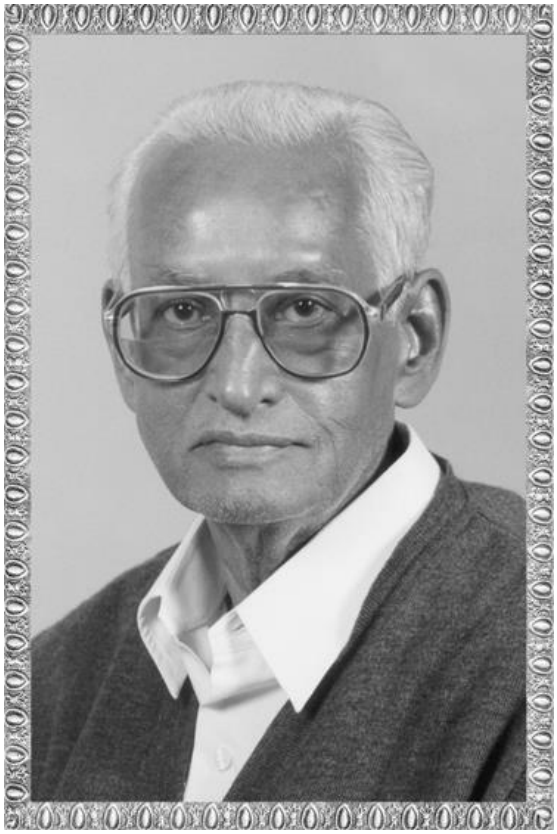
# Shree H.N.Shukla Group Of Colleges

(Affiliate to Saurashtra University & BCI)



# Lt. Shree Chimanbhai Shukla


**Shree H.N.Shukla College**
**2, Vaishali Nagar,**
**Nr. Amrapali Railway under bridge,**
**Raiya Road, Rajkot.**
**Ph. (0281)2440478**

**Shree H.N.Shukla College**
**3, Vaishali Nagar,**
**Nr. Amrapali Railway under bridge,**
**Raiya Road, Rajkot.**
**Ph. (0281)2471645**


*Shree H.N.Shukla College of Legal Studies* *"Sky is the Limit"*

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**Unit 1 – INTRODUCTION AND SOURCES OF LAW**

| UNIT NO. | TOPIC NAME |
|---|---|
| 1.1 | MEANING AND IMPORTANCE OF THE TERM 'JURISPRUDENCE' |
| 1.2 | NATURE AND DEFINITION OF LAW, RELATION BETWEEN : LAW AND MORALITY , LAW AND JUSTICE |
| 1.3 | SOURCES OF LAW : LEGISLATION, CUSTOMS, PRECEDENTS: CONCEPT OF STATE DECISIS WRITINGS |

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## UNIT -1- INTRODUCTION AND SOURCES OF LAW:


1.1 Meaning and Importance of term 'Jurisprudence':

Jurisprudence means the study of law in a logical and philosophical manner. The word Jurisprudence has been originated from the Latin word **Juris prudentia** which can be broken down into two parts, and that is *juris* which originated from the word jus which means law and the word prudential which means prudence, forethought or discretion.

Jurisprudence can also be referred to as a legal theory. Jurisprudence gives us an overview and a much more in-depth understanding of the law and the role of law in society. Jurisprudence deals with legal reasoning, legal institutions and legal systems.

The word jurisprudence is derived from the Latin word "Jurisprudentia" which means "knowledge of law". In Latin language 'Jure' or 'Juris' means 'law' and 'prudentia' means 'Skills or knowledge'. Jurisprudence then signifies a practical knowledge of law and its application.

In Murray's New English dictionary also Jurisprudence is defined as 'Knowledge of or skill in law'. Under the French law it refers to the body of judicial precedent as distinguished from statues and the expert opinion etc.

In Germany jurisprudence is termed as "rechts philosophics", that is the philosophy of rights, that is of law in an abstract sense.

Thus jurisprudence involves the study of general theoretical questions about the nature of law and legal systems, about the relationship of law to justice morality and about the social nature of law. Jurisprudence at many times has been used in different senses. Sometimes, it is used as a synonym of law, sometimes as a philosophy of law and sometimes as a Science of law. However, in today's time it is referred to as the term legal theory.

What is Legal Theory?

The term Legal theory was first coined by W. Friedman in 1945, when his book on "Legal Theory" appeared and since then it became popular. According to him the term legal theory is generally used as an evaluative and normative study of the concept of law and its relationship with morality and justice which the law sub serves. Such a study of law involves value judgments of social, ideological, sociological goals which the legal system is to conserve or cater.

Fitzgerald is of the opinion that "Legal Theory" is an attempt to an7swer the question what is law in order to clarify the most of all legal concept, the concept of law itself according to him legal theory is essentially a theoretical evaluation and an objective enquiry of the basic nature meaning and purpose of law, not what the legislature of code define in their day-to-day affairs, to determine what extent of interrelationship between law, morality and justice is necessary to determine the true nature and functions of law.

According to John D Finch- Legal Theory involves the study of the characteristic features essential to law and common to legal systems, an analysis to those basic elements of law which distinguishes it from other forms of rules and standards, from systems which cannot be described as legal systems and from other social phenomena. Therefore, the nature of legal theory lies in the study of distinctive attributes of law, by an examination of the relative merits and demerits of the principal exposition of the subject.

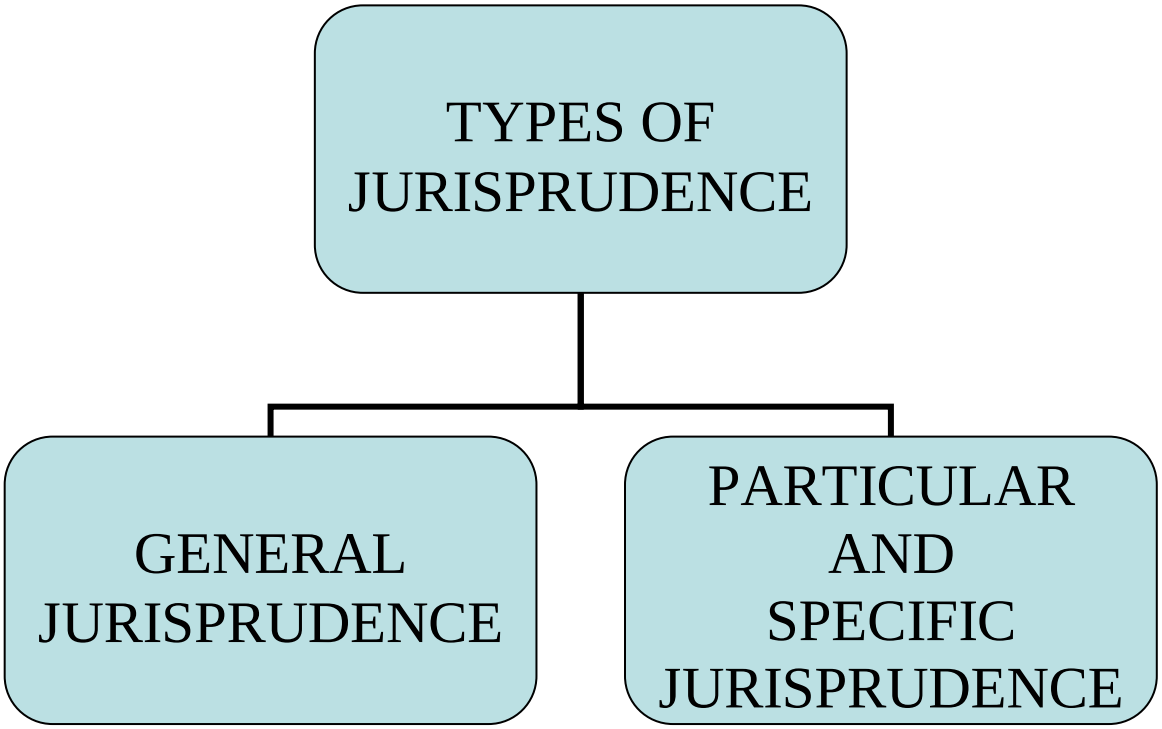
John Austin Point Of View

John Austin was the founder of Analytical School of Jurisprudence, and also being considered as the Father Of English Jurisprudence, was the first Jurist to term jurisprudence as a "science of law" which deals with the analysis of the concepts or its underlying principles. For Austin the appropriate subject of jurisprudence is positive law i.e law as it is (existing laws). He believed that it is not a moral philosophy but a systematic study of actual law as distinguished from moral, ideal or natural law.

Austin has further divided jurisprudence into two classes- General Jurisprudence and Particular Jurisprudence.

General Jurisprudence- According to him general jurisprudence is the philosophy of positive law. It concerns directly with principles and things which are common to various systems of positive law. It is a science concerning the expositions (comprehensive description) of the principles, motion, and distinctions which are common to the different systems of law.

For Example- The concept of rights and duties, possession, ownership, property etc comes under the province of general jurisprudence.




Particular jurisprudence- On the other hand particular jurisprudence is a science of particular systems of law. Its field is confined to one particular country, and is therefore sometimes termed as National jurisprudence.

For example- Ownership is one of the fundamental legal concepts. Particular jurisprudence would analyse, systematize and explain how the nature and scope of ownership has been defined or delimited by the particular systems of law.

Favor to Austin's Definition

Gray accepts Austin's classification of jurisprudence into general and in particular, though he prefers the term comparative jurisprudence in place of general jurisprudence.

Allen also agrees with Austin saying that there are certain elements inherent in the conception of law as the phenomena of social life, for example preservation of order, suspension of justice, delimitation of rights, etc. Therefore the term General Jurisprudence is applicable and particular jurisprudence is only a method how it works

Criticisms Against Austin's Definition

Salmond is opposed to the concept of general jurisprudence because for him, it is a science of civil law. He said that "Jurisprudence Generalis" is not the study of the legal systems in general but the study of general and fundamental principles of the particular legal system. He further adds that a particular principle does not pertain to the theory and philosophy of law simply because of its universal reception. One must go to other particular systems and study what they contribute to be the general sum of juristic knowledge.

Holland also objects to Austin's concept of particular jurisprudence. He says that if jurisprudence is a science then like all sciences it must be general. He gave the example of geology and says that it would be strange to call the study of composition and structure of the earth of England as a science of Geology.

Jurists from Historical School also denied the existence of general jurisprudence. According to them, law, like language, grows and evolves. In this process it is conditioned by local factors. For example the political, geographical, religious and historical etc, which differ from country to country. Therefore General Jurisprudence is not possible.

Holland's Point Of View

Holland has defined jurisprudence as" the formal science of positive law". According to him formal science is that which deals with the various relations which are regulated by legal rules than with the rules themselves which regulate these relations. Thus for Holland jurisprudence finally is a formal Science as opposed to material science. Material science supplies the fact, while the formal science of jurisprudence elucidates the meaning of the relations or prescriptions regulated by law.

For example- Jurisprudence deals with ownership and its relations regulated to actions also it explains the legal aspect of marriage and its connection with property and family.

Holland just like Austin considered jurisprudence as a positive law – it is not concerned with law as 'it ought to be' nor with the objects of law but with the law 'as it actually is' . He further adds that comparative law collects and tabulates the legal Institutions of various countries and that jurisprudence sets forth an orderly view of ideas and methods which have been variously released in actual systems.

Criticism to holland's definition

Gray has criticized Holland and says that material rules of law are like clay and relations governed by these rules are like bricks. As bricks cannot be made without clay, therefore, there can be no relationship if there is no material value.

Dias and Hughes, why criticising Holland observed that the analogy of jurisprudence with geology is erroneous. Law is a social institution and the structure of societies differ in their objective traditions and environment. Therefore law is not a mechanical structure like geological deposits.

Salmond's Definition

According to Salmond, Jurisprudence can be defined in two senses – Generic sense jurisprudence which is defined as "Science of Civil Law" and in the Specific sense which can be defined as a "Science of the First Principle Of Civil Law". He also observed that it is not possible indeed to draw any hard line of logical division between those first principles and the remaining portions of the law. The distinction is one of degree rather than of kind.

For Salmond, civil law means the law of the land or law of the state as distinguished from general law. Thus, civil law is the law which is administered by the courts in the administration of justice. According to Salmond, jurisprudence in the specific sense includes theoretical jurisprudence, therefore, it deals not with concrete details but with its fundamental principles and conceptions.

General jurisprudence as visualized by Salmond deals not with the study of legal systems in general but with the general or fundamental elements of a particular legal system. Further Salmond has divided jurisprudence into following categories:

1. Generic Sense Of Jurisprudence.
2. Specific Sense Of Jurisprudence.

He divides jurisprudence in the generic sense into:

Legal Exposition- The purpose of which is to set forth the contents of an actual legal system as existing at any time, whether past or present.

Legal History- The purpose of which is to set forth the historical process whereby any legal system came to be what it is or what it was.

The Science of legislation– Purpose of which is to set forth the law, not as it is or has been, but as it ought to be. It deals not with the past or present of any legal system but with its ideal future.

He divides jurisprudence in the specific sense into-

Analytical Jurisprudence: The purpose of which is to analyse, without reference either to their historical origin or development or to their ethical significance or validity. The first principles of law.

Historical Jurisprudence: The purpose of which is to deal with the general principles governing the origin and development of law. It is the history of the first principles and conceptions of the legal system.

Ethical Jurisprudence: The purpose of which is to deal with the law from the point of view of its physical significance and adequacy.

It is concerned not with intellectual content of the legal system or with its historical development but with the purpose for which it exists and the measure and manners in which that purpose is fulfilled.

Criticisms Against Salmond's Definition

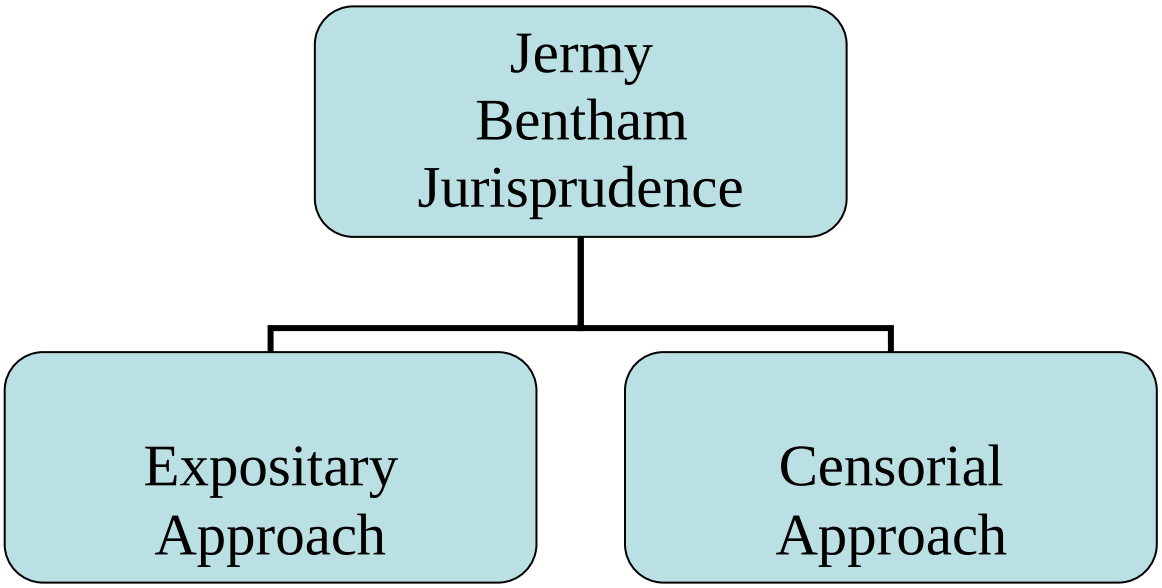
Salmond's definition has been criticized on the grounds that he has narrowed down the field of jurisprudence by saying that it is a science of civil law, and hence covers only particular legal systems. However with the emergence of functional approach, the province or scope of jurisprudence cannot be limited. The study of jurisprudence today is not confined to the study of law as administered by the courts of justice, it also takes note of the social life of the societies.

## DEFINITION OF JURISPRUDENCE :

### 1. JERMEY BENTHAM :

" A KNOWLEDGE OF LAW OR SKILLS OF LAW",Jermy Bentham is known as father of law. He divided the study of law in two parts :

(1) Expository approach
(2) Censorial approach




(1) Expositorial Approach :

It means command of sovereign. This approach explains that law should be examine as it is .

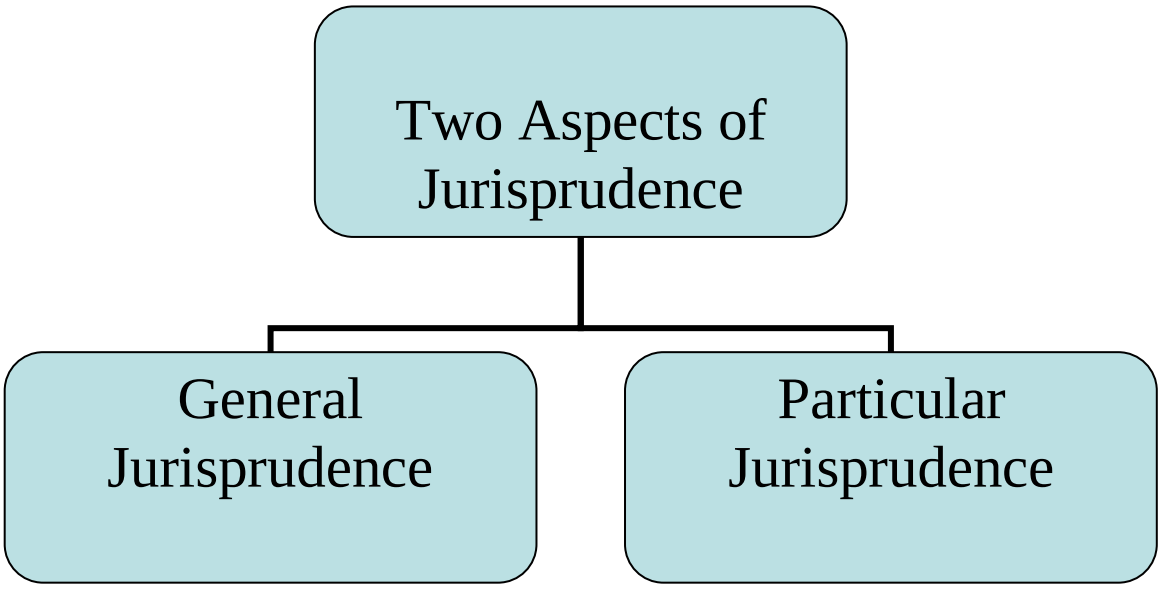
(2) Censorial Approach :

It means Morality of law. This approach explains that the law should be examine as ought to be.

2. **John Austin:**

He took the work of Bentham further. He defined Jurisprudence as a science, concerned with positive law that is law strictly so called. It has nothing to do with its goodness or badness of law. "

Two aspects has been given by Austin:




1. General Jurisprudence : Such subjects or ends of law as are common to all system
2. Particular Jurisprudence : The science of any actual system of law or any portion of it.

3. **Ulpian :**

Jurisprudence is observation of things human and divine, the knowledge of Just and Unjust. The definition given by him is too broad. Its scope is more inclined towards the concept of " Dharma". It focuses more on provinces of religion, ethics and philosophy.

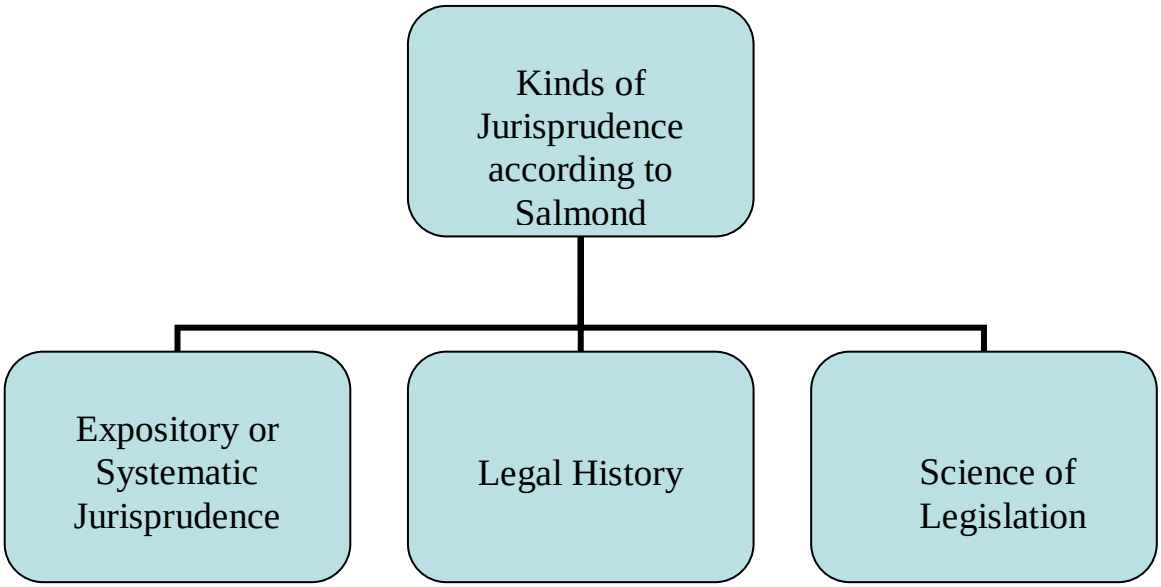
**4. Gray :**

Jurisprudence according to Gray , a Science of law, the statement & systematic arrangement of the rules followed by courts and the principles involved in those rules. He focuses more on religious and morality grounds. He believes that jurisprudence imposes a more practical approach on legal ethics, rules, justice by Court.

**5. Salmond :**

According to Salmond, Jurisprudence is a science of first principles of the civil law, which differentiate between the civil law and law of the state. By civil law means rules applied by courts in administration of justice.

Salmond agrees with the approach of Gray , for upholding Jurist's law and not concerned with theory or moralist view. He does not support inner belief. He divides the Jurisprudence into three parts :



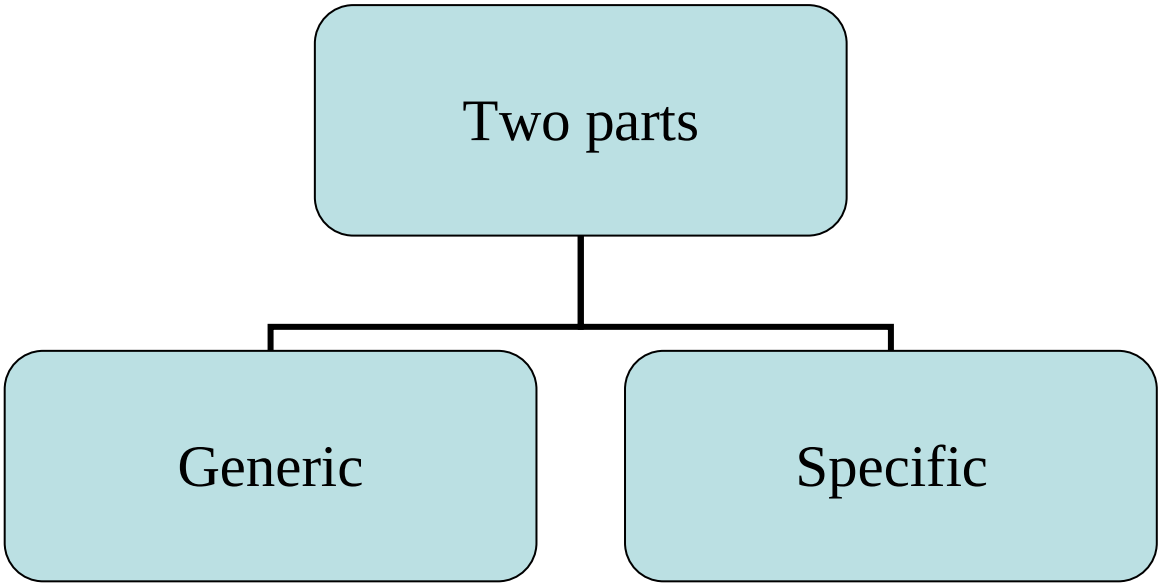

(1) Expository or Systematic Jurisprudence : deal with contents of an actual legal system as existing at any time whether past or present.

(2) Legal History : concerned with legal system in process of historical development

(3) Science of legislation: to set forth law as it ought to be , ideal future of legal system and purpose it may serve.

Salmond supports Holland & Austin:

He classified it in two parts




(1) Generic : Generic includes Legal doctrines , which includes Principles of Natural Justice.

(2) Specific: Specific includes only particular branch of such doctrines . for example, temporary and permanent injunction in contract.

## 6. Holland :

Jurisprudence according to Holland , means a formal science of positive law, which concerns with the basic principles or concepts underlying any natural system of law . Holland further positive law as general rule of external human action enforced by a sovereign political authority. Sovereign political body enforces the rule of law for its people, which deals not with concrete details but only with the fundamental principles underlying them. Jurisprudence deals with human relations who are governed by rules of law rather than the material rules themselves.

7. **Keeton:**

   Jurisprudence is the study and systematic arrangement of the general principles of law.

8. **Dean Roscoe Pound**:

   Jurisprudence is science of law using the term 'Law' in the juridical sense, as denoting the body of principles recognized or enforced by public and regular tribunals in the administration of justice. He said, all branches are distinctive but shed out with each other.

## Importance of the study of Jurisprudence

One of the major importance of the study of Jurisprudence is its fundamental value. Jurisprudence mainly comprises of research and the method to construct and clarify the basic concepts of law. Jurisprudence is not concerned with the making of the new laws; rather, it focuses on existing laws in the system and Jurisprudence, and its theories can help lawyers to form a better and much more improved practice.

Jurisprudence can also help students. It has its own scholastic worth in the life of students. Jurisprudence not only focuses on primary legal rules, but it also talks about the social impact of those laws. Jurisprudence combines logical and theoretical analysis of legal concepts. So it proliferates the analytical methods and techniques of a student.

Jurisprudence also focuses on law and its social value. It talks about fairness and the articulation of law. Jurisprudence deals with the basic fundamentals of the law and it is the eye of law. It helps a person to understand the thoughts and divisions of law.

Jurisprudence is also the grammar of law. It helps a person to understand the language and the grammar of law. Legal language and grammar are very different when compared to ordinary language, so Jurisprudence trains the mind of a lawyer so that he can use proper legal vocabularies and expressions.

Jurisprudence provides the rules of interpretation and as a result, it helps judges and lawyers in understanding the importance of laws passed by the legislators.

Jurisprudence and its relationship with other social sciences provide a broad spectrum to students in understanding how law can be related and connected with other disciplines.

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Jurisprudence teaches people that an answer to a legal problem is not hidden in the past or awaiting in the future rather than the answer to a legal problem is hidden around them in the fundamentals of legal studies.

Jurisprudence also talks about political rights and legal rights and how the system can strive to balance them out.

## Nature of Jurisprudence

Jurisprudence is the study and theory of law and it plays a critical role in shaping our understanding of the legal system. This field provides insights into the fundamental principles and concepts of law, including the meaning of rights, duties, possessions, property and remedies. By examining these concepts, jurisprudence helps us to better understand the role and function of law in society.

One of the key aspects of **jurisprudence is its focus on the sources of law**. This field provides insights into the various sources of law, including statutory law, common law and constitutional law. Through the study of jurisprudence, scholars and practitioners seek to develop a deeper understanding of how these sources of law interact with each other and how they influence the development of legal systems over time.

Another important aspect of jurisprudence is its role in **clarifying the concept of law itself**. While the law is often thought of as a set of rules and regulations, jurisprudence helps us to understand that law is a complex and multifaceted concept that cannot be reduced to a simple definition. Instead, the law is a dynamic and evolving concept that is shaped by a range of social, cultural and political factors.

It is important to note that jurisprudence is not a substantive or procedural law. Rather, it is an **uncodified law that provides a framework for understanding the legal system as a whole.** Jurisprudence serves as the "eye of law," providing insights into how the law operates and how it can be used to achieve justice and fairness in society.

**While some scholars view jurisprudence as a science, others view it as a social science.** Scholars of the historical school of jurisprudence, for example, view jurisprudence as a social science that is shaped by historical, cultural and political factors. Regardless of how one views jurisprudence, however, it is clear that this field plays a critical role in shaping our understanding of the legal system and in guiding the development of legal theory and practice over time.

Jurisprudence is a field of study that encompasses a wide range of topics and disciplines. It explores the relationship between law, culture and society and it seeks to understand the fundamental principles and concepts that underpin the legal system. One of the key aspects of jurisprudence is its focus on legal logic, which involves the study of legal frameworks, bodies of law and the reasoning behind legal decisions.

However, the scope of jurisprudence goes beyond just the study of legal logic. It also encompasses other fields, such as psychology, politics, economics, sociology and ethics. This is because the law is not created in a vacuum, but rather is shaped by the social, cultural and political context in which it operates.

Therefore, jurisprudence seeks to understand how these various fields intersect with the law and how they influence the development and application of legal principles.

The study of jurisprudence is also important for understanding the nature of law itself. It explores questions such as the origin of law, the need for law and the utility of law and seeks to develop a deeper understanding of how the law operates in practice. This includes studying various legal systems and traditions and how they have evolved over time.

Justice P.B. Mukherjee noted that jurisprudence is both an intellectual and idealistic abstraction, as well as a study of human behaviour in society. It encompasses political, social, economic and cultural ideas and covers the study of individuals in relation to the state and society.

Overall, the scope of jurisprudence is vast and wide-ranging and includes a variety of disciplines and topics. It is an essential field of study for understanding the legal system and the role of law in society and it continues to play a critical role in shaping legal theory and practice today.

## NATURE AND DEFINITION OF LAW :

The term "Law' denotes different kinds of rules and Principles. Law is an instrument which regulates human conduct/behavior. Law means Justice, Morality, Reason, Order, and Righteous from the view point of the society. Law means Statutes, Acts, Rules, Regulations, Orders, and Ordinances from point of view of legislature. Law means Rules of court, Decrees, Judgment, Orders of courts, and Injunctions from the point of view of Judges. Therefore, Law is a broader term which includes Acts, Statutes, Rules, Regulations, Orders, Ordinances, Justice, Morality, Reason, Righteous, Rules of court, Decrees, Judgment, Orders of courts, Injunctions, Tort, Jurisprudence, Legal theory, etc.

In old English "Lagu" i.e. law, ordinance, rule, regulation from old norse "lagu" law collective Plural of "Lag" is layer, measure, stroke 'Literally' something laid down of fixed. The term law has different meanings in different Places/societies at different times (as it is subject to amendments). In Hindu religion law implies "Dharma" in Muhammadean religion (Islam) it is "Hokum" in Roman its "Jus", in French, its "Droit" in Arabic, Alqanoon, in Persian and Turkish, its Kunoon, in Latin its "Legam" in Philipino its "Batas" in Albanian language its "Ligj" in Czech its "Zakon" in Danish its "Lor" in Dutch its "Wet" in Italian its "Legge" and in Lithuanian its "Teise" and so on. It varies from place to place in the sense adultery is an offence in India (under section 497 of the Indian penal code, 1860) while it is no offence in America. Law differs from religion to religion in the sense personal laws viz. Hindu law, Muslim law etc. differ from one another. For instance, A Muslim can have four wives living at a time, but, a Hindu can have only one wife living at a time (Monogamy). If a Hindu male marries again during the life time of first wife he is declared guilty of the offence of bigamy and is Punishable under sec. 494. The law is subject to change with the change in society and also change in the Government/legislative through the amendments/Acts.

Generally the term law is used to mean three things: First it is used to mean "legal order". It represents the regime of adjusting relations, and ordering conduct by the systematic application of the force of organized political society. Secondly, law means the whole body of legal Percepts which exists in a politically organized society. Thirdly, law is used to mean all official control in a politically organized society. This lead to actual administration of Justice as contrasted with the authoritive material for the Guidance of Judicial action. Law in its narrowest or strict sense is the civil law or the law of the land.

## Definition of Law :

The term 'law' denotes different kinds of rules and principles. Law is an instrument which regulates human conduct or behaviour. Therefore, Law is a broader term which includes Acts, Statutes, Rules, Regulations, Orders, Ordinances, Justice, Morality, Reason, Righteous, Rules of court, Decrees, Judgment, Orders of courts, Injunctions, Tort, Jurisprudence, Legal theory, etc.

The term law has been derived from the Latin term '**Legam'** which means the body of rules.
The term law has been derived from the Latin term '**Legam'** which means the body of rules.

**LAW**= DERIVED FROM LATIN WORD = **LEGAM** = BODY OF RULES

- Law in Hindu religion or jurisprudence = '***Dharma'***,
- Law in Islamic religion = '***Hukum'***,
- Law in Romans = '***Jus'***
- Law in France = '***Droit'***, and
- Law in Germany = '***Richt'***.

All these words convey different meaning. Thus, the term law has different meanings in different places/societies at different times as it is not static and it continues to grow.

**For example:-** Law varies from place to place in the sense that while adultery is an offence in India under Section 497 of IPC, it is not an offence in America.

Further, law differs from religion to religion in the sense of personal laws, e. a Muslim man can have four wives at a time, but a Hindu can have only one wife living at a time. If a Hindu marries during the lifetime of first wife he is declared guilty of the offence of bigamy under section 494 of IPC.

- Generally, the term law is used to mean three things:
    - **Legal Order:** Firstly, it is used to mean 'legal order'. It represents the regime of adjusting relations, and ordering conduct by the systematic application of the force of organized political society.
    - **Legal Precepts:** Secondly, law means the whole body of legal precepts which exists in an organised political society.
    - **Official Control:** Thirdly, law is used to mean all official control in an organised political society.

**Definitions of Law:**

It is very difficult to define the term law. Various jurists have attempted to define this term. Some of the definitions given by jurists in different periods are categorized as follows:

**(i) Idealistic Definitions:** Romans and other ancient jurists defined law in its idealistic nature.

**According to Salmond,** "*the law may be defined as body of principles, recognised and applied by the State in the administration of justice*".

**According to Gray**-, "*the law of the state or of any organised body of men is composed of the rules which the courts, that is the judicial organ of the body lays down for the determination of legal rights and duties.*"

(ii) **Definitions of Positivists:**

**Austin**: *Austin defined law as a command of sovereign backed by sanction.* According to him there are three elements of law, i.e

- command,
- duty
- sanction.

Thus, every law have a command and due to this command we have a duty to obey this command and if don't obey this command, then there is a sanction.

- **H.L.A. Hart**: *He defined law as a system of rules- the primary and secondary rules.*
- **Definition of Historical School of Law:**
  The chief exponent of the Historical school is ***Van Savigny.*** Historical jurisprudence examines the manner or growth of a legal system. He says that the law is not the product of direct legislation but is due to the silent growth of custom. He says that law is found in the society, it is found in the custom.
  (iv) **Definition of Sociological School of Law:**
  This school defines the law on the basis of its effect on law and society and vice versa.
  · **Ihering** definition of law: He says that *law is a means to an end and the end of law is to serve its purpose which is social and not individual.*
  · **Roscoe Pound's** definition of law: He *defines law as a social institution to satisfy social wants.* He says that law is a social engineering, which means that law is an instrument to balance between the competing or conflicting interests.
  (v) **Realistic definition of Law:**
  It studies law as it is in its actual working and effects.
  · **Holmes J.** considered the law to be part of judicial process. He says, "*the prophesies of what the courts will do, in fact and nothing more pretentions, are what I mean by law*". It would thus be seen that no single definition of law can be treated as satisfactory because law is ever changing in the dynamic fiber of its inherent element.

