

JURISPRUDENCE

(PAPER CODE-309)

UNIT - I

1. Nature and scope of jurisprudence
2. Need for study of jurisprudence
3. Linkage between jurisprudence and other sciences

UNIT - II

1. Natural school
2. Historical school
3. Analytical school

UNIT-III

1. Sociological School
2. Legal Realism
3. Economic Approach

UNIT-IV

1. Ancient Approach
2. Medieval Approach
3. Modern Trend

UNIT -I

Nature and Scope of Jurisprudence

What is Jurisprudence?

There is no universal or uniform definition of Jurisprudence since people have different ideologies and notions throughout the world. It is a very vast subject.

When an author talks about political conditions of his society, it reflects that condition of law prevailing at that time in that particular society. It is believed that Romans were the first who started to study what is law.

Jurisprudence- Latin word '*Jurisprudentia*'- Knowledge of Law or Skill in Law.

-Most of our law has been taken from Common Law System.

-Bentham is known as Father of Jurisprudence. Austin took his work further.

Bentham was the first one to analyze what is law. He divided his study into two parts:

1. Examination of Law as it is- **Expositorial Approach**- Command of Sovereign.
2. Examination of Law as it ought to be- **Censorial Approach**- Morality of Law.

However, Austin stuck to the idea that **law is command of sovereign**. The structure of English Legal System remained with the formal analysis of law (Expositorial) and never became what it ought to be (Censorial).

J. Stone also tried to define Jurisprudence. He said that **it is a lawyer's extraversion**. He further said that it is a lawyer's examination of the percept, ideas and techniques of law in the light derived from present knowledge in disciplines other than the law.

Thus, we see that there can be no goodness or badness in law. Law is made by the State so there could be nothing good or bad about it. Jurisprudence is nothing but the science of law.

Definitions by:

1. Austin
2. Holland
3. Salmond
4. Keeton
5. Pound
6. Dias and Hughes

Austin- He said that “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.

This has two aspects attached to it:

1. **General Jurisprudence-** It includes such subjects or ends of law as are common to all system.
2. **Particular Jurisprudence-** It is the science of any actual system of law or any portion of it.

Basically, **in essence they are same but in scope they are different.**

Salmond’s Criticism of Austin

He said that for a concept to fall within the category of ‘General Jurisprudence’, it should be common in various systems of law. This is not always true as there could be concepts that fall in neither of the two categories.

Holland’s Criticism of Austin

He said that it is only the material which is particular and not the science itself.

Holland's Definition- Jurisprudence means **the formal science of positive laws**. It is an analytical science rather than a material science.

1. He defined the term positive law. He said that Positive Law means **the general rule of external human action enforced by a sovereign political authority**.

2. We can see that, he simply added the word '**formal**' in Austin's definition. Formal here means that **we study only the form and not the essence**. We study only the external features and do not go into the intricacies of the subject. According to him, how positive law is applied and how it is particular is not the concern of Jurisprudence.

3. The reason for using the word '**Formal Science**' is that it describes only the form or the external sight of the subject and not its internal contents. According to Holland, Jurisprudence is not concerned with the actual material contents of law but only with its fundamental conceptions. **Therefore, Jurisprudence is a Formal Science.**

4. This definition has been criticized by Gray and Dr. Jenks. According to them, Jurisprudence is a formal science because it is concerned with the form, conditions, social life, human relations that have grown up in the society and to which society attaches legal significance.

5. Holland said that Jurisprudence is a science because **it is a systematized and properly co-ordinate knowledge of the subject of intellectual enquiry**. The term positive law confines the enquiry to these social relations which are regulated by the rules imposed by the States and enforced by the Courts of law. Therefore, it is a formal science of positive law.

6. Formal as a prefix indicates that the science deals only with the **purposes, methods and ideas** on the basis of the legal system as distinct from material science which deals **only with the concrete details of law**

7. This definition has been criticized on the ground that this definition is concerned only with the form and not the intricacies.

Salmond- He said that **Jurisprudence is Science of Law**. By law he meant **law of the land or civil law**. He divided Jurisprudence into two parts:

1. **Generic-** This includes the entire body of legal doctrines.
2. **Specific-** This deals with the particular department or any portion of the doctrines. 'Specific' is further divided into three parts:

1. **Analytical, Expository or Systematic-** It deals with the contents of an actual legal system existing at any time, past or the present.

2. **Historical-**

It is concerned with the legal history and its development

3. **Ethical-** According to him, the purpose of any legislation is to set forth laws as it ought to be. It deals with the 'ideal' of the legal system and the purpose for which it exists.

Criticism of Salmond- Critics says that it is not an accurate definition. Salmond only gave the structure and failed to provide any clarity of thought.

Keeton- He considered **Jurisprudence as the study and systematic arrangement of the general principles of law**. According to him, Jurisprudence deals with the distinction between Public and Private Laws and considers the contents of principle departments of law.

Roscoe Pound- He described **Jurisprudence as the science of law** using the term '**law**' in **juridical sense** as denoting the body of principles recognized or enforced by public and regular tribunals in the Administration of Justice.

Dias and Hughes- They believed **Jurisprudence** as any thought or writing about law rather than a technical exposition of a branch of law itself.

Conclusion- Thus, we can safely say that **Jurisprudence is the study of fundamental legal principles.**

Scope of Jurisprudence-

After reading all the above mentioned definitions, we would find that Austin was the only one who tried to limit the scope of jurisprudence. He tried to segregate morals and theology from the study of jurisprudence.

However, the study of jurisprudence cannot be circumscribed because it includes all human conduct in the State and the Society.

Approaches to the study of Jurisprudence-

There are two ways

1. **Empirical-** Facts to Generalization.

2. **A Priori-** Start with Generalization in light of which the facts are examined.

Significance and Need of the Study of Jurisprudence

1. This subject has its own intrinsic interest and value because this is a subject of serious scholarship and research; researchers in Jurisprudence contribute to the development of society by having repercussions in the whole legal, political and social school of thoughts. One of the tasks of this subject is to construct and elucidate concepts serving to render the complexities of law more manageable and more rational. It is the belief of this subject that the theory can help to improve practice.

2. Jurisprudence also has an educational value. It helps in the logical analysis of the legal concepts and it sharpens the logical techniques of the lawyer. The study of jurisprudence helps to combat the lawyer's occupational view of formalism which leads to excessive concentration on legal rules for their own sake and disregard of the social function of the law.
3. The study of jurisprudence helps to put law in its proper context by considering the needs of the society and by taking note of the advances in related and relevant disciplines.
4. Jurisprudence can teach the people to look if not forward, at least sideways and around them and realize that answers to a new legal problem must be found by a consideration of present social needs and not in the wisdom of the past.
5. Jurisprudence is the eye of law and the grammar of law because it throws light on basic ideas and fundamental principles of law. Therefore, by understanding the nature of law, its concepts and distinctions, a lawyer can find out the actual **rule of law**. It also helps in knowing the language, grammar, the basis of treatment and assumptions upon which the subject rests. Therefore, some logical training is necessary for a lawyer which he can find from the study of Jurisprudence.
6. It trains the critical faculties of the mind of the students so that they can detect fallacies and use accurate legal terminology and expression.
7. It helps a lawyer in his practical work. A lawyer always has to tackle new problems every day. This he can handle through his knowledge of Jurisprudence which trains his mind to find alternative legal channels of thought.
8. Jurisprudence helps the judges and lawyers in ascertaining the true meaning of the laws passed

by the legislators by providing the rules of interpretation. Therefore, the study of jurisprudence should not be confined to the study of positive laws but also must include normative study i.e. **that study should deal with the improvement of law in the context of prevailing socio-economic and political philosophies of time, place and circumstances.**

9. Professor Dias said that *'the study of jurisprudence is an opportunity for the lawyer to bring theory and life into focus, for it concerns human thought in relation to social existence'*.

Relationship of Jurisprudence with other Social Sciences

1. **Sociology and Jurisprudence-** There is a branch called as **Sociological Jurisprudence**. This branch is based on social theories. It is essentially concerned with the influence of law on the society at large particularly when we talk about social welfare. The approach from sociological perspective towards law is different from a lawyer's perspective. The study of sociology has helped Jurisprudence in its approach. Behind all legal aspects, there is always something social. However, Sociology of Law is different from Sociological Jurisprudence.

2. **Jurisprudence and Psychology-** No human science can be described properly without a thorough knowledge of Human Mind. Hence, Psychology has a close connection with Jurisprudence. Relationship of Psychology and Law is established in the branch of **Criminological Jurisprudence**. Both psychology and jurisprudence are interested in solving questions such as motive behind a crime, criminal personality, reasons for crime etc.

3. **Jurisprudence and Ethics-** Ethics has been defined as the science of Human Conduct. It strives for ideal Human Behavior. This is how Ethics and Jurisprudence are interconnected:

a. Ideal Moral Code-

This could be found in relation to Natural Law.

b. **Positive Moral Code-** This could be found in relation to Law as the Command of the Sovereign.

- c. Ethics is concerned with good human conduct in the light of public opinion.
- d. Jurisprudence is related with Positive Morality in so far as law is the instrument to assert positive ethics.
- e. Jurisprudence believes that Legislations must be based on ethical principles. It is not to be divorced from Human principles.
- f. Ethics believes that No law is good unless it is based on sound principles of human value.
- g. A Jurist should be adept in this science because unless he studies ethics, he won't be able to criticize the law.
- h. However, Austin disagreed with this relationship.

4. **Jurisprudence and Economics**- Economics studies man's efforts in satisfying his wants and producing and distributing wealth. Both Jurisprudence and Economics are sciences and both aim to regulate lives of the people. Both of them try to develop the society and improve life of an individual. Karl Marx was a pioneer in this regard.

5. **Jurisprudence and History**- History studies past events. Development of Law for administration of justice becomes sound if we know the history and background of legislations and the way law has evolved. The branch is known as **Historical Jurisprudence**.

6. **Jurisprudence and Politics**- In a politically organized society, there are regulations and laws which lay down authoritatively what a man may and may not do. Thus, there is a deep connected between politics and Jurisprudence.

UNIT-II

Natural Law

Natural law, or the **law of nature** (Latin: *lex naturalis; ius naturale*), is a system of law that is determined by nature, and so is universal. Classically, natural law refers to the use of reason to analyze human nature — both social and personal — and deduce binding rules of moral behavior from it. Natural law is often contrasted with the positive law of a given political community, society, or state. In legal theory, on the other hand, the interpretation of positive law requires some reference to natural law. On this understanding of natural law, natural law can be invoked to criticize judicial decisions about what the law says but not to criticize the best interpretation of the law itself. Some scholars use natural law synonymously with natural justice or natural right (Latin *iusnaturale*), while others distinguish between natural law and natural right. Although natural law is often conflated with common law, the two are distinct in that natural law is a view that certain rights or values are inherent in or universally cognizable by virtue of human reason or human nature, while common law is the legal tradition whereby certain rights or values are legally cognizable by virtue of judicial recognition or articulation. Natural law theories have, however, exercised a profound influence on the development of English common law,

History

The use of natural law, in its various incarnations, has varied widely through its history. There are a number of different theories of natural law, differing from each other with respect to the role those morality plays in determining the authority of legal norms. This article deals with its usages separately rather than attempt to unify them into a single theory.

Plato

Although Plato does not have an explicit theory of natural law his concept of nature, according to John Wild, contains some of the elements found in many natural law theories. According to Plato we live in an orderly universe. At the basis of this orderly universe or nature are the forms, most

fundamentally the Form of the Good, which Plato describes as "the brightest region of being. The Form of the Good is the cause of all things and when it is seen it leads a person to act wisely. In the *Symposium*, the Good is closely identified with the Beautiful. Also in the *Symposium*, Plato describes how the experience of the Beautiful by Socrates enables him to resist the temptations of wealth and sex. In the *Republic*, the ideal community is, "...a city which would be established in accordance with nature."

Aristotle

What the law commanded varied from place to place, but what was "by nature" should be the same everywhere. A "law of nature" would therefore have had the flavor more of a paradox than something that obviously existed. Against the conventionalism that the distinction between nature and custom could engender, Socrates and his philosophic heirs, Plato and Aristotle, posited the existence of natural justice or natural right . Of these, Aristotle is often said to be the father of natural law.

Aristotle's association with natural law may be due to the interpretation given to his works by Thomas Aquinas Aristotle notes that natural justice is a species of political justice, viz. the scheme of distributive and corrective justice that would be established under the best political community; were this to take the form of law, this could be called a natural law, though Aristotle does not discuss this and suggests in the *Politics* that the best regime may not rule by law at all The best evidence of Aristotle's having thought there was a natural law comes from the *Rhetoric*, where Aristotle notes that, aside from the "particular" laws that each people has set up for itself, there is a "common" law that is according to nature.

Universal law is the law of Nature. For there really is, as everyone to some extent divines, a natural justice and injustice that is binding on all men, even on those who have no association or covenant with each other. It is this that Sophocles' Antigone clearly means when she says that the burial of Polymerizes was a just act in spite of the prohibition: she means that it was just by nature:

"Not of to-day or yesterday it is, but lives eternal: none can date its birth."

And so Empedocles, when he bids us kill no living creature, says that doing this is not just for some people while unjust for others:

"Nay, but, an all-embracing law, through the realms of the sky Unbroken it stretched, and over the earth's immensity." Some critics believe that the context of this remark suggests only that Aristotle advised that it could be rhetorically advantageous to appeal to such a law, especially when the "particular" law of one's own city was averse to the case being made, not that there actually was such a law; Moreover, they claim that Aristotle considered two of the three candidates for a universally valid, natural law provided in this passage to be wrong. Aristotle's theoretical paternity of the natural law tradition is consequently disputed.

Stoic

The development of this tradition of natural justice into one of natural law is usually attributed to the Stoics. The rise of natural law as a universal system coincided with the rise of large empires and kingdoms in the Greek world. Whereas the "higher" law Aristotle suggested one could appeal to was emphatically natural, in contradistinction to being the result of divine positive legislation, the Stoic natural law was indifferent to the divine or natural source of the law: the Stoics asserted the existence of a rational and purposeful order to the universe (a divine or eternal law), and the means by which a rational being lived in accordance with this order was the natural law, which spelled out action that accorded with virtue. Natural law first appeared among the stoics who believed that God is everywhere and in everyone. Within humans is a "divine spark" which helps them to live in accordance with nature. The stoics felt that there was a way in which the universe had been designed and natural law helped us to harmonize with this.

