SYLLABUS

No	Topic
1	Definition of Jurisprudence
2	Definition of Law and Kinds of Law
3	Justice and its kinds
4	Sources of Law

1	Natural law school
2	Analytical school, Imperative Theory of law, Pure Theory of law
3	Historical school
4	Sociological school
5	Realistic school
6	The ancient : The concept of 'DHARMA'
7	Feminist – Schools of Jurisprudence

1	Legislation
2	Precedents – concept of Stare Decisis
3	Customs

1	Rights: kinds, meanings
2	Duty: meaning and kinds
3	Relation between right and duty
4	Nature of personality
5	Status of the unborn, minor. lunatic, drunken and dead persons
6	Corporate personality : Dimension of the modern legal personality: Legal personality of non-human beings

1	Ownership and possession
2	Its kinds
3	Title
4	Liability
5	Obligations

JURISPRUDENCE – THE PHILOSOPHY OF LAW
UNIT I
INTRODUCTION

Understanding Jurisprudence amounts to laying a strong foundation on which a towering building can stand that have the capability of withstanding the pressures of all forces working in any society. Since law is a means to do justice, studying jurisprudence contributes to a deeper understanding of law by providing the tools to engage in rational criticism of the law.

All the stakeholders in the legal arena have to compulsorily understand the jurisprudential nuances of the basic concepts, which constitute the 'essence of law' and continuously engage their attention in the legal administration endeavoring to bring about just social order.

Having dealt with the various schools and sources of law, this compilation also contains basic understanding of Justice, Right, Person, Duty, and Possession etc.

The constituents being delivered are the unprecedentedscripts of the intellectuals who have expounded these for their understanding/s and implication/s. The objective of the course outline is to inform the reader with these background materials and to stimulate them to have an independent critical analysis of social facts with originality.

DEFINITIONS OF JURISPRUDENCE

Defining any term is just a way to outline the best possible ways to explore the meaning of term in focus. Definitions, even on a singular term, can be given by many scholars in their own varied ways, but their ultimate reflection comes to end on a common objective. Out of ocean of definitions available, some of the vital definitions to be kept in mind are outsourced as under mentioned:

Ulpian

The Roman Jurist, Ulpian, defined Jurisprudence as "**The observation of things human and dive, the knowledge of just and unjust.**"

Salmond

Salmond defines Jurisprudence as the "**Science of the first principles of civil law**".

In Salmond's point of view, Jurisprudence thus deals with civil law or the law of the state. This kind of law consists of rules applied by courts in the administration of justice.

There are three kinds of laws that govern the conduct of human in a society:

- Theologian Laws - derive their authority from a divine or superhuman source intended to regulate human conduct as well as beliefs and are enforced by spiritual rewards or penalties in the other world (ultra-mundane sanctions)
- Moralist Laws - Man-made that exist in all societies, both primitive and most civilized. There is no definite authority to enforce the laws, but the public.
- Jurist Laws - Regulates external human conduct only and not inner beliefs. They can exist in politically organized societies, which has a Government. They are enforced by courts or judicial tribunals of the society which applies a variety of sanctions ranging from fines to capital punishments.

According to Salmond, Jurisprudence is the science of first principles of jurist law or in Salmond's words civil law.

Austin

Austin defines Jurisprudence as the "**Philosophy of Positive Law**".

Positive Law means the law laid down by political superior to regulate the conduct of those subject in his authority. The positive law is identical to civil law. However, the term Philosophy is misleading. Philosophy is the theory of things, man and divine, while Jurisprudence only deals with man-made law.

Holland

Holland defines Jurisprudence as "The Formal Science of Positive Law". He says "Jurisprudence deals with the human relations which are governed by rules of law rather than with the material rules themselves."
Formal science differs from material science in the way that formal science deals with fundamental principles underlying and not concrete details.

Thus, the selective definitions of the term Jurisprudence.

DEFINITIONS OF LAW
Framing a question before focusing on the definition/s of law, every scholar must think of this question – "If law remains the species, what will be the genus of it?" The answer to the above question will develop the analytical understanding of law, among each and every scholar. The answer to this question comes to be as the basic source from which the law/s has been originated, vis-a-vis the Customs and Conventions. That is to say that law has been born out of its parents named as Customs & Conventions[1].

Under mentioned are some of the most significant[2] definitions, selected out of various available from different sources:

It is possible to describe law as the body of official rules and regulations, generally found in constitutions, legislation, judicial opinions, and the like, that is used to govern a society and to control the behaviour of its members, so Law is a formal mechanism of social control.
Legal systems are particular ways of establishing and maintaining social order.

"A body of rules fixed and enforced by a sovereign political authority."
- John Austin (Province of Jurisprudence Determined)

Hart defined law as a system of rules, a union of primary and secondary rules.
- Hart, H.L.A. (The Concept of Law, 1961)

"An embodiment of Reason", whether in the individual or the community'.
- Plato & Aristotle (the Greek Philosophers, supporting Natural Law)

"Nothing else than an ordinance of reason for the common good, made by him who has care of the community, and promulgated"
- St. Thomas Aquinas (the Italian Philosopher in Summa Theologiae)

"'The sum of the influences that determine decisions in courts of justice."
- Lord Browne – Wilkinson (The Senior Lord born in 1930)

CLASSIFICATION OF LAW/S
Law/s can be classified in two categories:
1. Functional category
2. Intellectual category

[1] Retrieved on the 19th day of July 2015 at 1600 Hours from the class notes (Constitutional Laws II) of LL.M. III Semester at National Law University, Delhi by Reverend Prof. S. Sacchidhanandam on September 26, 2012.
[2] 'Most significant' is used only with regards to the small arena of intellect present in the compiler of this material/s.

Dealing with the functional category, laws can be divided as under:

Criminal laws: designed to protect society as a whole from wrongful actions (police can take action)

1. **Traffic/road laws**
   - drink driving
   - speeding
   - illegal use of an aeroplane
   - driving in an unregistered vehicle
   - wilful damage of vehicles
   - not wearing a helmet
   - stopping for pedestrians
   - correct indicating
2. **Public order (peaceful and safe community)**
   - drug use
   - public decency (sleeping on the streets)
   - carrying of weapons in public
   - dry areas
   - rioting
   - protest marches (staying non-violent)
   - assault
   - defamation (writing things about people that are not true which harm their character)
3. **Property**
   - arson
   - trespass
   - larceny (theft)
   - littering
   - vandalism
   - intentional damage
4. **People**
   - passive smoking
   - rape
   - murder
   - harassment
   - suicide
   - sexual abuse

Civil laws: help to solve problems which occur between individuals or groups (trained legal personnel and courts help solve)

1. **Contract law (agreements, responsibilities)**
   - not allowed to break a contract
   - marriage
   - fishing licences
   - misleading advertisements
2. **Employment law**
   - reason for firing someone
   - fair duties as an employer
   - equal opportunities
   - not to work over 40 hours in any one week (appropriate overtime penalties)
   - wrongful dismissal
   - age discrimination

3. **Family law**
   - abuse of children
   - catering for kids until they are 18 years old
   - domestic violence
   - custody of children
   - registration of birth
   - maintenance issues
4. **Law of Torts**
   - compensation (dog biting)
   - accidents involving other animals
   - others injuring themselves on your property

On the other hand, dealing with the **intellectual category,** law/s can be classified as under:

Intellectual sense of law/s, denotes uniformity and regularity of action/s. That is to say the relation derived from the nature of the things. Sir John Salmond has given an historical contribution to the classification of such laws, which are stated as under[3]:

Salmond has classified law in its widest sense in eight different kinds, which are as under:

1. Imperative Law:
It is a rule, which prescribes a general course of action imposed by some authority which enforces it by superior power either by physical force or any other form of compulsion.
The chief exponent of this kind of law is Austin. According to him positive law is a command, which obliges a person or persons to a course of conduct. A sovereign individual or sovereign body of individuals sets it to a person or persons in a state of subjection to its author. Being a command it must issue from a determinate person or group of persons with the threat of displeasure, if the rule were disobeyed.

2. Physical or Scientific Law:
According to Salmond physical laws or the laws of science are expressions of the uniformities of nature general principles expressing the regularity and harmony observable in the activities and operations of the universe. It governs the growth of bodies, the law of gravitation, the laws governing the planetary motion, etc.

3. Natural or Moral Law:
It is that portion of morality, which supplies the more important and universal rules for governance of outward acts of the mankind. In short, the law of nature is written by the lingers of nature in the hearts of mankind. It consists of the principles of natural right or wrong or the principles of justice in its widest sense.
It is also known as 'Divine Law' being the command of God imposed upon men, 'Unwritten Law' (not written on brazen tablets or on pillars), 'Universal or Common Law' (being of universal validity), Law of Reason (being established by that Reason which governs the world) and Eternal Law (being uncreated and immutable).

[3] Retrieved on the 19th day of July 2015 at 1645 Hours (exactly) from - http://www.studylecturenotes.com/social-sciences/law/124-kinds-of-law

4. Conventional Law:
It consists of rules or regulations of voluntary organizations, e.g., clubs, associations, etc. Such law acquires its force or validity from the agreement between the parties concerned. It may be noted here that conventional law when enforced by the State assumes the form of positive law.

5. Customary Law:
It comprises the reasonable customs and usages observed as a right from immemorial antiquity by a particular family or by society as a whole. According to Salmond by customary law here we mean any rule of action, which is actually observed by men any rule, which is the expression of some actual uniformity of voluntary action.

6. Practical or Technical Law:
It consists of rules for the attainment of a practical end, e.g., the laws of health, the laws of architecture, the rules for efficient conduct of any art or business, etc.

7. International Law:
It is an aggregate of rules and regulations recognised and accepted by civilised Suites in their relations with each other. According to Oppenheim it is the name for the body of customary and conventional rules, which are considered legally binding by the civilised states in their intercourse with each other.

8. Civil Law:
Salmond defines civil law as the "law of the State, the law of the land, the law of the lawyers and law courts". It is the law of the realm and has variously been named as municipal law, positive law or national law. It is the law in the strictest sense of the term. It is the main orbit round which Jurisprudence, the science of law, rotates and forms its subject matter.

JUSTICE & ITS KINDS
In this chapter we are concerned with issues of justice and its kinds. A striking feature of our society is its vast disparities in wealth, power and status. Are these disparities just? What moral principles should we use as the basis for our choice of legal institutions and arrangements to deal with social and economic inequality? Is it legitimate goal of Government to reduce poverty, using measures like progressive income and wealth taxes to redistribute resources from wealthier to poorer members of society? OR is it the case that there is a right to economic freedom which trumps all social goals, including the creation of a more just society, in which case any interference with economic freedom to reduce poverty would be difficult to justify or might not even be justifiable at all? There are Jurists like Jermy Bentham, John Rawls, Robert Nozick who has expounded there contributory theories to explain all these stigmas.

Justice is action in accordance with the requirements of some law. Whether these rules are grounded in human consensus or societal norms, they are supposed to ensure that all members of society receive fair treatment. Issues of justice arise in several different spheres and play a significant role in causing, perpetuating, and addressing conflict. Just institutions tend to instill a sense of stability, well-being, and satisfaction among society members, while perceived injustices can lead to dissatisfaction, rebellion, or revolution. Each of the different spheres expresses the principles of justice and fairness in its own way, resulting in different types and concepts of justice: distributive, procedural, retributive, and restorative.

These types of justice have important implications for socio-economic, political, civil, and criminal justice at both the national and international level[4].

Distributive justice[5], or economic justice, is concerned with giving all members of society a "fair share" of the benefits and resources available. However, while everyone might agree that wealth should be distributed fairly, there is much disagreement about what counts as a "fair share." Some possible criteria of distribution are equity, equality, and need. (Equity means that one's rewards should be equal to one's contributions to a society, while "equality" means that everyone gets the same amount, regardless of their input. Distribution on the basis of need means that people who need more will get more, while people who need less will get less.) Fair allocation of resources, or distributive justice, is crucial to the stability of a society and the well-being of its members. When issues of distributive justice are inadequately addressed and the item to be distributed is highly valued, intractable conflicts frequently result. This is the essence of the conflicts playing out across Europe and in United States politics in 2012-2013--over taxes, deficits, "austerity programs," jobs, rights of labor, etc.

Procedural justice[6] is concerned with making and implementing decisions according to fair processes that ensure "fair treatment." Rules must be impartially followed and consistently applied in order to generate an unbiased decision. Those carrying out the procedures should be neutral, and those directly affected by the decisions should have some voice or representation in the decision-making process. (See the essay on public participation.) If people believe procedures to be fair, they will be more likely to accept outcomes, even ones that they do not like. Implementing fair procedures is central to many dispute resolution procedures, including negotiation, mediation, arbitration, and adjudication.

Retributive justice[7] appeals to the notion of "just desert" -- the idea that people deserve to be treated in the same way they treat others. It is a retroactive approach that justifies punishment as a response to past injustice or wrongdoing[8]. The central idea is that the offender has gained unfair advantages through his or her behavior, and that punishment will set this imbalance straight. In other words, those who do not play by the rules should be brought to justice and deserve to suffer penalties for their transgressions. The notion of deterrence also plays in here: the hope is that the punishment for committing a crime is large enough that people will not engage in illegal activities because the risk of punishment is too high. In addition to local, state, and national justice systems, retributive justice also plays a central role in international legal proceedings, responding to violations of international law, human rights, and war crimes.

