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Best wishes,
Anurag Parihar
CEO & Co-founder,
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Table of Contents

Definition and History of Jurisprudence

- The word jurisprudence is derived from latin word jurisprudentia which in its widest sense means knowledge of law. The Latin word juris means law and prudentia means skill or knowledge.
- Jurisprudence signifies knowledge of law and its application.
- In this sense it covers the whole body of legal principles in the world.

Definition of Jurisprudence

1. According to **Ulpian** jurisprudence is the **observation of things human and divine , the knowledge of just and the unjust.**
2. According to **professor Grey** jurisprudence is the **science of law, the statement and systematic arrangement of the rules followed by the courts and the principles involved in such rules.**
   It is there to regulate external human conduct in the society but it does not concern itself with the inner beliefs of man.
3. According to **Salmond** jurisprudence ***is the science of the first principles of the Civil law.***
4. According to **John Austin** jurisprudence is the **philosophy of positive law**.
   By the term positive law he means that the law laid down by a political superior for commanding obedience from his subjects.
5. According to sir **Holland** jurisprudence is the **formal science of positive law**. He called jurisprudence as a formal Science as it deals not with concrete details but only with the fundamental principles underlying them.

History of jurisprudence

We can divide the development of jurisprudence in three phases

1. Pre Roman period
2. Roman period
3. Post Roman period

Pre Roman period

During pre Roman period jurisprudence is not recognised as separate subject of study rather it deals as part of philosophy. In this period Greek has developed the word **jus naturale** that is law is part of morality , ethics etc. . It means no difference between religion and law. Greek concept of jus naturale gives birth to the principles of equity.

Roman period

Word jurisprudence has been used first time by Romans. They provide separate existence to the jurisprudence. In the view of cicero the study of law should be separated from philosophy.

Cicero said that jurisprudence is the philosophical aspect of knowledge of law.

Post Roman period

In mediaeval ages **Saint Thomas aquinas reestablished jurisprudence as branch of religious philosophy.**

In 16 century Scholars have tried to remove law from religion

They have rejected the orthodox rules of Pope and churches as absolute and as such rulers or the kings got the power to make laws.

In 17th century grotius has emphasized to follow international law

Thomas Hobbes has written a book in the name of **leviathan** where he stated that ***order of state is a law and it is the duty of citizens to obey it.***

Austin got inspired with hobbes.

Natural Law School flourished in 18th century. **According to blackstone natural law is equivalent to divine law so it is superior to all laws.**

Bentham has criticized blackstone and said that if a law is approved by State then it will be binding on citizen whether it is natural or other law. By this view of Bentham science of law got freedom from bonds of religious philosophy.

According to Bentham legislation is an important part of jurisprudence.

Austin has established in new concept of positive law that **law is command of sovereign**

Kelsen has given pure theory of law. He rejected the command theory of Austin.

Functional School by roscoe pound

Jurisprudence varies according to time and place because it direct relates to human tendency.

For the development of jurisprudence the sociology is very important. Modern jurisprudence directly gets connected with sociology that has effect on law of society.

So it could also be called as the jurisprudence of interest.

According to Philip heck main function of jurisprudence is to end the conflict of human interest. That means the main object of law or is to preserve the interest of human being

The present American jurists have adopted the practical approach and started the movement of realist school. Main author of realist school is **Eugen Ehrlich who said that law is the centre gravity of a society.**

Types of jurisprudence

John Austin has divided jurisprudence into

1. General jurisprudence
2. Particular jurisprudence

Although Holland has criticized the Austin division of jurisprudence into to general and particular.

According to **Salmond** there are three schools of jurisprudence

1. Analytical School
2. Historical School
3. Ethical School

According to **Bentham**

1. Expositorial jurisprudence
2. Censorial jurisprudence

Julius stone has said that jurisprudence is lawyer's extraversion.

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Analytical schools/ Imperative school/ Positive school/ Austinian School

1. The major Premise of analytical School of jurisprudence is to deal with law as it exist in the present form.

2. The advocates of this school are neither concerned with the past of the law not with the future of it but they confine themselves to the **study of law as it actually exist.** That means ***positus*** so this school is **also called positive School of Law.**

3. It is also called **Austinian school of jurisprudence**

4. **Austin** is considered to be the **father of analytical for positive thought**.

5. However, **Jeremy Bentham** of England appears to be the **founder of this approach**.

6. The most important aspect of analytical school is its relation with state.

Jeremy Bentham 1748 - 1832

1. He is considered to be the founder of positivism in the modern sense

2. The laws in England were not based on definite guiding principles rather **in England law was not made rather grown out of occasions and emergencies**

3. He said that for the change in substantive law it structure should be changed with the process of analysis

4. So he distinguishes between **expositorial jurisprudence and censorial jurisprudence**.

5. He supported the **theory of lassez faire** which means minimum interference of the state in the economic activities of individuals

6. He has given the theory of utilitarianism.

7. According to him the purpose of government was to promote happiness of society by furthering enjoyment of pleasure.

8. Bentham desired to ensure happiness of the community by attaining four major goals

    - Subsistence (minimum resources necessary for survival)
    - Abundance
    - Equality
    - Security

9. He said that right to property should be respected for the Welfare of the state.

10. Bentham's view regarding utilitarianism is also called the **doctrine of hedonism** or **theory of pleasure and pain.**

11. Bentham has rejected natural law theory

12. He also criticized judges made law.

13. Bentham in his book ***limit of jurisprudence defined*** presented his analytical and positive thoughts.

Criticisms of Bentham

1. He has made an imbalance between materialism and idealism

2. He has also made imbalance between individual interest and interest of community

John Austin 1790 - 1859

1. John Austin was very much impressed by the scientific treatment of Roman law and Drew inspiration to introduce same method to the legal exposition of law in England.

2. He is also known as the **father of english jurisprudence**

3. He has written a book ***province of jurisprudence determined***

4. Another book written by him is a ***plea for the constitution*** is an answer to an essay of Gray on parliamentary government

5. He was very much influenced by Thomas Hobbes

6. The school founded by him is known as **analytical positivism.**

7. By positive law Austin meant laws ***properly so called*** as distinguished from morals and other laws which he called **laws improperly so called** which lack force or sanction.

8. He said that international law as positive morality because it is not given by political superior or sovereign.

9. **Austin defines law** as "***rule laid down for the guidance of an intelligent being by an intelligent being having power over him"***

10. He has completely devoid positive law from positive morality

11. He advocated for separation of morality from law.

Imperative theory of law

Austin's Definition of law is called imperative theory of law. It has following elements

- Command
- Duty
- Sanction
- Sovereignty

So according to him law is a command imposing duty enforced by sanctions.

So he said that **law is a command of sovereign**

Criticism of Austin

1. According to **Salmond** law must have elements of ethics justice and reasonableness
2. **Fuller** has said that law passed in derogation of popular will and needs of society will be short lived
3. **Gustav Radbruch** said that Austin's theory leads to dictatorship
4. He has overlooked the custom
5. There is no place for judges made law. Here **Salmond and gray** have improved the theory of Austin as they emphasized that judge can make law.
6. According to **Hart** Austin's theory is not more than command of a Gunman
7. According to Austin international law is no law
8. Austin has overemphasized upon command
9. He has not made the interrelation between law and morality.

Hans Kelsen (1881-1973)

1. Kelsen has the credit of reviving the original analytical legal thought in the 20th century through his ***pure theory of law.***

2. Like Austin, kelson too **divested moral, ideal or ethical elements from law** and wished to create a pure science of law devoid of all moral and sociological considerations.

3. **Law is a systematic arrangement of logical principles**

4. His positive law is based upon normative orders. It is called positive law because it is concerned only with actual and not with Ideal law.

5. Kelsen belonged to **Vienna School** of legal thoughts which was relative to analytical School.

Pure theory of law

1. According to kelson norm is a rule forbidding or describing a certain behaviour.

2. **Legal order is the hierarchy of norms** having sanction and jurisprudence is the study of these norms which comprise legal order.

