Lecture No 1

Meaning and kind of jurisprudence

Overview

The word *jurisprudence* derives from the Latin term *juris prudentia,* which means "the study, knowledge, or science of law." In the United States jurisprudence commonly means the philosophy of law. Legal philosophy has many aspects, but four of them are the most common:

1. The first and the most prevalent form of jurisprudence seeks to analyze, explain, classify, and criticize entire bodies of law. Law school textbooks and legal encyclopedias represent this type of scholarship.
2. The second type of jurisprudence compares and contrasts law with other fields of knowledge such as literature, economics, religion, and the social sciences.
3. The third type of jurisprudence seeks to reveal the historical, moral, and cultural basis of a particular legal concept.
4. The fourth body of jurisprudence focuses on finding the answer to such abstract questions as "What is law?" and "How do judges (properly) decide cases?"

It is a type of investigation into the essential principles of law and the legal systems (Salmond). It is the science of the first principles of civil law. The legal concepts like contracts, torts or criminal law consist of a set of rules. It has no such legal authority and further it has no practical application. The jurists have a free approach in their investigations. Further, the method of enquiry in jurisprudence is different from other legal subjects.

The questions answered are: What is law ?

What it is ,for a rule , to be legal rule ? What distinguishes law from morality, etiquette etc.,

The main fields of investigation are the following:

i) The nature of law, its sources: Administrative of Justice, statutory interpretation etc.,

ii) An analysis of:

a) The legal concepts of right and of its kinds and

b) Concepts like "intention", "negligence" "ownership" "possession" "persons" "liability", "obligations", Substantive and procedural laws" etc.

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JURISPRUDENCE

I. Definition of Jurisprudence

The word Jurisprudence will be used throughout the present Treatise to signify the science which teaches us to analyse and classify the rules of Justice. Justice is meant the due observance of Rights, and a Right is said to exist whenever one human being is morally entitled, in the opinion of the person speaking, to prevent or to compel, for his own benefit, the commission of a certain act by another. An act done or omitted in contradiction to an existing Right is a Wrong, and the habit of committing Wrongs is termed Injustice.

These definitions ought to be sufficient for the purpose of the present work, but no one who is acquainted with any branch of Moral Science will be surprised that I do not consider them likely to prove so. The Moralist, unlike the Physicist, is compelled to work with instruments which have been blunted by common use. His terms of art are already well known to his readers, some in a loose and popular and some in a narrow and technical, but all in some

popular and some in a narrow and technical, but all in some sense or other which is not precisely that, whatever it may be, in which he intends to use them. He will therefore perpetually fail to convey his true meaning, unless he can prevail upon the student to remember that words which he has been using all his life in one sense are now being used and reasoned upon in another. No mere positive statement is likely to be sufficient for this purpose. It is only by minutely specifying the distinctions between the various meanings which the word in question bears commonly and the particular meaning which it is to bear now, that the familiar sound can be prevented from bringing with it the familiar association.

It must moreover be remembered that every writer upon moral subjects, or upon subjects connected with Mo-

rality, is bound under peculiarly heavy penalties to make himself clearly understood. If he fails to do so, he runs the risk of being considered, not merely as a man who has undertaken to teach what he knows nothing about, but as a man who is endeavouring to teach what will injure and degrade human society. In the present work I shall frequently find it necessary to inquire how far certain acts, which all men justly regard as disgraceful and immoral, belong to that class of immoral acts which it is the duty of human Legislation to prohibit. It does not require the example of the great Spanish Casuists to show how easily and how fatally such speculations may be misunderstood. I therefore think it unnecessary to apologize for doing all that I can to make misunderstanding impossible.

I must first point out that, in defining Jurisprudence as the science which teaches us to analyse and classify the rules of Justice, I mean distinctly to exclude the idea that Jurisprudence teaches us, or can possibly teach us, what the rules of Justice *are*. Justice itself is an instinct, not a science. Its first principles must be taught by the conscience,

not by the intellect, and they are often most thoroughly felt and comprehended by men utterly incapable of tracing their remote consequences, or of applying them to any intricate combination of facts. The virtuous simplicity of an honest bigot like Clarkson, or of a religious visionary like Sharpe, rejects with abhorrence the sophistry which has deluded the practised acumen of Jurists like Eldon and Stowell. Jurisprudence, in short, is to Justice what Language is to Thought. The scientific philologist may only talk grammatical nonsense, and true eloquence or poetry has sometimes been expressed in the rude dialect of peasants or barbarians.

What I consider to be the true principles of Justice will appear hereafter. But it would, in the mean time, be a great mistake to suppose that a perfectly scientific system of Jurisprudence may not be constructed upon the basis of any Jural principles whatever. There is no Custom or Statute so

Jurisprudence of values

Jurisprudence of values or jurisprudence of principles is a school of legal philosophy. This school represents, according to some authors, a step in overcoming the contradictions of legal positivism and, for this reason, it has been considered by some authors as a post-positivism school Jurisprudence of values is referred to in various works all over the world. This modus of thinking of focuses on constitutional principles. The jurisprudence of values centers on the concepts of incidence and interpretation of the legal norm, as well as rules and principles, and concepts like equality, freedom, and justice.

Juridical norms

According to Pontes de Miranda "The juridical rule is the norm with which the man, willing to subordinate the events to an order and foreseeability, tries to distribute the life's goods". Mankind seeks to somehow control the facts; the juridical norm is used as a tool to decide what is right and wrong. The norm, according to this school, is seen as a creation of man, thus man is controlling man.

Pontes de Miranda explains the concept of *fact support*. Fact support is the fact that is previewed by the norm; it is the abstract fact; it is the fact that, if it is verified true in the *world of facts* the norm will *fall upon* it. In other words, there is a world of concrete facts and there is another world of ideas or *types*. Thus, the legislator tries to use words to group possible concrete facts

into sets, related to the world of ideas. This paradigm makes possible to attribute judicial effects to life's facts.

Purpose of Law – Concept of Justice

According to jurists like Prof. Sidgwick, the best indicator of a nation's political success is to see how it administers justice. Certain jurists also inculcate the concept of justice in their definitions of law itself. One of the most important functions of states is to ensure justice to their citizens. Every state must always possess the capability to administer justice according to its legal system. Even in ancient states, one of the primary duties of rulers was to guarantee justice to their subjects.

Meaning and Concept of Justice

In the most common terms, justice is an ideal representing something that is just and right. It basically means being just, impartial, fair and right. What is just may depend on the context, but its requirement is essential to the idea of justice.

For example, the natural law school of jurisprudence believes that justice means the implementation of religious laws. On the other hand,

modern jurisprudence says justice means the implementation of concepts like equality and liberty. However, in both these examples, justice just means enforcement of what the law perceives to be right.

In the modern context, justice basically means the recognition and implementation of laws made by legislatures. Furthermore, in the modern context, unlike ancient states, this function lies largely on judicial organs.

According to Salmond, laws are the bodies of principles that tribunals recognize and apply while administering justice. Even Roscoe Pound defines laws to mean principles that public tribunals recognize and enforce.

Therefore, justice generally means the recognition, application and enforcement of laws by courts. This is different from the understanding of justice in the ancient period when it was given a religious and moralistic meaning.

Purpose of Law – Meaning and Kinds

Law has defined as the body of rules of conduct or action that has been prescribed by the controlling authority and has a legal binding force. Also, the law must be followed and obeyed by all the citizens. Failing to do so will result in legal consequences of the law. In this article, we are helping you understand the kind meaning of the law.

Kind Meaning of the Law

Purpose of Law – Meaning and Kinds

In every country, the laws and the legal system are not always understood by the average citizen. Many people understand prohibiting laws like theft, murder, financial, physical harm, etc. But there are many laws that everyone needs to know.

Purposes of Law

Through the law, the information is passed on to the citizens every day in many various ways. Also, it is reflected in many branches of law. For example, contract law states that agreements need to exchange services, goods, or anything that is of value. Thus, it includes everything from purchasing a ticket to the trading options on the derivates market.