## Relationship between Law and Morality :

Law and Morality are two systems that govern the way humans behave. Law is a body of rules and regulations that all people are mandatorily obligated to adhere to. Morals, on the other hand, refer to general principles or standards of behavior that define human conduct within society but are not compulsory to be followed. The relationship between law and morality is a complicated one and has evolved over the years. Initially, the two were considered equivalent but with time and progressiveness, it is highlighted that the two are different concepts, but with certain inter-dependency between them.

In ancient times, when legal regulations were still at a very nascent stage, there was no particular distinction between law and morals. In India, Dharma was considered as law and morality. Hindu law, for example, was primarily derived from the Vedas and Smritis which were essentially values of the people. However, with time, Mimansa put forth certain principles which categorically distinguished between obligatory rules which are rules that are mandatory to be followed and are considered as law, and recommendatory rules which are suggested because they are good if they are followed and would amount to morality. Even in the middle age period, the Bible was considered as the major factor which influenced the legal regulations. Eventually, with time and new philosophies, the idea that there is a difference between these two concepts emerged.

Throughout history, no clear distinction has been made between law and morality. By virtue of a lack of distinction, all laws found their origin from what was considered morally correct by the people in a society. Eventually, the state picked up what was morally correct and gave it the form of laws or rules and regulations. Therefore, the law finds its origin and is based on the values that float amongst the people, creating a similarity between the two concepts, i.e. law and morality. For example, it is morally wrong to kill someone or to rape someone. This value has taken the form of a law. Morality may with time have been distinguished with laws, but it remains an integral part of legal development. Law essentially involves certain basic principles such as the principle of fairness and equality, and these principles are derived from ethics and morals.

Morality test of law

The entire purpose of the existence of laws is to ensure justice in society and do what is best for the welfare of all the people. Since the principle of justice is well under the ambit of morality, many jurists are of the opinion that there must not be any contradiction between law and morality. Any law which does not abide by moral standards should be removed and whether a law is right or wrong can be evaluated based on whether it is in consonance with moral values.

Morality as ends of law

As stated before, the end goal of enacting laws is to maintain a society that is based on principles of justice, fairness, and equality. The entire purpose of having certain moral standards is also to maintain some sort of order in the society which would lead to fewer conflicts. This shows that more or less, the purpose of both these phenomena is the same. It is believed by jurists that if the law is to stay involved in the lives of people, then it cannot ignore morals. If there is a law that is against moral standards, people may be hesitant to obey it which will create further conflicts within the society.

## Difference between law and morality

Law and morality may be interdependent to an extent and have certain similarities such as the same goals, but there are certain factors based on which the two concepts can be differentiated:

1. Law is derived from an external source which means that it is obtained through rules and regulations. Morality emerges from internal sources, i.e. it comes from the individual mind of a person.
2. Law treats all people in the same manner and doesn't change from person to person but morality is a subjective concept.
3. Morality has influenced the creation of laws but morality existed in society since even before legal implications were discussed.
4. Disobedience of the law leads to punishment but there are no repercussions of doing anything morally wrong.
5. Laws lay down mandatory behaviour that is expected out of the people who are governed under the said law. However, morality does not lay down strict guidelines of how one should behave but is a more personal concept.

## Relationship between Law and Justice :

Law is generally described as a system of rules established & implemented by social or governmental authorities to follow certain procedures. It is described as both a science as well as an art of justice. Historically, law and order were enforced by religion and faith. However, after further debate among philosophers & legal scholars, it was concluded that there should be human-made rules to govern human relations. The laws are constantly formed by the strong to favor themselves; they are not always just in nature.

The laws contain sanctions recognized by the state and implemented by state-authorized authorities. They differ from one country to another. There is also an international legal body that applies solely to governments that have signed treaties & conventions. Because each nation has its own rules & regulations, national laws are a set of regulations made by the govt or legislative authority that are executed by the govt body & interpreted by the judges.

## Justice

**Numerous scholars have tried to define the term justice:** "Justice is a reservoir from which the notion of right, responsibility, and equity develops," says Blackstone.

Plato defined justice as what was fair & right in both individuals as well as state acts in his Republic of Justice.

Aristotle defined justice as what was fair as well as equitable. As a result, Plato supported distributive justice rather than the corrective justice proposed by Aristotle.

## The Concept Of Justice

The notion of justice depends on how the Constitution is interpreted.

**The Constitution primarily addresses three types of justice:**

- Economic Equality,
- Legal Justice &
- Social Justice

## The Law And Justice Relationship

According to **HLA Hart**, justice is significantly more intricate due to the shifting standard of meaningful similarities between different situations inherent in it, which also fluctuates depending on the type of subject to which it is applied.

To attain justice is the goal of the law. Law is an instrument of society, according to **SALMOND**, and justice is what the law aims to accomplish. All moral notions cannot be recognized as just unless they are justified by the law.

"The real relation between Government & Law is ensured by making the law sovereign and the govt. its servant,", **Aristotle**.

According to **Aristotle**, the goal of justice is to give each person his just due by ensuring equal opportunity as well as fair and equal treatment. It also seeks to punish criminals and provide justice and remedies for civil wrongs. Thus, jurisprudence provides the connection between "Natural Justice", which refers to what is based on human behavior at all times, and "**Legal Justice**", which refers to what the state provides to its citizens.

Justice is a fundamental value that represents the moral ambition to make things fair. We believe the situation is out of balance without it. Of course, our perceptions of justice may differ from those of others in a given circumstance. We experienced tyrants who imposed many oppressive laws; these rules are the Law, but that does not imply they are good for anyone; they are structures that people are expected to obey in order to become good citizens. When this is exploited, they become extremely restricted and attempt to make people fully submissive; at that point, people would seek justice.

It does not follow that a law is just because it has been declared or implemented by a government. And there are many laws that are contrary to justice & natural law. As an illustration, apartheid law granted privileges based on a person's skin color, which violated the natural law. The laws of nature and justice were completely violated.

Consequently, "law" and "justice" refer to two related but dissimilar ideas. Though they frequently go hand in hand, the concepts of justice and law refer to two distinct concepts. A country's government creates a system of laws to control the lives and conduct of its population. Laws include rules, guidelines, principles, & norms. The government and its authorities, such as the security forces, officers, judiciary, etc., enforce laws that are found in written codes. On the other hand, justice is a more ethereal term built on the notions of fairness and equality of rights.

All laws shall be based upon the idea of justice and enacted and enforced in a just manner, without any discrimination.

## SOURCES OF LAW :

### INTRODUTION :

The word 'Jurisprudence' is derived from the Latin word *jurisprudentia*, which means science or knowledge of law. It is a very vast area of study and it consists of several ideologies and theories on how law has been made. It also includes the relationship of law with individuals and other social institutions within the scope of its study. There are various sources from which we derive law. Several jurists and scholars have attempted to classify the sources of law. However, the most common sources in all these classifications are legislations, judicial precedents, and customs.

## Law and sources of law

According to John Chipman Grey, who was a Harvard Law School professor, "*the Law of the State or of any organised body of men is composed of the rules which the courts, that is the judicial organ of the body, lays down for the determination of legal rights and duties".* Though Gray's definition has been criticised for being narrow, he distinguished law from the sources of law. According to him, law has evolved through case laws and sources of law are where we get the content and validity of law from. Essentially, law refers to the rules or code of conduct and its sources refer to the materials from which it gets its content.

### Types of sources of law

**John Salmond**, a legal scholar renowned for his ideologies on law in the field of jurisprudence, classified the sources of law into mainly two categories,i.e., material sources and formal sources.

#### Material sources

Material sources of law are those sources from which the law gets its content or matter, but not its validity. There are two types of material sources which are legal sources and historical sources.

#### Legal sources

Legal sources are the instruments used by the state which create legal rules. They are authoritative in nature and followed by courts of law. These are the sources or instruments that permit newer legal principles to be created. According to Salmond, legal sources of English law can be further classified into four categories-

- Legislation,
- Precedent,
- Customary law, and
- Conventional law.

Historical sources

Historical sources are sources that influence the development of law without giving effect to its validity or authority. These sources influence legal rules indirectly. The difference between legal and historical sources is that all laws have a historical source but they may or may not have a legal source. Decisions given by foreign courts serve as an example for this kind of source.

Formal sources

Formal sources of law are the instruments through which the state manifests its will. In general, statutes and judicial precedents are the modern formal sources of law. Law derives its force, authority, and validity from its formal sources.

According to **Keeton**, the classification given by Salmond was flawed. Keeton classified sources of law into the following:

Binding sources

Judges are bound to apply such sources of law in cases. Examples of such sources are statutes or legislation, judicial precedents, and customs.

Persuasive sources

Persuasive sources are not binding but are taken into consideration when binding sources are not available for deciding on a particular subject. Examples of such sources are foreign judgements, principles of morality, equity, justice, professional opinions, etc.

## Precedent as a source of law

Judicial precedents refer to the decisions given by courts in different cases. A judicial decision has a legal principle that is binding on the subordinate courts. Once a court has delivered a judgement on a particular case, the courts subordinate to it must abide by the precedent while deciding on similar cases with similar facts. Some of the most influential judicial precedents in India are the following:

1. ***Kesavananda Bharati v. the State of Kerala*** *(1973)*: This case is what introduced the concept of the basic structure doctrine in India, protecting the fundamental features of the Indian Constitution from being removed.
2. ***Gian Kaur v. the State of Punjab*** *(1996)*: This judgement affirmed that the right to die does not come within the scope of Article 21 of the Indian Constitution. The court affirmed that every person has the right to die with dignity. The court also stated that the right to die in a dignified manner is not the same as the right to die in an unnatural way.
3. **Maneka Gandhi v. the Union of India** *(1978)*: The court held Section 10(3)(c) of the Passports Act, 1967 as void since it violated Article 14 and 21 of the Indian Constitution.

4. ***Indra Sawhney v. the Union of India*** *(1992)*: This judgement set a ceiling of 50% for reservation of backward classes. It also held that the criteria of classifying groups as backward classes cannot be limited to economic backwardness.

## The doctrine of Stare Decisis

The authority of judicial precedents is based on the doctrine of stare decisis. The term stare decisis means to not disturb the undisturbed. In other words, precedents that have been valid for a long time must not be disturbed.

In India, subordinate courts are bound by the precedents of higher courts, and higher courts are bound by their own precedents. But when it comes to High Courts, the decision of one High Court is not binding on the other High Courts. Their decisions are binding on the subordinate courts. In cases where there are conflicts between decisions of court with the same authority, the latest decision is to be followed. As per Article 141 of the Constitution of India, the Supreme Court's decisions are binding on all the courts across the country. However, the Supreme Court's decisions are not binding on itself. In subsequent cases where there are sufficient reasons to deviate from the earlier decision, the Supreme Court can do so.

## Doctrine of Res Judicata

The term res judicata means subject matter adjudged. As per this doctrine, once a lawsuit has been decided upon, the parties are barred from raising the same issue in courts again, unless new material facts have been discovered. They can't raise another issue arising from the same claim either since they could have raised the same in the previous suit.

## Ratio Decidendi

As per Salmond, a precedent is a judicial decision that contains a legal principle with an authoritative element called ratio decidendi. Ratio decidendi means reason for the decision. Whenever a judge gets a case to decide on, he has to adjudicate it even when there is no statute or precedent concerning it. The principle that governs such a decision is the reason for the decision which is also called ratio decidendi.

## Obiter Dicta

The term obiter dictum means mere say by the way. This term is used to refer to statements of law that are not required for the case at hand. A judge may in the judgement of a case declare some legal principles to be applied in a hypothetical situation. It does not have much impact or authority. However, the subordinate courts are bound to apply the principles.

## Types of precedents

Authoritative and Persuasive

Authoritative precedents are those precedents that must be followed by subordinate courts whether they approve of it or not. They create direct and definite rules of law. They fall into the category of legal sources of law. Persuasive precedents on the other hand do not create a binding obligation on the judges. Persuasive precedents can be applied as per the discretion of the judge.

Authoritative precedents can be classified into the following two types:

(1) Absolute authoritative

An absolutely authoritative precedent is binding on subordinate courts in an absolute manner and it cannot be disobeyed even if it is wrong.

(2) Conditional authoritative

A conditionally authoritative precedent is binding on other judges but it can be disregarded in certain special circumstances as long as the judge shows the reason for doing so.

Original and Declaratory

According to Salmond, a declaratory precedent is a precedent that simply declares an already existing law in a judgement. It is a mere application of law. An original precedent creates and applies a new law.

## Factors increasing the authority of a precedent

1. The number of judges constituting the bench that makes the decision.
2. A unanimous decision has more weight.
3. Approval by other courts, especially the higher courts.
4. The enactment of a statute that carries the same law subsequently.

**Factors decreasing the authority of a precedent**

1. Abrogation of judgement by reversal or overrule of a higher court.
2. Abrogation of judgement by a statutory rule enacted subsequently.
3. Affirmation or reversal of decision on a different ground.
4. Inconsistency with the previous decision of a higher court.
5. Inconsistency with previous decisions of the court of the same rank.
6. Inconsistency with already existing statutory rules.
7. Erroneous decision.

## Legislation as a source of law

Legislation refers to the rules or laws enacted by the legislative organ of the government. It is one of the most important sources of law in jurisprudence. The word legislation is derived from the words *legis* and *latum,* where *legis* means law and *latum* means making.

## Types of legislation

According to Salmond, legislation can be classified into two types- Supreme and Subordinate.

1. Supreme legislation

Legislation is said to be supreme when it is enacted by a supreme or sovereign law-making body. The body must be powerful to the extent that the rules or laws enacted by it cannot be annulled or modified by another body. Indian Parliament cannot be said to be a sovereign law-making body as the laws passed by the parliament can be challenged in the courts. The British Parliament, on the other hand, can be said to be a sovereign law-making body since the validity of laws passed by it cannot be challenged in any court.

2. Subordinate legislation

Legislation enacted by a subordinate law-making body is said to be subordinate legislation. The subordinate body must have derived its law-making authority from a sovereign law-making body. It is subject to the control of the supreme legislative body. The following are the different kinds of subordinate legislation:

- **Executive legislation:** This is a form of subordinate legislation where the executive is granted or conferred certain rule-making powers in order to carry out the intentions of the legislature.
- **Colonial legislation:** Many territories across the globe were colonised by Britain and such territories were called colonies. The legislation passed by the legislature of such colonies was subject to the control of the British Parliament.
- **Judicial legislation:** Courts also have a role in enacting laws that aid in regulating the internal affairs and functioning of courts.
- **Municipal legislation:** Municipal authorities also possess the law-making power as they enact bye-laws.
- **Autonomous legislation:** Another kind of legislation is autonomous legislation, which is concerned with bodies like universities, corporations, clubs, etc.
- **Delegated legislation:** Sometimes legislative powers may be delegated to certain bodies by the parliament through principal legislation. A principal act may create subsidiary legislation that can make laws as provided in the principal legislation.

## Custom as a source of law

Custom refers to the code of conduct that has the express approval of the community that observes it. In primitive societies, there were no institutions that acted as authority over the people. This led to people organising themselves to form cohesive groups in order to maintain fairness, equality, and liberty. They started developing rules with coordinated efforts to make decisions. They eventually started recognising the traditions and rituals practised by the community routinely and formed a systematised form of social regulation. In India, laws relating to marriage and divorce are mostly developed from customs followed by different religious communities. Additionally, several communities belonging to the Scheduled Tribes category have their own customs related to marriage. As a result of that Section 2(2) of the Hindu Marriage Act, 1955 has exempted Scheduled Tribes from the application of this Act.

**Requisites of a valid custom**

1. **Reasonability:** The custom must be reasonable or practical and must conform with the basic morality prevailing in the modern-day society.
2. **Antiquity:** It must have been practised for time immemorial.
3. **Certainty:** The custom must be clear and unambiguous on how it should be practised.
4. **Conformity with statutes:** No custom must go against the law of the land.
5. **Continuity in practice:** Not only the custom must be practised for time immemorial, but it should also be practised without interruption.
6. **Must not be in opposition to public policy:** The custom must adhere to the public policy of the state.
7. **Must be general or universal:** There must be unanimity in the opinion of the community or place in which it is practised. Hence, it should be universal or general in its application.

**Sir Henry Maine's views on customs**

According to Sir Henry Maine, *"Custom is conception posterior to that of Themistes or judgments"*. Themistes refers to the judicial awards dictated to the King by the Greek goddess of justice. The following are the different stages of development of law according to Henry Maine:

1. At the first step, law is made by rulers who are inspired by the divine. Rulers were believed to be messengers of God.
2. At the second stage, following rules becomes a habit of the people and it becomes customary law.
3. At the third stage, knowledge of customs lies in the hands of a minority group of people called the priestly class. They recognise and formalise customs.
4. The final stage is the codification of customs.

## Types of customs

1. Customs without a binding obligation

There are customs that are followed in society that do not have a legal binding force. Such customs are related to clothing, marriage, etc. Not abiding by such customs can only result in a social boycott and not legal consequences.

2. Customs with a binding obligation

Customs that are meant to be followed by law are called customs with a binding obligation. They are not related to social conventions or traditions. There are mainly two types of customs with binding obligations- Legal customs and Conventional customs.

1. **Legal customs:** Legal customs are absolute in sanction. They are obligatory in nature and attract legal consequences if not followed. Two types of legal customs are general customs and local customs. General customs are enforced throughout the territory of a state. Local customs on the other hand operate only in particular localities.
2. **Conventional customs:** Conventional customs are those customs that are enforceable only on their acceptance through an agreement. Such a custom is only enforceable on the people who are parties to the agreement incorporating it. Two types of conventional customs are general conventional customs and local conventional customs. General Conventional Customs are practised throughout a territory. Local Conventional Customs on the other hand is restricted to a particular place or to a particular trade or transaction.

## Difference between custom and prescription

The main difference between the two is that custom gives rise to law and prescription gives rise to a right. Custom is generally observed as a course of conduct and is legally enforceable. Prescription refers to the acquisition of a right or title. When local custom applies to society, the prescription is applicable only to a particular person. For example, when a person X's forefathers have been grazing their cattle on a particular land for years without restriction, X acquires the same right to graze his cattle on the land. The right acquired by X is called a prescription. For a prescription to be valid, it must be practiced from time immemorial. In India, uninterrupted enjoyment for 20 years is essential to acquire a right to light and air as per the Indian Easements Act, 1882.

# Shree H.N.Shukla Group Of Colleges

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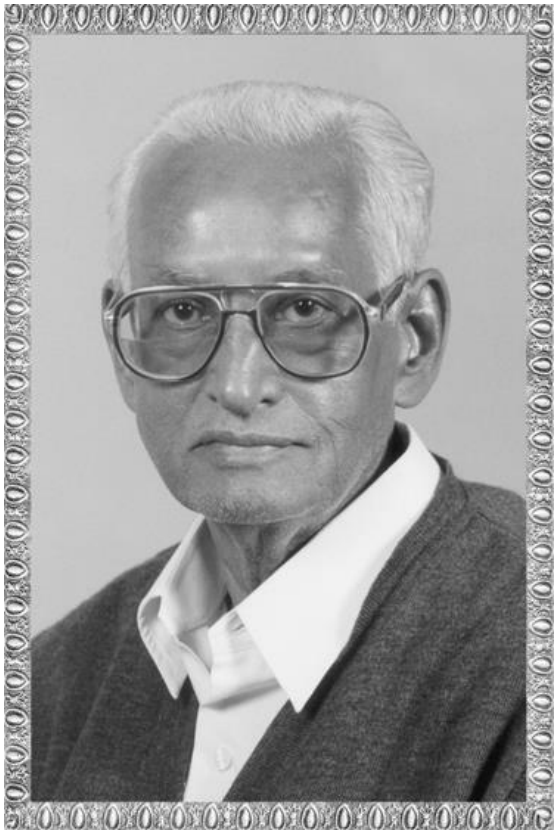

# Lt. Shree Chimanbhai Shukla


**Shree H.N.Shukla College**
**2, Vaishali Nagar,**
**Nr. Amrapali Railway under bridge,**
**Raiya Road, Rajkot.**
**Ph. (0281)2440478**

**Shree H.N.Shukla College**
**3, Vaishali Nagar,**
**Nr. Amrapali Railway under bridge,**
**Raiya Road, Rajkot.**
**Ph. (0281)2471645**


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**Unit 2 – SCHOOLS OF JURISPRUDENCE**

| UNIT NO. | TOPIC NAME |
|---|---|
| 2.1 | ANALYTICAL POSITIVISM : BENTAHM AND AUSTIN'S VIEW, CRTICISM OF AUSTIN'S THEORY |
| 2.2 | NATURAL LAW SCHOOLS,HISTORICAL SCHOOL, SOCIOLOGICAL SCHOOL |
| 2.3 | KELSON'S PURE THEORY OF LAW, H.L.A HART'S THEORY |

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## UNIT -2- SCHOOLS OF JURISPRUDENCE:


## 2.1 Analytical school of jurisprudence :

Analytical positivism (also known as the Analytical or Imperative school of law) is the most important school of thought in jurisprudence. The analytical school of jurisprudence is one of the most renowned contributions of Austin. It, therefore, explains law with reference to nature, purpose, characteristic, and function of the same. This school describes the history and philosophy of motion of emerging human thoughts on the aspect of law.

The positivist movement had been started at the beginning of the 19th decade because in this period of time the natural theory of law was not considered as relevant due to the influence of the scientific method on the concept of social sciences including jurisprudence.

Jurists of the school such as Austin, Hart, and others analyzed the same sense of law i.e. positive law. They did not rely on the concept of 'law ought to be' instead considered the concept of 'law as it is' existing. They also considered that law contains no relation with moral principles.

The jurists were named '***positivists'***= school was known as '***positivist school***'.

Different positivists had the same objective and perspective in their thoughts where few basic assumptions are followed by them which include;

- **Sovereign or Grundnorm** – As the law created by the authority.
- **Relied on the 'law as it is' not on 'the law ought to be'** – ignored morality and natural law.
- **Determined and encouraged the concept of sanction** – sanction which was substantive before the enforcement of laws.

Features of Analytical school of Jurisprudence

- Concerned with strictly so called i.e. what law is, not what it ought to be?.
- Law is not based upon idea of good or bad, it is based upon power of superior
- There is no moral law.
- Law and justice differs
- This school is reaction against natural law theories, which are based upon rationalization or nature confined law or God and gave importance to ethical and moral issues.

**Jeremy Bentham (1748-1832)**

Bentham is considered to be the founder of 'positivism' in the modern sense of the term. He preferred to divide jurisprudence into 'expository' and 'censorial' jurisprudence. Expository or analytical jurisprudence is concerned with law, it is without any regard to its moral or immoral character. On the other hand censorial jurisprudence is concerned with 'science of legislation' that is what the law ought to be.

Bentham in his book 'limits of jurisprudence defined' said that its duty of state to provide maximum happiness and maximum liberty. In other words he means to test every laws and keep a check whether they are providing maximum happiness and liberty, leading to principle of utility i.e. '*Greatest Happiness of the Greatest Number of People*'.

Bentham had defined law with the help of two important aspects such as;

- **Law is "Happiness is the Greatest Good":** According to Bentham, the laws framed must promote pleasure and decrease any kind of pain to human beings.
- **Law is the command of the sovereign:** The concept of sovereignty came into existence by Bentham before Austin would compose it. Bentham says the law is the command given by the sovereign.

**Bentham's Philosophy of Individualism**

The legal philosophy of Bentham is called "Individualism" because he was an individualist and propounded that the law is to be made for the emancipation of the individuals and restraining on their freedom.

**Principle Of Utility**

According to him the consequences of good and evil are respectively 'pleasure' and 'pain. In simple words, the basic thing which come under principle of utility i.e. pleasure and pain. Principle of utility recognizes the role of pleasure and pain as human life.

Pleasure = 'everything that is good'

Pain = 'everything that is bad or evil'.

Therefore, keeping the consequences of good and bad in human life the principle approves or dis-approves action on the basis of pleasure and pain. He believed that happiness of social order is to be understood in the objective sense and it broadly includes satisfaction of certain needs, such as need to be fed, clothed, housed etc. According to him, happiness changes its significance in the same way as the meaning also undergoes changes with the changes in societal norms.

He desired to ensure happiness of the community by attending four major goal namely,

- Subsistence
- Abundance
- Equality
- Security for the citizens

Therefore, the function of law must be to meet these ends in order to provide subsistence, to provide abundance, to favor equality and to maintain security.

In order to measure the pain they advise a calculator known as 'utilitarian calculus' which give seven factors to calculate pain-

- Intention
- Duration
- Certainty
- Nearness
- Fecundity
- Purity
- Extent

The task of government according to Bentham, was to promote happiness of society by furthering enjoyment of pleasure and affording security against pain. He was convinced that if individuals comprising society were convinced that if individuals comprising society were happy and contended, the whole body politic would enjoy happiness and prosperity.

**Laissez Faire**

He believed that, we must remove the hurdles between human beings and freedom. Because when every individual will enjoy his freedom, he himself will start about his own welfare. In other words he meant 'let the men free' leading to minimum interference of the state in economic activities of individuals.

**Criticism:**

- His theory ignores balancing the interest of the individual with the community's interest.
- His principle of utilitarianism says about pain and pleasure are the final and ultimate test of the adequacy of law but they cannot be defined as the final test.
- His theory was in the form of Laissez-Faire policy which harms the individuals in the society majorly on poor section people.
- Sole importance given on pleasure which is quantified is not a proper decision.

**Austin (1790 – 1859)**

John Austin is the founder of the Analytical school and father of the English Jurisprudence. He was born in 1790. He was elected to the chair of Jurisprudence at the University if London in 1826. His lectures delivered in the London University were published in 1832 under the title 'the Province of Jurisprudence Determined'.

Austin defined law as 'a rule laid down for the guidance of intelligent being by an intelligent being having power over him'.

- **Austin's Definition of Law**

"Law is a command of the sovereign backed by a sanction."

LAW = COMMAND + SOVEREIGN + SANCTION

His notion was that where there is no sovereign, there is no independent political society and vice versa is also applicable. For him, Law, was a set of rules established by men as politically superior, or sovereign, to men as politically subject.

The fundamentals of his theory are: Command, Sovereign and Sanction.

1. **Command:** Commands are the rules or expressions of imposed by a superior authority (by force or compulsion) on the Inferiors. The former is the sovereign which authorize the rules of conduct of the latter, the general public.

The commands may be

- **General Command** = issued for the guidance of a whole community, or
- **Particular command** = issued for the guidance of a particular community/ Individual.

Austin emphasizes that only General Commands form laws and they must be lawful and continuous.

- **Sovereign:** Sovereign is a source of law and every rule emerges from a sovereign. A sovereign may be any individual or body of individuals, whom the politically influenced mass of people habitually follow. However, he himself does not obey an individually or body of individuals.
- **Sanction:** To ensure and administer justice the state, applies physical force as sanction. Therefore, it is the sole crux of Positive Law. It instils fear of punishment in case one disobeys the laws. Sanction is related to duty shaped by the command of a sovereign authority and sanction becomes absolute necessity for enforcement of law
- **Punishment**

  Imprisonment of any type

  Fines

  Forfeiture of property

**Classification of Law by Austin:**

**(Austin theory of Imperative Law)**

Austin separated law as improperly so-called and law properly so-called. He encourages positive law only because he is a positivist.

He recognized that law can be set by both God (divine law) or by men to men, where law set by God is regarded as ambiguous and misleading according to him and on the other hand laws set by men to men is of three types;

- Laws set by political superiors to their inferiors – law properly so-called.
- Laws set by men who are not political superiors – positive morality.

**Criticism:**
Australians theory has been criticized by a number of jurist points of the criticism against Austin theory of law which are as follows:-

1. **Custom ignored**:- As per the Australian theory we founded that law is the command of the sovereign. Austin mainly focuses on the commands that are given by the sovereign are the laws. But in the earlier times, not the command of any superior but custom regulates the conduct of the people. Continue to regulate the conduct of the people, even after coming of the state into existence. Some jurists are in favour of the customs as laws and they say that laws are not the command of the sovereign but the custom followed by the people for a long time. But Austin in his theory of law emphasized only the law as the command of the sovereign and ignored the custom as a law.

2. **Judge made law**:- Austin in his theory has not provided any place for judge-made law. In the course of their duty judges make law by applying precedents and interpreting the law. Though an Austinan would say that judges act under the powers delegated to them by the sovereign, therefore, their acts are the commands of the sovereign body, in modern times, will deny that judge perform a creative function and Austin's definition of law does not include it.
3. **As against the command:-** Austin believes that the determination of human superiority is the only law-maker and its commands are laws. But with other historic jurists, Sir Henry Main criticized Austen's theory of sovereignty and condemned it. Sir Henry Men believes that sovereignty does not exist in the determination of human superiority. According to him, "a large population of influences, which we can call for a lesser ethic, which permanently shapes, limits or prohibits the real direction of forces by its sovereign".
4. **This theory makes the sovereign completely absolute:-** This theory makes the sovereign completely absolute, but in practice, it is not possible to be completely absolute. In the ancient and medieval era, there were absolute monarchs. But the monarchs could not remain completely absolute in his actions and behavior. They were subject to ethics theory, code of conduct, and investigation of religion. If he tried to violate established moral, ethical, and religious canons, he was in danger of facing rebellion.
5. **This theory is not even applicable to Europe:-** Austin has claimed that the King-in-Parliament is sovereign in England. But legally, this claim is not right because neither the king nor the parliament can go to the extent of becoming completely absolute. Always have to pay attention to the wishes of the public. The reality is that the public is the ultimate source of power. It is public which empowers Parliament. This is the reason why elections are held every five years after the House of Commons. And in the absence of the House of Lords, the House of Lords is quite ineffective.

**Holland (1835-1928)**

Holland is a follower of Austin. He followed the concept of the analytical approach of the study of law which is thoughts of Austin and the same was carried further by him. He rejected Austin's thoughts on 'Particular Jurisprudence' by stressing that if the jurisprudence is science then it is always general and universal but not particular.

His famous book is "The Elements of Jurisprudence".

- According to Holland, Jurisprudence is

**"***the formal science of that relation of mankind which is generally recognized as having legal consequences – the formal science of positive law".*

**The important terms to be remembered here is:**

- **Formal:** The jurisprudence concerns the human relation which is governed by the rules of law.
- **Positive Law:** Holland deals with the law as it is or existing law and does not concern with the law ought to be, which is the same as the concept of Austin.

**Holland's Criticism**

- Buckland criticized the concept of distinction of the word 'particular' and 'general' in the particular jurisprudence concept of Austin by saying it is not a correct separation.
- Buckland also said that law is not a mechanical structure like geological deposits but the law is development or growth and its true analogy is with biology.
- Salmond, Jethrow, Brown, and Gray also criticized Holland for his rejection of 'particular jurisprudence' and agreed with Austin on this concept.

Dias and Hughes observed Holland's jurisprudence with geology is erroneous because according to the law is a social institution and which differs its structure upon its objectives, traditions, and environment

**Salmond (1862 – 1924)**

Salmond is a legal positivist and belongs to an analytical school. He says jurisprudence is a science as same in the eyes of Austin and Holland. He has defined law in a unique way which is different when it is compared to Austin.

Salmond's famous book is "Jurisprudence or Theory of the law".

**Salmond's Contribution to the Analytical school of jurisprudence**

- According to Salmond, the law is "the body of principles recognized and applied by the state in the administration of justice". It means the law is rules which are acted by the courts of justice. The final and true test of the adequacy of law is defined by the enforceability of law in the courts of justice.
- According to Salmond, Jurisprudence is "the science of first principles of the civil law".
- The civil law here is the law that is applied by the administration in the court of justice and it is the first principle and the final test of the adequacy of law.
- Salmond's definition of law has brought a drastic change in the thoughts of analytical positivists.
- Inspired by him many realist jurists have considered law as it is and not law which ought to be.

**Salmond's Criticism**

- Vinogradoff criticized Salmond's definition of law, according to his law is to be formulated precisely by applying it in a court of justice.
- Critiques also said that the definition is itself defective because on their thoughts law is logically subsequent to the justice of administration.
- The definition of law is vitiated because when the rule has existed for the purpose of applying it in the court of justice.
- The purpose of the law Is not only justice but it also must be accepted universally.
- He has also narrowed the field of law according to the critiques.

**Hans Kelsen (1881 – 1973)**

Kelsen has contributed the pure theory of law to the analytical school of jurisprudence. He also accepted the concept of law as normative in nature and not a natural science.

Hans Kelson was an Austrian jurist, legal philosopher, and political Philosopher belonging to a legal positivism school of thought. Roscoe Pound was appreciated as Kelson's "undoubtedly the leading jurist of time."

His famous book is "The Pure Theory of Law".

**Pure Theory of Law or Vienna School**

Kelsen defines law as

"*the body of norms which stipulates sanction*".

Here, the norm is a pattern or model, the definition says that a kind of directive by which a certain act is permitted or authorized or commanded. His theory says to be pure because he eliminates alien elements which make the structure of the legal system improper. According to him, the law must be positive law.

According to Kelsen, Jurisprudence is "the study of a hierarchy of norms, the validity of each norm depending on that of a superior norm 'Grund Norm'.

*For example*– Constitution is our Grundnorm, all the other laws like IPC, CrPC, CPC, and other laws check their validity from the Grundnorm which is Constitution. If in IPC any such law made which is against the Grundnorm then they will become invalid.

His definition executes the relationship between the Grund norm and all other norms. For him norm is a 'rule of conduct' and grund norm is the superior norm. The grund norm delegates authority to inferior norms which derives their validity from the norms superior to themselves.

The validity of other inferior norms can be defined by testing against grund norm.

**Key Features of Kelsen's Pure Theory**

1. **Law as Science:** Kelsen tried to present a theory that could be attempted to change Law in science, a theory that could be understood through logic.
2. **As a positive law**: In the first paragraph of the pure theory of law, Kelsen introduces his theory as a theory of positive theory. This principle of positive law is then presented by Kelson as a hierarchy of laws that begins with one basic norm, i.e. Grundnorm ', where all other norms are related to each other either being inferior norms.
3. **Law "As it is"**: Kelsen emphasized that analysis should focus on the law 'as it is' in fact laid down, not as 'it ought to be'.
4. **Law and morality:** Kelsen's strict separation of law and morality is an integral part of his pure theory of law.
5. **The theory of law should be uniform**: According to Kalsen, the theory of law should be applied at all times and in all places.
6. **Static Aspect of Law:** Kelsey distinguished the static theory of law from the dynamic theory of law. The static theory of law represented the law as a hierarchy of laws where individual laws

were related to each other either being inferior, the one to other, or superior with respect to each other.

**Kelsen's Criticism**

- The concept of Grundnorm is vague and creates confusion.
- His theory of him did not give importance to his practicality of it.
- He directly ignored morality and natural law.
- As he says his theory is pure and excludes improper elements in it but the critiques say that it is not possible to maintain purity.

## 2.2 NATURAL LAW THEORY OF JURISPRUDENCE

There is no unanimity about the definition and exact meaning of Natural Law.

In jurisprudence = 'Natural Law' = rules and principles which are supposed to have originated from some supreme source other than any political or worldly authority.

It symbolizes Physical Law of Nature based on moral ideals which has universal applicability at all places and terms. It has often been used either to defend a change or to maintain status quo according to needs and requirement of the time.