However, because there is a tendency to slip from retributive justice to an emphasis on revenge, some suggest that restorative justice processes are more effective. While a retributive justice approach

---

[4]More for information on justice, see: Morton Deutsch, "Justice and Conflict," in The Handbook of Conflict Resolution: Theory and Practice,Morton Deutsch, Peter T. Coleman, Eric C. Marcus, eds. (John Wiley & Sons, 2011). http://books.google.com/books?id=rw61VDID7U4C

[5] Retrieved on the 19th day of July 2015 at 1700 Hours (exactly) from - http://www.beyondintractability.org/essay/types-of-justice

[6] Supra note 4

[7] Ibid

[8]See the chapter "Retributive Justice and the Limits of Forgiveness in Argentina," in Mark R. Amstutz, The Healing of Nations: The Promise and Limits of Political Forgiveness, (Rowman & Littlefield, 2005). http://books.google.com/books?id=gTFnh2GuD8EC

conceives of transgressions as crimes against the state or nation, restorative justice focuses on violations as crimes against individuals. It is concerned with healing victims' wounds, restoring offenders to law-abiding lives, and repairing harm done to interpersonal relationships and the community. Victims take an active role in directing the exchange that takes place, as well as defining the responsibilities and obligations of offenders. Offenders are encouraged to understand the harm they have caused their victims and take responsibility for it. Restorative justice aims to strengthen the community and prevent similar harms from happening in the future. At the national level, such processes are often carried out through victim-offender mediation programs, while at the international level restorative justice is often a matter of instituting truth and reconciliation commissions[9].

Thus, the Justice and its kinds are explained in short length.

ELEMENTARY SOURCES OF LAW[10]

The thought of our day moves mainly along two lines: the evolution in all things wrought by time, and the correlation of forces, whether of matter or of mind. To those -interested in legal education, it has brought a new sense of the unity and permanence of what is essential in law, and of the passing and shifting character of all that is not essential in it. It has made law a larger thing. It has set in a larger place. It has correlated it to the whole family of social sciences, of which it is both child and king.

Legal science is the science dealing with the relations of man, as a member of organized political society, to that society and, through that society to mankind. But what is an organized political society? Out of what conditions does it arise? What differentiates it from human society at large? These questions reach far. They belong to the domain of jurisprudence, and must be studied wherever and whenever that is taught. But jurisprudence and law, as these terms are commonly used, are not convertible. Jurisprudence deals more with generals; law, more with particulars.

Law schools have for their main office the imparting of such a knowledge of the legal principles and rules[11] prevailing in, some one particular political community as will justify the learner in: professing his ability to expound and apply these in practice, against all comers, as occasion may arise.

What is it that has made the law of this particular society different from that of any other? In what does this difference consist? How shall principles and rules be so marshaled as best to show this? How shall their slow evolution be made clear? How much, of accident, how much of order, has there been in their development? What light can be thrown on this by History, by the Philosophy of History, by Psychology, by Physical Geography? But Law is both Science and Art-a philosophy and a trade. How does one best learn the trade-terms and trade-methods? How in a trade of word and argument does one best acquire that sleight of mind, which takes the place of sleight of hand in the trades of handicraft? Our trade-masters are the courts. How shall the apprentice be best taught to shape himself to such modes of approaching them as may serve most the advantage of clients-to such modes of learning the lessons

---

[9]For further clarification of the different forms of justice, including retributive, restorative, and procedural, see Jeffrey A. Jenkins's discussion on "Types of Justice," in The American Courts: A Procedural Approach, (Jones & Bartlett Publishers, 2011). http://books.google.com/books?id=yvT5SVwbakUC.

[10]Baldwin, Simeon E., "The Study of Elementary Law, the Proper Beginning of a Legal Education" (1903). Faculty Scholarship Series. Paper 4313. Retrieved on the 19th day of July 2015 at 1820 hours (partially) from http://digitalcommons.law.yale.edu/fss_papers/4313 additionally from: http://digitalcommons.law.yale.edu/fss_papers

[11] The greater part of this paper is taken from the annual President's address, delivered by the author before the Association of American Law Schools, August 26, i9o3. HeinOnline -- 13 Yale L.J. 1 1903-1904 YALE LAW JOURNAL.

they daily teach as will give him the real meaning of their judgments, the true ratio decidendi of their opinions?

Among English speaking peoples it is undisputed that Americans have thus far provided the best facilities for education for the bar. The force of circumstances drove them to it. Their system of government was one that rested, not on personal authority, not on historical tradition, not on political necessities, but on unwritten law, and it was a law higher than any which their legislatures could make or unmake. Who was to apply this higher law? Who was to say which, in any case of doubt, was the higher? On its proper understanding and executor, it's just administration, its adaptation and re-adaptation, from time to time, to fast changing social conditions, hung the safety of the State. For all this it looked to its lawyers-made by inevitable circumstances both a creative and a conservative governing aristocracy. They were to lead in its Constitutional Conventions, in its legislatures. They were alone to officer its courts.

With these things in view, the American law student, As soon as the United States attained political independence, was subjected to a careful training. It was at first found in the office of some leader of the bar. Here was he first set to reading such works as Montesquieu, Grotius, Puffendorf, Vattel, Hale's History of the Common Law, the Institutes of Justinian, and perhaps a few books of the Pandects, and then given Blackstone's Commentaries[12]. Whatever else might be omitted, in any case, Blackstone's Commentaries never were. Soon came the first Law School, that at Litchfield-, Connecticut, first opened in 1784, where instruction was given by elaborate lectures on the whole field of law, supported by references to leading cases in the reports. Later Law schools followed first the same method, and then added to it recitations from standard text-books. The great aim was to acquaint the student with the principles of law in such an order of arrangement, and with such reference to their historical development, as would best impress them permanently upon his mind. Cases were used mainly to support or illustrate antecedent propositions. They were regarded less as sources of law than as channels of law.

Bacon revolutionized the processes of philosophy with respect to the study of the physical world. He left them where Aristotle left them with respect to the study of reasoning from assumed premises to logical conclusions by pure laws of thought[13]. He left them as Aristotle left them, in their application to methods of legal education, and we have his own word for it. In his de Dignitate et Augmentis Scientiarum, the father of the inductive philosophy devoted a separate title' to the Sources of Law. Unless, he says, law is certain, it cannot be just. Hence, that law is best quae minimum relinquit arbitrio judicis.' His ideal to aim at was the formation of an official code of written law, stated with such clearness that he who runs might read it[14].

Meanwhile, for the better understanding of what the written law might leave doleful, the judgments of the highest courts were to be looked to as the surest guide. They were to be arranged and digested in order of time, not in that of their subject-matter, since not only the decisions, but the times in which they were pronounced, were to be considered in estimating their due authority. This work was to be done at public cost, and not by any of the judges, lest they should stuff the book too full of their own opinions[15]. Such works, however, were for the information of the lawyer or the citizen. So far as they set forth the rules of public law, they were also proper to be put in the hands of the student of law. Not so as

---

[12] Wood's HeinOnline -- 13 Yale L.J. 2 1903-1904 THE STUDY OF ELEMENTARY LAW.

[13] Works, VII, 458, Aphorisms LXXXI. Ibid

[14] Praeparendi sunt juvenes et novitii ad scientiant et ardua juris altius et conmnodius haurienda et imbibenda per institutiones. Ibid.

[15] See Sir William Hamilton's Lectures on Logic, Lect. XVII. -Lib. VIII. Cap. III. 3Works, 4 Ed. of 1803, VII, 44. HeinOnline -- 13 Yale L.J. 7 1903-1904 YALE LA;V JOURNAL

to private law. This must be taught by institutional treatises, set out in clear and plain order, "not omitting some subjects and dwelling too long on others, but touching upon each briefly, so that to a student afterwards coming to read the whole body of the law nothing may appear wholly new, but as that of which some little, notion had been previously imparted (levi aliqua notione praeceptum).

No one who reads this chapter of Bacon's philosophy will question his attitude towards the teaching of elementary law. To quote his very words: "Youths and novices are to be prepared for receiving and imbibing more deeply and conveniently the knowledge and the difficulties of jurisprudence by institutes." He would also have in each country a book setting forth its legal rules, and after each of them, which, is to be stated in brief and comprehensive words, adding illustrations and decisions of cases best fitted to explain it (decisiones casuum maxime luciden-tae ad explicationem).

In the same vein, he has a word of caution for us who are law teachers. Lectures, he says, on law, and the exercises of those who are devoted to the study of law, should be so framed and ordered as all to tend rather to quiet than exciting questions and controversies as to what the law is. For now, and from a remote antiquity, too, it has been a kind of contest between all law teachers how to multiply doubts and questions as to law, as if for the sake of showing how bright they were.' Bacon took pains himself to prepare an elementary law book for the benefit of students. His Elements of the Common Law, published in 1630, came at once into use as a text-book, and held its place as such until the close of the next century.' In his preface to that work, he observes that he could think of no way in which he could essay to pay his debt to his profession so well as by collecting the rules and grounds dispersed throughout the body of the laws of England, for-to quote his words[16]-"Hereby no small light will be given in new cases and such wherein there is no direct authority, to sound into the true conceit of law by the depth of reason; in cases wherein the authorities do square' and vary, to confirm the law and to make it received one way; and in cases where the law is cleared by authority, yet nevertheless to see more profoundly into the reason of such judgment and settled cases, thereby to make more use of them for the decision of other cases more doubtful; so that the uncertainty of law, which is the most principal and just challenge that is made to the laws of our nation at this time, will by this new strength laid to the foundation, somewhat the more settle and be corrected." His book sets forth certain rules, it will be recollected, each being followed by a number of illustrations, often taken from reported cases. To these cases, however, he did not refer, ' for, he says, "I judged it a matter undue and preposterous to prove rules and maxims, wherein I had the examples of Mr. Littleton and Mr. Fitzherbert, whose writings are the institutions of the laws of England; whereof the one forbeareth to vouch any authority altogether; the other never reciteth a book but when he thinketh the case so weak in credit of itself as it needeth surety."" A great American lawyer and law teacher, speaking in the same vein, has said that cases do not make principles: they only illustrate them; and that the well-trained student has a higher learning than they can furnish. "He does not," to quote his words, "need to wade through hundreds of volumes of books to see whether a particular point has been somewhere or other decided. He knows how it was decided, if it ever was, and how it ought to be decided if it never was.

The more details of the sources of law will be detailed in UNIT III.

[16] Praeparendi sunt juvenes et novitii ad scientiant et ardua juris altius et conmnodius haurienda et imbibenda per institutiones. Ibid. Ibid, 459, Aph. LXXXIV. 4Ibid, Aph. XCIII. 5 Works, IV, I-81. 8 Theophilus Parsons dissuaded John Quincy Adams, when a student in his office, from reading it, saying that it taught rules rather than principles. Proc. Mass. Soc., 2d Series, XVI, 412. HeinOnline -- 13 Yale L.J. 8 1903-1904 THE STUDY OF ELEMENTARY LAW.

UNIT II
SCHOOLS OF JURISPRUDENCE

Focusing on the various philosophies of Jurisprudence, there are six major schools through which we can study all this philosophies viz:

1. The Historical School of Jurisprudence
2. The Analytical School of Jurisprudence
3. The Philosophical School of Jurisprudence
4. The Comparative School of Jurisprudence
5. The Sociological School of Jurisprudence
6. The Synthetic School of Jurisprudence

Elaboration:

1. **The Historical School of Jurisprudence:**

   Contributors (major): Henery Maine, Montesquieu, Hugo, Savigny etc.

   The task of this school is to deal with the general principles governing the origin and development of law, and with the influences that affect the law. This school points out to the history of first principles and conceptions of the legal system. From this school of jurisprudence one can know the origin, sources and development of law, together with the origin and development of various societies.
   According to Sir Henry Maine, Montesquieu may easily be considered as the first jurist of this school, who in his 'Espirit Des Lois' (spirit of the laws) has made a very remarkable contribution to human knowledge. His only defect was that he paid too much importance to the accidental and external causes in framing of the laws, and thus failed to see the importance of the qualities of human nature or race which go to make and develop the law.

   Some of the important points to be focused for this school of jurisprudence are:

   a) Evolution/ development of law.
   b) Darvin theory of living is the base.
   c) Changing needs of the society.
   d) Law is the dynamic nature, which change according the needs of the society.
   e) Law has the organic character.
   f) Every thing has a natural selection.
   g) The positive law must conform were not principles of morals but principles of customary action. They could be traced not by reasoning but by historical study.
   h) They reject all the creative principle of judge and jurist or law –giver in making of law.
   i) Evolution of law from the primitive legal institutions of the ancient communities.

The Historical school, thus made history as important as reason in the development of law. Its only defect is that it has identified law with custom, which is actually not law, but best 'quasi law'.

2. **The Analytical School of Jurisprudence:**

   Contributors (major): Bentham, Austin, Salmond etc.

The Analytical School is positive in its approach to the legal problems in the society. It is not concerned with the ideals and takes the law as given by the state, whose authority it does notquestion. The legal system is thus made water-tight against all ideological intrusions,and all legal problems are couched in terms of legal logic. Its purpose is only to analyze the first principles of law-without reference either to their historical origin or development or to their ethical significance or validity.

The Analytical School has made several important contributions, which can be summarized as follows:

1. Positive law and ideal law have been kept strictly distinct. It has thus analyzed the concept of civil laws and established its relationship with other forms of law.
2. All positive law is deduced from a clearly determinable lawgiver, e.g. sovereign.
3. This school also lays down the essential elements that go to make up the whole fabric of lawe.g. State Sovereignty and the administration of justice.
4. The analytical school investigates about each source from which the law proceeds.
5. It inquires the scientific division of the whole fabric of law.
6. It also analyses the concept of legal rights, together with division of rights.

It also considers such allied problems like property, possession, obligations, contracts, trusts, incorporation, intention, motive and negligence that directly or indirectly affect the fabric of law.

7. It favors codification of laws.

3. **Philosophical Jurisprudence:**

Contributors (major): Bacon, Grotius, Spinoza and Kant.

Ethical jurisprudence is a branch of legal philosophy, which approaches the law from the viewpoint of its ethical significance and adequacy. It deals with the law as it ought to be an ideal state. It investigates the purpose of law and the measure and manner in which that purpose is fulfilled. It concerns itself chiefly with the relation of law to certain ideas which law is meant to achieve. This area of study brings together moral and legal philosophy. In German, ethical jurisprudence is known as Rechtsphilosophie and in French it is known as philosophie du droit.

