A Student Manual on **Jurisprudence**



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PREFACE

The study of jurisprudence seeks to obtain a deeper understanding of the nature of law, legal reasoning, legal systems, and legal institutions. Early jurisprudential studies focused on the first principles of the natural law, civil law, and the law of nations. Today, general jurisprudence addresses fundamental questions structuring our legal system, including: How do we know what the law is? What are the proper sources and purposes of law? What is the relationship between law and justice? What is the source of one's duty to obey the law? A familiarity with jurisprudence provides students with an ability to analyse, explain, classify, and criticize schools of thought in law.

This manual contains various knowledge areas and topics ought to be covered according to the national legal training curriculum of Tanzania of 2010. It is prepared so as to provide general understanding on the jurisprudence specifically for students undertaking the course of jurisprudence and legal theories. It is conceptual and theoretical oriented manual. It aims at imparting underlying conceptual knowledge. It is user friendly since it has been designed to attract attention and establish the strategies in studying jurisprudence with results desired. It uses simple language as well as ideas grasping nature. This can enable students to understand well jurisprudence. However this manual should not be used as final and conclusive reference during the pursuit of the course of jurisprudence. Hence students are needed to refer other literatures cited and referred also in this manual for further clarification and extensive knowledge development.

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CHAPTER ONE

NATURE OF JURISPRUDENCE

1.0 Introduction

Jurisprudence has been considered at various times and by different schools of thought as philosophy, history or science. It is concerned essentially with the nature and function of law. It deals with such questions as what is law, where does it come from. What does it do? And what are the means for doing it. This chapter deals with introduction issues of jurisprudence.

1.1 Objectives



At the end of this chapter students should have:-

- Acquired knowledge and understanding of the basic concept of jurisprudence so as to build conceptual foundation of the course of jurisprudence.
- Acquainted with knowledge and understanding on relevance in terms of utilities and significance of study of jurisprudence as to provoke the interest of studying the course of jurisprudence**.**
- Developed ability to describe nature as well as scope of the jurisprudence to determine the extent and boundaries of the study of jurisprudence.
- Acquainted with ability to discuss the interface between jurisprudence and other disciplines particularly social sciences.

1.2 Jurisprudence

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

The English word is based on the Latin maxim **jurisprudentia**: *juris* is the genitive form of jus meaning **law**, and *prudentia*means **prudence or knowledge**. The word is first attested in English in 1628, at a time when the word prudence had the meaning of knowledge of or skill in a matter. The word may have come

via the French jurisprudence, which is attested earlier. Hence jurisprudence is the knowledge or skills of the law.[1]

Encyclopaedia America defined jurisprudence as functional study of concept that legal system develop and the social interest that the law protects. As the practical science jurisprudence is the practice of judging the same question in the same manner and thus forming precedents. It includes both the legal ordering of human relations and the body of legal institutions and materials by which the legal process is carried out.[2]

Keeton considered jurisprudence as the study and systematic arrangement of the general principles of law.[3] According to him, Jurisprudence deals with the distinction between Public and Private Laws and considers the contents of principle departments of law.

Roscoe Pound described jurisprudence as the science of law using the term 'law' in juridical sense as denoting the body of principles recognized or enforced by public and regular tribunals in the administration of justice.[4]

Holland defined jurisprudence as the formal science of positive laws. It is an analytical science rather than a material science. Positive law means the general rule of external human action enforced by a sovereign political authority. Jurisprudence is a science because it is a systematized and properly co-ordinated knowledge of the subject of intellectual enquiry.

To sum up jurisprudence is a study, knowledge understanding, philosophy or research of the fundamental legal principles. It is any thought or writing about law and its relation to other social sciences such as economics, psychology, philosophy, sociology, politics and ethics etc. It digs into the historical past and attempts to create the symmetry of a garden out of the confusion of different conflicting legal systems. It consists in whatever law thinks, says and does in any field of human society.

[1]Garner, Bryan A. (2009). Black's law dictionary (9th ed.). Saint Paul, Minnesota, USA: West,Pp, Jurisprudence entry

[2] http://hubpages.com/literature/Jurisprudence-meanings-scope-and-purpose. Retrieved on 26th September 2016

[3]M. D. A., Freeman, Lloyd's Introduction to Jurisprudence, 4th ed., Stevens and Sons, 1979, Pp.1-78 (Chapters 1 & 2)

[4]Campbell, A "A note on the word Jurisprudence" 58 LQR (1942)334.

1.3 Scope of Jurisprudence

There is no unanimity of opinion regarding the scope of jurisprudence. Different authorities attribute different meanings and varying premises to law and that causes difference opinions with regard to the exact limit of the field covered by jurisprudence.

Jurisprudence has been so defined as to cover moral and religious precepts also and that has created confusion. It goes to the credit to Austin that he distinguished law from morality and theology and restricted the term to the body of the rules set and enforced by the sovereign or supreme law making authority within the realm.[5]

Thus the scope of jurisprudence was limited to the study of the concepts of positive law and ethics and theology fall outside the province of jurisprudence.

Jurisprudence involves the study of general theoretical questions about the nature of laws and legal systems, about relationship of law to justice and morality and about the social nature of law.[6]

All in all jurisprudence includes all concepts of human order and human conduct in state and society. Anything that concerns order in the state and society falls under the domain jurisprudence.

1.4 Relevance of Jurisprudence

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

Jurisprudence also has an educational value. It helps in the logical analysis of the legal concepts and it sharpens the logical techniques of the lawyer.[7] The study of jurisprudence helps to combat the lawyer's

[5] http://www.srdlawnotes.com/2016/02/scope-of-jurisprudence_93.html. Retrieved on 26th September 2016

[6] http://www.gupshupstudy.com/note/323739/jurisprudence-basic-CHAPTER-notes-pdf-download. Retrieved on 26th September 2016

[7] Fuller, L. L. "The Place and Uses of Jurisprudence in the LawSchool Curriculum" 1 J. of Legal Education 495

occupational view of formalism which leads to excessive concentration on legal rules for their own sake and disregard of the social function of the law.

The study of jurisprudence helps to put law in its proper context by considering the needs of the society and by taking note of the advances in related and relevant disciplines.

Jurisprudence can teach the people to look if not forward, at least sideways and around them and realize that answers to a new legal problem must be found by a consideration of present social needs and not in the wisdom of the past.

Jurisprudence is the eye of law and the grammar of law because it throws light on basic ideas and fundamental principles of law. Therefore, by understanding the nature of law, its concepts and distinctions, a lawyer can find out the actual **rule of law**.

It also helps in knowing the language, grammar, the basis of treatment and assumptions upon which the subject rests. Therefore, some logical training is necessary for a lawyer which he can find from the study of Jurisprudence.[8]

It trains the critical faculties of the mind of the students so that they can dictate fallacies and use accurate legal terminology and expression.[9]

It helps a lawyer in his practical work. A lawyer always has to tackle new problems every day. This he can handle through his knowledge of Jurisprudence which trains his mind to find alternative legal channels of thought.[10]

Jurisprudence helps the judges and lawyers in ascertaining the true meaning of the laws passed by the legislators by providing the rules of interpretation.[11] Therefore, the study of jurisprudence should not be confined to the study of positive laws but also must include normative study i.e. that study should deal with the improvement of law in the context of prevailing socio-economic and political philosophies of time, place and circumstances.

[8] Frederick K. Beutel, The Relationship of Experimental Jurisprudence to Other Schools of Jurisprudence and to Scientific Method, 1971 Wash. U. L. Q. 385 (1971)

[9] Ibid

[10] Bridge, J. W. "The Academic Lawyer: Mere Working Mason orArchitect?" 91 LQR (1975) 488

[11] Mac Cornick, D. N. "Law as an Institutional fact" 90 LQR (1974)102

Furthermore, the study of jurisprudence is an opportunity for the lawyer to bring theory and life into focus, for it concerns human thought in relation to social existence.[12]

All in all Jurisprudence disclose knowledge of general ideas and principles of all legal systems, so it is called eye of the law. Certain fundamental conceptions such as negligence liability, mensrea etc. have to be learned before provision of law relating to them can be understood, and jurisprudence teaches these fundamentals conceptions. Jurisprudence trains the mind into legal ways of thought. It teaches the proper use of legal terms, and is called grammar of law. The study of jurisprudence helps law makers by providing them brief and clear terminology. It enlightens students and helps them in adjusting themselves in society without causing injuries to the interest of other student. To find out the true meaning of law, jurisprudence helps the judges and the lawyer.

1.5 Classification of Jurisprudence

Jurisprudence as the study about philosophy and theories as well as nature and utility of laws and legal system can be classified into various kinds. The classification is based on the philosophical view point of the law. They are going to be described hereunder:-

1.5.1 Historical Jurisprudence

Historical Jurisprudence gives the answers of the questions, origin of law, the development of law, evolution of law and philosophy of law. It constitutes the general portion of legal history. It deals with the general principles governing the origin and development of law as also the origin development of legal conceptions and principles found in the philosophy of law.[13]

Historical jurisprudence has value on the catalogue the development of law and allotting to each phase its true position in the completed narrative.[14] It indicates the processes of change, and is therefore descriptive. It is the function of historical jurisprudence to interpret these changes and to expose the forces which have brought them about.

[12]Twining, E. "Legal Education within East Africa" in East African LawToday, (London: Stevens 1966)

[13] See http://www.docsity.com/en/kinds-of-jurisprudence-business-and-labour-law-CHAPTER-handout/170214/. Retrieved on 26th September 2016

[14]M. Oakeshott, the Concept of a Philosophical Jurisprudence: Essays and Reviews 1926–51, Andrews UK Limited, 2011

1.5.2 Ethical Jurisprudence

The branch of jurisprudence deals with basic principles of ethics and moral values.[15] 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.[16]

This area of study brings together moral and legal philosophy. It is connected with the purpose of which the law exists and the manner in which such purpose is fulfilled. Salmond observes that ethical jurisprudence is the meeting point and common ground of moral and legal philosophy of ethics in jurisprudence. Ethical jurisprudence has for as its object the conception of justice, the relation between law and justice.

1.5.3 Sociological Jurisprudence

Sociology is the study of men in society. A sociologist considers law as a social phenomenon. The object of sociological jurisprudence is to work upon jurisprudence with reference to the adjustment of relations of ordering of conduct which is involved in group life.[17] A theme of this branch is to study living law in the same manner as a psychologist studies living issue.

The most important branch of legal sociology is penology, which studies the causes of crimes, behaviour of criminal and effect of different theories of punishment. The only principle in penology is to find out why a man does wrong to make it not worth his while.

1.5.4 Analytical jurisprudence

The branch of jurisprudence gives analysis to basic principles of civil and their interpretation. The purpose of this branch of study is to analyse and dissect the law of the land as it exists today.[18]

This analysis as the principles of the law is done without reference to their historical origin or their ethical significance. Analytical jurisprudence it examines the relations of civil law with other forms of law, analysis the various constituent ideas of which the complex idea of the law is made up.

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[15]See http://adf.ly/12195333/banner/http://ba-llb-handout-notes.blogspot.com/2015/09/kinds-of-jurisprudence.html. Retrieved on 26th September 2016

[16]See http://www.docsity.com/en/kinds-of-jurisprudence-business-and-labour-law-CHAPTER-handout/170214/#login-modal. Retrieved on 26th September 2016

[17]See, Marvey, C. P. "A Job for Jurisprudence" 7 Mod L. R. (1944) 42

[18]Kisanga, R. H. "The Lawyer and the Society:The Challenge of the Professional and the Academic Lawyer inTanzania" CHAPTER Delivered at UDSM on 2nd November 1983.(Mimeo, Faculty of Law).

1.6 Relation of Jurisprudence and Other Disciplines

There is relationship of between Jurisprudence to the many other social science disciplines for their foundational background which have existed from time to time. It has also an important relation to the expansion of the scientific method into the literature and practice of social control through law.

1.6.1 Sociology and Jurisprudence

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

1.6.2 Jurisprudence and Psychology

No human science can be described properly without a thorough knowledge of human mind[19]. Hence, psychology has a close connection with Jurisprudence. Relationship of psychology and law is established in the branch of criminological jurisprudence. Both psychology and jurisprudence are interested in solving questions such as motive behind a crime, criminal personality, reasons for crime etc.

1.6.3 Jurisprudence and Ethics

Ethics has been defined as the science of Human Conduct. It strives for ideal Human Behaviour.[20] This is how Ethics and Jurisprudence are interconnected:

a. Ideal Moral Code- This could be found in relation to Natural Law.
b. Positive Moral Code- This could be found in relation to Law as the Command of the Sovereign.
c. Ethics is concerned with good human conduct in the light of public opinion.
d. Jurisprudence is related with Positive Morality in so far as law is the instrument to assert positive ethics.
e. Jurisprudence believes that Legislations must be based on ethical principles. It is not to be divorced from Human principles.

[19]M. Oakeshott, the Concept of a Philosophical Jurisprudence: Essays and Reviews 1926–51, Andrews UK Limited, 2011
[20]Ibid

f. Ethics believes that No law is good unless it is based on sound principles of human value.
g. A Jurist should be adept in this science because unless he studies ethics, he won't be able to criticize the law.
h. However, Austin disagreed with this relationship.

1.6.4 Jurisprudence and Economics

Economics studies man's efforts in satisfying his wants and producing and distributing wealth. Both Jurisprudence and Economics are sciences and both aim to regulate lives of the people. Both of them try to develop the society and improve life of an individual. Karl Marx was a pioneer in this regard.[21]

1.6.5 Jurisprudence and History

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

1.6.6 Jurisprudence and Politics

In a politically organized society, there are regulations and laws which lay down authoritatively what a man may and may not do. Thus, there is a deep connected between politics and Jurisprudence.[22]

1.7 Conclusion



In this chapter we have learnt an overview or introduction of study of jurisprudence. We have seen the concept of jurisprudence, its nature, scope, relevance and relation with other social science disciplines. Generally it has been discerned that jurisprudence is a study, knowledge understanding, philosophy or research of the fundamental legal principles.

It is any thought or writing about law and its relation to other social sciences such as economics, psychology, philosophy, sociology, politics and ethics etc. It digs into the historical past and attempts to create the symmetry of a garden out of the confusion of

[21]Marvey, C. P. "A Job for Jurisprudence" 7 Mod L. R. (1944) 42

[22]M. Oakeshott, the Concept of a Philosophical Jurisprudence: Essays and Reviews 1926–51, Andrews UK Limited, 2011

different conflicting legal systems. It consists in whatever law thinks, says and does in any field of human society. Henceforth jurisprudence all concepts of human order and human conduct in state and society. Anything that concerns order in the state and society falls under the domain jurisprudence. Jurisprudence trains the mind into legal ways of thought. It teaches the proper use of legal terms, and is called grammar of law.

The study of jurisprudence helps law makers by providing them brief and clear terminology. It enlightens students and helps them in adjusting themselves in society without causing injuries to the interest of other student. To find out the true meaning of law, jurisprudence helps the judges and the lawyer. There is relationship of between Jurisprudence to the many other social science disciplines for their foundational background which have existed from time to time. Social sciences related to jurisprudence are psychology, ethics, sociology, economics and politics to mention but a few.

1.8 Review Questions



1. How do you define the term jurisprudence?
2. Describes the types of jurisprudence
3. Discuss the nature and scope of jurisprudence
4. “There is close interface between jurisprudence and other social sciences disciplines.” Discuss
5. What is the Jurisprudence? Explain the relevance of Jurisprudence.

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CHAPTER TWO

INTRODUCTION TO PHILOSOPHY

2.0 Introduction

Philosophy deals with the study of general and fundamental problems concerning matters such as existence, knowledge, values, reason, mind, and language. This study is very important because philosophy can not only help improve critical thinking skills, but also it can help provide us with knowledge of logic that can greatly help improve critical thinking. Henceforth this chapter entails overview of philosophy.

2.1 Objectives



At the end of this chapter students should have:-

- Acquired knowledge and understanding of the basic concept of philosophy so as to build conceptual foundation of the course of jurisprudence.
- Acquainted with knowledge and understanding on relevance in terms of utilities and significance of philosophy as to provoke the critical thinking while studying the course of jurisprudence**.**
- Developed ability to describe nature, history, branches, groups as well as scope of the philosophy to determine the extent and boundaries of the study of jurisprudence.
- Acquainted with ability to discuss the interface between jurisprudence and philosophy particularly social sciences.

2.2 Philosophy

Philosophy is a search for a general understanding of values and reality by chiefly speculative rather than observational means. It signifies a natural and necessary urge in human beings to know themselves and the world in which they live and move and have their being.[23]

[23] See Jenny Teichmann and Katherine C. Evans, Philosophy: A Beginner's Guide (Blackwell Publishing, 1999), p. 1

However, etymologically, the word philosophy literally means love of wisdom; it is derived from two Greek words i.e. 'Phileo' (love) and 'Sophia' (wisdom). A love of wisdom is the essence for any philosophy investigation.[24] The subject of philosophical inquiry is the reality itself. There are different schools of philosophy depending on the answers they seek to the question of reality. It is the search for understanding of man, nature and the universe.[25]

2.3 Branches of Philosophy

There are different branches of philosophy-epistemology, metaphysics, etc. As a branch of knowledge it covers main aspects.

2.3.1 Metaphysics

Metaphysics is the study of the most general features of reality, such as existence, time, objects and their properties, wholes and their parts, events, processes and causation and the relationship between mind and body.[26] Metaphysics includes cosmology, the study of the world in its entirety and ontology, the study of being, example why are you here? We try to analyse the very existence of man and other realities.[27]

2.3.2 Epistemology

Epistemology is the study of the putative sources of knowledge, including intuition, a priori reason, memory, perceptual knowledge, self-knowledge and testimony. Epistemology entails the theories of knowledge; we ask how do you know? How does the child know and what assist him to know?[28]

They also ask: What is truth? Is knowledge justified true belief? Are any beliefs justified? Putative knowledge includes propositional knowledge (knowledge that something is the case), know-how

[24] See Philosophy – Wikipedia available at https://en.wikipedia.org/wiki/Philosophy

[25] See A.C. Grayling, Philosophy 1: A Guide through the Subject (Oxford University Press, 1998), p. 1

[26] See Adler, Mortimer J. (28 March 2000). How to Think About the Great Ideas: From the Great Books of Western Civilization. Chicago, Ill.: Open Court

[27] See Quinton, Anthony, The ethics of philosophical practice, p. 666

[28] See Greco, John, ed. (1 October 2011). The Oxford Handbook of Skepticism (1st Ed.). Oxford University Press

(knowledge of how to do something) and acquaintance (familiarity with someone or something). Epistemologists examine these and ask whether knowledge is really possible.[29]

2.3.3 Ethics

Ethics is the study of about morals. Ethics has been defined as the science of human conduct. It strives for ideal human behaviour. It studies and considers what are good and bad conduct, right and wrong values, and good and evil.[30]

Its primary investigations include how to live a good life and identifying standards of morality. It also includes meta-investigations about whether a best way to live or related standards exists. The main branches of ethics are normative ethics, meta-ethics and applied ethics.[31]

2.3.4 Logic

Logic is a study of concept reasoning /argumentation. It is the science that studies the formal processes used in thinking and reasoning. It deals with the principles and criteria of validity of inference and demonstration.[32] It consists of the systematic study of the form of arguments. A valid argument is one where there is a specific relation of logical support between the assumptions of the argument and its conclusion.[33]

2.4 Groups of Philosophy

In propounding ideas philosophers have fallen into two main blocks/groups, idealistic and materialistic trend.

2.4.1 Idealism

It refers to the group of philosophy argues that ideas are the only reality. It ascertains that the material world is determined by the spiritual world. It further postulates that spirit or an idea or your own cognition exist independent from matter. Moreover, it provides that there is a realm of the mysterious and the

[29] See Glymour, Clark (10 April 2015). "Chapters 1–6". Thinking Things Through: An Introduction to Philosophical Issues and Achievements (2nd Ed.). A Bradford Book

[30] See Shapin, Steven (1 January 1998). The Scientific Revolution (1st Ed.). University Of Chicago Press

[31] See Sartwell, Crispin (1 January 2014). Zalta, Edward N., ed. Beauty (Spring 2014 ed.).

[32] See Feyerabend, Paul; Hacking, Ian (11 May 2010). Against Method (4th Ed.). Verso

[33]See PLATO, Hippias Major | Loeb Classical Library" Loeb Classical Library Retrieved27 October 2016

unknowable above and beyond what can be known and ascertained by perception, experience or science.[34]

2.4.2 Materialism

It is the group of philosophy that postulates that matter is the only reality. It prescribes that the world is by its very nature material and everything which exists came into being on the bases of material causes, arises and developed in accordance with the laws of motion of matter.[35]

It also provides that material we have existed independent from what you know from your mind. It moreover enumerates that there is no unknowable fear of reality which lies outside the material world i.e. there is nothing apart from matter.[36]

2.5 History of Philosophy

Generally history of philosophy can be traced back as human society began existing hence philosophy cannot be separated from the development of human societies. Hence history of philosophy can be explained in relation to the levels of human development.[37]

Philosophy in each era was determined by the level of development of that society at that time. For instance in primitive stage of development people was simply hunting and gathering. Religion came to take the place of myth and there were ecclesiastic courts, which were not developed.[38]

During civilization philosophy dominated such as there were modern courts which were developed due to the formation and development of machinery for production purpose.[39]

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[34] See Nozick, Robert: Political Philosophy | Internet Encyclopaedia of Philosophy"www.iep.utm.edu. Retrieved 25 September 2016

[35] See Kant, Immanuel (2012-05-21). Kant: Groundwork of the Metaphysics of Morals (2nd Ed.). Cambridge University Press

[36] See McGinn, Colin (8 December 1993). Problems in Philosophy: The Limits of Inquiry (1st Ed.). Wiley-Blackwell

[37] See Brewer, Talbot (11 June 2011). The Retrieval of Ethics (1st Ed.). Oxford; New York: Oxford University Press

[38] See Garfield (Editor), Edelglass (Editor); The Oxford Handbook of World Philosophy, Introduction.

[39] See Hegel, Georg Wilhelm Friedrich; Brown, Robert F. (1 January 2006). CHAPTERs on the History of Philosophy: Greek philosophy. Clarendon Press. p. 33

2.5.1 Ancient Philosophy

In the primitive mode of production everything was communally owned. During this period, man depends on nature i.e. was only hunting and gathering, no philosophy. Man was tied to nature with no time to reflect and to understand nature. The level of critical thinking was very low.[40]

The earliest form of philosophy was in the form of **myth and totemic**. This philosophy regarded life of the earliest man was regarded as ignorant. Man did not understand nature and then he resorted to myth in trying to explain what was around him. He resorted to look on explanations to explain nature.[41]

They tried to think the reality with a particular object for instance stone. There were some links with certain object called "totem" so they link the society with certain objects. Totem was a mixture of beliefs of aparticular clan/society.[42]

Moreover this philosophy was practiced in various ways such as there was a practice of having some ceremonies called totem. Clans had their own totems even today we have certain totem, example national totem e.g. Giraffe as an emblem. Slowly as economy was growing small totem was dying of living the stronger totem remaining as the national totem to explain the society.[43]

2.5.2 Pre-classical Philosophy

Development of productive forces i.e. means of labour led to the coming of slave mode of production, initially they came with division of labour. Other people cultivating, others were herding cattle.[44] Later on there was a division between mental and manual labour, in this development, there was a division of society into classes such as slaves and slave owners. Slave owners had leisure time; slave owners could think others and the society. The thinking group belongs to the ruling class. Philosophers during this period were from the ruling class.

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[40] See Diane Collinson. Fifty Major Philosophers, a Reference Guide. p. 125

[41] See Rutherford, The Cambridge Companion to Early Modern Philosophy, p. 1

[42] See Nadler, A Companion to Early Modern Philosophy, p. 2

[43] See Bruce Kuklick, "Seven Thinkers and How They Grew: Descartes, Spinoza, Leibniz; Locke, Berkeley, Hume; Kant" in Rorty, Schneewind, and Skinner (eds.), Philosophy in History (Cambridge University Press, 1984), p. 125

[44] See Sesardic, Neven; De Clercq, Rafael (2014). "Women in Philosophy: Problems with the Discrimination Hypothesis" (PDF). Academic Questions. New York: Springer Science+Business Media.

Apart from this development there was other development. This was the art of writing developed from Egypt, i.e. there is alphabet, and there was a system of counting numbers that encouraged thinkers and increase for commodity production of exchange, which led to development of money. Originally there was exchange for goods. Thereafter there was a universal equivalent, which was "money.[45]

There were various philosophers at this era that understood nature and tried to explain in observation of the nature such as Thales, Anaximander and Anaximenes. They had same ideas like common origin of the universe, they are saying that the universe had evolved from a single mass, the universe is always moving and development consists of conflict of movement.[46]

They were talking about developments. It is a step to explain myths. Their explanation was rational to explain nature. It was a result of their thinking, (i.e. by simple thinking). The level of thoughts or standard of ideas goes hand in hand with the change of economy. The economy was a factor of development.[47]

2.5.3 Pure Reason Philosophy

This philosophy grew around 570 BC. The leading philosopher was Pythagoras. He postulated that the origin of everything was numbers; he did not however explain how the aggregate of numbers was the origin of everything. Most other philosophers belonged to the merchant class and they had a roof to the landed aristocracy. Most of these belong to the families of priests-kings.[48]

This philosophy was categorized into two main groups who had conflicting ideas. These were sophist and anti-sophist philosophies. Though both philosophies brought up in the same era, they were in conflict to one another on their perspectives of some things.

2.5.3.1 Sophist Philosophy

These were concerned with human spirit, knowledge and ethics. The main sophists are Protagros, Georgias, Hippias, Thrysimacus and Callicles. Around 5th BC philosophy was separated from religion.

[45] See Wendy Doniger (2014). On Hinduism.Oxford University Press. p. 46
[46] See Students' Britannica India (2000), Volume 4, Encyclopaedia Britannica, page 316
[47] See John Bowker, Oxford Dictionary of World Religions, p. 259
[48] See John Bowker, Oxford Dictionary of World Religions, p. 259

Before this time there was so much linking between religion and philosophy. After this period, people wanted to be independent in their own ideas.[49]

Sophists were very instrumental in this change. Before the sophists, there was a linkage of religion and philosophy. Thereafter people wanted to be independent in their own ideas. The sophists were very instrumental in that change. Sophists agreed with natural philosophers that traditional mythological thinking was incorrect.[50]

They were doubtful because answers to the riddle of nature and universe were unknowable. They shifted philosophical inquiry away from natural science towards the nature of morality and society. They rejected the fruitless speculations of natural philosophers e.g. Thales, Heraclitus and others.[51]

2.5.3.1.1 Protagoras

He is the leading thinker in this school. He was saying that being is nothing but subjective colours appearance. He was talking about law, by saying that law is an invention of human being.[52] What was important to the sophists was practical knowledge for the ordinary person. Thus the sophists they concern with man and his place in the society. He said the state and religion was one thing.[53] His basic premise was to think about law, and own view. He wanted to independent by having his own ideas. He was trying to separate religion from philosophy. Previously, philosophy and religion were merged together.[54]

2.5.3.1.2 Callicles

He put together another theory. He was right of the strong as the basis of “natural” as control with the conventional law. He was trying to explain the legal phenomenon. In his society there existed slave and

[49] See Hiltebeitel, Alf (2007), Hinduism. In: Joseph Kitagawa, "The Religious Traditions of Asia: Religion, History, and Culture", Routledge

[50] See Pierotti,Raymond; Communities as both Ecological and Social entities in Native American thought

[51] See Garfield (Editor), Edelglass (Editor); The Oxford Handbook of World Philosophy, Chinese philosophy.

[52] See Bowker, John, (1999), The Oxford Dictionary of World Religions, Oxford University Press, Incorporated

[53] See Carnap, Rudolf, (1953), ""Inductive Logic and Science", Proceedings of the American Academy of Arts and Sciences, 80 (3): 189–97

[54] See Bruce B. Janz, Philosophy in an African Place (2009), pp. 74–79, Plymouth, UK: Lexington Books

slave owners. [55] The god of the state was a 'toteni' of the particular clan. People who are stronger are the one to decide what is right. The stronger are the ones who make law. He said that man and groups in men to promote their own interests created the law. They are saying "justice" is that is wielded by the more powerful.[56]

2.5.3.1.3 Thrysimacus

He did touch the right of the might. He says justice is nothing else than that which is advantageous to the stronger. Whatever is right to the stronger is what justice. Justice men are always sufferers and they are always than justice men who could get away at the cost of justice men.[57]

2.5.3.2 Anti-Sophist Philosophy

This is philosophy which was going against the sophist ideas. It opposed the doctrine of justice. There were various philosophers who were in this group of philosophy. These were Socrates, Plato and Aristotle. The pioneer for anti-sophist was Socrates. Plato was student of Socrates who developed and modified and contradicted ideas of his teacher. Aristotle was the student of Plato who developed and modified ideas of Plato.

2.5.3.2.1 Socrates (469 B.C.)

Socrates dealt with small ethical matters than the natural world of ideas. He was saying that knowledge should be about ideas. He said that a distinction must be made between the impression of senses and the product of reason. He distinguished what one can perceive from his own senses.[58]

He said the impression of senses is valid and in imagination they contain individual arbitrariness because they are unstable and subjective. He says a product of reason contain knowledge which is equal for all. To him begun living with knowledge.[59]

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[55] See Craig, Edward. Philosophy: A Very Short Introduction.

[56] See Edwards, Paul, ed. (1967). The Encyclopaedia of Philosophy, Macmillan & Free Press

[57] See Buccellati, Giorgio (1981-01-01). "Wisdom and Not: The Case of Mesopotamia", Journal of the American Oriental Society, 101 (1): 35–47

[58] See Rutherford, Donald (12 October 2006). The Cambridge Companion to Early Modern Philosophy. Cambridge University Press

[59] See Bunnin, Nicholas; Tsui-James, Eric, eds. (15 April 2008). The Blackwell Companion to Philosophy. John Wiley & Sons

To him he had some thought of the law. He said people should respect the law. To obey law was a duty to him. He said good citizen should obey law even if they are bad laws. This is meant to discourage bad citizens to disobey or violate good laws.[60]

2.5.3.2.2 Plato (427—347B.C.)

He postulated that the physical and intelligible worlds exist simultaneously. The physical world is a shadow of the intelligible, immaterial. He contended also humans have appetites (artisans), emotions (the spirited part = guardians) and reason (rulers). The better part should rule.[61]

World is ruled by wise legislation, a principle of reason. External circumstances bring neither happiness nor misery, whether king or slave because good and evil are states of the soul. There is no afterlife because even the soul is made of atoms. The gods exist, but have no need of humans. They are blessedly uninvolved.[62]

2.5.3.2.3 Aristotle (384–322 B.C.)

Aristotle believed that everything had a purpose. He stated that our purpose as humans is to think in order to live a good life. Therefore the best way to understand why things are the way they are is to understand what purpose they were designed to serve.[63] He said that there is no single category of being. We can talk about existence in connection with all sorts of things. Colours exist, ideas exist, places exist, times exist, and movements exist, and so on.[64]

Aristotle argues that universal concepts of beauty and justice derive from the instances of beauty and justice in this world. We only arrive at a conception of beauty by observing particular instances of beauty,

[60] See Baldwin, Thomas, ed. (27 November 2003). The Cambridge History of Philosophy 1870–1945. Cambridge University Press

[61] See Rutherford, Donald (12 October 2006). The Cambridge Companion to Early Modern Philosophy, Cambridge University Press

[62] See Copleston, Frederick Charles (1953), A history of philosophy: volume III: Ockham to Suárez. Paulist Press

[63] See Knight, Kelvin. Aristotelian Philosophy: Ethics and Politics from Aristotle to MacIntyre

[64] See Kim, J. and Ernest Sosa, Ed. (1999). Metaphysics: An Anthology. Blackwell Philosophy Anthologies, Oxford, Blackwell Publishers Ltd.

and the universal quality of beauty has no existence beyond this conception that we build from particular instances.[65]

Aristotle perceives change and motion as deep mysteries. He believes that all causes must themselves be caused and all motion must be caused by something that is already in motion.[66] Aristotle observed that the validity of any argument can be determined by its structure rather than its content. Philosophy arose historically after basic necessities were secured. It grew out of a feeling of curiosity and wonder, to which religious myth gave only provisional satisfaction.[67]

Reason is the source of the first principles of knowledge. Reason is opposed to the sense insofar as sensations are restricted and individual, and thought is free and universal. Though many ends of life are only means to further ends, our aspirations and desires must have some final object or pursuit. Such a chief end is universally called happiness.[68]

2.6 Conclusion



In this chapter we have learnt philosophy is a search for a general understanding of values and reality by chiefly speculative rather than observational means. It signifies a natural and necessary urge in human beings to know themselves and the world in which they live and move and have their being. It has several branches. Metaphysics is the study of the most general features of reality, such as existence, time, objects and their properties, wholes and their parts, events, processes and causation and the relationship between mind and body. Epistemology is the study of the putative sources of knowledge, including intuition, a priori reason, memory, perceptual knowledge, self-knowledge and testimony. Epistemology entails the theories of knowledge; we ask how do you know? How does the child know and what assist him to know? Ethics is the study of about morals. Ethics has been defined as the science of human conduct. It strives for ideal human behaviour. It studies and considers

[65] See Existentialism: Basic Writings (Second Edition) by Charles Guignon, DerkPereboom

[66] See Honderich, T., ed. (1995). The Oxford Companion to Philosophy, Oxford University Press

[67] See The Concise Routledge Encyclopaedia of Philosophy

[68] See Chan, Wing-tsit (1963). A Source Book in Chinese Philosophy, Princeton University Press

what are good and bad conduct, right and wrong values, and good and evil. Logic is a study of concept reasoning /argumentation. It is the science that studies the formal processes used in thinking and reasoning. It deals with the principles and criteria of validity of inference and demonstration.

Generally history of philosophy can be traced back as human society began existing hence philosophy cannot be separated from the development of human societies. Hence history of philosophy can be explained in relation to the levels of human development. The earliest form of philosophy was in the form of **myth and totemic**. This philosophy regarded life of the earliest man was regarded as ignorant. Man did not understand nature and then he resorted to myth in trying to explain what was around him. He resorted to look on explanations to explain nature. There were various philosophers at this era that understood nature and tried to explain in observation of the nature such as Thales, Anaximander and Anaximenes. They had same ideas like common origin of the universe, they are saying that the universe had evolved from a single mass, the universe is always moving and development consists of conflict of movement. Sophists were very instrumental in this change. Before the sophists, there was a linkage of religion and philosophy.

Thereafter people wanted to be independent in their own ideas. The sophists were very instrumental in that change. Sophists agreed with natural philosophers that traditional mythological thinking was incorrect. There was philosophy which was going against the sophist ideas. It opposed the doctrine of justice. There were various philosophers who were in this group of philosophy. These were Socrates, Plato and Aristotle. The pioneer for anti-sophist was Socrates. Plato was student of Socrates who developed and modified and contradicted ideas of his teacher. Aristotle was the student of Plato who developed and modified ideas of Plato.

2.7 Review Questions



1. What do you understand about the term philosophy? What is its significance in society?
2. Compare and contrast idealist and materialistic philosophies.

3. Account for growth and development of philosophy.
4. Compare and contrast between sophist and anti-sophist philosophies.

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CHAPTER THREE

THEORIES OF KNOWLEDGE

3.0 Introduction

The philosophical study of epistemology is concerned with the nature, sources, and limits of knowledge. An examination of the conflict resolution field reveals that that there are indeed a variety of kinds of knowledge at work and that the sources of this knowledge are numerous. In the 19th and 20th centuries, there have surfaced many attempts to analyse conflict dynamics and better understand how to deal with these dynamics in a constructive way. The chapter focuses on various theories regarding knowledge so as we can better understand about acquisition of knowledge.

3.1 Objectives



At the end of this chapter students should have:-

- Acquired basic knowledge of concepts such as knowledge
- Acquainted with understanding of nature and relevance of knowledge.
- Acquainted with ability to account for the theories postulating about knowledge.
- Acquired the competency of comparing idealist and materialist theories of knowledge.
- Acquainted with competency to describe the stages of knowledge acquisition basing on the materialist point of view.

3.2 Knowledge

Knowledge is a familiarity, awareness or understanding of someone or something, such as facts, information, descriptions, or skills, which is acquired through experience or education by perceiving, discovering, or learning.[69] Knowledge can refer to a theoretical or practical understanding of a subject.[70] It can be implicit that is with practical skill or expertise or explicit that is with the theoretical understanding of a

[69]Gottschalk-Mazouz, N., "Internet and the flow of knowledge," in: Hrachovec, H.; Pichler, A. (Hg.): Philosophy of the Information Society. Proceedings of the 30, (2008)

[70]Piaget, J., and Inhelder, B., The child's conception of space. Routledge&Kegan Paul: London, (1948 / 1956)

subject.[71] It can be more or less formal or systematic. Also, knowledge denotes the body of facts, skills, information or principles perceived and acquired through human experience and thought[72].

Knowledge is what helps us survive far longer than we should, and knowledge is even what prevents us from making the same mistakes we made in the past. With knowledge, you can improve your abilities of thinking critically. The problems you face in class, you may face in real life.[73]

3.3 Epistemology

Epistemology from Greek, epistēmē, meaning "knowledge, understanding", and logos, meaning "word"

3.3.1 Meaning

It is a branch of philosophy that investigates the origin, nature, methods, and limits of human knowledge.[74] It goes hand in hand with the development of philosophy.[75] The issues relating to the theory of knowledge limit about one philosophical knowledge question that what is basic, matter or spirit? Epistemology is analysis made by Marxist.

Epistemology and philosophy grew out from the same material condition.[76] When the society was in division of labour between mental and manual labour gives room to those were dealing with mental labour, were the one who were dealing with philosophy.[77] Factors assisting the development of philosophy are money, arts and mathematics. These were major tools in representing ideas. Epistemology reflects the materials and condition within the particular group.[78]

[71]Popper, K.R., "The rationality of scientific revolutions"; in Rom Harré (ed.), Problems of Scientific Revolution: Scientific Progress and Obstacles to Progress in the Sciences. Clarendon Press: Oxford, (1975).

[72]Read more at http://www.yourdictionary.com/knowledge#XESk18z2hW07OiPH.99

[73] https://blog.udemy.com/importance-of-knowledge/. Retrieved on 28th September 2016

[74]Suchting, W., "Epistemology", Historical Materialism, Academic Search Premier: 331–345.

[75]Edward N., ed. "Epistemology", Stanford Encyclopaedia of Philosophy, Spring 2014 ed.).

[76]R. Nozick .,Philosophical Explanations. Harvard University Press, (1981)

[77]Russell, B., "A Priori Justification and Knowledge", The Stanford Encyclopaedia of Philosophy (Summer 2014 Edition)

[78]J. L. Pollock Knowledge and Justification, Princeton University Press, Princeton, New Jersey (1975),

3.3.2 Scope of Epistemology

Epistemology is the branch of philosophy that examines the nature of knowledge, its presuppositions and foundations, and its extent and validity. Epistemology studies the nature of knowledge, the rationality of belief, and justification.[79]

Much of the debate in epistemology centres on four areas such as the philosophical analysis of the nature of knowledge and how it relates to such concepts as truth, belief, and justification, various problems of scepticism, the sources and scope of knowledge and justified belief, and the criteria for knowledge and justification.[80]

3.4 Theories of Knowledge

There are two main schools of thought postulating on knowledge. These schools have always been in conflict. But you are not bound to follow any of the two theories. You can give your own reasons.[81]The struggle between the materialist and idealist theories reflect two things such as they reflect material conditions of that time and reflect the mutual fact of scientific knowledge as gained at a given historical period.[82]

3.4.1 Idealist Theories of Knowledge

Idealism denies the existence of mind-independent objects. For the idealist, "to be is to be perceived"[83]; objects are nothing more than our experiences of them. The attraction of idealism is its economy.[84] We don't have direct access to the external world, it is generally agreed; all we can access directly are our

[79]Kvanvig, J., the Value of Knowledge and the Pursuit of Understanding, Cambridge, UK; New York: (2003)

[80]D. M. Armstrong, Belief, Truth and Knowledge, Cambridge University Press, (1973.

[81]Berkeley, George, Three Dialogues between Hylas and Philonous, Reason and Responsibility, 6th ed., ed. Joel Feinberg, Wadsworth, Belmont, CA, 1985. (originally published in 1713)

[82]MacPherson, Stacey, "Berkeley's Idealist Theory of Knowledge and Whether or Not Empiricism Can Lead To Idealism" (2004). All Volumes (2001-2008). Paper 88

[83]MacPherson, Stacey, "Berkeley's Idealist Theory of Knowledge and Whether or Not Empiricism Can Lead To Idealism" (2004). All Volumes (2001-2008). Paper 88

[84]Berkeley, George, Three Dialogues between Hylas and Philonous, Reason and Responsibility, 6th ed., ed. Joel Feinberg, Wadsworth, Belmont, CA, 1985. (originally published in 1713)

experiences.[85] Why, then, postulate the existence of anything beyond our experiences? The idealist refuses to do so, holding that our experiences don't represent objects, but rather constitute them, that there is nothing beyond them.

It nevertheless seems safe to say that within modern philosophy there have been two fundamental conceptions of idealism such as something mental (the mind, spirit, reason, will) is the ultimate foundation of all reality, or even exhaustive of reality, and although the existence of something independent of the mind is conceded, everything that we can know about this mind-independent "reality" is held to be so permeated by the creative, formative, or constructive activities of the mind (of some kind or other) that all claims to knowledge must be considered, in some sense, to be a form of self-knowledge.[86]

The idealist theories of knowledge are in two trends such as rationalistic and empiricist trends.

3.4.1.1 Rationalist Theory of Knowledge

Rationalists are saying knowledge is a prison i.e. in your mind there is everything. They argued that the mind is not "tabula-raza" i.e. the mind is empty, (empty-headed), is not empty, they are already a- prison i.e. already existed "concept" in your mind. As you go in the world you simply discover what you know in your mind.

3.4.1.1.1 Rationalism

They are saying knowledge could not be obtained through practical investigation. This kind of reasoning / conception was progressive at that time because it was affirming the supremacy of man's cognitive powers over religious dogma which was primalating at that time.[87]

The religious dogma was the ruling concept of the church by that time.[88] The idealist they want independent thinking rather to take the dogmatic thinking of that time by theologists. They affirmed the materialist of the world by working some theory how the mind is working in relation to nature.[89]

[85] http://www.theoryofknowledge.info/theories-of-perception/idealism/. Retrieved on 28th September 2016

[86] http://plato.stanford.edu/entries/idealism/. Retrieved on 28th September 2016

[87] See P. Coffey, Epistemology; Or, the Theory of Knowledge; An Introduction to General Metaphysics - Vol. 2 , Peter Smith, 1958

3.4.1.1.2 Weaknesses of Rationalist Theory of Knowledge

There is a problem of fitting new discoveries in life. Rationalists normally use deductive reasoning i.e. what they know. There is no room for experimentation or research for the rationalist because what is truth, to them truth can only come from reasoning. Nothing can come out from reasoning.[90]

Rationalists do not consider the objective reality as the only source of knowledge.[91] To idealists the source of knowledge is either consciousness or sensations of the individual man or some kind of mystic conscious that is supposed to exist independent of man i.e. a universal spirit.[92]

3.4.1.2 Empiricist Theory of Knowledge

Empiricism developed in Britain. It was basically laid down by Francis Bacon 1561-1629. The empiricist project has always been concerned with the argument that knowledge is based upon experience rather than innate ideas.[93] In its pursuit of knowledge about things other than the contents of our own minds, empiricism seeks to get us out of the mind and into the "real" world.[94]

3.4.1.2.1 Empiricism

Empiricists generally tried to explain reality by seeking the ultimate authority of facts. They argued that through a systematic collection of data or facts one can make generalisation which are solely found on experience.[95]They said that science can only understand nature through factual investigations of nature. Because of this kind of thinking the empiricists encouraged the experimental method.[96]

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[88]See Berkeley, George, Three Dialogues between Hylas and Philonous, Reason and Responsibility, 6th ed., ed. Joel Feinberg, Wadsworth, Belmont, CA, 1985. (originally published in 1713)

[89]Ibid

[90]Ibid

[91]Ibid

[92]See Russell, B., "A Priori Justification and Knowledge", The Stanford Encyclopaedia of Philosophy (Summer 2014 Edition)

[93]See Berkeley, George, op-cit

[94]See, MacPherson, Stacey, "Berkeley's Idealist Theory of Knowledge and Whether or Not Empiricism Can Lead To Idealism" (2004). AllVolumes (2001-2008). Paper 88

[95]See, https://www.questia.com/library/530171/prolegomena-to-an-idealist-theory-of-knowledge. Retrieved on 28th September 2016

[96]See, P. Coffey, Epistemology; Or, the Theory of Knowledge; An Introduction to General Metaphysics - Vol. 2 , Peter Smith, 1958

They wanted to induce certain principle from facts. They adopted a materialist concept of nature i.e. they viewed matter and observed a reality. Nature is objective and independent reality that should not be mixed. They said that knowledge could be founded on experience. The role experience among empiricists is metaphysically exaggerated i.e. by emphasizing the role of experience alone.[97]

3.4.1.2.2 Weakness of Empiricism

They over rely on facts that do not give the complete picture of nature. Man efforts or cognitive to analyse the nature is required. Empiricists have underestimated the role of scientific abstraction and the role of theories in the advancement of knowledge. Having theories is important in scientific investigation that was neglected by the empiricists. Theory was missing.[98]

The denial of the active role and relative independence of reasons or thought was fatal to the growth of knowledge i.e. they don't give weight of man's cognitive ability in knowing of the world. Empiricists focused more on facts and experience. They denied the wholesome of understanding the world.[99]

3.4.2 Materialist Theory of Knowledge

This was advocated by Karl Marx. Knowledge is active, purposive and reflection of the objective world and its laws is in man's mind. The source of knowledge is the outside world around man i.e. the material world that is the source of knowledge.[100]

3.4.2.1 Materialism

Materialists say that ideas, thinking, and ideals are parts of material reality that are created by human beings in processes that take place in their brains.[101] Materialists say that ideas result from peoples'

[97]See, R. Audi, Epistemology: A Contemporary Introduction to the Theory of Knowledge , Routledge, 2003

[98]See, R. M. Eaton Symbolism and Truth: An Introduction to the Theory of Knowledge, Harvard University Press, 1925

[99]See, P. K. Moser, The Theory of Knowledge: A Thematic Introduction, Oxford University Press, 1998

[100]See, https://www.questia.com/library/530171/prolegomena-to-an-idealist-theory-of-knowledge. Retrieved on 28th September 2016

interaction with each other and with other material things in nature and society. Although, thinking influences reality when it directs human activities, material reality has a much bigger effect on thinking than thinking has on the rest of reality. This is the central idea of materialism.[102]

Thoughts have not always existed, but only became possible when animals with brains evolved, which happened a very long time after the beginning of the universe.[103] Thinking has only been raised to a higher level through biological evolution of modern humans and their production of their own historical development. But thinking still depends on material reality every day, in discovering knowledge and in learning.[104]

Man does not perceive objects and phenomenon of the world but also actively and practically acts on them. It is based on recognition of objective of the world. Its objects and phenomenon are the only source of human knowledge.[105]

3.4.2.2 Steps of Knowledge

The Marxists in trying to explain the process of knowledge says that: the process of knowing is in 3 steps namely as perceptual stage, rational stage and redirecting stage.

3.4.2.2.1 Perceptual stage

In perceptual stageman's knowledge is confined to external appearance. When man comes into contact to some material objects/phenomenon of nature in the course of practical activities; man gets impression on that object.[106] This is done with assistance of your own organs. The said man's sense organs are the window through which the outside world penetrates and assists man to perceive nature. This stage of knowledge is called sensory knowledge.[107]

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[101]See, Sohn-Rethel, Alfred. "Historical Materialist Theory of Knowledge," Marxism Today, 1965

[102]See, http://www.autodidactproject.org/other/sohn_rethel_epistemology.html. Retrieved on 28th September 2016

[103] See, Sohn-Rethel, A., op-cit

[104] Ibid

[105]Ibid

[106]Sohn-Rethel, Alfred. "Historical Materialist Theory of Knowledge," Marxism Today, 1965

[107]Ibid

3.4.2.2.2 Rational Stage

After analysing sensory knowledge; you get a qualitative knowledge. It is a stage of logical thought, that man gained knowledge of the laws governing development of reality i.e. you deduce logically from what you know by looking any possible theory to understand nature.[108]

In analysing sensory knowledge logically man can build concept i.e. concept is main form of logical thought. Concept reflects on objects not all the aspects but only essential ones.[109] The built up of concept day-to-day life leads to the formation of theories. They said the sum of these "concepts" and "theories" make what we call rational knowledge of man.[110]

3.4.2.2.3 Redirecting Stage

They are saying that rational /conceptual knowledge is perfected by practice. The problem is whether theory corresponds to the objective reality can completely be solved. The only way to solve them is to re direct rational knowledge to practice.[111] To know that this particular theory is good is only by way of "practice". Knowledge and practice goes hand in hand. In Marxist theory; this cycle is endless.[112]

3.5 Conclusion



In above chapter we have learnt that the philosophical study of epistemology is concerned with the nature, sources, and limits of knowledge. An examination of the conflict resolution field reveals that that there are indeed a variety of kinds of knowledge at work and that the sources of this knowledge are numerous. In the 19th and 20th centuries, there have surfaced many attempts to analyse conflict dynamics and better understand how to deal with these dynamics in a constructive way. Knowledge refers to a theoretical or practical understanding of a subject. It can be implicit that is with practical skill or expertise or explicit that is with the theoretical understanding of a subject. It can be more or less formal or

[108] http://www.autodidactproject.org/other/sohn_rethel_epistemology.html. Retrieved on 28th September 2016

[109]V.I.Lenin, Materialism and Empirio-criticism: Critical Comments on a Reactionary Philosophy, Progress Publishers, Moscow, 1975, 122-123

[110]ibid

[111]V.I.Lenin, Materialism and Empirio-criticism: Critical Comments on a Reactionary Philosophy, Progress Publishers, Moscow, 1975, 122-123

[112]Ibid

systematic.

There are two main schools of thought postulating on knowledge. These schools have always been in conflict. The struggle between the materialist and idealist theories reflect two things such as they reflect material conditions of that time and reflect the mutual fact of scientific knowledge as gained at a given historical period. Idealism denies the existence of mind-independent objects.

On rationalists, they are saying knowledge could not be obtained through practical investigation. This kind of reasoning / conception was progressive at that time because it was affirming the supremacy of man's cognitive powers over religious dogma which was primalating at that time. To empiricists, they argued that through a systematic collection of data (facts) one can make generalisation which are solely found on experience.

However, materialists argue that knowledge is active, purposive and reflection of the objective world and its laws is in man's mind. The source of knowledge is the outside world around man i.e. the material world that is the source of knowledge.

3.6 Review Questions



1. What is knowledge? Illustrate its relevance.
2. Describe the concept epistemology and its scope
3. Discuss various theories of knowledge.
4. Compare and contrast between materialist and idealist theory of knowledge
5. Compare and contrast between rationalist and empiricist theory of knowledge.
6. Describe the materialist stages of knowledge acquisition.

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CHAPTER FOUR

LEGAL EDUCATION

4.0 Introduction

The creation and maintenance of a strong legal profession is thought to be a key element in promoting the efficient and fair administration of justice. Law schools and bar associations in various countries in the world stress theimportance of training ethical and socially responsible lawyers.[113]Moreover, the state of legal education variesfrom country to country. As part of theory of knowledge, it is better we learn something about legal education and tis essence. Such is going to be covered in this chapter.

4.1 Objectives



At the end of this chapter students should have:-

- Acquired basic knowledge of concepts such as legal education
- Acquainted with understanding of nature and relevance of legal education.
- Acquainted with ability to account for the historical background of legal education in Tanzania.
- Acquired the competency of explaining the requirements for legal practice in Tanzania as matter of professionalism.

4.2 Concepts

4.2.1 Education

Education refers to the act or process of imparting or acquiring general knowledge, developing the power of reasoning and judgment, and generally of preparing oneself or others intellectually for mature life.[114] Education provides students with key skills to succeed in society and in life. Without an appropriate

[113]See Ben W. Heineman, Jr., Lawyers as Leaders, 116 Yale L.J. Pocket Part 266 (2007), available at http://yalelawjournal.org/images/pdfs/102.pdf

[114] See Kay H, What is Legal Education? Georgia State University Law Review, Vol 6, Issue No 2, 1990 at p. 349

education, individuals may face challenges obtaining employment and other necessities. There is a great connection between education and success.[115]

4.2.2 Legal education

Legal education then is a process that takes an ordinary human being, preferably a collage graduate, and turns him or her into a person who thinks like a lawyer. It is the education of individuals who intend to become legal professionals or those who simply intend to use their law degree to some end, either related to law (such as politics or academic) or business.

4.3 Nature of Legal Education

There is widespread consensus that the legal profession stands at an important inflection point. Traditional models of professional organization, practice, and education are under increasing pressure to adapt to important changes in the environments in which lawyers work.[116] At the same time, these same forces make the profession's commitment to its traditional ideals of equality and the rule of law more relevant and important than ever[117].

The primary role of law professors is to teach the next generation of lawyers to think critically about problems, to understand the structure and power of law in our society, and to be thoughtful and engaged with respect to solutions.[118] This is accomplished through traditional classroom and clinical teaching; engagement with the community, the bench, and the bar; pro bono work;[119] and research and scholarship, in which faculty explore, question, and test the boundaries of the law.[120]

[115] See Dan Ahearn et al (2009), Education Law, A Career Guide, Harvard Law School, USA at p.1

[116]See, D. B. WilkinsThe Women and Men of Harvard Law School: Preliminary Results from the HLS Career Study, Harvard Law School Center on the Legal Profession, 2015

[117]See more at: https://clp.law.harvard.edu/clp-research/legal-careers/#sthash.1MMJePdq.dpuf

[118] Statement of value of legal education, this statement was developed by the Deans Steering Committee of the Association of American Law Schools. It is offered as a resource and, where appropriate, as a point of discussion to those interested in legal education.

[119]D. B. Wilkins,op-cit

[120] Statement of value of legal education, this statement was developed by the Deans Steering Committee of the Association of American Law Schools. It is offered as a resource and, where appropriate, as a point of discussion to those interested in legal education.

4.4 Background of Legal Education

Tiberius Coruncanius was the first who publicly professed law (publiceprofessusest), known to be both eloquent and full of knowledge.[121]Like Socrates, he left no writings. His public legal instruction had the effect of creating a class of legally skilled non-priests (jurisprudentes), a sort of consultancy.

After Coruncanius' death, instruction gradually became more formal, with the introduction of books on law beyond the then scant official Roman legal texts.[122]

It is possible that as the first plebeian Pontifex Maximus, Coruncanius allowed members of the public and students of the law of Ancient Rome to attend his consultations tasked with giving legal advice to citizens. These consultations were probably held outside the College of Pontiffs, and thus accessible to all those interested. As such, he became the first teacher of Roman law. How students of law learned their material earlier is unknown.

Prior to the Europeans' arrival in Africa, there appeared to be no formal system of legal education that produced "legal professionals" [123]as the term is presently understood.[124] Even with no formal legal education system, traditional African culture attached great importance to the law and legal education.[125] Learning of customary laws and practices was generally an informal life-long process.

Traditional legal systems and customary laws in African polyethnic societies formed "part of a functioning, coherent, and consistent totality" of the African way of life.[126] Those who would be regarded as legal

[121]George Long article, p. 655 of A Dictionary of Greek and Roman Anqiquities by William Smith. John Murray, London 1875.

[122]See, Encyclopædia Britannica. 2007. Encyclopædia Britannica Online

[123]See, A. M. Johnson, Jr., Think Like a Lawyer, Work Like a Machine" The Dissonance Between Law School and Law Practice, 64 S. CAL. L. REv.1231 (1991).

[124]See, George B. N. Ayittey, Indigenous African Institutions (2006)

[125]See, S. Manteaw, Reforming African Legal Education: Lessons from Ghana, in DEVELOPMENTS IN GHANA LAW SINCE INDEPENDENCE: HISTORY, DEVELOPMENT AND PROSPECTS (Mensa-Bonsu et al, eds., 2007)

[126]See, KojoYelpaala, Circular Arguments and Self-Fulfilling Definitions: "Statelessness" and the Dagaaba, 10 HIST. AFR. 349, 349 (1983)

professionals in present times traditionally would have been seen as merely performing their social duties.[127]

The role of legal professionals was not litigation.[128] Rather, legal professionals performed public interest services and used mediation to resolve disputes and maintain balance and harmony between parties and in the community.[129]

Colonization changed this state of affairs significantly. It introduced formal legal education and legal representation, and compounded Africa's plural legal systems.[130] Though it provided useful juridical patterns for contemporary African legal systems, colonization and the legal education it introduced focused on litigation to the detriment of other useful roles that lawyers could perform. The colonial legal system offers useful lessons that might be instructive for African law curriculum reform initiatives.[131]

Historically, the legal profession in Africa was seen primarily as an aid to thedevelopmental efforts of the respective governments.[132] Consequently, the overall objective of legal education at the inception of independence in African stateswas to train lawyers to serve the manpower needs of the newly formed countries.[133]

Over the years this objective has been maintained despite changes in thedomestic and international circumstances of African countries.[134] As a matter ofcolonial policy, legal education was discouraged due to

[127]See, R. B, Turner,., "Changing Objectives in Legal Education" (1931). Faculty Scholarship Series, Paper 4463

[128]See, B. N George. Ayittey, Indigenous African Institutions (2006)

[129]See, KojoYelpaala, Circular Arguments and Self-Fulfilling Definitions: "Statelessness" and the Dagaaba, 10 HIST. AFR. 349, 349 (1983)

[130]See, Jurist, Nigeria: Legal Education in Nigeria, http://jurist.law.pitt.edu/world/nigeria.htm McGeorge Law Review)

[131]See A. N. E. Amissah, The Supreme Court, A Hundred Years Ago, in ESSAYS IN GHANAIAN LAW 1 (W. C. Ekow Daniels & G. R. Woodman eds., 1976)

[132]See, Dr. Kwame Nkrumah, Speech at the Opening of the Ghana Law School: Ghana Law in Africa, 6 J. AFR. L., 103, 107 (1962)

[133] Emmanuel KwabenaQuansah, Educating Lawyers for Transnational Challenges: Perspectives of a Developing Country-Botswana, 55 J. LEGAL EDUC. 528, 528-33 (2005)

[134]See M.O. Adediran, Transnational Curriculum for Tomorrow's Lawyers, Written for the Association of American Law Schools conference on Educating Lawyers for Transnational Challenges at Oahu, Hawaii, U.S.A (May 26-29, 2004)

its potential for producing political agitators.[135] Consequently, emphasis has been placed on the trainingof other professionals, such as engineers, doctors and agriculturalists, to the detriment of the legal profession.[136]

4.5 Relevance of Legal Education

Legal education sets for a transformative experience in which students engage with a challenging intellectual tradition that teaches them to question their assumptions and learn how to be creative problem-solvers.[137] Legal education empowers students to become agents of change[138] because it teaches students about the legal system of the United States, a system that has the seeds of change built into its structure.[139] Legal education has always been the platform where students learn about the rule of law by learning about the history of the law and about the constitution and the body of law it has created.[140]

Sometimes legal education empowers lawyers to use the law in order to ensure protection of an otherwise powerless person or group; sometimes they seek to change the law to improve our society and increase prosperity.[141] Legal education enables every day lawyers to use their problem-solving skills to help individuals and organizations resolve conflicts, plan their affairs, and reach their goals.[142]

Legal education also trains students in a variety of problem-solving skills that can be utilized in situations within and outside of the practice of law.[143] No other professional training imparts this combination of knowledge and skills and empowers its holders to use them in myriad ways, from defending the rights of

[135]See W. A. Twining, Legal Education within East Africa, in Commonwealth Law Series No. 5 115, 116 (1966).

[136] M. NduloLegal Education, Internationalization and African Law School, 2 J. OF COMMONWEALTH L. AND LEGAL EDUC., 22, 31 (2004)

[137]Ibid

[138]See D. B. Wilkins, op-cit

[139]See, Statement of value of legal education, op-cit

[140]Ibid

[141]Ibid

[142]Ibid

[143]See, Statement of value of legal education, this statement was developed by the Deans Steering Committee of the Association of American Law Schools. It is offered as a resource and, where appropriate, as a point of discussion to those interested in legal education.

the marginalized and downtrodden, to running a multinational corporation; from working for law reform and policy, to continually striving to understand the meaning and application of the Constitution.[144]

4.6 Legal education in Tanzania

4.6.1 Overview

In order to become a member of legal profession in Tanzania one must go through legal education. Legal education in Tanzania includes undergraduate programme, bar courses or post graduate program for vocational and legal training at law school usually for 9 months leading to post graduate diploma in law, post graduate studies this lead to higher academic degrees such as masters and doctorates, for more advanced academic study and lastly continuing education and training for lawyers, judges and magistrates to adopt new changes in legal profession normally offered through seminars.

4.6.2 Trends

In Tanzania and other countries, law has been a favourite choice for most arts oriented students planning to join universities. For example in 1993, 300 students were enrolled in the Open University of Tanzania that being a large number of students enrolled for law studies ever seen. The number has now increased to over 800 per year[145].

Some of the reasons given by students who want to pursue law career being high prestige, to get a well-paid and respectable job and possibilities of saving one's society better as a lawyer.[146] Both legal academics and centres involved in running legal education programmes are increasingly coming to a consensus that theoretical knowledge alone is deficient.[147]

[144] Ibid

[145]See, Twaibu F (1997), Legal Profession in Tanzania, The Law and Practice, MkukinaNyota Publishers, Dar-es-salaam at p. 164.

[146]Rwelamira M, Tanzania Legal Internship Programme, A New Horizon in Legal Education 1974 at p.30

[147]Ishengoma S.K, Report on The Legal Reform Processes for The Recognition of Paralegals In Tanzania, FriedrichEbert-Stiftung, Dar es Salaam, Tanzania 2011 at p.9.

4.6.3 History of Legal Education in Tanzania

Before the establishment of local legal training in Tanzania, a prospective lawyer has to undergo training abroad. The training was mostly in England and India. One has to attend University and graduate with LLB Degree. In England the main system of training was at the Inns of courts.[148]

Those who qualify as Barristers in England were required to stay in Tanganyika for six months before they could petition for enrolment. The records shows that in Tanganyika there were 27 legal practitioners in 1929, 40 in 1936, 34 in 1948, 34 in 1949 and 113 in 195816.[149]

The system of training at the Inns, however was inadequate and in appropriate for the focused profession in the colonies. Most of the lawyers were trained in only one half of the task they were called upon to carry out when they returned home.[150]

The Denning report noted that legal education provided in England was inadequate and did not fully prepare a student for the practice of law in their countries. The Denning committee recommends that one faculty of law would suffice for the whole of East Africa[151].

The post-independence government's policy of providing free education to all from primary school to university has helped widen the base of educational system in Tanzania, including legal education.