**For example**,

Locke used Natural Law as an instrument of change but Hobbes used it to maintain status quo in the society.

The concepts of 'Rule of Law' in England and India and 'due process' in USA are essentially based on Natural Law.

Natural Law is also the Law of Reason, as being established by that reason by which the world is governed, and also as being addressed to and perceived by the rational of nature of man. It is also the Universal or Common Law as being of universal validity, the same in all places and binding on all peoples, and not one thing at Athens.

Lastly in modern times we find it termed as "moral law" as being the expression of the principles of morality. The Natural Law denies the possibility of any rigid separation of the 'is' and 'ought' aspect of law and believes that such a separation is unnecessarily causing confusing in the field of law. The supporters of Natural Law argue that the notions of 'justice', 'right' or 'reason' have been drawn from the nature of man and the Law of Nature and, therefore, this aspect cannot be completely eliminated from the purview of law. It has generally been considered as an ideal source of law with invariant contents.

**Features of Natural Law:**

- Natural Law is eternal and unalterable, as having existed from the commencement of the world, uncreated and immutable.
- Natural Law is not made by man; it is only discovered by him.
- Natural Law is not enforced by any external agency.
- Natural Law is not promulgated by legislation; it is an outcome of preaching of philosophers, prophets, saints etc. and thus in a sense, it is a higher form of law.
- Natural Law has no formal written Code.
- Also there is neither precise penalty for its violation nor any specific reward for abiding by its rules.
- Natural Law has an eternal lasting value which is immutable.
- Natural Law is also termed as Divine Law, Law of Nature, Law of God, etc. Divine Law means the command of God imposed upon men

**Evolution, Growth and Decline of Natural Law**

The content of 'Natural Law' has varied from time to time according to the purpose for which it has been used and the function it is required to perform to suit the needs of the time and circumstances. Therefore, the evolution and development of 'Natural Law' has been through various stages which may broadly be studied under the following heads:

(1) Ancient Period

(2) Medieval Period

(3) Renaissance Period

(4) Modern period

**Ancient Period**

**Heraclitus (530 – 470 B.C.)**

The concept of Natural Law was developed by Greek philosophers around 4th century B.C. Heraclitus was the first Greek philosopher who pointed at the three main characteristic features of Law of Nature namely,

- destiny,
- order and
- reason.

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

**Socrates (470 – 399 B.C.)**

Socrates said that like Natural Physical Law there is a Natural or Moral Law. 'Human Insight' that a man has the capacity to distinguish between good and bad and is able to appreciate the moral values. This human 'insight' is the basis to judge the law. Socrates did not deny the authority of the Positive Law. According to him, it was rather the appeal of the 'insight' to obey it, and perhaps that was why he preferred to drink poison in obedience to law than to run away from the prison. He pleaded for the necessity of Natural Law for security and stability of the country, which was one of the principal needs of the age.

His pupil Plato supported the same theory. But it is in Aristotle that we find a proper and logical elaboration of the theory.

**Aristotle (384 – 322 B.C.)**

According to him, man is a part of nature in two ways;

- Firstly , he is the part of the creatures of the God, and
- Secondly, he possesses insight and reason by which he can shape his will.

By his reason man can discover the eternal principle of justice. The man's reason being the part of the nature, the law discovered by reason is called 'natural justice'.

Positive Law should try to incorporate in itself the rules of 'Natural Law' but it should be obeyed even if it is devoid of the standard principle of Natural Law. The Law should be reformed or amend rather than be broken. He argued that slaves must accept their lot for slavery was a 'natural' institution. Aristotle suggested that the ideals of Natural Law have emanated from the human conscience and not from human mind and, therefore, they are far more valuable than the Positive Law which is an outcome of the human mind.

- **Natural Law in Roman System**

The Romans did not confine their study of 'Natural Law' merely to theoretical discussions but carried it further to give it a practical shape by transforming their rigid legal system into cosmopolitan living law.

In this way Natural Law exercised a very constructive influence on the Roman law through division of Roman Law into three distinct divisions namely

- 'Jus civile',
- 'Jus gentium' and
- 'Jus naturale'.

Civil law called 'Jus civile' was applicable only to Roman citizens and the law which governed Roman citizens as well as the foreigners was known as 'Jus gentium'. It consisted of the universal legal principles which conformed to Natural Law or Law of Reason. Later, both these were merged to be known as 'Jus naturale' as Roman citizenship was extended to everyone except a few categories of persons.

Roman lawyers did not bother themselves with the problem of conflict between 'Positive Law' and 'Natural Law'. Though there was a general feeling that natural law being based on reason and conscience was superior to Positive Law and therefore, in case of a conflict between the two, the latter should be disregarded.

- **Natural Law in India**

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

According to the Hindu view, Law owes its existence to God. Law is given in 'Shruti' and 'Smritis'. The king is simply to execute that law and he himself is bound by it and if goes against this law he should be disobeyed. Puranas are full of instances where the kings were dethroned and beheaded when they went against the established law.

Medieval Period

Catholic philosophers and Theo logicians of the Middle Ages gave a new theory of 'Natural Law'. Though they too gave it theological basis, they departed from the orthodoxy of early Christian Fathers. Their views are more logical and systematic.

**Thomas Acquinas**

His views may be taken as representative of the new theory. His views about society are similar to that of Aristotle. Social organization and state are natural phenomena.

He defined law as *'an ordinance of reason for the common good made by him who has the care of the community and promulgated'*.

St. Thomas Aquinas gave a fourfold classification of laws, namely,

Law of God or external law,

Natural Law which is revealed through "reason",

Divine Law or the Law of Scriptures,

Human Laws which we now called 'Positive law'.

Natural Law is a part of divine law. It is that part which reveals itself in natural reason. Like his predecessors, St. Aquinas agreed that Natural Law emanates from 'reason' and is applied by human beings to govern their affairs and relations. This Human Law or 'Positive Law', therefore, must remain within the limits of that of which it is a part. It means that Positive Law must conform to the Law of the

Scriptures. Positive Law is valid only to the extent to which it is compatible with 'Natural Law' and thus in conformity with 'Eternal Law'.

He regarded Church as the authority to interpret Divine Law. Therefore, it has the authority to give verdict upon the goodness of Positive Law also. Thomas justified possession of individual property which was considered sinful by the early Christian Fathers.

The Period of Renaissance

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

**Hugo Grotius (1583 – 1645)**

Grotius built his legal theory on 'social contract'. His view, in brief, is that political society rests on a 'social contract'. It is the duty of the sovereign to safeguard the citizens because the former was given power only for that purpose. The sovereign is bound by 'Natural Law'. The Law of Nature is discoverable by man's 'reason'. He departed from St. Thomas Aquinas scholastic concept of Natural Law and 'reason' but on 'right reason', i.e. 'self-supporting reason' of man.

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

Hugo Grotius is rightly considered as the founder of the modern International Law as he deduced a number of principles which paved way for further growth of International Law. He propagated equality of State and their freedom to regulate internal as well as external relations.

**Thomas Hobbes (1558 – 1679)**

According to Hobbes, prior to 'social contract', man lived in chaotic condition of constant fear. The life in the state of nature was "solitary, poor, nasty, brutish and short". Therefore, in order to secure self-protection and avoid misery and pain, men voluntarily entered into contract and surrendered their freedom to some mightiest authority that could protect their lives and property. Thus Hobbes was a supporter of absolute power of the ruler and subjects had no rights against the sovereign.

Though he makes a suggestion that the sovereign should be bound by 'Natural Law', it is not more than a moral obligation. It would thus be seen that Hobbes used Natural Law theory to support absolute authority of the sovereign. He advocated for an established order.

During the Civil War in Britain, his theory came to support the monarch. In fact, it stood for stable and secure government. Individualism, materialism, utilitarianism and absolutism all are interwoven in the theory of Hobbes.

**John Locke (1632 – 1704)**

According to Locke, the state of nature was a golden age, only the property was insecure. It was for the purpose of protection of property that men entered into the 'social contract'. Man, under this contract, did not surrender all his rights but only a part of them, namely, to maintain order and to enforce the law of nature. His Natural Rights as the rights to life, liberty and property he retained with himself.

The purpose of government and law is to uphold and protect the Natural Rights. So long as the government fulfils this purpose, the laws given by it are valid and binding but when it ceases to do that, its laws have no validity and the government may be overthrown. Locke pleaded for a constitutionally limited government.

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

**Jean Rousseau (1712 – 1778)**

Rousseau pointed out that 'social contract' is not a historical fact as contemplated by Hobbes and Locke, but it is merely a hypothetical conception. Prior to the so called 'social contract', the life was happy and there was equality among men. People united to preserve their rights of freedom and equality and for this purpose they surrendered their rights not to a single individual, i.e. sovereign, but to the community as a whole which Rousseau named as 'general will'. Therefore, it is the duty of every individual to obey the 'general will' because in doing so he directly obeys his own will.

The existence of the State is for the protection of freedom and equality. The Sate and the laws made by it both are subject to 'general will' and if the government and laws do not conform to 'general will', they would be discarded. Rousseau favored people's sovereignty. His 'Natural Law' theory is confined to the freedom and equality of the individual. For him, State, law, sovereignty, general will etc. are interchangeable terms.

**Immanuel Kant (1724 – 1804)**

The Natural Law philosophy and doctrine of social contract was further supported by Kant and Fichte in 18th century.

They emphasized that the basis of social contract was 'reason' and it was not a historical fact. Kant drew a distinction between Natural Rights and the Acquired Rights and recognized only the former which were necessary for the freedom of individual. He favored separation of powers and pointed out that function of the State should be to protect the law. He propounded his famous theory of Categorical Imperative in his classic work entitled Critique of Pure Reason.

Kant's theory of Categorical Imperative was derived from Rousseau's theory of General Will. It embodies two principles:-

- The Categorical Imperative expects a man to act in such a way that he is guided by dictates of his own conscience. Thus it is nothing more than a human right of self-determination.
- The second principle expounded by Kant was the doctrine of 'autonomy of the will' which means an action emanating from reason but it does mean the freedom to do as one pleases.

In essence, Kant held that "an action is right only if it co-exists with each and every man's free will according to the universal law". This he called as "the principle of Innate Right". The sole function of the state, according to him, is to ensure observance of law.

**Modern Period**

The Natural Law theory received a setback in the wake of 19th century pragmatism. The profounder of analytical positivism, notably, Bentham and Austin rejected Natural Law on the ground that it was ambiguous and misleading. The doctrines propagated by Austin and Bentham completely divorced morality from law.

In the 19th century, the popularity of Natural Law theories suffered a decline. The 'Natural Law' theories reflected, more or less, the great social economic and political changes which had taken place in Europe. 'Reason' or rationalism was the spirit of the 18th century thought. A reaction against this abstract thought was overdue. The problems created by the new changes and individualism gave way to a collectivist outlook.

Modern skepticism preached that there are no absolute and unchangeable principles. Priori methods of the natural law philosophers were unacceptable in the emerging age of science. The historical researches concluded that social contract was a myth. All these developments shattered the very foundation of the Natural Law theory in 19th Century. The historical and analytical approaches to the study of law were more realistic and attracted jurists. They heralded a new era in the field of legal thought. In this changed climate of thought it became difficult for the 'Natural Law' theories to survive.

Therefore, though solitary voices asserting the superiority of 'Natural Law' are still heard, the 19th century was, in general, hostile to the 'Natural Law' theories.

- **20th Century Revival of Natural Law**

Towards the end of the 19th century, a revival of the 'Natural Law' theories took place. It was due to many reasons:

- First, a reaction against 19th century legal theories which had exaggerated the importance of 'positive law' was due and theories which over-emphasized positivism failed to satisfy the aspirations of the people because of their refusal to accept morality and 'reason' as element of law;
- Second, it was realized that abstract thinking or a priori assumptions were not completely futile; Third, the impact of materialism on the society and the changed socio-political conditions compelled the 20th century legal thinkers to look for some value-oriented ideology which could prevent general moral degradation of the people.
- The World War 1 further shattered the western society and there was a search for a value-conscious legal system.

All these factors cumulatively led to revival of Natural Law theory in its modified form different from the earlier one. The main exponents of the new revived Natural Law were Rudolf Stammler, Prof. Rawls, Kohler and others.

**Rudolf Stammler (1856 – 1938)**

Stammler defined law as, "*species of will, others-regarding, self-authoritative and inviolable*". For him, a just law was the highest expression of man' social life and aims at preservation of freedom of individuals. According to him, the two fundamental principles necessary for a just law were:

- principles of respects, and
    - the principle of community participation.

With a view to distinguishing the new revived Natural Law from the old one, he called the former as 'Natural Law with variable content'.

According to him, law of nature means 'just law' which harmonizes the purposes in the society. The purpose of law is not to protect the will of one but to unify the purposes of all.

**Professor Rawls**

Professor Rawls made significant contribution to the revival of Natural Law in the 20th century.

He propounded two basic principles of justice, namely,

- equality of right to securing generalized wants including basic liberties, opportunities, power and minimum means of subsistence; and
- social and economic inequalities should be arranged so as to ensure maximum benefit to the community as a whole.

**Kohler**

As a neo-Hegelian, Kohler defined law as, "*the standard of conduct which in consequence of the inner impulse that urges upon men towards a reasonable form of life, emanates from the whole, and is forced upon the individual".*

He says that there is no eternal law and the law shapes itself as the society advances morality and culturally in course of evolution. He tried to free the 19th century Natural Law from the rigid and a priori approach and attempted to make it relativistic, adapting itself to the changing norms of the society.

The approaches of these philosophers are very scientific and logical and are free from the right and a priori principles.

**Lon Luvois Fuller (1902 – 1978)**

He rejected Christian doctrines of Natural Law and 17th and 18th century rationalist doctrines of Natural Rights. He did not subscribe to a system of absolute values. His principal affinity was, with Aristotle. He found a "family resemblance" in the various Natural Law theories, the search for principles of social order. He believed that in all theories of Natural Law it was assumed that "the process of moral discovery is a social one and that there is something akin to a 'celebrative articulation of shared purposes' by which men come to understand better their own ends and to discern more clearly the means for achieving them."

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

**Hart**

Hart, the leader of contemporary positivism, though critical of Fuller's formulation, has attempted to restate a national law position from a semi-sociological point of view. Hart points out that there are certain substantive rules which are essential if human beings are to live continuously together in close proximity.

"These simple facts constitute a case of indisputable truth in the doctrines of natural law".

Hart places primary emphasis here on an assumption of survival as a principal human goal. "We are concerned", he says, "with social arrangements for continued existence and not with those of suicide clubs. There are, therefore, certain rules which any social organization must contain and it is these facts of human nature which afford a reason for postulating a 'minimum content' of Natural Law"

**Finnis**

Finnis who in his writing 'Natural Law and Natural Rights', restated the importance of natural law. For Finnis, 'Natural' is the set of principles of practical reasonableness in ordering human life and human community. Drawing on Aristotle and Aquarius, Finnis sets up the proposition that there are certain basic goods for all human beings.

The basic principles of Natural Law are pre-moral. These basic goods are objective values in the sense that every reasonable person must assent to their value as objects of human striving.

## 2.2 HISTORICAL SCHOOL OF JURISPRUDENCE

It may be defined as history of fundamental principles of a legal system. Historical school of Jurisprudence argued that the law is the exaggerative form of social custom, economic needs, conventions religious principles, and relations of the people with society. The historical school follows the concept of man-made laws. 'Law is formulated for the people and by the people' means that the law should be according to the changing needs of the people. And everyone understand their own need better than anyone else.

The followers of this school argued that law is found not made. The historical school doesn't believe and support the idea of the natural school of law which believe that the origin of law is from superior authority and have some divine relevance.

**Reasons for the Origin of Historical School of Jurisprudence**

The Historical School believe that law is made from people according to their changing needs. Habits and customs are the main sources of the Historical School of Jurisprudence. According to Dias, Historical school arose as a reaction against the natural law theories.

- The reasons for the emergence of this school are:
- **It's a reaction against the natural law theories.:** Natural school of law believes that the law is originated from some divine power. Natural law is also called the Eternal law. It exists since the beginning of the world. It is closely associated with the morality and intention of God. Indian constitution has some relevance of the natural law in its articles. Historical school of Jurisprudence focuses on the formation of law by people not by some divine origin.
- **It opposes the ideology of the analytical school of jurisprudence. :** Analytical school of jurisprudence is also called Austinian School. It is established by John Austin. The subject matter of Analytical school of Jurisprudence is positive law. It focuses on the origin of law the judges, state and legislators. Historical School laid emphasis on the formation of law by people through customs and habits, not by the judges and superior authority.
- **Rationalism in Europe:** the spread of the spirit of rationalism in European people was the reason for the emergence of this school. This school emphasis on the development of law, take into account the historical facts.

The S.C of India, in **Byram Pestonji Gariwala v. Union of India**, agreed with this viewpoint, quoting Justice Thommen: "*The Indian legal system is a historical product. It is embedded in our land, nurtured and nourished by our culture, languages, and customs, cultivated and sharpened by our genius and pursuit of social justice, and reinforced by history and culture*."

**Montesquieu**

According to Sir Henry Maine, the 1st Jurist to adopt the historical method of understanding the legal institution was Montesquieu. He laid the foundation of the historical school in France. According to him, it is irrelevant to discuss whether the law is good or bad because the law depends on social, political and environmental conditions prevailing in society. Montesquieu concluded that the "law is the creation of the climate, local situation, accident or imposture". He was of the view that law must change according to changing needs of the society. He did not establish any theory or philosophy of the relation between the law and society. He suggested that the law should answer the needs of the place and should change according to time, place and needs of the people.

One of the best-known works of Montesquieu was his book 'The Spirit of laws'. In this book, he represents his beliefs in political Enlightenment ideas and suggests how the laws are required to modify according to the needs of people and society.

**Savigny (1779-1861)**

Savigny is regarded as a father of the Historical school. He was a German Philosopher, in 1810 he went to work as a professor at the University of Berlin. In 1803 he established his reputation with a book The Jus Possessionis of the Civil Law.

The Law has source within the general consciousness of the people. He said that Law develops like language and Law features a national character. Law, language, customs and government haven't any separate existence. There's one force and power in people and it underlies all the institutions. The law, language, develops with the lifetime of people.

- Savigny's theory is often summarized as follows:

i. Law is found and not made.
ii. According to him, law is Volkesgeist.

Volkesgeist = Volkes + Geist i.e.

(People Consciousness) = (People )+ (Consciousness)

Therefore, people Consciousness is Law

i. That may be a matter of unconscious and organic growth. No efforts are needed to make the law.
ii. Law cannot be of universal validity nor be constructed on the basis of certain rational principles or eternal principles. Savigny argued that law is like the language having its own national character. So, it can't be universally applied and varies according to the people.

**Basic Concept of Savigny's Volksgeist**

Volksgeist means "national character". According to Savignty's Volksgesit, the law is the product of general consciousness of the people or will. The concept of Volksgeist was served as a warning against the hasty legislation and introduce the revolutionary abstract ideas on the legal system. Unless they support the general will of the people.

Basically, Savigny was of the view that law should not be found from deliberate legislation but should be made and arises out of the general consciousness of the people.

**Criticism of Savigny's theory**

1. **Inconsistency within the theory:** He emphasized the national character of law, but at the equivalent time he recommended a way how the Roman law are often adapted.
2. **Customs not always supported on popular consciousness:** Savigny's view is whole not perfectly sound, because many customs originated just for the convenience of a powerful minority. Sometimes, customs completely against one another exist within the different parts of the country which can't be reflecting the spirit of the whole community.
3. **He ignored other factors that influence law:** Another criticism against him was 'so occupied with the source of law that nearly forgot the stream'. The creative function of the judge was also ignored by the Savigny's theory.
4. **Many things were unexplained:** Certain traits, like mode of evolution and development weren't explained by the Savigny.

**Georg Friedrich Puchta (1798-1846)**

Puchta, a German jurist, was Savigny's most popular student. He was convinced that the law was the result of people's collective consciousness and the manifestation of their spirits. Law will not evolve in this way, according to Puchta, if it is formed without prior considerations of the past, historic culture, and traditional practices. This would have established a clear situation rather than solving an issue.

Puchta's ideas were acknowledged as more reasonable and enhanced after a period of progress. He began by stating that men have always lived in oneness since the dawn of time. This unity could be physical as well as spiritual, focused on people's collective will.

Self-interest, according to Puchta, caused conflicts. For the sake of maintaining peace and actual evolution law, he argued that general will should take precedence over individual will.

Furthermore, the state's position was discussed, which is extremely important. The state prioritized the general will and interest of the people while downplaying individual interests, resulting in a functional system.

"***Neither the people nor the state alone can make and formulate laws***," was Puchta's main thought.

**Puchta's Contribution**

He discussed two dimensions of human will, as well as the origins of the state.

Even though Georg Friedrich Puchta was Savigny's student, Puchta improved Savigny's views and gave them a better logical interpretation.

**Sir Henry Maine (1822-1888)**

Sir Henry Maine was the founder of the English Historical School of Law. Savigny's views of Historical school was carried forward in England by Sir Henry Maine.

**Major Works by Sir Henry Maine**

- The first work of Maine 'Ancient Law' was published in 1861.
- He also wrote Village Communities (1871),
- Early History of Institutions (1875)
- Dissertations of Early Law and Custom (1883).

Maine studied the Indian legal system deeply as he was law member in the Council of the Governor–General of India b/w 1861 to 1869. Maine's ideas were incorporated by the best things in the theories of Savigny and Montesquieu and he avoided what was abstract and unreal Romanticism.

Maine favored legislation and codification of law, unlike Savigny.

**Maine describes the development of law in four stages:**

- **Therris stage**

Rulers are believed to be acting under divine inspiration. And the laws are made on the commands of the rulers. For example, Themistes of ancient Greek. The judgment of the king was considered to be the judgment of god or some divine body. King was merely an executor of judgments of God, not the law-maker.

- **Custom**

Then the commands of King converted into customary law. The custom prevails in the ruler or majority class. Customs seems to have succeeded to the right and authorities of the king.

- **Aristocracy stage**

The knowledge & administration of customs goes into the hands of a minority, Due to the weakening of the lawmaking power of the original law-makers like Priests the knowledge of customs goes into the hands of a minority class or ordinary class. And the ruler is superseded by a minority who obtain control over the law.

- **Codification stage**

In the fourth and last stage, the law is codified and promulgated.

**Static and Progressive Society**

- **Static societies**

Societies which does not progress and develop their legal structure after the fourth stage of development of law are Static society. Static societies don't progress beyond the era of codes.

- **Progressive Society**

Societies which go on progressing after the fourth stage of development of law are Progressive Societies. They develop their laws with the help of these instruments:

a. **Legal Fiction:** Legal Fiction changes the law according to the needs of the society without making any change in the letters of the law. Legal fiction harmonizes the legal order but made the law difficult to understand.
    1. **Equity:** According to Maine, "Equity is a body of rules existing by the side of the original civil law & founded on distinct principles". Equity helps to remove rigidity and injustice.
    2. **Legislation:** The legislation is the most effective and desirable method of legal change. Laws will be enacted and became operative officially.

Legislation is made up of 2 words:

LEGISLATION = LOGIS + LATIS i.e.

( Law Making) = (Law) + (Making)

**Status to Contract**

Maine is known to have commented on "status" and "contract". He said that "the movement of progressive societies has hitherto been a movement from status to contract". In explaining this statement, Maine said that in early times an individual's position in his social group remained fixed; it was imposed, conferred or acquired. He just stepped into it. He accepted such fate as he found it. He could do nothing about it.

Later on, however, there came a time when it was possible for an individual to determine his own destiny through the instrumentality of contract. No longer was anything imposed on him from external forces; he was now in charge: from slavery to serfdom, from status determined at birth, from master-servant relationship to employer – employee contract.

**Criticism:**

Maine is criticized for oversimplifying the nature and structure of early society for the following reasons: Early society does not show an invariable pattern of movement from the three-stage development of law – from personal commands and judgments of patriarchal rulers through law as custom upheld by judgments to law as code. The so-called rigidity of the law has repeatedly be challenged by contemporary anthropologists who are of the opinion that primitive peoples were adaptable and their laws flexible.

- **Return to Status**

Also, there were matriarchal societies just as there were patriarchal societies. Furthermore, it has been observed that status does not necessarily gravitate to contract. Rather, the opposite development has been possible. For example, social welfare legislation in advanced countries is status-based. In the U.S., "affirmative action", a policy that is predicated on Afro-Americanism, is status-based. Also, in Canada and UK, the status of a single mother is recognized in law. Conclusion: Although Maine lived up to his historical commitment, he overlooked the dynamics that have characterized societies across ages.

## 2.2 SOCIOLOGICAL SCHOOL OF JURISPRUDENCE

The main exponents of sociological jurisprudence are: Montesquieu, Auguste Compte, Albert Spencer, Ihering, Ehrlich, Duguit, Roscoe Pound etc. The French thinker Auguste Compte is regarded as founding the father of the sociological school of law.

August Comte (1798-1857) was a French Philosopher. The term "Sociology" was first used by the Comte and he described Sociology as a positive science of social facts. He said that Society is like an organism and It could progress when it is guided by Scientific Principles. Thus, he makes great efforts to use the law as a tool by which human society maintains itself and progresses.

The main subject matter of sociology is Society. Sociology is the study of society, human behavior, and social changes. And jurisprudence is the study of law and legal aspect of things. The Sociological school of Jurisprudence advocates that the Law and society are related to each other. This school argues that the law is a social phenomenon because it has a major impact on society.

**Meaning of Sociological school of Jurisprudence**

The idea of Sociological School is to establish a relation between the Law and society. This school laid more emphasis on the legal perspective of every problem and every change that take place in society. Law is a social phenomenon and law has some direct or indirect relation to society. Sociological School of Jurisprudence focuses on balancing the welfare of state and individual was realized.

In the words of Ehrlich, "At the present as well as at any there time, the centre of gravity of legal development lies not in legislation, nor in the juristic decision, but in society itself. "

Sociological School of Jurisprudence studies the relationship between the law and sociology. Every problem or concept has two different aspects. One is sociological view and other is a legal aspect. For example Sati.

**Background Of Sociological Jurisprudence**

The factors which led to the establishment of sociological school are as follows:

- The 19th century witnessed a shift of emphasis from the individual to the society. This happened as a result of the shocking consequences resulting from the Laissez faire doctrine.
- The Historical School which was a reaction to the intense individualism of the 19th century by its emphasis on the Volkgeist spirit of the people – indicated that law and the social environment in which it develops are intimately related. This idea was worked out by the jurists of sociological school.
- Prior to the 19th Century matters like health, welfare, education etc were not the concern of the state. In the 19th Century because of the adverse effects of laissez faire doctrine, the state became more and more concerned with numerous matters encompassing almost all aspects of human life and welfare. This implied regulation through law, which compelled legal theory to re-adjust itself so as to take account of social phenomena.
- Also there was a dire need to study law not in near abstraction, but in its functional and practical aspects. By this time the shortcomings of purely formal analysis (as propounded by analytical jurists) were being felt. Therefore the Sociological school of jurisprudence was established as a reaction against too much theorising of the law.
- Prior on account of economic and social conflict towards the beginning of 20th century led to growing disbelief in the eternal principles of natural law of which had until now placed an idea of harmony before the individual. To solve and bring harmony between the people, a sociological school of thought was inspired.
- Revolutions and social and social unsettling not only upsetted any complacency (self satisfaction) about social stability, but also provoked anxiety about the shortcomings of the law. Sociological jurists wanted to overcome these shortcomings.

These factors contributed to the Rise Of The Sociological School.

**The main feature of Sociological school of law**

- Sociological School of Law is emphasis more on the functional aspect of law rather than its abstract content.
- They consider law as a social institution essentially interlinked with other scientists and the direct impact of the law on society with its formation according to social needs.
- Sociological School of Law completely neglects positivism i.e. the command of sovereign and also historical jurisprudence.
- Sociological jurists describe the perception of the law in different ways like the functional aspect of law or defining the law in terms of courts rulings and decisions with a realistic approach of law.

**Montesquieu (1689-1755)**

Montesquieu was the French philosopher and he paved the way of the sociological school of jurisprudence. He was of the view that the legal process is somehow influenced by the social condition of society. He also recognized the importance of history as a means for understanding the structure of society. And explained the importance of studying the history of society before formulating the law for that society.

In his book 'The Spirit of Laws', he wrote "law should be determined by the characteristics of a nation so that they should be in relation to the climate of each country, to the quality of each soul, to its situation and extent, to the principal occupations of the natives, whether husbandmen, huntsmen or shepherd, they should have relation to the degree of liberty which the constitution will bear, to the religion of the inhabitants, to their inclinations, riches, numbers, commerce, manners, and customs."

**Eugen Ehrlich (1862-1922)**

Ehrlich another eminent jurist of the sociological school primarily expounded the social basis of law. Like Savigny, he believed in the spontaneous evolution of law but he did not hang on to the past but conceived law in the context of existing society and thus evolved his theory of living law.

According to Ehrlich, the institution of marriage, domestic life, heritage, possession, contract, etc. governs society through living law which dominates human life. By living law, he meant the extra-legal control that controls my social reality. The central point of Ehrlich's thesis is that the law of a community is to be found in social facts and not in formal sources of law.

He says, "at present as well as at any other time, the center of gravity of legal development lies not in legislation nor in juristic science, nor in judicial decisions, but in the society itself." Hence the living law is the fact that governs life and a proper study of law requires the study of all the social circumstances in which the law functions in society. A statute that is habitually disregarded is no part of living.

The use of the word 'sociological jurisprudence' means that the law should be made in society, and its needs should be given more attention. To achieve this end, a very close study of the social conditions of society, in which law is to be worked, is indispensable.

For example: There may be some enactments enforced in the sense that courts may apply them in the decisions in any issue but a community may ignore the enacted laws and lives according to the rules created by their mutual consent, like dowry system in India.

**Inhering (1818-1892)**

Inhering was a German jurist and described as 'the father of modern sociological jurisprudence'.

His main work is 'The spirit of law'. But he is very well known for his principal:

Wor Der Zweck in Reett (1877-83) = 'Law as a means to an End'.

He rejected the Analytical and Historical jurisprudence as the jurisprudence of conceptions. He says that the law is coercion organized in Act by the state. It is a way to achieve a proper balance between social and individual interests. It is through two impulses- coercion, and reward that society compels individuals to subordinate selfish individual interests to social purposes and general interests. Thus his insistence on the need to reconcile competing individuals and social interests made him 'the father of the modern sociological jurisprudence that inspired jurists like Roscoe Pound and others.

- He described the law In following aspects:
- **Law as a result of Constant Struggle:** Ihering pointed out that the social struggle gives birth to law and the role of law is to harmonize the conflicting interests of individuals for the purpose of protection of interest of society. He gave importance to living law which develops with the struggles of society.
- **Law as a means to serve Social Purpose:** According to him, the ultimate goal of the law is to serve a social purpose. It is the duty of the state to promote social interests by avoiding various clashes between social and individual interests. According to him, "law is coercion organised in a set form by the state", which means that he justified coercion by the state for the purpose of social welfare.
- **Law as one of the means to control society:** Law alone is not a means to control society, there are some other factors also like climate, etc. Like Bentham, Ihering favours the interest in the achievement of pleasure and avoidance of pain but for the society, that's the reason that Ihering theory is also known as the theory of "Social Utilitarianism".

So, according to the Ihering, the social activities of individuals can be controlled by the state by means of coercion, reward and duty for achieving social control for the welfare of society. Friedman said that "Ihering was declared as the father of modern sociological jurisprudence because of his concept of law as one of the important effective factors to control social organisms."

**Roscoe Pound (1870-1964)**

Pound was an American Legal Scholar. His view is that law should be studied in its actual working and not as it stands in the book. He was one of the most leading and important jurists who developed American sociological jurisprudence is a systematic manner. His major works are:

- Spirit of the common law.
- An introduction to the philosophy of law.
- Interpretation of legal history.
- Law and morals.
- The formative era of American law.
- Administrative law.
- Social contract through law.
- The task of law.

He treated law as a means of affecting social control and his contribution to jurisprudence is great.

**Theory of Social Engineering**

The American Jurist, Roscoe Pound propounded the theory of social engineering. According to him, as Engineers need to use their engineering skills to manufacture new products, Social Engineers too need to develop a type of structure in the society which provides utmost happiness and minimum friction. He said that everyone has their individual interests and consider it to be supreme to all other interest. The law focuses on seeking a balance between the interests of the people.

Article 19(1)(a) of the Constitution of India can help us understand this 'balancing element' in a better way. Although, Article 19(1)(a) guarantees the 'Rights to speech and expression', it also gives the State the liberty to put reasonable restrictions contained in Article 19(2).

With the help of law, Social Engineering aims at balancing the conflicting interest of the individual and the state. Law helps in solving conflicting interest and problems in the society. This body of knowledge helps carrying out social engineering.

**Interest Theory**

Roscoe Pound in his interest theory mentioned the three kinds of interest. To avoid the overlapping of the interests, he put boundaries and divide the kinds of interests.

**Jural Postulates by Roscoe Pound**

According to Roscoe Pound, every society has certain basic assumptions for proper order and balance in society. These assumptions are implied and not in expressed form and are called as Jural Postulates of the legal system of that society. These assumptions of man related to the reference for what they want from the law or legal system or we can say that it is the expectation of a man from the law. He has mentioned five kinds of jural postulates:

- In a civilised society, man must be able to assume that others will not commit any intentional aggression on him.
- In a civilised society, man must be able to assume that they must control for beneficial purposes. E.g.- control on whatever they discover or create by their own labour.
- In a civilised society, man must be able to assume that those with whom they deal as a number of societies will act in good faith.
- In a civilised society, man must be able to assume that the people will act with due care and will not cast unreasonable risks of injury on others.
- In a civilised society, man must be able to assume that certain people must restrain from doing harmful acts under their employment and agencies which are otherwise harmless to them.

So, these Jural Postulates are a sort of ideal standards which law should pursue in society for civilised life and with the changes in society, the jural postulates may emerge or originate in society.

- **Criminal:** An interest of protection from any intentional aggression. For Example, Assault, Wrongful restraint, Battery, etc.
- **Law of Patent:** An interest of securing his own created property by his own labour and hard work. E.g. agricultural land, any music or artistic things.
- **Contract :** The interest in making the contract and getting of reasonable remedy or compensation when his right violate
- **Torts:** Protection against Defamation and unreasonable injury caused by the negligent act of another person.
- **Strict Liability:** Similarly, In case Ryland Vs. Fletcher Protection of our interest if the injury caused by the things of another person. It is the duty of other people to keep his/her things with his/her boundary and should look after that thing to avoid injury to other people.

**Criticism:**

Despite Pound's great contribution to sociological jurisprudence and his emphasis on studying the actual work of law in society, his theory suffers from some shortcomings. Pound's theory of social engineering has been criticised on various grounds.

It has been argued that the classification of interests by the Pound is in the nature of a catalog, in which additions and changes must be made continuously that are neutral in relation to the value and priority relative to the neutral value. Pound's theory of social engineering has been criticized for its use of the term engineering, which equates society to a factory like a mechanism. Law is a social process rather than the result of applied engineering. It is also not right to equate society with a factory because the former is changing and dynamic in nature while the latter is more or less stable. Again, Pound's emphasis on engineering ignores the fact that law evolves and develops in society according to social needs and wants that for which law can develop in society according to social needs and for which either in law approval or rejection may occur.