Understated are some of the points, which are to be kept in mind while studying philosophical/ethical jurisprudence:

Ethical School, Metaphysical School or Law of Nature School: The philosophical school concerns itself chiefly with the relation of law to certain ideals which law is meant to achieve. It investigates the purpose of law and the measure and manner in which that purpose is fulfilled. The philosophical jurist regards law neither as the arbitrary command of a ruler nor as the creation of historical necessity. To him law is the product of human reason and its purpose is to elevate and ennoble human personality.

Relation between Ethics and Jurisprudence: The philosophical school regards the perfection of human personality as the ultimate objective of law. The science of Ethics, which deals with the principles and moral considerations affecting man's conduct and constituting his criterion of right and wrong, also sets for itself the goal of making man virtuous and so attain perfection. Since the ultimate objectives of jurisprudence and ethics are thus co-incident, philosophical jurists seek to differentiate between the subject-matter of the two sister sciences.

Ethics does not rely upon Compulsion: The German philosopher Immanuel Kant made a clear distinction between law and ethics. In "Lectures on Ethics" Kant observes: "Ethics concerns itself with the laws of free action in so far as we cannot be coerced to it, but the strict law concerns itself with free action in so far as we can be compelled to it". Ethics is the science of virtue while law belongs to the science of right. Ethics aims at the elevation of man's inner life while law seeks the regulation of his external conduct. Organised society should not exercise compulsion to make man virtuous. Compulsion should be confined to the reguation of man's external conduct. "Woe to the political legislator", said Kant, "who aims in his Constitution to realise ethical purposes by force, to produce virtuous intuition by legal compulsion. For in this way he will not only effect the very opposite result, but will undermine and endanger his political Constitution as well".

The Common Ground of Law and Ethics: Salmond points out that "philosophical jurisprudence is the common ground of moral and legal philosophy, of ethics and jurisprudence". The justification for this statement would be found when we examine the concusions of philosophical jurisprudence.

The philosophical school rivets its attention on the purpose of law and the justification for coercive regulation of human conduct by means of legal rules. Immanuel Kant has shown that the chief purpose of the law is the provision of the field of free activity for the individual without interference by his fellowmen.

4. **The Comparative School of Jurisprudence:**
Contributors (major): Ihering etc.
This school is essentially concerned with the comparative study of the systems of jurisprudence in different countries of the world. The Germans have successfully adopted this method. Ihering as a representative of this school regards laws as an efficient means to an end, which should be for the good of humanity.
The comparative method aims at the collection, examination and collation of the notions, doctrines and institutions, which are found in various legal systems worthy of a comparative study. Its purpose is to distinguish what is local or accidental or transient in legal doctrine from what is general, essential and permanent.
The material at the disposal of comparative jurists is not very extensive. A great many of the mature systems of law have been profoundlyinfluenced by and are in fact based upon the Roman law. The scope of the comparative method thus becomes very limited indeed. As Viscount Bryce observes: "In practice the comparative method becomes an examination of Roman conceptions with the help of light from England in those departments of English law which have been least influenced by Rome and of some glimmers from the East and from the laws of ancient European people". Comparative jurisprudence is thus only a broadened form of the older historical jurisprudence.
One system of law is compared with another either to understand the better course of development of each system or to better judge the practical merits of each of them. Otherwise, a part from such purposes, the comparative study of law would be futile.

5. **The Sociological School of Jurisprudence:**
Contributors (major): Roscoe Pound, Paton etc.
The sociological questions in jurisprudence are concerned with the actual effects of the law upon the complex of attitudes, behaviour, organization, environment, skills, and powers involved in the maintenance of a particular society. Conversely, sociological jurisprudence is

also concerned with the effects of social phenomena on both the substantive and procedural aspects of law, as well as on the legislative, judicial, and other means of forming, operating, changing, and disrupting the legal order. The fact that people in a given time and place hold particular ideas and values, including ideals of justice, is itself a fact the relation of which to law must be studied; but the focus is sharply different from that in the study of theories of justice. Its focus is descriptive, not normative; it is concerned with what is or with what goes on, not with what ought to be or ought to go on.

This school is comparatively modern, and it devotes itself to the study of law as a social phenomenon, and tries to examine the consequences of law on homo-sapiens in civilized societies.

It deals with the study of social consequences of law and with the observation of social phenomenon. It also studies about crime and punishment in its important branch called Criminology.

The jurist's function is to formulate these jural postulates for the civilization of the time and place by observation of the phenomena of a given society and objective synthesis of the principles concerning human conduct which such society presupposes. Under the guidance of these jural postulates, the legislators and judges are to formulate and shape the development of the law. While Kohler recognizes the weakness of abstract logical propositions, he is never definite as to the nature of the phenomena from which the postulates are to be drawn. Dean Pound was considerably influenced by the Comtian sociologist Lester F. Ward. Ward's description of animated nature as burning with desires and desires itself as the dynamic agent in society furnished a foundation for a theory of interests. Ward's phrase "the efficacy of effort" was taken over by Pound as indicative of the endeavor, which men should make to master internal and external nature. The influence of William James and pragmatism, however, is more specifically avowed. It was from James and pragmatism that Pound derived the ethical and philosophical basis for his theory of interests.' Therefore, some consideration should be given to James's ethical ideas[17].

Considering the meaning of the terms "good," "ill," and "obligation," James reasons that these words can have no meaning in a merely material universe, where no sentient life exists." They take on meaning only in relation to the consciousness of sentient beings. When one sentient being comes into existence, there is a chance for good and evil to exist. "Moral relations now have their status in that being's consciousness. So far as he feels anything to be good, he makes it good." Being good for him, it is "absolutely good," "for he is the sole creator of values in that universe, and outside of his opinion things have no moral character at all."" If there are two individuals in this universe, you cannot find any ground for saying the opinion of one is more correct than that of the other or that either has the "truer moral sense." Such a world is a "moral dualism," and if there are many such persons, a "pluralism." The philosopher, therefore, to obtain a hierarchical scheme of values "must trace the ought itself to the de facto constitution of some existing consciousness, behind which, as one of the data of the universe, he as a purely ethical philosopher is unable to go." Such consciousness must make right and wrong such by feeling it to be so. If one thinker were divine, the others (human) would accept him as a model, but even here the question would remain as to the ground of the obligation.

James concludes that: the moment we take a steady look at the question, we see not only that without a claim actually made by some concrete person there can be no obligation, but that there is some obligation wherever there is a claim[18].

[17] Retrieved on the 20th day of July 2015 from, 'The Sociological Jurisprudence of Roscoe Pound (Part I)' by Gardner.
[18] Ibid.

6. The Synthetic School of Jurisprudence:

Contributors (major): Dr. M.J. Sethna

This school is most recent school of jurisprudence founded in India in 1955 by an eminent Indian Jurist, Dr. M.J. Sethna.

This school of jurisprudence attempts to arrive at a harmonious blend of all the other schools of jurisprudence, and in the words of founder, Dr. Sethna, "…..the jurists of 20th century would turn their attention more and more to synthetic jurisprudence….. It is no use regarding jurisprudence as merely analytical or merely historical and so on. Jurisprudence should be, at the same time analytical, historical, comparative, philosophical and sociological".

Dr. Sethna, classifies India as afederal state, with a "rigid" constitution-that is, the amendment of theconstitution is procedurally more complex and cumbersome than the amendmentof other statutes-and this is certainly at least superficially true, butIndia and its constitution are so interesting that they may warrant a moreelaborate description. It is noteworthy, for instance, that the Indian constitutiondoes not use the word "federation," and that it distributes powersbetween the central and state government in an unusual, not to say uniquemanner. The central legislature has exclusive jurisdiction over foreign affairs,defense, transportation and communications, etc.; the states have powerover public health, education, local government, etc.; and there is also alist of certain areas over which there is concurrent jurisdiction-criminallaw, marriage, and labor legislation, for example. In case of a conflict, ofcourse, the laws enacted by the central legislature prevail, as is essential toany form of federalism. However, the central legislature may, by the enactmentof an ordinary statute, create new states and change the boundariesof old ones; there are also provisions under which the central governmentcan take over not only the executive, but also the legislative functions ofa state in the event of an emergency. The constitution is probably morefederal than unitary, but its principal interest lies in those aspects in whichit is neither, and in particular the broad emergency authority given thecentral government at the expense of the states. Again, it seems fair tocharacterize the Indian constitution as rigid, since it cannot, like those, whichfollow the British practice, be amended in the same manner as other statutes[19].

On the other hand, most constitutions which have been adopted since WorldWar II have probably departed from the British model to a greater or lesserdegree, and in India there are constitutional amendments which can be putinto effect without reference to either the state legislatures or the electorateitself. In this respect, therefore, it would appear that the constitution wasless rigid than that of the United States or Australia--countries which aregenerally regarded more or less as models of federalism-or even Switzerland,which is usually designated as a "confederation."[20]

[19] Kindly refer: Jurisprudence. By M. J. Sethna, Ph.D. (Bombay). Bombay, India: B. P. Lakhani, 2d ed. 1959. Pp. xliii, 689. RS 13.25. Dr. Sethna's book on jurisprudence.

[20] Ibid.

7. The Feminist School of Jurisprudence:

Contributors (major):
A philosophy of law based on the political, economic, and social equality of the sexes.

Overview

Feminist jurisprudence is a burgeoning school of legal thought that encompasses many theories and approaches to law and legal issues. Each strain of feminist jurisprudence evaluates and critiques the law by examining the relationship between gender, sexuality, power, individual rights, and the judicial system as a whole. As a field of legal scholarship and theory, feminist Jurisprudence had its beginnings in the 1960s. By the 1990s it had become an important and vital part of the law, informing many debates on sexual and Domestic Violence, inequality in the workplace, and gender-based discrimination at all levels of U.S. society.
Feminist jurisprudence intersects with a number of other forms of critical theories, most notably critical race theory and the study ofGay and Lesbian Rights. Moreover, the form of feminist thought that focuses on legal theory draws from feminism in other disciplines, including sociology, political science, history, and literature. Leaders in the feminist jurisprudence camps thus do not focus exclusively upon purely legal aspects of feminism.

Scholarship in Feminist Jurisprudence

Feminists also criticize mainstream jurisprudence as patriarchal. They say that male-dominated legal doctrine defines and protects men, not women. By discounting gender differences, the prevailing conceptions of law perpetuate patriarchal power. Because men have most of the social, economic, and political power, they use the system to subordinate women in the public spheres of politics and economics as well as in the private spheres of family and sex. The language, logic, and structure of the law are male created, which reinforces male values. Most troubling, these concepts and values are presented as and are widely perceived to be both neutral and objective.
For example, in determining liability in Negligence actions, the law crafted the "reasonable man" test. This "man" was a hypothetical creature whose hypothetical action, reaction, or inaction in any situation was the law's standard of reasonable conduct for real people in similar circumstances. Person in the name for this test, which might seem to resolve the problem, has replaced the gender-biased term man. But some feminist legal scholars have argued that a gender-neutral label merely avoids the fact that the test is based on assumptions of what a male would do in a situation. They propose that when an action involves a female, a court should apply a "reasonable woman" test. By doing so, the court would recognize the differences in how males and females react to situations.

Current Issues in Feminist Jurisprudence

While the different camps of feminists in legal theory have focused upon different agendas, feminist jurisprudence has changed the way legislators and judges look at issues. By asking the "woman question," feminists have identified gender components and gender implications of laws and practices that are claimed to be neutral. Moreover, this school of thought has brought needed changes in the law to protect certain rights of women that have not been protected adequately in the past.

One of the most pressing issues in women's rights is the protection of women from domestic violence. According to some statistics, as many as four million women per year are the victims of domestic violence, and three out of four will be the victims of domestic violence in their lifetimes. Led by women's groups and other supporters outraged by these numbers, Congress enacted the violence against women act as Title IV of the Violent Crime Control and Law Enforcement Act of 1994 (Pub. L. No. 103-322, 108 Stat. 1796 [codified as amended in scattered sections of 18 and 42 U.S.C.A.]).

Feminist advocates support a broad interpretation of the types of advances that constitute sexual harassment. To many feminists, sexual harassment represents the domination men seek to exert over women and should be strictly prohibited. The issue has caused controversy because in some cases it is difficult to determine whether sexual advances are welcomed or not. Moreover, some cases have arisen because an employer or supervisor has told a dirty joke or displayed a sexually explicit photograph to a female employee. Women's groups maintain that sexual harassment laws should be liberally construed, even in these types of cases.

Thus, above all schools of jurisprudence plays a vital role in the whole study of law.

\

UNIT III
SOURCES OF LAW[21]

As the inevitability of law in life of state is well-known, the question automatically crops up as to how law originate? What are its sources?

By sources of law we mean its beginning as law and the point from which it springs or emanates. **As regards law there are six important sources.**

(A) Customs
Customs are oldest source of law. It is the outcome of habits. When the people follow a particular habit for a long time regularly and habitually, the custom comes into being. When written laws were more conspicuous by their absence in the primitive society, it was customary laws that regulated human conduct in the primitive society. It is said that kings have no power to create custom and perhaps less to destroy it. Customs largely influence the legal system of a state and the state gets rid of the bad customs like Sati, Polygamy, and Dowry etc. only by means of legal impositions. The United Kingdom provides the best example of customary laws which are found in the common law of England. In the United Kingdom the law and custom are so intimately connected with each other that the violation of convention custom will lead to the violation of law.

(B) Religion
The religion is another important source of law. It played an important role in the primitive period when men were very much religious minded and in the absence of written laws the primitive people obeyed religion thinking it of divine origin. In the medieval period, most of the customs that were followed were only religious customs. Even today the Hindu Laws are founded on the code of Manu and the Mohammedan Laws are based on the Holy Koran. The religious codes become a part of the law of the land in the state incorporates the religious codes in its legal system.

