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INTRODUCTION TO LEGAL THEORY

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1. Meaning and Concept of Jurisprudence

It is difficult to give a universal and uniform definition of jurisprudence. Every jurist has his own notion of the subject-matter and the proper limits of jurisprudence depend upon his ideology and the nature of society. Moreover, the growth and development of law in different, countries has been under different social and political conditions.

The words used for law in different countries convey different meanings. The words of one language do not have synonyms in other languages conveying the same meaning. The word "jurisprudence" is not generally used in other languages in the English sense.

In French, it refers to something like "case law". The evolution of society is of a dynamic nature and hence the difficulty in accepting a definition by all. New problems and new issues demand new solutions and new interpretations under changed circumstances. However, scientific inventions have brought the people of the world closer to each other which helps the universalisation of ideas and thoughts and the development of a common terminology.

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 includes 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.
The term 'jurisprudence' has been derived from the Latin term *'jurisprudentia'* which literally translates to 'knowledge of law' or 'skill in law'. The Roman civilization, which is popularly known as the bedrock of all human civilizations in the world, started to question the meaning and nature of law. Ulpian defined law as the "knowledge of things divine and human". According to him, the law is the science of right and wrong. Several jurists in Europe began to deliberate upon the meaning of the law.
Jeremy Bentham, the Father of Jurisprudence, stated that the "science of jurisprudence" has nothing to do with ideas of good and bad. His disciple, Austin, defined jurisprudence in the following words, "Science of Jurisprudence is concerned with Positive Laws that is laws strictly so-called. It has nothing to do with the goodness or badness of law." According to him, laws are commands made by the sovereign and their non-obedience leads to imposition of sanctions. He termed such laws as positive law and stated that the main subject matter of jurisprudence is the study of positive laws. According to Holland, "Jurisprudence means the formal science of positive laws. It is an analytical science rather than a material science." Keeton defined jurisprudence as, "the study and systematic arrangement of the general principles of law."
Jurisprudence is the study of the Theory and Philosophy of Law.
The subject, in its entirety, differs from other social sciences. There are several ideas with regards to the meaning of jurisprudence and its nature. This makes it difficult to define. Each country has its own idea of jurisprudence shaped by the social and political conditions in which the development of law took place in that particular region. Modern jurisprudence is tied to sociology on one end and philosophy on the other. The ideas of jurisprudence that are popular in major legal systems throughout the world today have their origins in the West.
One of the most interesting debates in jurisprudence has been with regards to the difference between jurisprudence and legal theory. It has been argued that while jurisprudence studies the legal concepts which may or may not be theoretical in nature, the legal theory deals with the philosophical aspects of the law.

Salmond explains that the jurisprudence is concerned with investigating law while legal theory seeks to understand the law in a strictly academic manner. According to him, jurisprudence brings some important principles of law and legal concepts to light and legal theory attempts to study legal concepts in an academic manner to answer questions pertaining to meaning of law. The subject matter of jurisprudence includes the study of concepts such as nature of law, legal systems and legal institutions, etc. as well as the utility of concepts such as liberty, equality, neutrality, etc. Legal theory is concerned with the meaning of law and legal concepts and the philosophies which shape them such as- natural law and natural rights, legal positivism, legal realism, Marxism, feminist legal theory, postmodern legal theory, etc Jurisprudence originated in the Roman civilization with the Romans questioning the meaning and nature of law. It was quite limited since the concepts of law, morals and justice were confused with each other. References are also made to the works of ancient Greek philosophers such as Homer, Socrates, Plato and Aristotle**.** With the fall of the Roman Empire, the ideas of Roman and Greek jurisprudence disappeared and the Christian State emerged. Soon, the authority of the church over the state was challenged by the reformist and ideas of secularism emerged. Many theories were proposed with regards to the evolution and nature of 'state' by philosophers like Hugo Grotius, John Locke, Rousseau and Blackstone. The Age of Reason in the 17th Century led to the formation of ideas of collectivism and social welfare. Slowly, the idea of positive law and positivistic approach gained popularity whereby the boundaries of the law were demarcated and its scope was limited.

Importance

The purpose of jurisprudence is to study the law and legal concepts and analyze the same to facilitate better understanding of legal complexities. Therefore, the theories of jurisprudence are quite useful in solving complex legal problems in the practical world. The various studies and analysis of the legal concepts help a legal professional in sharpening his legal acumen. The subject has immense academic value. One of the most important features of jurisprudence is its relation with other social sciences such as sociology, political science, ethics, etc. Therefore, research in the field of jurisprudence yields great amount of social benefits. Moreover, jurisprudential concepts make way for sociological perspectives in law, thereby preventing it from being reduced to rigid formalism. Jurisprudence is known as the "grammar of law". It helps in the effective expression and application of legal concepts to real-life legal problems. It greatly

helps in the interpretation of law and determination of legislative intent. It stresses upon the importance of considering present social needs over the ideas of the past while dealing with legal problems.

Indian Perspective:

The Hindu legal system is one of the most ancient legal systems of the world. It is based on the concept and philosophy of *"Dharma".* The Hindu concept of dharma might appear to be similar to the natural school of jurisprudence. Dharma refers to the order set by nature and the adherence of human beings to such natural order. Dharma includes the concept of *nyaya* or justice. The term natural order implies to the cosmic order- the law which sustains the entire universe. The Hindus believed that dharma ensures that humans exist in harmony with the entire cosmos or universe.

The philosophy of Dharma is found to be encoded in various ancient Hindu texts known as the *"Dharmashastras" (Code of Law)***.** Some of the most important ones are:

- *Manu Smiriti* – it is the systematic collection of all rules of *Dharma Shastras*- covering all the branches of law then in force. The simple language and great clarity in its composition made the Manu Smriti the most authoritative source of ancient Hindu jurisprudence.
- *Narada Smriti*- It consists of both substantive as well as procedural laws.
- *Yajnavalkya Smriti*
- *Arthashastra*- The political treatise of Hindus.The modern Indian Legal System is based on the common law system. The ancient Hindu system is denounced greatly to ensure that the Indian state remains secular in nature. Thus, the ancient Hindu legal system has lost its relevance in the modern world.

Definition of Jurisprudence

a. **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.

b. **C. K. Allen:**

Jurisprudence is the scientific synthesis of laws essential principle.

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

d. **Ulpian:**

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

e. **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.

f. **Roscoe Pound:**

Dean Roscoe Pound defines jurisprudence as "the science of law, using the term law in the juridical sense, as denoting the body of principles recognised or enforced by public and regular tribunals in the administration of justice".

g. **Lee:**

Lee writes that jurisprudence "is a science which endeavors to ascertain the fundamental principles of which law is the expression. It rests upon the law as established facts; but at the same time it is a power in bringing law into a coherent system and in rendering all parts thereof subservient to fixed principles of justice".

h. **Ulpian:**

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h. P.B. Mukherji:

New jurisprudence is intellectual and idealistic abstraction as well as behaviour juristic 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.

k. **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

l. **Gray**: According to Gray, jurisprudence is "the science of law, the statement and systematic arrangement of the rules followed by the courts and the principles involved in those rules.

Relevance of Jurisprudence in Contemporary era:

There is no unanimity of opinion regarding the scope of jurisprudence. Different authorities attribute different meanings and varying premises to law and that causes difference opinions with regard to the exact limit of the field covered by jurisprudence .

Jurisprudence has been so defined as to cover moral and religious precepts also and that has created confusion . It goes to the credit to Austin that he distinguished law from morality and theology and restricted the term to the body of the rules set and enforced by the sovereign or supreme law making authority within the realm.

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

There is tendency to widen the scope of jurisprudence and at the present we include what was previously considered to be beyond the provinces of jurisprudence. The present view is that scope of jurisprudence can not be circumcised or regimented. It includes all concepts of of human order and human conduct in state ans society. Anything that concerns order in the state and society falls under the domain 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.

In the contemporary era, the excessive arguments for liberty, and its indiscriminate exercise without strict adherence to duty by individuals in their numerous acts, again resulted in bringing

miseries to the world. In order to resolve the problems and to provide a problem free world, the UN took a number of legal steps for the promotion of human rights. The aim of these acts of UN is to regulate the behavior of the mankind and to guide them to discharge their duties to uplift the moral and ethical values. This in turn will help to restore liberty in its true sense and makes individuals to be happy for their legal and justified actions. Apart from the above, it is the duty of nation-states also to adhere to the principles of international law and human rights in their relations, respecting the concept of liberty of the other nations and their citizens.

The Strict adherence to liberty and practice of self-restraint alone would yield the desired results in protecting the rights of every citizen as guaranteed by law.

Diverse voices from the Chief Justice of the United States to prominent civic leaders throughout the nation have emphasized that the most critical deficiency among thelaw school graduates is a woeful lack of awareness of the ongoing interrelationship of the legal process and the larger sphere of social change.

2. Significance and Utility of Jurisprudence

It is sometimes said that jurisprudence has no practical utility as it is an abstract and theoretical subject. Salmond does not agree with this view. According to him, there is its own intrinsic interest like other subjects of serious scholarship. Just as a mathematician investigates the number theory not with the aim of seeing his findings put to practical use but by reason of the fascination which it holds for him, likewise the writer on jurisprudence is impelled to his subject by its intrinsic interest. It is as natural to speculate on the nature of law as on the nature of light. Researches in jurisprudence may have repercussions on the whole of legal, political and social thought.

Jurisprudence also has practical value. Progress in science and mathematics has been largely due to increasing generalization which has unified branches of study previously distinct, simplified the task of both scientist and mathematician and enabled them to solve by one technique a whole variety of different problems. Generality can also mean improvement in law.

3. Meaning and definition of law:

Law forms the subject matter of jurisprudence. Therefore, it is essential to examine the nature and definition of law. Many jurists have argued that there exists no exact definition of law. They have gone on to say that law cannot and should not be defined for the same would narrow down its scope.

1. According to Arnold, the law is incapable of being defined. However, he states that this particular fact must not discourage the people from attempting to define law for the world rejects renders anything that is incapable of definition as irrational. Lloyd has observed that several attempts have been made over time to provide a universally acceptable definition of law, however, none of them have even remotely succeeded.

2. **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.

3. **Roscoe Pound** : Law is -Legal precepts (customs, usages),Legal order (Law enacted by sovereign authority),including

I. Judicial process (Doctrine of precedent)

II. Principles (Principles of natural justice)

Nature and Theories of law

1. **Law is a Social and a Normative Science-** The primary aim of the law is to regulate human conduct. It has been introduced to maintain order in the society. Thus, law is essentially a social science and is normative in nature since it lays down rules for human conduct.
2. **Law is Dynamic in nature-** An essential element of law is its dynamic nature. According to the Supreme Court of India, ***"Greatest virtue of Law is its Adaptability and Flexibility***

   We have to differentiate law of motion, gravitation 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.

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 helps the judges and lawyers in ascertaining true meaning of laws passed by the legislature by providing the rules of interpretation. To become successful lawyer or judge jurisprudential background is necessary.

Relevance of Jurisprudence with other Sciences:

1. Jurisprudence and Sociology

It means influence of law on society i.e. social welfare means causes of crime. Jurisprudence and Sociology. According to Salmond, jurisprudence is the knowledge of law and in that sense all law books can be considered as books on jurisprudence.

Among the phenomena studied by sociologists is law also and that makes sociology intimately connected with jurisprudence. The attitude of the sociologists towards law is different from that of a lawyer who,in his professional capacity, is concerned with the rules which have to be obeyed by the people. He is not interested in knowing how and to what extent those rules actually govern the behaviour of the ordinary citizen.

A book on the law of torts or contract deals with the rules relating to torts and contract but does not mention how often torts and breaches of contract are committed. A lawyer is essentially interested in those who frame the rules and execute them in a given society.

There is a separate branch of sociological jurisprudence based on sociological theories and is essentially concerned with the influence of law on society at large, particularly social welfare. The sociological approach to legal problems is essentially different from that of a lawyer. In the case of crime in society, its causes are to a very great extent sociological and to understand their pros and cons, one must have a knowledge of society.

2. Jurisprudence and Psychology

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

Psychology has been defined as the science of mind and behaviour. It is recognised that no human science can be discussed properly without a thorough knowledge of the human mind and hence its close connection with jurisprudence. In the study of criminal jurisprudence, there is great scope for the study of psychological principles in order to understand the criminal mind behind the crime.

Both psychology and jurisprudence are interested in solving such questions as the motive for crime, a criminal personality, whether a criminal gets pleasure in committing a crime, why there are more crimes in one society than in another and what punishment should be given in any

particular case.

In criminology, psychology plays an important part. It is the duty of a lawyer to understand the criminal and the working of a criminal mind.

3. **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.

4. **Jurisprudence and Ethics:**

Ethics has been defined as the science of human conduct. It deals with how man behaves and what should be the ideal human behaviour.

There is the ideal moral code and the positive moral code. The former belongs to the province of natural law, while the latter deals with the rules of positive or actual conduct. Ethics is concerned with good or proper human conduct in the light of public opinion. Public opinion varies from place to place, from time to time and from people to people. Dr. Sethna writes: "It changes in the furnace of social evolution, social culture and social development. What may be a rule of good morality at one time may be a bad moral today."

Jurisprudence is related to positive morality insofar as law is considered as the instrument through which positive ethics tries to assert itself. Positive morality is not dependent upon the good actions of a good man only.

It requires a strong coercive influence for maintaining public conscience. There is a separate branch of ethical jurisprudence which tries to examine the existing ethical opinions and standards of conduct in terms of law and makes suggestions for necessary changes so that it can properly depict the public conscience.

5. Law and morals and value of Judgment:

The Relationship between law and morality

Morality can be defined as a set of rules or principles that guide the process of making decisions and behavior in society. It also includes principles that define what is acceptable and unacceptable in society. On the other hand, law refers to principles that augment and maintain the morality code in society.

The issue of law and morality is a complex matter that has been widely discussed in various fields including religion, law, and psychology. Many debates have discussed the relationship between morality and law. For instance, the Hart and Devlin debate tried to determine this relationship. Each of the two took a different side in an effort to establish the role that should be played by law with regard to morality. However, their views and suggestions contradicted each other and did present an agreement.