A general criticism against Pound's theory is about his use of the word 'engineering' because it suggests a mechanistic application of the theory to social needs, the term "engineering" is used by Pound as a metaphor to indicate the problems that law has to face, the objectives to be met and the method one must adopt for this purpose.

**Duguit ( 1859 – 1928)**

Leon Duguit was a French Jurist and leading scholar of Droit Public (Public Law) who made a substantial contribution to sociological jurisprudence in the early twentieth century. He was much influenced by August Comte's theory of law as a fact that denounced individual rights of men and subordinated them to social interest and Durkheim's work "Division of Labour in Society". In this theory, he made a distinction between the two kinds of needs of men in society namely:-

- Common needs of the individuals who are satisfied by mutual assistance,
- Diverse needs of individuals who are satisfied by the exchange of services.

Therefore, the division of labour is the pre-eminent fact that Duguit called "Social Solidarity". In his theory, he explained the social cooperation between individuals for their needs and existence.

- **Theory of Social Solidarity:-**

Social Solidarity is the feeling of unity. The term 'Social Solidarity' represents the strength, cohesiveness, collective consciousness, and viability of the society. Solidarity is nothing more or less than the fact or interdependence uniting the members of human society, and particularly the members of a social group by reason of the community of needs and the division of labour.

Law is an instrument of social solidarity and cohesion. Because man cannot live apart from society, as a social animal. Law is not a body of rights. The only real right of man in society is to do his duty. All human being's activities, and organizations should be directed to the end of ensuring the smoother and fuller working of men with men.

This Duguit calls the principle of social solidarity. For Example, in India, the codified laws are followed by everyone. Hence, it promotes Social Solidarity.

**Implications of Duguit's Theory**

- **David attack on sovereignty; Minimization of state functions-:** Duguit attacked the myth of state sovereignty. Social solidarity is the touchstone of judging the activities of individuals and all organisations. State is also a human organisation and it is in no way different from other organisations. It is simply the expression of the will of the individuals who govern. Therefore, the state stands in no special position of privilege and it can be justified only so long as it fulfills its duty.

Duguit's story of minimization of state function leads him to deny any arbitrary power to legislators. According to him "legislator does not create law but merely gives expression to judicial norms formed by the consciousness of the social group".

- **No Distinction Between Public And Private Rights:** Duguit's views on state and its functions led him to deny the distinction between private and public law. According to him both are to serve the same end i.e. 'Social Solidarity'. Therefore, there is no difference in their nature. Such a division will only elevate the state above the rest of the society which Duguit's theory never accepts.
- **No Private Rights :** Another important point in Duguit's theory is that he denies the existence of private rights. He says that "the only right which any man can possess is the right to always do his duty". Individuals working in any capacity are the parts of the same social organism and each is to play his part in furtherance of the same end i.e. 'Social Solidarity'.

**Utilitarianism – propounded by – Jeremy Bentham.**

His general view on utilitarianism is aptly expressed in this classic passage :

"*Nature has placed mankind under the governance of two sovereign masters, pain and pleasure. It is for them alone to point out what we ought to do, as well as to determine what we shall do. On the other hand the standard of right and wrong , on the other the chain of causes and effects, are fastened to their throne. The principle of utility recognises this subjection and assumes it for the foundation of that system, the object of which is to rear the fabric of felicity by the hands of reason and law. Systems which*

*attempt to question it, deal in sounds instead of sense, in caprice instead of reason , in darkness instead of light*".

Utilitarianism thus looks to the future. Its concern is maximisation of happiness or welfare or something that is good.

## 2.3 Kelson's pure theory of law :

The pure theory of law is a broad theory of law that complies with legal positivism's principles. Its technique is structural analysis, and its goal is to comprehend the law as it is, not as it should be. More precisely, it supplies us with a collection of core legal ideas to employ when seeking to comprehend and express the law in a scientific manner, such as 'legal system,' 'norm,' 'right,' 'duty,' 'sanction,' and 'imputation.' We may argue that Pure Theory's goal is to create the theoretical groundwork for other legal disciplines like Contract Law, Constitutional Law, Legal History, Comparative Law, and so on.

Hans Kelsen, a renowned Austrian lawyer, and philosopher proposed the concept of Pure Theory of Law. At the turn of the twentieth century, Kelsen began his long career as a legal thinker. Traditional legal philosophies were hopelessly tainted, according to Kelsen, with political ideology and moralising on the one hand, and efforts to reduce the law to natural or social sciences on the other. Both of these reductionist initiatives were proven to be substantially defective by him. Instead, Kelsen proposed a 'pure' philosophy of law that avoided any reductionism.

Kelsen's argument claims that when natural law contains aspects of politics, sociology, or other factors, there is no need to explain it. He felt that any potential of morality, sociology or any other factor should be removed from understanding the pure or natural law. As a result, the theory is known as the Pure Theory of Law

**Pure Theory of Law**

A theory of law should be "pure," that is, free of extra-legal influences of any type. As a result, Hans Kelsen believed in and promoted a theory that was free of any extra-legal aspects such as sociology, philosophy, ideology, psychology, politics, ethics, and so on. Kelsen quickly deduced that law belongs to the human sciences rather than the scientific sciences. According to Kelsen, the pure theory of law is so named because it exclusively describes the law and strives to exclude anything that isn't precisely legal from the object of this description: Its goal is to free legal science of alien components. On the basis of two elements, Kelsen stated that his hypothesis is pure. For example, it distinguishes between law and fact. Second, it distinguishes between morals and law. Kelsen's views go counter to the notion of precedents, which states that legal ideas emerge as a result of cases being decided. Kelsen's pure legal theory does not represent the realities of real-world legal systems. Kelsen's Pure Theory of Law aimed to purge law of all impure or foreign aspects, leaving material that is purely legal. From a legal standpoint, the law is a standard, not an actuality.

According to Kelsen, a "pure theory of law" is one that is entirely concerned with the part of knowledge that deals with law, including everything that does not technically belong to the subject matter of law. According to Kelsen, a theory of law must deal with the law as it is written, not as it should be. The philosophy of law, according to Kelsen, should be consistent. It ought to be appropriate at all times and in all locations. Kelsen's idea has a wide range of ramifications. State, sovereignty, private and public law, legal personality, right and obligation, and international law are all covered.

## Main principles under Pure Theory of Law

### 1. Law as a normative science

Law is a 'normative science,' according to Kelsen, yet legal norms can be separated from scientific norms. 'Science,' according to Kelsen, is a form of knowledge organised around logical principles. A norm, according to Kelsen, is a rule that prescribes a specific behaviour. He makes a distinction between legal and moral rules. He said that a moral standard just states "what a person should do or not do," but a legal norm states that if a person violates the norm, he would be penalised by the state. Law is distinguished from politics, sociology, philosophy, and all other non-legal sciences, according to him. According to Kelsen, an appropriate theory of law must be pure, that is, logically self-contained and therefore not reliant on extra-legal values, natural law, or any other external source (such as the sociological, political, economic, or historical influence of law). The Command Theory of Austin is not accepted by Kelsen because it incorporates a psychological aspect into the concept of law, which Kelsen rejects. Kelsen proposes that the law be described as a Depsycholised command. Kelsen considers 'sanction' to be an important part of the law, but prefers to refer to it as 'norm.' Kelsen's philosophy of law is devoid of any ethical or political ideals or judgments.

### 2. Grundnorm

Kelsen's pure theory of law features a pyramidal hierarchy based on the grundnorm as the foundational norm. Grundnorm is a German term that means "fundamental norm." He defines it as "the assumed ultimate rule by which the norms of this order are constituted and annulled, and their validity is received or lost." The grundnorm establishes the content and verifies additional norms that are derived from it. But whence it gets its legitimacy was a question Kelsen refused to address, claiming it to be a metaphysical one. Kelsen suggested Grundnorm is a work of fiction and not a hypothesis.

According to Kelsen, unlike some of the other norms, the basic norm cannot be explained by referring to certain other or more validating laws. Instead, it may draw its legitimacy from the fact that it has been recognised, acknowledged, and accepted by a significant number of people inside the political unit. As a result, the law cannot be separated from the state's organised structure and authority. Because this structure is normative, the concept of sanctions, which plays a rather unique role in Austinian doctrine as the element that makes law functional, depends on other forces such as prosecutors, officials, and judges to undertake their aspects of the normative structure before sanctions are activated and inflicted.

The Grundnorm is the beginning point for a legal system, and it is from this point that a legal system grows more complex and specialised as it evolves. This is a fluid situation. The grundnorm, which is self-contained, is at the summit of the pyramid. In a hierarchical structure, subordinate standards are governed by norms that are superior to them. The system of norms progresses from downwards to upwards and finally closes at grundnorm

### 3. Hierarchy of Norms

A legal order, according to Kelsen, is made up of norms arranged in a hierarchical sequence, with one norm positioned above another and each norm getting its validity from the norm above it. The legal order is symbolised by the hierarchy, which takes the shape of a pyramid. As a result, the last level is the greatest norm, known as the fundamental norm or Grund Norm, emerges, which serves as the foundation for all future norms. The Grund norm is the cornerstone of Kelsen's ideology. The Grund norm can be used to determine the legality or validity of any norm. The Grund norm's validity cannot be objectively assessed. The Grund norm serves as a common reference point for the validity of the positive legal order, or all of the legal system's norms. The Grund norm must be effective, that is, it must be followed by the general public. The validity of the Grund standard is referred to as efficacy.

### 4. Validity of Norms

The term "validity" refers to the existence of a given standard. It also refers to the fact that a norm is legally obligatory and that an individual must follow the norm's instructions.

The following two postulates are stated by Kelsen:

- Every two norms that derive their validity from the same fundamental standard are part of the same legal system.
- The legitimacy of all legal norms in a particular legal system is ultimately derived from one basic standard.

The validity of another norm is the only explanation for a norm's validity. When a single norm ceases to be effective, a legal order does not lose its validity, nor does a single norm lose its validity if it is just ineffectual from time to time. Effectiveness is a criterion for validity, but it is not a criterion for validity. The question of a norm's validity comes before the question of its efficacy. A fact, i.e., a declaration that something is, cannot be used to determine why a standard is legitimate or why a person should behave in a specific manner; the reason for the correctness of a norm cannot be a fact.

While the traceability of a norm to an existing basic norm which determines its validity, efficacy refers to the norm's effectiveness or enforcement. In other words, it examines if the rule is followed and whether violations are punished. If the response is affirmative, then the standard is effective. It isn't otherwise. As a result, the principle of legitimacy is constrained by the principle of efficacy. Although inefficacy may not have an immediate impact on the validity of a norm, it may do so in the long run. For example, the system of norms may lack its validity if the overall legal order or the fundamental norm loses its efficacy.

In other words, they lose their validity not only when they are declared invalid by the Constitution, but also when the entire order is rendered ineffective. Norms must be accepted by a large number of people. As a result, validity entails higher-level legal approval and a minimum level of efficacy. 'The legitimacy of every single standard of the order is contingent on the efficacy of the entire legal order.' Each standard in the system depends on the validity of a higher norm.

**5. Sanctions**

Kelsen uses sanctions to emphasise the law's coercive aspect. Because it brings a psychological aspect into a theory of law, Kelsen rejects Austin's interpretation of sanction, which views it as a mandate from the Sovereign. As a result, he favours Grundnorm, which gives legislation legitimacy. Its authoritative character lends credibility to any legal system. The Grundnorm's sanctioning authority makes it applicable to all other laws. According to Kelsen's study of the sanctioned view of the law, legal norms are articulated in the form that if a person does not follow a certain ban, the courts must impose a punishment, whether criminal or civil.

## Pure Theory of Law and its incorporation under the Indian legal system

The fact that the Constitution of India may very well be amended indicates that it is possible to deviate from the Constitution's authority. If a constitutional clause is significantly changed, the laws that fall under it lose their legality. If a provision of the Constitution is repealed, the result will be the same. As a result, calling the Constitution the Grundnorm is incorrect. Given this background, the Grundnorm in India should be found in the "Basic Structure". The "basic structure" of the Indian Constitution can be considered the rule of recognition or grundnorm, which is really the ultimate basis of a legal system since the legislation in the Constitution acquires legitimacy from the basic structure's defined norms. The superiority of the Constitution, India as a sovereign, socialist, secular, democratic, republic as in the Preamble and a welfare state, the federal character of the Constitution, the unity and integrity of the country, separation of powers between the legislature, the executive, and the judiciary, and Part III of the Indian Constitution i.e. Fundamental Rights are some of the major features of the basic structure.

The notion of basic structure was highlighted in the case of *Kesavananda Bharati v. the State of Kerala* 1973. The term 'basic structure' refers to the area of the Constitution in which the parliament has no authority to make changes. It is the foundation of the ultimate recognition rule. This case supported the argument that any rule or norm validating authority is the basic structure. In *Indira Gandhi v. Raj Narain* (1975), the Supreme Court threw down clause 4 of Article 329-A, which was introduced by the 39th Amendment, on the grounds that it was outside the amending authority of the legislature since it was not in parlance with the Constitution's "basic structure." Furthermore, the Hon'ble Court decided in *Minerva Mill & Ors. v. Union of India* (1980) that the Constitution's "Basic Structure" include the limited ability of Parliament to modify the Constitution, as well as maintaining harmony between Fundamental Rights and Directive Principles. Furthermore, amendments cannot alter the Constitution's "Basic Structure." As a result, the legal system of India closely resembles the framework of the legal system proposed by Kelsen in his "Pure Theory of Law."

## Implications of Pure Theory of Law

### 1. No difference between Law and the State

Kelsen rejects the sovereign's existence as a distinct entity. He also disputes the existence of the state as a separate entity from the law. In its ideal form, the state would be neither more nor lesser than the law, an object of normative juristic knowledge. A system of normative connections is referred to as a law. All legal personality is created artificially and derives its legitimacy from a higher standard. According to Kelsen, the idea of a person is nothing more than a phase in the concretization process. The most important aspect of Kelsen's philosophy is that the state is regarded as a "system of human conduct and a compulsive order." Kelsen further argued that because legislative, executive, and judicial systems all create norms, there is no distinction between them. For Kelsen, the distinction between procedural and substantive law is a matter of degree, with the procedure taking precedence. The state is, in actuality, a mechanism that regulates social behaviour in a normative order. However, only a judicial system can uncover such a scheme. In reality, law and state are the same things, and the distinction arises because we study them from two different perspectives.

### 2. No difference between public and private law

The contrast between public and private law is another important characteristic of the hierarchical organisation of law. According to Kelsen, because every law gets its force from the same Grundnorm, there is no distinction between public and private law. They cannot be distinguished on the basis that they safeguard various types of interests. In the public interest, private interests are preserved. He identifies this divergence as the result of a political philosophy that aims to "elevate public law and justice authoritarianism."

### 3. No difference between Natural and legal personalities

Kelsen does not distinguish between natural and legal beings. There is no distinction between physical and legal beings. In law, he defines 'personality' as an individual who is able to bear rights and obligations. All legal personalities are fictitious and derive their validity from superior norms.

### 4. No Individual rights

Individual rights, according to Kelsen, do not exist in law. The 'essence of law' is legal obligations. Law is always a necessary system in a state. He believes that the notion of right is not fundamental to a legal system. A legal right is just a responsibility as regarded by the person who has the authority to demand that it should be fulfilled.

## Criticisms of Pure Theory of Law

According to Australian lawyer Julius Stone, because the fundamental norm is evidently the most impure, the succeeding processes' purity must imitate the lower norm's originating impurity. Some also criticise the pure theory for separating natural law from law and excluding it.

Sir Lauterpacht, a former member of the United Nations' International Law Commission and a judge of the International Court of Justice, believes that Kelsen's theory of natural law allows for the precedence of international law above state law. According to American jurist Allen, sources of law such as custom, legislation, and precedent are co-ordinate and do not allow for an organisation in Kelsen's hierarchical structure.

Friedmann's objection is that Kelsen's pure science of law is insufficient in terms of legal theory. Law is now overlapping areas that were formerly assigned to other social disciplines such as Economics, Psychology, and Sociology. Critics also argue that a single theory cannot rule over all of the world's legal systems. Because each legal system has its unique set of laws and norms, the pure theory cannot be applied to all legal systems. Another issue is that an abstract man-made theory cannot determine the legal ramifications of a sudden change. It cannot contend with changing conditions and scenarios posed by the legislation because of its limited reach.

In terms of effectiveness, there is no such criterion by which minimal effectiveness can be determined. The notion is not viable in revolutionary conditions, according to critics. There is no criterion by which the minimal effectiveness of a legal system can be judged, and the efficacy of a legal system cannot be quantified by a theory. It left out the social issues of morality and fairness, both of which have a role in efficacy.

## 2.3 H.L.A HATRT THEORY OF LAW :

H.L.A. Hart went on to modify the theory of Austin and Kelsen. He defined the legal system as such in his book "The Concept of Law".
"Legal system is a system of rules which are social in nature because firstly they regulate the conduct of a member of society and secondly, they drive from human social practices".

The Second reason in his definition gives an idea that in a legal system not only legal rules but also non-legal rules also exist, e.g. morality, customary practices, ethics, and values, etc. "Where there is a law, there human conduct is made in some non-optional or obligatory." Thus the idea of obligation is at the core of the rule.
Austin rejected the content of morality but for Heart rules are derived from the social practices. Prof. Hart maintains the difference between source and relationship between law and morality. He directly accepted the relationship between law and morality, which Kelson tries to keep the Purity of law: Prof. Hart accepted the content of some other elements in law.

**Concept of law by Prof. Hart**

**Nature of legal system:-**

In The Concept of Law, Prof, H.L.A. Hart cautiously analyses the concept of a social rule. He distinguishes rule-governed behaviour from habitual behaviour, and distinguishes legal rules from standards and from orders backed by threats. He also illuminatingly compares legal rules and moral rules. An essential element of social rules can be brought out by comparing behaviour according to rules with habitual behaviour. To the "external" observer, these types of behaviour are indistinguishable, for to him each appears to be regular and uniform.

**Kinds of rules:-**

According to Heart, Rules of Obligation are distinguishable from other rules in that they are supported by great social pressure because they are felt to be necessary to maintain society. Our conscience also imposes an obligation.
Having said this he talked about two kinds of rules;

Primary rules and
Secondary rules

**Primary rules:-**

Primary Rules are those rules which impose 'duty' on a member of society like criminal laws, tort, etc.
Primary rules are one which tells people to do things, or not to do things. Primary rules are 'duty imposing' rules. They impose certain specific duties on the citizens of the state to act in a certain manner, or they may be subject to certain legal sanctions. Hart characterizes primary rules as "basic" rules. They tell the citizen what one can and cannot do under the law. They lay down duties. These rules are to do with physical matters.

**Secondary rules:-**

Secondary rules are one which let people, by doing certain things, introduce new rules of the first kind, or alter them. They give people (private individuals or public bodies) power to introduce or vary the first kind of rule. Secondary rules are not duty-imposing rules. They are what Hart calls power-conferring rules.

Secondary rules are those rules which confirm 'powers' like Contract, Marriage, Will, Delegated Legislation – power to make law.
In the Indian Constitution, Schedule VII gives a list namely State, Centre , and Concurrent List, which conferred power to respective organs to make laws. There is a link between these primary and secondary rules. There is a specific relationship between these rules which rather systematically comprises a legal system and legal order.
Secondary rules have been divided into three more types, these are as follows;
.Rule of Adjudication
Rule of Change
Rule of Recognition

**Rule of Adjudication:-**
It mainly represents those rules, which confer a direct power to adjudicate the matter in dispute, e.g. Article 32, which empower Supreme Court to issue prerogative writ: Article 131, 132, 134, 133 that empower Supreme Court the original and Appellate jurisdiction. Article 323A and 323 B empowers tribunals to adjudicate matters in dispute. All those articles in the Constitution are power conferring. They enable a court to decide a particular dispute.

**Rule of change:-**
Law-making power is to be accompanied by modification when a competent legislative body derived its power to make law should have the power to change the law. This power is necessary to affect any kind of notification, e.g. Article 368 gives power to Parliament to amend the Constitution and procedure thereof. Thus it gives the power to amend the Constitution. This power includes the power to repeal, remove difficulties. It is equally applicable to delegated legislation.

**Rules of recognition:-**
This principle is the most crucial and vital principle of secondary rules. It is that rule which recognize other rules. The rule of recognition is the criterion of existence and validity of the rule of legal system.
Hart believes that the rule of recognition is the most important. The rule of recognition tells us how to identify a law. In the modern system with multiple sources of law such as a written constitution, legislative enactments, and judicial precedents, the rules of recognition can be quite complex and require a hierarchy where some types of rules overrule others Hart holds this out for the remedy for uncertainty.
Kelson also talked about recognition, i.e. validity and existence of norms are recognized by the basic form. Here we can see the similarity between the Heart and Kelson on the point or rule of recognition and Grundnorm. However, Kelsen basic norm is Sui Generis that have to fulfill the test of minimum effectiveness but in Heart's Rule of recognition to a legal system, to effectively empower, it has to give two minimum tests or to fulfill two conditions. On the base of which a legal system could effectively be enforced.

**Criticism by professor Dwarkin**

Prof. Hart called a legal system a system of Rules. Whether a legal system is a system of rules only? Prof. Ronald Dwarkin criticized Prof. Heart on this point. Dwarkin pointed out that legal system does not comprise only rules but it consists of principles also. So to call the legal system of rules is not proper. Sometimes those principles are more important than those rules, e.g. Principle of Natural Justice, which is elaborated in Maneka Gandhi vs. Union of India. The judiciary positively incorporates the Principle of Natural Justice. So what Dwarkin says is also an important one. If rules and principles come into conflict then principle gets primacy with overriding effect overrules.

Justice Coke in Bohman's Case (1610), contended that "if it is found that the law made by Parliament is contrary to certain moral principle then such law could be null and void".

The heart also failed to provide a true character of law, but this contribution noteworthy as a bridge-builder of Natural Law to Positivism through Semi sociological School of law. Prof. Heart was active in promoting democratic socialism and other political causes for the left to then prevailing political center and advocated privacy rights for homosexual long before it was common to do so.

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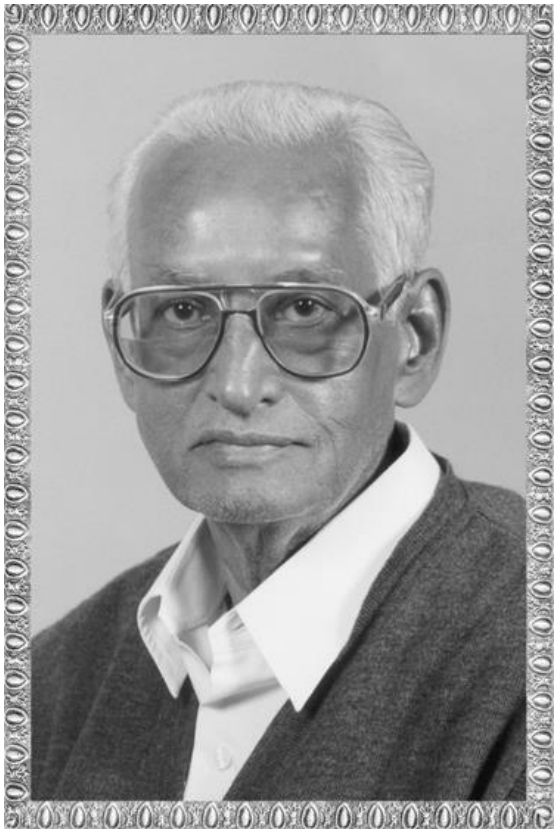

# Lt. Shree Chimanbhai Shukla


**Shree H.N.Shukla College**
**2, Vaishali Nagar,**
**Nr. Amrapali Railway under bridge,**
**Raiya Road, Rajkot.**
**Ph. (0281)2440478**

**Shree H.N.Shukla College**
**3, Vaishali Nagar,**
**Nr. Amrapali Railway under bridge,**
**Raiya Road, Rajkot.**
**Ph. (0281)2471645**

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## Unit 3- Legal rights, Duties, Persons, Titles, Liabilities;

| UNIT NO. | TOPIC NAME |
|---|---|
| 3.1 | Rights, Duties and Wrongs: Definitions and relationship, Rights legal rights as defined by Hopfield, Right-duty correlations |
| 3.2 | Nature of personality: Corporation sole and aggregate , rights & Liabilities |
| 3.3 | Corporate Personality : Corporation Sole and Aggregate , Rights &b Liabilities |
| 3.4 | Status of Unborn, Minor, Lunatic ,Drunken and Dead person |
| 3.5 | Kinds of Legal rights and Duties |
| 3.6 | Liabilities: Conditions for imposing liabilities, Mens rea , International Negligence , Vicarious Liability, Strict Liability |
| 3.7 | Theories of Punishment |

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## UNIT -3- RIGHTS, DUTIES AND WRONGS: DEFINTIONS, AND RELATIONSHIP, RIGHT AND LEGAL RIGHTS AS DEFINED BY HOPFIELD, RIGHT-DUTY CORRELATION:

## 3.1 Rights , Duties and Wrongs: Definitions and relationship, right and Legal right as defined by Hopfield, Right-Duty correlations

**Introduction**

The law protects the legal right of every citizen. By being a citizen of the country, the people are given the legal right. It is the duty of every individual to protect the rights of each individual.

**Meaning**:

Right in the ordinary sense of the term means a number of things, but it is generally taken to mean the standard of permitted action within a certain sphere. As a legal term, it means the standard of permitted action by law. Such permitted action of a person is known as his legal right.

**Definition of Right:**

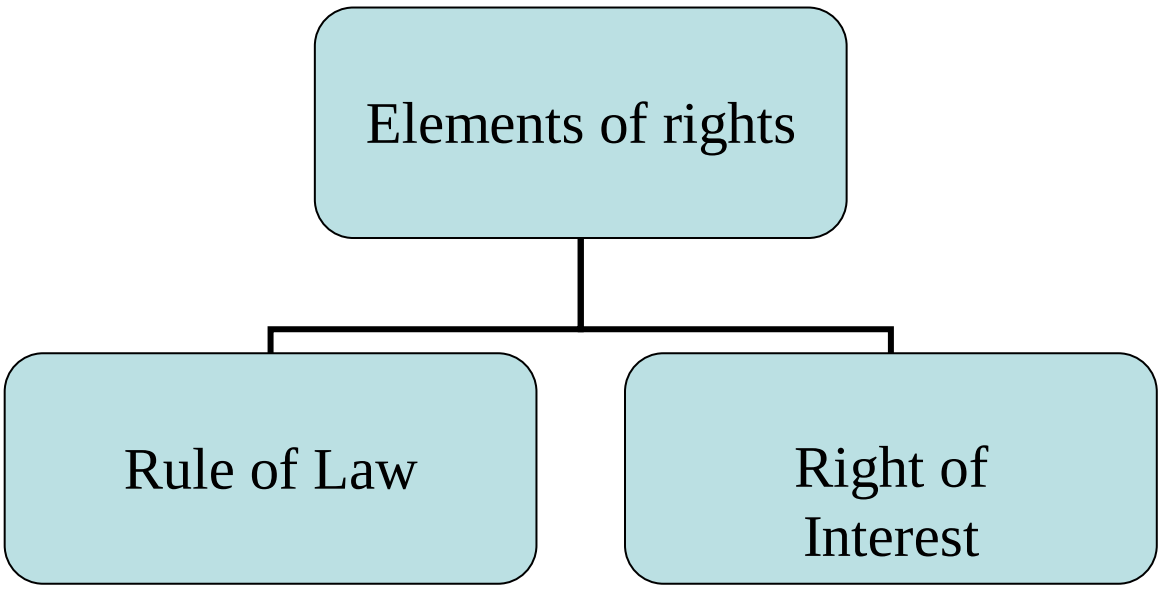
Austin: About the definition and the analysis of the legal rights there is a great deal of difference of opinion among the jurists. According to Austin, right is a faculty which resides in a determinate party or parties by virtue of a given law and which avails against a party or parties (or answers to a duty lying on a party or parties) other than the party or parties in whom it resides. According to him, a person can be said to have a right only when another or others are bound or obliged by law to do something or forbear in regard to him. It means that a right has always a corresponding duty. This definition, as it appears on is very face, is imperfect because in this definition there is no place for imperfect rights.

Holland: Holland defines legal right as the capacity residing in one man of controlling, with the assent and assistance of the state the actions of others'. It is clear that Holland follows the work given by Austin.

A legal right must be distinguished from a moral or natural right. A legal right is an interest recognized and protected by a rule of legal justice, an interest the violation of which would be a legal wrong, done to him whose interest it is, and respect for which is a legal duty. Moral or natural right means an interest recognized and protected by a rule of natural justice, an interest the violation of which would be a moral wrong, and respect for which is a moral duty'.

Salmond: Salmond defines right from a different angle. He says, A right is an interest recognized and protected by a rule of right'. It is an interest respect for which is a duty, and disregard of which is a wrong.

The main elements in this definition are two:




First, a rule of right means a rule of law, or, in other words, that which is judicially enforceable. Thus, according to Salmond, a right must be judicially enforceable.

Second, a right is an interest. The element of Interest is essential to constitute a right. So far as Salmond's first element is concerned, it is a corollary to his definition of law.

Supreme Court of India also interprets the definition of right in case of State of Rajasthan v. Union of India, AIR (1977) SC 1361 as:

In the strict sense, legal rights are correlatives of legal duties and are defined as interests whom the law protects by imposing corresponding duties on others. But in a generic sense, the word right' is used to mean immunity from the legal power of another, immunity is an exemption from the power of another in the same way as liberty is an exemption from the right of another, Immunity, in short, is no subjection.

**Theories of Rights**

**The Will Theory:**

This theory says that the purpose of law is to grant the individual the means of self-expression or self-assertion. Therefore, right emerges from the human will. Holmes In his definition of right puts the same view more clearly. He defines legal right as nothing but a permission to exercise certain natural powers and upon certain conditions to obtain protection, restitution, or compensation by the aid of public force'. Hegel, Kant, Hume and others say that by right is meant the power of self-expression or will.

Will-Theory criticized: Duguit is vehemently opposed to the will theory. According to him, the basis of law is the objective fact of social solidarity and not the subjective will. The idea of will is anti-social. The will theory has been criticized on other grounds also. Those who greatly emphasis the element of will confuse the fact with abstract ideas, that is, they do not make the distinction between what is and what ought to be.

**The Interest Theory:**

The profounder of this theory is Ihering-a great German jurist. He defines legal right as a legally protected interest'. According to him, the basis of right is interest' and not will'. His definition of law is in terms of purpose'. Law always has a purpose. In case of rights the purpose of law is to protect certain interests and not the wills or the assertions of individuals.

**Classification of Rights:**

(1) Antecedent and remedial rights:

They are known by other names also, such as primary and secondary rights, principal and accessory rights. Pollock calls them as substantive and adjective rights. When a right exists independent of any other right and for its own sake it is an antecedent right. When another right is joined to it then so joined right is called a remedial right

(2) Perfect and Imperfect rights:

A perfect right means a right which has a correlative duty that can be legally enforced. Generally, when law recognizes a right, it prescribes a remedy also and when the right is violated, it enforces it. An imperfect right' is that right which, although, recognized by law, is not enforceable, such as the claims barred by time.

(3) Positive and negative rights:

A positive right is that right which has a correlative positive duty. In case of positive right the person having the right can compel the person upon whom the correlative duty is imposed to do some positive act. The scope of a negative right is only that the person having the right shall not be harmed.

(4) Rights in rem and rights in Personam:

Generally most of the rights in personam, are positive right and rights in rem are mostly negative rights.

(5) Proprietary and personal rights:

Proprietary right means a person's right in relation to his own property. Personal rights are rights-relating to status and that arising out of contract. Mainly two points of distinction between proprietary and personal rights are put forward.

First that proprietary right is valuable; personal rights are not valuable. Second, that proprietary rights are transferable, personal rights are not transferable.

(6) Vested and contingent rights:

A right is a vested right when all the facts happening or not happening of which it is necessary to create or vest the right, have happened or not happened If only some of such facts have occurred then the right is a contingent right. It would become vested when all the facts have occurred. A vested right creates an immediate interest. It is transferable and heritable. A contingent right does not create an immediate interest, and it can be defeated when the required facts have not occurred.

(7) Legal and equitable rights:

The rights recognized and enforced by the common law courts were known as legal rights and the rights recognized and enforced by the chancery courts were known as equitable rights.

**Meaning of Duties**

Duty, the word finds its derivation from the word "due" which means something which owed. So, Duty can be described as an obligation to perform an act or a task. This act or task can be ethical, moral, cultural etc. in nature or either a compulsion by the state, omission of which will result in punishment by law. Cicero, an early Roman philosopher who discusses duty in his work "On Duty", suggests that duties can come from four different sources:-

1. as a result of being a human
2. as a result of one's place in life (one's family, one's country, one's job)
3. as a result of one's character
4. as a result of one's own moral expectations for oneself.

In the legal scenario, duty means a legal obligation to do or not to do something.

**According to Salmond** "A duty is an obligatory act, it is an opposite of which would be wrong. Duties and wrongs are correlatives. Supporting this, Fitzgerald has said, the commission of wrong is breach of duty and performance of duty is avoidance of wrong.

**According to Keeton**, a duty is an act of forbearance which is enforced by the state in respect of a right vested in another and breach of which is a wrong act.

**According to Prof. Dicey,** " a duty is a species of obligation. People obey it due to indolence, deference, sympathy, fear and reason. And due to psychological, social and moral pressures. Most duties are supported by State. the breach of the duty is imprisonment or fine."

**Concept of Duties in India**

In India, Fundamental Duties are enshrined under Art 51-A. Though they are not enforceable in court , but many of these duties have promoted and pushed the legislature to frame legislations taking inspiration from these duties. Thus, not enforceable constitutionally, with formulation of statutes, they get statutory backing and become enforceable. Even in cases of violations, liability in terms of either fine or imprisonment is imposed. This has been achieved because of pro-active role of judiciary of recognizing the role and importance of fundamental duties and highlighting it continuously in various judgements decided in the past years.

The trend began with introduction of P.I.L system in the country. Thus, any violation relating to environment, education, maternity benefit etc. is punishable under the respective statutes framed based on the fundamental duty. Many fundamental duties are linked with fundamental rights like fundamental duty of protecting environment has become an essential part and parcel of right to life under Art 21, similarly equal pay for equal work not only has a statute named "Equal Remuneration Act" but also gets backing from Art 14. This is how the interplay and interlink of rights and duties have shaped the present legal spectrum in the country.

**Wrongs**

The terms "wrong" and "right" are often used interchangeably. A wrong, according to Salmond, is an act that is done incorrectly. Such behaviour is "incompatible with the rule of law and justice." The word injury comes from the Latin word injuria, which means "that which is contrary to justice." As a result, the term "injury" is essentially synonymous with "wrong." However, in modern usage, it refers to the harm caused by a legally wrongful act to either party in a legal dispute.

**Moral Wrongs**

Moral wrongs and legal wrongs are the two main types of wrongs. A moral wrong, also known as a natural wrong, is an act that violates the rule of natural justice. It is made up of acts that are considered morally wrong. For example, in a society that values elder respect, any act that is disrespectful to elders may be considered a wrongful act. This would be considered a moral blunder. There is no legal recourse for harm caused by a moral blunder.