3. **Pure theory of law is based upon a pyramidical structure of Hierarchy of norms** which derive their validity from the basic norm which he termed as **grundnorm**

4. **Grundnorm gives validity to other norms.**

5. According to kelsen There is no difference between public and private Norm.

HLA HART 1907-1992

1. He practiced at Chancery bar

2. He worked as professor of jurisprudence in Oxford

3. He rejected Austinian theory of analytical positivism and expounded his own theory based upon **relationship of law and Society**

4. He believed that law , coercion and morality are interrelated

5. According to him law is a union of two types of rules which are

    - **Primary Rules** which are duty imposing
    - **Secondary rules** which are conferring power

6. **Rule of recognition** - the recognition and enforcement of law is dependent upon its acceptance.

7. His views on law and morality

    - It is necessary for law and morality to have certain elements of natural law
    - Law and morality are complementary and supplementary to each other

8. According to him law is a legal system whereas legal rules are describing code of conduct and also obligatory nature.

9. He criticized the Austin's theory that law is accepted by the people and not obeyed by the people (obligation versus command)

10. Book written by him is ***the concept of law***.

Criticism

1. He has given no space for principles as he focuses only upon rules

2. Fuller contended for inner morality

3. Morality is guided by or adjusted with changes in society, whereas Law needs outside force of the state.

Historical School

Historical School does not attach importance to relation of law to the state but gives primacy to the social institutions in which the law develops itself.

According to them law is a Legacy of past and product of customs and traditions and beliefs prevalent in different communities.

Montesquieu 1689 - 1755

1. First jurist of historical School (acc. to Henry Maine)
2. He has given the theory of national character of law
3. Law of a particular Nation should be determined by its national characteristics and must bear relation to the climate of each country.
4. Laws are the creation of climate and local situations.

Edmund Burke(1729 - 1797)

1. **Evolution of law is an organic process**
2. It is an expression of belief faith practices of community
3. Book written by him was **reflections on the revolution in France** 1770

Frederick Karl Von Savigny (1779-1861)

1. He was called as **Darwinian before Darwin by Dr Allen.**
2. Also called as sociologist before sociologists
3. **Volksgiest is a source of law.**
4. **Law is the result of general consciousness of the people**
5. Origin of law lies in popular spirit of people
6. Law is not an artificial lifeless mechanical device

His Contributions

1. **Growth of law is a continuous and Unbreakable process** bound by common cultural traditions and beliefs
2. **Law grows with the growth and strengthens with the strength of the people and finally dies away as a nation loses its nationality**

3. The **law develops like language**
4. He opposed codification of German laws
5. Early development of law was spontaneous and thereafter jurists developed it

Books

1. History of Roman laws in middle ages
2. System of modern Roman laws
3. Law of possession or **Das recht des bestiges.**

Puchta (1798-1856)

1. Law is a result of conflict between individual and general will
2. The state through the instrumentality of law restraints the individual from exceeding the limits of his free will.
3. State regulate human conduct to implement general will sacrificing individual interest

Gustav Hugo (1764 - 1844)

Law is a result of habits and traditions of people which they follow voluntarily is a member of society.

Henry maine (1822- 1888)

1. He was the law member of the central legislative council in India during 1863 to 1869.
2. He made a **comparative study between Indian law and the laws of Western society**
3. He was called as **socialist Darwin**
4. He said that almost all the societies of world are almost identical
5. All the **societies are patriarchal in nature** where **male head acquires status**
6. The movement of **progressive societies has had to been a moment from status to contract** (it was relevant in 1860 but not in today's context)

Stages of development of law

1. Divine law - law made by ruler under divine inspiration
2. Customary law
3. Knowledge of law in the hands of priest - dark ages
4. Codification

The society which do not progress Beyond The Fourth Stage are called **static society** and societies which progress Beyond The Fourth Stage and which develops law by new methods are called **progressive societies.**

According to him progressive societies develop their law by

1. **legal fiction -** legal fictions change the law according to the changing needs of the society without making change in the letter of law
2. **equity -** equity consists of those principles which appeal to the consensus of human being. These principles were invoked to remove the defects existing in the common law in England
3. **legislation -** it is considered to be the most systematic and direct method of introducing reforms through new laws. Legislation is the most powerful instrument of legal reform.

Books

1. Ancient law
2. Village community
3. History of Institutions
4. Dissertation on early law and Customs

Vinogradoff 1854

1. Law is not a command of the state but it is an expression of the general will of the people
2. He emphasized on comparative method of the study of law in modern socialistic pattern of societies for establishment of a welfare state
3. He said that the theory of Henry Maine of status to contract does not have much force in the twentieth century as his expression of status to contract does not hold good in communities following collectivist ideology

Frederick Pollock 1845

1. He analysed the law of England during the reign of Henry II and Henry III.
2. Most of these laws are based on traditions and custom prevalent in England from time immemorial.
3. According to him **historical legal Institutions and Customs are important source of development of law.**

Sociological School

The main scope of sociological School is to study the **effect of law on society** and vice versa.

August Compte 1786- 1857

1. He was the first person to use the term sociology. Some jurist consider him to be the **founder of science of sociology.**
2. He applied scientific method to study of sociology which has been termed as **scientific positivism**.
3. According to him society is like an organism and can progress when it is guided by scientific principles.
4. Man is a social animal and cannot live without society and therefore his social life is regulated and controlled by law.
5. Therefore it is the **society** and **not the individual** which should be the focal point of law.
6. The only right a man can possess is the right to always do his duty

Herbert Spencer 1820-1903

1. He has given **organic theory of society**.
2. The purpose of law is to resolve the conflicting interest of the individuals in the society

Rudolf Ihering 1818-1892

1. **Founder of modern sociological jurisprudence acc. To Friedmann.**
2. He opposed the doctrine of individualism
3. Social interest of the society must gain priority over individual interest and the purpose of law should be to protect the interest of the society.
4. His theory is also called as **social utilitarianism**
5. According to him law is means to achieve the end which according to him is social control.
6. He considers punishment as a means to social ends.

Books

1. Spirit of law 1852- 1865
2. Law as means to an end

Eugen Ehrlich 1862-1922

1. He has given the theory of living law
2. The law need not be necessarily created by the state or applied by the court or Having a coercive legal compulsion behind it but it is created by life of groups living within the society.
3. According to him the institutions of marriage ,domestic life, inheritance ,possession , contract are governed by the society through living law.
4. By living law He meant extralegal controls which regulate social relations of man.
5. The purpose of law according to him was attainment of Social Justice
6. He said that while making and administering law the requirement for the society in which law is to operate must be taken into consideration. then only law may serve a really useful purpose.

Duguit 1859-1928

1. He has given the ***doctrine of social solidarity***
2. Every man has his existence as being member of society
3. Everyone is dependent upon each other to fulfill their needs
4. **People follow law because they have to live in society**
5. Justice means fulfillment of social needs and obligations
6. He favoured minimization of state function and decentralisation of State Power
7. He rejected the notion of state sovereignty
8. Duguit was **inspired by the theory of durkheim**
9. Duguit **pushed the natural law out through the door and let it come by window.**
10. Another important point on its theory is that he denies the existence of any private right. He says that the only right which a man possess is the right only to do his duty (said by compte , Duguit has just taken inspiration)

Durkheim

1. He has written a book **division of labour in Society**
2. He made a distinction between two kinds of need of man in society
3. Firstly the common needs of individuals which are satisfied by mutual assistance
4. Secondly the diverse needs of individuals which are satisfied by exchange of services
5. He is a writer of criminology
6. His theory is called ***principles of anomie.***

Gierke

1. His main thesis is that group has real personality
2. He is known mainly for his **theory of reality of group personality**
3. He made a study of legal history with special attention to Association or group as a social and legal phenomena

Roscoe pound 1870- 1964

1. He **concentrated on functional aspect of law** which He meant fulfillment of maximum wants with minimum friction.
2. According to him the task of law is social engineering. It means a balance between competing interest of society
3. According to him law and life flows together
4. He is called as **father of American sociological jurisprudence**
5. He has given the **theory of social engineering**
6. Enumerated the various interest which the law should seek to protect which are

   i. Private interest

   ii. Public Interest

   iii. Social interest
7. He gave five **jural postulates** that in a civilized society man must be able to assume that.

