacted legislation & codes are not expost facto i.e. a code legislates in advance for the future, which in turn breeds a certainty of law. In case of precedent one has to wait till a dispute arises. The judge made law is always ex post facto; where as codified law is pre declared.

10) General in application
Legislation lay down general rules & therefore wider than precedent because Judge made law is specific & deals with particular circumstances.

11) Step forward

D.D. Field: *codification*

The codified law is good or better compared to judge made law & constitutes a step forward in the development of the legal systems.

12) Initiating change

Many time the government wishes to initiate change in society & it is not possible without legislation because drastic changes do not take place in society very quickly as inherent nature of man is averse to change. Therefore if order to bring quickly & legally changes in society it has to be through new laws Legislated for that purpose.

E.g. -

I. Monopolies & Restrictive Trade Practices Act.
II. Secular nature of Law & Government.
III. Nationalization of Banks, Airlines, Mines, Hotels etc.
IV. Unsociability Abolition.
V. Dowry Abolition etc.

13) No slavish obedience

Friedman

Just because there is a code, it doesn't mean that a judge hast to obey it like a slave. In fact, in most democracies a code can be declared ultra virus or unconstitutional by the court.

14) Unification

Codes are also useful in unifying diverse jurisdiction – consolidation which entails the putting into one statute what was previously to be found in several, also simplifies & reduces. The bulk of law e.g. Transfer of property Act 1882.

15) Separate body makes codes

The legislation enacted by parliament is made by a separate body of persons & made with deliberation & debate normally judge made law is made by one judge, due to judicial hurry pressurizes judge & chance of a mistake increases. But on the other hand parliament, enacted legislation are made by more than one mind.

Dr. Sethana

The human mind is not infallible & the Judge is not exception. The wisdom of the legislature can therefore be regarded as a more reliable means of protection than the fancy of an individual judge.

16) Logical arrangement

Codified laws can be arranged in a simple, coherent & logical manner. As they are indexed therefore there is in case of reference, which in turn saves time & is simpler to understand.

CONCLUSION

John Salmond

So great is the superiority of Legislation over all other methods of legal evolution that the modern tendency is to acknowledge its claim exclusively, and to disregard the other instruments as relics of the infancy of Law.

Thus there is no doubt that a complete code is better than a body of judicial Law.

***Arguments against Legislation**.

1) It is not possible to Legislate on every possible Legal situation. Unforeseen situation will always come-up, which have not been incorporated into the code or Legislation.
2) Technical matters can't be reduced to simple language –Resulted into
   I. Cumbersome,
   II. Lengthy
   III. Verbose,
   IV. Complicated &
   V. Difficult to understand.
3) Some Legislation takes years to be drafted, approved, accepted etc. Therefore not tune in social changes. While precedent is current & up to date.
4) Badly written codes can be misused by bad elements of society while as precedent follows justice, equity & good conscience. Therefore give proper justice.
5) An ambiguous code or legislation led to uncertainty & until that ambiguity is clarified by court or legislature.
6) Some time Amendment in code is difficult -- It follows complex legislative procedure.
7) It is accepted truth that it is virtually impossible to draft a code without ambiguity, obscurity & conflicting the sections of society.
8) Code written in a language alien to the masses doesn't serve the purpose e.g. Indian penal Code - initially not understand to Indian as it is in English not more than 1%
9) The legislatures will always a politically volatile issue & allegations of bias (ideological racist caste based) are heaped.

E.g. some knives & foolish people contend that the issue o Reservation for Supreme Court or State tribunal have been incorporated into our constitution merely because one of its draftsman was a member of a supreme court.

10) The desire for certainty in the application of legislation leads to over elaboration, which in turn leads to red tape & instability.

Due to codification people go by the letters of the law rather than by the spirit of the law.

II. PRECEDENT AS A SOURCE OF LAW

The word precedent can be understood by two senses.

I. Broader Sense

It is a decision of a court cited as authority for deciding similar facts on that principle or by analogy i.e. any past decision of court irrespective of whether it is a decision of higher, lower, Indian or foreign court.

II. Narrow sense

It is statement of law found in a judicial decision of a superior court, which meant to be followed by the same court & also by subordinate courts.

Thus whatever done or followed in past expectedly to be followed in future in order to avoid discontinuity & achieve the stability in law. So that it is one of the important sources of law amongst the other sources of law i.e. legislation & custom.

Origin of precedent

It is found in **American Realistic Theory of Law**

Law is not a law what is enacted or framed by legislation or Executive but it is the law, which is decided by the judges.

E.g. 1) S.R. Bommai case – U/A 356 otherwise – word, 2) Vishaka case - Direction to legislation, 3) Sarla Mudgal case – common or Uniform Civil Code.

Prof H.L.A. Hart

Acknowledges the role of judges to shape the legal system as a positivist. E.g. Maneca Case - Rule of Law.

Prof. Salmond

Judicial decision has the force of law & legally ultimate and these ultimate principles are Grund Norm or Rule of Recognition of Legal System. E.g. Keshawanand Bharati's case - Basic Structure

Prof Loan fuller

Adjudication is the social procedure of decision, which assures the affected party a particular form of participation & presenting form of decision in his favors.The matter of social interest & its decision binding on whole society e.g. Maneca, Vishaka, Keshavanand Bharati Cases.

Thus such judicial decisions becomes guidelines of future cases & as compare to the Dictatorial State, the precedent is more binding in Democratic state and therefore respect is given to the decision of Judges as court is temple of justice & judges are priest in it.

Values or Importance of Precedent

It has following 3 important values.

(I) To give justice to the party,
(II) To Admire the Legal System as per Precedent &
(III) To develop law prospectively.

Objects of precedent

It has following object

a) To give same decision on same line in future by referring past,
b) To constitute equality of justice in Legal system,
c) To achieve continuity & stability,
d) Administration of Law in society as per the statutory provision &
e) To give efficiency in decision-making.

Common Law features of Doctrine of Precedent

As Indian Legal system follow the common law system therefore it is necessary to see the common law features of precedent.

a) Specific emphasis upon judicial decisions as a core of legal system.
b) Very subordinate role accorded to the judicial writings than the judicial decisions.
c) The treatment of judicial decision as a binding on other Judges
d) The particular form or style of judicial Judgment & mode of its reporting.

Whether precedent is Rule of Law or Rule of practice?

Rule of Law means

Absolute bindingness of precedent & no discretion to the judges.

Rule of Practice

It is not absolute binding but there is description of the judges.

Prof. Dwelling
It is matter of rule of practice

Karl Llewellyn
It is followed for the sake of Equality

Criticism
1) Cohn

There could be desirable distinction in decision whenever necessary.

2) J. Cardozo

It is followed for sake of efficiency (Rule of Law)

Criticism
Wassr Storm

Only efficiency not but end result is important.

Thus adherence to precedent is not but adherence to justice is important

GENERAL RULES FOR APPLICATION OF PRECEDENT

Prof. C. K. Allen: *Law in making*

1) Each court is bound by the decision of court above it,
2) Any relevant judgment of any court in a strong argument entitled to respectful consideration,
3) Judgment is authoritative only as to its "Ratio Decidendi",
4) Precedent is not abrogated by laps of time,
5) Very ancient or old precedent ought not to be sighted due to modern or changed circumstances. As law is living systems, it changes with an organic system of society.

*Rayland v. Fleature

Now strict liability converted into absolute liability.

Precedent to be sighted from any source, to, which court, consider as reliable.

RATIO DECIDENDI

It means 'reason of past decision'. It is followed in future cases as a precedent therefore lawyers & judges have to separate it from the past decision to apply in future.

Prof. Dias

He gave meaning of Ratio Decidendi as follows –

(I) It is the reason not only deciding but also finding facts.
(II) It is the rule of law offered by Justice as the basis of his decision. &
(III) It is the rule of law which others regarded as binding authority.

Theory of Ratio Decidendi
(1) Material fact theory
Prof Good Hart

Ratio Decidendi is the controlled material fact as viewed by Judges & reasoning why those facts are material one.

This theory observes Dais's 1st meaning of Ratio Decidendi. This theory world widely accepted.

Krishna Kumar v. Union of India
Supreme Court uphold this theory
Limitation – Need to pay more attention to the judges own formation of the rule of law than facts of the case.

(2) Classical Theory
Prof. Monnrose

It is said to be a principle propounded by the courts as necessary for or basis its decision. This theory observes Dais's 2nd meaning of Ratio Decidendi.

(3) The reversal test
Prof. Wambaugh

We should take the proposition of law private forward by the Judge & reverse or negate it and then see if the reversal has altered the decision. If the reversal changes decision then proposition is the ratio. If no makes difference upon decision then it is not ratio but it is obiter Decta.

Limitation

(i) where no proposition of law is given & it is a statement of facts & together with the order that was made.
(ii) Court gave several reason for its decision.

Which theory is superior ?
Shyam Rao v. Pondicherry

Justice Shelat – The bindingness of precedent regarded to Ratio Decidendi & principle laid don there in.

H.M. Seervai

Whenever judgment considers to be binding on courts, it is not merely ratio decidendi of judgment but judgment as a whole is binding.

Great Western Rly Comp. v. Mostyn
Lord Dunedin – Whenever decision is treated as binding it is a whole judgment itself which is treated as binding

Patton – He also affirmed above view.
But in India Prof. Good Harts view is followed - Material fact theory i.e. decision is bind on the basis of Ex facto obiture jus i.e. Law eminent from facts. Therefore in India, the discretion not allowed to Judges to decide material facts.

The doctrine of the Binding force of precedents i.e. stare Decisis. It suggests that precedent not only have great authority but also must be followed.

STARE DECISIS

It means let it stand as decided. It suggests a statue quo & implies that a past judgment is fixed & shouldn't be moved altered.
Mire house v. Runnel 1833
Chief Justice Parker – for the sake of (1) Uniformity (2) consistency & (3) certainty precedent must be followed in future in the form of stare Decisis.

The doctrine of stare Decisis implies that certainty of law is, as a rule, preferable to and more valuable than its improvement. The doctrine of stare decisis has been recognized U/A 141 of Indian Constitution which provides that the law declared by the Supreme Court shall be binding on all courts in India.

Merits of Stare Decisis

(1) It shows respect for the opinion of our ancestor .
(2) It infuses certainty in Law. * Minerva Mills case supreme court – certainty & continuity are essential ingredients of the rule of law.
(3) If Judges is free to decide case contrary to prior decision it would resulted into the fate of litigants would hang on the whim, fancy & caprice of the Judge.
(4) It allows common law & the statute law to be restated & reshaped.
(5) An original precedent actually create new principles of the law which help in development of legal system.
(6) It brings into legal system as element of convenience i.e. once decided point of law must not be opened again & again .
(7) Helps to reduce quantum of disputes.
(8) Llewllyne – The precedent is based on principle" like being treated alike" .
(9) It infuses sense of /justice.
(10) Repose public confidence that judges administration the law impersonally & that none of them make rules.

Criticisms

1) Dwyer

Rigidity – Precedent does not rule the law but law rules the precedent. The doctrine of precedent should not be rigid & not be applied at the cost of justice.

2) Lord Denning

While treating a previous decision as normally binding to depart from it if it appeared right to do so.

3) C.K. Allen

Precedent must be servant not a master.

4) Paton

A truly practical method should allow experiment, and there should be opportunity to correct one's mistake. Therefore, it is better for the court to be ultimately right than to be persistently wrong. Certainty of law must not become certainty of injustice. E.g. A.K . Gopalan, & Maneka Gandhi case.

5) Cardozo

If a rule laid down by a decision is found to be inconsistent with justice it must not be followed.

6) Roscoe Pound

The changing rule or flexibility of precedent is very essential in cases of Higher courts of Land than lower courts, because in case of mistake of lower in case of mistake of lower courts, it can be corrected by a higher court.

7) Lord Denning

The Discipline of – Not only the certainty of law but also justness of law also important otherwise law will cease to grow & it will become a structure of fossil therefore

flexibility in precedent is very much important / necessary .

Conway v. Rimmer 1968

House of Lord – Not allow to take defence of confidentiality to disclose the governmental report as it was allowed in Duncan v. Camel, Laird & Co. 1942

Scorch Meier Gilt v. Henning 1975

House of Lords – allow compensation in the foreign currency (Dutch marks) & overruled it earlier decision in re united Railway of Havana & Regla warehouses Ltd .1960 (Compensation only in pound sterling)

A.K. Gopalan 1951

Supreme court - Law as it is no question of it justness, fairness / reasonable ness

Maneka case 1976

Supreme court – Overrule above decision & held law must be fair , Just & reasonable.

***Theories of Precedent**

I. The Declaratory Theory

Judges do not make law but only declares the law as found in statute or custom they don't lay new principle of law.

Coke, Hale, Blackstone, carter, Hammod, Esher & Scrutton expressed the views that judges merely interpret the already existing law.

Black stone

Judges 1) discover the law & 2) find the law but they do not make the law.

Mathew Hale: *History of common law*

The decisions of courts of justice do not make law properly for that only the king & parliament can do so.

C. K. Allen

Judge made law is misleading. Judges merely apply an existing general rule to a concrete case.

***Criticism**.

As per American Realism-Judges not only Administer & interpreter the law but also develop the law. Therefore Judges do make law.

II. Constitutive theory

This theory emerged to criticize the above theory. It is true that generally Judges apply existing law, but very often they 1) Extend, 2) modify & 3) create an entirely new principle.

Bacon, Bentham Austin, Dicey, Salmond, Radiliffe, & Denning, A R. Holmes, Frank, Gray, Llewllyn, Sturges, Morris & Cohen are the propounders of this theory.

Dicey: *Law & public opinion in England*

A large & perhaps the most & pest part of the law of England is judge made law. The majority of the England law is not created by an Act of parliament but by Judges.

Chief Justice P.N. Bhagwati

Even where the court is concerned with legislation, the Legislatures merely gives the dry skeleton of the law but to fill it with flesh & blood is the function of the judges & it is there that he takes part in the process of creation. Therefore a judge is not a mimic but a creative artiste. E.g. Vishaka Case, Shahbanoo Case, Mandal Commission Case, Maneca Gandhi Case, Kotrial Case2005

Power of over ruling the precedent

It is necessary to remove rigidity in precedent, as it is detrimental to growth of the law.

I. Position in U.K.

House of Lords acts as legislature as well as Highest court therefore its decisions are final & binding, the House of Lords was the orthodox, it have no power to over rule its own decision.

*London Street Tram way v. London City Council 1878

House of Lords acknowledged its rigidity.

*Young v. Pristal Airplanes Comp. 1946

The court of Appeal held that in following circumstances it would not be bound by rigidity of stare decises.

(1) It decision is inconsistent with the decision of House of Lords. Same view followed in India.
(2) The court of Appeal can choose one of the decisions out of two conflicting decision of that court itself. Not so in India, such matter referred to Chief Justice of High court or Supreme Court. He by establishing larger bench settles the matter.

*Wangechung Case

(Election case)J. Ramaswami gave above view.

(3) The Constitutional Assembly wouldn't follow precedent if it were in conflict with

latter Act of parliament. Same view followed in India. E.g. Shahbanoo Case.

(4) Precedent not bound, if it was result of per incurium decision i.e.decision not based on existing law. Same view followed in India.

*Scruten v. Midland Silicon Comp. Case 1962

House of Lords held that it could permit itself to overruled past decision on basis of Yong's case if it is not convenient.

In 1966 Lord Chancellor held that House of Lord not bound by follow own past decision & it got curatorial power therefore Lord of street tram way case seizes to exist.

II. Position in India

* Bengal Immunity Comp. Case 1955

Supreme court held that u/a. 141 Supreme Court doesn't require following its own decision rigidly.

J. Das said that the judges exercise power of overrule is unavoidable with reference to an organic body like constitution.

Thus power of overrule is more necessary in constitutional matters because the rigidity of precedent will affect the constitutional provisions & goals of it. It is only flexibility & not the elasticity as per time & circumstances e.g. Maneca overruled Gopalan.

In Indian context the American correctable judicial trend is more suitable than British. Therefore now Doctrine of precedent U/A 141 is coupled with power of overruled & also it binding on all courts in Indian Territory.

*Tribhuvan Dav v. V. Ratilal

Supreme court held that the Doctrine of precedent u/a. 141 initiate rule of law (Business of Practice) & form of the foundation of Administration of justice under our Legal system as decision of Supreme Court has 3 D values. It is much important.

*Sajjan Singh & Shankari Prasad Cases

Supreme Court held the doctrine of Ratio Decidendi or Stare Decises may not strictly applied to the extend & no one can disprove the position of the said doctrine. It should not be permitted to perpetuate the erroneous decision pronounced by this court to determinate of the general welfare.

These cases interpret Art. 141 contains inbuilt mechanism of power of overruling.

Prospective overruling

The prosperity is rule of legislation exception is Retrospectivity & the Retrospectivity is rule of judiciary exception is Prospectivity.

Thus precedent binding from the date of the cause of action & not from date of decision. But if, it is cause inconvenience to give Retrospectivity then past decision overruling & gave effect from date of decision onward & this is nothing but the Prospective Overruling.

The prospective overruling is used to come out from –

(I) The inconvenience,
(II) Impossibility &
(III) Chaos of past act.

This principle 1st time laid down by U.S.A Supreme Court.

*Great Northern Railway v. Sun Burst

J. Cardozo held that the Doctrine of Prospective overruling is important because Retrospectivity causes –

1) Administrative inconvenience &
2) Might disturbed vested rights.

Which could cause hardship to those who have acted on the basis of old rule.

Thus the prospectivity confirmed on the law declared by the court.

In India

* Golaknath Case 1967

Supreme Court (11 Judges Bench) held that Parliament can't Amends Fundamental Rights u/a. 368 & Sajjan Sing & Shankari Prasad cases overruled & doctrine of Prospective overruling incorporated as follow. Further the Supreme Court laid down the following guidelines -

1) The Doctrine of Prospective Overruling used & applies only in constitutional matters.
2) It could be used only by Supreme Court & not by any other court.
3) The precise version of the prospectivity is to be the discretion of Supreme Court itself.

Thus in India the Great Northern Railways principle is not applied as it is because in that decision past decision ceases to operate after the date of the decision of present case, but in India the past Amendment remain exist forever but from present decision date the parliament has not power to amend fundamental right.

In the following cases this doctrine directly or indirectly followed

*Suman Gupta v. State of Jammu & Kashmir

Nomination of Students in Medical College.

*Indra Shawney
Reservation for 5 years.

*Ashok Kumar Gupta
Art 16(2)

*Jaylalita Case 2001
Public mandent could not be above constitutional mandet.

The doctrine of prospective overruling not limited to matters arising out of constitution but it could be used & invoked in ordinary statute also the 1st rule of Golaknath case is overruled in the present case.

*Kothari's Case 2005
Free Medical Services.

***Obiter Dicta**

Judges often express legal opinion on issues they are not asked to decide.

Meaning

An obiter is an expression of an opinion on a point, which is not necessary for the decision of a case.

1) What the Judge said unwontedly
2) Statements of law, which are not necessary for the decision, they give & go beyond the requirement of the particular case.

Thus Judge have the habit of illustrating their reasoning by reference to hypothetical situations, passing remarks about such situation.

In England

An obiter dictum has no binding efficacy on a co-ordinate or subordinate court; it however has the persuasive value.

In India

Some High Courts held the obiter dictum of Supreme Court is authoritatively binding on all sub-ordinate courts.

*Mohandas v. Sattanathan 1954
Some high court held that obiter dictum of a Judge of Supreme Court even in a dissenting judgment is entitled to high respect especially if there is no direct decision contrary to it.

*Ashok Leyland v. State of Madras 1957
But some of the High Courts held the obiter dictum of the Supreme Court is not binding on sub-ordinate courts.

*Basanta Kumar v. The chief Electrical Engineer 1956
(Calcutta High Court)

***Importance of obiter dictum**

(1) They are important in rationalizing the law &
(2) In suggesting solution to the problems not yet decided by the courts.

Salmond

Some time they have greater weightage than Ratio Decidendi as they are given by eminent judges.

Criticism

Obiter dictum some time irrelevant to the case while giving importance to obiter dictum there must some relation or nexus to the issue in question.

***Test to determine obiter dictum**

*Mohan Das v. Sattanathan 1954
(Bombay High court)
Chagla Chief Justice said the question which was " necessary for the determination "of the case would be the Ratio Decidendi & the opinion of the court on the question which was "not necessary to decide the case" would be only obiter dictum.

***Kinds of precedent**

(I) Authoritative
Principle laid down by the superior court is binding on all the inferior court e.g. Ratio Decidendi.

(II) Persuasive
Decision of same rank court may be followed or it may not be followed e.g. obiter dictum.

***How binding force is added to precedent**

1) Unanimity in Bench e.g. Keshvanand Bharati's Case majority decision.
2) Eminence of judges e.g. Justice Hidaytullah – constitutional Law, Justice Shah – company law, Justice Gajendragadkar – Hindu law etc.
3) Observance by the same court in future.
4) Conformity with statute.
5) Laps of time.

Circumstances which destroy / weaken the binding force of precedent

(I) Abrogated decision / Abolished – Decision which have been abrogated lose their authoritative bindingness. This can be happen in the following ways.

(II) Enacting statute.- If the legislature enacts a statute which is inconsistent with the precedent loses its value e.g. Muslim women protect (on Divorce) Act 1986 – Shabanoo's case nullify.

(III) Reversal – when decision of lower court reversed by the appellate court.

(IV) Overruling – When a higher court declares in another case that the precedent was wrongly decided & so is not to be followed e.g. Maneka _ Overruled A.K. Gopalan's case.

(V) Affirmation / reversal on a different ground.- A case decided on one ground is overruled by the higher court on another ground then it losses authoritativeness to some extent therefore the precedent becomes weak.

(VI) Ignorance of statute.- Decision is not binding if it was rendered in ignorance of a statute. a rule having the force of statute. In such a case even a lower court may also refuse such a precedent passed by a higher court.

(VII) Inconsistency with earlier decision. - It may be by two ways.

1) Supreme Court gives contrary decision than earlier decision. E.g. Sajjan Singh case supreme court – fundamental right can be amend
2) High court gives contrary decision to another high court.

(VIII) Precedent sub silentio / not fully argued.
When a particular point involved in a decision is not taken notice of & is not argued by counsel the court may decide in favor of one party whereas if all points have been argued properly then decision may have been in favor of the other party.
Salmond – It is nothing but per incurium decision because the failure of counsel to argue the point will generally mean that relevant cases / statutes are not bought to the attention of court.

(IX) Decision of courts equally divided – some times an appeal court may have two Judges & they may be divided on the issue, in such a case the appeal is normally dismissed & such a decision is not precedent. In order to avoid this now the two steps followed. (1) Refer matter to larger bench / (2) establish additional numbers bench.

(X) Erroneous Judgment. – A precedent based upon (1) faulty reasoning ?(2) illogically drawn analogies /(3) which is against other better established principles is a weak precedent . e.g. Radhika's case Nagpur High Court.

(XI) Changed condition –
Dias – Although a case has neither been reversed nor overruled it may ease to be law owing to the changed condition & changed Law.
Chief Justice Willes – When the nature of things change, the rule of law must change too.

(XII) Precedent based upon absolute & antiquated techniques.
C. A. Allen.—Changes & development in human knowledge, such as (1) science (2) medicine, (3) forensic techniques (4) computerization etc may greatly affect the application & importance of precedent.

Law is product of its own period & environment and it can't remain static therefore on the basis of larger & superior current knowledge a judge may disregard precedent based on absolute techniques. E.g. Digital signature etc.

III. Custom

It is also an important source of Law.

Definition

1) Salmond – It is the embodiment of those principle which have commended themselves to the national conscience as principles of justice & public Utility.
2) Holland – Observed course of conduct.
3) Austin – rule of conduct which the governed observe spontaneously & not in pursuance of law settled by a political superior.
4) Judicial committee of privy council . – A rule which in a particular family / in a particular district has from long usage obtained the force of law.

Thus the custom is nothing but those rules of human action, established by usage which are adopted by the court because they are generally followed by the political society as a whole /by some part of it.

The custom doesn't derive its inherent validity from the authoritative of court & the sanction of

court is declaratory rather than constitutive therefore only those customs which are approved by the court considered as law.

The customs may be present in the habits of the people, but it becomes legal custom (law) only when it is declared by the court as a custom.

Reasons far the custom as a source of law

(I) Opinio Necessities. – Out come of essential nature / requirement of community e.g. Adoption.

(II) De-novo / Totally new.- As law always comes from the material existing facts in society & therefore basis provided by custom to law.

(III) Philosophical Aspect – Right & good followed in past is good today & will be good in future.

(IV) Psychological aspect – As based on immemorial antiquity easily accepted by society. The Indian constitution U/A 13 gave the weightage to the custom as a law.

General custom in the form of individual behaviour acquire the status of law after long period of time.

Individual behavior – Repetition of behaviour in that society – Habits of people – Judicial notice through decision of court incorporation of the behavior under statute law. E.g. 1) Rule of pre-emption 2) Damdupat etc.

Essentials of valid customs

By Blackstone

(I) Immemorial Antiquity – The custom should be so ancient that no living man could say when it had first started.

The antiquity is relative term it must be applied with necessary qualification. Therefore in England the limit to legal memory fixed at 1189 A. D. (when Richard –I became kind.) Therefore immemorial antiquity today means that the custom must be as old as 1189 (if not older)

In India

Madhavrao v. Raghavendra Rao (1946) Bombay High Court – If it is shown that a custom has been present for the last 30 years, then it may be presumed that it has been in existence for a long time.

Thakur Gokul Chand v. Pravin Kumar 1952 Supreme court – The custom need not be immemorial nor before 1189 but it should be in existence for long time so that the custom can easily derive the force of law.

(II) Continuity:

he custom must be in existence & recognized by the community without any intervening break, for such duration as may be reasonably held as long.

In England – It must be exist from 1189 onward without interruption.

(III) Certainty – A claim which is uncertain & indefinite can't be a custom. Therefore it must not be covague,(2) indefinite & (3) uncertain.

(IV) Consistency (In Line) – It must be consistent with other customs in the same area. If there is conflict regarding consistency of custom when alleging party has to prove which custom is correct.

(V) Open & Peaceful enjoyment. – Without fighting & controversy, there should not be secret custom it as never legal status.

(VI) Conformity with enacted law – A local custom to be valid & have the force of law must not conflict with any statute.