More and more children of peasants, lower level workers and illiterate parents have been able to pursue their studies without financial constraints, do well in secondary schools, take law degree courses and ultimately become lawyers.[152]

Tanzania was the first East African country to have its own law faculty. The faculty of Law University of Dar es salaam started in 25th October 1961 as a part of the University of East Africa following the recommendations of the Denning committee which recommend that one faculty of law would suffice for the whole of East Africa.[153]

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[148] Ibid

[149] Report on the Committee on Legal Education for Students from Africa 1961.

[150] Twaibu F (1997),op-cit

[151] Report on the Committee on Legal Education for Students from Africa 1961.

[152] Ibid

[153] See, http://www.tls.or.tz/?cle.html. Retrieved on 27th September 2016

The whole of East Africa by then depends on the faculty of law of University of Dar es salaam to train its lawyers until in 1970's after the collapse of the former East African Community where member states decide to establish their own faculties of law. Law Nairobi University opened in 1983.[154]

4.6.4 Requirements

4.6.4.1 Undergraduate Education

To pursue a legal career in Tanzania one may start with a Certificate in Law, particularly for persons who have discontinued secondary education, followed by a Diploma in Law, a Degree in law (LL.B) and continue with a Postgraduate studies.[155]

The first degree in law take three to four years in Tanzania depends on which university you intend to pursue it.[156] The entry requirements for a law degree in various universities in Tanzania are that a student must obtain at least two principal pass in any A-Level subjects or equivalent.[157] Candidates must also have O- Level credit passes of at least 'C' in English[158].

4.6.4.2 Bar Education

This involves vocational and legal training at law school. These studies normally take 9 months to one year to which a successful student is awarded a post graduate diploma in legal practice. Before 2007 any LL.B degree holder who has attended internship and pupillage in two years can apply to sit the Bar exam which is held three times a year.

The Bar exam is an oral interview conducted under a panel of the Council for Legal Education, which is composed of representatives of the Chief Justice of the United Republic of Tanzania, the Attorney General of the United Republic, the Dean of Faculty of Law, of the University of Dar Es Salaam, and two

[154]See, Report on the Committee on Legal Education for Students from Africa 1961

[155]See, http://www.nyulawglobal.org/globalex/Tanzania.html. Retrieved on 27th September 2016

[156]See, Ishengoma S.K, Report on The Legal Reform Processes for The Recognition of Paralegals In Tanzania, FriedrichEbert-Stiftung, Dar es Salaam, Tanzania 2011

[157]Ibid

[158]See, http://www.ice.cam.ac.uk/faqs/3-credit-faqs/140-what-do-undergraduate-and-postgraduate-mean. Retrieved on 27th September 2016

representatives of the Law Society. A successful candidate is sworn in and enrolled as an Advocate of the High Court of Tanzania and sub-ordinate Courts thereto[159].

The Law School of Tanzania was established by the law school of Tanzania Act which came into force in 2nd May 2007.[160] This was an important milestone toward improving practical skills ofaspiring lawyers in the country.

Before the establishment of the school, aspiring lawyers were trained in practical skills through the internship program run by the Attorney General's chamber. Latter on some universities adopted the externship system to impart practical skills to aspiring lawyers. These systems have now been replaced by the practical legal training programme to be run by the Law School. The School is under the Ministry of Constitutional Affairs and Justice[161].

Presently the law school of Tanzania a offers one year practical legal training programme, which is compulsory for any law graduate aspiring to be enrolled as an advocate of the High court o Tanzania.

This programme is divided into two semesters. The first semester covers classroom instructions for up to twelve weeks while the second semester involves a period of clinical law (field placement) followed by a written and oral exams. Successful candidates are awarded the Post graduate diploma in legal practice.

4.6.4.3 Continuing Education

The members of legal profession include judges, magistrates, advocates, state attorneys and law teachers. The members of legal profession are required to undertake continuing training to adopt new changes in their profession.[162]

It should be noted that legal profession is dynamic, the law changes every day. The development of science and technology and adoption of new ways of recording evidence in courts, new ways of conducting

[159]See, http://lst.ac.tz/academics/programmes.php. Retrieved on 27th September 2016

[160] Act No.5 of 2007

[161]http://www.nyulawglobal.org/globalex/Tanzania.html. Retrieved on 27th September 2016

[162]Ishengoma S.K, Report on The Legal Reform Processes for The Recognition of Paralegals In Tanzania, FriedrichEbert-Stiftung, Dar es Salaam, Tanzania 2011

trials through digital means, development of electronic evidence and other areas in law necessitated the need for continuing education to members of legal profession.[163]

Continuing legal education is given to members of legal profession in form of seminars or short courses offered by various educational institutions or organizations. The main purpose of continuing legal education being to sharpens knowledge and skills of members of legal profession on new changes in laws and procedures.[164]

4.7 Conclusion



In above chapter we have learnt that the creation and maintenance of a strong legal profession is thought to be a key element in promoting the efficient and fair administration of justice. Law schools and bar associations in various countries in the world stress theimportance of training ethical and socially responsible lawyers.

Legal education is the education of individuals who intend to become legal professionals or those who simply intend to use their law degree to some end, either related to law. There is widespread consensus that the legal profession stands at an important inflection point. Traditional models of professional organization, practice, and education are under increasing pressure to adapt to important changes in the environments in which lawyers work.

Historically, the legal profession in Africa was seen primarily as an aid to thedevelopmental efforts of the respective governments. Consequently, the overall objective of legal education at the inception of independence in African stateswas to train lawyers to serve the manpower needs of the newly formed countries. Legal education sets for a transformative experience in which students engage with a challenging intellectual tradition that teaches them to question their assumptions and learn how to be creative problem-solvers.

Legal education in Tanzania includes undergraduate programme, bar courses or post graduate program for vocational and legal training at law school usually for 9 months leading

[163] Ibid

[164]Ishengoma S.K, Report on The Legal Reform Processes for The Recognition of Paralegals In Tanzania, FriedrichEbert-Stiftung, Dar es Salaam, Tanzania 2011

to post graduate diploma in law, post graduate studies this lead to higher academic degrees such as masters and doctorates, for more advanced academic study and lastly continuing education and training for lawyers, judges and magistrates to adopt new changes in legal profession normally offered through seminars.

However, to pursue a legal career in Tanzania one may start with a Certificate in Law, particularly for persons who have discontinued secondary education, followed by a Diploma in Law, a Degree in law (LL.B) and continue with a Postgraduate studies. Moreover, there is Bar education which involves vocational and legal training at law school. These studies normally take 9 months to one year to which a successful student is awarded a post graduate diploma in legal practice. Since legal profession is dynamic in terms of science and technology, there is continuing education and training for members of legal profession include judges, magistrates, advocates, state attorneys and law teachers. The members of legal profession are required to undertake continuing training to adopt new changes in their profession.

4.8 Review Questions



1. What is legal education? Illustrate its relevance.
2. Describe the nature of legal education in Africa
3. Account for legal education in Tanzania.
4. How do you go about to become legal professional in Tanzania?

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CHAPTER FIVE

NATURE OF LAW

5.0 Introduction

In any society, everybody is subject to the law. Everybody must do as the law says, or face the punishments which can be handed out to law-breakers. Societies have laws in order to protect people from the actions of other people. It is clearly impossible for everybody in any society to have absolute freedom: as one person exercised that freedom, it would trample upon somebody else's freedom. This chapter entails the nature of the law from its meaning, essence, types as well as theories of laws.

5.1 Objectives



At the end of this chapter students should have:-

- Acquired basic knowledge of concepts such as law, sources of law.
- Acquainted with understanding of nature and functions of law.
- Acquired ability to describe the classification of laws.
- Acquainted with skills of determining the relationship between the laws and moralities.
- Acquainted with ability to account for imperative theory of law.
- Acquired the competency of explaining the criticism posed upon the imperative theory of law.
- Acquainted with understanding of nature of classification of sources of laws.

5.2 Concept of Law

Jurists and legal scholars have not arrived at a unanimous definition of law. The problem of defining law is not new as it goes back centuries.

Austin said that law is the aggregate of the rules set by men as political superior or sovereign to men as politically subject. In short, law is the command of sovereign. It imposes a duty and duty is backed by a sanction.[165]

[165] See J. Austin, The Province of Jurisprudence Determined, (1861).

Salmond defined law as the body of principles recognized and applied by the state in the administration of justice.[166] Law consists of a series of rules regulating behaviour, and reflecting, to some extent, the ideas and preoccupations of the society within which it functions.[167]

Philosopher Herbert Lionel Adolphess Hart defines law as a system of rules, a union of primary and secondary rules. The Primary rules impose duties on people to behave in certain ways. Secondary rules, by contrast, pertain to the primary rules.[168]
British philosopher Jereny Bentham defined the as 'A collection of signs declarative of a volition conceived or adopted by the sovereign'[169]

German jurist and historian Friendrich Carl Von Savigny said that law is a product of the general consciousness of the people.[170]

Oliver Wendell Holmes noted American jurist said that the prophecies of what Courts will do in fact, and nothing more pretentious, are what I mean by the law.[171]

According to American philosopher Ronald Dworkin, Judges create a rationally integrated and coherent network of legal principles which is law.

Israeli philosopher Joseph Raz says Law consists of authoritative positivist considerations enforceable by the courts.[172]

Distinguished American legal scholar Roscoe Pound defined law as: An organised and critically controlled body of knowledge both of legal institutions and legal precepts and of the legal order, that is, of the legal ordering of the society.[173]

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[166] See N. Stavropoulos, Interpretivist Theories of Law, Stanford Encyclopaedia of Law.
[167] See Fitzgerald P.J: Salmond on Jurisprudence, 12th ed.,1966.
[168]See H.L.A Hart -The Concept of Law; Liberty and Morality; The Morality of the Criminal Law; Punishment and Responsibility; Essays in Jurisprudence and Philosophy.
[169] See Jeremy Bentham- Fragment on Government; An Introduction to the Principles of Morals and Legislation; The limits of jurisprudence defined.
[170] See Pollock, Sir Frederick: Jurisprudence and legal Essays Selected Introduced by A.L. Goodhard, London Macmillan, 1961.
[171]See RatanapalaSuri, Jurisprudence, 1st South Asian ed. 2011, Cambridge.
[172]See Paton, G.W.: Text Book of Jurisprudence, 3rd ed., Oxford University Press, 1964

Therefore law is system of rules which binds the members of the community together in their adherence to recognized values and standards. It is both permissive in allowing individuals to establish their own legal relations with rights and duties, as in the creation of contracts, and coercive, as it punishes those who infringe its regulations.[174]

Law is concerned with social behaviour of human beings within a given society as far as they materialize certain being as social beings, within the social organization of a given society as whole or other organized groups of human beings.[175]

Law essentially regulates relations between human beings as social beings. Law is a system of rules of a special kind of norms.[176] Law regulates social relations by regulating the social behaviour of human beings, in order to provide an equilibrium or balancing between competing interests or rights of individual persons within a given society or community in which they live; or between one community and another.

5.3 Functions of Law

Functions and purpose of law have been changing with time and place. They depend on the nature of the state. However, at present in a welfare and democratic state, there are several important functions of law.

5.3.1 Standards Prescription

The law is a guidepost for minimally acceptable behaviour in society. Some activities, for instance, are crimes because society through a legislative body has determined that it will not tolerate certain behaviours that injure or damage persons or their property.[177] For example, under a typical state law, it is a crime to cause physical injury to another person without justification doing so generally constitutes the crime of assault.

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[173]See Roscoe Pound - Outlines of CHAPTERs on Jurisprudence; The Spirit of the Common Law; Law and Morals; Criminal Justice in America, 1952

[174] See B. Tamanaha, Law, Oxford International Encyclopaedia of Legal History, 2008.

[175] See R. Dworkin, Law's Empire (1986).

[176] See J. Raz, The Authority of Law: Essays on Law and Morality, (1983).

[177] See http://www.businesslawbasics.com/chapter-3-purposes-and-functions-law-1. Retrieved on 30th September 2016

5.3.2 Peace and Order Maintenance

This is an offshoot of establishing standards. Some semblance of order is necessary in a civil society and is therefore reflected in the law.[178] The law when enforced provides order consistent with society's guidelines.[179]

5.3.3 Liberties and rights protection

The constitutions and statutes provide for various liberties and rights.[180] A purpose and function of the law is to protect these various liberties and rights from violations or unreasonable intrusions by persons, organizations, or government.[181]

5.3.4 Disputes Resolution

Disputes are unavoidable in a society made of persons with different needs, wants, values, and views. The law provides a formal means for resolving disputes the court system.[182] There is a court system and each state has its own separate court system. There are also various less formal means for resolving disputes collectively called alternative dispute resolution.

5.3.5 Furtherance Progress in Society

Law is in existence to further the progress of societies as absence of it would only have whole nations revert back. Law functions to ensure that its citizens have the opportunity to exercise the rights provided to them.[183] It seemingly regulates a lot of what we think and do, though some may not be as obvious as

[178]See https://www.reference.com/government-politics/functions-law-105ad03a8714ad63. Retrieved on 30th September 2016

[179]See J. Edward, "The Function of Law in Society" Journal of Comparative Legislation and International Law 5.4 (1923): 169-77.

[180] See M. Partington, Introduction to the English Legal System 2014-2015, Oxford University Press, 2014

[181]See The Function of Law in Society, 3 Golden Gate U. L. Rev. (1973). http://digitalcommons.law.ggu.edu/ggulrev/vol3/iss1/2

[182] See http://paralegal.laws.com/functions-sources-law/functions-of-law. Retrieved on 30th September 2016

[183]Ibid

others. It is assumed that, each act we partake in is accompanied by the express consideration of a law or societal rule, and as so, we proceed accordingly.

Therefore it can be stated that law starts regulating the welfare and other aspects of human life, from the moment a child is conceived in her mother's womb. In fact, the State interacts with and protects its citizens throughout their lives, with the help of law.

5.4 Nature of Law

What is the nature of law? This question has occupied centre stage jurisprudence and philosophy of law in the modern era, and has been the central occupation of contemporary analytic jurisprudence.

5.1.1 Characteristics of law

Law is normative in nature. Normativity of law means that the members of society (the law subjects) are bound to behave in accordance with the law. Hence law being normative means it has a compelling force to the people. It has s force which binds people.[184]

Law is permissive in nature. It allows the people to perform some of the acts in the society. The law empowers and gives freedom individuals to perform certain acts or avoids certain acts depending on their will or freedom.[185] Therefore it is permissive in nature. For instance contract law allows a person to enter into a contract with his or her own freedom.

Law is prohibitive in nature. It prescribes don'ts to human beings. It gives limitation upon acts and omission. It prohibits people from doing certain actions or from abstaining from certain omissions.[186] Most of these laws are criminal in nature. They prohibit what people should not do in the society. For instance, the law prohibits killings of persons, torturing, assaulting etc. other human beings.

[184] See http://lonang.com/library/reference/blackstone-commentaries-law-england/bla-002/. Retrieved on 30th September 2016

[185] See A. Marmour, the Nature of Law, Stanford Encyclopaedia of Philosophy.

[186] See L. Green, Legal Obligation and Authority, Stanford Encyclopaedia of Philosophy

Law is directive in nature. Also, the law gives directions and guidelines when a certain person wants to perform a certain things in the society.[187] The law provides guidelines of which people must follow them while performing certain deeds or when discharging certain duties or functions in the community.

Law is punitive in nature. Moreover, the law of the country has the nature of providing the sanctions against the persons who have violated certain don'ts and directives.[188] Hence since the law provide for prohibition and directions, when the people act contrary to them, sanctions are also provided for those violations. For instance section 25 of the Penal Code[189] provides for various punishments such as fines, corporal punishments, capital punishments, imprisonments to mention but a few.

5.4.1 Law and Morality

In the early stages of society, there was no distinction between law and morals. In the 19th century Austin gave his theory that the law has nothing to do with morals. According to him, law is the command of the sovereign. He said that it was command alone which is the subject-matter of jurisprudence.[190] Many other jurists supported the view of Austin. During the 20th century, Kelsen propounded his theory of 'grundnorm' and said that only the legal norms are the subject matter of jurisprudence. But in modern times, there is change in trend of thought because now the sociological approach to law indirectly studies morals.

5.4.1.1 Relation between law and morality

Law and morality are intimately related to each other. Laws are generally based on the moral principles of society. Both regulate the conduct of the individual in society. They influence each other to a great extent. Laws, to be effective, must represent the moral ideas of the people. But good laws sometimes serve to rouse the moral conscience of the people and create and main such conditions as may encourage the growth of morality.[191]

[187] See J. Finnis, Natural Law Theories, Stanford Encyclopaedia of Philosophy.

[188] See H.L.A. Hart, the Concept of Law (1961) (2d ed. 1984).

[189] CAP 16 RE 2002

[190] See Scott Shapiro, Legality, (Harvard University Press 2011).

[191] See J. Finnis, op-cit

Laws regarding prohibition and spread aim of primary education are examples of this nature. Morality cannot, as a matter of fact, be divorced from politics. The ultimate end of a state is the promotion of general welfare and moral perfection of man.[192]

For instance section 14 provides for the prohibited relationships in which the persons whom are closely related either by consanguinity or affinity are prohibited to get marriage to each other. Grounding on the spirit of this section one will come into the position to realize that it the replica of our moral values and nothing else, thus justify that law and morality are the two sides of the same coin.

It is the duty of the state to formulate such laws as will elevate the moral standard of the people. The laws of a state thus conform to the prevailing standard of morality. Earlier writers on Political Science never made any distinction between law and morality.[193]

Law, it is pointed out, is not merely the command of the sovereign, it represents the idea of right or wrong based on the prevalent morality of the people.[194] For instance **Part XV of the Penal Code[195]**. This part reflect for the element of morality in law, as it provided for the offences grounded on morality such as ; rape, abduction procuration for prostitution, trafficking of person, brothels, attempts to procure abortion, unnatural offences, Incest. All these provisions in the Penal Code is the mirror image that our laws have some point in time reflected the issue of morality whether coincidental or deliberately.

For instance, in the case of **R vs. HasaniSaidi,** Mapigano J (as he then was) was of the view that 'Rape is an enormous crime, no doubt. In Tanzania, it is punishable by imprisonment for life with or without corporal penalty. That demonstrates the intensity of the feeling of disgust with which the legislature views it. Incidentally other jurisdictions, olden and modern, express more intense opprobrium.

To a great measure that is due to the stigma that is attached to the victim, if unfairly, the humiliation and trauma that the victim invariably experiences the violation of her freedom of sexual choice and the threat which it poses to the security and morality of society.

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[192]See R. Alexy, The Argument From Injustice: A Reply to Legal Positivism 127 (Bonnie Litschewski Paulson & Stanley L. Paulson trans., Clarendon Press 2002)

[193] See http://www.oxfordlawtrove.com/view/10.1093/he/9780198704225.001.0001/he-9780198704225-chapter-2. Retrieved on 30th September 2016

[194]See H.L.A. Hart, The Concept of Law 203-04 (Clarendon Press 2d ed. 1994)

[195]CAP 16 RE 2002

Moreover, obedience to law depends upon the active support of the moral sentiments of the people. Laws which are not supported by the moral conscience of the people are liable to become dead letters.[196]

Morality is in some way an integral part of law or of legal development. Morality is 'secreted in the interstices' of the legal system and to that extent is inseparable from it. The judicial process distils a moral content out of the legal order, though it is admitted that this does not permit the rules themselves to be rejected on the general ground of their morality.[197]

For instance, in the case **of Republic v. Mbushuu Alias Dominic Mnyaroje and KalaiSangula**[198]This case can also be cited for approval in as far as the proximity between law and morality is concerned. In this case Mwalusanya J (as he then was) condemning on the punishment of death penalty held that; death penalty is inherently cruel, inhuman and a degrading punishment and the process of execution by hanging is particularly gruesome, generally sordid, debasing and generally brutalizing, and it offends article 13(6)(e) of the Constitution of the United Republic of Tanzania. This holding by Mwalusanya J (as he then was) reflect for the need of even our penal system to consider the aspect of morality, since it condemned death penalty as the cruelty and inhuman punishment which to borrow other words is to say the same was immoral.

Law and morality act and react upon and mold each other. This is done in the name of justice, equity, good faith and conscience, morals have infiltrated into the fabric of law. Moral considerations play an important part while making law, interpreting law and exercising judicial discretion.[199]

Law and morals have common origin but they came to differ in course of development. This can also be justified by many rules which are common to both law and morals.[200]

[196] See R. Dworkin, Taking Rights Seriously (1977)

[197]Essays, UK. (November 2013). Six Main Functions Of Laws Contract Law Essay. Retrieved from http://www.lawteacher.net/free-law-essays/contract-law/six-main-functions-of-laws-contract-law-essay.php?cref=1

[198]1994 TLR 146 (HC)

[199]See R. Alexy, The Argument From Injustice: A Reply to Legal Positivism 127 (Bonnie Litschewski Paulson & Stanley L. Paulson trans., Clarendon Press 2002)

[200]Ibid

Ordinarily laws in most jurisdictions conform to morals; this is obvious because there is a close relation between law and the life of the community. In the life of the community, morals occupy an important place.[201]

Morals have often been considered as the end of law and many eminent jurists have defined law in terms of justice. It is contented that the aim of law is to secure justice which is very much based upon morals.[202]

5.4.1.2 Distinction between law and morality

i. Laws regulate external human conduct whereas morality mainly regulates internal conduct.
ii. Laws are universal while morality is variable.
iii. Laws are definite and precise while morality is variable.
iv. Laws are upheld by the coercive power of the state where as morality simply enjoys the support of public opinion or individual conscience.
v. Laws are studied under Jurisprudence but morality is studied under Ethics.
vi. Law has its basis in social conduct while morals go on intrinsic value of conduct.[203]
vii. Law lays down what is convenient for that time and place while morals concentrate on the individuals rather than society.[204]
viii. New legal rules can be inserted and old ones changed and repealed. However, moral rules cannot be brought into existence or altered or done away with in this way.[205]
ix. Object of law is the submission of the individuals to the will of the organized society while on the other hand the object or tendency of morality is to subject the individuals to the dictates of his or her conscience.[206]

5.5 Classification of Law

There are several ways of classifying law and the idea of classification of law is not new. Even in ancient civilizations, the jurists were well aware of the difference between civil and criminal laws. However, with the passage of time, many new branches have come into existence and therefore, the old classification has

[201]See H.L.A. Hart, The Concept of Law 203-04 (Clarendon Press 2d ed. 1994)
[202]See N. Luhmann, Law As A Social System (Klaus A. Zeigert trans., Oxford Univ. Press 2004) (1993)
[203]Ibid
[204]See Fuller, L., The Morality of law 1964.
[205]See Hart, Concept of Law, 1961.
[206]See C.K.Allen, Law in the Making, 1964.

become out-dated. Law can be classified in many ways with respect to time and place. However law may be broadly divided into the following two classes in terms of its usage.

5.5.1 International and Municipal Law

International law is an important branch of law. It deals with those rules and regulations of nation which are recognized and are binding upon each other through reciprocity.[207] In recent times, this branch of law has grown manifold and has acquired increasing importance on account of globalization and other related factors.[208] Municipal laws are basically domestic or national laws. They regulate the relationship between the State and its citizen and determine the relationship among citizens.[209]

5.5.2 Public and Private Law

Public law chiefly regulates the relationship between the State and its' subjects. It also provides the structure and functioning of the organs of States.[210] For instance, public laws are constitutional law, administrative law, criminal law etc.

Private law is the branch of law defines, regulates, governs and enforces relationships between individuals and associations and corporations.[211] In other words, this branch of law deals with the definition, regulation and enforcement of mutual rights and duties of individuals. They confer civil rights which are administered and adjudicated by civil courts. Much of the life of a society is regulated by this set of private laws or civil rights.

5.5.3 Criminal and Civil Law

Criminal law deals with offences by people against society as a whole. Prosecutions are usually brought in the name of the Head of State, or of the State itself.[212] For instance penal code[213], economic and organised

[207]See C.K.Allen, Law in the Making, 1964.
[208]See Black's Law Dictionary, (1912)
[209]See J. Austin, CHAPTERs on Jurisprudence, 1904.
[210]See Dhyani, fundamentals of Jurisprudence, 1997.
[211]See Dias, jurisprudence, 5th ed., 1985.
[212]See Paton, G.W.: Text Book of Jurisprudence, 3rd ed., Oxford University Press, 1964.
[213]CAP 16 RE 2002

crimes Act, Cyber Crime Act[214], preventing and Combating Corruption Act[215] to mention but a few are criminal laws.

Civil law deals with offences by people against other individuals. This may include disputes over fences and other land matters, defamation cases, damaged property, broken promises or a host of other disputes between people. For instance law of contract Act[216], Law of Marriage Act[217], Law of torts, Occupiers Liability Act to mention but a few are civil laws

5.5.4 Substantive and Procedural Law

Substantive law is the main body of the law dealing with a particular area of law. Substantive law enshrines the rights and duties to person in the society. It describes obligations, freedoms, liberties, offences in the society. For instance, these are penal code, aw of contract Act, law of tort etc. Procedural law, on the other hand, is law in that deals with the process which must be followed in order to enforce the substantive law. For instance, these are criminal procedure law, civil procedure law etc.

5.6 Theories of Law

There are many theories of law. They describe what is law, its nature and what its usefulness. But the most prominent theory of law is imperative theory of law propounded by John Austin which we shall discuss it in this chapter.

5.6.1 Imperative Theory of Law

Austin said that law is the aggregate of the rules set by men as political superior or sovereign to men as politically subject. In short, law is the command of sovereign. It imposes a duty and duty is backed by a sanction.[218] Sovereign is a person or a body or persons whom a bulk of politically organized society habitually obeys and who does not himself habitually obey some other person or persons. Perfect obedience is not a requirement.[219]

[214]2015
[215]2007
[216]CAP 345 RE 2002
[217]CAP 29 RE 2002
[218]See N. Luhmann, Law As A Social System (Klaus A. Zeigert trans., Oxford Univ. Press 2004) (1993)
[219] See J. Austin, The Province of Jurisprudence Determined, (1861).

Command is also an expression of desire which is given by a political superior to a political inferior. The relationship of superior and inferior consists in the power which the superior enjoys over the inferior because the superior has ability to punish the inferior for its disobedience. There are certain commands that are laws and there are certain commands that are not laws. Commands that are laws are general in nature.[220]

Therefore, laws are general commands. Laws are like standing order in a military station which is to be obeyed by everybody.He further goes on to classify the types of laws:[221]

(1) Divine laws; God created laws

(2) Human laws; Man made laws

(i) Positive laws; Statutory Laws

(ii) Non-positive laws; Customs, Traditions

5.6.2 Criticism on imperative theory of law

(i) Laws before state

It is not necessary for the law to exist if the sovereign exists.[222] There were societies prior to existence of sovereign and there were rules that were in prevalence. At that point of time, there was no political superior.[223]

(ii) Origin of law

Law had its origin in custom, religion and public opinion. All these so called 'laws' were later enforced by the political superior. Thus, the belief that sovereign is a requirement for law has received criticism by the Historical and Sociological School of Thought.[224]

[220] See J. Austin, The Province of Jurisprudence Determined, (1861).

[221]See Pollock, Sir Frederick: Jurisprudence and legal Essays Selected Introduced by A.L. Goodhard, London Macmillan, 1961.

[222]See Paranjape N.V.: Studies in Jurisprudence and legal Theory, 5th ed.,Allahabad LawAgency, 2008

[223]See J. Habermas, Between Facts And Norms: Contributions To A Discourse Theory Of Law And Democracy (William Rehg trans., MIT Press 1996) (1992)

[224]See H. Baxter, Autopoiesis and the "Relative Autonomy" of Law, 19 CARDOZO L. REV. 1987 (1998)

(iii) Generality of Law

The laws are also particular in nature. Sometimes, a Law is applicable only to a particular domain. There are laws which are not universally applicable.[225] Thus, laws are not always general in nature.[226]

(iv) Promulgation

It is not necessary for the existence of the law that the subjects need to be communicated. But, Austin thought otherwise.[227]

(v) Law as Command

According to Austin, law is the command of the sovereign. But, all laws cannot be expressed as commands. Greater part of law in the system is not in the nature of command. There are customs, traditions, and unspoken practices etc. that are equally effective.[228]

(vi) Sanction

The phrase 'sanction' might be correct for a Monarchical state. But for a democratic state, laws exist not because of the force of the state but due to willing of the people. Hence, the phrase 'sanction' is not appropriate in such situations.[229] Also, there exists no sanction in Civil Laws unlike Criminal Laws.

(vii) Not applicable to International Law

Austin's definition is not applicable to International Law. International Law represents law between sovereigns. According to Austin, International Law is simply positive Morality i.e. soft Laws.

(viii) Not applicable to Constitutional Law

Constitutional Law defines powers of the various organs of the state. It comprises of various doctrines such as separation of power, division of power etc. Thus, no individual body of a state can act as sovereign or command itself. Therefore, it is not applicable to constitutional law.[230]

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[225]See Fuller, Lon L.: Problems of jurisprudence-Brooklyn, Foundation Press, 1949.

[226]See Tripathi B,N. Mani:An Introduction to Jurisprudence(Legal Theory),ed.,2008

[227]See J. Habermas, Between Facts And Norms: Contributions To A Discourse Theory Of Law And Democracy (William Rehg trans., MIT Press 1996) (1992)

[228]See Lloyd, Introduction to Jurisprudence, 1959

[229]See Fuller, Lon L.: Problems of jurisprudence-Brooklyn, Foundation Press, 1949.

(ix) Not applicable to Hindu Law or Mohammedan Law or Cannon Law

Personal Laws have their origin in religion, customs and traditions. Austin's definition strictly excludes religion. Therefore, it is not applicable to personal laws.[231]

5.7 Sources of Law

The term 'sources of law' has been interpreted by different writers in various ways and it has been used in different senses.

5.7.1 What is source of law

Sources of law are where one must resort to get at law. In other words, sources of law are the evidence of records of land or books or reports which have to be looked into for the purpose of learning or knowing law.[232]

5.7.2 Categories of sources of law

Salmond preferred to emphasize on two main sources of law. These are material sources and formal sources. Material sources are further sub-divided into legal and historical sources. Formal sources, on the other hand, are that from which a rule of law derives its force and vitality.[233]

Thus, the will of the State as manifested in the statute Book or decisions of Courts are formal sources of law, while legislation, customs, agreements and professional opinions of jurists are the material sources of law.[234]

5.7.2.1 Formal Sources

A formal source of law is defined by Salmond as that from which a rule of law derives its force and validity. The formal source of the law is the will of the State, as manifested in statutes or decisions of the Courts. It is that from which the authority of the law proceeds.[235]

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[230]See http://www.transnational.deusto.es/IP2011/docs/Introduction20to%20Private%20International%20Law.pdf. retrieved on 30th September 2016

[231]See R. Dworkin, A Matter of Principle (1985)

[232]See http://www.cscja-acjcs.ca/sources_of_law-en.asp?l=4. Retrieved on 30th September 2016

[233]See Slapper & Kelly - English Legal System - Routledge-Cavendish - 2008 - page 65

[234]See Mozley&Whiteley's Law Dictionary - E.R. Hardy Ivamy

5.7.2.2 Material Sources

The material sources of law are those from which is derived the matter, though not the validity, of the law.[236] The matter of the law, as stated above, may not be drawn from all kinds of material sources.

5.7.2.2.1 Historical Sources

Historical sources are sources where rules, subsequently turned into legal principles, were first found in an un-authoritative form.[237] They are not allowed by the law Courts as of right. Some examples are religion, morality and opinion of text writers. They operate only mediately and indirectly. Historical sources are those which lack formal recognition by the law. They are thus destitute of legal recognition.

5.7.2.2.2 Legal Sources

Legal sources are those sources, which are instruments or organs of the State by which legal rules are created, for example legislation and customs.[238] They are authoritative and are allowed by Courts as of right. They are the gates through which new principles find their way into the realm of law.

a. Legislation

Legislation is the making of law by the formal and expressed declaration of rules by some authority in the political body, which is recognized by the Courts of law as competent for that purpose. Law, which has its origin in legislation, is called enacted law. It is also called statute law.[239]

b. Precedent

Precedents establish the law by the recognition and application of new rules by the Courts themselves in the administration of justice. Precedents produce case law. Judicial decisions form an important source of law.[240]

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[235]See RatanapalaSuri, Jurisprudence, 1st SouthAsian ed. 2011, Cambridge

[236]See Fitzgerald P.J: Salmond on Jurisprudence,

[237]Ibid

[238]See Friedman: Legal Theory, 5th ed., 1967, Stevens & Sons, London

[239]See http://www.businesslawbasics.com/chapter-5-sources-law. Retrieved on 30th September 2016

[240]See R. Dworkin, A Matter of Principle (1985)

It was on the raw materials of custom that the judges fashioned up rules of law. Like sculptors working on marble, the judges worked on the raw material of custom supplied and thus made a valuable contribution to the law of the land.

c. Custom

Law based on custom is known as customary law. In fact, custom is one of the most fruitful sources of law. Custom is to society what law is to the state.[241] Each is the expression and realization, to the measure of men's insight and ability, of the principles of right and justice.[242]

d. Agreement (Treaty)

An agreement may be defined as the expression by two or more persons, communicated each to the other, of a common intention to affect the legal relations between them. The terms of an agreement constitute conventional law for the parties.[243]

Conventional law is that which is constituted by agreement as having the force of special law inter partes, in derogation of, or in addition to, the general law of the land. The rights and duties arising out of such an agreement apply only to the parties of the agreement, and not to others who are not parties thereto.

e. Professional Opinion

Professional opinion of eminent jurists may be called juristic law. In fact, juristic writing and professional opinion have played a very important role in legal evolution. Lord Eldon once remarked that a writer who had held no judicial position could not properly be cited as an authority.[244]

However, this view has been gradually modified and it has now become the convention that the works of dead authors can be cited, not as binding authorities, but as expert evidence as to the state of the law.[245]

[241]See http://www.thenewsmanual.net/Manuals%20Volume%203/volume3_63.htm. Retrieved on 30th September 2016

[242]See Henry Maine, Ancient law, 1946

[243]See Fuller, Lon L.: Problems of jurisprudence-Brooklyn, Foundation Press, 1949

[244] See R. Dworkin, Justice In Robes (2006)

[245]See Paranjape N.V.: Studies in Jurisprudence and legal Theory, 5th ed.,Allahabad LawAgency, 2008

5.8 Conclusion



In above chapter we have learnt that jurists and legal scholars have not arrived at a unanimous definition of law. Austin said that law is the aggregate of the rules set by men as political superior or sovereign to men as politically subject. In short, law is the command of sovereign. It imposes a duty and duty is backed by a sanction.

The problem of defining law is not new as it goes back centuries. However generally law can be defined to mean system of rules which binds the members of the community together in their adherence to recognized values and standards. It is both permissive in allowing individuals to establish their own legal relations with rights and duties, as in the creation of contracts, and coercive, as it punishes those who infringe its regulations.

Law is concerned with social behaviour of human beings within a given society as far as they materialize certain being as social beings, within the social organization of a given society as whole or other organized groups of human beings. Functions and purpose of law have been changing with time and place. They depend on the nature of the state.

However, at present in a welfare and democratic state, law starts regulating the welfare and other aspects of human life, from the moment a child is conceived in her mother's womb. In fact, the State interacts with and protects its citizens throughout their lives, with the help of law. Law and morals have common origin but they came to differ in course of development. This can also be justified by many rules which are common to both law and morals.

There are several ways of classifying law and the idea of classification of law is not new. Even in ancient civilizations, the jurists were well aware of the difference between civil and criminal laws, public and private laws, international and municipal laws, and substantive and procedural laws. Salmond preferred to emphasize on two main sources of law. These are material sources and formal sources. Material sources are further sub-divided into legal and historical sources. Formal sources, on the other hand, are that from which a rule of law derives its force and vitality. Thus, the will of the State as manifested in the statute book or decisions of courts are formal sources of law, while legislation, customs, agreements and professional opinions of jurists are the material sources of law.

5.9 Review Questions



1. How do you define the term law?
2. Describe the nature and purposes of law.
3. What is the need for law in a society? Can a country and its citizens be governed without any kind of law?
4. Account for relationship between law and morality.
5. Discuss the sources of law.
6. What are the benefits of classifying law? How many units are they classified into? Describe each, briefly.
7. Discuss the imperative theory of law.

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CHAPTER SIX

NATURAL LAW

6.0 Introduction

Natural law school considers law as absolute social fact of power and practice, and as a set of reasons for action that can be and often are sound as reasons and therefore normative for reasonable people addressed by them. Natural law school stipulates more on the law as ought to be rather than the law as it is.It is called natural law because it is believed to exist independently of human will.[246] It is 'natural' in the sense that it is not humanly created. It is a law, which is inherent in the nature of man and is independent of conventions, legislation or any other institutional device.

Therefore in this chapter we are going learn natural in the context of the legal philosophy and jurisprudence starting from its development, growth, relevance, characteristics, ideas, exponents and their contribution as well as application of natural law in the current modern countries.

6.1 Objectives

At the end of this chapter students should have:-

- Acquired knowledge and understanding of the basic concepts of natural law, law according to natural law theories.
- Acquainted with knowledge and understanding on growth and development of the natural law school of jurisprudence.
- Developed ability to explain central ideas and main features of the natural law school of jurisprudence which shall differentiate itself from other schools of jurisprudence.
- Acquired competency to describe the strengths and weaknesses of the natural law school of jurisprudence as compared to other schools of jurisprudence.
- Developed ability to examine the applicability and relevance of the natural law school of jurisprudence in current world and particularly in Tanzania.

[246]See Brian Bix, "Natural Law Theory," in Dennis M. Patterson (ed.), A Companion to Philosophy of Law and Legal Theory (Cambridge: Blackwell Publishing Co., 1996)

6.2 Natural law

There is no unanimity about the definition and exact meaning of natural law and the term 'natural law' has been interpreted differently in different times depending on the needs of the developing legal thought. Some of those meanings are hereby below described:-

Natural law is a philosophy that certain rights or values are inherent by virtue of human nature and universally cognizable through human reason. Natural lawis theory of natural rights based on the supposed state of nature.[247]

Historically, **natural law** refers to the use of reason to analyse both social and personal human nature to deduce binding rules of moral behaviour. Also, Natural lawis the use of reason in the making and administration of law.[248]

Natural law is principles of human conduct discoverable by reason, from basic liking of human nature and that are absolute, unchangeable and of universal validity for all times and places.[249] Hence it is the norm of conduct discoverable by experience and observation as prevalent and useful among different people.

6.3 Scope of Natural Law

Natural law consists of one supreme and universal principle, from which are derived all our natural moral obligations or duties. Natural law school law seeks both to give an account of the facticity of law and to answer questions that remain central to understanding law. It investigates the moral principles that ought to govern political action, law making and adjudication as well as the personal lives of citizens.[250] The 'law' that natural law theory speaks of has a much wider meaning than the positive law of the state

6.4 Characteristics of Natural Law

The central idea behind natural law is that it embodies moral principles which depend on the nature of the Universe and which can be discovered by natural reason. But human law can only be said to be law in so far as it conforms to those principles.

[247]See John Finnis, Natural Law and Natural Rights (Oxford: Clarendon Press, 1980)

[248]See Kenneth EinarHimma, "Positivism, Naturalism, and the Obligation to Obey Law," Southern Journal of Philosophy, vol. 36, no. 2 (Summer 1999)

[249]See Lon L. Fuller, The Morality of Law, Revised Edition (New Haven: Yale University Press, 1964)

[250] See Klaus F¸þer, "Farewell to 'Legal Positivism': The Separation Thesis Unravelling," in George, The Autonomy of Law, 119-162

Natural law is not enforced by any external agency, but every other form of law is enforced by the State or sovereign and there is always a coercive force behind it. Also, Natural law is eternal and unalterable.[251]

Natural law is not promulgated by legislation nor made by man; it is only discovered by him. Whereas the other laws are created, evolved, modified and altered by man. It is an outcome of preaching of philosophers, prophets, saints and thus in a sense it is a higher form of law to which all forms of man-made laws should pay due obedience.[252] Therefore natural law has no formal written Code, nor a precise penalty for its violation or specific reward for abiding by its rules

Natural law is a priori method as opposed to an empirical method. A priori method accepts things or Conclusions in relation to a subject as they are without any enquiry or observation. Also, natural law is a posteriori approach because tries to find out the causes and reasons in relation to subject matter.

It symbolizes physical law of nature based on moral ideals, which has universal applicability at all places and times.Natural law is universal, that is to say, it applies to the entire human race, and is in itself the same for all.[253]

It has often been used either to defend a change or to maintain status quo according to the needs and requirements of the time. But Natural law has an eternal lasting value, which is immutable.[254]

Natural law is immutable in itself and also extrinsically. It follows that, assuming the continued existence of human nature, it cannot cease to exist.[255] It also commands and forbids in the same tenor everywhere and always.

6.5 Trends of Natural Law

Natural law has been undergoing changes depending on the material condition of a particular epoch. There are two important trends in Natural law.

[251] See Joseph Raz, "Authority, Law and Morality," The Monist, vol. 68, 295-324 Joseph Raz, "Legal Principles and the Limits of Law," 81 Yale Law Review 823 (1972)

[252]See Striker, Gisela, 1986. “Origins of the Concept of Natural Law” Proceedings of the Boston Area Colloquium in Ancient Philosophy, 2: 79-94.

[253]See Kenneth EinarHimma, "Positivism, Naturalism, and the Obligation to Obey Law," Southern Journal of Philosophy, vol. 36, no. 2 (Summer 1999)

[254] See Joseph Raz, The Authority of Law: Essays on Law and Morality (Oxford: Clarendon Press, 1979)

[255] See Benson, B.L, (1990)“The enterprise of law, justice without the state” Pacific Research Institute, ISBN 0-936488-29-8

6.5.1 1st Trend of Natural Law

Where an appeal has been made to Natural law to justify and rationalize the existing order. In this category Natural law has been playing a conservative role/order. It has a conservative role in the society.[256]

6.5.2 2nd Trend of Natural Law

Where it appeals at different periods have been made to fight against the existing order. People have seen the existing order being oppressive; therefore natural law is used to effect changes in the society. Sometimes religion has been used in the course of History to explain natural law.[257] For example, Locke used the natural law theory as an instrument of change (Revolution trend), but Hobbes used it to maintain status quo in the society, (Conservative trend).

6.6 Natural Law Background

The Natural Law concept has its historical roots in Greek culture and philosophy. First, we see the concept expressed in theatre, especially in the works of Sophocles (497-406 B.C.).[258]

In Antigone, for example, his main character insists upon her moral duty to bury her brother (Polyneices) even though the king (Creon) ordered that the body be left unburied[259]. Which law prevails? Is it the will of the king which is the prevailing community law? Or is there a higher law reflected perhaps in traditional custom but grounded ultimately in an understanding of human being and the moral requirements founded on that understanding? [260]

Sophocles' point is that human nature and human reason are the ground of ethical duties which have to be recognized wherever human beings gather in community.[261] Later, philosophers like Aristotle and Plato would argue explicitly that nature rather than convention is the foundation of both law and morality.

[256]See Striker, Gisela, 1986. "Origins of the Concept of Natural Law" Proceedings of the Boston Area Colloquium in Ancient Philosophy, 2: 79-94.

[257]See Sayre-McCord, Geoffrey, 1988. "Introduction: The Many Moral Realisms," in G. Sayre-McCord (ed.), Essays on Moral Realism, Ithaca: Cornell University Press, 1988a, pp. 1-23.

[258]See Oderberg, David S., and Timothy Chappell (eds.), 2004. Human Values: New Essays on Ethics and Natural Law, New York: Palgrave.

[259]See Chappell, T. D. J., 1995. Understanding Human Goods, Edinburgh: Edinburgh University Press.

[260] See Moore, Michael, 1982. "Moral Reality," Wisconsin Law Review, 6: 1061-1156.

[261] See Foot, Philippa, 2001. Natural Goodness, Oxford: Oxford University Press.

Centuries later, St. Thomas would express this same notion by saying that if our natures were different, our moral obligations would be different.[262]

For over two thousand years, the greatest minds in Western culture agreed that there are universal laws bases on human nature against which the laws of a particular king or ruler or legislature have to be judged.[263]

The use of natural law, in its various incarnations, has varied widely through its history. There are a number of different theories of natural law, differing from each other with respect to the role those morality plays in determining the authority of legal norms.[264]

6.7 Natural Law in Early Greeks

Natural law is located from the early Greeks. There was no distinction between religion and law. In the Greek times all laws were received from the chief God. By this time the priest had every important role in the society.[265] Around 5th Century Philosophy was separated from religion. This was brought about by changes in the material conditions such as discoveries of iron, alphabet and writing technologies, development of city states and money as medium of exchange.[266]

6.7.1 Sophists and Natural Law

Sophists were early philosophers in Greek societies. They made a fundamental distinction between what is right and just according to positive law basing on the social institutions of Athens-and nature. They

[262]See Thompson, Michael, 1995. "The Representation of Life," in Rosalind Hursthouse, Gavin Lawrence, and Warren Quinn (eds.), Virtues and Reasons, Oxford: Oxford University Press, pp. 247-296.
[263]See Hooker, Richard, 1989. Of the Laws of Ecclesiastical Polity, A. S. McGrade (ed.), and Cambridge, UK: Cambridge University Press.
[264] See Gomez-Lobo, Alfonso, 2002. Morality and the Human Goods: An Introduction to Natural Law Ethics, Washington, DC: Georgetown University Press.
[265] See Adams, Robert Merrihew, 1999. Finite and Infinite Goods: A Framework for Ethics, Oxford: Oxford University Press.
[266]See Irwin, Terence, 2000. "Ethics as an Inexact Science: Aristotle's Ambitions for Moral Theory," in Brad Hooker and Margaret Little (eds.), Moral Particularism, Oxford: Oxford University Press.

clamoured for certain fundamental and absolute rights which are common to all men and, hence, which must be enjoyed by all men.[267]

They pointed out that in many instances the laws or legal institutions of the state primarily are used as means to promote the political power, interests and aspirations of the ruling class or the people in power.[268]

6.7.1.1 Protagoras

He was great and leading thinker among the sophist in early Greek societies. He had the view that concept of justice may be determined by time, place, and particular circumstance and, hence, may be relative, the more so, since finite man does not always and everywhere know the absolute or objective meaning of right and justice.[269] Whatever appears to the state to be just and equitable, as long as it is regarded as such, is just and equitable to it.

The gods had endowed all men with a sense for what is right and just, as well as with the gift of reverential and conciliatory restraint. In short, certain immutable moral principles are innate in man.[270] But on account of man's limited understanding and insight, he does not always properly apply these innate moral or legal principles. Hence under different factual conditions or in different situations he might interpret these innate moral principles in vastly different ways.

6.7.1.2 Thrysimacus

The ruling class becomes the ultimate criterion of what constitutes justice both in a moral and legal sense. Therefore justice is the interest of the stronger. People, indeed, talk a great deal about justice, but they do nothing about realizing justice.[271]

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[267] See Davison, Scott A., 2009. "A Natural Law Based Environmental Ethic," Ethics and the Environment, 14: 1-13.

[268]See Duns Scotus, John, 1997. Duns Scotus on the Will and Morality, Allan Wolter (ed.), Washington, DC: Catholic University of America Press.

[269]See Darwall, Stephen, 2006. The Second-Person Standpoint: Morality, Respect, and Accountability, Cambridge, Massachusetts: Harvard University Press.

[270]See Grisez, Germain, 1965. "The First Principle of Practical Reason: A Commentary on the Summa Theologiae, 1-2, Question 94, Article 2," Natural Law Forum, 10: 168-201

[271] See Haakonssen, Knud, 1992. "Natural Law Theory,", in Lawrence C. Becker and Charlotte B. Becker (eds.), Encyclopaedia of Ethics, New York: Garland

In all states there is the same principle of justice, which is in fact the interest of the government. Hence any person acting against the interest of the ruling class, that is, against the stronger, acts "unjustly" and, hence, will be punished as a criminal.[272]

6.7.1.3 Callicles

He is among the sophist who put great emphasis on the distinction between justice according to positive law and justice according to natural law and nature. He insisted that justice according to nature is the only acceptable form of justice.[273]

He opined that the people in power always attempted to protect and promote their particular class interests and class prejudices in the name of law. The convictions and qualifications of those who are in power are the ultimate foundation and justification of law and justice.[274]

However he had the view that the makers of the law in a democracy are and should be the majority of those who are weak. They dispense praise and censure with a view to themselves and their own interests.[275]

6.7.1.4 Hippias

He was the sophist and early philosopher to describe about equality of all mean. He opined that all men are fellow citizens of one single universal community, to wit, mankind. They are all free and are all equal. God has created all men free; nature has made no slaves.[276]

Therefore the rule of a master over slaves is contrary to nature, and that the distinction between slave and freeman exists only by positive law, but not by nature. Hence naturally all men are equal but inequality is brought by positive laws.

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[272]See Aristotle, Nicomachean Ethics, and Cited by book and chapter number.

[273]See Edwin W. Patterson, Jurisprudence Men and Ideasof the Law (Brooklyn, N.Y.: Foundation Press, 1953), p. 333.

[274]See Hallett, Garth, 1995. Greater Good: The Case for Proportionalism, Washington, DC: Georgetown University Press

[275]See See also Murray N. Rothbard, "Huntington on Conservatism: A Comment," American Political Science Review (September 1957): 784–87

[276]See amuel P. Huntington "Conservatism as an Ideology," American Political Science Review (June 1957): 458–59.

6.7.2 Anti-Sophist and Natural Law

In classical Greek societies, there was another group of philosophers whose major themes were different from those of sophists. However they also had some issues related to natural law which they are hereunder described.

6.7.2.1 Plato

He said that by nature society is divided into classes. The classes are men of gold, copper and base metals[277].

a. Men of Gold: (i.e. wise men).

These must be the rulers, not the foolish men; but people like philosophers. He was looking for philosopher kings. Why was he looking for philosopher kings? It is because man is dominated by reason and not therefore the one who can reason is supposed to rule in order to administer justice according to their reason and his own wisdom.[278]

These rulers administer justice without law but they use their wisdom and discretion; i.e. if you have a philosopher king with his wisdom; he will use his wisdom very carefully and discretionary. [279]

b. Men of Copper

These are soldiers, warriors; these are guardian of the state. They are meant to protect the state and defend the social organism. He says a state is a man with a large scale. He says a state is a perfect organism.[280] For this reason both an "individual" and the "state" must be in harmony obtained by nature. He says in the state there is individual having reason, courage and sense. He says reason dominates courageous acts and sense obeys.[281]

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[277]See http://rationalwiki.org/wiki/Natural_law. accessed on 7th October 2016 at 7:24 AM

[278]See See Bernard Bailyn, The Ideological Origins of the American Revolution (Cambridge, Mass.: Belknap Press of Harvard University Press, 1967).

[279]See John Wild, Plato's Modern Enemies and the Theory of Natural Law (Chicago: University of Chicago Press, 1953), p. 176

[280]See Lewis, V. Bradley, 2006, "Plato's Minos: The Political and Philosopical Context of the Problem of Natural Right", Review of Metaphysics, 60: 17-53.

[281]See A. Kenneth Hesselberg, "Hume, Natural Law and Justice," Duquesne Review (Spring 1961): 46–47

c. Base Metals

The producing classes i.e. slaves, artisans and farmers. They had a duty of feeding themselves and to feed others.[282]

Therefore each class should protect its inherent qualities i.e. human beings are inherently basically unequal. He was saying that others were meant to rule and other to be assisted to rule in order to produce. [283]

It is an alternative to govern the society. In addition, he says that in society these are inherent inequalities. Therefore there is no issue of having the law that is the same to everybody. The law should comply with qualities of a particular class in the society. The king's discretion should sort out the distinction.[284]

In his later book, Plato changed his altitude .The book is called the "LAWS BOOK". Authorities should not be guided by discretion alone but by written code; and enactments in the administration of justice.[285]

He avoided the discretionary powers which are very dangerous in the administration of justice in the society. He assumed the inequality of men in the society. He was relying on human reason.

6.7.2.2 Aristotle

Aristotle said that man is part of nature in two senses that "man" that is he is a creature of God and he is endowed with reason as distinct from all other creatures. He said man can control nature. Man can live according to reason. Living according to reason is living naturally.[286]

There must be a body of laws to guide society even if the Government is governed by a good man. Therefore ruler should be guided by the law.[287] The Right Constituted law should be a final i.e. rightly;

[282]See George P. Grant, "Plato and Popper," The Canadian Journal of Economics and Political Science (May 1954): 191–92.

[283] See Sayre-McCord, Geoffrey, 1988. "Introduction: The Many Moral Realisms," in G. Sayre-McCord (ed.), Essays on Moral Realism, Ithaca: Cornell University Press, 1988a, pp. 1-23.

[284]See George P. Grant, "Plato and Popper," The Canadian Journal of Economics and Political Science (May 1954): 191–92.

[285] See Moore, Michael, 1996. "Good without God," in Robert P. George (ed.) Natural Law, Liberalism, and Morality, Oxford: Oxford University Press.

[286] See Aristotle (350BC) Politics, Book 1 Chapter 2

[287]See Aristotle, Nicomachean Ethics, Cited by book and chapter number.

constituted law must stand on reason and ethical base.[288] What the law commanded varied from place to place, but what was "by nature" should be the same everywhere.[289]

6.8 Stoics and Natural Law

The base of stoicism is associated with Zeno (350-260 BC) the stoics line of thinking is a mixture of ideas propounded by different stoics, they mixed religious and worldly thinking in their philosophical propositions. They build their philosophy in the falling of Roman Empire.[290]

The Universe is a human being of which God is a soul, the governing intelligence, the sovereign laid the motives principles and an “Imenting wolf” i.e. gives life. Natural law forms the basis in creation for our intuitions of right and wrong, and is the context for our ability to reason. The ability to discern the natural law is not limited to one nation.[291]

True law is right reason in agreement with Nature. It is of universal application, unchanging and everlasting. For Justice is one; it binds all human society and is based on one law, which is right reason applied to command and prohibition.[292]

6.9 Natural law in middle Ages

During Feudal era, the period that was highly dominated by church fathers; between the collapse of the Greeks and the Romans’ civilization in the middle Ages; the natural law was capitalized by the church of fathers.[293]

Church fathers articulated that mankind is ruled by two laws, natural law and custom. Natural law is that containing the scriptures and gospel. They said because of divine character Natural Law is absolutely being

[288]See Henry Veatch, Rational Man: A Modern Interpretation of Aristotelian Ethics (Bloomington: University of Indiana Press, 1962)
[289]Ibid
[290]See Chappell, T. D. J., 1995. Understanding Human Goods, Edinburgh: Edinburgh University Press.
[291] See Darwall, Stephen, 2006. The Second-Person Standpoint: Morality, Respect, and Accountability , Cambridge, Massachusetts: Harvard University Press.
[292] See Lisska, Anthony, 1996. Aquinas's Theory of Natural Law: An Analytic Reconstruction, Oxford: Oxford University Press.
[293] See Ellickson, Robert C., (1991). “Order without Law, How Neighbors Settle Disputes” Harvard University Press.

and it is superior to other rules of law. It precedes them with time. It came into existence with a very creation of man and it does not vary in time but it remains unchangeable.[294]

6.9.1 Saint Augustine354-430 AD

He was a classical representative of early church doctrine of law. He wrote a book called "City God". There must be correspondence to the likeness of the city of God[295].

Social institutions of man are sinful including the state. Man could only justify its institutions by creating those corresponding to the likeness of God.[296] Since man's mission in the world is to approximate the likeness of God, then it follows that those institutions should approximate that of God.

6.9.2 Thomas Aquinas 13th Century

He defined law to mean a rational ordering of things concern the common good promulgated by whoever changed by the case of the community. He was saying that foundation of all law is divine law. Human inclination and reason has a certain contribution in the realization of law.[297]

All laws make the preservation of human desirable and possible in the ultimate of human existence. i.e. if the law is intended to do good is acceptable. There is a nexus between law and morality.[298] E.g. there are certain moral principles which are similar with legal principles. Killing of a human being is precluded by law as well as by morality.

The evolution of all social institutions can only be judged through the paramount standard of natural law. If human law it is at variance with any part of natural law then is no longer legal (i.e. it is no longer law) but it is a corruption of law. Nowadays people are saying unjust law is not law.[299]

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[294] See Barkow, JH, Cosmides L, Tooby J. (1992) "The adapted mind, Evolutionary psychology and the generation of Culture", Oxford University Press.

[295]See Fox, J. (1910). Natural Law. In The Catholic Encyclopaedia. New York: Robert Appleton Company. Retrieved October 7, 2016 from New Advent: http://www.newadvent.org/cathen/09076a.htm

[296]See http://www.newadvent.org/cathen/09076a.htm. Accessed on 7th October 2016 at 7:22 AM

[297] See Thomas Aquinas, On Law, Morality and Politics (Indianapolis: Hackett Publishing Co., 1988)

[298]See Robert P. George, Natural Law Theory: Contemporary Essays (Oxford: Clarendon Press, 1992)

[299]See Jules L. Coleman, "On the Relationship Between Law and Morality," Ratio Juris, vol. 2, no. 1 (1989), 66-78

Although eternal law & natural law forms the basic foundations of social institutions but they are limited because man needs natural law which must be established to draw the entire Conclusion and to restrain evil man from wrong doing by force/fear.[300]

He divided the law into 4 classes of law[301]:-

- Lexeterna (Eternal law)
- Lexnaturale (Natural law)
- Lexhumana (Human law)
- Lexdivina (divine law).

i. Lex eternal (Eternal law)

It means the divine wisdom governing the universe. Knowledge of which is outside human capacity except blessings of God himself.[302] Since the world is under the governance of divine law; then the whole community of the universe is governed by the divine reason. The rational guidance of creating things on the part of God has a quality of laws.

ii. LexNaturale (natural law)

All things participate in some degree in eternal law, in so far as they derive certain inclinations from them which are proper of them. There is a sharing of divine reason which matured in law. This actually becomes natural law.[303] Natural law operates on complete precepts such as the desire for self-preservation.

iii. Lex Humana (Human Law)

Human reason proceeds from precepts [teaching] of natural law i.e there is development of principles that are common. These are laws in ordinary etc. Natural laws may govern us in creating other laws.[304]

[300]See Robert P. George, "Natural Law and Positive Law," in George, The Autonomy of Law, 321-334

[301]See Aquinas, Thomas, Commentary on the Nicomachean Ethics, Cited as Commentary on NE by book, lectio, and section number.

[302]See Michael Moore, "Law as a Functional Kind," in George, Natural Law Theory, 188- 242

[303] See Geoffrey Sayre-McCord, "The Many Moral Realisms," in Sayre-McCord (ed.), Essays on Moral Realism (Ithica: Cornell University Press, 1988)

iv. LexDivina (divine law)

This is the law revealed by God through scriptures. It order and regulates the internal of human action.[305]

6.10 Natural law in Reformation Era 16th -18th Century

The decline of Feudalism and the rise of Capitalism as a system took a long time. The elements of Capitalism grew up in the womb of Feudalism. There were a number of things that facilitated the collapse of Feudalism and the rise of Capitalism mode of production these are industrial revolution, commodity productions and international voyages.[306]

People wanted to be independent in things rather than being dogmatic in idea in religion. Hence there was a divorce of law from theology i.e. law was separated from theology. Philosophers at this era were Hugo Grotius, T. Hobbes, Spinoza, John Locke, and J. Rousseau.[307] These philosophers were very strong in defending the ruling class. However later on they tried to move against the ruling class by not defending the class in power.

6.10.1 Hugo Grotius(1583-1645)

He was a Dutch jurist and a father of International law. He wrote a book called DEJURE BELLEST PACIS, which means cross of law and peace. He said man's desire is essentially to live in society peacefully in line with his intellect and reason.[308]

Natural Law principles as so far they are rational they are independent of God. He says natural law so immutable that it cannot be changed except by God himself. Since early Natural Law will remain so, it won't change. He tried to free Natural Law from theology.[309]

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[304]See Aquinas, Thomas, Summa Theologiae, Cited as ST by part, question, and article.

[305]See Aquinas, Thomas, Summa Theologiae, Cited as ST by part, question, and article.

[306]See Williamson M. Evers, "Hobbes and Liberalism," The Libertarian Forum (May 1975): 4–6 [available in PDF].

[307]See Evers, "Social Contract: A Critique," The Journal of Libertarian Studies 1 (Summer 1977): 187–88 [available in PDF]

[308] See Grotius, Hugo, 1949. The Law of War and Peace, Louise R. Loomis (trans.), Roslyn, NY: Walter Black

[309]See Haakonssen, Knud, 1996. Natural Law and Moral Philosophy: From Grotius to the Scottish Enlightenment, Cambridge, UK: Cambridge University Press.

6.10.2 Thomas Hobbes 1588 – 1679

He was of the view that man was living in the state of nature. Man was living naturally. Later man was living in a more organized manner called civil society when man organized himself in society.[310] There is an original condition of man, which is natural. In that original condition man was guided by motion of his thought. He said these thoughts / ideas were activated from external sensation.

With time man could distinguish sensation that brought pleasure and avoided those brought pain. Therefore man thought for things that brought pleasure and avoided those brought about pain.[311]

Human nature was intrinsically selfish, malicious and aggressive. In a state of nature everybody is in a state of war with everybody and there is nothing right or wrong. Hence man would prefer peace to war like state of nature.[312] Through reason man realizes that there're a certain principles that can bring god and peaceful situation. These are:-

- Every man wants to seek peace, but where he cannot obtain it, he can resort to war.
- A man should be wiling too lay down his rights and liberty and to transfer them to one man or assemblage of persons on conditions that others do the same. (**Social contract**). To him man should surrender his right and liberty to one man. This is a contract. The man should govern us according to contract, to have a good civilized society rule us according to your will. Don't rule us arbitrarily without observing the contract as we agreed.
- Man should keep his covenant we agreed upon. Therefore a social contract is necessary for individual in a state of nature to form a civilized society. He adds that man should realize that she can't get rid of the state of nature; unless he learns to keep contract.

[310]See Hobbes, Thomas, 1994. Elements of Law: Natural and Politic, J. C. A. Gaskin (ed.), Oxford: Oxford University Press. Cited as EL by chapter and section number

[311]See Haakonssen, Knud, op-cit

[312]See Hobbes, Thomas, 1993. Leviathan, Edwin Curley (ed.), Indianapolis: Hackett. Cited as Leviathan by chapter and paragraph number

To him the law of nature is the foundation of justice. He distinguished civil laws from the law of nature by arguing that civil laws are instrument by which the sovereign imposes the will upon the people.[313]

According to Hobbes, Natural law refers laws of human conducts based on observation and appreciation of human nature and the chief principle being that the natural right of self-preservation.[314]

He furthermore opined that there is no other instrument or organ to judge the validity of the laws except the state itself formed as result of social contract to achieve peace and protection of property[315].

6.10.3 Samuel Pufendorf1632-1694

He was a German law professor and a land owner. He advocated the supremacy of the state over the church. The basis of obligation was the "will" of the superior or strong enough to punish disobedience and resistance within the limit of reason and justice.[316]

The state is the manifestation of human reason. In order to make state acceptable even through the oppressive class, the state must aim at general good and human peace. Manifestation of state is necessarily to be strong due to the fact that[317]:-

(i) Under natural law man is naturally aware of him and holds himself dearer than anything.