   - Others will commit no intentional aggression upon them
   - They may control for or beneficial purposes what they have discovered and appropriated to their own use what they have created by their own labour
   - Those with whom they deal as a member of the society will act in good faith
   - Those who engage in some course of conduct will act with due care
   - Others who maintain things or employ agencies, harmless in the sphere of their use but harmful in their normal actions elsewhere, and having a natural tendency to cross the boundaries of their proper use will restrain them and keep them within their proper bounds

Books

1. The spirit of common man 1921
2. An introduction to philosophy of law 1922
3. Interpretation of legal history 1923
4. Law and morals 1926
5. Formative era of American law 1938

6. Contemporary juristic theory 1940
7. Administrative law - its growth procedure and significance 1942
8. Social control through law 1942
9. The task of law 1944

Justice Oliver windell Holmes 1841-1935

1. Law is to protect collective interest but not individual interest
2. Life of law is by experience
3. Judges and lawyers must take into account need of time, morals, public policy and public opinion while determining law and rules.

Book : **The common law**

Benjamin cardozo 1870-1938

1. Law is to be interpreted in light of social necessities and realisation of life
2. Judges could not keep themselves away from social realisation
3. Judges should apply law objectively keeping in mind the prevailing traditions morals and needs of the society.
4. Law must change with the changing needs of society

Book: nature of judicial process

Philosophical or ethical School

1. according to the exponents of this school legal philosophy must be based on ethical values so as to motivate people for an upright living

2. The ethical School of jurisprudence expounds the first principle of law as it ought to be. It is neither concerned with the historical past nor with the analytical present, but with the future of law as it ought to be.

3. The ethical or philosophical school considers law as the means by which individuals will is Harmonised with the general will of the community.

Hugo Grotius 1583 - 1645

1. He is known as **father of philosophical jurisprudence.**

2. Law springs from social nature of man

3. Natural law as well as positive morality both are based on the notion of righteousness.

Books:

The law of War and Peace

Immanuel Kant 1724 - 1804

1. **He developed metaphysical method of Justice and said that ethics and law are not one and the same thing**.

2. Ethics relates to man's spontaneous acts while Law deals with all those acts to which a man can be compelled.

3. Ethics deals with inner life of the individual whereas law regulates external conduct.

4. He has distinguished between morality and law

5. Theory of **categorical imperative**

6. As regards the function of the state, kant opined that it should confine itself to maintenance of law and order and administration of Justice.

7. Citizens should have the freedom of criticizing the government

Books :

1. Metaphysical element of Justice

2. Critique of pure reason

Fichte

1. Freedom is necessarily a relative term depending on mutual personal relations which regulate human conduct. .
2. The state should protect only those rights of individuals which are necessary conditions of his personal existence.

Hegel 1770- 1831

1. **The purpose of making of law is to Reconcile the conflicting egos in the society**
2. This could be done by merger of self-centered consciousness to Universal consciousness.
3. The idea of freedom has dominated man's mind throughout his struggle for existence
4. All laws must confirm to dynamic changes in society.
5. Development of idea of evolution
    - Legal history embodies within it the March of freedom in civil societies.
        - Struggle for freedom gave temporal freedom from church
        - the concept of legal government away from tyrannical rule of despotic Monarchies
        - economic enslavement under capitalism have given way to economic freedom.
    - During british rule in India, law was an instrument of political coercion but after independence role of law changed to preservation of rights and socio economic justice.
    - The established rule of law aims at ensuring justice, liberty, equality, fraternity and human dignity.
    - The concept of welfare state evolved.

Scebbling 1775- 1854

1. Law is a means to harmonize individual and general will of community
2. Law delimits the sphere of freedom available to individuals.

Kohler 1849-1919

1. Law is not Universal for all the societies.
2. Law is a standard of conduct which in consequence of inner impulse that urges men towards a reasonable form of life.

   Books - philosophy of law

Stammler 1856-1938

1. Law is **just** if it furthers social ideas. If it harmonizers individual interest with those of society.
2. He is known as a **Neo kantian**

   Book - the theory of law

Realist School

1. The realist Movement in United States **concentrates on decision of law courts**.
2. The content that law has emanated from judges therefore ***Law is what courts do and not what they say.***
3. Judges are the lawmakers
4. Realist school is also called as **left wing of functional School.**
5. They emphasized on functional and realistic study of law not as contained in the statute or enactment but as interpreted and laid down by the courts in their judicial pronouncements.
6. Realism is antithesis to idealism.
7. Realists believe that ***certainty of law is a myth.***

Karl Llewellyn 1893-1962

1. He said that there is no such realist School rather it is a group of thinkers of sociological School
2. Justice could not be seeked by the law books rather by behaviour and thinking of judges.
3. There can never be certainty about law as the society changes faster than law.

Jerome frank 1889-1957

1. Judges do not make laws rather discover it.
2. Personality of the judge and his past experience play a dominant role in molding the law.

   Books: ***Law and Modern Minds, If men were Angels, Court on Trial***

Oliver windell Holmes 1841-1935

1. He studied the law from the point of ***Bad man*** which means from the point of an accused person.
2. The accused has no interest in the law rather he was interested in what the court would do or decide in his particular case.
3. Judges use precedent when there is a gap in law.
4. When the law is not clear judge shall decide the best way to do justice.

Scandinavian realism

1. Dr Allen said that **Scandinavian realism is metaphysical skeptic whereas American realism was rule skeptic.**

2. **Axel hagerstorm(1896- 1939) is considered to be founding father of realism in Sweden.**

3. **Prof. Oliver Crona (1897-1980)** Scandinavian realists discarded from law all ***a Priori*** notions of natural law, abstract conceptions and idealism because they are all purely theoretical precepts without any practical utility

4. **Professor Ross(1899- 1979)** said that law in all its form is a social reality devoid of doctrinal conceptions like morality, idealism, natural law and theoretical on metaphysical conceptions.

Natural law theory

1. The natural law theory reflects a perpetual quest for absolute justice.

2. Its practical value is a historical fact as it generated a wave of liberalism and individual freedom and inspired people to Revolt against totalitarian rule in France and Germany

3. Dr friedman has commented that the history of natural law is a tale of the search of mankind for absolute justice and its failure. Therefore with the changes in social and political conditions the notions about natural law have also been changing.

4. In the ancient societies natural law was believed to have a divine origin. During the mediaeval period it had religious and Supernatural bases and in modern times it has a strong political perspective.

Main characteristics natural law

1. It is basically ***a Priori*** method different from empirical method.

2. Empirical method or ***a posteriori*** approach tries to find out the causes and reasons.

3. It focuses more on moral ideals which has universal applicability.

4. **Locke** used natural law as an ***instrument of change*** but **hobbes** used it to maintain ***status quo*** in the society

5. The concept of rule of law and due process are based on natural law philosophy.

Development of natural law is divided into four parts

1. **Ancient period**
2. **Mediaeval period**
3. **The period of Renaissance**
4. **Modern period**

Ancient period

Heraclitus 530 - 470 BC

The concept of natural law was developed by Greek philosophers who pointed out that there are three main characteristic features of law of nature

- **Destiny**
- **Order**

- **Reason**

Reason is one of the Essential elements of natural law

Socrates 470 to 399 BC

1. According to Socrates man possesses human insight which distinguishes between good and bad.

2. Justice may be of two kinds.

- Legal justice

- natural justice

natural justice are uniformly applicable whereas legal justice may differ from place to place depending upon statuary law.

Plato 427-347 BC

1. He has given the concept of Ideal state which he termed as ***Republic.***

2. He contended that only intelligent and worthy person should be king.

Aristotle 384-322 BC

1. According to him a man is a part of nature in two ways. **Firstly he is a creation of God** and secondly he **possesses insight and reason.**

2. Hi define natural law has ***reasons unaffected by Desires***

3. **He justified that slavery is a part of nature.**

4. He suggested that the ideas of natural law have emanated from human conscience and not from human mind.

Mediaeval period

This period was dominated by Christian fathers who propagated there doctrines for establishing the superiority of the church over the state.