(VII) Reasonableness – It is an essential of a valid local custom. It is depend upon whether it is in accordance with fundamental principle of right / wrong.

(VIII) Not apposed to public policy.- It should not be violative , pubic morality public order, public good, law & order etc.

(IX) Opinio Necessities- It must show some mandatory / compulsory on the people of that local area. E.g. contribution in the form of particular amount of rupees toward maintenance of Bridge of that particular area.

Criticism:

1) All customs are not law, - Declaration of court is most essential.
2) Diminishing scope of custom. – As in today's modern developed society the formulation of legal rules becomes more explicit & as a more elaborate machinery is set up for the making & administration of law therefore they play reduced role in civilized society as a source of law.

(IV) Other Sources of Law

These are called as formal sources

The sources from which the law derives its source and validity are formal sources of law. These associates to the shape or system that

causes the rules applicable formally. Here, we accept the rules as valid and binding in the legal system. Example: The manifested will of statutes and judicial decision. Hence, the formal sources of law include:

i. Will of the state: Sometimes for the benefits of the people the state makes its own laws on the subjects which are provided in the state list under the Schedule, with due process of law manifested in our constitution.
ii. Will of the people: Laws are also made by the will of the people sometimes on facing certain problems though it has to be considered acknowledgeable by the state. Then the state makes it in the form of law.
iii. Judicial decision of the court: In this case sometimes judgments of some lordships with immense value are treated and transferred into a law.

MODULE - 03
NATURAL LAW THEORIES

Natural law in common sense means the law that is largely unwritten and consist of principles of - 1) what law ought to be and 2) not what law is, as revealed by the nature of man or reason or derived from the God.

Del Vecchio says that, Natural Law is the criterion, which permits us to evaluate positive law and to measure its intrinsic justice.

The term Natural Law is analogue to high ideals like 1) morality, 2) justice 3) ethics, 4) right reason, 5) good conduct, 6) equality, 7) liberty, 8) freedom, 9) social Justice etc.

Thus Natural Law is not a body of actual enacted law rather, it is a way of looking at things a spirit of human interpretation in the mind of judges.

Lord Cloyed stated Natural Law has been envisaged as a mere law of self-preservation or as an operative law of nature constraining man to a certain pattern of behaviors.

The Natural Law has history of 2500 years therefore there is no one theory of Natural Law and there are many versions of it.

Dr. W Friedman state the history of Natural Law is a tale of the search making of for absolute justice and its failure.

The Natural Law changed with changing social and political conditions.

***Principles of Natural Law**

The two important principles of Natural Law cannot and never changed throughout the development of Natural Law.

(1) Universal order governing all man &

(2) Inalienable rights of Individuals.

Means the doctrine of waiver rejected and emphasized upon Fundamental Right. These two principles are backbone of every Municipal and Internal Law. These the basic pimple of Natural Law therefore incorporated in every positive legal order, otherwise Judiciary interprets it as a part of positive legal order.

*Basweshwarnath Case

Supreme Court held that Fundamental Right couldn't be waived.

*Meribally v Medison

U.S.A, Supreme Court stated that, Judicial Right is Natural Right it is judicial activism to protect Fundament Right.

Thus Natural Law is integral part of positive legal order. Therefore every positive law must meet the parameters of Natural Law.

* Dr. Bernard Case

House of Lord held that, if law made by British Parliament violates the ethical moral values, then those laws would not prevail upon. Thus Doctrine of Parliament sovereign is restricted on the basis of principles of Natural Law.

By 44th amendment two Articles 20 and 21are immune from suspension under Article 352 and 359 thus Natural law incorporated under Indian constitution also.

***The History of Natural Law divided into 4 periods**.

I. Ancient period (500 B.C. to 100 A.D.) Greek sophistic, Aristotle, Greek stoics, Roman Philosopher (Cicero)
II. Medieval period (400 – 1500) St Augustine, St. Thomas Aquinas.
III. Period of Renaissance (1600 – 1800) Grotius, Hobbes Locke Montesquieu, Roussean.
IV. Modern period or contemporary Naturalists (Early 1800 past 1925)

Fuller, Finns. States that, while developing Natural Law 3 reasons played vital role.

The Natural Law developed through five trends.

I) 1st trend
Society first come in existence then state for sake of justice and freedom because of emergence of Natural Law.

II) 2nd Trend
King come into existence Ruler and ruled maintains equality, Religion played key role in regulation of affairs of people, and before state came in existence religious fathers functioned as administration of the people. They have 1) religious order and 2) political power.

III) 3rd Trend
The religious and spiritual and political powers separated from each other.

IV) 4th Trend
Political authority derives power from people and popular sovereign established

then "Government and Law " came into existence.

V) 5th Trend

Right to property in particular above life and liberty and Natural Law in general.

Thus the central notion of Natural Law is that there exists objective moral principle which depends on the essential nature of the universe and which can be discovered by natural reason, and that ordinary human law is only truly law in so far as it conforms to these principles. The rules of Natural Law can be ascertained by reason and commonsense.

The term Natural Law also appeals in psychology science but its meaning but its meaning is totally different. It among and predict the relationship between phenomenon e.g. law of gravity while Natural Law in society science having altogether different meaning - Law which is based on reason Justice and transcendental principles.

***Features of Natural Law**

1) There is a structural reality embedded in the very nature of things which man has the capacity to discover by his reason.
2) Each being has a natural purpose or end or goal
3) There is an order of inclinations in each being, which 'pushed' it towards its end.
4) Goodness is the fulfillment and completion of this end.
5) Man can thus know not only what he is, he can also know what he is to do.
6) This knowledge is general and man can understand that there are certain fundamental principles of justice and morality, which govern all human conduct.

The 3 reasons help to develop the Natural Law.

1) Devine Reason,
2) Human reason &
3) Changing Contents of Natural Law.

I) NATURAL LAW AS A DEVINE REASON.

St Thomas Aquinas stated Natural Law derived from law of God. It is basic colas tic thought.

***Definition**

Law is an ordinance of reason for common good made by him who has the care of the community.

This law shall be treated, as binding because universe is created by God therefore this is superior law.

The whole divine law cannot accessible to all human beings only part of it accessible. Therefore it is "Accessible Devine Law" The Devine law gives justice to mankind and other things and it is object of the Natural Law.

He gave principle of 'Lex Divina' that is positive law enacted by the God himself for all mankind in the form of scriptures e.g. Gurusaheb, Kuran, Vedas etc. If Human Law by its forms and content contrary to Natural Law or Devine Law then it will be void e.g. cow slaughter case. The power to enact law is limited by principle of Natural Law and Devine Law.

Right to property is integrated part of governance of society. As religious and political power imposed in Religious father they started to exploit the people therefore it started to create Human Reason as a base of law. Thus Human reason comes in substitution of divine reason.

II) NATURAL AS A HUMAN REASON

This is the 2nd phase of Natural Law it was gave importance to Human reason to manage social affairs. The Human reason became the basic source of Law.

The spiritual and political power separated from each other. As the head of Religion make disadvantage of religion and make exploitation in the name of religion and God. Therefore people separated religion from politics.

Because of mutual influence of Natural Law and Natural Reason on each other people want to enjoy their liberty independent from Religion and they established political authority to rule them instead of religion and supremacy given to the political power.

During this stage I) individual want to enjoy liberty, ii) State want to enjoy supremacy and iii) commercial persons want to save there interest. This resulted into complex situation and chaos. In this complex situation the human reason played crucial Role.

Plato: *The Republic*

Only human reason help to come together and neither injure nor suffer any body and develop the human beings.

He was convinced that in truly ideal state the rule of pure reason embodied in philosopher king and unhampered by law or custom, ought to prevail. He asserted that social progress must rely on the forces of I) knowledge,

Enlightment and ii) Natural Reason (Right or Just) .

He made 3 points regarding what is right

I. It is naturally right or just for each person to do his own business i.e. work for which he is best suited.

II. There is a natural order of the virtues and the other good things ; and this natural order is the standard for legislation and

III. Natural Reason alone could determine the best regime. That regime is naturally right or best in which those who are 1) best by nature and training and 2) who are wise, rule the unwise with absolute power, assigning to each of them (the unwise) what is by nature just that is what is by nature good or suitable for each of them.

Aristotle: ***Rhetoric***

Truth is knowable and that truth (reality) can be known for certain. It means that knowledge based on reason, and not a faith or intuition, is the real knowledge. It maintains that knowledge is both maintain that knowledge is both accessible and public practically every man has access to the knowledge of rationalism through his sense and his rational faculties.

He developed standards of correctness available to the human intellect, which are universally true. He is a rationalist in the sense that he claims for the mind an ability to apprehend essential structures.

Plato and Aristotle followed by the philosophy of the stoic school (300-B.C.)

Stoic – stated Natural Law means the law of God and right reason. He said that man is rational and that God is rational and men have reason, they have speech and the sense of Right and wrong. As per him the right reason is the law of nature, the standard everywhere of what is just and right, unchangeable in its principles, binding on all men whether ruler or subject the law of God.

For stoics, the Natural Law is higher than the positive law or the law of custom. The positive laws are varied, but Natural Law is one. It privies Authority and norms to the positive law (statute and customs). It is a perfect law, higher law founded on divine revelation. It is law of reason morality and justice.

On this basis stoic built up the theory of "equality" and refuted Aristotle's arguments that man is a slave by nature, and diminished the importance of social distinctions between individual.

This **Stoic's** idea reminded the rulers that above their commands there is a higher law (Natural Law) founded on the precepts of Natural reason and justice.

***Cicero's Doctrine of Natural Law (104 43 B.C.)**

Cicero:** ***Treaties on republic

Man has some objective standard of Right and Wrong given to them by the mere fact of there being men with human nature. This body of principle common to all men called as Natural Law and they based on it a considerable part of Romans Legislations.

As per him Natural Law is a universal law of nature arising equally from the fact of God s providential government of the world and from the rational and social nature of human beings, which makes them akin to God.

As per him Natural Law in itself is right and for no ruler and no people can make right wrong, It is same everywhere and is unchangeable, binding on all men and all nations.

Natural Law does not depend upon the consent of men, nor is it brought into existence by convention it is eternal and unchangeable. It commands men to perform their duties it restrains them from doing wrong things. It is of universal application. God is the author of this law, its interpreter, sponsor, promulgator and enforcing Judge therefore it is not morally right to invalidate this law, otherwise it is a sin to change this law. It doesn't operate automatically upon all rational creatures it can order their conduct only so far they apprehend it by their conduct. Individual doesn't under obligation to render obedience to it he may be compelled by a superior force to obey it but he is not under a moral obligation to it. Thus for Cicero Natural Law is the law of God and of reason, and is of universal application. It binds the people together in a common social bond by recognizing the intrinsic worth in human personality.

The process of reasoning is, in truth, the exact opposite of that which Aristotle had used. Aristotle had argued that men are not equal, and that citizenship must be restricted to a small and carefully selected group whereas for Cicero equality is a moral requirement.

Thus as per him Natural Law is kind of technology or means to an end or practical and workable rules for the realization of Justice and equality.

***Natural Law and Social Contract**

This theory propounded by Hugo Grotives, Thomas Hobbes., John Locke and Roussean. This concept first time envisaged by Italian jurist Marcellus of panda (1270 –1343).

He used social contract term first time. As per him people treated as source of political power. This theory also known as **consent theory**. The 3rd and 4th trend in 12th 14th C. become visible by his theory The Ruled and Ruler both treated at power to each other therefore if king commits any wrong then he punished.

Thus by this concept source of Natural Law changes from Religion into the Human reason. By this theory the institution of "Social " came into existence. 1st product and either some body or body must be at power to control the affair of social institution therefore Institution of "state" came into existence.

This theory considered as 'forerunner' of the 'Democracy' because peoples were elect, select and appoint 'Body' to govern them. This theory upholds the principle of equality in the Natural Law.

I. Hugo Grotius

He propounded that instead of Divine Law or Gods feat an individual reason is the basic source of law, only due to this reason social exists peacefully and guides the affairs of society.

He regarded principle of Morality Higher Values as principles of Natural Law. By the Yardstick of 'Rationality' ethical principles and Reasonability we can test the morality or immorality in the society.

Thus he totally rejected the view of Thomas Aquinas and importance given to Human Reason as a basis source of Law. He said that every man made or positive Law must be based on Natural Law i.e. Human Reason or morality. E.g. The principle of 'pacta santa servanda'

He used the social contract for two purposes –

I) Internally

For the justification of absolute duty of obedience of the peoples to the Government.

II) Internationally

To create basis for legally binding and stable relations among the states.

Thus the social contract is an actual fact in Human History where in construction of each state had been prescribed by social contract by means of which people had chosen form of government, which they consider most suitable for themselves, e.g. Preamble of constitution.

*Berubari case

Not part

*Keshawanand Bharati

It is part of constitution.

*S.R. Bommai

It held as Basic structure and Internal part of constitution.

As per his view, if Ruler commits any wrong he not punished because people elect him, by surrending their right to him. Thus he rejected pauda'sprinciple of Equality. The Right to property is very sacrosanct right, which cannot be removed or taken away

II. Thomas Hobbes (1588-1679)

He was the author of two books De Cive (1642) & The Leviathan (1651)

He lived during the days of civil war in England & Hence was convinced of the great importance of state authority which he wanted to be vested in an absolute Ruler.

In his famous book Leviathan he acknowledged the improved version of social contract theory of Natural Law .He shifted the emphasis from Natural Law as an objective order to natural state as a subjective claim based on the nature of man and prepared the way for individualism in the name of inalienable right"

He understood Natural Law not with certain ethical principle but laws of Human conduct based on observation & appreciation of human nature.

For him, the chief principle of Natural Law was the Right of 'self preservation' by which man tried to escape from the state of "permanent insecurity" because men live without a common power to keep them all in awe, they are in that condition which is called war & such war basis of every man against every man.

As per him, the life of an individual or men in the state of nature was salutatory poor, nasty, brutish & short therefore as per self preservation he transfer all his Natural Rights to the ruler whom he promised to obey unconditionally, then Ruler Became an absolute ruler. The subject could not demand the fulfillment of any obligation by the ruler. The only condition was that the absolute ruler must keep the order.

He was against civil disobedience therefore he get thrown away by civil war & then

people could transfer their obedience to a new ruler.

All law is dependent upon sanction therefore he said government without the swords are but words, and of no strength to secure a man at all. So that all real law is civil law, commanded & enforced by the sovereign. It is men & arms that make the force & power of the law.

There is no distinction between society and state, all social & legal authority concentrated in the sovereign and church subordinate to it.

He propounded concept of Lex Naturalist i.e. Law of nature by following way

(i) The fundamental law of nature is that every man ought to endeavors to obtain peace as far as he has hope of obtaining it otherwise he can seek & use all help & advantages of war.

(ii) If others were willing to follow the same rule, men should be content with so much liberty against other men as he would allow to others against himself.

(iii) Men should performed their covenants made therefore nature was fountain & origin of justice.

He said injustice is nothing else than the non-performance of covenants. The nature of justice consists in the keeping of valid covenants, which start, with the constitution of a civil power sufficient to compel men to keep them.

III. John Locke (1632-1704)

As Natural Law is superior to the any law therefore law must be based on moral or higher or Ethical principles.

Thus Locke recreates ethical value rejected by Hobbes, because as Natural Law is superior then it must contained or incapacited the Higher Moral, Ethical principles & they are integrated part of Natural Law. Locke was the opponent of Hobbes. In place of the theory of absolutism or dectorship of Hobbes Stood for authority while Locke stood for liberty.

He used the social contract to justify government by majority, which held the power in trust with the duty to preserve individual rights whose protection was entrusted to them by individuals.

He placed the individual in the center & invested him with inalienable Natural Right among which the right to private property was the most prominent.

Thus as per his view state is under duty to protect right of individual.

E.g.

1) Hofehldian Analysis –
   Right ⟶ Duty.
2) Fundamental Rights against state therefore state duty bound to protect Rights of Individual.
3) Amendment No. Vth to USA constitution – Individual has right to life, liberty &property or estate.

As per Locke – State of Nature is like paradise, only some Institution not there to protect or preserve this paradise (e.g. peace, Mutual understanding, Good will) therefore states came into existence to protect the Individuals Rights.

As per him, the basic object of social contract was to preserve Right particularly right to property. Therefore laws made by state should not take away basic Natural Rights of Individuals.

Thus Natural Law superior to positive Law. The Natural Law is limitation on the sovereign power of the state.

*Keshawanand Bharati case

It was held Doctrine of Basic structure, which cannot be altered by Legislation.

III. Rousseau (1712-88)

Rousseau: *The social contract & Emile.*

As per him in early era individual had unlimited liberty there was innocence everywhere no competition & no jealousy therefore individual lived the free life of a savage.

But due to development of Act of Agriculture& Metallurgy which resulted into diversity of man's talents. The stronger man did greater amount of work & craftier got more of the product. Thus difference between Rich & poor aroused, which resulted into inequality therefore life, became intolerable. There were wars & murders everywhere.

This problem solved through social contract by this everyone surrendered to the community all his Rights & the result was that the community became sovereign. Even after contract, in individual remained free as was before.

Law is an expression of the general will the government & Sovereign are separate.

First law was passed by sovereign to create government and governors appointed to run government.

Thus sovereign is infallible, indivisible, unrepresentable & illimitable. The sovereign is unrepresentable because it lays in the general will, which can't be represented.

The sovereign is absolute like Hobbes but difference is that Hobbes – Monarch is head of state Roussean – whole community.

Thus he unites the absolute sovereign of Hobbes & the popular consent of Locke into the "Doctrine of popularity". "General Will".

Hobbes state sovereign & government are identical.

Rousseau state 1) Representative form of government, 2) sovereign must rule property. It must not do anything which is not in the interest of the whole people . It must maintain equality before law & Rule of Justice

Roseau's stated that sovereign constitute compromise between constitutionalism of Lock & Absolutisms of Hobbes.

Thus sovereign lies in general will of people & cannot impose limitation on itself as it has only interest in favor of public at large.

As nature gives each man an absolute power over all his part likewise social contract gives an absolute power to the body politic are all its parts. - Sovereign.

Absolutism not based on fear or compulsion but upon consent. The legislative executive judicial power emanate from sovereign & which collectively belongs to people. Thus sovereign is source of all laws, separation of power not divide sovereign but used it in convenient manner.

Man surrender right to state & not to out side agency but to a corporate body of which he is a member therefore he is free. The right to liberty, Equality & property are right of citizens & not Natural Right & inherent right of individual Liberty means civil Liberty not natural Liberty. Men are equal by law & not by nature.

The Liberty is not Licence, but it is the rational freedom of an individual who lives a common life with others & whose welfare is integrally related to the welfare of others.

Law is the expression of general will therefore it will not be unjust because nobody is unjust to himself. Law established equality, which belongs to man in the state or of nature therefore man, is free when he obeying laws because laws merely reflect his own will. He put greater emphasis on the general will, the majority will becomes the general will by the minority willing as the majority had willed. The general will is the expression of the highest in every man. It is the spirit of citizenship taking concrete form & shape Government Will is the manifestation of soverign therefore when sovereign acts for the common interest, it is the exercise of general will.

So long as laws are in the common interest, they are the expression of the general will which is the key to self – expression. The Government Will can't be self-contradictory, it is unity in variety, and it is always the right will. It always tends to the welfare of the whole.

There can't be justification for disobeying it. If individual differs from Government Will he is in the wrong because then his will become selfish will & not general will such persons will manifested in the authority of state therefore he is free even he not affirm the general will.

The Government Will is inalienable & indivisible can't delegated otherwise it closes its character.

Thus he wants to bring popular sovereign. The state & laws of state are subject to general will of people e.g. Post Office Bill. Thus sovereign power should be exercise on the basis of collective will of people. The trend of individualism changed to collectivism due to emergence of welfare state.

***Importance of Social Contract**.

1) It started the changing minds in the European countries.
2) It involved separation of law from moral duty to rights.
3) It liberated the individualism from the ties of feudalism & church.
4) Provide ground for modern theories of Government.
5) It inspired the revolution in United State & France.
6) It also inspired totalitarian theories of Government on the basis of general will.
7) It helps to develop modern International Law.

III) CHANGING OR VARIABLE CONTENT OF NATURAL LAW

I. David Home (1711 – 1776)

David Home: *Treaties of Human Nature, 1739*

He destroyed theoretical concept of Natural Law & said that Human Reason not provide

any guidance to Human Activity as well as Human Law. E.g. smoke – fire 2+2 = 4

Reason itself is a state of passion therefore reason could not basis of every human action. E.g. Head v Heart

Heart provides guidance to head. Therefore Reason must have moral sense. He attacks 3 great branches of Natural Law. 1) Rational Religion – It is fictitious, any deductive proof of a matter of fact is impartial the existence of God must be indemonstrable. So-called Religion lack even the practical reliability of scientific generalization therefore religion on passion of feeling. Religion may have a psychological or anthropological explanation of its belief & practices but there can be no question of truth.

***Contractual Theory of politics**

In moral & politics that why values depend upon propensities to action it is impartial that reason by itself should create any obligation. The force of moral obligation depends upon the acceptance of the propensities wants motives to action that gives rise to it.

Thus he wants to give psychological explanation of behaviouir, depend upon the pursuit of pleasure & the avoidance of pain as its sole motive.

Therefore he first time evolve theory of Utility i.e. greatest happiness of greatest numbers. Thus he was 1st Utilitarian & he substitute moral sense instead of reason to law.

The moral sense is to be guided by pleasure & pains therefore Law must provide maximum happiness to greatest number. He upholds Utilitarian theory of moral, political & economic value. Thus moral sense is the basis of all laws.

The moral sense is not source of just but it is important in –

(1) Creation of social & establishment of peace & order in society.
(2) Guard the public interest at the cost of individual equity.

Therefore whenever there is conflict between Individuals & public Interest then only Public Interest should be protected. E.g. Art. 31C,31B ,(IXth Sch.) Art 39(b) & (c)

*Kameswar Singh Case

It was held Directive Principles of State Policy are superior to Fundamental Rights.

Aristotle

All human being indorsed with human mind & they are part & parcel of Nature and it is creation of Nature therefore human being is distinct from nature as well as he can dominate the Nature.

Thus Human Mind is basic source of Law.

Kant

Investigate the functions of Mind.

1) Thinking morality play important role.
2) Volition morality play important role.
3) Filling – philosophy play important role.

Man has freedom to decide what is right & what is wrong and it is helps to react in particular manner. The freedom & morality are interlinked & it helps to create mind.

A postulate is basis of ethical postulate & it is important & necessary.

Kant introduced concept of Categorical Imperative – Act in a such away that the maximum of your action could be maximum of general notion.

Thus your act must not disturb the others then only other give respect to your action. As per him categorical imperatives is the foundation of Natural Law. It comes from inner voice of feeling.

He distinguished between Morality & Legality

I. **Morality** – It is matter of action inconformity with external standard set by Laws e.g. Indian penal code – Mens Rea.
II. **Legality** – it is matter of action inconformity with external standard set by Law e.g. attempt.

He said law is nothing but the aggregate of condition in which arbitrary will of one individual may be combine with that of another under general inclusive Law of freedom.

Thus individuals interest subordinate to social interest therefore individual interest club with general interest. The force may be used to enforce public Interest, for peaceful co-existence the use of force can't rule out.

He lastly said that principle of equality of freedom is basis of Natural Law. He wants to establish only one country in whole world.

Stammler (1856 – 1938)

He is the exponent of "Natural Law with a variable content". He first distinguished between

I. **Technical Legal** science which concerns a given Legal system – content of Law (concept of Law)

II. **Theoretical Legal** science, which concerns rules giving effect to fundamental principles.

Ultimate principle of law (idea of Law or Justice)

Law is nothing but a species of will others, regarding, self-authoritative & inviolable.

Analysis of meaning of law given by him -

***Species of will** – concerns with orderings of conduct.

***Others regarding** – concerns with man's relation with other man.

***Self-authority** – general obedience

***Inviolable** – its claim to permanence.

Thus idea of law is the application of the concept of law in the realization of justice. One must seek a Universal method of making just law, only it is the highest expression of man's social activity.

Its aim is the preservation of freedom Individual with the equal freedom of other individuals. In the realization of justice, specific content of rule of positive law will vary from place to place & from age to age i.e. Natural Law with a variable content. Law must contain Justice, Liberty & right as these are universal parameters traced upon which every law enacted otherwise law will be invalid law is not procurements of History, philosophy, and society, Religion, Morality. It is independent to these facts. Thus law has its own base.

Thus law is to be pure & Independent He rejected morality as the basis of law & started Natural Law as a changing content. Thus seeds of positive law given by the Naturalist themselves.

As per him the validly of Law or Legal system is based on purity. Law is combining, sovereign inviolable volition viz – There must be relation between Law & its Goals and objectives.

Society having two principles

I. Principle of Respect

II. Principle of participate

I. Principle of Respect

1) No ones volition must subject to arbitrary desire of another e.g. Art 21 – Due procedure.
2) Any Legal demand must of such a nature that addressee can his own neighbor i.e. Respect i.e. Respect the others equality as you have.

Thus 1st principle of Natural Law is maintained.

II. Principle of participation

1) No member can be arbitrarily excluded from community.
2) Legal power exclusive so far as the executed person can till being his own neighbor.

*Saffudin Saheb v. State of Bombay

(Ex communication by Dai-ul-mutalab)

High Court held invalid that right to community can't taken away .

Supreme Court held valid as he enjoys all civil Liberties. Being a member of society.

Duguit

The validity of Natural Law must be checked by functional principle of Right & Law. Law must be proper, violable Right & Law based on social interdependence because it is necessary for social unity or social solidarity amongst the people. Law has to develop & help social solidarity or cohesiveness in society. He rejected, the notion of Morality & introduces Social Interdependence as a basis of Natural Law.

E.g. Farmer -Worker - Industry.

As per him the notion of Natural Law not require because every individual/ section in so in society. Interdependence on each other therefore they not require Natural Law.

Only duties are recognized to fulfill the need of society & once need fulfilled then right not required.

Aristotle said fundamental specialization i.e. every section in society has to discharge its own function fulfillment of duty amount to fulfillment of Rights e.g. u/A51A Fulfillment of Duty.

Legislation is less the production of legislature because it is production of facts existed in society, therefore if law passed by legislature in accordance with constitution but not helps or further the social Interdependence then that Law will be void therefore constitution has to also further the social interdependence.