(C) Judicial Decisions
Since the dawn of the human civilization the dispute between two parties is referred to a third party who acts as the arbiter. Both the parties generally obey his decision. The arbiter may be a tribal chief or a priest. But with the passage of time, the judicial organ of the state is given power to decide cases between the parties. While deciding a case and pronouncing a judgment, the judges generally apply their own common sense and justice. This is known as Judge-made laws or case laws. Justice Holmes commented,"Judges do and must make laws". The principle by which a judicial decision becomes a precedent is known as "Stare Decisis".

(D) Scientific commentaries
Chief Justice Hughes of the U.S.A. opines that "We are living under a constitution and the constitution is what the judges say it is". The law needs interpretation and the scientific commentaries and interpretations by eminent jurists have contributed a lot for the evolution of a legal system. The views of Blackstone in the U.K., Kent in the U.S.A. have made tremendous impact on the legal system of their respective countries. The opinions of these expert legal luminaries are always kept in high esteem by the judges and the courts.

[21] Kindly refer 'Code of Hammurabi' for details.

(E) Equity

The term 'equity' literally means 'just', 'fairness' and according to 'good conscience'. When the existing law is inadequate or silent with regard to a particular case, the judges generally apply their common sense, justice and fairness in dealing with such cases. Thus, without 'equity' the term law will be devoid of its essential quality.

(F) Legislation

This is the most important and modern source of law. The legislature is that organ of the state whose primary function is to make laws. To Leacock the legislatures deliberate, discuss and make laws. Thus, law can be defined as the opinion of the majority legislators. They are recorded in the Statute Book. When the legislature is not in session, the executive is empowered to issue ordinances, decrees etc., which are as good as, the laws made by the legislatures.

Besides the above six sources of law we can add two more sources of law in the present days. The executive in a parliamentary democracy has the support of the majority legislators in the legislature enabling it to make laws according to its choice. The executive in a presidential system can influence legislation in the floor of the legislature through its party men. With the advent of time, the legislature is required to make laws in a large number of subjects. Due to paucity of time, the legislature makes laws in the skeleton form and the executive adds the flesh and blood to it. This is termed as 'delegated legislation which has considerably enhanced the role of the executive in the field of legislation. Public opinion in this age of democracy plays a vital role in the process of lawmaking. In Switzerland, with direct democracy, public opinion is reflected through Landsgeminde, Referendum and Initiative, which paves the way for making laws for the state.

Austin said that the term *'source of law'* has three different meanings:

1. This term refers to immediate or direct author of the law which means the **sovereign in the country**.
2. This term refers to the **historical document** from which the body of law can be known.
3. This term refers to the causes that have brought into existence the rules that later on acquire the force of law. E.g. customs, judicial decision, equity etc.

Historical Jurists like ***Von Savigny, Henrye Maine, Puchta etc.***believed that **law is not made but is formed**. According to them, the foundation of law lies in the common consciousness of the people that manifests itself in the practices, usages and customs followed by the people. Therefore, for them, customs and usages are the sources of law.

Sociological Jurists,protest against the orthodox conception of law according to which, **law emanates from a single authority in the state**. They believe that law is taken from many sources and not just one.

Ehlrich said that *at any given point of time, the centre of gravity of legal development lies not in legislation, not in science nor in judicial decisions but in the society itself.*

Duguit believed that law is not derived from any single source as the basis of law is public service. There need not be any specific authority in a society that has the sole authority to make laws.

Salmond has done his own classification of sources of law, as under:

1. **Formal Sources- A Formal Source is as that from which rule of law derives its force and validity**. The formal source of law is the **will of the state** as manifested in statutes or decisions of the court and the authority of law proceeds from that.

2. **Material Sources**- Material Sources are those from which is derived the matter though not the validity of law and the matter of law may be drawn from all kind of material sources.

a. **Historical Sources**- Historical Sources are rules that are subsequently turned into legal principles. Such source are first found in an Unauthoritative form. Usually, such principles are not allowed by the courts as a matter of right. They operate indirectly and in a mediatory manner. Some of the historical sources of law are:

i. **Unauthoritative Writings**

ii. **Legal Sources**- Legal Sources are instruments or organs of the state by which legal rules are created for e.g. legislation and custom. They are authoritative in nature and are followed by the courts. **They are the gates through which new principles find admittance into the realm of law**. Some of the Legal Sources are:

a. Legislations
b. Precedent
c. Customary Law
d. Conventional Law- Treatises etc.

Charles Allen said that Salmond has attached inadequate attention to historical sources. According to him, historical sources are the most important source of law.

Keeton said that state is the organization that enforces the law. Therefore, technically State cannot be considered as a source of law. However, according to Salmond, a statute is a legal source which must be recognized. Writings of scholars such Bentham cannot be considered as a source of law since such writings do not have any legal backing and authority.

Legal sources of English Law- There are two established sources of English Law:

1. **Enacted Law having its source in legislation**- This consists of statutory law. **A Legislation is the act of making of law by formal and express declaration of new rules by some authority in the body politic which is recognized as adequate for that purpose**.

2. **Case Law having source in Judicial Precedence**- It consists of common law that we usually read in judgments and law reporters. Precedent could also be considered as a source of law as a precedent is made by recognition and application of new rules by the courts whilst administering justice. Thus, Case Laws are developed by the courts whereas enacted laws come into the court *ab extra*.

3. **Juristic Law**- Professional opinion of experts or eminent jurists. These are also sources of law. Though, they are not much accepted.

Sources of Law: Are they sources of Right too?

A Legal Right means a fact that is legally constitutive of a right. A Right is the *de facto*antecedent of a legal right in the same way as a source of law is *de facto* antecedent of a legal principle.

Legislation- *'Legis'* means law and *'latum'* means making. Let us understand how various jurists have defined legislation.

1. **Salmond**- Legislation is that source of law which consists in the declaration of legal rules by a competent authority.

2. **Horace Gray**- Legislation means the forma utterance of the legislative organs of the society.

3. **John Austin**- There can be no law without a legislative act.

Analytical Positivist School of Thought- This school believes that typical law is a**statute** and legislation is the normal source of law making. The majority of exponents of this school **do not approve that the courts also can formulate law**. They do not admit the claim of customs and traditions as a source of law. Thus, they regard **only legislation as the source of law**.

Historical School of Thought- This group of gentlemen believe that **Legislation is the least creative of the sources of law**. Legislative purpose of any legislation is to give better form and effectuate the customs and traditions that are spontaneously developed by the people. Thus, **they do not regard legislation as source of law.**

Types of Legislation

1. **Supreme Legislation**- A Supreme or a Superior Legislation is that which proceeds from the sovereign power of the state. It cannot be repealed, annulled or controlled by any other legislative authority.

2. **Subordinate Legislation**- It is that which proceeds from any authority **other than the sovereign power** and is dependant for its continual existence and validity on some superior authority.

Delegated Legislation- This is a type of subordinate legislation. It is well-known that the main function of the executive is to **enforce the law**. In case of Delegated Legislation, executive frames the provisions of law. This is also known as executive legislation. The executive makes laws in the form of orders, by laws etc.

Sub-Delegation of Power to make laws is also a case in Indian Legal system. In India, the power to make subordinate legislation is usually derived from existing enabling acts. It is fundamental that the delegate on whom such power is conferred has to act within the limits of the enabling act.

The main purpose of such a legislation is to supplant and not to supplement the law. Its main justification is that sometimes legislature does not foresee the difficulties that might come after enacting a law. Therefore, Delegated Legislation fills in those gaps that are not seen while formulation of the enabling act. Delegated Legislation gives flexibility to law and there is ample scope for adjustment in the light of experiences gained during the working of legislation.

Controls over Delegated Legislation:

Direct Forms of Control -

1. **Parliamentary Control**
2. **Parliamentary Supervision**

Indirect Forms of Control -

1. **Judicial Control**- This is an indirect form of control. Courts cannot annul subordinate enactments but they can declare them inapplicable in special circumstances. By doing so, the rules framed do not get repealed or abrogated but they surely become dead letter as they become *ultra vires* and no responsible authority attempts to implement it.

2. **Trustworthy Body of Persons**- Some form of indirect control can be exercised by entrusting power to a trustworthy body of persons.

3. Public Opinion can also be a good check on arbitrary exercise of Delegated Powers. It can be complemented by antecedent publicity of the Delegated Laws.

It is advisable that in matters of technical nature, opinion of experts must be taken. It will definitely minimize the dangers of enacting a vague legislation.

Salient Features of Legislation over Court Precedents:

1. **Abrogation**- By exercising the power to repeal any legislation, the legislature can abrogate any legislative measure or provision that has become meaningless or ineffective in the changed circumstances. Legislature can repeal a law with ease. However, this is not the situation with courts because the process of litigation is a necessary as well as a time-consuming process.

2. **Division of function**- Legislation is advantageous because of division of functions. Legislature can make a law by gathering all the relevant material and linking it with the legislative measures that are needed. In such a process, legislature takes help of the public and opinion of the experts. Thus, public opinion also gets represented in the legislature. This cannot be done by the judiciary since Judiciary does not have the resources and the expertise to gather all the relevant material regarding enforcement of particular principles.

3. **Prospective Nature of Legislation**- Legislations are always prospective in nature. This is because legislations are made applicable to only those that come into existence once the said legislation has been enacted. Thus, once a legislation gets enacted, the public can shape its conduct accordingly. However, Judgments are mostly retrospective. The legality of any action can be pronounced by the court only when that action has taken place. Bentham once said that *"Do you know how they make it; just as man makes for his dog. When your dog does something, you want to break him off, you wait till he does it and beat him and this is how the judge makes law for men".*

4. **Nature of assignment**- The nature of job and assignment of a legislator is such that he/she is in constant interaction with all sections of the society. Thereby, opportunities are available to him correct the failed necessities of time. Also, the decisions taken by the legislators in the Legislature are collective in nature. This is not so in the case of Judiciary. Sometimes, judgments are based on bias and prejudices of the judge who is passing the judgment thereby making it uncertain.

5. **Form**- Enacted Legislation is an abstract proposition with necessary exceptions and explanations whereas Judicial Pronouncements are usually circumscribed by the facts of a particular case for which the judgment has been passed. Critics say that when a Judge gives Judgment, he makes elephantiasis of law.

Difference between Legislation and Customary Law:

1. Legislation has its source in theory whereas customary law grows out of practice.

2. The existence of Legislation is essentially *de Jure* whereas existence of customary law is essentially *de Facto*.

3. Legislation is the latest development in the Law-making tendency whereas customary law is the oldest form of law.

4. Legislation is a mark of an advanced society and a mature legal system whereas absolute reliance on customary law is a mark of primitive society and under-developed legal system.

5. Legislation expresses relationship between man and state whereas customary law expresses relationship between man and man.

6. Legislation is precise, complete and easily accessible but the same cannot be said about customary law. Legislation is *jus scriptum*.

7. Legislation is the result of a deliberate positive process. But customary law is the outcome of necessity, utility and imitation.

Advantage of Court Precedents over Legislation:

1. Dicey said that *"the morality of courts is higher than the morality of the politicians".* A judge is impartial. Therefore, he performs his work in an unbiased manner.

2. Salmond said that *"Case laws enjoys greater flexibility than statutory law. Statutory law suffers from the defect of rigidity. Courts are bound by the letter of law and are not allowed to ignore the law."*

Also, in the case of precedent, **analogical extension** is allowed. It is true that legislation as an instrument of reform is necessary but it cannot be denied that precedent has its own importance as a constitutive element in the making of law although it cannot abrogate the law.

3. **Horace Gray** said that *"Case law is not only superior to statutory law but all law is judge made law. In truth all the law is judge made law, the shape in which a statute is imposed on the community as a guide for conduct is the statute as interpreted by the courts. The courts put life into the dead words of the statute"*.

4. **Sir Edward Coke** said that *"the function of a court is to interpret the statute that is a document having a form according to the intent of them that made it"*.

5. **Salmond** said that *"the expression will of the legislature represents short hand reference to the meaning of the words used in the legislature objectively determined with the guidance furnished by the accepted principles of interpretation"*.

Precedent as a Source of Law:

In India, the judgment rendered by Supreme Court is binding on all the subordinate courts, High Courts and the tribunals within the territory of the country.

In case of a judgment rendered by the High Court, it is binding in nature to the subordinate courts and the tribunals within its jurisdiction.

In other territories, a High Court judgment only has a persuasive value. In ***Indo-Swiss Time Ltd. v. Umroo, AIR 1981 P&H 213*** Full Bench, it was held that *"where it is of matching authority, then the weight should be given on the basis of rational and logical reasoning and we should not bind ourselves to the mere fortuitous circumstances of time and death"*.

Union of India v. K.S. Subramanium- AIR 1976 SC 2435- This case held that when there is an inconsistency in decision between the benches of the same court, the decision of the larger bench should be followed.

What is the meaning of Precedent as a source of law?
Till the 19th Century, Reported Court Precedents were probably followed by the courts. However, after 19th century, courts started to believe that precedence not only has great authority but must be followed in certain circumstances. William Searle Holdsworth supported the pre-19th century meaning of the precedence. However, Goodheart supported the post-19th century meaning.

Declaratory Theory of Precedence- This theory holds that judges do not create or change the law, but they 'declare' what the law has always been. This theory believes that the Principles of Equity have their origin in either customs or legislation. However, critics of this theory say that most of the Principles of Equity have been made by the judges and hence, declaratory theory fails to take this factor into regard.

Types of Precedents
1. **Authoritative Precedent**- Judges must follow the precedent whether they approve of it or not. They are classified as Legal Sources.

2. **Persuasive Precedent**- Judges are under no obligation to follow but which they will take precedence into consideration and to which they will attach such weight as it seems proper to them. They are classified as Historical Sources.