Saint Thomas aquinas 1225-1274

He has given classification of laws

1. **Law of God** or external law
2. **Natural law** which is revealed through reason
3. **Divine law** or the law of scriptures
4. **Human laws** which he called positive law

1. He said that Church has the authority to interpret divine law.
2. Positive law should be accepted only to the extent to which it is compatible with natural or external law.

The period of Renaissance

1. This period is marked by rationalism and emergence of new ideas
2. Tremendous growth of trade and commerce in European countries created new classes in the society which needed greater protection from the state
3. There was a wave of nationalism and a demand for absolute sovereignty of the state and Supremacy of the positive law overthrowing the dominance of the church.
4. In this period authors denied the authority of Church and emphasized on Sovereignty.

Hugo grotius 1583-1645

1. He **propounded the principles of international law** which were equally applicable to all states.
2. He Departed from Thomas aquinas concept of natural law and reason and held that **natural law was not merely based on reason but on right reason.**
3. Grotius believed that **however bad a ruler maybe it is the duty of the subjects to obey him because** Grotius's main concern was stability of political order and maintenance of international peace which was the need of the time.

Thomas Hobbes 1588-1679

1. He made use of natural law to **justify the absolute authorities of the ruler** by endowing him power to protect his subjects.
2. Thomas Hobbes propounded his Theory of social contract relating to evolution of the state.
3. He **supported the absolute power and authority of the ruler**. Subjects had no right against the sovereign
4. **According to him prior to social contract man lived in a chaotic condition of constant fear**
5. **In order to secure self protection and avoid misery and pain men voluntarily entered into contract and surrendered their freedom to some mightiest authority who could protect their life and property**
6. His famous work is **leviathan**
7. According to him governments without sword are but words ,and of no strength to secure a man at all.
8. Austin's imperative theory of law is essentially an outcome of Hobbes' doctrine of absolutism of sovereign.

John Locke 1632-1704

1. He has rejected the theory of hobbes and has given new interpretation to social contract.
2. He stated that the life in state of nature was not as miserable and Brutish as depicted by Hobbes, instead it was reasonably good and enjoyable except that the property was insecure.
3. **In order to ensure proper protection of property man entered into the social contract by surrendering few of his rights.**
4. Thus the natural rights of man such as **right to life , liberty and property** remained with him.
5. Locke pleaded for a constitutionally limited government.

Jean Rousseau 1712 - 1778

1. He gave new interpretation to social contract and natural law
2. He pointed out that social contract is not a historical fact as contemplated by Hobbes and Locke but it is merely a hypothetical conception
3. People United to preserve their rights of freedom and equality and for this purpose they surrendered their rights not to a single individual but to the community as a whole which Rousseau termed as **General will.**
4. **People surrendered their right to the community as a whole**
5. Individual surrender his natural right as a return to get civil liberties like freedom of speech etc.
6. The state and the laws made by it are subject to general will and if the government and the laws do not confirm to general will they would be discarded.
7. It generated a wave of Nationalism in Europe and United States which eventually lead to French Revolution against tyranny and American war of independence.

Modern period

1. In the wake of 19th century natural law theory received a setback by analytical jurist like Bentham and Austin who rejected natural law on the ground that it was ambiguous and misleading.
2. The doctrines propagated by Austin and Bentham completely diverged morality from law.
3. But in the 19th Century legal theory which overemphasized positivism failed to satisfy the aspirations of people.
4. The impact of materialism on society compelled The Scholars to look for some value oriented ideology

Rudolf Stammler 1856-1938

Book - **Natural Law with variable content**

John rawls

He propounded two principles of Justice

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

Lon Louis fuller 1902 -1978

1. Law and morality are necessarily correlated
2. He analysed the concept of morality and its relation with law
3. He distinguishes between **morality as it is** from **morality as it ought to be**

Sources of law

In the Indian context the expression sources of law is generally used in two senses

1. According to Hindu scriptures **duty is the foundation head of all law**

2. According to modern jurisprudence it is the **sovereign from where the law emanates.**

- According to Fuller the sources of law includes the material from which the judge obtains rule for deciding cases, it includes statutes ,judicial precedents, customs, opinion of Legal Experts, jurist etc.
- According to natural law philosophers law has a divine origin.
- It is a gift of god contained in holy books.

Salmond's view

1. Salmond divided the sources of law into two classes. **material sources and formal sources**.

2. According to him **formal sources of law are that** from which rule of law derives its **force and validity.** For example **will of the state** as manifested in the statute book or **decision of courts** are the formal sources of law.

3. But **if we talk about material sources** the law derives only its matter and not the validity.

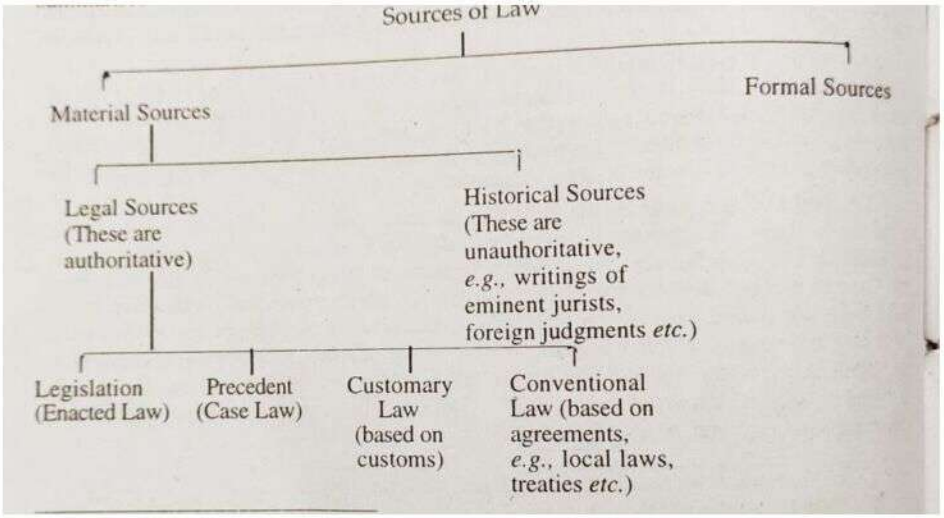
4. So legislation, custom, agreements , professional opinion of jurist are material sources of law.

5. Material sources are further subdivided into **legal sources and historical sources.**

6. **Legal sources are authoritative where as a historical sources are unauthoritative.**

7. For example a law passed by legislature has a binding force therefore it is a legal material source of law. Whereas opinion of eminent jurist are not binding upon the courts.

8. **Important: custom is what kind of source**. Answer. Legal material source.



Keeton's view

According to him the sources of law can be divided into two broad categories

1. **Binding source of law**
2. **Persuasive source**

Binding source can further be classified as.

1. Legislation
2. Judicial precedent
3. Customary law

Persuasive sources may also be of three kinds

1. Professional opinion
2. Principles of equity
3. Writing of jurists

In his opinion persuasive sources are useful only when there is no binding source of law.

1. If we talk about **sources of law according to Indian perspective** we find that prior to the British rule in India Hindus and Muslims were governed by their personal laws.

2. **Hindus recognised their sources of law as Shruti ,Smriti, the conduct of the Virtuous and one's own conscience**

3. **Muslims recognised their source of law as Quran , Sunnat (traditions) , Ijma (consenses of opinion) and Kiyas(analogical deduction**).

4. Both these laws claimed transcendental origin which supposed to be a direct relevation from God.

Custom as a source of law

1. Custom is one of the oldest sources of law making
2. According to **salmond custom is to society what law is to state**
3. The influence of custom on society is similar to that of law in the state
4. Morality and codification are not essential for custom

Definitions

1. **Dr Allen.** Custom is the uniformity of habits or conduct of people under like circumstances.
2. **Herbert Spencer .** Custom is a tradition passing on from one generation to another that originally govern human conduct
3. **Salmond** custom embodies those principles as are acknowledged and approved by public opinion of the society at large.
4. **Austin** custom is a rule of conduct of which the governed observe spontaneously and not in pursuance of law settled by the political superior
    - Custom is a source of law and not itself a law.
    - A custom is not a positive law unless declared as such by Court or sovereign
5. **Hari Prasad vs Shiv Dayal 1876 privi council** Custom is a rule which has obtained the force of law in a particular family or region due to long usage.