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.

A central debate is whether law should attempt to shape morality of whether it should stay on the sidelines.

Hart Devlin Debate:

Professor Hart discussed the connection between crime and sin and to what extend should the law be concerned with the enforcement of morals and the punishment for immorality. According to Devlin there are certain moral principles aimed at the good of civil society and a breach of those morals is a social offence.

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 behavior.

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 shall 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.
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Values of Judgment:

The dictionary meaning of value judgment is 'a personal estimate of merit in a particular respect' or 'an assessment that reveals more about the values of the person making the assessment than about the reality of what is assessed.
No discipline or combination of disciplines can provide a value-free basis for prescribing a constitution or any set of rules.? Value jurisprudence dwells in the minds of legal theorists for many years. The past century brought up many changes, including the change in notion, changing the understanding of law 'as rules' into a concept of law 'as values'.
Justice Cardozo stated that there are three types of conflicts that come before the courts for adjudication. They are as follows:-

* Where the rule of law is clear and its application to facts is equally clear.
* Where the rule of law is clear and the sole question is about its application.
* Where neither the rule of law nor its application is clear.

However, according to Cardozo, it is the third situation which is serious business for judges where a value judgment could be given which has the potential of having the effect of advancement or retardation of development of law.

In order to arrive at clarity about the issue, it must first of all be realized that the terms 'value-judgment' and 'value-free' science were not part of the philosophical vocabulary before the second half of the nineteenth century.

The notion of a value judgment according to Werturteil is meaningless in itself one kind of value judgment refers to the behavior of the subjects of law, and qualifies that behavior as lawful (legal, right) or as un- lawful (illegal, wrong).

Such concepts as "legal right," "legal duty" and "delict" derive their meaning through judgments of this sort.

(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.

(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.

Jurisprudence is also helpful to legislators who play a vital role in the process of law making. Study of jurisprudence helps them to understand the technicalities of the law and legal precept. It makes their job easy and interesting.

Supeme Court on Value Judgment:

The Constitution can have no meaning if not embedded in a shared practice of interpretation, and what legitimates a particular act of interpretation is the former or grammar of the argument that it rests upon.

The Supreme Court of India has progressively adopted a futuristic task and delivered a number of value judgments.

It has pronounced a glut of judgments inculcating social, moral, constitutional, religious and

human right values into the legal system and thereby introduced a number of doctrines and principles. E.g. the concept of PIL.

In Shankari Prasad v. Union of India, [1]Supreme Court refused to put any restrictions on the amending (i.e. constituent) power of the parliament under Article 368, and held that it includes power to amend any law under Article 13 and also the constitution itself.

Also in several cases, Supreme Court has relied on Human Rights jurisprudence in interpreting Right to life and liberty of individual.

Olga Tellis v. Bombay Municipal Corporation,[2]Gaurav fain v. Union of India,[3] P.U.D.R. v Police Commissioner[4] the Supreme Court widened the meaning of Right to Life as incorporated in Article 21 of Indian Constitution and thereby gave significance to human value.

[1] Shankari Prasad v. Union of India, AIR 1,951 SC 458 [Supreme Court of India]
[2] Olga Tellis v. Bombay Municipal Corporation, AIR1986 SC 180 [Supreme Court of India].
[3] Gaurav Jain v. Union of IndiaAIR1986 SC 180 [Supreme Court of India].
[4] PUD.R. v. Police Commissioner, (1989) 4 SCC 730 [Supreme Court of India].

Chapter II : Relevance of Natural Law: Theoretical Perceptions

Topics for study:

(a) Origin and significance of natural law

(b) Theoretical perspective of natural law

(c) St. Thomas Acquinas, Grotious, Hobbes, Locke, Rouessaeu

(d) German Transcendental Idealism- Immanuel Kant

(e) Semi Sociological Natural Law- H.L.A. Hart

(f) Liberty and civil disobedience

(a) Origin and significance of natural law:

According to Salmond: "By natural law or moral law is meant the principles of natural right and wrong—the principles of natural justice ifwe use the term justice in its widest sense to include all forms of rightful action." Natural law has been called divine law, the law of reason, the universal or common law and eternal law.

It is called the command of God imposed upon men. It is established by that reason by which the world is governed. It is unwritten law and is not written on brazen tablets or pillars of stone but by the finger of nature in the hearts of men. It is universally obeyed in all places and by all people. It has existed from the beginning of the world and hence is called eternal.

Divine law is also called natural law as its principles are supposed to have been laid down by God for the guidance of mankind. It is called rational law as it is supposed to be based on reason. It is -called unwritten law as it is not to be found in the form of a code.

Salmond points out that from a practical standpoint, natural law terminology might seem to offer advantages. First, as an antidote to legal rigidity, it could provide flexibility, allowing rules of law to be changed from what they are to what they ought to be, on the ground that the law always is what it ought to be. Secondly, the natural lawyer's terminology, it is claimed, would weaken the authority of unjust and immoral laws.

The view of Dias and Hughes is that some of the contributions of the philosophy of natural law to human progress are epoch-making:

(1) The various doctrines have always served the social need of the age. They have helped to maintain stability against changes as in the time of the Greeks and the medieval church. They have inspired change against stability, notably after the Reformation and the Renaissance.
(2) The philosophy of natural law has inspired legislation and the use of reason in formulating systems of law.
(3) The period from the Renaissance down to the 1811 century witnessed a lasting distinction drawn between positive law and morality.
(4) The same period also brought about the emancipation of the individual.
(5) A strong connection was established between positive law and freedom of the individual.

The evolution and development of Natural Law' has been through various stages Which may broadly be studied under the following heads:
(1)Ancient Period
(2)Medieval Period
(3)Renaissance Period
(4)Modern period

(1) Ancient Period

Heraclitus:

The concept of Natural Law was developed by Greek philosophers around4th century B.C. Heraclitus was the first Greek philosopher who pointed at the three main characteristic features of Law of Nature namely,

1. destiny,
2. order and
3. reason.

He stated that nature is not a scattered heap of things but there is a definite relation between the things and a definite order and rhythm of events .According to him, reason' is one of the essential elements of Natural Law.

Socrates

Human insight that a man has the capacity to distinguish between good and bad and is able to

appreciate the moral values.

This human insight‘ is the basis to judge the law. Socrates did nodeny the authority of the Positive Law. According to him,it was rather the appeal of the insight‘ to obey it, and perhaps that was why he preferred to drink poison in obedience to law than to run away from the prison. He pleaded for the necessity of Natural Law for security and stability of the country ,which was one of the principal needs of the age.

Aristotle

According to him , man is apart of nature in two ways; firstly ,he is the part of the creatures of the God, and secondly, he possesses insight and reason by which he can shape his will .By his reason man can discover the eternal principle of justice. The man‘s reason being the part of the nature, the law discovered by reason is called natural justice‘.

Positive Law should try to incorporate in itself the rules of Natural Law‘ but it should be obeyed even if it is devoid of the standard principle of Natural Law. The Law should be reformed or amend rather than be broken.

He argued that slaves must accept their lot for slavery was a natural ‘ institution. Aristotle suggested that the ideals of Natural Law have emanated from the human conscience and not from human mind and, therefore , they are far more valuable than the Positive Law which is an outcome of the human mind.

Natural Law in India

Hindu legal system is perhaps the most ancient legal system of the world. They developed a very logical and comprehensive body of law at very early times.

A sense of Justice‘ pervades the whole body of law. But the frequent changes in the political System and government and numerous foreign invasions, one after the other prevented its systematic and natural growth. Under the foreign rule no proper attention could be paid to the study of this legal system. Many theories and principles of it are still unknown, uninvestigated. Whether there was any conception of Natural Law‘ or not, and if there was any, what was its authority and its relation with Positive Law‘ are the questions which can not be answered with great certainty. However, some principles and provisions can be pointed out in this respect .

According to the Hindu view, Law owes its existence to God. Law is given in Shruti ‘and

Smritis‘.

The king is simply to execute that law and he himself is bound by it and if goes against this law he should be disobeyed.
Puranas are full of instances where the kings were dethroned and beheaded when they went against the established law.

Theoretical Perspective of Natural Law :

Natural Law in Roman System

The Romans did not confine their study of _n merely to theoretical discussions but carried it further to give it a practical shape by transforming their rigid legal system into cosmopolitan living law. Civil law called 'Jus civile' was applicable only to Roman citizens and the law which governed Roman citizens as well as the foreigners was known as 'Jus gentium'. It consisted of the universal legal principles which conformed to Natural Law or Law of Reason and the law which governed Roman citizens as well as the foreigners was known as Jus gentium‘.
It consisted of the universal legal principles which conformed to Natural Law or Law of Reason. Later, both these were merged to be known as law of nations in which citizenship was extended to everyone except a few categories of persons. Though there was a general feeling that natural law being based on reason and conscience was superior to Positive Law and therefore ,in case of a conflict between the two, the latter should be disregarded.

The influence of natural law ideas on English lawyers was also great.One of the effects was the doctrine of the supremacy of law. Natural law theories are reflected in the writings of certain legal authors such as Fortesque, Blackstone and St. Jerman.
The modern law of quasi contract was erected from avowed principles of natural justice. The conflict of laws was originally founded on natural justice. In cases of first impression, a judge must resort to his reason and sense of justice.
The sense of justice of a judge plays a decisive role even when he is applying certain principles. It is all the more prominent where there are no principles to apply. The concept of reasonableness, particularly intort, is the result of the ideas of natural law. The judicial control of administrative and quasi-judicial functions is based on the principle that those who administer

them must abide by the principles of natural justice. Foreign law is not applied in English courts if it is found contrary to the principles of justice.

There is widespread revival of the concept of natural law in theworld and there are many reasons for it. There is a general desire torestore closer relations between law and morality. People are not satisfied with the Austinian view of law which ignores morality altogether.

It is also felt that there is a necessity for a juristic basis for a progressive interpretation of positive law. The development of sociological theories demands that the theory of law should allow a judicial interpretation of positive law in accordance with changing ideas and circumstances.

The development of the idea of relativity in modern law has removed the chief difficulty in the way of the old idea of natural law. Laws can be universal and still vary in their content.

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In Hindu legal system, is perhaps the most ancient legal system of the world. They developed a very logical and comprehensive body of law at very early times. A sense of Justice‘ pervades the whole body of law. But the frequent changes in the political System and government and numerous foreign invasions, one after the other prevented its systematic and natural growth. Under the foreign rule no proper attention could be paid to the study of this legal system. Many theories and principles of it are still unknown, uninvestigated.

Whether there was any conception or not, and if there was any,what was its authority and its relation with estions which can not be answered with great certainty. However, some principles and provisions can be pointed out in this respect. According to the Hindu view

,Law owes its existence to God. Shruti‘ and Smritis‘.

The king is simply to execute that law and he himself is bound by it and if goes against this law he should be disobeyed. Puranas are full of instances where the kings were dethroned and beheaded When they went against the established law.

Medieval Period

Catholic philosophers and theologicians of the Middle Ages gave a new theory of Natural La Though they too gave it theological basis, they departed from the Orthodox of early Christian Fathers. Their views are more logical and systematic views may be taken as representative of His views unknown, uninvestigated. Whether there was any conception of Natural Law‘ or not, and if there was any, what was its authority and its relation with Positive Law‘ are the questions which can not be answered with great certainty. However, some principles and provisions can be pointed out in this respect. According to the Hindu view, Law owes its existence to God. Law is given in Shruti‘and Smritis‘.

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Main features of Natural Law theory in Medieval Era:

1. The institutions of slavery, state, property, etc. represent the evil desire because they’re not the creation of nature and the existence of the state is only essential for the development of moral and ethical values in a man.
2. Law is the greatest binding force that’s why supremacy of law is there.
3. The main conflict in this theory was the correct interpretation of the law and the conflict between the worldly and godly activities in which the state was the ruler is the supreme in the field of worldly activities whereas Pop held supreme authority in godly activities.
4. The exact source of legal authority in a developed society was that state and law were the gifts of the people to themselves agreed to surrender before these authorities.

Period of Renaissance:

Period of Renaissance marks the general awakening of new ideas in all fields of knowledge. This period is marked by rationalism and the emergence of new ideas in various fields. On the other hand, development in the field of trade and commerce created new groups in society which required more protection from states and nationalism has developed. Due to this concept the state must have sovereign power or due to cumulative effect of this trade, social and commercial developments were created due to this sovereignty of states and supremacy of positive law overthrows the dominance of church and new theories were developed. These new theories were propounded by rationalist thinkers such as Machiavelli.

Modern classical Era:

In the 19th century, the popularity of natural law theories was suffered and declined & the natural law theories reflected more or less the great social, economic and political changes which have taken place in Europe. The doctrine propounded by Austin and Bentham separated the law from morality. The first jurist of the 19th century was David Hume. In the 19th century, he rejected the theory of natural law which was against of empirical approach and he destroyed the theories of natural law by his analytical study. One more jurist of the 19th century was Auguste Compte (French). He denounced the natural law theory and called it false, non-specific and based upon supernatural beliefs. So, the roots of the natural law like morality, justice reason are declared unreal by them.

In the 20th century (revival of natural law), the 19th century overemphasized positivism and totally refused morality as the element of the law, that's why these theories were unable to satisfy people. The impact of materialism on society and the changes socio-political conditions compelled the 20th-century legal thinkers to look forward some value-oriented ideologies to prevent the moral degradation of people.

Stammler:

He said that "Law of nature means just law", which harmonizes the purposes in society and the purpose of the law is not to protect the will of one but to unify the purposes of all. He believed that its impossible to frame universal legal principles, so the law is the law of nature with variable contents. Justice is a relative concept only.

(c) St. Thomas Acquinas, Grotious, Hobbes, Locke, Rouessaeu

1. **St. Thomas Acquinas**

Thomas Acquinas views may be taken as representative of the new theory. His views and thus in conformity with _Eternal Law‘.