Duty combined with the Liberty of others. Liberty exercised for the Development of others by which only the social unity achieved.

Tribunal set up containing all section of society to decide whether, Law passed by Legislature is further the social interdependence or not and its decision in favor called as positive Natural Law which helps the social interdependence.

REVIVAL OF NATURAL LAW
PROF. LON L. FULLER (1902)

As per his theory the central aim of Natural Law is the attainment of "Satisfactory Human Life"

Law has to see, How Human Life will be more & more become the satisfactory one.

As per him the morality is the necessary component required for collaborative articulation of shared purposed which are common to survive human society e.g. not to injure, torture, kill attack etc.

The most fundamental principles of Natural Law is to affirmation of Role of the "Reason" in Legal order because, it plays key role to govern the society.

Thus there is close relation between aims & means therefore legal order must be right, therefore connection between Law & morality is necessary in order to achieve means & goals of Law.

He gave five fold encompassed procedural arrangement & they are analyzed as followed -

(1) Legislation
(2) Adjudication
(3) Contract
(4) Customary practices &
(5) Electoral methods.

Thus Law passed in relation to these five-fold arrangement then only it is Natural Law because it represents compulsion & necessity to develop society. E.g. U/S 23 of Indian Penal Code Act 1872 the object of contract must be moral one, Protection of Civil Right Act, Peoples Representative Act.

Thus every legal system is "purposive Human Enterprise" i.e. there are certain purposes, which has to be achieved by legal system for the sack of Human survives, & development.

The sustentative Laws must follow certain necessary procedures to achieve goals therefore certain requirements should be fulfilled by law as follows -

(I) Law must be sufficientatly General that it is the basis of Legislation.

(II) Law must be sufficiently Publicly Promulgated.

So that people could know what law is & it is an essence of Legislation.

*Harla v. State of Rajesthan

Supreme court held that Publication of Law is an essence of implication of Law otherwise Law will be bad. Public controls the Delegated Legislation.

(III) Law must be suffiently Prospective.

The date of application of the enacted Law should have prospective effect & not retrospective. This is the legislative rule. In Judicial process there is retrospective effect e.g. Ex post facto Laws u/a. 20 (1).

Thus though the prospectivity is the rule of legislation even Retrospectivity cannot over rule.

(IV) Law must be sufficiently clear & intelligible.

Law must be rational in order to avoid social disorder.

(V) Law must be sufficiently free from the contradiction.

E.g. Not with standing. ……Etc.

(VI) Law must be sufficiently constant through out the time.

(VII) Law must not required to be impossible.

(VIII) Law must be administered in accordance with the provision so that people could abide by it.

All these principles are called as "Internal Morality" because they are Intrinsically & deeply rooted in every Legal system and they are part & parcel of every legal system.

***Importance of these principles.**

1. They provide or prescribe certain standard for official behavior to carry out there function of Business.
2. They are the yardstick to qualify Law as a Law or Legislation as well as providing Licence to law.

If any Law or Legal system failed to comply any of these principles then that Law or Legal system is called as "Half Legal System".

Prof. Joseph Razz criticized this theory –

I. Rule of Law doesn't mean Law; the Law must be attached with justness.

E.g. Nuremberg & Tokyo Trials

II. No any Legal system can be measured as full or Half because legal system itself is a legal system.

III. Access to court or justice must be the IXth principle in order to give Legal Base or sanction to them.

*Bandhva Mukti Morcha

J. Bhagwati stated that access to court is the Basic structure.

*A.D.M. Jabalpure v. Shivkant Shukla.

J. Khanna by descending judgment held that right to access court is Basic feature of the constitution.

On the basis of this decision the 44th constitutional amendment is done & now Art20 &21 immune from the suspension during the National Emergency & Art 21 also include Right to Judicial Review.

PROF. FINNIS

Prof. Finnis: *natural law & Natural Right 1980*.

He rejected Natural Law tradition. He believed in the changing content of Natural Law. He rejected the morality as a basis of Natural Law. There is no need to declare Law invalid if it is contradictory to moral principles.

The Natural Law is set of Principles of practical reasonableness required in ordering Human Life & Human community. There are certain basic common goods, which are necessary to Human Social or Legal system. As they are pre moral therefore their validity can't adjust on any external basis i.e. morality higher principle because they are exists prior to morality.

Thus these basic common goods are immune from ay scrutiny by Judicial or Extra Judicial or Quasi Judicial legal system. There is no question of the desirability (Have or Have not) or Legality as existence of Human society itself is the proof of the existence of Basic common good in that society.

He believed in Individual Autonomy i.e. freedom with independence. There is no question of only surviving but it is matter of human striving, because human serving must have some objective in the life.

He gave Seven Basic Common Goods & these are enumerative & not the exhaustive every rational human being has to assent to these basic common goods as follows –

(I) Life -

It is necessary for self-preservation as well as self-recognition & striving.

E.g. Art 21 is the "Basic structure " of the constitution.

(II) Knowledge -

Preference of truth over falls believes to avoid the superstitions belief in society.

* Unnikrishnan case

Supreme Court held, Right to Education is Fundamental Right u/a. 21 for True & Real Knowledge.

(III) Play -

Work for own betterment or advancement.

(IV) Aesthetic Experience –

Goodness is to be appreciated.

(V) Sociability & friendship -

To help & co-operation for the co-existence.

(VI) Practicable Reasonableness –

It means use of Additional Intelligence to shaping own character & life .

(VII) Religion –

It is own belief to use own advancement.

E.g. 1) Preamble of Constitution,

2) Art 25 – 28.

Thus in ordering the community these Basic common Goods should be acknowledged for the Advancement of Society by Society itself.

The ultimate aim of law is provide justice. Therefore law must be just & Reasonable and these Basic common Goods are the stipulation on State authority therefore the machinery of Law required to perceive these goods & not to jeopardize these goods, otherwise law will be unjust law.

They are necessary for good, welfare & Advancement of people of Law. E.g. Art 21 by 44th Amendment immune from suspension during National Emergency.

He added three more goods -

(I) Need
(II) Function &
(III) Capacity.

These are "Basic Methodological Requirement". The Basic Methodological Requirement & Basic Common Goods together constitute the Natural Law & they are required for Distributive Justice.

*Asiad Case

*Express Newspaper case.

In these Supreme Court held that if Industry has no capacity to pay wages then it has no right to run the Industry, because the wages the wages are need based.

Thus functions means Role & Responsibility of each Industry & it is amount to capacity to run the Industry.

He Advocated Right to private property because the private property is to be symbol of status & the resources could be employed more proper way & properly enjoyed.

E.g. - Privatization of Government Undertaking.

The Rights are not Natural or Fundamental these are only Human Rights. The Human Right are absolute there are no any limitations on them.

E.g. - Right to Life, Reputation etc.

Thus the public authorities are political for public good.

The privatization of public power is detrimental to scheme of Basic Common Good; therefore if public authority acts against these goods then legality of Act can be challenged.

*Makhan Singh v. State of Punjab

Supreme Court held that right to life couldn't suspend during National Emergency.

*Shivkant Shukla v. A.D.M. Jabalpure

Supreme Court held that J. Khanna stated that right to access court is one of the Basic Right to challenge Legality of Law in the scheme of Natural Law & Natural Right.

Thus Rule of Law used to help the people & not to exploit them.

The Rule of Law & principle of Legality is greatest detriment to Sovereign Authority against misuse of the power mere the competency of Legislation is not important, it has to meet the standard of the Rule of Law & Principles of Legality.

Prof. Hart (Contemporary Jurisprudence)

He was the Leader of contemporary Jurisprudence i.e. coming together positive Law & natural law. He described or restated position of Natural Law from semi-sociological point of view. He said that if Human being in society wants to leave in close proximity then there is necessary of certain "Subs tentative Rules," but he did not point out those Rules. Instead of those rules he stated that there are certain facts, which constitute core of indisputable truth in the riteme of Natural Law – "minimum contents of Natural Law"

He said that first & foremost object of Legal system is surviving because society is not club of suicide, people are not only want to survive but also want prosperity of civilization.

He point out Human nature or tendency –

1) **Human vulnerability to each other.**
   Ability to torture, kill, Injure, other person.

2) **Approximate Equality.**
   Wider disparity in society.

3) **Limited Altruism.**
   Limited unselfishness & unlimited selfishness.

4) **Limited Resources.**
   Limited resources & unlimited want.

5) **Limited understanding.**
   Not to understand each other resulted into crises, troubles etc.

These are inevitable features of Human tendency, which follows natural necessity for certain form of protection to person, property & promises. He rejected relation between Law & Morality similar to Finnis.

He said neither law necessarily derived from morality nor there could be any essential relation between law & morality, but he further said there could be relation between law & morality/there could might derived from morality therefore the content of morality in law is minimum & not essential one.

He said that the whole History of Mankind, there was operation, exploitation & discrimination on various grounds like religion, race etc, therefore it must be suppress.

E.g. summit on Racism in South Africa at Durban on 3rd September 2001.

Prof. Neil McCormick criticized Hart

1) There is striking omission of Human Tendency in the form of 'Sex', which translates the limit of supremacy rational human being as his understanding. Therefore is close relation between morality & Human tendency.
   E.g. Vishwamitra, Rupam Deol Bajaj case, Vishaka case, Bodhisattva Gautam case.
2) Killing in war, capital punishment, abortion are needed for survival.
3) Pure or absolute equality is not possible.
4) If law lack Minimum contents of Natural Law. Then that law is proper law.

Even though these criticism, he was Bridge Builder between positive law & Natural Law positive law as apposite to Natural Law the positive law appose morality as a foundation of law but Hart combined these two laws together.

***CHARACTERISTICS OF NATURAL LAW**

I. Emanates from an absolute source.

It is based on values, which comes from an absolute source such as God or Nature.

II. Justice & Morality are the two pillars of Natural Law.

Morality is a set of beliefs, values principles & standard of behavior found in particular social groups. It is an Internal force, it appeals to the conscience. Morality is influenced by religion but it is not religion.

Thus an atheist may be a very moral person. Morality doesn't frighten or command, it only persuades. If Moral Rules are broken there may be moral sanctions & social disapproval.

III. Reason & common sense is the basis of Natural Law.

Aristotle – man can discover the eternal principle of justice by his reason, & because man's reasons are part of nature, the law discovered by reason that is Natural Law.

Stoics – man's reason allows him to differentiate right from wrong and law is based on man's concept of Right & right cousness .

IV. Natural Law is common to all states.

Aristotle – Natural Justice means, which everywhere has the same force & does not exists by the people thinking this or that.

Friedman – Natural Law concerns a universal order governing all men e.g. You shall not kill – common to any legal system.

V. Proposition of Natural Law is both self evident & eternally valid.

The absolute values of Natural Law reflect the essential nature of universe & are immutable (unalterable)& eternally (forever) valid. I.e. Natural Law is valid forever & is unchanging. Natural Law signifies the truth, and truth cannot change.

VI. According to the naturalists, unjust law is no law.

Positive law must be in consonance with the Natural Law principles based on justice, morality& reason.

Lex injusta non est ex means unjust law is no law e.g. Nuremberg & Eichmam Trials.

***Merits of Natural Law**.

I. Based on morality.

By this theory it has been possible to find common principles among different religions & outlook and to that extent it creates a common bond between people of diverse religion & culture.

II. Revolutions & freedoms struggles have been based upon Natural Law precepts.

E.g. French, American, Indian, - Freedom & Democracy.

III. Important Legal principles are based upon Natural Law concepts.

E.g. 'Reasonableness, justice, Equity and good conscience, Innocent until proven guilty.

IV. Basis for Fundamental Right.

E.g. Right to Life, Liberty etc. These rights are self-evident & in the absence of these Rights man cannot function in modern society. Natural Law means Natural Right i.e. Justice, Paternity, Liberty & Equality.

V. Check on bad regimes.

Such regimes controlled only by the struggle based upon the principles of Morality & Justice.

VI. Justification to resist bad Law.

Immoral Law is no law. Any man made Law if not in conformity with Natural Law principles then it should be resisted & removed.

VII. Limits the power of Legislature.

In determine the validity of enactments the principles of Natural Law play a very important part. E.g. Postal Office Bill.

VIII. Natural Law serves as guidance to positive law.

Not to enact contrary to Morality & Justice.

IX. Natural Justice is also extended to administrative actions.

*Maneca Gandhi Case 1978

Supreme Court held Natural Justice is a great humanizing principles intended to invest law with fairness & to secure justice & over the years it has grownd into a widely pervasive rule effecting large areas, of administrative actions.

***Demerits of Natural Law.**

(I) No distinction between Law & Morality.

Naturalists confused law with morality in actual real fact, which may not constitute law.

(II) The Problem of what is Morality?

Who decides what is or not moral. It is difficult to lay down absolute principle regarding it.

(III) Encouragement to the dangerous theory of Right.

As per this theory people get rights from nature & therefore their rights are not subject to control & regulation by the State. But in actual practice control & Religion by State on Right is important otherwise there would be disorder in the society & the principle of Might is Right would rule the society.

E.g. Nazian concept of superiority of the Aryan race.

(IV) Encouragement to disobey laws.

Naturalist said that unjust law is no law & must not be obeyed. This may resulted into disobedience, which leads to chaos & anarchy. Who decides what is unjust law.

(V) Natural Law is static & unchanging.

It doesn't keep pace with development. Some of the Natural Law concepts are very regressive in nature & look back rather then forword.

Rousseau

Back to Nature, which is inconsistent & unrealistic in today's dynamic society e.g. Abortion –Natural Law – wrong, but for population control etc its necessary.

Stammler

Law needs to be tested regularly in the light of the" community's prevailing moral ideals."

(VI) Not all Natural Law ideas are self-evident.

Salmand criticizes Natural Law means attitudes to moral proposition unlike attitudes to truths of logic vary with time, place & culture. Therefore it is very difficult to contend that such proposition is self-evident.

(VII) How do we prove the existence of God?

Naturalist said Law emanates from God but it is difficult to prove existence of God.

MODULE - 04
LEGAL POSITIVISM

Prof. Hobbes Stammler, Fennis rejected the morality, as a basis of Natural Law because foundation of Natural Law is not sound then law subsequent Legal theory will be sound.

Due to above the theory of positive Law immerged for appose the Natural Law theory it developed subsequently & theory of positive law begained by the Naturalist themselves.

Stammler said Law must be immune from all the inquiries of morality or ethical principle.

Bentham, Austin, Kelesen & Prof. H.L. Hart are the known positivists and they descending on the Natural Law on the basis of the morality. They separated morality from Law.

John Austin (1790-1859) was an English lawyer who propagated the imperative theory.

John Austin: *The province of Law Determined.*

The existence of law is one thing & merits and demerits of it is another thing. A law, which actually exists, is a law though we happen to dislike it.

As per him we shall not apply test of Justness, Reasonableness & fairness to the law.

*A.K. Gopalan Case

Supreme Court held that whether law is proper & reasonable is no question only its existence is important & rejected the due process u/a. 21 & applied law as it is.

William Black Stone

Law of God is superior to all the other laws therefore man made law must be in tune with the God made law as it derive validity from that divine authority

Austin assented this view & said there will be frequent co-incidences between Law & morality.

Prof. Hart – Thoughts of Austin are always confusing therefore it is myth to say whether Austin appose he morality or not.

Bentham – mere Legislative competence or existence of law is not sufficient, instead to that law must comply with the Higher Law of Land.

Thus he didn't reject totally morality as a basis of law.

Thus as per **Bentham** sovereign authority 's power must be in tune with the higher Law i.e. constitution because higher law only can control the sovereign power & he said every law or Legal system shall be subject to principle of Utility.

*Keshawanand Bharati case

Supreme Court laid down Doctrine of Basic structure to check the constitutional Amendments or Law making power of Legislation.

*Ismile Faruki Case

This principle confirmed by Supreme Court.

*S.R. Bommai Case

Supreme Court restricted executive power of president to suspend Fundamental Right during National Eergency.

*State of Rajasthan v. Union of India

Supreme Court held Fundamental Right couldn't be suspend during state emergency u/a. 356.

But Austin rejected the supremacy of constitution to the sovereign Legislative power, because it is moral conduct & said that the constitution only creates the positive moral obligation.

Bentham

If any law passed by the sovereign Legislative Authority reaches the degree of inequality, then there is plane moral obligation on people to appose it & reject it because such law became immoral & people not under due to obey it.

*Postal Office Bill

Violative to Right to Privacy u/a. 21

Thus Austin rejected morality to some extends, but Bentham does not renect it. They are pole –apart.

Prof. Hart given meanings of positivism

I. Law is commands of Human beings.

It shows kind of mandetoryness so people have to obey it. Thus source of law is not divinity or Higher principle.

II. There is no necessary connection between Law & morals as well as Law as it is & Law ought to be.

Ought to be morality is value lead statements.

III. Law must be distinguish & separate from inquiries of aspects like Sociological, Political etc.

As law, as it is there is no question of intoning law with other factors.

IV. Legal system is closed Logical system.

Only on the basis of existing law the legal issue in the society has to be addressed because laws are matter of as it is & not ought to be

*Vishaka Case

Supreme Court enacted guidelines given by the Internal Declaration because of absence of property law or Legislation to protect women from sexual harassment.

V. Moral judgments can't be establish as a statement of facts.

As law is matter of fact as it is exist & merits and demerits of it not important.

***Austin gave following characteristics of Analytical school.**

(1) Main object is to promote certainty & predictability in law.

It can be achieved by removing morality or higher principles from law.

(2) Offer the scientific study by way of observation & verification.

This is in order to attain certainty & predictability in Law.

(3) Law has to be a definite & verifiable source.

Command of sovereign is the source.

(4) Sanction is essential element of Law.

This is in order to bring the mandetoryness to law.

Prof. Pound called this theory as Threat Theory of law.

(5) Binding ness & Recognition of Law comes from the State.

Law itself as enacted by sovereign authority so it get recognition automatically.

In case of Municipal Law binding ness & recognition by the state , while in case of International Law it is choice to party to make binding on each other.

***Characteristics of Law given by Austin.**

***Definition**

Law is a command of sovereign addressed to its subjects, the enforcement where of secured by physical force of state.

***Analysis of the definition**

I. LAW IS A COMMAND OF SOVEREIGN.

His theory revolves around the notion of sovereign. Sovereign means the determinate human superior i.e. king or Dictator or Ruler. The peoples are under absolute duty to follow that command.

He gave two connotation of sovereign.

1) The sovereign power should not use on the basis of morality.
2) No any restriction or checks on exercise that sovereign power.

It has positive aspect that peoples under an absolute duty to obey command & negative aspect that sovereign is not under duty to obey law passed by it.

Thus sovereign command applicable to people in civilized society & sovereign is immune from this command.

There are four attribution of notion of sovereign

(1) It is not subordinate

It is not creature of law rather it is creator of Law. E.g. constitution is creator & the parliament is creature of it.

(2) It is illimitable or not limited.

As it is creature the sovereign 's Legislative power is absolute therefore it is illimitable.

(3) It is unique.

As there is only one sovereign authority.

(4) It is united.

The all sovereign powers in one hand.

This uniqueness & united ness make sovereign absolutely absolute.

Prof. J. Razz

Command is desire of only the sovereign & following conditions must be fulfilled to stand as command of sovereign as a Law.

A-Austin & C- command.

(i) A ---Desires that some others behave in ascertain ways.
(ii) A ---Has expressed his desire.

(iii) A---- Intends to cause harm if his desire not fulfilled by them.
(iv) A---- Has power to do so.
(v) A----Has expressed his intention to do so.
(vi) C-----Expression of the contents of all these.

Thus only after completion of these all condition then only A&C will be Law.

II. LAWS ARE RULES SET BY DETERMINATE AUTHORITY.

The source of Law is tangible.

III. LAWS ARE RULES OF GENERAL APPLICABILITY.

He used politically organized society instead of state therefore law must be apply to it in general.

IV. LAWS OR RULES DEALS WITH ONLY EXTERNAL HUMAN ACTIVITIES.

Kant

1) Morality means Internal motive.
2) Legality means External act of human beings.

Thus only action, which is contrary to sovereign law gets, punished therefore conspiracy, instigation, abatement, bad will having no answer in this theory.

V. LAW US A SANCTION.

In order to qualify Law as a Law it must contain sanction or punishment& it is basic characteristics of Law.

***Criticisms against Austin's Theory.**

1) Law is a command of sovereign

In today's modern society the notion of Law & making of Law is changed. Law only not made by sovereign but also by -

i) Delegated Legislation.
ii) Supreme court U/A 141
iii) There must be choice given to the people e.g. contract, will, and partnership.

Duguit

The command is a desire therefore it involves psychological element also therefore purity of Law from morality not maintained. In today's modern welfaric state the sovereign is not immune form its duty.

Bentham

The political morality is the basis of sovereign authority therefore law is not only it is made by the competent sovereign authority but it must as per the higher law of Land i.e. constitution.

E.g. Doctrine of Basic structure.

Also the law couldn't command of sovereign but it must encompassed with the social wants & desire. E.g. Postal Office Bill.

2) Notion of sovereign

His notion of absolutely absolute sovereign is not acceptable in toto in the federal system like India because of separation of power u/Sch. VII. The sovereign is not technical but it is pragmatic & realistic one therefore the sovereign power restricted on the basis of Fundamental Right of person.

*Vishaka Case
*Rudalshah Case

Held that sovereign liable to pay compensation.

In case of De facto & De jure sovereign, the sovereign authority is one & power of it executed by others therefore it is against this theory. In case of an International Agreement the sovereign authority under due to follow it. In case of today's modern judicial trends in the form of Arbitration & Conciliation the notion of sovereign authority not acceptable.

In actual practice, the people obey sovereign & not sovereign individual person, but it is obedience of sovereign.

3) Separation between Law & Morality

Prof. H.L. Hart

The minimum content of morality must be in Law. E.g. Fundamental Right, Principles of Natural Justice, Rule of Law, and Gender Justice etc.

These have rooted intrinsically in every Legal System. Therefore in today's democratic state the Austin's separation of Law from morality can't acceptable in toto.

4) Sanction

The people conscience & will also play important role in order to obey Law. In sanction the psychological elements involved therefore it diluted the notion of purity of positive Law.

The people accept Law given by sovereign authority because legitimacy given by them to that authority through any means therefore they treat Law enacted by that authority is binding on them i.e. acceptance of Legitimacy amount the obedience of law by people.

In some cases if public officer disobey duty then there is punishment even through he was exercising sovereign authority.

E.g. R.D. Tygi 1992, Bombay Riots (Suleman Bakery case) Rajesh Gopal DIG Arrested for corruption Dec. – 2004.

Person teaches leason of obedience since the childhood therefore he has tendency or habit of obedience. In case of general exception in IPC the punishment not given for offence committed. The sanctions are presents in the community in the non-Legal form like religion, custom & they form the Law of Society e.g. Saffudin Case.

Austin's notion about existence of Law is one thing & merits and demerits of it is another thing not acceptable e.g. Dena Case, Form of Death sentence, merit demerits u/a. 20 & 21.

Even though existence of sanction the rate of crime is increasing in the society & it can't control the reoccurrence of crime.

Thus obedience of law not totally depends upon the sanction but it is also depends upon conscience of person e.g. Anti-national element doesn't care about sanction. Also sanction depends upon the acceptance of people, rationality of society social culture etc e.g. Dhananjay Chatterji Case 2004

***Similarity & dissimilarity between Hindu philosophy & Austin.**

(1) In Hindu philosophy the Dharma is superior, Govern king & his subject. But in Austin's theory king is not under obligation he has absolutely absolute power.
(2) Dharma having source in the Vedas, U pnisidhas. But as per Austin, command of sovereign is the source of law i.e. determinate body.
(3) As per Hindu philosophy king get punished, if he committees wrong. But as per Justine king immune from any kind of sanction.
(4) Notion of Rule of Law is basis of Hindu philosophy. But Austin to great extend denied this notion.

But even though above criticism this theory is useful

Prof. C. K. Allen: *Law in making*

For a systematic exposition of the method of Jurisprudence we will have to turn to Austin.

III. KELESEN'S PURE THEORY OF LAW.

As per Kelesen's view law must be pure.

Hams Kelesen (1881-1973) was an Austrian jurist who framed the constitution of the Austrian Republic in 1919.

He advocated democratic ideals & therefore had to flee Austria when it was taken over by the Nazis and escaped to the U.S.A. where he became prof of Political science at the university of California, Berkeley Kelsen's pure theory of Law was enunciated in his famous book ***"General Theory of Law and State "*** (1995) in U.S.A.

E.g. Codification in Law must be done in order to bring the unity in Law. Because of Heterogeneous mixture of Law it is become difficult to tress the source of Law.

***Object of his Theory**

To bring Homogeneous Legal system in order to achieve the source of Law.

Austin fails to determine the validity of Law, but Kelesen says the validity of Law must be in Legal systems itself therefore. He is also known as positivist of positivist.

As per his theory the Legal system is "Normative Legal System" which prescribe & subscribe the regulation of Human behavior in society.

Norm

It means standard of behavior therefore Law as the norms & its Legality must be determined. His normative Legal system is Hierarchical i.e. clear-cut order in the Norm. These norms must be free from all the other aspects i.e. it must be pure one.

At the top of the Hierarchical there is "Grund Norm" from which other norm gradually comes down, it is nothing but the "Gradual Democratization" e.g. In India the Indian constitution is Grund Norm From which all the other Acts, Delegated Legislation & sub-Delegation Legislation gradually democratized. The order presents the fixed position of each norm, which can't change its position from Hierarchies.

Every Norm derived its validity from all other higher norms including Grund Norm. See the following illustration –

The constitution
Parent Statute
Delegated Legislation
Sub – Delegation Legislation

If hierarchic is not in this order then it is Ultra Virus. He not mentioned the level of Norms to which any Legal system burden down i.e. not mentioned the end of Hierarchy of Normative system.

As Legality of Norm decided on the basis of Higher Norm, but what is about the Legality of Grund Norm because beyond it there is nothing to this he replied that the Grund Norm is fundamental, Highest & supreme in the Hierarchy therefore it is not subject to any scrutiny.

Thus the validity of Grund Norm can't be challenged, it itself is the basic source of Law in every Legal system & this Norm is a superior Norm.

*Jay Lalita Case 2001

Supreme Court held that constitution is the superior to the mandate of people.