**Legal Wrongs**

A legal wrong could or could not be a moral wrong. A legal wrong is an act that is either contrary to justice as defined by a state's legal system or infringes on any of the rights guaranteed by law. A wrong can be recognised as a legal wrong in a number of ways. The traditional method is to penalise the act in order to declare it legally wrongful. Modern thinkers, on the other hand, argue that the essence of a legal wrong is the declaration of the act as a wrong by law, rather than the punishment or sanction imposed by law. As a result, other means and methods of recognising an act as a legal wrong have emerged. For damage caused by a legal error, there is a legal remedy. A moral wrong could or could not be a legal wrong.

**The Relationship of Rights, Duties, and Wrongs**

When you look at the definitions and meanings of right, duty, and wrong, it's clear that they're all linked together. When it comes to the relationship between rights and duties and wrongs, wrong is either the cause of claiming a right or the result of failure to perform a duty. As a result, there can be no wrong without duty, and there can also be no wrong without someone who has been wronged, i.e., someone who has the right to claim it. The relationship between rights and responsibilities has sparked a lot of debate. There are primarily two schools of thought in this area. One believes that rights and responsibilities are inextricably linked and that one cannot exist without the other. According to the second school of thought, which is led by Austin, a right may have a corresponding duty, but a duty does not always have a corresponding right.

**Nature of Duties**

Duties follow rights. The same is expressed by Mahatma Gandhiji in these words, *"If we discharge our duties, rights will not be far too seek."*

Every right or duty comes with a covenant of obligation of legal nature in which two or more persons are bound together. One has an obligation to perform for the other and to ask for duty to be performed is the other person's right. Therefore, for any obligation to exist there has to exist an entity to whom the obligation is due; similarly for a right to exist there has to be an entity who asks for the obligation to be performed to whom it is due; and for a violation to occur there has to be a person whose obligation has not been met which means his right to get the due obligation has been blocked. This is also called as *vinculum juris which means "a bond of the law". It is a tie that legally binds one person to another.[6]*

Such a relationship is interpersonal in nature, rights and duties are corresponding entities. Having a right implies that the other person should respect that right by performing the corresponding duty. Right to life also comes with a duty to respect the other's right to life that is to not disturb his life. Thus, it is this reciprocal and corollary nature of duties that enhance our rights and govern the inter-relationship between individuals in a democratic society.

When a person is required to fulfill two duties at the same time the following guideline have to be followed :-

1. Duties towards God must be given priority over those towards men.
2. Duties that secure public order or the common good have priority over those that safeguard the individual.
3. Duties towards the family and relatives take precedence over those towards strangers.
4. Duties of greater importance take precedence to those of lesser importance.
5. Duties based on higher laws take precedence over those coming from lower laws.

**Characteristics of Duties**

A duty is a responsibility to be fulfilled. It is the guideline, a prescription to be followed which details the conduct which must be followed when fulfilling duties which are moral or social in nature. Professor Fuller states the main attributes of duty as :-

1. It should be general, though limited exceptions are permissible.
2. It should be promulgated.
3. It should be prospective and intelligible.
4. It must be consistent.
5. It should be capable of fulfillment and congent with inner morality.

**Other characteristics can be summed as –**

1. Basic ideology is that it is an obligation for something in return.
2. It is a concept that is prescribed -to be followed but is not mandatory in nature.
3. It is a commitment which is moral towards someone and must be performed for that individual.
4. There is restriction of free will but by the operation of law.
5. Negative Duties which arise from Natural Law are not exempted.

6. Affirmative Duties which arise from the affirmative precepts of Natural Law admit exemptions only when the act is rendered impossible to be performed under certain circumstances or if it is causing excessive hardship on the person.
7. Hardships which are a part of the process of the obligation and are a part of normalcy in accordance with the nature of the duty will not result in any exemption
8. Only a strong reason can stop one from the compliance of a duty. For instance, a student must attend classes unless sickness prevents him from doing so.

**Classification of Duties**

**A. LEGAL AND MORAL DUTIES** :- A Legal duty is adversary of a legal wrong and it is recognized by the law for administration of justice. Similarly, Moral duty is an opposite of moral wrong, but is not recognized by law but it is followed out of human conscience and social perception. So, a duty can be legal but not moral and vice versa. So, by the operation of law it is mandatory to perform a legal duty but not a moral duty. For example – not selling adulterated milk is a legal duty and not wasting paper is a moral duty. There is punishment for former and not for latter.

**B. POSITIVE AND NEGATIVE DUTIES** :- When a person is enforced to perform a duty, the duty is called positive duty. Whereas, when the law asks the person from refraining in involving or undertaking a particular act, such duty is called negative duty. For example – to pay debt is a positive duty whereas, not to trespass on third person's land is a negative duty.

**C. PRIMARY AND SECONDARY DUTIES :**– Primary duty is one which doesn't need to be stated, it exists on its own. Whereas, Secondary duty is one which exists only for giving the way to other duties thus, having no independent existence. For example – Not to cause injury to another person is the primary duty, but to pay damages as a result of injury caused is the secondary duty.

**D. ABSOLUTE AND RELATIVE DUTIES :-** Absolute duties are the one which are not followed by a right which means a right is mot corollary of a duty in the case of an absolute duties, whereas relative duties are the duties which come with a bond and are followed by right. Thus, a relative duty cannot exist without a right.

Austin stated 4 kinds of absolute duties ;-

1. Duties to those who are not human beings, such as duty towards god.
2. Duties towards indeterminate persons or public at large, such as duty not to commit nuisance.
3. Self-regarding Duties, such as duty not to commit suicide or duty not to become intoxicated.
4. Duty towards State or sovereign.

**About Hohfeld's Analysis of Legal Rights**

Professor Wesley Newcomb Hohfeld, a graduate from University of California gave the concept of analyzing legal rights. Professor Hohfeld has contributed mostly to the field of Jurisprudence. He simplified the term right by analyzing several core concepts in law.

Professor Hohfeld has proposed that the different meanings of the term right are often expressed in a single sentence. This uncertainty in the language indicates a lack of precision in thought and the conclusions that are derived in turn. His broke the meaning of rights into eight unique concepts. These terms are defined with respect to one another to eliminate the presence of any ambiguity. The four pairs of opposites and correlatives exist as mentioned below.

Right and duty correlations :

**Legal Rights**

A legal right is an interest which is recognized and protected by a rule of legal justice and the violation of which would be a legal wrong. It, therefore, follows that in all civilized societies law consists of those rules which control and standardizes the model conduct and behavior of people.

Also, it is the state which enforces the rights and duties created by such rules. The conception of right accordingly is of fundamental significance in the modern legal system because rights are indispensable for all civil societies.

SALMOND defines a right as interest and protected by a rule of right. It is any interest, respect for which is a duty, and this disregard of which is wrong.

**Legal Duties**

A duty is an obligatory act. It is an act the opposite of which would be the wrong behavior. It is something to do or denied doing in favor of another person. A man has a duty towards any matter for which he has a legal obligation. Thus, duties and wrongs are generally co-related.

According to KEETON, a duty is an act of forbearance which is enforced by the state in respect of a right vested in another and breach of which is a wrong act. Every right implies a co-relative duty and vice-versa. Duties are of two kinds, namely Legal and Moral.

**Correlation**

It is very much obvious that legal rights and duties both are simultaneously existing and related to each other. So, we can view a natural correlation between these two.

Thus, it will be clear from this discussion that right, duty and wrong all these three terms are related to each other. We can conclude that the right has the following important components –

1) It is an interest.

2) This interest is recognized and protected by the rule of right "justice" and law.

3) This interest must be respected by someone else against whom interests are claimed, then that person is under a duty.

4) If this interest is not respected then the person who disregards it is said to have committed a wrong.

According to AUSTIN'S view, a state can have no legal rights against the subjects which are erroneous. All duties are relative just as all rights are. There can be no absolute duties and AUSTIN'S classification of duties into absolute and relative duties is unsound.

A perfect right is one which corresponds to a perfect duty. A perfect duty is one which law not merely recognizes but also enforces. In a fully developed legal system, there are rights and duties which though recognized by law but are not perfect in nature. Both are important but we need not take any action for enforcing them.

The rights form a logical ground for action, but duties do not form a logical ground for action. In some cases, an imperfect right is sufficient for equality. Therefore, in summary, every right implies duty against somebody. There can be no right without a corresponding duty and similarly, there can be no duty without a corresponding right.

## 3.2 LEGAL PERSONALITY/ PERSON

### Meaning of Person

The term Person is derived from the Latin word 'Persona' it means those who are recognised by law as being capable of having legal rights and duties.

### Definition :

1. ***Salmond*** – " A person is any being whom the law regards as capable of rights and bound by legal duties.
    1. ***Savigny*** defines the term person as the subject or bearer of a right.
    2. ***According to Gray*** A person is an entity to which rights and duties may be attributed.
    3. ***According to Austin*** the term 'person' includes physical or natural person including every being which can be deemed human.

According to ***Section 11 of the Indian Penal code*** the word person includes *any company or association, or body of Persons, whether Incorporated or not.*

### Historical Background of the Concept of 'Person'

The term 'person' and 'personality' has a historical evolution. Roman law, Greek law and Hindu law, has used the concept too.

In Roman law, the term had a specialized meaning, and it was synonymous with 'caput' means status. Thus, a slave had an imperfect persona. In later period it was denoting as a being or an entity capable of sustaining legal rights and duties.

In ancient Roman Society, there was no problem of personality as the 'family' was the basic unit of the society and not the individual. The family consisted of a number of individuals, but all the powers were concentrated with '***pater familias***' means the head of the family. If a head of the family dies, and there is an interval between his death and devolution of property on the heir who accepted inheritance, the property will vest in a person during the interval. This was called ***hereditas jacens*** which was developed by the Romans. The hereditas jacens is considered by some scholars as similar to legal personality. Hereditas jacens means the inheritance during the interval between death of the ancestor and the acceptance of the inheritance by the heir. Some scholars are not ready to agree with the views that it has some connection with present doctrine of legal personality, even if it is there, it may be in a very limited sense. There was a provision in Roman law that other institutions or group who had certain rights and duties were capable to exercise their legal rights through a representative.

Under Greek law, an animal or trees were tried in court for harm or death done to a human being. It can be said on the basis of this practice that these objects were subject to duties even though they may not possesses rights. This is an element of the attribution of personality.

Under early English law, there are some incidences in it had found that an animal or tress or inanimate objects had been tried in Court under law. The trees and animals were subject to duty but not rights. After 1846, this system has modified and it was made clear that animals or tresses are capable of possessing rights and duties; therefore, there is no question of personality.

**Kinds of Persons :**

There are two kinds of persons are as follows

- Natural persons
- Legal persons ( legal persons are also known as juristic, fictitious or artificial persons )

1. **Natural Person** : A natural person is a human being possessing natural personality.
2. According to Holland, a natural person is a human being as is regarded by the law as capable of rights and duties.
3. Requisite of normal human being is that he must be born alive moreover , he must possess essentially human characteristics.
4. Generally a person/human being who has a capacity to sue and be sued is person.
5. **Legal persons / Artificial persons :** A legal person has a real existence but it's personality is fictitious. A fictitious thing is that which does not exist in fact but which is deemed to exist in the eye of law.
6. **Example** : Company or corporation, idol etc.

3.3 **CORPORATION SOLE AND AGGREGATE** :

In the subject of the statute and lawful hypothesis, the law perceives two sorts of people that are normal individuals and legitimate individuals (counterfeit formation of law). In this article, we will examine the juristic character of a corporation. Corporate Personality is considered a counterfeit character.

A Corporation is a fake individual appreciating in law jobs to have commitments and holding property. The people shaping the corpus of the organization are called its individuals. The juristic character of organizations pre-assumes the presence of the following conditions:

- There should be a gathering or assemblage of individuals related for a specific reason.
- There should be organs through which the company capacities,
- The organizations are ascribed will (enmity) by lawful fiction.

The privileges of organizations are unimaginable, similar to the right of holding property or arranging it off, right of sue, right of going into contracts and so on. They are likewise responsible for their demonstrations and demonstrations of specialists acted in their name. In the milestone instance of ***The Citizen's Life Assurance Company v. Brown (1904)AC426*** the Privy Council has decided that corporations may likewise be expected to take responsibility for their demonstrations suggesting malignant aim. Along these lines, it is expressed that 'artificial', 'conventional' or ' juristic' people, are such masses of property or gatherings of individuals that according to the law are fit for rights and liabilities, that is, to which the law gives recognition.

Comprehensively Corporate Personality is of two sorts –

- Corporation Aggregate
- Corporation Sole

**Corporation Aggregate**

There are a number of individuals where we make a section outside individuals which means making a group as a solitary unit. In basic words, company total is a gathering or relationship of individuals joined for specific interests. It was at first made by the Royal Charter in England later it was enrolled under the organizations' act.

The organization is fundamentally made by advertisers. Production of the organization incorporates different exercises like enrollment of organizations, arrangement of the directorate, making an outline and so forth. At long last when the entire system of enlistment is finished then the organization is treated as a legitimate character.

Such an organization is framed by various people who as investors of the organization contribute or guarantee to add to the capital of the organization for the assistance of normal target. The property of the organization is treated as unmistakable from its individuals if there should be an occurrence of death and bankruptcy of individuals if it doesn't influence the organization, it might keep on prospering the business. The organization has separate legitimate substance and restricted obligation.

On account of ***Salmon v. Salmon*** that a corporate body has its own reality or character independent and unmistakable from its individuals and thus an investor can't be expected to take responsibility for the demonstrations of the organization despite the fact that he holds the whole offer capital.

On account of Tata Engineering and *Locomotive Company Ltd. V. Province of Bihar* the Court noticed the organization in law is equivalent to a characteristic individual and has its very own legitimate element'. The substance of the enterprise is totally isolated from that of its investors and its resources are discrete from those of its investors.

**Utility of Corporation Aggregate**

The different purposes which counterfeit enterprise total might advance and protect may momentarily be expressed as follows-

- Help and aid the administration of the country through Municipal partnerships, Local Bodies, Panchayats, Welfare Organizations. and so forth
- Promote demonstrable skills through foundations, schools giving specialized, logical, designing, clinical law, and other particular courses.
- Preserve and advance strict amicability by comprising strict trusts, sheets, learning focuses, altruistic homes, etc.
- Advancement of logical and imaginative fever through suitable trusts, associations, establishments, and so on
- General public help, through Medical clinics, Trusts, halfway houses, salvage homes, etc.
- Promote exchange, trade, and enterprises through Corporate houses, Public area utility foundations, Private business houses, etc.

**Corporation sole**

An organization sole is a legitimate substance consisting of a single sole in a corporate office, involved by a single (sole) regular individual. The most remarkable illustration of partnership sole is the crown (in England) It basically implies that there is a solitary individual who is represented and viewed by law as a legitimate individual.

Single individual in his legitimate limit has a few rights and obligations while holding the workplace or capacity. The fundamental point of organization sole is to guarantee the coherence of an office so the inhabitant can gain property to serve his replacements or he might agree to tie or help them and can sue for wounds to the property while it was in the possession of his archetype.

Holders of public office are referred to by law as enterprises. The principal trademark is its consistent element supplied with a limit with respect to perpetual length.

3.4 **Status of Unborn, Minor, lunatic, Drunken and Dead Person:**

Who is a person? According to the law, a person is anyone who has certain legal rights and is bound by some legal duties. This person may be real or even imaginary. So then what is the legal status of an unborn child, a minor, a drunk or a lunatic?

Under the eyes of the law, there are two types of legal entities – human and non-human. So a person will be a human legal entity. But a company or corporation, on the other hand, is a judicial (non-human) person or entity. It still has legal rights and duties just like a human entity.

Now the law of status concerns itself with the status of a man in the society. It governs the natural, domestic and the extra domestic status of such a man in the society as a whole. The extra domestic status covers the relations and interactions of the man apart from those with his family.

Thus the law of status will deal with those persons that do not enjoy the privilege of being legal entities, i.e. have no distinct legal personalities. But yet the society has a duty towards them and their well being. These include an unborn child, a minor, a lunatic or a drunk person and even a dead person.

Legal Status of an Unborn Child

A child that is still in the womb of its mother is still not technically a person. But by legal fiction, an unborn child is considered already born. i.e. he is granted a certain legal personality. If the child is born alive he will then enjoy legal status. Let us look at certain provisions made for the unborn child under the Indian law,

- As per the Transfer of Property Act, we can transfer property for the benefit of the unborn child. This is done via a trust.
- As per the Indian Succession Act, we can create an interest in the name of the unborn child in a property. But the interest of the property can only be vested after the child is born alive.
- In a HUF as per Mitakshara Law, an unborn child will have an interest in coparcenary property.
- Criminal Procedure states that if a female inmate sentenced to death is found to be pregnant, the execution is postponed till the child has a chance to be born.

A child who is still in the womb of the mother is consider not technically legal person but by legal friction the foetus gets some legal rights and the society has certain duty to perform towards such unborn. There are certain laws in India which advocate an unborn child as a person and grants him certain rights some of which are as follows:

1. **Indian Penal Code, 1860**

***Section 312 to section 316*** of the Indian penal code deal with thaw relating to abortion. The medical termination of pregnancy act lays down various laws and procedure to be followed in order to get a child aborted.

***Section 315*** – This section of the IPC states that inflicting prenatal injury on a child possessing the capability of being born and where such injury affects it from being born amounts to an offence of child destruction.

- **Criminal Procedure Code, 1973**

***Section 416*** – This section of the CrPC states that in case any woman who is sentenced to death is found to be pregnant, an order to postpone the execution must be passed by the High Court, or if it deems it fit, the execution can be reduced to life imprisonment.

- **Transfer of Property Act, 1882**

***Section 13*** – This section of the said Act states that a property can be transferred for the benefit of an unborn person through the means of trust.

- **The Indian Succession Act, 1925**

***Section 114*** – This section provides for the creation of prior interest before the unborn child is made the owner of the corporeal or incorporeal property. However, no property will be deemed to be vested in the unborn child until he is born alive as per the Act.

Under Hindu Law, an unborn child is deemed to be a living person for certain purposes. The rights of an unborn child that is in the womb of its mother are dealt with by ***Section 20 of the Hindu Succession Act***, 1956. As per Mitakshara Law, in a Hindu Undivided Family, an unborn child will have an interest in coparcenary property.

Under Mohammedan Law a gift in the name of a person who does not exist is void.

- **The legal status of a minor**

Minors are legal subjects, and their position in a legal and social society should be at the heart of the legal system. Their key characteristic is that they are unable to perform legal connections on their own thoroughly. This is due to their lack of total capacity as they enter essential legal relationships through their parents or someone who may replace their place.

Minors are natural persons with a legal identity. They are, however, deemed incapable of entering into a contract. In India, minors are usually under the age of 18 because they cannot comprehend the essence and implications of their acts.

*Various provisions for a minor under Indian Laws*

1. **Indian Contract Act, 1872**

The person who is a citizen of India and whose age is under 18 years, then that person is called a minor. A minor is an incompetent person to enter into a contract. Any agreement made with the minor is void-ab-initio, i.e., void from the beginning. In the case of a minor agreement, the court cannot allow the specific performance of a contract because it is completely void.

- **Transfer of property act, 1882**

A minor is not competent to transfer a property under this act, but A minor may accept an immovable property as a gift without his guardians' intervention.

- **Indian Succession Act, 1925**

***Section 144*** of the Indian succession act, 1925 provides for the creation of prior interest before the unborn person may be made the owner of the property. The person can create an interest in the name of the unborn child in a property. But that created interest of the property can only be vested after the unborn child is born alive.

- **Indian Penal Code, 1860**

According to ***section 82*** of the Indian Penal Code, a child below the age of 7 years old get a complete defence from any kind of criminal liability. A child below the age of 7 years old the child cannot be guilty of any offence. Because this age of a child cannot distinction between what is good or wrong. It works under the assumption that a child below the age of 7 years lacks the ability of understanding and unable to understand the nature and consequences of the act that he or she has done and the mens rea is not present in this case.

According to ***section 83*** of the Indian Penal Code, there is a partial defence from the criminal liability conferred on child above the age of 7 years and below the age of 12 years. Age between the 7 years and 12 years is capable to understand the nature and consequences of the offence that he or she is done.

- **Legal Status of Lunatic and Drunken Person**

Status of lunatic and drunken person have some special position. They are natural persons and have legal identity but are not capable o enter into contract. If at the time of entering into a contract lunatic or drunken person is incapable of understanding the nature of contract, then they are considered to be incapable of entering into a contract.

**Law of contract provisions for Lunatics**

By virtue of ***S. 12*** of Indian Contract Act 1872, a sane person can be said as person who while entering into a contract, understands the nature of contract and hence can form rational judgment regarding the same. Therefore we can say that a person is said to be of unsound mind if he is not capable to understand the nature of contract and is unable to form a reasonable judgment. As per ***S. 11*** of this Act, if a person of unsound mind enters into a contract, it will be declared as void.

Now, a person of unsound mind can be a lunatic or an idiot.

- ***IDIOT***– A person who is of unsound mind by birth or permanently of unsound mind is said to be an idiot. Therefore, the contracts entered upon by him are void-ab-initio.
- **LUNATIC**– A person who is not permanently of unsound mind but during specific periods he is of sound mind is regarded as a lunatic. They are allowed to enter into a contract only during a period of their sanity.

**Insanity/lunatic – Mc'naghten rule**

In 1843, the law of insanity was formulated in the case of R v. Mc'Naghten

- **Principles in Mc'naghten case:-**
- Every person is presumed to have sanity unless the opposite is established.
- In order to take the plea of insanity, it has to be proved that at the time of committing the crime the person was so insane that he didn't understand the nature of the act or had no idea that the act he was doing was of criminal nature.
- The test of wrongfulness of the act is in the ability to distinguish between right and wrong not in general but related to that particular act committed.

**Law of Contract provisions for drunken person**

A person having a majority age is considered to be capable of entering into a contract usually. But to a contrary there are certain exceptions as to this that under certain circumstances a drunk person is incapable of entering into a valid contract. Generally the Contractual capacity of a drunken person is regarded same as that of one who is a lunatic.

Therefore the burden of proving drunkenness rests on the person asserting it.

- Contracts entered into by the drunken person are not binding on him in the following cases :-
- When he was too drunk to understand the nature of contract ;
- The opposite party took advantage of it knowing of his condition.

By this it can be assumed that a drunk may ratify the contract entered into by him at the time of his incapability to understand the nature of contract. Also in certain circumstances, an infant, a lunatic and a drunk is bound to pay a price as compensation for goods sold and delivered to him according to Sale of Goods Act (1893).

Thus, a drunken and lunatic person has to pay not only when goods are sold to them but even when delivered and also for necessary goods. According to Sale of Goods Act, goods delivered to drunken must be suitable to the condition of his life.

**Indian penal code provisions as regards Intoxication**

The provisions for intoxication is provided under ***Sections 85 and 86*** of IPC. The major difference between these is that S.85 deals with a person who is involuntarily intoxicated whereas S.86 is a person who is voluntarily intoxicated. Thus according to S. 85 a person is not liable criminally but in case of S. 86 a person cannot take a defense of intoxication.

- ***Essential elements under S. 85 for a person to be safeguarded from action against him:-***
- The person was incapable of knowing the nature of act committed.
- He was not in a sense to know the acts were wrong or against law.
- The act committed by him was as a result of such intoxication.

Where the accused was persuaded by his father to drink alcohol, the plea of defense cannot be taken here since he had the knowledge of drink offered to him.

- **Legal status of Dead Person:**

**Dead person** – Someone who is no longer alive is called dead.

Dead persons have no legal personality and hence, cannot sue and be sued. Dead men are no longer persons in the eye of law. Legal personality of a person dies with his person. They do not remain the owners of their property until their successors enter upon their inheritance. When a person dies leaving Will, his property is distributed according to the Will. Law recognises and takes account after the death of the person of his desires and interest when alive. There are three things in respect of which the anxieties of living men extend even after their death. Those are his body, his reputation and his property.

1. **His Body:**

A living person is interested in the treatment to be given to his own body. A person is interested in a decent funeral and good burial. Criminal law secures a decent burial for all dead persons and the violation of a grave is a criminal offence. It is because to the respect the feelings of the relatives of a dead person, not in protection of dead person's right.

- **His reputation:**

Everyone is interested in maintaining reputation even after death. The reputation of a dead person receives some degree of protection from the criminal law. Defamation suit can be filed for loss of reputation of a dead person. If the publication is an attack on the internet of living persons, as a matter of fact, this right is in reality not that of the dead person but of his living descendants.

- **His Property/ Estate:**

A man is dead but his hand may continue to regulate and determine the enjoyment of the property he owned while he was alive. He can dispose of his property by WILL. When a person dies intestate ( dies living will) the property is distributed according to the WILL.

***William Vs. William*** .

In this case, court held that a person during his lifetime cannot make a Will, disposing of his body. **E.g.** giving his brain, bones etc to the museum or giving any part of his dead body to the

medical college. But the trend changed today and it is legal to donate one's eyes of part of his body after his death.

**Legal Status of a Dead Man**

A dead person is no more a legal entity. As soon as a person dies, he becomes incapable of enjoying rights or performing his duties. So the legal personality of a person ends with their death.

However, the law does take into account the wishes and desires of the deceased person. And it also ensures that there is no false harm to the reputation of the deceased. As per the Indian law,

- Every person has the legal right to a decent burial as per their religious faith. Any act that amounts to the indignity of the corpse is punishable by section 297 of the Indian penal code. This also applies to any homeless person without any family.
- The wishes of a dead person regarding his property must also be fulfilled. This is done for the benefit of the living who are benefitting by such wishes or will.
- The defamation of a dead person is punishable by section 499 of the Indian Penal Code. This includes anything that harms the reputation of the person with the intention to hurt family members and close relatives.
    - Now, the legal status of a drunkard, a minor and a lunatic have some special consideration. These people are all obviously natural persons and all have a legal identity. However, they are considered incapable to enter into a contract.
    - As per the law, every person who has attained majority is considered capable of entering into a contract. This obviously means a minor is incapable of doing so. Other than that, there are certain persons who are also incapable of entering into a contract.
    - So any person who is mentally afflicted (includes lunatics and drunk persons) at the time of entering into a contract is incapable of doing so.

3.5 **Kinds of Legal rights and Duties** :

**Classification of Legal Right**

- Salmond gave following classifications of rights.
- Positive and Negative Rights
- Real and Personal Rights
- Right in rem and right in personam
- Proprietary and Personal Rights
- Inheritable and Uninheritable Rights

**1 Positive Rights**

A positive right corresponds to a corresponding duty and entitles its owners to have something done for him without the performance of which his enjoyment of the right is imperfect.In the case of positive rights, the person subject to the duty is bound to do something.The satisfaction of a positive right results in the betterment of the position of the owner.In case of positive rights, the relation between subject and object is mediate and object is attained with the help of others.In case of positive rights, a duty is imposed on one or few individuals.

**2. Negative Rights**

Negative rights have negative duties corresponding to them and enjoyment is complete unless interference takes place. Therefore, majority of negative rights are against the entire world.Whereas, in case of negative rights, others are restrained to do something.Whereas in case of a negative right, the position of the owner is maintained as it is.Whereas in case of negative rights, the relation is immediate, there is no necessity of outside help. All that is required is that others should refrain from interfering case of negative rights.In case of negative rights, the duty is imposed on a large number of persons.

**3. Real Rights**

A real right corresponds to a duty imposed upon persons in general.A real right is available against the whole world.All real rights are negative rights. Therefore, a real right is nothing more than a right to be left alone by others. It is merely a right to their passive non-interference.In real right, the relation is to a thing. Real rights are derived from some special relation to the object.Real rights are *right in rem*.

**4. Personal Rights**

A personal right corresponds to a duty imposed upon determinate individuals.A personal right is available only against a particular person. Most personal rights are positive rights although in a few exceptional cases they are negative. In personal right, it is the relation to other persons who owe the duties which is important. Personal rights are derived from special relation to the individual or individuals under the duty.Personal rights are *right in personam*.

**5. Right in rem**

It is derived from the Roman term *'actio in rem'*. An *action in rem* was an action for the recovery of dominium.The right protected by an *action in rem* came to be called *jus in rem*. *Jus in rem* means a right against or in respect of a thing. A *right in rem* is available against the whole world.

***6. Right in personam***

It is derived from the Roman term *'action in personam'*. An *action in personam* was one for the enforcement of *obligato* i.e. obligation.A right protected by *action in personam* came to be called as *jus in personam*. *Jus in personam* means a right against or in respect of a person. A *right in personam* is available against a particular individual only.

**7. Proprietary Rights**

Proprietary rights means a person's right in relation to his own property. Proprietary rights have some economic or monetary value. Proprietary rights are valuable. Proprietary rights are not residual in character. Proprietary rights are transferable. Proprietary rights are the elements of wealth for man. Proprietary rights possess not merely judicial but also economic importance.

**8. Personal Rights**

Personal rights are rights arising out of any contractual obligation or rights that relate to status. Personal rights are not valuable. Personal rights are the residuary rights which remain after proprietary rights have been subtracted. Personal rights are not transferable. Personal rights are merely elements of his well-being. Personal rights possess merely judicial importance.

**9. Inheritable Rights**

A right is inheritable if it survives the owner.

**10. Uninheritable Rights**

A right is uninheritable if it dies with the owner.

11. **Perfect and Imperfect Rights**

Perfect rights are protected and recognized by law and the suit can be instituted in the court against the wrongdoer for the breach of it.

**Example**: A has taken the loan from B. B has the duty to pay the loan and A has the perfect right to claim the loan amount. If B fails to pay then A has the right to file the suit in the court.

Imperfect rights are those rights which are neither recognized nor protected by law. **Example**: if the loan becomes time-barred, then he can claim his money back but it cannot be enforced by law.

3.6 **LIABILITIES :**

one of the most significant words in the field of law, liability means legal responsibility for one's acts or omissions. Failure of a person or entity to meet that responsibility leaves him/her/it open to a lawsuit for any resulting damages or a court order to perform (as in a breach of contract or violation of statute). In order to win a lawsuit the suing party (plaintiff) must prove the legal liability of the defendant if the plaintiff's allegations are shown to be true.

This requires evidence of the duty to act, the failure to fulfill that duty and the connection (proximate cause) of that failure to some injury or harm to the plaintiff. Liability also applies to alleged criminal acts in which the defendant may be responsible for his/her acts which constitute a crime, thus making him/her subject to conviction and punishment.

Example: Jack Jumpstart runs a stop sign in his car and hits Sarah Stepforth as she is crossing in the cross-walk. Jack has a duty of care to Sarah (and the public) which he breaches by his negligence, and therefore has liability for Sarah's injuries, giving her the right to bring a lawsuit against him. However, Jack's father owns the automobile and he, too, may have liability to Sarah based on a statute which makes a car owner liable for any damages caused by the vehicle he owns. The father's responsibility is based on "statutory liability" even though he personally breached no duty. A signer of a promissory note has liability for money due if it is not paid and so would a co-signer who guarantees it. A contractor who has agreed to complete a building has liability to the owner if he fails to complete on time.

**Conditions for liabilities : Mens Rea** :

Mens rea is a legal term that generally refers to the guilty mental state, the lack of which negates the crime situation on any given occasion. It's one of the most important aspects of criminal liability. Only when an act is done intentionally that is prohibited by law is it considered a criminal offence. The intent, which is the driving force behind the illegal conduct, is referred to as mens rea. Only when an act is committed with a guilty conscience does it become criminal. In most cases, a crime is not committed if the individual committing the act has an innocent mind. Before a person can be held criminally accountable, they must be in a blameworthy state of mind. For example, inflicting injury on an aggressor in self-defence is not illegal, but inflicting injury with the aim of exact revenge is illegal.

The familiar Latin maxim '*actus non facit reum nisi mens sit rea*'—the act does not render one guilty unless the thought is also guilty—expresses the essential concept of the principle of mens rea. At least in the case of the more severe crimes, simply committing a criminal act (or causing the state of events that the law prohibits) is insufficient to constitute a crime. In most cases, there must also be some element of improper intent or other misconduct.

Mens Rea was not an ingredient of crime in the 12th century. Wrongdoers used to be punished regardless of whether their actions were deliberate or not. Mens Rea was first proposed in the 17th century, coupled with the Latin phrase *'actus reus non facit reum nisi mens sit rea,'* which means 'there can be no crime without a guilty mind.' This maxim resolved the problem that a crime can only be defined as an activity carried out with the purpose to commit a crime. Later, during British rule, the element of Mens Rea was borrowed from English law and implemented into Indian criminal laws. Lord Macaulay created a proposal of the Indian Penal Code in 1860, which was passed on October 6, 1860. Though Mens Rea was originally part of English law, it was introduced after it was modified and carefully arranged to suit the circumstances of British India.

Mens Rea has a very prominent usage in Indian criminal law. The reasons behind this are self-evident. One of the key reasons is that in India, the entire criminal law has been codified, and all of the offences have been properly specified. If mens rea is viewed as a precondition, it is then incorporated into the definition of the crime and treated as a component of it. Many definitions in the penal code demand that the crime is committed 'voluntarily,' 'dishonestly,' 'knowingly,' 'fraudulently,' and so on. A fraudulent, dishonest, or negligent mind is hence the guilty mind.

Furthermore, certain offences under the Indian penal code are defined without regard to mens rea or purpose, such as crimes against the state, counterfeiting coinage, and so on.

In India, mens rea as a condition of penal liability works to such an extent that it is codified in the General Exceptions (Sections 76 to 106) of the penal code, which stipulates all those conditions in which mens rea appears to have been subordinated, and therefore no culpability.

**What are the four types of mens rea**

1. **Purpose/intent**

The term 'intention' is a difficult one to define. The Penal Code does not define it. It is a well-known term that, at the same time, resists clear definition. It can refer to the object, purpose, ultimate goal, or design of action in numerous ways. The intention is the deliberate use of a person's mental powers to do an action to achieve or satisfy a goal. As a result, the intention is frequently employed in relation to the outcomes of an act rather than the act itself. If he wants a consequence to follow from his conduct, he must state it explicitly.

The words 'intention,' 'intentionally,' or 'with intent to' are not usually used in law to represent the concept of 'intention.' Words like 'voluntarily', 'willfully', 'deliberately', 'deliberate intention', 'with the purpose of', or 'knowingly' are also used to represent it. All of these numerous expressions can be found in the IPC's various Sections.

- 'Voluntarily' is defined under Section 39 of the 1860 Act as follows:

Section 39 : Voluntarily — When a person causes an effect "voluntarily," he does so by using methods that he meant to use, or by using means that he knew or had reason to believe were likely to cause it at the time he used them.

- Section 298 of IPC

By Section 298, the terms "deliberate intention" and "premeditated intention" refer to premeditated intentions to damage religious feelings. However, on a first understanding of the text, the terms 'deliberate' and 'intent' appear to be interchangeable.

Sections **285, 286**, and **287** state deliberately or negligently omitting to take reasonable care so as not to cause harm to human life in respect of possession of poisonous substance, fire, inflammable matter, and explosive substances, an offence.

The defendants *in* **Niranjan Singh v Jitendra *Bhimraj (1990)***, sought to eliminate two people named Raju and Keshav in order to acquire control of the underworld. They were accused of committing a terrorist offence in violation of TADA. In this case, the Supreme Court determined that the intention was evident based on the facts. However, it cannot be argued that their purpose was to terrorise the general public or a subset of the general public. As a result, it acquitted the accused in the lack of an intention to cause terror, even though the outcome of their act was to cause terror.