He regarded Church as the authority to interpret Divine Law. Therefore, it has the authority to give verdict upon the goodness of Positive Law also.

Thomas justified possession of individual property which was considered sinful by the early Christian Fathers.

The Period of Renaissance

The period of renaissance in the history of development of Natural Law may also be called the modern classical era which is marked by rationalism and emergence of new ideas in different fields of knowledge.

2. **Hugo Grotius:**

Grotius build this legal theory on social contract. His view, in brief, is that political Society rests on a social contract‘.

It is the duty of the sovereign to safeguard the citizens because the former was given power only for that purpose. The sovereign is Bound by Natural Law‘.

The Law of Nature is discoverable by man‘s reason‘.

He departed from St. Thomas Aquinas scholastic concept of Natural Law and reason‘ but on right reason‘ ,i.e. self- supporting reason‘ of man. Grotius believed that howsoever bad a ruler may be,it is the duty of the subjects to obey him. He has no right to repudiate the agreement or to take away the power. Although there is apparent inconsistency in the Natural Law propounded by Grotius because on the one hand, he says that the ruler is bound by the Natural Law‘ ,and, on the other hand, he contends that in no case the ruler should be disobeyed, but it appears that Grotius‘s main concern was stability of political order and maintenance of international peace which was the need of the time.

According to him, each person has chosen the form of government which they considered most reasonable for themselves by the method of the social contract. The ruler was bound by natural law which was valid even with his promises and keeping of promise is the basic principle of natural law. The ruler was bound only by the concept of natural law. Grotius basically used the social contract for two purposes:

- To justify the absolute duty of obedience of people towards the government in the national-international level.
- Internationally to create a basis for legally binding and stable relations among the states.

Hugo Grotius is rightly considered as the founder of the modern International Law as he deduced number of principles which paved way for further growth of International Law. He propagated equality of State and their freedom to regulate internal as well as external relations. The law of nature has performed a very useful function. It was with the help of the law of nature that the jus civile or civil law of the Romans was transformed into jus gentium which later on became the basis of international law. Grotius based his principles of international law on the law of nature. An appeal was made to the law of nature toput a check on the arbitrary powers of the government and thereby to protect the liberties of the people. Judges also refer to the law of nature while interpreting the Constitution. This has been done in the United States and the same is being done in India. The law of nature puts forward an ideal to be followed. This was actually done by writers like Hegel, Kant, Paine, Aristotle, Locke, Hume etc. During the Middle Ages, the law of nature was considered to be a higher law which was imposed on the people by the command of God. The law of nature sets up an ideal which the legal systems of the country.

3. John Locke:

According to Locke, the state of nature was a golden age, only the property was insecure.

It was for the purpose of protection of property that men entered into the_social contract'. Man, under this contract, did not surrender all his rights but only a part of them, namely, to maintain order and to enforce the law of nature. His Natural Rights as the rights to life, liberty and property he retained with himself. The purpose of government and law is to uphold and protect the Natural Rights. So long as the Government fulfils this purpose, the laws given by it are valid and binding but when it ceases to do that, its laws have no validity and the government may be

overthrown.

Locke pleaded for a constitutionally limited government. The 19th century doctrine of_ laissez faire‘ was the result of individual‘s freedom in matters relating to economic activities which found support in Locke‘s theory. Unlike Hobbes who supported State authority, Locke pleaded for the individual liberty.

4. Jean Rousseau:

Rousseau pointed out that contrat‘ is not a historical fact as contemplated by Hobbes and Locke, but it is merely a hypothetical conception. Prior to the so called _social contract‘, the life was happy and there was equality among men. People united to preserve their rights of freedom and equality and for this purpose they surrendered their rights not to a single individual ,i.e sovereign, but to the community as a whole which Rousseau named as general will‘.

According to him, every individual owns unlimited liberty and there was no concept of private property, no competition, no jealousy, and people lived free life with innocence, but due to increase in population and decline of reason, the things were changed and simplicity and happiness disappeared. A difference between rich and poor raised and inequality prevailed and this problem was solved by the concept of the social contract. By this concept of the social contract, every person surrenders to the community his rights and the community become sovereign. The community gives the power to political body or person i.e. called a ‘sovereign’ which is directed by a general will. So, social contract theories are basically reflecting the necessity of law in society.

Therefore, it is the duty of every individual to obey the general will‘ because in doing so he directly obeys his own will. The existence of the state is for the protection of freedom and equality. The Sate and the laws made by it both are subject to general will‘ and if the government and laws do not conform to‘ general will‘, they would be discarded. Rousseau favored people‘s sovereign.

Natural law theory is a complex tradition to which Rousseau reacts in the Discourse. Its chief modern figures were theorists such as Hobbes, Grotius and Pufendorf.

Essentially, natural law is a set of laws or precepts laid down by God or Nature for man's

preservation.

In the Social Contract (1762) Rousseau argues that laws are binding only when they are supported by the general will of the people. His famous idea, 'man is born free, but he is everywhere in chains' challenged the traditional order of society.

His Natural Law ‘ theory is confined to the freedom and equality of the individual. For him, State, law, sovereignty, general will etc. are interchangeable terms.

(d) German Transcendental Idealism- Immanuel Kant

Immanuel Kant (1724-1804) is generally considered to be one of the most profound and original philosophers who ever lived. He is equally well known for his metaphysics–the subject of his "Critique of Pure Reason"—and for the moral philosophy set out in his "Groundwork to the Metaphysics of Morals" and "Critique of Practical Reason".

Natural law theories of ethics and justice go back to the ancient Greeks, and there are variations within this tradition. Generally speaking, however, natural law theories maintain that ethical and political principles can be justified by reason alone, that they are objective and universal in scope, and that they do not depend on the subjective feelings or desires of individuals or originate in the decrees of government. Modern libertarian thought, as found in the writings of John Locke and other classical liberals, emerged from this natural law perspective, and it remains a dominant theme in contemporary libertarian thought.

Immanuel Kant vigorously upheld the objective validity of fundamental moral and political principles; and he intended his Categorical Imperative to be a formal test that tells us which moral principles qualify as objectively justifiable and which do not.

The Categorical Imperative:

The Categorical Imperatives essentially a principle of universalize ability, according to which moral principles must apply in the same way to all rational beings, without exception. We may not demand that others do x while exempting ourselves from the same rule, nor may we exempt

others from the same moral standards that we apply to ourselves. As Kant put it: ‒The first principle of morality is, therefore, act according to a maxim which can, at the same time, be valid as universal law.—Any maxim which does not so qualify is contrary to morality.‖ Among his three famous formulations of the Categorical Imperative, it is the second that has the most relevance to Kant's theory of rights and justice.

This second formulation reads as follows:

"*Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end.*"

As an example of this principle, Kant discussed a person who violates the freedom or property rights of other people.*"*

It is manifest that a violator of the rights of man intends to use the person of others merely as means without taking into consideration that, as rational beings, they ought always at the same time to be rated as ends…

That every human being (indeed, every rational being, whether human or not) is an end in himself, with the right to pursue happiness in his own way without the coercive interference of others, was an essential element of Kant's moral and political theory. Quoting John Ladd once again:

The key to Kant's moral and political philosophy is his conception of the dignity of the individual. This dignity gives to man an intrinsic worth, a value *sui generis* that is ‒above all price and admits of no equivalent.‖…Kant may be regarded as the philosophical defender par excellence of the rights of man, of his equality, and of a republican form of government….A theme throughout his political writings is the condemnation of the use of violence and fraud [in social relationships.

Kant's theory of justice is most fully developed in *The Metaphysical Elements of Justice,* which comprises Part One of *The Metaphysic of Morals* (not to be confused with his earlier work *Groundwork* [or *Foundation*] *of the Metaphysic of Morals.*)

It is highly significant that the second part of *The Metaphysic of Morals* is titled *The Doctrine of Virtue,* for Kant's division between justice and virtue signifies his desire to distinguish between those spheres of human action in which coercion may legitimately be used and those spheres in

which persuasion alone is morally justifiable.

And it is this distinction that determines the moral limits of governmental power. Like classical liberals before him, Kant understood that governments primarily use coercion, not persuasion, to achieve their ends, so we must first determine when coercion is morally justifiable and when it is not if we are to understand the proper limits of government.

Kant drew a Bright Line between duties of virtue and duties of justice. The latter—juridical duties, such as respecting the rights of others and fulfilling our voluntary contracts—may legitimately be enforced by physical coercion, whereas the former cannot. According to Kant, What essentially distinguishes a duty of virtue from a juridical duty is the fact that external compulsion to a juridical duty is morally possible, whereas a duty of virtue is based on free self-constraint.

Before proceeding, I should clear up a potential misunderstanding. In distinguishing between justice and virtue, Kant did not mean to deny that justice itself must be based on objective moral principles. By ‑virtue‚ in this context, he meant *personal* moral qualities and actions that do not violate the rights of others. Kant was drawing essentially the same distinction that we find in the title of Lysander Spooner‘s great essay *Vices are not Crimes.* Matters of justice pertain to *external* actions that violate the rights of others, whereas virtuous actions emerge from the *inner* qualities (which Kant characterized as a ‑good will‚) of individuals.

Virtuous actions cannot, and therefore should not, be compelled by others; they must be freely chosen by each person, who is an autonomous moral agent. By this Kant meant that each person must ‑legislate‚ his own moral principles and act upon those principles *voluntarily*. In Kant‘s approach, to speak of a virtuous action that one has been compelled to perform is a contradiction in terms.

Justice differs from virtue because we may rightfully *compel* others to respect individual rights. Of course, some people may respect rights from a virtuous motive, as a matter of moral principle, in which case coercion is unnecessary. But humans are morally imperfect, so some

people would rather use force instead of persuasion when dealing with others. In such cases coercion (physical force or the threat of force) is morally appropriate, because to violate a right is to violate the equal freedom of others, as mandated by the Categorical Imperative. Rights are a matter of law, as enforced by a government, and from this perspective it is irrelevant whether a person respects rights because he believes this to be morally required or because he fears the coercive consequences of violating rights.

Kant's interest in establishing a Bright Line between the voluntary sphere of social interaction and the coercive sphere of governmental actions was by no means original with him. On the contrary, determining the exact nature of this Bright Line had been a major concern of liberals and libertarians for many years, as we see in John Milton's statement about the basic goal of political philosophy:

Here the great art lies, to discern in what the law is to bid restraint and punishment, and in what things persuasion only is to work. Or as John Locke expressed the same idea several decades later:

It is one thing to persuade, another to command; one thing to press with arguments, another with penalties. Likewise, in the following century Adam Smith wrote: "We must always…carefully distinguish what is only blamable, or the proper object of disapprobation, from what force may be employed either to punish or to prevent Kant's attempt to justify a Bright Line between the proper spheres of persuasion and coercion placed him squarely in the tradition of liberal individualism, but he explored this problem in greater detail than had his predecessors. Indeed, Kant wrote an entire book on this subject—the aforementioned work, *The Metaphysic of Morals*—in which the differences between coercive justice and voluntary virtue are explained in considerable detail. Although Kant reached essentially the same conclusions in this area as had previous classical liberals, his method of argument differed from theirs substantially in several respects.

It should be noted that in his second formulation of the Categorical Imperative, Kant maintained that we should treat not only others as ends in themselves but ourselves as well. This led Kant to argue that we have moral obligations to ourselves, including the obligation to preserve our lives and the obligation to strive for moral perfection to the best of our ability. Moral perfection, in

this context, pertains to personal qualities, or virtues, like integrity and honesty.,

Kant did not regard actions motivated by self-interest as moral in nature, but he did not single out self-interest in this regard. Any action taken to satisfy a desire, whether that desire be to benefit ourselves *or* others, does not qualify as moral in nature, according to Kant. But this does *not* mean that hypothetical imperatives (as Kant called them), which take the form of *If* you want x, *then* you should do y,‖ are *immoral*. On the contrary, such practical maxims, whether selfish or altruistic, may be perfectly consistent with moral principles, but they are motivated by *prudential* rather than by moral considerations.

Only if we take an action *because* we believe that action is morally right, as a matter of principle, will our motive qualify as moral. It is therefore essential to understand that ‒moral‖ in this context, should be contrasted with non moral not with immoral.

Thus, since hypothetical imperatives, such as the prudential maxims that will promote personal

Happiness, cannot be applied universally to every human being, they do not meet Kant‘s formal test for moral laws, as expressed in his Categorical Imperative.

H.L.A Hart: Semi Sociological lawyer

Hart is one of the great jurists of that time. He belongs to analytical school. HLA Hart was the Principal and Professor in ― Brasenose College Oxford‖ His theory about the law named as concept of Law. He talks about the realty. His theory mainly based on primary and secondary

Definition :

Sir HLA Hart define Law,‖ that law is the system of rules, a union of primary and secondary rules.‖ He means to say that law is the system of rules and these rules are primary which are pre-legal rules and secondary which are legal rules and the main based of his theory on the relationship between Law and Society.

Body : Sir HLA Hart theory talks about the two words. These words are:-

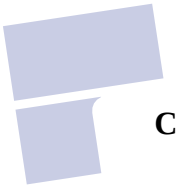
1. **Pre-Legal World** :- This pre legal world belongs to old age. According to Sir, HLA Hart pre legal world there was primitive society. And in this society there was no legislature which can make the rules. There was no executive also which can change the rules besides this there was no court also to decide the disputes. In the primitive society there were three defects which are as under :-

2 **Un-certainty :-** Since there was no Parliament in the primitive society which causes the un-certainty in the law.

3 **Static character:-** In the primitive society there were customs and these customs were not changed. It means there have static character.

4 **Inefficiency :-** In the primitive society there were no power of Jurisdiction. It means that there were no courts followed by the people.

2. **Legal World :-** This legal world belongs to modern age. According to Sir HLA Hart in the legal world there are modern society. Because of modern society there are rules of recognition which means that there is a Parliament/State Executive. The function of the Executive to change or to amend the rules. In modern age there are courts which decides the disputes. Judges applies the earlier laws in deciding the disputes. These rules/laws are the secondary rules. Thus we can say that Law is the union of Primary and Secondary rules. In other words it can be said that the Law is the journey of rules.