The DARK AGES:

from the fall of Western Roman Empire in the hands of Barbarians (476) to the fall of Constantinople (the seat of Byzantine Empire) in the hands of Muslim Turks (1453). This period is remembered by the Europeans as the Medieval Age or Dark Ages (It is to be noted that this period is a dark period for Europe and not for Asia because in that period Asia was quite enlightened in terms of intellect, governance and medical science etc. because of ignorance,

lawlessness, arbitrary actions of the feudal lords and the Church Authority and suppression of scientific exploration in the name of religion though the very theses of the Church Authority were derived from Greek philosophy and not from God's revelation.

The Renaissance (13th century – early 17th century):

The Renaissance is a series of literary and cultural movements in the 13th, 14th, 15th, 16th and early 17th centuries. These movements began in Italy and eventually expanded into Germany, France, England, and other parts of Europe. Participants studied the great civilizations of ancient Greece and Rome and came to the conclusion that their own cultural achievements rivaled those of antiquity. The word *renaissance* means “rebirth.” The idea of rebirth originated in the belief that Europeans had rediscovered the superiority of Greek and Roman culture after many centuries of what they considered intellectual and cultural decline. Thomas Aquinas sought to reconcile Aristotelian philosophy with Augustinian theology. He employed both reason and faith in the study of metaphysics, moral philosophy, and religion. But the dominant intellectual movement of the Renaissance was humanism; a cultural impulse characterized by, among many other things, a **SHIFT OF EMPHASIS FROM RELIGIOUS TO SECULAR CONCERNS**. During the Renaissance, they (i.e. the humanists) challenged the basis of scholastic education and sought an emphasis on practical experience rather than abstract thought. Humanists such as Desiderius Erasmus **rejected religious orthodoxy in favors of the study of human nature**. Humanism reflected some of the changes in values of the new urban society and the townspeople challenged the dominance of the church in everyday life.

The Age of Enlightenment / the Age of Reason (1620 – 1781) :

It refers to the time of the guiding intellectual movement covering about a century and a half in Europe, beginning with the publication of Francis Bacon's *Novum Organum* (1620) and ending with Immanuel Kant's *Critique of Pure Reason* (1781). From the perspective of socio-political phenomena, the period is considered to have begun with the close of the Thirty Years' War (1648) and ended with the French Revolution (1789).

Cicero

Cicero wrote in his De Legibus that both justice and law derive their origin from what nature has given to man, from what the human mind embraces, from the function of man, and from what serves to unite humanity. For Cicero, natural law obliges us to contribute to the general good of the larger society. The purpose of positive laws is to provide for "the safety of citizens, the preservation of states, and the tranquility and happiness of human life." In this view, "wicked and unjust statutes" are "anything but 'laws,'" because "in the very definition of the term 'law' there inheres the idea and principle of choosing what is just and true." Law, for Cicero, "ought to be a reformer of vice and an incentive to virtue." Cicero expressed the view that "the virtues which we ought to cultivate, always tend to our own happiness, and that the best means of promoting them consists in living with men in that perfect union and charity which are cemented by mutual benefits." Cicero influenced the discussion of natural law for many centuries to come, up through the era of the American Revolution. The jurisprudence of the Roman Empire was rooted in Cicero, who held "an extraordinary grip ... upon the imagination of posterity" as "the medium for the propagation of those ideas which informed the law and institutions of the empire." Cicero's conception of natural law "found its way to later centuries notably through the writings of Saint Isadora of Seville and the Decretum of Gratian." Thomas Aquinas, in his summary of medieval natural law, quoted Cicero's statement that "nature" and "custom" were the sources of a society's laws. Some early Church Fathers, especially those in the West, sought to incorporate natural law into Christianity. The most notable among these was Augustine of Hippo, who equated natural law with man's prelapsarian state; as such, a life according to nature was no longer possible and men needed instead to seek salvation through the divine law and grace of Jesus Christ.

In the twelfth century, Gratian equated the natural law with divine law. A century later,

Hobbes

Thomas Hobbes

By the 17th Century, the medieval teleological view came under intense criticism from some quarters. Thomas Hobbes instead founded a contractualist theory of legal positivism on what all men could agree upon: what they sought (happiness) was subject to contention, but a broad

consensus could form around what they feared (violent death at the hands of another). The natural law was how a rational human being, seeking to survive and prosper, would act. Natural law, therefore, was discovered by considering humankind's natural rights, whereas previously it could be said that natural rights were discovered by considering the natural law. In Hobbes' opinion, the only way natural law could prevail was for men to submit to the commands of the sovereign. Because the ultimate source of law now comes from the sovereign, and the sovereign's decisions need not be grounded in morality, legal positivism is born. Jeremy Bentham's modifications on legal positivism further developed the theory.

Hugo Grotius

Liberal natural law grew out of the medieval Christian natural law theories and out of Hobbes' revision of natural law, sometimes in an uneasy balance of the two. Hugo Grotius based his philosophy of international law on natural law. In particular, his writings on freedom of the seas and just war theory directly appealed to natural law. About natural law itself, he wrote that "even the will of an omnipotent being cannot change or abrogate" natural law, which "would maintain its objective validity even if we should assume the impossible, that there is no God or that he does not care for human affairs." (*De iure belli ac pacis*, Prolegomena XI). This is the famous argument *tiam sidaremus (non esse Deum)*, that made natural law no longer dependent on theology. However, German church-historians Ernst Wolf and M. Elze disagreed and claimed that Grotius' concept of natural law did have a theological basis. In Grotius' view, the Old Testament contained moral precepts (e.g. the Decalogue) which Christ confirmed and therefore were still valid. Moreover, they were useful in explaining the content of natural law. Both biblical revelation and natural law originated in God and could therefore not contradict each other.

Samuel Pufendorf

He gave natural law a theological foundation and applied it to his concepts of government and international law.

Thomas Aquinas



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The Roman Catholic Church holds the view of natural law provided by St. Thomas Aquinas. The Catholic Church understands human beings to consist of body and mind, the physical and the non-physical (or soul perhaps), and that the two are inextricably linked. Humans are capable of discerning the difference between good and evil because they have a conscience. There are many manifestations of the good that we can pursue. Some, like procreation, are common to other animals, while others, like the pursuit of truth, are inclinations peculiar to the capacities of human beings. To know what is right, one must use one's reason and apply it to Aquinas' precepts. This reason is believed to be embodied, in its most abstract form, in the concept of a primary precept: "Good is to be sought, evil avoided." St. Thomas explains that:

there belongs to the natural law, first, certain most general precepts, that are known to all; and secondly, certain secondary and more detailed precepts, which are, as it were, conclusions following closely from first principles. As to those general principles, the natural law, in the abstract, can nowise be blotted out from men's hearts. But it is blotted out in the case of a particular action, insofar as reason is hindered from applying the general principle to a particular point of practice, on account of concupiscence or some other passion, as stated above. But as to the other, i.e., the secondary precepts, the natural law can be blotted out from the human heart, either by evil persuasions, just as in speculative matters errors occur in respect of necessary conclusions; or by vicious customs and corrupt habits, as among some men, theft, and even unnatural vices, as the Apostle states, were not esteemed sinful. According to Aquinas, to lack any of these virtues is to lack the ability to make a moral choice. For example, consider a man who possesses the virtues of justice, prudence, and fortitude, yet lacks temperance. Due to his lack of self-control and desire for pleasure, despite his good intentions, he will find himself swaying from the moral path.

John Rawls-

He was a political scientist and one of the most influential moral philosophers. He gave theory of Justice and said that political thought is distinct from natural law. This society is self-sufficient association of persons who in their relations to one another recognize rules of condition as binding and act in accordance. They specify co-ordination designed to advance well of those who are

taking part in it. The society is witnessing a conflict of interest both in terms of sharing of benefits as well as making a better life. A set principle is required in determining the limits of individual advantages and social arrangement for proper division of heirs. It is called as “Social Justice”. It provides a way of assigning rights and duties in basic institution of society. It also defines appropriate distribution of benefits and burdens of social co-operation.

The main idea is to carry it to higher level of abstraction, the familiar theory of social contract. These can regulate all agreements and they specify co-operation that can be entered into and forms of government that can be established. Thus, justice is termed as fairness.

He conceives that basic structure of society distributes primary goods. They are liberty, opportunity, income and wealth, health and vigor, intelligence and imagination.

Two principles of Justice-

1. Each person is to have equal right to most extensive total system of basic liberties compatible with a similar system for all.
2. Social and economic inequalities are to be arranged so that both are greatest benefit of the least advantage consistent with the just saving principle.
3. Attached to offices and persons open to all under fair equality for the protection of liberty itself.
 - a. Maximization of liberty subsists only to such constraints as are essential for the protection of liberty itself.
 - b. Equality for all, both in basic liberties of social life and also in distribution of all other forms of social good. It is subject only to the exception that the inequalities may be permitted if they produce greatest possible benefit for those least well-off in given scheme of inequality.
4. Fair equality of opportunity and elimination of all inequalities of opportunities based on birth or wealth.

Immanuel Kant-

He gave modern thinking a new basis which no subsequent philosophy would ignore. In ‘Critique of Pure Reason’, he set for himself the task of analysing the world as it appears to



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human consciousness. Nature follows necessity but human mind is free because it can set itself purposes and free will. Compulsion is essential to law and a right is characterized by the power to compel. The aim of Kant was a universal world state, the establishment of a republican constitution based on freedom and equality of states was a step towards league of states to secure peace. Kant was doubtful of the practical possibility of the state of nations and he saw no possibility of international law without an international authority superior to the states. He was a German Idealist. He based his theory on pure reason. He says man is a part of reality and is subject to its laws (sovereign's laws). Though, it is through will of the people, the sovereign comes into existence, but still the man is not free. His reason and inner consciousness makes him a free moral agent, so the ultimate aim of the individual should be a life of free will and it is when free will is exercised according to reason and uncontaminated by emotions, that free willing individuals can live together. People are morally free when they are able to obey or disobey a moral law but since morality and freedom are same, an individual can be forced to obey the law without forcing the freedom provided by law in conformity with morality. He talks about proclamation of autonomy of reason and will. Human reason is law creating and constitutes moral law. Freedom in law means freedom from arbitrary subjection to another. Law is the complex totality of conditions in which maximum freedom is possible for all. The sole function of the state is to ensure observance of the law. The individual should not allow himself to be made a means to an end as he is an end in himself, if need be he should retire from society if his free will would involve him in wrong doing. Society unregulated by right results in violence. Men have an obligation to enter into society and avoid doing wrong to others. Such a society has to be regulated by compulsory laws. Those laws are derived by pure reason of the idea of social union; men will be able to live in peace. What is needed is a rule of law and not of man. Kant's ideal of laws does not bear any relation to any actual system of law; it is purely an ideal to serve as a standard of comparison and not as a criterion for the validity of law. Kant considered political power as conditioned by the need of rendering each man's right effective while limiting it at the same time through the legal rights of others. Only the collective universal will armed with absolute power can give security to all. This transfer of power is based on social contract which is not a historical fact but it is an idea of reason. The Social Contract is so sacred that there is an absolute duty to obey the existing legislative power. Rebellion is not justified.

Therefore, he considers a republican and representative state is an ideal state. Only the united will of all can institute legislation and law is just only when it is at least possible when the whole population should agree to it. He was in favour of separation of power and was opposed to privileges of birth and established church and autonomy of corporations. He was in favour of free speech. The function of the state was essentially that of the protector and guardian of that law.

HISTORICAL JURISPRUDENCE

The two prime reasons for the evolution of historical school are:

I. Came as a reaction against natural law, which relied on reason as the basis of law and believed that certain principles of universal application can be rationally derived without taking into consideration social, historical and other factors.

ii. Came as a reaction against analytical positivism which constructed a soul-less barren sovereign-made-coercive law devoid of moral and cultural values described as „gun-men-situation“.

The basic tenets of historical school can be summarized as:

I. It views law as a legacy of the past and product of customs, traditions and beliefs prevalent in different communities.

II. It views law as a biological growth, an evolutionary phenomena and not an arbitrary, fanciful and artificial creation.

III. Law is not an abstract set of rules imposed on society but has deep roots in social and economic factors and the attitude of its past and present members of the society.