Historical View

1. According to the historical view custom is superior to statute and it can supersede statute.
2. **Gray** custom is not law unless approved by judges
3. **Pollock** common law is customary llaw
4. **Savigny** customary laws completely modify or repeal statute.
5. **Manu** custom is a transcendent law.

Kinds of custom

There are two kinds of custom

1. Conventional custom

2. Legal custom
    - Local custom
    - General custom

Conventional custom

1. A conventional custom is also called usage
2. A conventional custom is legally binding not because of any legal authority but because it has been expressly or impliedly incorporated in a contract between the parties concerned
3. A custom should be old enough to be in the knowledge of the people in general but No specific period is prescribed for custom to be treated as old enough.
4. The privy council in Subhani vs Nawab 1941 said that even a relatively new conventional custom may also get legal recognition provided it has been well established in the community.
5. A conventional custom shall be recognised as law so long as it is not contrary to the general law of the country
6. It should be reasonable

Legal custom

1. These customs operate as binding rule of law
2. They have been recognised by court and have become part of law of land
3. Legal customs may be further divided into local custom and general custom.
4. Local custom is that which prevails in some defined locality where as General custom is operative throughout the realm

Essential elements of a valid custom

1. **Reasonableness**, a custom is contrary to reason if it is opposed to the principles of justice equity and good conscience

2. **Consistency**, it should not be contrary to an Act of parliament. It means that it should have conformity with statute law

3. **Compulsory observance,** if a practice is left to individual choice it cannot be treated as a customary law

4. **Continuity and immemorial antiquity**, for a good custom it must have been in use so long that memory of man does not run to the contrary. However in England custom in order to be recognised as law must be before the coronation of king Richard 1189 AD.

5. **Peaceful enjoyment**

Legislation as a Source of Law

- Legislation is regarded as one of the most effective sources of law
- It involves laying down of legal rules by the legislature which the state recognises as law.
- It has the force and authority of the state.
- Legis means **law** and latum means **to make** or **set.**
- Legislation means making of law.

Definition

1. **Analytical School :** jurist of this school are very much supporter of legislation. According to them it is the only way to promulgate the law

2. **Historical School**: jurist of this school attach no importance to legislation. Function of legislation according to these jurists is only to collect custom and give better form to them.

3. **According to Austin** legislation includes activities which result into law making for amending, transforming, or inserting new provisions in the existing law.

Supreme and subordinate legislation

1. Legislation is Supreme when it proceeds from the sovereign power (parliament in India) in the state and is incapable of being repealed , annuled Or controlled by any other legislative authority.

2. When Supreme authority delegates its power of law making to other authority (to executive) then law made by Such authority is known as subordinate or delegated legislation.

Kinds of subordinate legislation

1. **Colonial legislation**
2. **Executive legislation**
3. **Judicial legislation**
4. **Municipal legislation**
5. **Autonomous legislation**

Colonial legislation:

- The British colonies and other dependencies were conferred Limited power of self-government by the Imperial legislature.

- But the laws so made by colonial government could be repealed altered or superseded by the Imperial legislature ie.the British Parliament.

Executive legislation

- The Parliament quite often delegates it's rule making power to certain departments of the executive organ of the government.
- The rules made by them have the force of law however it may be repealed by the Legislature
- It has given rise to the administrative law.
- In France it is known as droit administratif.

Judicial legislation

1. In certain cases, legislative power of rulemaking is delegated to the Judiciary and the supreme courts are authorised to make rules for regulation of their own procedure in exercise of this power
2. **Judicial legislation should not be confused with judicial precedents where the court formulates a new principal of law through its judicial decisions.**
3. Under article 145 Supreme Court whereas article 227 High Court has been conferred the power of rule making relating to the following matters.
    - For setting up norms for practicing lawyers
    - For the procedure of appeals and time limit for such appeals.
    - For proceedings relating to the enforcement of fundamental rights
    - For transfer of cases to different high courts
    - For disposal of criminal appeals coming from high courts
    - For laying down conditions for review petitions.
    - For making rules relating to the cost and fees
    - For making rules for grant of bail ,bonds ,security etc.
    - For making rules relating to stay of proceedings

Municipal legislation:

The municipal authorities are allowed within their areas to make bye-laws for Limited purposes such as water tax ,land urban cess, property tax, town planning ,Public Health ,sanitation etc.

Autonomous legislation

The state may allow private entities or bodies such as universities, companies, Corporation etc. to make bye laws for regulating the conduct of their business.

Delegated legislation

1. Delegated legislation is a legislation made by any authority other than the Legislature.
2. It denotes the rules, orders, notifications bylaws or directions made by the executive authorities under the law passed by the parliament.
3. Law made by executive is known as delegated legislation
4. When the function of legislation is entrusted to organs other than the legislature itself the legislation made by such organs is called delegated legislation
5. **Delegated legislation is also known as Henry VIII clause.**

In Modern Times delegated legislation has become important due to following reasons

1. **Want or lack of time to legislature** With the evolution of concept of welfare state the government necessitated a huge bulk of legislation.
2. **Technicality of matter**: there are certain fields which require technical skills to make law
3. **Emergency**: delegated legislation is further deemed necessary to meet the cases of emergency arising out of War, floods , economic depression , epidemic etc.
4. **Flexibility**
5. **Local matters**
6. **To meet unforeseen contingencies**
7. **Confidentiality of matter**

Judicial Precedent

1. Judicial precedent is another important source of law. As in English legal system most of the common law is unwritten and it owes its origin to judicial precedent.

2. Judicial precedent has a binding force and therefore it is an important source of English law.

3. Judicial precedent leads to certainty of law.

4. According to Jeremy Bentham precedent is a judge made law while Austin calls it as judiciary's law.

There are two systems in the world to adopt precedent as law. In some countries it is accepted as law but in other countries it is not accepted as law.

Inductive method

When from particular case the judge deduces general rules and applies them on the cases before him and decides the case accordingly this is known as inductive method. Which means that **decisions according to previous judgement** which is generally practised in England

Deductive method

When the judge decides the cases according to the law laid down by authority and do not look for decided cases of similar nature It is called deductive method. It means that **decision according to the law and not according to previous judgement.** It is generally practised in European countries.

Judicial precedent May either be authoritative or persuasive.

1. Authoritative precedent are the decisions of the Superior Court of Justice which are binding on subordinate courts.

2. Whereas persuasive precedent is one which the judges are under no obligation to follow but which they may take into consideration.

Article 141

This article of the Constitution of India gives a constitutional status to the doctrine of precedent in respect of law declared by the Supreme Court of India.

The decisions of the Supreme Court of India are binding on all the Courts in India and they constituted authoritative precedent.

Bengal immunity Limited versus state of Bihar 1955

1. In this case the Supreme Court has overruled its own precedent for the first time.

2. The court held that Supreme Court is not bound by its own decisions.

3. So the concept of overruling started from this case

Golaknath: concept of prospective overruling was propounded in this case

important points

1. The decision of federal court is binding on High Court so long as they have not been overruled by Supreme Court.

2. The decision of privy Council given before 1950 shall be binding on the high courts unless they have been overruled by Supreme Court

Justice gray of American realist school says that **the court puts life into the dead words of statute.**

Ratio decidendi

The term ratio decidendi literally means reason of the decision**. It is the general principle** which is deduced in a case. Ratio decidendi is the rule of law upon which the decision is founded.

The doctrine of ratio decidendi can be better understood by a concrete illustration. In an English case of **bridges versus hawkeshworth** a customer found some money on the floor of a shop. The court applied the rule of **finders keepers** and awarded possession of the money to him rather than to the shopkeeper.

(a shop is a public place)

Doctrine of Privity of contract - donoghue versus Stevenson

Manufacturer is liable to consumer for his negligence in manufacturing The goods.

(decomposed Snail was inside the Ginger beer bottle which was opaque)

Obiter dicta

Obiter dicta literally means something said by the judge by the way which does not have any binding authority.

These dictas have the force of persuasive authority and are not binding upon the courts.