Concept of Law

Pre-legal world	**Legal world**
No legislature	**Rule of recognition**
No executive	**Rule of Change**
No court	**Rule of Adjust ice**

Relevance of Hart's Theory

Sir HLA Hart's theory ― Concept of Law ― is the most important theory of analytical school. Because this theory tells us about the old age and for the modern age. In the old age there were primitive society which did not have any legislature, executive and court. Therefore only custom and usages which were not allowed to change them by any person.

The theory of law' tells us about the legal world. In the legal world there is legislature which makes the rules and these rules are changed or amended by the executive when it necessary. There are courts which apply the rules on party. So we can say that in modern age the law is certain not static in character. Sir HLA Hart also gives the place of Morality in his theory because the moral have an important role in every legal world and these morals are not changed by passing any Act. We can say that Sir HLA Hart theory, ― Concept of Law‖ has the most important place in the theory of Analytical School.

Conclusion: Sir, HLA Hart theory Concept of Law have no conclusion because this theory talks about both the pre-legal world and the legal world which updates and tells us that how the law comes. So we can opined that such best and usable theory needs no conclusion as it has its self conclusi

Modern Period

Lon Luvois Fuller:

He rejected Christian doctrines of Natural Law and 17th and 18th century rationalist doctrines of Natural Rights. He did not subscribe to a system of absolute values.

His principal affinity was, with Aristotle. He found a –family resemblance‖ in the various Natural Law theories, the search for principles of social order. He believed that in all theories of Natural Law it was assumed that ―the process of moral discovery is a social one and that there is something akin to a ‗celebrative articulation of shared purposes' by which men come to understand better their own ends and to discern more clearly the means for achieving them.‖

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

Fuller's theory corresponds with natural law philosophy. However, his idea of the inherent link between law and morality has been fiercely opposed by legal positivists whose views are based wholly on a different school of thought.

Finnis who in his writing ‗ stated that Natural Law and Natural Rights, restated the importance of a law.

Drawing on Aristotle and Aquarius, Finnis sets up the proposition that there are certain basic goods for all human beings. The basic principles of Natural Law are pre-moral. These basic goods are objective values in the sense that every reasonable person must assent to their value as objects of human striving.

Merits:

The merits of this theory of law are as follows:

i) **Superior standard**:

When the ordinary positive law falls short of some ideal, the people appeal to some higher standard based on natural law.

The cry of the people in such cases would be" an unjust law is no law at all."Thus natural law has

so misleading role to play.

ii) Obedience:

The phenomena of nature like the movement of the moon, the earth and the heavenly bodies are governed by the law of nature obligatory and are being followed. However, People have made their own customs, manners, fashion setc. ,and these are arbitrary

iii) **Stoic's Philosophy**:

The Stoic philosophers developed this concept further. According to them, "man should live, according to nature" since, man by nature is endowed with reason. True law is equal to right reasoning.

iv) Natural Rights:

On the ground of "reasoning‖, the fundamental human rights have their base in natural law. For example, equality, has its base in natural law.

Criticism:

Natural law has its own formidable difficulties,

i) Not followed in Practice:

Natural law holds that the people 'ought' to follow its rules. But, in reality this may not be so.

For example, man out to be get children, just like a tree bearing fruits. This may not be followed. Even States may impose restrictions on begetting children.

ii) Fulfilling functions:

The principle of nature is that everything has its proper function and so,it must fulfill this function. The function of a watch is to show correct-time, as per its maker. This is its definite purpose. This analogy is not fully applicable to man. His purposes and functions are varied. The question about his maker god creates many other problems.

iii) Functions:

According to nature, it is the function of smoke to rise, fire to burn, of tree to bear fruits, and of wind to blow. Likewise there are many functions of man founded on "reason".

iv) There is no acceptance of natural law, universally. Slavery was recognized in Rome and Greece. Inequality prevails on the basis of religion, colour etc.

v) Contents:

The contents of natural law are also changing. Monogamy is recoginsed in many States; Polygamy is some other setc.

vi) Natural law has not provided for the security and protection of property and of the person of the individuals.

vii) Disputes are solved or decided by the Courts and tribunals.

(g) Liberty and civil disobedience

It comes from the Latin root word –liberty meaning freedom. It is the absence of constraints and not merely the absence of restraints. As with Law, Liberty too has been perceived to be different by different philosophers and political scientists. A layman may perceive Liberty to be the freedom to do anything he/she pleases**.**

Mill an Individualist treated Liberty as something completely immune from all restraints in the self-regarding sphere of human activity. It was a very selfish and unrealistic conceptualisation of liberty. While the view of collectivists and idealists was that liberty lies in the obedience to the laws of the state.

T.H. Green describes it as a power to do or enjoy something that is worth doing or enjoying in common with others. Many thinkers class liberty as negative and positive liberty. The idea of distinguishing between a negative and a positive sense of the term _liberty' goes back at least to Kant and was examined and defended in depth by Isaiah Berlin in the 1950s and '60s. Discussions about positive and negative liberty normally take place within the context of political and social philosophy.

The term civil disobedience' was coined by Henry David Thoreau in his 1848 essay to describe his refusal to pay the state poll tax implemented by the American government to prosecute a war in Mexico and to enforce the Fugitive Slave Law. In his essay, Thoreau observes that only a very few people – heroes, martyrs, patriots, reformers in the best sense – serve their society with their consciences, and so necessarily resist society for the most part, and are commonly treated by it as enemies. Thoreau, for his part, spent time in jail for his protest. Many after him have proudly identified their protests as acts of civil disobedience and have been treated by their societies – sometimes temporarily, sometimes indefinitely – as its enemies.

Throughout history, acts of civil disobedience famously have helped to force a reassessment of society's moral parameters. The Boston Tea Party, the suffragette movement, the resistance to British rule in India led by Gandhi, the US civil rights movement led by Martin Luther King Jr.,

Rosa Parks and others, the resistance to apartheid in South Africa, student sit-ins against the Vietnam War, the democracy movement in Myanmar/Burma led by Aung San Suu Kyi, to name a few, are all instances where civil disobedience proved to be an important mechanism for social change. The ultimate impact of more recent acts of civil disobedience – anti-abortion trespass demonstrations or acts of disobedience taken as part of the environmental movement and animal rights movement – remains to be seen. Certain features of civil disobedience seem vital not only to its impact on societies and governments, but also to its status as a potentially justifiable breach of law. Civil disobedience is generally regarded as more morally defensible than both ordinary offences and other forms of protest such as militant action or coercive violence. Before contrasting civil disobedience with both ordinary offences and other types of protest, attention should be given to the features exemplified in the influential cases noted above.

These features include, amongst other things, a conscientious or principled outlook and the communication of both condemnation and a desire for change in law or policy. Other features commonly cited – publicity, non-violence, fidelity to law – will also be considered here though they prove to be less central than is sometimes assumed. The second part of this section contrasts civil disobedience with ordinary offences and the third part contrasts it with legal protest, rule departures by officials, conscientious objection, radical protest.

Chapter III : Legal Positivism

Topics for study:

(a) Austin's analytical theory of law

(b) Pure Theory of Law- Hans Kelson

Austin's analytical theory of law- Positive Theory of Law:

A. Analytical School and Imperative Theory of Law:

Great attention was given to the study of law by men belonging to the profession of law whether as teachers of law or as practising lawyers. They were merely concerned with positive law which had little to do with vague and abstract notions of natural law. They started demarcating the proper bounds of law and analysing and systematising it.

They advocated the reform of law in the light of changed social needs and conditions and not on extraneous considerations. They laid more and more emphasis on the analysis of positive law and they came to be called "positivists" or "analysts". Though John Austin is considered to be the father of the new approach, he owed much to Bentham and on many points his propositions were no more than a "paraphrasing of

Bentham's theory".

Analytical School

The analytical school is known by different names. It is called the Positive School because the exponents of this school are concerned neither with the past nor with the future of law but with law as it exists, i.e.,with law "as it is" (Positum). The school was dominant in England and is popularly known as the English School.

It's founder was John Austin and hence it is also called the Austinian School.

This school takes for granted the developed legal system and proceeds logically to analyse its basic concepts and to classify them in order to bring out their relation to one another. This concentration on the systematic analysis of legal concepts has given this school the name of

Analytical Jurisprudence**.**

The first concern of the jurists is to understand the structural nature of a legal system and for this purpose, discussions of justice are not only irrelevant but also dangerously confusing. Such an approach to law is commonly termed analytical and such writers are often styled Analytical Positivists.

The term positivism was invented by Auguste Comte, a French thinker.

Positivism in Law

In the words of Prof. Dias, the positivist movement started at the beginning of the 19thcentury. It represented a reaction against the a priuri methods of thinking which turned away from the realities of actual law in order to discover in nature or reason the principles of universal validity. Actual laws were explained or condemned according to those principles.

Positivists do not deny that judges make law. As a matter of fact, a majority of them admit it. They also acknowledge the influence of ethical considerations of judges and legislators as a judge or legislator adopts a proposition when it is considered to be moral and just. What they maintain is that it is only incorporation in precedent, statute or custom that imparts a quality of law to a precept. Even if an unjust proposition is embodied in precedent or statute, it will be law. Every proposition which passes through one or other of the accepted media is law irrespective of all other considerations. The positivists distinguish between formal analysis and historical and functional analysis.

They do not deny the value of historical and functional analysis but maintain that they should be kept apart from formal analysis. There is one inherent difficulty as it is seldom possible to study institutions as they are except in the light of their history and function. Many can be understood only in the light of their origins and past influences.

The nature of sovereignty is explained by John Austin in these words:

"If a determinate human superior, no in the habit of obedience to alike superior, receives habitual obedience from the bulk of a given society, that determinate superior is sovereign in that society and the society, including the superior, is a society political and independent.

To that determinate superior, the other members of the society are dependent. The position of its other members towards the determinate superior is a state of subjection or a state of dependence.

The mutual relation which subsists between that superior and them may be styled the relation of sovereign and subject, or the relation of sovereignty and subjection."

Prof. Laski says that there are three implications of the .definition of sovereignty given by Austin. The State is a legal order in which there is a determinate authority acting as the ultimate source of power. Its authority is unlimited. It may act unwisely and dishonestly but there is no limit on the exercise of its power. From the legal point of view, the character of the action is immaterial, lithe order comes from the sovereign, that order is lawful. Command is the essence of the law.

Law is in the form of "You must do certain things" or "You must not do other things" and failure in either direction is punished.

According to Austin, in every independent political society, there is a sovereign power. The chief characteristic of sovereignty lies in the power to exact habitual obedience from the bulk of the members of the society. Sovereignty is the source of law. Every law is set, directly or circuitously, by a sovereign person or body to a member or members of the independent political society wherein that person or body is sovereign or supreme. Law is the will or command of the sovereign.

Sovereign is that authority in the State which can make and unmake any and every law. The power of the sovereign is legally unlimited.

Austin admits that the sovereign power may have de facto limitations. The effective power of the sovereign is dependent on two factors. The first factor is the coercive force which the sovereign has at his command. The second factor is the docile disposition of the people.

As these two things have practical limits, sovereignty is also limited do facto.

What Austin denies is that the sovereign power can be limited do jure. By definition, the legal sovereign is that person or body to whose directions the law attributes legal force, the person in whom resides as of right the ultimate power of laying down general rules or isolated commands, whose authority is that of the law itself. As the sovereign is the source of !aw, the view of Austin is that there can be no legal limits to the power of the sovereign. The power of the sovereign is indivisible, It cannot be legally limited. ii cannot be divided also. According to Austin, there can be only one sovereign in the State. The totality of sovereign power is vested in One person or a body of persons.

According to the Austinian theory, sovereignty in a federal State is to be sought in the ultimate

power which can alter the Constitution. Article V of the American Constitution provides for constitutional amendment. That amendment is to be proposed by a two-thirds majority of the Congress and ratified either by the legislatures of three-fourths of the States or by conventions in three-fourths of the States. An amendment may also be proposed by a constitutional convention called on the application of the legislatures of two-thirds of the States and ratified by the legislatures of three-fourths of the States or by conventions in three-fourths of the States.

It is clear that the constitution-amending body is fettered in coming to decision by very restrictive rules as to majorities. These restrictions are provided to ensure that the Constitution does not become so readily alterable. However, a sovereign thus trammelled would be more or less a contradiction in terms. Moreover, the constitution-amending body comes into operation only on very exceptional occasions.

Lord Bryce writes: "Is there not something unreal and artificial in as cribbing sovereignty to a body which is almost always in abeyance?"

This theory states what a legal rule is, and, distinguishes it from a 'just rule 'or' a Moral rule'. It takes into consideration the formal criteria of a legal rule, and distinguishes it from morals, etiquette etc. The importance of analytical jurisprudence lies in the fact that it brought about precision in legal thinking. It provided us with clear, definite and scientific terminology. It fulfilled the object of "clearing the heads and untying knots" as envisaged by Austin.

It deliberately excluded all external considerations which fall outside the scope of law.

Austin wrote with extreme difficulty. He imposed on himself standards of precision and clarity that made work a torment. Between 1832and 1859, he published only a couple of articles and a pamphlet A Plea for the Constitution.

The second edition of The Province of Jurisprudence Determined was published by his widow in 1861. She also reconstructed from the notes of her husband Lectures on Jurisprudence or The Philosophy of Positive Law' and published them in 1863.

Prof. Gray writes: "Especially valuable is the negative side of analytical study. Most of us hold in our minds a lot of propositions and distinctions, which are in fact absurd, and which we believe, or pretend to ourselves to believe, and which we impart to others, as true

and valuable. If our minds and speech can be cleared of these, there is no small gain."
According to Austin positive law has three characteristic features:.

1. It is a type of command;
2 .It is laid down by the political sovereign&
3. It is enforced by a sanction.

1. Command:

According to Austin, every positive law is a director circuitous command of theMonarch or the sovereign, to his subjects.
Austin explains the nature of these commands. In a State, where there is an absolute Ruler, by name ,are all the orders made by him commands? His order to his servants to close the door, or to arrange for a banquet ;(if not followed these be punished).