Furthermore, property law defines the duties and rights of people towards the property. This includes real estate along with their possessions. Also, it includes intangible property like shares of stock and bank accounts. Various offenses against state, federal, or local community in itself appeared as a subject of criminal law.

Thus, it provides the government to punish the offender. There are many purposes served by the law. Out of these, the main four are maintaining order, establishing standards, protecting liberties, and resolving disputes.

Purpose of Law – Justice, and Law Approaches of Different School

The Indian constitution in India is considered as the rule book in our country. It consists of clauses and articles for all the activities in the country. Law and justice ensure equality for every citizen and gives justice to all everyone.

Law and Justice – a Historical Background

The evolution in the legal aid came up for the first time in France in the year 1851. Also, it was during this time that the government introduced an act that provides legal help to needy people. While in India, this concept of law and justice, started in 1952.

In this year the government asked for legal help for the needy people in different law conferences. Also, in 1980 a committee was established that supervised the legal aid programs throughout the country.

Furthermore, the setting up of Lok Adalats is considered as another achievement in the field of legal aid in India. These courts were tasked to speed up the trial process in the country. Thus, it made the process of justice faster.

Furthermore, in 1987, the legal services authority act was established. Thus, the concept of legal aid to gain uniformity and a statutory base was formed. But it was in 1995, that the act was finally enforced by Hon. Mr. Justice R.N.Mishra.

There was a nationwide set-up along with the apex body being the national legal authority. Furthermore, they promoted that all individuals should get justice.

Also, it laid down the policies and principles so that legal services are available for all as per the constitution. There were certain measures being taken up so that the motive of legal aid cells can be fulfilled. Below are the measures which were implemented by the central authority:

- Legal aid facilities in jail
- Lok Adalats disposing of the cases
- Publicity to legal aid programs and schemes so to make people aware about the legal aid facilities
- Accrediting organizations and NGOs for spreading legal awareness

Lecture No 2

MAJOR THEORIES OF LAW

Q#6: Discuss the different theories about the nature of law?

Ans: Nature of law

Extradition is not practiced in civil cases. However, every state gives a remedy in its own courts for civil wrongs wherever they may be committed.

ENFORCEMENT OF LAW

The enforcement of law is territorial in the same way as a state is territorial. The territoriality of law flows from the political divisions of the world. No state allows other states to exercise powers of government within it. The enforcement of law is confined to the territorial boundaries of the state enforcing it.

PATON WRITES

Paton writes: "The purpose of law is essential to an understanding of its real nature, but the pursuit of justice is not the only purpose of law the law of any period serves many ends and those ends will vary as the decades roll by. To seek for one term which may be placed in a definition as the only purpose of law leads to dogmatism. The end that seems most nearly universal is that of securing order, but this alone is not an adequate description; indeed, Kelsen regards it as a pleonasm, since law itself is the order of which we speak."

DIFFERENCE BETWEEN JUSTICE AND LAW

We must distinguish clearly between justice and law, for each is a different conception. Law is that which is actually in force, whether it be evil or good. Justice is an ideal founded in the moral nature of man. The conception of justice may develop, as men's understanding develops, but justice is not limited by what happens in the actual world of fact. However, it is wrong. To regard law and justice as entirely unrelated.

There are theories of nature written below:

THE CONCEPT OF DIVINE LAW

"The divine laws are consists of those unwritten rules which are recognised among all men."

THE CONCEPT OF NATURAL LAW

From time to time, great writers have expressed their views on natural law or the law of nature. A reference in this connection may be

made to the views of Blackstone, Cicero, Aristotle, Hobbes, Grotius and Pufendorf.

ACCORDING TO SALMOND

According to Salmond: "By natural law or moral law is meant the principles of natural right and wrong – the principles of natural justice if we use the term justice in its widest sense to include all forms of rightful action."

ETERNAL LAW

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.

ADVANTAGES

Salmond points out that from a practical stand point, 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.

UNWRITTEN LAW

It is unwritten law and is not written on brazen tablets or pillars of stone but by the finger of nature in the heart of men. It is universally obeyed in all places and by all people.

THE CONCEPT OF IMPERATIVE LAW

Law in this sense means a rule which prescribes a general course of action imposed by some authority which enforces it by superior power, Either by physical force or any other form of compulsion."

ACCORDING TO SALMOND

According to Salmond: "Imperative law means a rule which prescribes a general course of action imposed by some authority which enforces it by superior power either by physical force or any other form of compulsion."

ESSENTIAL CHARACTERISTICS

Salmond refers to two essential characteristics of imperative law. The first characteristic is that the command of the sovereign must be in the form of a general rule.

The second characteristic of imperative law is that it should be enforced by some authority. The observance of law must not depend upon the pleasure of the people.

THE CONCEPT OF LAW MEANS TO END

Law is a social science and grows and develops in society with the growth and development of society. New developments in society create new problems and law is required to deal with those problems.

Laws are made for the welfare of all men.

Cardozo writes: "A principle of rule of conduct so established as to justify a prediction with reasonable certainty that it will be enforced by the courts if its authority is challenged is a principle or rule of law."

Holland says: "More briefly, law is general rule of eternal human action enforced by a sovereign political authority. All other rules for the guidance of human action are laws merely by analogy; and propositions which are not rules for human action are laws by metaphor only."

Ihering defines law as "the form of the guarantee of the conditions of life of society, assured by state's power of constraint." Law is treated only as a means of social control. It is to serve social prpose.

Demosthenes wrote: "Every law is a gift of God and a decision of sages."

THE CONCEPT OF LEGAL REALISM

Theories of legal realism like positivism, look on law as the expression of the will of the state, but see this as made through the medium of the courts.

Like Austin, the realist look on law as the command of the sovereign, but his sovereign is not parliament but the judges for the realist the sovereign is the court.

Positivism regards law as the expression of the will of the state through the medium of the legislature.

One version of realism was held by Salmond. All law he argued, is not made by the legislature.

THE CONCEPT OF GRADUAL DEVELOPMENT OF LAW

Law is a social science and grows and develops with the growth and development of society. New developments in society create new problems and law is required to deal with those problems: In order to keep pace with society, the definition and scope of law must continue to change. The result is that a definition of law given at a particular time cannot remain valid for all times to come and definition which is considered satisfactory today may be found narrow tomorrow.

GLIMPSES

1- The enforcement of law is territorial in the same way as a state is territorial.

2- The divine laws are consists of those unwritten rules which are recognised among all men."

3- According to Salmond. "By natural law or moral law is meant the principles of natural right and wrong the principles of natural justice if we use the term justice in its widest sense to include all forms of rightful action."

4- Natural law has been called divine law.

5- Natural law is unwritten and is not written on brazen tablets or pillars of stone but by the finger of nature in the heart of men.

6- Law is a social science and grows and develops in society with the growth and development in society create new problems and law is required to deal with those problems.

Q#7: Explain the imperative theory of Law? Enumerate its merits and demerits?

OR

Law and always imperative in nature according to John Austin. Give your arguments for and against this theory. (Annual 2001)

OR

Explain imperative theory of Law. Discuss its merits as well as demerits. (Supplementary 2000)

OR

Write a comprehensive note on imperative. Theory of Law. Is International Law imperative? (Annual 1995)

OR

Explain the theory of Imperative Law. Is moral Law imperative. Discuss (Annual 1998)

OR

Explain the concept of Imperative Law? Civil Law Imperative? Discuss. (Annual 1997)

Ans: **IMPERATIVE THEORY**

According to Salmond: "Imperative law means a rule which prescribes a general course of action imposed by some authority which enforces it by superior power either by physical force or any other form of compulsion:

Prof. Hobbes, propounded this theory but it is largely attributed to John Austin, due to whom it gained recognition and popularity. It is also known as the Austinian Theory.