(ii) Whenever man is threatened with danger he remains with hatred and arranging for revenge.

(iii) Man is worse than other beasts and he cannot defend himself until he matures. In order to mature he requires training.

(iv) Man who grows up without training and without depending on others would be a worst kind than animal. Then strong state is needed to fame this characteristic.

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[313]See Hobbes, Thomas, 1993. Leviathan, Edwin Curley (ed.), Indianapolis: Hackett. Cited as Leviathan by chapter and paragraph number

[314]See Philippa R. Foot, Virtues and Vices (Berkeley: University of California Press, 1978), pp. 99–105.

[315] See Moore, Michael, 1996. "Good without God," in Robert P. George (ed.) Natural Law, Liberalism, and Morality, Oxford: Oxford University Press.

[316] See Murphy, Mark C., 2001. Natural Law and Practical Rationality, New York: Cambridge University Press.

[317] See Pufendorf, Samuel, 1994. The Political Writings of Samuel Pufendorf, Michael J. Seidler (trans.), Oxford: Oxford University Press.

6.10.4 John Locke1632- 1704

He advocated that man was originally on the state of nature. He called this state of nature pre-political society. There was no political state in the state of nature. In a state of nature all men are equal and every man /person would have the right to enforce the law of nature.[318]

Those members of the society entered into social contract by which they established a government. To him a society was meant "a contract. The powers of the government are limited to the terms of social contract.[319]

When the government so established goes contrary to the trust imposed on it i.e. when the government violates the social contract then the people have the right to revolt and return to the pre-political state of nature and establish a new government by a new social contract.[320] The right to revolution must be exercised as a last resort; citizens must learn to tolerate great mistakes by the government.[321]

6.10.5 Charles Montesquieu1689- 1755

He was French philosopher who advocated that liberty is the highest goal which a nation must achieve. There must be a system of government under which liberty will be secured in the most efficient manner.

There should be no interference of one organ of state to the function of the other organs of the state but they must check each other and independent to each otherwise. In order to get a good efficient government, power must be checked by power. i.e. .there must be separation of powers between the executive, judiciary and parliament.[322]

[318]See Locke, John, (1689) A letter concerning toleration

[319]Ibid

[320]See John Locke, An Essay Concerning the True Origin, Extent, and End of Civil Government, V. pp.27–28, in Two Treatises of Government, P. Laslett, ed. (Cambridge: Cambridge University Press, 1960), pp. 305–7.

[321] See Locke, John, (1690) Two Treatises of Government

[322] See Thompson, Michael, 1995. "The Representation of Life," in Rosalind Hursthouse, Gavin Lawrence, and Warren Quinn (eds.), Virtues and Reasons, Oxford: Oxford University Press, pp. 247-296.

6.10.6 Jean Jacque Rousseau

He was French philosopher who opined that law is an expression of the general will of the community. Hence a law that has not been ratified by the people as a whole (parliament) is null and void.[323]

The sovereign cannot have separate interests apart as the community as a whole. When an individual obeys the law; obeys himself because an "individual will" is made in a "general will" which is the law.

The state is formed by a social contract; subsequent manifestations of the general will are seen through majority decisions. Under social contract individual surrender all their natural rights to the whole community for common good and in return citizens and individuals are granted civil liberty and security of the property/possession.

6.11 Rejection of Natural Law in 18th -19th Century

After getting the government, capitalists thought that there was no need of Natural law. They could now make their own laws. After the Bourgeoisie Revolution in America, all philosophies in natural law were rejected.

For instance John C. Calhoom criticized Thomas Hobbes and his works heavier than and elements of law work. He argued that for the predominant of individuals over others to continue without conflict there is need for a controlling power i.e. the state. He is interested on the control.

There must be some power of control by the state. Focus is now on the power of the state and not natural law. After basically rejecting natural law motion: the ruling Bourgeoisie adopted positivism as their legal philosophy.

The Bourgeoisie adopted positivism; you look at law as it is. After rejection of Natural Law jurisprudence was limited to the technical analysis of positive law laid down by the state. According to positivistic philosophers, there was no need to find the value of the law beyond the law itself.[324]

[323]See illiam J. Kenealy, S.J., "The Majesty of the Law," Loyola Law Review (1949–50): 112–13; reprinted in Brendan F.Brown, ed., The Natural Law Reader (NewYork: Oceana, 1960), p. 123.

[324]See Blackstone, Commentaries on the Laws of England, Book 1: quoted in Brown, Natural Law Reader,p. 106.

6.12 Revival of Natural Law 20th Century

The material conditions which led to natural law again were the revival of natural law and using it again was rise of monopoly capitalism that created class of rich and poor. Imperialism and fascism that led to colonialism and conflict of interest among the imperialist nations eventually led to wars, sufferings and property destruction.[325]

Natural law re-emerged vehemently after the Second World War. After the war the economy of Europe was affected but the USA was not affected. In the process of re-activated capitalism at political level the UN was formed with the aim of maintaining peace, order and security.[326]

The UN Charter which came into 1945 had a lot of Natural law thinking / sentiments. The Universal Declaration of Human Rights of 1948 was made. The rights contained in the Declarations range from moral liberty, equality, dignity of life etc. These rights were not new but were built on those developed by the earlier philosophers in the Natural law philosophy.[327]

These situations made the capitalists to re-think on how to solve these problems such sufferings and losses. They were interested to find a philosophy or politics to show the people that despite what have happened, capitalism as a system was still a face of human. Therefore Natural law had to be brought back.[328] Natural law was not resumed as it was but modified to suit the new conditions.

6.12.1 Rudolf Stammler1856-1938

He was a German professor of law, a father of contemporary natural law and a stronger follower of Kant. He accepted notion that law is a regulation of external conduct while ethics as having to do with the

[325]See Joseph Cropsey, "A Reply to Rothman," American Political Science Review (June 1962): 355

[326]See Frederick C. Copleston, S.J., Aquinas (London: Penguin Books, 1955), p. 204.

[327]See Gierke, Natural Law and the Theory of Society, p. 289. Also see Herbert Spencer, An Autobiography (New York: D. Appleton, 1904), vol. 1, p. 415.

[328]See see Carl L. Becker, The Heavenly Cityof the Eighteenth-century Philosophers (New Haven, Conn.: Yale University Press, 1957), p. 8.

intention of the actor (motive).[329] Law should be sovereign without interference and inviolable because a body of norms characterized by their inviolability.[330]

There is neither ethics nor feeling nor conception of justice superior to positive law. Therefore law must be final without any other criterion to interfere with such positive law. Once law is enacted, it is compulsory and binding to all despite someone's inclination to follow it or not.[331]

Legal regulation is the determining term of social activities, a theory of law must consider every specific legal rule as a means to an end, and for this purpose there is need to look or find a universal method of just law.[332]

Justice should be directed towards attaining the most perfect of harmony in a particular community and time. It should aim to create harmony in the society. Individual desires must be adjusted to the aim of the community i.e. the social ideal is a commodity of free willing of men.[333]

In realization of justice the specific content of a rule of law will vary from place to place and from age to age. The aim of just law is to achieve the highest possible harmony in the society.[334] There must be free willing men obeying the law in order to build a harmonious society. This will be achieved by considering the following[335]:-

- Obedience should not depend on the arbitrariness of another. i.e. don't harass them in order to obey.
- If you want to make your law to run ensure that the dignity of any person is maintained.
- When you enact the law don't segregate people.
- Don't degrade anybody in the society

[329]See John Wild, in his important article, "Natural Law and Modern Ethical Theory," Ethics (October 1952),

[330]See Kramer, Matthew, 2004a, "On the Moral Status of the Rule of Law," Cambridge Law Journal, 63: 65.

[331]See George, Robert, (ed.), 1992, Natural Law Theory: Contemporary Essays, Oxford: Clarendon Press.

[332]See Anthony Kenny, ed., Aquinas: A Collection of Critical Essays (New York: Anchor Books, 1969), pp. 340–82.

[333]See Brink, David, 1985, "Legal Positivism and Natural Law Reconsidered," The Monist, 68: 364–387.

[334]See Finnis, J., 2014, "Law as Fact and as Reason for Action: A Response to Robert Alexy on Law's 'Ideal Dimension'," American Journal of Jurisprudence, 59: 85–109.

[335]See https://mises.org/library/introduction-natural-law. Accessed on 7th October 2016

6.12.2 Gustav Radbruch 1878-1949

He was the German professor of law. He opined that the ultimate goal of law was the realisation of justice. In order to realise justice there must be a stable legal order.[336] To have stable legal order there must be the following elements[337]:-

a) Justice must be valued
b) Expedience of justice must be realised quickly as justice delayed is justice denied
c) There must be certainty in law

Justice demands that the equally be treated equally and the different be treated differently. He says class treatment must be different. Law requires some recognition of individual freedom and a complete denial by the state is absolutely false law.[338]

For the law to deserve its name and fulfil its objective there must be certain absolute postulate (principles) that must be fulfilled to make it really a law. A law must require some recognition by the state and complete denial of individual freedom is absolutely false law.

6.12.3 Lon Fuller

He was of the view that there is a basic orderliness in all things which is natural one. In the case of law one has to seek a natural order that underlies group.[339]

Our duty of making law is to subject human conduct to follow the law. But law should comply with internal morality. This is because without morality in law such law would give un-desired results that are not good in law. Therefore people must obey the law made by the state.[340]

Internal morality of law deals with the procedural aspect of law. In order to build internal morality of the law one has to abide with the following principles[341].

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[336]See Finnis, John, 1980. Natural Law and Natural Rights, Oxford: Oxford University Press

[337]See Professor Patterson, in Jurisprudence: Men and Ideas of the Law (Brooklyn: Foundation Press, 1953), p. 333

[338]See Alexy, Robert, 2002, The Argument from Injustice: A Reply to Legal Positivism, Oxford: Clarendon Press.

[339]See Fuller, Lon, 1969, The Morality of Law, revised ed., New Haven & London, Yale University Press, 1965.

[340]See Dickson, Julie, 2001, Evaluation and Legal Theory, Hart Publishing.

- Generality, i.e. forms of law should cover society generally.
- Promulgation, i.e forms of law must be publicly promulgated.
- Absence of retrospective legislation. Law should be prospective and not retrospective
- Clarity: i.e. Laws should be clear to the people. Vague laws make it difficult to be obeyed by the people in the society.
- No contradictory rules
- There must be a system on how to change laws so that people must obey the same; without hesitation.
- Law demands certainty in order to be obeyed / followed.
- Congruent between rules as announced and the administration i.e. the administration of laws should be in harmony with the laws itself

External morality of the law which deals with contents i.e. what does the law contains. Consists of fundamental rules without which society cannot survive.[342] These fundamental principles are minimum morality of the duty as follows:-

- Human vulnerability required mutual forbearance. There is a need to accommodate each other.
- Approximate equality i.e. there must be equality.
- Limited humanity or self-sacrifice
- Limited resources required the institutions of rules regarding property.
- Limited understanding strength of will lead to the requirement of voluntary corporation with a coercive system.

6.13 Contemporary Natural Law

Natural law in the contemporary era has its own unique features. There are various characteristics of contemporary Natural law, which we have today[343]:

[341]See Fuller, Lon, 1969, The Morality of Law, revised ed., New Haven & London, Yale University Press, 1965.

[342]See Simmonds, N.E., 2004, "Straightforwardly False: The Collapse of Kramer's Positivism," Cambridge Law Journal, 63: 98.

[343]See Finnis, John, 1998. Aquinas: Moral, Political, and Legal Theory, Oxford: Oxford University Press.

a) It rests on moral idealist but it is always coached in terms of internal variety; there is a moral aspect.
b) It is based on Law with a changing content so that it does not rest on principle of immutability.[344]
c) Justice is emphasized in much contemporary law. Theory of justice is an indispensable standard as the evolution of law is much more emphasised.[345]
d) Social experience has been evaluated/ used as a basis as constructive search for legal criteria to define human rights internationally in charters and programmes vested in social experience, which is integrated with value judgments.[346]

6.14 Conclusion



In this chapter we have understood that natural law school stipulates more on the law as ought to be rather than the law as it is.It is called natural law because it is believed to exist independently of human will. It is 'natural' in the sense that it is not humanly created. It is a law, which is inherent in the nature of man and is independent of conventions, legislation or any other institutional device. Natural law school law seeks both to give an account of the facticity of law and to answer questions that remain central to understanding law. It investigates the moral principles that ought to govern political action, law making and adjudication as well as the personal lives of citizens.

The central idea behind natural law is that it embodies moral principles which depend on the nature of the Universe and which can be discovered by natural reason. But human law can only be said to be law in so far as it conforms to those principles. The use of natural law, in its various incarnations, has varied widely through its history.

There are a number of different theories of natural law, differing from each other with respect to the role those morality plays in determining the authority of legal norms. Sophists were

[344]See Murphy, Mark C., 2006, Natural Law in Jurisprudence & Politics, Cambridge: Cambridge University Press.
[345]See Orrego, Cristóbal, 2007, "Natural law under other names: de nominibus non estdisputandum", American Journal of Jurisprudence, 52: 77-92.
[346]See Soper, Philip, 1992, "Some Natural Misunderstandings about Natural Law," Michigan Law Review, 90: 2393–2423.

early philosophers in Greek societies. They made a fundamental distinction between what is right and just according to positive law basing on the social institutions of Athens-and nature. They clamoured for certain fundamental and absolute rights which are common to all men and, hence, which must be enjoyed by all men. Plato says that in society these are inherent inequalities. Therefore there is no issue of having the law that is the same to everybody. The law should comply with qualities of a particular class in the society. The king's discretion should sort out the distinction. Aristotle said that man is part of nature in two senses that "man" that is he is a creature of God and he is endowed with reason as distinct from all other creatures. He said man can control nature. Man can live according to reason. Living according to reason is living naturally. Church fathers articulated that mankind is ruled by two laws, natural law and custom. Natural law is that containing the scriptures and gospel. They said because of divine character Natural Law is absolutely being and it is superior to other rules of law.

After decline of feudalism, capitalism emerged. People wanted to be independent in things rather than being dogmatic in idea in religion. Hence there was a divorce of law from theology i.e. law was separated from theology. Philosophers at this era were Hugo Grotius, T. Hobbes, Spinoza, John Locke, and J. Rousseau. These philosophers were very strong in defending the ruling class. However later on they tried to move against the ruling class by not defending the class in power. After getting the government, capitalists thought that there was no need of Natural law. They could now make their own laws.

After the Bourgeoisie Revolution in America, all philosophies in natural law were rejected. Natural law re-emerged vehemently after the Second World War. After the war the economy of Europe was affected but the USA was not affected. In the process of re-activated capitalism at political level the UN was formed with the aim of maintaining peace, order and security. The UN Charter which came into 1945 had a lot of Natural law thinking / sentiments. The Universal Declaration of Human Rights of 1948 was made. The rights contained in the Declarations range from moral liberty, equality, dignity of life etc. These rights were not new but were built on those developed by the earlier philosophers in the Natural law philosophy.

6.15 Review Questions



1. Natural law is always but the ideologies, glorified explanation of the existing economic relation, how they are consecutive and now from revolutionary angles. Discuss
2. Natural law like a harlot is at the disposal of everyone and can always be invoked to suit what is wanted. In it is 2500yrs; Natural law has appeared in different forms Religious or Secular. Substantiate
3. To what extent is this statement true “natural law is an ideology of what you believe? You try to explain the economic relation. It is an ideology of the ruling and sometimes an ideology of the rulers depending on the material conditions of the epoch concerned.”
4. What is contribution of natural law philosophy to the existing legal system of Tanzania?
5. Natural law is the major and unique school of jurisprudence. Discuss.

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CHAPTER SEVEN

UTILITARIANISM

7.0 Introduction

Utilitarianism is one of the best known and most influential moral theories. Like other forms of consequentialism, its core idea is that whether actions are morally right or wrong depends on their effects. More specifically, the only effects of actions that are relevant are the good and bad results that they produce. Utilitarianism is the philosophy which involves the belief that a morally good action is one that helps the greatest number of people.

7.1 Objectives



At the end of this chapter students should have:-

- Acquired basic knowledge of concepts such as utilitarianism school of jurisprudence, law in the utilitarian view etc.
- Acquainted with understanding of scope, nature and themes of the utilitarian school of jurisprudence.
- Acquired ability to describe the relevance of the utilitarian school of jurisprudence in the current legal systems.
- Acquainted with skills of assessing and evaluating the contribution of the Jeremy Bentham and John Stuart Mill in the utilitarian school of jurisprudence.
- Acquired the competency of explaining the criticism posed upon the utilitarianism school of jurisprudence.

7.2 Utilitarianism

Utilitarianism is a philosophical movement of the Bourgeoisie class which prescribes that there must be some good use (utility) in law making and legal system.The core principle of utilitarianism in the context of Jeremy Bentham is the greatest pleasure to the greatest number of people.It is argued that man is ruled by pain and pleasure and consciously and unconsciously seeks pleasure and shiver pain.[347]

[347] See Ben Eggleston and Dale Miller, eds. The Cambridge Companion to Utilitarianism, Cambridge University Press, 2014

Also, utilitarianism denotes a doctrine that the useful is the good and that the determining consideration of right conduct should be the usefulness of its consequences; specifically: a theory that the aim of action should be the largest possible balance of pleasure over pain or the greatest happiness of the greatest number.

7.3 Scope of Utilitarianism

The utilitarian school of jurisprudence believes that man is social by nature and is always motivated in life chiefly by the desire to obtain happiness and avoid pain and that the happiness of each individual involves relations with other individuals which necessitates state regulation of mutual relations of men by legislation.

Utilitarian philosophy is thus closely associated with practical ethics and practical politics. The object of legislation of the state is to promote and secure the greatest happiness of the greatest number.

The criterion of right and wrong of good and bad which the state should apply are found in happiness and not in divine revelation, dictates of conscience or in the abstract principles of reason.[348]

It insisted that all political institutions and public offices must be judged by their fruits and not by their idealism, i.e., by their actual effects on the happiness of the people and not by their conformity to the theories of natural rights or absolute justice.[349]

Thus this theory is based on the psychological doctrine of hedonism which proceeds on the assumption that man is a sentient being, a creature of feeling and sensibility.

The principle of utility or the greatest happiness of the greatest number is the measuring rod by which utilitarian measure and evaluate the public policies and legislative enactments of governments. The state is a necessity for the promotion of the greatest happiness of the greatest number and it is a means, not an end in itself.[350]

[348] See Wendy, D., The Liberal Self: John Stuart Mill's Moral and Political Philosophy, Ithaca, NY: Cornell University Press, 1991

[349] Ibid

[350] See Hruschka, Joachim, 1991. "The Greatest Happiness Principle and Other Early German Anticipations of Utilitarian Theory," Utilitas, 3: 165–77

Utilitarianism is a form of consequentialism because it rests on the idea that it is the consequences or results of actions, laws, policies, etc. that determine whether they are good or bad, right or wrong.

In general, whatever is being evaluated, we ought to choose the one that will produce the best overall results. In the language of utilitarian, we should choose the option that "maximizes utility," i.e. that action or policy that produces the largest amount of good.

7.4 History of Utilitarianism

Utilitarianism as an ethical political and legal theory is essentially a product of the English mind. It is essentially associated with Jeremy Bentham and John Stuart Mill.

Utilitarianism is one of the most powerful and persuasive approaches to normative ethics in the history of philosophy. Though not fully articulated until the 19th century, proto-utilitarian positions can be discerned throughout the history of ethical theory.[351]

Since the early 20th Century utilitarianism has undergone a variety of refinements. After the middle of the 20th Century it has become more common to identify as a 'Consequentialist' since very few philosophers agree entirely with the view proposed by the Classical Utilitarian, particularly with respect to the hedonistic value theory.[352]

But the influence of the Classical Utilitarian has been profound not only within moral philosophy, but within political philosophy and social policy. The question Bentham asked, "What use is it?" is a cornerstone of policy formation. It is a completely secular, forward-looking question. The articulation and systematic development of this approach to policy formation is owed to the Classical Utilitarian.[353]

7.5 Themes of Utilitarianism

In order to find the sources of law one has to look at a political society. When a number of people are supposed to be in a habit of paying obedience to a person or assemblage of a known / certain description

[351] See Hruschka, Joachim, 1991. "The Greatest Happiness Principle and Other Early German Anticipations of Utilitarian Theory," Utilitas, 3: 165–77

[352] See Rosen, Frederick, 2003. "Reading Hume Backwards: Utility as the Foundation of Morals," in Frederick Rosen (ed.), Classical Utilitarianism from Hume to Mill, London: Routledge, 29–57.

[353] See Rosenblum, Nancy, 1978. Bentham's Theory of the Modern State, New York: Cambridge University Press.

such persons all together are seen to be in a state of political society. Law arises out of these relationships.[354]

The person or body of persons who assign duties is the sovereign (it may be a king or parliament of other authority). Sovereign can only arise in a political society and independent.[355]The "will" of the sovereign is absolute. The expresses sovereign its "will" through command and others should obey. The commands addressed to the government. The command of the sovereign is the law.[356]

Utilitarian believe that the purpose of morality is to make life better by increasing the amount of good things (such as pleasure and happiness) in the world and decreasing the amount of bad things (such as pain and unhappiness).[357]

They reject moral codes or systems that consist of commands or taboos that are based on customs, traditions, or orders given by leaders or supernatural beings. Instead, utilitarian think that what makes a morality be true or justifiable is its positive contribution to human (and perhaps non-human) beings.[358]

Utilitarian disagree about whether judgments of right and wrong should be based on the actual consequences of actions or their foreseeable consequences. This issue arises when the actual effects of actions differ from what we expected.[359]

Foreseeable consequence utilitarian accept the distinction between evaluating actions and evaluating the people who carry them out, but they see no reason to make the moral rightness or wrongness of actions depend on facts that might be unknowable. For them, what is right or wrong for a person to do depend on what is knowable by a person at a time?[360]

[354] See Walter Sinnott-Armstrong, "Consequentialism," Stanford Encyclopaedia of Philosophy

[355] See Hume, David, 1738. A Treatise of Human Nature, edited by L. A. Selby-Bigge, Oxford: Oxford University Press, 1978.

[356] See Gay, John, 1731. A Dissertation Concerning the Fundamental Principle and Immediate Criterion of Virtue in Frances King's An Essay on the Origin of Evil, London.

[357] See Henry Sidgwick, The Methods of Ethics, Seventh Edition, available in many editions, 1907

[358] See John Stuart Mill. Utilitarianism, available in many editions and online, 1861

[359] See Jeremy Bentham, An Introduction to the Principles of Morals and Legislation, available in many editions, 1789.

[360] See John Rawls. "Two Concepts of Rules." In Philosophical Review LXIV (1955), 3-32

Legal rules, Bentham believed, should be codified, and the codes should be written so as to produce "the Greatest Good, for the Greatest Number." That is, we should adopt those legal rules that will maximize utility.

There are three principles to guide the process of legislation. First, it is a principle of utility that must guide legislation i.e. what is the use of such law**.** Second,every individual action must conform to the need of the society. By doing so the society attains greatest happiness.[361]

Third, anyone who does not conform to these standards must face sanctions and those who conform must be awarded. Punishment or awards for conforming to standard or not conforming are in four areas.[362]

- Popular or moral sanctions: These are sanctions based on the approval or disproval of others in the society.
- Legal / political sanction: This is based on political power of the government.
- Religions sanctions: Imposed by divine agents.
- Physical / natural sanctions: Occurs accidentally and they are independent of human nature.

Therefore the legislation has to ensure the greatest happiness of the greatest number of people.There is one principle that is not natural law but "utility" (the use). A good principle in making law is utility (Utilitarianism).[363]

7.6 Exponents of Utilitarianism

The most important classical utilitarian is Jeremy Bentham (1748-1832) and John Stuart Mill (1806-1873). Bentham and Mill were both important theorists and social reformers. Their theory has had a major impact both on philosophical work in moral theory and on approaches to economic, political, and social policy. Although utilitarianism has always had many critics, there are many 21st century thinkers that support it**.**

[361] See Bentham, Jeremy, 1789 [PML]. An Introduction to the Principles of Morals and Legislation., Oxford: Clarendon Press, 1907.

[362] See Bentham, Jeremy, 1785 [OAO]. "Offences Against Oneself." Louis Compton (ed.), The Journal of Homosexuality, 3(4) (1978): 389–406, 4(1): 91–107.

[363] See Julia Driver, "The History of Utilitarianism," Stanford Encyclopaedia of Philosophy

7.6.1 Jeremy Bentham

The philosopher and jurist Jeremy Bentham (1748-1832) was born in Spitalfields, London, on 15 February 1748. He proved to be something of a child prodigy: while still a toddler he was discovered sitting at his father's desk reading a multi-volume history of England, and he began to study Latin at the age of three. At twelve, he was sent to Queen's College Oxford, his father, a prosperous attorney, having decided that Jeremy would follow him into the law, and feeling quite sure that his brilliant son would one day be Lord Chancellor of England.[364]

Jeremy Bentham was influenced both by Hobbes' account of human nature and Hume's account of social utility. He famously held that humans were ruled by two sovereign masters' pleasure and pain.[365]

He also promulgated the principle of utility as the standard of right action on the part of governments and individuals. Actions are approved when they are such as to promote happiness, or pleasure, and disapproved of when they have a tendency to cause unhappiness, or pain.[366]

Jeremy Bentham defined law as an assemblage of signs, declarative of volition, conceived or adopted by the sovereign in a state, concerning the conduct to be observed in a certain case by a certain person or class of persons who in the case in question are supposed to be the subject to his power.[367]

Legislation is a science. Science is the basis for good government, because science creates certainty in law. Scientific legislation is the second matter of jurisprudence. When you deal with legislation you, deal with science.[368]

Bentham does not recognize individual's human rights and therefore the idea of justice is merely a subordinate aspect of utility.[369]His principle of justice is an implicit part of utility as incorporated in legislation.

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[364] See https://www.ucl.ac.uk/Bentham-Project/who. Accessed on 6th October 2016 at 8:30 AM

[365] See Gill, Michael, 2006. The British Moralists on Human Nature and the Birth of Secular Ethics, New York: Cambridge University Press.

[366] See John C. Harsanyi. "Morality and the Theory of Rational Behavior." in Social Research 44.4 (1977): 623-656. (Reprinted in AmartyaSen and Bernard Williams, eds., Utilitarianism and Beyond, Cambridge University Press, 1982)

[367] See Jeremy Bentham- Fragment on Government; An Introduction to the Principles of Morals and Legislation; The limits of jurisprudence defined.

[368] See Paton, G.W.: Text Book of Jurisprudence, 3rd ed., Oxford University Press, 1964

It, therefore, seems that his theory of justice is justice according to law as laid down in a legislation. He was not prepared to recognize a general or specific human right to justice because he had no respect for natural rights.

7.6.2 John Stuart Mill

John Stuart Mill (1806–1873) was a follower of Bentham, and, through most of his life, greatly admired Bentham's work even though he disagreed with some of Bentham's claims particularly on the nature of 'happiness[370].

John Stuart Mill also insisted that the utilitarian doctrine of happiness was altruistic rather than egoistic, since its ideal was the happiness of all concerned. Within the utilitarian, one of the chief issues of legal philosophy to which Mill suggested an approach different from that of Bentham was the significance that should be attributed to the concept of justice. Bentham had spoken of justice in a deprecatory fashion and had subordinated it completely to the dictates of utility.

John Stuart Mill had a view that there are some pleasures that are more fitting than others. Intellectual pleasures are of a higher, better, sort than the ones that are merely sensual, and that we share with animals. Mill then continues to argue that people desire happiness the utilitarian end and that the general happiness is "a good to the aggregate of all persons.[371]

Like Jeremy Bentham, John Stuart Mill sought to use utilitarianism to inform law and social policy. The aim of increasing happiness underlies his arguments for women's suffrage and free speech.[372]

John Stuart Mill's version of utilitarianism differed from Bentham's also in that he placed weight on the effectiveness of internal sanctions emotions like guilt and remorse which serve to regulate our actions.[373]

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[369] See H.L.A. Hart. Essays on Bentham, Jurisprudence and Political Theory, Clarandon Press, Oxford, 1982, p. 51

[370] See Driver, Julia, 2004. "Pleasure as the Standard of Virtue in Hume's Moral Philosophy." Pacific Philosophical Quarterly., 85: 173–194.

[371] See Mill, John Stuart, 1843. A System of Logic, London: John W. Parker.

[372] See Mill, John Stuart, 1861 [U]. Utilitarianism, Roger Crisp (ed.), Oxford: Oxford University Press, 1998.

The sense of justice, John Stuart Mill pointed out, encompasses all those moral requirements, which are most essential for the wellbeing of mankind and which human beings therefore regard as sacred and obligatory.[374]

John Stuart Mill also held that natural features of human psychology, such as conscience and a sense of justice, underwrite motivation. The sense of justice, for example, results from very natural impulses.[375]

Jeremy Bentham and John Stuart Mill attacked social traditions that were justified by appeals to natural order. The correct appeal is to utility itself. Traditions often turned out to be "relics" of "barbarous" times, and appeals to nature as a form of justification were just ways to try rationalizing continued deference to those relics[376]

7.7 Usefulness of Utilitarianism

Utilitarianism is a philosophical view or theory about how we should evaluate a wide range of things that involve choices that people face. Among the things that can be evaluated are actions, laws, policies, character traits, and moral codes.[377]

Utilitarian believe that whenever we are deciding what to do, we should perform the action that will create the greatest net utility. In their view, the principle of utility do whatever will produce the best overall results should be applied on a case by case basis. The right action in any situation is the one that yields more utility (i.e. creates more well-being) than other available actions.[378]

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[373] See Mill, John Stuart, 1859. On Liberty, London: Longman, Roberts & Green.

[374] See John S. Mill. Utilitarianism (edi.O. Piest), New York, 1957, p.63

[375] See Raphael, D. D., 1969 [R] British Moralists, in two volumes, London: Oxford, Clarendon Press.

[376] See Price, Richard, 1758 [PE]. A Review of the Principle Questions in Morals, London: T. Cadell in the Strand, 1787.

[377] See Donner, Wendy, 1991. The Liberal Self: John Stuart Mill's Moral and Political Philosophy, Ithaca, NY: Cornell University Press.

[378] See Peter Singer., "Famine, Affluence, and Morality" in Philosophy and Public Affairs 1 (1972), 229-43., Reprinted in Peter Singer. Writings on an Ethical Life, Harper Collins, 2000

7.8 Critiques on Utilitarianism

The most common argument against act utilitarianism is that it gives the wrong answers to moral questions. Critics say that it permits various actions that everyone knows are morally wrong.[379]

Although utilitarian criticize traditional moral rules for being too rigid, critics charge that utilitarian ignore the fact that this alleged rigidity is the basis for trust between people. If, in cases like the ones described above, judges, doctors, and promise-makers are committed to doing whatever maximizes well-being, then no one will be able to trust that judges will act according to the law, that doctors will not use the organs of one patient to benefit others, and that promise-makers will keep their promises[380].

Critics also attack utilitarianism's commitment to impartiality and the equal consideration of interests.[381] An implication of this commitment is that whenever people want to buy something for themselves or for a friend or family member, they must first determine whether they could create more well-being by donating their money to help unknown strangers who are seriously ill or impoverished.

7.9 Conclusion



In above chapter we have learnt that utilitarianism denotes a doctrine that the useful is the good and that the determining consideration of right conduct should be the usefulness of its consequences, specifically a theory that the aim of action should be the largest possible balance of pleasure over pain or the greatest happiness of the greatest number.

The utilitarian school of jurisprudence believes that man is social by nature and is always motivated in life chiefly by the desire to obtain happiness and avoid pain and that the happiness of each individual involves relations with other individuals which necessitates state regulation of mutual relations of men by legislation. Utilitarianism as an ethical political and legal theory is essentially a product of the English mind. It is essentially associated with Jeremy Bentham and John Stuart Mill.

Utilitarianism is one of the most powerful and persuasive approaches to normative ethics in

[379] See Tim Mulgan., Understanding Utilitarianism, Acumen, 2007

[380] See John Troyer. The Classical Utilitarian: Bentham and Mill. Hackett, 2003

[381] See J. O. Urmson. "The Interpretation of the Moral Philosophy of J. S. Mill," in Philosophical Quarterly (1953) 3, 33-9

the history of philosophy. In order to find the sources of law one has to look at a political society. When a number of people are supposed to be in a habit of paying obedience to a person or assemblage of a known / certain description such persons all together are seen to be in a state of political society. Law arises out of these relationships.

Jeremy Bentham defined law as an assemblage of signs, declarative of volition, conceived or adopted by the sovereign in a state, concerning the conduct to be observed in a certain case by a certain person or class of persons who in the case in question are supposed to be the subject to his power. John Stuart Mill also insisted that the utilitarian doctrine of happiness was altruistic rather than egoistic, since its ideal was the happiness of all concerned. Within the utilitarian, one of the chief issues of legal philosophy to which Mill suggested an approach different from that of Bentham was the significance that should be attributed to the concept of justice. Bentham had spoken of justice in a deprecatory fashion and had subordinated it completely to the dictates of utility.

Utilitarianism is a philosophical view or theory about how we should evaluate a wide range of things that involve choices that people face. Among the things that can be evaluated are actions, laws, policies, character traits, and moral codes. The most common argument against act utilitarianism is that it gives the wrong answers to moral questions. Critics say that it permits various actions that everyone knows are morally wrong.

7.10 Review Questions



5. What is utilitarianism? How is it different from legal positivism?
6. Describe nature and scope of utilitarian school of jurisprudence.
7. Assess the contribution of John Stuart Mill and Jeremy Bentham in the development of utilitarian jurisprudence.
8. Account for growth and development of the utilitarian school of jurisprudence.
9. To what extent utilitarian jurisprudence reflected in the current legal systems of African Countries?

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CHAPTER EIGHT

ANALYTICAL JURISPRUDENCE

8.0 Introduction

Analytical jurisprudence is the influential school of thought in jurisprudence. This is hardly surprising, as the idea of law as the creation of a human law giver that likes at its heart is a common intuition.It is also called legal positivism school. Positivism simply means that the law is something that is 'posited', that is to say laws are made in accordance with socially accepted rules.

8.1 Objectives



At the end of this chapter students should have:-

- Acquired basic knowledge of concepts such as analytical jurisprudence, law in the analytical jurists etc.
- Acquainted with understanding of scope, nature and themes of the analytical school of jurisprudence.
- Acquired ability to describe the relevance of the analytical school of jurisprudence in the current legal systems.
- Acquainted with skills of assessing and evaluating the contribution of the Aguste Comte, Jeremy Bentham, John Austin and Albert Hart in the analytical school of jurisprudence.
- Acquired the competency of explaining the criticism posed upon the imperative theory of law posited by the analytical jurists.

8.2 Analytical Jurisprudence

Analytical jurisprudence is a method of legal study that concentrates on the logical structure of law, the meanings and uses of its concepts, and the formal terms and the modes of its operation.[382] It takes law as the command of the sovereign. It puts emphasis on legislation as the source of law. It regards law as a closed system of pure facts from which all norms and values are excluded.

[382] http://definitions.uslegal.com/a/analytical-jurisprudence/. Accessed on 5th October 2016 at 12:35 PM

Analytical jurisprudence draws on the resources of modern analytical philosophy to try to understand the nature of law. It is not concerned with the past stages of its evolution or its goodness or badness.[383] The exponents of this school are concerned neither with the past nor with the future of law but with law as it exists, i.e. 'as it is (positus).For this reason this school is termed the positive school.

8.3 Scope of Analytical Jurisprudence

Analytical jurisprudence deals with the analysis of basic principles of law. It deals with the contents of an actual legal system existing at any time, past or the present.[384] It is not concerned with the past stages of legal evolution.[385] It focuses on analysis the basic principles of civil law, it does not pay any attention to the evolutionary process and there ethical aspects that is whether they are good piece of law or bad one.[386]

Therefore analytical jurisprudence does not consider the historical and ethical aspects because it considers that the most important aspect of law is its relation to the State Law is treated as an imperative or command emanating from the state.

8.4 Purpose of Analytical Jurisprudence

The analytical jurisprudence brought about precision in legal thinking. It provided us with clear, definite and scientific terminology. It deliberately excluded all external considerations which fall outside the scope of law. Hence the purpose is to analyse and discuss the law of the land as it's exists today.[387]

The purpose of analytical jurisprudence is to analyse the first principles of law without reference either to their historical origin or development or their validity. Another purpose is to gain an accurate and intimate understanding of the fundamental working concepts of all legal reasoning.

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[383] http://www.legalservicesindia.com/article/article/analytical-law-school-1702-1.html. Accessed on 5th October 2016 at 3:17 PM

[384] http://www.desikanoon.co.in/2012/08/jurisprudence-notes-nature-and-scope-of.html. Accessed on 5th October 2016 at 2:57 PM

[385] http://pulaw.blogspot.com/2015/04/jurisprudence-and-types-of-jurisprudence.html. Accessed on 5th October 2016 at 2:43 PM

[386] http://www.vusr.net/course/mgt611-business-labor-law/faqs/question/scope-of-analytical-jurisprudence. Accessed on 5th October 2016 at 2:49 PM

[387][387] http://kuklawnotes.blogspot.com/p/jurisprudence-1-what-is-administration.html. Accessed on 5th October 2016 at 3:12 PM

8.5 Growth and Development of Analytical Jurisprudence

Analytical jurisprudence as positivist school, as a philosophical method, is also known as empiricism was propounded by Auguste Comte in 18th Century who was is regarded by many as the first true positivist. He sought to expel metaphysics (unverified belief systems) from the study of society.[388]

Yet the roots of this intellectual tradition may be traced to the thought of the 18th century Scottish philosopher David Hume who proposed that if you want to know the law the law concerning murder you try to find the law as it is authoritatively stated, or as it is actually enforced, as opposed to what the law ought to be.

Analytical jurisprudence, also called legal positivism grew when the Bourgeoisie overthrew the feudal class and took reign power. Natural law was rejected and they took new trend in their philosophy i.e. positivism. The Bourgeoisie was interested to explain the new status quo based on customs/religion. They consolidated it and centralized the state. A strong state requires a new rules/ laws as opposed to customs/ religions which were prevalent at the feudal class.[389]

For these reasons it was necessary to explain a new status quo based on new rules/ laws. Positivism was adopted in order to explain a new status quo. They were trying to explain "what is" and not what "ought to be". Analytical jurists offered theories on how we may distinguish law 'in the legal sense' from laws in the non- legal sense.

8.6 Themes of Analytical Jurisprudence

Analytical jurists have their significant disagreements but they share the common aim of helping people understand the law as it actually. However they regard the law as 'social fact', by which they mean that law is found in the actual practices or the institutions of society.

Law is the creation of human agents. Even custom is not law unless it is recognized and enforced by a human authority. Hence it is possible to identify a set of formal criteria by which we may determine whether or not a rule is a law.[390]

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[388] Encyclopaedia Britannica, 10th Edition

[389] http://www.1902encyclopedia.com/L/LAW/law-02.html. Accessed on 6th October 2016

[390] See Jeremy Bentham- Fragment on Government; An Introduction to the Principles of Morals and Legislation; The limits of jurisprudence defined.

The law as it is can be distinguished from notions of what the law ought to be. Law is social fact. It is found as rules declared by authorities such as legislatures and courts, or in the actual practices of those who enforce the law.[391]

There are good practical reasons for distinguishing the law as it is from what the law ought to be. It will make the law more clear and certain, so that people have a better idea of their rights and duties and the community is better able to assess the worth of laws.

The other major theme in analytical jurisprudence is claim that law has no necessary connection to morality, although often enough the law will express the morality of the people if regulates.[392]

A rule may be universally observed in a society but will not be a law in the legal positivist's book unless it is made or recognized by established authority. Also a law does not cease to be a law if it fails some moral test which is not is not in itself a law because there is no necessary connection between law and morality, though many laws are based on moral precepts.

8.7 Exponents of Analytical Jurisprudence

The chief exponent of the positivist or analytical School in England are Bentham, Austin, Sir William Markby (1829 to 1914), Sheldon Amos (1835- 1886), Holland (1835 -1926) Salmond (1862-1924) and Professor H. L.A. Hart (1907).[393]

8.7.1 Aguste Comte 1798-1857

He was the father of positivism and born in Europe during the revolutionary period. He argued that we can truly understand the nature and functioning of society only by the scientific method of empirical, theory construction and verification.[394]

Comte's most important works are (1) the Course on Positive Philosophy (1830-1842, six volumes, translated and condensed by Harriet Martineau as The Positive Philosophy of Auguste Comte); (2) the

[391] See Paton, G.W.: Text Book of Jurisprudence, 3rd ed., Oxford University Press, 1964

[392] See RatanapalaSuri, Jurisprudence, 1st South Asian ed. 2011, Cambridge.

[392]See B. Tamanaha, Law, Oxford International Encyclopaedia of Legal History, 2008.

[393] See Fitzgerald P.J: Salmond on Jurisprudence, 12th ed.,1966.

[394] See http://plato.stanford.edu/entries/comte/. Accessed on 6th October 2016

System of Positive Polity, or Treatise on Sociology, Instituting the Religion of Humanity, (1851-1854, four volumes); and (3) the Early Writings (1820-1829).[395]

He propounded that human beings have passed through three stages of knowledge development. These differentiate the level of knowledge human beings acquired at different era. These are:-

8.7.1.1 Theological Stage

It was the stage of knowledge development where man understood nature by assigning supernatural causes. People conceived of the world as divinely ordained. The authority of rules in such a world is subordinate to divine will.[396]

8.7.1.2 Metaphysical Stage

In the middle Ages certain abstractions replaced good in explaining nature. The will of God was replaced by nations of natural rights. People have rights by virtue of being born human, and these rights must not be abrogated by human rulers. The existence of natural rights, though, is a moral claim that cannot be proved or disproved.[397]

8.7.1.3 Positivism Stage

There is a refutation of all metaphysical abstractions. Knowledge is gained through senses. i.e. science is used to understand nature. If you want to know the law concerning murder you try to find the law as it is authoritatively stated, or as it is actually enforced, as opposed to what the law ought to be.[398]

8.7.2 Jeremy Bentham

The philosopher and jurist Jeremy Bentham (1748-1832) was born in Spitalfields, London, on 15 February 1748. He proved to be something of a child prodigy: while still a toddler he was discovered sitting at his father's desk reading a multi-volume history of England, and he began to study Latin at the age of three. At twelve, he was sent to Queen's College Oxford, his father, a prosperous attorney, having decided that

[395] See http://plato.stanford.edu/entries/comte/. Accessed on 6th October 2016 at 8:25 AM
[396] See Harriet Martineau as The Positive Philosophy of Auguste Comte
[397] See Comte, A., the Early Writings (1820-1829).
[398] See Comte, A., Course on Positive Philosophy (1830-1842)

Jeremy would follow him into the law, and feeling quite sure that his brilliant son would one day be Lord Chancellor of England.[399]

Law is an assemblage of signs, declarative of volition, conceived or adopted by the sovereign in a state, concerning the conduct to be observed in a certain case by a certain person or class of persons who in the case in question are supposed to be the subject to his power.[400]

Legislation is a science. Science is the basis for good government, because science creates certainty in law. Scientific legislation is the second matter of jurisprudence. When you deal with legislation you, deal with science.[401]

A legal philosophy deals with the law without regard to any morals or value judgment.The greatest happiness of the number of people implies make legislation and ensures that many people are happy.[402]

He distinguished the function of the court and of the parliament. The court interprets the law and the parliament makes the law and reforms the law.[403]

8.7.3 John Austin (1790-1859)

John Austin was born March 3, 1790, Creeting Mill, Suffolk, England died December 1859, Weybridge, Surrey. He was English jurist whose writings, especially The Province of Jurisprudence Determined (1832), advocated a definition of law as a species of command and sought to distinguish positive law from morality. He had little influence during his lifetime outside the circle of Utilitarian supporters of Jeremy Bentham. His authority came posthumously.[404]

Austin wanted to formulate a system of analytical positivism in the context of modern state.He used also the concept of utility in his philosophical reasoning. His focus was jurisprudence. The subject matter or jurisprudence is positive law, the law as it is.

[399] See https://www.ucl.ac.uk/Bentham-Project/who. Accessed on 6th October 2016 at 8:30 AM

[400] See Jeremy Bentham- Fragment on Government; An Introduction to the Principles of Morals and Legislation; The limits of jurisprudence defined.

[401] See Paton, G.W.: Text Book of Jurisprudence, 3rd ed., Oxford University Press, 1964

[402] See RatanapalaSuri, Jurisprudence, 1st South Asian ed. 2011, Cambridge.

[403]See B. Tamanaha, Law, Oxford International Encyclopaedia of Legal History, 2008.

[404] See https://www.britannica.com/biography/John-Austin. Accessed on 6th October 2016 at 8:34 AM

Austin postulated that law is the command of sovereign which the subjects are duty bound to obey, the disobedience of which would lead to penal consequences. Law as a coercive command issued by the sovereign is devoid of moral or cultural values. Austin rejected the historical growth of law and concentrated on law as it is. Existing law and legal institution can be supported or opposed only when we know the sanction behind them and how they worked in the past and are actually working in the present.[405]

He classified law into two groups such as law property so called and law improperly so called.

Law property so called are those laws which are made and set directly by political superior (sovereign) while law improperly so called are the laws which are not directly or indirectly made and set by political sovereign.Customary law does not quality to be law. It becomes law where the political superior has adopted it. It must be politically sovereign not under any person.[406]

In order that a given society may form a political society and being independent, the political superior in it must not be in a habitual obedience to a determinate human superior. Sovereign cannot be limited. It can do anything. He postulated the following issues on sovereign power.[407]

- Even if the sovereign raises unconstitutional rules; they are binding. Whatever the law is unjust and provided there is a political superior; such law must be binding.
- The sovereign can do nothing illegal. i.e. everything done by the sovereign is legal
- The origin of political government is the habit of obedience.

He is stressing the correlation between duty, command, sanctions and sovereignty. These elements are inseparable in the law property so called. i.e. duty, command, sovereign and sanctions are inseparable. Failure the same entails sanctions.[408]

Austin said that law is the aggregate of the rules set by men as political superior or sovereign to men as politically subject. In short, law is the command of sovereign. It imposes a duty and duty is backed by a sanction.[409]

[405] See J. Austin, The Province of Jurisprudence Determined, (1861).

[406] See J. Raz, The Authority of Law: Essays on Law and Morality, (1983).

[407] See M. Partington, Introduction to the English Legal System 2014-2015, Oxford University Press, 2014

[408] See R. Alexy, The Argument From Injustice: A Reply to Legal Positivism 127 (Bonnie Litschewski Paulson & Stanley L. Paulson trans., Clarendon Press 2002)

Command is also on expression of desire which is given by a political superior to a political inferior. There are certain commands that are laws and there are certain commands that are not laws. Commands that are laws are general in nature. Therefore, laws are general commands. Laws are like standing order in a military station which is to be obeyed by everybody.[410]

According to John Austin, there are three elements in law. These are:-

(i) It is a type of command

(ii) It is laid down by a political superior (sovereign)

(iii) It is enforced by a sanction

Sovereign is a person or a body or persons whom a bulk of politically organized society habitually obeys and who does not himself habitually obey some other person or persons. Perfect obedience is not a requirement.

The relationship of superior and inferior consist in the power which the superior enjoys over the inferior because the superior has ability to punish the inferior for its disobedience.

8.7.4 Herbert Lionel Adolphus Hart

Herbert Lionel Adolphus Hart (18 July 1907 – 19 December 1992), usually cited as **H. L. A. Hart**, was a British legal philosopher, and a major figure in political and legal philosophy. He was Professor of Jurisprudence at Oxford University and the Principal of Brasenose College, Oxford. His most famous work is The Concept of Law (1961; 3rd edition, 2012). He is considered one of the world's foremost legal philosophers in the twentieth century, alongside Hans Kelsen.[411]

He postulated that one of the basic tenets of positivism is separation of law from morality. i.e. there is no necessary connection between law and morality.The analysis of legal concept must be distinguished from historical inquiries or causes or origin of law. i.e. there is a distinction between inquiry of law and morals.[412]

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[409] See L. Green, Legal Obligation and Authority, Stanford Encyclopaedia of Philosophy

[410] See Scott Shapiro, Legality, (Harvard University Press 2011).

[411] See M. H. Kramer and C. Grant (2008). "Introduction", in Satthew H. Kramer, Claire Grant, Ben Colburn, and Anthony Hatzistavrou (ed.): The Legacy of H.L.A. Hart: Legal, Political and Moral Philosophy. Oxford/New York, Oxford University Press, xiii

[412] See H.L.A. Hart, The Concept of Law 203-04 (Clarendon Press 2d ed. 1994)

There is no reason to deny the name 'law' to the customary rules observed by primitive societies that had no legislatures or courts or other authority. These are called primary rules of obligation (rights, duties).[413]

International law as law, even though the international community locks the kind of law making bodies and law enforcement capacities that we expect of national legal systems.

Legal system is a closed logical system in which legal decisions can be decided by logical means from predetermined legal rules without looking at social ends, it is sufficient and close. No need to go outside to make a decision.[414]

Developed national legal systems generally display a set of secondary rules that regulate the recognition of primary obligation rules, their modification and their application.

These secondary rules authorize certain bodies to make, declare or modify laws, and define their powers and procedures.Secondary rules correct the defects in primary rules through rules of recognition, rules of change and rules of adjudication.[415]

8.8 Critiques

8.8.1 Customs ignored

Analytical school is based upon the law. According to Austin the law does not include customs but we see that customs are a very important part of the society. There were customs by which the society and later on state came into existence.[416]

In state also customs played an important role in the administration of justice. Even in the modern times the customs play an important role in the formation of law. So we cannot ignore customs from law.

[413] Ibid

[414] See N. Luhmann, Law As A Social System (Klaus A. Zeigert trans., Oxford Univ. Press 2004) (1993)

[415] See H.L.A. Hart, The Concept of Law 203-04 (Clarendon Press 2d ed. 1994)

[416] See R. Alexy, The Argument From Injustice: A Reply to Legal Positivism 127 (Bonnie Litschewski Paulson & Stanley L. Paulson trans., Clarendon Press 2002)

8.8.2 Ignoring Precedents

Precedent means the decisions of the court, which are also called as judge made laws. Judge made laws because these laws were not the command of the Sovereign. These laws were not enforceable at that time, so he excluded these laws from his concept of the law.[417]

8.8.3 Conventions Ignored

There are certain conventions or methods, which are observed or followed by the coming generation. These conventions or methods later on take the form of law. The become law afterwards by their regular observance.[418] In England the base of English Law is conventions, which is very popular in the World. So we cannot ignore conventions. But Austin did not include conventions in his concept of law.

8.8.4 International Law Ignored

Austin did not include international law in his law. According to his law there is no sovereign for enforcing the international law. But in modern days we cannot exclude international law from the field of law because it plays an important role in maintaining peace and society at international level. In other words it is also a form of municipal law of civil law.[419]

8.8.5 Command Theory is not suitable

It is not easy to understand the 'Commands Theory' for common persons. It is not necessary that all should be enforceable or all common people should be considered as law. Only those commands which are related with law and order should be law. It is difficult to separate those commands from others by the common people or persons.[420] So this theory is not suitable in modern times. It is also an artificial theory having no sense in the modern world.

[417] See Roscoe Pound - Outlines of CHAPTERs on Jurisprudence; The Spirit of the Common Law; Law and Morals; Criminal Justice in America, 1952

[418] See Pollock, Sir Frederick: Jurisprudence and legal Essays Selected Introduced by A.L. Goodhard, London Macmillan, 1961.

[419] See H.L.A Hart -The Concept of Law; Liberty and Morality; The Morality of the Criminal Law; Punishment and Responsibility; Essays in Jurisprudence and Philosophy.

[420] See N. Stavropoulos, Interpretivist Theories of Law, Stanford Encyclopaedia of Law.

8.8.6 Only Power Is Not Necessary

According to the 'Command Theory', law can be imposed only with the help of power, but we have the result of the tyrants or forced rules which were thrown away by the people of French Revolution, of Panamaeto. Law can be enforced even without power, it they are suitable to the society.[421]

8.8.7 Moral Ignored

The Command Theory has also excluded morals from the field of law. But we have observed that morals have also an important role in the formation of law. We cannot ignore morals from law because laws are meant for the society and such laws must be according to the feelings of society. The feelings of society are based upon morals. So we can't ignore morals from the field of law.[422]

8.9 Conclusion



In above chapter we have learnt that analytical jurisprudence is the influential school of thought in jurisprudence. Also, we have understood that analytical jurisprudence is a method of legal study that concentrates on the logical structure of law, the meanings and uses of its concepts, and the formal terms and the modes of its operation. It takes law as the command of the sovereign. It puts emphasis on legislation as the source of law. It regards law as a closed system of pure facts from which all norms and values are excluded. It focuses on analysis the basic principles of civil law, it does not pay any attention to the evolutionary process and there ethical aspects that is whether they are good piece of law or bad one.

Moreover, analytical jurisprudence, also called legal positivism grew when the Bourgeoisie overthrew the feudal class and took reign power. Natural law was rejected and they took new trend in their philosophy i.e. positivism. The Bourgeoisie was interested to explain the new status quo based on customs/religion. They consolidated it and centralized the state. A strong state requires a new rules/ laws as opposed to customs/ religions which were prevalent at the feudal class.

Furthermore, The chief exponents of the positivist or analytical School in England are Aguste Comte, Bentham, Austin, Holland, Salmond and Professor H. L.A. Hart. Comte

[421] See J. Finnis, Natural Law Theories, Stanford Encyclopaedia of Philosophy.
[422] See A. Marmour, the Nature of Law, Stanford Encyclopaedia of Philosophy.

was the father of positivism and born in Europe during the revolutionary period. He argued that we can truly understand the nature and functioning of society only by the scientific method of empirical, theory construction and verification. Bentham has a view that legislation is a science. Science is the basis for good government, because science creates certainty in law. Scientific legislation is the second matter of jurisprudence. When you deal with legislation you, deal with science.

Austin postulated that law is the command of sovereign which the subjects are duty bound to obey, the disobedience of which would lead to penal consequences. Law as a coercive command issued by the sovereign is devoid of moral or cultural values. Austin rejected the historical growth of law and concentrated on law as it is. Existing law and legal institution can be supported or opposed only when we know the sanction behind them and how they worked in the past and are actually working in the present. Hart was of the opinion that there is no necessary connection between law and morality.He also opined that developed national legal systems generally display a set of secondary rules that regulate the recognition of primary obligation rules, their modification and their application. These secondary rules authorize certain bodies to make, declare or modify laws, and define their powers and procedures.Secondary rules correct the defects in primary rules through rules of recognition, rules of change and rules of adjudication.

Finally the main critique of the school is based on the Command Theory that has excluded morals from the field of law. But we have observed that morals have also an important role in the formation of law. We cannot ignore morals from law because laws are meant for the society and such laws must be according to the feelings of society. The feelings of society are based upon morals. So we can't ignore morals from the field of law.

8.10 Review Questions



1. What is analytical jurisprudence? Why is called legal positivism and imperative school of jurisprudence?
2. Describe nature, scope and basic tenets of analytical school of jurisprudence.
3. Assess the contribution of John Austin, Jeremy Bentham and Albert Hart in the development of analytical jurisprudence.

4. Account for growth and development of the analytical jurisprudence as a school of jurisprudence.
5. Is command theory of law posited by the analytical jurists relevant in the modern democratic countries? Give reasons for your answer.
6. To what extent analytical legal positivism reflected in the current legal systems of African Countries?

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CHAPTER NINE

HISTORICAL JURISPRUDENCE

9.0 Introduction

The study of historical Jurisprudence possesses a complex attractiveness. It has a value that is at once theoretical and practical, an interest that arises from the ease of acquiring, as well as from the difficulty of comprehending, its principles. Therefore in this chapter we are going to learn about historical jurisprudence as the school of jurisprudence. We are going to see the meaning, central ideas, tenets, development, philosophers, strengths and weaknesses of the historical jurisprudence.

9.1 Objectives



At the end of this chapter students should have:-

- Acquired knowledge and understanding of the basic concepts of historical jurisprudence, law, and customs according to the historical school of jurisprudence.
- Acquainted with knowledge and understanding on growth and development of the historical school of jurisprudence.
- Developed ability to explain central ideas and main features of the historical school of jurisprudence which shall differentiate itself from other schools of jurisprudence.
- Acquired competency to describe the strengths and weaknesses of the historical school of jurisprudence as compared to other schools of jurisprudence.
- Developed ability to examine the applicability and relevance of the historical school of jurisprudence in current world and particularly in Tanzania.

9.2 Historical Jurisprudence

Historical jurisprudence is the school of jurisprudence that deals with general governing principles governing origin and also development of law and also development, evolution of legal conceptions and principles found in the philosophy of law.[423]

[423]Nathan I., The Schools of Jurisprudence: Their Places in History and Their Present Alignment, The Harvard Law Review Association, Harvard Law Review, Vol. 31, No. 3 (Jan., 1918), pp. 373-411

Historical jurisprudence deals with the scientific study of evolution and development of the first principles of law. It is a legal philosophy concerned with the history of the first principles and conceptions of a legal system[424].

Historical jurisprudence is marked by judges who consider history, tradition, and custom when deciding a legal dispute. It concerns with historic evolution of principles of law.

9.3 Scope of Historical Jurisprudence

Historical Jurisprudence deals with law as it appears in its various forms and at its several stages of development.[425] It holds fast the thread which binds together the modern and the primitive conceptions of law, and seeks to trace, through all the tangled mazes which separate the two, the line of connection between them. It takes up custom as enforced by the community, and traces its development.[426] It seeks to discover the first emergence of those legal conceptions which have become a part of the world's common store of law, to show the conditions that gave rise to them, to trace their spread and development, and to point out those conditions and influences which modified them in the varying course of their existence.

Therefore historical jurisprudence studies the principles of law in their origin and developments that take place over a period of time. Henceforth it gives the past history of important existing legal conception and principles of a particular system[427]. The basic focus of the school is that law in its essence is not something imposed on a community from above or from without, but is an inherent part of its on-going life, an emanation of the spirit of the people. Therefore the object of historical jurisprudence is to vindicate the earliest of mankind as they are reflected in ancient law and to point out their relation to the modern thought.

9.4 Growth of Historical Jurisprudence

Historical Jurisprudence has been developed in the Old World. In university and in study, during a score of centuries, the ablest thinkers have given of their best effort to perfect the science, until it has achieved an

[424] "The Path of the Law," 10 Harvard Law Review. 469, 474

[425] Hayman, R. L. Jr. Et Al., Jurisprudence Classical and Contemporary: From Natural Law to Postmodernism xi (2d ed. 2002)

[426] Rodes, R. E., On the Historical School of Jurisprudence, Scholarly Works, Paper 858, 2004, at page 165

[427] http://www.vusr.net/course/mgt611-business-labor-law/faqs/question/scope-of-historical-jurisprudence. Accessed on 5th October 2016 at 7:43 AM

importance not excelled by that of theology. In the New World the northern continent has been surpassed by the southern in this science.

In South America the study of jurisprudence early found an honoured place. In the United States the rush and tumult of material progress has caused the philosophical to recoil before the impact of the ultra-practical. Scientific jurisprudence has been a thing unknown to the majority, not even being considered a necessary background for the comprehension of law.

The historical school of jurisprudence was founded by Fredrick Karl von Savigny in 19th century. Its central idea was that a nation's customary law is its truly living law and that the task of jurisprudence is to uncover this law and describe in historical studies its social provenience. [428]

Historical jurisprudence came to prominence during the German debate over the proposed codification of German law.[429]Henceforth there were two prime reasons for the growth and development of the historical jurisprudence. These are:-

First, historical jurisprudence came as a reaction against natural law, which relied on reason as the basis of law and believed that certain principles of universal application can be rationally derived without taking into consideration social, historical and other factors.[430]

Second, it came as a reaction against analytical positivism which constructed a soul-less barren sovereign-made-coercive law devoid of moral and cultural values described as gun-men situation.[431]

9.5 Characteristics of Historical Jurisprudence

As a school of thought and jurisprudence, historical jurisprudence can be differentiated from other by considering its features. These features embrace the ideas and nature of the historical school of jurisprudence. The characteristics of historical jurisprudence are hereby accounted for:-

[428] Frederick Charles von Savigny, Of the Vocation of our Age for Legislation and Jurisprudence, Abraham Hayward London, Littlewood, 1831; repr. Birminghom, Legal Classics Library, 986), 24

[429] Ibid

[430]AgrawalNomita,Jurisprudence(Legal theory),7th edi., Central Law Agency,Allahabad,2008 p.g. 305

[431]Dyan S.N., Fundamentals of Jurisprudence, The Indian Approach, Central Law Agency, Allahabad, 2004 p.g.245.

i. Historical jurisprudence is marked by judges who consider history, tradition, and custom when deciding a legal dispute.[432]

ii. It views law as a legacy of the post and product of customs, traditions and beliefs prevalent in different communities.[433] In other words, it arises spontaneously in connection with man's social life and its distinctiveness from custom lies only in the fact that law is so necessary to the existence of society and the common activities that it is enforced by an authority.

iii. It views law as a biological growth, on evolutionary phenomena and not an arbitrary, fanciful and artificial creation.[434]

iv. It considers law as not an abstract set of rules imposed on society but has deep roots in social and economic factors and the attitude of its past and present members of the society.[435]

v. It provides that the essence of law is the acceptance, regulation and observance the members of the society[436]. Therefore law derives its legitimacy and authority from standards that have withstood the test of time.

9.6 Basic Tenets of Historical Jurisprudence

Historical jurisprudence has its own unique themes especially those related to the laws and their existence. It has its own perception and approaches to the consideration of laws in the society. It has the following basic ideas.

Historical jurisprudence identifies law with the consciousness, or of a specific people. Historical jurisprudence postulates that law is "found" by the jurist and not "made" by the state or its organs. Law is a national or folk and not a political phenomenon.[437]

Historical jurisprudence argues that law is a social and not an individual production: like language, it cannot be abstracted from a particular people and its genius.[438] Their central idea was that a nation's customary

[432] Murphy J. G. & Coleman, J. L., Philosophy Of Law: An Introduction to Jurisprudence (rev. ed. 1990)

[433] Michael Oakeshott, the Concept of a Philosophical Jurisprudence (pts. 1 & 2), 3 Politica 203, 214, 221, 345, 352 (1938)

[434] Ibid

[435]Schauer F &Sinnott-Armstrong,W., The Philosophy Of Law: Classic And Contemporary Readings With Commentary (1996)

[436] Pound, R., The Scope and Purpose of Sociological Jurisprudence I, 24 HARV. L. REV. 591, 591 (1911).

[437] Frederick Charles von Savigny, Of the Vocation of our Age for Legislation and Jurisprudence, Abraham Hayward London, Littlewood, 1831; repr. Birminghom, Legal Classics Library, 986), 24

law is it truly living law and that the task of jurisprudence is to uncover this law and describe in historical studies its social provenience.

Historical jurisprudence claims that law is a historical necessity and not an expression of will or reason, and therefore it cannot be transplanted. The Historicists believe that the law originates will society.[439] Its aims is to show how a given rules come to be what it is where as analytical school answers, why it is what it is?