Doctrine of stare decisis

The doctrine of stare decisis has essentially developed as a result of progress made in law reporting.

There must be hierarchy of courts

The doctrine of stare decisis literally means **let the decision stand in its rightful place.** When a decision contains in new principal it is binding on subordinate courts and has persuasive authority for equivalent courts.

Principles on which this Doctrine is based

1. Each Court is bound by the decisions of court above it
2. To a certain extent higher courts are bound by their own decisions. However in India supreme court is not bound by its own earlier decision.
3. The decision of one high court is not binding on any other High Court rather it has only persuasive value.
4. A single bench judge is bound by the decision of a division bench of the same High Court.

When people come in contact as members of societies they have certain legal rights and duties towards one another. These rights and duties are regulated by the law prevalent in the society. It is well known that the main purpose of law is to protect human interest by regulating the conduct of individuals in the society.

Duties: duty is an obligatory act which means it is an act opposite of which would be wrong.

Duty maybe moral but not legal or it may be legal But Not moral or it may be both moral and legal at once.

Classification of legal duties.

1. **Positive and negative duties**

when law obliges a person to do an act the duty is called positive duty.

Whereas when the law obliges a person to refrain from doing an act it is called a negative duty.

2. **Primary and secondary duties**

Primary duty is one which exists **per se** and is independent of any other duty. For instance, to forbear from causing personal injury to another is a primary duty.

A secondary duty on the other hand is one which has no independent existence but exists only for the enforcement of other duties. For example duty to pay damages for the injury done to a person is a secondary duty.

3. **Absolute and relative duties**

Acc. To Hibbert- absolute duties are owed only to the states, breach of which is generally called a crime and the remedy for it is punishment.

Relative duties are owed to any person other than the one who is imposing them, the breach of which is called a civil injury which is redressible by compensation or restitution to the injured party.

Legal rights

Sir John salmond defines rights as **an interest recognised and protected by rule or justice.**

A man has varied interest but all of them are not recognized by law. Many interests exist de facto and not De jure that means they receive no recognition or protection from any rule of right. The violation of them is no wrong and respect for them is no duty. Interests are things which are to man's advantages such as his freedom or reputation.

- Like wrong and duties, rights are either moral or legal. A moral or natural right is an interest recognised and **protected by a rule of morality** and violation of which would be a moral wrong.
- A legal right on the other hand is an interest recognised and **protected by a rule of law** and violation of which would be a legal wrong.

John Austin observed

A party has a right when another or others are bound or obliged by law to do or forbear towards or in regard of him.

This definition has been criticized on the ground that it overlooks the element of interest involved in the conception of right. John Stuart mill has illustrate the inadequacy of Austin's definition of right by pointing out that when a Prisoner is sentenced to death the jailer is duty bound to execute him. Then will it be proper to say according to Austin's definition that the Convict has a right to be hanged ?

Ehring also defines right as a **legally protected interest.**

Theories of legal rights

1. **Will theory of legal right**

- The will theory of legal rights has been supported by hegel, kant, hume etc.
- According to this theory a right is an inherent attribute of human will. the subject matter of right is derived from human will.
- the theory suggest that it is through a right that a man expresses his will over an object

The eminent jurist duguit is opposed to the view that the basis of a legal right is human will. He argues that all laws originate from social solidarity hence there is no existence of a right as such.

Duguit it believes that human will is opposed to social good because it always leads to conflict of interest between individuals. Law being an expression of social solidarity demands that everyone should abide by his duties and has no right to claim rights. Thus duguit rejects the concept of right, as Immoral and against the interest of the society.

Rejecting duguit's view about legal rights Dr Edward Jenks writes that undoubtedly the main function of the state is to ensure enforcement of duty is but after all these duties are enforced for protecting the interest of the people.

2. **Interest theory of legal right**

Another popular theory regarding the nature of legal right is called the interest theory which was mainly propounded by the German jurist ihering.

According to this theory ***a legal right is a legally protected interest.*** Ihering does not emphasize on the element of will in legal right.

Salmond has criticized iherings theory on the ground that it is incomplete since it completely overlooks the element of recognition by State.

Elements of legal right

1. **Subject :** Subject means the person in whom right is vested or holder of rights.(***Person of Inherence***)
2. **The act or forbearance**: right is related to some act or forbearance. It obliges a person to act or forbear in favour of the person who is entitled to right.
3. **Object of right:** it is thing in respect of which the right exists.***(Subject matter of Right***)
4. **Person bound** it means the person upon whom co- relative duty Falls.(***Person of Incidence***)

5. **Title** salmond says that every legal right has some title attached to it

Right and duty relationship

It is a General principle that right is always co-relative to duty but some jurist who do not agree with this view say that there can be some duties without co-relative rights and they call this duties as absolute duty.

Austin's view

He says that there are four kinds of absolute duties which have no corelative right.

1. Self regarding duties such as a duty not to commit suicide
2. Duties towards indeterminate persons or public at large for example, duty not to commit a nuisance
3. Duties to those who are not human beings such as duty towards God or animals or birds
4. Duty towards the sovereign or the state

Classification of legal rights

Perfect and imperfect rights

- a perfect right is one which corresponds to a perfect duty. It is not only recognised by law but also enforced by it.
- An imperfect right on the other hand is one which although recognised is not enforced by law.
- A perfect right means which can be legally enforced and imperfect right is that right which cannot be legally enforced.

Positive and negative rights in case of a positive right ,the person subject to the duty is bound to do something whereas in case of negative rights others are restrained from doing something.

Real and personal rights these are also called ***right in rem*** and ***rights in personam.*** A real right corresponds to a duty imposed upon persons in general where as a personal right corresponds to a duty imposed upon determinate individuals.

Rights in Re propria and rights in Re aliena: right in Re propria means right over one's own property where as right in re aliena means right over the property of someone else

Legal and equitable rights in England those rights which are provided by common law courts are called legal rights and those rights which are provided by equity courts are called equitable rights

Public and private rights; Vested and contingent rights; Proprietary and personal rights.

Ownership

1. ownership has its origin in the ancient Roman law. Right to ownership is the most important right.

2. In Early Times the distinction between ownership and possession were not distinguished but with the advancement of Civilization the two terms were considered not same but separate.

3. There is a difference between ***right of ownership*** and ***ownership of right.*** On one hand right of ownership is a corporeal ownership but on the other hand ownership of a right is incorporeal ownership.

Definition of ownership according to Hibbert:

1. right to use of a thing

2. Right to exclude others from use of a thing

3. Disposing of the thing

4. Right to destroy it.

Austin's definition of ownership

1. Right over a determinate thing and indefinite in point of user, unrestricted in point of disposition and unlimited in the point of duration.

2. **Ownership is a right in rem** which is available to the owner against the world at large.

3. Ownership is used in reference to things which maybe corporeal things.

Three attributes of ownership

1. Indefinite user

2. Unrestricted disposition

3. Unlimited duration

Indefinite user implies that the owner of a thing is free to use or even misuse it in any manner he likes subject to certain restrictions of law.

Unrestricted disposition means an owner of a thing has unrestricted right to dispose it off in a way he likes. Thus he regards right of alienation as a necessary incident of ownership.

Unlimited duration means The right of ownership according to Austin is unlimited in point of duration. The right shall exist so long as the owner and the thing exist

Holland's definition. Ownership is a plenary control over an object.

Keeton's definition. Ownership is an Ultimate right to the enjoyment of a thing.

Salmond's definition . Ownership denotes the relationship between a person and right that is vested in him.

Kinds of ownership

1. **Corporeal and incorporeal ownership.**

- The ownership of material object is called for corporeal ownership whereas the ownership of right is called incorporeal ownership.
- For example the ownership of a house, table, land, machine etc. is corporeal ownership whereas ownership of copyright, patent, trademark etc. is incorporeal ownership.
- Corporeal things are those which are tangible which means it can be perceived and felt by the senses whereas incorporeal things are intangible and cannot be perceived or felt by senses

2. **Sole ownership and co-ownership**.

When the ownership is vested in a single person it is called sole ownership whereas when it is vested in two or more persons at the same time it is called co-ownership.