Aurtin's theory of law is also known as the imperative theory of law. According to Austin, positive law has three main features. It is a type of command. It is laid down by a political sovereign. It is enforceable by a sanction.

EXAMPLE

A typical example would be the Road Traffic Act, 1960 which could be described as a command laid down by the sovereign under the English Legal System.

THE RELATION BETWEEN THE SOVEREIGN AND LAW

Austin puts great emphasis on the relation between law and sovereign. Law is law because it is made by the sovereign and sovereign is sovereign because it makes the law. The relation between the sovereign and law is the relation between the centre and the circumstance.

MERITS OF THE IMPERATIVE THEORY

SUITABLE FOR ALL SYSTEMS

Its simplicity and consistency are its chief characteristics. Totalitarian states, democratic system communism, martial law, all reflect in the integrity of this theory.

APPLICABLE TO MODERN SOCIETY

Allen asserts that this is the one theory which is applicable to modern societies and systems, primitive societies no doubt, have their history but the law of the modern civilised world is invarriably enforced by some kind of sanctions.

CLEAR DEFINITION OF LAW

This theory clearly recognises that law is the product of the state and depends on the physical force of the state exercised through its machinery for its existence.

DEMERITS

LAWS BEFORE STATE

Austin's theory of law has been criticised on many grounds. The definition of law in terms of state has been criticised by the jurists belonging to the historical and sociological schools. Critics belonging to the historical school concede that in modern societies where there are established states, laws may be in the nature of command, but there existed laws may be in the nature of command, but there existed laws even prior to the existence of the state. The law which existed prior to the state was not the command of the state.

GENERALITY OF LAW

According to Austin, law is a general rule of conduct, but that is not practicable in every sphere of law. A law in the sense of the Act of the legislature may be particular in the fullest sense of the word.

A Divorce Act is law even if it does not apply to all persons law, in the sense of the legal system, can be particular.

PROMULGATION

According to Austin, law is a command and that command has to be communicated to the people by whom it is meant to be obeyed or followed. This view of Austin is not tenable. Promulgation is usualy resorted to but it is not essential for the validity of a rule of law.

LAW AS COMMAND

According to Austin, law is a command of the sovereign but all laws cannot be expressed in the terms of a command. The greater part of a legal system consists of law which neither command nor forbid things to be done.

SANCTION

Austin's definition of law may be true of a monarchical police state, but it cannot be applied to a modern democratic country whose machinery is employed for the service of the people.

The sanction behind law is not the force of the state but the willingness of the people to obey the same.

Force can be used only against a few rebels and not against the whole society. If law is opposed by all the people, no force on earth can enforce the same.

It is true that there is such a thing as sanction in case of criminal law but no such sanction is to be found in case of civil law.

NOT APPLICABLE TO INTERNATIONAL LAW

Austin's definition of law cannot be applied to international law. Although international law is not the command of any sovereign, yet it is considered to be law by all concerned. The view of Austin was that international law was positive morality and he described it as "law by analogy."

NOT APPLICABLE TO CONSTITUTION LAW

Constitutional law is regarded law by all concerned and if the definition of Austin does not apply, that definition must be taken to be defective. Austin's definition of law does not apply to constitutional law which cannot be called a command of any sovereign. As a matter of fact, the constitutional law of a country defines the power of the various organs of the state. Nobody can be said to command himself. Even if one makes a command to bind one's self, it cannot have much force.

DISREGARD OF ETHICAL ELEMENTS

The main criticism of Salmond against Austin's theory of law is that it disregards the moral or ethical elements in law. The end of law is justice. Any definition of law without reference to justice is inadequate.

Austin's theory is silent about the special relation between law and justice. Austin's theory of law is defective in as much as it disregards that ethical element which is an essential constituent of a complete conception. Law is not right alone, or might alone, but the perfect union of the two.

The term "a law" is used in a concrete sense to denote statute e.g., the law of contract etc. However, the term "the law" is used in an abstract sense to denote legal principles in general.

PURPOSE OF LAW IGNORED

Imperative theory of sovereignty ignores altogether the purpose of law and hence is one sided and incomplete.

About Austin's view of law and sovereignty, Backland writes: This, at first sight, looks like circular reasoning. Law is law since it is made by the sovereign. The sovereign is sovereign because he makes the law." As it is put, the statement in undoubtedly circular. Law is defined in terms of the sovereign and the sovereign is defined in terms of the law. However, Austin did not do so.

The view of Sir Henry Maine is that Austin's theory is founded on a mere artific of speech and it assumes courts of justice to act in a way and from motives of which they are quite unconscious.

GLIMPSES

1- Austin puts great emphasis on the relation between law and sovereign.

2- This theory clearly recognises that law is the product of the state and depends on the physical force of the state exercised through its machinery for its existence.

3- The definition of law in terms of state has been criticised by the jurists belonging to the historical and sociological schools.

4- According to Austin, law is a general rule of conduct, but that is not practicable in every sphere of law.

5- Law is a command of the sovereign but all laws cannot be expressed in the terms of a command.

MAJOR THEORIES OF LAW

Different legal theories developed throughout societies. Though there are a number of theories, only four of them are dealt with here under. They are Natural, Positive, Marxist, and Realist Law theories. You may deal other theories in detail in your course on jurisprudence.

NATURAL LAW THEORY

Natural law theory is the earliest of all theories. It was developed in Greece by philosophers like Heraclitus, Socrates, Plato, and Aristotle. It was then followed by other philosophers like Gairus, Cicero, Aquinas, Gratius, Hobbes, Lock, Rousseau, Kant and Hume. In their studies of the relation between nature and society, these philosophers have arrived at the conclusion that there are two types of law that govern social relations. One of them is made by person to control the relations within a society and so it may vary from society to society and also from time to tome within a society. The other one is that not made by person but controls all human beings of the world. Such laws do not vary from place to place and from time to time and even used to control or weigh the laws made by human beings. These philosophers named the laws made by human beings as **positive laws** and the laws do not made by human being as **natural laws.**

Natural law is given different names based on its characteristics. Some of them are law of reason, eternal law, rational law, and principles of natural justice.

Natural law is defined by Salmond as “the principles of natural justice if we use the term justice in its widest sense to include all forms of rightful actions.” Natural law theory has served different societies in many ways. The Romans used it to develop their laws as *jus civile*, laws governing roman citizens, and *jus gentium*, laws governing all their colonies and foreigners.

The Catholic Pope in Europe during the middle age become dictator due to the teachings of Thomas Aquinas that natural law is the law of God to the people and that the pope was the representative of God on earth to equally enforce them on the subjects and the kings. At the late of the Feudalism stage, Locke, Montesque and others taught that person is created free, equal and independent by taking the concept of Natural law as the individual right to

life, liberty, and security. Similarly, Rousseau's teachings of individual's right to equality, life, liberty, and security were based on natural law. The English Revolution of 1888, the American Declaration of Independence and the French Revolution of 1789 were also results of the Natural law theory.

Despite its contribution, however, no scholar could provide the precise contents of the natural law. As a result, it was subjected to criticisms of scholars like John Austin who rejected this theory and latter developed the imperative called positive law theory.

POSITIVE LAW THEORY

Positive law theory is also called, imperative or analysts law theory. It refers to the law that is actually laid down by separating "is" from the law, which is "ought" to be. It has the belief that law is the rule made and enforced by the sovereign body of the state and there is no need to use reason, morality, or justice to determine the validity of law.

According to this theory, rules made by the sovereign are laws irrespective of any other considerations. These laws, therefore, vary from place to place and from time to time. The followers of this theory include Austin, Bentham and H.L.A Hart. For these philosophers and their followers law is a command of the sovereign to his/her subjects and there are three elements in it: command; sovereign; and sanction. Command is the rule given by the sovereign to the subjects or people under the rule of the sovereign. Sovereign refers to a person or a group of persons demanding obedience in the state. Sanction is the evil that follows violations of the rule.