Historical school in its ideal condition would require on accurate record of the history of all legal systems as its material whereas analytical school requires only the existing legal system.[440] It uses evolutionary history and hundreds of legal systems as its subject matter where as analytical school examines the available subject- matter. It is structure and rules in order to reach its principles and theories by analysis.

Law is an outgrowth of the needs of man in society. In the first form of social grouping, law was no more than the sum of the simple rules by which alone even the rudest types of communal life were mode possible.[441]

9.7 Friendrich Karl Von Savigny and Historical Jurisprudence

Friendrich Karl Von Savigny advocated that the meaning and content of existing bodies of law be analysed through research into their historical origins and modes of transformation.[442] He traced the development of law as an evolutionary process much before Charles Darwin gave his theory of evolution. It is for this reason he is even said as "Darwinian before Darwin" for his contribution to apply the evolutionary principle to the development of legal system.[443]

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[438] Carleton K. A., Law in the Making, 6th ed. (Oxford: Clarendon, 1958), 86

[439]Kantorowicz, H., "Savigny and the Historical School ofJurisprudence," 53 Law QuarterlyReview326 (1937).

[440]Karl von Savigny, F., System des heutigenRbmischenRechts, vol. 1 (Berlin, Viet, 1840), 14.

[441]Rodes, R. E., On the Historical School of Jurisprudence, Scholarly Works, Paper 858, 2004, at page 165

[442]Paranjape N.V., Studies in Jurisprudence and Legal Theory,4th edi., Central Law Agency, Allahabad,2006 , p.g. 32

[443] https://www.academia.edu/428817/BASIC_CONCEPT_OF_SAVIGNY_S_VOLKSGEIST. Retrieved on 5th October 2016 at 8:48 AM

9.7.1 Friendrich Karl Von Savigny (1779-1861)

Savigny, the pioneer of historical school was born on February 21, 1779 in Frankfurt, Germany and was one of the most respected and influential 19th-century jurists.[444]

9.7.2 Von Savigny Contributions on Historical jurisprudence

Savigny was a pioneering legal scientist who made lasting contributions to jurisprudence, particularly in revealing the continuity of present legal institutions with past ones; in laying the foundations of legal sociology; and in developing many of the critical methods that are now used by legal scholars everywhere. The following are his ideas and contribution to the historical school of jurisprudence.

Savigny's central idea was that law is an expression of will of the people. It doesn't come from deliberate legislation but arises as a gradual development of common consciousness of the nation.[445]

The essence of Savigny'sVolksgeist was that a nation's legal system is greatly influenced by the historical culture and traditions of the people and growth of law is to be located in their popular acceptance. Since law should always confirm to the popular consciousness i.e. Volksgeist, custom not only precedes legislation but is also superior to it.

To him, legal system was a part of culture of a people. Hence, law wasn't the result of an arbitrary act of legislation but developed as a response to the impersonal powers to be found in the people's national spirit. Laws can stem from regulation by the authorities, but more commonly they evolve in an organic manner over time without interference from the authorities.[446]

Law is not to be regarded as an arbitrary grouping of regulations down by same authority.The meaning and content of existing bodies of law be analysed through research into their historical origins and modes of

[444] http://www.britannica.com/EBchecked/topic/525746/Friedrich-Karl-von-Savigny. Accessed on 5th October 2016 at 8:44 AM

[445] Doherty Michele, Jurisprudence: The Philosophy of Law, 2nd edi., Old Bairy Press, London, p.g. 233

[446] Mathias Reimann, The Historical School Against Codification: Savigny, Carter, and the Defeat of the New York Civil Code, 37 AM. J. COMP. L. 95, 97-98 (1989)

transformation.[447]Rather, those regulations are to be seen as the expression of the convictions of the people, in the same manner as language, customs and practices are expressions of the people.

The law is grouped in a form of popular consciousness called the Volksgeist**(common consciousness of the people).** It doesn't come from deliberate legislation but arises as a gradual development of common consciousness of the nation. Law and people cannot be isolated from each other.[448]

Laws aren't of universal validity or application. Each people develop its own legal habits, as it has peculiar language, manners and constitution. He insists on the parallel between language and law. Neither is capable of application to other people and countries. The Volksgeist manifests itself in the law of the people: it is therefore essential to follow up the evolution of the Volksgeist by legal research.[449]

The view of Savigny was that codification should be preceded by "an organic, progressive, scientific study of the law" by which he meant a historical study of law and reform was to wait for the results of the historians.

9.7.3 Critiques on Von Savigny

A precise and flawless definition of law is far from reality, and Savigny'sVolksgeist is no exception. The following are the criticisms of Savigny'sVolksgeist.

Lord Lloyd also points out that Savigny underrated the significance of legislation for modern society. Sir Henry Maine rightly pointed out that a progressive society has to keep adapting the law to fresh social and economic conditions and legislation has proved in modern times the essential means of attaining that end.

Many institutions like slavery have originated not in Volksgeist but in the convenience of a ruling oligarchy. In pluralist societies such as exist in most parts of the world it really seems somewhat irrelevant to use the concept of Volksgeist as the test of validity.[450]

[447]Friedmann W., Legal Theory, 5th edi., Universal Law Publishing Co. Pvt. Ltd.,Delhi,2002, p.g. 213

[448] Frederick Charles von Savigny, Of the Vocation of our Age for Legislation and Jurisprudence, Abraham Hayward London, Littlewood, 1831; repr. Birminghom, Legal Classics Library, 986), 24

[449] Ibid

[450]Lamsal Narayan Prasad, Bidhisastra, 7th edi.,Pairawi Prakasan,Kathmandu2063, p.g. 38.

Important rules of law sometimes develop as a result of conscious and violent struggle between conflicting interests within the nation and not as a result of imperceptible growth. That applies to the law relating to trade unions and industry.

Savigny underrated the significance of legislation for modern society because progressive society has to keep adapting the law to fresh social and economic conditions and legislation has proved in modern times the essential means of attaining that end.[451] It is not clear on whom the volk are and whose geist determines the law nor it is clear whether the Volksgeist may have shaped by the law rather than vice-versa.

9.8 Sir Henry Maine on Historical Jurisprudence

Sir Henry Maine wrote in the intellectual climate of eighteenth-century and nineteenth-century social evolutionism, and accordingly he set his model in an evolutionary mold. His polar types were designed not only to represent extremes in a range of variable social forms but also to describe development in the dimension of time. His central interest was to explain how modern civilization had emerged in certain 'progressive' societies.[452] His theory that political organization had originally been based on blood (kinship) and later moved to territory, which is part of that famous transition from societies based on status to contract which he developed in Ancient Law, has provided a solid foundation for much work in political anthropology.[453]

9.8.1 Sir Henry Maine

Sir Henry James Sumner Maine, (15 August 1822 – 3 February 1888), was a British comparative jurist and historian.[454] Sir Henry Maine was a distinguished lawyer, academic and civil servant in mid-Victorian England, holding chairs in Civil Law at Cambridge and Oxford, the legal member of the Council of India for seven years from 1862 and Master of Trinity Hall in Cambridge from 1877.

But it is for his prolific writings and their influence on modern anthropology, of which, along with Tylor and Morgan, he is one of the founding fathers, that we best know him. His books included **Ancient Law** (1861),

[451] https://www.academia.edu/428817/BASIC_CONCEPT_OF_SAVIGNY_S_VOLKSGEIST. Supra
[452] Alan Diamond (ed.), The Victorian Achievement of Sir Henry Maine (Cambridge U.P. 1991).
[453]Sir M.E.Grant Duff, Sir Henry Maine: A Brief Memoir of his life...(Murray, London, 1892).
[454]http://www.encyclopedia.com/social-sciences/applied-and-social-sciences-magazines/maine-henry-sumner. Accessed on 5th October 2016

Village Communities in the East and West (1871), **chapters on the Early History of Institutions** (1875) and **Dissertations on Early Law and Custom** (1883).[455]

9.8.2 Contribution of Henry Maine in Historical Jurisprudence

His enduring contribution to the social sciences is to be found in his formulation of the concept of ideal polar types and its uses in the comparative analysis of social phenomena.

Maine introduced the idea that law and society developed "from status to contract." In ancient times, individuals were bound by social status and/or belonging to traditional social castes.[456]

On the other side, in the modern world, people were regarded as independent entities, free to make contracts on their own. Maine saw Roman law as the intermediate stage between ancient customs and modern British law.[457]

His work investigated the early development of law, introducing the notion that societies moved from being bound by social status in their relationships, to independent individuals who were free to make contracts with other individuals.[458]

Although many of his ideas on the development of law have been discredited, Maine's work on the history of jurisprudence greatly contributed to an understanding of how legal systems have developed over time.[459]

His emphasis on the social factors involved in legal transactions laid the foundation for later work in the sociology of law, and is valuable in providing insights into the nature of social structure that supports peaceful, harmonious human relationships.[460]

He believed that in ancient times legal bonds were firmly connected with customs rooted in the patriarchal family system. In that system all the goods, including land and the means of production, were the property of a family, and private property was practically non-existent.[461]

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[455] Sir M.E.Grant Duff, Sir Henry Maine: A Brief Memoir of his life...(Murray, London, 1892)

[456] Cocks, R., Sir Henry Maine: A Study in Victorian Jurisprudence, Cambridge University Press, 2004.

[457] Feaver, G., From Status to Contract: A Biography of Sir Henry Maine 1822-1888, London: Longmans Green, 1969.

[458] Maine, H. S. The early history of the property of married women: As collected from Roman and Hindu law, (CHAPTER delivered at Birmingham, March 25, 1873), A. Ireland and Co

[459] Maine, H. S. CHAPTERs on the Early History of Institutions, Adamant Media Corporation, [1875] 2006

[460] Morgan E.O., Theories and Criticism of Sir Henry Maine, Fred B Rothman & Co, 1981

It was only in more recent times, with the development of settlements and later towns, that society started to apply principles of private property and depend on contract as means of creating larger and more complex relationships.[462]

Sir Henry contrasted primitive and non-western societies, in which "the great bulk of men derive their rules of life from the customs of their village or city," with modern society, in which "the Sovereign is ever more actively legislating on principles of his own, while local custom and idea are ever hastening to decay.[463]

9.8.3 Critiques on Sir Henry Maine

Maine wrote that Austin's command theory, though false with regard to homogenous ancient villages, was largely accurate with regard to modern nation states, with their expansive territory and subsumed subgroups.[464] This is because the rules which have to be obeyed once emanate from an authority external to the small natural group and forming no part of it, they wear a character wholly unlike that of a customary rule.

Although some of his statements were modified or invalidated by later research Ancient Law is noted for its general lack of reference to authorities and its failure to cite supporting evidence for its Conclusions his study helped to place comparative jurisprudence on a sound historical footing.[465]

9.9 Conclusion



In this chapter we have understood that historical jurisprudence deals with the scientific study of evolution and development of the first principles of law. It is a legal philosophy concerned with the history of the first principles and conceptions of a legal system. The basic focus of the school is that law in its essence is not something imposed on a community from above or from without, but is an inherent part of its on-going life, an emanation of the spirit of the people. Therefore the object of historical jurisprudence is to vindicate the earliest

[461] Maine, H. S. Dissertations on early law and custom, Arno Press, [1890] 1975

[462] Maine, H. S. Popular Government: Four Essays, University Press of the Pacific, [1885] 2004

[463] Maine, H. S., Ancient Law: Its Connection with the Early History of Society, and its Relation to Modern Ideas (London: John Murray, 1861); Maine, Early History of Institutions

[464] Cocks, R. C. J., Sir Henry Maine: A Study in Victorian Jurisprudence (Cambridge: Cambridge University Press, 1988), 64-65

[465] https://www.britannica.com/biography/Henry-Maine. Accessed on 5th October 2016

of mankind as they are reflected in ancient law and to point out their relation to the modern thought.

Historical jurisprudence came as a reaction against natural law, which relied on reason as the basis of law and believed that certain principles of universal application can be rationally derived without taking into consideration social, historical and other factors. Also, it came as a reaction against analytical positivism which constructed a soul-less barren sovereign-made-coercive law devoid of moral and cultural values described as gun-men situation.

Historical jurisprudence identifies law with the consciousness, or of a specific people. Historical jurisprudence postulates that law is “found” by the jurist and not “made” by the state or its organs. Law is a national or folk and not a political phenomenon.

Savigny’s central idea was that law is an expression of will of the people. It doesn’t come from deliberate legislation but arises as a gradual development of common consciousness of the nation. However, Savigny underrated the significance of legislation for modern society because progressive society has to keep adapting the law to fresh social and economic conditions and legislation has proved in modern times the essential means of attaining that end.

Maine introduced the idea that law and society developed "from status to contract." In ancient times, individuals were bound by social status and/or belonging to traditional social castes. Although some of his statements were modified or invalidated by later research Ancient Law is noted for its general lack of reference to authorities and its failure to cite supporting evidence for its Conclusions his study helped to place comparative jurisprudence on a sound historical footing.

9.10 Review Questions



1. What is historical jurisprudence? Describe its central ideas that make it be different from other schools of jurisprudence.
2. Discuss the development and growth of the historical jurisprudence.
3. Describe the strengths and weaknesses of Savigny Volksgeist theory.

4. To what extent historical jurisprudence is reflected in Tanzania's legal system and societies?
5. Discuss the ideas of Sir Henry Maine and his contribution to the legal philosophy and jurisprudence.

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CHAPTER TEN

SOCIOLOGICAL JURISPRUDENCE

10.0 Introduction

Sociological jurisprudence is the school of jurisprudence which focuses on the relationship that exists between law and society. It does so in the sense that it determines how the law and society influences each other. It is very important since it embraces the need of the law to reflect the interests and what prevails in the society. It needs to embrace that because traditionally and always shall be that law intends to regulate human conduct while understanding man is social being. Hence for the effectiveness of law and stability of the society, law has to reflect what transpires in the society.

Henceforth in this chapter, we are going to learn all about sociological jurisprudence. The chapter covers meaning of sociological jurisprudence and associated legal theories. It also embraces the determination of this school of jurisprudence in the contemporary and democratic societies.

10.1 Objectives



At the end of this chapter students should have:-

- Acquired knowledge and understanding of the basic concepts of sociological jurisprudence, interests, law according to sociological jurisprudence.
- Acquainted with knowledge and understanding on growth and development of the sociological school of jurisprudence.
- Developed ability to explain central ideas and main features of the sociological school of jurisprudence which shall differentiate itself from other schools of jurisprudence.
- Acquired competency to describe the strengths and weaknesses of the sociological school of jurisprudence as compared to other schools of jurisprudence.
- Developed ability to examine the applicability and relevance of the sociological school of jurisprudence in current world and particularly in Tanzania.

10.2 Sociological Jurisprudence

Sociological jurisprudence is the school of jurisprudence that deals with the understanding of the role of law in society and the application of the social sciences to the study of law in action.[466] It embraces all aspects of the relations and interactions between law and society and the rendering of law more effective as an instrument of social control for the ends which law is designed to accomplish in the civilization of the time and place.[467]

The term 'sociological jurisprudence' was coined by its most famous proponent, Roscoe Pound, who is also known as Dean Pound because of his extraordinarily long tenure as the Dean of the Harvard Law School. But later on was developed by Leon Duguit, Emmanuel Levy, Eugen Ehrlich and Maurice Hauriou, were jurists who went to sociology from law.

Sociological jurisprudence evaluates the influence of society on laws themselves, as well as on the procedural aspects of the legal system. This type of scrutiny compares the law with other sociological fields of study, including religion, economics, and literature, in an effort to bring enlightenment by sharing understanding between each sociological field.[468]

10.3 Scope of Sociological Jurisprudence

Sociological jurisprudence is 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.[469]

Moreover, sociological jurisprudence is 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.[470]

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[466]See Ferrari, Vincenzo (1990) ed., Developing Sociology of Law. A World-Wide Documentary Enquiry (Milano, Giuffré)

[467]See Luhmann, Niklas (1985) A Sociological Theory of Law (London: Routedge&Kegan Paul)

[468]See http://legaldictionary.net/jurisprudence/. Accessed on 8th October 2016 at 8:10 AM

[469]See McBarnet, Doreen (1981) Conviction: The Law, the State and the Construction of Justice (Macmillan)

[470]See http://lawdessertation.blogspot.com/2015/09/sociological-school-of-jurisprudence.html. Accessed on 9th October 2016 at 10:20 AM

Therefore this philosophical approach to law stresses the actual social effects of legal institutions, doctrines, and practices. It examines the actual effects of the law within society and the influence of social phenomena on the substantive and procedural aspects of law.[471]

The sociological school carries forward the mission of the historical school and rejects the formal and logical idea of law according to the positivists on the ground that the formal law presents only a partial portrait of the law.[472]

10.4 Growth and Development of Sociological Jurisprudence

The maladjustments and inadequacies of the law gave to early sociological jurisprudence an intensely activist drive, directed to ad hoc remedies, and a great deal of the relevant work is still of this nature.[473]

The forerunner of sociological jurisprudence was Montesquieu, who was the first to apply the fundamental principle which sociological jurists assume. He expounded the thesis that a system of law is a living growth and development interrelated with the physical and societal environment.[474]

Especially since 1945, however, juristic work on the relations of law and society has come into more fruitful contact with other social sciences, leading in turn to greater stress on cognition of the social and economic orders in their complex unity.

Under the influence of the Comtian positivist sociology, theredeveloped a sociological jurisprudence having in view the understandingof the role of law in society and the application of the social sciencesto the study of law in action and the rendering of law more effective asan instrument of social control for the ends which law is designedto accomplish in the civilization of the time and place.[475]

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[471]See http://definitions.uslegal.com/s/sociological-jurisprudence/. Accessed on 7th October 2016 at 8:07 PM

[472]See Munger, Frank (1998) "Mapping Law and Society" in A. Sarat, ed., Crossing Boundaries (Northwestern University Press).

[473]See Dr.BijaiNarainmaniTripathi, An introduction to jurisprudence (legal theory) Allahabad law agency Page no-38 to 43

[474]Ibid

[475] See J. A. Gardner, The Sociological Jurisprudence of Roscoe Pound (Part I), 7 Vill. L. Rev. 1 (1961), at page 1, also available at: htp://digitalcommons.law.villanova.edu/vlr/vol7/iss1/1

This has created new stirrings of the turn of the 20th century ambition that the study of law in society became a specific branch of social science, concerned with framing and testing general laws governing law as a social phenomenon.[476]

The goal of sociological jurisprudence is to resolve immediate problems of society with such tools legal or extra-legal and techniques which promote harmony & balance of interest of society.[477]

10.5 Themes of Sociological Jurisprudence

Sociological jurisprudence considers law is not unique but only one of the social control norms. Also, the socio-economic problem of the present time cannot be solved by means of the existing laws.[478]

Also sociological jurisprudence postulates that laws in the books and statutes containing formal rules, legislations and expositions of particular subjects is not where the real law in society is to be found.[479]

Moreover, sociological jurisprudence describes that the law is not an absolute and static body of rules in themselves but are relative to time, place and society.[480]

Sociological jurisprudence believes that there is such a thing as 'social justice'. However, views differ greatly as to what constitutes social justice and the achievement thereof.[481]

10.6 Exponents of Sociological Jurisprudence

10.6.1 Rudolf VonJhering (1818 – 1892)

Initially as a traditional member of the German Historical School, Jhering studied Roman law and published four volumes of a theme, The Spirit of Roman Law. He became convinced that the origin of law was embedded in sociological precepts and left the volume unfinished. He came to believe in his sociological

[476]See Friedman, L. M. (1986) "The Law and Society Movement" in Stanford Law Review 38: 763-780.
[477]See Dr. S.N. Dhyani, Fundamentals of jurisprudence The Indian approach central approach Page no-329 to 339
[478]See Friedman, L. M. (2002) American Law in the 20th Century (New Haven: Yale University Press).
[479]See Galanter, Marc "Justice in many rooms: courts, private ordering and indigenous law" in (1981) 19 Journal of Legal Pluralism and Unofficial Law
[480]See Griffiths, John (1986) "What is Legal Pluralism" in Journal of Legal Pluralism 24: 1-55.
[481]See Ehrlich, Eugen (1936) Fundamental Principles of the Sociology of Law. Cambridge, MA: Harvard University Press (orig. 1912 Grundlegung der Soziologie des Recht)

treatise that the basis of a right was an interest. His most influential work was Der ZweckimRecht (Purpose in Law).[482]

The basic springboard for laws that were to be found satisfactory by society lay in this notion of purpose. In every society there were individual interests as well as group interests. There was also the interest of the society. Inevitably, even in the most docile of societies, this catalogue of interests will conflict eventually.[483]

Jhering expounded the concept of Jurisprudence of interests quite opposed to jurisprudence of conceptions the later had made law rigid, logical and purely formal without content.[484]

Jhering searched for the purpose of law and concluded that purpose is the creator of all law, that every rule of lawowes its origin to some practical motive. Every act is an act done fora purpose.[485]

Jhering treats law in the broad context of society. The purposeof law is to secure the conditions of social life, and this determinesthe content of law. The conditions of social life include both physicalexistence and ideal values, but these are relative to the social orderof the time and place.[486]

He developed an inchoate scheme of interestsand designated them as individual, state, and public, the last two ofwhich he tended to treat as one.[487]

10.6.2 Roscoe Pound 1870 – 1964

Roscoe pound was born on October 27, 1870, in Lincoln Nebraska to Stephen Bosworth Pound and Laura Pound. Pound studied botany at the University of Nebraska in Lincoln, where he became a member of Acacia Fraternity. He received his Bachelor's degree in 1888 and his master degree in 1889. In 1889 he

[482]See Encyclopaedia Britannica 5th Ed. at 150

[483]See The Idea of Law, Dennis Lloyd at p. 207

[484] See Dias Jurisprudence Fifth edition Page-no-430-436

[485] See J. A. Gardner, the Sociological Jurisprudence of Roscoe Pound (Part I), 7 Vill. L. Rev. 1 (1961), at page 2, also available at: htp://digitalcommons.law.villanova.edu/vlr/vol7/iss1/1

[486]See Ihering, Geist des RömischenRechts. Ill. 1, 11. In the period just before Coke the reports full of "putting differences" and "noting diversities." e. g. Keilwey, 50, 53, 57, Dyer, 111 b.

[487]See Lloyd's – Introduction to jurisprudence Seventh edition 2001. M.D.A. freeman Sweet and Maxwell a Thomson company Page –N0-721 t0 724

began the study of law, he spent one year at **Harvard but never received a law degree.** He received the first P.H.D. in botany from the University of Nebraska in 1898.[488]

Roscoe pound was one of the most leading and influential jurists who developed the American sociological jurisprudence in a systematic form. He emphasised on inter disciplinary approach to law so that rule of law and life may flow together.[489]

Roscoe Pound treated law as a means for affecting social control and did not believe in the abstract or mechanical application of law.[490]

For Roscoe Pound, the law is an ordering of conduct, so as to make the good of existence and the means of satisfying claims go round as far as possible with the least friction and waste with a minimum of friction. Since the society is always changing law should be continually adapted and readapted to the needs of individuals and society.[491]

Roscoe pound had an idea that ought to be someone's duty to gather and preserve statistics of the administration of justice and to apply thereto or deduce therefrom the proper principles of judicial administration.[492]

Law teachers ought to be making clear to the public what law is and why law is and what law does and why it does so.[493] Also, those who practice and those who teach the law should be in a position to command the popular ear. We must reinvestigate the theories of justice, of law, and of rights.[494]

Legal science must first exhibit some practical results. It must show that it has something to offer before it may hope for public recognition. But it should not be suffered to remain stricken with sterility in face of the fruitful tasks that await it in this era of transition.[495]

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[488]See Lloyd's – Introduction to jurisprudence Seventh edition 2001. M.D.A. freeman Sweet and Maxwell a Thomson company Page 721 to 724

[489]See R., Pound, An introduction to the Philosophy of Law(1922)

[490]See R., Pound, Social control through law (1942)

[491]See R., Pound, The task of law (1944)

[492]See The Institute of Human Relations, the inspiration of Robert M. Hutchins, Yale Law School Dean. See Laura Kalman, Legal Realism at Yale, 1927-1960 113 (Univ. of North Carolina Press, 1986)

[493]See also, David Widgor, Roscoe Pound: Philosopher of Law 242-45 (Greenwood Press, 1974).

[494]See R., Pound, The spirit of the common Law (1921)

Law is no longer anything sacred or mysterious. Judicial decisions are investigated and discussed freely by historians, economists, and sociologists. The doctrines announced by the courts are debated by the press, and have even been dealt with in political platforms.[496] Laymen know full well that they may make laws, and that knowledge of the law is no necessary prerequisite of far-reaching legislation.[497]

Law is a means, not an end. Such a divergence cannot endure unless the law is in the hands of a progressive and enlightened caste whose conceptions are in advance of the public and whose leadership is bringing popular thought to a higher level.[498]

Roscoe pound conceived law as a '**social Engineering**' its main task being to accelerates the process of social ordering by making all possible efforts to avoid conflicts of interest of individuals in the society . Thus courts, legislators, administrators and jurists must work with a plan and make an effort to maintain a balance between the competing interests in society.[499]

An interest is a demand or desire which human beings either individually or in groups seek to satisfy, of which, therefore, the ordering of human relations in civilised society must take account.[500]

The law does not create interests. It classifies them and recognises a larger or smaller number; it defines the extent to which it will give effect to those which it recognises, in view of other interests, and the possibilities of effectively securing them through law; it devises means for securing them when recognised and within determined limits.[501]

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[495]See Wooddesson, Elements of Jurisprudence, lxxix, in 1792 treats the law merchant as part of the law of nations.

[496]See R., Pound, Interpretations of legal history (1923)

[497]See Ward, Applied Sociology, 22-24, Willoughby, Social Justice, 20-25.

[498]An excellent example may be seen in the history of equity in England. Equity was unpopular, but it was in the right line of progress. The chancellors, however, developed doctrines of an ultra-ethical character which went beyond the requirements of common sense, and these refinements of equity have been largely swept away. For instances of this, the doctrine as to compensation of trustees, precatory trusts, and the rules as to clogging the equity of redemption may suffice

[499]See R., Pound, Contemporary juristic theory(1940)

[500]See R., Pound, Interpretations of legal history (1923)

[501]See R., Pound, Contemporary juristic theory(1940)

Roscoe Pound's social engineering theory is that the interests are the main subject-matter of law and the task of law is the satisfaction of human wants and desires. It is the duty of law to make a valuation of interests.[502] He classified interests under three heads:-

(i) **Individual Interests:** These are claims or demands or desires involved in and looked at from the standpoint of the individual life e.g. privacy, reputation, freedom of thought and speech[503] etc.

(ii) **Public Interests:** These are claims or demands or desires asserted by individuals involved in & looked at from the standpoint of political life e.g. freedom of action and honour, integrity[504] etc.

(iii) **Social Interests:** These are claims or demands or desires thought of in terms of social life and generalized as claims of the social group e.g. public health, peace and harmony, speech, trade[505] etc.

10.6.3 Leon Duguit

He was a professor in the Faculté de Droit at Bordeaux from 1886 until his death. His basic ideas were[506]:-

People in political power should not use power and force arbitrarily but solely according to the interests of society; otherwise their actions would be unlawful, and hence invalid.Political power is primarily applied through legislation.[507]

There are two sorts of legal rules such as normative legal rules and constructive legal rules. Normative legal rules are rules constitute prohibitions or commands while constructive rules are enact measures to ensure that the normative legal rules are respected and enforced, defining the authority entrusted with applying a sanction to persons breaking them.[508]

[502]See R., Pound, Social control through law (1942)
[503]See R., Pound, the Need of a Sociological Jurisprudence, 1907
[504]Ibid
[505]Ibid
[506]See D. A. Ijalaiye-The Sociological Jurisprudence and the Nigerian Order at p. 33
[507] V. D., Mahajan , Jurisprudence and legal theory, Fifth edition, reprint – 2010 Eastern book company Page no- 8, 545-556
[508]Ibid

10.7 Relevance of Sociological Jurisprudence

The importance of the sociological school of law may be immediately noticed when the attitude of law and state is compared. The previous attitude of the state was to confine itself to law and order enforcement and thereby striving to enforce stability in society by enforcing the norms regulating the existing relationship between individuals and society as well as between individuals. This in many ways (which we will evaluate) can be futile. Therein lies the allure of the sociological school: in the failure of the laissez faire notion of law and state.[509]

The gains of the advent of the sociological school of jurisprudence remain enormous. The school has opened new methods in examining the interaction between law and society. The school has also shown that law is not a study of just abstracts but plays a creative and dynamic role in a society. In that vein a lawyer's role in society has been widened to encompass more creative and dynamic functions.[510]

Lawyers are no longer warriors of just the rights of individuals but have formed the vanguard for society as well. An inter-disciplinary approach in law has also come into the foreground with the emergence of the school. It has also affected the concept of legal education in many countries e.g. the United States of America.[511]

10.8 Criticism of Sociological Jurisprudence

From legislation to court judgments, Roscoe Pound emphasized 'judicial activism'. His theory shifts the centre of gravity from legislation to court judgments. A list of interests can't be drawn in advance as new interests are created and recognised by the courts. The judiciary has limitations and doesn't have the machinery of enforcing its decisions. It can't do what legislature can do.[512]

Theory lacks general application. There are certain competing interests who can never be balanced or reconciled, e.g., interests of labour and capital and landlord and tenant.[513]

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[509]See Black, D. (1976) The Behavior of Law (New Haven, Conn. : Yale University Press).

[510]See Banakar, R. and Travers, M. (2005) "Law, Sociology and Method" in Theory and Method in Socio-Legal Research, pp. 1–25. Edited by Banakar, R. and Travers, M. (Oxford: Hart Publishing, 2005).

[511]See Aubert, Vilhelm (1994) Continuity and Development in Law and Society (Oslo, Norwegian University Press).

[512]See Cotterrell, Roger, ed, (2001) Sociological Perspectives on Law (2 vols) (Aldershot: Ashgate).

[513]See Cotterrell, Roger (1992) The Sociology of Law: An Introduction (Oxford: Oxford University Press).

Utility of list of interests; A society constantly develops and changes and the pressures behind interests change too. What is an individual interest and what is a social interest is itself a matter of changing political conceptions. The value or importance to be allotted to each interest can't be predetermined & the recognition of a new interest is a matter of policy.[514]

Misleading balancing metaphor; if two interests are to be balanced, that presupposes some 'scale' or 'yardstick' with reference to which they are measured. The 'weight' to be attached to an interest will vary according to the ideal that is used.[515]

10.9 Conclusion



In this chapter we have understood that sociological jurisprudence is the school of jurisprudence that deals with the understanding of the role of law in society and the application of the social sciences to the study of law in action. Sociological jurisprudence evaluates the influence of society on laws themselves, as well as on the procedural aspects of the legal system. This type of scrutiny compares the law with other sociological fields of study, including religion, economics, and literature, in an effort to bring enlightenment by sharing understanding between each sociological field.

Jhering searched for the purpose of law and concluded that purpose is the creator of all law, that every rule of lawowes its origin to some practical motive. Every act is an act done fora purpose. Roscoe pound conceived law as a '**social Engineering**' its main task being to accelerates the process of social ordering by making all possible efforts to avoid conflicts of interest of individuals in the society . Thus courts, legislators, administrators and jurists must work with a plan and make an effort to maintain a balance between the competing interests in society. Leon Duguit postulated that people in political power should not use power and force arbitrarily but solely according to the interests of society; otherwise their actions would be unlawful, and hence invalid.Political power is primarily applied through legislation.

The importance of the sociological school of law may be immediately noticed when the

[514]See http://lawdessertation.blogspot.com/2015/09/sociological-school-of-jurisprudence.html. Accessed on 9th October 2016 AM

[515]See Banakar, R. and Max Travers (2002) Introduction to Law and Social Theory (Oxford: Hart Publishing).

attitude of law and state is compared. The previous attitude of the state was to confine itself to law and order enforcement and thereby striving to enforce stability in society by enforcing the norms regulating the existing relationship between individuals and society as well as between individuals. This in many ways (which we will evaluate) can be futile. Therein lies the allure of the sociological school: in the failure of the laissez faire notion of law and state. Theories of sociological jurisprudence shift the centre of gravity from legislation to court judgments. A list of interests can't be drawn in advance as new interests are created and recognised by the courts. The judiciary has limitations and doesn't have the machinery of enforcing its decisions. It can't do what legislature can do.

10.10 Review Questions



1. What is sociological jurisprudence? Describe its relevance in the contemporary democratic world.
2. Describe the nature and scope of the sociological jurisprudence.
3. Account for the development and growth of sociological jurisprudence.
4. What are the strengths and weakness of the sociological jurisprudence?
5. Evaluate the contributions of Roscoe Pound, Rudolf Von Jhering and Leon Duguit in the sociological jurisprudence.

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CHAPTER ELEVEN

REALIST JURISPRUDENCE

11.0 Introduction

Realism has been characterized as a philosophy, a school, a movement, and an approach. It is an approach to thinking about and studying the results of the application of law, and subsequent social engineering through systematic and purposeful change of the law. It is not only concerned with the origins and bases of law, but also with its practical application and results. Scholars consider realist jurisprudence to be a movement which should not be formalised into a separate school of jurisprudence, as it nothing but a branch of the sociological approach.

11.1 Objectives



At the end of this chapter students should have:-

- Acquired knowledge and understanding of the basic concepts of realist jurisprudence, interests, law according to realist jurisprudence.
- Acquainted with knowledge and understanding on growth and development of the realist school of jurisprudence.
- Developed ability to explain central ideas and main features of the realist school of jurisprudence which shall differentiate itself from other schools of jurisprudence.
- Acquired competency to describe the strengths and weaknesses of the realist school of jurisprudence as compared to other schools of jurisprudence.
- Developed ability to examine the applicability and relevance of the realist school of jurisprudence in current world and particularly in Tanzania.

11.2 Realist Jurisprudence

Realist jurisprudence is school of jurisprudence under which law is characterized as an autonomous system of rules and principles that courts can logically apply in an objective fashion to reach a determinate and apolitical judicial decision.[516]

[516] See Hayman, et al, editors, Jurisprudence Classical and Contemporary 156, West Publishing, St. Paul, Minn., (2002).

Realist school of jurisprudence regards law, primarily as emanating from the judges. It is a movement in thought of law or a concept of law, rejects the notion of natural law because it does not believe in immutable principles of justice, it also rejects imperative models of the law because for the realists, the meaning of legal terms does not come from the legislator but from an observation of law in action.[517]

11.3 Growth and Development of Realist Jurisprudence

This realist movement flourished back in the 1920s and 30s, primarily at Yale and Columbia law schools and at Johns Hopkins's short- lived Institute of law.[518]

Realist jurisprudence arose to counter attack common law doctrine of precedent. Realist jurisprudence postulates that common-law adjudication is an inherently subjective system that produces inconsistent and sometimes incoherent results that are largely based on the political, social, and moral predilections of state and federal judges.[519]

Also, realist jurisprudence had its core in a reaction to the black letter approach to law which advocates the formal syllogistic application of the law to the facts, an approach sometimes labelled as formalism or the mechanical approach to jurisprudence.[520]

11.4 Basic Tenets of Realist Jurisprudence

Generally realist jurisprudence held two things to be true. First, they believed that law is not a scientific enterprise in which deductive reasoning can be applied to reach a determinate outcome in every case. Instead, most litigation presents 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 is typically drawn in accordance with the political, economic, and psychological proclivities of the judge.[521]

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[517] See K., Llewellyn, Some Realism about Realism: Responding to Dean Pound, Harvard Law Review, Volume 44, No.8, June 1931, p.1222-1264.

[518] See B., Leiter, American Legal Realism, in The Blackwell Guide to Philosophy of Law and Legal Theory (W. Edmundson& M. Golding, eds., 2003)

[519] See M. S., Green, Legal Realism as Theory of Law, 46 William & Mary Law Review 1915 (2005)

[520] See H., Erlanger et al. Is It Time for a New Legal Realism?, Wisconsin Law Review 2005(2): 335-363

[521]Read more: Jurisprudence - Realism - Law, Legal, Realists, and Court - JRank Articles http://law.jrank.org/pages/7914/Jurisprudence-Realism.html#ixzz4MezVAIK8

Law is nothing more than what a particular court says it is on a given day. Law consists simply of the decisions of courts and the prediction of them. However, law is an autonomous body of knowledge independent and distinguishable from the personal preferences of the judge applying it.[522]

Law does and should serve social ends. Judges unavoidably take account of considerations of fairness and public policy, and they are right to do so. Law is a means of social ends and every part of it has constantly to be examined for its purpose and efforts and judged in the light of both and their relation to each other.[523]

A statute can be the law without being a legal a rule in the relevant sense, for its status as law may not provide a rebellious judge with any reason to adjudicate as the statute instructs.[524]

Judges neither do nor should decide cases formalistically because the law is riddled with ambiguities, Contradictions, gaps, vague terms, and conflicting rule of interpretation. Therefore legal reasoning is indeterminate as it fails to justify a unique outcome in those cases that reach the stage of appellate review.[525]

Judges, in deciding cases, are responsive to the "situation types" recurring factual patterns.Henceforth judges look to the "normal" practices in the existing business culture in deciding what the right outcome is. This is because there is clear distinction should be drawn between what the law is and what it should be through treating it scientifically.[526]

Society changes faster than law and so there is a constant need to examine how law meets contemporary social problems. Therefore outcome to a legal dispute will vary according to the political, cultural, and religious persuasion of the presiding judge.[527]

[522] See M. P., Golding and W. A., Edmundson, eds.,The Blackwell Guide to the Philosophy of Law and Legal Theory. Oxford: Blackwell, 2005, p. 50.

[523] See R., Audi, ed., The Cambridge Dictionary ofPhilosophy. New York: Cambridge University Press, 1995, p. 425.

[524] See G. C., Christie, Jurisprudence: Text and Readings on the Philosophy of Law. St. Paul, MN: West Publishing Co., 1973, pp. 642–644.

[525] See F., Schauer, "Easy Cases," Southern California Law Review, Vol. 38 (1985), p. 399.

[526] See L. L., Fuller, The Morality of Law, rev. ed. New Haven, CT: Yale University Press, pp. 33-94.

[527] See R., Dworkin, Taking RightsSeriously. Cambridge, MA: Harvard University Press, 1978, pp. 22-28

11.5 Versions of Realist Jurisprudence

There are generally two versions or kinds of realist jurisprudence. They are American and Scandinavian realisms. They emerged in different places and different times. Despite the fact that they are both realist jurisprudence school, they differ in some slight issues.[528]These are American and Scandinavian realism.

Scandinavian realism is speculative in approach to legal problems, and it does not devote much attention to psychological behaviour of Judges as the American realist do. It has empirical approach to law and life alike American Realism and give more weight to the social effects of law with emphasis on judicial decisions.[529]

11.5.1 American Realist Jurisprudence

American Realist jurisprudence is a jurisprudence movement that arose in 1920s and 1930s in the United States, challenged the prevailing view that judges are rational decision- makers, who apply only legal rules found in law books to the facts of the case.[530]

11.5.1.1 American Realist Jurisprudence

The American realist movement is a combination of the analytical positivist and sociological approaches. It is positivists in the sense that it regards law as it is and not as it ought to be. It appears that, they share with sociologists an interest in the effects of social conditions of law as well as the effect of law in the society.[531]

The ultimate aim is to reform the law, but that cannot be done without understanding it. Law is the product of many factors and therefore the realists are interested in those sociological factors that which influence the law.[532]

[528] See https://newindialaw.blogspot.com/2012/11/american-realist-school-of-jurisprudence.html. Accessed on 10th October 2016 at 9:18 AM

[529] See M.D.A., Freedman, Lloyd's Introduction to jurisprudence; seventh edition; p. 799-800.

[530] See B. Leiter, op-cit

[531] See W. W., Fisher III et al., eds., American Legal Realism. New York: Oxford University Press, 1993, p. 3.

[532] Ibid

11.5.1.1.1 Basic Tenets of American Realist Jurisprudence

Law is not a scientific enterprise in which deductive reasoning can be applied to reach a determinate outcome in every case.Hence adjudication is not logical or deductive because law reflects not logic but experience.[533]

Judges are not impartial.There is no law that pre-exists the judgment of judges. Judges make and change law.Statutes and other source of law are not law until courts say they are law.What a statute requires cannot be specified until courts interpret and apply it.[534]

11.5.1.1.2 Exponents of American Realist Jurisprudence

According to Friedmann, the mental founders of the Realist movement in America were Oliver Wendell Holmes, Gray, Cardozo, Karl Llewellyn and Jerome Frank who emphasised the 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. The realists are concerned with the study of law as it works which means-investigating the social factors that makes a law on one hand and the social results on the other.[535]

11.5.1.1.2.1 Oliver Holmes

Oliver Wendell Holmes Jr. was an American jurist who served as an Associate Justice of the Supreme Court of the United States from 1902 to 1932, and as Acting Chief Justice of the United States January–February 1930.[536] He is one of the most widely cited United States Supreme Court justices in history. He proposed the following:-

Oliver Wendell Holmes through bad man's theory postulated that law is the system of predictions even a bad man wants to know.Hence to know legal dogma is to be able to make predictions. This is because people want to know under what circumstances how far they will run the risk of coming against what is so much stronger than them, and hence it becomes a business to find out when this danger is to be feared.[537]

[533] See M. C., Doff, Prediction and the Rule of Law, 42 UCLA L. REV. 651, 657-59 (1995)
[534] See B., Leiter, Legal Realism and Legal Positivism Reconsidered, 111 ETHICS 278, 278 (2001)
[535] See Friedmann, Legal Theory, Fifth Edition, Stevens and Sons, London, 1967, p.293
[536] See https://en.wikipedia.org/wiki/Oliver_Wendell_Holmes_Jr. Accessed on 10th October 2016 at 10:42 AM
[537] See Justice O. W., Holmes, Jr., "The Path of the Law," 10 Harvard Law Review 457 (1897)

He also opined that rights are willed by the dominant forces of an age and community whatever prevails is right, and therefore all political developments are good until they are no longer in ascendancy, and every regime is worthy until it is overthrown or crumbles.[538]

Judges have to look to their visions of the future more than to documents and doctrines of the past, and thus to take on a new and far more active role in the constitutional order. This is because law and society are always in flux, and courts adjudicate with an eye to law's practical effects.[539]

Sources of law such as statutes, precedents, legal rights and duties are all just prophecies about what courts will do. Therefore law is whatever the courts will use the public might to enforce. It is prediction or actual decision of a court.[540]

Law is a profession concerned with the use of public force by courts. The life of law has not been logic; it has been experience. Morality has nothing to do with law; it amounts to little more than a state of mind.[541]

11.5.1.1.3 Jerome Frank

Jerome New Frank (September 10, 1889 – January 13, 1957) was an American legal philosopher and author who played a leading role in the legal realism movement, a chairman of the Securities and Exchange Commission, and a federal appellate judge of the United States Court of Appeals for the Second Circuit.[542]

Jerome Frank defined law as what the Court has decided in respect of any particular set of facts, however prior to such a decision, the opinion of the lawyers is only a guess as to what the courts will decide and this cannot be treated as law unless the court so decides by its judicial pronouncement.[543]

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[538] See Justice O. W., Holmes, The Common Law; CHAPTER 1: Early Forms of Liability, Digireads.com Publishing, 2005 Edition, p.3

[539] See M. J., Horwitz, The Transformation of AmericanLaw, 1870–1960: The Crisis of Legal Orthodoxy. New York: Oxford University Press, 1992, p. 193

[540] Ibid

[541] See V., Nourse and G., Shaffer, "Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?, 95 Cornell Law Review (Forthcoming 2009)

[542] See https://en.wikipedia.org/wiki/Jerome_Frank. Accessed on 10th October 2016 at 10:44 Am

[543] See J. Frank, Law and the Modern Mind (1930), If Men were Angels (1942) &Court on Trial (1949)

Law consists of the particular decisions of courts. Judge's preferred outcome precedes the inquiry into legal rules. There are sources of law i.e. rules courts adopt for the setting of cases; precedents; statutes but these do not determine a correct outcome to a case.[544]

Judicial outcomes depend on many factors, most of which can be extra-legal: judge's personality, political preferences, mood, and racial views. Judge's personality plays a more important role than legal rules.[545]Thus, it is not proper for judges and lawyers to stick on certainty of law. It is not proper for judges and lawyers to stick to the myth of precedents and codifications.[546]

No one knows the law about any case or with respect to any given situation, transaction or event, until there has been a specific decision for instance judgment, order or decision with regards there to, however this uncertainty is not to be deplored, but is of immense social value. A wise and creative judge, unfettered by paragraphs in the code and precedents, will find justice through a clear and cool perception and valuation of social issues at stake.[547]

11.5.1.1.4 John ChipmanGray

John ChipmanGray (July 14, 1839 – February 25, 1915) was an American scholar of property law and professor at Harvard Law School. He also founded the law firm Ropes and Gray, with law partner John Codman Ropes. He was half-brother to U.S. Supreme Court justice Horace Gray.[548]

John ChipmanGray was of the view that the real relationship of jurisprudence to law depends not upon how law is treated but how law is created. He emphasised that the personality and personal view of a judge plays an important role in decisions.[549]

Gray stressed that the statutes together with precedents, equity and custom are sources of law but the law itself is what the persons acting as judicial organs of the state lay down as rules of conduct. Positive morality also forms a source of law on which the courts rely.[550]

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[544] See W. W., Cook, Substance and Procedure in the Conflict of Laws, 42 YALE L.J. 333, 347-48 (1933)

[545] See G. E., Griffin, The Creature from Jekyll Island, American Media; 4th edition (June 2002)

[546] See B.N. Mani Tripathi, Jurisprudence (Legal Theory), Allahabad Law Agency, 2010, 18th Edition, p. 56-57

[547] See J., Frank, Law and the Modern Mind, Transaction Publishers- 1930, p.46

[548] See https://en.wikipedia.org/wiki/John_Chipman_Gray. Accessed on 10th October 2016 at 10:45 AM

[549] See J.C. Gray, The Nature and Sources of Law, Macmillan, Second Edition (1921)

He believed that to determine rights and duties, the judges settle what facts exist and also lay down rules according to which they deduce legal consequences from facts. The law becomes concrete and positive only in the pronouncements of the court; judge made law is the final and authoritative form of law. Hence, Gray defined law as "what the judges declare."[551]

11.5.1.1.5 Professor Karl Llewellyn

Karl Nickerson Llewellyn (May 22, 1893 – February 13, 1962) was a prominent American jurisprudential scholar associated with the school of legal realism. The Journal of Legal Studies has identified Llewellyn as one of the twenty most cited American legal scholars of the 20th century.[552]

Legal certainty is treated as a genuine social value and the inquiry whether case law produces it is considered as having an important bearing on the merits of the system as a whole.[553] Judicial decision making is indeed among the most conservative and inflexible. Such is its fixity that it almost always impedes other social change.[554]

Judging is a rule bound activity, where a judge proceeds downward from legal rules to the outcome of the case.Judges do use same rules in their decision-making, only these rules are largely non-formal rules. These are the rules that judges would not find in a law book.[555]

Extrinsic aids to interpretation, such as legislative history, are irrelevant when the language of the statute is clear on its face.The plain language of a statute should not be applied literally if such an application would produce a result divergent from what the legislation intended.[556]

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[550] Ibid

[551] See J.C. Gray, The Nature and Sources of Law, Macmillan, Second Edition (1921)

[552] See https://en.wikipedia.org/wiki/Karl_Llewellyn. Accessed on 10th October 2016 at 10:47 AM

[553] See Karl Llewellyn, The Case Law System in America, 88 Colum. L. Rev. 989, 996. (1988).

[554] See G., Tiwari, Jurisprudence I, Lexis Nexis Publication, First Edition- 2013, Chapter 9: Legal Realism, p.128

[555] Ibid

[556] See A., Scalia and B. A., Garner, ReadingLaw: The Interpretation of Legal Texts. Minneapolis: West, 2012

11.5.1.2Critiques on American Realist Jurisprudence

American realist jurisprudence undermines the separation of law making and adjudication, making judges' political actors.It undermines a comfortable fiction: that the world is completely predictable. The realists have exaggerated the human factor in judicial decisions.[557]

Also, American realist jurisprudence undermines the theory that judicial reasoning is deductive from general principles. Realists seem to have neglected that part of law which never comes before the courts.[558]

The American realist jurisprudence confuses case law from cases. This realist movement could make progress only in a case law country because there the law appears to be a heap of decisions and therefore a body of facts.[559]

Law is not always uncertain and there is so much in the whole of the legal system which makes law certain. A lot of transactions are carried out every day with certainty of law. Otherwise, the work of the society will standstill.[560]

11.5.2 Scandinavian Realist Jurisprudence

The term "Scandinavian realism" was introduced in 1940s to refer to a group of philosophers and law professors from Sweden, Denmark, Finland, Iceland and Norway. Scandinavian Realists strictly reject natural law and believe that legal concept shall be based on experience, observation and experimentation.[561] The movement is characterized by a sustained attack on metaphysical ideas as manifested in the opposition between realism and idealism.[562]

[557] See L. H., Carter and T. F., Burke, Reason in Law, 8th ed. Chicago, University of Chicago Press, 2015

[558] See R., Pound, The Scope and Purpose of Sociological Jurisprudence, 24 Harv. L. Rev. 591 (1911)

[559] See A. R., Kamp, Between the Wars Social Thought: Karl Llewellyn, Legal Realism, and the Uniform Commercial Code in Context, 59 Al. L. Rev. 325 (1995).

[560] See T. C., Grey, Modern American Legal Thought, 106 Yale L. J. 493, (1996)

[561] http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1202&context=faculty_scholarship

[562] http://ivr-enc.info/index.php?title=Scandinavian_Realism

11.5.2.1Scandinavian Realism

Scandinavian[563] realism is a movement of jurisprudence that focuses on explaining scientifically how changes human behaviour.[564] Scandinavian realism believes that everything about law is not objective but instead, subjective. Subjective means the personal impression to how law should be whereas objective means to the external impression like religion and morality.[565] So, law is something that one observe or experiment with and it is real as it is not influenced by external factors.[566]

11.5.2.2Tenets of Scandinavian Realism

Scandinavian realism holds that there is but one world of reality that is related to empirical cognition and locates the law as part of the world of reality in terms of facts that is related to legal cognition as empirical knowledge of social facts.[567]

Law should be analysed through the prism of social empirical sciences. This is because there is interrelationship between legal rules and policy objectives had to become more intimate.[568]

Since law is associated with psychological pressure in a society,therefore law should be used as a tool to achieve social purposes and to balance competing societal interests.[569]

Evaluation of any part of the law ought to be in terms of its effect's and 'on the worthiness of trying to find these effects. Henceforth whether law is described as a fact as a machinery in action or in any other manner it is directed to certain ends.[570]

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[563] Scandinavia is a historical and geographical region centered on the Scandinavian Peninsula in northern Europe, generally considered to consist of Sweden, Norway and Denmark with some sources also including Finland and Iceland as well.

[564] See G., MacCormack, Scandinavian Realism 11 Juridical Review (1970)

[565] See R., Wacks, Understanding Jurisprudence, An introduction to legal theory,(2005),p. 177

[566] See M.D.A., Freeman, Lloyd's Introduction to jurisprudence; seventh edition; p. 799-800.

[567] See M., Deflem, Sociology of Law: Visions of a Scholarly Tradition. Cambridge; New York: Cambridge University Press, 2008.

[568] See http://ivr-enc.info/index.php?title=Scandinavian_Realism. Accessed on 10th October 2016 at 10:09 AM

[569] See M. D. A., Freeman, "Introduction of Jurisprudence" Lloyd's: Sweet & Maxwell, 2008.

[570] Ibid

Social legal reforms would be vain unless one could understand what really drives judicial decision-making. This is because the social factors are the one contributed to the making of law and this has reality in the contemporary society.[571]

11.5.2.3Exponents of Scandinavia Realist Jurisprudence

Scandinavian Realism was introduced by group of philosophers and law professors from Sweden, Denmark and Norway taking their starting point in the philosophy put forward by the Swedish philosopher, Axel Anders Theodor Hagerstorm.[572] The philosophers include Ander VilhelmLundstedt, Karl Olivecrona, and Alf Niels Christian Ross.

11.1.1.1.1 Axel Hagerstrom (1868-1939)

Axel Hagerstorm was born in Vireda, Jönköping County, Sweden. He was not a lawyer. He was a professor of Philosophy in Uppsala University, whose attention was directed to law and ethics as particularly fertile sources of metaphysics. He dedicated his life to exposing speculative ideas and myths by which man is exploited by man.[573]

He is the founder of Scandinavian realism. He made a wide inquiry into the nature of laws and morals. He discovered that law is made of norms and is independent of ideology. His major attack was directed to those schools of legal theory, which assumed that legal concepts had a factual basis capable of systematic analysis.[574]

He said existence of such things as 'goodness' and 'badness' represent simply emotional attitudes of approval or disapproval respectively towards certain facts and situations. Hence all questions of justice, aims, purpose of law are matters of personal evaluation not susceptible to any scientific process of examination.[575]

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[571] See B. N., Cardozo, Growth of the Law, Universal Law Publishing Co. Pvt. Ltd., Indian Economy Reprint 2002, Chapter III: The Growth of law, and the Methods of Judging, p.56-80

[572] http://ivr-enc.info/index.php?title=Scandinavian_Realism. Accessed on 10th October 2016 at 10:03 AM

[573] See M.D.A., Freeman, Lloyd's Introduction to jurisprudence; seventh edition; p. 799-800.

[574] See Dr.Paranjpe N.V.; Studies in jurisprudence and legal theory; Sixth edition; Central law agency; p. 81-82

[575] Ibid

He discussed that right exists because the State has issued a command to all others that they should not interfere with such a right, if one disobeys the State threats to take coercive measures for the benefit of the owner should he so desire.[576]

11.5.2.3.1 Karl Olivecrona (1897-1980)

Karl Olivecronawas a Swedish lawyer and legal philosopher. He studied law at Uppsala from 1915 to 1920. He was also a pupil of Axel Hagerstorm, the spiritual father of Scandinavian legal realism.[577]Olivecrona was a professor of procedural law and legal philosophy at Lund University.

Law is a social fact. It is an observable fact in the surroundings of society. It is always concerned with the action of men. Therefore the study of law should be taken as social fact and for a collect approach to law sociological investigation is necessary.[578]

The picture of law which emerges is of patterns of conduct in imperative forms which are distinguishable from other imperatives by virtue of the nature of the feeling of being bound that is associated with them.[579]

11.5.2.3.2 Alf Ross (1899-1979)

Alf Neils Christian Ross is a Danish legal and moral philosopher and scholar of international law. He is best known as one of the leading exponents of Scandinavian Legal Realism.[580]

The science of law is divided into two branches one of them is legal jurisprudence in a narrow sense having legal norms as its object of study, whereas the other is the sociology of law, which concerns itself with law in action. Science only aims of studying whether the law actually has an effect on the citizens' conduct or not.[581]

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[576] See G., Tiwari, Jurisprudence I, Lexis Nexis Publication, First Edition- 2013, Chapter 9: Legal Realism, p.128

[577]Yatedo, "Karl Olivecrona " available at http://www.yatedo.com/p/Karl+Olivecrona/famous/e2a4ced, accessed on 10th October 2016.

[578] Ibid.

[579]Dr.Paranjpe N.V.; Studies in jurisprudence and legal theory; Sixth edition; Central law agency; p. 81-82

[580] http://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=3080&context=ilj. Accessed on 10th October 2016 at 10:14 AM

[581] See Dr.Paranjpe N.V.; Studies in jurisprudence and legal theory; Sixth edition; Central law agency; p. 85-86

He opined that law in action and the norms of law are not two independent spheres of existence, but different sides of the same reality. The social effects of law will produce invaluable knowledge of the real importance of law as a regulatory of society. Any law should be in conformity with society together and any law, which is against the society, is functionless.[582]

He also postulated that all judges are influenced by one and the same factor when judging, and this factor can only be a joint ideology, adopted by all of them as part of their own individual ideology.[583]

11.5.2.4Critiques on Scandinavian Realist Jurisprudence

In societies, where the will of the legislator dominates every sphere of law, as in totalitarian states there is no scope for the application of the realistic approach. It is wrong to state that the certainty of law is myth. In practice, we found certainty in law and so many transactions are regulated on this basis.[584]

They give too much importance to human factors or personality of a judge in judicial decision it is true that human factors or personality of a particular judge play a party in judicial decision but it does not mean that personality of a judge is all in all for a particular decision there are so many other factors also which play very important role.[585]

[582] See Dr.Paranjpe N.V.; Studies in jurisprudence and legal theory; Sixth edition; Central law agency; p. 81-82

[583] See J., William, Pragmatism in Focus, Edited by Doris Olin, Routledge (1992),p.51

[584] See V.A. Bobde, The Rise of Judicial Power, Law & Justice: An Anthology, Edited by- Soli J. Sorabjee, Universal Law Publishing Co. Ltd., 2003 Edition, p.370-371; Also see: Brooms Legal Maxims, 68(10th Edition)

[585] See Moolchand Sharma, Constitutional Democracy and Access to Justice, Constitutionalism Human Rights &
the Rule of Law- Essays in honour of Soli J. Sorabjee, Edited by: Prof. Mool Chand Sharma &RajuRamachandran, Universal Law Publishing Co., 2005 Edition, p.281-282

11.6 Critiques on Realist School of Jurisprudence

The realist approach to jurisprudence has evoked criticism from many quarters. The critics allege that the exponents of Realist legal philosophy have completely overlooked the importance of rules and legal principles and treated law as an assemblage of unconnected court decisions.[586]

Their perception of law rests upon the subjective fantasies and life experience of the Judge who is deciding the case or dispute. Therefore, there cannot be certainty and definiteness about the law. This is indeed overestimating the role of Judges (court) in formulation of the laws. Undoubtedly, judges do contribute to law-making to certain extent but it cannot be forgotten that their main function is to interpret the law.[587]

Another criticism so often advanced against realist is that they seem to have totally neglected that part of the law which never comes before the court. Therefore, it is erroneous to think that law evolves and develops only through court decisions. In fact a great part of the law enacted by legislature never comes before the court; nevertheless, it does remain a law enforceable and applicable in appropriate cases and situations.[588]

The supporters of realist theory undermine the authority of the precedent and argue that case law is often made "in haste", without regard to wider implications. The courts generally give decisions on the spot and only rarely take time for consideration. They have to rely on the evidence and arguments presented to them in court, and do not have access to wider evidence such as statistical data, economic forecasts, public opinion, survey, etc.

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[586] See V.Lakshmanan, Justice V.R. Krishna Iyer: A Stroke of Genius, C.Sitaraman& Co. Pvt. Ltd., First Edition-
2008, Chapter 3: Justice Iyer, The Jurist, p.109

[587] See Justice V.R. Krishna Iyer, Legally Speaking, Universal Law Publishing Co. Pvt. Ltd., 2003 Edition, p.254

[588] See Mukesh, Corruption in Judiciary and Judicial Accountability, Journal of Law Teachers of India, Volume II,
Issue 1-2, 2011, Law Centre I, University of Delhi, p.152

Realists have exaggerated the role of human factor in judicial decisions. It is not correct to say that judicial pronouncements are the outcome of personality and behaviour of the judge. There are a variety of other factors as well which he has to take into consideration while reaching hid decision.[589]

The realist theory is confined to local judicial setting of United States and has no universal application in other parts of the world. The Scandinavian jurist Olivecrona has, however, accepted the universal validity of the nature of law.[590]

11.7 Conclusion



In this chapter we have understood that realist jurisprudence is school of jurisprudence under which law is characterized as an autonomous system of rules and principles that courts can logically apply in an objective fashion to reach a determinate and apolitical judicial decision. Realist jurisprudence arose to counter attack common law doctrine of precedent. Realist jurisprudence postulates that common-law adjudication is an inherently subjective system that produces inconsistent and sometimes incoherent results that are largely based on the political, social, and moral predilections of judges. Also, realist jurisprudence had its core in a reaction to the black letter approach to law which advocates the formal syllogistic application of the law to the facts, an approach sometimes labelled as formalism or the mechanical approach to jurisprudence.

Generally realist jurisprudence held two things to be true. First, they believed that law is not a scientific enterprise in which deductive reasoning can be applied to reach a determinate outcome in every case. Instead, most litigation presents 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 is typically drawn in accordance with the political, economic, and psychological proclivities of the judge. Scandinavian realism is speculative in

[589] See Justice Dr. A.S. Anand, Judicial Review-Judicial Activism- Need for Caution, Constitutionalism Human
Rights & the Rule of Law- Essays in honour of Soli J. Sorabjee, Edited by: Prof. Mool Chand Sharma &Raju Ramachandran, Universal Law Publishing Co., 2005 Edition, p.377-387

[590] See S., Ratnapala, Jurisprudence, Chapter 4: Realism in Legal Theory, Cambridge University Press, 2009
Edition, p.108

approach to legal problems, and it does not devote much attention to psychological behaviour of Judges as the American realist do. It has empirical approach to law and life alike American Realism and give more weight to the social effects of law with emphasis on judicial decisions.

The critics allege that the exponents of Realist legal philosophy have completely overlooked the importance of rules and legal principles and treated law as an assemblage of unconnected court decisions. Realists have exaggerated the role of human factor in judicial decisions. It is not correct to say that judicial pronouncements are the outcome of personality and behaviour of the judge. There are a variety of other factors as well which he has to take into consideration while reaching hid decision.

11.8 Review Questions



1. What is realist jurisprudence? Is it relevant to the modern democratic societies?
2. Compare and contrast American realism and Scandinavian realism.
3. Discuss the basic tenets of the realist school of jurisprudence.
4. What are the contributions of Oliver Holmes, John ChipmanGray, Karl Llewellyn and Jerome Frank to the development of American realism?
5. Account for the growth and development of the realist school of jurisprudence.
6. What are contributions of Axel Hagerstrom, Karl Olivercrona and Alf Ross to the growth and development of Scandinavian realism?
7. What are strengths and weaknesses of realist school of jurisprudence?

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CHAPTER TWELVE

PURE THEORY OF LAW

12.0 Introduction

The idea of a pure Theory of law was propounded by the formidable Austrian jurist and philosopher Hans Kelsen whose main view was that thescience of law has been mixed with the elements of psychological,sociology, ethics and political theory. He sought to restore the purity ofthe law by isolating those components of the work of a lawyer or judgewhich may be identified as strictly legal.

12.1 Objectives



At the end of this chapter students should have:-

- Acquired knowledge and understanding of the basic concepts of pure theory of law, law, norm, grund norm etc.
- Acquainted with knowledge and understanding on growth and development of the pure theory of law.
- Developed ability to explain central ideas and main features of the pure theory of law which shall differentiate itself from analytical jurisprudence.
- Acquired competency to describe the strengths and weaknesses of the pure theory of law.
- Developed ability to examine the applicability and relevance of the pure theory of law in current world and particularly in Tanzania.