According to Austin, positive law has four elements viz., command, sanction, duty and sovereignty. In the words of Austin: "Laws properly so called are a species of commands. Being a command, every law properly so called flows from a determinate source. Whenever a command is expressed or intimated, one party signifies a wish that another shall do or forbear and the latter is obnoxious to an evil which the former intends to inflict in case the wish is disregarded. Every sanction properly so called is an eventual evil annexed to a command. Every duty properly so called supposes a command by which it is created and duty properly so called is obnoxious to evils of the kind. The science of jurisprudence is concerned with positive laws, or with laws strictly so called, as considered without regard to their goodness or badness. All positive law is deduced from a clearly determinable law-giver as sovereign. Every positive law is set by a sovereign or a sovereign body of persons, to a member or members of the independent political societywherein that person or body is sovereign or supreme."
.According to Austin, a. law is a command .of the sovereign backed by a sanction'. Duty and-sanction are, correlative terms, the fear or sanction supplying the motive for.obedience. Prof., Dias criticises this view. His view is that the fear of sanction is not the sole or even the principal motive 'for obedience. There are many objections to the association of duty with. Sanction.
To define law as command can mislead us in many ways.

'(1) though the definition of Austin applies to certain portions of law such as criminal i law, the greater part of a legal system consists of laws which neither command nor forbid things to be done, but which empower people by certain means to achieve certain results, e.g., laws giving citizens the 'right to vote, laws conferring on leaseholders the right to buy the reversion, laws concerning the sale of property and making of wills. The bulk of the law of contract and of property consists of such power-conferring rules. .:.

(2) The term command suggest the existence of a personal commander. In modern legal systems, the procedures for legislation may be so complex as to make It 'impossible to identify any commander

in this personal sense. This is particularly so where sovereignty is divided as in federal States .

(3) Command conjures up the picture of an order given by one artic War commander on one particular occasion to one particular recipient,but law can and does continue in existence long after the extinction of the actual law-giver. An argument is put forward that laws laid down by a former sovereign remain law only insofar as the present sovereign is content that they should continue. What the sovereign permits, he impliedly or tacitly commands.

However, it is not always true that the present sovereign can repeal any law. In certain States, the law-making powers of the sovereign are limited by the Constitution which prevents the repeal by ordinary legislation of the entrenched clauses. In such cases, the question of the present sovereign allowing or adopting or is not arise. Moreover, the notion of an implied or tacit command is suspect.

(4) The bulk of English Law has been created neither by ordinary nor by delegated legislation, but by the decisions of the courts. The argument of Austin is that judges are the delegates of Parliament whichhas conferred upon them law-making powers.

It is true that judges are appointed in England by a Government answerable to Parliament and there are parliamentary procedures for their removal, but to describe the judges as delegates is wholly misleading. The fact that Parliament can always overrule any judicial decision of the court does not entail that judicial law-making is of a delegated nature.

This would confuse subordinate powers with derivative powers.

(5) There are laws which are not commands, e.g., declaratory statutes, repealing statutes and "laws of imperfect obligation" which include laws defining what a contract is, what a crime is or

a law which lays down that no action shall succeed after the lapse of the limitation period. Austin treated them as exceptions.

Buckland points out that declaratory statutes could have been treated as repeating earlier commands, while repealing statutes may be said to create fresh claims and duties by their cancellation of earlier ones and hence can be called command. However, this view is not accepted by Prof. Dias.

(6) Prof. Dias raises the question whether a determinate person or body of persons can be discovered who might be regarded as having commanded the whole corpus of the law. His answer is that such a person or a group of persons was not discoverable at any point in history.

(7) It is not possible to say who commanded the rule that precedents shall be binding. There are not commands but only desires according to Austin. To be law, the command must be a general command. Of course, generality alone is not sufficient to be a law.

Even the actual commands of a sovereign acquire the character of laws when certain procedures have been followed and not otherwise. Even if the Queen and the members of the House of Lords and the House of Commons unanimously assent to a measure at a garden party in the Buckingham Palace, it would not become a law as the appropriate parliamentary procedures have not been observed. If these procedures are laws, they cannot be called command. If they are not laws, they are indistinguishable from the dictates of etiquettes and morals. This shows the inadequacy of the view that law is a command.The view that law is a command of the sovereign suggests as if the sovereign is standing just above and apart from the community giving his arbitrary commands.

2. **Political Sovereign:**

Law emanates from the political Sovereign or Superior .As over reign may be a person or a group of persons, but not obedient to any other person. He enjoys the obedience of his subjects; of course ,perfect obedience may not be available .Laws maybe obeyed out of respect ,fear, habit or wisdom. There as on is not important for Austin,but, obedience to the sovereign exists as a fact,in general.

3. **Sanction:**

Human nature being what it is, a sovereign without a means to enforce his commands would

have no scope. Law stands in need of sanctions. To Austin law is something for the citizen to obey, not as he pleases but whether he likes it or not. This can be achieved by using some coercion (force), that is, by inflicting punishment, by the sovereign.Thus,sanction is part of law.

Criticism:

i) The Naturalists, opposed the positive law, stating that Codes, Statutes, Constitutions etc. are enforced by force and, hence, are not true law ,but a violation of law. Moral and ethical base is essential for a good law and there can not be good positive law, without this base.

ii) Austin‘s definition of law as a command of the sovereign ,is silent about customary law. Viewed from this angle, international law isno, law all according to Austin .In reality this is not so.

iii) There are some laws which are not commands ,but are rules which confer only powers. Right to vote ,right to contest for election etc.examples.

Critics point out that law is not an arbitrary command as conceived by Austin but a growth of an organic nature. Dr. J. Brown points out that even the most despotic of legislators cannot think or act without availing himself of the spirit of his race and time. Moreover, law has not grown as a result of blind force but has developed consciously and has been directed towards a definite end. Austin put international law under positive morality and not law as it lacked the main ingredient of sanction. However, nobody will accept the view that international law is not law. The definition of Austin excludes a very important branch of law. In the opinion of Duguit the notion of command is not applicable to modern social legislation which binds the State itself rather than the individual. This view ic also accepted by the Supreme Court of India.

iv) Laws continue even after the extinction of the actual law giver.

Sir .Henry Maine was very critical of Austin's theory of sovereignty.

His view was that sovereignty did not reside in a determinate human superior. To quote him: "A despot with a disturbed brain is the sole conceivable example of such sovereignty."

Maine emphasised the existence of "vast mass of influences which we may call, for shortness, moral, that perpetually shapes, limits or forbids the actual direction of the forces by its sovereign." Referring to Maharaja Ranjit Singh of the Punjab, Maine pointed out that the

Maharaja "could have commanded anything; the smallest disobedience to his command would have been followed by death or mutilation."

According to Austin, the sovereign possesses unlimited powers,but experience shows that ther is no power on earth which can wield unlimited powers. The reason is that the State or the sovereign acts through law which can regulate only the external actions of human beings and is helpless to regulate their internal actions. Whatever the Government might do, it cannot control the morality of the people, the beliefs of the people, their religion or the public opinion.

The State cannot control the internal lives of the people. Hence the sovereign does not possess unlimited powers.

Some provisions of the Constitutions provide for restrictions on the law giver and some provisions can not be changed, in some states,e.g.basic structure in India.

v) English law is full of judge-made law. Austinians argue that judges are the delegates of the Parliament. But,this is not so in reality.

Under judicial review in many States judges declare law as null and void. Hence Austin's Theory is inadequate to explain this.

Rules defining sovereignty are varied. Modern States have written Constitutions. These provisions are hardly the commands of the sovereign. The conclusion is that Austin's view of sovereignty is not applicable to the States in modern times. The definition served its purpose during the nineteenth century but now it does not serve its purpose.

Contribution of Austin's Theory:

Austin's command theory of law became the starting point for subsequent analytical theories of great importance. Holland accepted the command theory in principle but substituted enforcement for the command of the sovereign. According to him, law is a general rule of human action enforced by a determinate authority.

About Austin's contribution to analytical jurisprudence, Gray says that it was "the recognition of the truth that the law of State or another organised body, is not ideal but something which actually exists. It is not that which is in accordance with religion or nature or morality, it is not that which it ought to be, but that which it is"

Pure Theory of law

In the words of Prof. Dias, the pure theory of law of Hans Kelsen (1881-1973) represents a development in two different directions. It marks the most refined development to date of

analytical positivism. It also marks a reaction against the welter of different approaches that characterised the opening of the 20th century This does not mean that Kelsen reverted to ideology. As a matter of fact, he sought to expel ideologies of every description and present a picture of law, austere in its abstraction and severe in logic.Kelsen started his theory from certain premises.

According to him,a theory of law must deal with law as it is actually laid down and not as it ought to be. In this, he agreed with Austin and insistence on this point got him the title of "positivist".

A theory of law must be distinguished from the law itself. Law consists of a mass of heterogeneous rules and the function of a theory of law is to organise them into a single, ordered pattern. Kelsen evolved his theory out of a profound study of the legal material actually available. What he did was to proffer it as a way of regarding the entire legal order and to demonstrate the pattern and shape into which it falls.

According to Kelsen, a theory of law should be uniform. It should be applicable to all times and in all places.

Kelsen advocated general jurisprudence. He arrived at generalisations which hold good over a very wide area.

Hans Kelson (1881-1973)

Hans Kelson was Austrian Jurist. He was born at Prague in Austria in 1881 and was a professor of law at the Vienna University. She was also the judge of the supreme constitutional Court of Austria for 10 years during 1920 to 1930. thereafter he shifted to England he came to the United States and work as a professor of law in several American Universities and authored many books. He released the "Theory of law entitled "The General Theory of Law and State 1945. it drew the attention of the modern jurisprudents and came to be known as Kelson's Pure Theory of Law.

Kelsons Pure theory of Law

The aim of a theory of law is to reduce chaos and multiplicity to unity. Legal theory is a science and not volition. It is knowledge of what the law is and not of what the law ought to be. Law is a

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

A theory of law is formal, a theory of the way of ordering, changing contents in a specific way. The relation of legal theory to a particular system of positive law is that of possible to actual law. According to Kelson a theory of law should be uniform. It should be applicable to all times and in all places. according to him, Law must be free from ethics, politics, history, sociology etc in other words, it must be pure.

To Kelsen, Knowledge of law is a knowledge of "norms". A norm is a proposition in hypothetical form: "If X happens, then' Y should happen". The science of law consists of the examination of the nature and organisation of normative propositions. It includes all norms created in the process of applying some general norm to a specific action. According to Kelsen, a dynamic system is one in which fresh norms are constantly being created on the authority of an original, or basic norm which is named by him Grundnorm.

A static system is one which is at rest and the basic norm determines the content of those derived from it in addition to imparting validity to them.

Pure theory is closed to some other theories -

Kelson and Austin both are positivists. Hans Kelson's Pure theory of law is a part of analytical positivism. Kelson explains his theory by the method of analogy. It deals with the existing fact for example what law is and not as it ought to be.

The theory of law must be distinguished from this law itself -

Law itself consists of a mass of heterogeneous of rules and the function of the theory of law is to relate them in a logical pattern and to recognize them in single ordinarily unit

Theory of law should be uniform –

According to Kelsen, a theory of law should be uniform. for example - it should be applicable at

all times and in all places

Law is Normative Science -

According to Kelson law is a normative science and it is not a natural science based on cause and effect like law of gravitation.

Theory of law must be pure -

The Basic Norm : Grundnorm
The view of Kelsen is that in every legal system, no matter with what propositions of law we start, an hierarchy of "oughts" is traceable to some initial or fundamental "ought" from which all others emanate.
This is called by him Grundnorm or the basic or fundamental norm.
This norm may not be the same in every legal system, but it is always there.
It is not necessary that there should be one fundamental law.
Every rule of law derives its efficacy from some other rule standing behind it, but the Grundnorm has no rule behind it. The Grundnorm is the initial hypothesis upon which the whole system rests. We cannot account for the validity or the existence of the Grundnorm by pointingto another rule of law.
The Grundnorm is the justification for the rest of the legal system. We cannot utilizes the legal system or any part of it to justify the Grundnorm. A Grundnorm is said to be accepted when it has secured for itself a minimum of effectiveness. That happens when a certain number of persons are willing to abide by it. There must not be a total disregard of the Grundnorm, but there need not be universal adherence to it.

All that is necessary is that it should command a minimum of support. When a Grundnorm ceases to derive a minimum of support, it ceases to be the basis of the legal order and it is replaced by some other Grundnorm which obtains the support of the people. Such a change in the state of affairs amounts to a revolution.

Kelsen does not give any criterion by which the minimum of effectiveness is to be measured. It is contended that in whatever way the effectiveness is measured, Kelsen's theory ceases to be "pure". The effectiveness of the Grundnorm depends upon sociological factors which are excluded by Kelsen himself.

The Grundnorn is the starting point for the philosophy of Kelsen.

The rest of the legal system is considered as broadening down in gradations from it and becoming progressively more and more detailed and specific. The entire process is one of gradual concentration of the basic norm and the focusing of the law to specific situations.

According to Kelson's pure theory of law, it must be free from Ethics, Morality, Politics Sociology, History etc it must be pure.

According to Kelsen law is a normative science -

Jurisprudence is the knowledge of norms. Law is a normative science. A norm of law is simply a preposition in hypothetical from. A norm of law has a distinct feature. They are different from Science norm.

Hierarchy of normative relations -

For Kelsen law is the knowledge of hierarchy of normative relations. He does not want to include in his theory what ought to be but for him, law is a theory of analysis an analysis that is free from all ethical and political judgment of value.

Salient features of Kelson's pure theory of law / Essential of Kelson's Pure Theory of Law

(1) Reduce chaos and multiplicity to unity- The aim of the Pure theory of law is to reduce

(2) Legal theory as a science of what law is, not what ought to be - Pure theory of law deals with the knowledge of what law is, and it is not concerned about what law ought to be.

(3) Law as normative science - Theory considered as a normative science and not a natural science.