IV. The essence of law is the acceptance, regulation and observance by the members of the society.

V. The law is grounded in a form of popular consciousness called the Volksgeist.

VI. Law develops with society and dies with society.

Hart's Positivism

As mentioned above, Hart's theory is developed from the theories propounded by Bentham and Austin. Standing at the heart of Hart's theory is his assertion that “the most prominent general feature of law at all times and places is that its existence means that certain kinds of human conduct are no longer optional but in some sense, obligatory”. According to Hart, his theory aims to provide “an improved analysis of the distinctive structure of a municipal legal system and a better understanding of the resemblances and differences between law, coercion, and morality, as types of social phenomena”. By employing the word ‘improved’, it is evident that Hart is building on the positivists' theses before him. However, some commentators such as McCoubrey argue that Hart's theory should be seen as “a distinct account of jurisprudential character of positive law”. As such, Hart's positivism has also been referred to as ‘modified positivism’. Albeit Hart's ‘modified positivism’ can be distinguished from the classical positivism in certain ways, Hart agrees with “earlier legal positivists, specifically with the nineteenth century jurist John Austin, on two points”. First, Hart agrees to begin his analysis of the theory of law by “appreciation of the fact that where there is law, there human conduct is made in some sense non-optional or obligatory”. Second, Hart stood by Bentham, refusing to admit a connection between law and morality. In Hart's words, “though there are many different contingent connections between law and morality there are no necessary conceptual connections between the content of law and morality”. In his support for Bentham's separation of laws and morals, he proposed the ‘Reparability Thesis’, which remains a central fort of his theory. The ‘Reparability Thesis’ referred to the separation of law and morality. Kenneth Himma stated that “this abstract formulation can be interpreted in a number of ways”. On one hand, extreme positivists like Faber



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argue that the definition of law should be completely free from morality, rejecting any moral consideration related to the concept of law, legal validity and legal system. On the other hand, soft positivists like Hart believe that whilst law does not necessary “reproduce or satisfy demands of morality, in fact they have often done so”. As Hart describes, although “a legal system must exhibit some specific conformity with morality or justice, or must rest on a widely diffused conviction that there is a moral obligation to obey it..., [it does not follow that] the criteria of legal validity of particular laws used in a legal system must include, tacitly if not explicitly, a reference to morality or justice”. Unlike previous classical positivists, however, Hart emphasized on ‘social phenomena’. In his influential *The Concept of Law*, his theory was equipped with the social element which his predecessors ignored. He stated that “there are certain rules of conduct which any social organization must contain if it is to be viable”. He continued, “Such universally recognized principles of conduct which have a basis in elementary truths concerning human beings, their natural environment, and aims, may be considered the minimum content of Natural law”. He points out that without this ‘minimum content of natural law’, “Laws and morals could not forward the minimum purpose of survival which men have in associating with each other”. Thus, “men, as they are, would have no reason for obeying voluntarily any rules”. However, as Wacks stated, “Hart is not saying that law is derived from morals or that there is a necessary conceptual relationship between the two”. This is evident from Hart's own analysis that “sometimes the claim that there is a necessary connection between law and morality comes to no more than the assertion that a good legal system must conform at certain points..., to the requirements of justice and morality”. Another proposition put forward by Hart is that law, as he sees it, is a system of rules. This includes obligation rules which impose duties or obligations. Obligation rules, as Wacks observed, can be separated into moral rules and legal rules. As mentioned in the preceding section, when Hart attempted to refine the classical positivism theory, he distinguishes legal rules between primary rules and secondary rules. According to Hart, many primary rules are also social rules. As presented in the last paragraph, many people are adhering to the law for the function and success of the society. Thus, it is arguable that these social rules carry a moral duty to observe the law. Nonetheless, Hart is opposed to the idea that such moral obligations have made them laws. Rather, these primary rules must be combined with the secondary rules, which “specify the ways in which the primary



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rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined”, to be social rules laws properly so called. From this, it is evident that Hart do rely on social rules in the formulation of his theory. However, as Hart identified, there are three defects with primary rules in the simplest form of social structure. Firstly, of the defect which Hart termed as ‘uncertainty’, primary rules by itself do not provide procedure to resolve doubts arose as a result of uncertainty over what the rules are and the scope of the rules. The second defect arose a result of the rules’ ‘static’ character, where “there will be no means, in such a society, of deliberately adapting the rules to changing circumstances”. The third defect “is the *inefficiency* of the diffuse social pressure by which rules are maintained”. The final defect arises when despite efforts to catch and punish offenders; there is an “absence of an official monopoly of ‘sanctions’”. These defects led Hart to propose the secondary rules, consisting of rules of recognition, rules of change, and rules of adjudication, to supplement the primary rules and thus resolving these defects. On the defect of ‘uncertainty’, Hart stated that it should be remedied by a ‘rule of recognition’, which “will specify some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that is a rule of the group to be supported by the social pressure it exerts”. In classical era, this may mean “an authoritative list or text of the rules... in a written document or carved on some public monument”; in modern days, the list may refer to “some general characteristics possessed by the primary rules”. Hart then went on to introduce the ‘rules of change’ to remedy the ‘static’ defect. In Hart’s words, “the simplest form of such a rule is that which empowers an individual or body of persons to introduce new primary rules for the conduct of the life of the group, or of some class within it and to eliminate old rules”. This can be seen from the legislature, or parliament, which legislate law such as the Civil Partnership Act 2004 when people are more comfortable now with homosexuality. Hart explained that “there will be a very close connection between the rules of change and the rules of recognition: for where the former exists the latter will necessarily incorporate a reference to legislation as an identifying feature of the rules”. Finally, the defect of ‘inefficiency’ was countered by the ‘rules of adjudication’. This means that individuals will be empowered to “make authoritative determinations of the question whether, on a particular occasion, a primary rule has been broken”. Again, the ‘rules’ of adjudication’ has very close links with the ‘rules of recognition’ for “the rule which confers jurisdiction will also be a rule of



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recognition, identifying the primary rules through the judgments of the courts”. As such, the concept of ‘rules of recognition’ is, in Hart's theory, vital to the existence of a legal system.

This important concept was expressly admitted by Hart as a social rule. Considering that several elements of his theory are formed from the ‘rules of recognition’, it can be said that Hart's theory relies heavily on the social rules. Also, as Coleman rightly pointed out, “the rule of recognition comes into existence as a rule that regulates behavior only if it is practiced”. However, she commented, this feature “falls out of the fact that the rule of recognition is a social or conventional rule”. It is thus submitted that Hart's theory could possibly be flawed, or at least not commanding as much authority, for “the ambiguity in the meaning of the rule of recognition”. Also, it is submitted that Hart's description of social rules is defective. He sets out three requirements for a social rule. For one, he emphasized on the “importance or seriousness of social pressure behind” the social rules, as they are “the primary factor determining whether they are thought of as giving rise to obligations”. Secondly, “the rules supported by this serious pressure are thought important because they are believed to be necessary to the maintenance of social life or some highly prized feature of it”. The third element of Hart's social rules is that they “characteristically [involve] sacrifice or renunciation”. However, there are actual laws in many, if not all, jurisdictions which do not fulfill all three of Hart's criteria for a social rule. Also, it is possible for rules which fulfill all three of Hart's elements but not the legal requirements of legality or the naturalists' requirements of morality. Hence, Hart's concept of social rules could be flawed, in the sense that it does not add any value to the study of jurisprudence.

SAVIGNY'S THEORY OF VOLKSgeist: In a simple term, Volksgeist means the general or common consciousness or the popular spirit of the people. Savigny believed that law is the product of the general consciousness of the people and a manifestation of their spirit. The basis of origin of law is to be found in Volksgeist which means people’s consciousness or will and consists of traditions, habits, practice and beliefs of the people. The concept of *Volksgeist* in German legal science states that law can only be understood as a manifestation of the spirit and consciousness of the German people.⁸ As already discussed, his theory served as a warning against hasty legislation and introduction of revolutionary abstract ideas on the legal system unless they mustered support of the popular will, Volksgeist. Savigny’s central idea was that law

is an expression of will of the people. It doesn't come from deliberate legislation but arises as a gradual development of common consciousness of the nation.⁹ The essence of Savigny's *Volksgeist* was that a nation's legal system is greatly influenced by the historical culture and traditions of the people and growth of law is to be located in their popular acceptance. Since law should always confirm to the popular consciousness i.e. *Volksgeist*, custom not only precedes legislation but is also superior to it. Hence, law wasn't the result of an arbitrary act of a legislation but developed as a response to the impersonal powers to be found in the people's national spirit. Laws aren't of universal validity or application. Each people develop its own legal habits, as it has peculiar language, manners and constitution. He insists on the parallel between language and law. Neither is capable of application to other peoples and countries. The *Volksgeist* manifests itself in the law of the people: it is therefore essential to follow up the evolution of the *Volksgeist* by legal research.

Savigny felt that "a proper code [of law could only] be an organic system based on the true fundamental principles of the law as they had developed over time." Savigny's method stated that law is the product of the *Volksgeist*, embodying the whole history of a nation's culture and reflecting inner convictions that are rooted in the society's common experience. The *Volksgeist* drives the law to slowly develop over the course of history, thus, according to Savigny, a thorough understanding of the history of a people is necessary for studying the law accurately. Savigny in his own words view *Volksgeist* as,

"The foundation of the law has its existence, its reality in the common consciousness of the people. We become acquainted with it as it manifests itself in external acts, as appears in practice, manners and customs. Custom is the sign of positive law."- Savigny. Hence, Savigny clearly believes that *Volksgeist* (common consciousness) is the foundation of law.

Criticism:

As already stated, a uniform definition of law is far from reality, and Savigny's *Volksgeist* is no exception. The following are the criticisms of Savigny's *Volksgeist*:

1. It is not clear who the volk are and whose geist determines the law nor it is clear whether the *Volksgeist* may have shaped by the law rather than vice-versa.

2. In pluralist societies such as exist in most parts of the world it really seems somewhat irrelevant to use the concept of Volksgeist as the test of validity.
3. He has over emphasized custom and underestimated the role of legislation.
4. It unfortunately gave rise to the extreme nationalism in Germany and other countries.
5. It over emphasizes history rather than present.

Henrie Maine

He introduced the idea that law and society developed "from status to contract." In ancient times, individuals were bound by social status and/or belonging to traditional social castes . On the other side, in the modern world, people were regarded as independent entities, free to make contracts on their own. Maine saw Roman law as the intermediate stage between ancient customs and modern British law. He believed that in ancient times legal bonds were firmly connected with customs rooted in the patriarchal family system. In that system all the goods, including land and the means of production, were the property of a family, and private property was practically non-existent. It was only in more recent times, with the development of settlements and later towns, that society started to apply principles of private property and depend on contract as means of creating larger and more complex relationships.

Maine did not approve of the idea that law actually progressed throughout human history, and that democracy was a superior form of government. Maine had published, in 1885, his work of speculative politics, a volume of essays on *Popular Government*, designed to show that democracy was not in itself more stable than any other form of government, and that there was no necessary connection between democracy and progress. The book was deliberately unpopular in tone; it excited much controversial comment and some serious discussion. Many believed that

Maine particularly resented late Victorian mass democracy, and advocated instead laissez-faire economic individualism.

Living for more than seven years in India, Maine came in contact with Eastern ideas, and was able to compare them to Western thought. His *Village Communities in the East and the West* (1871); *Early History of Institutions* (1875); *Early Law and Custom* (1883) compared those two systems of thought, finding numerous similar points. In all these works the phenomenon of societies in an archaic stage, whether still capable of observation or surviving in a fragmentary manner among more modern surroundings or preserved in contemporary records, are brought.

Analytical positivism

Austin

As we know, according to Austin, there are three elements in law:

- a. It is a type of command
- b. It is laid down by a political superior
- c. It is enforced by a sanction

He goes on to elaborate this theory. For him, Requests, wishes etc. are expressions of desire. **Command is also an expression of desire which is given by a political superior to a political inferior.** The relationship of superior and inferior consists in the power which the **superior enjoys over the inferior** because the superior has ability to punish the inferior for its disobedience.

He further said that there are certain commands that are laws and there are certain commands that are not laws. Commands that are laws are general in nature. Therefore, **laws are general commands.** Laws are like standing order in a military station which is to be obeyed by everybody.

He goes on to define who is a sovereign. According to him, **Sovereign is a person or a body or persons whom a bulk of politically organized society habitually obeys and who does not himself habitually obey some other person or persons.** Perfect obedience is not a requirement.

He further goes on to classify the types of laws:



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1. **Divine Law**- Given by god to men
2. Human Law- Given by men to men
 - a. **Positive Laws**- Statutory Laws
 - b. **Not Positive Laws**- Non- Statutory Laws, Customs, Traditions etc.

Criticism of Austin's Theory of Law

1. **Laws before state**- It is not necessary for the law to exist if the sovereign exists. There were societies prior to existence of sovereign and there were rules that were in prevalence. At that point of time, **there was no political superior**. Law had its origin in custom, religion and public opinion. All these so called 'laws' were later enforced by the political superior. Thus, the belief that **sovereign is a requirement for law has received criticism** by the Historical and **Sociological School** of Thought. However, the above mentioned criticism is not supported by Salmond. Salmond said that the laws which were in existence prior to the existence of state were something like **primitive substitutes of law and not law. They only resembled law**. Salmond gave an example. **He said that apes resemble human beings but it is not necessary to include apes if we define human beings.**
2. **Generality of Law**- The laws are also particular in nature. Sometimes, a Law is applicable only to a particular domain. There are laws which are not universally applicable. Thus, laws are not always general in nature.
3. **Promulgation**- It is not necessary for the existence of the law that the subjects need to be communicated. But, Austin thought otherwise.
4. **Law as Command**- According to Austin, **law is the command of the sovereign**. But, all laws cannot be expressed as commands. Greater part of law in the system is not in the nature of command. There are customs, traditions, and unspoken practices etc. that are equally effective.

5. **Sanction-** The phrase '**sanction**' might be correct for a Monarchical state. But for a Democratic state, laws exist not because of the force of the state but due to willing of the people. Hence, the phrase '**sanction**' is not appropriate in such situations. Also, there exists no sanction in Civil Laws unlike Criminal Laws.

6. **Not applicable to International Law-** Austin's definition is not applicable to International Law. International Law represents **law between sovereigns**. According to Austin, International Law is simply Positive Morality i.e. Soft Laws.

7. **Not applicable to Constitutional Law-** Constitutional Law defines powers of the various organs of the state. It comprises of various doctrines such as separation of power, division of power etc. Thus, no individual body of a state can act as sovereign or command itself. Therefore, it is not applicable to constitutional law.

8. **Not applicable to Hindu Law or Mohameddan Law or Cannon Law-** Personal Laws have their origin in religion, customs and traditions. Austin's definition strictly excludes religion. Therefore, it is not applicable to personal laws.

9. **Disregard of Ethical elements-** The moment law is devoid of ethics, the law loses its colour and essence. Justice is considered an end of law or law is considered a means to achieve Justice. However, Austin's theory is silent about this special relationship of Justice and Law. **Salmond said that any definition of law which is without reference to justice is imperfect in nature.** He further said '*Law is not right alone, it is not might alone, it is a perfect union of the two*' and **Law is justice speaking to men by the voice of the State.** According to Salmond, whatever Austin spoke about is '**a law**' and not '**the law**'. By calling '**the law**' we are referring to justice, social welfare and law in the abstract sense. Austin's definition lacked this abstract sense. A perfect definition should include both '**a law**' and '**the law**'.

10. **Purpose of law ignored-** One of basic purposes of Law is to promote Social Welfare. If we devoid law of ethics, the social welfare part is lost. Again, this part has been ignored by Austin.