For example: the members of a partnership firm are co-owners of the partnership property.

Co-ownership can be of two kinds

Ownership in common. In this case the right of the deceased passes on to his successor like other inheritable rights

Joint ownership. 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 of survivorship.

3. **Trust ownership and beneficial ownership**

- In case of Trust ownership the property is owned by two persons at the same time
- The relation between them is such that one of them is under an obligation to use his ownership for the benefit of other.
- The former is called Trustee and his ownership is called **trust ownership**
- The latter is called beneficiary and his ownership is called **beneficial ownership**

4. **Legal and equitable ownership**

- legal ownership is that which has its origin in the rules of common law whereas equitable ownership proceeds from the rules of equity.

5. **Vested and contingent ownership**

- In vested ownership the title of the owner is already perfect while in contingent ownership his title is as yet imperfect but it is capable of becoming perfect on the fulfillment of some conditions.

6. **Absolute and Limited ownership**

- When all the rights of ownership such as possession , enjoyment and disposal are vested in a person without any restriction the ownership is absolute.

- When there are restrictions as to user, duration or disposal the ownership will be called a limited ownership

Gandhian concept of ownership

1. He has extended the concept of Trusteeship to the right of ownership and said that ownership does not exist for individual benefits alone but he holds it as a Trustee of property or thing owned for the benefit of society as a whole.

2. Ownership is vested in a person to use it for public good

3. Also under present Indian laws no person can have absolute ownership over a property because these rights are subjected to restrictions by various statutes and regulations such as ceiling laws ,rent control , company regulations etc.

Possession

- possession is prima facie evidence of ownership (section 110 of evidence Act) . Usually the presumption is that the possessor of a thing is the owner of it and the other claimants to have it must prove their title.
- Possession is the most basic relation between man and things. Possession of material things is essential to life because the existence of human life and human society would be rather Impossible without the consumption and use of material things.

Possession in fact (de facto possession)

It indicates physical control of a person over a thing. **The relation between a person and a thing which he possess is called possession in fact.**

Certain points to be noted

1. There are certain things over which a person cannot have physical control.(Sun ,moon ,stars etc) .

2. The physical control over the object need not be continuous. In other words physical control may continue even if a person relinquishes actual control temporarily.

   For example wearing and removing a coat.

   Important is I should be in a position to resume control over it in normal course whenever I so desire.

3. In spite of having physical control the person must have capacity to exclude others from the possession of it. However some jurists do not consider this element necessary for possession.

Possession in law (de jure possession)

1. Law protects possession by conferring legal rights on the possessor.

2. Law protects the possession by penalizing the persons who interfere with the possession of a person or by making him pay damages to the possessor.

Savigny's theory of possession

Corpus possession means effective control over the thing which in the other words means exclusive use of the thing with capacity to eliminate the interference of others.

Corpus implies two things first the **possesor's physical relation to the object** and second the **relation of the possessor to the rest of the world.**

Animus possession means the intention to hold the thing as the owner of it. The subjective or mental element in possession is called animus possidendi.

Henry Maine pointed out that in the early stages of development of law physical contract must have been deemed necessary to constitute legal possession but in actual practice , possession does not mean mere physical control but the **intention to possess a thing to the exclusion of others is also equally necessary.**

Iherings theory of possession

Whenever a person look like an owner in relation to a thing, he had possession of it , unless possession was denied to him by rules of law based on practical convenience.

Ihering was more practical in approach and did not insist on presence of animus as an element of possession

According to him the person holding property in majority of cases would be the owner of the property.

Kinds of possession

1. **Corporeal and incorporeal possession**

Corporeal possession is in relation to material things like land, house, building. Actual use of thing is however not necessary. Thus a person may keep his watch locked in a safe for several years without using it, he would nevertheless be deemed to be in possession of it.

Incorporeal possession on the other hand means possession of immaterial or intangible things which we cannot touch or perceive. But in this case actual continuous use and enjoyment of it is deemed as an essential condition.

2. **Mediate and immediate possession**

Mediate possession

1. When the owner of a thing possesses it through some mediator, agency, servant or manager his possession is called mediate possession.

2. For example if I purchase a book through an agent for servant I have mediate possession so long as the book remains in the Agent's of servant's possession.

3. In this case two persons have the possession of the same thing at one and the same time.

Immediate possession

1. whereas when the owner of a thing possesses himself it is called immediate possession.

2. For example if I purchase a book myself I have immediate possession of it without any intervening agency.

3. It is also known as direct possession.

3. Adverse possession

It implies the 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 , the title of the true owner is extinguished and the person in possession becomes the true owner of that land.

Element: continuity, adequate publicity and peaceful Possession for prescribed period.

Modes of acquisition of possession

1. **By taking**

Taking is the acquisition of possession without the consent of the previous owner. Taking May either be rightful or wrongful. It is not necessary that the thing taken in possession must necessarily be already in possession of any previous owner. **Res Nullius- a thing belongs to none**

2. **By delivery**

When a person acquires possession with the consent or co-operation of the previous owner it is known as acquisition of possession by delivery.

3. **Operation of law**

It may either be obtained by operation of law.

Difference between ownership and possession

1. Possession is de-facto exercise of a claim where as ownership is de jure. (Henry Maine)
2. Possession is a fact but ownership is a right.(Ihring)
3. Possession is an external evidence of ownership
4. Possessor is Deemed to be the owner of property.
5. Long possession may be converted as an adverse possession
6. According to salmond when a claim is recognised and protected by the law it is ownership but possession is exercised and realised without any such recognition of state.
7. According to dr. Sethna the relationship between ownership and possession is same as that of body and soul.

8. There may be ownership without possession and also there may be conversely possession without ownership

Cases on possession

1. Bridges versus hawkishworth
2. R vs. Riley (lamb case)
3. R vs harding
4. R vs ashwell
5. Merry vs green
6. R vs moore

Legal personality

Generally there are two types of person which the law recognises namely, natural and artificial. The former refers to human beings while latter to other than human beings which the law recognised as having duties and rights. **One of the most recognised artificial person is corporation**.

Legal or juristic personality includes gods, Angels, idols, Corporation etc. although they are not human beings.

Definition of legal person

Gray defines a person as ***an entity to which rights and duties may be attributed.*** Any being that is capable of holding a right or duty, whether it be a human being or not, is person in law.

According to **GW Paton**, legal personality is a medium through which some such units are created in whom rights can be vested.

A juristic person is not a human being. It may be any other subject matter either a thing or a mass of property or group of human beings to which law attributes personality.

Legal status of Unborn person

The law attributes legal personality to Unborn children. A child in mother's womb is by fiction treated as already born and regarded as person for many purposes. A gift may be made to a child who is still in the Mother's Womb. However if the child does not take birth alive his share may be equally partitioned between the surviving heirs.

Under the Indian Penal Code injury to the child in womb is punishable offence under section 312,313 and 316.

The rights conferred on Unborn children are, however contingent depending upon his taking birth alive, when they are transformed into vested rights.

Montreal tramways co. vs. leveille 1933

Legal status of Dead Man

Acc to Salmond : Dead Men are no longer persons in the eyes of the law. They cease to have rights since they cease to have any interest nor do they have any duties. A Dead Man's Corpse is not property in the eyes of law.

But supreme court in ***ashray Adhikar Abhiyan versus Union of India 2002*** has held that even a homeless person when found dead on the road has a right of a decent burial for cremation as per his religious faith.

The reputation of deadman is to some extent protected by the law only when it affects the interest of his relatives and near ones who are living. the right so protected is in reality not that of the dead man but that of his living descendants.

Legal status of Idol and mosque

1. **Idol**

It has been judicially recognised that Idol is a juristic person and as such it can hold property. Its position is like that of a minor because the priest or Pujari acts as a Guardian to look after the interest of the Idol. The privy council in the historic case of ***Pramath Nath Mullick vs Pradyumna Kumar Mullick*** held that an idol is juristic person.

The supreme court in ***devakinandan versus Muralidhar*** ruled that the property of Hindu temple or an idol vests in the idol itself while its possession and management vest in shebait as a manager of the estate.