(4) Effectiveness of not out of scope - Legal theory as a theory of norms is not concerned with the effectiveness of legal norms.

(5) It is formal theory confined to a particular system of positive law as actually in operation.

(6) The relation of legal theory to a particular system of positive law is that of possible to actual law

Implications of Pure Theory

Certain conclusions were drawn by Kelsen. There is no distinction between public and private law. That is due to the fact that all law emanates from the same Grundnorn. Both public and private laws are a part and parcel of a single process of concretization.

Another conclusion is that the legal system is an ordering of human behaviour.

The idea of duty is the essence of law. That is evident in the"ought" of every norm. The idea of a right is not essential. It is said to occur "if the putting into effect of the consequence of the disregard of legal rule is made dependent upon the will of the person who has an interest in the sanction of the law being applied".

The idea of right is merely a by-product of law. The idea of individual rights is not the foundation of criminal law today. Formerly, the machinery of law was set in motion by the injured person, but now the same is set in motion by the State. It is true that the idea of right is still the basis of the law of property, but it is possible that the same may be dispensed with in the future.

The most significant feature of Kelsen's doctrine is that the State is viewed as a system of human behaviour and an order of compulsion.

Law is a normative ordering of human behaviour backed by force which "makes the use of force a monopoly of the community". A State is constituted by territory, independent government, population and ability to enter into relations with other States and each of these requirements is legally determined. The conclusion is that State and law are identical but this does not mean that

every legal order is automatically a State, e.g., orders in primitive communities. Only relatively centralised legal orders are States.

Kelsen also applied his theory to the system commonly known as "international law". His earliest work did not touch on this field. It was only after Verdross had started to adapt his approach to international law that Kelsen himself took interest in it. However, his theory, when applied to international law, revealed many limitations. The Pure Theory demands that a Grundnorm be discovered.

Merits of the Pure Theory of Law

1. Kelson recognized International Law as a law

2. Pure theory of law is best for peaceful change

3. It makes the most refined development of analytical positivism

4. Kelson's concept of legal system is clear original and striking

5. Kelson has explained that no law can prevail country to grundnorm or constitution

6. Kelson's Pure Theory of Law is considered to be the most outstanding theory of law

Criticism of Kelsons Pure theory law

1. Grund norms vague And confusing-

2. Purity of nerve cannot be maintained

3. Natural law is ignored

4. Supremacy of international law

5. No practical significance

Chapter IV: Post Modern Theories

Topics for study:

a) ***Hart's concept of Law***
b) ***Rawl's Theory of justice***
c) ***Amartya Sen's theory of justice***

1. Hart's concept of Law

Law as a system of Rules –Hart's Theory.

Prof. Hart is regarded as the leading contemporary representative of
British positivism. His influential book, The Concept of Lau was published in 1961 and that shows that he is a linguistic, philosopher, barrister and a jurist.
Prof. Hart approaches his concept of law in this way,
According to him: "Where there is law, there human conduct is made in some sense non-optional or obligatory."
Thus the idea of obligation is at the core of a rule. He commences in his book by criticising Austin's view of law as a command.

The idea of command explains a coercive order addressed to another in special circumstances but not why a statute applies generally and also to its framer.
Hart's theory concerns itself with the analysis of the term "rule" or with a system of rules. These rules deal with what ‑ought to be done". They are imperative and prescriptive.
Moreover, there are other varieties of laws, notably powers. The continuance of pre-existing laws cannot be explained on the basis of command. Hart demolished the myth of "tacit command".
Austin's "habit of obedience" fails to explain succession to sovereignty because it fails to take account of the important differences between "habit" and "rule". Habits only require common behavior which is not enough for a rule. A rule has an "internal aspect" which people use as a standard by which to judge and condemn deviations.
Habits do not function in this way. Succession to sovereignty occurs by virtue of the acceptance

of a rule entitling the successor to succeed and not because of a habit of obedience.

The view of Prof. Hart is that the significance of rules has been neglected

They have some characters of "commands". They demand repeated activity.

Sometimes they are constitutive, e.g. rules of grammar. In others, regulative, as in rules of games like tennis, foot balletc.

These rules are followed as part of the game. Hence, observance of law by the people is part of an ordered tolerable society.

The rules have two aspects:

1. External behavior and
2. Internal attitude that a behavior is obligatory.

Hart explains that when a person conducts himself to ascertain pattern, he requires the Same in others; if others do not confirm ,he criticizes them. To a rule or a set of rules, this is the reaction in the society.

Primary and Secondary Rule

Prof. Hart makes a distinction between basic or primary rules and secondary rules.

Under primary rules, human beings are required to do or abstain from certain actions whether they wish or not. Secondary, rules are in a sense parasitic upon or secondary to primary rights.

i) They provide that human beings may by doing or saying certain things introduce new rules of the primary type, extinguish or modify old rules,or in various ways determine their incidence or control their operations. Primary rules impose duties. Secondary rules confer powers,public or private. Primary rules concern actions involving physical movement or changes. Secondary rules provide for operations which lead not merely to physical movement or change but to the creation or People comply or follow the rules not under coercion, but out of a sense of obligation. Even those who are opposed, consider the rule as an obligation to obey. Hence , law is followed under obligation and, not under coercion or force.

ii) There are the moral and legal rules in the society ;moral rules apply to every human act, but, legal rule(law)applies to a number of such actions. These moral or legal rules apply to individuals whether they like them or not. They are non-optional.

iii) Out of these legal rules has grown a system called the "legal system". Hart's view is that this system has arisen from the combination of the primary and secondary rules.

Primary rules are those which impose duties. Secondary rule are those which confer the power of

rule-making in the legal system and vestsitinan authority eg. Parliament or any other authority. This makes uniform ,dynamic rules adapting the social changes..

Criticism:

Though Hart's theory of law is convincing and has its own merits, still it has many drawbacks.

i) The division of rules into primary and secondary is not satisfactory.Change in the legislative sovereign may create problems.

ii) It is not correct to say that the entire legal system is based on rules.

There are many fundamental principles which are exclusive and separate, and are found in every developed legal system.

iii) Observance of rules on the basis of internal or external attitudes expecting others to follow them is not true in reality.

iv) Hart's analysis of Rule is incomplete in respect of his explanation of "What ought to be done". The truth is, that people have found the necessity of a social life. In that a legal system is a must, and, basic rules are essential in such a system.

(b) Rawl's Theory of Justice

Introduction:

John Rawls theory of justice had come up at a time when all what everyone talked about was regarding maximizing the welfare of society or the utilitarian concept of maximizing the happiness of the majority of the people, _justice' as a concept was least talked about, least discussed about. Rawls's theory of justice was in a way an alternative to the classical utilitarian. Rawls theory of distributive justice is based on the idea that society is a system of cooperation for mutual advantage between individuals. As such, it is marked by both conflicts between differing individuals' interests and an identity of shared interest. Principles of justice should define the appropriate distribution of the benefits and burdens of social co -operation. One must not fail to observe the fact that Rawls's theory of justice as fairness, stretches its roots from the social contract theory, Rawls argues that it is necessary to distinguish between the genuine judgments about justice (which people have) and their subjective, self-interested views. After arriving at those objective principles, it should be measured against our own judgments, there will be inevitable distinction when one resorts to such measurement, therefore, it is important to modify our own judgment in such a way that a stage of equilibrium could be reached in which these two situations are similar; this is the situation of reflective equilibrium'.

In his rather complex theory, Rawls starts with a moral conjecture, that justice is tied to fairness, with a fair society and fair institutions and those members of the society adopt this situation in order to arrive at fundamental principles of justice. The original position' is a central feature of John Rawls's social contract account of justice. In the words of Rawls the original position is simply a hypothetical thought experiment that seeks to: Make vivid to ourselves the restrictions that it seems reasonable to impose on arguments for principles of justice, and, therefore, on these principles themselves.

Rawls imagine people in the hypothetical situation of original places upon them the restraint of the veil of ignorance'. This veil denies them knowledge of their status (e.g.

The answer will be a certain no, because anyone under the veil of ignorance will like to be treated with dignity, once the veil of ignorance goes up. He will stipulate basic liberties such as gender, ethnicity, economic standing, intelligence etc) and their perception about _good living or well being‘.

In the words of John Rawls

“No one knows his place in society, his class position or social status, nor does anyone know his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like. I shall even assume that the parties do not know their conceptions of the good or their special psychological propensities. “

The principles of justice are chosen behind a veil of ignorance. This ensures that no one is advantaged or disadvantaged in the choice of principles by the outcome of natural chance or the contingency of social circumstances. Since all are similarly situated and no one is able to design principles to favour his particular condition, the principles of justice are the result of a fair agreement or bargain.

So basically, according to Rawls this is a special type of arrangement, a contract where people favours for a strategy which maximises the prospects of the least well- off. Once the veil of ignorance is lifted and once the people leave their original position, the contract shall be maintained, out of respect for each other. So basically this is akind of radical egalitarian liberalism in which focus is on the fact that one person should not resort to maximising profit so much that it leads to deterioration of the other person.

Rawls original position has been designed to be a fair and impartial point of view that is to be adopted in our reasoning about fundamental principles of justice and exclude personal interest when choosing the _basic principles of justice‘ so as to ensure generality and validity.

1. **Principles of Justice:**

Rawls‘s basic principles of justice are generalized means of securing generalized ends. It primarily deals with the aspect of distribution of wealth, if behind the veil of ignorance the people are confronted with the question as to whether they will accept the utilitarian principle of distribution of wealt, right to life, liberty, freedom of consciousness and religion, assembly etc

and these basic liberties will similarly be demanded by a member of minority community as well, he will not take chance of ending up a member of oppressed minority being tyrannized by a majority. This brings us before the _first principle' of Rawls i.e., the _Liberty Principle'. Rawls in his book Political Liberalism included this principle in a form of guarantee of fair value of the political liberties.

The fair value of political liberties requires that –citizens similarly gifted and motivated have roughly an equal chance of influencing the government's policy and of attaining positions of authority irrespective of their economic and social class.Thus ensuring that members of a social group are able to participate in the political process which conforms to the principle of equality.

2. **Second Principle**: It proposes that —social and economic inequalities are to be arranged in such a way so that they are both

i. Reasonably expected to be to everyone's advantage , and

ii. Attached to offices and positions open to all under conditions of fair equality of opportunity

According to Rawls, social and economic inequalities should be so arranged so that they are for the greatest benefit of the least advantaged persons, also known as the _difference principle'. The people under the veil of ignorance don't know that under what system are they going to be placed in, if the veil is lifted, whether they will be healthy or unhealthy, rich or poor. Therefore, it is advisable to have an arrangement, whereby there is an equal distribution of wealth so as to ensure that each member is on a safe side.

Or the members can go for a different setup, on a qualified principle of equality (difference principle), according to which, only those social and economic inequalities will be permitted that work to the benefit or advantage of the least worst off.Fair equality of opportunity maintains that offices and positions should be open to individual, regardless of his/her social background, ethnicity or sex. Rawls rejects the idea of feudal aristocracy. Rawls argues that an individual should not only have the right to opportunities, but also an effective equal chance as another of similar natural ability. Formal equality of opportunity is satisfied if there are no discrimination legal barriers that bar some groups in so Rawls do not overrule the possibility that these two primary principles will be in conflict with each other. To meet this difficulty Rawls proposes certain of Priority'. Such priority is lexical', i.e., the first has to be fully satisfied before the second is to be considered.

These principles have been arranged lexicographically which means that the first principle of

justice takes priority over the second and the principle of fair equality of opportunity takes priority over the difference principle. This implies that the equality of basic liberties and rights, including the fair value of the political liberties, is not to be overridden by other consideration society from access to social institutions and offices.

Rawls also modified the principles of justice as follows, with the first principle having priority over the second, and the first half of the second having priority over the latter half.

1. Each person has an equal claim to a fully adequate scheme of equal basic rights are liberties, which scheme is compatible with the same scheme for all; and in this scheme the equal basic liberties, and only those liberties, are to be guaranteed their fair value.
2. Social and economic inequalities are to satisfy two conditions! first, they are to attached to positions and offices open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit of the least advantaged members of society.

Here the most significant changes are in the content of the first principle. In A Theory of Justice Rawls state the first principle as follows: "Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all. Rawls Political Liberalism is a rich and suggestive account of how to justify a scheme of principles for ordering the basic structure of society. Clearly no one else has produced a work that matches the scope of Rawls's theory.

(c) Amartya Sen's View regarding Rawl's Theory:

Sen's chief argument against Rawls theory is that the transcendental institutionalism' is nothing more than a moral conjecture, a hypothesis, on which he progresses his theory and which

subsequently gets infested with certain limitations.

The first objection which Sen raises is that the original position‘ which Rawls is talking about, creates a hypothetical situation, in practicality it may never be able to incorporate multifaceted, diverse, variegated, conflicting but very genuine and cogent demands of a large plurality.

Sen beautifully exemplifies his point with the help of the example of the illustration of three children and a flute With resources being limited we may not be able to meet the plurality of genuine voices airing their genuine demands. Anne, Bob and Clara are all well raising their genuine arguments and these genuine demands cannot be brushed aside by giving a superficial argument of being foundation less which is based on the pursuit of human fulfilment, or removal of poverty, or entitlement to enjoy the products of one‘s own labour.

So in a way transcendental theories of justice do not resort to comparative assessment between pair of alternatives, what Prof. Sen wants to propose is that concept of justice should not be indifferent to the lives of people which they are actually living.

Discussing further about his principles of justice‘, Sen argues that there is an inner dichotomy in Rawls‘s liberty principle. As said before, priority has been given to the liberty principle over the second principle which relates to the equality of certain general opportunities and to equity in the distribution of general – purpose resources.

In other words liberty is that sacrosanct principle which people will not like to compromise about even if it is related to better distribution of wealth or even if it facilitates furtherance of wealth i.e., the concept of liberty cannot be reduced to the level of a mere facility, but if we see when Rawls deals with the primary goods‘ then it includes things such as rights, liberties and opportunities, income and wealth, and the social bases of self respect. We can see that liberty though has entered but just in from of a mere facility. One can see that the concept of liberty is being treated like a king and a slave simultaneously. Again, why such kind of unrestrained priority is being given to liberty, aren‘t hunger, starvation and medical neglect etc less important than personal liberty?