This theory has criticized by scholars for defining law in relation to sovereignty or state because law is older than the state historically and this shows that law exists in the absence of state. Thus, primitive law (a law at the time of primitive society) serves the same function as does mature law [Paton; 1967: 72-3].

With regard to sanction as a condition of law in positive law, it is criticized that the observance of many rules is secured by the promise of reward (for example, the fulfilment of expectations) rather than imposing a sanction. Even though sanction plays a role in minority who is reluctant, the law is obeyed because of its acceptance by the community "habit, respect for the law as such, and a desire to reap the rewards which legal protection of acts will bring" are important factors the law to be obeyed [Paton; 1967:74]

The third main criticism of definition of law by Austin (positive law theory) is that it is superficial to regard the command of the sovereign as the real source of the validity of law. It is argued that many regard law as valid because it is

the expression of natural justice or the embodiment of the sprit of people [Paton; 1967: 77].

MARXIST LAW THEORY

Marxists believe that private property is the basis for the coming into existence of law and state. They provide that property was the cause for creation of classes in the society in which those who have the means of production can exploit those who do not have these means by making laws to protect the private property. They base their arguments on the fact that there was neither law nor state in primitive society for there was no private property. The theory has the assumption that people can attain a perfect equality at the communism stage in which there would be no private property, no state and no law. But, this was not yet attained and even the practice of the major countries like the former United Soviet Socialist Russia (U.S.S.R.) has proved that the theory is too good to be turn[Beset; 2006]. Nevertheless, this theory is challenged and the theory of private property triumphs.

REALIST THEORY OF LAW

Realist theory of law is interested in the actual working of the law rather than its traditional definitions. It provides that law is what the judge decides in court. According to this theory, rules not put to use to solve practical cases are not laws but merely existing as dead words and these dead words of law get life only when applied in reality. Therefore, it is the decision given by the judge but not the legislators that is considered as law according to this theory. Hence, this theory believes that the lawmaker is the judge and not the legislative body.

This theory has its basis in the common law legal system in which the decision previously given by a court is considered as a precedent to be used as a law to decide future similar case. This is not applicable in civil law legal system, which is the other major legal system of the world, and as a result this theory has been criticized by scholars and countries following this legal system for the only laws of their legal system are legislation but not precedents. This implies that the lawmaker in civil law legal system is the legislative body but not the judge. The followers of this theory include Justice Homes, Lawrence Friedman, John Chpman Gray, Jerom Frank, Karl N. Lewelln and Yntema.

Lecture No 3

Schools of Jurisprudence

Introduction

Jurisprudence is the study or philosophy of law. Various Jurisprudence thinkers and scholars have tried to explain it in the general form for the more profound understanding of the lawmaking process. Modern-day **jurisprudence** started in

the **eighteenth century** and was centred on the primary standards of natural law, civil law, and the law of nations.

General jurisprudence can be separated into classifications both by the sort of inquiry researchers look to reply and by the hypothesis of jurisprudence, or schools of thought, in regards to how those inquiries are best replied. Contemporary rationality of law, which manages general jurisprudence mainly delivers issues under the law and legitimate frameworks and it also with issues of law as a social establishment that identifies with the more significant political and social setting in which it exists.

Schools of Jurisprudence

Jurisprudence is the hypothesis and investigation of law. It considers the cause and idea of law. Law has an unpredictable idea. Its comprehension differs from individuals to individuals. Everybody has an alternate perception of the law. The article discusses the five **schools of Jurisprudence** viz.

- Philosophical School
- Historical School
- Realist School
- Sociological School
- Analytical School

Philosophical School

The philosophical or moral school concerns itself mainly with the connection of law to specific thoughts which law is intended to accomplish. It tries to explore the reasons for which a particular law has been established. It isn't related to its recorded or scholarly substance. The eminent law specialists of this school are **Grotius** (1583-1645), **Immanuel Kant (1724-1804) and Hegel (1770-**

1831). These law specialists see law neither as the discretionary order of a ruler nor concerning the making of recorded need. To them, the law is the result of human reason and its motivation is to hoist and praise human identity.

New speculations supporting the sway of the state were propounded by pragmatist Polito-legitimate masterminds. For example, Machiavelli, Jean Bodin. Because of these advancements, transient expert of the Church and the natural religious law got a genuine blow.

Lastly, it dwindled offering approach to inherent privileges of man and the state. The natural law hypothesis propounded by **Grotius, Locke and Rousseau** altered the current organisations and held that '**social contract'** was the premise of the general public. Hobbes utilised natural law hypothesis to propagate reactionary development and legitimise business as usual for the safeguarding of harmony and insurance of people from never-ending struggle and disarray. Thus, the views of Scholars represent the **Philosophical thought** of the School itself.

Lecture No 4

Grotius

Hugo Grotius (1583–1645), a well known legal scholar in the **Dutch Republic and established frameworks for universal law**, in light of natural law. Grotius expelled the natural law from the locale of good scholars and made it the matter of lawyers and thinkers, by declaring that by their very nature, natural laws were definitive in themselves, with or without confidence in God.

He held that the ethical morals of natural law connected to all social and sane creatures, Christian and non-Christian alike. **Grotius** additionally advanced the idea of **"Simply War**" as a war which was required by natural, national and celestial law in specific situations.

Hobbes

Thomas Hobbes discovered the **social contractual hypothesis** of legal positivism. He proclaimed that all men could concur that what they looked for **(bliss)** was liable to dispute, yet that a comprehensive accord could conform to what they dreaded (savage demise on account of another, and loss of freedom and individual property). Natural law was characterised as how a sound person, looking to endure and flourish, would act.

It could be found by thinking about mankind's natural rights, prior understandings had determined **natural rights** by thinking about natural law. As Hobbes would like to think, the primary way that natural law could win was by all men submitting to the directions of a sovereign. A definitive source of law currently turned into the sovereign, who was in charge of making and upholding laws to oversee the conduct of his subjects.

Locke

John Locke (1632–1704) is among the most **persuasive political thinkers** of the difficult period. He safeguarded the case that men are commonly free and equivalent against claims that God had made all individuals naturally subject to a ruler. He contended that individuals have rights, for example, the privilege to life, freedom, and property that has an establishment autonomous of the laws of a specific culture.

Locke utilized the case that men are naturally free and equivalent as a significant aspect of the defense for understanding real political government as an after effect of a social contract where individuals in the **condition of nature** restrictively exchange a portion of their rights to the legislature so as to all the more likely guarantee the steady, agreeable happiness regarding their lives, freedom, and property. Locke additionally protects the guideline of dominant party rule and the division of administrative and official forces.

Hegel

Hegel was the most **persuasive scholar** of the philosophical school. His framework is a necrotic one. As per him "**the state and law both are developmental**."

The extraordinary commitment of Hegel to philosophical school is the improvement of the possibility of advancement. As per him, the different appearances of social life, including law are the result of a developmental, unique procedure. This procedure includes **rationalistic structure, uncovering itself in theory, absolute opposite** and **blend.** The human soul sets a proposition which ends up present as the main thought of a specific recorded age.

Rousseau

Jean-Jacques Rousseau (1712 – 1778) trusted current man's **enslavement** to his very own requirements was in charge of a wide range of societal ills, from misuse and mastery of others to poor confidence and despondency. Rousseau trusted that great government must have the opportunity of every one of its natives as its most key goal.

The **Social Contract**, specifically, is Rousseau's endeavour to envision the type of government that best avows the individual opportunity of every one of its natives, with specific limitations natural to an intricate, present day, civil society.

Rousseau recognised that as long as property and laws exist, individuals can never be as utterly free in present-day society as they are in the condition of nature, a point later reverberated by Marx and numerous other Communist and rebel social thinkers.

Regardless, Rousseau unequivocally had confidence in the presence of specific standards of government that whenever authorised, can bear the cost of the individuals from society, a dimension of opportunity that at any rate which approximates the opportunity appreciated in the condition of nature.