12.2 Pure Theory of Law

The pure theory describes the positive law as an objectively valid order and states that this interpretation is possible only under the condition that a basic norm is presupposed. It is called pure theory of law because it characterizes itself as a 'pure' theory of law because it aims at cognition focused on the law alone" and this purity serve as its basic methodological principle.[591]

Pure theory of law was developed because the traditional legal philosophies at the time were claimed to be hopelessly contaminated with political ideology and moralizing on the one hand, or with attempts to reduce

[591] See E., Bodenheimer, Jurisprudence (Delhi :Universal Law Publishing Co. Ltd, 2004) at 101.

the law to natural or social science, on the other hand. Kelsen found both of these reductionist endeavours seriously flowed.[592]

12.3 Scope of pure theory of law

Pure theory of law is not universally accepted nor is it a basic doctrine for the modern jurisprudence because of its inconsistency for all revolutionary situations. The theory can be challenged at any time because of its abstract nature. It is highly unjustified that why it is not obligatory for any nation or state to accept such a grund norm based on reason.[593]

12.4 Growth and Development of pure theory

The idea of a Pure Theory of Law was propounded by the formidable Austrian jurist and philosopher Hans Kelsen (1881–1973). Kelsen began his long career as a legal theorist at the beginning of the 20th century.

The traditional legal philosophies at the time, were, Kelsen claimed, hopelessly contaminated with political ideology and moralizing on the one hand, or with attempts to reduce the law to natural or social sciences, on the other hand. He found both of these reductionist endeavours seriously flawed.

Instead, Kelsen suggested a 'pure' theory of law which would avoid reductionism of any kind. The jurisprudence Kelsen propounded "characterizes itself as a 'pure' theory of law because it aims at cognition focused on the law alone" and this purity serves as its "basic methodological principle.[594]

12.5 Basic Tenets of pure theory of law

The law is basically a scheme of interpretation. The law gives a duty to an individual which duty entails the consequences. Its reality, or objectivity, resides in the sphere of meaning because we attach legal normative meaning to certain actions and events in the world.[595]

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[592] See S. N., Dhyani, Fundamentals of Jurisprudence The Indian Approach (Allahabad : Central Law Agency,2004) at 24

[593] See G., Hughes, Validity and the Basic Norm, California Law Review, Volume 59 | Issue 3

[594] See http://plato.stanford.edu/entries/lawphil-theory/. Accessed on 11th October 2016 at 8:40 AM

The enactments of a new law are to interpret certain actions and events in a certain way. An act or an event gains its legal normative meaning by another legal norm that confers this normative meaning on it. The actions and events that constitute the enactment of a law are all within the sphere of what "is" the case; they are all within the sphere of actions and events that take place in the world.[596]

An act can create or modify the law if it is creating in accordance with another, "higher" legal norm that authorizes its creation in that way. The "higher" legal norm is legally valid if and only if it has been created in accord with yet another, "higher" norm that authorizes its enactment in that way.[597]

At some stage, in every legal system, we get to an authorizing norm (constitution) that has not been authorized by any other legal norm, and thus it has to be presupposed to be legally valid. Such authorizing norm that has not been authorized by any other legal norm is called basic norm or grand norm.[598]

The content of the basic norm of any given legal system is determined by the actual practices that prevail in the relevant community. Legal norms necessary come in system.[599] There are no free floating legal norms. Legal system is themselves organized in a hierarchical structure, manifesting a great deal of complexity but also a certain systematic unity. The systematic unity comes into existence under the following postulates:

(i) Every two norms that ultimately derive their validity from one basic norm belong to the same legal system.

(ii) All legal norms of a given legal system ultimately derive their validity from one basic norm.

Norms are legally valid within a given system, they have to form part of a system of norm that is in force in a given place and time.[600] Legal validity is essentially relative to the social facts that constitute the content of the basic norm in each and every legal order.[601]

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[595] See H., Kelsen, 1934/2002. Introduction to the Problems of Legal Theory, B.L. Paulson and S.L. Paulson, trans., Oxford: Clarendon Press.

[596] See H., Kelsen, 1945/1961. General Theory of Law and State, A. Wedberg, trans., New York: Russell & Russell.

[597] See H., Kelsen, 1960/1967. Pure Theory of Law, M. Knight, trans., Berkeley: University of California Press.

[598] See H., Kelsen, 'The Pure Theory of Law and Analytical Jurisprudence', 55 Harvard L. Rev. (1941), 44

[599] See H., Kelsen, Professor Stone and the Pure Theory of Law: A Reply', (1965), 17 Stanford L. Rev. 1128

[600] See R. M. W., Dias, Jurisprudence (New Delhi: Aditya Book Private Limited, 1994) at 351

[601] See H., Kelsen, General Theory of Norms (M. Hartney trans.) Oxford, 1991, pp. 440–454.

12.6 Hans Kelsen

Hans Kelsen was an Austrian legal theorist, who worked in Germany until the rise of the Nazi Party, and then in the USA. Kelsen was the most famous for his studies on law and especially for his idea known as the pure theory of the law.[602]

Kelsen aimed to develop a theory which according to him would be pure and would be free of any external influence pertaining from the other institutions instead of law such as history, sociology, politics and religion. Kelsen view is based upon Hegelian idea of considering history as a grund norm from which all other sciences are emerged.[603]

12.6.1 Who is Hans Kelsen?

Hans Kelsenwas born Oct. 11, 1881, Prague, Bohemia, Austria-Hungary, now in Czech Republic] died April 20, 1973, Berkeley, Calif., U.S. He was Austrian-American legal philosopher, teacher, jurist, and writer on international law, who formulated a kind of positivism known as the "pure theory" of law. Kelsen was a professor at Vienna, Cologne, Geneva, and the German university in Prague.[604] He published the first edition of The Pure Theory of Law in 1934, and a second, expanded edition in 1960.[605]

He wrote the Austrian constitution adopted in 1920 and served as a judge of the Austrian Supreme Constitutional Court (1920–30). After immigrating to the United States in 1940, he taught at Harvard, the University of California at Berkeley, and the Naval War College, Newport, R.I.[606]

Among Kelsen's later books are General Theory of Law and State (1945) and The Law of the United Nations (1950–51). In such works as Principles of International Law (1952) he envisioned a world unity under law superimposed on the legal order within each nation.

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[602] See B.N. Mani Tripathi, Jurisprudence (Faridabad: Allahabad Law Agency,1999) at 59.

[603] See M. D. A., Freeman, Lloyd's Introduction to Jurisprudence (London: Sweet and Maxwell Ltd,1994) at 272.

[604] See https://www.britannica.com/biography/Hans-Kelsen#ref90388. Accessed on 11th October 2016 at 8:59 AM

[605] See https://hughmccarthylawscienceasc.wordpress.com/2014/12/08/test-post/. Accessed on 11th October 2016 at 9:06 AM

[606] Ibid

12.6.2 Ideas of Hans Kelsen

Pure theory of law is any science tries to reduce chaos and multiplicity of disputes. It must be a united logical system. A legal theory must be a science not volition. It is knowledge of what the law is and of what the law ought to be. The relation of a legal theory to a particular system of positive law is that of possible to actual law.[607]

Law is normative and not a natural science. i.e. deals with norms as opposed to causality. Theory of norms is not concerned with effectiveness of a legal system (norm). He said this can be left to an area called sociology of law. At theory of law is formal because is a theory of the way of ordering/ changing contents of law in specific way.[608]

Where there is revolution situation by force in the government and if the revolution succeeds and the new order is efficacious i.e. the people in that country by and large obey the new order, then the new grund norm is valid. The earlier basic norm ceases to operate.[609]

Where the revolution fails then the old order is valid and legal. Therefore the new order is ineffective and illegal as it is not effective and not obeyed by people. Perhaps changes in the basic norms of municipal legal systems legally derive from the basic norm of public international law.[610]

Norms are regulations which set forth how many are to behave. Law is an aggregate or system of norm. Legal norm is created by an act of a human will, but other norms come out of experience. Legal norm can be recognized if it is a part of a legal normative order.[611]

Validity of legal norm can be tested whether is within the same efficient system of legal order. They must be some ultimate norm postulated on which other norms rest. The ultimate norm that other norms derive their validity is called Basic Norm or Grund Norm.[612]

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[607] See H., Kelsen, What is Justice?, UC Berkeley Press, 1957

[608] See H. L. A., Hart, 1970, "Kelsen's Doctrine of the Unity of Law", in H.E. Kiefer and M.K. Munitz (eds), Ethics and Social Justice, pp. 171–199, New York: State University of New York Press.

[609] See S., Paulson, Introduction to Kelsen'sIntroduction to the Problems of Legal Theory, p. xvii, Oxford: Clarendon Press, 2002

[610] See J., Raz, 'Kelsen's Theory of the Basic Norm' in Raz, The Authority of Law, pp. 122–145, Oxford: Oxford University Press, 1979.

[611] See R.H., Tur, and W., Twining, (eds), 1986, Essays on Kelsen, Oxford: Clarendon Press.

The choice of the grund norm is not arbitrary, it is chosen by legal science on the principle of efficacy. The grund norm determines the organs and procedure for setting of the general law in making up legislation.[613]

Every system of norms rests for its motivation on some type of sanctions. These sanctions may vary too much. For system of norm to be functional there must be sanctions to bring certain conducts which we want.[614]

Therefore law to be valid must have sanctions. However it is conceded that in some cases such as constitutional law, sanctions are taken together /read together with other laws with the system.[615]

International laws all are law because it is possible to identify the "ought" and "sanctions", it does not matter whether sanctions by blood field or wars or anything. It is a basic principle of international law that state sovereignty is determined by actual control over a territory / population.[616]

There is a possibility of existing conflicts between various grund norms especially the national grund norm and the grund norm at International level. Municipal legal system and International legal system are two different systems operating in two different spheres. Therefore they don't contradict each other though they may conflict.[617]

12.7 Application of pure theory of law

Kelsen is known for his most rigorous development in positive law. His theory of pure law is based on logic. It has normative nature and is devoid of the influence of other worldly knowledge especially of the social sciences. His ideas were also applied in various circumstances.

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[612] See S., Paulson, "The Great Puzzle: Kelsen's Basic Norm". In Luis Duarte d'Almeida, John Gardner, and Leslie Green (eds.), Kelsen Revisited: New Essays on the Pure Theory of Law, pp. 43–62. Oxford: Hart Publishing, 2013.

[613] See A., Marmor, Objective Law and Positive Values, Oxford: Oxford University Press, 2001

[614] See A., Marmor, Philosophy of Law, The Princeton Series in the Foundations of Contemporary Philosophy (S. Soames ed.), Chapter 1, Princeton: Princeton University Press.

[615] See S.M., Green, "Marmor'sKelsen", in D.A. Jeremy Telman (ed.) Hans Kelsen in America. Springer Verlag, 2016

[616] See J.W., Harris, Legal Philosophies, chapter 6, London: Butterworths. 1980

[617] See S., Paulson, "A 'Justified Normativity' Thesis in Hans Kelsen's Pure Theory of Law? Rejoinders to Robert Alexy and Joseph Raz" In Matthias Klatt (ed.), Institutionalized Reason: The Jurisprudence of Robert Alexy, pp. 61–111. Oxford: Oxford University Press, 2012.

12.7.1 The state vs. Doss PLD[618]

In 1956 the basic constitution of Pakistan was enacted. In 1958 the President of Pakistan issued a proclamation nullifying the existing constitution (i.e. 1956). This was held to amount to a revolution.

In this action the President also removed the national and regional cabinet. Regional Legislatures and finally declared Martial law. Three days after that revolution an order was proclaimed validating all the existing laws and decisions before the proclamation except the 1956 constitution.

This order also restored the jurisdiction of courts. The respondent in this case had been convicted under the frontiers crimes regulation of 1910. The High Court gave judgment in favour of the respondent on the ground that the 1910 law was unconstitutional i.e. he was convicted by on old law which was annulled by the president.

In the Supreme Court the question centred on validity of orders declared after the revolution versus the 1956 constitution.

The court held that:

- The 1910 regulations were good law and not unconstitutional. (The court considered that the new order was efficacious and working as it was obeyed by people. The new regime was efficacious.
- The court used Kelsen's view to arrive at such decision. B) The old under 1956 constitution was abolished therefore all laws should seek validity from the new proclamation

12.7.2 Uganda vs. Ex –Parte Matovu[619]

Up to 1966 Uganda was a federal state. The power of the central government was shared also by a district authority. Later, a class struggle occurred between petty bourgeoisie headed by Obote and the Aristocratic class was also in power. Obote took over regain of the government and abolished the constitution 0n 22nd Apr.1966.

[618] 1958 Sc 533

[619] (1966) A.C 514

At one time Motovu was arrested and detained. He was later released from prison. But just when he was getting out from the prison compound he was re –arrested and detained under the detention order of Aug.1966.

Motovu's advocate filed a writ of Habeas Corpus contending that the detention was illegal. Obote abolished the earlier Uganda constitution on 22nd Apr.1966 and immediately he proclaimed himself executive President with power to appoint vice President.

At the end of the day the court decide that the 1966 constitution was valid because the revolution was successful and there was no attempt to overturn the government in power.

12.8 Critiques of Pure Theory of Law

It excludes from consideration sociological factors of morality and justice that contribute to the acceptance / effectives of the new legal order.[620]

It must not be forgotten that the continued validity of the grund norm has an ethical background in so far as an element of morality is built in it as part of the criterion of its validity.[621]

In Kelsen theory the law and the state are merged. He does not want to realize the two that are distinct where the law served the state.[622]

What he claimed to be scientific but fictitious i.e. hypothetical. This is because Kelsen claimed that is theory is a scientific one but his closed logical system in the analysis of law, has no relationship with the social position or situation in which the law operates.[623]

[620] See W., Friedman, Legal Theory (Delhi: Universal Law Publishing Co. Pvt. Ltd , 1967) at 276

[621] See Ali, S. K. Jahangir, An Analysis of the Kelson's Theory of Law (January 28, 2013). Available at SSRN: http://ssrn.com/abstract=2208176 or http://dx.doi.org/10.2139/ssrn.2208176

[622] See W., Ebenstein, The Pure Theory of Law, 1945; New York 1969.

[623] See R., Moore, Legal Norms and Legal Science: a Critical Study of Hans Kelsen's Pure Theory of Law, Honolulu 1978.

12.9 Conclusion



In this chapter we have understood that pure theory of law describes the positive law as an objectively valid order and states that this interpretation is possible only under the condition that a basic norm is presupposed. It is called pure theory of law because it characterizes itself as a 'pure' theory of law because it aims at cognition focused on the law alone" and this purity serve as its basic methodological principle.

In pure theory of law, law is basically a scheme of interpretation. The law gives a duty to an individual which duty entails the consequences. Its reality, or objectivity, resides in the sphere of meaning because we attach legal normative meaning to certain actions and events in the world.

Hans Kelsen was an Austrian legal theorist, who worked in Germany until the rise of the Nazi Party, and then in the USA. Kelsen was the most famous for his studies on law and especially for his idea known as the pure theory of the law. Pure theory of law is any science tries to reduce chaos and multiplicity of disputes. It must be a united logical system. A legal theory must be a science not volition. It is knowledge of what the law is and of what the law ought to be. The relation of a legal theory to a particular system of positive law is that of possible to actual law.

Kelsen is known for his most rigorous development in positive law. His theory of pure law is based on logic. It has normative nature and is devoid of the influence of other worldly knowledge especially of the social sciences. What he claimed to be scientific but fictitious i.e. hypothetical. This is because Kelsen claimed that is theory is a scientific one but his closed logical system in the analysis of law, has no relationship with the social position or situation in which the law operates.

12.10 Review Questions



1. Define pure theory of law and explain its relevance to the modern democratic state.
2. Describe the basic ideas of pure theory of law which differentiate it from

analytical jurisprudence.

3. Evaluate the contribution of Hans Kelsen in the development of pure theory of law.
4. Assess the usefulness and shortfalls of the pure theory of law as propounded by Hans Kelsen.

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CHAPTER THIRTEEN

MARXIST JURISPRUDENCE

13.0 Introduction

Marxist jurisprudence, as a radical theory of law, attempted to expose the contradictions inherent in capitalist law, and hence in mainstream liberal theories. Hence, it extended the analysis of Marx, which tried to show the inherent contradictions within the economic philosophy and ideology of capitalism, to the field of legal theory.[624]

13.1 Objectives



At the end of this chapter students should have:-

- Acquired knowledge and understanding of the basic concepts of Marxism, Marxist jurisprudence, law, state etc.
- Acquainted with knowledge and understanding on growth and development of the Marxist jurisprudence.
- Developed ability to explain central ideas and main features of the Marxist school of jurisprudence which shall differentiate itself from other schools of jurisprudence.
- Acquired competency to describe the strengths and weaknesses of the Marxist school of jurisprudence as compared to other schools of jurisprudence.
- Developed ability to examine the applicability and relevance of the Marxist school of jurisprudence in current world and particularly in Tanzania.

13.2 Marxist Jurisprudence

Marxist jurisprudence posits that legal relations are determined by the economic base of particular kinds of society and modes of production.Marxist thought's primary focus rests on political economy and the

[624]See H., Collins, Marxism and Law, Oxford: Oxford University Press, pp.1-2.

corresponding power relations within society, providing the most extensive critique to date of liberal tradition on which may of our legal presuppositions are founded.[625]

Law is not of central concern to Marxist jurists as law in the capitalist mode of production is seen as an instrument of class oppression perpetuated as a consequence of its particular historical, social and economic structures.[626]

13.3 Scope and Purpose of Marxist Jurisprudence

The principal aim of Marxist jurisprudence is to criticize the centrepiece of liberal political philosophy, the ideal called the Rule of Law. Although this undertaking constitutes a mere fragment of the Marxist tradition of critical social theory, today it is regarded as a vital element.[627]

Never before have had Marxists devoted so much energy to the investigation of the nature and functions of legal systems. Their efforts merge into the general purpose of Marxism which is to mount a sustained offensive against the existing organizations of power in modern society.[628]

By exposing the structures of domination and subverting the beliefs and values which sustain them[629], Marxists seek to pave the way towards a revolutionary social transformation. Within this programme, the theory of law assumes an important place.[630]

Marxists examine the real nature of law in order to reveal its functions in the organizations of power[631] and to undermine the pervasive legitimating ideology in modern industrial societies known as the Rule of Law.[632]

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[625]See, The Institute of Law of the Academy of Sciences, Proposition 24, as reprinted in A. Y. Vyshinshky, "The Fundamental Tasks of the Science of Soviet Socialist Law," Soviet Legal Philosophy, Cambridge: Harvard University Press, 1951, p. 336.

[626]See S. A. Golunski and M. S. Strogovich, The Theory of the State and Law, 1940

[627] See, A. Y., Vyshinshky, "The Fundamental Tasks of the Science of Soviet Socialist Law," Soviet Legal Philosophy, Cambridge: Harvard University Press, 1951, p. 337.

[628]See M. A., Reisner, "The Theory of Petrazhitskii: Marxism and Social Ideology," Soviet Legal Philosophy, translated by Hugh W. Babb with an introduction by John N. Hazard, Cambridge: Harvard University Press, pp. 95-96.

[629]See Collins, supra. n. 1, pp. 108-110.

[630]See E. B., Pashukanis, "The Soviet State and the Revolution in Law," Soviet Legal Philosophy, Cambridge: Harvard University Press, 1951, pp. 263-268

13.4 Growth of Marxist Jurisprudence

Marxist jurisprudence was expounded upon the notions of Karl Marx (1818-83) and Friedrich Engels (1820-95), consider law an instrument of class oppression that benefits the ruling class through oppression of the proletariat.[633] The common law system of criminal and civil law, which protects personal and private property rights, as well as facilitating predictability in social life, is regarded as "no more than a system of coercion designed to protect bourgeois ownership of the means of production.

Karl Marx and Friedrich Engels are considered to be the founders of the greatest social and political movement which began in 19th century and flourished in 20th century as a political philosophy in Eastern Europe which is the erstwhile Soviet Union[634] and influenced all the decolonized colonies of the world, Tenets of their ideology are practiced in China's Political Philosophy.[635]

The paucity of Marxist jurisprudence until modern times is probably largely a result of the materialist emphasis of Marxism.[636] Since the primary focus rests on the economy and the corresponding power relations within a society, law is treated as a peripheral concern.[637]

Even then it is usually relegated to the position of a relatively unproblematic sector of the State scarcely worthy of detailed consideration.[638] There is, however, a second reason for the absence of a Marxist theory of law in a highly developed form which goes to the roots of our perception of legal institution.[639]

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[631]See https://www.wsws.org/en/articles/2008/11/pash-n26.html. Accessed on 11th October 2016 at 11:03 AM

[632]See E.B., Pashukanis, "The General Theory of Law and Marxism," Soviet Legal Philosophy, Cambridge: Harvard University Press, 1951, pp. 180-193

[633]See Balbus, I., 'Commodity Form and Legal Form' in Reasons, C., The Sociology of Law, Toronto: Butterworths, 1978 83.

[634]See R. A., Belliotti, "The Legacy of Marxist Jurisprudence," Radical Philosophy of Law, ed. by David S. Caudill and Steven Jay Gold,New Jersey: Humanities Press International, Inc., pp. 30

[635]Ibid

[636]See M. A., Reisner, "The Theory of Petrazhitskii: Marxism and Social Ideology," Soviet Legal Philosophy, translated by Hugh W. Babb with an introduction by John N. Hazard, Cambridge: Harvard University Press, pp. 95-96

[637]See P., Yudin, "Socialism and Law," Soviet Legal Philosophy, Cambridge: Harvard University Press, 1951, pp. 281-284; 286-287

[638]See Ibid, pp. 400-425

13.5 Basic Tenets of Marxism

Nature of individuals depends on the material conditions determining their production. To understand man and his history, therefore, it is necessary to understand his productive activities.[640]

The principle governing all human relations to be found in the common end that all men pursue is production of means to support life and exchange of things produced.[641]

There are two factors in production such as productive forces including the instruments of production including labour and implements and the productive relations between men.[642]

History is conceptualized as a history of class struggles. The particular structure of the classes at any given time is determined by the mode of production.It is the contradiction within the system, furthermore cannot be resolve within its framework, which lead to higher stages of development.[643]

State and law come into being through development of division of labour band appearance of private ownership of the means of production. I.e. law is a product of economic and social conditions within a particular society.[644]

The mode of production of material life conditions the social, political and intellectual life process in general. It is not the consciousness of men that determines their being but on the contrary, their social being that determines their consciousness.[645]

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[639]See S. A., Golunskii and M. S. Strogovich, "The Theory of State and Law," Soviet Legal Philosophy, Cambridge: Harvard University Press, 1951, pp. 365-375

[640]See Marx, K., 'Preface to A Contribution to the Critique of Political Economy' in Karl Marx and Frederick Engels Selected Works, Moscow: Progress Press, 1989 521.

[641]See Barry, N., An Introduction to Modern Political Theory, London: Macmillan, 1989 53.

[642]See O'Malley, P., 'Theories on Structure Versus Causal Determination' in Tomasic (ed.) Legislation and Society in Australia, Allen and Unwin, 1980 140.

[643]See Marcuse, H., One-Dimensional Man, Boston: Beacon Press, 1968 xv.

[644]See Marx, K., 'Bloody Legislation against the Expropriated, from the end of the 15th. century: Forcing Down Wages by Acts of Parliament' in Capital, 1986 686.

[645]See Marx, K., and Engels, F., 1976, The German Ideology, Moscow: Progress Press.

There is a close relationship between law and classes in many societies. This means law was created and made to secure the rule of one class against another class. Thus the legal forms real refer to the right to enter freely into contracts but in the absence of equality of bargaining power this freedom is illusory.[646]

The legal form is an ideological mantle. Any definition of law arising from philosophy is based from material conception of law and the recognition of its class nature and value.[647]

13.6 Marxism on State and Law

The state and law the product of class struggle in the particular level of development. Law seemed to be nothing more than function of economy without any independence existence.[648]

The state and law are determined or conditioned by economic factors and would be subsidiary to them, indeed derivative from them.The state is political organizations which correspond to the stage of development and which support the interest of the dominant class.

The state and law act as intermediary in the formation of a communal institution and gives them a political form. The state may be representative not of the whole of a class but only of a section of tat class. One class can also control the state for the benefit of another class.[649]

The state and law were temporary phenomena.Revolution was inevitable and this would be bound to break the power of the state.The first step in the revolution of the working class is to raise the proletariat to the position of ruling class, to win the battle of democracy.[650]

With the abolition of classes the power of state would disappear and governmental functions be transformed into simple administrative ones.Once the state is truly universal, it ceases to exist as a

[646]See Ollman, B., 1976, Alienation; Marx's Conception of Man in Capitalist Society, Cambridge: Cambridge University Press.

[647] See Ollman, B., 1976, Alienation; Marx's Conception of Man in Capitalist Society, Cambridge: Cambridge University Press.

[648]See Marx, K., the German Ideology, Moscow: Progress Publishers, 1976 42.

[649]See Marx, K., 'Bloody Legislation against the Expropriated, from the end of the 15th. Century: Forcing Down Wages by Acts of Parliament' in Capital, 1986 686.

[650]See Marx. K., Preface to 'A Contribution to the Critique of Political Economy' in Karl Marx and Friedrich Engels Selected Works, 1989 521.

differential organism.All officials, including judges elected by universal suffrage and paid the same wages as workman.[651]

Universal suffrage is to serve the people constituted in communes, as individual suffrage serves every other employer in search for the workmen and managers of his business.Right can never be higher than the economic structure of society and its culture development conditioned thereby.[652]

13.7 Karl Marx

Marx's view of state and law was co-terminus with the understanding of society and social process. Marx's originality of thought lies in the fact that he synthesized almost entire philosophical thought from Aristotle to Hegel.[653]

The sociological understanding of the society led Marx to pronounce that the desired system should be a Communist Society based on rational planning, co-operative production and equality of distribution and most importantly, liberated from all forms of political and bureaucratic hierarchy.[654]

Marx condemned and rejected the state and money as Bourgeois concept. He believed that the proletariat has a historical mission of emancipating the society as a whole. For him, law seemed to be nothing more than a function of economy without any independent existence

The concept of state is a super structure in a capitalist state to organise and upholds class oppression.The bureaucracy and the executive in a state are for the managing common class and struggle waged by the society against each other.[655]

Law seemed to be nothing more than a function of economy without any independence.Law is not based on will but once the bourgeois state is overthrown by a proletariat, the proletariat state would come into existence. This state would be representative of social will the classes.[656]

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[651]See Giddens, A., Capitalism and Modern Social Theory: An Analysis of the writings of Marx, Durkheim and Weber, Cambridge: Cambridge University Press, 1971 21.

[652]See Gramsci, A., Selections from the Prison Notebooks, London: Lawrence and Wishart. 1971 195.

[653]See http://www.desikanoon.co.in/2014/05/jurisprudence-notes-theory-of-law-as.html. Accessed on 11th October 2016 at 11:06 AM

[654]See Engels, F., Socialism: Utopian and Scientific, Moscow: Progress Publishers: 1954 79.

[655]See Karl Marx, Preface to A Contribution to the Critique of Political Economy, 521

The nexus between safeguarding the private property by a capitalist state will be replaced by a proletariat state which has nationalized all the private property. However, it is interesting to note that the state and statecraft remains an important and integral in the proletarian society.[657]

There are the laws that constitute the relations of product, i.e., the scheme of property rights in the existing forces of production. We have a norm we have because it is in the interests of the dominant class that we have them.[658]

Marxist jurisprudence argues there is no absolute concept of justice, justice being dependent on the requirements of a given mode of production.[659]Lukes claims Marx believes justice, "Does not provide a set of independent rational standards by which to measure social relations, but must itself always in turn be explained as arising from and controlling those relations".[660]

Marxism believes that rights are simply a bourgeois creation, and that justice is something only the rich can achieve in capitalist modes of production. Formal justice as entitlement therefore allows equal opportunity to the individual without any reference to the unequal ability to use it, with rights only being anti-socialist if individuals are taken to be "inherently and irredeemably self-interested."[661]

13.8 Critiques

Capitalism, as an economic and political system, has proven to be more durable and flexible than Marx maintained. In modern social systems, for example, the advent of Communism does not appear imminent.[662]

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[656]See Lukes, S., Marxism, Morality and Justice' in Parkinson, G., Marx and Marxism, Cambridge: Cambridge University Press, 1982 197.

[657]See Gamble, A., and an Introduction to Modern Political and Social Thought, Hampshire: Macmillan, 1987 101.

[658]See Wacks, R., Jurisprudence, London: Blackstone Press, 1987 175.

[659] See Wacks, R., Jurisprudence, London: Blackstone Press, 1987 175.

[660] See Lukes, S., Marxism, Morality and Justice' in Parkinson, G., Marx and Marxisms, Cambridge: Cambridge University Press, 1982 197.

[661] See Campbell, T., Justice, London: Macmillan, 1988 189.

[662]See Campbell, T., 1981, Seven Theories of Human Nature, Oxford: Oxford University Press

There exists external influence on the forces of production. Underestimation of the capacity of the state to adapt to crisis leads to stopping it from becoming a catastrophe. There are some laws in various legal systems which protect the interest of the lower class in society.[663]

13.9 Conclusion



In this chapter we have understood that Marxist jurisprudence posits that legal relations are determined by the economic base of particular kinds of society and modes of production.Marxist thought's primary focus rests on political economy and the corresponding power relations within society, providing the most extensive critique to date of liberal tradition on which may of our legal presuppositions are founded. The principal aim of Marxist jurisprudence is to criticize the centrepiece of liberal political philosophy, the ideal called the Rule of Law.

Although this undertaking constitutes a mere fragment of the Marxist tradition of critical social theory, today it is regarded as a vital element. State and law come into being through development of division of labour band appearance of private ownership of the means of production i.e. law is a product of economic and social conditions within a particular society. The state and law are determined or conditioned by economic factors and would be subsidiary to them, indeed derivative from them.The state is political organizations which correspond to the stage of development and which support the interest of the dominant class.

Marxist jurisprudence argues there is no absolute concept of justice, justice being dependent on the requirements of a given mode of production. Marxism believes that rights are simply a bourgeois creation, and that justice is something only the rich can achieve in capitalist modes of production. There exists external influence on the forces of production. Underestimation of the capacity of the state to adapt to crisis leads to stopping it from becoming a catastrophe. There are some laws in various legal systems which protect the

[663]See Barry, N., 1989, An Introduction to Modern Political Theory, 2nd Edn., London: Macmillan.

interest of the lower class in society.

13.10 Review Questions



1. What is Marxist jurisprudence? Describe its basic ideas as a school of jurisprudence.
2. Assess the contribution of Karl Marx in the development of the Marxist jurisprudence.
3. To what extent is Marxist jurisprudence is reflected in the common law countries?
4. Describe the Marxist theory of state and law.
5. "Your ideas are but the outgrowth of the conditions of your bourgeois production and bourgeois property, just as your jurisprudence is but the will of your class made into a law for all, a will, whose essential character and direction are determined by the economic conditions of existence in your class." Discuss.

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CHAPTER FOURTEEN

CRITICAL LEGAL STUDIES

14.0 Introduction

Critical legal studies school is a movement in legal theory and a network of leftist legal scholars that emerged in the 1970s in the United States. It was committed to shaping society based on a vision of human personality devoid of the hidden interests and class domination that critical legal studies scholars argued are at the root of liberal legal institutions in the West.[664]

14.1 Objectives



At the end of this chapter students should have:-

- Acquired basic knowledge of concepts such as critical legal studies, law according to critical legal studies scholars.
- Acquainted with understanding of nature, purpose, scope relevance and characteristics of critical legal studies
- Acquainted with ability to examine and understand the major exponents of critical legal studies and their contribution or ideas in the study of jurisprudence.

14.2 Critical legal studies

Critical legal studies[665] school is a jurisprudence movement that challenges and overturns accepted norms and standards in legal theory and practice. It is concerned with the relationship of legal scholarship and practice to the struggle to create a more humane, egalitarian, and democratic society.[666]

Critical legal studies believe that logic and structure attributed to the law grow out of the power relationships of the society. The law exists to support the interests of the party or class that forms it and is merely a

[664]See J. M., Balkin, "Ideology as Constraint: Andrew Altman, 'Critical Legal Studies: A Liberal Critique' (1990)" [book review], 43 Stan. L. Rev. 1133, 1991

[665]See Duncan Kennedy defines critical legal studies as 'the emergence of a new left intelligentsia committed at once to theory and to practice, and creating a radical left world view in an area where once there were only variations on the theme of legitimation of the status quo'; D. Kennedy, 'Critical Labour Theory: A Comment' 4 IndRel LJ 505, 506 (1981)

[666]See R. W., Bauman, Ideology and community in the first wave of critical legal studies, Toronto, CA : University of Toronto Press, 2002

collection of beliefs and prejudices that legitimize the injustices of society. The wealthy and the powerful use the law as an instrument for oppression in order to maintain their place in hierarchy.[667] Within certain limits, CLS has delivered a coherent legal discourse about social injustice and the role played by the legal community

14.3 Growth and Development of Critical Legal Studies

Critical legal studies was officially started in 1977 at the conference at the University of Wisconsin-Madison, but its roots extend back to 1960 when many of its founding members participated in social activism surrounding the civil Rights movement and the Vietnam War.[668]

Critical legal studies school is the first movement in legal theory and legal scholarship inthe United States to have espoused a committed Left political stance andperspective. A left-wing academic trend of considerable breadth in the field of lawis in itself worthy of attention, but one which has assumed an organized form andhas already made a marked impact loudly demands careful scrutiny.[669]

Many critical legal studies scholars entered law school in those years and began to apply the ideas, theories, and philosophies of post modernity intellectual movements of the last half of the twentieth century to the study of law. They borrowed from such diverse fields as social theory, political philosophy, economics, and literary theory.[670]

Since then critical legal studies has steadily grown in influence and permanently changed the landscape of legal theory. Among noted critical legal studies theorists are Roberto Mangabeira Unger, Robert W. Gordon, Morton J. Horwitz, Duncan Kennedy, and Katharine A. MacKinnon.[671]

It was influenced to a great extent by European philosophers, such as nineteenth-century German social theorists Karl Marx, Friedrich Engels, and Max Weber; Max Horkheimer and Herbert Marcuse of the Frankfurt school of German social philosophy; the Italian Marxist Antonio Gramsci; and poststructuralist

[667]See J., Finnis, "On the Critical Legal Studies Movement" 30 American Journal of Jurisprudence, 1985

[668]See D., L. Gregory, "A Guide to Critical Legal Studies, by Mark Kelman, 1987" [book review] Duke L.J. 1138, 1987

[669]See J., Stick, Chartingthe Development of CriticalLegalStudies, 88 Columbia Law Review 409(1988)

[670]See https://www.law.cornell.edu/wex/critical_legal_theory. Accessed on 11th October 2016 at 2:47 PM

[671]See A., Altman, Critical Legal Studies: A Liberal Critique, Princeton, NJ: Princeton University Press 1990

French thinkers Michel Foucault and Jacques Derrida, representing respectively the fields of history and literary theory.[672]

Critical legal studies have borrowed heavily from Legal Realism, the school of legal thought that flourished in the 1920s and 1930s. Like critical legal studies scholars, legal realists rebelled against accepted legal theories of the day and urged more attention to the social context of the law.[673]

Critical legal studies movement was born out of frustration with, and in an effort to expose, the contradictions and incoherence of both liberal and conservative legal theories

14.4 Scope of Critical Legal Studies

The basic idea of critical legal studies is that the law is politics and it is not neutral or value free. Many in the critical legal studies movement want to overturn the hierarchical structures of domination in the modern society and many of them have focused on the law as a tool in achieving this goal. Critical legal studies movement is also a membership organization that seeks to advance its own cause and that of its members.[674]

Originally, it had three distinctive features. First, it was situated within legal, as opposed to political science or sociological scholarship. Secondly, it sought to tackle the injustices it identified in legal doctrine. Thirdly, it adopted an interdisciplinary approach, drawing on politics, philosophy, literary criticism, psychoanalysis, linguistics, and semiotics to expound its critique of law.[675]

14.5 Purpose of Critical Legal Studies

The primary purpose of critical legal theory, it is reasonable to assert, is to contest the universal rational foundation of law which, it maintains, clothes the law and legal system with a spurious legitimacy.

[672]See R. W., Bauman, Critical legal studies : a guide to the literature, Boulder, CO: Westview Press, 1996
[673]See D., Kennedy, A Critique of Adjudication , Cambridge, MA: Harvard University Press, 1997
[674]See C., Douzinas and A., Gearey, Critical Jurisprudence: The Political Philosophy of Justice, Hart Publishing, 2005
[675]See http://www.veryshortintroductions.com/view/10.1093/actrade/9780192806918.001.0001/actrade-9780192806918-chapter-6. Accessed on 11th October 2016 at 4:01 PM

Nor does critical legal theory accept law as a distinctive and discrete discipline. This view, it alleges, portrays the concept of law as autonomous and determinate independent from politics and morality which it can never be.

They seek to express claims of textual ambiguity and historical contingency in their own methods. Influenced by post-modernist developments in cultural studies, these critical scholars prefer episodic interventions to systematized theories.[676]

Some critical scholars press hard on a particular line of argument, and then shift away from it in order to avoid treating the argument itself as a kind of fetish or talisman. They also draw upon intellectual currents in literature, pop culture, social theory, history, and other fields to challenge the idea of the individual as a stable, coherent self, capable of universal reason and guided by general laws of nature.[677]

14.6 Basic Tenets of Critical Legal Studies

Although the critical legal studies like other schools and movements of jurisprudence has not produced a single, solid body of thought, several common themes can be generally traced in its adherents' works. These include:-

14.6.1 Legal Indeterminacy

Legal materials such as statutes and case law do not completely determine the outcome of legal disputes, or, to put it differently, the law may well impose many significant constraints on the adjudicators in the form of substantive rules, but, in the final analysis, this may often not be enough to bind them to come to a particular decision in a given particular case.[678] Quite predictably, once made, this claim has triggered many lively debates among jurists and legal philosophers, some of which continue to this day.[679]

[676]See https://cyber.harvard.edu/bridge/CriticalTheory/critical2.htm. Accessed on 11th October 2016

[677]See J.M., Balkin, "Ideology as Constraint: Andrew Altman, 'Critical Legal Studies: A Liberal Critique' (1990)" [book review], 43 Stan. L. Rev. 1133, 1991

[678]See A., Hunt, "The Theory of Critical Legal Studies," Oxford Journal of Legal Studies, Vol. 6, No. 1 (1986): 1-45, esp. 1, 5

[679]See D. W., Kennedy and W., Fisher, eds. The Canon of American Legal Thought, Princeton, NJ: Princeton University Press, 2006

14.6.2 Law is politics

This means that legal decisions are a form of political decision, but not that it is impossible to tell judicial and legislative acts apart. Rather, critical legal studies have argued that while the form may differ, both are based around the construction and maintenance of a form of social space.[680]

The argument takes aim at the positivist idea that law and politics can be entirely separated from one another. A more nuanced view has emerged more recently. This rejects the reductivism of 'all law is politics' and instead asserts that the two disciplines are mutually intertwined. There is no 'pure' law or politics, but rather the two forms work together and constantly shift between the two linguistic registers.[681]

14.6.3 Law tends to serve the interests of wealthy and powerful persons

This claim is often coupled with the legal realist argument that what the law says it does and what it actually tends to do are two different things. Many laws claim to have the aim of protecting the interests of the poor and the subaltern. In reality, they often serve the interests of the power elites.[682]

This, however, does not have to be the case, claim the critical legal studies scholars. There is nothing intrinsic to the idea of law that should make it into a vehicle of social injustice. It is just that the scale of the reform that needs to be undertaken to realize this objective is significantly greater than the mainstream legal discourse is ready to acknowledge.[683]

14.6.4 Legal materials are contradictory

Critical legal studies claim that legal materials are inherently contradictory. The structure of the positive legal order is based on a series of binary oppositions such as, for instance, the opposition between individualism and altruism or formal realisation i.e. preference for strict rules and equitable flexibility i.e. preference for broad standards.[684]

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[680]See J., Turley, "Hitchhiker's Guide to CLS, Unger, and Deep Thought". Northwestern University Law Review 81 (1987): 593-620,

[681]See E. S., Fruehwald, "Postmodern Legal Thought and Cognitive Science," 23 Ga. St. U.L. Rev. 375, 2006

[682]See D., Kennedy and K. E., Klare, "A Bibliography of Critical Legal Studies," Yale Law Journal, Vol. 94 (1984): 461.

[683]See D., Costas and P., Colin. Critical Legal Theory, London: Routledge, 2011.

[684]See U. R., Mangabeira, The Critical Legal Studies Movement. New York: Verso, 2015.

14.6.5 Autonomous individuals

The law often treats individual petitioners as having full agency vis-à-vis their opponents. They are able to make decisions based on reason that is detached from political, social, or economic constraints.[685]

Critical legal studies hold that individuals are tied to their communities, socio-economic class, gender, race, and other conditions of life such that they cease to be autonomous actors in the Kantian mode.[686]

Rather, their circumstances determine and therefore limit the choices presented to them. People are not "free"; they are instead determined in large part by social and political structures that surround them.[687]

14.7 Roberto Mangabeira Unger

Roberto Mangabeira Unger (born 24 March 1947) is a philosopher and politician.His work is seen to offer a vision of humanity and a program to empower individuals and change institutions.He has developed his views and positions across many fields, including social, political, and economic theory.[688]

In legal theory, he is best known by his work in the 1970s/80s while at Harvard Law School as part of the Critical Legal Studies movement, which is held to have helped disrupt the methodological consensus in American law schools.His political REVIEW QUESTIONS helped bring about democracy in Brazil, and culminated with his appointment as the Brazilian Minister of Strategic Affairs in 2007 and again in 2015.[689]

Unger viewed that transformation as taking place through an “internal development,” in which the ideal conflicts of law are exploited to transform the actual law bit by bit, first changing the law, then revising ideal conceptions in light of that change, and then working for more change.[690]

[685]See U. R., Mangabeira. Passion: An Essay on Personality. New York: Free Press, 1984, p. 47

[686]See E., Engle, Marxism, Liberalism, and Feminism: Leftist Legal Thought, New Delhi: Serials, 2010.

[687]See B., Amy, and A., Hunt. "What's Wrong with Rights"? Law and Inequality: A Journal of Theory and Practice 1990. 9: 1.

[688]See Rathbone, John Paul (3 October 2014). "Lunch with the FT: Roberto Mangabeira Unger", Financial Times

[689]See Smolin, Lee. "No Eternal Truths, Just Divine Advancements", Times Higher Education Supplement, 31 August 2007.

[690]See R. M., Unger, Law in Modern Society, Free Press, 1976.

Also, legal thought today is but a rationalization of existing rules and doctrines that make up contemporary arrangements. Unger argues this rationalizing legal analysis works to uncover what it sees as the latent principles existing in the law. It cannot rethink our social, economic, or political arrangements.[691]

Moreover, there is connection between law codes and arrangement of institutions. He explored the connection between law codes and the arrangement of social institutions. In this work he asked why modern societies have legal systems with distinctions between institutions, such as legislature and court, and has special caste of lawyers possessing a method of reasoning about social problems.[692]

Furthermore, social action reflects norms generated by the legal system, either because people internalize these norms or actual coercion compels them to do so. He argues that each area of social life is organized according to certain practices such as the market economy or property rights and codified into law; but at the same time, these codes are sets of ideal projected onto social life and meant to be enacted.[693]

14.8 Duncan Kennedy

Duncan Kennedy (born 1942) is the Carter Professor of General Jurisprudence at Harvard Law School and a founder of critical legal studies as movement and school of thought.[694] His publications have contributed to legal and social theory, the history of legal thought, legal semiotics, law and economics, contract law, and legal education.[695]

Kennedy's object of attention is not law per se but legal consciousness; that is, the "structure of categories, concepts, conventionally understood procedures, and conventionally given typical legal arguments" within which thinking about law occurs, supplemented by structures of subjective experience.[696]

[691]See R. M., Under, The Critical Legal Studies Movement, Harvard University Press, 1986.
[692]See R. M., Unger, What Should Legal Analysis Become?, Verso, 1996
[693]See R. M., Unger, Knowledge and Politics, Free Press, 1975.
[694]See http://hls.harvard.edu/faculty/directory/10469/Kennedy. Accessed on 12th October 2016 at 7:58 AM
[695]See Kennedy, Duncan M. Legal Education and the Reproduction of Hierarchy: A Polemic against the System, a Critical Edition (NYU Press 2004).
[696]See http://duncankennedy.net/legal_history/index.html#LC. Accessed on 12th October 2016 at 8:13 AM

Kennedy established that legal institutions and ideas are not simply "frameworks or contexts" for other developments but are constitutive of them. They are constitutive in particular when it comes to that other looming omnipresence of assumptive causality, economic activities.[697]

He also postulated that economic activities can't be understood as something autonomous in relation to a set of passive institutional and legal conceptual constraints, as the terms framework and context suggest. Legal institutions have a dynamic, or dialectical, or constitutive relationship to economic activities.[698]

Duncan Kennedy suggests this line in discussing the possibility of using moral theory to justify legal doctrine. Kennedy admits that, in the context of the fact situation of a particular case, opposing principles do not necessarily carry the same weight.[699] He analysed the role in the form and content of legal doctrine of what he characterizes as "individualist" and "altruist" ethical conception.

14.9 Professor Robert W. Gordon

A preeminent legal historian, prolific scholar, and gifted teacher, Professor Robert W. Gordon's expertise in American legal history, evidence, the legal profession, and law and globalization spans four decades, his influence on generations of lawyers and legal scholars incalculable.[700]

He has written extensively on contract law, legal philosophy, and on the history and current ethics and practices of the organized bar. Professor Gordon is known for his key works, The Legacy of Oliver Wendell Holmes (1992), and StorieCritiche del Diritto (Critical Legal Histories) (1995), and is editor of Law, Society, and History: Themes in the Legal Sociology and Legal History of Lawrence M. Friedman, which examines and celebrates the scholarship of Stanford's Marion Rice Kirkwood Professor of Law Lawrence Friedman.[701]

Law and society are separate social categories, each describable independently from the other but related to each other through various mechanisms of causal linkage. Society is the primary realm of social

[697]See Catharine Wells, "Thoughts on Duncan Kennedy's Third Globalization," Comparative Law Review, 3, 1 (2012), 1.1 at 1-2, 7, 9.

[698] See Catharine Wells, "Thoughts on Duncan Kennedy's Third Globalization," Comparative Law Review, 3, 1 (2012), 1.1 at 1-2, 7, 9.

[699]See Kennedy, Duncan M. The Rise & Fall of Classical Legal Thought: With a New Preface by the Author, "Thirty Years Later" (Beard Books 2006).

[700]See https://law.stanford.edu/directory/robert-w-gordon/. Accessed on 12th October 2016 at 8:22 AM

[701]See https://law.stanford.edu/directory/robert-w-gordon/. Accessed on 12th October 2016 at 8:22 AM

experience[702]. It is real life: What's immediately and truly important to people, like desire and its fulfilment or frustration, goes on there. This realm is the realm of production, commerce, the market, the family. Law or the legal system, on the other hand, is a distinctly secondary body of phenomena.

Societies have needs. Social needs may be universal-needs such as survival, stability, maintenance of social order, conflict management, organization of production, security against foreign enemies, allocation of scarce resources, or preservation of continuity in the midst of change or they may be specific to a given stage of social or economic development. One key need is the need to develop along the appropriate social evolutionary path.[703]

Legal systems should be described and explained in terms of their functional responsiveness to social needs. Progressive improvements in legal science have tended to clarify legal doctrine, making it ever more certain and predictable, as well as more adaptable to social needs. Therefore the legal system adapts to changing social needs.[704]

14.10 Conclusion



In above chapter we have learnt that critical legal studies school is a movement in legal theory and a network of leftist legal scholars that emerged in the 1970s in the United States. It was committed to shaping society based on a vision of human personality devoid of the hidden interests and class domination that critical legal studies scholars argued are at the root of liberal legal institutions in the West.

Critical legal studies believe that logic and structure attributed to the law grow out of the power relationships of the society. The law exists to support the interests of the party or class that forms it and is merely a collection of beliefs and prejudices that legitimize the injustices of society. The wealthy and the powerful use the law as an instrument for oppression in order to maintain their place in hierarchy.[705] Within certain limits, critical legal

[702]See Gordon, Robert W., "Critical Legal Histories" (1984). Faculty Scholarship SeriesPaper 1368. htp://digitalcommons.law.yale.edu/fss_papers/1368

[703]Ibid,

[704] See Gordon, Robert W., "Critical Legal Histories" (1984). Faculty Scholarship Series.Paper 1368. htp://digitalcommons.law.yale.edu/fss_papers/1368

[705]See J., Finnis, "On the Critical Legal Studies Movement" 30 American Journal of Jurisprudence, 1985

studies movement has delivered a coherent legal discourse about social injustice and the role played by the legal community.

The basic idea of critical legal studies is that the law is politics and it is not neutral or value free. Many in the critical legal studies movement want to overturn the hierarchical structures of domination in the modern society and many of them have focused on the law as a tool in achieving this goal. Critical legal studies movement is also a membership organization that seeks to advance its own cause and that of its members. Originally, it had three distinctive features. First, it was situated within legal, as opposed to political science or sociological scholarship. Secondly, it sought to tackle the injustices it identified in legal doctrine. Thirdly, it adopted an interdisciplinary approach, drawing on politics, philosophy, literary criticism, psychoanalysis, linguistics, and semiotics to expound its critique of law.

The primary purpose of critical legal theory, it is reasonable to assert, is to contest the universal rational foundation of law which, it maintains, clothes the law and legal system with a spurious legitimacy.

Unger explored the connection between law codes and the arrangement of social institutions. In this work he asked why modern societies have legal systems with distinctions between institutions, such as legislature and court, and has special caste of lawyers possessing a method of reasoning about social problems. Kennedy's object of attention is not law per se but legal consciousness; that is, the "structure of categories, concepts, conventionally understood procedures, and conventionally given typical legal arguments" within which thinking about law occurs, supplemented by structures of subjective experience. Professor Robert Gordon postulates that law and society are separate social categories, each describable independently from the other but related to each other through various mechanisms of causal linkage.

Society is the primary realm of social experience. It is real life: What's immediately and truly important to people, like desire and its fulfilment or frustration, goes on there. This realm is the realm of production, commerce, the market, the family. Law or the legal system, on the other hand, is a distinctly secondary body of phenomena.

14.11 Review Questions



1. What are critical legal studies as movement of jurisprudence? How did develop?
2. Describe the themes of the critical legal studies as school in jurisprudence.
3. Discuss contribution of Roberto Mangabeira Unger, Prof Robert Gordon and Duncan Kennedy in the development of critical legal studies.
4. Evaluate the relevance of the critical legal studies in the study of jurisprudence.
5. Describe the nature, purpose and scope of critical legal studies as a movement in jurisprudence.

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CHAPTER FIFTEEN

FEMINIST JURISPRUDENCE

15.0 Introduction

Feminist jurisprudence is a philosophy of law based on the political, economic, and social equality of sexes. As a field of legal scholarship, feminist jurisprudence began in 1960s. It now holds a significant place in many legal systems and legal thought and influences many debates on sexual and domestic violence, inequality in the workplace, and gender based discrimination.

15.1 Objectives



At the end of this chapter students should have:-

- Acquired basic knowledge of concepts such as feminist jurisprudence, law according to feminists.
- Acquainted with understanding of nature, purpose, scope relevance and characteristics of feminist jurisprudence
- Acquainted with ability to examine and understand the major exponents of feminist jurisprudence and their contribution or ideas in the study of jurisprudence.
- Developed competency to examine the reflection of the feminist ideas in the current legal systems in the world.

15.2 Feminist Jurisprudence

Feminist jurisprudence is a branch of jurisprudence that examines the relationship between women and law, including the history of legal and social biases against women, the elimination of those biases in modern law, and the enhancement of women's legal rights and recognition in society.[706]

Feminist jurisprudence is the study of the construction and workings of the law from perspectives which foreground the implications of the law for women and women's lives.[707] This study includes law as a

[706]Black's Law Dictionary, 8th edition

[707]See Baer, Judith A, Our Lives Before the Law: Constructing a Feminist Jurisprudence (Princeton, NJ: Princeton University Press, 1999)

theoretical enterprise as well its practical and concrete effects in women's lives. It includes law as an academic discipline, and thus incorporates concerns regarding pedagogy and the influence of teachers.

15.3 Nature of Feminist Jurisprudence

Feminist jurisprudence seeks to analyse and redress more traditional legal theory and practice.[708] It focuses on the ways in which law has been structured that deny the experiences and needs of women.

Feminist jurisprudence claims that patriarchy infuses the legal system and all its workings, and that this is an unacceptable state of affairs.[709] It is not politically neutral, but a normative approach, it challenges basic legal categories and concepts rather than analysing them as given.

Feminist jurisprudence asks what is implied in traditional categories, distinctions, or concepts and rejects them if they imply the subordination of women.[710] It sees the workings of law as thoroughly permeated by political and moral judgments about the worth of women and how women should be treated.

Feminist jurisprudence comprises what have come to be known as 'women and law' studies which generally promote the visibility of women in jurisprudence. These studies may include documentation of law's discrimination against women, analyses of law's male bias against women, and reviews of all liberal jurisprudence which omits reference to gender.[711]

15.4 Growth and Development of Feminist Jurisprudence

The first recorded use of the phrase "feminist jurisprudence" occurred in 1978 at a conference celebrating the twenty-fifth anniversary of women graduates of the Harvard Law School. Professor Ann Scales, then a Harvard student, moderated a panel of feminist lawyers, legal educators, and judges. The question for debate was whether there was in fact, or should be, such a thing as a feminist jurisprudence.

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[708]See Cornell, Drucilla, Beyond Accommodation: Ethical Feminism, Deconstruction and the Law (New York: Routledge, 1990)

[709]See Fellows, Mary Louise and Beverly Balos, "Guilty of the Crime of Trust: Nonstranger Rape" 75 Minnesota Law Review 599 (1991)

[710]See MacKinnon, Catherine, Feminism Unmodified: Discourses on Life and Law (Cambridge: Harvard University Press, 1987)

[711]See https://www.rep.routledge.com/articles/feminist-jurisprudence. Accessed on 12th October 2016 at 10:30 AM

Theories about women, however, are not always grounded on feminist method. Theories about women, even if developed by a woman, are not necessarily based on women's experience.[712] For example, women lawprofessors are confined to an academic environment that is particularly male.[713] There is no guarantee that those of us who focus our scholarship on legal issues of concern to women will necessarily build theories based on women's experience.

15.5 Themes of Feminist Jurisprudence

Feminists believe that history was written from a male point of view and does not reflect women's role in making history and structuring society. Male-written history has created a bias in the concepts of human nature, gender potential, and social arrangements. The language, logic, and structure of the law are male-created and reinforce male values.[714]

Feminist jurisprudence challenges the belief that the biological make-up of men and women is so different that certain behaviour can be attributed on the basis of sex. Gender, feminists say, is created socially, not biologically.[715] Sex determines such matters as physical appearance and reproductive capacity, but not psychological, moral, or social traits.[716]

Feminist Jurisprudence argues that we must look at the norms embedded in our legal system and rethink the law. It is about being inclusive of women, and of all people who differ from the norms of the law as it is today.[717] The endeavour will necessarily shake up established relations between family, the workplace and the state. Lawyers, judges, and legislators should get ready for the changes.[718]

[712]See See C. Heilbrun, Reinventing Womanhood (1979).

[713]See Chused, The Hiringand Retention of Minorities and Women on American Law School Faculties,137U. PA. L. REV. 537 (1988)

[714]See Abrams, K. and H. Keren, 2010. “Law and Emotion,” Minnesota Law Review, 94: 1997–2074.

[715]See Ackerly, B.A., 2008. Universal Human Rights in a World of Difference, Cambridge: Cambridge University Press.

[716]See Cornell, D., 1995. The Imaginary Domain, New York: Routledge.

[717]See Juergens, Ann, "Feminist Jurisprudence: Why Law Must Consider Women's Perspectives" (1991). Faculty Scholarship, Paper 111

[718]See Bartlett, K., 1990. “Feminist Legal Methods,” Harvard Law Review, 1039(4): 829–888.

Feminist Jurisprudence is not just for women. It is not about replacing all the male values with female values.[719] Feminist Jurisprudence points out that what is neutral or natural for one person is a distortion for another person.[720]

Feminist philosophy of law identifies the pervasive influence of patriarchy on legal structures, demonstrates its effects on the material condition of women and girls, and develops reforms to correct gender injustice, exploitation, or restriction.[721]

To these ends, feminist philosophy of law applies insights from feminist epistemology, relational metaphysics, feminist political theory, and other developments in feminist philosophy to understand how legal institutions enforce dominant masculinity norms.[722]

Contemporary feminist philosophy of law also draws from diverse scholarly perspectives such as international human rights theory, postcolonial theory, critical legal studies, critical race theory, queer theory, and disability studies.[723]

15.6 Schools of Thoughts in Feminist Jurisprudence

Though feminists share common commitments to equality between men and women, feminist jurisprudence is not uniform. There are three major schools of thought within feminist jurisprudence.

15.6.1 Traditional or Liberal Feminism

This is the variety of feminism that works within the structure of mainstream society to integrate women into that structure. Its roots stretch back to the social contract theory of government. Traditional, or liberal,

[719]See Chen, M.A., 2011. "Recognizing Domestic Workers, Regulating Domestic Work: Conceptual, Measurement, and Regulatory Challenges," Canadian Journal of Women and the Law, 23(1): 167–184.
[720]Ibid
[721]See http://plato.stanford.edu/entries/feminism-law/. accessed on 12th October 2016 at 10:48 AM
[722]See Dickenson, D., 2007. Property in the Body: Feminist Perspectives, Cambridge, UK: Cambridge University Press.
[723]See Engle, K., 2005. "International Human Rights and Feminisms: When Discourses Keep Meeting," Ch. 3 in D. Buss and A. Manji (eds.), International Law: Modern Feminist Approaches, Oxford and Portland: Hart Publishing.

feminism asserts that women are just as rational as men and therefore should have equal opportunity to make their own choices.[724]

Liberal feminists challenge the assumption of male authority and seek to erase gender based distinctions recognized by law thus enabling women to compete in the marketplace.[725]

This is because law is a neutral, rational and fair institution which defends individual liberty and treats people equally.The objective is to give women genuine, as opposed to nominal, equal rights or, where their special social situation demands it, special rights.[726]

15.6.2 Cultural Feminism

Cultural feminism refers to a philosophy that men and women have different approaches to the world around them, and that greater value should be placed on the way women approach the world.[727] In some cases, cultural feminism argues that a woman's way of looking at the world is actually superior to men's. This perspective aims to unite all women, regardless of ethnicity, race, class or age.[728]

Cultural feminism focuses on the differences between men and women and celebrates those differences.[729] Following the research of psychologist Carol Gilligan, this group of thinkers asserts that women emphasize the importance of relationships, contexts, and reconciliation of conflicting interpersonal positions, whereas men emphasize abstract principles of rights and logic.[730]

[724]See Martha Minow, Making All the Difference: Inclusion, Exclusion, and American Law (Cornell, 1991)
[725]See https://www.law.cornell.edu/wex/feminist_jurisprudence. Accessed on 12th October 2016 at 10:05 AM
[726]See https://www.rep.routledge.com/articles/feminist-jurisprudence. Accessed on 12th October 2016 at 10:30 AM
[727]See Fineman, M., 2004. The Autonomy Myth, New York: The New Press.
[728]See Fineman, M. and T. Dougherty (eds.), 2005. Feminism Confronts Homo Economicus, Ithaca: Cornell University Press.
[729]See Patricia Williams, The Alchemy of Race and Rights (Harvard, 1992)
[730]See https://www.law.cornell.edu/wex/feminist_jurisprudence. Accessed on 12th October 2016 at 10:05 AM

The goal of this school is to give equal recognition to women's moral voice of caring and communal values.[731]It is an ideology of a "female nature" or "female essence" that attempts to revalidate what cultural feminists consider undervalued female attributes. It is also a theory that commends the difference of women from men.[732]

The movement is about finding ways to make the female essence a more appreciated part of society and using women's special gifts to contribute positively to the world.[733] The belief includes the idea that women in leadership positions would be more likely than men to cultivate a more peaceful, less war-torn world.[734]

15.6.3 Radical Feminism

This term refers to the feminist movement that sprung out of the civil rights and peace movements in 1967-1968.[735] The reason this group gets the "radical" label is that they view the oppression of women as the most fundamental form of oppression, one that cuts across boundaries of race, culture, and economic class.[736] This is a movement intent on social change, change of rather revolutionary proportions, in fact

Radical or dominant feminism focuses on inequality. It asserts that men, as a class, have dominated women as a class, creating gender inequality.[737] For radical feminists gender is a question of power.[738]

Radical feminists urge us to abandon traditional approaches that take maleness as their reference point.[739] They argue that sexual equality must be constructed on the basis of woman's difference from man and not be a mere accommodation of that difference.[740]

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[731]See Gould, C., 2003. "Women's Human Rights & the U.S. Constitution," in S. Schwarwenbach and P. Smith (eds.), Women and the United States Constitution, New York: Columbia University Press, pp. 197–219.

[732]See Funk, N. and M. Mueller (eds.), 1993, Gender Politics & Post-Communism, New York: Routledge

[733]See Frug, M.J., 1992. "Sexual Equality and Sexual Difference in American Law," New England Law Review, 26: 665–682

[734]See http://study.com/academy/lesson/cultural-feminism-definition-lesson-quiz.html. Accessed on 12th October 2016 at 10:41 AM

[735]See Jain, D., 2005. Women, Development & the United Nations, Bloomington: Indiana University Press.

[736]See http://www.uah.edu/woolf/feminism_kinds.htm. Accessed on 12th October 2016 at 10:43 AM

[737]See Mary Joe Frug, Postmodern Legal Feminism (Routledge, 1992)

[738]See https://www.law.cornell.edu/wex/feminist_jurisprudence. Accessed on 12th October 2016 at 10:05 AM

Radical feminism points out that our society is based on an understanding of the world through the eyes of men and not women.[741] Radical feminism believes that the oppression of women goes so deep, that it will take a significant overhaul of existing society to make the world fairer to women.[742]

15.7 Notable Scholars of Feminist Jurisprudence

There is a good number of scholars who championed for the feminist jurisprudence. They are divided into radicalism, liberalism and culturalism. Some of them are hereby described.

15.7.1 Martha Albertson Fineman

Martha Albertson Fineman (born 1943) is an American jurist and legal theorist, known for her work in feminist legal theory and family law. She is Robert W. Woodruff Professor of Law at Emory University School of Law.

Fineman was previously the first holder of the Dorothea S. Clarke Professorship of Feminist Jurisprudence at Cornell Law School and held the Maurice T. Moore Professorship at Columbia Law School. She is an affiliated scholar of the Center for American Progress and has been described as a "close friend of the Obama administration.[743]

Vulnerability is and should be understood to be universal and constant, inherent in the human condition. The vulnerability approach is an alternative to traditional equal protection analysis; it represents a post-identity inquiry in that it is not focused only on discrimination against defined groups, but concerned with privilege and favour conferred on limited segments of the population by the state and broader society through their institutions.[744]

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[739]See Li, X., 1995. "Gender Inequality in China & Cultural Relativism," in M. Nussbaum and J. Glover (eds.) 1995, pp. 407–425.