2. **Math**

The supreme court in ***Krishna Singh vs Mathura*** distinguished the legal position of a math from that of a temple and held that a math is a religious institutions sui generis unlike a temple where presiding element is diety, whereas the preceding element of a math is it's Mahant. The property belonging to math is in fact attached to the office of Mahant and passes by inheritance to one who fulfills the office.

3. **Mosque**

As regards the legal personality of a Mosque the courts have expressed conflicting views. In ***Maula bux versus hafizuddin*** 1925. The High Court of Lahore held that a Mosque was a juristic person capable of being sued.

But the Privy Council held contrary view in ***masjid Shahid Ganj 1940*** case and observed that mosques are not artificial persons in the eyes of law and therefore no suit can be brought by or against them.

Guru Granth Sahib

The supreme court in in ***Sriomani Gurudwara Prabandhak committee vs Somnath Das*** has ruled that Guru Granth Sahib the holy Granth of sikhs is a legal person.

The court further pointed out that Gurudwara and Guru Granth Sahib are not two separate legal entities. The existence of Gurudwara is because of the installation of Guru Granth Sahib which is its nucleus.

The apex court further made it clear that Guru Granth Sahib stands on altogether different footings then the holy book of other religions such as Holy Quran or Bible or Ramayan or Bhagavad Gita because the latter does not treated as legal persons. The justification for treating Guru Granth Sahib as legal person according to the learned judges was that it is

treated and worshipped as "guru" by the Sikh community and considered as the soul and heart of Gurudwara.

Double capacity distinguished from double personality

A man may have two or more capacities but he has no power to enter into a legal transaction with himself. Therefore double capacity does not mean double personality. For example a director of a company may also be a Trustee of a trust, thus he may have two distinct capacities nevertheless his personality remains single.

The English law does not recognize double personality and therefore a person could not sue himself or contract with himself.

Kinds of legal persons

The law recognises only two kinds of persons

1. Natural persons
2. Legal persons who are artificial creations of law

A natural person is a living human being. But all living human beings need not necessarily be recognised as persons in law.

For examples slaves have no rights and duties.

Lunatics and infants have only a restricted legal personality. They do not have many civil right such as Right to vote etc.

Legal person is any subject matter to which law attributes legal personality. Legal personality being the creation of law can be conferred on entities other than human beings.

Corporate personality :its nature

Corporate personality is a creation of law. Legal personality of Corporation is recognised both in English and Indian law. Corporation is an artificial person enjoying in law capacity to have rights and duties and holding property.

1. The individuals forming the Corpus of the corporation are called its members.
2. Corporation is distinct from its individual members.
3. It has the legal personality of its own and it can sue and can be sued in its own name.
4. It does not come to an end with the death of its individual member and therefore has a perpetual existence.
5. Law provides special procedure for the winding up of a corporate body.

Corporations are of two kinds

1. **Corporation aggregate**
2. **Corporation sole**

Corporation aggregate.

1. A corporation aggregate is an association of human beings United for the purpose of forwarding their certain interest. **Limited companies are the best example.**
2. Company has an independent existence from those of its members. ***Solomon case***
3. The death of members does not finish the existence of the company.
4. Partnership firm is not a company in the eyes of law as the existing partners own the property and the Debt. There cannot be one man firm but there can be a one man company ***soloman versus Solomon and Company 1887.***
5. This case established the principle of corporate personality
6. In this case it was held that share holder cannot be held liable for the acts of the company even though he holds Virtually the entire share capital.

Lifting of corporate veil

Where the legal entity of the company is being used for fraudulent and dishonest purpose , the individuals concerned will not be allowed to take the shelter behind the corporate personality. The court ,in such cases, break through the corporate shell and apply the principle what is known as lifting or piercing the corporate veil.

The corporate veil of a company may be lifted to ascertain the true character and economic realities behind the legal personality of a company.

1. Where the corporate personality has been used for fraudulent or improper conduct. ***Jones vs lipman***
2. The corporate veil of the company may be lifted where it a corporate facade is in reality only an agency.

   Central inland water transport corporation limited vs brojo Nath Ganguly *Supreme Court applied this principle to check whether the appellant company was an agency or instrumentality of the state for the purpose of article 12 the constitution.*
3. Corporate veil may be lifted where the company is engaged in activities which are against the public policy. ***Connors brothers versus Connors***
4. Corporate veil may be lifted to determine the real character and status of the company. ***Daimler Company Limited versus Continental Tyre and Rubber company***

5. Corporate veil may be lifted where the corporate facade of the company has been used for evasion of taxes or duties. **In re sir Dinshaw Manakjee petit.**

6. Corporate veil may be lifted where it is found that the sole purpose of the formation of the new company was to use it as a device to avoid or reduce Payment of Bonus to workers. ***Workmen of the associated Rubber Industries Limited Bhavnagar vs The associated Rubber Industries Bhavnagar***

7. Corporate veil may be lifted in quasi criminal cases relating to companies in order to look behind the legal person and punish the real persons who have violated the law. ***Delhi Development Authority versus skippers Construction Company Private Limited.***

Corporation sole

Corporation sole is an incorporated series of successive persons. It consists of a single person who is personified and regulated by law as a legal person.

The examples of Corporation sole are Postmaster General ,public Trustee ,Comptroller and Auditor General of India, the President of India, the Crown in England etc.

Generally Corporation sole are the holders of a public office which are recognised by law as Corporation.

Theories of Corporate personality

1. **Fiction theory :**

- this theory is expounded mainly by savigny, salmond ,Coke ,blackstone and Holland.
- According to this theory a corporation is clothed with a legal personality.
- The personality of a corporation is different from that of its members. Change in the membership does not affect the existence of corporation or its Unity.

2. **Realist theory**

- **The founder of realist theory was gierke** who believed that every collective group has a real mind ,a real will and the real power of action.
- a corporation therefore has a real existence irrespective of the fact whether it is recognised by the state or not.

3. **Bracket Theory**

- **the bracket theory is associated with the well known German jurist Ihering.**
- Only the members of the corporation are persons in real sense and Bracket is put around them to indicate that they are to be treated as one single unit when they form themselves into a corporation

4. Concession theory

- This theory is basically linked with the philosophy of Sovereign state.
- Juristic personality is a consession granted to corporations by the state.
- It is entirely at the discretion of the state to recognise or not to recognise a juristic person.
- This theory closely resembles the fiction theory.

5. Purpose theory

- this theory is founded on the view that corporations are treated as persons for certain specific purposes.
- The assumption that only living persons can be the subject matter of rights and duties would have deprived imposition of rights and duties on corporations which are non living entities.
- It therefore became necessary to attribute personality to corporation for the purpose of being capable of having rights and duties

Principles of liability

1. Today the rights and duties of individuals are regulated by the law of the land
2. The breach of these rights or duties is called a wrong and one who commits the wrong is said to be liable for it
3. Thus wrong maybe a wrongful act or omission

Definition of liability

Salmond : a bond of necessity that exists between the wrongdoer and the remedy of the wrong.

Austin: liability consists in those things which a wrongdoer must do or suffer. It is the ultimatum of the law and has its source in the supreme will of the state.

Kinds of liability

Civil Liability : it is enforcement of the right of the plaintiff against the defendant in a civil proceeding**.**

For example an action for recovery of Debt or restoration of property

1. Civil liability arises when a wrong has been committed against individual
2. Civil liability entails damages
3. The Civil liability is determined in Civil Court in civil proceedings
4. In civil liability it is the act , and not intention which is taken into consideration

Criminal liability : it is the liability to be punished in a criminal proceeding.

For example assault ,defamation ,theft, injury etc.

1. It arises when a wrong is done against the society
2. Criminal liability results into punishment
3. Criminal liability is imposed by criminal proceeding initiated by the state
4. In criminal proceedings it is the mens rea which is the determining factor

- ✓ Penal liability : Actus non face Reum nisi mens sit rea
- ✓ Injuria Sine Damnum
- ✓ Damnum Sine Injuria
- ✓ Vicarious liability
- ✓ Strict liability
- ✓ Absolute liability
- ✓ Stages of Crime- intention, preparation, attempt and commission

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