Kant

Kant gave current reasoning another premise which no consequent philosophy could overlook. The Copernican Turn' which he provided for philosophy was to supplant the mental and exact strategy by the basic technique by an endeavour to base the reasonable character of life and a world not on the perception of actualities and matter but rather on human cognisance itself.

According to **Kant** "*the opportunity of man act as indicated by his will and the moral proposes are commonly co-relative because no moral hypothesise is conceivable without man's opportunity of self-assurance*".

Lecture No 4

Historical School

Historical school of jurisprudence trusts that law is a result of a long historical advancement of the general public since it starts from the social custom shows ethical standards, monetary requirements and relations of the general population.

As indicated by this hypothesis**, the law is the result of the powers and impact of the past**. Law depends on the general awareness of individuals. The cognisance began from the earliest starting point of the general public because there was no individual like sovereign for the making of law.

Savigny, Sir Henry Maine and Edmund Burke are the eminent legal jurists of this school.

Savigny is viewed as the originator of the historical school. He has given the **Volksgeist theory**. As indicated by this theory, the law depends on the general will or through and through the freedom of ordinary citizens. He says that **law develops with the development of Nations increments with it and passes on with the disintegration of the countries.** Along these lines, the law is a national character of **the cognisance of individuals.**

This school does not connect much significance to the connection of law to the state yet offers importance to the social establishments in which the law creates itself. While the investigative school pre-assumes the presence of a very much established legal framework.

The historical school focuses on the development of law from the crude legal organisations of the antiquated networks. The undertaking of the historical

school is to manage the general standards administering the root and advancement of law and with the impact that influences the law.

Historical legal advisers ousted the moral thought from jurisprudence and rejected all imaginative interest of judge and law specialist or lawgivers really taking the shape of the law.

Volksgeist Theory

Savigny takes a shot at the law of ownership (Das Recht Des Vestiges) which was distributed in 1803 is said to be the beginning stage of Savigny's historical jurisprudence. He solidly trusted that all law is the confirmation of **ordinary mindfulness** (an indication of regular cognisance) of the general population which develops with the development and reinforces with the quality of the general population and thus diminishes as the country loses its **nationality.**

The beginning of law lies in the well-known soul of the general population which Savigny named as '**Volksgeist**'.

Law has a national character, and it creates a language and ties individuals into one entire due to their primary religions, convictions, and feelings. Law develops with the development of the general public and increases its quality from the general public itself lastly, it wilts away as the country loses its nationality. Law, language, custom, and governments have a no different presence from the general population who tail them.

At the most particular stage, law grows consequently, as indicated by the interior needs of the network. Yet, after a specific dimension when it achieves civilisation, it has an incredible task to carry out.

As a two-part harmony good example between the controller of general national life and as an unmistakable order for study, i.e., performing, controlling and

managing the national exercises just as considering it by experts as law specialists, phonetics, anthropologists, researchers and so on.

In straightforward terms, it tends to be named as the political component of law and juristic component and both assume a large job in the advancement of law.

Savigny was not absolutely against the codification of the German law on the French example around then since Germany was then partitioned into a few small states and its statutes were **crude, prudish and needed consistency**. He expressed that the German law could be classified when there is a **commonness of one law** and one language all through the nation. Since **Volksgeist** had not satisfactorily created around then, in this way, codification would have beset the development and development of law.

Following out the advancement of law from **Volksgeist**, Savigny considered its development as a nonstop and unbreakable procedure bound by necessary culture, customs, and convictions. He needed German law to be created on the example of **Roman law**. As indicated by him, the codification of law may hamper its consistent development, and when the legal framework gets entirely created and built up, then the codification may happen.

Regardless of specific criticisms, Savigny's legal theory denoted the start of the **cutting edge jurisprudence.** His theory of **Volksgeist** translated jurisprudence as far as individuals' will as it laid more noteworthy accentuation on the connection of law and society. What's more, is that this theory came as a **rebel** against the eighteenth-century **natural law theory and explanatory positivism.**

The quiet essence of Savigny's Volksgeist theory was that a country's legal framework is incredibly affected by the historical culture and customs of the general population and the development of law is to be situated in their prevalent acknowledgement.

Lecture No 5

Schools of Jurisprudence

Realist School

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 serving specific social closures and concentrate any given cross-segment of it to discover to what degree these finishes are being served.
3. 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.

Sociological School

The sociological school of jurisprudence developed as the blend of different juristic contemplations. The types of this school treat law as a social wonder. As indicated by them, the law is a social capacity, an outflow of human culture concerning the external relations of its individual individuals. **Montesquieu, Auguste Comte, Herbert Spencer, Duguit and Rosco Pound** are the prominent legal advisers of this school.

This type of school laid more prominent weight on the **utilitarian part** of the law as opposed to its **conceptual substance.** They view the law as a social organisation connected with their orders bearing a direct effect on society.

The historical school, which was a response to the ultimate independence of the nineteenth century by its accentuation on the **Volkgeist soul** of the general

population demonstrated that law and the social condition wherein creates are personally related. This thought was worked out by legal advisers of sociological school.

Before the nineteenth-century matters like wellbeing, welfare, training, and so on were not the worry of the state. In the nineteenth century, state, on account of the antagonistic impacts of free enterprise turned out to be increasingly more worried about various issues including practically all parts of life and welfare. This inferred guideline through the law, which constrained legal theory to straighten out itself to assess social wonders.

Ehrlich (1862-1922), a famous legal adviser of sociological school, essentially clarified the **social premise of law.** For him, the law is gotten from social realities and depends not on state expert but rather on social impulse. Law, he said contrasts a little from different types of **social impulse** and the state is simply one among numerous affiliations, however, indeed it has specific qualities methods for impulse.

The genuine wellspring of law isn't rules or announced cases, however, the exercises of society itself. There is a "**living law**" basic the formal guidelines of the legal framework and it is the assignment of the judges and the legal advisers to incorporate these two kinds of law.

Roscoe Pound is viewed as a standout amongst the most noted American Sociological legal scholars of the twentieth century. Kohler's methodology, **truth is told**, motivated Roscoe Pound the most for propounding the theory of social designing and the adjusting of social interests. **Kohler** attests that all laws are relative and moulded by the civilization where they emerge.

The possibility of law needs to pursue the all inclusive thought of human civilisation and the significance of **civilisation** is the social improvement of human parts towards their most astounding conceivable unfurling. The

development of civilization results from the battle between the human personality separating itself from nature and the item matter of develop.

The assignment of law following the advancement of civilization is both to keep up existing qualities and to make new ones for the further improvement and unfurling of human forces. Each **civilisation** has a certain country which hypothesises thoughts of rights to be made successful by legal Institution.

Legal materials must be moulded to offer impact to those hypothesises and officials, judges, legal scholars must mole to the law as per them. For **Pound**, the law is a requesting of lead in order to cause the merchandise of presence and the methods for fulfilling professes to go Round quite far with the least grinding and waste. Pound views these cases as interests which exist autonomously of the law and which are squeezing for acknowledgement and security.

Equity Oliver Windell Holmes thought about law as a way to ensure and advance the aggregate gathering interests as contrasted and individual interests. Therefore, he moved toward law in a down to earth way, receiving a sensible frame of mind to dissect its working in the **general public**.

He apropos commented, "life of law has not been rationale, it has been involvement" which implied that while deciding the law and legal guidelines by which men ought to be administered, the lawyers and judges must mull over the requirements of the time, common good and political statutes, public policy and the public feeling.

Roscoe pound considered law as a `**social engineering**` its primary assignment being to quickens the procedure of social requesting by endeavouring every single imaginable exertion to maintain a strategic distance from irreconcilable circumstances of people in the general public. Along with these lines, courts, officials, heads and legal scholars must work with an arrangement and try to keep up a harmony between the contending interests in the public eye. He

specifies different benefits which the law should look to secure and arranged them into various general classes.