Disregarding a Precedent- Overruling is a way by which the courts disregard a precedent. There are circumstances that destroy the binding force of the precedent:

1. **Abrogated Decision**- A decision when abrogated by a statutory law.

2. **Affirmation or reversal by a different ground**- The judgment rendered by a lower court loses its relevance if such a judgment is passed or reversed by a higher court.

3. **Ignorance of Statute**- In such cases, the decision loses its binding value.

4. **Inconsistency with earlier decisions of High Court.**

5. Precedent that is *sub-silentio* or not fully argued.

6. **Decision of equally divided courts**- Where there is neither a majority nor a minority judgment.

7. **Erroneous Decision**

Custom as a Source of Law:

Salmond said that *'Custom is the embodiment of those principles which have commended themselves to the national conscience as the principles of justice and public utility'*.

Keeton said that *"Customary laws are those rules of human action, established by usage and regarded as legally binding by those to whom the rules are applicable, which are adopted by the courts and applied as a source of law because they are generally followed by the political society as a whole or by some part of it"*.

However, Austin said that Custom is not a source of law.

Roscoe Pound said that Customary Law comprises of:

1. Law formulated through Custom of popular action.
2. Law formulated through judicial decision.
3. Law formulated by doctrinal writings and scientific discussions of legal principles.

Von Savigny considered that customary law, i.e.**law which got its content from habits of popular action recognized by courts, or from habits of judicial decision, or from traditional modes of juristic thinking**, was merely an expression of the *jural* ideas of the people, of a people's conviction of right – of its ideas of right and of rightful social control.

However, it is the Greek historical School that is considered as the innovator of custom as source of law.

Otto Van Gierke, a German Jurist and a Legal Historian, said that *"every true human association becomes a real and living entity animated by its own individual soul".*

Henry Maine believed that custom is the only source of law. He said that *"Custom is a conception posterior to that of themestes or judgment*."

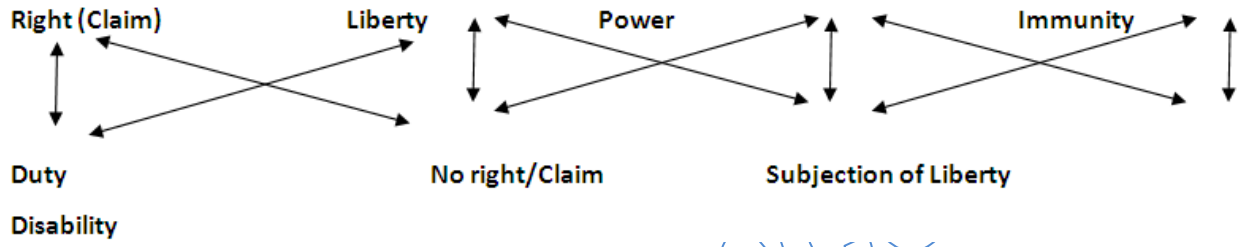
Some of the ingredients of Custom are as under:

1. Antiquity
2. Continuous in nature.
3. Peaceful Enjoyment
4. Obligatory Force
5. Certainty
6. Consistency
7. Reasonableness

Hence it can be concluded that law/s is/are not self-born, but are the outcome of various sources, which came into consideration with time and needs of the homo-sapiens and their development/s.

UNIT IV
CONCEPTS OF LEGAL RIGHTS

CHART TO SHOW THE RIGHT DUTY LEGAL RELATION (HOHFELD)[22]



Wesley Hofeld, a Harvard law professor in the early part of the 20th Century, developed an analytical framework for understanding interests in property. Hohfeld's eight terms are arranged in two tables of 'correlatives' and 'opposites' that structure the internal relationships among the different fundamental legal rights.

JURAL OPPOSITES

Right	Privilege	Power	Immunity
No-right	Duty	Disability	Liability

A privilege is the opposite of a duty; a no-right is the opposite of a right. A disability is the opposite of a power; an immunity is the opposite of a liability

JURAL CORRELATIVES

Right	Privilege	Power	Immunity
Duty	No-right	Liability	Disability

"Correlatives" signifies that these interests exist on opposing sides of a pair of persons involved in a legal relationship. If someone has a right, it exists with respect to someone else who has a duty. If someone has a privilege, it exists with respect to someone else who has no-right. If someone has a power, it exists with respect to someone else who has a liability. If someone has an immunity, it exists with respect to someone else who has a disability.

A right can be enforced by a lawsuit against the person who has the correlative duty. A privilege negates that right and duty, and typically would be asserted as an affirmative defense in the lawsuit.

A power is the capacity to create or change a legal relationship. For example, when someone make an offer of a contract, that gives the offerree the power to create a contract by accepting the offer (or not). If the power to create the contract is exercised, then both parties have rights and duties with respect to each other. Courts have power, only if plaintiffs or prosecutors exercise their power to commence a lawsuit. Sovereign states are immune because courts lack power over them, in which case courts are said to have a disability with respect to sovereigns.

---

[22] Joseph William Singer, The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld, 1982 Wis.L.Rev. pp. 975, 986-87.

If I "own" property, it means that I have various rights with respect to the thing constituting my property--the "bundle" of sticks or rights. I probably have the right to exclude and everyone else in the world has a correlative duty not to use my property. Some people may have a privilege, however, as to fly over it. I also have power with respect to my property because I can create rights in others, as by transfering some or all of the property to them, as by creating an easement, which gives the grantee certain rights vis-a-vis others and certain rights and privileges vis-a-vis me.

When people come into contact as a member of society, they have certain legal right and duties towards one another. These right and duties regulated by the prevailing law in the society. It is the establish fact the main purpose of law is the protection of the society. To establish this fact it is essential that Sovereign or Sate use its physical force for the enforcement of legal right and duties and punish those who violate these rights.

Law consist those rule, which regulate the human society, and it is the state, which enforce these right and duties created by the state.

Duties- It is an obligatory act, or it is an act opposite of it means would be wrong. It is an act, which one ought to do, an act the opposite of which would be a wrong.

Kind of Duties-

1. **Moral duties**
2. **Legal duties.**
   - I. **Positive and Negative Duties-** When a law obliges a person **<u>to do and act</u>** it is called the positive duty. And when law obliges him/her ***to refrain from doing an act*** it is called the negative duty.
   - *II.* **Primary and Secondary Duties-** A primary duty which is exists per se and is ***independent of any duty***, which the duty which has no independent existence, but ***exist only for the enforcement of other duties***.
   - *III.* **Absolute and Relative Duties-** Absolute duties **owns only by the state**, which generally called the crime and remedy of it is punishment. Relative duties are **owns by any person other than the one who is imposing** them, the breach of it called the civil injuries. Which is repressible by compensation -***<u>(Hibbert).</u>***

     Austin says- *Relative duties which have corresponding rights.*

     Austin defined 4 kind of duties-
     1. *Self duty- e.g. not commit suicide.*
     2. *Public duty- not to commit nuisance.*
     3. *Duty towards who are not human being duties towards God or animal.*
     4. *Sovereign- Duty towards sovereign.*

Salmond-Reject the concept of Absolute duty he said there can be no duty without the right.

RIGHTS-

According to Salmond- Right is a interest recognized and protected by a rule of justice.

According to Holems – Right is the power of enforcing legal limitation on conduct.

According to Gray - Right is that power which a man has to make a person or persons to do or refrain from doing a act or certain acts

Honorable Supreme Court has defined the Legal Right[23]**-**

In **strict sense**, legal rights are correlative of legal duties and are defines as **interest, which the law protected by imposing duties on others.** But in **generic sense** the word right is used to mean **immunity from the legal power of other**.

Theories of Legal Rights-
There are two theories on legal rights-

1. Will theory.
2. Interest theory.

Will theory-

Hume, Hegel and kent - A right is an inherent attribute of the human will. The subject matter of right is deriving from human will and through a right a man expresses his will over an object.

Puchta- says – legal right is an **power over an object.**

Vinogradoff- in a social order establish by law no man is absolutely free to act as he likes, but his **freedom of action is restricted due to rights of other.**

Austin- A right of a person means that **other are obligates to do or forbear from doing something** in relation to him.

Holland- legal right is nothing but a **permission to exercise certain natural powers** to obtain protection under certain conditions.

Interest Theory- This theory mainly propounded by **Ihring.**

According to Ihring- A legal right is a **legally protected interest**. He does not emphasis on the element of will. He said the basic function of law is to protect the human interest and to avoid a conflict between their individual interests.

But **Salmond criticize** his theory and said- it is incomplete because it is completely overlook the element of State recognition. A legal right should not only be protected by the sate but also be legally recognized.

Gray was greatly impress by Salmond's view and held that interest theory was partly true, he emphasized that a legal right is not an interest in itself but it **only a mean to extend protection to interest**. he said a legal right as the power by which a man makes other person do or refrain from doing a certain act by imposing a legal duty upon them through which the agency of law(State).

Allen- chooses the mid-way he said both the element of Will and Interest are essential for legal right.

[23] In the case of State of Rajasthan etc. Versus Union of India, 1977 AIR 1361.

Essential element of legal Rights

There are five elements of legal rights-

1. The person of **Inherence**- This is also called the Subject, the **legal right always vested in a person**, without a person of inherence there cannot be a legal right.
2. The person of**Incidence**- The right avail against a person, he is a **person bound by the duty and so may be describe the Subject of duty.**
3. **Content** of the Right- **Act or omission** which is obligatory on the person bound in the favor of the person entitle.
4. **Subject matter of right-** it is **something which act or omission is relate**, it may be the **object.**
5. **Tile of Right-** every legal right has a title that is **certain fact over event**.

Illustration-

A testator leaves a gold ring to a legatee. In this case the **legatee** is the inherence or the **subject owner of the right;**

The **gold ring** is the **object/ subject matter** of the right;

And the **delivery of the ring** is the **content** of the right;

The **executer** is the person of **incidence;**

The **bequeathing the ring** is the **title of the right**.

Enforcement of legal rights-

Through the agency of court of law established by State it can be enforced. The usual method of legal right is –

Award of damages in civil cases.

Grant of an injunction- where by a party is restrained from doing an act which is likely to affect the plaintiff adversely in enjoyment of his legal right.

Right in a wider sense-

Salmond suggested-

Right Other persons ought to do in my behalf.

Liberty- I may do without the interference of law.

Power- I can do effectively against other.

Immunity- Other cannot do effectively against me.

Classification of Legal Rights:

Perfect and Imperfect Rights. A/c Salmond – Perfect right is one which correspondent to legal duty, and not only recognized by law but also enforce by law.

Whereas imperfect right though recognized by law but not enforceable by law, a time barred dept is the example of it.

Positive and Negative Rights. The nature of co relative duty defines the positive or negative rights, if a person is bound to do something then it is a positive right, if a person is refraining to do an act it is a negative right.

Proprietary and Personal Rights. Proprietary rights related to economic or monetary rights or right of wealth. For e.g.: money in some one pocket or in bank, right to debt, land etc. Personal rights related to ones well-being for example- right of reputation, freedom, liberty etc.

Right in re propria and rights in re aliena.
.re propria- Right over one's property.
.**re aliena**- Right over the property of someone else.

Principle and Accessory Right- Principle rights are independent rights, but accessory rights are ancillary rights of principle rights. For example – A piece of land has a right is the principle right but the right of way is the accessory right of adjoining land.

Public and Private rights- When the right is vested in the State is called the public right whereas the private rights concerned only with the private individuals.

Jus ad rem- a right which is originated from another right is called jus ad rem. A person of inherence has a right to have some other right transferred to him.

PERSONALITY
The legal use of the word 'person' has attracted an assortment of theories which is probably second to none in volume. 'Person' in law, is both the recognition of an entity as well as the acknowledgement of such an entity's rights and interests. Granting of 'personhood' states then enables an entity to undertake acts and relations that are recognized in the law. In the realm of law, the term 'person' is nothing more than an abstraction - a representation through the form of an entity either real or artificial, of certain attributes. These attributes come to form what is known as 'personality' in the law.

Persons in law are seen to be of only two kinds: real/natural and artificial. Human beings are considered 'real' or 'natural' persons because they are ipso facto persons. The other kind of person is the artificial person, which is a fiction of law invested with limited legal capacity. At this juncture, it is necessary to clarify the meaning of the term 'capacity' in law. Capacity is the primary attribute of personality and denotes the ability to commit acts and undertake relations that are recognised in the law. Capacity is what enables a person to have a 'standing' in law, be it in the person's ability to claim-possess-exercise rights, property, enter into contracts, sue and be sued, commit legal injury or be the victim thereof. In other words, capacity in law is the medium through which personality expresses itself.

CORPORATE PERSONALITY
As mentioned earlier, the law in recognising artificial persons infuses such entities with limited legal capacity. The limitation exists in the sense that artificial persons do not possess personalities in the fullest sense of the term. Their ability to commit legally recognizable acts is limited to the extent that law allows for, nothing more. To provide an example, a body corporate such as a joint stock company is undoubtedly a 'person' but cannot be likened to a human person any more than an apple can be compared to an orange. While human beings as natural persons are capable of every act and relation possible in fact, an artificial person is only capable of those acts and relations allowed in law; the doctrine of ultra vires with respect to joint stock companies prevents such artificial persons from committing acts/undertaking relations that are outside their scope of activities as specified in the Memorandum and Articles of Association.
The familiar theoretical classification of artificial persons follows likewise -

1. Corporation Sole.
2. Corporation Aggregate.

Both of the above are however narrow in the sense that they contemplate only one segment of artificial personality i.e. the body corporate. It may be pertinent to note that the law also recognises other forms of artificial personality such as the idol. Indeed Salmond in his work on jurisprudence has chanced to observe on this aspect, "Legal persons, being the arbitrary creations of the law, may be of as many kinds as the law pleases." However, for our present purposes, a discussion on the concept of a 'body corporate' will suffice in helping understanding the nature of artificial personality.