He said Grund Norm is initial Hypothesis because some time in Legal system there may or may not exists the Grund Norm but as positive theory based on what law is & not what Law ought to be, then he said Grund Norm is a "Legal fixtion" in order to give the legality of subsequent norms.

***Principles of Kelsen's pure Theory**.

(I) The basic aim to reduce chaos & multiplicity.
This is in order to achieve unity & in the Legal systems as well as in society.

(II) Legal theory is science & not volition.
It is knowledge of what Law is & not what Law ought to be.

(III) Law is a normative science.
It prescribes certain standard for act of individual behavior in society.

(IV) Legal theory as a theory of Norm.
Legal theory not concerned with the effectualness of Legal Norm because Legality or Validity of Norm is the precondition for its existence.

Austin said sanction is essential elements of Law in order to get its Legality.

Kelesen said neither such law derives from essential element of sanction or command in order to get legality.

Thus Kelesen said Law doesn't constitute command but it is condition i.e. validity of norm & the sequence of norm & its validity on the basis of Higher norm/ including Grund Norm is important. He didn't ruled out ought from his scheme of Law the ought to be must be legal one.

Thus Hierarchy of Norm can be obtained only by single & united legal order in the given system. The Grundnorm has to be securing the obedience by the society therefore efficacy or effectiveness of the total legal order depends upon minimum effectiveness of the Grund norm in that legal systems by the society.

*Madzimbabootos v. Larderburk (Rhodesian case)

Judiciary recognized usurper after 2 years therefore what is about rules passed by Revolutionary regime during these two years

*State v. Dossa

Pakistan Supreme Court held that usurper legally empowered to make laws

*Jillani v. Punjab

Pakisthan Supreme Court overruled above decision.

*Mirhasan v. State

Pakisthan supreme court usurper is illegal & invalid regime.

But Revolutionary regime issued an order to nullify above decision.

*Jaylalita Case 2001

Supreme Court held constitution is superior to mandate of people.

Thus from above cases it is clear that the minimum effectiveness to Grund Norm shouldn't secured by society but it is a matter of Judiciary.

***Relation between Grund Norm & international law.**

Kelesen said International Law is the supreme Grund Norm in respect to every independent so State therefore the legality of every Legislative system of sovereign state confirmed only by International Law.

E.g. -

1) Pacta Santa Servanda
2) GATT, WTO, Human Right etc. to them Municipal Law have to give position.
3) Theory of recognition of Municipal law gives equal status to all independent sovereign state.

Thus he achieved the unity of International Law & Municipal Legal order, this is based on fact to give equality to every & all Municipal state the Law.

Whether International Law is in the Municipal real sense?

As Kelesen was Monist, therefore having opinion that as the Municipal Law & international law is artificial one. Therefore they

are same & also there are only duties & not Rights therefore both private & public laws are same.

He didn't made distinguishment between "Law made" (Legislation) & "Law Applied" (Judiciary) therefore the rule created will be valid if there is -

(1) Legally constitute body &
(2) Legally valid procedural followed while enacting it.

*I. N. Gandhi v. Raj Narayan

J. Ray (descending Judgment) amendment to the constitution is subject to judicial scrutiny on basis of the constitution itself.

Today amendment to the constitution tested on basis of Basic structure i.e. Grund Norm.

Thus Kelesen's pure theory of sugeneric evolution of Grund Norm is refused by supreme court, the Legislative system can't sank democracy & democracy can't sank Human Right & couldn't acquire legality in today's world therefore legality & purity of legal system not depends upon exclusion of values but it depends upon the inclusions of there values.

MODULE - 05
SOCIOLOGICAL, REALIST AND HISTORICAL SCHOOLS OF LAW

Roscoe pound (1870 –1964) social contribution through law. The positive law is inadequate to meet the changing concept of society. The need of the society must be fulfilled by the Legal system. The Law has to meet the scientific, technical requirements of the society because the Law is made for society & not society for Law therefore the new concept of sociological school aroused.

As per this theory law is a tool of the social welfare. The institute of state changed from laissaiz fair to the welfare for progress of the individual in the society. Therefore instrument of law used as an instrument for social welfare. The law is social phenomenon therefore it involves numbers of other factors of sociology.

The social jurist like Genning Roscoe pound help to develop this theory. This theory also called ***Social Engineering Theory*** in which lawyers helps to construct the society because every society require restructuring the organization, various plethora's are there like desire of numbers of wants, but there is vast gap between resources & demands therefore gap fulfilled in such a way that maximum of fulfillment of desire & minimization of wastages.

Human beings are acquisitive competitive & self-assertion therefore everyone wants to acquire & everyone want in competition & acquires a plane. This is nothing but fulfillment of own desire therefore these claims, desires, needs i.e. interest came into conflict.

Interest means right recognized & enforced by Law. The interest only Defacto claims in every society & not Dejure.

The social Defacto claims have to fulfill following requirements.

i) Assessment of Defacto claim i.e. identification of claim.
ii) Define limits within which these claim will be given legal support
iii) What are those Legal precept or concepts e.g. property-possession, ownership.
iv) Machinery for enforcement of claim.
v) Limitations upon the enforcement machinery i.e. machinery has its own restrictions.

These requirements are necessary in order to balance the conflicting & competing Interest.

Duguit said Law is a social phenomenon in order to balance address & redress problems in a given society at given point of time.

Why we require social change?

If present situation is not conducive to development of an individual in society therefore social changes are require. It is a matter concerned with striving & not mere surviving therefore social changes necessary for human development.

This theory based on social reality i.e. practical or pragmatic consideration. So that this theory always try to give solution to hour to protect the claim and balance them with confliction & competing interests in order to get minimum waste. Therefore it is task of law to see law these claim can be balance in a society therefore there must be minimum waste because we have limited sources.

Thus Law is an instrument of social welfare i.e. minimum friction & minimum waste. The minimum friction or Defacto claims must be recognized by the Legal system therefore Roscoe pound classified the interest as follow -

(I) Individual Interest
(II) Social interest &
(III) Public Interest.

These interests are in the point of view of individual, society & State. It connotes individual has interest in all these categories therefore individual has interest everywhere. The interests are interlinked with each other. Thus in single interest all other interests are involved

Prof. T. N. Scalan

Individual interest of speech & expression involves –

i) Interest of speaker,
ii) Interest of audience &
iii) Interest of social.

Prof. Joseph Razz

The ultimate interest is an individual interest either in case of single or collective interest, because ultimate beneficiary is individual.

E.g. 1) Launching of satellites,
2) Kameswar Singh case.

This scheme envisaged evolved & recognized by the sociological jurists

themselves. In order to balance these there interest Roscoe pound gave following solution.

(1) Legislative or Judicial solution.
It has to be reached after careful evaluation & valuation of an interests, solution shall be just which leads to minimize waste.
E.g. Medical Pregnancy Termination Act— Interest of state is important than parents.

(2) The conflicting & competing interests have to be Harmoniously balanced.
The totality of scheme of an interest to be kept in minimum disturbance to every other interest in order to avoid the total Jeopardizing of any of the interest.
E.g. Minimum Wages Act, ESI (Employers State Insurance) Act

Thus at a given point of time sometime jeopardize of single interest is important requirement in order to keep balance in a balanced position. For this purpose law is the instrument of social control & lawyer is an engineer to satisfy the balance of an interest. These three interests are inter-linked some time; there may be conflict between the interests. The balance between them resolves this.

Prof. Paterson

Social interest is final yardstick to resolve conflict of interests because social interest is important for maintenance of the civilized society.

Thus what is beneficial to society is only recognized by the Legal system & not the individual interest. The social interest must able to maintain the level of society then only social interest could recognize & not the social demands. Hence, the social interest, which is above all the interest & other interest, are subordinate to it. Every interest valuated in the given situation & on basis of that measures the particular interest upheld or given primacy, because ultimate beneficiary is an individual.

Prof. Roscoe pound acknowledges the interest of minority, it required be protecting & enforcing.

E.g. Art 29 & 30 of Constitution.

What interests are to be protected as an interest of individual?

These are as follows -

(I) Individual Interest

Individual interests are claim on behalf of individual. There are following categories of an individual interest.

(1) Interest of personality. E.g. 1) Reputation, privacy, Belief & opinion
(2) Life & Liberty.
(3) Speech & expression.
(4) Interest in Domestic Relation. E.g. 1) family relation.

*Ahluwalia Case

Parents can sue on behalf of child or kids.

*Deshaney v. U.S.A.

Husband & Wife use to bit child at every evening therefore neighbor old lady file petition on behalf of child. –Interest of an individual can be claim by anybody on behalf any individual. 2) Maintenance u/s. 125 of Criminal Procedure Code (Cr. P. C.), 3) Interest of substance - In relation to property, promises, contract, freedom of association, continuity in employment. It requires living with human dignity. E.g. - 1) Asiad case, 2) Land ceiling Act, 3) Bela Banarji's Case -- compensation on acquisition of property by state.

(II) Public or State interest

Claims & demands in the point of state and can claim on behalf of state. U/A 12 - - state has its own identity, it is juristic person therefore it has also interest. State has two aspects -

(1) It is Juristic person.
It is politically organized society
Duguit - State is a biggest corporation.
It can possess property, enter into contract can sue & can be sued.

(2) It is guardian of social interest.
Doctrine of parents' patria. E.g. 1) If public undertaking sick, then the state steps its shoe, 2) Bhopal Gas case –file case as guardian of sufferer.

But it will amount to trespass in the social interest.

(III) Social Interest

Classified in following -

(1) Social interest in general social security for maintains civilized structure & level of society. The social interest is required.
E.g. 1) peace & order, 2) Public Health & public order, 3) Security of
transaction, 4) Safety & security e.g. U/A 25 freedom of religion limited
on basis of public order, peace, & health & morality of society.

(2) Social interest in security of social institution.
E.g. 1) family, religion, marriage

*Sarla Mudgal Case

Kuldeep J. – conversion for marriage & again conversion will disturb the whole society in India. E.g. Khatoonissa case, Shahbanoo case.

2) If election process used illegally then it violets political & social interest. E.g. 1) Balasaheb Thakre's case 2) Narsimharao case

(3) Social Interest in General morals.

The values sentiments, religious & ethical principles must be protected.

E.g. 1) living without marriage socially not allowed, 2) Devdasi system, sati system forbidden, 3) Public of schedicious matter e.g. Anara's case, 4) Cases 1) satyam shivam suderam picture case, 5) Picture film like water, fire , 6) painting of Goddess Saraswati by F.M. Hussein, 7) Madhu sapre & Milind Soman picture of Advertisement.

(4) Social Interest in conservation of social Resources.

1) Natural Resources e.g. forest conservation pollution Acts, U/a. 51A – Duty to protect Environment,
2) Human Resources e.g. S.C's or S.T.'s,

(5) Social interest in General Progress, Economical, Political & Cultural progress.

Economical – free trade, commerce & Intercourse, Industry, trade mark , Patent , GATT, WTO.
Political – freedom of Association.
Cultural - U/A29 & 30.

(6) Social interest in individuals Life.

As society comprises of individual therefore progress & development of individual resulted into development of society for e.g. right to education u/a. 21A

*Mohini Jain case
*Unnikrishnan case

Prof. C. Sesnic – This theory went out changing i.e. developed in 3 stages

I) 1st Stage

Roscoe Pound & his followers – Law is an instrument of social welfare the task of lawyers to see every section of society gets their requirement & claim.

II) 2nd stage

Lawyers are not merely layers. They take helps of sociological methods e.g. to carry survey & determining what type of Law required in given situation.
Thus sociological & Law comes together in this stage.

III) 3rd stage

Till 1965 it was not reached, but it was rapprochement between sociological jurisprudence & Natural Law theory

But as we know prof finnis common goods, Prof. H.L. A. Hart, as Semi-sociologist IPV – these precepts, has to be perceive only in human society therefore we could say how 3rd stage reached by rapprochement between sociological Jurisprudence & natural law theory.

***CRITICISMS AGAINST THIS THEORY.**

1) Term engineering means equate society to a factory like mechanism.
2) **Dr. Allen** – He confines the interpretation of wants & desire only material welfare of individual life, completely ignoring the personal freedom which are equally important for a happy social living.
3) Law develops & evolves as the need of society & law simply recognizes or approves it. This dynamic feature of Law undermined due to great emphasis on engineering.
4) Concept of an interest not much significance in a pluralistic society. E.g. linguistic, ethnic, & religions minorities having diverse interests.
5) **W. Friedman** – Classification of an interest is not useful. E.g. 1) Right to property subject to increasing limitation, 2) In totalitarian system, Personal Interests suppress or severally restricted in favor of state.

***Contribution of Roscoe Pound**

His contribution to jurisprudence is great while propounding idea of social engineering he has not forgotten the task of maintaining of balance. He has taken a middle way for avoiding all exaggeration but his approach has been experimental.

His emphasis on studying the actual working of legal rules in the society, the importance of socio-legal research for good law making & pointing out the great constructive fun which the law is to perform are very valuable contribution to jurisprudence.

His influence on modern legal thought is also great & it is under the light of his theory

among others things, that the subject is being studied.

***Jural Postulates of Roscoe Pound**

In order to evaluate the conflicting interests pound suggested that every society has certain basic assumption upon which it's ordering rests. These assumptions are nothing but Jural postulates. Therefore every individual in civilized society must be able to take it for granted that -

1. He can appropriate for his own use what he has created by his own Labour, and what he has acquired under the existing economical order.

2. That others will act with due care & will not cast upon him an unreasonable risk of injury.

3. That others will not commit any intentional aggression upon.

4. That the people with whom he deals will carry out their undertaking & act in good faith.

These postulates 3 he added more lately in 1942 as follow -

1) That he will have security as a jobholder.
2) That society will bear the risk of unforeseen misfortunes such as disablement as a whole.
3) That society will bear the burden of supporting him when he becomes aged.

LEGAL REALISM

This concept propounded by John Salmond, Jerome Frank, Karl Llewllyne, Justice Benjamin Cardozo. Realism is the tendency to be concerned with the act rather than with ideas & feeling.

Realism is the doctrine that law has reality apart from the perception.

The word real is intended to point to the contrast between law as it seems & law as in its actual working. Realism makes the distinction between law in books & law in action. As per realists, law consists in a collection of decisions rather than a body of Rules i.e. realism look on law as the expression of the will of the state through the medium of the courts. E.g. Law is like electric wires, without the switch 'ON' there is nothing. It is the Judge that switches 'ON' the law.

John William Salmond (1872-1924)

All law is not made by Legislature much of it is made by the courts, if the courts do not recognize rule. It is not a rule of law. Therefore to ascertain the nature of law we must go to the courts & not the legislature.

***Definition of Law**

The body of principle recognized & applied by the state in the administration of justice, as those rules recognized and acted on by the courts of Justice.

Thus as per him the courts have to continually interpret the law & plug holes & gaps left by the statute.

*Thabo Meli v. R 1954

If actual killing not intentional . In this case court develop further law of murder by plugging this gap left by the statute.

*AMERICAN REALISM

Karl Llewellyn (1893-1962)

He considers law as a means to social ends, & since society is changing law must change accordingly. Realism involves the acceptance of a law in flux (change) and a society, which changes faster than the law.

He believed that law was a means to social ends. The social ends were (a) to assist the survival of society & (b) aid in the search. The law should therefore be examined in terms of purpose & effect.

Why was the law made? – Purpose.
What consequences will follow due to the law? – Effect.

Therefore as per him, Judges when makes a decision are guided by a situation sense i.e. circumstances of the case. Hence Legal system comprises not only laws enacted by Legislature or Delegated Legislation or other, but it also includes law declared by the courts. The precedent not only binding on the parties but also on the subordinate courts. The value of precedent as a Law is very much significance to decide future cases.

Thus according to Realists, the Law is that which judiciary declared therefore law becomes a law only on declaration by courts. The ideology, philosophy of the Judges plays important role along with the existing laws while making the decision.

E.g. -

1) Maneka Gandhi case – J. Bhagwati – Due process

2) Banglore Water Supply case – J. Krishna Iyer – Definition of Industry expanded
3) A.D.M. Jabalpure case – J. Khanna – concept of Human Rights elaborated by J Khanna.
4) Asiad Case – J. Bhagwati – wage in need based.
5) Keshvanand Bharati case – J. Bhagwati – Doctrine of Basic structure
6) Vishaka case – J. Das – guidelines to protect workingwomen's from sexual harassments.

Thus task of law as an investment is to survive the group peaceably & provide justice & richer the life.

If sentiments & emotions of the Judges reflected in the decision then it is against Law. – Doctrine of Breakfast.

* Bhauri Devi case

Supreme Court – How it is possible, that tribal women raped by higher status or caste person? Two way case can be decide.

(I) **Formal** – In this, there is slavish approach of judge to adopt the precedent in their decision, they merely render the law, as laid down in the precedent.

(II) **Grand** – Judge does not follow the slavish approach to abide by precedent

He creates own law on the basis of his ideology, philosophy or give new different dynamic interpretation to law. Therefore it is judicial activism or judicial creativity. This dilute the rigidity of precedent & makes it flexible e.g. 1) dilution of concept of Locus Standi - Public Interest Litigation, 2) Maneka's case , 3) Vishaka case etc.

But some time it may leads to side tracking the law itself & play the role of Legislature. Therefore, in order to avoid this it is advised that Judges has to take helps of –

1) Professors,
2) Teachers,
3) Law students,
4) Lawyers,
5) Opinions of eminent persons or Judges &
6) Read the reported judgments or Reports of law commissions.

This will give cherished flavor to his ideology or thoughts while deciding the case.

Prof. Yentema

He reassesses the American Legal Realism. He included sociological jurisprudence init, to balance the conflicting & competing interests & provide solution to judiciary & Legislation.

***Judicial Behavior**

J. Schoolbert – coined this term the Judicial behavior is predictable i.e. ideology & philosophy reflected on the decisions.

E.g. some time it is referred as 'Breakfast Theory'

***MERITS OF LEGAL REALISM**

1) Not concerned with any ideology or theory .
2) Pointed out certainty of law is a myth.
3) Contributed towards the Liberation of Judges from unduly rigid legal concepts,
4) Recognize importance of doctrine of precedent in addition to rules or Law.
5) Law is a living organism as society changes law change.
6) Law is a mean to a social end.
7) Gives insight into judicial processes.
   E.g. various factors influencing the mind of Judges – Bias, prejudices, idiosyncrasies, upbringing, education social background etc.
8) Stipulated empirical study i.e. study based on experience or observation, in the field of Jurisprudence.
9) It combined intellectual positivism & the social approach i.e. while studies Law take into account other factors also.
10) Legal realists are called skeptics of traditional conceptualism. & Doctrine i.e. they expect Healthy framework of mind of Judges & Lawyers.

***Criticism**

1) Create confusion in minds of people whether statute law or Judges made law is real law?
2) Judges law some times not law because his decision may be overruled.
3) Some time on the part of Judges – Bias, emotions, haunches etc.

But **C. K. Allen**

1) Judges are also men & not law not only depends upon personal vagaries & Idiosyncrasies of Judges.
2) There is appeal in such cases.

3) **Curzon** – Today Laws are so much developed therefore there is no place to judges. E.g. Arbitration conciliation.

4) **H.L.A. Hart** – Judges has the last word it doesn't mean that there is no law. E.g. Rule of LBW in cricket.

5) Realist argument about uncertainty of language therefore Judges has to interpret it in proper way is not acceptable in Toto because it is a generalization of an expectable situation.

6) Legal Realism is nothing but a modified version of Austin's theory therefore instead of sovereign command it is a command of judges.

7) **GoodHart** – The judges' attitude towards a Legal rule is that it is a guide or mandate for action because prediction is from the standpoint or perspective of the observer.

8) **Cardozo** – it would be mistake on part of a judge to impose upon whole community his own belief or conduct because judge is under a duty to conform to the accepted standard of community.

HISTORICAL SCHOOL OF LAW

Propounded by Savigny & Maine

This school developed against the positive Law. He propounded his theory as follow -

(i) Law is a matter of unconscious & organic growth therefore law is found & not made.

(ii) Law is not universal in its nature.
E.g. Language, it varies with people & age.

(iii) Custom not only precedes Legislation but it is superior to it. Therefore law should always conform to the popular consciousness.

(iv) As law grows into complexity. Lawyers & Jurists are more important than legislature in the process of development of a legal system.

Prof. C.K. Allen

Historical jurisprudence is cibitas ibi lex ubi sociaties ibi – jus means where is a society there is a law in a wider sense.

As Savigny volksgeist is a source of Law.

It means a law made without taking into consideration the past history culture & tradition of community is likely to create more confusion than solving the problem because law is not an 'artificial' lifeless mechanical device but the origin of law lies in the popular spirit of the people which is known as volksgeist.

***Criticism against Savigny's theory**

1) Inconsistency in the theory – On one hand side he said origin of law is in the popular consciousness & at other hand he argued that some of the principle of Roman Law were of universal application.

2) Volksgeist not the exclusive source of Law.
Some time alien legal systems are successfully transplanted in another country. E.g. IPC Evidence Act, Transfer of Property Act Criminal Procedure code., Civil Procedure code. Contract Act enacted by British Rules on the basis of their experience in U.K.
Constitution adopted important concept from other constitution in the world e.g. Fundamental Right – U.S.A., Directive Principles of State policy – Irish, Trade & Commerce – Australia.

3) Legislation sub-ordinate to custom –his view that customs are based on popular consciousness of community as a whole is not true because many customs originated only for the convenience of a powerful majority to rule minority therefore in order to remove such bad custom which are not in tune with freedom & Human Right law must be able to change them. E.g. Devdasi, Sati system, Untouchability that is stigma on Humanity.

Sir Henry Maine (1822 –1885) Propounded Historic – comparative school

He showed contrast between Hindu, & Roman law, which shows fundamental distinction between Static & Progressive society.

Static Society—Which doesn't developed beyond particular limit i.e. it follows limit i.e. it follows old traditions. The static society governed by dictators under the name of God/ Devine Law. E.g. Taliban in Affaganisthan, Ayodhya crises in India.

Progressive society - Which developed beyond particular stage i.e. they change with demand of changing time. The Progressive society governed by popular sovereign authority by the democratic & Republic form of Government in tune with the demand of changing time. E.g. Hindu Marriage Act, Protection of Civil Rights Act.

In world major societies are static one therefore called as status & Progressive societies –contract. Therefore always society tries to transfer from status to contract. E.g. Untouchability.

Thus his main emphasis upon changing the society from status to contract. This concept theoretically and logically applicable in "freedom of Labours & Industrial contract." Where collective bargain & trade unionism is important therefore status demolition & contract get importance. It provides security, welfare in order to avoid exploitation, slaveries of employees or labour in developing world.

But in present context the contract reversed into status e.g. Minimum Wages Act, u/s. 25 'contracting out ' i.e. –No individual can enter into contract with employers to work below minimum wages.

Thus an employee seizes freedom & termed into status.

But this reversal is for certain values i.e. Collective welfare.

***Maine's contribution to Historical Jurisprudence**

He improved Savigny's theory by explaining inter relationship between community & law and also recognized the role of legal fictions, equity & Legislation in the evolution of Law.

He studied the Legal system of different communities for his comparative research on evolution & development of law.

Later jurist were greatly inspired by his theory and his comparative researches e.g. Pollock, Vinogradoff.

MODULE - 06
CRITICAL LEGAL STUDIES

Critical Legal studies

Robert Anger & Dunkain Kennedy developed this critical Legal studies movement.

This movement initiated on political & social aspects, and helps to expand American realism due to emergence of Industrial & Economical relation. This movement gives emphasis on Liberalism to Legal system along with Marxism. They try to make balance between Liberalism & Marxism.

As per this movement law is politics, it doesn't exist independently of any kind of ideology in a given society therefore politics require enforcing Law in a given society.

E.g. -

1) Shahbanoo Case
2) Women's Reservation Bill,
3) Mandal Commission Case
4) Appointment of Governors.

The Legal reality is not product of Nature rather it is socially constructed on therefore life in society is less organized & structured therefore it is a job of Legal systems to organize & structure the society according to certain rights.

Prof Robert Anger

He gives guidelines & suggestion regarding, How society organized & structured?

1. **Immunity Rights** – These are absolute claims. E.g. Right to Life & Liberty, Right to property, Freedom to speech & expression.
2. **Destabilization Rights** – Inability of an individual to destroy practices in society e.g. Untouchability, Devdasi System, Sati system, Dowry system.
3. **Market Rights** –Rights which gives a condition & provisional claim to divisible portion of social capital e.g. Bonus to Employee.
4. **Solidarity Rights** – Rights that are leads to mutual understanding & communal harmony.

I. FEMINIST JURISPRUDENCE♣

(A) Meaning of feminist jurisprudence

Feminist jurisprudence is the study of the construction and workings of the law from perspectives of women and women's lives. The study views law as a theoretical and practical enterprise and its impact on women's lives. Feminist jurisprudence focuses on the way in which law has been structured that denies women's experiences and needs. It is basically concerned with an analysis of the law and legal system intended to show that how existing law is structured to promote the interests of males and to exclude females. In this effort feminist jurisprudence analyses how patriarchal domination and its assumptions in the mind of law-makers have shaped the content of laws in different areas of law including trust law, family law, property law, contract, criminal law constitutional law etc. Feminist jurisprudence claims that patriarchy in intended in the legal system and all its workings, is an unacceptable state of affairs. Feminist also have gone to the extent of challenging conventional ideals of judicial decision making. According to them Judges have biases towards female and not working neutral, impartial and objective manner. There are claims made by the Feminist Jurisprudence.

The feminist legal theory is expressly descriptive as well as implicitly normative. In this sense, feminist jurisprudence is a normative like traditional theories of jurisprudence. Feminist jurisprudence challenges basic legal categories and concepts rather than analyzing them as given.

While some scholars doubt whether there exists a school of legal thought deserving the title feminist jurisprudence, there are others who consider feminist jurisprudence as representing the most important modern development in the analysis of law.

(B) Influences on feminist jurisprudence

Feminist jurisprudence has been inspired and influenced by the ideas, approaches and methods adopted by number of other approaches to law like Realist, Marxist theories, Critical legal studies and post-modernist legal theory. There 3Je many similarities between the approaches of feminist jurisprudence and CLS. They include condemnation of injustice, skepticism as to the alleged neutrality of law, the purported separation of law from politics, and the role that law had played conferring legitimacy on a society's existing institutions and social ordering. Both, feminist jurisprudence and CLS share a common intention to challenge the

♣. Dr. Vijay Ghormade: Text Book on Jurisprudence & Legal Theory, Hind Law Publications, Pune, 2008 pp. 219- 226

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

(C) Main theme of feminist jurisprudence

Feminist jurisprudence revolves around a number of questions and features diverse approaches. However, following two characteristics are seen in the major debates in current feminist jurisprudence, which can be called the central, them of feminist jurisprudence:

(1) Responding to Liberalism and Questions of Perspective:

The Anglo-American legal tradition is built on liberalism and its tenets. Feminist jurisprudence responded to liberalism by raising some questions about their assumptions.