In Case-**Animal and environment legal defence fund vs Union of India & Ors.**

The **Supreme Court** connected the standards of Economic supportability and condition assurance. The court thus ruled that if the townspeople are not allowed angling, their employment will be decimated. If they are allowed, there will be a threat to nature.

Henceforth the **Supreme Court** requested the concerned woodland specialists and the board established to find a way to secure the resources of earth without disrupting the employment of the locals. They will watch the locals and give reasonable guidelines for them. They will be instructed on the significance of the condition. The locals ought not to enter in other territories acknowledges to the lakes on which they are given angling rights.

Principle

The Supreme Court connected sociological methodologies for this situation for the welfare of tribals, whose wellspring of the job is angling. For this situation, yet besides in each ecological case, the sociological methodology of their lordship is perfectly clear. Their lordships regularly state that "law is a social building".

It might be expressed that pound's characterisation of interests in his theory of social designing can't be said to be idiot proof, and one may discover some covering of benefits all over. Pound himself acknowledged that the different benefits of people in the general public must be extensively grouped and they can't be put in watertight compartments. Julius stone has rejected the division of public affairs and social interests on the ground that in actuality, they are on the full social benefits.

Pounds handled the issue of interests as far as adjusting of individual and social interests. It is through the instrumentality of law that these interests are tried to be accommodated. As Justice Cardozo accurately commented, "Pound endeavoured to stresses the requirement for judicial attention to the social qualities and interests".

Lecture No 6

Analytical School

Analytical school is otherwise called the Austinian school since this methodology is set up by John Austin. It is likewise called as an imperative school since it regards law as the direction of the sovereign. Dias terms this methodology as "Positivism" as the topic of the school is certain law. The analytical school picked up unmistakable quality in the nineteenth century. His methodology was mainstream, positivistic and exact. Truth be told, it was Austin who propounded the theory of positive law, the establishment of which was laid by Bentham.

Jeremy Bentham can be said to be the author of the Analytical school. In one of his books, he dismissed the principles of natural law and expounded the rule of utility with logical accuracy. He isolated jurisprudence into explanatory and censorial. The previous arrangements with the law all things considered while the last arrangements with the law as it should be.

Bentham's examination of **censorial jurisprudence** is demonstrative of the way that the effect of natural law had not totally vanished that is the reason he discussed utility as the overseeing rule. Maybe, as a result of this reason, Bentham isn't usually known as the f**ather of analytical school**. He, in any case, trusts that law is a **result of state** and **sovereign.** Bentham's idea of law is an imperative one for which he alluded the expression "command."

Austin gave the primary precise and extensive treatment on a subject which expounded the analytical positivist methodology, and because of this work, Austin is known as the father of the Analytical School. He constrained the extent of jurisprudence and endorsed its limits. His methodology was analytical. The investigation was by him "the **standard strategy"** to concentrate in the fields of jurisprudence. Austin based on the establishment of explanatory jurisprudence laid by Bentham and did not worry about additional legal standards. He recognised the investigation of enactment and law from ethics.

To **Austin,** jurisprudence implied the formal examination of legal originations. He isolates jurisprudence into **general jurisprudence and specific jurisprudence**. Austin accepting a legal framework as it is that is specific law and settled it into its **crucial origination.** Positive law is the result of state and sovereign and is not the same as profound positive quality.

Kelson's theory of law which is known as the pure theory of law suggests that law must stay free from Social Sciences like brain research, human science or social history. Kelson's point was to build up an investigation of law which will be pure as in it will carefully shun all powerful, moral, mental and sociological components.

Salmond surrenders the endeavour to locate the general components in law by characterising jurisprudence as an art of civil law. As indicated by him, there is not at all like general component in law since it is the exploration of the **law of the land(lex loci)** and is subsequently adopted by elements which win in a specific state. He manages low for what it's worth however law to him is to be characterised not as far as the sovereign but rather as far as courts.

Law is something which exudes from courts as it were. He didn't concur with Austin that **examination of law** should be possible with the assistance of rationale alone. He calls attention to that the **investigation of jurisprudence** which disregards moral and historical viewpoints will turn into a desolate report.

Thus, in a nutshell, the theory deals with the following aspects.

- An Analysis of the origination of **civil law.**
- The investigation of different relations between **civil law and other types of law.**
- An investigation into the logical game plan of law.
- A record of **legal sources** from which the law continues.
- The investigation of the **theory of obligation.**
- The investigation of the origination of legal rights and obligations.
- To research such legal ideas as property, contracts, people acts, and aim, and so forth.

Conclusion

Jurisprudence is the scientific study of law. It is a kind of science that investigates the creation, application, and requirement of laws. Jurisprudence is the investigation of theories and methods of insight in regards to the law. It has **viable and instructive esteem.**

There are five schools of jurisprudence. Although the schools of the law tried to eradicate some of the shortcomings in the lawmaking and enacting procedures, there has to be an analysis and study to **rapport the claim of the purpose and rationale** behind the law. Moreover, the enactment of law should be looked at from a practical approach rather than a theoretical one.

Lecture No 7

Sociological jurisprudence

An effort to systematically to inform jurisprudence from sociological insights developed from the beginning of the twentieth century, as sociology began to establish itself as a distinct social science, especially in the United States and in continental Europe. In Germany, Austria and France, the work of the "free law" theorists (e.g. Ernst Fuchs, Hermann Kantorowicz, Eugen Ehrlich and Francois Geny) encouraged the use of sociological insights in the development of legal and juristic theory. The most internationally influential advocacy for a "sociological jurisprudence" occurred in the United States, where, throughout the first half of the twentieth century, Roscoe Pound, for many years the Dean of Harvard Law School, used this term to characterise his legal philosophy. In the United States, many later writers followed Pound's lead or developed distinctive approaches to sociological jurisprudence. In Australia, Julius Stone strongly defended and developed Pound's ideas. In the 1930s, a significant split between the sociological jurists and the American legal realists emerged. In the second half of the twentieth century, sociological jurisprudence as a distinct movement declined as jurisprudence came more strongly under the influence of analytical legal philosophy; but with increasing criticism of dominant orientations of legal philosophy in English-speaking countries in the present century, it has attracted renewed interest. Increasingly, its contemporary focus is on providing theoretical resources for jurists to aid their understanding of new types of regulation (for example, the diverse kinds of developing transnational law) and the increasingly important interrelations of law and culture, especially in multicultural Western societies

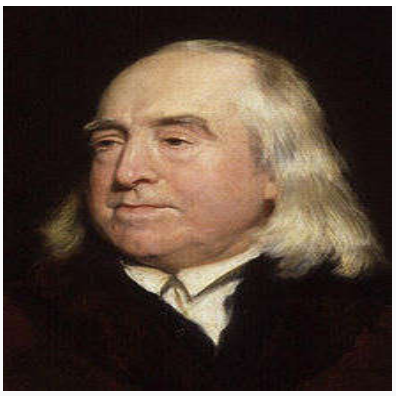
Legal positivism

Legal positivism is the view that the content of law is dependent on social facts and that a legal system's existence is not constrained by morality. Within legal positivism, theorists agree that law's content is a product of social facts, but theorists disagree whether law's validity can be explained by incorporating moral values. Legal positivists who argue against the incorporation of moral values to explain law's validity are labeled exclusive (or hard) legal positivists. Joseph Raz's legal positivism is an example of exclusive legal positivism. Legal positivists who argue that law's validity can be explained by incorporating moral values are labeled inclusive (or soft) legal positivists. The legal positivist theories of HLA Hart and Jules Coleman are examples of inclusive legal positivis.

Thomas Hobbes

Hobbes was a social contractarian and believed that the law had peoples' tacit consent. He believed that society was formed from a state of nature to protect people from the state of war that would exist otherwise. In Leviathan, Hobbes argues that without an ordered society life would be "solitary, poor, nasty, brutish and short. It is commonly said that Hobbes's views on human nature were influenced by his times. The English Civil War and the Cromwellian dictatorship had taken place; and, in reacting to that, Hobbes felt that absolute authority vested in a monarch, whose subjects obeyed the law, was the basis of a civilized society.