The corporation sole is nothing more than a tool meant to ensure continuity of an office. Any office that is created in law also by implication, creates a legal personality to such office which occupies it in perpetuity till the law itself extinguishes it. This legal personality is the Corporation Sole. Examples of it are predominantly found in Offices of the State discharging sovereign functions, which are always creations of the law. The proverbial example of the Corporation Sole is the English Crown. However, the Corporation Sole is also manifest in various other instances such as the Offices of the President, Prime Minister, Chief Justice of India, Attorney-General of India all of which are creations of the Indian Constitution. Likewise, even localised examples where there is a need for permanent Office implies the existence of a Corporation Sole: e.g. the Vice-Chancellor of a University, the Postmaster General, both of which are statutorily created Offices.

Here it is to be pointed out in the preceding paragraphs that human beings, ipso facto are persons enjoying all the attributes of legal personality. Each human being then is vested with an independent personality in the law. However, if the same notion were to be applied as a general rule, concerted and unified human action can have no place in law for the simple reason that such action can only be recognised as several acts of several persons as opposed to a single act of a group of several persons. The former perception would lead to many difficulties including unlimited liability of such several persons towards third parties. It is for this reason that a partnership, though an association of persons acting in concert, renders each of those persons jointly and severally liable for acts of any partner. This approach also has the effect of apportioning liability disproportionately in the sense a partner who is insolvent cannot be proceeded against while a solvent partner is satisfy the entire liability or debt that subsists between the partnership and the third party. It is to obviate this difficulty, the law recognises certain groups of several persons as a 'body corporate' and thus holds the several acts of such several persons in fact, attributable to a single person in law. In doing so what the law also does is create a veil of incorporation as between the constituting members and the legal personality of the constituted body: the corporation. The veil of incorporation implies the existence of a personality in the corporation as distinct from its members. In the joint stock company, the veil of incorporation is what separates the acts of the company from those of its shareholders and the individual acts of its shareholders from that of the company. The result of adopting this approach is also that there is limited liability of the shareholders (members of the group) which renders them liable only to the extent of their holding in the group or company.

Going by the above description of corporations aggregate, it would logically follow that every form of concerted activity of willing individuals aimed at a particular end, would lead to their acts coming to known through the glass of incorporation which realises their combined operations as one single act, performed by a single personality. However, it is in this regard that the real limits of artificial personality are discernible. The law deems only certain forms of concerted action as eligible for recognition through incorporation; thus while joint stock companies are recognised as incorporated bodies, associations such as partnerships, trade unions and other organizations are not recognised as incorporated bodies for various reasons. These groups have come to assume the term 'unincorporated associations'. However the effect of such thinking has been somewhat mitigated by statutory devices and judicial interpretation which in certain respects have enabled such associations to assume characteristics of a single legal person. Thus it may be said that even unincorporated associations in certain contexts, assume the character of a legal person.

There are five principal theories, which are used to explain corporate personality, namely, the fiction theory, realist theory, the purpose theory, the bracket theory and the concession theory.
The fiction theory of corporation is said to be promulgated by Pope Innocent IV (1243-1254). This theory is supported by many famous jurists, particularly, Von Savigny, Coke, Blackstone and Salmond. According to this theory, the legal personality of entities other than human beings is the result of a fiction. The famous case of Salomon v A Salomon Co Ltd is a proof of the English court adoption of the fiction theory. In this case, Lord Halsbury stated that the important question to decide was whether in truth an artificial creation of the legislature had been validly constituted. It was held that as the company had fulfilled requirements of the Companies Act, the company becomes a person at law, independent and distinct from its members.

Under the concession theory, the state is considered to be in the same level as the human being and as such, it can bestow on or withdraw legal personality from other groups and associations within its jurisdictions as an attribute of its sovereignty. Hence, a juristic person is merely a concession or creation of the state. Concession theory is often regarded as the offspring of the fiction theory as it has similar assertion that the corporations within the state have no legal personality except as it is conceded by the state. Exponents of the fiction theory, for example, Savigny, Dicey and Salmond are found to support this theory. Nonetheless, it is obvious that while the fiction theory is ultimately a philosophical theory that a corporation is merely a name and a thing of the intellect, the concession theory is indifferent as regards to the question of the reality of a corporation in that it focus on the sources of which the legal power is derived.
Next, is the **purpose theory** (also known as the theory of Zweckvermogen) . The advocates who are associated with this theory are E.I Bekker, Aloys Brinz and Demilius. Similar to the fiction and concession theories, it declares that only human beings can be a person and have rights. Under this theory, juristic person is no person at all but merely as a "subjectless" property destined for a particular purpose and that there is ownership but no owner. The juristic person is not constructed round a group of person but based on the object and purpose. The property of the juristic person does not belong to anybody but it may be dedicated and legally bound by certain objects.

The Symbolist theory is also known as the "bracket" theory. It was set up by Ihering and later developed particularly by Marquis de Vareilles-Sommiéres. Basically, this theory is similar to the fiction theory in that it recognizes that only human beings have interests and rights of a legal person.38 According to Ihering, the conception of corporate personality is indispensable and merely an economic device by which simplify the task of coordinating legal relations. Hence, when it is necessary, it is emphasized that the law should look behind the entity to discover the real state of affairs. This is clearly in line with the principle of lifting of the corporate veil.

The realist theory, founded by German jurist, Johannes Althusius has been most prominently advocated by Otto von Gierke. According to this theory, a legal person is a real personality in an extra juridical and pre-juridical sense of the word. It also assumes that the subjects of rights need not belong merely to human beings but to every being which possesses a will and life of its own. As such, being a juristic person and as 'alive' as the human being, a corporation is also subjected to rights. Under the realist theory, a corporation exists as an objectively real entity and the law merely recognizes and gives effect to its existence. The realist jurist also contended that the law has no power to create an entity but merely having the right to recognize or not to recognize an entity. A corporation from the realist perspective is a social organism while a human is regarded as a physical organism. A corporation from the realist perspective is a social organism while a human is regarded as a physical organism.
From the discussion on jurisprudence theories of corporate personality, it is observed that main arguments lie between the fiction and realist theories. The fiction theory claimed that the entity of corporation as a legal person is merely fictitious and only exist with the intendment of the law. On the

other hand, from the realist point of view, the entity of the corporation as a legal person is not artificial or fictitious but real and natural.

Being merely a metaphor or an analogy, corporate personality is not entirely arbitrary and therefore must respond to the organizational realities of the corporation as well as conform to the treatment of organization as legal actors. As such, conception of a corporation should be analytical and ideological, descriptive and prescriptive. The metaphor of personality is indeed useful in describing many of the corporation's traditional and modern corporate attributes, namely, perpetual succession, ability to own property, rights to take its own legal proceedings, ability to create floating charge, limited liability and compliance with the formalities of the Companies Act. Placing these attributes under the head of separate legal entity has resulted to selection of these few salient feature existence of the concept of a fictitious person.

Nevertheless, the use of the metaphor is mainly to describe and not to dictate the reality of corporation. As Bryant Smith pointed out:

"It is not the part of legal personality to dictate conclusions. To insists that because it has been decided that a corporation is a legal person for some purposes it must therefore be a legal person for all purposes… is to make of…corporate personality…a master rather than a servant, and to decide legal questions on irrelevant considerations without inquiring into their merits. Issues do not properly turn on a name.

UNIT V
OWNERSHIP & POSSESSION

The essence of corporeal possession is essentially to be found in the physical power of exclusion.

There is 9 point out of 10 for possession, which are commented as under:

Earlier legal system did not recognize the distinction between the possession and ownership. In Roman Law ownership and possession are relative terms-dominium, and possession, which denote **absolute right to a thing, while possession implied only physical control over it.** Roman attached greater importance ownership rather than possession because in their view having absolute right over a thing was much more important than merely having physical control over it.

Ownership- The term ownership was used in English law for the first time in 1583, and when it was distinguished form possession.
Ownership is a supreme right that can be exercised on anytime.
Hibbert, define ownership which includes within its four kinds of right-

1. Right to use a thing.
2. Right to exclude others from using the thing.
3. Disposing of thing.
4. Rights to destroy.

Hibbert suggested that no one can have an absolute ownership in land as land not capable of being destroyed. One can merely have an estate in it.

Austin- right indefinite in point of user unrestricted in point of disposition and unlimited in point of duration.
It is a right in rem which is available to the owner against the world at large.

Element of ownership a/c Austin-

1. Indefinite user -
2. Unrestricted Disposition-
3. Unlimited duration.

Criticism against Austin Definition-
It is being criticize that – it is fallacious to think that ownership is a single right, in fact it is a bundle of rights including right of user and enjoyment.
Second that the owner has an unrestricted right of disposition is not correct. The right of ownership can be curtail by the state subject to injurious to public health/ or for public use as per Constitution of India Art 31(2), any property can be taken by the state for public use.

Salmond- relation between a person and right that is vested in him. In simple sense ownership signifies the relation between the person of inherence and the object of ownership.
Salmond try to comprehend ownership in a wider sense to include both corporal and incorporeal rights. Thus a man can own a copyright or a right of way.

Duguit - criticized Salmon- a person really owns is a thing and not a right.

Paton- Defines ownership in respect of four things-

1. Right of use.
2. Possession which also includes elimination of other.
3. Right of alienation.
4. Disposition

Characteristics of Ownership

1. It may be absolute or restricted.
2. Subject to public safety.
3. Law does not confer ownership on an unborn child or an insane person because both of them are incapable of conceiving the nature and consequences of their acts.

According to Salmond there are two ways of acquiring the ownership-

1. **By operation of law.** Such as the law of intestacy(Dying without a legal will) or bankruptcy.
2. **By reason of some event or act.** Such as taking or making a thing for the first time.

There are three generally known mode of acquisition of ownership-

1. **Absolute- when there was no previous owner of that thing. i.e. res nullius (ownerless thing).**
2. **Extinctive- when ownership of a previous owner has been terminated by reason of adverse possession by the acquirer.**
3. **Accessory- Acquired as a result of accession. E.g. owner of an animal has right to its off springs or the owner of a tree has the right of the fruits of the tree.**

Salmond think that the concept of ownership is changing with social changes pointed out that in ancient times the right of ownership regarded as absolute, but in modern time it is subject to reasonable restriction.

Kind of Ownership-

1. **Corporeal and Incorporeal-**
   - Material/ tangible object= corporeal i.e. pen, table, vehicle etc. it is chose in possession
   - Immaterial/ intangible = incorporeal- i.e. copy right etc. it is chosen in action.
2. **Sole and Co- ownership-**
   - **Sole=**single person ownership.
   - **Co-ownership=** when it vested in two person.
     - **I. Common=** Right of the deceased passes on to his successor like other inheritable right. For example. When a property belongs to A, and B in equal shares and if A dies the right of half of the thing will pass on to the legal heirs of the property. And the other half will remain with B. Hindu law recognized the right of common ownership.
     - **II. Joint=** if one of the two joint owners dies, his right of ownership also dies with him and the survivor becomes the sole owner by virtue of his right. It is also called the right of survival ship.
3. **Trust and Beneficial- The** property is own by two owner, in which one is under an obligation to use his ownership for the benefit of other. The former is called the trustee and the later is called the beneficiary. The ownership is nominal for trustee rather than real because he is deprived of any right to the beneficial enjoyment of the trust property.

4. **Vested and Contingent-**
   Vested= perfect ownership
   Contingent= fulfillment of some future condition.

   Possession-
   It is de facto= exercise of a claim
   Possession is in fact while ownership is in the form of the right. Possession is the prima facie example of ownership.

   Henry Maine- possession means that contact with an object which provides the rights of exclusion of other form the enjoyment of it.

   Pollock- having physical control over a thing is possession.

   Salmond- the possession of a material object is the continuing exercise of a claim to the exclusive use of it.

   Savigny- physical power of exclusion.

   Nature of Possession - possession is the most basic relation between man and things. Possession of material thing is essential to life because the existence of human life and human society. It is also one of the modes of transferring ownership. **Possession is said to be nine out of ten points of law meaning thereby that it is an evidence of ownership.** For example a thief who steals my watch has a possession which the law protect against everyone except myself or some person thing on my behalf.

   Possession under Roman Law - under Roman Law it has been defined in two categories-
   1. Corpus possessionis- Simply a physical control over a thing.
   2. Civilis possessionis- legal possession. The property disputes mostly decided on the basis of this possession.

   Animus- A person was deemed to be in legal possession of a thing when not only thing was in his physical control or he had custody over it. But he also had the power to exclude other from interference in his possession. This is the mental element.

   Holems- to gain a possession a man must stand in certain physical relation to the object and to the rest of the world, and must have a certain intent.

   The Roman law distinguished *detention* from the *custody*. *In detention a person was to have real possession and control over a thing though he may not have ownership of it. The custody on the other hand involved possession and control without ownership.*
   Element of Possession
   Holland- possession has two essential elements-
   - Corpus- Physical control over a thing.
   - Animus- Power of exclusion other of it use.

Salmond- It is not necessary that animus should always be present in legal possession.

Ihring- takes a sociological view of the concept of possession, he does not give much stress animus, he says it is quit immaterial as to how a person intended to possess a thing but what is important is how he got it.

In the case of N. Majumdar versus State- the *question of animus came up for determination before the High court of Calcutta.*

Brief Fact- Police made a search of the accused house in the hope that the pistol would be recovered form there but no such recovery could be made. In the meantime, the accused had a quick word with his wife who went out and retuned within three or four minutes with a pistol and some cartridges. The police took the plea that as per S.27of the Evidence Act, it should be presumed that the pistol was recovered from the possession of the accuses. The court however, rejected the contention of the prosecution and held that the Arms Act being a special enactment, ***the fact of curpus must be specifically proved and mere existence of corpus without animus is ineffective to constitute possession***.