Merit in Austin's Definition

Not everything is faulty about Austin's theory of law. He gave a clear and simple definition of law because he has excluded ethics and religion from the ambit law. Thus, he gave a paramount truth that **law is created and enforced by the state.**

KELSON (1881-1973) Kelson's Theory of Pure Science of Law / Pure theory

Kelson was not in favor of widening the scope of jurisprudence by co-relating it with other social sciences. He insisted on separation of Law from politics, sociology, metaphysics and all other extra-legal disciplines. Kelson tried to rescue jurisprudence from vague mysticism and in a way revival of John Austin's 19th century analytical jurisprudence. Kelson wished to create a pure science of law devoid of all moral and sociological considerations. He rejected Austin's definition of law as a command because it introduces subjective considerations whereas he wanted legal theory to be objective. He defines 'science' as a system of knowledge or a 'totally of cognitions' systematically arranged according to logical principles. Kelson's Grundnorm is analogous to Austin's concept of sovereign without which, law cannot be obligatory and binding. Kelson's theory being a theory of positive law is based on normative order eliminating all extra-legal and non-legal elements from it. He believed that a theory of law should be uniform. The theory of Hans Kelson, says Dias, has represented a development in two different directions; on the one hand, it marks the highest development to date of analytical positivism. On the other hand, it marks a reaction against the welter of different approaches that characterized the close of the 19th century and the beginning of the 20th century. For Kelson and his followers any such legal idealism is unscientific. He claimed that his pure theory was applicable to all places and at all times. He wanted it to be free from ethics, politics, sociology, history, etc. though he did not deny the value of these branches of knowledge.

LAWS AS NORMATIVE SCIENCE

Kelson described law as a 'normative science' as distinguished from natural sciences which are based on cause and effect such as law of gravitation. The laws of natural science are capable of being accurately described, determined and discovered in the form of 'is' (das seen) which is an essential characteristics of all natural sciences. But the science of law is knowledge of what law ought to be (das sollen). It is the 'ought to' character which provides normative character to law. For instance, if 'A' commits a theft he ought to be punished. Like Austin, Kelson also considers sanction as an essential element of law but he prefers to call it 'norm'. Kelson argues his science of law as 'pure' and time and again, insists that law 'properly so-called' must be put unspotted from elements which merely confuse and contaminate it. It should not be mixed with politics, ethics, sociology and history. By 'pure theory of law', he meant it is concerned solely with that part of knowledge that deals with law, excluding from such knowledge everything which does not belong to subject matter of law. He attempts to free the science of law from all foreign elements. It is called positive law because it is concerned only with actual and not with ideal law. For Kelson, legal order is the hierarchy of norms having sanction and jurisprudence is the study of these norms which comprise legal order.

THE GRUNDNORM

The basis of Kelson's pure theory of law is on pyramidical structure of hierarchy of norms which derives its validity from the basic norm i.e. 'Grundnorm'. Thus it determines the content and gives validity to other norms derived from it. He was unable to tell as to from where the Grundnorm or basic norm derives its validity. But when all norms derive their validity from basic norm its validity cannot be tested. Kelson considers it as a fiction rather than a hypothesis. According to Kelson it is not necessary that the Grundnorm or the basic norm should be the same in every legal system. But there will be always a Grundnorm of some kind whether in the form of a written constitution or the will of a dictator. In England there is no conflict between the authority of the king in Parliament and of judicial precedent, as the former precedes the latter. For example, In England, the whole legal system is traceable to the propositions that the enactments of the crown in Parliament and Judicial precedents ought to be treated as 'law' with immemorial custom as a possible third. Keelson says that system of law cannot be grounded on



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two conflicting Grundnorms. The only task of legal theory for Kelson is to clarify the relation between the fundamental and all lower norms, but he doesn't go to say whether this fundamental norm is good or bad. This is the task of political science or ethics or of religion. Kelson further states that no fundamental norm is recognizable if it does not have a minimum of effectiveness e.g. which does not command a certain amount of obedience. Producing the desired result is the necessary condition for the validity of every single norm of the order. His theory ceases to be pure as it cannot tell as to how this minimum effectiveness is to be measured. Effectiveness of the Grundnorm depends on the very sociological and political questions, which he excluded from the purview of his theory of law.

Pyramid of Norms

Kelson considers legal science as a pyramid of norms with Grundnorm at the top. The basic norm (grundnorm) is independent of any other norm at the top. Norms which are superior to the subordinate norms control them. He defines 'Concretization' as the process through which one norm derives its power from the norm superior to it, until it reaches the Grundnorm. Thus the system of norms proceeds from bottom to top and stops when it reaches to the top i.e. 'Grundnorm'. The Grundnorm is said to be a norm creating organ and the creation of it cannot be demonstrated scientifically nor is it required to be validated by any other norm. Thus a statute or law is valid because they receive their legal authority from the legislative body and the legislative body derives its authority from a norm i.e. the constitution. According to him the basic norm is the result of social, economic, political and other conditions and it is supposed to be valid by itself.¹³ There is a difference between propositions of law and propositions of science. Propositions of science are observed to occur and necessarily do occur as a matter of cause and effect. Whenever, a new fact which is found not to comply to a scientific law it is so modified to include it. On the other hand propositions of law deal with what ought to occur e.g. if 'A' commits theft, he ought to be punished.

Bentham:

One of the main rationales for Bentham establishing the positive law theory was that he thought the system of common law, that was then in use in England in the 17th century, was insufficient



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and inconsistent. He classified this common law system as 'dog law', referring to the way it often applied retrospectively and assimilated it to the way in which we treat animals. He criticized the lack of legal certainty and clarity that the common law system provided. Bentham proposed a system whereby the limits of power and conduct were specifically outlined, and were available for all to see and abide by. He often intertwined his own ideas with the ideas of utilitarianism (i.e. "the greatest good for the greatest number"), which then obviously formed the basis of the scientific approach to the law. His "science of legislation" approach meant that the law had a rigid format, was clear in its terms, and achieved a positive result overall for the subjects of the law, thus satisfying the requirements of the utilitarian aspects of Bentham's theory. He also identified that human behavior is often governed by two key factors: the desire for pleasure, and the avoidance of pain. It was Bentham that proposed a system of codification of the law, similar to the system of legislation we see in the modern context, where the premise was that it would create a universal set of laws that was easy to understand, and was able to be easily communicated to the public, so they knew what they had to do to obey the laws. It also meant that judges would effectively have their law-making powers reduced or rescinded, meaning they assumed more of an administrative role in the judiciary. Bentham had a similar view of the sovereign, believing that the sovereign is a person or group to whom the people of the society are "in a disposition to pay obedience" to. For Bentham, law had to contain the following factors:

- A collection of signs
- Which indicate an intention
- Which are conceived or adopted by a sovereign in a state
- Which describe the desired behavior
- Of the people to whom the intention is directed
- Which should also provide a motive for those subjects to obey?

This heavily itemized list is similar to that of Austin; however Bentham's theory came first according to the history books. It shows the much more scientific approach to the law that a positivist tends to take rather than, say, a natural law theorist. Bentham's rationale for creating such a system was that, as mentioned, judges were much more restricted in their law-making



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powers. This meant that they were not able to apply any form of morality to their legal arguments, as they were simply bound to apply the law as it was enacted by the Parliament. This further supports the fact that those who follow analytical jurisprudence maintain a strict separation from the law and any social or political factors surrounding it, leaving the debate of merits and demerits to the legislature.

UNIT-III

SOCIOLOGICAL JURISPRUDENCE

ROSCOE POUND THEORY

Pound is the most systematic writer on the sociological jurisprudence. Pounds concentrated more on the **functional aspect of law**. That is why some writers name his approach as **functional school**. For pound, the law is an ordering of conduct, so as to make the good of existence and the means of satisfying claims go round as far as possible with the least friction and waste with a minimum of friction.

LAW AS PURPOSIVE AND NEED-BASED

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 realization 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 and interest The end of law according to him is to satisfy a maximum of wants with a minimum of friction or confrontation. Elaborating the functional aspect of law, Roscoe pound stated that the function of law is to reconcile the conflicting interest of individuals in the community and harmonize their inter-relations. He termed this as "**social Engineering**."

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POUND'S THEORY OF SOCIAL ENGINEERING-

- I. **Private interests**
- ii. **Public interests**
- iii. **Social interests**

JURAL POSTULATES OF ROSCOE POUND

- I. **jural postulate**
- II. **Jural postulate**



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III jural postulate

IV. Jural postulate

V. jural postulate

JURAL POSTULATES OF ROSCOE POUND

In order to evaluate the conflicting interests in due order of priority , pound suggested that every society has certain basic assumption upon which its ordering rests, through for most of the time they may be implicit rather than expressly formulated. This assumption may be called as jural postulates of the legal system of that society. Pound has mentioned five jural postulates as follows-

- A. **Jural postulate I-** in civilized society men must be able to assume that others will commit no intentional aggression upon them.
- B. **Jural postulate II-** in civilized society men must be able to assume that they may control for beneficial purposes what they have discovered and appropriated to their own use, what they have created by their own labor and what they have created by their own labor and what they have acquired under the existing social and economic order.
- C. **Jural postulate –III –** In a civilized society men must be able to assume that those with whom they deal as a member of the society will act in good faith and hence-
 - I. Will make good reasonable expectations which their promises or other conduct reasonably create;
 - ii. Will carry out their undertaking according to the expectations which the moral sentiment of the community attaches thereto.
 - iii. Will restore specifically or by equivalent what comes to them by mistake, or failure of the pre-suppositions of a transaction, or other unanticipated situation whereby they receive at other's expense what they could not reasonably have expected to receive under the actual circumstances.
- D. **Jural postulate iv-** in civilized society men must be able to assume that those who engage in some course of conduct will act with due care not to cast an unreasonable risk of injury upon others.



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E. **Jural postulate V**-in a civilized society men must be able to assume that others who maintain things or employ agencies, harmless in the sphere of their use but harmful in their normal action elsewhere, and having a natural tendency to cross the boundaries of their proper use will restrain them and keep them within their proper bounds.

Pounds confessed that these jural postulates are not absolute but they have a relative value. These are a sort of ideal standards which law should pursue in society they are of a changing nature and new postulates may emerge if the changes in society so warrant. Thus the jural postulates by Roscoe pound provide guidelines for righteous and civilized life and they also seek to strike a synthesis between reality and idealism as also power and social accountability of men in the community.

The end of law according to him is to satisfy a maximum of wants with a minimum of friction or confrontation. Elaborating the functional aspect of law, Roscoe pound stated that the function of law is to reconcile the conflicting interest of individuals in the community and harmonize their inter-relations. He termed this as “**social Engineering**”.

POUNDS THEORY OF SOCIAL ENGINEERING:

Roscoe pound conceived law as a ‘**social Engineering**’ its main task being to accelerates the process of social ordering by making all possible efforts to avoid conflicts of interest of individuals in the society . Thus courts, legislators, administrators and jurists must work with a plan and make an effort to maintain a balance between the competing interests in society. He enumerates various interests which the law should seek to protect and classified them into three broad categories, namely-

I. Private Interests / Individual Interest-

Individual interests, according to pound are claims, or demands or desires, involved in and looked at from the stand point of the individual life immediately as such asserted in title of the individual life’. In individual interest Dean Pound includes-



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1) Personality- interest of personality consist of interests in -

- A. the physical person,
- B. freedom of will,
- C. honor and reputation,
- D. Privacy and sensibilities and
- E. Belief and opinion.

2) 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

- a. Parents and Children,
- b. Husbands and Wives.
- c. And marital interests.

3) Interest of substance- this includes

- A. Interests of property,
- B. Succession and testamentary disposition,
- C. freedom of industry and contract,
- D. promised advantages
- E. advantageous relations with others,
- F. freedom of association

II. Public Interest- Public interests according to him are the claims or demands or desires asserted by individuals involved in or looked at from the stand point of political life- life in politically organized society. They are asserted in title of that organization. It is convenient to treat them as claims of politically organized society thought of as a legal entity. The main public interest according to Roscoe pound are-

1. Interests of state as a juristic person which includes

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

2. 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 so on to make use of thing which are open to public use , etc. this interest seem to overlap with social interests.

III. Social Interests

To pounds social interest are claims or demands or desires, even some of the foregoing in other aspects, thought of in terms of social life and generalized as claims of the social group. They are the claims functioning of society; the wider demands or desires ascertained in the title of social life in civilized society. Social interest are said to include -

a. Social interest in the 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 social institutions comprises domestic institution, religious institutions, political institutions and economic institutions. Divorce legislation may be adduced as an example of the conflict between the social interests in the security of the institution of marriage and the individual interests of the unhappy Spouses. There is tension between the individual interest in religious freedom and the social interest in preserving the dominance of an established church.

c. Social interest in general morals,-

Social interests in general morals cover a variety of laws, e.g. laws dealing with prostitution, drunkenness and gambling;

d. Social interest in the conservation of social resources,-

Social interests in the conservation of social resources covers conservation of social resources and protection and training of dependants and defectives , i.e. , conservation of human resources, protective and education of dependants and defectives , reformation of delinquents, protection of economically dependants.

e. Social interest in general progress and –

Social interest in general progress has three aspects. Economic progress, political progress and cultural progress.

Economic progress covers freedom of use and sale of property, free trade, free industry and encouragement of inventions by the grant of patents.

Political progress covers free speech and free association, free opinion, free criticisms.

Cultural progress covers free science, free letters, encouragements of arts and letters, encouragements of higher education and learning and aesthetics.

f. Social interest in individual life.

Meaning thereby each individual be able to live a human life according to the individual's (a) political life, (b) physical life,(c) cultural ,(d) social and (e) economic life.

ECONOMIC APPROACH TO JURISPRUDENCE:

The existing alternative approaches to economics of law, related to Austrian school (Hayek), “old institutional” economics (Commons) and transaction cost economics (Coase) as well as the social systems theory (Pearsons, Luhman and Teubner).