Bentham and Austin



Bentham's utilitarian theories remained dominant in law until the twentieth century

John Austin and Jeremy Bentham were early legal positivists who sought to provide a descriptive account of law that describes the law as it is. Austin explained the descriptive focus for legal positivism by saying, "The existence of law is one thing; its merit and demerit another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry." For Austin and Bentham, a society is governed by a sovereign who has de facto authority. Through the sovereign's authority come laws, which for Austin and Bentham are commands backed by sanctions for non-compliance. Along with Hume, Bentham was an early and staunch supporter of the utilitarian concept, and was an avid prison reformer, advocate for democracy, and firm atheist. Bentham's views about law and jurisprudence were popularized by his student John Austin. Austin was the first chair of law at the new University of London, from 1829. Austin's utilitarian answer to "what is law?" was that law is "commands, backed by threat of sanctions, from a sovereign, to whom people have a habit of obedience".HLA Hart criticized Austin and Bentham's early legal positivism because the command theory failed to account for individual's compliance with the law.

Hans Kelsen

Hans Kelsen is considered one of the prominent jurists of the 20th century and has been highly influential in Europe and Latin America, although less so in common-law countries. His Pure Theory of Law describes law as "binding norms", while at the same time refusing to evaluate those norms. That is, "legal science" is to be separated from "legal politics". Central to the Pure

Theory of Law is the notion of a "basic norm" (Grundnorm)'—a hypothetical norm, presupposed by the jurist, from which all "lower" norms in the hierarchy of a legal system, beginning with constitutional law, are understood to derive their authority or the extent to which they are binding. Kelsen contends that the extent to which legal norms are binding, their specifically "legal" character, can be understood without tracing it ultimately to some suprahuman source such as God, personified Nature or—of great importance in his time—a personified State or Nation.

HLA Hart

In the English-speaking world, the most influential legal positivist of the twentieth century was HLA Hart, professor of jurisprudence at Oxford University. Hart argued that the law should be understood as a system of social rules. In The Concept of Law, Hart rejected Kelsen's views that sanctions were essential to law and that a normative social phenomenon, like law, cannot be grounded in non-normative social facts.

Hart claimed that law is the union primary rules and secondary rules. Primary rules require individuals to act or not act in certain ways and create duties for the governed to obey. Secondary rules are rules that confer authority to create new primary rules or modify existing ones. Secondary rules are divided into rules of adjudication (how to resolve legal disputes), rules of change (how laws are amended), and the rule of recognition (how laws are identified as valid). The validity of a legal system comes from the "rule of recognition," which is a customary practice of officials (especially barristers and judges) who identify certain acts and decisions as sources of law. In 1981, Neil MacCormick[wrote a pivotal book on Hart (second edition published in 2008), which further refined and offered some important criticisms that led MacCormick to develop his own theory (the best example of which is his Institutions of Law, 2007). Other important critiques include those of Ronald Dworkin, John Finnis, and Joseph Raz.

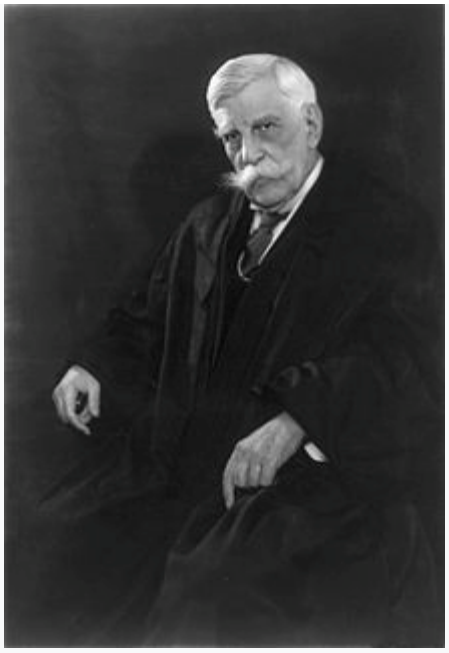
In recent years, debates on the nature of law have become increasingly fine-grained. One important debate is within legal positivism. One school is sometimes called "exclusive legal positivism" and is associated with the view that the legal validity of a norm can never depend on its moral correctness. A second school is labeled "inclusive legal positivism", a major proponent of which is Wil Waluchow, and is associated with the view that moral considerations may, but do not necessarily, determine the legal validity of a norm.

Joseph Raz

Joseph Raz's theory of legal positivism argues against the incorporation of moral values to explain law's validity. In Raz's 1979 book The Authority of Law, he criticised what he called the "weak social thesis" to explain law. He formulates the weak social thesis as "(a) Sometimes the identification of some laws turn on moral arguments, but also with, (b) In all legal systems the identification of some law turns on moral argument." Raz argues that law's authority is identifiable purely through social sources, without reference to moral reasoning. This view he calls "the sources thesis." Raz suggests that any categorisation of rules beyond their role as

authority is better left to sociology than to jurisprudence. Some philosophers used to contend that positivism was the theory that held that there was "no necessary connection" between law and morality; but influential contemporary positivists—including Joseph Raz, John Gardner, and Leslie Green—reject that view. As Raz points out, it is a necessary truth that there are vices that a legal system cannot possibly have (for example, it cannot commit rape or murder).

Legal realism



Oliver Wendell Holmes was a self-styled legal realist

Legal realism is the view that a theory of law should be descriptive and account for the reasons why judges decide cases as they do. Legal realism had some affinities with the sociology of law and sociological jurisprudence. The essential tenet of legal realism is that all law is made by humans and thus should account for reasons besides legal rules that led to a legal decision.

There are two separate schools of legal realism: American legal realism and Scandinavian legal realism. American legal realism grew out of the writings of Oliver Wendell Holmes. At the start of Holmes's The Common Law, he claims that “[t]he life of the law has not been logic: it has been experience. This view was a reaction to legal formalism that was popular the time due to the Christopher Columbus Langdell. Holmes's writings on jurisprudence also laid the foundations for the predictive theory of law. In his article "The Path of the Law," Holmes argues that "the object of [legal] study...is prediction, the prediction of the incidence of the public force through the instrumentality of the courts.

For the American legal realists of the early twentieth century, legal realism sought to describe the way judges decide cases. For legal realists such as Jerome Frank, judges start with the facts before them and then move to legal principles. Before legal realism, theories of jurisprudence

turned this method around where judges were thought to begin with legal principles and then look to facts.

It has become common today to identify Justice Oliver Wendell Holmes, Jr., as the main precursor of American Legal Realism (other influences include Roscoe Pound, Karl Llewellyn, and Justice Benjamin Cardozo). Karl Llewellyn, another founder of the U.S. legal realism movement, similarly believed that the law is little more than putty in the hands of judges who are able to shape the outcome of cases based on their personal values or policy choices.

The Scandinavian school of legal realism argued that law can be explained through the empirical methods used by social scientists. Prominent Scandinavian legal realists are Alf Ross, Axel Hägerström, and Karl Olivecrona. Scandinavian legal realists also took a naturalist approach to law.

Despite its decline in popularity, legal realism continues to influence a wide spectrum of jurisprudential schools today, including critical legal studies, feminist legal theory, critical race theory, sociology of law, and law and economics.

Critical legal studies]

Critical legal studies are a new theory of jurisprudence that has developed since the 1970s. The theory can generally be traced to American legal realism and is considered "the first movement in legal theory and legal scholarship in the United States to have espoused a committed Left political stance and perspective". It holds that the law is largely contradictory, and can be best analyzed as an expression of the policy goals of a dominant social group.