Savigny-

1. **Corpus- physical control of the thing, that is, immediate physical power to exclude any foreign agency's interference by the possessor.**
2. **Animus- mental element or conscious intention to hold the object as owner against all other.**

Criticism- he assumed that without the combination of these two element possession is not possible, and possession will lost when either of these element are lost and in some instance without the element of both of this.

Second Law does not protect a possession, which is acquired unlawfully, although both the element is present.

Ihering- consider animus only as a supplemental element for possession.

Criticism Ihering purely analyzed the concept of possession in the background of Roman Law refused possessory rights to persons who were in effective physical control of the thing possessed.

Kind of Possession-

1. **Corporeal and Incorporeal- Possession for material thing. Incorporeal- Possession for inventible thing**
2. **Mediate and Immediate Possession-** Mediate means possession through third person- for example I purchase a book through any agent or servant. I have mediate possession so long as the book remains in my agent's possession.
   Immediate- Direct possession.
3. **Adverse Possession- it implies a possession by a person initially holding the land on behalf of some other person and subsequently setting up his own claim as a true owner of that land. If adverse possession continues peacefully undisturbed for a prescribed period (12 years in India) the title of the true owner is extinguished and the person in possession becomes the true owner of that land.**

Mode of Acquisition of Possession-

1. **By taking- Without Consent of owner.**
2. **By delivery- with consent of owner.**
3. **By operation of Law.**

Relationship between possession and ownership-

Possession has been treated as an external evidence of ownership. a person possession of a thing, be presumed to be the owner of it. The person in possession may not need to prove the ownership.

DIFFERENCE BETWEEN POSSESSION & OWNERSHIP

POSSESSION	OWNERSHIP
Possession is a primary stage of ownership which is in fact.	Ownership is in right.
Possession does not give title in the property defacto exercise of a claims	While in ownership it gives title in the property dejure recognisation.
Possession is a fact.	Ownership is a right and superior to possession.
Possession tends to become ownership.	Ownership tends to realize itself in to possession.
Possession dominion corpus and animus are necessary.	Ownership they are not necessary because law gives full rights.
Transfer of possession is comparatively easier.	Ownership most of the cases involves a technical process i.e. conveyance deed etc.
Possession is nine points of law.	Ownership always tries to realize itself in possession i.e. complete thing.

LIABILITY

A comprehensive legal term that describes the condition of being actually or potentially subject to a legal obligation.Joint liability is an obligation for which more than one person is responsible. Joint and several liability refers to the status of those who are responsible together as one unit as well as individually for their conduct. The person who has been harmed can institute a lawsuit and recover from any or all of the wrongdoers—but cannot receive double compensation, for instance, the full amount of recovery from each of two wrongdoers.

Primary liability is an obligation for which a person is directly responsible; it is distinguished from secondary liability, which is the responsibility of another if the party directly responsible fails or refuses to satisfy his or her obligation.

Responsibility; the state of one who is bound in law and justice to do something, which may be enforced by action. This liability may arise from contracts either express or implied, or in consequence of torts committed.

The liabilities of one man are not in general transferred to his representative's further than to reach the estate in his hands. For example, an executor is not responsible for the liabilities of his testator further than the estate of the testator, which has come to his hands.

.

The husband is liable for his wife's contracts made dum sola, and for those made during coverture for necessaries, and for torts committed either while she was sole or since her marriage with him; but this liability continues only during the coverture; as to her torts, or even her contracts made before marriage; for the latter, however, she may be sued as her executor or administrator, when she assumes that character.

A master is liable for the acts of his servant while in his employ, performed in the usual course of his business, upon the presumption that they have been authorized by him; but he is responsible only in a civil point of view and not criminally, unless the acts have been actually authorized by him[24].

STRICT LIABILITY

Strict liability applies when a defendant places another person in danger, even in the absence of negligence, simply because he is possession of a dangerous product, animal or weapon. The plaintiff need not prove negligence.

Types of Strict Liability Torts

There are instances when a person becomes responsible for things that may go wrong even if the person did not intend for the wrong to occur. In other words, some actions hold a person strictly liable regardless of the circumstances. Say you owned an exotic Python. If the snake creeps out of the house and bites your neighbour, you will be held responsible even though you did not let the snake out. Ownership is enough to hold you responsible.

In other words, **strict liability tort** means a defendant is held fully liable for any injury sustained by another party regardless of whether the injury was intended. Dangerous animals are just one of three major strict liability categories. Strict liability categories include:

- Animals, owned or possessed
- Abnormally dangerous acts
- Product liability

Animals, Owned or Possessed

The owner or person in possession of certain types of animals is liable for injuries if the animal causes injury to another person or animal. This may include **livestock**, like cows, horses, bulls or goats. **Abnormally dangerous animals** also fall under this category and may include snakes, tigers, monkeys or bears. You may think **wild animals** are not included because, well, they live in the wild. But that is not true. If a person is in possession of a wild animal or has wild animals on their land, like animals that are housed at a zoo, and the animal causes injury, liability is assumed.

Livestock and domestic animal ownership is fairly easy to prove. Livestock is generally branded, and domestic animals require registration in their place of residence. Wild animals, on the other hand, are more difficult to track. In an interesting case that remains in litigation as of late summer of 2013, the question of possession and ownership of suspect wild animal remains unanswered.

Arizona-Sonora Desert Museum is located in a remote area of Tucson, Pima County. It is a place where tourists can experience Arizona's indigenous landscape. Back in 2009, a Dutch tourist and plaintiff, Zegerius, was brutally attacked by a wild javelina while touring the grounds. The victim sustained extensive damage, including torn muscles and severed veins and arteries to his calf and hand. So much damage was done that he was hospitalized for over a week.

As a side note, javelinas are a member of the peccary family. Although they are not particularly aggressive, they will attack if cornered. Javelinas were commonly seen on the trails within the museum. Although the museum did not own the animals, they were part of the scenery in a wildlife attraction. The question remained: who was in possession of this peccary? This is where it gets a little muddy.

The museum operators claim that this particular javelina was not one of the commonly seen animals on their property. They performed blood tests on the javelina in their possession, and it turned out that no match could be determined. In fact, the javelina that attacked Zegerius was never found. But the looming question of strict liability was still left unanswered. At last report, the plaintiff's attorneys filed further action claiming that, regardless of the ownership, possession is all the law requires.

[24]See Bouv. Inst. Index, h.t.; Driver; Quasi Offence; Servant. (at any accessible source/s)

Javelinas are wild animals. No provisions were made to corral the owned javelinas; therefore, other javelinas can come and go freely across the boundaries. While, as of late summer of 2013, no verdict had been rendered yet, this case proves that strict liability may be applied to cases where ownership does not have to be established.

Abnormally Dangerous Acts

Another form of strict liability comes with engaging in abnormally dangerous acts. An **abnormally dangerous act** can be defined as an act that carries a substantial risk to oneself and others' personal property and physical being. That's plenty of legal mumbo jumbo, think pyrotechnics, nuclear power plants and blasting rock with dynamite.

In *Miller v. Civil Constructors, Inc.*, a bullet fired from a nearby quarry struck a person. The quarry, owned by Civil Constructors, was used for police target practice. The case seems rather cut and dry. Remember, in strict liability cases, negligence does not have to be proven. What does have to pan out is whether using a quarry to discharge a firearm is considered abnormally dangerous. Here is what the court will consider:

- The activity is highly risky and could cause harm to a person, chattel or property.
- It is highly likely that harm will result from the activity.
- The risk could not be mitigated easily even if reasonable care is taken.
- The act is not one that is commonly recognized.
- It is inappropriate to be carried out in the location.

VICARIOUS LIABILITY[25]

Liability that a supervisory party (such as an employer) bears for the actionable conduct of a subordinate or associate (such as an employee) based on the relationship between the two parties.

Under common law, a member of a conspiracy can be held vicariously liable for the crimes of his co-conspirators if the crimes committed by the co-conspirators were foreseeable and if they were committed with the intent of furthering the objective of the conspiracy.

Vicarious liability derives from the reasoning that (1) the employee is acting on the employer's behalf, (2) the employer is usually exercising control and supervision over the employee's conduct, (3) the employer is in the better position to accept financial responsibility or to insure against it, and (4) the employer receives the benefit of the employee's work and should therefore also bear the burden of the employee's negligent conduct. Thus, some courts have characterized it as respondeat superior, or "let the master answer." As a result, the primary limit on vicarious liability is drawn by the distinction between employees and independent contractors. If the person employed is considered to be an independent contractor, the employer usually is not liable for the tort committed. Typically, a contractor is not supervised and operates relatively independently; hence, the rationale for holding the employer liable breaks down. This distinction is a question of fact that is often disputed. The labels chosen by the parties involved to describe themselves, such as staff consultants or contractors or the like, are not determinative. What is crucial is their actual working relationship and the nature of the supervision and control actually or potentially exercised by the employer. Once that supervision or control exists—/ and regardless of whether it is properly exercised -- the employer becomes potentially liable for the torts of the employee.

[25]Kindly refer: Legal Services and Oxford Library Articles.

The common examples of such a liability are:
(1)Liability of the principal for the tort of his agent;
(2)Liability of partners of each other's tort;
(3)Liability of the master for the tort of his servant.

So Vicarious Liability deals with cases where one person is liable for the acts of others. In the field of Torts it is considered to be an exception to the general rule that a person is liable for his own acts only. It is based on the principle of qui facit per se per alium facit per se, which means, "He who does an act through another is deemed in law to do it himself". So in a case of vicarious liability both the person at whose behest the act is done as well as the person who does the act are liable. Thus, Employers are vicariously liable for the torts of their employees that are committed during the course of employment.

Reasons for vicarious liability:
(1) The master has the 'deepest pockets'. The wealth of a defendant, or the fact that he has access to resources via insurance, has in some cases had an unconscious influence on the development of legal principles.

(2) Vicarious liability encourages accident prevention by giving an employer a financial interest in encouraging his employees to take care for the safety of others.

(3) As the employer makes a profit from the activities of his employees, he should also bear any losses that those activities cause.

In the words of Lord Chelmsford: "It has long been established by law that a master is liable to third persons for any injury or damage done through the negligence or unskillfulness of a servant acting in his master's employ. The reason of this is, that every act which is done by servant in the course of his duty is regarded as done by his master's order, and, consequently it is the same as if it were master's own act".

Constituents of Vicarious Liability:
(1) There must be a relationship of a certain kind.
(2) The wrongful act must be related to the relationship in a certain way.
(3) The wrong has been done within the course of employment.

Servant and Independent Contractor:
A servant and independent contractor are both employed to do some work of the employer but there is a difference in the legal relationship which the employer has with them. A servant is engaged under a contract of services whereas an independent contractor is engaged under a contract for services. The liability of the employer for the wrongs committed by his servant is more onerous than his liability in respect of wrongs committed by an independent contractor. If a servant does a wrongful act in the course of his employment, the master is liable for it. The servant, of course, is also liable. The wrongful act of the servant is deemed to be the act of the master as well. "The doctrine of liability of the master for act of his servant is based on the maxim respondent superior, which means 'let the principal be liable' and it puts the master in the same position as he if had done the act himself. It also derives validity from the maxim qui facit per alium facit per se, which means 'he who does an act through another is deemed in law to do it himself'." Since for the wrong done by the servant, the master can also be made liable vicariously, the plaintiff has a choice to bring an action against either or both of them. Their liability is joint and several as they are considered to be joint tort-feasors. The reason for the

maxim respondent superior seems to be the better position of the master to meet the claim because of his larger pocket and also ability to pass on the burden of liability through insurance. The liability arises even though the servant acted against the express instruction, and for no benefit of his master.

For the liability of the master to arise, the following two essentials are to be present:

(1) The tort was committed by the servant.
(2) The servant committed the tort in the course of his employment.

A servant is a person employed by another to do work under the direction and control of his master. As a general rule, master is liable for the tort of his servant but he is not liable for the tort of an independent contractor. It, therefore, becomes essential to distinguish between the two.

A servant is an agent who is subject to the control and supervision of his employer regarding the manner in which the work is to be done. An independent contractor is not subject to any such control. He undertakes to do certain work and regarding the manner in which the work is to be done. He is his own master and exercises his own discretion. And independent contractor is one "who undertakes to produce a given result, but so that in the actual exclusion of the work, he is not under the order or control of the person for whom he does it, and may use his own discretion in things not specified beforehand."

Example:
My car driver is my servant. If he negligently knocks down X, I will be liable for that. But if he hire a taxi for going to railway station and a taxi driver negligently hits X, I will not be liable towards X because the driver is not my servant but only an independent contractor. The taxi driver alone will be liable for that.

The main exceptions to the principle fall into the following categories:

(1) Cases where the employer is under some statutory duty which he cannot delegate.

(2) Cases involving the withdrawal of support from neighboring land.

(3) Cases involving the escape of fire.

(4) Cases involving the escape of substances, such as explosives, which have been brought on the land and which are likely to do damage if they escape; liability will attach under the rule in Rylands v Fletcher, (1868) UKHL 1.

(5) Cases involving operations on the highways which may cause danger to persons using the highway.

(6) Cases involving non-delegable duties of an employer for safety of his employees.

(7) Cases involving extra-hazardous acts.

Performing Right Society Ltd. v Mitchell, etc. Ltd., (1924) 1 K.B. 762.
The defendants engaged a band called 'The Original Lyrical five' to play at their dance hall, and the band played two songs without the permission of the claimants, the owners of the copyright. It was held that

the members of the band were employees of the defendants who were liable for the breach of copyright.

MCCARDIE J.: The nature of the task undertaken, the freedom of action given, the magnitude of the contract amount, the manner in which it is to be paid, the powers of dismissal and the circumstances under which payment of the reward may be withheld, all these bear on the solution of the question … it seems, however, reasonably clear that the final test, if there be a final test, and certainly the test to be generally applied, lies in the nature and degree of the detailed control over the person alleged to be servant. This circumstances, of course, one only of several to be considered, but it is usually of vital importance. The point is put well in Pollock on Torts, 12th ed., pp. 79, 80.