The first three theories are foundation list because they regard law as a foundation of economic order. Foundationalism also seems to admit the existence of the universally accepted foundations of law as well as economy regarded as human activity concentrated on managing of resources. The last theory, namely the system theory emphasizing autonomy of both economy and law as social systems, is thus antifoundationalist. This division

seems to be significant in the context of the present discussion within jurisprudence, especially concerning the difference between modern and post-modern legal theories. Economics of law as well as law and economics have certainly a broader meaning. The meaning is associated with a methodological approach - the economic analysis of law as well as the revision within economics itself. The name economics of law to law and economics is preferred because it seems more realistic at the moment -the insight of law in economics is either poor or redefined in economic terms. The impact of economics on law is enormous and a realistic approach cannot neglect this fact. At the same time, while the impact of law on economy is essential, it is not, however, reflected in theory.

Economic analysis of law

Economics of law is most often associated with the so called Chicago school of law and economics. According to R. Posner, the popularity of this approach results from two factors: the crisis of traditional legal doctrine and the success of the economics of non-market behavior. The starting point for economic analysis of law is the assumption that decisions may be based either on intuition and vague moral beliefs or on scientific data. If economics is just a theory of choice it should *prima facie* be an excellent data provider for judges and legislators. Thus the rationale of the economic analysis of law is rather simple: to implement economics to legal decision-making process. The Chicago school implemented welfare economics with its theory of self-interest, price and efficiency. The basic assumption of the theory regards human nature: it assumes that people are rational and they maximize their satisfactions in a nonmarket as well as in market behavior. Their preferences may be represented by utility function. The “economic man” may be perfectly rational while breaking legal norms if it maximizes his utility. The second pivotal assumption of the economic analysis of law states that individuals respond to price incentives in nonmarket behavior in the same way as if they were on market. It means that legal sanctions are treated as prices. The third assumption is that legal decision-making process should imitate market. It means that law should be analyzed from the perspective of economic efficiency. The Chicago approach derives from Kaldor-Hicks criterion of wealth maximization. The other theory stemming from this methodology is a hypothesis about the internal efficiency of common law, efficiency achieved due to the process



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of selection of norms by virtue of litigation. The Chicago approach includes both: positive and normative theory of law. The first claims that law, at least common law, is in fact based on efficiency principle and that judges, even if using other terms such as justice, still treat efficiency enhancement as the main purpose of law. The normative theory states that if some parts of legal system are not promoting efficiency, such rules should be changed to reflect the efficiency-enhancing attitude of the whole legal system. At the moment economic analysis of law might be regarded as one among equal trends of the contemporary jurisprudence. As such the movement found strong opposition among many authors. One of the strongest critics is Ronald Dworkin who opposes the recognition of wealth as a basic value within society and the dependence of other values and allocation of

Rights upon wealth maximization. Dworkin points out that the initial allocation of rights cannot be instrumental i.e. based on efficiency principle because the argument is deteriorated by its circularity. Other critics debunked the pretended empirical and scientific character of Posner's analysis: there is nothing scientific in his approach which turns out to be a purely normative and perfectly unverifiable project.²⁰ Another group of critics is associated with CLS movement. The crucial issue, however, seems to be the skepticism among economists or economically oriented lawyers. Ronald Coase in his polemics with Richard Posner refuted not only his economic imperialism, but rather the whole methodology attached to welfare economics. For Coase economics of law was to overcome narrow and artificial approach of the welfare economics, especially concentrated on the price theory and equilibrium model. He directly opposed the expansion of principles of traditional economy to non-market sectors. Another problem with economic analysis of law is firmly related to the notion of efficiency. For the Chicago school the idea of efficiency is central and indisputable. According to Kaldor-Hicks criterion the notion of efficiency is perceived as a static factor whereas other concepts of efficiency are not attached to allocation of resources between economic agents. H. Leibenstein's concept of "X" efficiency refers to the internal productivity of economic institution. Deakin and Hughes purported with the notion of efficiency in context of legal regulation, the so called technical efficiency. H. Eidenmüller stresses the importance of the so called "costs of intervention" by which he understands an additional cost of changing existing legal regulation or creating a new one. On the other



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hand Zerbe as well as Sen called for broadening the notion of efficiency so that also sentimental value could have been encapsulated. The economic imperialism is however, not only a theoretical project. It rather reflects a wider social, political and historical phenomenon: the “economization” of social life. In the last twenty years moral or ideological debate in politics as well as a wider part of social discourse have been dominated by economic debates. Economy plays a more and more important role within the society, due to the long historical process of the collapse of traditional moral and political thinking, technical progress, civilization changes, globalization process and the bankruptcy of the centrally planned economies. It is perhaps also due to the expansion of the social attitude called by Ch. Taylor an “instrumental reason”. Social sciences, legal theory and moral philosophy admit the omnipotence of economic relations within the contemporary society. In democratic and liberal pluralistic societies the only linkage among individuals seems to be economic exchange. The contemporary society is no longer solely based on moral consensus but on free market and liberal democracy being values themselves. This observation is shared by pragmatists, functionalists (Rorty) and communitarians (MacIntyre). In these circumstances it is not strange that traditional legal doctrine can hardly explain judicial decisions, and that modern ant functionalist conceptions explain little about the contemporary legal order in which large part of regulations is based on economic reasoning. The modern economics of nonmarket behavior is based on philosophical assumptions regarding human nature, ethics and political philosophy. These assumptions and other axioms of economic theory, especially its abstract character and repugnance of realism, are too rigid and narrow when applied to such complex social reality as law.

The formalism and axiomatisation of economics was purported principally by Marshall, who believed that economics had to limit its scope to processes that had a price measurement. According to this approach, the economic laws are simple generalizations about human behavior measured in terms of a utility. Thus economics has been definitively founded on models based on axioms abstracting from the real world. Such models embrace the set of ideas such as the notion of equilibrium as stated by Marshall or the concept of the system of markets and general equilibrium endorsed by Walras and then definitely formalised by Arrow and Debreu.

This evolution in one word lead from economics regarded as political economy studying historical society as it was understood by A. Smith, to formalised abstract study of Interrelated variables applicable to any system of production or exchange, and after Becker's discovery of the economics of nonmarket behaviour, even to any social relations. The majority of economic analysis remains a normative project rather than a positive description or explanation. According to Friedman's methodology, the purpose of economics is to predict, not to explain. Posner claims it advantageous but such a defence seems doubtful. In order to explain legal phenomena a richer ontology and a broader scientific perspective are needed. Therefore, a new methodological approach is necessary in order to introduce a truly interdisciplinary research. The possibility of such methodological endeavor may be historically illustrated.

Foundationalist theories on law and economics

One of the earliest interdisciplinary approaches to law and economics may be found in the theory of J.R. Commons . Commons searched for legal foundations of economy. His theory of property gave rise to more general observations regarding the evolution of law and economy. He defined market as a process and a flow of transactions. Market was possible only if there were at least two transactions - one actual and the next best alternative. The price system operated in a real environment influenced by inequalities between parties. This inequality was connected to the distribution of economic power which created a basis of managerial transactions. The transactions between legal and economic superior and legal and economic inferior took place not on market but within economic institutions. As far as those managerial transactions were concerned the legal framework reflected economic inequality. Thus the economic position of parties of transaction also induced a legal power. The notion of legal power and of different categories of legal rights implemented by Commons were closely connected to the Hohfeld's theory of legal power and legal rights. This lead to the development of the concept of managerial transaction and economic institutions. The version of institutional insight into economics endorsed by Commons was to some extent shared by Ronald Coase. Coase seems to have adopted the distinction between bargaining and



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managerial transactions, stressed by Commons . The former referred to market exchanges, the latter to economic institutions “superseding” price mechanism, such as firms and government. The institutional analysis included in *The Nature of the Firm* passed unnoticed within the mainstream economics.⁴⁹ It is rather *The Problem of Social Cost* that raised extensive references and comments both by economists and lawyers. In this article Coase noted that the world of Zero Transaction Costs (ZTC world) made the initial allocations of rights irrelevant. But we do not live in such world, says Coase. In a real world of positive transaction costs allocation of rights affects outcome of economic activity. This means that law may increase or decrease transactional costs and allocative efficiency. It forms the ground for the so called normative Coase theorem which states that judges taking up any legal decision should be aware of its economic implications. They should also take them into account as to minimize transactional costs “insofar as this is possible without creating too much uncertainty about the legal position itself”. The Chicago school plainly states that law should be based on efficiency calculations. In fact normative Coase theorem does not offer a basis for such unanimous and straightforward interpretation. Coase in his discussion with Pigou suggested limitation of regulation by means of tax law and tax policy. It does not mean however, that he uncritically pushed for liberalization and limitation of transactional costs by virtue of freedom of contract, liability rules and protection of property. This solution would rather comply with basic assumptions of welfare economics, especially with policy recommendations formulated by K. Arrow referring to the General Equilibrium Model. There is another way of reducing transactional costs: by substituting market by firm perceived as an institution with its own hierarchy of power of decision-making. The firm however needs its own internal regulations (e.g. company law, insolvency law, etc.). It is somehow paradoxical that there is no escape from law. One can try to maintain ZTC like world but the price would be sometimes extensive regulation (e.g. Securities law, stock exchange law, etc.). But firm has yet another meaning, not linked with economic activity- it is an institution, where transactional costs are reduced by virtue of power and limitation of individual preferences submitted to the purposes of the organization. The question arises why law is so necessary for reducing transactional costs? It seems to be jurisprudential theory the endeavor to answer this question. But the most jurisprudential question is related directly to the normative Coase theorem.



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Is Coase suggesting that law should enhance efficiency? Should it promote free exchange and property rights? The answer to these questions depends on how seriously we treat the ZTC world. For Coase this is the world of welfare economics. But is it a model world which should be established in reality? In other words, should we intend to transform the real world of positive TC into ZTC world of economic models? Coase does not directly answer those questions, but to some extent he suggests the solution. The institutional framework arises if the TC is too high. In case of high TC firm will substitute free exchange. On the other hand Coase in one place suggested that ZTC world as for example in case of stock exchange requires massive regulation. Such complex regulation will tend to generate additional TC, if it is too complicated. But the observation endorsed by Coase vicariously opposes this “pro-market” solution. Coase seems to be more skeptical when he suggests, that there is no escape from law in the artificial ZTC world. The world reminding ZTC world may technically be built by virtue of massive regulations, and in fact transforms stock exchange in sort of firm with its internal power and organizational hierarchy. In conclusion I would like to suggest that the common interpretation of the normative Coase theorem is somehow based on over simplification. Coase simply observed a kind of economic regularity, perhaps even economic right concerning the relationship between market as decentralized institution regulated by the price theory and economic institutions regulated by internal relations of power. Neither of them is better - there are complementary elements of economic system. As far as law is concerned, there is no trace of proposition that public or private, statutory or judicial law is better. Coase analyses only the basic influence of law upon both market and firm or government. His legal analysis is perhaps not extensive but it is profound. Law seems to rule economic system shifting some sectors of economic activity between market, firm and government by virtue of the level of TC. At the same time there is no escape from law. Similarly to Commons, Coase emphasized that economic goods are bunches of rights assigned to legal individuals in accordance with legal rules. Law thus creates the kind of framework of economic system. One of the most important features of this framework remains the certainty about legal position which is the limit of the instrumental purpose oriented legal decision-making process. The close analysis of Coase theory provides the view that economics of law seems to be a more profound theory of the relationships between two systems of values, two frameworks of society: law regarded as a



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normative system providing order and stability for any actions of individuals, and market economy: economic order maintained by legal rules and consisting of activities of individuals. This landscape of the spontaneous social order delimited by law demarcation lines is very akin to Hayek's theory of *nomos*, *taxis* and *cosmos*. The starting point for Hayek is the epistemological assumption that knowledge and information is dispersed. Individual agents have limited access to whole information regarding complex *milieu* of social interrelations. Spontaneous order is founded upon the notion of free individual action. Nevertheless the liberty of agents is limited by the so called "abstract rules of just conduct". Those rules are prior to legal regulations and evolved in the course of the evolutionary process. Hayek draws distinction between the rules of just conduct identified with *nomos* and the purpose-oriented rules resulting from legislative process- *thesis*. According to Hayek *nomos* includes rules without any detailed purpose, but the purpose of *nomos* as a set of "principles of just conduct" is to maintain *cosmos* i.e. spontaneous order. On the other hand *thesis* refers to the purpose oriented norms whose main task refers to the aims of organization e.g. state. There are also two types of social order; *cosmos* and *taxis*. *Cosmos* refers to spontaneous order, typical for Great Society with its pluralistic approach to values and forms of social as well as individual life whereas *taxis* is the purpose-oriented order of state. The interrelationship between those two orders and respective two types of rules is a central issue for Hayek. He refers *nomos* to the rules of private law whereas *thesis* rather to public law. According to Hayek *thesis* and *nomos* should not be blend but rather separate since there is a real threat of domination of public law over private law, because the state has a natural inclination to growing and broadening the scope of the public regulation. This assumption is however difficult to reconcile with contemporary structure of legal order, where the norms of private and public law interfere between themselves. Another problem with Hayek's theory regards the origin and essence of rules of just conduct. Those rules seem to evolve in course of evolutionary process very similar to the history of common law. In reality they were always effected by public law, but Hayek seems to refer *nomos* rather to ideal model than historically developed and existing in reality set of rules. For him rules of just conduct may be identified with three fundamental rights as stated by Hume; "that of stability of possession, of its transference by consent, and of the performance of promises". Hayek opposes constructivism of the type evolving from

Descartes' rational philosophy. He does not recognise the link between constructivism and the moral basis of above stated rules of just conduct. One has to admit, that what for Hayek is just a kind of natural foundation of spontaneous order is in reality nothing more than a special category of moral foundationalism and constructivism based on secularized version of natural law and morality as it was perceived by the Enlightenment philosophers: Hume and Kant. This is perhaps the reason for certain similarity between Hayek's idea of *nomos* and Weinrib's concept of private law. To some extent both are antifunctionalist, even if Hayek agrees, that *nomos* as a whole is to some extent purpose-oriented. For Weinrib the purpose of law is to maintain and sustain legal order stemming from the formality and autonomy of individual freedom and individual rights. It is irrelevant that many other concepts, the notion of a total separation of private and public law including, are similar. *Nomos* is set up predominantly by courts and judges. *Taxis* refers rather to the politically oriented legislation.⁶³ Another problem regards the role and ontological nature of law. According to Hayek's account law seems to be both frame (*nomos*) of the social order and the instrument of state (*taxis*). Thus one may sum up that according to Hayek's theory, legal system plays double role: it provides expectation of behaviour of economic agents and it ensures enforcement of legal obligations.