[740]See Kellerman, B. and D. Rhode (eds.), 2007. Women and Leadership, New York: Jossey-Bass Pub.

[741]See Mayeri, S., 2011. Reasoning from Race: Feminism, Law, and the Civil Rights Revolution, Cambridge: Harvard University Press.

[742]See http://study.com/academy/lesson/cultural-feminism-definition-lesson-quiz.html. Accessed on 12th October 2016 at 10:41 AM

[743]See https://en.wikipedia.org/wiki/Martha_Albertson_Fineman. Accessed on 12th October 2016 at 11:10 AM

[744]See M. A., Fineman, The Vulnerable Subject: Anchoring Equality in the Human Condition (Princeton University Press, 2013)

As such, vulnerability analysis concentrates on the institutions and structures our society has and will establish to manage our common vulnerabilities. This approach has the potential to move us beyond the stifling confines of current discrimination-based models toward a more substantive vision of equality.[745]

The current anti-discrimination doctrine assumes that discrimination is the discoverable and correctable exception to an otherwise just and fair system, characterized by values such as individual liberty and autonomy.[746]

Fineman raises the question that if our bodily fragility, material needs, and the possibility of messy dependency they signify cannot be ignored in life, how can they be absent in our theories about equality, society, politics and law?'[747] Moving beyond gender and other identity categories, Fineman uses the concept of vulnerability to 'define the very meaning of what it means to be human.

15.7.2 Mary Joe Frug

Mary Joe Frug (1941–1991) was a professor at New England School of Law from 1981 to 1991. She is considered a forerunner of legal postmodern feminist theory, and was a renowned postmodernist and feminist legal scholar. Much of her work was collected in the posthumously-published book Postmodern Legal Feminism. She authored the casebook Women and the Law.[748]

The liberal equality doctrine is often understood as an engine of liberation with respect to sex-specific rules.[749] This imagery suggests the repressive function of law, a function that feminists have inventively sought to appropriate and exploit through critical scholarship, litigation, and legislative campaigns. Therefore legal discourse should be recognized as a site of political struggle over sex differences.

Because sex differences are semiotic, that is, constituted by a system of signs that we produce and interpret each of us inescapably produces herself within the gender meaning system, although the meaning

[745]See M. A., Fineman, The Illusion of Equality: The Rhetoric and Reality of Divorce Reform (University of Chicago Press, 1991).

[746]See M. A, Fineman and A., Grear, Vulnerability: Reflections on a New Ethical Foundation for Law and Politics (Ashgate, 2014)

[747]See M. A., Fineman, The Autonomy Myth: A Theory of Dependency (The New Press, 2004)

[748]See https://en.wikipedia.org/wiki/Mary_Joe_Frug. Accessed on 12th October 2016 at 11:32 AM

[749]See See Catharine A. MacKinnon, Feminism, Marxism, Method, and the State: An Agenda for Theory, 7 SIGNS: J. WOMEN CULTURE &SOC'y 515 (1982)

of gender is indeterminate or un-decidable. The dilemma of difference, which the liberal equality guarantee seeks to avoid through neutrality, is unavoidable.[750]

Legal rhetoric should not be dominated by masculine pronouns or by stereotypically masculine imagery; legal feminists have conceded the significance of style. For instance Figures of speech invite ideas to break out of the linear argument of a text; they challenge singular, dominant interpretations.[751]

15.7.3 Catharine Alice MacKinnon

Catharine Alice MacKinnon (born October 7, 1946) is an American radical feminist, scholar, lawyer, teacher and activist.[752] Catharine A. MacKinnon is a lawyer, teacher, writer, and activist on sex equality issues domestically and internationally. She is Elizabeth A. Long Professor of Law at the University of Michigan and from 2008-2012 was the first Special Gender Adviser to the Prosecutor of the International Criminal Court.[753]

She postulates that feminism is an approach to society from the standpoint of women, a standpoint defined by concrete reality in which all women participate to one degree or another. This is not to say that all women are the same or that all women in all cultures and across history have been in an identical position.[754]

She argues that working-class movements and the left undervalue women's work and concerns, neglect the role of feelings and beliefs in a focus on institutional and material change, denigrate women in practice and in everyday life, and in general fail to distinguish themselves from any other ideology or group dominated by male interests, where justice for women is concerned.[755]

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[750]See Mary Joe Frug, A Postmodern Feminist Legal Manifesto (An Unfinished Draft), New England School of Law, 1981-1991.

[751]Ibid

[752]See https://en.wikipedia.org/wiki/Catharine_MacKinnon. Accessed on 11:34 AM

[753]See http://www.austlii.edu.au/au/journals/LegEdRev/1989/7.html. Accessed on 12th October at 11:59 AM

[754]See C MacKinnon, Feminism Unmodified: Discourses on Life andLaw (Cambridge: Harvard University Press, 1987).

[755]See CA MacKinnon, Feminism, Marxism, Method and the State: Toward Feminist Jurispudence (1983) 8 Signs: J of Women in Culture and Soc'y 635. See generally C Boyle, Sexual Assault (Toronto: Carswell, 1984).

She opines that men have written the laws from their point of view based on their experiences, which have not included women's experiences from the point of view of women.[756] This is a relatively obvious observation based on the not terribly controversial notion that experience influences as well as grounds perspective. The result, though, is that law is written as if social equality on the basis of sex can be presumed to exist where it does not.

It is also written as if the social inequality between the sexes that is socially imposed is also biologically fixed and must be legally reflected for the law to have a legitimate relation to social reality. For law to be authoritative, this view holds, it must reflect social life. Since social life is comprised of real acts of male power, law must reflect the male experience of power to be legitimate. Hierarchy, including gender hierarchy, becomes a legitimating norm. Dominance in life becomes dominance in law, both in substance and in form.[757]

Law is usually taught as if the norm of respect for precedent is neutral. All precedents have, in fact, been constructed in a system which excludes women and is based on the silence of women. Women have been excluded from legal education. The fact that there are so few women doing it means that the women doing it are tokens.[758] They experience a funny combination of presence and absence, an exaggerated attention combined with nearly total invisibility, meaning one is seldom listened to but always centre stage.

15.8 Conclusion



In above chapter we have learnt that feminist jurisprudence is the study of the construction and workings of the law from perspectives which foreground the implications of the law for women and women's lives. This study includes law as a theoretical enterprise as well its practical and concrete effects in women's lives. It includes law as an academic discipline, and thus incorporates concerns regarding pedagogy and the influence of teachers.

Feminist jurisprudence seeks to analyse and redress more traditional legal theory and

[756]See C MacKinnon, Sexual Harassment of Working Women: A Case of Sex Discrimination (New Haven: Yale University Press, 1979).

[757]See DEH Russell & N Howell, The Prevalence of Rape in the United States Revisited (1983) 8 Signs: J of Women in Culture and Soc'y688 .

[758]See CA MacKinnon, Toward Feminist Jurisprudence (1983) 34 Stan L Rev 703 review of A Jones, Women Who Kill (New York: Holt, Rinehart & Winston, 1980).

practice. It focuses on the ways in which law has been structured that deny the experiences and needs of women. Feminist Jurisprudence argues that we must look at the norms embedded in our legal system and rethink the law. It is about being inclusive of women, and of all people who differ from the norms of the law as it is today. The endeavour will necessarily shake up established relations between family, the workplace and the state. Lawyers, judges, and legislators should get ready for the changes. Though feminists share common commitments to equality between men and women, feminist jurisprudence is not uniform.

There are three major schools of thought within feminist jurisprudence. Liberal feminists challenge the assumption of male authority and seek to erase gender based distinctions recognized by law thus enabling women to compete in the marketplace. Cultural feminism focuses on the differences between men and women and celebrates those differences. This perspective aims to unite all women, regardless of ethnicity, race, class or age. Radical or dominant feminism focuses on inequality. It asserts that men, as a class, have dominated women as a class, creating gender inequality. For radical feminists gender is a question of power.

Fineman argues that the current anti-discrimination doctrine assumes that discrimination is the discoverable and correctable exception to an otherwise just and fair system, characterized by values such as individual liberty and autonomy. Frug opines that legal rhetoric should not be dominated by masculine pronouns or by stereotypically masculine imagery; legal feminists have conceded the significance of style. For instance, figures of speech invite ideas to break out of the linear argument of a text; they challenge singular, dominant interpretations. Mackinnon postulates that feminism is an approach to society from the standpoint of women, a standpoint defined by concrete reality in which all women participate to one degree or another. This is not to say that all women are the same or that all women in all cultures and across history have been in an identical position.

15.9 Review Questions



1. Define feminist jurisprudence. Account for its growth and development.
2. Differentiate radical, cultural and liberal feminism
3. Describe the nature, scope and purpose of feminist jurisprudence
4. Discuss the relevance of feminist jurisprudence in the modern democratic states.
5. To what extent the feminist legal philosophy is reflected in the legal system of Tanzania.

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CHAPTER SIXTEEN

JURIMETRICS

16.0 Introduction

Jurimetrics, the empirical study of the law, has never really come into existence. Although, given the way in which society has developed during the information age, it could have been expected that jurimetrics would become an important discipline, until now it has not conquered much ground in the universities or outside. In this chapter, some elements of the history of jurimetrics are presented as well as the academic and practical potential of this discipline. Finally, an attempt is made to explain the slow development of jurimetrics and a possible future perspective is given.

16.1 Objectives



At the end of this chapter students should have:-

- Acquired basic knowledge of concepts such as jurimetrics.
- Acquainted with understanding of nature, purpose, scope relevance and characteristics of jurimetrics.
- Acquainted with ability to examine and understand the growth and development of jurimetrics.
- Developed competency to examine the reflection of the jurimetrical ideas in the current legal systems in the world.

16.2 Jurimetrics

Jurimetrics is the application of quantitative methods, and often especially statistics to law.[759] The term jurimetrics has been suggested, and is gaining some use, as a designation for the activities involving scientific investigation of legal problems.[760]

Franken defined jurimetrics as 'the application of quantitative methods to legal problems'.[761] Franken did not agree with the behavioural, positivist approach as proposed by Loevinger, but would only accept

[759] See Garner, Bryan A. (2001). "jurimetrics". A Dictionary of Modern Legal Usage p. 488

[760] See Loevinger, Jurimetrics-The Next Step Forward, 33 MINN. L. Rav. 455 (x949)

[761] See Franken H., Maat en regel (Arnhem: Gouda Quint 1975).

quantitative methods if applied on a theoretical basis with explicit ethical and political principles. He proposed cybernetic systems theory as candidate for this.

De Mulder in 1984 equated 'jurimetrics' to 'the empirical legal science', which should be concerned with the world of experience.[762] He agreed with Loevinger that there are strong similarities between jurimetrics and econometrics, the scientific approach of economic phenomena. Lawyers, unfortunately, are not familiar with quantitative approaches and cannot build upon a tradition of mathematical models. This approach has had to be developed from the start.[763]

Therefore generally jurimetrics is the empirical study of the form, the meaning and the pragmatics of demands and authorisations issuing from state organisations with the aid of mathematical models and using methodological individualism as the basic paradigm for the explanation and prediction of human behaviour.

The distinction between jurisprudence and jurimetrics is that jurisprudence is concerned with the function of law and the analysis of general juristic concepts whereas jurimetrics is concerned with the quantitative analysis of judicial behaviour, the application of information theory to legal expression, and the retrieval of legal data by electronic and mechanical means.[764]

Jurimetrics is an attempt to utilize the method of science in the field of law. It is stated that data retrieval is one of the most important functions performed by lawyers, and jurimetrics involves the use of electronic computers for the storage and retrieval of legal data.

16.3 History of Jurimetrics

Although the effect of science on law has a long history, modern developments date only to the second half of the twentieth century. Precipitating the rise of the contemporary legal practice which relies heavily on computers to research relevant law and, in some cases, to analyse evidence was an emphasis on logical reasoning

[762]See De Mulder R.V., Een model voorjuridischeinformatica [A Model for the application of computer science to law], with a CONCLUSION in English (Lelystad: Vermande 1984) 239.

[763]See Professor of Computers and Law, Centre for Computers and Law, Erasmus University Rotterdam, The Netherlands.

[764]See http://connection.ebscohost.com/c/articles/59245670/jurimetrics-methodology-legal-inquiry. Accessed on 13th October 2016 at 8:04 AM

The term was coined in 1949 by Lee Loevinger in his article "Jurimetrics: The Next Step Forward". It was the American Lee Loevinger who launched the term 'jurimetrics'. He stressed the importance of scientific and therefore statistical methods for lawyers. He saw a number of possibilities for using these applications in the law.[765]

Loevinger contended that knowledge about the law could be obtained by observation, rather than through speculation. 'Jurimetrics promises to cut windows in the house of law, so that those inside can see out, and to cut doors, so that those outside can get in.[766]

Loevinger's willingness to apply scientific methods to the law did not receive undivided support. In particular, his interpretation of scientific was criticised because it made no distinction between the activities of practising lawyers and those of academic researchers, as long as their work was of a quantitative nature. The quantitative approach became some headway in the United States in the 1960s and 1970s, but later appeared to go out of fashion.[767]

The possibilities for applying jurimetrics are diverse, from analyses of the frequency of proceedings to the development of models to support decision making. Jurimetrics can be considered from different perspectives depending on one's focus.[768]

16.4 Scope of Jurimetrics

Jurimetrics is concerned with such matters as the quantitative analysis of judicial behaviour, the application of communication and information theory to legal expression, the use of mathematical logic in law, the retrieval of legal data by electronic and mechanical means, and the formulation of a calculus of legal predictability.[769]

[765]See Loevinger L., "Jurimetrics, the next step forward" (1949) Minn. Law Review 455.
[766]Ibid, p. 490
[767]See Kuhn T.S., The Structure of scientific revolutions (Chicago and London: University of Chicago Press 1970).
[768]See Meckling W. and Jensen M., "Specific and general knowledge and organizational structure", in M. Jensen (ed.), Foundations of organizational strategy (Cambridge, Mass: Harvard University Press 1998)
[769]See Loevinger, Jurimetrics: Science and Prediction in the Field of Law, 46 id. 255 (ig6x)

Jurimetrics is an effort to utilize the methods of science in the field of law. The conclusions of jurimetrics are testable. Jurimetrics investigates methods of inquiry.[770]Jurimetrics involves the utilization ofelectronic computers for the storage and retrieval of legal data.

Jurimetrics examines a wide range of interrelated scientific and legal topics. It covers the influence on law of the so-called hard sciences as well as the social sciences, disciplines such as engineering and communications, methodologies such as symbolic logic and statistics, and the use of technology in law practice, legislation, and adjudication.[771]

Henceforth topics range from the state of the art in DNA evidence to experimental research on jury decision making. Also concerned with the regulation of science and technology, Jurimetrics examines cutting edge issues such as electronic security and copyright law in the age of the internet.[772]

16.5 Importance of Jurimetrics

Jurimetrics touches one of the principal aspects of data retrieval in the law is that of finding applicable, analogous, or relevant precedential authority in the reported cases for determination of some current question.[773]

This is due to the fact that it is becoming increasingly difficult to search for and find the relevant authority in the enlarging bulk of all reported cases; and as these difficulty increases, so does impatience and dissatisfaction with the system.[774]

Also, jurimetrics facilitates a large part of the formal professional education of the lawyer consists of training and exercise in the analysis ofproblems, the use of a legal vocabulary, and the use of legal index systems in orderto perform this task.[775]

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[770]See Johnson, Jurimetrics and the Association of American Law Schools, x4 J. LEGAL. ED. 385 (x962)

[771]See Computer Power and Legal Reasoning, 1986. American Bar Association Law Practice Management (September).

[772]See Jacob, Bernard E. "Ancient Rhetoric, Modern Legal Thought, and Politics: A Review Essay on the Translation of Viehweg's 'Topics and Law'." 1995. Northwestern University Law Review 89 (summer).

[773] see Kehl, Horty, Bacon & Mitchell, An Information Retrieval Language for Legal Studies, 4 CosnIuMCA'boNsoFTa ACM (Association for Computing Machinery) 380 (xg6i).

[774]See Kent &Barhydt, Compromise-A Key to Documentation, Datamation, Oct. 1961, p. 26 et seq

This is done through the system utilizes a code dictionary in which terms and phrases are correlated to generic concepts and which also acts as a thesaurus of terms. The code dictionary is on punch cards so that abstracts and questions can be quickly and automatically checked against the dictionary.[776]

Moreover, jurimetrics enables the existing conceptual framework of the law itself is used for storage. In storing data, legal material is recorded in its conventional form on magnetic tape except that it is preceded by the appropriate code number or numbers.[777]

Then, the system of storage certainly has a flexibility that exceeds any conventional index; permits searches for specific words, generic concepts, or both simultaneously; and provides for specificity or generality at almost any level of abstraction.[778]

Therefore jurimetrics originated and played role in the use of computers in law practice began to revolutionize the areas of legal research, evidence analysis, and data management.[779]

16.6 Elements of Jurimetrics

Jurimetrics is built within three main elements. These elements do define the scope, nature and study of jurimetrics. They define what jurimetrics is all about. They are hereunder described:-

16.6.1 Empirical study of legal phenomena

Jurimetrics involves empirical study of various legal situations or events. The legal phenomena are studies empirically within the scope of jurimetrics. Hence the object of empiricism in law is to investigate legal texts because spirit of the law is within its texts.[780]

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[775]See Horty, Experience with the Application of Electronic Data Processing Systems in General Law, 6oD M.U.L.L. 158 (xg6o). 26 Horty, The "Key

[776]See Jurimetrics." West's Encyclopaedia of American Law. . Encyclopedia.com. 13 Oct. 2016 <http://www.encyclopedia.com>.

[777]See Horty, The "Key Words in Combination" Approach, 62M M.U.L.L. 54, 58 (1962).

[778]See Melton &Bensing, Searching Legal Literature Electronically: Results of a Test Program, 45 MINN. L, RFv. 299 (s96o);

[779]See http://www.encyclopedia.com/law/encyclopedias-almanacs-transcripts-and-maps/jurimetrics. Accessed on 13th October 2016 at 8:01 AM

[780]See Brickley J., Smith C. Jr. and Zimmerman J., Managerial Economics and Organisational Architecture (Boston: McGraw-Hill 2007).

The legal texts can be analysed through various forms. They can be analysed in their form context, meaning and effect as well as how and why the legal texts came into existence. This study involves why the use of legal texts, how the legal texts are used and what the legal texts do mean so as to make proper and critical analysis of the legal phenomena.

16.6.2 With aid of mathematical models

Also when the law is studied empirically that means it has to be studied with aid of mathematical models. Mathematical models usually help critical and analytical understanding of the legal phenomenon as statistical issues. This study of law vide mathematical models is achieved in jurimetrics.[781]

Jurimetrics uses model building approach to legal phenomena. Hence this denotes that theory of law is attempted to be expressed in mathematical such as statistical models. It entails quantification because it is inevitable for probability calculations.

16.6.3 On the basis of methodological individualism or rationality

Jurimetrics requires theory to describe, explain and predict human behaviours due to involvement of mathematical models. In other disciplines, there is good number of models which have been appeared and used. [782]

However in the context of social sciences and law, many scholars have been using sociological image of a man to describe, explain and predict human behaviours. In this context, human behaviours will conform to the group of people that human belongs. To determine this in modern, theorists have been using REMP or REMM. REMP means resources, evaluative and maximising person or REMM means resourceful, evaluative and maximising model.

REMP is a person who wants all of his decisions to be maximum use of himself. REMPs realise that their interests are better than taking into account of others. This is done through negotiation because negotiation

[781]See Meckling W. and Jensen M., "Specific and general knowledge and organizational structure", in M. Jensen (ed.), Foundations of organizational strategy (Cambridge, Mass: Harvard University Press 1998)
[782]See Fama E. and Jensen M., "Separation of ownership and control", in Jensen (ed.), ibid.and (1983) Journal of Law and Economics 26. Available at SSRN: http://ssrn.com/abstract=94034 or DOI: 10.2139/ssrn.94034.

is the life blood of REMP model. It is based on utility maximising and does not restrict itself to maximising of money as to the economic model.[783]

Bad enough REMP is based on the fact of a person is rational man but in real sense sometimes a person can act irrationally. That means their emotions can affect their decisions. Rationality of the model lies to the presumption that individual will decide what will produce the most utility for that individual and that includes emotional factors.[784]

16.7 Analysis of legal language

According to jurimetrics, legal texts should be studied scientifically. This paves the way for foundation of legal empirical knowledge. The foundation of legal empirical knowledge is result of the study of properties of form of the legal texts.[785]

This understanding can be done through comparison of legal texts and non-legal texts in the context of meaning and pragmatics. This can be done through various forms such as quantitative linguistics etc.

16.7.1 Quantitative linguistics

This method involves the comparative study of the frequency and distribution of words and syntactic structures in different texts. Frequency, frequency distribution and distribution of word types can be done by compiling frequency list of the corpus[786].

This a list of word types in a corpus plus the number of times the word appears in the corpus and in the documents of which it is part. It is sorted according to word frequency, the most common word being at the top. The value of these measurements provides typology of what could be called structure of word use. They characterise in which way words are used.[787]

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[783]See Schubert G. (ed.), Judicial Decision-Making (New York: The Free Press of Glencoe, 1963).

[784]See Nagel S., "Off-the-bench judicial attitudes", in Schubert G. (ed.), Judicial Decision-Making (New York: The Free Press of Glencoe,1963) 30.

[785]See De Mulder R., van Noortwijk K., &Combrink-Kuiters, “Jurimetrics Please”, in European Journal of Law and Technology, Vol 1, Issue 1, 2010.

[786]See in linguistics, a **corpus** (plural corpora) or text **corpus** is a large and structured set of texts (nowadays usually electronically stored and processed). They are used to do statistical analysis and hypothesis testing, checking occurrences or validating linguistic rules within a specific language territory.

[787]See R. Lawlor, Personal stare decisis, 1967, in: Cal. Law Rev., vol 73, p.41

16.7.2 Characteristics of English corpora

In the quantitative linguistics, several characteristics or measurements have been proposed to compare corpora inter alia characteristics K as defined by Yule and Herdan.[788] This is indication of the average frequency of repetition of word types. Also, it is an indication of size or vocabulary in the corpus. This means it can be used to predict the number of word types from any given number of word tokens. This can be calculated by suing the following formula:-

$$K = \frac{\Sigma r.n_r}{(\Sigma r^2.n_r)^2}$$

Where **r** stands for rank number of a frequency class, equal to frequency in the corpus of word types in that class.

Where $\mathbf{n_r}$stands for number of word types in that class.

If you are given certain corpus of English legal texts whereby rank number of frequency of word class is (r) = 5 and number of word types in the word class is (n) = 10, then calculate value of average frequency of repetition of word types (K)

r	n	$r.n_r$	r^2	n	$r^2.n$
1	10	10	1	10	10
2	10	20	4	10	40
3	10	30	9	10	90
4	10	40	16	10	160
5	10	50	25	10	250
	$\Sigma r.n_r$	150		$\Sigma r^2.n_r$	550

$(\Sigma r^2.n_r)^2$	302500

Therefore $K = \frac{\Sigma r.n_r}{(\Sigma r^2.n_r)^2}$

[788]See L. Loevinger, Jurimetrics, the next step forward, 1949, in: Minn. Law Rev., april 1949, p. 455.

K = 150

302500

K = 0.000495868

In this "traditional" jurimetrical research the meaning and the pragmatics of the law are studied. However, it seems that also the form of legal texts should be studied scientifically.

In the Netherlands, Kees van Noortwijk has analysed the word use of large collections of legal texts, concerning statute law as well as case law. He has compared the word use of these texts with general Dutch texts. This research is of practical importance as an aid in the development of more intelligent document retrieval systems. However, it seems that lawyers could benefit by learning more about the properties of their most important instrument, legal language.[789]

It is the empirical, quantitative and economical approach to law that will enable lawyers to come up with advice that will be relevant, reliable and comprehensible to their clients.

16.8 Analysis of case laws

The analysis of case law with the aid of mathematical models is probably the most promising possibility for jurimetrics. The general idea of this research is to examine judicial decision-making or, more precisely, the relationship between the input - the identifiable case factors - and the output - the decision.[790]

A number of ways have been found to represent this relationship in simple mathematical formulae or just by using a conceptual model. As computers became more powerful, the interest in this kind of research initially increased strongly. However, interest in the computer-assisted analysis of case law quickly waned, probably because this method of research still remained very time consuming, despite the use of computers.[791]

A significant part of the work had to be done manually, as a legally trained individual must perform the coding operation. It is for this reason that most of the research has been limited to a pilot study. These

[789]See T.S. Kuhn, The Structure of scientific revolutions, 1970, Chicago/London.

[790]Lawlor R.C., "Personal stare decisis" (1967) 41:1 University of Southern California Law Review 73-118, 73. C.f. Ulmer 1967, op. cit. p. 67.

[791]seeLawlor R.C., "Personal stare decisis" (1967) 41:1 University of Southern California Law Review, 73-118.

studies showed that, with the use of a certain mathematical model, satisfactory results could be achieved.[792]

In making a case analysis, a list of factors must be drawn up. One of the case variables that have been examined is the role of the judge him/herself in the decision-making process[793]. Some results indicate that the judge who makes the decision can be a determining factor in the result of a case. In one of the approaches, the so-called 'behavioural approach', a relationship is supposed between the personal characteristics of judges and the content of their decisions.[794]

In this line of research two kinds of characteristics are distinguished: on the one hand, the opinions, preferences and attitudes of judges and, on the other, their personal attributes. Sometimes a third personal characteristic is mentioned: the group behaviour of judges. This kind of research studies the way judges communicate with their peers during their deliberations.[795]

16.9 Conclusion



In above chapter we have learnt that information technology is changing society in a fundamental way. These changes are not simply concerned with increasing the speed and the scale of communication and other types of processes, but are leading to fundamental changes in human behaviour. The impact on the law is huge; not only as concerns the substantive law but also procedural law and the distribution of power within states. Therefore generally jurimetrics is the empirical study of the form, the meaning and the pragmatics of demands and authorisations issuing from state organisations with the aid of mathematical models and using methodological individualism as the basic paradigm for the explanation and prediction of human behaviour.

The term was coined in 1949 by Lee Loevinger in his article "Jurimetrics: The Next Step

[792]See De Mulder R.V., Een model voorjuridischeinformatica [A Model for the application of computer science to law], with a CONCLUSION in English (Lelystad: Vermande 1984) 239.

[793]See Goldman S., "Behavioral approaches to judicial decision-making: towards a theory of judicial voting behaviour" (1971) March Jurimetrics Journal 142.

[794]See Jensen M. and Meckling W., "The nature of man" (1994) 7:2 Journals of Applied Corporate Finance 4-19.

[795]Jensen M. and Meckling W., "The nature of man" (1994) 7:2 Journals of Applied Corporate Finance 4-19.

Forward". It was the American Lee Loevinger who launched the term 'jurimetrics'. He stressed the importance of scientific and therefore statistical methods for lawyers. He saw a number of possibilities for using these applications in the law. Loevinger contended that knowledge about the law could be obtained by observation, rather than through speculation. 'Jurimetrics promises to cut windows in the house of law, so that those inside can see out, and to cut doors, so that those outside can get in.

Jurimetrics is concerned with such matters as the quantitative analysis of judicial behaviour, the application of communication and information theory to legal expression, the use of mathematical logic in law, the retrieval of legal data by electronic and mechanical means, and the formulation of a calculus of legal predictability. Jurimetrics originated and played role in the use of computers in law practice began to revolutionize the areas of legal research, evidence analysis, and data management.

16.10 Review Questions



1. What is jurimetrics? Explain its relevance in the contemporary world of science and technology.
2. Describe nature, scope and elements of jurimetrics
3. Account for the growth and development of jurimetrics.
4. If you are given rank of the frequency in the corpus of word types in that class (r) = 6 and number of word types within which the abortion is found is (n) = 10, what is the average frequency of the word abortion in the corpus (K)

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CHAPTER SEVENTEEN

HUMAN RIGHTS JURISPRUDENCE

17.0 Introduction

Human rights jurisprudence is reflected in notion that the entire humanity behappy. The greatest gift of classical and contemporary human thought to culture andcivilization is the notion of human rights. The struggle to preserve, protect andpromote human rights continues in every generation in every society. Newrights arise from the womb of the old. In mean time, there is wide sphere of Human Rightsthought and action to new areas and constituencies.

17.1 Objectives



At the end of this chapter students should have:-

- Acquired basic knowledge of concepts such as human rights, natural rights, moral rights, legal rights etc.
- Acquainted with understanding of nature, purpose, types relevance and characteristics of human rights.
- Acquainted with ability to examine and understand the philosophy and theories of human rights.
- Developed ability to account for the history of human rights generally.
- Acquired competency to describe the historical development of human rights in Tanzania.

17.2 Human Rights

Human rights are rights inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status. We are all equally entitled to our human rights without discrimination. These rights are all interrelated, interdependent and indivisible.[796]

Human rights are norms that help to protect all people everywhere from severe political, legal, and social abuses.[797] Examples of human rights are the right to freedom of religion, the right to a fair trial when

[796]See http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx. Accessed on 17th October 2016 at 2:47 AM

charged with a crime, the right not to be tortured, and the right to engage in political acitivities. These rights exist in morality and in law at the national and international levels.[798]

Human rights are the basic rights and freedoms that belong to every person in the world, from birth until death. They apply regardless of where you are from, what you believe or how you choose to live your life.[799] They can never be taken away, although they can sometimes be restricted for example if a person breaks the law, or in the interests of national security. These basic rights are based on values like dignity, fairness, equality, respect and independence. But human rights are not just abstract concepts they are defined and protected by law.[800]

Human rights are the fundamental rights that humans have by the fact of being human, and that are neither created nor can be abrogated by any government.[801] These include cultural, economic, and political rights, such as right to life, liberty, education and equality before law, and right of association, belief, free speech, information, religion, movement, and nationality[802]. Promulgation of these rights is not binding on any country, but they serve as a standard of concern for people and form the basis of many modern national constitutions.

According to wording of the holding in the case of **Rev. Christopher Mtikila v. Attorney General[803]**, human rights are fundamental rights which are not gifts from the state but they inhere in a person by virtue of birth, and they are prior to the state and the law. The enactment of those rights in the Constitution is mere evidence of their recognition and the intention that they should be enforceable in a court of law, and an intention that those rights should not be arbitrarily restricted by the state.

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[797]See Sumner, W., 1906. Folkways: A Study of the Sociological Importance of Usages, Manners, Customs, Mores, and Morals, Boston: Ginn and Co.

[798]See http://plato.stanford.edu/entries/rights-human/. Accessed on 17th October 2016 at 3:45 PM

[799] See https://www.equalityhumanrights.com/en/human-rights/what-are-human-rights. accessed on 17th October 2016 at 3:12PM

[800]See Raz, J., 2010. "Human Rights without Foundations" in Besson, S., and Tasioulas, J. (eds.), the Philosophy of International Law, Oxford: Oxford University Press.

[801]Read more: http://www.businessdictionary.com/definition/human-rights.html

[802]Supported by several international conventions and treaties (such as the United Nation's Universal Declaration of Human rights in 1948),

[803] 1995 TLR 31 (HC)

Another definition for human rights is those basic standards without which people cannot live in dignity. To violate someone's human rights is to treat that person as though she or he were not a human being. To advocate human rights is to demand that the human dignity of all people be respected.[804]

17.3 Characteristics of Human Rights

The following list describes the characteristics of human rights that make them such powerful tools in the political discourse:-

17.3.1 Inherence

Human Rights are inherent because they are not granted by any person or authority. They are instrumental principles in the sense that we don't want them for their own sake; they are means for the creation of better life quality and not just goals in themselves.[805]

17.3.2 Equality

All human rights are equal because all men are by nature equally free and independent and have certain inherent rights, of which, when they enter a state of society, they cannot, by any compact, deprive or divest their posterity.[806]They are equal rights: rights are equal in two meanings of the word; they are equal between people because all people are equally human and they are equal to other human rights. There are no "basic" and "less urgent/important" human rights.[807]

17.3.3 Non-Discrimination

Human rights must be guaranteed without discrimination of any kind. This includes not only purposeful discrimination, but also protection from policies and practices which may have a discriminatory effect.[808]

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[804]See http://hrlibrary.umn.edu/edumat/hreduseries/hereandnow/Part-1/whatare.htm. Accessed on 17th October 2016 at 3:16 PM

[805]See http://braungardt.trialectics.com/philosophy/political-theory/characteristics-of-human-rights/. Accessed on 17th October 2016 at 3:32 PM

[806]Read more: http://www.businessdictionary.com/definition/human-rights.html. Accessed on 17th October 2016 at 3:10 PM

[807]See Morsink, J., 1999. Universal Declaration of Human Rights: Origins, Drafting, and Intent, Philadelphia: University of Pennsylvania Press.

[808]See https://www.nesri.org/programs/what-are-the-basic-principles-of-the-human-rights-framework. Accessed on 17th October 2016 at 3: 42 PM

17.3.4 Universality

Human Rights are universal in application and they apply irrespective of one's origin, status, or condition or place where one lives. Human rights are enforceable without national border. All human beings have certain rights, for no other reason than their humanity and the values attached to humanity.[809]

This means that human rights precede and trump considerations of national sovereignty and that national sovereignty therefore does not provide a means to escape human rights obligations. They are provided to members of the human society as a whole whether or not some sections of them are aware of them or not.[810]

17.3.5 Inviolability

Since rights are owned by human beings because of their humanity, these rights aren't given and hence can't be taken away; people still have rights when those rights are violated. Human Rights do not prescribe and cannot be lost even if man fails to use or assert them, even by a long passage of time.[811]

Human rights are inalienable. They should not be taken away, except in specific situations and according to due process. People can't give their rights away for the same reason that these rights can't be taken away; however, people can decide that they don't want their rights enforced.[812] For example, the right to liberty may be restricted if a person is found guilty of a crime by a court of law.

17.3.6 Fundamental

Human Rights are fundamental rights because without them, the life and dignity of man will be meaningless.[813] They are essential for every human being. They cannot be categorized as the preserve of one particular nation but are in fact the possession of mankind as a whole.[814]

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[809] See http://www.yourarticlelibrary.com/india-2/human-rights-meaning-characteristics-and-other-details/49346/. Accessed on 17th October 2016 at 3:39 PM

[810] See Korey, W., 1998. NGOs and the Universal Declaration of Human Rights, New York: St. Martin's.

[811] See http://www.yourarticlelibrary.com/india-2/human-rights-meaning-characteristics-and-other-details/49346/. Accessed on 17th October 2016 at 3:39 PM

[812] See Kateb, G., 2011. Human Dignity, Cambridge, MA: Harvard University Press

[813] See http://www.uberdigests.info/2011/12/what-are-the-basic-characteristics-of-human-rights/. Accessed on 17th October 2016 at 3:22 PM

Henceforth, they require mandatory as opposed to discretionary compliance and are therefore more than mere aspirations, they are necessary for the protection and realization of certain fundamental, basic and universal human values and interests.[815]

17.3.7 Interdependence

Human Rights are interdependent because the fulfilment or exercise of one cannot be had without the realization of the other.[816] All human rights are indivisible, whether they are civil and political rights, such as the right to life, equality before the law and freedom of expression; economic, social and cultural rights, such as the rights to work, social security and education, or collective rights, such as the rights to development and self-determination, are indivisible, interrelated and interdependent.[817] The improvement of one right facilitates advancement of the others. Likewise, the deprivation of one right adversely affects the others.[818]

17.3.8 Rights and Obligations

Human rights entail both rights and obligations. States and individual persons assume obligations and duties under international law to respect, to protect and to fulfil human rights. The obligation to respect means that States must refrain from interfering with or curtailing the enjoyment of human rights. [819]

The obligation to protect requires States to protect individuals and groups against human rights abuses. The obligation to fulfil means that States must take positive action to facilitate the enjoyment of basic human rights. At the individual level, while we are entitled our human rights, we should also respect the human rights of others.[820]

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[814]See http://www.yourarticlelibrary.com/india-2/human-rights-meaning-characteristics-and-other-details/49346/. Accessed on 17th October 2016 at 3:36 PM

[815]See Holmes, S. and Sunstein, C., 1999. The Cost of Rights: Why Liberty Depends on Taxes, New York: Norton.

[816]See Henkin, L. 1978. The Rights of Man Today, Boulder, CO: Westview Press.

[817]See Hodgson, D., 1998. The Human Right to Education, Aldershot, England: Ashgate Publishing.

[818]See Henkin, L., Neuman, G., Orentlicher, D. and Leebron, D. (eds.), 2009. Human Rights, 2nd end. New York: Foundation Press.

[819]See Griffin, J., 2008. On Human Rights, Oxford: Oxford University Press.

[820]See Gilabert, P. 2011. "Humanist and Political Perspectives on Human Rights," Political Theory 39: 439–467

17.3.9 Limitation

Rights have to be balanced against each other because respect for one right can imply a violation of another right; balancing means imposing limitations on some rights for the benefit of other rights (or of the rights of others); the fact that there are no basic rights makes this balancing more difficult but not impossible. [821]

Conflicting rights then have to be balanced by taking into account the nature of the underlying values, or the way in which the two conflicting rights realize the values they are supposed to uphold.[822]

17.4 History of Human Rights

Human rights are a product of a philosophical debate that has raged for over two thousand years within the European societies and their colonial descendants. This argument has focused on a search for moral standards of political organization and behaviour that is independent of the contemporary society.[823]

In other words, many people have been unsatisfied with the notion that what is right or good is simply what a particular society or ruling elite feels is right or good at any given time. This unease has led to a quest for enduring moral imperatives that bind societies and their rulers over time and from place to place. Fierce debates raged among political philosophers as these issues were argued through.[824]

While a path was paved by successive thinkers that lead to contemporary human rights, a second lane was laid down at the same time by those who resisted this direction. The emergence of human rights from the natural rights tradition did not come without opposition, as some argued that rights could only from the law of a particular society and could not come from any natural or inherent source. The essence of this debate continues today from seeds sown by previous generations of philosophers.[825]

[821]See Finnis, J., 2011. Natural Law and Natural Rights, 2nd edn. Oxford: Oxford University Press.
[822]See Gewirth, A., 1978. Reason and Morality, Chicago: University of Chicago Press.
[823]See http://www.sfu.ca/~aheard/intro.html. Accessed on 18th October 2016 at 7:08 AM
[824]Ibid
[825]See Thomas Paine, The Rights of Man, New York: Penguin Books, 1985, p.68.

The earliest direct precursor to human rights might be found in the notions of `natural right' developed by classical Greek philosophers, such as Aristotle, but this concept was more fully developed by Thomas Aquinas in his Summa Theologica.[826]

For several centuries Aquinas' conception held sway: there were goods or behaviours that were naturally right (or wrong) because God ordained it so. What was naturally right could be ascertained by humans by `right reason' thinking properly. Hugo Grotius further expanded on this notion in **De jure belli etpaci**, where he propounded the immutability of what is naturally right and wrong.[827]

The moral authority of natural right was assured because it had divine authorship. In effect, God decided what limits should be placed on the human political acitivities. But the long-term difficulty for this train of political thought lay precisely in its religious foundations.[828]

As the reformation caught on and ecclesiastical authority was shaken and challenged by rationalism, political philosophers argued for new bases of natural right. Thomas Hobbes posed the first major assault in 1651 on the divine basis of natural right by describing a State of Nature in which God did not seem to play any role. Perhaps more importantly, however, Hobbes also made a crucial leap from `natural right' to `a natural right'. [829]

In other words, there was no longer just a list of behaviour that was naturally right or wrong; Hobbes added that there could be some claim or entitlement which was derived from nature. In Hobbes' view, this natural right was one of self-preservation.[830]

Further reinforcement of natural rights came with Immanuel Kant's writings later in the 17th century that reacted to Hobbes' work. In his view, the congregation of humans into a state-structured society resulted from a rational need for protection from each other's violence that would be found in a state of nature.[831]

[826]See http://www.sfu.ca/~aheard/intro.html. Accessed on 18th October 2016 at 7:08 AM
[827]Ibid
[828]See Edmund Burke, Reflections on the Revolution in France.
[829]See Hugo Grotius, The Law of War and Peace, ...p.22
[830]See Gayle Binion, "Human Rights: A Feminist Perspective," (1995) 17 Human Rights Quarterly 515-20.
[831]See Andrew D. Heard, "The Charter in the Supreme Court of Canada: The Importance of Which Judges Hear an Appeal", (1991) 24 Canadian Journal of Political Science 289-307, at p.297.

However, the fundamental requirements of morality required that each treat another according to universal principles.[832] Kant's political doctrine was derived from his moral philosophy, and as such he argued that a state had to be organized through the imposition of, and obedience to, laws that applied universally; nevertheless, these laws should respect the equality, freedom, and autonomy of the citizens. In this way Kant, prescribed that basic rights were necessary for civil society.[833]

However, the divine basis of natural right was still pursued for more than a century after Hobbes published his Leviathan. John Locke wrote a strong defence of natural rights in the late 17th century with the publication of his Two Treatises on Government, but his arguments were filled with references to what God had ordained or given to mankind.[834]

Locke had a lasting influence on political discourse that was reflected in both the American Declaration of Independence and France's Declaration of the Rights of Man and the Citizen, passed by the Republican Assembly after the revolution in 1789. The French declaration proclaimed 17 rights as "the natural, inalienable and sacred rights of man".[835]

The French Declaration of Rights immediately galvanized political writers in England and provoked two scathing attacks on its notion of natural rights. Jeremy Bentham's clause-by-clause critique of the Declaration, entitled Anarchical Fallacies, argued vehemently that there can be no natural rights, since rights are created by the law of a society.[836]

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[832]See Tom Campbell, The Left and Rights: A Conceptual Analysis of the Idea of Socialist Rights, London: Routledge and Kegan Paul, 1983

[833]See Immanuel Kant, "Perpetual Peace," in Hans Reiss (ed.), Kant: Political Writings, 2nd.ed., Cambridge: Cambridge University Press, 1991, p.125. Note, however, that Kant did not believe that the citizenry could revolt against the sovereign for a misuse of power; thus, the rights of mankind in a Kantian society would lack the ultimate in political enforcement.

[834]See Wesley N. Hohfeld, Fundamental Legal Concepts as Applied in Judicial Reasoning, (New Haven: Yale University Press, 1919). For a clear CONCLUSION of this work see Jeremy Waldron, Theories of Rights, (New York: Oxford University Press, 1984), pp.6-10.

[835]See Gayle Binion, "Human Rights: A Feminist Perspective," (1995) 17 Human Rights Quarterly 515-20.

[836]See Jeremy Bentham, "Anarchical Fallacies; being an examination of the Declaration of Rights issues during the French Revolution", in Jeremy Waldron (ed.),Nonsense Upon Stilts: Bentham, Burke and Marx on the Rights of Man, New York: Methuen, 1987, p.69.

Modern theorists have developed a notion of natural rights that does not draw its source of inspiration from a divine ordering. The ground work for this secular natural rights trend was laid by Paine and even Rousseau.[837]

In its place has arisen a variety of theories that are humanist and rationalist; the `natural' element is determined from the prerequisites of human society which are said to be rationally ascertainable. [838]

Thus there are constant criteria which can be identified for peaceful governance and the development of human society. But problems can develop for this school of thought when notions of a social contract are said to underlie the society from which rights are deduced.[839]

Contemporary notions of human rights draw very deeply from this natural rights tradition. In a further extension of the natural rights tradition, human rights are now often viewed as arising essentially from the nature of humankind itself. The idea that all humans possess human rights simply by existing and that these rights cannot be taken away from them are direct descendants of natural rights.[840]

However, a persistent opposition to this view builds on the criticisms of Burke and Bentham, and even from the contractarian views of Rousseau's image of civil society. In this perspective rights do not exist independently of human endeavour; they can only be created by human action. Rights are viewed as the product a particular society and its legal system.[841]

[837]See Allan Gewirth, "Why There Are Human Rights", (1985) 11 Social Theory and Practice, 235-248, at p.235.

[838]See John O'Manique, "Universal and Inalienable Human Rights: A Search for Foundations", (1990) 12 Human Rights Quarterly 465-485.

[839]See Douglas Husak, "Why There Are No Human Rights", (1984) 10 Social Theory and Practice, 125-141.

[840]See Jack Donnelly, Universal Human Rights in Theory and Practice, Ithaca: Cornell University Press, 1989, p.17.

[841]See Jean-Jacques Rousseau, The Social Contract, Maurice Cranston (trans.), Baltimore: Penguin, 1968, p.50. For Rousseau's views of the connection between religion and the state, see: Book IV, ch.8.

17.5 Historical Sources of Human Rights

Historical sources for bills of rights include the Magna Carta (1215), the English Bill of Rights (1689), the French Declaration of the Rights of Man and the Citizen (1789), and the Bill of Rights in the United States Constitution (1791).[842]

Early philosophical sources of the idea of human rights include Francisco Suarez (1548–1617), Hugo Grotius (1583–1645), Samuel Pufendorf (1632–1694), John Locke (1632–1704), and Immanuel Kant (1724–1804). [843]

The main sources of the contemporary conception of human rights are the Universal Declaration of Human Rights (United Nations, 1948b) and the many human rights documents and treaties that followed in international organizations such as the United Nations, the Council of Europe, the Organization of American States, and the African Union.[844]

17.6 Relevance of Human Rights

Human rights are both inspirational and practical. Human rights principles hold up the vision of a free, just, and peaceful world and set minimum standards for how individuals and institutions everywhere should treat people.[845]

Human rights also empower people with a framework for action when those minimum standards are not met, for people still have human rights even if the laws or those in power do not recognize or protect them.[846]

17.7 Philosophy of Human Rights

The philosophy of human rights addresses questions about the existence, content, nature, universality, justification, and legal status of human rights. The strong claims made on behalf of human rights for

[842]See Etinson, A. (ed.), forthcoming 2015. Human Rights: Moral or Political? Oxford: Oxford University Press.

[843]See Ernst, G. and Heilinger, J. (eds.), 2011. The Philosophy of Human Rights: Contemporary Controversies, Berlin: De Gruyter 2011.

[844]See Donnelly, J., 2012. International Human Rights, 4th edn. Philadelphia: Westview Press.

[845]See Gardiner, S., 2013. "Human Rights in a Hostile Climate," in Holder C, and Reidy, D. (eds.), 2013 Human Rights: The Hard Questions, Cambridge: Cambridge University Press: 211–230

[846]See Evans, G., 2008. The Responsibility to Protect, Washington, DC: Brookings Institution.

example, that they are universal, or that they exist independently of legal enactment as justified moral norms frequently provoke sceptical doubts and countering philosophical defences.[847] Reflection on these doubts and the responses that can be made to them has become a sub-field of political and legal philosophy with a substantial literature.[848]

17.7.1 Existence of Human Rights

One theory of human rights is that people are born with rights, that human rights are somehow innate or inherent in human beings. They are not created by instruments. They are present even if no law provide for them.[849]

This theory had been effected by Lugakingira J as he then was when he said that human rights are fundamental rights which are not gifts from the state but they inhere in a person by virtue of birth, and they are prior to the state and the law. The enactment of those rights in the Constitution is mere evidence of their recognition and the intention that they should be enforceable in a court of law, and an intention that those rights should not be arbitrarily restricted by the state.[850]

Another theory provides that human rights exist as norms of national and international law created by enactment and judicial decisions. At the international level, human rights norms exist because of treaties that have turned them into international law.[851]

However, if human rights exist only because of enactment, their availability is contingent on domestic and international political developments. Many people have looked for a way to support the idea that human rights have roots that are deeper and less subject to human decisions than legal enactment.[852]

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[847]See Cruft. R., Liao, S., and Renzo, M. (eds.), forthcoming 2015Philosophical Foundations of Human Rights, Oxford: Oxford University Press.

[848]See Dershowitz, A., 2004. Rights from Wrongs: A Secular Theory of the Origins of Rights, New York: Basic Books.

[849]See Alston, P., 1999. Promoting Human Rights through Bills of Rights, Oxford: Oxford University Press

[850]Rev. Christopher Mtikila v. A.G (1995) TLR 31

[851]See Alston, P. and Crawford, J. (eds.), 2000. The Future of UN Human Rights Treaty Monitoring, Cambridge: Cambridge University Press

[852]See Bayefsky, A., 2001. The UN Human Rights Treaty System: Universality at the Crossroads, Ardsley, NY: Transnational

Human rights could also exist independently of legal enactment by being part of actual human moralities. All human groups seem to have moralities: imperative norms of behaviour backed by reasons and values. These moralities contain specific norms (for example, a prohibition of the intentional murder of an innocent person) and specific values for example, valuing human life.[853]

One way in which human rights could exist apart from divine or human enactment is as norms accepted in all or almost all actual human moralities. If almost all human groups have moralities containing norms prohibiting murder, these norms could constitute the human right to life. Human rights can be seen as basic moral norms shared by all or almost all accepted human moralities.[854]

17.7.2 Which rights are human rights

It should be noted that not every question of social justice or wise governance is a human rights issue. For example, a country could have too much income inequality or inadequate provision for higher education without violating any human rights. Deciding which norms should be counted as human rights is a matter of considerable difficulty.[855]

And there is continuing pressure to expand lists of human rights to include new areas. Many political movements would like to see their main concerns categorized as matters of human rights, since this would publicize, promote, and legitimize their concerns at the international level.[856]

In deciding which specific rights are human rights it is possible to make either too little or too much of human right instruments or documents such as the Universal Declaration or the European Convention.[857]

One makes too little of them by proceeding as if drawing up a list of important rights were a new question, never before addressed, and as if there were no practical wisdom to be found in the choices of rights that went into the historic documents.[858]

[853]See Beitz, C., 2009. The Idea of Human Rights, Oxford: Oxford University Press.

[854]See Cranston, M., 1967. "Human Rights, Real and Supposed," in D. D. Raphael (ed.), Political Theory and the Rights of Man, London: Macmillan

[855]See Corradetti, C. 2009. Relativism and Human Rights, New York: Springer.

[856]See Beyleveld, D., 1991. Dialectical Necessity of Morality: An Analysis and Defense of Alan Gewirth's Argument to the Principle of Generic Consistency, Chicago: University of Chicago Press.

[857]See Brandt, R. B., 1983. "The Concept of a Moral Right," Journal of Philosophy, 80: 29–45

Also, one makes too much of them by presuming that those documents tell us everything we need to know about human rights. This approach involves a kind of fundamentalism: it holds that when a right is on the official lists of human rights that settles its status as a human right.[859]

But the process of identifying human rights in the United Nations and elsewhere was a political process with plenty of imperfections. There is little reason to take international diplomats as the most authoritative guides to which human rights there are.[860]

Further, even if a treaty could settle the issue of whether a certain right is a human right within international law, such a treaty cannot settle its weight. It may claim that the right is supported by weighty considerations, but it cannot make this so.[861]

If an international treaty enacted a right to visit national parks without charge as a human right, the ratification of that treaty would make free access to national parks a human right within international law. But it would not be able to make us believe that the right to visit national parks without charge was sufficiently important to be a real human right.[862]

17.8 Generations of Human Rights

This division of human rights into three generations was introduced in 1979 by Czech jurist KarelVasak. The three categories align with the three tenets of the French Revolution: liberty, equality, and fraternity.[863] The three generations framework contains within it room for many of the key debates about the nature of rights. It also encourages us to take a critical approach in challenging our own assumptions about rights as

[858]See Brems, E., 2009. "Human Rights: Minimum and Maximum Perspectives," Human Rights Law Review, 9: 343–372

[859]See Brownlee, K., 2013. "A Human Right against Social Deprivation," Philosophical Quarterly, 63: 251, 199–222.

[860]See Buchanan, A., 2010. Human Rights, Legitimacy, and the Use of Force, Oxford: Oxford University Press

[861]See Buchanan, A., 2013. The Heart of Human Rights, Oxford: Oxford University Press.

[862]See Cohen, Jean, 2012. Globalization and Sovereignty, Cambridge: Cambridge University Press

[863]See KarelVasak, "Human Rights: A Thirty-Year Struggle: the Sustained Efforts to give Force of law to the Universal Declaration of Human Rights", UNESCO Courier 30:11, Paris: United Nations Educational, Scientific, and Cultural Organization, November 1977.

we begin to think about some of the real-world problems involved in the application of human rights in the sections ahead.[864]

17.8.1 First Generation

This covers "civil-political" rights deal with liberty and participation in political life. They are strongly individualistic and negatively constructed to protect the individual from the state.[865] Civil-political human rights include two subtypes: norms pertaining to physical and civil security for example, no torture, slavery, inhumane treatment, arbitrary arrest; equality before the law and norms pertaining to civil-political liberties or empowerments for example, freedom of thought, conscience, and religion; freedom of assembly and voluntary association; political participation in one's society.[866]

These rights draw from those articulates in the United States Bill of Rights and the Declaration of the Rights of Man and Citizen in the 18th century. Civil-political rights have been legitimated and given status in international law by Articles 3 to 21 of the Universal Declaration of Human Rights and the 1966 International Covenant on Civil and Political Rights.[867]

17.8.2 Second Generation

This entails "socio-economic" human rights guarantee equal conditions and treatment. They are not rights directly possessed by individuals but constitute positive duties upon the government to respect and fulfil them.[868] Socio-economic human rights similarly include two subtypes such as norms pertaining to the provision of goods meeting social needs for example, nutrition, shelter, health care, education and norms

[864]See http://www.globalization101.org/three-generations-of-rights/. Accessed on 18th October 2016 at 7:33 AM

[865]See Karel V., supra

[866]seeCranston, Maurice. "Human Rights: Real and Supposed," in Political Theory and the Rights of Man, edited by D. D. Raphael (Bloomington: Indiana University Press, 1967), pp. 43-51

[867]See https://en.wikipedia.org/wiki/Three_generations_of_human_rights. Accessed on 18th October 2016 at 7:38 AM

[868]See KarelVasak, "Human Rights: A Thirty-Year Struggle: the Sustained Efforts to give Force of law to the Universal Declaration of Human Rights", UNESCO Courier 30:11, Paris: United Nations Educational, Scientific, and Cultural Organization, November 1977.

pertaining to the provision of goods meeting economic needs for example, work and fair wages, an adequate living standard, a social security net.[869]

Socio-economic rights began to be recognized by government after World War II and, like first-generation rights, are embodied in Articles 22 to 27 of the Universal Declaration. They are also enumerated in the International Covenant on Economic, Social, and Cultural Rights.[870]

17.8.3 Third Generation

Third-generation, "collective-developmental" rights of peoples and groups held against their respective states aligns with the final tenet of "fraternity." They constitute a broad class of rights that have gained acknowledgment in international agreements and treaties but are more contested than the preceding types.[871]

Collective-developmental human rights also include two subtypes such as the self-determination of peoples for example, to their political status and their economic, social, and cultural development and certain special rights of ethnic and religious minorities for example, to the enjoyment of their own cultures, languages, and religions.[872]

They have been expressed largely in documents advancing aspirational "soft law," such as the 1992 Rio Declaration on Environment and Development, and the 1994 Draft Declaration of Indigenous Peoples' Rights.[873]

17.9 Development of Human Rights in Tanzania

Tanzania has passed through various era which can be used to explain the development of human rights. These phases determine the status and conditions of human rights in Tanzania.

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[869]See Karl Polanyi (2001). The Great Transformation, Beacon Press. ISBN 978-0-8070-5643-1

[870]See https://en.wikipedia.org/wiki/Three_generations_of_human_rights. Accessed on 18th October 2016 at 7:38 AM

[871]See KarelVasak, "Human Rights: A Thirty-Year Struggle: the Sustained Efforts to give Force of law to the Universal Declaration of Human Rights", UNESCO Courier 30:11, Paris: United Nations Educational, Scientific, and Cultural Organization, November 1977.

[872]See Jeremy Waldron, 1993. Liberal Rights: Collected Papers, page 7, 1981–91

[873]See Bastiat, Frédéric (1995, originally written 1850). "Selected Essays on Political Economy" Irvington-on-Hudson, NY: The Foundation for Economic Education

17.9.1 Colonialism

Considering this history in Human Rights perspective, it is clearly understood by all that colonialism was a negation of human rights. When one state colonizes another, it violates the right to self-determination of the colonial peoples.[874] There is no law that justifies colonialism. Notwithstanding that, colonial powers never allowed the natives to enjoy any human rights[875].

Historically Tanzania passed through different colonial administration. Before German invasion, Tanzania by then Tanganyika and Zanzibar went through difficulty times under Arabs. The presence of Arabs made the trade of slave trade to be the main type of human right violation by then.[876]

During colonial time it was hardly to hear any one talk of Human rights in Tanzania.[877] Prof Maina says, for the colonial government to pretend to uphold the fundamental rights and freedom would defeat the very aim of colonialism.[878]

As we historically learned, colonialist came to Africa highly motivated by what we possess interns of resources for their economic development. Colonial administration was driven by policies which promoted class differentiation in human beings, apartheid, racism and discrimination.[879]

They did all those things to us because they were not among ourselves; we were born from different angles of the world, they only came because Africa is extremely rich.1960's we sang songs of liberations and

[874]See Mashamba, J. C. (2004): "Institutional Care and Support to Orphaned and Vulnerable Childre in Tanzania: A Legal and Human Rights Perspective" in National Organization fo Legal Assistance, Using the Law to Protect Children's Rights in Tanzania: The Unfinished Business 17 (2004), supra note 1.

[875]See LHRC (Nov, 2006) Through a Crucible of Human Rights Struggles in Tanzania: A Decade of Legal and
Human Rights, Pages 5 and 6.

[876]See Olengurumwa, O (2009): "Untold Stories of Ngorongoro", Paper Presented at the University of Dar es Salaam during the Marking of 2009 Human Rights Day. 12 December.

[877]See Mukangara, D. R (2002): "The Tanzanian Constitutional Review: Issues for Debate". Paper Presented at the 8th REDET Workshop on Democratic Transition in East Africa, Bagamoyo, July

[878]See Chris Maina Peter, (2006): "Independence of the Judiciary in Tanzania: Many Rivers to Cross," address at Kituo cha Katiba Zanzibar.

[879]See Olengurumwa, O (2010): "1990's Land Law Reforms and its Impact on Pastoral land Tenure." Paper presented during one Day Consultative workshop towards Tanzania Pastoral Week.February.

chased them away[880]. Our parents and grandparents thought things could be different, because the black men substituted colonial master; in return African leadership became bitterer.[881]

17.9.2 Post-Colonialism

The Human Rights situation under the post-colonial Tanzania, just like many other African states, was shadowed with a need for development.[882] The nationalist leaders conceived the process of economic development to be one that may not necessarily promote or respect human rights[883].

Tanzania at independence era experienced distinct history. According to Bisimba and Maina[884]MwalimuNyerere the first president of Tanganyika when negotiating for independence of Tanganyika in London and Dar es Salaam rejected the inclusion of a Bill of Rights in the independence Constitution of 1961[885].

Among the justifications given by rulers as to why Bill of rights couldn't be part of our laws some of them sound fishy like the reason by First Prime minister Late Rashid Kawawa who openly categorized human rights as a luxury.[886]

Others said the movements of human rights will in turn be a thorn to new government process of developing the country. Some of the justifications made Tanzania to be the exceptional to general rule in the Commonwealth cycle. Maina[887] is hereby below quoted supplying more emphasis on this, by

[880]See African Peer Review Mechanism (2008): a Survey on Stakeholders' Views on Social Economic Development in Tanzania.

[881]See Shivji, I. G. (2003): "Constitutional Limits on Parliamentary Powers" in The Tanganyika Law Society Journal

United Republic of Tanzania [URT] (1977): The Constitution of the United Republic of Tanzania

[882]See Makulilo A. B (2007): Tanzania: A De Facto One Party State? M.A. Dissertation: University of Dar es Salaam

[883]Ibid

[884]See Bisimba, H & Peter, M (2009), "MwalimuNyerere and the challenge of human rights" see also http://www.pambazuka.org/en/category/features/59511.

[885]See Nyerere,J (1966) Freedom and Unity, Dar- es- Salaam, Oxford University Press, p. 311 see also Peter,M (1997),Human Rights in Tanzania: Selected Cases and Material.p 2

[886]See Nyerere, Julius (1995): Our Leadership and the Destiny of Tanzania, Harare: African Printing Group.

[887]See Chris Maina Peter, (2006): "Independence of the Judiciary in Tanzania: Many Rivers to Cross," address at Kituo cha Katiba Zanzibar.

suspecting that may be the Bill of rights in the constitution right from the time of independence would have acted as check from some of the many undemocratic decisions made in the early period and cemented the culture of non-respect of fundamental rights and freedom of people; disregard of rule of law and constitution by the both the party and government.[888]

The same position was repeated during the Republican Constitution of 1962, the Interim Constitution of 1965 and the Permanent Constitution of the United Republic of Tanzania of 1977.[889]

The situation of human rights in Tanzania was later made worse by enactment of draconian laws, most of them being inherited from colonial legal system. The Nyalali commission under Chief Justice Francis Nyalali (As then he was) openly analysed forty laws in Tanzania as draconian laws. The Forty Plus unconstitutional laws in Tanzania were seen to be against fundamental rights and freedom of the people and good governance.[890]

Among others the following were the laws found to be unconstitutional after independence era; Collective Punishment Ordinance, 1921, the Deportation Ordinance of 1938, Preventive Detention Act, 1962, Preventive Detention Act, 1962 etc.[891]

The Bill of Rights was eventually incorporated in the Constitution in 1984 a year before he left office due to the pressure from the people and after a long advocacy struggle by activists. When the Bill of rights was entrenched in our constitution almost every citizen believed to be the end of human rights violation in Tanzania.[892] On the ground that was not the case, surprisingly, the rate of abuses of human rights like arrests, detention conditions and sometimes acts of torture rose significantly.[893] Worse enough on the first

[888]See Bakary, M.A. K (2006): "The Union and Zanzibar Constitutions" in Chris M. Peter and H. Othman (eds.) Zanzibar and Union Question. Zanzibar Legal Services Centre Publication

[889]See Baregu, M. "Beyond the Myth of 'Island of Peace': Peace and Security Challenges Facing the Kikwete Government in Tanzania", unpublished paper.

[890]See Mtaki, C.K and Okema, M (1994): Constitutional Reforms and Democratic Governance in Tanzania, Faculty of Law, University of Dar es Salaam

[891]See Bakari, M. A and Mushi, S. S. (2005): "Prerequisites for Democratic Consolidation in Tanzania in Democratic Transition in East Africa, REDET Publications. Dar es Salaam: E&D. Limited

[892]See Tanzania: Human Rights Advocated in Tanzania," Africa News Service, Inc., 6 October 1997.

[893]See Government of Tanzania, 'Fourth periodic report of the United Republic of Tanzania to the United Nations Human Rights Committee' (17 December 2007) CCPR/C/TZA/4 (Fourth report to the UNHRC). at pp. 7 – 8 See also LHRC 2008 Human rights report.

instance there was no any proper mechanisms for implementation of Bill of rights in Tanzania Until 1994 when Basic rights and duties enforcement Act was enacted[894].