"The relation of master and servant exists only between persons of whom the one has the order and control of the work done by the other. A master is one who not only prescribes to the workman the end of his work, but directs or at any moment may direct the means also, or, as it has been put, 'retains the power of controlling the work'. A servant is a person subject to the command of his master as to the manner in which he shall do his work, and the master is liable for his acts, neglects and defaults, to the extent to be specified. An independent contractor is one who undertakes to produce a given result, but so that in the actual execution of the work he is not under the order or control of the person for whom he does it, and may use his own discretion in things not specified beforehand."

Finally, it can be concluded that,
Vicarious Liability deals with cases where one person is liable for the acts of others. In the field of Torts it is considered to be an exception to the general rule that a person is liable for his own acts only. It is based on the principle of qui facit per se per alium facit per se, which means, "He who does an act through another is deemed in law to do it himself". So in a case of vicarious liability both the person at whose behest the act is done as well as the person who does the act are liable. Thus, Employers are vicariously liable for the torts of their employees that are committed during the course of employment. In order that the liability of A for the act done by B can arise, it is necessary that there should be certain kind of relationship between A and B, and the wrongful act should be, in certain way, connected with that relationship. So a master is liable for the acts of his servant if the act is done in the course of employment. But where someone employs an independent contractor to do work on his behalf he is not in the ordinary way responsible for any tort committed by the contractor in the course of the execution of the work except in certain exceptional cases as dealt above.

So the servant and independent contractor are under contract of service and contract for service respectively. The traditional view to distinguish between the two was the control test exclusively. But in modern scenario this is not sufficient test as there is no single test. The significant outcome can be achieved only by balancing different factors with the help of different tests like: The nature of the employment test, the 'integral part of the business' test, Allocation of financial risk/ the economic reality test/ multiple test along with the control test.

OBLIGATIONS
In his book *The Concept of Law*, Hart has analyzed the relation between law, coercion, and morality, and has also attempted to clarify the question of whether all laws may be properly conceptualized as coercive orders or as moral commands. Hart says that there is no rationally necessary correlation between law and coercion or between law and morality. According to him, classifying all laws as coercive orders or as moral commands is oversimplifying the relation between law, coercion, and morality. He also explicates that to conceptualize all laws as coercive orders or as moral commands is to impose a deceptive appearance of uniformity on different kinds of laws and on different kinds of social functions which laws may perform. Hence, it will be mischaracterization of the purpose, function, content, mode of origin, and range of application of some laws.

Indeed, there are laws, which forbid individuals to perform various kinds of actions and impose an assortment of obligations on individuals. Sometimes, some laws impose punishment or penalties for injuring other individuals or for not complying with various kinds of duties or obligations.

Hart disapproves of the **concept of law**, which was formulated by John Austin in *The Province of Jurisprudence Determined* (1832). Hart commences explaining his concept of law by first taking Austin's command theory to task. According to Austin, all laws are commands of a legally unlimited sovereign, and he asserts that, all laws are coercive orders that impose duties or obligations on individuals. Hart, on the other hand, says that laws may be at variance from the commands of a sovereign in as much as they may apply to those individuals who enact them and not merely to other individuals. Secondly, laws may also be different from coercive orders in as much as they may not necessarily impose duties or obligations but may instead confer powers or privileges without imposing duties or obligations on individuals. Thirdly, the continuance of pre-existing laws cannot be explained on the basis of command; as pointed out, he was able to demolish completely the 'tacit command' myth[26]. Fourthly, Austin's 'habit of obedience' fails to elucidate succession to sovereignty because it fails to take account of improvement difference between 'habit' and 'rule'. Habits only require common behaviour, which is not sufficient for a rule. A rule has an 'internal aspect', i.e. people use it as a standard by which to judge and condemn deviations; habits do not function in this manner. Succession to sovereignty occurs by virtue of the acceptance of a rule entitling the successor to succeed, not on account of a habit of obedience. Fifthly, Hart also uses 'rule' to differentiate between 'being obliged' and 'having an obligation'. Austin's command-duty-sanction thesis fails to explain why, if a gunman threatens X with 'Your money or your life', X may be obliged to hand over his purse, but has no obligation to do so[27]. The reason is that people have an obligation only by virtue of a rule.

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[28]. For Hart, 'law' is equivalent to 'legal system'. According to him, legal system (law) is a system of rules comprising 'primary rules' and 'secondary rules'. These rules are 'social' in two senses: firstly, in as much as they regulate the conduct of the members of the society, i.e. they are guides to human conduct and standards of criticism of social conduct; secondly, in as much as they derive from human social practices. Apart from these rules, there are other social rules also, for example, rules of morality. The union of these two rules is the essence of his concept of law. Hart describes 'primary rules of obligation' as rules that impose duties or obligations on individuals, such as the rules of the criminal law or the law of tort. They are binding because of practices of acceptance which people are required to do or to abstain from certain actions. On the other hand, secondary rules are those which confer power, public or private, such as the law that facilitate the making of contracts, wills, trusts, marriages, etc or which lay down rules governing the composition of powers of courts, legislatures and other officials bodies. Primary rules are concerned with actions (that individuals must do or must not do) involving physical movement or change whereas the secondary rules provide for operations, which lead not merely to physical movement or change, but to the creation or variation of duties or obligations. Thus, the secondary rules are ancillary to and are concerned with the primary rules themselves. That is to say, the secondary rules specify the way in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined. Secondary rules are chiefly procedural and remedial, and embrace not only the rules governing sanctions but also go far beyond them. Furthermore, these rules also extend to the rules of judicial procedure, evidence and the rules governing the procedure for new legislation.

According to Hart, the primary rules must be combined with secondary rules so as to advance from the pre-legal to the legal stage of determination. Hart says that the foundations of a legal system do not

---

[26] Dias, RWM (1994) *Jurisprudence* New Delhi: Aditya Books Private Ltd, p352.
[27] *Ibid.*
[28] Hart, HLA (1961) *Concept of Law* Oxford: Clarendon Press, p84.

consist, as Austin claims, of habits of obedience to a legally unlimited sovereign, but, instead, consist of adherence to, or acceptance of, an ultimate rule of recognition by which the validity of any primary or secondary rule may be assessed. If a primary or secondary rule satisfies the criteria, which are provided by the ultimate rule of recognition, then that rule is legally valid.

There are two fundamental essentials which must be satisfied in order for a **legal system** to exist: (i) private citizens must generally obey the primary rules of obligation, i.e. those rules of behavior are valid according to the system's ultimate criteria of validity must be generally obeyed and (ii) public officials must accept the secondary rules of recognition, change, and adjudication as standards of official conduct. If both of these essentials are not satisfied, then primary rules may only be adequate to establish a pre-legal form of government.

BEING OBLIGED & HAVING AN OBLIGATION

"There is a difference, yet to be explained, between the assertion that someone was obliged to do something and the assertion that he had an obligation to do it[29]".

(1) Being obliged:- involves motives and beliefs, in terms of harm or unpleasant consequences; plus (i) serious not trivial harm; (ii) reasonable grounds to believe that the threat will be carried out. So "being obliged" is a psychological phenomenon.

(2) Having an obligation:- is "very different" [p.81]. (i) Facts are not sufficient to warrant the statement that X had an obligation; a fortiori, facts about X's psyche are not sufficient; (ii) facts are not necessary; a fortiori, X may have an obligation irrespective of his mental state. The following passage develops the point and incidentally throws further doubt on the "freshness" of Hart's approach: 100. "The difference between being constrained to do something because of my needs or wishes and being constrained to do it irrespective of them is perhaps most easily discerned in the parallel between being 'obliged' and being 'obligated' to do it. To be, or to feel, obliged to do something is quite different from being, or believing myself to be, obligated to do it. For instance, I am obliged to put my name in my books, since I do not want them to be borrowed and not returned; but I desire to keep them as my own. It makes perfectly good sense to say: 'I had an obligation to tell the truth, but to get out of that scrape I was obliged to lie'. To be obliged to do something means that, to accomplish a given purpose, I have to do something I don't particularly want to do, or dislike doing. To be obligated to do something means to be under necessity of choosing to do something without consulting my desires". (L.W. Beck, Commentary on Kant's Second Critique, p.113). Further, Hart suggests, ever the linguistic philosopher, that "was obliged to" implies "he did" whereas "had an obligation" does not.

CONCLUSION (As a whole):

The word jurisprudence derives from the Latin term juris prudentia, which means "the study, knowledge, or science of law." In the United States jurisprudence commonly means the philosophy of law. Legal philosophy has many aspects, but four of them are the most common. The first and the most prevalent form of jurisprudence seeks to analyze, explain, classify, and criticize entire bodies of law. Law school textbooks and legal encyclopedias represent this type of scholarship. The second type of jurisprudence compares and contrasts law with other fields of knowledge such as literature, economics,

[29] Hart's Concept of Law, Lecture 5, (2001)

religion, and the social sciences. The third type of jurisprudence seeks to reveal the historical, moral, and cultural basis of a particular legal concept. The fourth body of jurisprudence focuses on finding the answer to such abstract questions as-What is law? How do judges (properly) decide cases?

Apart from different types of jurisprudence, different schools of jurisprudence exist. Formalism, or conceptualism, treats law like math or science. Formalists believe that a judge identifies the relevant legal principles, applies them to the facts of a case, and logically deduces a rule that will govern the outcome of the dispute. In contrast, proponents of legal realism believe that most cases before courts present hard questions that judges must resolve by balancing the interests of the parties and ultimately drawing an arbitrary line on one side of the dispute. This line, realists maintain, is drawn according to the political, economic, and psychological inclinations of the judge. Some legal realists even believe that a judge is able to shape the outcome of the case based on personal biases.

Apart from the realist-formalist dichotomy, there is the classic debate over the appropriate sources of law between positivist and natural law schools of thought. Positivists argue that there is no connection between law and morality and the only sources of law are rules that have been expressly enacted by a governmental entity or court of law. Naturalists, or proponents of natural law, insist that the rules enacted by government are not the only sources of law. They argue that moral philosophy, religion, human reason and individual conscience are also integrate parts of the law.
There are no bright lines between different schools of jurisprudence. The legal philosophy of a particular legal scholar may consist of a combination of strains from many schools of legal thought. Some scholars think that it is more appropriate to think about jurisprudence as a continuum.

REFERENCES

- A.K.Majumdar et al., Company Law and Practice, 14th ed., Taxmann Publications Pvt. Ltd., 2009, New Delhi
- Allen Buchanan, "What is so special about Rights", pp. 61-75, (1984)
- Amrutya Sen, Culture and Human Rights, pp. 227 – 48, (2000)
- Bryant Smith, "Legal Personality", The Yale Law Journal, Vol. 37, No. 3, pp. 223-299, (1928)
- Bryant Smith, Legal personality, Yale Law Journal, Vol. 37, No.3, p. 283
- Clement Chigbo, Corporate Personality and Limited Liability, The Bahama Journal, March 3rd 2006 available at http://www.jonesbahamas.com/?c=135&a=7866 (Retrieved on July 22, 2015)
- Companies Act 1956
- David P. Derham (ed.) A Textbook of Jurisprudence by G.W. Paton (4th ed., 1972)
- Denis Meyerson, Understanding Jurisprudence (2007)
- Frank Snare, "The Concept of Property", American Philosophical Quarterly, Vol.9, No. 2 (Apr., 1972)
- G.W. Paton, A Text book of Jurisprudence, Oxford, IV edition.
- Halsbury's Law of England, 4th ed., Vol. IX,
- Howard Williams, "Kant's Concept of Property", The Philosophical Quarterly, Vol. 27, No. 106, (Jan., 1977)
- Indian Partnerships Act, 1932
- Katsuhito Iwai, Persons, Things and Corporations: The Corporate Personality Controversy and Comparative Corporate Governance, University of Tokyo, July 1997 as available at http://74.125.153.132/search?q=cache:w6tuJi4vErQJ:www.e.u-tokyo.ac.jp/cirje/research/dp/97/f24/dp.pdf+martin+wolff+law+quarterly+review+nature+of+legal+persons&cd=10&hl=en&ct=clnk&gl=in (Retrieved on July 22, 2015)

- LLOYD'S INTRODUCTION TO JURISPRUDENCE (7TH ED., 2001)
- N.E. SIMMONDS, CENTRAL ISSUES IN JURISPRUDENCE (3RD ED.)
- N.O. PAUL, 'JUSTICE AS FAIRNESS' AN ENCYCLOPEDIA OF THE ARTS VOL. 9(2), PP. 155-171, (2006)
- P.J. FITZGERALD, SALMOND ON JURISPRUDENCE (12TH ED., 1966)
- R.W.M. DIAS, JURISPRUDENCE (5TH ED., 1994)
- RONALD DWORKIN, TAKIN RIGHTS SERIOUSLY, PP. 1- 13, (1996)
- SALMOND, JURISPRUDENCE, P.J. FITZGERALD ED., 12TH ED., UNIVERSAL LAW PUBLISHING CO. PVT. LTD., 2006, DELHI
- TRADE UNIONS ACT, 1926
- UPENDRA BAXI, "LACHES AND RIGHT TO CONSTITUTIONAL REMEDIES: QUIS CUSTODIET IPSOS CUSTODES?", ALICE JACOB (ED.) CONSTITUTIONAL DEVELOPMENTS SINCE INDEPENDENCE (1975)
- W.M. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS, PP. 1-15, (1919)
- ZUHAIRAH ARIFF ABD GHADAS, REAL OR ARTIFICIAL? JURISPRUDENTIAL THEORIES ON CORPORATE PERSONALITY, US-CHINA LAW REVIEW, VOL. 4, NO. 5, MAY 2007 AVAILABLE AT HTTP://WWW.JURIST.ORG.CN/DOC/UCLAW200705/UCLAW20070502.PDF (RETRIEVED ON JULY 22, 2015).