Antifoundationalist theories on law and economics

The system theory may be traced back to Talcot Parsons and his *structuralfunctionalism*⁶⁴ but the paradigm shift from foundationalist to antifoundationalist social systems theory is associated with the *functionalist-structuralism* and the theory of law as *autopoiesis* endorsed by Luhman. According to his theory law is characterized as operationally closed self-referential and self-replicating *autopoietic* social subsystem. Law may also be defined as a systematically and institutionally generalized normative behavioral expectation. This means that law is regarded as a kind of information about the possible actions taken by the legal system and by the subjects of legal norms - legal actors. Thus for

Luhman the enforcement of legal norms has no separate significance. According to this theory it has only the signalling function, spreading information about the fact that state mechanism enforced or has not enforced the legal rule.

On the other hand the system theory of law does not refer exclusively to legal system. Social communication is common for all subsystems as a kind of inter-systemic interface. Law is “the product of an emergent reality, the inner dynamics of legal communications”. Law emerges in course of the communication process which is not linear but circular. The same is to be said about economy, which is also a closed system. According to Teubner law encodes information regarding *legality/illegality* whereas economy concerns information about *utility/non-utility*. Both systems are totally autonomous, but intellectually some influence is possible while decoding and translating information. The example such process of translation of the legal information into economic language is e.g. sanctioning. Legal sanction is translated by economic environment as a mere cost or price. If than such rationale is put into the circulation within legal system of communication some kind of “economisation” of legal system takes place. Teubner mentions “hand formula” and “doctrine of efficient breach” as examples of such process. It does not mean that law depends on economics or vice versa. Both systems are operationally closed, and the possible interaction is possible only due to the process of communication and spread of information within the system of social communication. At the same time law and economics evolve and the process of evolution is in fact a kind of co-evolution of the whole social system⁷⁴. Teubner states that legal evolution is based on circularity. Circularity may seem inadmissible way of scientific explanation, but law is paradoxical so that the only way to deal with this problem is “to shift the paradox from the world of thinking about law into the social reality of law”. Thus law seems to be a kind of hypercycle defined by legal procedure, the

notion of legal act, legal norm and legal doctrine, but perhaps the most important observation is that “Legal norms are thus defined by reference to legal acts; that is legal components are produced by legal components”. The process of co-evolution of law and economy requires a new regulatory attitude: instead of a traditional “command-and-control” approach, law should adopt “option policy” which is generally a type of reflexive regulation. Such regulation has an influence upon the economic system in more appropriate way because it is based on the



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observation that legal acts affect both systems and therefore should be effective not only within the scope of legal order but also from the perspective of the economic agents. In these circumstances the regulatory success would only be possible if the legal regulation respected the autonomy of economic system, transforming legal commands into the language adequate to the institutional environment of the economic system. Summarizing, it should be admitted that the social systems theory provides an interdisciplinary insight into law-economy relations. Subsystems are autonomous but at the same time the process of translation between them occurs. Why is it possible? The crucial issue seems to be the idea of law regarded as a process of communication. The enforcement of law is perceived as closer to reality. For Luhman physical power and its use are the ultimate foundations of pre-modern law. Due to the evolution decision-making process has become proceduralised and dispersed legal information sufficient to enhance legal conformity does no longer need sanction. The last thread with reality has thus been broken. The circularity and *autopoiesis* is a next step on the road to the cognitive perspective on law. The social system is substantialised - it is a real ontological being. The rest is just an element of the system. To some extent the social systems theory is an antithesis of Hayek's theory of *catalaxy*. The borders between private and public law does no longer exist.

The process of fragmentation of private law and decomposition of the historical idea of justice is thus finally approved.

Toward the new interdisciplinary paradigm

The foundationalist and antifoundationalist theories of law and economics seem to contradict each other. This contradiction may be explained within the historical perspective. The problem is in reality closely connected with the controversy on historical justice in private law.⁸² The notion of historical justice is often derived from Aristotelian theory of justice. In my opinion there is no possibility of finding solid bases for interdisciplinary project combining law and economics without explaining the path-dependant co-evolution of both disciplines. One general remark may be added: both economists and lawyers trace back very often to Aristotle. Karl Polanyi called him the founder of economics, whereas Ernst Weinrib points out that Aristotle invented private law. In fact the fifth book of *Nicomachean*



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Ethics on justice seems to be an interdisciplinary reflection on both; economic exchange and the basis of legal relations and obligations. The fundamental difference between utility-value and exchange-value was discovered by Aristotle. He referred commutative justice to what is now called market exchange. Accordingly, the price and exchange-value is usually defined by market forces. Only in case of collapse of voluntary exchange the judge determines the price. He represents not only state but a kind of justice no longer based on commutative but rather on distributive justice. But Aristotle rejected the possibility of founding social life on market exchange. For Aristotle did not distinguish between society and community - Greek *polis* was based on interpersonal relations, on friendship rather than on exchange. The difference between those two types of relationships is based on the assumption, that friendship stems from the care about others - friends, and not from the self-interest, as in case of market relations. Therefore Aristotelian notion of friendship seems as a kind altruistic behavior, which from the economic perspective may be characterized as irrational or at least unexplainable. As Polanyi had pointed out, according to Aristotelian tradition there were three levels of social interaction: “gift”, “exchange” and “threat”. “Gift” operated on a level of friendship and morality, “exchange” on level of market transactions, and “threat” on level of law and state sanctions. Perhaps the most dramatic process in the history of economic thought was its concentration solely on market exchange. This was not the case as far as Adam Smith and his *Lectures on Jurisprudence* or *Wealth of Nations* are concerned. Such identification of all possible social interactions with market exchanges resulted with “economic imperialism”. The true interdisciplinary project should be based on more pluralistic assumptions, taking into account the multiplicity of social relations and differences between economic exchange, moral obligations and legal system.

According to this one can differentiate among various levels of reality and different aspects of the same social relations. Therefore, it may be suggested that there are two basic aspects of law. Firstly, law may be perceived as a centralized information in form of a cognitive resource maintaining the expectation about behavior of other agents. The nature of law as a cognitive resource is related to the legal norms and principles communicated in advance and used as a kind of mechanism harmonizing social co-operation. This is what would be called the essence of law, according to the theory of social systems’ or the *autopoietic* theory of law.



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Secondly, law is an institutionalised normative mechanism for dispute settlement and as such it seems to be regarded as a foundation of social order. The reality of enforcement is not virtual as system theory suggests, but rather vicarious. Many legal rules are in fact self imposing and may resemble conventions. This may happen if the certainty of “natural sanction” is an observable fact. The pay-off is visible and obvious. It is not the case with complex social interactions. As Cooter states, conformity to legal rules is a process composed of self-imposing and externally-enforced mechanisms. The ultimate character of legal sanction gives rise to law as a unique normative system. Parties of transactions behave according to economic rights and normative expectations but this take place only in limited extent, namely if the parties agree to cooperate. Then they rely on conventions, trust or other quasi normative patterns of cooperation, even if self interest is the only purpose of their activity. The situation changes when the transaction encapsulated in legal form needs to be interpreted or if parties cease to cooperate out of an opportunistic behavior or any other reason. Then the third party- namely arbiter is needed in order to solve potential conflict. Thus we shift from free market to the scope of internal relationship within institution. Such exemplary institution may be the firm - acting according to its procedure e.g. company, but eventually it is a state as a “special type of firm” that should provide with legal solutions to the conflicts. Such an ultimate response is necessarily connected with court and judiciary process. Concluding, one may state that the limits of market are identical to the limits of the process of formation of exchange-value. The regular market exchange takes place without any direct intervention of legal institutions. Law is only a kind of information. But if there is a collapse within the process of exchange, if parties are unable to determine exchange-value in course of bargaining process, when the problem of interpretation of conditions of exchange or the problem of enforcement of freely made contract arises, law takes over. Thus judiciary becomes the ultimate value-determining institution. Judges certainly operate in an institutionalized legal environment and their activity is confined by the set of overlapping rules and principles, including the rules on interpretation of legal texts or the norms expressed in precedent. In accordance with legal rules and principles judges establish new conditions and resolve the conflict between parties. This solution is generally guaranteed by state enforcement. Normative legal order operates only on



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the level of legal system which does not refer to reality in a direct way - the sanctions and “pay-offs” have conventional and variable meaning (as in system theory).

The artificiality of the system means that it is based on axioms.100 Tony Lawson claims that contemporary economic system is such a deductive system.101 According to its positivistic version the legal system is another kind of normative set of axioms, rules and principles. The normative nature of economic model is parallel to the notion of legal one but on the normative level both systems do not interfere.

Epilogue

The crisis of jurisprudence enabled economic analysis of law to penetrate legal practice, legal theory, legal education. Legal theory is in crisis because the contemporary jurisprudential theories attacked by pragmatism give very weak basis for legislation and adjudication. Economics seems more solid. But the model of perfect market has been revised. Various theories of market imperfections attract attention. Economics as well as jurisprudence requires a broadened perspective, more realistic assumptions, a richer ontology. These propositions may be satisfied by an interdisciplinary approach addressing the question how law as well as economy are possible, how they work within social reality - the reality of complex networks, patterns of exchange, systems of communication. Jurisprudence based on moral foundations has been refuted - because no moral foundation, common value system for complex society are possible to identify. Change in legal theory is thus necessary because jurisprudence does not reflect the paradigm shift from non democratic to democratic law making process. The central institution of society is market; it is in fact market society. It does not mean that morality does no longer play any important role - but morality, custom or convention are not characteristic for market society; they are limited to small groups and communities. According to N. Simmonds, the jurisprudence of market society should be based on assumption, that “property is distributed by means of innumerable individual transactions between consenting parties, and which is pervaded by relationships of an essentially limited, contractual and often transitory nature” .Within the landscape of such market society we have a free exchange on the market, based on the principles such as protection of property, freedom of contract and institutions with their hierarchy, power and common

purposes. What we really need, however, is a theory on law and economics embracing the complexity of mutual relations between market and institutions. Such theory should be based on assumption, that legal norms play a double role in society. On the one hand there are providing expectation about the behavior of other agents and thus may form a kind of cognitive resources; on the other law as enforceable normative system protects rights and physically or conventionally enforces obligations.

Legal Realism: Birth and Development

Introduction to Realism

Legal realism was arguably the most important and controversial theory of judging in the history. And in general as well, there were few intellectual developments in law that have been as influential, controversial, and misunderstood. Its influence went far beyond as a theory of adjudication. As one legal theorist notes, even contemporary legal positivism owes much of its renewal to legal realism. Realism is a diverse school of thought and any attempts to homogenize it will distort more than simplify. When it comes to judicial decision-making, realists had two general theses.¹⁸ First, judges have a preferred outcome of a case even before they turn to legal rules; that preferred outcome is usually based on some non-legal grounds – conceptions of justice, attributes of litigating parties (government, poor plaintiff, racial group, etc), ideology, public policy preferences, judge's personality, etc. Second, judges usually will be able to find a justification in legal rules for their preferred outcome. This is possible because the legal system is complex and often contradictory. Of course, occasionally a judge will come across a preferred outcome that just “won't write”, but these are rare.¹⁹ Normally, however, judges will find some cases, statutes, maxims, canons, authorities, principles, etc, that will justify their preferred outcome.

Realists before Legal Realism

Most accounts of how legal realism came to exist start with Holmes or the birth of the movement in 1920s and 1930s. Yet, as some scholars showed, there were plenty of realists in the US even before the birth of realism: when “the legal realists arrived on the scene, realism about judging had circulated inside and outside of legal circles loudly and often for at least two generations.”²⁰ Francis Lieber, an eminent American lawyer of the mid-nineteenth century, noted that judicial decisions are rarely mechanistic; instead, experience and numerous other factors influence the outcome significantly.²¹

Likewise, William Hammond, a legal scholar who is considered a formalist, already in 1881 expressed a rather realistic attitude about law as a constraint on judging:

It is useless for judges to quote a score of cases from the digest to sustain almost every sentence, when everyone knows that another score might be collected to support the opposite ruling. The perverse habit of qualifying and distinguishing has been carried so far that all fixed lines are obliterated, and a little ingenuity in stating the facts of a case is enough to bring it under a rule that will warrant the desired conclusion. ... [T]he most honest judge knows that the authorities with which his opinions are garnished often have had very little to do with the decision of the court - perhaps have only been looked up after that decision was reached upon the general equities of the case. ... He writes, it may, a beautiful essay upon the law of the case, but the real grounds of decision lie concealed under the statement of facts with which it is prefaced. It is the power of stating the facts as he himself views them which preserves the superficial consistency and certainty of the law, and hides from careless eyes its utter lack of definiteness and precision.

Holmes, Cardozo, and other Predecessors of the Movement:

Oliver Wendell Holme.

The birth of legal realism is largely credited to the jurist who probably would not consider himself a realist – Oliver Wendell Holmes, Jr. Holmes famously wrote that “the life of law has not been logic; it has been experience.” Holmes essentially argued that changes in law (at least judge-made law) were not due to logic or pre-existing law; instead, policy preferences or personal experiences of judges mattered more.

Holmes also famously stated in his dissenting opinion that “general propositions do not decide concrete cases”. Many commentators consider this statement as his realist position that general rules of law will never decide actual cases. It seems, however, that this may have been an exaggeration as Holmes himself believed that specific legal propositions can determine how judges decide their cases.

It is probably fair to say that Holmes’ views were not iconoclastic by the later standards. It might be also true that many of his ideas were voiced by a previous generation of jurists. However, his prominence as a scholar and the Justice of the US Supreme Court helped to spread his ideas in all legal circles.