### 2. Knowledge

The term 'knowledge' refers to a person's awareness of his or her own thinking. When there is a direct appeal to a person's senses, he can be assumed to know. The awareness of the act's repercussions is known as knowledge. It is a person's state of mind towards existent facts that he has personally observed or whose existence has been transmitted to him by others whose veracity he has no cause to dispute. The essence of knowledge is that it is subjective. In many circumstances, though, intention and knowledge blur together and imply the same thing, and intention can be inferred from knowledge. Although the border between knowledge and intention is blurry, it is clear that they mean distinct things. Knowledge, in contrast to intention, denotes a state of mental realisation in which the mind is a passive recipient of certain ideas or impressions that arise in it, whereas intention denotes a conscious state of mind in which mental faculties are summoned into action to achieve predetermined, predetermined outcomes. Obviously, knowledge is predicated on a thorough understanding of the facts and situations, as well as the consequences of one's actions.

A person was prosecuted in ***Ranjit D Udeshi v State of Maharashtra (1964)*** for selling a popular novel by DH Lawrence called Lady Chatterley's Lover. The accused claimed that he had no knowledge of the book's contents and hence lacked the essential mens rea. The Court dismissed this argument, holding that because **Section 292** of the Code, unlike numerous other provisions, does not include the words 'knowingly,' knowledge of obscenity is not an essential element of the crime under Section 292 of the Code.

### 3. Recklessness

Recklessness is regarded as a person's state of mind in which he foresees the prospective repercussions of his actions but does not intend or seek to bring them about. A guy is said to be reckless when it comes to the consequences of his actions if he foresees the possibility of them happening but neither desires nor expects them to happen. It's possible that the perpetrator is unconcerned about the consequences, or that he doesn't care. In all of these circumstances, the offender is considered to be unconcerned about the consequences of his or her actions.

To put it another way, recklessness is a mental attitude of disregard to the apparent risk. Driving at a high speed through a congested and small street is dangerous. The guy realises that his actions may damage someone in the crowd, but is indifferent to this. Similarly, if A throws a stone over a crowd without regard for whether it will damage anyone and the stone lands on the head of one of the people in the crowd, A is guilty of recklessly causing injury.

The respondent was driving a car with a customer in the front seat in ***R v Reid (1978).*** While remaining in the nearside lane, he tried to pass another vehicle. The rest stop for taxi drivers protruded six feet onto the nearside lane. The defendant was found guilty of causing death through reckless driving, in violation of Section 1 of the Road Traffic Act 1972. The risk must be clear to a reasonably sensible person; however, the defendant does not have to be aware of it.

**4.Negligence**

Negligence is a legal term that refers to a lack of care and caution that a rational person would have done in the given circumstances. Negligence is defined as failing to do something that a prudent and reasonable person would do or doing something that a prudent and reasonable person would not do based on the considerations that normally govern the conduct of human affairs. It is a man's state of mind when he pursues a path of action without considering the repercussions.

A is liable for injuring a passer-by if, during a fight with his wife, A takes up a paperweight from the table and throws it out the window, shattering the passer-skull. by's A had neither predicted nor contemplated injury to anyone when he threw the paperweight, yet he is liable since he failed to do so.

Despite the fact that the court acknowledged that the defendant was exercising all the skill and attention to be anticipated from a person with his limited experience, he was found guilty of driving without due care and attention in ***McCrone v Riding (1938)*** as he had failed to meet the necessary standard.

In contrast to torts, negligence is not the basis of liability in general in crimes. Only in a few instances does the IPC, 1860 establish criminal liability based on negligence. For example, a man is accountable for negligence if his actions endanger the lives of others, such as in the case of rash and negligent driving, rash vessel navigation, negligent conveyance of individuals by water for hire in an unsafe or overloaded vessel, and so on. It's important to distinguish between negligence and neglect. Neglect, unlike negligence, does not imply a particular state of mind, but rather describes a fact that could be the outcome of either a deliberate or negligent act. A man who knows his scooter's brake is broken fails to repair it and crashes into a youngster on the road. The injury to the child is caused by his intentional neglect or recklessness in failing to repair the brake, rather than his negligence.

**Negligence :**

In everyday usage, the word 'negligence' denotes mere carelessness. In legal sense it signifies failure to exercise standard of care which the doer as a reasonable man should have exercised in the circumstances. In general, there is a legal duty to take care when it was reasonably foreseeable that failure to do so was likely to cause injury. Negligence is a mode in which many kinds of harms may be caused by not taking suchadequate precautions.

According to Winfield and Jolowicz- Negligence is the breach of a legal duty to take care which results in damage, undesired by the defendant to the plaintiff.
In Blyth v. Birmingham Water Works Co., (1856) LR 11 Exch. 781; Alderson, B. defined negligence as, negligence is the omission to do something which a reasonable man would do, or doing something
which a prudent or reasonable man would not do.

In Lochgelly Iron & Coal Co. v. Mc Mullan, 1934 AC 1; Lord Wright said, negligence means more than headless or careless conduct, whether in commission or omission; it properly connotes the complex concept of duty, breach and damage thereby suffered by the person to whom the duty was owing.

In an action for negligence, the plaintiff has to prove the following essentials:

1. **Duty to Take care :**

1. : One of the essential conditions of liability for negligence is that the defendant owed a legal duty towards the plaintiff. The following case laws will throw some light upon this essential element. In **Grant v. Australian Knitting Mills Ltd**., 1935 AC 85; the plaintiff purchased two sets of woolen underwear from a retailer and contacted a skin disease by wearing underwear. The woolen underwear contained an excess of sulphates which the manufacturers negligently failed to remove while washing them. The manufacturers were held liable as they failed to perform their duty to take care.

2. **Duty to whom:**
Donoghue v. Stevenson**, 1932 AC 562** carried the idea further and expanded the scope of duty saying that the duty so raised extends to your neighbour. Explaining so as to who is my neighbour Lord Atkin said that the answer must be "the persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question".

**3. Duty must be towards the plaintiff-**

It is not sufficient that the defendant owed a duty to take care. It must also be established that the defendant owed a duty of care towards the plaintiff. In **Bourhill v. Young**, 1943 AC 92; the plaintiff, a fishwife, alighted from a tram car. While she was being helped in putting her basket on her back, a motor-cyclist after passing the tram collided with a motor car at the distance of 15 yards on the other side of the tram and died instantly. The plaintiff could see neither the deceased nor the accident as the tram was standing between her and the place of accident. She had simply heard about the collision and after the dead body had been removed she went to the place and saw blood left on the road. Consequently, she suffered a nervous shock and gave birth to a still-born child of 8 months. She sued the representatives of the deceased motor-cyclist. It was held that the deceased had no duty of care towards the plaintiff and hence she could not claim damages.

**4. Breach of duty to take care**

Yet another essential condition for the liability in negligence is that the plaintiff must prove that the defendant committed a breach of duty to take care or he failed to perform that duty.

In Municipal Corporation of Delhi v. Subhagwanti, AIR 1966 SC 1750; a clock-tower in the heart of the Chandni Chowk, Delhi collapsed causing the death of a number of persons. The structure was 80 years old whereas its normal life was 40-45 years. The Municipal Corporation of Dellhi having the control of the structure failed to take care and was therefore, liable.

In **Municipal Corporation of Delhi v. Sushila Devi**, AIR 1999 SC 1929; a person passing by the road died because of fall of branch of a tree standing on the road, on his head. The Municipal Corporation was held liable.

**5. Consequent damage or consequential harm to the plaintiff**

6. The last essential requisite for the tort of negligence is that the damage caused to the plaintiff was the result of the breach of the duty. The harm may fall into following classes:-

- physical harm, i.e. harm to body;
- harm to reputation;
- harm to property, i.e. land and buildings and rights and interests pertaining thereto, and his goods;
- economic loss; and mental harm or nervous shock.

In **Achutrao Haribhau Khodwa v. State of Maharashtra** (1996) 2 SCC 634; a cotton mop was left inside the body by the negligence of the doctor. The doctor was held liable.

**Defences for negligence:**

In an action for negligence following defences are available:-

1. **Contributory negligence:** It was the Common law rule that anyone who by his own negligence contributed to the injury of which he complains cannot maintain an action against another in respect of it. Because he will be considered in law to be author of his wrong.

– Soon after parted with her children in a narrow street, a lady saw a lorry violently Butterfield v. Forrester, (1809) 11 East 60; the defendant had put a pole across a public thoroughfare in Durby, which he had no right to do. The plaintiff was riding that way at 8'O clock in the evening in August, when dusk was coming on, but the obstruction was still visible from a distance of 100 yards, he was riding violently, came against the pole and fell with the horse. It was held that the plaintiff could not claim damages as he was also negligent.

2. **Act of god or vis major:** It is such a direct, violent, sudden and irresistible act of nature as could not, by any amount of human foresight have been foreseen or if foreseen, could not by any amount of human care and skill, have been resisted. Such as, storm, extraordinary fall of rain, extraordinary high tide, earth quake etc.
In Nichols v. Marsland, (1875) LR 10 Ex.255; the defendant had a series of artificial lakes on his land in the construction or maintenance of which there had been no negligence. Owing to an exceptional heavy rain, some of the reservoirs burst and carried away four country bridges. It was held that, the defendant was not liable as the water escaped by the act of God.

3. **Inevitable accident:** Inevitable accident also works as a defence of negligence. An inevitable accident is that which could not possibly, be prevented by the exercise of ordinary care, caution and skill. it means accident physically unavoidable.
In Brown v. Kendal, (1859) 6 Cussing 292; the plaintiff's and defendant's dogs were fighting, while the defendant was trying to separate them, he accidentally hit the plaintiff in his eye who was standing nearby. The injury to the plaintiff was held to be result of inevitable accident and the defendant was not liable.
In Holmes v. Mather, (1875) LR 10 Ex.261, 267; a pair of horses were being driven by the groom of the defendant on a public highway. On account of barking of a dog, the horses started running very fast. The groom made best possible efforts to control them but failed. The horses knocked down the plaintiff who was seriously injured, it was held to be an inevitable accident and the defendant was not liable.
In Stanley v. Powell, (1891) 1 QB 86; the plaintiff and the defendant, who were members of a shooting party, went for pheasant shooting. The defendant fired at a pheasant, but the shot from his gun glanced off an oak tree and injured the plaintiff. It was held that the accident was an inevitable accident and the defendant was not liable.

**Res ipsa loquitur-**
It means 'the things itself speaks'. When the accident explains only one thing and that is that the accident could not ordinarily occur unless the defendant had been negligent, the law raises a presumption of negligence on the part of the defendant.
Hambrook v. Stokes Borsrunning down the narrow street. When told by some bystander that a child answering the description of one of her children had been injured, she suffered a nervous shock which resulted in her death. The defendant was held liable.

**Contributory negligence**
When the plaintiff by his own want of care contributes to the damage caused by the negligence or wrongful conduct of the defendant, he is considered to be guilty of contributory negligence. This is a defence in which the defendant has to prove that the plaintiff failed to take reasonable care of his own safety and that was a contributing factor to harm.
Rural Transport Service v. Bezlum Bibi (1980) – The conductor of an overcrowded bus invited passengers to travel on the roof of the bus. The driver ignored the fact that there were passengers on the roof and tried to overtake a cart. As a result, a passenger was hit by a branch of tree, fell down, received injury and died. It was held that both the driver and the conductor were negligent towards the passengers, there was also contributory negligence on the part of the passengers including the deceased, who took the risk of travelling on the roof of the bus.
Yoginder Paul Chowdhury v. Durgadas (1972) – The Delhi High Court has held that a pedestrian who tries to cross a road all of a sudden and is hit by a moving vehicle, is guilty of contributory negligence.

**Doctrine of alternative danger –**
There may be certain circumstances when the plaintiff is justified in taking some risk where some dangerous situation has been created by the defendant. The plaintiff might become nervous by a dangerous situation created by the defendant and to save his person or property, he may take an alternative risk. If in doing so, the plaintiff suffered any damage, he will be entitled to recover from the defendant.
Jones v. Boyce (1816) – The plaintiff was a passenger of defendant's coach. The coach was driven so negligently that the plaintiff jumped off the bus fearing an accident and broke his leg. It was held that the plaintiff would be entitled to recover.
Shayam Sunder v. State of Rajasthan (1974) – Due to the negligence on the part of the defendants, a truck belonging to them caught fire. One of the occupants, Navneetlal, jumped out to save himself from the fire, be struck against a stone lying by the roadside and died. The defendants were held liable.

**Negligence in our laws**

The Penal Code, 1860 –

**s. 284** – If anyone has custody of poisonous substance and fails to guard against probable danger is punishable with 6 month or 1000 taka or with both.

**s. 285** - If anyone acts rashly or negligently to endanger human life with fire or combustible substance is punishable with 6 month or 1000 taka or with both.

**s. 286** – If anyone acts rashly or negligently to endanger human life with explosive substance is punishable with 6 month or 1000 taka or with both.

**s. 287** – If anyone acts rashly or negligently to endanger human life with any machinery is punishable with 6 month or 1000 taka or with both.

**s. 288** – If anyone in pulling down or repairing any building knowingly or negligently omits to guard against probable danger to human life, he will be punishable with 6 months or 1000 taka or with both.

**s. 289** – If anyone knowingly or negligently omits to take such order with any animal in his possession as is sufficient to guard against any probable danger to human life or any probable danger or grievous hurt from such animal, shall be punished with 6 months or 1000 taka or with both.

**Vicarious Liability :**

*Respondeat superior*, which literally means "let the master answer," is a doctrine that holds one party liable for another's actions based on their relationship. While commonly applied to hold employers responsible for certain types of their employees' actions, this doctrine can also be relevant in principal/agent relationships. Simple negligence claims (e.g., *negligent hiring, negligent entrustment of an automobile*) may also apply in these relationships.

What is Vicarious Liability?

Vicarious liability means the liability of a person for an act committed by another person and such liability arises due to the nature of the relation between the two. For e.g. A, is a driver who works for B and while driving B's car for taking him to his office, he hits C, a pedestrian due to his negligence in driving. In such a case even though B was not driving the car he will still be liable for the accident which was caused due to the negligence of A.

Relations in which Vicarious Liability arises

These are the major relations in which vicarious liability of a person arises

1. Master and Servant.
2. Partners in a Partnership Firm.
3. Principal and Agent.
4. Company and its Directors.
5. Owner and Independent Contractor.

Vicarious Liability of Master for torts by Servant

In a Master-Servant relationship, the master employs the services of the servant and he works on the command of master and thus a special relation exists between the two and in case of a tort committed by the servant, his master is also held liable.

There are many cases in which the servant does an act for his master and thus in law, it is deemed that the master was doing that act himself, therefore if the servant commits an unlawful act the master will also be held liable for the same. This liability of the master is based on the following two maxims

***1.Qui facit per alium facit per se*: –** It means that whenever a person gets something done by another person then the person is viewed to be doing such an act himself.

**Illustration:** If A is the owner of many trucks and employs drivers to drive them for the purpose of trade and in case one of his drivers gets into an accident because of his rash driving, then even though A did not drive the truck himself, he will be liable for the accident.

***2. Respondant Superior*: –** It means that the superior should be held responsible for the acts done by his subordinate.

These two maxims have played a significant role in the development of the law of vicarious liability of the master.

**Essentials of Vicarious liability in Master-Servant Relationship**

These essential conditions have to be followed for the vicarious liability of master to arise: –

1. The servant has committed an act which amounts to a tort.

2. Such a tortious act is committed by the servant during the course of his employment under the master.

**Reasons for liability of the Master**

There are several reasons behind holding the master liable for the acts of his servants which are: –

1. An act which is committed by the servant is considered to be done by the master through him and therefore in the law of torts, it is assumed that if any wrong is done by the servant, it has been committed by his master indirectly and so the master is held liable for these wrongs.
2. The master is in a better financial position as compared to his servant and thus in case of any loss caused by the tortious act of the servant, the master is better suited to pay off the damages to the victim of the act. Also, since the master is made liable he makes sure that all reasonable care and precautions are carried so that he can avoid such liability.

3. When a servant does any act, the benefit from such an act is enjoyed by the master and thus for the liability arising out of the servant's act, the master should also shoulder that liability

**Test for Determining Master-Servant Relationship**

For the determination of a Master-Servant relationship, certain tests have been developed over a long period of time.

Traditional View – Control Test

As per this test, for the determination of a master and servant relationship, it should be seen whether the master has the power to not only instruct what should be done but also the manner of doing the act and if such power exists then as per this test, the master and servant relationship exists between the two.

**Illustration:** A is the owner of a big area of land on which farming activities are carried out and he has hired many workers for farming. A, not only instructs them how to do their jobs but also how to do it. Here, by the test of control, the relation between A and his employees is established as that of a master-servant.

Modern View

The old Control test is not applicable as an exhaustive test because in cases of work requiring skill such as a doctor working in a hospital, the owner of the Hospital cannot instruct the doctor on how to treat a patient and can only instruct him to treat patients. Thus certain other tests have been developed for determining the Master and Servant Relationship.

The test of work being an Integral Part of Business

In the case of **Stevenson Jordan & Harrison Ltd. V Macdonald & Evans (1952) 1 TLR 101**, the test of an integral part of the business was applied. Here, a **contract of service** was held to be a contract for such work which is an integral part of the business and a **contract for service** was held to be a contract for such work which is not an integral part of the business.

**Illustration:** In an IT company the programmers are the employees of the company and there is a master-servant relationship but if the company has hired catering services, the company does not have a master-servant relationship because the act of providing food is not an integral part of an IT company.

Multiple Test

This test provides that people who are in a contract **of** service are deemed to be employees whereas the people who are in contract **for** service are independent contractors. In the case of **Ready Mixed Concrete v Minister of Pensions and National Insurance (1968) 2 QB 497**, three conditions were laid down for a contract of service

1. The servant agrees to provide his skill and work to the master for performing some service in exchange for wages or some other consideration.
2. He agrees to be subjected to such a degree of control so as to make the person his master in performance of his work.
3. The other provisions of the contract are consistent with this provision of being a contract of service.

This view was also reiterated in the case of The Management of Indian Bank v. The Presiding Officer.

This test also includes other important factors that are used to determine the master-servant relationship such as who owns the tools being used for the work, is the employee paid wages monthly or on a daily basis and all other relevant factors.

Thus the old view of using Control test is no longer the only method of determining the relation of master and servant as it has been realized that in the present complex world where there are a wide number of factors which affect the process of determining the relation between the employee and the employer, it is not possible to use just one test and thus the various aspects of a case are seen to determine the nature of the relationship and to decide whether such a relation is that of master and servant or not.

**Strict Liability :**

In certain situations, a person is held liable for the damages caused by his actions even when the actions are done without any ill intention or negligence on account of equity and justice. For example, if a person keeps a lion as a pet and despite of all the precautions the lion escapes the cage and kills someone. In this case, the owner of the lion will be liable even though he had no ill intention to cause death and had taken all the precautions to keep the lion in the cage. This seems just because the damage happened only because he brought a dangerous thing on his property. He was also aware of the consequences if the lion escapes the cage and so he should be made liable if it escapes and causes damage.
This principle of holding a person liable for his actions without any kind of wrong doing on his part is calledthe principle of absolute liability or no fault liability. This principle was first upheld in the case of Ryland vsFletcher by the Privy Council in 1868.

However, later on some exceptions to this were also established due to which "strict liability" is considered a more appropriate name for this principle. In this case, the defendant hired contractors to build a reservoir over his land for providing water to his mill. While digging, the contractors failed to observe some old disused shafts under the site of the reservoir that lead to plaintiff's mine on the adjoining land. When water was filled in the reservoir, the water flooded the mine through the shafts. The plaintiff sued the defendant.

The defendant pleaded that there was no intention and since he did not know about the shafts, he was not negligent even though the contractors were. Even so, he was held liable. J Blackburn observed that when a person, for his own purposes, brings to his property anything that is likely to cause a mischief if it escapes, must keep it at his peril and if it escapes and causes damage, he must be held liable. He can take the defence that the thing escaped due to an act of the plaintiff or due to vis major (act of God) but since nothing of that sort happened here, then it is unnecessary to inquire what excuse would be sufficient.

To this rule promulgated by J Blackburn, another requirement was added by the Court of Exchequer Chamber, that the use must be a non-natural use of land as was the case in Ryland vs Fletcher itself. For example, growing of regular trees is a natural use but growing poisonous trees is not. Keeping dogs as pet is a natural use but keeping wild beasts is not. Thus, the conditions when this rule will apply are –

The thing kept must be dangerous - The thing kept on the land must be as such as is likely to cause mischief if it escapes. For example, storing gas or explosives or wild beasts are all likely to cause damage if they escape.

- The thing must escape - If the thing is within the boundary of the defendant's land, he is not liable. The thing must escape out of his land for him to be liable. In Crowhurst vs Amersham Burial Board 1878, branches of a poisonous tree were hanging outside the land of the defendant. Plaintiff's cattle ate them and died. Defendant was held liable because protrusion of branches outside his property were considered as escaping from his property. However, in Ponting vs Noakes 1994, when the plaintiff's horse intruded over his boundary and ate poisonous leaves of the defendant's tree, he was not held liable because there was no escape.

- The thing must be a non natural use of land - The use must not be an ordinary use of the land. There must be a special purpose because of which it brings additional danger to other. In Noble vs Harrison 1926, a branch of a tree growing on defendant's land broke and fell on plaintiff's vehicle. It was held that growing regular trees is not a non natural use of land and the branch fell because of an inherent problem and not because of any negligence of the defendant and so he was not liable.

As mentioned before the following are exceptions or defenses against this rule –

- Plaintiff's own default - If the thing escapes due to plaintiff's fault the defendant cannot be held liable. In Eastern and South African Telegraph Co. Ltd. v Capetown Tramway Co 1902. The plaintiff's submarine cable transmissions were disturbed by escape of electric current from defendant's tramway. It was held that since the current was not causing any problem to regular users and it was causing problem to the cables only because they were too sensitive and so the defendant cannot be held liable. One cannot increase his neighbor's liabilities by putting his land to special uses.

- Act of God - In circumstances where no human has control over, no one can be held liable. In Nichols vs Marsland 1876, the defendant created artificial lakes to store rainwater. In that particular year, there were exceptionally heavy rains, which caused the embankments to break causing floods, which broke defendant's bridges. It was held that since there was no negligence on the part of the defendant and the flood happened only because of rains so heavy that nobody could imagine, the defendant was not liable.

- Consent of the plaintiff - If the plaintiff has consented for the accumulation of the dangerous thing, he cannot hold the defendant liable. This is also the case when an activity is done for mutual benefit. For example, A lives on the ground floor and the defendant lives on the floor above A's. Now, a water tank is built by the defendant to supply water for both of them. The defendant will not be held liable for leakage of water from the tank.

- Act of third party - When a third party, who is not an employee or a servant or a contractor of the defendant is responsible for causing the dangerous thing to escape, the defendant will not be held liable for the damage. In Box vs Jubb 1879, the overflow from the defendant's reservoir was caused by the blocking of a drain by some strangers. The defendant was held not liable. However, if such act can be foreseen, this defence cannot be pleaded because the defendant must take precautions to prevent such an act. In M.P. Electricity Board vs Shail Kumar AIR 2002, a person was killed by a live electric wire lying on the road. SC applied the rule of strict liability and held that the defence of act of stranger is not applicable because snapping of wire can be anticipated and the Electricity Board should have cut off the current as soon as the wire snapped.

- Statutory Authority - When an act is approved by the legislature or is done on the direction of the legislature, it is a valid defence for an action of tort even when the rules of Ryland vs Fletcher apply. However, it is not application when there is negligence.

### 3.7 Theories Of Punishments:

Punishment is a form of social control which helps the society to sustain its rules and regulations, not to mention the peacefulness of the lives of its inhabitants. Because of that reason if the wrongdoing is not controlled then it will create problem within the society and in the lives of people. In order to deal with the wrongdoing; and in this particular case, crimes, which can be said as the violations of law, we have the theories of punishment. The theories of punishments try to explain and justify punishment by their own viewpoints.

There are mainly three theories of punishment which are the deterrent theory which tries to deter crimes by punishing the criminal, retributive theory which aims to attain retribution by punishing the criminal for his or her wrongdoing and finally reformative theory which hopes to reform the character of the criminal by inflicting punishment. Nevertheless, every one of these theories has their own merits and demerits. Deterrent Theory of Punishment Deterrent theory of punishment is one of the theories of punishment. This aims at, according to Mackenzie “to deter others from committing similar offense” whereas Lillie describes it “when the judge makes example of some offender.” (Lillie, 1948, p. 253) Thus it is also preventive theory of punishment or exemplary theory of punishment. Similarly, it is thought that “Punishment is said to have a deterrent effect when the fear or actual imposition of punishment leads to conformity.

Specifically, punishments have the greatest potential for deterring misconduct when they are severe, certain, and swift in their application." So in general, the aim of punishment is to deter crimes. So, punishment is inflicted upon the criminal in order to deter or prevent similar offenses. It is done as a preventive measure towards crimes. It is exemplary so that the others do not commit similar crimes. It is forward-looking. It is focused on society.

It is done as a preventive measure towards crimes. It is generally held that when a person commits a crime, he or she gets mental satisfaction by doing so. Pain and pleasure being natural feelings of human beings, the satisfaction of a crime leads to more crime.

In order to prevent that pain is given to the offender so that he or she may have the dissatisfaction of the act and thus deter from doing so. For example, if a person steals something and as a result of that, he is given a punishment in which his or her hand is cut off then the negative effect that is to say the pain will abstain him or her from stealing.

It is done as a preventive measure towards crimes. It is exemplary so that the others do not commit either the identical or the similar crimes. For example, if a person takes drugs, this crime can influence other latent criminals to indulge in the same activity. And punishing the drug user can deter others from doing the same kind of heinous act.

**TYPES OF THEORIES OF PUNISHMENT :**

**Retributive Theory of punishment:**

The Retributive Theory of Punishment, or the 'Theory of Vengeance', as many people in the society would perceive it as, is the most basic, yet inconsiderate theory of inflicting a penal sentence over a perpetrator. It is based on a very small doctrine, namely the doctrine of *Lex talionis,* which if translated, means '*an eye for an eye'*.

Now, if looked at from the perspective of very serious and heinous offences, like the Delhi gang rape case, people may feel that it is better to inflict such retributive punishments, so as to ensure that a deterrent is set across the society, in order to prevent such crimes in the near future.

However, we forget to understand sometimes that always having a retributive approach will render the society one with a primitive system of justice, where the Kings or the Judges were considered to be the supreme beings and were provided with the stature of God Himself (hence the address *My Lord*) and thus, collapse the very concepts of the representatives being 'servants'. Before we move on to a deeper understanding of the Retributive Theory, we need to understand two very important doctrines. Let us have a look at them both.

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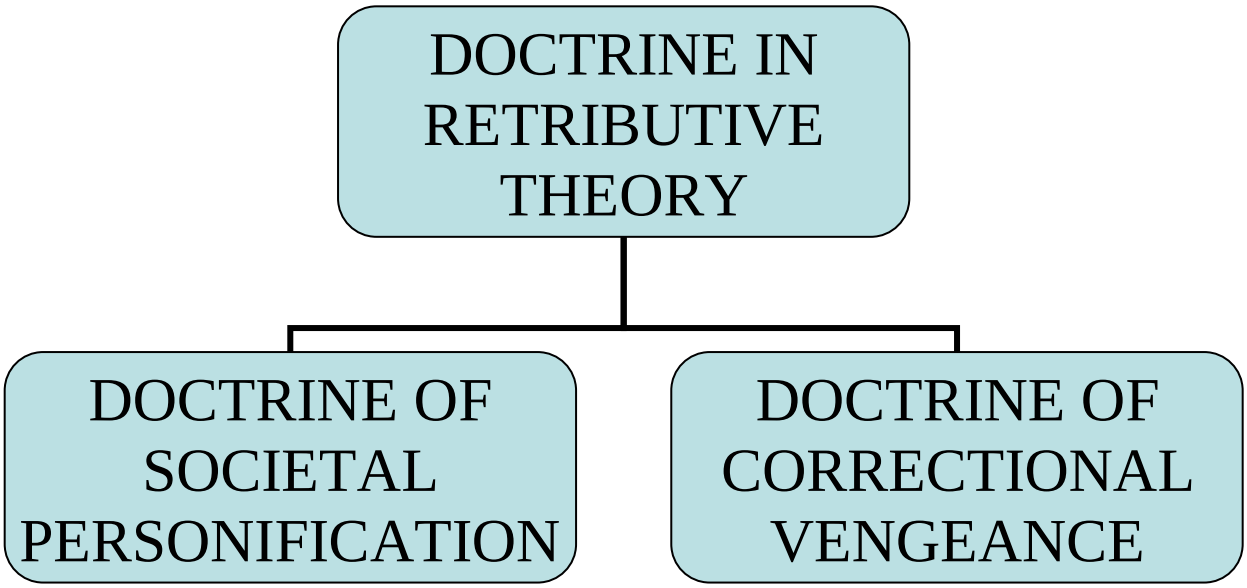



**Doctrine of Societal Personification can be stated as-**

'When a member of the society is subjected to a very heinous crime, as a result of which, the whole society, as if it were a natural person, considers the offence to be inflicted upon itself, comes to the defence of that person either by way of demanding justice or by conducting the same on its own, the society is said to be personified.'

A very self-explanatory doctrine. To be put simply, it means that the society, whenever a heinous crime of an extreme form is committed, assumes the form of a natural person and behaves in a collective manner so as to get justice.

Eg: The country-wide protests for the Delhi gang rape case, the current Hathras rape case, etc.

**Doctrine of Correctional Vengeance maybe stated as-**

'When the society, in a fit to get justice, demands the concerned authorities to inflict vengeful (as painful as the original act, or even more) punishments upon the victim for creating a deterrent, it is said to exhibit correctional vengeance.'

The above definition, too, is quite self-explanatory in its nature. Now that we have understood these two doctrines, we have a basic idea about what really is retributivism or retributive justice. Let us now have a closer look upon the same.

'The concept of retributive justice has been used in a variety of ways, but it is best understood as that form of justice committed to the following three principles:

1. that those who commit certain kinds of wrongful acts, paradigmatically serious crimes, morally deserve to suffer a proportionate punishment;
2. that it is intrinsically morally good—good without reference to any other goods that might arise—if some legitimate punisher gives them the punishment they deserve; and
3. that it is morally impermissible intentionally to punish the innocent or to inflict disproportionately large punishments on wrongdoers.'

The above three principles clarify the needs for retributive justice even further. We may understand retributive justice in this manner. The place where both Criminal Law as well as Moral Law meet, is the place where mostly the retributive punishments are generated.

In fact, although people may classify punishments into seven different types, but in reality, every punishment, indeed, is retributive in nature. It is very interesting to see that the damages claimed under Torts, or the remedies sort for environmental violations, maybe compensatory, but at their hearts, are retributive in nature. Then why aren't they labelled as retributive, instead? Well, the answer to the question is simple. Retributive punishments are somewhat vengeful in their nature (an eye for an eye). They may not be vengeful always, but maybe merely morally vengeful. When we say this, it means that although the punishment is not literally the thing that was originally done by the perpetrator, is still acts as a vengeance by virtue of its seriousness.

E.g: If a person rapes someone, capital punishment maybe given as a retributive measure. If we literally give the person back what he did, i.e., sex, then it would be pleasurable rather than torturing for him. Now that we have understood briefly that how exactly the retributive punishment works, let us now move on to understand the ways in which Retributive Theory is displayed in the Hindu texts and scriptures.

**Retributive Theory and the Hindu Scriptures:**

The Hindu scriptures, particularly the *Ramayana*, *Mahabharata* and the *Durga Saptashati*, are primarily based on Retributive Theories but also, depict the ways in which one should proceed while applying them.

***Ramayana-*** In the *Ramayana* the whole story began from retribution itself. *Lakshmana* cut the nose of *Raavan*'s sister, because of which he kidnapped *Sita*. In order to rescue her and also to avenge her kidnapping, *Ram* went to kill *Raavan*. But, the major difference between the application of the retributive punishment between the two was that *Raavan* did not even give *Ram* a chance to repent for his younger brother's act, but, *Ram* gave several chances to *Raavan* to correct his act.

***Mahabharata–*** *Mahabharata*, once again, is a very good example of how retributive punishment should be inflicted. The *Pandavas* had not started-off with the war right away. They had sent *Shri Krishna* as their messenger of peace a number of times to the *Kauravas*, but, they did not give in. *Mahabharata*, especially *Shrimad Bhagvad Geeta*, talks about the time when the retributive mode should be used. As we all know that *Arjun* was about to leave the battlefield as he was too scared to go against his own relatives, it was *Krishna* who said that 'when all other paths close down, only then war is to be resorted to. Because if then the person refuses to fight, then it will inflict gross injustice upon the society at-large.'

***Durga Saptashati–*** In this too, Goddess *Durga* warns the various demons, i.e. *Mahishasur* and *Shumbh-Nishumbh,* repeatedly, before starting a killer spree upon them.

**Case Laws:**

1. Nirbhaya Judgement– This case is indeed the first and foremost case to be mentioned, while talking about retributive justice in India. In this Judgement, the Supreme Court sentenced four out of six felons involved in the extremely heinous Delhi gang rape case to death, much to the delight of the society, as they had committed an extremely gruesome, as well as morally unimaginable crime.
2. Anwar Ahmad v/s. State of Uttar Pradesh and Anr.– In this case, the convicted had already undergone a six month imprisonment term, before being officially convicted by the Court. The Court held that since the convict had been convicted and also, the required 'blemish' had also been imposed upon him, it was not necessary to sentence him again in the name of 'retributive punishment', as it would inflict a very big loss upon the family as well.
3. Sri Ashim Dutta Alias Nilu vs State of West Bengal– In this case, it was observed that both deterrent and retributive punishment aim at prevention of the recurrences of the offences by others passing exemplary punishment for a particular offence. But the civilization and the societies are progressing rapidly. There is advancement of science and technology. The literate people and the experts in different branches of knowledge started thinking in a different way. Eye for an eye, and tooth for a tooth are no more considered as the correct approach towards the criminals. Such principle may perpetuate the rule of the Jungle but cannot ensure the rule of law.

| SR.NO. | PROS | CONS |
|---|---|---|
| 1 | Acts as a strong deterrent. | Sometimes, may become disproportionate with the seriousness of the crime. |
| 2 | Helps in giving moral justice to the victim. | Society develops feelings of vengeance and destructive tendencies follow. |
| 3 | Instils the feeling of trust within the society, towards the judiciary. | The State may become autocratic in its functioning, using the punishment to torment people. |

**Deterrent Theory of punishment**

In Deterrent theory of punishment, the term "DETER" means to abstain from doing any wrongful act. The main aim of this theory is to "deter" (to prevent) the criminals from attempting any crime or repeating the same crime in future. So, it states that deterring crime by creating a fear is the objective; to set or establish an example for the individuals or the whole society by punishing the criminal. That simply means, according to this theory if someone commits any crime and he/she is punished by a severe punishment, then, it may result maybe that the people of the society will be or may be aware of the severe punishments for certain kinds of crimes and because of this fear in the minds of the people of the society, the people may stop from committing any kind of crime or wrongful act. Here I used the phrase *"may stop"* instead of *"will stop".* That means, there is a probability of committing any crime or repeating the same crime.