It is important to see that in his pursuit of advancing his principles of justice he excluded the idea of merits and just deserts, or on ownership of property. He allows room for only those inequalities that would help the worst off. May be incentives can be given so that it instills amongst the member a new vigour and new vitality which can catapult them to do their work more efficiently. Here Sen argues that should not the principles adopted at the original position

eliminate the need for incentives? Somehow we can see that Rawls is taking one step forward and then simultaneously going back two steps.

Niti over nyaya – The cornerstone of Sen's idea of justice

It has been dealt that how Sen consider the perfect model of justice as redundant, he believes that all these transcendental system of justice are impregnated with a basic flaw that do not emphasizes on reduction of justice and instead emphasises on advancement of justice without taking into consideration that plurality of demands will not let this perfect system of justice to stand on its feet. According to Sen, presence of remediable injustice may well be connected with behavioral transgressions rather than with institutional shortcomings. Justice is ultimately connected with the way people's lives go, and not merely with the nature of the institutions surrounding them Professor Sen took cue of the early Indian jurisprudence to shed light on the different concepts of justice, Niti' and the Nyaya'.

The idea of niti relates to organizational propriety as well as behavioural correctness, whereas the latter, nyaya, is concerned with what emerges and how, and in particular the lives that people are actually able to lead. In other words it is necessary to assess the roles of institutions on the basis of fact that how much inclusiveness is reflected in them i.e., in the broader perspective of nyaya, which pertains to the world that actually emerges and not just constricted to the institutions that we possess.

Sen gives an example to show the difference between niti and nyaya. Ferdinand I, roman emperor in the sixteenth century claimed: Fiat justitia , et pereat mundus', which can be translated as Let justice be done , though the world perish'. This is an example of a very austere form of niti which advocates even bringing of catastrophe, but without considering the fact that how justice will be done if world will perish? According to Professor Sen, a realization- focussed perspective also makes it easier to understand the importance of the prevention of manifest injustice in the world, rather than seeking the perfectly just. He further gave an example that the agitation against slavery in the eighteenth and the nineteenth century was not successful because they were labouring under the belief that abolition of slavery will lead to a perfectly just society. It was intolerably nauseating injustice that made abolition of slavery a priority.

Even though the arrangement centred perspective of niti is often interpreted in ways that make the presence of appropriate institutions themselves adequate to satisfy the demands of justice, the

broader perspective of nyaya would indicate the necessity of examining what social realizations are actually generated through that institutional base.Such a system can help to incorporate and accommodate divergent points of view. Sen also visualises a set of principles for justice for the modern world that will avoid parochialism and address the vital questions of global injustice. Sen acknowledges the fact that institutions play a very important role in sharpening our ability to scrutinize the values and priorities that we can consider , especially through public discussions and democracy is such an institution, which is assessed in terms of public reasoning , an institution of democracy should be judged on the touchstone of the extent, as to how different voices from diverse sections are able to put forth their voice and their voice actually been heard and not just about the formal existence of the institution, because a democratic institution, if fails to provide representation to the people, fails to provide the much needed opportunity to put forth their voice then the institution is insipid.

4. Conclusion

Sen's work though criticizes the notion of perfect justice and rather advocates removal of injustice, but this very idea can be debated. The search for perfect justice aspires to an unachievable completeness but the problem is that many plausible cases of injustice are much more complicated. If we look into the complex question of gender inequality, we may get conflicting opinion regarding what really is unjust as our conception may differ regarding what should be considered as injustice pertaining to gender. Today questions are coming before society that whether men should also be given incentives on the line of women as a men also involves his labour in child rearing and domestic care, should there be a concept of paternity leave? Some people think that in order to ensure equality in opportunity between men and women, legal barrier must be lifted. These questions are very difficult to answer both men and women may reason that injustice is being done to them. The point is that there are times when a person cannot figure out what constitutes a move to a superior, more just position without reflecting upon and working out her own conception of what ‑perfect justice entails. A vision of just society puts forth before an existing society a sort of vision, a noble pursuit which a society should aspire to accomplish, it is not necessary that the vision comes into reality but at least it leads to fulfillment of some tenets of that vision.

Karl Marx theory was also regarding a perfect society in which laborers were no more the

subjugated class, the theory was brushed aside as being hypothetical and not tenable and yet it has not led to the establishment of setup which Marx envisioned, but it paved a way, where economic reforms were rolled down, legislatures such as workmen compensation act, labour laws etc. were possible. A vision for perfect society also leads to lessening of injustice. However, both Rawls and Amartya Sen are traversing on the same path and they have similar opinion in this regard that utilitarianism or a conception of system which only promotes welfare of majority or happiness of greatest number is not correct. Sen uses an analogy of old Hindu jurisprudence regarding the Matsyanyaya or the judgements of the fishes, where big fish devoured small fish, is somewhat identical to the utilitarian principle that exists today, and cannot be said to be chink free.

Chapter 5: Sociological Jurisprudence

Topics for study:

1. ***Roscoe Pound's Social Engineering Social Engineering Theory***

2. ***Prof. Patterson***
3. ***Prof. Selznick***

1. Roscoe Pound's Social Engineering Theory

Roscoe pound was one of the most leading and influential jurists who developed the American sociological jurisprudence in a systematic form. He emphasised on inter disciplinary approach to law so that rule of law and life may flow together. He treated law as a means for affecting social control and did not believe in the abstract or mechanical application of law. He is considered to be the father of American Sociological Jurisprudence for his unique contribution to the science of law and legal philosophy. The emergence of Realist School in America in later years owes its origin to Pound's functional jurisprudence and theory of interests.

Pound is the most systematic writer on the sociological jurisprudence. Pound concentrated more on the functional aspect of law.

Theory of Social Engineering

Roscoe Pound's concept of law is of practical importance which inspires judges, legislators and jurists to mould and adjust law to the needs and to interests of the community. Since the society is always changing law should be continually adapted and readapted to the needs of individuals and society. He, therefore, stresses the need of paramount co-ordination and co-operation between the legislators, administrators, judges and jurists to work in unison towards the realisation and effective implementation of law for securing social harmony and social justice to the general public with the a minimum of waste or friction and maximum of material satisfaction of wants, needs.

Pound compared the task of the lawyer to the engineers.

He stated that the aim of Social engineering is to build a structure of society as possible which requires the fulfillment or satisfaction of maximum wants with minimum usage of resources.

It involves the balancing of competing interests.

He called this theory as the theory of –Social Engineering.

Here Pound has used two words i.e.—Social which means group of individual forming a society.

The second word is –Engineering| which means applied science carried out by engineers to produce finished products, based on continuous experimentation and experience to get the finished product by means of an instrument or device.

For facilitating the tasks of social engineering, Pound classified various interests to be protected by law in three heads:

Classification of Interest:

1. **Private Interests/Individual Interest**

   Individual interests, according to Pound are claims, or demands or desires from the point of the individual.

   Individual interests according to Pound includes:

a. Personality-interest of personality consist of interests in–

- The physical person,
- Freedom of will,
- Honour and reputation,
- Privacy and sensibilities,
- Belief and opinion.

b. **Domestic relations**:

   It is important to distinguish between the interest of individuals in domestic relationships and that of society in such institutions as family and marriage.

   Individual interests include those of:

- Parents and Children,
- Husbands and Wives&
- Marital interests.

c. Interest of substance-this includes

- Interests of property,
- Succession and testamentary disposition,

- Freedom of industry and contract,
- Promised advantages
- Advantageous relations with others,
- Freedom of association, and
- Continuity of employment

2. **Public Interest**:

   Public interests according to him are the claims or demands or desires looked at from the stand point of life in politically organized society**.**

   The main public interest according to Roscoe pound are:

- Interests of state as a juristic person which includes
- Interests of state as a juristic person i.e. protection
- Claims of the politically organized society as a corporation to property acquired and
- Held for corporate purposes.

  b. Interests of State as a guardian of social interest, namely superintendence and administration of trusts, charitable endowments , protection of natural environment,

- Territorial waters ,sea-shores, regulation of
- Public employment and soon to make use of thing which are open to public use , this interest seem to overlap with social interests.

3. Social Interest:

Social interests are the claim or demands or desires thought of in terms of social life and generalized as claims of social groups. Social interests are said to include:

- a. Social interest in general security-Social interest in the general security embraces those branches of the law which relate to
- General safety,
- General health,
- Peace and order,
- Security of acquisitions and
- Security of transactions.

b. Social interest in the security of social institutions-Social interest in the security of the social institutions include

- General security of domestic institution
- Religious institutions, political institution and
- Economic institutions.

d. Social interest in general morals–Social interest in general morals comprises of

Prevention and prohibition of prostitution, drunkenness, gambling, etc.

e. Social interest in conservation of social resources-Social interests in the 1.Political progress covers free speech and free association, free opinion

Criticisms:

2. Economic progress covers freedom of use and sale of properly, free, trade ,free Industry and encouragement of inventions by the grant of patents.

3. Cultural progress covers free science, free letters, encouragement so farts and letters, encouragement so higher educational earning and aesthetics.

Meaning thereby each individual be able to live a human life according to the individual‘s

1. Political life
2. Physical life
3. Cultural
4. Social and
5. Economic life.

Conservation of social resources covers conservation of social resources and protection and training of dependent sand defectives i.e. ,conservation of human resources, protective and

education of dependents and defectives, reformation of delinquents, protection of economically dependents.

f. Social interest in general progress–Social interest in general progress has three aspects.

- Economic progress,
- Political progress and
- Cultural progress.

Criticism against Pound's theory:

i. Despite pound's great contribution to sociological jurisprudence and his emphasis on studying the actual working of law in the society ,his theory suffers from certain drawbacks. Pounds theory of social engineering has been criticised on various grounds.

ii. It is contended that the classification of interests by pound is in the nature of a catalogue to which additions and changes have constantly to be made which is neutral as regards the relative value and priority of the interest enumerated. Pound's theory of social engineering has been criticised for the use of the term engineering, which equates society to a factory like mechanism.

iii. Law is a social process rather than the result of an applied engineering. Equating society with a factory is also not correct because the former is changing and dynamic in nature whereas the latter is more or less static. Again , pound's emphasis on engineering ignores the fact that law evolves and develops in the society according to social needs and wants for which law may either have develops in the society according to social needs and wants for which law may either have approbation or disapprobation.

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

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

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

(B) **Professor Patterson**:

Professor Patterson , who is generally sympathetic with Pound's theory of interests, cannot agree that Pound has set forth "no more than a description of how the legal order actually functions." Rather, he calls it "an imaginative 'construction' of the ends of our law."

He considers it worth while, however, in the evaluation of cases, which no jurist would deny. Specific examples will be considered later. That Pound's scheme or table of interests is not the only one which could be developed is shown by the fact that Paton has presented one of his own construction, which is much simpler.

(C) Selznick:

American jurists evidently were ready for the social theory of law and application of social science to law. –In this country,‖ observed legal sociologist Philip Selznick mid-century, –the premises of sociological jurisprudence achieved a rather quick and general victory, helped along by a pragmatic temper, and impatience with abstractions, and a setting of rapid social change.

Conclusion:

Thus, the contribution of social engineering theory is valuable in Jurisprudence.

Chapter VI: American Legal Realism

Topics for study:

(a) Jerome Frank

(b) Karl Lewellyn

(c) Indian Judicial Process and relevance to American Legal Realism

Introduction:

Legal Realism, a movement that arose in 1920s and 1930s in the US, challenged the prevailing view that judges are rational decision-makers, who apply only legal rules found in law books to the facts of the case. Realists were a sundry group: there were more differences between some realists then between some realists and formalists. Overall, however, realists asserted that often judges make up their mind about the outcome even before they turn to legal rules; often they will use policy principles and make new law; some realists asserted that judge's personality has more impact than legal rules. After making a decision, judges will justify it with formal legal rules.

The Main Concern of the Realist Movement:

The main concern of the realist movement was the desire to discover how judicial decisions were reached in reality, which involves a playing down of the role of 'law in books' to discover the other factors that contributed towards a judicial decision, in other words to discover the 'law in action. Once the realists had deciphered the factors that lead to judicial decisions, both legal and non-legal, they were concerned with the prediction of future decisions. Realists were of the opinion that judicial decision-making would be mere amenable to the needs of the society if judges were open about the non-legal factors which had influenced their decisions, instead of instinctively trying to submerge them behind the fecade of syllogistic legal reasoning. It was of prime concern for the realist that law should not simply be separated from the society that created it and for whose benefit it should be applied.

American Realism is not a school of jurisprudence but it is pedagogy of thought. Realists are concerned with the study of law as it works and functions which means investigating the social factors that makes a law on the hand and the social results on the other. The emphasis is more upon what the courts may do rather than abstract logical deductions from general rules and on the inarticulate ideological premises underlying a legal system. In the words of Professor Roscoe Pound by realism the realists mean "fidelity to nature, accurate recording of things as they are, as

contrasted with things as they are imagined to be or wished to be or as one feels they ought to be. The 'realism' is anti-thesis of 'idealism'……"1 Friedman said, realist prefers to evaluate any part of law in terms of its effects. American Realism is a combination of the Analytical Positivism and Sociological approaches. Julius Stone calls the Realist Movement a 'gloss' on the sociological approach.2 Legal Realism was a distinctly American approach to the philosophy of law. It was an attempt to take a hard-headed, cold-eyed look at how the legal system actually operates. It was a reaction to the formalistic account of law and 'mechanicalIt was a reaction to the formalistic account of law and 'mechanical Jurisprudence'.

According to formalists, judges apply the governing law to the facts of a case in a logical, mechanical, and deliberative way. For the formalists, the judicial system is a "giant syllogism machine," and the judge acts like a "highly skilled mechanic." Legal realism, on the other hand, represents a sharp contrast. ... For the realists, the judge "decides by feeling and not by judgment; by 'hunching' and not by ratiocination" and later uses deliberative faculties "not only to justify that intuition to himself, but to make it pass muster.