Cardozo

Like Holmes, Cardozo was not only an outspoken legal commentator but also a prominent judge. Thus, his position probably gave his views additional credibility. Compared to later realists, Cardozo was far from a revolutionary freethinker. His main treatise published in 1921 - *The Nature of the Judicial Process* – shows that most of his views rather moderate. He observed that in most cases, there are clear legal principles, which dictate the outcome. Yet, often a clear legal answer does not exist; in such cases, Cardozo thought, the judge should promote social ends; and here, Cardozo admitted, a judge may be tempted to substitute his view for that of the community. Grant Gilmore observed that “Cardozo’s hesitant confession that judges were, on rare occasions, more than simple automata, that they made law instead of merely declaring it, was widely regarded as a legal version of hard core pornography.” Gilmore probably exaggerated Cardozo’s impact, but we should not make the opposite mistake of underrating Cardozo’s impact.

Jerome Frank

Jerome Frank published his “*Law and the Modern Mind*”. If there ever was a radical version of legal realism, then Jerome Frank was it. Like other realists, Frank doubted judges’ ability to make decisions on the basis of general categories or general rules. Like many other eminent realists, Frank himself was an eminent federal judge. Frank thought that troubled psychological development is responsible for legal formalism.

According to Frank, the judge's preferred outcome precedes the inquiry into legal rules: "Judicial judgments, like other judgments, doubtless, in most cases are worked out backward from conclusion tentatively reached". Frank was also one of few realists who was preoccupied not only with "legal rules realism", but also with "fact finding realism" – a judge will usually accept only that evidence which will support his or her preferred outcome: "A judge, eager to give a decision which will square with his sense of what is fair, but unwilling to break with the traditional rules, will often view the evidence in such a way that the facts' reported by him, combined with those traditional rules, will justify the result which he announces".

Frank was also the only major realist who thought that judge's personality plays a more important role than legal rules. Legal rules, for Frank, were in general not important. Furthermore, he considered that rational element in law is an illusion. Frank argued that judicial outcomes depend on many factors, most of which can be extra-legal: judge's personality, political preferences, mood, racial views, etc.

On the other hand, Frank pointed out that a judge, after arriving at the conclusion, can consult with the general rules and principles to see if it is acceptable. So in a sense, Frank did not say that legal rules do not matter; instead, his point was that they were not leading to the decision, but they could provide guidance to a conscientious judge as a check-up.

Frank and later realists have been ridiculed by saying that how a judge decides a case depends on what "the judge had for breakfast." (Frank himself, apparently, never said such thing). Of course, this ridicule sets up realists for a straw man fallacy. Frank and other realists never maintained that it all comes down to what "the judge had for breakfast". Yet, he wouldn't deny that it might influence the decision. Although later criticized for his attachment to psychoanalytic school (and he also argued that judging ability would be greatly enhanced if judges underwent extensive psychological treatment), his views were well-known and to some extent influential.

Karl Llewellyn

Karl Llewellyn was arguably the most influential realist. He also presented the version of legal realism that perhaps could lay claim for an established theory of law and judging. Like other realists, Llewellyn scoffed at the idea that judging is a rule-bound activity, where a judge proceeds downward from legal rules to the outcome of the case: "[W]ith a decision already

made, the judge has sifted through these 'facts' again, and picked a few which he puts forward as essential - and whose legal bearing he then proceeds to expound".

For Llewellyn, formal rules – “the paper rules” or “pretty playthings” - have little effect on what judges actually do. Llewellyn, however, argued that judges do use some rules in their decision-making, only these rules are largely non-formal rules. These are the rules that judges would not find in a law book. Such general rules could be policy preferences like “maximize efficiency”, “let win the poorer party in a civil litigation” or “uphold any outcome which fosters free market competition”. In addition to policy preferences, other factors determine the outcome: legal knowledge, legal indoctrination, approval of peers, the collaborative nature, institutional constraints. Unlike Frank, Llewellyn did not deny that there is a rational element in law. Llewellyn also disagreed with Frank that judge's personality plays a crucial role in judging.

Llewellyn's one of the most famous contributions to the legal realism was to demonstrate the ambivalence of legal rules. Llewellyn used a fencing metaphor: “thrust” and “parry” of dueling cannons - for every canon of interpretation that said one thing, there was a “dueling” canon that said just the opposite. For example, the canon of *in pari materia* says that statutes dealing with the same subject should be interpreted so as to be consistent with each other, but another canon provides that later statutes supersede earlier ones. One canon provides that extrinsic aids to interpretation, such as legislative history, are irrelevant when the language of the statute is clear on its face; another canon, however, says that even the plain language of a statute should not be applied literally if such an application would produce a result divergent from what the legislation intended.

In his later years, Llewellyn seems to have adopted even more moderate position. In “The Common Law Tradition”, he noted that judges do follow accepted doctrinal techniques, provide a right legal answer, and achieve just results. They also want to earn approval of their legal audience. Moreover, he observed that institutional factors, like collegiality, also minimize individual inconsistencies.

European Realism

Legal Realism, by and large, was an original school of thought. There were, however, several attempts to promote similar view even before the movement. In the late nineteenth century and to

some extent in the early twentieth century German Free Law School (Freirechsschule) expressed similar ideas.⁵⁴ François Géný, a famed French scholar, in his “Science and Technique in Positive Private Law”, published from 1914 to 1924, also argued for a “free scientific research.”⁵⁵ Géný wanted to use sciences such as sociology, economics, linguistics, and philosophy to discover origins of rules. Overall, it seems that this European Legal Realism had little impact on European lawyers.

Scandinavian Realism

Legal Realism (also known as American Legal Realism) should be distinguished from its Scandinavian counterpart who had little concern for studies of judicial decision-making and legal reasoning.⁵⁷ Scandinavian realists like Alf Ross, Axel Hagerstrom, and Karl Olivecrona thought that law should be analyzed through the prism of social empirical sciences. Scandinavian realists wanted to explain scientifically how the law changes human behavior. American Realists, while also devoted to empirical research, were mostly preoccupied with the studies of judging, legal reasoning, and judge-made law.

Novel Contributions of Legal Realists

Some scholars argue that legal realism brought nothing new to the understanding of judicial decision-making.

For example, some scholars noted that preceding legal generations made similar observations about judging even before realists came to the scene. But almost all major scientific discoveries or ideological movements were preceded by “observations” similar to the new theories. Likewise, it is true that preceding generations of lawyers made similar observations as the legal realists; however, observations are not enough. ⁵⁹ It even might be that the genius of the realists was not in the discovery of their doctrinal and philosophical outlooks, but in their crystal articulation. Whatever it is, it is easy now to underrate their contribution. One can only wonder then, if the movement brought nothing new, why the awareness of the legal community and general public was so much different than before?

UNIT-IV

MODERN TRENDS

Post-colonial period witnessed significant amount of law-making that affected much of social transformation in India. This started with the framing of Indian Constitution, a document which could be referred to as socio-political and right-based in approach. The Constitution has actually sown the seeds of a slow social revolution that had triggered many progressive and purposive law-making. The Constitution by incorporating provisions that brings in affirmative action, promotes multiculturalism and measures of an obligation upon the State leading to a welfare mechanism is an epitome of a law made within the framework of sociological jurisprudence. Even though the Constituent Assembly was not an elected body, the views and issues that were discussed and further got reflected in the Constitution, had definitely the aspirations of the people and considered the various aspects of interest of the Indian society. Further, we could very well derive that the Constitution of India, is a purposive law-making for leading India into a slow social revolution, and over the period of time Constitution has moulded its shape with the changing need of the nation. In the following part an attempt have been made to look into certain instances by which the laws as a tool for social control and purposive policy making have been used so as to transform the society.

(a) Affirmative Action Affirmative action in India could be traced to the Constitution. The provisions relating to affirmative action are Article 46 in Part IV of the Constitution, which deals with directive principles of State policy and also in Part III dealing with fundamental rights by way of Article 15(4) and Article 16(4) for education and government jobs. Article 15(4) and Article 16(4) are brought about by the first amendment to the Constitution, so as to balance the original provisions, prohibiting any discrimination on the basis of caste, class, and sex. It is further stated that affirmative action, as many of the fundamental rights and directive principles provisions were brought in with the idea of greater social equality. This clearly shows that the affirmative action in India was incorporated in the Constitution of India, which is the basic policy document, as reconciliation of individual and societal interest and to emphasizing on purposive law making method under the sociological jurisprudence, to address the need of Indian

society at large, by removing the caste-based discrimination and inaccessibility to opportunities. So in turn the affirmative action would lead to removal of caste-based demarcation and lead to social transformation. But many academic works have pointed out to the fact that making caste as major criteria for reservation in public jobs and education had led to a situation of multiplicity and re-enforcement of caste system.

(b) Hindu Law Codification Hindu law codification, was one the steps taken by the Indian Government during mid-1950s, so as to carry forward the notion of women's equality and legitimizing it in Indian society. Hindu law reform was seen as the first step towards this. Commonly referred to as the Hindu code, the codified laws include the Hindu Marriage Act, 1955, the Hindu Minority and Guardianship Act, 1956, the Hindu Succession Act, 1956 and the Hindu Adoptions and Maintenance Act, 1956.

The Hindu Marriage Act, 1955 brought about major changes such as removing the necessity of being in the same caste for both husband and wife which was previously a precondition. Further, important concept of monogamy and uniform provision for dissolution of marriage was brought in. Academic writings have criticized the Hindu law reform on grounds of not bringing in uniform practices, which is in certain manner more procedural and inflexible than the existing practices in certain parts of India, but have accepted largely that Hindu law codification had led to the gradual reform and brought about social transformation in Indian society. The outstanding feature of the changes made in the law is that all disparity in the rights of men and women and disabilities based on sex are eliminated in matters of marriage, succession and adoption. This also leads to a situation where the female and male heirs would be seen at par when it comes to succession. From the perspective of sociological jurisprudence, the need of society is not clearly reflected in the Hindu law reform, as it is the leaders who were involved in the nationalist movement and later governed the country, who thought of need for such a codification and uniform law being applied to Hindu community. Academic writings have referred to the aspect of the Indian people not very aware or even interested in the codification and coming under the procedural rigor of a Hindu law. But this could be well viewed as a conflict approach to law-making, with certain progressive thinkers and women organizations supporting and lobbying for the law, while at large people were unaware or not interested in the law.

(c) Panchayati Raj Institutions (PRI) Though Mahatma Gandhi, had advocated for a village model of development, with self-dependent villages having resources and even the dispute resolution being done at the village level, the constitutional framers were not very much in favor of such a model.⁴¹ The model that finally got implanted in India is a top-down approach model, with a partial mention to the need for village level administration in Article 40 of Constitution of India.

Panchayati Raj Institutions (PRI) as a method of decentralized mechanism of administration, with participatory method got constitutional recognition in the real sense, quite late with the Seventy Third Amendment to the Constitution of India. An attempt to scrutinize whether PRI have contributed to the social transformation, with the people plan and participatory governance prioritizing the agenda for their own development, would lead us to the answer that the PRI is not given enough funds and powers in effect, thus leading to an overcrowded regime of paper laws for panchayats. This depicts the sad state of no effective social change being through PRI mode of administration. From the sociological jurisprudence aspect, the importance of giving the want of people is totally not taken into account here. Also decentralized PRI is the real manner in which want of the people and responsive laws at the lowest level could be framed. Hence, there is need for giving more emphasis on the PRI system of administration. The Nyaya Panchayat Act, 2009 was passed but no effective implementation in this regard has been initiated.

(d) Access to justice and PIL The greatest contribution the Indian judiciary has provided regarding access to justice for the people of India, could very well be identified as the concept of public interest litigation (PIL). Prof. Upendra Baxi has referred this judicial activism trend by the nomenclature of Social Action Litigation (SAL) as this is an Indian brand of class action suits and noted that the Supreme Court of India is suffering seriously. The most important aspect regarding PIL is that of relaxing the locus standi concept, any &public-spirited person can approach the constitutional courts and could bring into the courts notice the blatant violations of fundamental rights of people who are not capable of being approaching the courts themselves. PIL is a concept aimed at increasing the accessibility to justice and forms a part of constitutional jurisprudence in India. An academic article has mentioned that he need was more pressing in a country like India where a great majority of people were either ignorant of their rights or were

too poor to approach the court & hellip; especially when the actual plaintiff suffers from some disability or the violation of collective diffused rights is at stake.

The PIL which started around 1970 had cases related to the rights of disadvantaged sections of society such as child laborers, bonded laborers, prisoners, mentally challenged, pavement dwellers, and women as the subject-matter of the case. But this trend underwent a change and the subjects of PIL got shifted to matters of collective concern such as environment and policy matters in the 1980's and early 90's and have contributed to the social change in the sense that without such a mechanism many of the problems that had been faced by the poor and those inaccessible people would have never come before the court. Another important aspect that has also contributed to the development of the Supreme Court as an important institution in social change is the liberal and pro-active interpretation of the Constitutional provisions by the Supreme Court of India. This judicial activism was mainly carried forward by the way of making Article 21 of the Constitution of India an umbrella provision by stretching the ambit of the provision.

Judge-jurist Cardozo has clearly shown the importance of judiciary for social progress. He had emphasized the judges should ensure that the social progress and desired change is being carried on without hindrance. From the sociological jurisprudential perspective, the Supreme Court of India has played an important role in the social transformation with providing access to justice being made available for all through PIL and taking up important issues leading to the policy molding with the purpose of striking balance between interest claims of society and individuals. Post-Liberalization and Globalization Post-liberalization has made the governmental and law-making processes a method of negotiation in which the demands of various forces in the society for transfer of resources do take place. Forces and groups claiming for the various resources would include corporate conglomerates to poor and marginalized people. Here an important factor of democracy in India is that the electoral vote bank politics does play a role in providing the poor and marginalized people, even after the time of liberalization, for laying claims in the allocation of resources of the State. Viewing from the lens of sociological jurisprudence, we could say that conflict model which exist in India, still provide the poor and marginalized people a say in the government policy and law-making and still purposive and responsive law is made with striking the balance of need of society and individuals. Legislations such the Mahatma



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Gandhi National Rural Employment Guarantee Act, 2005 and the pending Food Security Bill are examples of the same. Khap Panchayat Recent issue of Khap Panchayat, which are tribal councils formed for their intra and inter-conflict resolution, giving rulings for honor killing have shown the importance of sociology of law based study under the sociological jurisprudence. Aspect of how law as a tool for social engineering could affect the issues of social ostracism and peer pressure on the basis of caste has now come to the forefront. Even though the marriages in the same gothra are valid as the Hindu Marriage Act, the peer pressure and fear of social ostracism have made the families to follow the rulings of Khap Panchayat and even led to killing of their own relatives. Demand of society for moulding criminal laws so as to make the people who issue such illegal rulings for honour killing is an example of demand of people for change in the law from sociological jurisprudential perspective.