Feminist jurisprudence is critical to the current dominant understanding of legal thought - positivism and natural law philosophy which is usually identified with the liberal Anglo-American tradition[1]. Feminists responded to both these tradition-positivists on the one hand, and natural law theorists on the other by raising questions regarding their assumptions about the law, including:

(a) law is objective and thus must have recourse to objective rules or understandings at some level,
(b) law is impartial, hence it is not to be tainted by the personal experience of any of its practitioners, particularly judges,
(c) law apply equally as a formal concept rather than a substantive one,
(d) law is certain, and that the goal of lawmaking and legal decision-making is to gain certainty,
(e) legal justice can be achieved by following proper procedures.

Each of these assumptions has been a significant feature of the liberal traction of legal understanding. Feminist jurisprudence debated and contested these traditional legal thought.

[1]. In the modern period, this tradition is represented by Hart and Dworkin

(2) Law does not acknowledge the needs of women:

The law as currently constructed does not acknowledge or respond to the needs of women and therefore must be changed. Theoretically feminists are concerned with how to understand the law itself, its proper scope and legitimacy. Scholars raised these questions in the context of the feminist jurisprudence. These critical issues can not be answered easily by traditional legal theory. What is the proper moral foundation of the law? The answer depends on the moral principles of the dominant structure of the society. What is the meaning of rule of law? The answer is important in the light of obedience to law which has been an important part of the history of subjugation. What is the meaning of equality? It is difficult to answer especially when there is diversity in the world. What is the meaning of harm? The answer is subject to the fact that women are subordinated to men in all over the world and also subjected to certain kinds of violence by men. How can adjudication of disputes between men and women be properly and fairly resolved when there is no equality in the parties? What is the meaning of property in the light of the ideology which categorized women as property? Under the patriarchal structures of legal system, how far law is an appropriate mode for the resolution of dispute.

Thus, the main concern of feminist theory is the treatment of woman by the legal system, and the perception or lack of perception of women's experiences and needs in law. In other words, it is the extension of the feminist perspective to an analysis and critique of law.

In India, feminist views patriarchy as the main reason for the subordination of women. Patriarchy is the ordering of society under which standards-political, economic, legal, social-are set by and fixed in the interests of men. In such a society men are more highly valued than women. Naturally, the political structure of that society also values men more than women. In a patriarchal society, experiences and perspectives of males are the reference points in relation to which e law is fixed. Even when laws are enacted for women, it is men’s understanding of women, their nature, capacities, and experiences that have informed the law. In short, law sees women through the male eye. An example from criminal law may illustrate this point. In the definition of rape given in the Indian Penal Code, an essential ingredient is the penetration of the vagina by the penis. This is the men’s

definition of sex, rather than the women's experience of sexual violation. In Sakshi v Union of India[2] the petitioners argued that according to modern feminist legal theory and jurisprudence, rape is looked at as an experience of humiliation, degradation and violation, rather than an outdated notion of penile / vaginal penetration. It was, therefore, contented that the meaning of rape should be broadly construed to include all forms of non-consensual penetration. The Supreme Court took the view that the definition of rape cannot be altered by judicial interpretation to include all forms of penetration. The court observed that an exercise to alter the definition of rape by the process of judicial interpretation, when there is no ambiguity in the provisions of the enactment, 'is bound to result in good deal of chaos and confusion, and will not be in the interest of society at large. Again, when the law accepts consent of woman as a defence in rape, what actually accepted is the male view of whether the woman consented. The controversial decision of the Supreme Court of India in Mathura case[3] is a typical example of such a view. Here, a poor illiterate Dalit girl was raped by Police constables in the police station. The Supreme Court accepted the contention of the accused that the girl has consented to sexual intercourse, because there were no clear signs of resistance and external injuries on her body. The accused were acquitted. The court obviously failed to look at the situation from the victim's - perspective a poor illiterate Dalit girl in police custody, unable both psychologically and physically to resist the sexual assault on her. Silent submission due helplessness, in an atmosphere of domination and fear, was interpreted by the court as consent.

The norm of family in a patriarchal society as a household headed by a man with his wife and children wholly dependent on him, is accepted by law also. Other forms of family, especially those without a man, are seen as abnormal. Feminist jurisprudence challenges the claim by those in power that the law is neutral, detached, objective, and disinterested. Enumerating instances of disadvantages and discriminations that women had to fight against - as in the case of inheritance and property rights to access to education and employment, right to vote etc-feminist jurisprudence believes that the system will not be free from gender bias until women's lives are taken by law as seriously as men's. Feminist jurisprudence may, therefore, be described as an approach which challenges the male-centric approach of legal theory and practice, and which seeks to incorporate feminist reasoning into law, and legal scholarship.

(D) Different approaches of feminist jurisprudence

There are different strands of feminism which have influenced feminist jurisprudence.

1. Liberal Feminist Theory

Liberal feminism considers liberalism as the appropriate weapon to fight improvements in the position of women. In support of their argument they cite the examples of social legislation passed by the British Parliament, and conclude that liberalism had claimed and secured rights for women.

2. Radical Feminist Theory

Radical feminism focuses more on the issues that affect women's private lives. Thus, they have raised such issues as marital rape, failure of the legal system to recognise the economic value of the contribution of women in child rearing and housework, harassment, and pornography. According to radical feminists, abortion is not infanticide, but an act of self-defence by a woman against the invasion of the 'other' in the shape of the foetus. They recognise the differences between men and women, and ask as to what justification exists for any such differences being treated as a reason for women to be disadvantaged and discriminated?

Debate between Radical and Liberalism

There are some areas where their views common. For instance, radical feminism recognises the importance of rights-oriented strategies advocated by liberal feminism as empowering women in some contexts.

In many respect however.

Radical feminism is different from liberalism. Radicals consider liberalism as inadequate to meet women's needs. While the main concern of liberal feminism is rights, radical feminism is not concerned with rights in the abstract sense, but with the fact of domination of women by men. The basic difference between these two kinds of feminism makes their approach to law different. Liberal feminism, by and large, accepts the law and its reasoning process, but radical feminism rejects

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2. (1996) 6 SCC 591; 1999 SCC (Cr. L. J.) 1159
3. (1979) 2 SCC 143

this approach, since the reasoning structure of law corresponds with the patterns of socialization, experience and values of a particular group of privileged, educated men. The language of neutrality of law is seen by radical feminism as a device to silence women, and submerge a critical awareness of institutional power and domination. Radical feminism seeks to demystify the neutrality of law, and to make the law comprehend that women's definitions have been excluded and marginalized.

Liberalism argues that the liberal tradition offers much that can be shaped to fit feminist hands and should be retained for all that it offers. These feminists approach jurisprudence with an eye to what needs to be changed within the system that already exists. Their work, then, is to gain entry into that system and use its own tools to construct a legal system which prevents the inequities of patriarchy from affecting justice.

Radical feminists find the traditional system as either bankrupt or so problematic that it cannot be reshaped. According to this approach, the corruption of the legal tradition by patriarchy is thought to be too deeply embedded to allow for any significant adjustments to the problems that women face. Feminists using is approach tend to argue that the legal system must be abandoned. They argue that liberal legal concepts, categories and processes must be rejected, and new ones put in place which can be free from the biases of the current system. Their mission is to craft the transformations that are necessary in legal theory and practice and to create a new legal system that can provide a more equitable justice.

3. Cultural Feminist Theory

This is another influential school of feminism is known as cultural feminism. The basic assumptions of this theory are different from those of liberal and radical feminism. The cultural feminism sees woman as caring and connected to others. A cultural feminist does not denounce pregnancy, child birth and child rearing is rather treated as matters of celebration. In other words, women have a sense connectedness to others, and to life. This attitude is explained with an illustrative reference to dispute resolution. If males are asked to resolve a dispute, they treat individuals as autonomous units and in any dispute they look for a rule that - covers an issue, to see what right each side possesses. In other words, the follow an ethics of rights. Females, on the other hand, seek solution for not in terms of rights, but in terms of seeking to safeguard relationships. They do not look for rigid rules, but are willing to adapt a different solution for each problem seeking to safeguard relationships, revealing a concern for both sides. The cultural feminists call this aspect as ethics of care. Extending this approach to law, cultural feminists argue that the refusal of the legal system to protect these values has weakened the community as it has impoverished women's life. What is needed, they continue, is a restructuring of law and society to accommodate the values nurturing, caring and loving that are traditionally associated with women.

Difference between Cultural and Radical or Liberalism

Cultural feministic thoughts are different from those of liberal and radical feminism. While liberal feminism seeks women as mainly confined to the private sphere and radical feminism sees her as man’s sexual object, cultural feminism sees her as caring and connected to others. According to radical feminists, pregnancy and intercourse imply a violation of women's privacy, integrity and life. However, cultural feminists see pregnancy, child birth and child rearing as matters of celebration, not matters of dread and despair.

4. Post-modernist Feminism:

Post-modernism is also an influential theory. Post-modern feminism rejects equality, and views it as 'a construct that must be reconstructed'. The idea of a woman’s point of view, which appears in feminist literature, is not acceptable t postmodern feminists because they consider it as a fiction, which, in practice, merely serves to bind the individual to her identity. Practical solutions to concrete legal situations involving women are required, rather than abstract notions of the nature of law. Post-modern feminism believes that arguments with the upholders of a male dominated jurisprudence on terms of its own choosing can never be to the advantage of women as a group.

5. Sameness v. Difference Debate:

Under this debate the central concern for feminists is to understand the role of difference and how women’s needs must be figured before the law. Sameness feminists argue that to emphasize the differences between men and women is to weaken women’s abilities to gain access to the rights and protections that men have enjoyed. Their concern is that it is women’s

difference that has been used to keep women from enjoying a legal status equal to men's. Consequently, they see difference as a concept that must be de-emphasized. Sameness feminists work to highlight the ways in which women can be seen as the same as men, entitled to the same rights, protections, and privileges.

Difference feminists argue that the differences between men and women, as well as other types of difference such as race, age, and sexual orientation, are significant. These significant differences must be taken into account by the law in order for justice and equity to be achieved. What has been good law for men cannot simply be adopted by women, because women are not in fact the same as men. Women have different needs which require different legal remedies. The law must be made to recognize differences that are relevant to women's lives, status and possibilities.

(E) Common characteristics of different schools of feminist jurisprudence

Feminism, under whatever label, shares a common aim-the betterment of women. The question is how to achieve this aim. All feminists continue to raise questions which are designed to identify the gender implications of rules and practices which-might otherwise appear to be neutral or objective. Feminist jurisprudence, in particular, examines how the law fails to take into account the experiences and values that seem more typical of women than men, or how existing legal standards and concepts might disadvantage women. It also tries to expose those features of the legal system which discriminate against or are disadvantageous to women, the manner in which they operate, and to suggest corrective measures. What seems to emerge is an approach which integrates the ethics of rights with the ethics of care. Change has not only suggested in the content of laws, but also in the institutions of society. The demand for more representation women in the judiciary and law enforcement machinery and for reservation of seats in democratic institutions, including legislatures, must be seen and under~100d in this perspective. Katherine Bartlect identifies the following three basic 3iements which characterize feminist legal theory:

(a) The extent of the presence and recognition of women's experience in law ('women question');
(b) A reasoning which proceeds from context and value difference and the experience of the un-empowered (feminist practical reasoning); and
(c) An exploration of the collective experience of women through a sharing of individual experiences (consciousness raising).

Upon these basic elements feminist legal theory seeks to articulate women's perspective, and thereby empower women in the future development of law.

The two characterizations of the debate about what perspective is best for understanding the problems of the law do share some features. Those who argue a sameness position are often thought to fit, to some degree, with the reformist view. Difference feminists are seen as sharing much with radicals. The parallel between the two characterizations is that both argues over how much, if any, of the current legal system can and must be preserved and put to use in the service of feminist concerns. The two characterizations are not the same, but the important parallel between them allows for some generalization regarding the ways in which each is likely to respond to particular theoretical and substantive issues. From these perspectives, feminist jurisprudence emphasizes two kinds of question: the theoretical and the substantive, in which feminist jurisprudence is interested.

II. Race Theory

Critical race theories combine progressive political struggles for racial justice with critiques of the conventional legal and scholarly norms which are themselves viewed as part of the illegitimate hierarchies that need to be changed. Scholars, most of whom are themselves persons of color, challenge the ways that race and racial power are constructed by law and culture. One key focus of critical race theorists is a regime of white supremacy and privilege maintained despite the rule of law and the constitutional guarantee of equal protection of the laws. Agreeing with critical theorists and many feminists that law itself is not a neutral tool but instead part of the problem, critical race scholars identify inadequacies of conventional civil rights litigation. Critical race theorists nonetheless fault critical legal scholars as failing to develop much to attract people of color and for neglecting the transformative potential of rights discourse in social movements, regardless of the internal incoherence or indeterminacy of rights themselves.

Critical race theorists thus try to combine pragmatist and utopian visions; they draw upon a variety of critical strategies to expose how law constructs race to disadvantage persons of color while joining larger struggles for social transformation and counter-mobilization against right-wing retrenchment in struggles for racial justice.

Not a set of abstract principles but instead a collection of people struggling inside and outside legal scholarship, critical race theorists are engaged in building a movement to eliminate racial oppression, and other forms of group-based oppression. The scholars pursue individual routes, methods, and ideas. Nonetheless, they converge around the belief that racism is endemic, not aberrational, in American society; that liberal legal ideals of neutrality and color-blindness have replicated rather than undone racism; that analysis should be informed by personal experience and contextual, historical studies; and that pragmatic and eclectic strategies should be pursued in the struggle for racial and social justice.

Critical Race Theory is strongly associated with Critical Legal Studies—an approach to American jurisprudence advanced by a group of progressive, often liberal and sometimes Marxist jurists in the 1980s and the present decade. The Critical Legal Studies group, of whom the most prominent associates are Patricia Williams, Richard Delgado, Kimberlé Crenshaw, and Derrick Bell, are most peculiarly marked by their utilization of developments in postmodern post structural scholarship, especially the focus on "subaltern" or "marginalized" communities and the use of alternative methodology in the expression of theoretical work, most notably their use of "narratives" and other literary techniques.

A constraint on the Critical Legal Studies group is the focus on law. Quite often, the presumption of their work is that strategies of recognition—powerfully evoking, for instance, an unemployed Latina or black mother's confrontation with the obstacles posed by the legal system and government bureaucracies, or the situation of a person of color facing juries and other facets of the criminal justice system—will have an impact on the practice or implementation of justice within the systems of laws available. In effect, the structure of interpretive legal argumentation permits criticisms of the system only to the extent to which the criticisms call for, at best, systemic adjustment. Such an approach renders revolutionary or more radical approaches to questions of law at best "interpretations" worth considering but performatively limited. As a consequence, the form of critical discussions of race that emerges [sic} in the Critical Legal Studies movement is usually limited by the impact of juridical conceptions of how race will be negotiated in the sphere of litigation and legislation. How about race in civil and often not so civil society?

The critical treatment of the concept of race and especially the impact of racism in the modern world has pre-dated the Critical Legal Studies approach well more than a century. Its history is isomorphic with the development of Africana thought, which began in the eighteenth century with, ironically, critical efforts to render slavery illegal. Although the African dimension of Africana thought preceded the eighteenth century, the diasporic reality created by conquest, colonization, and slavery created the conditions for the discourse on black humanity that has been a main feature of thought among the African diaspora. That discourse can be traced back to the writings of Wilhelm Amo and Quobno Cugoano where,especially in Cugoano's work, a philosophical anthropology of freedom is advanced, and stands as the groundwork for nearly all subsequent critical discussions of race and racial oppression.

Subsequent discussions emerged in the nineteenth century in the work of nearly all of that century's central figures in Africana thought: David Walker, Maria Stewart, Martin Delany, Frederick Douglass, Alexander Crummell, Edward Blyden, Anna Julia Cooper, Rufus Lewis Perry, and W.E.B. Du Bois. Although freedom was the leitmotif of their writings, quite often they found themselves straddling questions not only regarding the freedom they sought, but also the identification of the bearers of the oppression they sought to alleviate. The liberation of "blacks," "Negroes," or "nègres" was complicated by cultural differences between many sets of peoples designated by these terms and the simultaneous epistemological leakages in the developing "sciences of man." We could call this complication the identity question. It addresses the question, "What or who are racialized people?" or, "What does it mean for a people to be racialized?" or, simply, "What is race?" That century ended with a body of writings that can perhaps be considered, in spite of their limitations, the first critical work that focuses on the concept of race, namely, Rufus Lewis Perry's

recognition that there is an ontological dimension to race discourses,2 and W.E.B. Du Bois' reflections on racial conservation and the problems involved in studying racialized people. The more influential of the two, however, was Du Bois.

Critical race theory has gained much from Du Bois. It was Du Bois who formulated, for instance, the distinction between identity and policy (liberation). In "Conservation of the Races" (1897), Du Bois struggled through the difficulty of using biological criteria for group classification of differences in the human species. Much of what he says in the essay is archaic today and downright false. But of importance is his identification of the need for a policy to protect certain groups from the genocidal onslaught of American and European imperialism. We should bear in mind, when we read Du Bois's essay today, that the indigenous populations of the United States were reduced to four percent of the original numbers in little more than a century. Du Bois had every reason to believe—given the rhetoric and realities of Manifest Destiny—that not only black populations in the New World but also such populations in Africa faced a similar fate. His essay challenged the intellectual community of color to take action against such a calamity. Those of us today who are very critical of Du Bois and his contemporaries' errors should wonder what our present may have been like had they not built institutions to combat the racist policies of the U.S. government and the European governments. In order to prevent "racial" genocide, however, Du Bois had to articulate "racial identification" of "racial identities."

Du Bois was a critical thinker of unusual talent for his times. In other work from the period, for instance, his "The Study of the Negro Problems" and The Philadelphia Negro, he began to question not only prevailing racial assumptions but also the assumptions of racial study itself. In other words, he began to study the studier, the imagined "objective" voice of reason in the systematic acquisition of knowledge of racial or racialized subjects. At the heart of Du Bois's critical race theory, then, was a critical theory—a critique of theory itself. In The Souls of Black Folk, Du Bois formulated the problem succinctly as a failure on the part of the theorists to study the problems of racialized people instead of reducing such peoples to the problems themselves. Implicit in this move is Cugoano's insight: a proper anthropology keeps the humanity of human subjects in sight. So the legacy is this. We must study even dehumanized human subjects in a humanistic way in order to recognize the dehumanizing practices that besiege them. The importance of such work for those who focus on policy is, then, obvious.

Critical work burgeoned throughout the twentieth century, the century marked by Du Bois' famous admonition about the color line. It is in this century that the most prominent other strain of critical race theory emerged, through the radical critical work of Frantz Fanon. Fanon announced, in Black Skin, White Masks (1952), the constructivity of racial formation.4 In addition, he brought into focus the tension between structural identities and lived identities and the tension between constitutional theories (the organism) and raw environmental appeals. The mediating forces, he argued, are sociogenic forces, forces that are "real" but subject, always, to the dictates of human intervention or agency. These forces were all examined after Fanon declared that he was not going to concern himself with problems of method but instead with problems of "failure," problems where the assumptions and presumptions of the social system and its modes of rationalization break down. In effect, Fanon's response to the status of the studier was to admit prejudice at the outset, which required an exploration of the failures that emerge both from prejudice itself, and from a failure to admit prejudice. Later, in an essay entitled, "Racism and Culture,"5 Fanon explored the complications raised by cultural normativity. The pervasiveness of culture offered a degree of "rationality" to racist thinking. There is, in other words, such an appeal as "racist logic," and worse, racial normativity leads to racial normality. A racist in a racist society is, in a word, "normal." In each instance, Fanon pushed categories of interpretations to their limits to address the systemic flaws at hand, flaws that require revolutionary practices for their transformation instead of discourses of systemic adjustment. One can never "fix" all the players of a bad system.

The Fanonian strain had an enormous impact on the development of post structuralism. Its focus on failure, popular textual resources, cultural aetiologies, and constructivity were all subsequently utilized by deconstructionists and genealogical poststructuralists, and their importance for critical discussions of race came to the fore in Edward Said's influential Orientalism. That all post colonialists appeal to

the constructivity of race is but an example of this influence.

From the late 1970s to the present, critical race theory has, thus, been marked by two major influences: Du Bois and Fanon. The central contemporary figures can easily be distinguished by the predominant influence of one of these two thinkers, and conflicts have emerged from the use of one to criticize the other, and from efforts to combine the two. The Du Boisian legacy is, perhaps, most marked in the work of Lucius T. Outlaw and the group of contemporary African-American philosophers who have followed his lead, albeit critically—for example, Tommy Lott, Robert Gooding-Williams, and Josiah Young. The Fanonian legacy varies because it has two offshoots. On the one hand, there are those who simply follow Fanon's insights on constructivity. Some of those scholars rely on an appeal to scientific verificationism that makes for some strange allies. Anthony Appiah, Naomi Zack, Charles Mills, and Victor Anderson, for instance, share Fanon's approach of analyzing failures, and his appeals to constructivity, but they reject his thesis that liberalism and scientism are examples of those failures. David Goldberg, Michael Omi, Howard Winant, Cornel West, Paul Gilroy, Stuart Hall, and many others have taken the lead on the racist culture position. We should bear in mind that none of these thinkers, on either the Du Boisian end or the Fanonian end, represent a complete unity. Cornel West, for instance, draws upon insights from both Du Bois and Fanon, although he explicitly appeals to John Dewey and Michel Foucault, as is evident not only in Prophesy, Deliverance! and Race Matters but also in Keeping Faith.6 Tommy Lott and Robert Gooding-Williams have taking the constructivity thesis seriously in much of their critical work on race as well. And although I have placed Omi and Winant in the Fanonian legacy of focusing on racist culture and racist projects, their sociological approach owes much to Du Bois' turn-of-the-century efforts at policy analysis.

A debate that has emerged from the work of the aforementioned theorists is the significance of the "critical" in critical race theory. For some, "critical" serves a purely negative function—to determine what must be eliminated or rejected. Such theorists dismiss "race" on the basis of its constructivity. A construction is, such theorists argue, a fiction, and by 'fiction' they mean that which fails to achieve ontological legitimacy through natural scientific criteria. The leader of this way of using 'critical' is K. Anthony Appiah.

For others, "critical" serves the same function as does "critique" in Kant's Critique of Pure Reason—to determine the transcendental conditions of meaning and limits of concepts, in this case, the concept of "race." Kant, as is well known, eventually called his transcendental philosophy "critical philosophy." The impact of Kant's work on modern thought needs no explication here. Let it be said that its legacy has continued influence on another way of using the word 'critical', namely, Frankfurt School type of critical theory. There, although the historical figurehead was Marx—where the critical exposed the ideological forces of the economic sedimented as the "natural" and the "religious"—the Kantian fusion led to explorations of meaningful conditions of dialogue, including dialogue on the critical, as we find in the work of Jürgen Habermas. The critical here does not function in a dismissive way, but instead as a way of interpreting the social world. For race theorists, the question of a critical understanding of the social brings back Fanon's sociodiagnostical approach. To be critical here requires understanding how the social functions as its own reality.

Although not often mentioned in this light, the phenomenological work of Alfred Schutz is central here in that it examines the inter subjective dimensions of social reality. Schutz's work has influenced critical race theorists primarily in the so-called "continental" tradition, which, ironically, includes such theorists as Lucius Outlaw as well. Outlaw has, in addition, presented a powerful case for this dimension of the critical through his examination of the debate between class-centered theorists and race-centered theorists. In "Toward a Critical Theory of Race,"8 Outlaw appeals to Omi and Winant's racial formation theory—where racial projects, by virtue of institutional agents of transmittal, have led to the formation of the "racial state"—to raise the question of a Marxist or any other type of critique in a racialized society. Does not such a reality betray the error of reductive readings of race and class (and other identity formations)? Outlaw's phenomenological side emerges in his concluding remarks:

"Lest we move too fast on this [on moving beyond racism in a pluralistic democracy] there is still to be explored the "other side" of "race": namely, the lived experiences of those within racial groups (e.g., blacks for whom Black nationalism, in many ways, is fundamental).

That "race" is without a scientific basis in biological terms does not mean, thereby, that it is without any social value, racism notwithstanding. The exploration of "race" from this "other side" is required before we will have an adequate critical theory, one that truly contributes to enlightenment and emancipation, in part by appreciating the integrity of those who see themselves through the prism of "race." We must not err yet again in thinking that "race thinking" must be completely eliminated on the way to emancipated society."

Outlaw's advancing the category of "lived experience" raises another legacy that, ironically, is a fusion of Du Bois and Fanon through their differing phenomenological influences. Du Bois, as is well known, advanced the experience of blackness as a dual consciousness. Fanon raised this question in Black Skin through a phenomenology of alienated embodiment. Both Du Bois and Fanon recognized, as well, the impact of "historicity" in this mode of alienation. Racialized peoples have an ambivalent relation to history, for their identities are historically constituted as both the bane of their existence and the reality without which they could not be. Like an abusive parent who has abandoned its offspring, modern history is also such people's history, for better or worse. For Fanon, this ambivalence called for a dialectic between history and theoretical reflection, and what emerges from that dialectic is lived experience. The counsel of recognizing lived experience reaffirms Du Bois' edict of studying people's problems without problematizing the people—in effect, appealing to their lived experience calls for recognizing them as points of view, as part of the inter subjective world of sociality. But more, experience is here used as a bridge between the subjective and the objective (where the objective signifies inter subjectivity).
This other legacy raises the question of the critical through the paradoxes and failures of intentional life. The critical here signifies the self-reflective activity of the theorist advanced by Du Bois a century ago. The studier must here raise the question of his or her performative contradictions. The theorist must be attuned to possibilities of bad faith—lying to himself or herself about the practices of knowledge production at hand—and the "object," if we will, of "race" study, namely, human beings. In my work, this question has required the challenge of developing resources through which to study a being who lacks a nature. It has meant taking Du Bois' and Fanon's contributions on a phenomenological journey of socially converging matrices of identity. A properly critical race theory must address, in other words, the fact that no human being is, nor is able to live, one (and only one) identity without collapsing into pathology. In addition, a properly critical race theory must be willing to explore the possibility of systemic failure, a failure which may require radical transformations of the matrices through which a society's resources are distributed and through which they are interpreted. From this point of view, liberating practices aim at opening possibilities for more humane forms of social relations. In effect, it argues for "material" and "semiotic" conditions of human possibility. As such, it's a theory that bridges the identity and liberation divide.