Tanzania is a signatory to several international and regional human rights instruments that address civil rights and liberties, including the International Covenant on Civil and Political Rights of 1966[895], the African Charter on Human and Peoples' Rights of 1981 and the International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities etc. Although Tanzania has not explicitly incorporated all of these instruments into its domestic legislation, it accepts these instruments as legally binding.[896]

For a country to be named as the country that respect and promote human rights, must before all ratify and domesticate all international human rights instruments. By international law, countries like Tanzania are obligated to take some measures to ensure human rights protection and promotion. This is because, under international law, States will be accountable for not complying with their legal obligations to respect and ensure effective enjoyment of the human rights recognized in the legal instruments. Tanzania as dual system state did allot as far as ratification of international human rights instruments are concern.[897]

17.10 Conclusion



In above chapter we have learnt that human rights are the rights that every human being automatically qualifies for at birth. They cannot be denied because of the colour of one's skin, religion, age or other personal factors. Central to the concept of human rights is the protection of human dignity. These rights are all interrelated, interdependent and indivisible.

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[894] Basic Rights and Duties Enforcement Act, 1994, Cap. 3, R.E. 2002

[895] International Covenant on Civil and Political Rights, 1966 (adopted 16 December 1966, entered into force 23 March 1976, ratified by Tanzania 11 June 1976) 999 U.N.T.S. 171; African Charter on Human and Peoples' Rights, 1981 (adopted 27 June 1981, entered into force 21 October 1986, ratified by Tanzania 18 February 1984), (1982) 21 ILM 58; International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, 2006 (adopted 13 December 2006, entered into force 3 May 2008, ratified by Tanzania 30 March 2007) UNGA Res A/61/611.

[896]See Government of Tanzania, 'Fourth periodic report of the United Republic of Tanzania to the United Nations Human Rights Committee' (17 December 2007) CCPR/C/TZA/4 (Fourth report to the UNHRC). at pp. 7 – 8 See also LHRC 2008 Human rights report.

[897]See Assad, M and S. Kibaja (2007): "Resource Allocation and Challenges of Education Reform in Tanzania," paper presented to Education Sector Review Workshop, October

Human rights are manifested by the Universal Declaration of Human Rights, which was adopted in 1948 by the United Nations. These are not provided in any document. Human rights instrument only recognize and guarantee them and to put standards. Violation of human rights can be both horizontal and vertical. Violations done by state to its people are vertical and violations among citizens are horizontal. Human rights are a product of a philosophical debate that has raged for over two thousand years within the European societies and their colonial descendants. This argument has focused on a search for moral standards of political organization and behaviour that is independent of the contemporary society.

Human rights are both inspirational and practical. Human rights principles hold up the vision of a free, just, and peaceful world and set minimum standards for how individuals and institutions everywhere should treat people. The philosophy of human rights addresses questions about the existence, content, nature, universality, justification, and legal status of human rights. The strong claims made on behalf of human rights for example, that they are universal, or that they exist independently of legal enactment as justified moral norms frequently provoke sceptical doubts and countering philosophical defences.

There are three generations of human rights such as first, second and third. The three generations framework contains within it room for many of the key debates about the nature of rights. It also encourages us to take a critical approach in challenging our own assumptions about rights as we begin to think about some of the real-world problems involved in the application of human rights in the sections. Considering this history in Human Rights perspective in Tanzania, it is clearly understood by all that colonialism was a negation of human rights. When one state colonizes another, it violates the right to self-determination of the colonial peoples. There is no law that justifies colonialism. Notwithstanding that, colonial powers never allowed the natives to enjoy any human rights.

The Human Rights situation under the post-colonial Tanzania, just like many other African states, was shadowed with a need for development. The nationalist leaders conceived the process of (economic) development to be one that may not necessarily promote or respect human rights. Bill of Rights was denied apparently due to the nationalistic reasons. There

were still human rights abuses such as torture and detention through the law. In 1984, the Bill of Rights was incorporated in the Constitution of the United Republic of Tanzania after a long advocacy struggle by activists.

17.11 Review Questions



1. What are human rights? Illustrate their relevance.
2. Describe the nature and characteristics of human rights.
3. Account for the growth and development of human rights in the world.
4. Discuss the theories and philosophy of human rights.
5. Explain the generation and types of human rights.
6. Evaluate the historical development of human rights in Tanzania.

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CHAPTER EIGHTEEN

LIBERALISM

18.0 Introduction

Liberalism is a label that has embraced many different theories that have almost nothing to do with each other. Liberalism is a doctrine of individual rights and state's neutrality.Liberalism fractures on so many issues the nature of liberty, the place of property and democracy in a just society, the comprehensiveness and the reach of the liberal ideal one might wonder whether there is any point in talking of 'liberalism' at all. It is not, though, an unimportant or trivial thing that all these theories take liberty to be the grounding political value.

18.1 Objectives



At the end of this chapter students should have:-

- Acquired basic knowledge of concepts such as liberalism, law, freedom, right etc.
- Acquainted with understanding of nature, purpose, types relevance of liberalism.
- Acquainted with ability to examine and understand the basic ideas of liberalism.
- Acquired competency to describe the contribution of various philosophers in the development of liberalism.

18.2 Liberalism

Liberalism is the political theory that characterizes individuals as being naturally suited to accept their place in a hierarchical society where all pay unswerving homage to the king.[898] The common theme of individualism sets liberalism against monarchical conservatism, but if attention be paid to the diversity of liberals, even that common theme may conceal more than it reveals.[899]

Liberalism focuses onderiving liberal Conclusions about social justice from rather sparse premises abouthuman nature, premises which purport to remain neutral aboutthe nature of the good in life.[900]

[898]See Tushnet, Deviant Science in Constitutional Language, 59 TEX. L. REV. 815, 826 n.42 (1981)

[899] See Kymlicka, Will (1989). Liberalism, Community and Culture, Oxford: Clarendon Press

[900] See L., Tribe, The Puzzling Persistence of Process-Based Constitutional Theories, 89 YALE L.J. 1063 (1980)

18.3 Kinds of Liberalism

18.3.1 Classical Liberalism

Classical liberalism is sometimes called the 'old' liberalism whereby liberty and private property are intimately related. From the eighteenth century right up to today, classical liberals have insisted that an economic system based on private property is uniquely consistent with individual liberty, allowing each to live her life including employing her labour and her capital as she sees fit.[901]

Indeed, classical liberals and libertarians have often asserted that in some way liberty and property is really the same thing; it has been argued, for example, that all rights, including liberty rights, are forms of property; others have maintained that property is itself a form of freedom.[902]

Classical liberals employ argument of connecting liberty and private property. Rather than insisting that the freedom to obtain and employ private property is simply one aspect of people's liberty, this second argument insists that private property is the only effective means for the protection of liberty.[903]

18.3.2 New Liberalism

New liberalism arose in the late nineteenth and early twentieth centuries, a period in which the ability of a free market to sustain prosperous equilibrium. Just as the new liberals were losing faith in the market, their faith in government as a means of supervising economic life was increasing.[904]

The development of the new liberalism was probably the most fundamental: a growing conviction that, so far from being 'the guardian of every other right, property rights generated an unjust inequality of power that led to a less-than-equal liberty for the working class.[905]

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[901] See Rawls, John (1996). Political Liberalism, New York: Columbia University Press

[902] See Robbins, L. (1961). The Theory of Economic Policy in English Classical Political Economy, London: Macmillan

[903] See Rawls, John (1999a). Law of Peoples, Cambridge, MA: Harvard University Press.

[904] See Reiman, Jeffrey (1990). Justice and Modern Moral Philosophy, New Haven, CT: Yale University Press

[905] See Ritchie, D.G. (1896). Principles of State Interference, 2nd edn., London: Swan Sonnenschein.

18.4 Themes of Liberalism

Human being is a selfish pleasure centre by nature, seeking out pleasure and striving to avoid pain. Human being is an animal, but a smart one equipped with reason that helps further its pleasure-seeking instincts. Whatever enhances pleasure is right for humans, and morals are defined in these terms. Any other conception contradicts human nature.[906]

Government is a necessary device. Without government, individuals would seek pleasure unlimited by rules. No property would be secure, nor would life or the pursuit of happiness. Existence would be a constant state of war.[907]

A system of rules is needed to assure that persons do not seek their pleasure by inflicting pain upon others. The rules must not favour one group at the expense of another; otherwise the government could not expect the allegiance of its citizens.[908]

Thus, each citizen must stand as an equal before the government which acts as night watchman, enforcing neutral rules so that men may pursue their pleasure without inflicting pain upon each other and so that men will be secure in the knowledge that if they obey the rules, the fruits of their pursuit of pleasure will be theirs to enjoy.

In order to secure happiness, men must also be free to trade what belongs to them, and the state should not interfere with their decisions, prudent or not. Even if inequality should result from the trading process, the state must not intervene.[909]

The empirical assumptions are that if the law were to intervene, the productivity incentive would be diminished. Therefore, security would be undermined as well as happiness would be diminished.[910]

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[906] See J. Bentham, Anarchical Fallacies, In 2 The Works Of Jeremy Bentham 501

[907] See L., Tribe, Technology Assessment and the Fourth Discontinuity. The Limits of Instrumental Rationality, 46 S. CAL. L. REV. 617 (1973)

[908] See J.J. Rousseau, The Social Contract bk. I, ch. VII, at 18 (G. Cole trans. 1950)

[909] See, Karst, The First Amendment and Harry Kalven: An Appreciative Comment on the Advantages of Thinking Small, 13 UCLA L. REV. 1 (1965)

[910] See Karst, Equality and Community-Lessons from the Civil Rights Era, 56 NOTRE DAME LAW. 183 (1980)

The state as night watchman, therefore, protects people's right to private property and their freedom to contract, and stands to arbitrate other aspects of their activities that might interfere with the activities of others. In arbitrating conflicts, the role of government is dictated by human nature-it should strive to maximize pleasure and minimize pain.[911]

18.5 John Locke on Liberalism

God created humans as free, equal, and independent beings, granting to none of them or to no group of them, the right to impinge upon the freedom[912] of any other except as a just infliction of punishment.[913]

To deny another's freedom would be to make one person slave to another, and slavery is the antithesis of what the natural law requires.[914] Government becomes necessary because, without the establishment of rules and their enforcement, humans could not be free from the restraint or violence of those who failed to respect the natural law.[915]

But government derives the power to impose rules on individuals only if they in one way or another have consented to the rule of government.[916] And the exclusive purpose of government is to protect individuals from the arbitrary will of others, that is, to preserve their freedom.[917]

Humans, at a minimum, own their own bodies, and God intended that the industrious be able to use their bodies and their minds to give value to the resources of the world and to enjoy the fruits of their labour. [918]

The invention of money as a medium of exchange by the mutual consent59 of the governed allows us to store wealth in a way that can lead to unequal distribution of wealth. Because we own our own bodies,

[911] See J.S. Mill, On Liberty, In The Utilitarian's 474 (Dolphin ed. 1961)

[912] See Locke, John (1960 [1689]). The Second Treatise of Government in Two Treatises of Government, Peter Laslett, ed. Cambridge: Cambridge University Press, 283-446

[913] See J. Locke, Treatise Of Civil Government And A Letter Concerning Toleration 6 (1937)

[914] See E. Bramsted& K. Melhuish, Western Liberalism (1978).

[915] See H. Girvetz, The Evolution Of Liberalism (1963).

[916] See Locke, John (1975 [1706]). An Essay Concerning Human Understanding, Peter H. Nidditch (ed.), Oxford: Clarendon Press

[917] See D. Long, Bentham On Liberty 23 (1977))

[918] See C. Macpherson, Liberal Democracy; supra note 34, at 23-43.

however, we can freely work to lead a full life. Moreover, government would depart from its function if it attempted to redistribute property.[919]

Because government's only purpose is to preserve freedom including the freedom to possess property, to take property from some to give to others would be theft. If people are to help others in need, their actions must be free. To take property, then, circumscribes freedom-it is a form of slavery.[920]

18.6 Ronald Dworkin Liberalism

Before the content of equal treatment can be articulated a government must have before it a theory of what might constitute the good life for citizens. Citizens cannot be treated as equal human beings unless it is known what precisely human beings are about. [921]

It would accordingly conclude that the content of equality it owes its citizens on the basis of these principles must be seen in terms of the good life for its citizens that have been politically endorsed.[922]

A liberal political structure would reject such an approach. A liberal approach is not to settle for one conception of the good life in the political structure. Rather, citizens in a liberal society have available to them as many conceptions of the good life as they wish.[923]

Dworkin sees liberalism as a theory of commitment. He distinguishes liberalism based on neutrality from his liberalism based on equality. This liberalism of equality has a positive commitment to an egalitarian morality which rejects the economics of privilege.[924]

Fundamental to this liberalism based on equality is a requirement for a government to treat its citizens as equals. A government in a society of liberalism based on equality will remain neutral only to the extent and to the degree that equality demands.[925]

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[919] See I. Kant, The Metaphysical Elements of Justice, supra note 15, at 86

[920] See C. Macpherson, Possessive Individualism, supra note 22, at 194-262

[921]See Ronald's Dworkin liberalism and its relationship to his Jurisprudence - Gerard C Kelly - Solicitor http://www.gerardkelly.com.au/dworkindissertation.html

[922] Ibid

[923]See, R., Dworkin, A Theory of Justice Oxford, University Press, Oxford 2000

[924]See, J., Raz, The Morality of Freedom, (Claredon Oxford, 1986, p 288)

[925] See,R., Dworkin, Taking Rights Seriously, Duckworth, London, 2000 p 275

Dworkin outlines a system for market place equality. The system attempts to achieve equality in the context of a free market, people taking responsibility for their choices within the structure devised by Dworkin to compensate for disabilities, talents and unsought misadventure.[926]

He distinguishes two kinds of resources: personal and impersonal. Personal resources are physical and mental health, talent, strength - the qualities of mind and body necessary for achievement. Impersonal resources surround us and lie outside of us: land, raw materials, and the goods we purchase.[927]

Political liberties must be preserved so as to serve the gaols of liberal equality. The preservation of these personal liberties and rights occurs as part of the modification to the liberal political structures in a democratic society.[928]

In a democratic society, where persons are free to pursue their conception of the good, democracy in practice could easily be susceptible to corruption, to the advantaged manipulating the system for their personal objectives, to the dominance of those with economic power. It is necessary to have a scheme of individual rights to ensure the majority cannot swamp certain specific minority conduct.[929]

Dworkin devises a judicial system that is required to apply law in a manner that achieves the best possible result so far as gaining equal concern and respect for the citizen. Basic to Dworkin's legal philosophy is the idea of equality that like cases must be treated alike.[930]

It is obviously unjust for a case to be decided in one fashion on one occasion and a similar case or cases to be decided differently on later occasions. Such an outcome makes justice unprincipled, subject to judicial whims, and leaves litigants in a position where they have no idea what the law might be that will be applied to them. Citizens are not being treated equally where like cases are decided differently.[931]

[926] See, R., Dworkin, Laws Empire, Harvard University Press, Cambridge, Massachusetts 2000, p 228

[927] See R., Dworkin, Collected Papers, Ed Freeman, Justice as Fairness: Political not Metaphysical, Harvard University Press, London ,2001 p 388

[928] See, R., Dworkin, A Matter of Principle, Harvard University Press, London, 1985, p 183

[929] See R., Dworkin, The Tanner CHAPTERs on Human Values XII, 1990

[930] See R., Dworkin, Foundations of Liberal Equality, University of Utah Press, Salt Lake City.

[931] See, J., Raz, The Morality of Freedom, (Claredon Oxford, 1986, p 288)

18.7 John Dewey

Dewey's instrumental philosophy holds that ideas are plans of action, and not mirrors of reality and that philosophy ought to free itself from metaphysics and devote itself to social engineering.[932]

Innate reason or human instinct, Dewey found from his study of psychology, is unable to explain human conduct and attitudes. Recourse must be had to custom and habit.[933] The idea of mind or inborn reason separated from the cultural matrix, an idea which Locke and other classic liberals supported, thus found its repudiation in Dewey's new psychology.[934]

There is moral progress as well as moral order. This may be discovered by an analysis of the very nature of moral conduct, but it stands out more clearly and impressively if we trace the actual development in history.[935]

18.8 Conclusion



In above chapter we have learnt that liberalism is a label that has embraced many different theories that have almost nothing to do with each other. Liberalism is a doctrine of individual rights and state's neutrality. Liberalism defends the natural rights of the individual and the invisible harmony of society. Justice is considered a form of nature and manmade law must conform to natural law if the former is also to be just. Translation of the absolute moral qualities of justice into positive law is accomplished by logical deduction. Individual human reason thus reaches beyond the corporeal world to the unseen realm of moral values.

Accordingly, political institutions must give full rein to the individual to bargain his own contracts, to hold and dispose of his own property, and to run his own government. Liberals thus consider republican government to be the most just political arrangement. Furthermore, equality before the law is classic liberalism's judicial aspect: both the plaintiff and defendant

[932] See M. White, Social Thought in America: The Revolt against Formalism 11 (1949).

[933] See Daniels, Introduction in Reading Rawls critical Studies Of A Theory Of Justice at xiii-xvi

[934] See R. LEVY, T. Lewis, & P. Martin, Social Welfare And The Individual-Cases And MATERIALS 51, 54 (1971), 22 M. WHITE, SOCIAL

[935] See J. Dewey & J. Tufts, Ethics 4 (1908)

compete as equals to show the better reason for their side; that they are social un-equals is irrelevant. The function of the judge is to coordinate individual rights and administer remedies when due. This is the sporting theory of justice used at common law.

Classical liberalism also means laissez faire economic policy: the government should leave the individual alone while society's natural harmony or "invisible hand" automatically regulates supply and demand. New liberalism formed around a sociological perspective of strife between individuals and among groups. This scenario accorded with the Darwinian picture of constant struggle for survival. The new liberals recognized that individuals could not always be entrusted with their own welfare. Man's fight against man is too intense. Industrialized society, furthermore, is not self-regulating because ownership of the means of production provides the propertied class with historically unparalleled power over other individuals. Therefore whereas classic liberal jurisprudence had advocated the sanctity of contract and property, and the equality of all individuals, the new liberalism subordinated all of these factors to the public interest.

18.9 Review Questions



1. What is liberalism? How is relevant to the modern democratic countries?
2. Describe the kinds of the liberalism and their distinctive features.
3. Discuss the basic tenets of the liberalism
4. Evaluate the contribution of John Locke and Ronald Dworkin in the liberal jurisprudence.

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CHAPTER NINETEEN

RADICALISM

19.0 Introduction

Radicalism denotes principles focused on altering social structures through revolutionary means and changing value systems in fundamental ways. It denotes the opinions and behaviour of people who favour extreme changes especially in government. In its most general sense radicalism is the striving for fundamental change. Usually the term has a narrower meaning in politics. Although there can be right-wing or nationalist radicalism, the term is more often used in connection with movements on the left of the political spectrum.

19.1 Objectives



At the end of this chapter students should have:-

- Acquired basic knowledge of concepts such as radicalism, radical, civil disobedience.
- Acquainted with understanding of nature, purpose, types relevance of radicalism.
- Acquainted with ability to examine and understand the basic ideas of radicalism.
- Acquired competency to describe the contribution of various philosophers in the development of radicalism.

19.2 Radicalism

The term radicalism is derived from the Latin radix (root). The denotation of radical has changed since its eighteenth-century coinage to comprehend the entire political spectrum yet retains the "change at the root" connotation fundamental to revolutionary societal change.[936]

Historically, radicalism has referred exclusively to the radical left under the single category of far-left politics and rarely incorporating far-right politics, though these may have revolutionary elements.[937]

[936] See Radicalism | Radicalism Definition by Merriam-Webster, available at http://www.merriam-webster.com/dictionary/radicalism. Accessed on 7th November 2016 at 11:43 am

Radicalism means the political orientation of those who favour revolutionary change in government and society. Both radical and radicalism came out of the idea that political change must come from the root or the very basic source of society. It signifies belief that society needs to be changed, and that these changes are only possible through revolutionary means.[938]

Radicalism is the belief that there is a vital need for a clear awareness of the root causes and character of things, by which one can recognize and penetrate superficial or false appearances; in political terms, this is often accompanied by the belief that society requires fundamental and drastic changes.[939]

19.3 Background of Radicalism

Historically, Radicalism began in the United Kingdom with political support for a "radical reform" of the electoral system to widen the franchise. Some radicals sought republicanism, abolition of titles, and redistribution of property and freedom of the press.[940]

The Radical movement had its beginnings at a time of tension between the American colonies and Great Britain, with the first Radicals, angry at the state of the House of Commons, drawing on the Leveller tradition and similarly demanding improved parliamentary representation.[941]

These earlier concepts of democratic and even egalitarian reform had emerged in the turmoil of the English Civil War and the brief establishment of the republican Commonwealth of England amongst the vague political grouping known as the Levellers, but with the English Restoration of the monarchy suchideas had been discredited.[942]

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[937] See Radicalism | Define Radicalism at Dictionary.com available at http://www.dictionary.com/browse/radicalism. Accessed on 7th November 2016 at 11:45 am

[938] See, Radicalism - Dictionary Definition: Vocabulary.com available at https://www.vocabulary.com/dictionary/radicalism. Accessed on 7th November 2016 at 11:41 am

[939] See, Himka, J.-P. Socialism in Galicia: The Emergence of Polish Socialism and Ukrainian Radicalism (1860–1890) (Cambridge 1983)

[940] See Radicalism – Wikiquote available at https://en.wikiquote.org/wiki/Radicalism. Accessed on 7th November 2016 at 11:49 am

[941] See Bartholomew, Amy (ed.), 2007, Empire's Law: The American Imperial Project and the 'War to Remake the World', London: Pluto Press

[942] See Burns, J.H (2005). "Happiness and utility: Jeremy Bentham's equation", Utilitas, **17**: 46–61

Although the Glorious Revolution of 1688 had increased parliamentary power with a constitutional monarchy and the union of the parliaments brought England and Scotland together[943], towards the end of the 18th century the monarch still had considerable influence over the Parliament of Great Britain which itself was dominated by the English aristocracy and by patronage. [944]

Candidates for the House of Commons stood as Whigs or Tories, but once elected formed shifting coalitions of interests rather than splitting along party lines. At general elections the vote was restricted to property owners, in constituencies which were out of date and did not reflect the growing importance of manufacturing towns or shifts of population[945], so that in many rotten borough seats could be bought or were controlled by rich landowners, while major cities remained unrepresented. Discontent with these inequities inspired those individuals who later became known as the Radical Whigs.[946]

In France in the nineteenth century, the Republican, Radical and Radical, Socialist Party, initially identifying itself as a far-left party opposed to more right-wing parties eventually became the most important party of the Third Republic (1871–1940).[947]

As historical Radicalism became absorbed in the development of political liberalism, in the later 19th century in both the United Kingdom and in continental Europe the term Radical came to denote a progressive liberal ideology.[948]

Many European parties that are nowadays categorised in the group of social-liberal parties have a historical affinity with radicalism and may therefore be called liberal-radical.[949]

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[943] See Marx, K. and Engels, F., 1976, The German Ideology, (Collected Works, Volume 6), London: Lawrence and Wishart

[944] See Robinson, Dave; Groves, Judy (2003), Introducing Political Philosophy, Cambridge: Icon Books

[945] See Halpin, Andrew, 2006, 'Ideology and Law,' Journal of Political Ideologies, 11: 153–168

[946] See Rosen, Frederick (1992). Bentham, Byron, and Greece: constitutionalism, nationalism, and early liberal political thought. Oxford: Clarendon Press

[947] See Davidson, John Morrison (1880). Eminent English liberals in and out of Parliament, Boston: James R. Osgood.

[948] See Gilbert Abcarian (1971) American Political Radicalism: Contemporary Issues and Orientations

[949] Ibid

19.4 Themes of Radicalism

Human beings, secure their identitiesas pleasure-seeking animals to the extent that society trains themto be that way, but society need not be so arranged.The democratic radicals would substitute altruism for egoismon the ground that egoism is unsatisfying and morally bankrupt.[950]

They believe that the model of an individual standing alone ishardly an appropriate symbol for all that is human, and personsare not truly free if they are poor or lack power. For the anomieof individualism, radicals would substitute friendship;for the egoism of competition, they would substitute cooperation;instead of the night watchman, they propose community. [951]

Inshort, the radical opposes the idea of a civil society ofego-maximizing individuals striving for greater and greater wealthat the expense of their fellow citizens. Instead they offer thehope of friendship, community, cooperation, love, trust, and sharing.[952]

To defend liberalism, radicals say, is to defend selfishness, widespread inequality, the misery produced byprivate property and freedom of contract, and the sense of loneliness and anomie that comes from isolation.[953]

Effective government was not to be had on the foundation of abstract formulas such as “mixed and balanced” institutions, but required “the frequent and easy changes of condition between governors and governed and whereby the interests of one class are more or less indistinguishably blended with those of the other.[954]

Those who hold the “operative power” in government, administration, and judiciary are, like everyone else, motivated by personal interest. It is imperative, therefore, to devise mechanisms that will ensure that only by acting in the public interest could they promote their own interests.[955]

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[950] See Mike Sanders (ed.) (2001) "Women and Radicalism in the Nineteenth Century"

[951] See D. Richards, A Theory of Reasons, supra note 19, at 87.

[952] See Luke March (12 March 2012), Radical Left Parties in Europe, Routledge. p. 1724

[953] See Edward Walter (1992) The Rise and Fall of Leftist Radicalism in America

[954] See J., Bentham, 1838–43, The Works of Jeremy Bentham, Published under the Superintendence of his Executor, John Bowring, 11 vols., Edinburgh: William Tait

[955] See J., Bentham, 1840, Theory of Legislation; by Jeremy Bentham. Translated from the French of Etienne Dumont, by Richard Hildreth, 2 vols., rept. Bristol: Thoemmes Continuum, 2004

But radical schemes for property re-distribution are ruled out; the axiomatic requirement that each be treated equally, that the happiness of each be counted, justified policies to equalize the distribution of goods only where this could be achieved without disappointing legitimate expectations.[956]

19.5 Jeremy Bentham and Radicalism

Jeremy Bentham, jurist and political reformer, is the philosopher whose name is most closely associated with the foundational era of the modern utilitarian tradition. Jeremy Bentham is a political radical whose ideas influenced the development of welfarism.[957]

He advocated individual and economic freedom, the separation of church and state, freedom of expression, equal rights for women, the right to divorce, and the decriminalising of homosexual acts.[958]

He called for the abolition of slavery, the abolition of the death penalty, and the abolition of physical punishment, including that of children.[959] He has also become known in recent years as an early advocate of animal rights.[960] Though, strongly in favour of the extension of individual legal rights, he opposed the idea of natural law and natural rights, calling them "nonsense upon stilts.[961]

Bentham says that liberty is the absence of restraint and so, to the extent that one is not hindered by others, one has liberty and is free.[962] Bentham denies that liberty is natural in the sense of existing prior to social life and thereby imposing limits on the state or that there is an a priori sphere of liberty in which the individual is sovereign.[963]

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[956] See J., Bentham, 1968–, The Collected Works of Jeremy Bentham, General Editors: J. H. Burns, J. R. Dinwiddy, F. Rosen, T. P. Schofield, London: Athlone Press; Oxford: Clarendon Press

[957] See Avila-Martel, A. de, 1981, "The Influence of Bentham on the Teaching of Penal Law in Chile",The Bentham Newsletter, 5: 22–8

[958] See Bentham, Jeremy. "Offences Against One's Self", first published in Journal of Homosexuality, v.3:4(1978), p. 389–405

[959] See, Bedau, Hugo Adam (1983), "Bentham's Utilitarian Critique of the Death Penalty" The Journal of Criminal Law and Criminology, 74 (3): 1033–1065

[960] See, Sunstein, Cass R. "Introduction: What are Animal Rights?", in Sunstein, Cass R. and Nussbaum, Martha (eds.). Animal Rights, Oxford University Press, 2005, pp. 3–4

[961] See Fisher, W.W. et al., 1933, American Legal Realism, New York: Oxford University Press

[962] See MacCunn, John. Six Radical Thinkers, second impression, London, 1910

[963] See, Harrison, Ross. Bentham. London: Routledge and Kegan Paul, 1983.

In fact, Bentham holds that people have always lived in society, and so there can be no state of nature though he does distinguish between political society and natural society and no social contract.[964]

Nevertheless, he does note that there is an important distinction between one's public and private life that has morally significant consequences, and he holds that liberty is a good that, even though it is not something that is a fundamental value, it reflects the greatest happiness principle.[965]

Bentham was the first person to aggressively advocate for the codification of all of the common law into a coherent set of statutes; he was actually the person who coined the verb to codify to refer to the process of drafting a legal code.[966]

Rights are created by the law, and law is simply a command of the sovereign. The existence of law and rights, therefore, requires government.[967] Rights are also usually though not necessarily correlative with duties determined by the law.[968]

Bentham believed that facilitating individuals in the pursuit of their interests in a free market is what government should do, because this is the proven best way to maximise the public good. Where laissez-faire does not produce the best result, however, the legislator must act in other direct and indirect ways to produce the optimal outcome.[969]

[964] See, J., Bentham, A Comment on the Commentaries and a Fragment on Government, Ed. J.H. Burns and H.L.A. Hart, London: The Athlone Press, 1977

[965] See J., Bentham, An Introduction to the Principles of Morals and Legislation, Ed. J.H. Burns and H.L.A. Hart, London: The Athlone Press, 1970.

[966] See Andrew P. Morriss, Codification and Right Answers, 74 Chic.-Kent L. Rev. 355 (1999)

[967] See Mack, Mary Peter. Jeremy Bentham: An Odyssey of Ideas 1748-1792. London: Heinemann, 1962

[968] See Lyons, David. "Rights, Claimants and Beneficiaries," in American Philosophical Quarterly, Vol. 6 (1969), pp. 173-18

[969] See Carlyle, T., 1840, On Heroes, Hero-Worship, and the Heroic in History, ed. M.K. Goldberg, J.J. Brattin, and M. Engel, Berkeley, CA: University of California Press, 1993

On securities against misrule, Bentham proposed that the precise definition of responsibilities attached to each office, against which the actions of officials could be judged by either a superordinate official or the public.[970]

Also, the principle of subordination, according to which every official was subordinate to another who could punish him for inefficiency in the performance of his tasks and complete exposure to legal prosecution of all officials for wrong-doing.[971]

Moreover, the elimination of the practice of handing out unwarranted titles of honour to party supporters and other favourites, complete publicity of government business and the elimination of secrecy and freedom of the press, speech and association.[972]

19.6 Civil Disobedience and Radicalism

Civil disobedience is a public, non-violent and conscientious breach of law undertaken with the aim of bringing about a change in laws or government policies. On this account, people who engage in civil disobedience are willing to accept the legal consequences of their actions, as this shows their fidelity to the rule of law.[973] Civil disobedience, given its place at the boundary of fidelity to law, is said to fall between legal protest, on the one hand, and conscientious refusal, revolutionary action, militant protest and organised forcible resistance, on the other hand.[974]

[970] See Hazlitt, W., 1826, "The New School of Reform: A Dialogue between a Rationalist and a Sentimentalist", in The Complete Works of William Hazlitt, 21 vols., ed. P. P. Howe, London: J.M. Dent and Sons, 1930–4, vol. 12, pp. 179–95

[971] See Mill, J. S., 1963–91, Collected Works of John Stuart Mill, Gen. Ed. J. M. Robson, Toronto: University of Toronto Press

[972] See Smith, T. S., 1832, CHAPTER Delivered over the Remains of Jeremy Bentham, Esq., in the Webb-Street School of Anatomy & Medicine, on the 9th June, 1832, London: Effingham Wilson

[973] See Smith, William, 2011. 'Civil Disobedience and the Public Sphere,' in The Journal of Political Philosophy, 19 (2): 145–166

[974] See, Washington, J. M. (ed.), 1991. Testament of Hope: The Essential Writings and Speeches of Martin Luther King Jr., San Francisco: Harper Collins

Civil disobedient address themselves to the majority to show that, in their considered opinion, the principles of justice governing cooperation amongst free and equal persons have not been respected by policymakers.[975]

Civil disobedient can either breach the law they oppose or breach a law which, other things being equal, they do not oppose in order to demonstrate their protest against another law or policy. Openness and publicity, even at the cost of having one's protest frustrated, offer ways for disobedient to show their willingness to deal fairly with authorities.[976]

19.7 Justification of Civil Disobedience

The task of defending civil disobedience is commonly undertaken with the assumption that in reasonably just, liberal societies' people have a general moral obligation to follow the law. In the history of philosophy, many arguments have been given for legal obligation.[977]

Socrates emphasises the importance of moral consistency; he would prefer to give up his life than to compromise his principles. A basic principle for Socrates is that a person must never do wrong or injury in return for wrong. To escape without persuading the state would be to try to destroy it and its laws. Also, Socrates maintains that he has an obligation to follow the laws of Athens since he has tacitly agreed to do so and since he enjoys the rights and benefits of citizenship.[978]

According to Rawls disobedient has to coordinate with other minorities for civil disobedience justification. Since minority groups are equally justified in resorting to civil disobedience when they have sufficiently weighty objections, these groups should avoid undermining each other's' efforts through simultaneous appeals to the attention of society and government.[979]

According to Raz, when one considers the idea of a moral right to civil disobedience, one must appreciate that this right extends to cases in which people should not exercise it. To say that there is a right to civil

[975] See, Thoreau, Henry David, 1991. 'Civil Disobedience,' in Civil Disobedience in Focus, Hugo A. Bedau (ed.), London: Routledge

[976] See Walzer, Michael, 2004. Arguing about War, New Haven: Yale University Press

[977] See Sunstein, Cass, 2003. Why Societies Need Dissent, Cambridge, MA: Harvard University Press

[978] See, Storing, Herbert J., 1991. 'The Case Against Civil Disobedience,' in Civil Disobedience in Focus, Hugo A. Bedau (ed.), London: Routledge

[979] See Rawls, John, 1971. A Theory of Justice, Cambridge, MA: Harvard University Press

disobedience is to allow the legitimacy of resorting to this form of political action to one's political opponents. It is to allow that the legitimacy of civil disobedience does not depend on the rightness of one's cause.[980]

Ronald Dworkin rests the right to civil disobedience not just on a person's right to political participation, but on all of the rights that she has against her government. People may be supposed to have a fundamental right against the government, such as freedom of expression, when that right is important to their dignity, to their standing as persons equally entitled to concern and respect, or to some other personal value of consequence. A person has a right to disobey a law, says Dworkin, whenever that law wrongly invades her rights against the government.[981]

19.8 Conclusion



In above chapter we have learnt that the term radicalism is derived from the Latin radix (root). The denotation of radical has changed since its eighteenth-century coinage to comprehend the entire political spectrum yet retains the "change at the root" connotation fundamental to revolutionary societal change.

Radicalism is the belief that there is a vital need for a clear awareness of the root causes and character of things, by which one can recognize and penetrate superficial or false appearances; in political terms, this is often accompanied by the belief that society requires fundamental and drastic changes. Inshort, the radical opposes the idea of a civil society ofego-maximizing individuals striving for greater and greater wealthat the expense of their fellow citizens. Instead they offer thehope of friendship, community, cooperation, love, trust, and sharing.

Civil disobedience is a public, non-violent and conscientious breach of law undertaken with the aim of bringing about a change in laws or government policies. A basic principle for Socrates is that a person must never do wrong or injury in return for wrong. To escape without persuading the state would be to try to destroy it and its laws.

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[980] See Raz, Joseph, 1979. The Authority of Law: Essays on Law and Morality, Oxford: Clarendon Press
[981] See Dworkin, Ronald, 1977. Taking Rights Seriously, London: Duckworth

justification. According to Raz, when one considers the idea of a moral right to civil disobedience, one must appreciate that this right extends to cases in which people should not exercise it. Ronald Dworkin rests the right to civil disobedience not just on a person's right to political participation, but on all of the rights that she has against her government.

19.9 Review Questions



1. What is radicalism? Explain its essence in modern democratic world.
2. Describe historical background of the radicalism.
3. Define civil disobedience. Why there is civil disobedience?
4. Is civil disobedience lawful or not? Give reasons for your answer.
5. Compare and contrast liberalism and radicalism.
6. Assess Jeremy Bentham radical ideas in relation to jurisprudence.

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CHAPTER TWENTY

THEORIES OF ADJUDICATION

20.0 Introduction

Theory of adjudication can be constructed from the various political and philosophical doctrines. There are always diverging views related to the field of what constitutes law and the major aspects affecting it such as adjudication.[982] Henceforth we are going to learn general overview of the adjudication, its purposes, and governing theories. This chapter is intended to equip the knowledge and understanding of the theoretical perspectives of the adjudication and not practical ones. This is done so as to acquaint with underlying conceptual and profound theoretical understanding of the adjudication process. Here we are lets go.

20.1 Objectives

At the end of this chapter students should have: -

- Acquired basic knowledge of concepts such as adjudication, theory of adjudication, principle, rule etc.
- Acquainted with understanding of nature, purpose, types, relevance and characteristics of concept of adjudication.
- Acquainted with ability to understand and examine the historical perspectives and development of concept of adjudication.
- Developed ability to account for theories which postulate about adjudication process.

20.2 Adjudication

Adjudication means the legal process of resolving a dispute.[983] The formal giving or pronouncing of a judgment or decree in a court proceeding; also the judgment or decision given. It includes the entry of a decree by a court in respect to the parties in a case. It implies a hearing by a court, after notice, of legal

[982] See Klare, Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941, 62 MINN, L. REV. 265, 337-39 (1978)

[983] See Bennett, Objectivity in Constitutional Law, 132 U. PA. L. REV. 445, 495 (1984)

evidence on the factual issue or issues involved and the equivalent of a determination. It indicates that the claims of all the parties thereto have been considered and set at rest.[984]

Adjudication ensures a fair and equitable outcome. Because, courts are governed by evidentiary and procedural rules, as well as by 'stare decisis', the adjudicative process assures litigants of some degree of efficiency, uniformity, and predictability of result.[985]

The purpose of adjudication is to provide justice to the aggrieved party in any said dispute. Parties come to Court only when any alternate dispute mechanism doesn't work. The experience of the Judges, who are the adjudicators, in deciding the cases, helps in determining the 'right' decision and granting relief to one of the parties.[986]

20.3 Historical Perspective

Since time immemorial, each society has advanced in its way of thinking and as new aspects of adjudication were conjured, changes were brought about in that legal system, sometimes by practice, usage by the Courts and at other times through legislative action.[987]

All that can be hoped is that in an attempt to lay down ground rules for the same, no society or legal system suffers in the way of granting justice, which is and should be the sole aim of every such legal system.[988]

20.4 Do Judges Make Laws?

An age-old question that still plagues legal theorists is whether judges "make" law when they adjudicate.

Sir William Blackstone believed that judges do nothing more than maintain and expound established law (Commentaries on the Laws of England); other writers vehemently disagree.[989]

Some legal analysts maintain that the law is whatever judges declare it to be. Echoing those sentiments, President Theodore Roosevelt asserted that "the chief lawmakers in our country may be, and often are, the

[984] See http://www.legalindia.com/theories-of-adjudication/. Accessed on 25th October 2016 at 1:35 pm
[985] See D'Amato, Towards a Reconciliation of Positivism and Naturalism: A Cybernetic Approach to a Problem of Jurisprudence, 14 W. **ONT.** L. REv. 171,177-78 (1975).
[986] See Brest, The Misconceived Quest for the Original Understanding, 60 B.U.L. REv. 204 (1980)
[987] See Parker, The Past of Constitutional Theory — And Its Future, 42 OHIo ST. L.J. 223 (1981);
[988] See Singer, The Player and the Cards, Nihilism and Legal Theory, 94 **YALE** L.J. 1 (1984)
[989] See Bork, Neutral Principles and Some First Amendment Problems, 47 IND. L.J. 1 (1971)

judges, because they are the final seat of authority. Every time they interpret. They necessarily enact into law parts of a system of social philosophy; and as such interpretation is fundamental, they give direction to all law-making.[990]

Supreme Court Justice Cardozo, writing in The Nature of the Judicial Process, argued that the law is evolutionary and that judges, by interpreting and applying it to specific sets of facts, actually fashion new laws.[991]

Whether judges are seen as making law or merely following what came before, they are required to operate within narrow strictures. Even when they are deciding a case on the basis of first impression that means a question that has not previously been adjudicated, they generally try to analogize to some existing precedent.[992]

Judges often consider customs of the community; political and social implications; customs of the trade, market, or profession; and history when applying the law. Some, such as Justice Oliver Wendell Holmes and Justice Cardozo, thought that considerations of social and public policy are the most powerful forces behind judicial decisions.[993]

A hearing in which the parties are given an opportunity to present their evidence and arguments is essential to adjudication. Anglo-American law presumes that the parties to the dispute are in the best position to know the facts of their particular situations and develop their own proofs. If the hearing is before a court, formal rules of procedure and evidence govern; a hearing before an Administrative Agency is generally less structured.[994]

Following the hearing, the decision maker is expected to deliver a reasoned opinion. This opinion is the basis for review if the decision is appealed to a higher tribunal for instances, a court of appeals.

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[990]See Munzer& Nickel, Does the Constitution Mean What It Always Meant?, 77 COLUM. L. REV. 1029 (1977

[991] See Sandalow, Constitutional Interpretation, 79 Mien. L. REV. 1033,1060-72 (1981);

[992] See Schauer, An Essay on Constitutional Language, 29 UCLA L. REV. 797,806-08 (1982).

[993] See Greenawalt, Discretion and Judicial Discretion: The Elusive Quest for the Fetters that Bind Judges, 75 CoLum. L. REV, 359-60 (1975).

[994] See Fuller, Positivism and Fidelity to Law A Reply to Professor Hart, supra note 49, at 644-48

It also helps ensure that decisions are not reached arbitrarily. Finally, a well-reasoned opinion forces the judge to carefully think through his or her decision in order to be able to explain the process followed in reaching it.[995]

No time is wasted with partisan tactics and delays. It commences immediately with an analysis of the applicable legal authorities and identification of the evidence that supports the positions of each party to the dispute. The adjudicator promptly examines material witnesses under oath in the locations where they are found.[996]

20.5 Theories of Adjudication

Theory of adjudication refers to theory of how judges actually do decide cases and how they ought to decide them. These questions include: Do legal rules really constrain judicial decision-making? What makes a rule (or norm) a rule of the legal system? Are principles of morality legally binding even when such principles have not been enacted into a law by a legislature? When no legal norm controls a case, how ought judges to decide that case? Can there be "right" answers to legal disputes, even when informed judges and lawyers disagree about the answer? Are there principles or methods of legal reasoning that constrain judicial decision-making, or are legal reasoning essentially indeterminate, such that a skilful judge can justify more than one outcome for any given dispute? Is judicial decision-making really distinct from political decision-making of the sort legislators engage in?[997]

There are several jurists and legal thinkers have given their own theories as to what should constitute the basis for adjudication by Judges in any Court of law.

20.5.1 Benjamin Nathan Cardozo

Benjamin Nathan Cardozo (May 24, 1870 – July 9, 1938) was a well-known American lawyer and associate Supreme Court Justice. Cardozo is remembered for his significant influence on the development of American common law in the 20th century, in addition to his modesty, philosophy, and vivid prose style.

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[995] See Dworkin, Law's Ambitions for Itself; supra note 39, at 187.

[996] See William Glaberson, Caseload Forcing Two-Level System for U.S. Appeals, N.Y. TIMES, Mar. 14, 1999 at A1

[997] See Milner S. Ball & James B. White, A Conversation Between Milner Ball and James Boyd White, 8 YALE J. L. & HUMAN. 465, 468 (1996)

Cardozo served on the Supreme Court only six years, from 1932 until his death in 1938, and the majority of his landmark decisions were delivered during his eighteen year tenure on the New York Court of Appeals, the highest court of that state.[998]

His theory is the first that deserves mentioning. Cardozo was a realist. He totally rejected the Austinian concept of logical interpretation of law and his analytical approach to the judicial process and he emphasised on his need to interpret the law in the light of the social necessities and realities of life. In his most renowned work, 'The Nature of the Judicial Process', he stated,

> "*The judicial process is one of compromise between paradoxes, between certainty and uncertainty, between the literalism that is exaltation of the written word and the nihilism that is destructive of regularity and order."*[999]

He said that Judges, while adjudicating upon a case generally keep a subjective view of the problem at hand and thus complete justice is never attained. No matter how much a Judge may try to be objective in his decision, at some point or another he lets his own beliefs, traditions or morals get in the way of adjudication.[1000]

He said that in order to give out justice, they need to set aside any subjective approach and apply the law objectively in each case, keeping in view the prevailing traditions, customs, morals, and needs of the society.[1001]

According to Cardozo, judges cannot keep themselves secluded from social realities and developments in other fields of social sciences which have a direct bearing upon the life of the people. Therefore, law must

[998] See Annette B. Weiner, From Words to Objects to Magic: "Hard Words" and the Boundaries of Social Interaction, in BRENNEIS & MYERS (EDS.), DANGEROUS WORDS: LANGUAGE AND POLITICS IN THE PACIFIC 181 (1984).

[999]See Jessie Allen, Just Words: No-Citation Rules in the Federal Courts of Appeals, 29 VA. L. REV. 555 (2005)

[1000] See James Penner, David Schiff and Richard Nobles, Introduction to Jurisprudence and Legal Theory: Commentary and Materials, Oxford University Press (2002) at page 353

[1001] See Michelle Z. Rosaldo, It's All Uphill: The Creative Metaphors of Llongot Magical Spells, IN M. SANCHES & D. BLOUNT (EDS.), SOCIOCULTURAL DIMENSIONS OF LANGUAGE USE 178 (1975)

be kept at pace with the rest of the society and shape itself according to various social developments to attain the ends of justice.[1002]

He stated that all adjudication is 'experimental' and that each new case was an experiment in itself, where the rules applied in previous cases of similar nature may be used. He gave great importance to precedents.[1003] In his own words,

> "*Every judgment has a generative power. It begets in its own image. Every precedent, in the words of Redlich, has a "directive force for future cases of the same or similar nature. It is the source from which new principles or norms may spring to shape sentences thereafter. If we seek the psychological basis of this tendency, we shall find it, I suppose, in habit*."

20.5.2 Oliver Wendell Holmes

Oliver Wendell Holmes, Jr. (March 8, 1841 – March 6, 1935) was an American jurist who served as an Associate Justice of the Supreme Court of the United States from 1902 to 1932. He is one of the most widely cited United States Supreme Court justices in history.[1004]

He was one of the most influential American common law jurists and served as an Associate Justice and as Chief Justice on the Massachusetts Supreme Judicial Court, and was Weld Professor of Law at the Harvard Law School, of which he was an alumnus.[1005]

Holmes compared the Law to a bad man "who cares only for the material consequences of things" rather than as an independent moral entity. Holmes defined the law in accordance with his pragmatic judicial philosophy. Rather than a set of abstract, rational, mathematical, or in any way un-wordly set of principles, Holmes said that, "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."[1006]

[1002] See Hutchinson and Wakefield 'A Hard Look and 'Hard Cases': The Nightmare of the Nobel Dreamer'(Spring 1982) OJLS Vol.2 No.1 page 90.

[1003] See Brian Bix, Jurisprudence: Theory and Context, (Thompson: Sweet & Maxwell) 4th Edition at page 47

[1004] See Brian Bix, Jurisprudence: Theory and Context, (Thompson: Sweet & Maxwell) 4th Edition at page 47

[1005] See Thomas D. Barton, Liberalism and Theories of Adjudication, 28 B.C.L. Rev. 625 (1987)

[1006] See Thomas D. Barton, Liberalism and Theories of Adjudication, 28 B.C.L. Rev. 625 (1987),

Accordingly, Holmes thought that only a judge or lawyer who is acquainted with the historical, social, and economic aspects of the law would be in a position to fulfil his functions properly.[1007]

According to Holmes, lawyers and judges are not logicians and mathematicians. The books of the laws are not books of logic and mathematics. He writes,

> "The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, and even the prejudices which judges share with their fellow-men, have had a good deal more to do than syllogism in determining the rules by which men should be governed."[1008]

In **Lochner v. New York**[1009] he observed that, general proposition do not decide concrete cases. Holmes also insisted on the separation of "ought" and "is," which are obstacles in understanding the realities of the law.[1010]

As a moral sceptic, Holmes stated that if you want to know the real law, and nothing else, you must consider it from the point of view of a "bad man" who cares only of the material consequences of the courts' decisions, and not from the point of view of a good man, who find his reasons for conduct "in the vaguer sanctions of his conscience.[1011]

20.5.3 Ronald Dworkin

He is an influential contributor to both philosophy of law and political philosophy. Dworkin received the 2007 Holberg International Memorial Prize in the Humanities for "his pioneering scholarly work" of "worldwide impact." According to a survey in The Journal of Legal Studies, Dworkin was the second most-cited American legal scholar of the twentieth century.[1012]

[1007] See Jerome Frank, "Are judges Human?", 80 University of Pennsylvania Law Review 17 (1931)

[1008] See J.W. Harris, Legal Philosophies, LexisNexis (2003), 2nd Edition at page 98

[1009] 198 U.S. 45 at 76 (1905)

[1010] See J.E. Penner, McCoubrey& White's Textbook on Jurisprudence, 4th ed., OUP (2008) at page 62

[1011] See Brian Leiter, "Legal Realism", in A Companion to the Philosophy of Law and Legal Theory (Dennis Patterson ed., Blackwell, Oxford,1986),pp. 261-279,at p.269

[1012] See Essays, UK. (November 2013). Hartsory. Retrieved from http://www.lawteacher.net/free-law-essays/judicial-law/hartsory.php?cref=1

Dworkin believes that when a court has to decide a hard case it will draw on these (moral or political) standards -principles and policies- in order to reach a decision. And, that there is no rule of recognition which distinguishes between legal and moral principles.[1013]

He proposed that judges should decide hard cases by interpreting the political structure of their community in the following, perhaps special way: by trying to find the best justification they can find, in principles of political morality, for the structure as a whole, from the most profound constitutional rules and arrangements to the details of, for example, the private law of tort or contract.[1014]

Each judge functions like a writer in a chain novel. The current judge's job is to "go on from here" in the best way possible. That puts constraints on the judge to incorporate previous legal decisions, legal principles and rules in such a way as to tell the most justifiable story about the law.[1015]

Going on from here is not just a matter of applying rules. Nor is it just a matter of applying your own moral standards to decide cases when the "rules run out". It involves searching for underlying principles of law that render the law at once coherent and morally and politically justifiable.[1016]

20.5.4 H. L. A. Hart

Hart theorized that the process of adjudication in lacuna situations amounts to almost legislation, giving judges the ability either to make new law or fundamentally to alter the meaning and range of application of existing laws.[1017] He said that only where gaps in the law appear, where the legislature has not clearly expressed itself, are judges free to exercise "discretion" to determine what the law ought to be.[1018]

[1013] See James Penner, David Schiff and Richard Nobles, Introduction to Jurisprudence and Legal Theory: Commentary and Materials, Oxford University Press (2002) at page 121

[1014]See Raymond Wacks, Understanding Jurisprudence: An Introduction to Legal Theory, Oxford University Press (2005) at page 147

[1015] See Ronald Dworkin, Justice in Robes (Cambridge, Mass and London; Harvard University Press,2006)

[1016] See Routledge.Cavendish 'Jurisprudence' fifth edition, at page 65

[1017] See H.L.A Hart 'Positivism and the Separation of Law and Moral'(1958) Quoted in Penner, Schiff and Nobles, Jurisprudence and Legal theory: commentary and materials (Butterworths,LexisNexis 2002) p.151

[1018] See Greenawalt, Discretion and Judicial Discretion: The Elusive Quest for the Fetters that Bind Judges, 75 CoLum. L. REV, 359-60 (1975).

Hart thinks that certain features of adjudication would not be observed if the making of new laws were not really governed by secondary rules. There could be no mistakes of law or genuine legal deliberation.[1019]

So, Hart criticised Legal Realists for failing to have an account of how a judge could wrongly apply the law, or wonder what the correct law is, if adjudication is just a matter of brute decision.[1020]

Hart concluded that judges inevitably must use their discretion to make new law, on the occasions where the legal rules have "open texture". In exercising this discretion, the judge or official will look to the purposes or the social consequences of adopting a certain interpretation of the rule.[1021]

Hart's theory remains true to the above formula that adjudication is legitimate only when tied to reasons that are politically declared. This is because when judges exercise this gap discretion, they must act in a fashion that is subordinated in two ways to the political process.[1022]

First, they should attempt to second-guess the content of what the legislature might do with the question. Second, and on a more conceptual level, they are to fashion this content in response to the evidence and arguments of the same character as would move the superior institution if it were acting on its own.[1023]

20.6 Conclusion



In above chapter we have learnt that adjudication means the legal process of resolving a dispute. The formal giving or pronouncing of a judgment or decree in a court proceeding; also the judgment or decision given. It includes the entry of a decree by a court in respect to the parties in a case. It implies a hearing by a court, after notice, of legal evidence on the factual issue or issues involved and the equivalent of a determination. It indicates that the claims of all the parties thereto have been considered and set at rest.

[1019] See https://thelegalphilosophyproject.files.wordpress.com/2011/09/fntfjtext.pdf. Retrieved on 30th October 2016 at 6:47 am

[1020] Ibid

[1021] See See Raymond Wacks, Understanding Jurisprudence: An Introduction to Legal Theory, Oxford University Press (2005) at page 147

[1022] See R. Dworkin, Taking Rights Seriously 82 (1978)

[1023] Ibid

A theory of adjudication is a theory primarily about what judges do when they decide cases in courts of law. Theory of adjudication can be constructed from the various political and philosophical doctrines. There are always diverging views related to the field of what constitutes law and the major aspects affecting it such as adjudication. The formalist view was that, when judges in superior courts of appeal decide case, they follow a deductive process. First, the judge categorises the factual situation: characterising the facts as a certain situation type. Second, the judge identifies the rule that applies to that category. Then the judge applies the rule to the facts to yield an outcome.

Legal realists postulate that first, the judge determines the best outcome given the factual situation. Second, the judge identifies the rule that yields the outcome. Last the judge categorises the factual situation so that the rule applies. If this is right then judges decide cases purely on the basis what strikes them as the right outcome when they are confronted by the particular facts of a case. Only after an outcome is preferred does the process of legal rationalisation begin.

There are several jurists and legal thinkers have given their own theories as to what should constitute the basis for adjudication by Judges in any Court of law. Cardozo subscribed that the judicial process is one of compromise between paradoxes, between certainty and uncertainty, between the literalism that is exaltation of the written word and the nihilism that is destructive of regularity and order. Holmes theorised that the life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, and even the prejudices which judges share with their fellow-men, have had a good deal more to do than syllogism in determining the rules by which men should be governed.

Dworkin believes that when a court has to decide a hard case it will draw on these moral or political standards -principles and policies- in order to reach a decision. And, that there is no rule of recognition which distinguishes between legal and moral principles. Hart said that only where gaps in the law appear, where the legislature has not clearly expressed itself, are judges free to exercise "discretion" to determine what the law ought to be.

20.7 Review Questions



1. How can you define adjudication and theory of adjudication?
2. Discuss the relevance of adjudication.
3. Describe the theories of adjudication that you know.
4. Assess the Ronald Dworkin theory of adjudication

20.8 Bibliography



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CHAPTER TWENTY ONE

JUDICIAL INDEPENDENCE

21.0 Introduction

Concern about judicial independence has been a recurrent feature of most legal systems, as have attacks on courts and their decisions. In recent years, however, such attacks have become more than the expected response of persons who profoundly disagree with those decisions.[1024] They have become part of orchestrated strategies of political parties and other groups, empowered by the tools of modern political campaigns and by the ignorance of the electorate, which are the godmother of the single-issue campaign and the godfather of the sound bite.[1025]

Henceforth this chapter acquaints us with the knowledge and understanding about philosophical issues related to the judicial independence. We are going to learn the concept of the judicial independence, its background and its theories. We are learning judicial independence because it is part and parcel of judicial activism which is jurisprudential issue of concern. Therefore get ready for the lesson.

21.1 Objectives

At the end of this chapter students should have: -

- Acquired basic knowledge of concepts such as judicial independence, separation of powers, etc.
- Acquainted with understanding of nature, and relevance of judicial independence.
- Acquainted with ability to understand and examine the historical perspectives and development of judicial independence.
- Developed ability to account for theories which postulate about judicial independence.
- Acquired the skills to examine critically the status of the judicial independence in Tanzania.

[1024] See Stephen B. Bright, Political Attacks on the Judiciary, 80 JUDICATURE 165, 165 (1997)

[1025] See ABA Comm'n On Separation Of Powers And Judicial Independence, An Independent Judiciary i-ii (1997)

21.2 Judicial Independence

The judiciary constitutes an autonomous and independent branch of government not subject to any other.Judicial independence is the concept that the judiciary needs to be kept away from the other branches of government.[1026] That is, courts should not be subject to improper influence from the other branches of government, or from private or partisan interests.[1027] Judicial Independence is vital and important to the idea of separation of powers.

The term judicial independence embodies the concept that a judge decides cases fairly, impartially, and according to the facts and law, not according to whim, prejudice, or fear, the dictates of the legislature or executive, or the latest opinion poll.[1028]

Judges are constrained to maintain judicial independence by the law, their legal training, their expectations, and the judicial culture. The judicial culture and judicial education treasure intellectual honesty, fair and principled decisions, and rising above partisanship and the political moment.[1029]

Judicial independence is also safeguarded by statutes and ethical codes requiring judges to conform to high standards and to disqualify themselves from sitting on cases in which their impartiality would be questioned. Judicial discipline commissions and the courts can discipline judges for violations of these codes.[1030]

A judge needs courage. Judges with courage resist threats to judicial independence and actively advocate judicial independence. Those lacking courage should neither apply nor run for the office. We must foster a culture that supports and rewards courageous judges.[1031]

[1026] See Adams, John (1851). The Works of John Adams, Vol 3 Boston: Little and Brown. p. 522

[1027] See Shimon Shetreet, Fundamental Values of the Justice System, 23 THE EUROPEAN BUSINESS LAW REVIEW 61-76, (2012).

[1028] See http://www.duhaime.org/LegalDictionary/J/JudicialIndependence.aspx. Accessed on 1st November 2016 at 8:50 am

[1029] See Abrahamson, Shirley S., Thorny Issues and Slippery Slopes: Perspectives on Judicial Independence, 64 Ohio St. L.J. 3 (2003)

[1030] See Joint Statement of the Courts of British Columbia, Judicial Independence (And What Everyone Should Know About It), March 15, 2012

[1031] See Plant, G., Reform no threat to engaged judiciary, Vancouver Sun Newspaper, March 20, 2012

A famous English judge said that justice must be rooted in confidence. He was referring to the confidence litigants and the public must have that judicial decision-makers are impartial. Those who come before the courts must be certain that decisions made by those courts are not subject to outside influence.[1032]

Judicial independence means that judges are not subject to pressure and influence, and are free to make impartial decisions based solely on fact and law. Judicial independence is often misunderstood as something that is for the benefit of the judge. It is not. It is the public's guarantee that a judge will be impartial.[1033]

21.3 Background

The development of judicial independence has been argued to involve a cycle of national law having an impact on international law, and international law subsequently impacting national law.[1034] This is said to occur in three phases: the first phase is characterized by the domestic development of the concept of judicial independence, the second by the spread of these concepts internationally and their implementation in international law[1035] and the third by the implementation in national law of these newly formulated international principles of judicial independence.[1036]

[1032] See Scott v. Stansfield, [1868] L.R. 3 Ex. 220

[1033] See Watson, Garry, "The Judge and Court Administration" in The Canadian Judiciary (Toronto: Osgoode, 1976) at 183

[1034] See S. Shetreet, 'The Normative Cycle of Shaping Judicial Independence in Domestic and International Law: The Mutual Impact of National and International Jurisprudence and Contemporary Practical and Conceptual Challenges' (2009) 10 Chicago Journal of International Law 275-332

[1035] See Robert Stevens, Law and Politics: The House of Lords as a Judicial Body, 1800-1976 (University of North Carolina Press, 1978), at 6

[1036] See S Shetreet, 'The Normative Cycle of Shaping Judicial Independence in Domestic and International Law: The Mutual Impact of National and International Jurisprudence and Contemporary Practical and Conceptual Challenges' (2009) 10 Chicago Journal of International Law 275-332

Judicial independence was born out of the Montesquieu doctrine of separation. It is well known that Montesquieu's seminal contribution to the history of ideas is that political power should be divided among the legislative, executive, and judicial branches of government so as to ensure the people's liberty.[1037]

What is largely overlooked, however, is that Montesquieu's characterization of the judicial power differs dramatically from the American view[1038]: the preferred scheme of checks and balances Montesquieu describes in The Spirit of the Laws[1039] is not the three famous powers but the established English scheme of king, lords, and commons. Among the three powers of which we have spoken, he writes that of judging is in some fashion, null.[1040]

He maintains that "only two" powers truly matter the legislative and the executive and that the "part of the legislative body composed of the nobles is quite appropriate" for checking legislative abuse.[1041]

John Adams was the American Founding's most sophisticated political theorist and when he modified Montesquieu's conception of the separation of powers by developing what can be fairly termed the political architecture of an independent judiciary, he articulated an idea that helped make judicial review possible.[1042] In fact, Adams's contribution to political theory is arguably as significant as that of the French baron whose work inspired him and the other American Founders.[1043]

Although today's judiciary has its origins in 1178, when Henry II appointed five members of his personal household to hear all the complaints of the realm and to do right, and although the role of Lord Chancellor

[1037] See Mary Sarah Bilder, Why We Have Judicial Review, 116 Yale L.J. Pocket Part 215 (2007), http://thepocketpart.org/2007/01/09/bilder.html (adapted from Mary Sarah Bilder, The Corporate Origins of Judicial Review , 116 Yale L.J. 502 (2006)).

[1038] See Peter H. Russell, The Judiciary in Canada: The Third Branch of Government (McGraw-Hill Ryerson 1987)

[1039]See Baron de Montesquieu, The Spirit of the Laws (Hafner 1949) (Thomas Nugent, trans)

[1040] See William Michael Treanor, Original Understanding and the Whether, Why, and How of Judicial Review, 116 Yale L.J. Pocket Part 218 (2007), http://thepocketpart.org/2007/01/09/treanor.html.

[1041] See Scott D. Gerber, The Political Theory of an Independent Judiciary, 116 Yale L.J. Pocket Part 223 (2007), http://yalelawjournal.org/forum/the-political-theory-of-an-independent-judiciary

[1042]See John Bell, Judicial Cultures and Judicial Independence, 4 Cambridge YB Eur Legal Studies 47 (2001).