The deterrent theory of punishment is utilitarian in nature. For a better understanding we can say like, 'The man is punished not only because he has done a wrongful act, but also in order to ensure the crime may not be committed.' It is best expressed in the word of Burnett, J who said to a prisoner:

*"Thou art to be hanged not for having stolen a horse, but in order that other horses may not be stolen".*

**Jurisprudential School of Thought:**

The deterrent theory can be related to the sociological school of Jurisprudence. The sociological school creates a relationship between the society and law. It indicates law to be a social phenomenon, with a direct and/or indirect connection to society. One of the main aim of the deterrence is to establish an example for the individuals in the society by creating a fear of punishment

*Now most important question is arrived at; "Who established this deterrent theory of punishment?"*

The concept of deterrent theory can be simplifying to the research of philosophers such like Thomas Hobbes (1588-1678), Cesare Beccaria (1738-1794), Jeremy Bentham (1748-1832). These social contract thinkers provided the foundation of modern deterrence in criminology.

In the *Hobbesian* view**,** people generally pursue their self-interests, such as material gain, personal safety and social reputation and make enemies, not caring if they harm others in the process. Since people are determined to achieve their self-interests, the result is often conflict and resistance without a fitting Government to maintain safety. To avoid, people agree to give up their egocentricity as long as everyone does the same thing, approximately. This is termed as "Social Contract".

According to this social contract, he stated that individuals are punished for violating the social contract and deterrence is the reason for it to maintain the agreement between the State and the people, in the form of a social contract workable.

According to *Cesare Beccaria,* while discussing about punishments, the proportion of the crime and punishments should be equal for it to serve as a deterrence or have a deterring value.

According to *J. Bentham,* who is known as the founder of this theory, a hedonistic conception of man and that man as such would be deterred from crime if punishment were applied swiftly, certainly, and severely. But being aware that punishment is an evil, he says, if the evil of punishment exceeds the evil of the offence, the punishment will be unprofitable; he would have purchased exemption from one evil at the expense of another.

From the deterrent theories of Thomas Hobbes, Cesare Beccaria and J. Bentham, we came to know that the theory of deterrence consists of 3 major components. They are as follows:

- *Severity:* It indicates the degree of punishment. To prevent crime, criminal law must emphasize penalties to encourage citizen to obey the law. Excessively severe punishments are unjust. If the punishment is too severe it may stop individuals from committing any crime. And if the punishment is not severe enough, it will not deter criminals from committing a crime.

- *Certainty:* It means making sure that punishments must happen whenever a criminal act is committed. Philosopher Beccaria believed that if individuals know that their undesirable acts will be punished, then they will refrain from offending in the future.

- *Celerity:* The punishment for any crime must be swift in order to deter crime. The faster the punishment is awarded and imposed, it has more effect to deter crime.

Therefore, deterrence theorists believed that if punishment is severe, certain and swift, then a rational person will measure the gain or loss before committing any crime and as a result the person will be deterred or stopped from violating the law, if the loss is greater than the gain.

According to Austin's theory, "Law is the command of the Sovereign". In his imperative theory, he clearly declared three important things, which are as follows:

1. Sovereign.
2. Command.
3. Sanction.

Austin's question is that 'Why do people follow the rule?'. He believes that people will follow the law because people have a fear of punishments. On the basis of his beliefs, we can see a small example over here: When people are biking, they wear a helmet as per biking rules. Now, we can assume that some people wear helmets genuinely to save themselves from road accidents but on the other hand, some people wear helmets because of escaping fines or in fear of cancellation of their biking licence. So, in that case, they know that if they bike rashly or disobey the biking rules they will be punished by giving huge a amount of fine or their biking licence will be cancelled. So here we can say that the purpose of the deterrent theory is successful and applied also.

Now, if we go back a little earlier in time, in our *Hindu Scriptures* we also see that there were several punishments like public hanging, not only that but also people were immersed in hot oil or water. Most penal systems made use of deterrent theory as the basis of sentencing mechanism till early 19th century.

- In England, punishments were more severe and barbaric in nature to restrict same crime in the future. At the time of 'Queen Elizabeth I', deterrent theory of punishment was applied for restricting future crimes, even for too little crimes like 'pickpocketing'.
- In India also, inhuman punishments are granted.

But, if we discuss or follow this theory in today's context, then, it will be very clear that "deterrent theory" is not applicable at all or it may not be useful enough to prevent or to deter crimes by creating a fear in the minds of people. We have a very recent example of why deterrent theory is not successful in the case of "Nirbhaya Rape Case, 2012". This case is the foremost case to be mentioned while talking about deterrent theory of punishment. In this judgement, the Supreme Court sentenced four out of six offenders involved in the extremely heinous Delhi gang rape case to death. Now, the most important questions are-

- Whether the death sentence to the culprits will act as a deterrent?
- Will the number of crimes against women in our society drop down permanently?
- Specifically, in Nirbhaya judgement, is the aim of deterrent theory fulfilled?

The answers are 'no'. According to deterrent theory, the main objective is 'to deter crime, by creating a fear or establishing an example to the society.' Now, death penalty is a severe punishment.

In the Nirbhaya case, the Court gave death sentence to the four convicts for committing gang rape. We can say that it is a great example for future offenders who will think about committing a crime like rape in future. So, according to this theory, after Nirbhaya judgment crimes like rape should not happen. But they are happening till now. Day-by-day, rape cases are increasing in our society

**Incapacitation Theory of punishment**

**Meaning:**

The word **"incapacitation"** means 'to prevent the offence by punishing, so that the future generation fears to commit the criminal act.' Incapacitation happens either by removing the person from the society, either temporarily, or permanently, or by some other method, which restricts him due to physical inability. One of the most common way of incapacitation is incarceration of the offenders, but in case of severe cases, capital punishments are also applied. The overall aim of incapacitation is preventing or restraining the danger in the future.

**Definition:**

*"Incapacitation refers to the restriction of an individual's freedoms and liberties that they would normally have in society."*

**Purpose of Incapacitation Theory:**

One of the primary purposes of this theory is removing the sufficiently dangerous persons from the society. The risk that is found to be posed by the offenders are largely a matter of inception. Therefore, if one country treats one offence in one way, another country will treat the same offence in a different way. For example, in the U.S., they use incarceration to incapacitate offenders at a much higher rate, than in other countries. It has been seen that unlike the other theories of punishments like deterrence, rehabilitation and restitution, the theory of incapacitation simply rearranges the distribution of offenders in the society so that the rate of crime decreases in the society. The main aim of the theory of incapacitation is to dissuade others from the offenders in the past, so that it is not followed by the future generation.

**Application of the theory:**

The theory of incapacitation gets reserved only for those people who are either sentenced to prison or to life imprisonment. Yet, it also includes things like being supervised by the departments within the community, like probation and parole.

**Origin:**

The theory of incapacitation was originated in Britain, during the 18th and the 19th centuries, where the convicted offenders were often transported to places like America and Australia. Later in the 21st century, the theory was changed to some extent, where the offenders were to remain in the primary method of incapacitation which was found in most of the contemporary penal systems. Therefore, the theory usually takes the form of imprisonment, which is considered to be the best the form of incapacitation, rather than other methods of incapacitation.

*So, can incapacitation reduce crime?*

According to a study conducted by The University of Chicago, it has been proven that the crime rates can be prevented by 20 per cent. Also, it has been seen that if other theories are applied like Retributive Theory, Compensatory Theory, etc., then they lay down a fairly stringent application of putting the criminal behind the bars for at least 5 years. Also, it can happen to increase the population of the prison if the rest of the theories are applied. If a small number of high-rate offenders commit a disproportionately large amount of crime, targeting limited prison resources on these offenders should achieve increased crime control without increasing prison populations unreasonably. This policy will depend on the degree of the crime committed and whether the criminal is early in his carrier.

**INTIMIDATION –UTILITARIAN THEORIES OF PUNSIHMENT :**

Preventive theory of punishment seeks to prevent prospective crimes by disabling the criminals. Main object of the preventive theory is transforming the criminal, either permanently or temporarily. Under this theory the criminals are punished by death sentence or life imprisonment etc.

Utilitarian's such as Bentham, Mill and Austin of England supported the preventive theory of punishment due to its humanizing nature. Philosophy of preventive theory affirms that the preventive theory serves as an effective deterrent and also a successful preventive theory depends on the factors of promptness. The profounder of this theory held that the aim of punishment is to prevent the crimes. The crimes can be prevented when the criminal and his notorious activities are checked. The check is possible by disablement. The disablement may be of different types. Confining inside the prison is a limited form of disablement, that is temporary and when it is an unlimited form of disablement, that is permanent. It suggests that imprisonment is the best mode of crime prevention, as it seeks to eliminate offenders from society, thus disabling them from repeating the crime. The death penalty is also based on this theory. This theory is another form of deterrent theory. One is to deter the society while another is to prevent the offender from committing the crime. From an overall study, we came to know that there are three most important ways of preventive punishment, they are as follows:

- By creating the fear of punishment.
- By disabling the criminal permanently or temporarily from committing any other crime.
- By way of reformation or making them a sober citizen of the society.

**Case Laws:**

1. Dr. Jacob George v state of Kerala: In this case, the Supreme Court held that the aim of punishment should be deterrent, reformative, preventive, retributive & compensatory. One theory preferred over the other is not a sound policy of punishment. Each theory of punishment should be used independently or incorporated on the basis of merit of the case. It is also stated that "every saint has a past & every sinner has a fortune". Criminals are very much a part of the society so it is a responsibility of the society also to reform & correct them and make them sober citizens of the society. Because the prevention of crime is the major goal of the society and law, both of which cannot be ignored.
2. Surjit Singh v State of Punjab: In this case, one of the accused, a policeman entered the house of the deceased with the intention to commit rape but failed to do so as the as sons of the deceased shouted for help. Another accused suggested the policeman to kill the deceased. The accused was held liable under section 450 of the Indian Penal Code. While on the contrary, the death penalty or capital punishment is more of a temporary form of disablement.

Justice Holmes, an American jurist and legal scholar, stated that there can be no case in which the law-maker makes certain conduct criminal without showing a wish and purpose to prevent that conduct. Prevention, for him, can be the chief and only universal purpose of punishment. The law threatens certain pains if one does certain things, intending thereby to give one a new motive for not doing them. If one persists in doing them, one has to inflict the pains in order that the threats may continue to be believed.

The main aim of preventive theory of punishment is to prevent further crimes being committed, which is done through disabling the criminal – holding him/her in custody or inflicting some kind of pain for the crime he/she has committed. Supporters of the Utilitarian Theory, like Jeremy Bentham and John Stuart Mill, support this theory because of its humanising approach towards the criminal. Prevention can be exercised in the following three ways:

- By instilling the fear of punishment in the mind of a probable offender
- By disabling an actual offender, either permanently or temporarily
- By educating the public at large about the threat of the punishment

The effectiveness of the preventive theory depends upon the efficacy of the legal system – how fast the system works, how accurate are the investigation and reports etc. If there is undue delay in awarding punishment, the offender may not feel threatened to commit the same crime again, and the public may lose confidence in the system existing on such theory.

Preventive theory of Punishment seeks to lessen the repetition of crime by the offender, by taking away his power to do so, through disablement. It scarcely takes into account the motive of the crime, or the situations responsible for building the momentum of the offender.

It also does not answer the question of rehabilitation, since it relies on imprisonment – physical restriction of the offender so that he is unable to commit the offence again. It also acts as a threat to the general public, showcasing the offender as an example, and the fact that a certain crime could lead to loss of freedom, or in certain cases, even life. But the aims of preventive theory of punishment can only be realised when an efficient legal justice system is in place, which, sadly, is not the case in India.

**Prevention and Deterrence**

The preventive theory of punishment can sometimes be confused with the deterrent theory; however, some consider both as one and the same. While their ideology may be the same, preventive theory emphasizes more on the punishment of the offender and his disablement, in turn preventing that offender from acting in the same way again, whereas the deterrent theory of punishment focuses on the offender as an example for himself as well as the rest of the society, in turn leading other people to deterrence. Like prevention, deterrence also rests on the swiftness of the legal system, and states that the punishment so awarded must be exemplary in nature, so that people should avoid engaging in similar acts. Punishments of flogging and mutilation were prevalent in the medieval ages, and although harsh, set an example for the public in general.

A major criticism of both the theories is that in cases where the people are first-time offenders, they are awarded imprisonment, and kept with criminals of all types – those who may have committed heinous crimes. This hardens them emotionally and does little to no help of reforming them. Also, exemplary punishments such as mutilation or death sentence are considered too harsh, and are not allowed by most countries, since they take away basic human rights. But conformers of the theories are of the view that people are prevented from committing crimes when the punishment of the same is in their knowledge, typically when it is harsh. Even if a person is unaware of the exact punishment that an offence may lead to, it is assumed that offence of a more serious nature will attach with itself a harsher punishment, which is what leads to heinous crimes being prevented.

**REFORMATIVE OR REHABILIATION THEORY OF PUNISHMENT :**

*"An eye for an eye blinds the whole world."* This quotation by Mahatma Gandhi is the foundation of the reformative theory of punishment. Punishment should not be used simply to punish; rather, it should be used to transform. The goal of punishment should be to change the offender's character. Punishment is a form of societal regulation that enables a society to maintain its policies and regulations, as well as the peace of its residents' lives. As a result, if the crime is not monitored, it will cause trouble within the community and in people's daily lives. In order to cope with improper conduct or crimes that could be defined as infringements of the law, a new theory known as the reformative theory was introduced around the 18th century. The theory's distinguishing characteristic is that, unlike all the other theories of punishment, it focuses on the criminal instead of the crime and aims to alter the criminal's mindset in order to rehabilitate him/her as a law-abiding citizen of society. In this article, we will be looking at various provisions and cases in which the court recognises the concept of reformative theory. Also, we will be looking at this concept from the Indian perspective.

Crime is a violation of relationships and individuals. It produces responsibilities to rectify the situation. The victim, the violator, and society are all engaged in the search for remedies that encourage restoration, reconciliation, and a sense of security.

According to reformative theory, the aim of punishment should be to transform the culprit through the individualization approach. It is premised on the humane concept that a wrongdoer does not simply cease to be a living human being just because he commits crimes. Individualism is central to the reformative theory. It involves the transformation of offenders and faith in re-educating and trying to reform them. According to this theory, crime is linked to the prevalent physical or emotional condition of the criminal as well as the society's environment and circumstances. As a result, the criminal is regarded as a patient. Therefore, penalisation is not used to reclaim the offender and not to torture or harass them.

According to this concept, most crimes occur as a consequence of a dispute between the criminal's character and intent. It should be noted that one may commit an offence either because the temptation of the intent is greater or because the restriction imposed by character is relatively weak. Punishment, according to reformative theory, is more restorative than a deterrent.

According to the reformative or rehabilitative theory of punishment, the goal of the punishment system of the country should be to transform the criminal rather than simply penalise him. The ideology behind the notion of punishment is not just to offer fairness to the victim, but also to preserve safety and security in the community. Punishing a criminal does not only mean torturing or humiliating him, but there is a greater objective that must be achieved, which is to develop a peaceful society. In modern jurisprudence, the idea of punitive action is commonly associated with the law of crimes.

The goal of punishment is to transform the criminal into a human, so that he may once more become an ordinary, law-abiding citizen of society. The focus here is not on the offence itself, the damage done, or the deterrent impact that punishment may have, but rather on the criminal person and his personality.
**Laws dealing with reformative theory of punishment**

**Article 72 and Article 161 of the Constitution of India**

Article 72 of the Indian Constitution, 1950 enables the President of India to pardon a wrongdoer. The Governor of the state also has the same authority under Article 161 of the Indian Constitution. When the President pardons, the sentence and judgement of the convict are completely absolved of all penalties, punishments, and disqualifications. The authority of pardon arises to avoid unfairness, whether it be from severe, unfair laws or from verdicts that lead to injustice; thus, it has consistently been recognised that granting that power to an authority other than the judicial system is necessary.

**The Juvenile Justice (Care and Protection of Children) Act, 2015**

The ideology of dealing with delinquent children is among the most crucial components of the Juvenile Justice (Care and Protection of Children) Act, 2015. The Act's goal is to restore children and make them capable members of the community. This is demonstrated by the fact that children under the age of 18 (16 in the case of heinous crimes) who commit a crime are termed delinquents rather than criminals.

Some of the main features that represent the Juvenile Justice Act's restorative nature are as follows:

1. Section 14: Even though the crime committed by the child is non-bailable, the Board, under the Juvenile Justice Act, may discharge the child on bail or put the child under the mentorship of a probation officer.
2. Section 18: If a child younger than the age of 16 is convicted of a crime, the Board under the Juvenile Justice Act may order counselling services or community work or a fine (payable by the parents) or discharge the child on probation or send him to a special home for a maximum of three years. Furthermore, the Board has the authority to direct the delinquent child to access education, vocational courses, a therapeutic facility, or de-addiction programmes.
3. Section 21: No child shall be sentenced to life imprisonment or death.
4. Section 40: The goal of a child care centre under the Juvenile Justice Act ought to be the transformation of children.
5. Section 74: The Juvenile Justice Act also bars the disclaimer of the child's identity in the press in any form. The police are also prohibited from disclosing any information concerning the child except to the Board in accordance with the Juvenile Justice Act and only in the best interests of the child.

**The Code of Criminal Procedure, 1973**

Section 27 of the Code of Criminal Procedure, 1973 (CrPC) states that any crime not punishable with life imprisonment or death if committed by any individual who is below the age of sixteen on the day he appears or is introduced before the court may be tried by the court of the Chief Judicial Magistrate or by any court particularly authorised under the Children Act, 1960 or any other legislation in force for the time being providing for the treatment, mentoring, and rehabilitative services of youth.

Section 360 of the CrPC enables the court to grant discharge on probation on good behaviour or after admonition.

Section 432 of the CrPC says that the government has statutory power under this section that whenever an individual is convicted of any punishment, the government can suspend or remit the punishment in entirety or in proportion at any period.

Section 433 of the CrPC enables the government to commute or change the punishment of the offender from:

- a death sentence to any other form of punishment;
- life imprisonment to imprisonment not exceeding 14 years;
- rigorous imprisonment to simple imprisonment.

**Sections 54 and 55 of the Indian Penal Code, 1860**

These provisions of the Indian Penal Code, 1860 deal with the commutation of punishment. Section 54 of the Indian Penal Code allows for the commutation of the death penalty to any other form of punishment, and Section 55 of the Indian Penal Code allows for the commutation of a life sentence of 14 years in prison. The ability to commute a sentence refers to the ability to exchange a sentence or punishment imposed by the judicial system for a lower punishment. In other words, it refers to the ability to decrease or minimise a sentence imposed as a result of a criminal conviction. For example, a 10-year sentence may be commuted to a 5-year sentence

The Probation of Offenders Act, 1958

Section 4 of the Probation of Offenders Act, 1958 addresses the discharge of a wrongdoer because of his or her good behaviour. Section 4 of the Act does not apply if the offender is convicted of an offence punishable by death or life imprisonment.

**CLASSSICAL HINDU AND ISLAMIC APPROACHES TO PUNISHMENT :**

Scholarly views on classical India suggested the importance of Dharma and śāstras as the central theoretical and textual categories that create a moral self in Hinduism. Various theories on evolution of Hindu Law and Dharma suggested that it developed from macrocosmic universal order and microcosmic sphere where the focus shifted from super humans to individuals. Dharma in the later stage became more associated with the duties of the individuals and self-controlled order.

In the process of this evolution, textual understanding of Hindu law and Dharma developed through the sacred texts of Śruti and Smriti genres and their commentaries and digests. These texts have traditionally formed the corpus of Hindu law, a law which was to govern every part of a Hindu's life. Later, more secular and personal understanding of Hindu law and Dharma developed under Muslim and British rulers in India. India's legal system presents the most extensive and diverse written law in the world. Law in India emerged from classical traditions rather than a construction of a public body or state and the system was considered as very near to people. The classical legal traditions of India were exclusively recorded in the Sanskrit texts and believed to have developed by the ancient sages.

These traditions are widely understood as Hindu law which originated from community principles and not from a state polity. Hindu law refers to the system of personal laws (marriage, adoption and inheritance) applied to Hindus in India. Very recently, Donald Davis has given more convincing definition of Hindu law as'variegated grouping of local legal systems that had different rules and

procedures of law but that were united by a common jurisprudence or legal theory represented by Dharmaśāstra literatures.

Man has passed from the stages of being uncivilized to becoming a social being. There are many factors responsible for promoting man for this change, one of which is common fear and reciprocity. Over time, man has become more and more social which resulted in the increase of moral restraints on his interaction with the society. Whenever a man acted in an unrestrained or unsocial manner, he came in conflict with others and in order to do away with such conflicts many rules and regulations enforcing various kinds of punishments came into being.

Earlier when there was no criminal law to govern the society, people were under a constant threat of being attacked at any time by one another. The weak, the young and the old were easily dominated and overpowered by the strong and the powerful. However as time advanced, societies became more integrated and various norms came into practice, whose violation resulted in punishments and penalties such as: compensation, death penalty, banishment, mutilation etc. With the rise of the humanitarian aspect in penal philosophy fines, forfeiture, confiscation of property and imprisonment to life became common forms of punishment meted out for almost all offences in many parts of the world.

Historical Perspective Of The Punishment System "Punishment governs all mankind; punishment alone preserves them; punishment wakes while their guards are asleep; the wise considers punishment as the perfection of justice" Proverb by Manu From the earliest times, punishment of offenders was a private matter. Punishment was basically based upon the principle of Lex Talionis.

It is a principle that states that the victim or a member of the victim's family retaliates against the offending party as a remedy for personal wrongs, i.e. an eye for an eye. In many instances, personal revenge was not only a right but also a responsibility. Every tribe, family and kin in every kind of society were obligated to avenge the harm caused to them and their family.

The Sumerian code and the code of Hammurabi are the earliest written criminal codes. These codes carry the harsh translation of 'lex talionis' but further specify the concept of 'equality on revenge', meaning that the severity of retaliation must be equal to the severity of offence or amount of retaliation must fit the crime.

Mythological Perspective of Punishment It is believed in many religions that an individual's ultimate punishment is being sent to hell by God who is the highest authority that upholds justice. Hell is considered to be a place which exists after the life of a person, corresponding to the sins committed during his/her life. In Plato's 'Myth of Er' and Dante's 'Divine Comedy' it is said that in hell, damned souls suffer for each of the sins that they committed.

In many religious cultures including Christianity and Islam, hell is traditionally depicted as a fiery and painful place where souls are punished. In Hinduism, Garuda Purana is considered to be a set of instructions given by lord Vishnu to his carrier, Garuda (king of birds). This version of Garuda Purana that survives into the modern era was written somewhere between 800 to 1000 CE.

It deals with law, astronomy, medicine, grammar, gemstones, etc. It is also known as Vaishnava Purana. In this Purana, different offences were defined and their respective punishments prescribed. Indian

Jurisprudence Under Hindu Kings Under Ancient Hindu kings, there was an administration of civil and criminal justice which was done according to the rules of the Dharma Shastras.

In ancient Hindu law, laws were discussed under 18 heads covering both modern civil and criminal branches of law which fell under heads such as gifts, sales, partition, bailment, non-payment of debt, breaches of contract, disputes between partners, assault, defamation, trespass of cattle, damage to goods and bodily injury in general.

A Hindu code was compiled by the Pandits of Banaras at the instance of Warren Hastings when he was governor general of India. It was known as the Gentoo code which was printed by the East India company in 1776 in London.

It provided that the penalty for theft be divided into open theft and concealed theft and different punishments were prescribed for them according to Roman Law. The former was punished by fine and the latter by the cruellest form of punishment of cutting off the hand or foot, at the discretion of the judge. Death punishment was also given for crimes like housebreaking and highways robbery

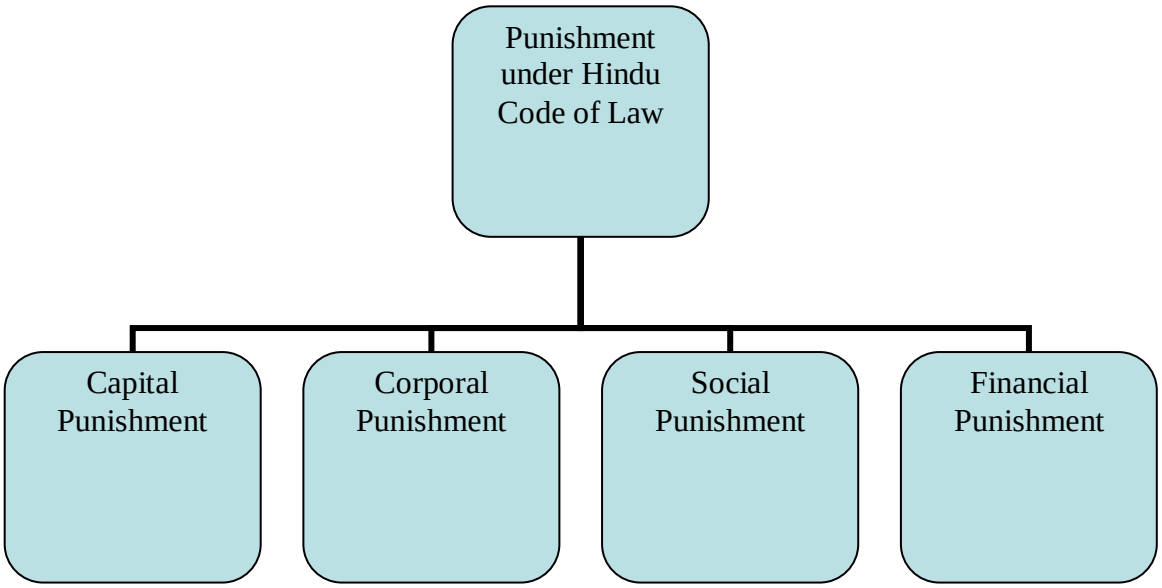
Unequal And Discriminatory Punishment System in Ancient India During the ancient Indian period there was a clear distinction made between the people of higher and lower castes while imposing punishments. Kautilya's Arthashastra prescribed lower punishment to higher caste offenders and more severe punishment to lower caste offenders.

According to him, a brahmin is not to be tortured like other people even though he may have committed an offence; they were also exempted from death penalty. For example: A Kshatriya who commits adultery with a woman would be punished with the highest punishment, while a Vaishya doing the same thing would be deprived of his entire property and a Shudra would be burnt alive. During that time the powers of the judge were also very limited and kept in check. According to Kautilya a judge or a magistrate, who imposes an unjust fine shall be fined either double the amount or 8 times over the prescribed fine. If he imposes corporal punishment wrongly, he shall himself suffer the same.

**Forms Of Punishments Under Hindu Code of Law**

The history of the penal system states that in the past punishments were torturous, cruel and barbaric in nature. The objectives of such punishments were to create deterrence and retribution. Such punishments were classified under the following heads:

1. Capital Punishment
2. Corporal Punishment
3. Social Punishment
4. Financial Punishment




1. Capital Punishment:
   Capital punishment is an authorized killing of someone in a legal manner as a punishment for the crime committed, such as a death penalty. In other words, it means a government has itself sanctioned a practice where a person is put to death by the state as a punishment for a crime. In Ancient India, capital punishment was a very common practice. It was the most extreme form of punishment and the methods of meting out this punishment varied from time to time. Some of those methods were: Stoning: 'Stoning' is that method of capital punishment in which a group of people throw stones at a person until he dies. In it, the guilty person is made to stand in a small trench dug in the ground and the people surround him from all sides and throw stones on him until his death.

This Mode of punishment is still meted out in some of the Islamic countries, especially in Afghanistan, Saudi-Arabia etc.

**Pillory:** In 'Pillory', the offender was compelled to stand in a public place with his head and hands locked in an iron frame so that he couldn't move. Then he would be whipped, branded or stoned, or his ears would be nailed to the beams of the pillory. Sometimes, dangerous criminals were nailed to the walls and were then shot or stoned to death. It undoubtedly was a very cruel and brutal form of punishment which was in practice till the 19th century.

**Immurement:** In it the offender was constructed into a wall. It was the most cruel, barbaric and the most painful form of execution of a death penalty.

**Execution by elephant:** Under this punishment, the offender was thrown under the feet of an intoxicated elephant, to be painfully crushed to death.

2. Corporal Punishment:
   Corporal Punishment simply means a form of punishment which is intended to cause physical pain on a person. It is also known as physical punishment. This form of punishment is for the violation of a law which involves infliction of pain on or harm to the body of the offender. The objective behind corporal punishment is not only to punish the offender but also to prevent the repetition of the offence by the offender or by any other person. The following are the corporal punishment which were meted out in ancient times:

- **Flogging:** It simply means 'beating or whipping' someone with a stick or whip as a punishment. It was the most common method of meting out corporal punishment to offenders. In India, it was recognized under the Whipping Act, 1864 which was repealed in 1909 but was finally abolished in 1955. The method of flogging differed from country to country. Some used straps and whips with a single lash while others used short pieces of rubber hose since they leave behind traces of flogging. It was one of the most barbaric and cruel forms of punishment. This method is being used in most of the Middle East countries even today

**Mutilation :** Generally it means 'to cause severe damage to the body of a person'. In other words it means damaging a person severely, especially by removing a part of the body. This mode of punishment was in practice in ancient India. During that period one or both of the hands of the person were chopped off if the offender committed theft, if he indulged in sex offences, his private parts were cut off, if he told a lie or criticized God his tongue was cut off, and if he was deceitful or untrustworthy his ears were cut off. This system was also in practice in the European countries. But in modern times this method has been completely disregarded because of its barbaric nature.

**Branding :** It means 'searing of flesh with a hot iron'. In this method of punishment, the culprit was branded by hot iron on the forehead with the words describing his offence. This method was commonly used in classical societies. In Roman Penal Law, criminals were branded with appropriate marks on their forehead so that they could've been identified and subjected to public ridicule. In India it was in practice during the Moghul rule, which has been completely abolished.

**Pressured by iron rods :** In this method of punishment the body of the offender was pressured by two iron rods in a very inhumane and cruel manner where he suffered a lot of pain.

**Imprisonment :** The Punishment of imprisonment which is seen today is totally different from the kind of imprisonment which was awarded in the past. Many kingdoms awarded the punishment of imprisonment by shackling the hands and legs of the culprit and throwing them down a dry well or in a small dark room.

3. Social Punishment:
   Social punishment is a punishment in which a person is restrained from making any kind of contact with any other person, or is moved to a distant place, breaking all of his social connections. No person can extend any help of any sort and if anyone tries to do that, they are held liable for punishment.

Social punishment wasn't aimed at inflicting any bodily pain, but a psychological one. This form of punishment was divided into two parts :

**Banishment :** Banishment means 'to expel a person'. It is also known as 'transportation'. In this form of punishment, undesirable criminals were transported to far off places with an aim to isolate them from the society. This type of punishment was also in practice during the British rule in India. It was popularly known as 'kalapani'. At that time, people deemed as 'dangerous criminals' were transported to remote islands. This practice was abolished in 1955 and was replaced with "Imprisonment for life".

**Social Boycott :** Social Boycott means 'an act of forcing a person to abstain from any kind of contact with other people of the society'. In ancient times, the nyaya panchayat in villages used to give the punishment of social boycott to offenders. Under this punishment, no person of the village was allowed to share any occasion of joy and happiness with the offender

In other words the offender was degraded from his caste and no caste member was allowed to come into contact with him. For example in those times smoking 'Hukkah' was considered as one of the means for social gatherings and acceptance by the society. But offenders were not allowed to participate in smoking 'Hukkah' with the rest of the people, thereby boycotting them. This was termed as stopping a person's 'HukkahPani.'

4. Financial Punishment:

It is also known as imposition of fine. It was the common mode of punishment which was not serious in nature and it was awarded specially for the breach of traffic rules, revenue laws and other minor offences. It also included the payment of compensation to the victims of the crime and also the payment of the costs of prosecution.

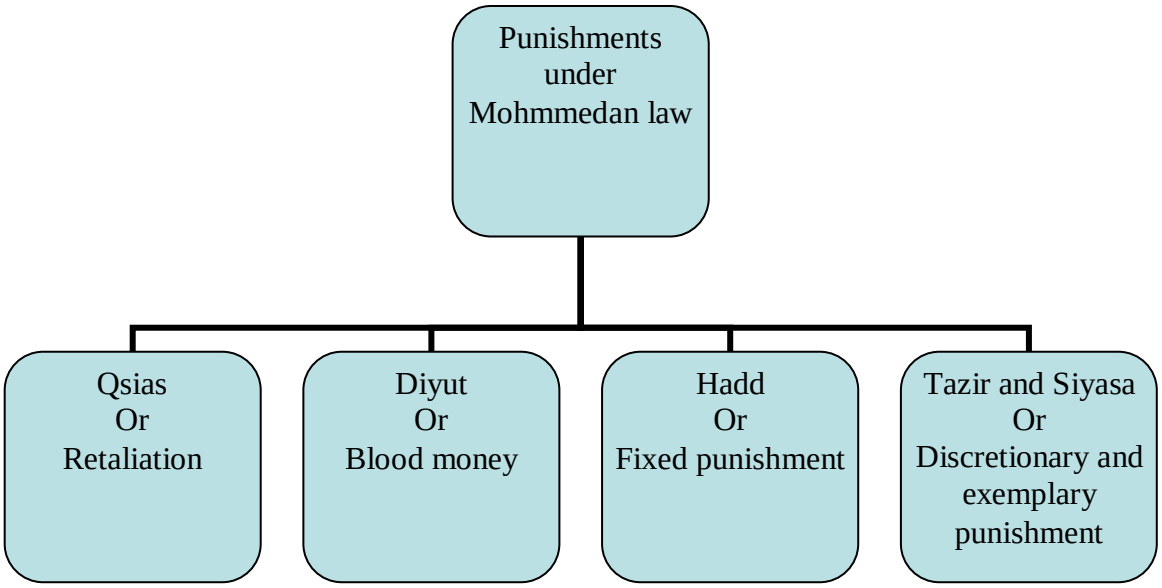
**Ancient Mohammedan Jurisprudence**

The criminal law practiced in northern and southern parts of India was the Mohammedan law, which was introduced by the Moghul conquerors whose power culminated under Akbar in the second half of the sixteenth century. The most authoritative written exposition version of the Mohammedan Jurisprudence in India was the Hidayah, which expresses the views of Aboo Huneefah and his disciples Aboo Yousuf and Imam Mohammed who were regarded by the Sunni sect of the Muslims as the principal commentators on the Quran.

The Mohammedan criminal law as stated in the Hidayah presents a curious mixture of great vagueness and extreme technicality. The Mohammedan criminal law was open to all objections. It was occasionally cruel. Thus, for instance, immoral intercourse between a woman and a married man was in all cases punishable by death.

The primary base of the Mohammedan criminal law was the Quran which was believed to be of Divine origin. But the laws of the Quran were found to be inadequate. Only eighty or ninety verses of the Quran talked about general rules which might come before a civil or criminal court of justice. Also under this system, the Sultan himself as a ruler exercised criminal jurisdiction over his subjects and accordingly sentenced the offenders to temporal punishments

Forms Of Punishments Under Mohammedan Jurisprudence The Mohammedan Jurisprudence had four broad principles of punishment.
They were as follows:
1. Qisas or retaliation
2. Diyut or blood-money
3. Hadd or fixed punishment
4. Tazir and Siyasa or discretionary and exemplary punishment




1. Qisas or Retaliation:

The principle of Qisas states, 'an eye for an eye, life for a life, and a limb for a limb'. Under this principle, crimes called Jinayat were also included. The qisas crimes were murder, manslaughter and any physical injury to another individual, intentional or unintentional.