"Reason is the life of the law; nay, the common law itself is nothing else but reason."-
Sir Edward Coke

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.

Main Features of American Realism:

Professor Goodhart has enumerated the basic features of Realistic Jurisprudence in the following way:-

1. The realist school depends for its importance, not upon any definition of law but upon the emphasis it places on certain features of law and its administration. The most striking feature of this school is the stress they place upon uncertainty of law as a series of single decision.
2. The second feature of the realist school is its attack on the use of formal logic in law, which they term 'medieval scholasticism'. According to them the judge in deciding a case reaches his decision on 'emotive' rather than on logical grounds.
3. The third feature of the realist school is the great weight they place on modern psychology with strong leaning towards behaviourism.
4. The fourth feature of the realist school is the attack they have made on the value of legal terminology, for according to them, these terms are a convenient method of hiding uncertainty of our law. Professor Green protests against the part which sacred words, taboo words, continue to play in our law.
5. Finally, the realists stress, "an evaluation of any part of law in terms of its effects, and an insistence on the worth-whileness of trying to find these effects".

(a) Jerome Frank

Frank believed that law is what the Court has decided in respect of any particular set of facts, however prior to such a decision, the opinion of the lawyers is only a guess as to what the courts will decide and this cannot be treated as law unless the court so decides by its judicial pronouncement.

The individual decision of the judge is law par excellence. The temperament of the judge has an important bearing on the mechanism of law. For Frank, _fact-finding' was the central theme of his realism, as he asserted that, the lawyers and judges should evaluate facts of every individual case under the changing social conditions. Frank believed that law as a mere collection of abstract rules, when is pitted against facts of a particular case, may produce legal uncertainty; according to him mere technical analysis is not enough understanding as to how law works is something that is required.

Frank was of the opinion that- No one knows the law about any case or with respect to any given situation, transaction or event, until there has been a specific decision (judgement, order or decision) with regards there to, however this uncertainty is not to be deplored, but is of immense social value. A wise and creative judge, unfettered by paragraphs in the code and precedents, will find justice through a clear and cool perception and valuation of social issues at stake. Frank compared such a judge to the Philosopher- King of Plato's Republic.

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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

1) 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 in it, 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'

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.
c) 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.

Basically, the Realist school was evolved and given accreditation in the American Jurisprudence. Legal realism suggests that judicial decisions must comply with financial factors and inquiries of strategy and qualities.

In America, we have the Realist School of jurisprudence. This school strengthens sociological jurisprudence and perceives law as the consequence of social impacts and conditions, and sees it as Judicial decisions.

Oliver Holmes is ,as it were, an example of the pragmatist school.

–Law is the thing that the courts do; it isn‘t simply what the courts state.

Emphasis is on activity. As Holmes would have it,

The life of the law has not been the rationale . it has been involvement.‖ Karl Llewellyn, in his previous works, was a representative for customary pragmatist theory. He contended that the guidelines of substantive law are far less significance in the genuine routine with regards to the law that had up to this point been expected.

The theory rules that chosen –cases which appeared for a century have been tricked and dealt by library-ridden hermits as judges.

‖He suggested that the point of convergence of legal research ought to be moved from the investigation of standards to the recognition of the genuine conduct of the law authorities, especially the judges.

–What these authorities do about debates is,to my mind ,the law itself.‖

Llewellyn, one of the examples of the pragmatist development, has put forward the accompanying focuses as the cardinal highlights of American realism;

1. Realism isn‘t so much another school of jurisprudence as another philosophy in jurisprudence.
2. Realists see the law as robust and not as static. They view the law as servingspecific social closures and concentrate any given cross-segment of it to discover to what degree these finishes are being served. Realists, with the end goal of perception of working of any piece of the legal framework, acknowledge a ‖separation of is from should—.

   This implies the moral purposes which, as per the spectator, ought to underlie the law are overlooked and are not permitted to obscure the vision of the eyewitness.

   4.Realism accentuates the social impacts of laws and legal decisions.

The main works of Jerome Frank include- Law and the Modern Mind (1930), If Men were Angels (1942) & Court on Trial (1949). In his work, Law and the Modern Mind, Frank exploded the myth that law is continuous, uniform, certain and invariable and asserted that Judges do not make law, instead, they discover it.

Supreme Court – How it is possible, that tribal women raped by higher status or caste person?

***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. Law is a mean to a social end.

6) Gives insight into judicial processes.

E.g. various factors influencing the mind of Judges – Bias, prejudices, idiosyncrasies, upbringing, education social background etc.

7) Stipulated empirical study i.e. study based on experience or observation, in the field of Jurisprudence.

8) It combined intellectual positivism & the social approach i.e. while studies Law take into account other factors also.

9) 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.

d) Indian Judicial Process and relevance to American Legal Realism

Motilal C. Setalvad, at the inaugural sitting of the Supreme Court of India on 28th January 1950, had stated. "It can truly be said that the jurisdiction and powers of the Supreme Court, in their nature and extent, are wider than those exercised by the highest court of any country in the Commonwealth or by the Supreme Court of the United States…… We hope and trust that this court will play a great and singular role and establish itself in the consciousness of the Indian people. Like all human institutions , we hope, the Supreme Court will earn reverence through truth.

Indian Courts and Traditional Role Perception:

There was a myth strongly nurtured by the Anglo-Saxon tradition and propagated by many jurists that judges do not make law, that they merely interpret law but if we analyse the true nature of the judicial function, it will immediately become apparent that judicial activism is an

essential part of the Judicial Process. In a traumatically changing society, a judge who denies himself judicial activism denies himself the role of a judge. A dynamic judge cannot be a mere spectator to the existing realities taking place all around him. Community expects the judges to be 'progressive', 'activist' and 'forward-looking' rather than the worshipers of the traditional blind-folded, balance wielding goddess of justice. Instead of preserving their authority by clocking themselves in the majesty of an overshadowing past, they must discover some composition with the dominant needs of their time. A creative judge must capture the mood of the change that already exists in the nation and interpret the law to give meaning and direction t that change.

This trust has been more than redeemed by the Supreme Court and it has earned adoration and almost worship of large cross sections of the people. The Supreme Court of India supervises the decisions not only of the 21 High Courts in the States and the Union Territories but also over a vast variety of tribunals in various parts of India through its jurisdiction under Article 136 – a jurisdiction which was described in the fifties as 'extraordinary'; it still is so described but only in name. Article 136 has now become the most frequently invoked provision of the Constitution furnishing a source for the court's unguided and often unpredictable final appellate jurisdiction. The Supreme Court is also vested with special advisory jurisdiction under Article 143 to answer question of law of fact of public importance that may be referred by the President of India.

Legal Realism in Indian Context of Positivism regards law as the expression of the will of the State through the medium of the

legislature. Theories of legal realism too, like positivism, look on law as the expression of the will of the State, but they see this through the medium of the courts. Like Austin, the realists look on law as the command of the sovereign, but there sovereign is not Parliament but the judges; for the realists the sovereign is the court.

The law during the British colonial rule in India was coercive and counter-productive to social needs of the Indian people. In strict Austinian sense sanctions were imposed on Indians in the name of ―justice is according to law‖ The British residents in India enjoyed many amenities was given no recognition, suppression, oppression & exploitation of the people continued unabated under the British Colonial Rule. The lawyers and judges interpreted and applied law mechanically without considering the felt needs or necessities of the people. There was rigid adherence to the Doctrine of Precedent.

The British residents in India enjoyed many exemptions and special privileges under the then existing laws. Thus there was one law for the ruler and other for the ruled.

With the wave of nationalism and awakening of intellectuals, demand for civil liberty and basic human rights were persistently made but the sIt is pertinent to note that the post-independent Indian positivism differs from Austinian positivism in the sense that the former seeks to establish harmonious relationship between is and ought. This can be seen in the harmonious construction adopted by the Supreme Court in deciding cases involving conflict between fundamental rights and directive principles of state policy where we find a fusion of justice and morality.

The philosophy enshrined in the preamble of the Constitution of India and the chapters on fundamental rights, directive principles, fundamental duties, provisions relating to the powers and functions of judiciary and amendment of the Constitution amply demonstrate that the entire focus of post independence Indian jurisprudence is on welfare of the Indian masses and making law responsive to the social needs.

There is an increasing trend of judicial activism and public interest litigation that can be witnessed in India lately. The developing trends as to and in regards to public interest litigation has opened new vistas for interpreting law in the context of social settings. Law has been used as a tool of social transformation for creating a new social order with primacy to social justice. In Indira Sawhney v. UOI, Justice P.B. Sawant observed: The Constitution of India being essentially a political document has to be interpreted to meet the felt necessities of time.

There are many welfare legislations enacted post-independence and from time to time it has been asserted by the SC that in case of social welfare legislations, it is the facts of a particular case that form the law. Thus, the realist school of jurisprudence as the left wing of the functional school has clearly found its place in India post-independence.

Conclusion:

The Indian legal system as imposed and designed by British rulers before 1947 was static, stale and counter-productive to social change and social justice. It was antipeople, suppressive to human dignity and non-responsive to egalitarian goals of Indian people. Accordingly the legal fraternity of judges, lawyers and jurists were insensitive to the urges, expectations and needs of the people. In India, this way the legislature, executive and judiciary were oriented to reflect such a policy perception to protect and promote the interests of the British. The impression gained in the Indian mind that their sacred, inalienable human rights and vital interests had been ignored

and denied for the sake of English rulers. Indians were reduced to hewers of wood and drawers of water sinking in the deep morass of poverty, illiteracy and slavery. To these was also added the exploitation of material resources and its wealth. The English law imported and implanted from England statistically cut and dry, legalistic, formal, draconian and punitive in character supported and sustained the system engrafted by the alien rulers in an alien soil. Indian protests against denial of civil liberty and human rights, against exploitation and fomentation of communal and linguistic divisive tendencies went unheeded. Under the British rule human rights and democracy were suspect and socialism was anathema for the processes of administrative and judicial justice. The idea of a valueloaded law acting as lodestar for social justice and social change was beyond the ken of law courts and lawyers and their colonial masters who glorified colonial jurisprudence and its deity Austin. In the backdrop of Gandhian humanism and Nehru's scientific temper the new Constitution enacted and adopted in 1950 contributed in ushering a new legal and constitutional philosophy embodying ideals of liberty, equality and human dignity. The Preamble to the Constitution of India together with Fundamental rights and Directive Principles constitute the bed rock of social- logical jurisprudence. Its core principles made the people of India the ultimate sovereign, the country socialist, democratic and republican in character in order to secure to all its citizens justice- social, economic and political. The Constitution of India also provides for the three organs of the Government namely, Legislature, Executive and Judiciary. The Fundamental Rights in the Constitution constitute the Magna Carta of individual liberty and human rights and the Directive Principles, the social charter of economic justice and it is paramount that the courts ought to synthesize these twin goals in a spirit of mutual accommodation and co-existence to subserve the social ends free from coercion and exploitation necessary for founding an egalitarian society in India. Thus, the Constitution aims at the creation of new legal norms, social philosophy and economic values which are to be effected by striking synthesis, harmony and fundamental adjustments between individual rights and social interests to achieve the desired community goals.

The pattern of social legislation in India since independence has been in accordance with the constitutional mandate. In face ninety percent of social legislation enacted by the Parliament has been concerning human rights of Indians- be it laws concerning agrarian reforms, abolition of zamindari system, ceilings of land holdings, regulation and control of labour problems, laws concerning labour welfare, safety, wages, bonus, gratuity, social insurance and social security,

protection of migrant workers, women and child labour, contract labour, bonded labour, equal remuneration for equal work, suppression of immoral traffic in women and girls, laws concerning bail, detention, arrest, punishment of tax evasion, trafficking narcotic drugs, protection of environmental pollution etc. Law, therefore, has been extensively used as a tool of effective social change and for eradicating social and economic evils. This process of social change through law not only involves the role of the Legislature but it also involves the active role of the law courts. Judiciary acts as the catalytic agent of social control, regulation, arbitration and reformation. The Courts have been reconciler of conflicting interests rejecting Austinian brand of legal positivism. The British legal system developed the principle that "justice is blind" or Judges ought to live in "Ivory tower" meaning thereby they are required to interpret law logically and statically unmindful and unconcerned of social consequences or effects of their judgment on society. The Indian Judges like M.C. Chagla, P.B. Gajendragadkar, Krishna Iyer, P.N. Bhagwati, D.A. Desai, Chinnappa Reddy, Kuldeep Singh, Dr. A.S. Anand have rejected the Anglo-Saxon jurisprudence being anti-people, draconian, cancerous and smuggled system which is utterly alien to the genius of the country. Hon'ble Justice Krishna Iyer was of the view that…….. "free India has to find its conscience in our rugged realities and no more in alien legal thougThe acceptance enjoyed by the judicial process in any society depends mostly upon the historic role played by that process in the shaping of socio-legal institutions in that country. In regard to the approaches and habits of thought that are generated by the courts in their work it is necessary to enquire to what extent do the courts show imaginative awareness of and wise insight into the various social and economic problems. How does the constitutional theorist account for this judicial adaptation of court processes for the tasks of social change? The answer is that the written constitution commits the adaptation of fundamental law to social change in the judicial branch and the discharge of this function entails judicial sharing and shaping of a social policy decision with the political branches. Undoubtedly, the Indian Judges do have the liberty of interpreting law in its contextual and social setting keeping in view the social, economic, political, cultural, historical and geographical variation of the Indian society. The power of review and doctrine of overruling its earlier decisions has enabled the Supreme Court to effectuate the socio-economic contents of the constitutional mandate through the process of judicial interpretation and use of its inherent powers. The observation made by Hon'ble Justice K. Ramaswami deserves a special mention in

the context of realism in the interpretation of the Constitution and the law of the land. To quote his words, he remarked as follows:- “The Judge is the living oracle working in the dry light of realism pouring life and force into the dry bones of law to articulate the felt necessities of the time….

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