Race – Caste

Race is group which shares in common a certain set of innate physical characters and a geographical origin within certain area. It is a broad association of persons of similar biological heritage, who are united in sentiment by common cultural traditions and who in time of conflict seek to claim rights to a better social position on the basis of an inherited quality. The category of caste' has a long history both in and out of the Indian subcontinent, one that is frequently intertwined with that of race. 'From H.H. Risley's use of late-nineteenth century European race science in anthropometric research, to Max Mueller's articulation of the Aryan theory of race and Pan- Africanist expressions of racial solidarity with the lower castes of India, caste has frequently been redefined and politicized by being drawn into wider discourses about race.

Caste means lineage or race. It is from the Latin word Castes that means pure. This is of Spanish and Portuguese origin. The Spaniards were the initial to utilize it, but its Indian submission is beginning the Portuguese, practical it in the middle of the fifteenth century. The current spelling of the word is after the French word Caste, which appears in 1740 in the academics', and is hardly found before 1800. Before that time it was spelt as cast.' In the sense of race or breed of man it was used as early as 1555 A.D. The Spanish word Casta' was applied to the mixed breed between Europeans, Indians and Negroes. As the Indian idea of caste was but vaguely understood this word was loosely applied to the hereditary classes of Europe resembling the castes of India, who keep themselves socially distinct.

The abstract noun caste in a variety of senses and the words caste system as one expression to denote a group of phenomena, the expression origin of caste can have no meaning. The theory of four classes (varnas) in society has its origin, a sharp line between various layers of society has its origin; ascendency of the priests and their exclusiveness has their origin, association of purity and impurity to various objects also has its origin.

According to H. Risley a caste may be defined as a collection or groups of families bearing a general name which usually denotes or is allied with specific activity, claiming common descent from a imaginary ancestor, human or celestial, professing to pursue the similar proficient callings which are capable to give an estimation as forming a homogeneous community. S.V. Ketkar says a caste is a social group having two characteristics. (1) Membership is confined to those who are born of members and includes all people as natural. (2) The members are forbidden by an inexorable social law to marry outside the group.

Castes are again divided into several groups called gotras. These gotras are exogamous. No family marries with a family of the same gotra. In some parts of India there is hypergamy. Certain groups of families in caste are considered higher than the rest, and it is customary that women in the inferior groups should seek to marry with men in the superior groups, but not vice versa. This type of caste system is also seen in Ramayana.

Module - 07
RIGHTS AND DUTIES

Natural Law influenced on the Natural Rights some jurist gave emphasis on the duties like Duguit while other on the human right like Fennis.

Roscoe Pound- Rights are claim of an interest in order to keep balance between private & social interest.

It shows that how the concept of right is the key concept in moral, philosophy & political system, because rights are sine guenon for human life as well as society for its progress.

Thus only the Rights govern the political & social morality.

John Lock & Thomas Pain

Political morality & the social choices were to be governed by the consideration of rights of an individual e.g. political morality.

(I) French Declaration, the Magna Carta Bill of Rights, the Universal Declaration of Human Rights & the Part IIIrd & IVth of the Indian Constitution are the political morality.

(II) Social Choices. – The festival like valentine day movies like Bandit queen, Water, Fire, girl friend etc. is the social choices.

***Definition of Rights**.

1) **Kohler** – It is a (1) regulation (2) sanction & (3) protection by the legal order.
2) **Hobbs's & Lock** – Right is the liberty,
3) **Jennings** – Right is an interest protected by law.
4) **Savigney** – Power of an individual is right which is authority.
5) **Holland** – Right is the capacity of one man to controlling the action of another with the assistance of the state.
6) **Salmond**- right is an interest recognized & protected by a rule of law.
7) **C. K. Allen** – Right is the will power of man applied to a utility / interest recognized & protected by a legal system.

Whether rights are Legal / moral?

1) Moral Rights – These are very basic rights. Not all moral rights are legal rights though most of legal rights are moral one. E.g. right to life, right to religion, property Equality, parents, right to be looked after.

   There is no legal sanction behind moral rights.

III) Legal Rights – confirmed by state / by judicial decision. E.g. Fundamental Right U/A. Part III.

IV) Rights justified on consequentiality Grounds. – Based on exigencies, of circumstances. & Common sense. E.g. 1) Shut prisoner who by breaking jail runs away, 2) Damage done by fireman, 3) Right of private defence.

Thus when moral right gets legal recognition & protection then it becomes legal right.

***Basis of the right.**

1. Rights are goal based. – Rights are based on goals, which are set out by the law of Land. e.g. part IV of constitution.
2. Rights are right based. – Rights only is the basis of right It governs the individual interest. E.g. part III of constitution.

*Minerva Mills case

Justice Bhagwati – Rights are goal based. Justice Chandrachude – Right are right based.

Prof T. N. Scallan – Even it is an individual interest, there are others, interests also involved. E.g. Public meeting 1) speaker, 2) audience, 3) society.

Prof Razz – whether it is right based / goal based the ultimate beneficiary is an individual therefore it is not make any difference.

*Unni Krishnan case

Supreme court – such a debate is not meaningful.

***Objects of the rights.**

1. Development of an individual in all dimension.
2. To maintain the structure of society it is primary aim or object.

   To achieve these objects the society must be –

   1)Tolerant one,
   2)Educated one &
   3)Infused with the sense of respect for human being.

   E.g. 1) During Taliban Regime in Afghanistan & Saddam's regime in Iraq the society was not as per above

In India society is present as above therefore India is called as fertile land for all the religion.

In every legal system rights are invisibly presents, which mayn't provided by law therefore positivitisation of rights only amount to give them basis of fundamental right because the list of right is an unlimited therefore rights are moral coinage.

Prof. Feinberg – Rights are indispensable valuable possession

1) Indispensable – Necessity & binding ness without any exception.
2) Valuable or object - the Value of rights having various aspect. E.g. Petals make flower like wise other various aspects make rights.

Thus value of Right means a definite object upon which a somebody stand on with respectfully & can do the particular act without any sham / shy e.g. 1) Right to vote – if Name is in Roll, 2) Attaining party on invitation.

As there are numbers of right therefore question arise how much weightage given to them?

The answer depends upon the following things.

(I) As per their 1) strength, 2) urgency 3) pre-eminency E.g. 1) Right to go on strike – This right is not available a) during war / emergency b) Natural calamities Fundamental Right is basic Human Right – these rights can be suspending during national emergency U/A 359 exception. U/A 20 & 21.

(II) As per their priority
Prof John Rawls – rights are lexical priority i. e. they have priority above any kind of consideration including consideration of utility. E.g. Reservation policy – In case of conflict of an interest the maximum of fulfillment of rights & minimum of violation of rights.

(III) The absolute rights are the limitation upon the exercise of executive power by the authority. The rights are stipulation upon sovereign legislative power of the state. E.g. part III of constitution reference with Art 12&13 .
Prof R. Dwarkin- Rights are trumps over some background justification for political decision that states for whole communities life.

Thus as per his view, the notification of right is absolute & they are immune from any type of control by state authority.
E.g. 1) Art 19 (1) (a) becomes absolute if Art 19 (2) is removed.

3. Privileges of Members of parliament / member of legislative assembly 's U/A105.

4. Photography by a person having licence.

Criticism.-

No any right is absolute there are always limitations on right
Prof J. Raz – Rights are essentially exercised for public goods. E.g. exception to freedom U/A 19(2) to (6).

Prof Dwarkine –

The rights are not gift from God rather, the institution of right is very complex & troublesome therefore it is the Job of government to securing the public good.

Thus legal system not only recognizes but also enforce & protect the rights. E.g.

1) Right to Education U/A 21A by 86 th Amendment 2002
2) J Khanna – Theory of Natural Law & Natural right are linked with each other.

Prof Dwarkin : taking rights seriously - As we have rights other do have therefore we have to respect thedegnity & Honour of the others, otherwise it will amount to not respect to rights of other.

He apposed right –life & Liberty in U.S. A. constitution because.

1) It can't explain / justify the discrimination which state would like to make for the upliftment of all.
2) This right linked with right to property therefore state mayn't have power to deprive the personal life & liberty.

` Therefore Right to Equality is only final yard stick to protect right to life liberty & not that right itself.

Characteristics of a Legal Rights

(I) There must be a person of inherence.- The own of right / the person entitled to the right – subject of right

The subject of right may be

1) A particular person. E.g. XIV – own a plot of land every rights regarding points in only his favour.
2) An unascertained person e.g. Bequest to unborn person.
3) An indeterminate body. E.g. Society / Community having right to get protected from society disturbance etc.

(II) There must be a person of an incidence.
Person who is has to obey/the person who has to respect the right is called the person of incidence – subject of duty .

Thus rights, always operates against some person who is under a duty to obey / respect that right therefore rights & duty are two sides of the same coin hence every legal right implies a corresponding duty. E.g. credito – Debtor.

Creditor – Right to receive money (Person of an inheritance) Debtor – Duty to pay debt (person of an incidence) .

III)There must be an obligation to do / not to do something.
The content of an right may be an act / an omission in favour of the person entitled . therefore right imply the doing / the not doing of something on part of the person bound. E.g. 1) Right not to allow trespasser over one's land. 2) right to receive goods under a contract.

IV) There must be an obligation of the right.
The right i.e. act / omission must be relate to something. The word "ting" having two sense.
1) Tangible things e.g. Right to property
2) Intangible things e.g. right to reputation, goodwill etc.

Thus object of the right is also called the subject matter of the right.

V) Every Legal right has a title.- Certain facts/events by reason of which the right has become vested in its owner – source of right.

It signifies how the owner of the right became owner of the right. Thus title is the "De facto" antecedent of which the right is "De jure" consequence .

Modes by which a person acquires title to a right.
1) citizenship e.g. Fundamental right
2) purchase ,
3) Inheritance.
4) Gift
5) Mortgage
6) Trove(finder of something)
7) Capturing a Res Nullins.

To understand above characteristics of right see the example of buying house.
1) person of inheritance –Buyer
2) person of incidence – seller
3) the content of right will be that nobody must disturb the peaceful enjoyment of house.
4) The subject matter of the right is the house,
5) The title is got by the purchase.

Nature of Right- It is described by two theory

(I) Choice / will theory of right .
By H.L.A. Hart – The purpose of law is to grant widest possible means of 1) self expression to the individual & 2) maximum degree of self assertion.
It shows the individual has choice to enjoys / not to enjoy his right / to extinguish his right. It shows the absolute descrition of an individual. E.g. 1) national Antham case 1996, 2) P. Rathinam case – Right to life also include right to die U/A 1992 But in Baseshare Nath case 1956 – supreme court – person can't waive his right he has no choice, 3) Gyan Kaur case. 1994. –Supreme court – right to life U/A21 doesn't incluid right to die.

Criticism
1) This theory discregarded others right e.g. Minor, Lunatics, they can't explain their choice / will e.g. Deshanie case.
2) Environment & Animals also have right but they can't explainit. E.g. caw slaugher case.
3) This theory is against principle Ubi jus Ubi Remedium. – Whenever there is right there is remedy. Therefore this theory is not acceptable.

(II) Interest / Benefit theory – Bentham prof J Raz initiated this theory. – Right is not will / choice of an individual nor self assertion / expression but "it is an interest of an individual"

Therefore R Pound – right is an interest recognized & protected by law.

Thus the nature of a right is to secure the interest / benefit of an individual so that there is no question of an interest / right of an individual but it is of the society at large. E.g. 1) Concept of Public Interest Litigation

2) Environment protection laws.3) cow slaughter (prohibition) Act

This theory got world wide accepted.

KINDS OF LEGAL RIGHTS

(I) Positive & Negative Rights

Positive Rights – To do some positive act. A----B ,A-Purchaser ,B-Seller, to claim purchase money (positive act) therefore the scope of a positive right is to receive " Positive benefits".

Negative Rights – Not to do some Negative act. I.e. right to retain what one already has promised / done so that to maintain status quo A-B (Apprentice in B's Business on condition that he not serve any Rival Business for 3 years.)

Therefore the scope of a negative right is that person having the right shall not be harmed. In any society the number of negative rights are much more than positive right. Therefore all men are bound to refrain from all kinds of positive harm. While only some men are bound to acting confer benefits for others.

A – Money – B – positive right – to give / pay money to B - Not to use, distroy , use , steal more – negative rights. Against whole world.

(II) Rights in re propria & rights in re aliena.

1) Re propria – sets in own property e.g. 1) own land, 2) fetch / draw water from own well etc.
2) Re aliena – one's rights in someone else's property e.g. 1) right to way over anothers land.etc.

Salmond – All rights which are not right in rel aliena are rightin re-propria . The right in realiena limits / reduces a right in repropria. E.g. Easement therefore Re aliena rights – Dominant rights & Re propria rights – servient rights. E.g. A is Dominant heritage/owner ,B servient heritage / owner. Even servient heritage is sold off, the dominant owner doesn't lose his right .

Salmond – some time there may be encumbrance of an encumbrance. E.g. in sub-letting of tenancy – Right of tenant is dominant with regard to actual land owner but servient with regard to that of sub-Tenant.

(III) Perfect & imperfect rights.

(i) perfect - can be legally enforced & which has a correlative duty attached to it It based on principle ubi jus ubi Remedium.

(ii) Imperfect – Although recognized by law, is not enforceable . e.g. 1) claims barred by time limit, 2) claims not in specific form (writing /sign) required by law.

The imperfect rights remain valid for all purposes except enforcement / Thus the laps of time / not followed specific requirement of law doesn't destroy the right but merely reduces it from the rank os one is perfect to an imperfect one perfect right can become imperfect / imperfect right become perfect. E.g. by acknowledgment / promise.

(IV) Proprietary & personal rights.

1) proprietary rights – persons right in relation to his own property , estate assets / other monetary benefits.
2) Personal rights – In relation to persons's status e.g. Right to reputationfreedom of speech etc.

Salmond- Difference between two right general in nature.1) propritory can be valued but Personal rights can't exception personal rights are valuable eg. Reputation. 2) proprietary rights are transferable but personal right are not. Exception proprietary right – right of pension can't transfer.

(V) Inheritable & Uninheritable rights. –

(1) Inheritable – They survives its owner e.g. Right to property , estate , car, land, etc.
(2) Unheritable – They die with the death of the owner.e.g. personal, rights speech & expression.

(VI) Rights in rem & Rights in personum.

1) Inheritable – They survives its owner e.g. Right to property , estate , car, land, etc.
2) Unheritable – They die with the death of the owner.e.g. personal, rights speech & expression

A right in rem however need not always relate to a tangible thing & may be an intangible thing.e.g. right not to defamed not to be assaulted. Etc.

A right in rem also called as a" real right " therefore no of rights in rem possesed by a person are countless therefore right in rem generally speaking are negative rights.

Right in personam – available against particular person. E.g. contract between A & B.

They are generally speaking positive right which requiring a specific act . therefore in case of breach of a right in rem a right in personam arises against aggressor e.g. contract between Employer & Employee , Employee bound not to work for another Employer.

(VII) Principal & Accessory Rights

(1) principal – main / primary rights vested in a person under law.

(2) Accessory – subordinate / Additional rights e.g. file suit – primary right & engangelawer – accessory rights.

Accessorium sequitur. – the accessory rights follows the principle rights e.g. right to a debt is principle right whereas the right to interest is an accessory

(VIII) General Rights & special rights H.L.A. Hart - (1) General rights – possessed equally by all members of a society . e.g. Rights to vote, right to enter public park, meetings etc.

(2) special – Rights arise out of special transaction between specific individual / from same special relationship between them. E.g. contractual rights.

The right in rem available against whole world while general right available to/ possessed equally by all member of society generally speaking right in rem are negative rights where as general rights are positive rights.

- **Rights in strict sense. –**

It is a debatable question whether rights & duties are necessarily correlative

Salmond – duty & rights are correlative

Austine – they are not correlative

The correlative – which is mutual complementary, reciprocal / corresponding .

Thus correlations signify something that occurs together therefore correlative doesn't mean opposite . Hence 'duty' is not the opposite of right it is a correlative of right i.e. they occur together therefore opposite of right is no- right.

(I) Salmonds View- Duties & rights are correlative. A duty is an obligatory act, it is an act the opposite of which is a wrong when we do a wrong we have violated the right of another therefore wrong (Breach of duty) signifies violation of a right.

He said there can be no duty unless there is someone to whom it is due therefore there can be no right without a corresponding duty, and no duty without a corresponding right. E.g. creditor – Debtor ,(Credito-right to get back) , (Debtor –Duty to pay back)

Thus every right / duty involves a vinculum juris or bond of legal obligaion by which two / more persons are bound together.

So that every duty must be a duty towards some person, in whom therefore a corresponding right is vested . And conversely every right must be a right against some person, upon whom therefore a corrective duty is imposed.

Lake shore & M.S.R. co.v. Kurtz.

House of Lord – A duty / legal obligation is that which one ought to / ought not to do . Duty & Right are correlative terms. When a right is involved a duty is violated.

In case of fundamental right U/P III of the constitution state is under duty to protect the fundamental rights.

(II) Austines view- Duties & rights are not necessarily correlative .

This view supported by C. K. Allen – Every right implies a corresponding duty, but every duty doesn't necessarily imply a corresponding rights.

If, Right then Duty,If Duty them may/ mayn't Right

e.g. It is the duty of a justice to punish an offender who is guilty, but it can't be said that the duty of the justice implies a corresponding right on part of the offender to be punished.

Austin

There are two kinds of duties. 1) Relative Duty & having corresponding rights e.g. Debt.& 2) Absolute Duty – do not having corresponding rights e.g Judges duty.

Thus it may be said that duties in the strict sense of the term have corresponding rights but duties in thewider sense do not.

State of Rajashtan v. Union of India 1977

Supreme court – In a strict sense, legal right are correlative of legal duties & are defined as interests which the law protects by imposing corresponding duties on others. But in a generic

sense, the word right is used to mean an immunity from the power of another in the same way as liberty is exemption form the right of another. Immunity, in short is no-subjection.

- **Rights in wider sense**- Every right includes other legally recognized interest without considering whether they have corresponding duty / not.

Therefore every right couldn't enforced because every right is not stict e.g. U/A 36 – State is not under any duty to enforce Directive principles of state policy.

Prof R. Pound- gave five meanings of right.

1) Right is an interest,
2) Right is the claim
3) Right is the power
4) Right is the Liberty/Privilage &
5) Justice.

It is important in relating to rightswhich are not recognized ? provided by law. E.g. Principle of Natural Justice.

Thus he showed that the right having different connotations.

W. N. Hohfeld

An American jurist who attempted to isolate various concepts in the field of legal rights & to present them in a specific unambiguous terminology.

He clarified the term right & differentiated it from such related ideas such as (1) Liberty, (2) power & (3) immunity in his famous publication fundamental Legal Conceptions as applied in Judicial Reasoning (1919).

In the wider / generic sense, a legal right may be defined as any advantage / benefit conferred upon a person by the law. Thus rights (in strict sense), liberties, powers & immunities are all of such a nature that they confer some advantage / benefit upon its holder . In wider sense., Right is generic common embracing whatever may be lawfully claimed & includes amongst other things interest , power , prerogative, immunity privilege / liberty, claim authority etc.

He attempts to split up the concepts embodied in the term 'right' (In its wider sense) and to give them precise meanings by articulating a scheme of 'Jural ''relations' by grouping them into 'Jural Correlation' & 'Jural opposites'

Jural – the law / rights

Jural – Relations – Jural Correlative & Jural opposites

Jural correlatives

1) Right –Duty
2) Privilege -/liberty – No right
3) Power – liability
4) Immunity – disability

Jural opposites

1) Right – No right
2) Privilage /liability – Duty
3) Power – Disability
4) Immunity – liability

1) Jural correlative – Two things that occur together.
2) Jural opposites – Diametrically different in characteristic & tendency i.e. no pair of opposites can co-exist in same person.

Jural Correlatives

Right	Privilege /Liberty	Power	Immunity
↓	↓	↓	↓
Duty	No Right (Subjection)	Liability	Disability (No power)

(I) Right – Duty – Right is an affirmative claim against another therefore another is under duty e.g. Landlord – Tenant.

(II) Privilege / Liberty – No right

Privilege means freedom from Rights of another therefore another has no –rights.

No. Rights – an absence of any right / power to prevent another from doing what he is doing / going to do.

` This is based on maxim "damnum sine injuria" - Damage without legal injury e.g. person has a liberty to defend himself against violence but he has "No right "to revenge upon a person who has injured him.

(III) Power- Liability

Power – affirmative control over another therefore another is under liability e.g. Employer – Employee

Powers are of two types

(i) Public power- vested in a person as an agent of state.e.g. 1) police power to arrest. 2) power of Legislature to enact laws etc.

(ii) Private power – which are vested in a person & are to be exercised by him for

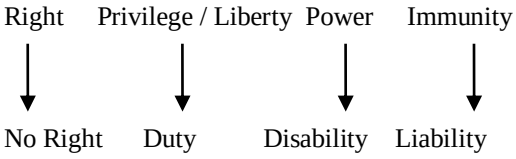
his own purpose . e.g. 1) power to make will, 2) power to make gift etc.

The liability signifies a loss, disatge/ a change for the worse, But some time liability may mean a chance to be benefited also. E.g. will – benefits.

(IV) Immunity – Disability

Immunity – the freedom from powers of another therefore another is under disability e.g. przd , Governor , foreign Ambassitor etc.

Jural co-opposite



It states the position of single person while enjoy his right as follow

(I) Right – No Right

When one person enjoy right he has no under any no right

criticism – How any one has right & No right.?

He replied – 1) It is used merely for convenience, in order to fill the vacuum 2) No – no right becomes a Righton the mathematical assumption.

(II) Privilege – Duty

When one has privilege then he is not under any duty.

(III) Power – Disability

When one has power he is not under any disability.

(IV) Immunity – Liability

When one has immunity he has no any liability

Criticism against Hohfeldian Analysis.

1) The Jural co-relative Immunity – Freedom from another's power is not correct. E.g. U/A 21 life & liberty can be taken away by the Government by following proper procedure. Therefore is not always immunity from the power of State.
2) The concept like No right & duty are merely fundamental concept.
3) The aspect of Right as per this analysis merely illustrative & not exhaustive therefore rights having various other important aspects. E.g. Fundamental Rights, Principle of Natural Justice.

- **Importance of this Analysis.**
  1) It provide strong base to the Right .
  2) It helps to under stand value, utility & need of Fundamental Right.

Thus the concept of Fundamental Right is recognized not only National but also International level e.g. Indian Constitution.

In case of absence of Fundamental Right they can incorporated under constitution by judiciary e.g. Maneka, Vishaka cases

Marbury v. Medicine.

U.S.A. supreme court – Judicial Review against amendment, if it taking away Fundamental Right.

The Fundamental / Non – Fundamental /Natural/ positive right are very important facet as they are working as the fertilizer of right.

Now the Principles of Natural Justice get positive in legal system as they not only confirm the right but also autonomy of an individual . Also they not only develop individual but society at large too.

Thus we may brand right is particular name but its ultimate value is prosperity, individuality & autonomy of an individual & its helps to develop large part / chunk of society.

MODULE - 08
CONCEPT OF PROPERTY AND OBLIGATIONS

Definition and concept of property

Property has a very wider meaning in its real sense. It not only includes money and other tangible things of value, but also includes any intangible right considered as a source or element of income or wealth. The right and interest which a man has in lands and chattels to the exclusion of others. It is the right to enjoy and to dispose of certain things in the most absolute manner as he pleases, provided he makes no use of them prohibited by law.

The sea, the air, and the like, cannot be appropriated; every one may enjoy them, but no one has any exclusive right in them. When things are fully our own, or when all others are excluded from meddling with them, or from interfering about them, it is plain that no person besides the proprietor, who has this exclusive right, can have any claim either to use them, or to hinder him from disposing of them as he pleases; so that property, considered as an exclusive right to things, contains not only a right to use those things, but a right to dispose of them, either by exchanging them for other things, or by giving them away to any other person, without any consideration, or even throwing them away.

Basically Property is divided into real property, and personal property. Property is also divided, into absolute and qualified, when it consists of goods and chattels.

Absolute property is that which is our own, without any qualification whatever; as when a man is the owner of a watch, a book, or other inanimate thing: or of a horse, a sheep, or other animal, which never had its natural liberty in a wild state.

Qualified property consists in the right which men have over wild animals which they have reduced to their own possession, and which are kept subject to their power; as a deer, a buffalo, and the like, which are his own while he has possession of them, but as soon as his possession is lost, his property is gone, unless the animals, go animo revertendi.

Property is again divided into corporeal and incorporeal. The former comprehends such property as is perceptible to the senses, as lands, houses, goods, merchandise and the like; the latter consists in legal rights, as chooses in action, easements, and the like.

It is proper to observe that in some cases, the moment that the owner loses his possession, he also loses his property or right in the thing: animals ferae naturae, as mentioned above, belong to the owner only while he retains the possession of them. But, in general,' the loss of possession does not impair the right of property, for the owner may recover it within a certain time allowed by law.

Meaning of property

In general sense, property is any physical or virtual entity that is owned by an individual or jointly by a group of individuals. An owner of the property has the right. Human life is not possible without property. It has economic, socio-political, sometimes religious and legal implications. It is the legal domain, which institutes the idea of ownership. The basic postulate of the idea is the exclusive control of an individual over some ‘thing’. Here the most important aspect of the concept of ownership and property is the word ‘thing’, on which a person has control for use. To consume, sell, rent, mortgage, transfer and exchange his property. Property is any physical or intangible entity that is owned by a person or jointly by a group of people. Depending on the nature of the property, an owner of property has the right to consume, sell, rent, mortgage, transfer, exchange or destroy their property, and/or to exclude others from doing these things.