Critical rationales

Karl Popper originated the theory of critical rationalism. According to Reinhold Zippelius many advances in law and jurisprudence take place by operations of critical rationalism. He writes, "daß die Suche nach dem Begriff des Rechts, nach seinen Bezügen zur Wirklichkeit und nach der Gerechtigkeit experimentierend voranschreitet, indem wir Problemlösungen versuchsweise entwerfen, überprüfen und verbessern" (that we empirically search for solutions to problems, which harmonise fairly with reality, by projecting, testing and improving the solutions).

Legal interpretive

American legal philosopher Ronald Dworkin's legal theory attacks legal positivists that separate law's content from morality. In his book Law's Empire, Dworkin argued that law is an "interpretive" concept that requires barristers to find the best-fitting and most just solution to a legal dispute, given their constitutional traditions. According to him, law is not entirely based on social facts, but includes the best moral justification for the institutional facts and practices that form a society's legal tradition. It follows from Dworkin's view that one cannot know whether a society has a legal system in force, or what any of its laws are, until one knows some truths about the moral justifications of the social and political practices of that society. It is consistent with Dworkin's view—in contrast with the views of legal positivists or legal realists—that no-one in a

society may know what its laws are, because no-one may know the best moral justification for its practices.

Interpretation, according to Dworkin's "integrity theory of law", has two dimensions. To count as an interpretation, the reading of a text must meet the criterion of "fit". Of those interpretations that fit, however, Dworkin maintains that the correct interpretation is the one that portrays the practices of the community in their best light, or makes them "the best that they can be". But many writers have doubted whether there is a single best moral justification for the complex practices of any given community, and others have doubted whether, even if there is, it should be counted as part of the law of that community.

Lecture No 8

CLASSIFICATIONS OF LAW

The classifications of law are the different categories into which all areas of law can be collated. A particular classification of law encompasses all types of law but it distributes them according to a particular unique characteristic.

The following are the major classifications of law:

1. Public and Private Law
2. Civil Law and Criminal Law
3. Substantive and Procedural Law
4. Municipal and International Law
5. Written and Unwritten Law
6. Common Law and Equity

1. Public and Private Law: Public Law can be defined as that aspect of Law that deals with the relationship between the state, its citizens, and other states. It is one that governs the relationship between a higher party — the state — and a lower one, the citizens. Examples of public law include Constitutional Law, Administrative Law, Criminal Law, International Law and so on.

Private law, on the other hand, is that category of the law that concerns itself with the relationship amongst private citizens. Examples include the Law of Torts, the Law of Contract, the Law of Trust and so on.

2. Civil Law and Criminal Law: Civil law in this regard can be defined as the aspect of Law that deals with the relationship between citizens and provides means for remedies if the right of a citizen is breached. Examples of civil law include the Law of Contract, the Law of Torts, Family Law etc.

Criminal Law, on the other hand, can be referred to as that aspect of Law that regulates crime in the society. It punishes acts which are considered harmful to the society at large. An example of criminal law is the **Criminal Code Act** which is applicable in the Southern part of Nigeria.

When treating a criminal case, the standard of proof to be used is proof beyond reasonable doubt; **S.135 Evidence Act 2011**. Also, the burden of proof does not shift from the prosecution. What this means is that before a conviction can be gotten, the state has to prove the commission of the crime to be beyond reasonable doubt.

On the other hand, in civil cases, the standard of proof is on the balance of probabilities; **S.134 Evidence Act 2011**. Also, the burden of proof shifts between both parties when they need to establish their case. Judgement normally goes in favour of the particular party that has been able to prove its case more successfully.

3. Substantive and Procedural Law: Substantive Law is the main body of the law dealing with a particular area of law. For example, the substantive law in relation to Criminal Law includes the **Criminal Code Ac**t and the **Penal Code Act**.

Procedural law, on the other hand, is law in that deals with the process which the courts must follow in order to enforce the substantive law. Examples include the rules of the various courts and the **Administration of Criminal Justice Act 2015**, which is the procedural law in relation to the **Criminal Code Act** and the **Penal Code Act**.

4. Municipal/Domestic and International Law: Municipal/Domestic law is the aspect of law which emanates from and has effect on members of a specific state. An example of a municipal Nigerian law is the **Constitution of the Federal Republic of Nigeria 1999(as amended)** which applies in only Nigeria.

International law, on the other hand, is the law between countries. It regulates the relationship between different independent countries and is usually in the form of treaties, international customs etc. Examples of International law include the **Universal Declaration of Human Rights** and the **African Charter on Human and People's Rights**.

It should be noted that according to the provision of **S.12** of the **1999 Constitution (as amended)** International treaties cannot have the force of law in Nigeria except they are enacted by the Nigerian National Assembly.

5. Written and Unwritten Law: A law would not be regarded as written just because it is written down in a document. Written laws are those laws that have been validly enacted by the legislature of a country.

Unwritten laws, on the other hand, are those laws that are not enacted by the legislature. They include both customary and case law. Customary Law as part of its basic characteristic is generally unwritten. Case law, though written down in a documentary format, would be regarded as unwritten law based on the fact that it is not enacted by the legislature.

An example of this is the good neighbour principle established in the case of ***Donoghue vs. Stevenson***. The principle posits that manufacturers of products should take utmost care in their manufacturing activities to ensure that the consumption of their product doesn't result in harm to the consumer. This principle is not

enacted in a statute but is a case law which is applicable in Nigerian Courts.

6. Common Law and Equity: In the legal sense, the term common law means the law developed by the old common law courts of the King's Bench, the Courts of Common Pleas and the Courts of Exchequer.

The English common law is regarded as such because it is law common to all parts of England. It grew over time from the practices, customs and way of life of the people. It is largely unwritten. The first common law judge was the King himself. People who had disputes usually brought them to the King to settle them.

However, due to matters of state, the king didn't have time to settle all cases. As a result of this, the king appointed members of his court who were to settle disputes in his stead. These judges had the authority of the king and any disobedience to them was treated as disobedience to the king and punishment was swift.

These different judges travelled the length and breadth of the realm to settle disputes. When they got to a particular location, they applied the customary law in that location in order to settle disputes. Regularly, these different itinerant judges would come together to compare the different customary laws they encountered on their travels.

They discarded customs that were thought to be insensible and accepted those which were sensible. This led to the conglomeration of different customs which were then applied all through the realm. This then metamorphosed into the common law of England.

However, the common law was strict, formal and full of legalism. One example of this was in its system of writs. If an action did not fit into a writ, there was no remedy for such action. Also, the only remedy available in common law was that of damages.

Due to the harshness of common law, the people petitioned the King directly for judgement. The Lord Chancellor, as the King's Prime Minister, was the one that dealt with most of these petitions. His court was called the Court of Chancery/Equity. The Lord Chancellor, was usually a bishop and thus, he applied the principle of fairness and natural law in making his decisions.

Subsequently, there was conflict between the common law court and the court of chancery. This conflict came to head in the ***Earl of Oxford's*** case. In this case, the plaintiff was the assignee of a lease and he built a house and planted a garden on the land. Subsequently, the defendant/owner of the land sought to evict him from the land. The assignee thus sued and lost at common law, and he appealed to the court of chancery.

The court of equity accepted his petition and allowed him to stay on the land. The reasoning of the Lord Chancellor, Lord Ellesmere, was that by natural law, it was only fair and just for a person who builds a house to be able to live in that house.

This judgement prompted Lord Coke, the Chief Justice of the King's Bench to accuse the Lord Chancellor of frustrating the rules of common law. The matter was brought to the King who referred it to Lord Francis Bacon. Francis Bacon supported the court of equity and ruled that whenever there was a clash between common law and equity, equity would prevail.

This ruling however, did not help to completely solve the problem between the two courts. This was due to the fact that the common law courts could only grant the remedy of damages and thus, anyone seeking a different remedy would first pass through the common law courts before going to equity.

Over the years, the two systems were merged till finally, in 1875, the Judicature Act fused the two systems into one court. However, although they are applied in one court, the rules of common law and

equity can be distinguished from each other. This is what prompts the statement “Although the two streams now flow into one, their waters do not mix.”