However the punishment of retaliation was classified under two heads:

• Life Qisas- If the intentional injurious act of the criminal causes the death of the victim, the heirs of the victim may take revenge and ask the judge for Life Qisa (death penalty).

• Limb Qisas- When the intentional injurious act does not cause the death of the victim, but rather the loss of a limb or its proper function, the victim, herself/himself, may take revenge or ask for Diya.

2. Diyut or Blood Money:

The second form of punishment was called Diyut which meant the fine or compensation for blood in cases of homicide. The amount of Diya received for a murdered person and injury of different parts of the body is determined in Fiqh books; the Islamic jurisprudence compiled in books by different Islamic jurists. The punishment of Qisas in all cases of willful homicide was exchangeable with that of Diyut, if the person having the right of retaliation wished so. He was given an alternate remedy either to take Diyut or Qisas as a form of compensation

3. Hadd or Specific Penalty :

The third principle of punishment under the Mohammedan law was called Hadd which is defined in the Hidayah, which comprises the specific penalties fixed to promote public justice. Under Hadd the quantity and quality of punishment was fixed for certain offences and this could not be altered or modified. If the offence was proved, the Qadi had no other alternative but to sentence the convict to the prescribed punishment.

But Hadd could not be executed if there was any doubt, or legal defects and then the Sultan was directed to administer the law with moderation. The punishment of Hadd also extended to the crimes of adultery, of illicit sexual intercourse between married or unmarried individuals, on false accusations, drinking wine, theft and of highway robbery.

Types of Hadd Punishment Given for Different Crimes

• Whipping is the Hadd punishment for adultery, sapphism, procuring, sexual defamation and drinking alcohol. Maximum amount of Hadd lashes is 100 lashes. Some offences receive 80 lashes and the minimum amount is 75 lashes.

• Amputation form of punishment is given for burglary, rebelling and doing corruption on earth. The perpetrator of rebellion was punished either by maiming of his/her hand and foot, crucifixion for three days, banishment or death.

• Death Penalty is given for crimes such as sodomy, rape and incest. Death penalty is considered as the most cruel and sadistic form of punishment given in those times. There are still many Islamic countries which encourage the practice of death penalties.

4. Lapidation or Stoning :
was the punishment for the offences of Zina, when legally established against a man of sound understanding and mature age, being a Musalman and free, and being married to a woman of the same description. Tazir and Siyasa Tazir and Siyasa were the discretionary and exemplary form of punishments, which rested completely on the discretion of the judge. Under Tazir, the punishment could be anything from imprisonment and banishment to public exposure. The Qadi was authorized to exercise discretion according to the nature of the offence, rank and situation of the offender in adjudging him to receive his punishment for the crimes he committed.
At the discretion of Qadi, banishment was also allowed. Public exposure with a blackened face was expressly declared to be the punishment to be inflicted upon a false witness in addition to forty lashes.

This general doctrine of discretionary punishment was clearly set forth in the preamble of Mohammedan law which states that "The Mohammedan law vests in the sovereign and his delegates the power of sentencing criminals to suffer discretionary punishment in the following three cases.
1. In the cases of offences for which no specific penalty of Hadd or Quisas has been provided by the law.
2. For crimes which are within the specific provisions of Hadd and Kisas and the proof of such crimes being committed may not be such as the law requires for a judgment of the specific penalties.
3. For repeated heinous crimes in high degree which causes injury to society at large and particularly other offences of this description that require exemplary punishment beyond the prescribed penalties. Siyasa was also the same as Tazir which was meant to create an example by punishing dangerous criminals habitually committing atrocious crimes, and of whom there could be no hope of reformation.

Therefore Tazir and Siyasa might in all cases be inflicted by the ruler upon strong presumption, whether arising from the credible testimony of such incompetent witnesses or from circumstances which raised a presumption of guilt or from any other reasonable cause.

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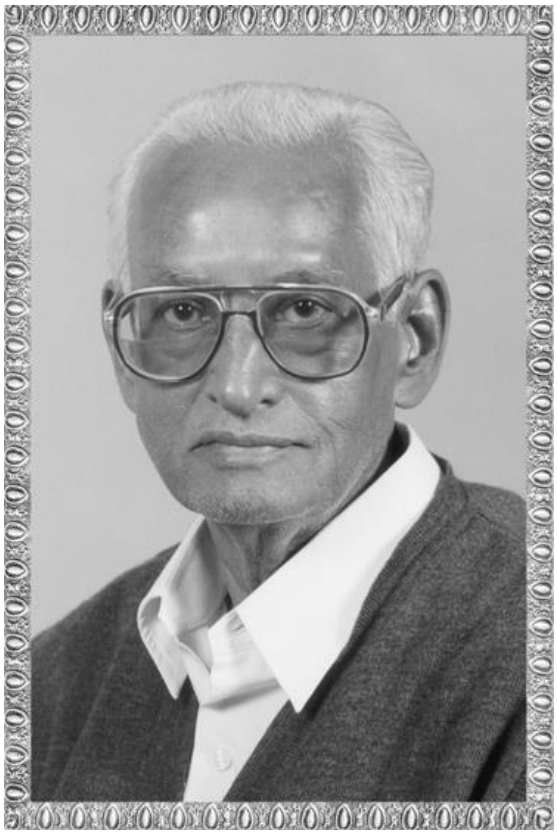

# Lt. Shree Chimanbhai Shukla


**Shree H.N.Shukla College**
**2, Vaishali Nagar,**
**Nr. Amrapali Railway under bridge,**
**Raiya Road, Rajkot.**
**Ph. (0281)2440478**

**Shree H.N.Shukla College**
**3, Vaishali Nagar,**
**Nr. Amrapali Railway under bridge,**
**Raiya Road, Rajkot.**
**Ph. (0281)2471645**

**Unit 4- Ownership, Possession and Property;**

| UNIT NO. | TOPIC NAME |
|---|---|
| 4.1 | Possession : Definition, concept and Importance |
| 4.2 | Kinds of Possession, Essential of Possession: Corpus Possession and Animus Possidendi |
| 4.3 | Ownership: Definition, Concept , Kind of Ownership |
| 4.4 | Distinction between Ownership and Possession, kinds of property |

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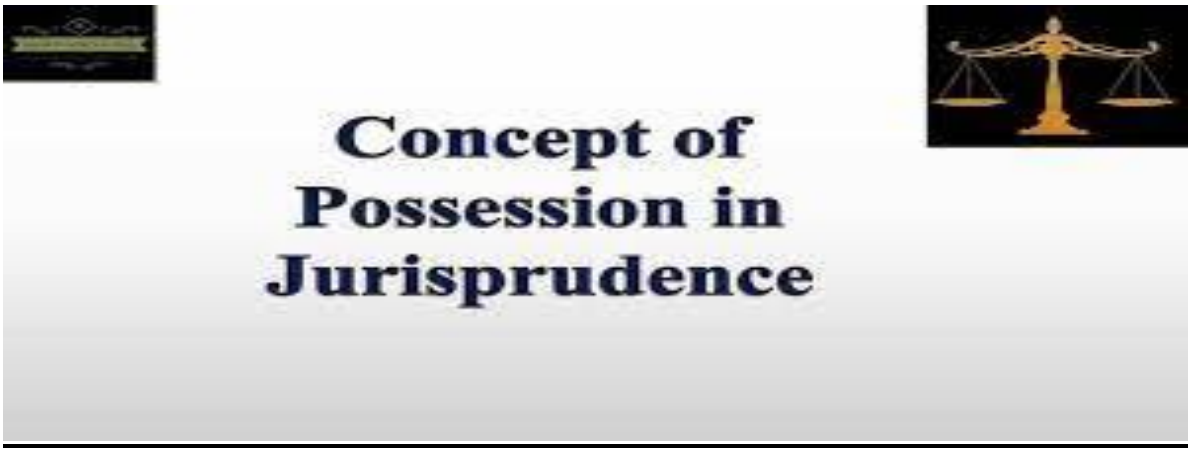
## UNIT -4- Ownership, Possession and Property:




## 4.1 Possession: Definition , Concept and Importance

**Possession in Jurisprudence; Introduction:-**

Possession is very difficult to define in English Jurisprudence. But it is a very important topic. Human life and society would become impossible without the retention and consumption of material and non-material things. Food, clothes, tools, etc. are essential items to use. We get hold over the first to claim possession. It is not just the acquisition of things but it is a continuing claim for the use of the item. It may be legal or illegal.

It is a prima facie evidence of ownership and anyone desiring to disturb a possessor must show a better title or a better possessory right.

**Meaning of possession in Jurisprudence:**

In Roman law possession was termed as a '*Possessio'*. The term *possessio* denoted physical control over things. In legal terminology, there is no word more ambiguous in its meaning than possession whether considered in relation to immovable property. In law, possession means a fact or condition of a person having such control of property that he may legally enjoy it to exclusion of others except against the true owner or prior possessor.

It has been claimed by eminent jurists that the conception of possession is very difficult to define and important in the range of legal theory.

Possession originally expresses the simple notion of a physical capacity to deal with the thing by as we like to the exclusion of everybody else.

Possession, to begin with, meant only physical control over the thing. It was only later that this fact started receiving recognition and protection by the laws from various aspects.

**Possession is of two types according to Salmond:-**

- When the possession included a physical or actual relation with the object is called possession in fact, And
- When it got recognition by law it was termed as a possession in law,

For example, in English law, a servant is not deemed to be in possession of Master's goods while things are in his (Master's) control. Thus, a servant under English law has possession in fact. Possession in law is the legal relation. It implies a manifest intention to exclude the world at large from interfering with the thing in question and to do so on one's own account and in one's own name.

**Definitions:-**
**Savigny definition:**

Savigny defines possession as, "Intention coupled with the physical power to exclude other from the use of material objects".

His definition involves two essential elements:-
A. The animus domini, i.e., the intention to hold the goods; and
B. The corpus possessionis, i.e., the physical control of such goods

Thus, according to Savigny, the permanent loss of one element or the other brought possession to an end. Savigny further observed that the essence of possession is to be found in the physical power of exclusion. He says that the corpus possession may be of two kinds, one related to the commencement of possession and the other relates to the retention of the possession.

**Criticism:**

Savigny has used the expression of physical power to exclude others without adding any qualification to it. He did not mention the fact that the exclusion is subject to one exception, i.e., that possessor cannot exclude a person who has a better title over the use of that particular material object.

**(1) Ihering:-**
Ihering**,** says — whenever a person looks like an owner in relation to a thing he has possession unless possession is denied to him by the rule of law based on convenience.

(2) **Salmond:-**
Salmond divides possession into incorporeal and corporeal and defines corporeal possession as 'the continuing exercise of a claim to the exclusion of others. Again, he says — Possession is a de facto relation between a person and a thing. It is not right. Thus, for Salmond corporeal possession is a title of right but it is not a right itself.

(3) **Markby** :-
has criticised Salmond's definition and said that the Law treats possession not merely as a physical condition but also as a right. He adds that the possession confers on the possessor all the rights of the owner except as against the owner and prior processor.

**Nature and Concept of Possession of Property**

Possession is prime evidence of transferring ownership. The term 'possession' is ordinarily used in both civil law and criminal law. In fact, both laws are based on the concept of possession, for instance, under civil laws, possession is used in the form of trespassing in the law of torts, possession of goods in contract laws and in the transfer of property in property law. Whereas, in criminal laws, theft is the most common example of possession as it implies *dishonestly taking away any movable property out of the possession of any person without that person's consent.*

**Theories of Possession of Property**

In the words of Sir Fredrick Pollock, Possession is expressed as *"In common speech a man is said to possess or to be in possession of anything of which he has the apparent control or form the use of which he has the apparent power of excluding others".*

John Salmond stated possession as *"Possession is the continuing exercise of a claim to the exclusive use of an object." He totally rejected the two concepts of possession, i.e. possession in fact and possession in law and reiterated one as 'possession in truth and in fact'. Hence for Salmond, possession is both corpus as well as animus.*

Savigny's theory was the first theory on the concept named possession. According to him, there are two elements in possession that are corpus possessionis and animus domini, where the former implies effective control and latter means the pure intention to hold as the owner. He further classifies corpus possessionis into two parts, one being the initiation of possession and the other is retention of possession. In the words of Savigny, "I must take him by bridal or ride upon him or have him in my immediate presence, so that I can prevent all others from interfering with me. And since detentor and possessor have same physical relation to the res, the difference between them must be found in the mental element, i.e. animus domini. He clearly focuses physical control and intention for the possession to constitute.

Holme's theory: In the words of Holmes, "To gain possession, then a man must stand in a certain physical relation to the object and to the rest of the world, and must have a certain intent. These relations and this intent are the facts of which who are in search." He further suggested that the element namely, 'animus domini' is not required under the English law, and has the intent to exclude others. [3]

**Possession in Law and Possession in Fact**

Possession in fact refers to physical or actual possession. It basically means a physical relation to a thing and one has actual control of it. For the actual control to exist, there must be a relation of the possessor with another person and simultaneously relation of the person to the thing so possessed. Possession in fact is also known as De facto possession and in roman language, it is read as naturalis possession.

One has to keep in mind the fact that there are certain things on which physical control is impossible like sun, stars, moon, etc. Also, it is not necessary that the physical control over a thing will be continuous which means even when an individual loses its actual control, the physical control will not be put to an end.

Possession in law implies the possession in the eye of law. Possession in law is recognized and at the same protected by law. Possession in law is also known as De Jure possession and in roman language, it is read as possession civilic. The law mainly protects for two major reasons that are by conferring legal rights on the possessor and by punishing the individuals interfering the possession. Three causes between possession in fact and possession in law are as follows:

1. Possession in fact and Possession in law
2. Possession in fact but not in law
3. Possession in law but not in fact

**4.2 KINDS OF POSSESSION :**

1. Corporeal and Incorporeal Possession

The possession of material or tangible things is known as Corporeal Possessor. Example: the possession of land, house, books, chattels etc.

• The possession of immaterial or intangible things which one can not touch, see or perceive, is known as Incorporeal Possession. Example: Possession of a copy-right or a Trade-mark or a Right of reputation, Goodwill etc.

2. Mediate and Immediate Possession

• The possession of a thing through another person is called as Mediate Possession or Indirect Possession. Example: when a person purchases a book through his agent or servant, he has mediate possession so long as the book remains in agent's or servant's possession.

• When the relation between the possessor and the thing possessed is a direct one, it is called as Immediate Possession or Direct possession. Example: when a person purchases a book himself, he has immediate possession of it without any intervening agency. The things in possession of a master, principal and owner are said to be in their immediate possession.

• Under English law, the distinction between Mediate and Immediate possession is not recognised; because at a time only one person can have exclusive possession over a thing. A servant merely has custody of his master's goods.

Kinds of mediate possessions:

(a) The first is that which one acquires through and agent or servant. Through some one who holds solely on one's account.

(b) The second kind is , in which the direct possession is with a person who hold the thing possessed, both on his own account.

(c) The third form is the case in which the immediate possession is with a person who claims it for him until some time has elapsed or some condition has been fulfilled.

3.Constructive Possession

• According to Pollock- A Constructive Possession is de-jure possession or possession-in-law. It is not actual possession. It is a right to recover possession.

• Example: the delivery of keys of a building may give rise to constructive possession of the contents of building to the transferee of the key.

4. Adverse Possession

• It means the possession by a person who initially holds the land on behalf of some other person and subsequently setup his claim as a true owner of that land.

For establishing Adverse Possession, following 3 - elements must be proved a) Continuity, b) Adequate publicity, and c) Peaceful and undisturbed possession for specific period.

5. Concurrent or Duplicate Possession

• According to definition of the possession when two persons cannot be in possession of the same thing at the same time because the exclusiveness is one of the essence of the possession.

• No two adverse claims of exclusive use can be effectually realised at the same time. But when the claims are not adverse and are not mutually destructive, they can be concurrently realised at the same time. Such cases of Concurrent Possession are also called Duplicate Possession.

• Example: Corporeal and Incorporeal possessions may concurrently exist in respect of the same material thing. as A certain land may be in possession of Mr. A and right of way may be in possession of Mr. B

6. Representative Possession

• Representative possession is that in which the owner has possession of a thing through an agent or a servant. The real possession is that of the actual owner and not that of the representative.

• Example- I put some money in the pocket of my servant to buy certain things from the market. Money in the pocket of the servant is not in his possession. It is a case of representative possession.

• The essence of representative possession lies in the fact that the master has the animus to exercise control over the thing in the hands of the servant or agent.

7. Derivative Possession

• In the case of derivative possession, the holder of the thing combines in himself both the physical and mental elements which constitute legal possession.

• A creditor has a derivative possession of the thing pledged to him, A watch-maker has a derivative possession of a watch entrusted to him for repair so long as the repair charges are not paid, A Bailee has a derivative possession of the goods bailed to him.

• In these cases, the title of the holder of the thing is derived from the person who entrusts the thing. It is pointed out that if the owner of the watch takes away the watch forcibly without making the payment, he is guilty of theft.

8. Quasi Possession

• Incorporeal possession is known in Roman law as "quasi possession".

• Possession “which is really understood as a right” should not be confounded with the subject matter of that right.

• Example- A right of way over a piece of land, cannot be identified with that land. Besides, as we have seen, in our discussion, under the previous heading, there can be no “corpus possession”

**Essentials of possessions:**

Possession involves two distinct elements, one of which is mental or subjective, the other , Physical or Objective. These were distinguished by the Roman Lawyers as animus and corpus. The subjective element is more particularly called animus possidendi and animus domini.

1. **Animus Possidendi :**

The legal maxim Animus Possidendi is a term of Latin origin. nimus means 'mind or intention' and Possidendi means 'to possess' and hence, the term literally means an intention to possess. It is synonymous with Animus Occupandi and De Jure possession.

the subjective element is the intent to appropriate to oneself, the exclusive use of thing possessed. It is an exclusive claim to a material object. It is the intention of using the thing oneself and of excluding the interference of other person.

To constitute the animus possidendi, there must be an intention to possess, and the nature of the intention is governed by the following rules:

(a) The animus need not necessarily be in the nature of claim of right.

(b) The claim of the possessor must be on of exclusive possession, involving an intent to exclude other person from the use of the thing possessed.

(c) The exclusion need not be absolute

(d) The animus possidendi need not be a claim on ones behalf; one may possess a thing either on his own account or on account of another.

(e) The animus possidendi need not be specific;

**2. Corpus :**

Corpus Possession means that there exists such physical contact of the thing by the possessor as to give rise to the reasonable assumption that other person will not interfere with it. Existence of corpus broadly depends on

(1) upon the nature of the thing itself, and the probability that others will refrain from interfering with the enjoyment of it;

(2) possession of real property, i.e., when a man sets foot over the threshold of a house, or crosses the boundary line of his estate, provided that there exist no factors negativing his control, for example the continuance in occupation of one who denies his right; and

(3) acquisition of physical control over the objects it encloses. Corpus, therefore, depends more upon the general expectations that others will not interfere with an individual control over a thing, then upon the physical capacity of an individual to exclude others.

The animus possidendi is the conscious intention of an individual to exclude others from the control of an object.

There is also a concept of "constructive possession" which is depicted by a symbolic act. It has been narrated with an illustration that delivery of keys of a building may give right to constructive possession of all the contents to the transferee of the key.

A person other than the owner, if continued to have possession of immoveable property for a period as prescribed in a Statute providing limitation, openly, without any interruption and interference from the owner, though he has knowledge of such possession, would crystallize in ownership after the expiry of the prescribed period of limitation, if the real owner has not taken any action for reentry and he shall be denuded of his title to the property in law. "Permissible Possession" shall not mature a title since it cannot be treated to be an "adverse possession". Such possession for however length of time be continued, shall not either be converted into adverse possession or a title. It is only the hostile possession which is one of the condition for adverse possession

To constitute possession, the animus domini is not in itself; it must be embodied in a corpus. Corpus is the effective realization in fact of the claim of the possessor. Effective realization means that the fact must amount to the actual present exclusion of all alien interference with the thing possessed.

The corpus possessionis :

1. In relation of the possessor to other person and ;
2. In relation of the possessor to the thing possessed.

**4.3 OWNERSHIP:**

Ownership refers to the relation that a person has with an object that he owns. It is an aggregate of all the rights that he has with regards to the said object. These rights are right in rem it means that they can be enforced against the whole world and not just any specific individual.

The prima facie evidence of ownership, called as **nine out of ten points of law**, meaning that there is a presumption that the possessor of a thing is the owner of it and the other claimants in order to have that thing must prove their title or better possessory right.

**Definition of Ownership**

According to **Austin**, ownership refers to "a right indefinite in point of user, unrestricted in point of disposition and unlimited in point of duration."

**Salmond**

According to him, '*Ownership, in its most comprehensive significance, denotes the relation between a person and the right that is vested in him. That which a man owns is in all cases a right*.' Also he states that '*Every right is owned, and nothing can be owned except a right. Every man is the owner of the rights which are his*.'

He also distinguished between corporeal and incorporeal ownership, 'Although the subject-matter of ownership in its widest sense is in all cases a right, there is a narrow sense of the term in which we speak of the ownership of material things. We speak of owning, acquiring or transferring, not rights in land or chattels, but the commonest meaning of the 'ownership'. We call it by the name of corporeal ownership to distinguish it from the ownership of rights which may be called 'incorporeal ownership'.

**Holland**

He followed Austin's view of ownership and according to him an owner has three kinds of powers namely;

- possession,
- enjoyment and
- ownership
    - all or some of which can be lost by lease or mortgage.

**Hilbert**

According to him, *ownership consists of four rights which are the right of using the thing, right of excluding others from using it, right to disposal of the thing and right of destruction of the thing*. In this regard absolute ownership in land is not possible since land is indestructible, which is why in English Law one can have a legal interest in land.

**Pollock**

According to him, *'Ownership may be described as the entirety of the powers of use and disposal allowed by law.*'

**Essentials of Ownership**

**Following essentials of it, namely-**

- ***Right to use:*** The owner has right to use the subject-matter of ownership as per his own discretion.
    - ***Right to the capital or alienation***: The owner has absolute right of alienating with the thing. A non-owner may possess a thing but he cannot transfer its ownership.
    - ***Right to income***: The owner has the right to the income arising out of the thing within the limits, if any, laid down by any law.
    - ***Right to possess***: The owner of a thing has a right to possess it, and the owner has exclusive control of a thing.
    - ***Right to manage***: The owner has the right to manage i.e., he has the right to decide how and by whom the thing shall be used.

**Characteristics of Ownership**

1. It is **absolute or restricted**. An owner of a property may be its absolute owner and nobody else may have any interest in the same. There may also be certain restrictions on the right of ownership and those restrictions may be imposed either by law or by voluntary agreement.
2. It is also possible that certain restrictions may be imposed on the owners of property **in times of national emergency.** The house of any owner may be requisitioned and any compensation may be fixed by the prescribed authority.
3. The ownership of a person **does not come to an end with his death**. He is entitled to leave his property to his property to his successors. The owner can distribute the property even in his own lifetime.
4. **Certain disabilities have been imposed on infants and lunatics** with regard to the disposal of property. Undoubtedly, they are not competent to enter into valid contracts. They are not expected to understand all the implications of their actions.
5. **The Government may demand certain taxes** from the owners of the property. If those taxes are not paid, the Government may seize their property of that portion of the property which is necessary to realize the money due to the Government.

**Modes of acquiring Ownership**

Under modern law, modes of acquiring ownership may be classified under two heads:

(*i*) Original mode; and

(*ii*) Derivative mode.

- **Original mode**: This mode is the result of some independent personal act of the acquirer himself. It is of following kinds:
    - **Absolute mode**: In this mode, ownership is acquired over previously ownerless object.
    - **Extinctive mode**: In this mode, there is extinction of previous ownership by an independent adverse act on part of the acquirer.
    - **Accessory mode**: In this mode, requisition of ownership is the result of accession.
- **Derivative mode**: When ownership is derived from a previous owner, it is called derivative acquisition of ownership. It is derived by any of the following modes:
    - **Title of prior owner**: In agreement, a title is acquired with the consent of the previous owner. It is only limited to contracts but includes all bilateral acts which create an interest. Such agreement may be either by grant or by assignment.
    - **Purchase**: A contract for sale does not confer title in immoveable property. As per Section 54 of the Transfer of Property Act, a contract for sale of immoveable property is a contract that such sale shall take place on terms settled between the parties. However, if a person has entered into possession under a contract for sale and is in peaceful and settled possession of the same with the consent of the person having the title thereto, he is entitled to protect his possession against the whole world.
    - **Gift**: It should be voluntary and without consideration and it may be movable or immovable. As per Section 123 of the Transfer of Property Act, the transfer by way of gift must be affected by a registered instrument signed by or on behalf of donor and attested by at least two witnesses, or by way of delivery.
    - **Succession**: In this regard, it has been held in several judgments that genuineness of will has to be established.

**KINDS OF OWNERSHIP:**

Ownership maybe of various kinds. Broadly, it may be classified under the following heads:-
(1) Vested and Contingent ownership.
(2) Sole and Co-ownership.
(3) Corporeal and Incorporeal ownership.
(4) Legal and Equitable ownership.
(5) Trust and Beneficial ownership.
(6) Absolute & Limited ownership.

**(1) vested and Contingent Ownership:-**

Ownership is either vested or contingent. It is vested when the entire events essential to vest property in the owner have happened and the owner's title is already perfect.

Thus if A sells a house to B for a price settled, the other formalities prescribed by law e.g., registration etc. are complied with, B becomes a vested owner of the house. A vested ownership does not depend upon the fulfillment of any condition but creates an immediate right through its enjoyment may be postponed to a future date, there is a transfer of property to A for life than to B, here Bs interest is vested one because B need not fulfill any condition precedent and his title is perfect, he is entitled to take possession the moment A dies.

Contingent ownership is conditional. In this, interest in the property is subjected to certain conditions or conditions. The vesting of the right in such cases depends upon the happening of such an event or fulfillment of such conditions.

Thus, if the property is transferred to A for life, if B marries C, B's interest is such that it cannot take place as soon as A dies because there is a condition which B is to fulfill viz., that he must marry A. Until B fulfills this condition is interest is contingent depending upon the fulfillment of the condition. The condition on which ownership depends may be either a condition precedent or condition subsequent. A condition precedent is one by the fulfillment of which a title is completed, a condition subsequent is one on the fulfillment of which a title already completed is extinguished."

**(2) Corporeal and incorporeal Ownership:-**

Corporeal ownership is that the ownership of a material thing and incorporeal ownership is that the ownership of a right. Ownership of a shop, land or a machine is corporeal ownership. Ownership of a patent, copyright, a trademark, right of way, etc. is incorporeal ownership. The distinction between corporeal and incorporeal ownership depends on the distinction between corporeal and incorporeal things.

Incorporeal ownership is ownership of intangible objects, which cannot be perceived and felt by the senses and which are intangible.
Incorporeal ownership includes ownership of intellectual property.

**(3)Trust and Beneficial Ownership:-**

Trust ownership is an instance of duplicate ownership. Trust property is a property owned by two persons at the same time. The relation between the two owners is such one among them is under an obligation to use his ownership for the benefit of the other. The ownership is called beneficial ownership. The ownership of a trustee is nominal and not real but within the eye of the law, the trustee represents his beneficiary.

**(4)Legal and Equitable Ownership:-**

This classification of ownership is recognized in England. This difference between the two of the ownerships has its origin in the rules of common law and equity.

Originally legal ownership is that which had its origin in the rules of common law and equitable ownership is that which resulted from the rules of equity. In many cases, equity recognizes ownership where the law does not recognize ownership owing to some legal defect.

There is no distinction between legal and equitable estates in India. Under the Indian Trusts Act, a trustee is the legal owner of the trust property itself. However, he has the right against the trustees to force them to carry out the provisions of the trust.

**(5)Sole Ownership and Co-ownership:-**

Ownership may be either sole or duplicate. When it is exclusively vested in one person it is called sole ownership. When it is jointly held by two or more persons at the same time, it is called duplicate or co-ownership.

The chief instances of duplicate ownership are;
Co-ownership;
Trust and beneficial ownership;
Legal and equitable ownership;
Vested and contingent ownership.

Co-ownership that is to say, ownership shared by several persons with equal or co-ordinate results may be of two kinds, namely:-
Joint ownership, and
Ownership in-common.

**(6)Absolute and limited ownership:-**

An absolute owner is the one who is vested all the rights over a thing to the exclusion of all. When all the rights of ownership, i.e. possession, enjoyment, and disposal are vested in a person without any restriction, the ownership called absolute. And limited ownership means when there are restrictions as to user, duration or disposal.

For example, before the enactment of the Hindu Succession Act, 1956, a woman had only limited ownership over the property because she held the property just for her life and after her death; the property passed on to the last heir or last holder of the property. Another example of limited ownership in English law is life tenancy when a property is held only for life.

## 4.4 Difference between ownership and possession :

As per Salmond ownership can be described as the relation between a person and any said object which forms the subject matter of this said ownership. Ownership also consists of a complex web of many rights all of which are rights in rem, and not merely rights against persons.

So ownership is actually the sum total of the rights of possession, the right of disposition and even the right of destruction. There are six essential characteristics of ownership as per the law. They are as follows,

- The owner has the absolute right to possession. It is immaterial if the owner in actual possession of the object, as long as he has the right of possession.
- The owner has the liberty or the right to use and enjoy the benefits of the said object. No one can interfere with his right to use the object he owns.
- Ownership also means that the owner has the right to exhaust the object while using it.
- And he also has the right to destroy or alienate the object. This means he can destroy or dispose of the object during his lifetime or via his will. This right is sometimes restricted by law.
- Ownership is also for an indeterminate duration. Possession or the right to use is for a limited period, but the ownership of an object is for an indeterminate period of time.
- And finally, ownership is residuary in character. So for example, if the owner leases the object, or gives it for use, etc. he still remains the owner.

**Possession**

Salmond defines possession (in legal terms) as the continuous exercising of a claim, to the exclusive use of an object or a thing constitutes possession of the object. In simpler words, if a person has apparent control of an object and apparent power to exclude others from the use of the object, then we can say he has possession.

Now it is a de facto relation between a man and an object. So a man can possess a thing he doesn't own. Say for example the possession of a property that he has leased from someone (who will be the owner). And the opposite is also true. One can own some object and not possess it.

| Sr. no. | Ownership | Possession |
|---|---|---|
| **1.** | Ownership is an **absolute** authority over the property. | Possession is **physical** control over the property. |
| **2.** | It holds unlimited and uncontrolled rights over the property. | It is a limited concept of right. |
| **3.** | It is a union of ownership and possession | It is a single concept giving no right of ownership. |
| **4.** | It is a **de jure** concept. | It is a **de facto** concept. |
| **5.** | Ownership right is a wider concept. | Possession is a right of consumption only. |
| **6.** | It is a perfectly **legal right**. It shows legal situation. | It is a **possessory right** only. It shows real position. |
| **7.** | Transfer of ownership is not an easy process, but it needs legal or formal procedures, prerequisites of registration. | Possession is a comparatively easy process and practically no need to register and such formalities like ownership. |
| **8.** | It has no technical obstructions to transfer. | It faces the technical obstacles for transfer. |
| **9.** | Ownership cannot be carried out practical use in the absence of possession. | Possession may be a ground for the ownership as well. |
| **10.** | It consists the bundle of rights and all the rights are right in rem. | It is prima facie a proof or evidence of ownership. |
| **11.** | It is a guarantee by the law. | It is a physical control over it. |

**Kinds of Property** :

The true definition of "property" covers a wide range of concepts. Not only does this encompass monetary wealth and other tangible things, but also intangibles like intellectual property rights, stocks, and so on. These assets, both tangible and intangible, can be anything that generates wealth or income. Possession, control, exclusion, income, and disposition are the most frequent types of legal property rights that an individual may have over an owned piece of property.

**Types Of Properly Under Law**:

To Begin With, Firstly, Remember These Major Types Of Property:

Movable property and Immovable property.

Tangible property and Intangible property.

Private property and Public property.

Personal property and Real property.

Corporeal property Incorporeal property.

(1)Movable Property:

Movable property can be moved from one place to another without causing any damage. These are the legislations which define movable property. Section 2(9) of the Registration Act, 1908:

"Movable property" includes standing timber, growing crops and grass, fruit upon and juice in trees, and property of every other description, except immovable property."

Section 22 of India Penal Code,1860:

"Movable property" are intended to include corporeal property of every description, except land and things attached to the earth or permanently fastened to anything which is attached to the earth." Section 3(36) of the General Clause Act,1897- "Movable property" shall mean the property of every description, except immovable property."

(2)Immovable Property:

Immovable property is one that cannot be moved from one place to another place. This is the property which is attached to the earth or ground. Section 2(6) of the Registration act, 1908 states that an "Immovable property means and includes land, buildings, hereditary allowances, rights to ways, lights, ferries, fisheries, or any other benefit to arise out of the land, and things attached to the earth or permanently fastened to anything which is attached to the earth, but not standing timber, growing crops nor grass."

This property of a value of more than Rs. 100/- is needed to be registered for which a registration fee and stamp duty are to be paid. This property can be considered an ancestral joint property.

(3)Tangible Property

Tangible property has a physical existence and can be touched. This type of property can be moved from one place to another, without causing any damage. From this, we can say that this property is movable in nature. Examples: cars or other vehicles, books, timber, electronic devices, furniture, etc.

(4)Intangible Property:

Intangible property does not have any physical existence. These are properties with current or potential value, but no intrinsic value of their own & cannot be touched or felt but holds value. Examples include intellectual property like copyright, patent or GI, stock and bond certificates. Franchises, securities, software & many more.

(5)Public Property:

Public property, as we can easily predict, means the property owned by the State for the Indian citizens. It belongs to the public with no claim from an individual. The government or any assigned community generally manages these properties for public utility. A few common examples can be Government hospitals, parks, public toilets, etc.

(6)Private Property:

As the name suggests, private property permits a non-government body to own the property. It is property owned by a juristic person for their personal use or benefit which can be of any nature tangible or intangible, movable or immovable. Common Examples include apartments, securities, trademarks, private wells, etc.

(7)Personal Property:

The personal property acts like an umbrella which includes all types of property. Individuals own this kind of property, be it either tangible or intangible.

(8)Real Property:

Real property, also called real estate property, includes land and any development made on such land. This kind of property is covered in immovable property. But why is this covered in immovable property? See, for example, roads, mines, buildings, factories, crops, etc, which are created by development, are all fixed with the land. This is immovable property, + any development on it, a further deliberation of immovable property is a real property. Other examples: Building (attached to the earth) using materials like cement, steel, mines, crops, etc.

(9)Corporeal Property:

Don't get confused here. Corporeal property is any tangible property that can be touched and felt. If this is similar to tangible property, then why did a separate type of corporeal property come into existence? This is a tangible property but it is mainly the right of ownership in material things of such property. All kinds of tangible property can be considered corporeal property. it can be divided into two categories: movable and immovable property and personal and real property as it is ownership rights.

(10)Incorporeal Property:

Incorporeal property means all kinds of intangible property. Again, then why is such a category brought up? This type of property is also called intellectual property. It is an incorporeal right, meaning having legal rights over things that cannot be touched or felt.