There are some Traditional principles related to property rights which includes include:

1. Control over the use of the property.
2. Right to take any benefit from the property.
3. Right to transfer or sell the property.
4. Right to exclude others from the property.

Definition of property

There are different definitions are given in different act as per there uses and needs. But in the most important act which exclusively talks about the property and rights related to property transfer of property act 1882 has no definite definition of the term property. But it is defined in some other act as per their use and need. Those definitions are as follows:

Section 2(c) of the Benami Transactions (Prohibition) Act, 1988 defines property as:

"Property" means property of any kind, whether movable or immovable, tangible or intangible, and includes any right or interest in such property.

Section 2 (11) of the Sale of Good Act, 1930 defines property as: "Property" means the general property in goods, and not merely a special property.

Theories of property

There are many theories which have been evolved for the purpose of understanding the concept of property properly.

Those theories are as follows:

1. Historical Theory of Property:
2. Labour Theory (Spencer):
3. Psychological Theory (Bentham):
4. Functional Theory (Jenks, Laski):
5. Philosophical Theories–

(i) Property as a means to Ethnical Ends
(ii) Property as an End in itself

Historical Theory of Property

According to the Historical theory, the concept of private property had grown out of collective group or joint property. In the words of Henry Maine, "Private property was chiefly formed by the gradual disentanglement of the separate rights of individual from the blended rights of the community.

Earlier property did not belong to individuals, not even to isolated families, but the larger societies composed on patriarchal mode. Later with the disintegration of family-individual rights came into being.

Roscoe Pound also pointed out that the earliest form of property was group property. It was later on that families were partitioned and individual property came into being.

Labour Theory (Spencer)

The theory is also known as 'positive theory'. This theory insists on the fact that labour of the individual is a foundation of property. This theory says that, a thing is the property of a person, who produces it or brings it into existence. The main supporter of this theory is Spencer, who developed it on the principle of equal freedom. He says that property is the result of individual labour. Therefore, no person has a moral right to property which he has not acquired by his personal effort.

Psychological Theory (Bentham)

According to this theory, property came into existence on account of acquisitive instinct of man. Every individual desires to own things and that brings into being property.

According to Bentham, Property is altogether a conception of mind. It is nothing more than an expectation to derive certain advantages from the object according to one's capacity.

Roscoe Pound also supports Bentham and observed that the sole basis of conception of property is the acquisitive instinct of individual which motivates him to assert his claim over objects in his possession and control.

Functional Theory (Jenks, Laski)

The theory is sometimes also known as 'sociological theory of property'. It implies that the concept of property should not only be confined to private rights but it should be considered as a social institution securing maximum interests of society. Property is situated in the society, has to be used in the society.

According to Jenks, no one can be allowed an unrestricted use of his property, to the detriment to others. He said that the use of property should conform to the rules of reason and welfare of the community.

According to Laski, Property is a social fact like any other, and it is the character of social facts to alter. Property has further assumed varied aspects and is capable to further change with the changing norms of society.

Property is the creation of the State The origin of property is to be traced back to the origin of law and the state. Jenks observed that property and law were born together and would die together. It means that property came into existence when the state framed laws. Property was nowhere before law.

According to Rousseau, "It was to convert possession into property and usurpation into a right that law and state were founded".

The first who enclosed a piece of land and said- 'this is mine'- he was the founder of real society.

He insisted on the fact that property is nothing but a systematic expression of degrees and forms of control, use and enjoyment of things by persons that are recognized and protected by law. Thus the property was the creation of the state.

Philosophical Theories –

Property as a means to Ethnical Ends

In the opinion of Aristotle, Hegel and Green, Property has never been treated as an end, but always as a means to some other end. According to Aristotle, it may be a means to the end of good life of the citizens, further in the opinion of Hegel and Green, it may be a means to the fulfillment of the will without which individuals are not full human. According to Rousseau, Jefferson, Friedman, it may be a means as a pre-requisite of individual freedom seen as a human essence.

Similarly the outstanding critics of property like Winstanley, Marx have denounced it as destructive of human essence, a negative means in relation an ontological end. In all the above cases, property is taken as a means not as an end.

Property as an End in itself

The supporters of liberal Utilitarian model, from Locke to Bentham, recognize property as an end. It is maximization of utilities. According to Bentham, the command of utilities is measured by the material wealth. The maximization of material wealth is indistinguishable from the ethical end; property is virtually an end in itself. In the words of Locke, the unlimited accumulation is a natural right of the individual that is an end in itself. Aristotle and Aquinas have considered, ‘’property as a means, concluded for a limited property right. Hegel and Green, treats property, as a means, concluded for an unlimited right’. The supporters of utilitarian tradition treat, accumulation of property, as an end, always meant a right of unlimited accumulation.

Later the concept changed and the utilitarian Bentham held that the ultimate end to which all social arrangements should be directed was the maximization of the aggregate utility (Pleasure minus pain) of the members of the society. While listing out the kinds of pleasures, including non material one, he held that wealth, the possession of material goods was so essential to the attainment of all other pleasures that it could be taken as the measure of pleasure or utility as such.

Kinds of property

Broadly Property is divided into three kinds those are as follow:

1. Movable and Immovable property
2. Movable property

The definition of movable property is given differently in many acts. Some of the definitions are as follows:

Section 3 (36) of the General Clauses Act defines movable property as: 'Movable property shall mean property of every description, except immovable property."

Section 2 (9) of the Registration Act, 1908 defines property as: 'Moveable property' includes standing timber, growing crops and grass, fruit upon and juice in trees, and property of every other description, except immovable property."

Section 22 of IPC defines property as: The words “moveable property” is intended to include corporeal property of every description, except land and things attached to the earth or permanently fastened to anything, which is attached to the earth.

Things attached to the land may become moveable property by severance from the earth.for example Cart–loaded of earth, or stones quarried and carried away from the land become movable property.

Immovable property

The Term "Immovable Property" occurs in various Central Acts. However none of those Acts conclusively define this term. The most important act which deals with immovable property is the Transfer of Property Act (T.P.Act). Even in the T.P.Act this term is defined in exclusive terminology.

1. According to Section 3 of that Act, "Immovable Property" does not include standing timber, growing crops or grass. Thus, the term is defined in the Act by excluding certain things. "Buildings" constitute immovable property and machinery, if embedded in the building for the beneficial use thereof, must be deemed to be a part of the building and the land on which the building is situated.
2. As per Section 3(26) of the General Clauses Act 1897, "immovable property" "shall include land, benefits to arise out of land and things attached to the earth, or permanently fastened to anything attached to the earth". This definition of immovable property is also not exhaustive;
3. Section 2(6) of The Registration Act,1908 defines "Immovable Property" as under: "Immovable Property includes land, building, hereditary allowances, rights to ways, lights, ferries, fisheries or any other benefit to arise out of land, and things

attached to the earth or permanently fastened to anything which is attached to the earth but not standing timber, growing crops nor grass".

The definition of the term "Immovable Property" under the Registration Act 1908, which extends to the whole of India, except the State of Jammu and Kashmir, is comprehensive. The above definition implies that building is included in the definition of immovable property.

The following have been held as immovable property.

A right to collect rent, life interest in the income of the immovable property, right of way, a ferry, fishery, a lease of land.

4. The term "Immovable Property" is defined in other Acts for the purpose of those Acts. As per Section 269UA(d) of the Income Tax Act, 1961, Immovable Property is defined as under :

a. Any land or any building or part of a building, and includes, where any land or any building or part of a building is to be transferred together with any machinery, plant, furniture, fittings or other things, such machinery, plant, furniture, fittings and other things also.

b. Any rights in or with respect to any land or any building or part of building (whether or not including any machinery, plant, furniture, fittings or other things therein) which has been constructed or which is to be constructed, accruing or arising from any transaction (whether by way of becoming a member of, or acquiring shares in, a co-operative society, or other association of persons or by way of any agreement or any arrangement of whatever nature, not being a transaction by way of sale, exchange or lease of such land, building or part of a building.

Tangible and Intangible property:

Tangible property Tangible property refers to any type of property that can generally be moved (i.e., it is not attached to real property or land), touched or felt. These generally include items such as furniture, clothing, jewellery, art, writings, or household goods.

Intangible property:

Intangible property refers to personal property that cannot actually be moved, touched or felt, but instead represents something of value such as negotiable instruments, securities, service (economics), and intangible assets including chose in action Intellectual property Intellectual property is a term referring to a number of distinct types of creations of the mind for which property rights are recognized—and the corresponding fields of law.

Property does not just comprise of tangible things like houses, cars, furniture, currency, investments etc and such assets are not the only kind that can be protected by law. There are many other forms of intangible property known as intellectual property that have been recognized under the law and granted protection against infringement

Under intellectual property law, owners are granted certain exclusive rights to a variety of intangible assets, such as musical, literary, and artistic works; discoveries and inventions; and words, phrases, symbols, and designs. Patents, trademarks and copyrights, designs are the four main categories of intellectual property.

Patents

Patents are used to protect new product, process, apparatus, and uses providing the invention is not obvious in light of what has been done before, is not in the public domain, and has not been disclosed anywhere in the world at the time of the application. The invention must have a practical purpose. Patents are registrable nationally; the patent granted by European Patent Office is a “bundle” of national patents. No EU-wide single patent system exists to date, although the Community Patent is in the final stages of enactment. Registration provides a patentee the right to prevent anyone making, using, selling, or importing the invention for 20 years. Patents are enforced by court proceedings. In addition, the Regulation on Supplementary Protection Certificates (SPCs), grants “patent extensions” of up to 5 years to pharmaceutical and plant products, providing as much as 25 years of patent life for originator medicines.

Trade Marks

A symbol (logo, words, shapes, a celebrity name, jingles) used to provide a product or service with a recognisable identity to distinguish it from competing products. Trademarks protect the distinctive components which make up the marketing identity of a brand, including pharmaceuticals. They can be registered nationally or internationally, enabling the use of the symbol ®. Trade mark rights are

enforced by court proceedings in which injunctions and/or damages are available. In counterfeiting cases, authorities such as Customs, the police, or consumer protection can assist. An unregistered trade mark is followed by the letters ™. This is enforced in court if a competitor uses the same or similar name to trade in the same or a similar field.

Copyright

Copyright is used to protect original creative works, published editions, sound recordings, films and broadcasts. It exists independently of the recording medium, so buying a copy does not confer the right to copy. Limited copying (photocopying, scanning, downloading) without permission is possible, e.g. for research. Publication of excerpts or quotes needs acknowledgement. An idea cannot be copyrighted, just the expression of it. Nor does copyright exist for a title, slogan or phrase, although these may be registered as a trade mark. Copyright applies to the Internet with web pages protected by many different copyrights, so that permission should be asked to copy or print a page, or insert a hyperlink to it. Material cannot be posted on a Web site (Intranet included) without permission from the copyright holder.

Copyright is not registrable because it arises automatically on creation. Copyright is protected in the EU for 70 years after the author's death for creative works, 50 years for broadcasts, etc and 25 years for published editions. Use of © is not required in most of Europe. Copyright is enforced by court proceedings.

Design Registration

Design registrations are used to protect products distinguished by their novel shape or pattern. They are available for one-off items. The design itself must be new, although a 1 year grace period is allowed for test-marketing. Registration is not possible where the new form is dictated by function. The design is registrable either nationally or under an EU-wide single right. It can also be protected by copyright.

OBLIGATIONS

It came from Latin word. Obligare – to tie around / bind in popular sense it is merely duty .

Holland – a tie, whereby one person is bound to perform some act for the benefit of another. E.g. Duty to pay debt., duty to perform contract.

Salmond – an obligation is a proprietary right in prsonam / a duty which corresponds to such right. Therefore obligation is both right & duty. – It is vinchlm Juris i.e.a bond of legal necessity which binds / links together two persons – one who is endowed with a right & the other who is burdened with a corresponding duty.

Thus it follows two thing.(1) It is a proprietary state in personam & (2) It is a duty which is correlative of a property right in personam .

Therefore to qualify as an obligation a right must not only be a proprietary right but it must also be a right in personam & it is both corporial & Incorporieal property,. E.g.owing an obligation to receive a debt.

The personal right (Speech to expression etc) and right in rem are not obligation because they are not right in personam

Chose in action & chose in possession technically obligation is chose in action (a thing in action) i.e. right in personam which can be enforced by a legal action. E.g. Debt , claim for damages . If there is right in ersonam but not a property right can't be a chose in action therefore not obligation .e.g. contract of to marry – It relates to a personal & not a property interest therefore not chose in action therefore not obligation.

Chose in possession. – any thing / right which was but compared to chose in action it become almost obsolete. Because by chose in action any thing / right of which the claimant had no possession but he could obtain if need by way of action (suit) at law. E.g. Money in a man's purse was a thing in possession & therefore not an obligation where as money lent to a friend was a thing in action & therefore an obligation.

Sources of obligations

(I) Contractual obligation. – arise due to an agreement between the parties to the contract.- right in personm.

(II) Quasi-contract obligation.
Which are not in truth contractual but which the law treats as if they are i.e. implied contract. E.g. 1) Necessaries supplied to a person incapable of contracting 2) Interested in the payment. Of money which another is bound by law to pay, 3)enjoying benefit of non-gratuitous act.4) takes money / a thing under coercion. 5) finder of goods – acts as an bailee.

Principle – unjust enrichment shouldn't be allowed to be retained at the expense of another person.

(III) Delictal obligation – Obligations based on Tort. I.e. it creats a duty of making monetary compensation for thecommission of a tort.e.g. Wikinson v. Dowton 1867. causing nervous shock by falsely representation.

(IV) Innominate obligation.- which are not included in above 3 classes i.e. these are residuary obligations. E.g. trustee – beneficiary, Guardian – ward.

- **Solitary obligation.**

Roman law – solidium – togetherness / collective part. E.g. employees – strict. Prof parte – portionate parte . It consequences are important Rs 1000 debt to B & A (partner) is creditor. It means debt of Rs 1000 owned by each of them to X . Here X has discretion to sue only A/B or both.

- **Kinds of solitary obligation**

(I) Several solidary obligation Individual / separately
Obligation – Debtor – I(Discharges only one party) & Debtor - II (contract of surety is after.)

(II) Joint solidary obligation – Under English law – Legal tie between the Debtors on one hand & the obligation on the other hand .(Discharges both the partie.) Obligation – Debtor – I & II (contract of surety together).

(III) Joint & Several Obligation – It is recognized in India . U/S 42, 43, 44 & 138 of Indian contract Act 1872.
Obligation – Debtor – I & II e.g. 'X' Debt = A B C . 'X' can sue 1) A/B/C 2) AB/ BC/ AC 3) A+ B +C& if 'X' discharges A/B/C the others will not be discharged .
U/S 138 If contract specified that redease of a co-surety / partner will discharge the other then others will be discharged even under the Indian contract Act – 1872.

MODULE - 09
CONCEPTS OF OWNERSHIP AND POSSESSION

Ownership

Ownership is an akin conception of possession ownership gradually developed out of it due to changes in the economic structure of society. The conception of ownership seems to have come into being when the society changed from nomadic to agriculture , it illustrate the principle that the development of law & society are interconnected & therefore one can't be fully understood without other.

Thus ownership describe the greatest possissional interest in a thing which recognized by the Natural Legal Person.

The ownership is advantageous than possession as it gives bundle of rights & interests associated with it. As there is no any right without remedy therefore the battery of remedy also attached with the ownership like claims, liberties right,power & immunities .

Salmond – ownership is the relationship between a person & any rights that are vested in him. Therefore ownership – rights relation.

Mitland – The history of ownership tressed in 1340 when this word used then in 1583 this word crystalised in Legal system.

In ancient time (1) only owner of property allow to give vote (2) the property recovered in war shared as per maximum property holder. In 19th centrury the institution of state changes & concept of ownership also changed . In the society welfare era society become central focus through collective right therefore as ownership is greatest possibility of possession therefore state empowers to put limitation on ownership therefore ownership not absolute one . e..g. not to use residential premises for business. Work.

Thus social interest protected by putting limitation on ownership. – It consists of tangible / material object such as land, chattlels etc. but ownership not limited to such thing s only therefore man can be owner of things. but he may also own intangible interests e.g. patent, copy rights etc.

As per salmonds view the true subject-matter of ownership always right therefore it may be sometimes material object & some times a right.

Thus things can be the subject matter of ownership depend upon the rules of each Legal system. E.g. (1) things capable of being owned e.g. land etc. (2) Things capable of being owned .but which are not in fact being owned e.g. animals in jungle. (3) things which seem incapable of being owned. E.g. living person, corpses air, sea sun, moon. Etc.

- **Characteristics of ownership**

(1) Right to possess – To have it with oneself therefore owner has the right to possess the thing which he owns.

(2) Right to use & enjoy the thing owned – owner has right to manage the thing & to decide How to use it. But it may be restricted / controlled by the law. E.g. 1) not use agreculural land for Non-agricultural without permission.

(3) Right to exhaust / destroy the thing – to use up, consume/finish off a product. E.g. apples.

(4) Right to Alienate.- Transfer / gift the property he owns subject to Nemo dat quod non habet he who has not , can give not.

(5) ownership is indeterminate in Duration . – It is forever therefore once an owner always an owner.
The Perpetuity of ownership means that on the death of the owner the property shall pass on to his heirs.

(6) ownership has a residuary characteristics owner can parted with several right in respect of the some thing owned.

Pollock – Test to ascertain the owner of a property is to look for the person having the residuary ownership right such a person is the owner even though the immediate power to control & use in with others. E.g. Lease of property.

- **Definition of ownership**

(1) Precian Civil code.- It is called the owner who is authorized with exclusion of others by his own power to make the disposition by himself / through a 3 rd person over a subsestance of a thing / right.

(1) French civil code U/A 544 .- It is a right to enjoy & dispose of things in the most absolute manner.

(2) Austrelian civil code – It is an authority to deal with the substance & a making use of a thing according ot once own

will & to exclude every one else there from.

(3) Gearies – It is a legal control over a thing on the totality of its connection with ownership is bundle of right.

(4) Holmes – The owner is allowed to exclude all & is accourtable to none.

(5) Dermburg - The rightof ownership is the right of general dominion over a corporial things it secures every power over the thing which according to nature & law are possible.Criticism – Not talked abourt incorporeal things.

(6) Holland – ownership has a propritory rights which are the extention of power of persons over the physical world.

Thus we came to conclusion that

1) In 18th century & 19th century the concept of ownership acquire its base because of emergence of Natural right & fundamental right.
2) The state also acquire the authority or power upon the ownership of an individual & put limitation on ownership therefore absolute ownership denied & it regulated by law.
3) It is not meant for the corporial things but also incorporeal things as science & technology develop ownership enter into incorporeal thing therefore the relation only to material thing is the falsity.

Whether right / property come first .

Salmond – Whoever possess thing is own the right .

Cook J – person doesn't own right he possesses them as he own the true material object.

But debate of property/ right first is irrelevant & not useful.

Paton – Ownership is incorporeal things advocated by him.

Kinds of ownership.

(I) Corporeal & Incorporeal ownership

Corporial – ownership of material object ,Incorporial – ownership of right . e.g. Right in re aliena.

(II) Legal & Equitable ownership.

It is regarded under English law & not under Indian law Commen law courts – Legal right , Chancery / Equity – Equity right.Legal rights enforced in rem / in personam while equity right enforced in personam only .

(III) vested & contigent ownership –

Vested – owners title is already perfect. Two sense- (1) Interest may be vested in possession when there is a right to present enjoyment e.g. car. ,(2) it is take effect on the happening of the future even which is certain / sure to happen.e.g. Death.

This interest once vested is transferable heritable & divisible.

Contingent – when the owners title is yet imperfect, but is capable of being perfect on the fulfillment of some conditions.e.g. Marriage.

An contigent interest take effect only on the (1) happening of a specified (particular) uncertain event / (2) if a specified uncertain event shall not happen.

This contigent is non-transferable , invisible & unheritable.

Three types of contingent ownership . (i) condition precedent.- Condition has to fulfil first for vesting ownership. But condition should not be 1) imposable to perform 2) immoral & 3) opposed to public policy – void. (ii) Condition subsequent – Condition is subsequent the establish immediately vests in the grantee & remaintion him till the condition is broken. It is also subject to above condition.(iii) conditional limitation.- it is combination of both (I) divests an estate that has vested & (2) vests in another. Therefore when condition precedent when combined with – condition subsequent gives us a 3 rd category – conditional limitation.

(IV) Absolut & Limited ownership.

Absolute – All the rights of ownership (possession enjoyment & disposal) are vested without any restriction. Exception – restriction by law in interest of society.

Limited – limitation on use, disposal/ duration the ownership is limited ownership.

(V) Trust & Beneficial ownership.-Sir francis Bacon – a trust is the binding of conscience of one to the dictates of another.

Author- 1) Trustee 2) Beneficiary.

Trustee in eyes of law – owner. But Beneficiaries in reality is the owner .

In U.K. – Beneficiaries can transfer its interest . India – Not.

I) Sole ownership & co-ownersip

Sole – an exclusive ownership of an individual as against the whole world . e.g. owner of land.

Co-ownership – Two/more person have interest in the same property / thing but there must be a common subject, comment right & more than one persons sharing the same right e..g partnership firm.

In U. K. co-ownership divided into two.

I] ownersip incommen . – each co-owner possesses the property permie but not pertout i.e. per share & not whole.

Characteristics –

1) It is exists only in equity.
2) After death legal heirs entitled to share.

II) Joint ownership- each joint owner has possession permie & pertout i.e. per share & per the whole.

Characteristics

1) derived title by co-owners from same document.
2) After death surviving co-owner becomes sole owner – jus accrescendi.

Development in India.

The concept of fundamental right & the eminent domain resulted into change in concept of ownership as per time society & Nation e.g. in 1992 the concept of privatization adopted by Union of India.

Marxism

Lenin – state of private ownership is right of robber & private ownership is the theft of property.

Mahtma Gandhi

He believes in the trusteeship towards the social welfare therefore in 1975 by 42nd Amendment word socialism' introduced in the preamble.

Excelwear v. Union of India.

Supreme court – upheld concept of socialism.

There are exclusive economic zones like Nuclear power, Electricity , Railway in which private ownership not allowed.

Thus it shows the concept of ownership changes as per need of tim & society & Nation.

Concept of Eminent Domain

It derived from word.

Domenium Imperium – sovereign Domain ownership .

This doctrine embodied U/A 300A of constitution . The state can deprive private ownership on the basis of this doctrine even though private individual has right to property.

1) The state can acquire property on the basis of public interest

Bela Banarjee case

Supreme court – ownership can't taken without law & compensation should pay as per the market value of such property. This doctrine imported from U.S.A .

U.S. v. California

U.S. A supreme court – It is the federal government rather than state government has ful domention over resources of soil including oil & the marginal sea.

Doughlus J. in U.S. v. Taxas

He retreated above case & gave reason for I. D.

2) The national interest , 2) National right must be paramount & prevail upon rights of any units.

In India the distribution of financial resources based on this doctrine.

Since an ancient time man require certain things for his life.

As per Hobbs – During the ancient time the state of society. – everything is mine therefore there was chaos, abourt what is belongs to whom in this condition the whoever stronger only become owner of the thing in order to avoid this the concept of ownership & possession came to be emerged.

POSSESSION

Normally possession – ownership . Its transfer is one of the chief method of transferring ownership . The possession of a thing is a good title against the whole world except real owner therefore it is said that possession is nine point of the law. Long possession creates ownership by prescription, possession is the basis / ground of obtaining certain legal remedies like possessory remedy.

In number of offences against property, possession becomes the main issue to be determined.

Reasons of Protection of possession.

(1) It helps a criminal law by preservation of a peace as interference of possession almost invites violence e.g. Ayothya crises.
(2) It protected as a part of Law of tort.e.g. Trespass.
(3) Possession as a part of Law of property. E..g. Mortgage , Easement etc.

As human life not protected without the essential goods of existence like Land, Air, Water Light in the same way the legal system. Recognizes the possession as an essential good of existence other wise there will be quarrel between peoples.

Thus the possession means the control over material objects of the rights.

Theories of possession.

(I) Savigney – He propounded his theory on the basis of two elements of possession. (1) Corpus possessionis – Effective control & (2) Animus Possidendi. – An intention to hold materials.

In absence of any of the above element there is loss of possession.

Criticism – In actual practice possession continued although one of the element was lost / both. E.g. In eyes of law the master was considered to be in possession of what was kept with his servant.

(II) Iherings. – Whenever person looked like an owner in relation to thing. He had possession of it unless it was denied to bim by rules of law based on practical convenience .

But he not discussed element of possession , as per him possessor only in rightful owner & this is advantage of possession.

Criticism – some time law denies possession. He said – It is exception.

(III) Salmond – He divided possession into (1) corporeal possession – Possession of the material object (Tangeable) & (2) Incorporeal possession – Possession of certain rights (Intangiable) e.g. I.P.R.

This theory have great advantage over savignyes theory as this theory recognizes incorporeal possession also.

The incorporeal claim consists two elements i.e. corpus & animus also.

(IV) Holmes – To gain possession a man must stand in a certain physical relation to the rest of the world and must have a certain intention .

Thus as per him possession is matter of fact therefore continuity of possession is important than its acquisition. Here owns on Defendant therefore the finder of goods has better title than other world.

(V) Pollack – A man is said to possession / to be possession of anything of which he was the apperent control / from the use of which he has the apparent power of excluding otheres.

Thus as per him it is animus but it is defacto control(physical control) necessary ingredient of possession.

Criticism – only control not but intention also important. E.g. He fails to give answer when coolies carry luggage Thus only salmonds & Holmes theory accepted to describe possession.

Following elements necessary to have possession.
(1) Control of subject matter.
(2) Intention to hold subject-matter &
(3) Power to excluides other.

Kinds of Possession.

(I) Mediate – possession exercised through some body.&
(II) Immediate – possession exercised by possessor himself .

Acquisition of possession

I] Taking – person who take possession without the consent of real possessor.

II] Delivery – voluntarily give possession to another. &

III] By operation of Law –Possession removed from one person & given to another person by way of law.

Bridges v. Hawkesworth

Plaintiff gives possession of bundles of notes as he was 1st finder.

sauth staffordshire water works company v. sharman.

Company gives possession because ring was found in company premises.

Armorie v. Delamire

Chinmey boy get possession of jwellary from goldsmith who refused to return it after checking those jwellary,whether real / not.