Article 46, Constitution of India reads as:

46. Promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections.&The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.

- Article 15(4), Constitution of India reads as: 15. (4) Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

- Article 16(4), Constitution of India reads as:

16. (4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favor of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

- Article 40, Constitution of India reads as:

40. Organization of village panchayats; The State shall take steps to organize village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government.



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MEDIVAL INFLUENCE

The pre-colonial law of nations in India it is clear that rules in ancient India were put in place for the benefit of the ruler and were identified with religious expectations and demands. Further all the rules were to uplift the wealth (*artha*) of the ruler. In the pre-colonial India, values were pursued and fulfilled for the state as an institution of wealth. Within this overarching context room for the discretion of the ruler was left. This is very much similar to “*lexhumana*” of Aquinas who believed that law may be changed for human reason but maintaining that “an unjust law is not a law”. It is also clear that in pre-colonial India there were limited actors/participants (king and the priest) who made authoritative decisions which were discriminatory for the citizens, nonetheless such decisions were enforced by appealing to the religious mandatory duties of citizens to the advantage of the ruler (as citizens did all the jobs, from cultivation of crops to serving in the army). Nonperformance of these duties attracted sanctions. This clearly points out to the fact that the Hindu tradition of law was guided by religion and was sovereign focused just as western positivist law. Of course it is to be noted that the early positivist law was influence by the natural law principles and later Christian natural law principles but it still remained sovereign focused which is even true today and international law remains state centered with some exceptions in areas of human rights and individual criminal responsibility. Having said this the roots of international law were partly based on “*jusnaturalae*” meaning that validity of international law is related to “Will of God” and sovereigns were seen as subject not only to divine law, but also to the laws of nature established by God. Most notable were Spanish theologian’s and jurists, such as Francisco de Vitoria (1486-1546), Francisco Suárez (1548-1617) and Dutch writer Hugo Grotius(1583-1645). In Grotius’s (also called the founder of the Law of Nations) teachings natural law was a dominant element nonetheless he attempted to harmonize between doctrines of naturalism and positivism. In the broad sense then law in ancient India was a command of sovereign that is backed by sanctions and this process took place under a religious cover. In the 19th Century, Lasswell & McDougal rightly summarize that the dominant tradition of positivism which is derived from ancient Western-European thinking and strongly reinforced by certain basic presuppositions of the trans-empirical and positivistic emphases, has been that law is regarded “as an absolute and autonomous entity, independent of space and time, not related in any particular way to the nature of the society, in



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which it exists” In order to reject the metaphysical elements positivists concentrate more on the syntactic interconnections of such rules than their semantic dimensions of the interactions in which rules are employed). It is clear that positivist ideas in India predates Westphalian international law and focuses on the nation-state sovereignty focusing on territoriality and non-intervention in the domestic affairs.

This leads me to another question that I initially raised “*did India or for that matter other civilizations needed to be colonized in order to civilize them i.e. teach them western International law, before they could be decolonized?*” It seems to me India did not need to be colonized to learn western style international law to make it civilized as similar values driven by wealth already existed. In this connection work of Gong , “standard of civilization”, is useful. He argues that international law originated in Europe and was later applied throughout the world which disregarded the values of other civilizations especially colonies that were seen as inferior sovereignties. Non-European nations had to make adjustments to retain or earn their cultural diversity. On the other hand, Anghie argues that Westphalian understanding of sovereignty and suggests that Westphalian definition of sovereignty provide equality among Western States not non-Western world, which was considered as “uncivilized and hence non-sovereign”. It is for this reason it was not possible to discuss pre-colonial visions on international law using the positivist methodology as they did not see non-European nations as equal but non-sovereign. However, Anghie in his work focusing on the relationship between positivism and colonialism that after numerous colonial wars in 1914, virtually all the territories of Asia, Africa, and the Pacific were controlled by the major European states, resulting in the assimilation of all these non-European peoples into a system of law that was fundamentally European in that it derived from European thought and experience. Positivists at that time were faced with a problem, how can legal order be created among sovereign states? This appears inevitable, because the colonial confrontation was not a clash between two sovereign states, but between a sovereign European state and a non-European state under which the latter lacked sovereignty. It is hence arguable that Eastern sovereignty was regarded as inferior as they did not fit in the definition of western sovereignty which governed relationship between two European/Christian sovereign states. The historical reality, as Alexandrowicz points out that all the major communities in India as well as elsewhere in the East Indies were politically organized; they were governed by their Sovereigns,



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they had their legal systems and lived according to centuries-old cultural traditions. In this connection it is asserted that the problem therefore for the positivist law was that there were no rules to allow the non-sovereign/colonial states into the Westphalian system, hence they came up with the rule of civilizing colonial nations for them to earn a place next to European sovereign nations through the process of decolonization. It is argued that aim was to usurp the wealth of colonies for their gain and it was disguised with a policy which provided them time to drain wealth authoritative decisions which were discriminatory for the citizens, nonetheless such decisions were enforced by appealing to the religious mandatory duties of citizens to the advantage of the ruler (as citizens did all the jobs, from cultivation of crops to serving in the army). Nonperformance of these duties attracted sanctions. This clearly points out to the fact that the Hindu tradition of law was guided by religion and was sovereign focused just as western positivist law. Of course it is to be noted that the early positivist law was influence by the natural law principles and later Christian natural law principles but it still remained sovereign focused which is even true today and international law remains state centered with some exceptions in areas of human rights and individual criminal responsibility. Having said this the roots of international law were partly based on “*jusnaturae*” meaning that validity of international law is related to “Will of God” and sovereigns were seen as subject not only to divine law, but also to the laws of nature established by God. Most notable were Spanish theologians and jurists, such as Francisco de Vitoria (1486-1546), Francisco Suárez (1548-1617) and Dutch writer Hugo Grotius (1583-1645). In Grotius’s (also called the founder of the Law of Nations) teachings natural law was a dominant element nonetheless he attempted to harmonize between doctrines of naturalism and positivism. In the broad sense then law in ancient India was a command of sovereign that is backed by sanctions and this process took place under a religious cover. In the 19th Century, Lasswell & McDougal rightly summarize that the dominant tradition of positivism which is derived from ancient Western-European thinking and strongly reinforced by certain basic presuppositions of the trans-empirical and positivistic emphases, has been that law is regarded “as an absolute and autonomous entity, independent of space and time, not related in any particular way to the nature of the society, in which it exists”. In order to reject the metaphysical elements positivists concentrate more on the syntactic interconnections of such rules than their semantic dimension.

CLASSICAL APPROACH

In ancient India not only was there tremendous development of mathematics, astronomy, medicine, grammar, philosophy, literature, etc. but there was also tremendous development of law. This is evident from the large number of legal treatises written in ancient India (all in Sanskrit). Only a very small fraction of this total legal literature survived the ravages of time, but even what has survived is very large.

It is said that all Hindu Law originated from the Vedas (also called Shruti). However, in fact this a fiction, and in fact the Hindu law really emanated from books called the Smritis e.g. Manusmriti, Yajnavalkya Smiriti and the Smritis of Vishnu, Narad, Parashar, Apastamba, Vashisht, Gautama, etc. These Smirits were not laws made by parliament or some legislature. They were books written by certain Sanskrit Scholars in ancient times that had specialized in law. Later, commentaries (called Nibandhas or Tikas) were written on these Smritis, e.g. the commentary of Vijnaneshwar (who wrote a commentary called Mitakshara on the Yajnavalkya Smiriti), the commentary of Jimutvahan who wrote a book called the Dayabhaga (which is not a commentary on any particular Smriti but is a digest of several Smritis), Nanda Pandit (whose commentary Dattak Mimansa deals specifically with the Law of Adoption), etc. This was a completely revolutionary approach adopted by Vijnaneshwar, as it was a complete break from the traditional Hindu then written on these commentaries, e.g. Viramitrodaya, which is a commentary on the Mitakshara (which founded the Banaras School of Mitakshara). It is not necessary to go into further details about this as that would not be necessary for this discussion.

All law was originally customary law, and there was no statutory law in ancient India, for the simple reason that there was no parliament or legislature in those times. The problem with custom, however, was that it was often vague and uncertain, and did not go into details. Customary rules could of course tell us that when a man dies his property should go to his son. But what would happen if there is no son and the deceased only leaves behind him several relations who are distantly related to him e.g. second cousins, grand nephews, aunts, etc. Who will then inherit his property? This could obviously not be answered by custom. Hence text books were required to deal with this subject, and this requirement was fulfilled by the Smritis and commentaries in ancient India, just as it was done in ancient Rome. Custom no doubt



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prevailed over these written texts but for that clear proof was required by the person asserting its existence, which was not easy.

The Hindu law, as we all know, got divided into two branches --- the Mitakshara and the Dayabhaga. The Mitakshara prevailed over the whole of India except Bengal and Assam, while the Dayabhaga prevailed in Bengal and Assam. What was the basic difference between the two branches? The difference arose because two different interpretations were given by the commentators to one word 'pinda'. To understand this it is first necessary to know that according to the traditional ancient Hindu law approach, the person who had the right to give Shradha to a deceased had the right to inherit the property of the deceased. The Shradha is a religious ceremony to satisfy the needs of the spirit of the deceased. According to ancient Hindu belief, when a man dies, his spirit had still some needs e.g. the need for food and water. Hence, after his death, he has to be offered rice cakes (called 'pinda') and water. there is no inheritance at birth in the Dayabhaga (unlike in the Mitakshara). Thus, for example, if A dies leaving behind him his son B and B's son C, then, according to the Dayabhaga C will not inherit the property of his grandfather A, because C has no right to give shradha to A since his father B was alive when A died. Since C has no right to give shradha to A, (because B is alive), hence C cannot inherit his grandfather A's property, and the entire property goes to B or, if B has brothers, then it is shared equally by all the brothers.

For the same reason, there is no concept of coparcenary property in the Dayabhaga, because in coparcenary, there is inheritance at birth by the son in the ancestral property of his father. The Mitakshara, as already stated above, is a commentary on the Yajnavalkya Smriti. An interesting question arises as to why Vijnaneshwar preferred to write his commentary on the Yajnavalkya Smriti and not on the Manusmriti. The Manusmriti was better known and more prestigious than the Yajnavalkya Smriti. Yet, Vijnaneshwar preferred Yajnavalkya Smriti to Manusmriti. The question is why? If we compare Manusmriti with Yajnavalkya Smriti, we will find a striking difference. The Manusmriti is not a systematic work. We will find one shloka dealing with religion, the next dealing with law, the third dealing with morality, etc. Everything is jumbled up. On the other hand, the Yajnavalkya Smriti is divided into three chapters. The first chapter is called Achara which deals with religion and morality, the second chapter is called Vyavahara, which deals with law, and the third chapter is called Prayaschit which deals with penance.



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Shlokas which were very terse and concise, because of which it was sometimes difficult to understand the meaning, but also because society was undergoing changes and this required creative thinking by the later Jurists to make the law in consonance with social developments.

As stated by Mayne in his treatise on `Hindu Law & Usage` :

“Hindu law is the law of the Smritis as expounded in the Sanskrit Commentaries and Digests which, as modified and supplemented by custom, is administered by the courts.”

The smritikars and commentators did not exercise any sovereign power such as is possessed by the king or the legislature. Their authority was based on their deep scholarship and the respect which they commanded by their writings.

In this connection, it may be mentioned that in the guise of commenting on the Smritis, the commentators utilizing their creativity developed and expounded the Smriti text in greater detail and differentiated between the Smriti rules which continued to be in force and those which had become obsolete. They also incorporated new usages which had sprung up. Smritis and commentaries repeatedly stated that customs would override the written text. This principle made the Hindu law Thus we find that in the Yajnavalkya Smriti, law is clearly separated from religion and morality, unlike in Manusmriti where all these are jumbled up. Thus the Yajnavalkya Smriti was a great advance over the Manusmriti because in it there is a clear separation of law from religion and morality. We can compare this separation of law from religion, morality etc. with the similar separation made by the positivist jurists Bentham and Austin, who separated law from religion, morality etc. The Yajnavalkya Smriti was written later than the Manusmriti and it shows a great advance over the latter. Apart from that, the Yajnavalkya Smriti is more concise and systematic. It has only about 1000 shlokas, whereas the Manusmriti has about 3000. Also, it is more liberal than the Manusmriti, particularly towards women, etc. Vijnaneshwar, who adopted a secular approach towards inheritance, naturally preferred Yajnavalkya Smriti to the Manusmriti since the former had clearly separated law from religion. The Dayabhaga, on the other hand, preferred Manusmriti because in it law is not separated from religion and the Dayabhaga takes a religious approach towards inheritance. The separation of law from religion, morality, etc. was carried further by Narada and Brihaspati, who in their Smritis confine themselves entirely to law, particularly civil law. The basic structure of the ancient Hindu law was that laid down in the Smritis which was supplemented and varied by



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custom. This, however, was only its early character. Subsequently, it made remarkable progress during the post smriti period (commencing about the 7th Century A.D.) when a number of commentaries and digests (Nibandhas and Tikas) were written on it. These commentaries and digests were necessary not only because Smritis were written in dynamic, because customs kept changing as society progressed. Also, as explained by the Viramitrodaya, the difference in the Smritis was in part due to different local customs.

Medhatithi in his commentary on the Manusmriti wrote that the Smritis were only codifications of the existing customs, and the same has been said in the Smriti Chandrika (which is the basic text of the Dravid school of Mitakshara) and the Vyavahar Mayukh (which is a basic text of the Bombay school of Mitakshara). This, however, is not a very accurate view. Though no doubt the smritikars and commentators relied heavily on customs, they also used their creativity to develop the law to make it more just and rational according to their own notions.

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