The rights are not only confirm on living being but also an non living being only enforceability aspect become different – Natural person enforce enforce his right by himself while legal person enforce his right through the member.

Thus the persons are not only subject to right but also duty too.

Salmond – Person is the any being to to whom the law regard as " capable of Having " rights & duties.

- **Criticism**

What is about children ,lunatic ?- Having not capable of rights.

Persons.

(a) Natural – (1) Unborn and (2) Living – a) Normal and b) abnormal
(b) Legal corporation sole Corporation aggregate

(A) Natural Persons

(I) Status of animals

The only natural persons are human beings Animals are not persons, neither natural / legal . They are regarded as things . Animals may be te object of legal right & duties but animals themselves can't possess right / duties.

In oldest days, the law was cpable of punishing animals they were considered to be capable of sustaining duties & was therefore to that extend a legal person. Modern law however does n't consider an animal of being capable of possessing rights / law protects animals except when tey becomes dangerous, in which case they may be shot.

e.g. (1) Society for the prevention of cruelty to Animals & statute laws protecting animal.

Mohammed shafi Quresi case.

(2) In China the smugglig and/ killing of Giant Pada attracts the death penalty

Law doesn't allow any bond/ obligation between men & animals when a man hurts an animal it is regarded as a wrong to its owner/to human society rather than wrong to the animal therefore man can't be cruel to his own animal.

National Anti-vivisection society v. I. R. 1928

Appelate Court – If for any reason the interests of animals conflict with those of human beings then, the interest of the human heing will be preferred.

Animal can't be the owner of property it can't own property even through a human trustee.

Re Dcan 1889 (Trust in Favour of animal)

C. D. – The only effect of such provison is to authority the trustees , if they think fit to utilize the property in the way indicated therefore what remains after spending / the whole , if unspent will go to the testator's heirs therefore private trust for the benefit of an animals can't be made.

Grove v. Lawrence 1929 .

Thus public charitable trust for the benefit of a class of animal is allowed.e.g. 1) panjrapole (asylum for crippled, weak /useless animals), 2) Bequest made for maintenance of a home for stray dogs / broken down horses is valid.

Thus a trust in perpetuity for an animal is invalid if it is a private trust.

Grove v. Lawrence 1929

(The Beaumont Animal Benevolent society) opposing for cruel sports involving animal .

Private trust * Pettingall v. pettingall

Testator gave $ 50/years to trustees for the maintenance of his favourite mare, to last until mare's death it is valid bequest.

Thus private bequest in perpetuity for animal is invalid however a private bequest not in perpetuity & it is for public charitable trust whether / not in perpetuity are all valid bequests.

May v. Burdett 1846

If an animal hurts a human being / another person's animal then the owner of the attacking animal may be held liable.

Distress damage feasant.- If an animal trespasses upon a person's property then the property holder may impound (detain) the animal until damages caused by it are paid by the owner of the animal .

(II) Status of Dead Men

In law the dead are things & not persons. They have no rights, duties & interests this can be studies under 3 headings.

2) Legal status regarding the forpse (dead body)
3) Legal status the dead man's reputation. &
4) Legal status of dead man's property.

1) Corpse – A dead man's corpse is not the property of anyone . It belongs of neighter to the dead man nor to his heirs therefore

any wrongrul dealing with it will n't amount to theft

Williamss v. Williams 1682 .

C – It can't be disposed off by will / by any other instruments.

But today this treand is changed & it is possible to donate eye, skin etc. for medical purposes & for that perpose special statutes are made.e.g. The Bombay Corneal Grafting Act,1957 .

R.v. Stewart 1840 .

English criminal law ensures a decent burial for the body of a dead man.

A permanent private trust (perpetuity) for the maintenance of a man's tomb is illegal & void. However a public charitable trust for the maintenance of all graves in a particular graveyard is valid.

*Re Vaghan

C. – A private trust which is not in perpetuity for the repairs of persons grave is valid.

Advocate General v. Yousuf Ali.

Agift in perpetuity for the upkeep of the tomb of state chanda bhai was held to be a valid Gift because it was given to a public charitable institution.

2) Reputaton- R v. Ensor 1887 (Right to reputation etc deis with death of person.) Defaming a dead man is an offence only if it is an indirect attack on the family & relatives of the deceased therefore rightto sue is not of the dead / in his name but of the living descendants.

3) Property – The law permits desires of the dead to regulate the action of the living.

Salmond – for years after a man is dead his hand may continue to regualate & determine the enjoyment of the property which he owned while he was alive .

Thus is indeed true & a dead man's property can control the lives of the beneficiaries who get that property after his death. E.g. Bequest – pay 'x' Rs 5 lacks if he marries before the age of 24.

(III) **The legal status of an unborn person**.

Dead man possesses no legal personality, but an unborn person can have legal rights & lea personality. Therefore there is nothing in law to prevent a man from owing property before he is born. E.g. A bequest can be made to an unborn person. *"en ventre sa mere"*- child in the mother's womb.

Thus property can be own by child in mothers womb.

However the unborn person's ownership is contingent on his birth as a living human being therefore to get the property he must be born alive. Posthumous child is entitled to his deceased father's estate provided he is born alive. If child dies in the womb, his inheritance fails to take effect and no one can claim through him.

In law, it is thought reasonable that a child who has lost his father shouldn't be further penalized by losing any interest which he would have secure had he been born at his father's death.

George & Richard 1871.

A posthumous child is entitled to compensation for the death of his father.

U/S 416 of Cr.p.c. 1973 – pregnant women condemned to death can't be executed until she has delivered the child.

In many legal system an abortion is a criminal offence.

R.v. Senior 1832

R.v. West 1848

Willful/negligent injury inflicted on a child in the womb by reason of which it dies after having been born alive amounts to murder / manslaughter.

Can child in mother womb sue:

Walker v. Great Nothern Railway 1890 .

Pregnant women get injured due to collision on the railway line there was negligence by railway servant.

Railway out not under duty to protect / take care of child in mother womb about which they were anawere.

Montral Tramway v. Levllie 1933

Child in mother womb can sue & compensation of L1030 allowed.

(B**) Legal Person**

Meaning – It is any subject matter other than a human being to which the law regards/ attributes the personality.

Chiranjit Lal v. Union of India.

Supreme court – Corporation having right U/A 19 but not a citizen.

Thus only law creats the Legal Person & confirms Rights & Duties on it. Similar to natural person.

- **Emergence of concept of Legal Person.**
  By development in Trade & Commerce there were difficulties arose to the intercourse. Therefore concept of Legal Person arose by which few persons come to gather fulfill all technicalities required then Legal Person come into existence & it become independent existed & named also, it can own, dispose, possess property entered into contract etc. e.g. the cases U/A 25,26 shows that how the idols get Legal personality like Balaji, Renuka, Vaishnavidevi,Somnath etc & their Trust affairs managed by the state.

  Thus this concept helps to protect the object of Legal system to manage the relationship between person.

  Prof H. L. A. Hart – such a unit not only over period of time & confirms being a personality.

R.D. Shetty case:
J . Bhagwati- Test of state U/A 12

Duggit – State is biggest corporation.

Purpose / Merits of corporation.

(I) Management of Common interest – If there is a large number of persons coming together to do Business, it becomes very difficult to deal with such joint ownership. E.g. 1) Manage their conmen interest enter into contract, dispose of property, incur liability, to sue etc.

Therefore by incorporation a personal it is attributed to the "Multitude of persons" & there by is made possible to carry out their common activities.

(II) Perpetual succession leading to continuity.

The coming, going, changing increasing & decreasing of member in no way affects the life of the corporation as in partnership therefore there is a continuity.

Thus member may come / go but corporation goes on forever.

Prof L.C. B. Gower Modern company Law.- case in which all the member of a company were killed by a bomb while at general meeting, but the company was deemed to survive.

Similarly , even if all the member of a company changed overnight the company remains the same legal person.

(III) Limited Liability & therefore limited risk.

A shareholder's having liability limited to the extend of his share / to the extent of the amount guaranteed by him if it is a company limited by guarantee.

(IV) Transferability of shares leads to convenience.

The freely transferable nature of the shares of a corporation is a great convinience to shareholder (investors) who can sell their shares in the market & get back their investment without going back to the corporation.

(V) Property rights can be enjoyed – companay to hold, buy & transfer property in its own name. The assets of the corporation don't belong to the shareholders they have indirect interest in the form of shares.

(VI) Facilities of management.

The whole management is done by one skilled person / a small team of professional it helps to increase production.e.g. department of production , finance, marketing , public relation, legal administration etc. It reduces burden on the members of company.

(VII) Substitute for the trust company can be formed for not only professional it purpose but also for society, charitable /quasi -charitable purpose therefore it is modern & convenient substitute for the trust.

(VIII) Simplification of legal proceedings .- Incorporation simplifies & cheapens the legal proceedings by / against the corporation. E.g. it can sue, can be sued in its own name.

(IX) Advantage of the floating charge.

Dr, John Farrar – the motive for incorporation is to take advantage of the floating charge – It floats over the undertaking class of assets until an event occurs which causes it to crystallize, where upon it becomes a fixed charge . Until then the company can dispose of its assets in the ordinary course of Business. Therefore Banks & financial institution put pressure on Business to incorporate so that they can be guaranteed a floating charge as a security over stock in trade & Business debts .

(X) Development of commerce & industry –
It brings out a small portion of their savings & combine together to form an enterprise.
L.C. B. Grower – Great bulk of individual enterprise is in the hands of large corporation in which many individual(shareholders) have property rights.
In 18th century the Britis Empire development & expanded through the enterprise. Todays world can't be imagined without IBM , Toyata, Ford , Boeing, coca-cola, sony etc.

(XI) Capital intensive enterprise may be undertaken.
A sole proprietor / partnership require lot of capital but corporation can do so as it can have a very large share holder membership e.g. coment manufacturor , power – generation etc. therefore how modern shareholders not a quasi- partner but he is simply a supplier of capital .

(XII) Reducing tax liability .
Salmond – Motive behind incorporation is tax avoidance . Under system of taxation the proportion increase in of tax payment increases with income & decreases with decrease in income .
Dr. John Farrar.- The use of corporate form is a useful means of spreading income amongst members of a family. It is alo useful for spreading ownership of wealth.

(XIII) A corporation being 'rich' can take up social responsibility.
Due to mass mobilization of resources , a corporation is able to undertake projects concerning improvement of society at large .
William Gosset (General council for the ford motor company)- The modern corporation is in some respects a public institution & is one of the key economic unit of our society it holds power in trust for the whole community.
Due to its big size & inherent financial strength the corporation is in a much better position to philanthropic & a developer of the society. E.g. Rural development, community social service, sports sponsorship , Environment protection, Resource conservation., Import substitution , Emancipation of women etc.

- **Types of Corporate personality**

(I) Corporate agreegate – The person come together to form company that bunch of person is nothing but the corporate agreegate.

(II) Corporate sole.- when corporation get existence by incorporation – corporate sole. It become (1) legal independent person in the eyes of law therefore it has . (2) all liability of future circumstances & transaction.

- **Theories of Corporate Personality**.

(II) Fiction theory – During pope Ivth Churches get Lagal Pesonality the origin of this theory is here.
Savigny – Besides the Natural priority right of certain fixicious / artificial person . – Corporation.

Fixion – Imagination ,Artificial – Not natural, This leads to division as corporate agreegate & corporate sole therefore we must carefully differentiate corporation from its members.

Coke J – corporation refered as 1) Invisible , 2)Immoratal- never come to an end . & 3) Resting only in the intendment of a law.

Excelwar v. Union of India.
Supreme court – As any body has right to freedom of Trade & Business , they have also right to close down that trade & Business. Therefore question comes how corporation is immortal.

This word used in olden days. When they doesn't imagine that closer of corporation.
Dart mount v. wood worth.
Marshall chief justice – Corporation is (1) an artificial being (2) intangiable, (3) invisible, (1) which exist only in the contemption of law.

Thus only law gave birth to corporation . It has no will/mind/body organs, it work through persons which created it.
Salmond – It is merely fixicious one .
This Legal Person not only enjoy interests & benefits but it also subject to duties & liability as the Natural person.

(III) Concession Theory. – The corporation only comes into existence through law. Law recognizes only those objects which are lawful. (Memorandum of Association)

Thus as per this theory corporation doesn't came into existence on the basis of will of member but only law recognize. it. Thus law gives concession to corporation to come into existence.

(IV) Bracket theory – Each Legal Person is technical Legal Device to which certain rights accorded .

Legal Device – putting persons group into bracket who wishes to form the corporation & then given name to it.

They loose their identity & new legal person immerged out.

The importance of this theory is that corporation get independent personality which helps to left corporate veil in case of determine liability by removing bracket & held member liable for his fraud.

Thus this theory helps to impose liability on its member who acted on behalf of corporation , this theory more closer to Doctrine of Lifting of corporate veil & having the practical significance .

Kelsen – There is no difference between Legal person & it members which help to held person liable who acted wrongly on behalf of corporation.

(V) Reality theory

Girke – The group having a real mind real will & real power of action.

Thus even though corporation having independent Legal Personality but real will & power with its members . Therefore corporation is merely technical personification.

(VI) Purpose theory – Law recognizes certain purposes & interest of individual beings.

Thus corporation only carry those Business which are mention in the documents of it creation otherwise it will be ultra virus therefore this theory not only recognizes personality but also its purposes for which it is established.

Which theory is proper.- Bracket theory is widely accepted as it has practical significance. It helps to see who is really liable to fraud by lifting corporate veil because some time group take advantage / disadvantage of Business in name of the corporation.

Holdwarth – No theory has been adopted properly, But more important is that consider corporation as the natural person because not only it enjoy right but also duty as similar to natural person.

Disadvantage / Demerit of corporation.

There are some difficulties arises because of advantages of Legal Person.

In Re. Eutrope – Husband & Wife were shareholders & Directors also agreed whole benefit to be transfer to Directors as the fees.

This challenged on the ground that the shareholder weren't different than Director otherwise it will amount to fraud on the state.

Thus in following circumstances the lifting of corporate veil.

(II) In the cases in which it become necessary / relevant to analyze the characteristics of corporation.

Damler v. Continental Rubber & Tyre company. (Enemy Company)

(III) cases in which the interpretation of legal obligation / transaction makes it necessary to look at the human individual covered by the mark of juristic person. &

(IV) The cases in which the device of corporation used fraudulently, in particular for evasion of tax obligation.

There are not Universal parameters to lift the corporate veil it depend on facts & circumstances of the case. Thus the approach is to be case to case basis.

MODULE - 11
CONCEPT OF TITLE

TITLES

Roman – Titulus, French – Titre.
Salmond – Every legal right has a title i.e. certain facts/ events by reason of which the rights has become vested in its own. Therefore it is "fifth" element of Legal rights.

The title is the defacto antecedent of which the right is the de jure consequent. Therefore if law confers a right upon one man which it does not confer upon another the reason is that certain facts are true of him which are not true of the other & these facts are the title of the Right.

Thus title means any fact which creates a right / duty. Bentham suggested term sinse Dispositive facts, instead of title. & divide it into 3 parts. 1) Vestitive facts,2) Investitive facts & 3) Divestitive facts.

(I) Vestitive fact

1) it is a fact (something that has already occurred) which either creates destroys / transfers a right. 2) which determines positve / negative the vesting of a right in its owner.

The vestitive fact is a generic term & includes investitive fact (titles) & divestitive facts.

Vestititive facts may be looked at from another prospective

Vestititive facts.

(I) Acts in the law (voluntary acts of parties), Unilateral, Not sub other things
(II) Acts of the law (Involuntary) Bilateral
Sub to other – void, voidable, valid
Party's dissent or other party's dissent

- **Acts in the law.**

(1) acts of the parties / juristic act / legal powers. Act of party – expression of the will / intention of person towards the creation , transfer/extinction of a right. E.g. contract , will (2) There voluntary –with the consent of the tranferor.

A] Unilateral – only one party whose will is effective e.g. gift , will, etc.

It is of two kinds.

1) Unilateral not take effect if other party objects. E.g. avoiding a viodable contract.
2) Take effect if other party doesn't object e.g. will.

B] Bilateral – agreement voluntary will of two / more persons. E.g. contract, mortgage, lease 3 kinds of Agreement
(1) Valid – fully operative in accordance with the intent of the parties.
(2) void – entirely fails to receive any legal recognition.e.g. against public morality
(3) voidable - valid /void at the election of one of the party to it.e.g. agreement by undue influence, coercion, misrepresentation.

- **Acts of the law.**

Creation , tranfer / extinction of a right by the operation of the law itself independent of any consent on part of the person. E.g. Devolution / distruction of the property of a person dying intestate (without making will)

(II) Investitive facts (Titles)

Salmond – the Title is defacto……
Title – Right
Two kinds / types of title

(I) Original – Original title creates a right de novo i.e. new right is created.e.g. Build House – original title.
(II) Derivative title.- transfers an existing right to a new owner. It is not new right . It is acquired by one & lost by other . e.g. Buying existing house.

An original & Derivative title, both have the same importance in the eyes of the law.

(III) Divestitive facts

It either destroy right / transfer right to someone else. It is a fact (situation / happening) which shows law the rights gets transferred / terminated. E.g. A-House- B.A divested of his right towards the House.
Two kinds of divestitive facts.

(I) Extinctive – when they divest (take away) a right by completely destroying the right. E..g on payment of Debt. Right of creditor destroyed..
(II) Alienative / translative –
When they divest an owner of his right by transferring it to some one. E.g. A – Sale House to B.

Purchase is a derivative /extinctive title, but sale is an alienative title.

MODULE - 12
CONCEPT OF LIABILITY

From the Hofeldian point of view there is relation between right & duty. It is the established fact that the rights are sine quen therefore person can't enjoy his life without rights.

The value of rights & quality of the rights maintained by imposing the duty on others therefore others has to discharge duty in such a way that it shouldn't jeopardize the rights of other.

If somebody doesn't discharge his duty in diligent manner i.e. If there is breach of duty then he is liable to pay damages. Thus liability is the condition of the person who has committed a wrong against others rights.

Salmand

It is a bond of necessity that exists between the wrong doer & the remedy for that wrong.

***Purpose of imposing the liability**

1. To avoid loss, damages from wrongdoer,
2. To ratify loss, damages from wrong doer
3. To get compensation from the wrong doer.

***Object of liability**

From above purposes we came to know that the object of liability not only pay compensation for loss suffered but also provide the social security to each individual from wrong doer & warn the prospective wrongdoer that they would be liable to compensation for their wrongful act by breach of duty.

***Kinds of liability**

For every wrong there is liability there are two types of wrong

I. Moral wrong

Not actionable

II. Legal wrong

Actionable the legal wrongs are divided into –

(a) Civil - they have remedial liability.

1) Tortious wrongs,
2) Breach of contract,
3) Breach of trust,
4) Breach of equitable obligation

(b) Criminal – it has the penal liability.

***Difference between Civil & Criminal Liability**

Sr. No.	Point of Difference	Civil	Criminal
1	**Nature**	Right in Persona.	Right in rem.
2	**Nature of Remedy**	Civil remedy i.e. damages, compensation, injunction or any other remedy.	Penal remedy in the form of punishment.
3	**Proceedings**	Civil Proceeding	Criminal Proceeding
4	**Action taken by whom?**	By the wronged person	By the state
5	**Relevance of Intention**	Intention is not necessary	Intention is very much relavent

***Nature of Civil or Remedial liability**

Ubi jus ibi Remedium i.e. whenever there is right there is remedy.

Exceptions –

1) Duties of imperfect obligations e.g. Limitation Act,
2) Some duties can't specifically enforced e.g. complete assault,
3) In some cases law awarded only damages instead of specific performance of duty e.g. personal services.

***Nature of Penal Liability**

Actus non facit reum nisi mena sit rea – act plus guilty mind leads to offence or crime.

Following are the kinds of act –

1) Positive or Negative,
2) Internal or External,
3) Intentional or Unintentional.

Out of these two liabilities in today's modern, developed society the civil liability became more & more important.

***Tortious liability**

In civilized society each individual has right to enjoy his person & property and each individual has duty not to aggravate the others person or property otherwise he will liability to pay damages.

Prof. R. Pound has given three instances in which the individual is liable to reparation losses or damage of others.

I. Intentional aggression upon person or property of another unless he establish the justification of privileges e.g. PSI enters on property without search warrant.
II. Negligent interference with person or property.
III. Unintended or non-negligent interference with person or property of another resulting in damages e.g. – Hazardous Industrial activities.

Third category becomes more important in today's modern life to impose liability not only on government but also on private individual in order to protect the social security of society, which has ultimate object of liability. As the State is biggest corporate & employer therefore in welfaric State it is duty to protect social structure of society therefore it passes the social security legislation.

E.g. – Workmen Compensation Act – u/s. 3(1)(a) it provides compensation for injuries arose **out of & in the course of** employment to the employee.

But it causes some difficulty to provide compensation therefore in -

Saurashtra Salt Mfg. Case

The Supreme Court laid down the **Doctrine of Notional Extension** – premises of the work place extended symbolically up to the place where injury occurred to the employee **out of & in the course of** employment, in order to held employer liable to pay compensation or damages to the employee.

BEST v. Mrs. Anglers

(Compensation as per doc. Of notional extension)

U/s. 3(1)(b) there are exceptions when employer not liable –

1) If employee not used safety guard,
2) Not follow the instructions given by the employer and displayed publicly on notice board
3) Employee was under influence of liquor.

These exceptions set free employer from liability to pay compensation to employee.

But at the same time by ESI Act u/s. 2(d) read with Sec. 51A, 51B, 51C & 51D diluted effect of sec. 3(1)(b) of Workmen Compensation Act & it provides certain benefits to the employee i.e. the injury benefits at the cost of employer without any exception.

Thus it provides the security to the worker by imposing liability on employer and converts strict liability into the absolute.

I. Liability in relation to the wrong against person

1) Defamation – it is intentional aggression upon person, his status and dignity therefore person suffered damages wrongdoer held liable e.g. – Sharad Pawar & Khairnar

If person has some justification or privileges then he not held liable e.g. – MP's of MLA's.

Kind of defamation

i) Slander (Oral) &
ii) Libel (Written)

Exceptions

A. Raj Gopalan v. St. of Tamilnadu

If defamation based on truthful evidence then damages not allow.

Thus in case of defamation Prof. R. Pound's 1st contention followed.

1) Assault & Battery – Physical & Mental injury
2) Malicious Prosecution – wrongful and intentional sufferings.

II. Liability in relation to Property – trespass upon property

Ryland v. Fletcher

(Water Reservoir case)

Blackburn J. laid down the concept of strict liability – if the thing which was not naturally there which is bought by person if it is escaped and caused damages then he is liable to pay damages because there is one kind of lack of duty.

Exception

1) Act of god (vis major) e.g. – natural calamity
2) When plaintiff himself or third party responsible

These exceptions take away liability of wrongdoer from compensation.

This doctrine applied by Supreme Court by convert it into absolute liability as follow –

M.C. Mehta v. UOI 1987

(Olium gas leakage case)

P.N. Bhagwati J. – where an enterprise engaged in **hazardous activities** and harm result to any one account of accident in operation of those activities then that enterprise is "absolutely liable" to compensate to all those affected and such liability no subject to any exception.

Thus supreme court evolved principal of absolute liability by ignoring Ryland case and evolve new law & new principle which could meet **inadequate problems of individual & scientific development** by ignoring old

common-law doctrine as well as come out from the clutches of the foreign rules and laws to meet social needs of today's life in modern Indian democracy.

Thus Supreme Court held enterprise liable absolutely as per its capacity & magnitude.

***Difference between Strict and absolute liability**

Sr. No	Point of Difference	Strict Liability	Absolute Liability
1	**Nature of subject**	Subject is not danger	Subject is danger
2	**Nature of compensation**	Compensation is ordinary	It is depends upon capacity and magnitude of enterprise
3	**Exceptions**	Having exceptions – 1) Act of god (vis major) e.g. – natural calamity 2) When plaintiff himself or third party responsible	Does not having any exception

UCCI v. UOI 1991
(Bhopal Gas leakage case)

Rangnath Mishra J. – M.C. Mehta case is massive obiter Decta because non-application of rule to that cases therefore its decision became 'inactive'. Therefore as per **'Doctrine of Parent patria'** he held govt. is liable to pay compensation.

After M.C. Mehta case Parliament enacted **'Public Liability Insurance Act, 1991'** to pay compensation to all those affected from the activity of enterprise. It excludes worker as they got damages under Workmen Compensation Act, 1948 or ESI Act.

Thus the social security provides to the workers as well as general society at large by imposing absolute liability on industry e.g. – Nuclear Plant Rajasthan is closed because of leakage of nuclear radiations on 11th Feb. 2002.

Thus sustainable development achieved by making balance between development and nature. ***The development can't be achieved at the cost of nature and social life***

III. Tortious liability of State

For sovereign function not liable but in non-sovereign function liable.

Vidyavati v. St. of Rajasthan

U/a. 300 govt. held tortiously liable whether the activity is sovereign or non-sovereign

Khatri v. St. of Bihar
(Bhagalpur Blind case)

State liable to pay compensation to blind victims

Rudal Shah v. St. of Bihar

(Detained for 14 years in jail even though he was acquitted by the court)

State liable to pay compensation of Rs. 35000/-

Nilavati Bhera v. St. of Orissa

Art. 95 of International Covenant on Civil & Political Right was referred by the Supreme Court and held State liable to pay compensation and Right to Compensation become Fundamental Right u/a. 21 of the Indian Constitution.

Bodhisattva Gautam Case

Fundamental right can be imposed not only against State but also against private party in order to pay compensation u/a. 21

Chandrima Das case 2000

Sagir Ahmed J. - fundamental right to get compensation is also available to Foreigners u/a. 21.

Thus by numbers of decisions supreme court tries ***to protect the general social security by imposing liability on wrong doer whether he may be State or Private person and pay the compensation to the wronged party.***

IV. Liability for the act of Transnational or Multinational Corporation

There is lack of definite International Law in respect of liability of Transnational or Multinational Corporation.

The General Assembly of UNO adopted Charter of **'Economic Rights and Duties'** on 12th Dec. 1974 – recognizes the rights of each State to 'Regulate and supervise the activities of Transnational Corporation within its national jurisdiction and take measures to ensure that such activities comply with its laws, rules and Regulations and confirmed with its economic & social policies'

But the developed countries like USA, UK, Federal Republic Germany and Japan did not sign this charter.

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