[1043] See Adams, John (1851). The Works of John Adams, Vol 3. Boston: Little and Brown. p. 522.

is understood to date back to the 7th Century, the notion of judicial independence from the power of the executive did not secure its victory over arbitrary Royal prerogative until the Act of Settlement of 1701.[1044]

On inviting William of Orange to take the Crown from James II in 1688, Parliament presented its Heads of Grievance, amongst which were proposals for freeing the judiciary from the interference it had suffered under the Stuarts. Although these measures were omitted from the Bill of Rights, William III observed the constitutional proposals, which were enacted in 1701.[1045]

The Glorious Revolution thus established the rule of law in the place of the will of the monarch, although in the absence of a written constitution, the doctrine of Parliamentary sovereignty meant that the law was whatever Parliament voted it to be.[1046]

21.4 Theories of Judicial Independence

Most constitutional theories require that the judiciary is separate from and independent of the government, in order to ensure the rule of law that is, to ensure that the law is enforced impartially and consistently no matter who is in power, and without undue influence from any other source.[1047]

The perception that judicial independence is at risk has arisen before in our history. Indeed, from the perspective of people who value judicial independence, it may be that current efforts to curb it are no more serious than those faced by state and judiciaries in the past. Certainly they are less serious than the threats the judiciary and judges in some states faced in the early years of the nineteenth century.[1048]

21.4.1 Economic Law Theory

The law and economics and public choice literatures have proposed a quite different approach to the study of judicial independence. Judges, even constitutional ones, are utility maximizers just like any individual, be

[1044] See http://www.politics.co.uk/reference/judicial-independence. Accessed on 31st October 2016 at 6:32 pm

[1045] See http://www.yalelawjournal.org/forum/the-political-theory-of-an-independent-judiciary. Accessed on 31st October 2016 at 6:39 pm

[1046] See Justice Gerard La Forest, Provincial Judges Reference, para. 306.

[1047] See Herbert Jacob, The Courts as Political Agencies: An Historical Analysis, in 8 TUL. STUD. IN POL. SCI. 9, 21-24 (1962)

[1048]See Burbank, Stephen B., "The Architecture of Judicial Independence," (1999), Faculty Scholarship.Paper 941

he or she a private or a public official.[1049] They seek the greatest possible satisfaction out of their activities, in terms of career, prestige, income, upholding of the law, under a set of constraints posed by the legal, institutional, political environment wherein they act.[1050]

Hayo and Voigt take into account the implications of different strands of the theoretical literature on the determinants of judicial independence in order to construct two indicators of judicial independence, named the de jure and the de facto indexes.[1051]

The former takes into account formal guarantees of judiciary autonomy, such as the judicial budget, the selection process, the duration of tenure and the like. The latter, instead, focuses on the factually ascertainable degree of judicial independence, namely, the effective term lengths, the degree to which their decisions have an impact on government behaviour and the like.[1052]

Therefore it may not be appropriate to compare a country with highly politicized judicial appointments with another where judges are first selected on merit but then promoted on the basis of the political relevance of their decisions.[1053]

21.4.2 Political Economy Theory

This provides a theory of how an independent judiciary improves the political accountability of a system with the three "classical" government branches, the executive, the legislative and the judicial branch.[1054]

On the basis of such a theory, the fundamental question that rises is what kind of factors, if any, contribute to make the courts independent in its rulings, so to effectively assure a mechanism of checks and balances within the institutional system.[1055]

[1049] See Persson T., et al, (1997), Separation of Powers and Political Accountability. Quarterly Journal of Economics, 112: 1163-1202

[1050] See Padovano, F. and Venturi, L. (2001). Wars of Attrition in Italian Government Coalitions and Fiscal Performance, 1948-1994. Public Choice 109:15-54.

[1051] See Hayo B., and Voigt, S. (2003), Explaining de facto judicial independence, mimeo.

[1052] See Landes W. M, and Posner, R.A., (1975), The Independent Judiciary in an Interest-Group Perspective. Journal of Law and Economics, 8: 875-901.

[1053] See Feld, L. P. and Voigt, S. (2003a), Economic Growth and Judicial Independence: Cross Country Evidence Using a New Set of Indicators, mimeo

[1054] See Padovano, F., et al., (2003), Judicial Branch, Checks and Balances and Political Accountability. Constitutional Political Economy, 14:47-70.

They argue that an independent judiciary is an institutional mechanism aimed to increase the durability of enacted legislation. Since the present value of legislative "deals" between legislators and interest groups is positively correlated with the durability of such deals, legislators have an ex ante interest to grant independence to judges. They may do so by extending the length of judges' tenure and by insulating their selection and incomes from political interferences.[1056]

When the court is relatively dependent, the durability of the standing legislation will be relatively low; consequently, on average there will be a relatively short time between the enactment of the law about which the court renders a sentence of constitutional illegitimacy and the sentence itself.[1057]

On the other hand, if the court is relatively independent, the durability of the standing legislation will be higher. Therefore, the longer the time elapsed between the enactment of the law and the ruling of the court, the greater the independence of the Court.[1058]

They find that the courts' rulings are affected both by features that secure the independence of individual judges and by characteristics of the institutional framework in which the courts operate. [1059]

Among the elements of individual independence rigid arrangements regarding tenure, immunity from wage decreases and judges' age turn out to be the most significant; whereas the presence of special procedures for the appointment and the promotion of judges, and the mechanism for the allocation of cases to judges are the institutional characteristics to carry the greatest explanatory power.[1060]

[1055] See Hanssen F. A. (2002), Is There a Politically Optimal Level of Judicial Independence?. Department of Economics, Montana State University, mimeo.

[1056] See Landes W. M, and Posner, R.A., (1975), The Independent Judiciary in an Interest-Group Perspective. Journal of Law and Economics, 8: 875-901

[1057] See Ramseyer, J. M. (1994), The Puzzling (In) dependence of Courts: A Comparative Approach. Journal of Legal Studies, 23:721-747

[1058] See Salzeberger, E. (2003). Temporary Appointments and Judicial Independence - Theoretical Analysis and Empirical Findings from the Supreme Court of Israel. Israel Law Review

[1059] See Tsebelis, G., (2001). "Veto Players: Foundations and Institutional Analysis"(forthcoming)

[1060] See Ramseyer J.M. and Rasmusen, M.E. (1997). Judicial Independence in a Civil Law Regime: The 23 Evidence from Japan. Journal of Law and Economic Organization, 13: 259-286.

They argue that judicial independence arises from high political turnover. If a party expects to stay in power for several consecutive legislative terms, it will eventually obtain close control over judicial agents.[1061]

21.5 Judicial Independence in Tanzania

Judicial independence is governed by article 107B of the Constitution of the United Republic of Tanzania of 1977 as amended. The article provides that in exercising the powers of dispensing justice, all courts shall have freedom and shall be required only to observe the provisions of the Constitution and those of the laws of the land.

This basic principle has been explained in the case of **R v. IddMtegule**[1062] where the defendant was accused of disobeying the order contrary to Section 124. He was alleged of selling maandazi contrary to Mpwapwa Area Commissioner. The list contained prohibited articles but maandazi were not there. The issue in court was that should the defendant be discharged for selling an unlisted article. It was held that the accused was discharged of the offence.

The Area Commissioner became furious and emotional over the decision of the court. He then wrote to the trial magistrate accusing him for being biased and hindrance to the effort of the authorities to stop the spreading of the disease.

On the revision of the High Court, it was held that the court was justified in discharging the accused on the grounds that maandazi were not listed in the Area commissioner's order, thus revising the decision of the district magistrate; the judiciary is supposed to be an independent institution; for it is entrusted by the Constitution to decide the rights, responsibility, liability, guilty or innocence of the people freely without pressure from all kinds and from any corner and it should not succumb to any intimidation of any kind for otherwise individuals will go unprotected and lose confidence with the judicial system.

It is quite clear that this organ is very important because is the one which individuals rights are protected and preserved. The authority to dispense justice in the United Republic is vested in the Judiciary and the Judiciary of Zanzibar, and therefore no other organ of the Government or the Parliament or the House of representatives of Zanzibar shall have the final say in the dispensing of Justice.

[1061] See Santoni M., and Zucchini F. (2001), Veto Players and the Constitutional Court: the Italian Case, December, mimeo.

[1062](1979), High court of Dodoma

21.5.1 Dimensions of Judicial Independence

The judicial independence is measured in four dimensions such as security of tenure, remuneration and emoluments, separation of judicial powers and personnel and judicial immunity.

21.5.1.1 Security of tenure of the Judicial Officers[1063]

Tanzania has achieved this by ensuring that Judges once appointed by the President, cannot be dismissed on the decision from the President alone but they can be removed from the office if there is misbehaviour as stipulated in the Constitution of the united republic of Tanzania. Not only that, but also after the judicial board chaired by one Judges from the common wealth country, to decide upon the matters.

21.5.1.2 Judicial Immunity[1064]

This is one of the dimensions of the Independence of Judiciary provided that no action will be against the Judge or a Magistrate for any act or word or words spoken when he is in judicial activities in the court. Therefore the Judge is not bound by those words or acts, thus helping the judicial officers to create large ground to interrogate either of the parties to find justice in their courts. While on the other hand, it helps to avoid prolonging the proceeding for magistrates' fear of being accused of biasness.

21.5.1.3 Separation of Judicial powers and personnel[1065]

The Judiciary as one of the three organs of the state, must be separate from any other organ of the state, that is to say it must be free from legislature and executive on its decision matters, also Judges, Magistrates and Registrars are not allowed to be engaged as the members in any political party as stipulated by United Republic of Tanzania Constitution as amended from time to time, therefore this can led to fair decision making in the whole process of making justice and provides non-existence of bias when political parties or individuals goes before the court.

This non-involvement in political parties is seen in the case of **James Bita v IddiKambi** whereby the defendant who trespassed in the plaintiff's land had support of the ruling party and had succeeded with the village authorities and the matter was not heard on appeal before consulting the party for it was a political issue forwarded to the High Court.

[1063] Article 110 of the Consitution of the United Republic of Tanzania, CAP 2 RE 2002

[1064] Section 16 of the Penal Code, CAP 16 RE 2002

[1065] Article 4 of the Constitution of the Tanzania, op-cit

It was held that though the village authority has power over all matters pertaining to the land, it does not exempt it from being questioned by the aggrieved individual party hence the matter was ordered to be returned to the resident magistrate in charge of the area to hear the appeal.

21.5.1.4Security of emolument and remuneration[1066]

Threat of the reduction of salaries and other benefits to the judicial officers is not allowed by the Constitution of the United Republic of Tanzania. Their payment is payable out of the consolidated fund and it does not depend on annual parliamentary debates and appropriations, therefore the payment of the Judges must be secured.

Through this it can lead to impartial, fairness and non-existence of biasness and corruption in judicial functions. Therefore this one of the main ingredients that shows that there is removal of pressures from other organs of the state such as, legislature and executive for fear of reduction of their salaries or other benefits

21.6 Conclusion



In above chapter we have learnt that Judicial independence is the idea of keeping the judiciary away from the other branches of government. The main objective behind granting judicial independence is to avoid the improper influence on the court from the other branches of government, or from private or partisan interests. It is also referred as independence of the judiciary. Judicial independence is not for the protection of judges, although it is often thought of in that context today. The principle of judicial independence is designed to protect the system of justice and the rule of law, and thus maintain public trust and confidence in the courts. With judicial independence, the winners are everyone.

Judicial independence came into existence since the beginning of 17th Century. Generally courts in Britain were Queen's Court. Their jurisdiction was either directly or indirectly derived from the crown but it was improper that the Queen carried out what had been entrusted to her court. This was the presumption during the era whereby all powers were vested on absolute Monarchy. The revolution came into existence in the beginning of the

[1066] Article 142 of the Constitution of the United Republic of Tanzania, CAP 2 RE 2002

Bourgeoisie period, whereby Chief justice Coke questioned on the absolutism of the monarchy. For the case of Tanganyika under the Local Ordinance of 1951, for the first time there was an attempt on separation of the judicial functions from Executive functions. This process was completed after Independence under the Constitution Republic of Tanzania of 1977, by permanently inserting three organs each separate from another in functions but with care on check and balance of the organs.

To preserve judicial independence requires three things such as security of tenure which means once appointed, a judge is entitled to serve on the bench until the age of retirement, unless, for judges should be removed from office for stipulated reasons and when a tribunal established has ordered that he or she should be removed from office. Second, financial security whereby judges are paid sufficiently and in a manner so they are not dependent on or subject to pressure from other institutions and administrative independence, courts must be able to decide how to manage the litigation process and the cases judges will hear.

Most constitutional theories require that the judiciary is separate from and independent of the government, in order to ensure the rule of law that is, to ensure that the law is enforced impartially and consistently no matter who is in power, and without undue influence from any other source.

It is the judge who is primarily responsible for the maintenance of their independence and the independence of the judiciary generally. The Chief Judge and others with administrative duties must act as a buffer between the executive and individual judges. All judges, especially those with administrative duties, must be vigilant to preserve their independence and the independence of their court. They must keep the government, just as they must keep all others, at arm's length. Therefore judicial independence can be ensured by granting life tenure or long tenure for judges. Life tenure or long tenure ideally frees the judges to decide cases and make rulings according to the rule of law and judicial discretion, even if those decisions are politically unpopular or opposed by powerful interests.

21.7 Review Questions



1. What do you understand the term judicial independence? Explain its relevance in the modern democratic states.
2. Account for the growth and development of the judicial independence concept.
3. Describe theories regarding to the judicial independence.
4. What are ingredients which define the judicial independence?
5. Critically discuss the judicial independence in Tanzania.

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CHAPTER TWENTY TWO

STATUTORY INTERPRETATION

22.0 Introduction

It is in fact the genius of law that it is not a set of "commands," but a set of texts meant to be read across circumstances that are in principle incompletely foreseeable. It is this fact that gives rise to the intellectual and ethical life of legal thought and argument. Therefore in this chapter we are going to learn the theoretical perspectives of the statutory interpretation and practical ones. We explore the theories which explain how the judges or courts interpret statutes. Of course we shall see also the strengths and weaknesses of the theories as well as how are they reflected in the Tanzania legal system.

22.1 Objectives



At the end of this chapter students should have: -

- Acquired basic knowledge of concepts such as statutory interpretation, statutory construction, intentionalism, textualism and purposivism.
- Acquainted with understanding of nature, and relevance of statutory interpretation.
- Acquainted with ability to understand and examine the historical perspectives and development of statutory interpretation.
- Developed ability to account for theories which postulate about statutory interpretation.

22.2 Statutory Interpretation

Statutory interpretation is the process by which courts interpret and apply legislation. Some amount of interpretation is often necessary when a case involves a statute. Sometimes the words of a statute have a plain and straightforward meaning. But in many cases, there is some ambiguity or vagueness in the words of the statute that must be resolved by the judge.[1067]

[1067] SeeCRS Report for Congress, Statutory interpretation: General Principles and Recent Trends

To find the meanings of statutes, judges use various tools and methods of statutory interpretation, including traditional canons of statutory interpretation, legislative history, and purpose.[1068]

In common law jurisdictions, the judiciary may apply rules of statutory interpretation both to legislation enacted by the legislature and to delegated legislation such as administrative agency regulations.[1069]

22.3 Theories of Statutory Interpretation

Theories of statutory interpretation attempts to answer the questions such as how do judges interpret statutes? How should they? Many commentators argue that judicial interpretation is, or at least ought to be, inspired by grand theory. Basically there are main three groups of theories of statutory interpretation such as textualim, intentionalism and purposivism.

These theories share several common weaknesses. First, each rests upon questionable premises about the nature of interpretation and the legislative process. Second, none can systematically produce determinate results in the hard cases, which undermines their claims to objectivity. Third, although each theory rests upon and sub-serves important values that should be considered when interpreting statutes, no theory persuades us that its cluster of underlying values is so important as to exclude all others.[1070] An overall difficulty of grand theory is its emphasis on the universal over the particular, its failure to recognize that statutory interpretation will work in different ways in different concrete cases.

22.3.1 Intentionalism

It is the theory whereby the actual or presumed intent of the legislature enacting the statute is presumed during statutory interpretation. This provokes the establishment of legal spirit which exists in the legal intent.[1071]

[1068]See Sinclair, Michael, "Llewellyn's Dueling Canons, One to Seven: A Critique" New York Law School Law Review, Vol. 51, fall 2006.

[1069]See Menahem Pasternak, Christophe Rico, Tax Interpretation, Planning, and Avoidance: Some Linguistic Analysis, 23 Akron Tax Journal, 33 (2008)

[1070] See William N. EskridgeJr and Philip P. Frickey, Statutory Interpretation as Practical Reasoning, 42 Stan. L. Rev. 321 (1989),

[1071] See Richard A. Posner, Statutory Interpretation-in the Classroom and in the Courtroom, 50 U. CHI. L. REV. 800, 817 (1983).

The most popular grand theory is probably intentionalism. Under this view, the Court acts as the enacting legislature's faithful servant, discovering and applying the legislature's original intent. [1072]

Traditional treatises on statutory interpretation generally acknowledge the primacy of legislative intent, qualifying the canons of construction with the caveat, "unless the legislature otherwise intends.[1073]

Although traditional intentionalism was subjected to withering attack in the 1930s and 1940s, recent scholarship has revived academic interest in the theory and posited some form of intentionalism as the anchor for a grand theory of interpretation.[1074]

Intentionalism makes a strong claim to be the only legitimate foundation for statutory interpretation in a representative democracy. If the legislature is the primary lawmaker and courts are its agents, then requiring the courts to follow the legislature's intentions disciplines judges by inhibiting judicial law-making, and in so doing seems to further democracy by affirming the will of elected representatives. Not surprisingly, then, a number of Supreme Court opinions state that original legislative intent is the touchstone for statutory interpretation.[1075]

This was seen in the case **Joseph Warioba v. Stephen Wassira and Another**[1076] where the court was of the view that in interpreting the section to divine the intention of the Legislature it was permissible in this regard to have recourse to the objects and reasons of the Bill which was relevant to the enquiry. The present was a fit case where the Court should interpret section 114 of Elections Act as including or extending to corrupt practice even though this meant reading words into the section. To do so in the present case would remove absurdity and avoid the discriminatory effect which would otherwise arise from a literal construction.

[1072] See Max Radin, Statutoy Interpretation, 43 HARV. L. REV. 863 (1930).

[1073] Ibid

[1074] See Earl M. Maltz, Statutory Interpretation and Legislative Power: The Case for a Modified Intentionalists Approach, 63 TUL. L. REV. 1 (1988);

[1075] See Thomas W. Merrill, The Common Law Powers of Federal Courts, 52 U. CHI. L. REV. 1, 33-39 (1985)

[1076] [1997] TLR 272 (CA)

However, if a majority of our elected representatives had a certain interpretation in mind when they enacted a statute, that interpretation has obvious appeal in a representative democracy.[1077]

But if the legislators did not clearly write that understanding into the statutory text, how can we figure out what they "intended"? It is hard enough to work out a theory for ascertaining the "intent" of individuals in tort and criminal law.[1078]

Notwithstanding, this theory rests upon the questionable assumption that judges will be able to recreate the historical understanding of a previous legislature. Modem historiography suggests that a present-day interpreter can never completely or accurately reconstruct past understandings.[1079]

Facts about the past are without meaning until they are woven together into a narrative by the historian (or judge). The nature of the story will vary according to the way the storyteller selects and interprets the facts. And in choosing and interpreting facts, even the most scrupulous historian will be influenced by her own biases, meta-theories, and desired Conclusions.[1080]

This effect will be most palpable in hard cases. There, judicial interpretation will most clearly be affected by the current context of the judicial interpreter. And the greater the distance between the current and historical contexts of the statute the more implausible will be the claims of intentionalists' interpretation.

22.3.2 Purposivism

This theory postulates that the court should determine what mischief, or ill, the legislature had targeted in passing the statute and then should interpret the statute to attack that mischief as manifested under current circumstances.[1081]

Professors Henry Hart and Albert Sacks in the 1950s expanded the realists' approach into a purposivists' theory of interpretation that seemed as faithful to the principle of legislative supremacy as intentionalism, but without the rigidity and definitional problems of intentionalism.

[1077] See Richard A. Posner, The Federal Courts: Crisis And Reform 286-93 (1985);

[1078] see Michael S. Moore, A Natural Law Theory of Interpretation, 58 S. CAL. L. REV. 277 (1985);

[1079] See William E. Nelson, History and Neutrality in Constitutional Adjudication, 72 VA. L. REV. 1237 (1986);

[1080] See G. Edward White, the Text, Interpretation, and Critical Standards, 60 Tex. L. REV. 569 (1982)

[1081] See Jerome Frank, Words and Music: Some Remarks on Statutory Interpretation, 47 COLuM. L. REv. 1259, 1269-72 (1947);

According to the Hart and Sacks legal process materials, every statute must be conclusively presumed to be a purposive act. The idea of a statute without an intelligible purpose is foreign to the idea of law and inadmissible.[1082]

They also added that because every statute and every doctrine of unwritten law developed by the decisional process has some kind of purpose or objective, identifying that purpose and deducing the interpretation with which it is most consistent resolves interpretive ambiguities.[1083]

Hart and Sacks formally announced their approach to statutory interpretation in the following **tentative formulation**. They said that in interpreting a statute a court should:-

i. Decide what purpose ought to be attributed to the statute and to any subordinate provision of it which may be involved;
ii. Interpret the words of the statute immediately in question so as to carry out the purpose as best it can, making sure, however, that it does not give the words either:-
    a. a meaning they will not bear, or
    b. a meaning which would violate any established policy of clear statement.

Yet, purposivism apparent majoritarian justifications rest upon questionable assumptions about the legislative process. Hart and Sacks assumed that the legislature is filled with reasonable people who will reach reasonable, purposive results by following established procedures.[1084]

Whether Hart and Sacks thought this assumption reflected the realities of the legislative process is unclear. But it was a plausible working assumption for the legal community in the 1950s, given the state of political science.[1085]

And since Hart and Sacks expressed no caveat along these lines, much less attempted any elaborate normative justification for these assumptions if they were deemed unrealistic, it appears that at least some of the legitimacy of their approach depends upon the empirical accuracy of these assumptions.[1086]

[1082] See Jonathan R. Macey, Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model, 86 COLuM. L. REV. 223, 250-51 (1986).

[1083] Ibid

[1084] See David B. Truman, The Governmental Process (1951)

[1085] See Earl Latham, The Group Basis of Politics (1952);

22.3.3 Textualism

Textualism appeals to the rule-of-law value that citizens ought to be able to read the statute books and know their rights and duties. By emphasizing the statutory words chosen by the legislature, rather than what seem to be more abstract and judicially malleable interpretive sources, textualism also appeals to the values of legislative supremacy and judicial restraint.[1087]

Textual analysis starts with the specific words of the statutory provision being interpreted. The interpreter should approach the statutory text as a reasonably intelligent reader would and give the text its most common sensical reading.[1088]

This was seen in the case **Joseph John Makune v. The Republic**[1089] whereby the court had the view that the word "ruling" in section 2 of the Economic and Organized Crime Control Act, 1984, should be given plain and ordinary meaning to include interlocutory ruling.

That reading should be sensitive to any special senses the words have acquired, and should also consider the placement of words in the sentence, and even the punctuation of the sentence.[1090]

Textual analysis should further consider how the statutory provision at issue coheres with the general structure of the statute, since other provisions in the statute might shed light on the one being interpreted.[1091]

There are at least two varieties of textualism. The stricter version posits the statutory text as at least ordinarily the sole legitimate interpretive source. A characteristically pithy Holmesianism says it well that we do not inquire what the legislature meant; we ask only what the statute means.[1092]

The second, and less ambitious, variety of textualism uses statutory language not in place of, but rather as the best guide to, legislative intent or purpose. There is, of course, no more persuasive evidence of the

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[1086] See WILFRED E. Binkley &Malcolm C. Moos, A Grammar of American Politics (1949)

[1087] See Frank H. Easterbrook, Statutes' Domains, 50 U. Cm. L. REv. 533, 544 (1983)

[1088] See Henry J. Friendly, Mr.JusticeFrankfurterandthe Reading of Statutes, in BENCHMARKS 216 (1967).

[1089] 1986 TLR 44 (CA)

[1090] See Frank I. Michelman, The Supreme Court, 1985 Term-Foreword: Traces of Self-Government, 100 HARV. L. REv. 4, 28-29 (1986)

[1091] See Robert Summers, Instrumentalism and American Legal Theory 156 (1982)

[1092] See Oliver Wendell Holmes, The Theory of Legal Interpretation, 12 HARV. L. REv. 417, 419

purpose of a statute than the words by which the legislature undertook to give expression to its wishes.[1093] Similarly, when words are free from doubt they must be taken as the final expression of the legislative intent.[1094]

As a grand theory, both versions of textualism suffer from similar defects: They oversimplify the meaning of statutory texts, are not so determinate as they sound, and ignore other values our polity considers important.[1095]

Textualism can control statutory interpretation only if the text itself offers a complete and reasonably determinate source of meaning. This proposition has long been contested, and it is more controversial than ever today. Whether or not language itself is intrinsically indeterminate, one would have to concede that general, politicized terms such as discrimination are susceptible of different interpretations.[1096]

22.4 Basis of Statutory Interpretation

Ronald Dworkin postulated that law as integrity holds a vision for judges which states that as far as possible judges should identify legal rights and duties on the assumption that they were all created by the community as an entity, and that they express the community's conception of justice and fairness.[1097]

According to law as integrity, proposition of law are true if they figure in or follow from the principles of justice, fairness and procedural due process, which provide the best constructive interpretation of the community's legal practice.[1098]

Law as integrity states that the law must speak with one voice, so judges must assume that the law is structured on coherent principles about justice, fairness and procedural due process, and that in all fresh cases which comes before them, judges must enforce these so as to make each person's situation fair and just by the same standard – that is to say, treat everyone equally.[1099]

[1093] United States v. American Trucking Assns., 310 U.S. 534, 543 (1940),followed and quoted in Huffman v. Western Nuclear, Inc., 108 S. Ct. 2087, 2092 (1988)

[1094]Caminetti v. United States, 242 U.S. 470, 490 (1917)

[1095] See Michael S. Moore, The Semantics ofJudging, 54 S. CAL. L. REV. 151, 181-99 (1981). 77

[1096] See Zechariah Chafee, Jr., The Disorderly Conduct of Words, 41 COLUM. L. REV. 381 (1941);

[1097] See R., Dworkin, Law's Empire, Hart Publishing; New Ed edition (1 Oct. 1998)

[1098] Ibid

[1099] Ibid

Dworkin argues that, law as integrity offers a blueprint for adjudicator which directs judges to decide cases by using the same methodology from which integrity was derived viz, constructive interpretation.[1100]

Integrity is both a legislative and an adjudicative principle. Legislative principle requires law makers to try to make the laws morally coherent. Lawmakers are required to ask the assumption that integrity is a distinct ideal of politics, for politics, and honors politics. If it fits these dimensions, then adjudicative principles is ready to begin.[1101]

Central to Dworkin's project that to develop a theory of adjudication it is necessary to engage in a constructive interpretation of legal practice. Adjudicative principles instruct that the law be seen as coherent in that way, as far as possible. Constructive interpretation is a methodology for interpreting social practices, texts and work of art. The distinctive feature of this is that it is argumentative[1102].

The proposal must satisfy two dimensions. It must be consistent with the data identified as constituting the practice at the pre-interpretive stage. He must choose a justification that he believes shows it in the best light.[1103]

The process of constructive interpretation is made up of three analytical stages. In the Pre-interpretive stage, a participant identifies the rules and standards that constitute the practice.[1104]

Then, in the interpretive stage, the interpreter settles on some general justification for those elements identified at the pre-interpretive stage. At the post-interpretive stage, participant adjusts his sense of what the practice really requires so as to better serve the justification he accepts at the interpretive stage.[1105]

[1100] See Dworkin, Ronald. 1986. Law's Empire. Cambridge, MA: Harvard University Press.

[1101] See Hart, H.L.A. 2012 [1961]. The Concept of Law, 3rd ed. New York, NY: Oxford University Press.

[1102] See Geertz, Clifford. 2000 [1983], Local Knowledge: Further Essays in Interpretive Anthropology. New York, NY: Basic Books.

[1103] See Wechsler, Herbert. 1959. "Toward Neutral Principles of Constitutional Law." The Harvard Law Review 73: 1-35.

[1104] See Patrick J. Kelley, Objective Interpretation and Objective Meaning in Holmes and Dickerson: Interpretive Practice and Interpretive Theory, 1 NEV L. J. 112 (2001) at 13334.

[1105] See Geertz, Clifford. 1973. The Interpretation of Cultures: Selected Essays. New York, NY: Basic Books

22.5 Conclusion



In above chapter we have learnt that statutory interpretation is the process by which courts interpret and apply legislation. Some amount of interpretation is often necessary when a case involves a statute. Sometimes the words of a statute have a plain and straightforward meaning. But in many cases, there is some ambiguity or vagueness in the words of the statute that must be resolved by the judge.

Statutory interpretation is neither mechanical foundationalism nor unbounded, unpredictable, and unprincipled decision-making. It is, therefore, fundamentally similar to judicial law-making in the areas of constitutional law and common law. In each area of judicial decision-making, deliberation and candor are necessary but not sufficient conditions for legitimating outcomes.

Basically there are main three groups of theories of statutory interpretation such as textualim, intentionalism and purposivism. These theories share several common weaknesses. First, each rests upon questionable premises about the nature of interpretation and the legislative process. Second, none can systematically produce determinate results in the hard cases, which undermines their claims to objectivity. Third, although each theory rests upon and sub-serves important values that should be considered when interpreting statutes, no theory persuades us that its cluster of underlying values is so important as to exclude all others.

Intentionalists, textualists, and purposivists oftenuse the same text and the same context to reach the sameConclusions about statutory meaning and its application to thefacts of the case. The biggest source of controversy among thethree self-defined groups seems to be the use of internallegislative history as part of context.

Purposivists andintentionalists would presumably use all elements ofthe internal legislative history to help determine the precisepurpose or subjectively intended meaning of the statutorylanguage. Textualists might eschew use of any materialsfrom the internal legislative history because those materials areonly relevant to an attempt to discover a non-existent, non-authoritative legislative intent

22.6 Review Questions



1. Differentiate between statutory interpretation and statutory construction
2. Describe the theories of interpretation
3. To what extent the theories of statutory interpretation are reflected in Tanzania legal system?
4. Opine the best theory of statutory interpretation and give reasons for your opinion.

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CHAPTER TWENTY THREE

NATURE OF JUSTICE

23.0 Introduction

The notion of justice is more ancient than that of law. The concept of justice is based upon and is equated with moral rightness (ethics), rationality, law, natural law, fairness, righteousness, equality, goodness, and equity. Nonetheless, views of what constitutes justice vary from society to society, person to person, from time to time and from place to place. As a notion it has been subject to various philosophical, legal, and theological reflections and debate throughout the history

23.1 Objectives



At the end of this chapter students should have: -

- Acquired basic knowledge of concepts such as justice, fairness, fair play, fair share, fare treatment etc.
- Acquainted with understanding of nature, purpose, types, relevance and characteristics of concept of justice.
- Acquainted with ability to understand and examine the historical perspectives and development of concept of justice.
- Developed ability to account for contribution of the natural law in the development of the concept of justice.

23.2 Concept of justice

What constitutes justice vary from society to society, person to person, from time to time and from place to place. It has thus been subject to various philosophical, legal, and theological reflections and debate. Justice signifies a cluster of ideals and principles for common good and welfare without the least hope or opportunity of injustice, inequality or discrimination. It is the notion of justice which directs our attention to the fairness and reasonableness of the rules, principles, and standards that are the ingredients of the normative structure.[1106]

[1106] See V.R.Krishnaiyer, Justice at Crossroads, Deep & Deep Publications, New Delhi, 1992, p.34

Justice is fairness in protection of rights and punishment of wrongs. It denotes the quality of being fair and reasonable. This involves the identification and articulation of the values that the legal order seeks to realize. [1107]This aspect of jurisprudence is inextricably interwoven with ethical and political philosophy, and theories of justice thus tend to parallel the full range of ethical and political philosophies[1108].

Justice is action in accordance with the requirements of some law. Whether these rules be grounded in human consensus or societal norms, they are supposed to ensure that all members of society receive fair treatment.[1109] Issues of justice arise in several different spheres and play a significant role in causing, perpetuating, and addressing conflict. Just institutions tend to instil a sense of stability, well-being, and satisfaction among society members, while perceived injustices can lead to dissatisfaction, rebellion, or revolution.[1110]

Justice may be defined as such an adjustment of therelations of human beings as to make all discharge all of their dutiesand other liabilities and all obtain all of their rights, privileges, powersand immunities.[1111]

What these are depends upon the social interestswhich society decides should have protection. Social justice at thepresent time recognizes more social interests than does legal justice.[1112]It consequently recognizes more rights and duties. It also recognizesto favoured classes and protects groups within nations and nationsas well as individuals. Legal justice has not as yet gone so far asthis, but it is tending in the direction of social justice. As a matterof fact, at the present time the law does not always give even legaljustice. This is because it is not perfect, especially in the matter ofcourts and legal procedure.[1113]

[1107] See Jerome Frank, Courts on Trial, Atheneum New York, 1963, p.168

[1108] See Oliver Wendell Holmes, Jr., The Common Law, Macmillan and Co., 1911, p.1

[1109] See Karl Llewellyn, The Bramble Bush: The Classic CHAPTERs on the Law and Law School, 11th ed.,2008

[1110] See Clark, PracticalJurisprudence,134, 172, 186, 187

[1111]Justice consists in bringing the actions of each into harmony with theactions of all by a rule of general application instead of by an arbitraryact."--Kant (Pound). Justice is "the liberty of each limited only by thelike liberties of all."-Spencer. "Justice means the satisfaction of everyone's wants so far as they are not outweighed by others' wants.'--Ward.

[1112] See Blackstone, Commentaries, 44.

[1113] 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)

23.3 Relevance

Justice is important because keeping justice, the act of upholding good and punishing evil, is necessary for having a safe society dedicated to the benefit of all people.When justice is not upheld, those doing wrong will continue to do wrong, while those who are doing right will suffer rather than be rewarded.[1114]

Justice is important because every person will not choose to do that which is deemed right in society. Since justice is the punishment of the wrong and the upholding of the good, justice is then implemented to maintain what is deemed right or appropriate behaviour.[1115]

Justice helps create a safe environment for people to live in. Without justice, there would be nothing to stop wrong doings from happening and nothing to prevent/punish people for doing things against what has been establish as good.[1116]

Justice is important because it places a standard of good over all people and demands all people to pay attention to this standard. This could be anything from avoiding a banned action, such as committing murder, or following certain instruction, such as going the correct direction on a one-way street.[1117]

Thus, in an attempt to protect the community as a whole, those breaking the law are punished according to what others find "just", or right. According to Santa Clara University, punishments are held to be just to the extent that they take into account relevant criteria, like the seriousness of the crime and the intent of the criminal, and discount irrelevant factors, like race[1118]

[1114] See https://www.reference.com/government-politics/justice-important-b7a60c04434c1e01?qo=contentSimilarQuestions#. Accessed on 19th October 2016 at 10:11 AM

[1115] See Anne De Moor, Nothing Else to Think? On Meaning, Truth, and Objectivity in Law, ed. J. Eekelaar,
Oxford Journal of Legal Studies, Vol. 18, Oxford University Press, 1998, p.357

[1116] See R.M. Dworkin, Taking Rights Seriously, Harvard University Press, 1978 p.22.

[1117] See Ronald Dworkin, A matter of Principle, Cambridge MA: Harvard University Press, 1985, p.119

[1118] See John Finnis, Law, Morality, and "Sexual Orientation" Printed in John Corvino (ed.), Same Sex: Debating the Ethics, SC ience, and Culture of Homosexuality (Lanham-New York-London, Rowman and Littlefield 1997) p.43.

23.4 Classification of Justice

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.[1119] These types of justice have important implications for socio-economic, political, civil, and criminal justice at both the national and international level. There are various forms and variations of the concept of justice. They vary depending on the philosophical stand point of concept of justice. However generally justice can be classified as hereunder: -

23.4.1 Retributive Justice

Retributive justice 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.[1120]

The central idea is that the offender has gained unfair advantages through his or her behaviour, 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.[1121]

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.[1122]

[1119] See John Rawls, A Theory of Justice, Universal Law Publishing Co.Pvt.Ltd., Delhi, First Indian Reprint 2000, p.12.

[1120] 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>.

[1121] See Chris Guthre, Jeffrey J. Rachlinski and Andrew J. Wistrich, Blinking on the Bench : How Judges decide cases, Cornell Law Review, Vol. 93 : XXX, 2007,p.102 & 103

[1122]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>.

Retributive justice administers proportionate response to crime proven by lawful evidence, so that punishment is justly imposed and considered as morally-correct and fully deserved.[1123]

The law of retaliation (lextalionis) is a military theory of retributive justice which states that reciprocity should be equal to the wrong suffered "life for life, wound for wound, stripe for stripe.[1124]

Retributive justice works on the principle of punishment, although what constitutes fair and proportional punishment is widely debated.[1125] While the intent may be to dissuade the perpetrator or others from future wrong-doing, the re-offending rate of many criminals indicates the limited success of this approach.[1126]

Punishment in practice is more about the satisfaction of victims and those who care about them. This strays into the realm of revenge, which can be many times more severe than reparation as the hurt party seeks to make the other person suffer in return[1127]. In such cases 'justice' is typically defined emotionally rather that with intent for fairness or prevention.[1128]

23.4.2 Distributive Justice

Distributive justice is fair distribution of goods such that all members of society enjoy the benefits of the community to which they contribute. It is also known as economic justice, is about fairnessin what people receive, from goods to attention[1129].

Its roots are in social order and it is at the roots of socialism, where equality is a fundamental principle. If people do not think that they are getting their fair share of something, they will seek first to gain what they believe they deserve. They may well also seek other forms of justice.[1130]

[1123] See Barzilai Gad, Communities and Law: Politics and Cultures of Legal Identities (Ann Arbor: University of Michigan Press, 2003)

[1124] See Andrew J. Wistrich, Magistrate Judge of the United States District Court for the central District of California

[1125] See Anthony Duff & David Garland eds, A Reader on Punishment (Oxford: Oxford University Press, 1994)

[1126] See Dan Simon, 3rd View of the Black Box: Cognitive Coherence in Legal Decision Making, University of Chicago Law Review 71:511, 2004, p.512.

[1127] See Brian Barry, Theories of Justice (Berkeley: University of California Press, 1989)

[1128] See Tamanaha: Balanced Realism of Judging, Valparaiso University Law Review Vol. 44, 2010, p.1245

[1129] See Benjamin N.Cardozo, The Paradoxes of Legal Science, Columbia University Press, New York, 1928, p.55

This is directed at the appropriate allocation of things meaning equal distribution among the equals. a just law in this case would be one which treats like situations alike, and an unjust law would be one that allocates rights and duties unequally without a plausible ground. According to Aristotle distributive justice aims at an equal distribution of the social good among persons equal before the law.[1131]

Distributive 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[1132], equality, and need.[1133]

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.[1134]

23.4.3 Procedural Justice

Procedural justice is fair application of rules and processes so that all who are subject to rules get an impartial outcome.[1135]The principle of fairnessis also found in the idea of fair play as opposed to the fair share of distributive justice.[1136]

[1130] See Mark Kozlowski, The Myth of the Imperial judiciary: Why the Right is wrong about the courts, New
York university Press, New York and London,2003, p.47

[1131] See Willis, Hugh Evander (1926) "Some Fundamental Legal Concepts," Indiana Law Journal: Vol. 1: Iss. 1, Article 2.Available at: htp://www.repository.law.indiana.edu/ilj/vol1/iss1/2

[1132] 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.

[1133] See http://www.beyondintractability.org/essay/types-of-justice. Accessed on 19th October 2016 at 10:24 AM

[1134]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

[1135] See https://www.reference.com/government-politics/different-types-justice-5477c48b2f0f736d?qo=contentSimilarQuestions. Accessed on 19th October 2016 at 10:12 AM

[1136] See Robert E. Goodin& Philip Pettit eds, Contemporary Political Philosophy: An anthology (2nd edition, Malden, Massachusetts: Blackwell, 2006), Part III

Procedural justice 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.[1137] 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.[1138]

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[1139]. If people believe that a fair process was used in deciding what it to be distributed, then they may well accept an imbalance in what they receive in comparison to others. If they see both procedural and distributive injustice, they will likely seek restorative and/or retributive justice.[1140]

23.4.4 Corrective or Restorative Justice

Restorative justice is repairing individuals and relationships when harmed, and making amends to victims when they are harmed or suffer loss. It is also called restorative justice. Restoration means putting things back as they were, so it may include some act of contrition to demonstrate one is truly sorry.[1141]

This may include action and even extra payment to the offended party. The first thing that the betrayed person may seek from the betrayer is some form of restitution, putting things back as they should be. The simplest form of restitution is a straightforward apology.[1142]

Corrective justice seeks to reinstate equality when this is disturbed. This comes into play when a norm of distributive justice has been breached or infringed by a member of a community.[1143] Therefore, it aims at

[1137] See James Konow (2003) "Which Is the Fairest One of All? A Positive Analysis of Justice Theories", Journal of Economic Literature, 41(4), p. 1188-1239

[1138]Maiese, Michelle. "Types of Justice." Beyond Intractability. Eds. Guy Burgess and Heidi Burgess. Conflict Information Consortium, University of Colorado, Boulder. Posted: July 2003 <http://www.beyondintractability.org/essay/types-of-justice>.

[1139] See Robert Nozick, Anarchy, State, and Utopia (Oxford: Blackwell, 1974)

[1140] See http://changingminds.org/explanations/trust/four_justice.htm. Accessed on 19th October 2016 at 10:06 AM

[1141] See Jeffrey A. Jenkins's discussion on "Types of Justice," in The American Courts: A Procedural Approach, (Jones & Bartlett Publishers, 2011

[1142] See Maiese, Michelle. "Types of Justice." Beyond Intractability. Eds. Guy Burgess and Heidi Burgess. Conflict Information Consortium, University of Colorado, Boulder, 2003

redressing an equality which has been interfered with. It is usually administered by a court or other organs invested with judicial or quasi-judicial powers.[1144]

In such a situation, it becomes necessary to make amends for a wrong or deprive a party of an unjustified gain. This type of justice is generally administered by the court or other organ invested with judicial or quasi-judicial power. Its major areas of application are contracts, torts, and crimes.[1145]

The disadvantages of restorative justice include possible breaches of confidentiality, the inability to prevent recidivism and the potential for uneven or discriminating outcomes for sentencing and restitution. Restorative justice encourages perpetrators of crimes to repair or restore the harm they created, thereby making their victims whole.[1146]

23.5 Historical Perspective of Justice

The concept of justice in Western philosophy has evolved since the ancient Greek philosophers. Plato argued that justice is part of a metaphysical, ideal realm that humans ought to imitate. In the 17th century, philosophers such as John Locke postulated that justice is part of natural law.[1147]

Liberal philosophers such as Jean-Jacques Rousseau in the 18th Century argued that everyone in a community is equal, and has equal right to accept the benefits and to contribute to their society. Utilitarian thinkers of the 19th century and later argue that justice is what is best for the majority.[1148]

The quest for justice has been as challenging as for the law. The concept of justice is of imponderable significance, and has been the watch word of all major social and political reform movements since time immemorial. Justice is a conception that emerges in our mind in connection with law.[1149]

[1143] See Eric Heinze, The Concept of Injustice (Routledge, 2013)

[1144] See Maiese, Michelle. "Types of Justice." Beyond Intractability. Eds. Guy Burgess and Heidi Burgess. Conflict Information Consortium, University of Colorado, Boulder. Posted: July 2003 <http://www.beyondintractability.org/essay/types-of-justice>

[1145] See AmartyaSen (2011). The Idea of Justice. Cambridge: Belknap Press of Harvard University Press.

[1146] See https://www.reference.com/government-politics/disadvantages-restorative-justice-5a344a9bea5b91f7?qo=contentSimilarQuestions#. Accessed on 19th October 2016 at 10:16 AM

[1147] See Will Kymlicka, Contemporary Political Philosophy: An introduction (2nd edition, Oxford: Oxford University Press, 2002)

[1148] See John Stuart Mill, Utilitarianism in On Liberty and Other Essays ed. John Gray (Oxford: Oxford University Press, 1991)

Ancient Indians, Greeks and Romans' view of justice was very broad. It includes the whole of righteousness, i.e. the morality. They postulated justice as an ideal standard derived from God or based on truth, equality, righteousness and similar high moral values of everlasting authority and validity.[1150]

In very general terms, justice signifies a cluster of ideals and principles for common good and welfare without the least hope or opportunity of injustice, inequality or discrimination.[1151] It is the notion of justice which directs our attention to the fairness and reasonableness of the rules, principles, and standards that are the ingredients of the normative edifice.[1152]

23.6 Natural Law and Justice

Natural law theory has been influential in the evolution of the human thought on the conception of justice for more than 2,500 years since its inception. Friedmann says, 'the history of natural law is a tale of the search of mankind for absolute justice and its failure'.[1153]

Justice, according to Ulpian is the constant and perpetual will to render to everyone that to which he is entitled'. Earlier, Cicero had described justice as the disposition of the human mind to render to everyone his due[1154]. This emphasizes the subjective aspect of justice but certain kinds of mental attitudes are not sufficient to capture all possible aspects of justice. Acquinas, sought to improve on this definition by describing justice as a habit whereby a man renders to each his due by a constant and perpetual will.[1155]

Plato identified justice with a harmonious relation between the various parts of the social organization[1156]. Aristotle made distinction between general and particular justice and classified particular justice as distributive as well as corrective justice. In a general sense, justice is a social virtue, while in the particular sense it means some sort of equality.[1157]

[1149] See Peter Singer ed., A Companion to Ethics (Oxford: Blackwell, 1993), Part IV

[1150] See Daston, Lorraine (2008). "Life, Chance and Life Chances". Daedalus. 137: 5–14.

[1151] See Ted Honderich, Punishment: The supposed justifications (London: Hutchinson & Co. 1969)

[1152] See John Rawls, A Theory of Justice (revised edition, Oxford: Oxford University Press, 1999)

[1153] See Karl Marx, 'Critique of the Gotha Program' in Karl Marx: Selected writings ed. David McLellan (Oxford: Oxford University Press, 1977): 564–70, p. 569.

[1154] See AmartyaSen (2011). The Idea of Justice. Cambridge: Belknap Press of Harvard University Press

[1155] See Colin Farrelly, An Introduction to Contemporary Political Theory (London: Sage, 2004)

[1156] See Plato, The Republic, trans. A.D. Lindsey (1950)

[1157] See David Gauthier, Morals By Agreement (Oxford: Clarendon Press, 1986)

Distributive justice, according to him, aims at an equal distribution of the social good among persons equal before the law. Corrective justice, on the other hand, aims at redressing an equality which has been interfered with. It is usually administered by a court or other organs invested with judicial or quasi-judicial powers. Distributive justice, in the view of Aristotle, is principally the concern of the legislator[1158].

The Christian Church injected the element of Christianity into the concept of justice and defined it to mean justice as ordained by the divine law. Aquinas combined Aristotelian reason with the position of the church doctors, and defined justice to mean justice according to divine reason. However, justice fell also within the measures of reason.[1159]

Social contract theorists like Hobbes and Locke used the concept of justice in the limited sense of contractual justice with Hobbes emphasizing the need of keeping social contract but kept silence on modes of redressing injustice perpetrated by a ruler, Locke held the view that injustice was reddressible by revolution if need be.[1160]

23.7 Conclusion



In above chapter we have learnt that what constitutes justice varies from society to society, person to person, from time to time and from place to place. It has thus been subject to various philosophical, legal, and theological reflections and debate. Justice may be defined as such an adjustment of therelations of human beings as to make all discharge all of their dutiesand other liabilities and all obtain all of their rights, privileges, powersand immunities.

Justice is important because keeping justice, the act of upholding good and punishing evil, is necessary for having a safe society dedicated to the benefit of all people.When justice is not upheld, those doing wrong will continue to do wrong, while those who are doing right will suffer rather than be rewarded. There are four major kinds of justice.

Retributive justice administers **proportionate response to crime** proven by lawful evidence, so that punishment is justly imposed and considered as morally-correct and fully deserved. Distributive justice is concerned with giving all members of society a **fair share** of

[1158] See Harry Brighouse, Justice (Cambridge: Polity Press, 2004)

[1159] See Nicola Lacey, State Punishment (London: Routledge, 1988)

[1160] See C.G. Weeramantry. An Invitation to Law (1988 Ind. ed.) p. 121

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.

Procedural justice 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. Corrective justice seeks to reinstate **equality when this is disturbed**. This comes into play when a norm of distributive justice has been breached or infringed by a member of a community. Therefore, it aims at redressing an equality which has been interfered with. It is usually administered by a court or other organs invested with judicial or quasi-judicial powers.

The concept of justice in Western philosophy has evolved since the ancient Greek philosophers. Plato argued that justice is part of a metaphysical, ideal realm that humans ought to imitate. In the 17th century, philosophers such as John Locke postulated that justice is part of natural law. Liberal philosophers such as Jean-Jacques Rousseau in the 18th Century argued that everyone in a community is equal, and has equal right to accept the benefits and to contribute to their society. Utilitarian thinkers of the 19th century and later argue that justice is what is best for the majority

23.7 Review Questions



1. What do you understand by the term justice?
2. Describe the relevance of justice in the contemporary democratic states.
3. Differentiate between procedural and distributive justice
4. Differentiate between social and legal justice.
5. Discuss the classification of justice.
6. Illustrate the role of natural law in the development of concept of justice.
7. Account for the historical perspectives of the concept of justice.

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CHAPTER TWENTY FOUR

JOHN RAWLS THEORY OF JUSTICE

24.0 Introduction

Theory of justice is concerned with the evolution and criticism of law in terms of the ideals or goals postulated for it. The main idea of a theory of justice asks, what kind of organization of society would rational persons choose if they were in an initial position of independence and equality and were setting up a system of cooperation?

24.1 Objectives



At the end of this chapter students should have: -

- Acquired basic knowledge of concepts such as justice, theory of justice, equality according to John Rawls theory of Justice
- Acquainted with understanding of basic ideas and propositions of the John Rawls' theory of Justice.
- Acquainted with ability to understand and examine the principles of the John Rawls' theory of Justice.
- Developed ability to account for application of the John Rawls' theory of Justice.

24.2 John Rawls

John Rawls (1921 - 2002) was an American political philosopher in the liberal tradition. Rawls's adult life was a scholarly one: its major events occurred within his writings. The exceptions were two wars. As a college student Rawls wrote an intensely religious senior thesis and had considered studying for the priesthood. Then in the 1960s Rawls spoke out against America's military actions in Vietnam. The Vietnam conflict impelled Rawls to analyse the defects in the American political system that led it to prosecute so ruthlessly what he saw as an unjust war, and to consider how citizens could conscientiously resist their government's aggressive policies.[1161]

[1161] See Reath, A., Herman, B., and Korsgaard, C., (eds.), 1997, Reclaiming the History of Ethics: Essays for John Rawls, Cambridge: Cambridge University Press.

Rawls's most discussed work is his theory of a just liberal society, called justice as fairness. Rawls first set out justice as fairness in systematic detail in his 1971 book, A Theory of Justice. Rawls continued to rework justice as fairness throughout his life, restating the theory in Political Liberalism (1993), The Law of Peoples (1999), and Justice as Fairness (2001). Students wanting a clear guide to A Theory of Justice may wish to read Lovett (2011), or (more advanced) Mandle (2009). Those interested in the evolution of justice as fairness from 1971 onwards should consult Freeman (2007) and Weithman (2011). This entry reflects Rawls's final statement of his views on justice as fairness, as well as on political liberalism and on the law of peoples.[1162]

24.3 John Rawls' Theory of Justice

Rawls political philosophy is not simply applied moral philosophy. The utilitarian holds to one universal moral principle ("maximize utility"), which he applies to individual actions, political constitutions, international relations, and all other subjects as required. Rawls has no universal principle: "The correct regulative principle for anything," he says, "depends on the nature of that thing". Rawls confines his theorizing to the political domain, and within this domain holds that the correct principles for each sub-domain depend on its agents and constraints.[1163]

Rawls covers the domain of the political by addressing its sub-domains in sequence. The first sub-domain he addresses is a self-contained democratic society reproducing itself across generations. Once principles are in place for such a society, Rawls moves to a second sub-domain: a society of nations of which this democratic society is a member.

Rawls suggests (though he does not show) that his sequence of theories could extend to cover further sub-domains, such as human interactions with animals. Universal coverage will have been achieved once this sequence is complete, each sub-domain having been assigned the principles appropriate to it.[1164]

24.3.1 John Rawls' Theory of Justice Perspective

Justice as fairness is Rawls's theory of justice for a liberal society. As a member of the family of liberal political conceptions of justice it provides a framework for the legitimate use of political power.[1165] Yet,

[1162] See M. Nussbaum, "The Enduring Significance of John Rawls," Chronicle of Higher Education July 20, 2001

[1163] SEE http://plato.stanford.edu/entries/rawls/#BasStrSocIns. Accessed on 19th October 2016

[1164] See http://plato.stanford.edu/entries/rawls/#BasStrSocIns. Accessed on 19th October 2016

legitimacy is only the minimal standard of political acceptability; a political order can be legitimate without being just. Justice is the maximal moral standard: the full description of how a society's main institutions should be ordered.[1166]

Rawls constructs justice as fairness around specific interpretations of the defining liberal ideas that citizens are free and equal and that society should be fair. He holds that justice as fairness is the most egalitarian, and also the most plausible, interpretation of liberalism's fundamental concepts.[1167]

Rawls sees justice as fairness as answering to the demands of freedom and equality, a challenge posed by the socialist critique of liberal democracy and by the conservative critique of the modern welfare state.[1168] Justice as fairness sets out a version of social contract theory that Rawls believes provides a superior understanding of justice to that of the dominant tradition in political philosophy of utilitarianism.[1169]

24.3.2 Basic Ideas of John Rawls' Theory of Justice

Social cooperation in some form is necessary for citizens to be able to lead a decent life. Yet citizens are not indifferent to how the benefits and burdens of cooperation will be divided amongst them.[1170] Rawls's principles of justice as fairness embody the central liberal ideas that cooperation should be fair to all citizens regarded as free and equal. The distinctive interpretation that Rawls gives to these concepts can be seen in broad terms as a combination of a negative and a positive thesis.[1171]

Rawls's negative thesis is that citizens do not deserve to be born into a rich or a poor family, to be born naturally more or less gifted than others, to be born female or male, to be born a member of a particular

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[1165] See Lovett, F., 2011, Rawls's A Theory of Justice: A Reader's Guide, London: Continuum.

[1166] See Griffin, S., and Solum, L. (eds.) 1994, Symposium of John Rawls's Political Liberalism, Chicago Kent Law Review, 69: 549–842.

[1167] See Davion, V. and Wolf, C. (eds.) 1999, The Idea of a Political Liberalism: Essays on Rawls, Lanham, MD: Rowman and Littlefield.

[1168] See Martin, R. and Reidy, D. (eds.), 2006, Rawls's Law of Peoples: A Realistic Utopia?, Oxford: Blackwell.

[1169] See Lloyd, S., (ed.), 1994, John Rawls's Political Liberalism, Pacific Philosophical Quarterly 75 (special double issue).

[1170] See J. Rawls, 2001, Justice as Fairness: A Restatement E. Kelly (ed.), Cambridge, MA: Harvard University Press

[1171] See J., Rawls, 1999, CHAPTERs on the History of Moral Philosophy [LHMP], B. Herman (ed.), Cambridge, MA: Harvard University Press

racial group, and so on. Since these features of persons are in this sense morally arbitrary, citizens are not at the deepest level entitled to more or less of the benefits of social cooperation because of them.[1172] For example, the fact that a citizen was born rich, white, and male provides no reason in itself for this citizen to be either favoured or disfavoured by social institutions.[1173]

John Rawls attempts to establish a reasoned account of social justice through the social contract approach. This approach holds that a society is in some sense an agreement among all those within that society. If a society where an agreement, Rawls asks, what kind of arrangement would everyone agree to?[1174]

He states that the contract is a purely hypothetical one: He does not argue that people had existed outside the social state or had made agreements to establish a particular type of society.[1175]All social values such as liberty and opportunity, income and wealth, and the social bases of self-respect are to be distributed equally unless an unequal distribution of any or all, of these values is to everyone's advantage.[1176]

24.4 Principles of Justice

24.4.1 Principle of equality

The first principles state that each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for other. The first principle of equal basic liberties is to be used for designing the political constitution, while the second principle applies primarily to economic institutions. Fulfilment of the first principle takes priority over fulfilment of the second principle, and within the second principle fair equality of opportunity takes priority over the difference principle.[1177]

The first principle affirms for all citizens' familiar basic rights and liberties: liberty of conscience and freedom of association, freedom of speech and liberty of the person, the rights to vote, to hold public office, to be

[1172] See J., Rawls, 2009, A Brief Inquiry into the Meaning of Sin & Faith (with "On My Religion") [BI], T. Nagel (ed.), Cambridge, MA: Harvard University Press

[1173] See Fleming, J., (ed.), 2004, Rawls and the Law, Fordham Law Review 72 (special issue).

[1174] See J., Rawls, 1971, A Theory of Justice [TJ], Cambridge, MA: Harvard University Press. Revised edition, 1999. The page citations in this entry are to the 1971 edition

[1175] See Vatican Council II, 1965, DignitasHumanae (Declaration on Religious Freedom), in Documents of Vatican II, W. Abbott (ed.), New York: Herder and Herder, 1966.

[1176] See Freeman, S., (ed.), 2003, The Cambridge Companion to Rawls, Cambridge: Cambridge University Press.

[1177] See Daniels, N., (ed.), 1975, Reading Rawls: Critical Studies on John Rawls' A Theory of Justice, New York: Basic Books. Reissued with new Preface, 1989.

treated in accordance with the rule of law, and so on. The principle ascribes these rights and liberties to all citizens equally. Unequal rights would not benefit those who would get a lesser share of rights, so justice requires equal rights for all in all normal circumstances.[1178]

Rawls's first principle accords with widespread convictions about the importance of equal basic rights and liberties. Two further features make this first principle distinctive. First is its priority: the basic rights and liberties must not be traded off against other social goods. The first principle disallows, for instance, a policy that would give draft exemptions to college students on the grounds that educated civilians will increase economic growth. The draft is a drastic infringement on basic liberties, and if a draft is implemented then all who are able to serve must be equally subject to it.[1179]

24.4.2 Fair Value of Political Liberties

The second distinctive feature of Rawls's first principle is that it requires fair value of the political liberties. The political liberties are a subset of the basic liberties, concerned with the rights to hold public office, the right to affect the outcome of national elections and so on.[1180]

For these liberties Rawls requires that citizens be not only formally but also substantively equal. That is, citizens similarly endowed and motivated should have the same opportunities to hold office, to influence elections, and so on regardless of their social class. This fair value proviso has major implications for how elections should be funded and run, as described below.[1181]

(a) fair equality of opportunity

Rawls's second principle of justice has two parts. The first part, fair equality of opportunity, requires that citizens with the same talents and willingness to use them have the same educational and economic

[1178] See Davion, V. and Wolf, C. (eds.) 1999, The Idea of a Political Liberalism: Essays on Rawls, Lanham, MD: Rowman and Littlefield.

[1179] See Fleming, J., (ed.), 2004, Rawls and the Law, Fordham Law Review 72 (special issue).

[1180] See Griffin, S., and Solum, L. (eds.) 1994, Symposium of John Rawls's Political Liberalism, Chicago Kent Law Review, 69: 549–842.

[1181] See Richardson, H., and Weithman, P. (eds.), 1999, The Philosophy of Rawls: A Collection of Essays, 5 vol., New York: Garland.

opportunities regardless of whether they were born rich or poor. In all parts of society there are to be roughly the same prospects of culture and achievement for those similarly motivated and endowed.[1182]

So for example if we assume that natural endowments and willingness are evenly distributed across children born into different social classes, then within any type of occupation (generally specified) we should find that roughly one quarter of people in that occupation were born into the top 25% of the income distribution, one quarter were born into the second-highest 25% of the income distribution, one quarter were born into the second-lowest 25%, and one-quarter were born into the lowest 25%. Since class of origin is a morally arbitrary fact about citizens, justice does not allow class of origin to turn into unequal real opportunities for education or meaningful work.[1183]

(b) Difference principle

The second part of the second principle is the difference principle, which regulates the distribution of wealth and income. With these goods inequalities can produce a greater total product: higher wages can cover the costs of training and education, for example, and can provide incentives to fill jobs that are more in demand.[1184]

The difference principle requires that social institutions be arranged so that any inequalities of wealth and income work to the advantage of those who will be worst off. The difference principle requires, that is, that financial inequalities be to everyone's advantage, and specifically to the greatest advantage of those advantaged least.[1185]

24.5 Application of Principles of Justice

These principles primarily apply, to the basic structure of society and govern the assignment of rights and duties and regulate the distribution of social and economic advantages. They lay foundation for the aspect

[1182] See Kukathas, C., (ed.), 2003, John Rawls: Critical Assessments of Leading Political Philosophers, 4 vol., London: Routledge.

[1183] See Lehning, P., 2009, John Rawls: An Introduction, Cambridge: Cambridge University Press.

[1184] See Lovett, F., 2011, Rawls's A Theory of Justice: A Reader's Guide, London: Continuum.

[1185] See Mandle, J., 2009, Rawls's A Theory of Justice: An Introduction, Cambridge: Cambridge University Press.

the social system that define and secure the equal basic liberties and the aspects that specify and establish social and economic inequalities.[1186]

The first principle applies to certain basic liberties. These liberties have a central range of application within which they can be limited and compromised only when they conflict with other basic liberties. Since they may be limited when they clash with one another, none of these liberties is absolute; but however they are adjusted to form one system, this system is to be the same for all.[1187]

The second principle applies, in the first approximation, to the distribution of income and wealth and to the design of organization that make use of differences in authority and responsibility. While the distribution of wealth and income need not be equal, it must be everyone's advantage, and at the same time, positions of authority and responsibility must be accessible to all.[1188]

One applies the second principle by holding positions open, and then, subject to this constraint, arranges social and economic inequalities so that everyone benefits. In regard to the second principle, the distribution of wealth and income, and positions of authority and responsibility, are to consistent with both the basic liberties and equality of opportunity.[1189]

24.6 Conclusion



In above chapter we have learnt that theory of justice is concerned with the evolution and criticism of law in terms of the ideals or goals postulated for it. The main idea of a theory of justice asks, what kind of organization of society would rational persons choose if they were in an initial position of independence and equality and were setting up a system of cooperation?

John Rawls (1921 - 2002) was an American political philosopher in the liberal tradition. Justice as fairness is Rawls's theory of justice for a liberal society. As a member of the

[1186] See Pogge, T., 1989, Realizing Rawls, Ithaca, NY: Cornell University Press.

[1187] See Reath, A., Herman, B., and Korsgaard, C., (eds.), 1997, Reclaiming the History of Ethics: Essays for John Rawls, Cambridge: Cambridge University Press.

[1188] See Richardson, H., and Weithman, P. (eds.), 1999, The Philosophy of Rawls: A Collection of Essays, 5 vol., New York: Garland.

[1189] See Weithman, P., 2011, Why Political Liberalism? On John Rawls's Political Turn, Oxford: Oxford University Press.

family of liberal political conceptions of justice it provides a framework for the legitimate use of political power. Yet legitimacy is only the minimal standard of political acceptability; a political order can be legitimate without being just. Justice is the maximal moral standard: the full description of how a society's main institutions should be ordered.

Rawls sees justice as fairness as answering to the demands of freedom and equality, a challenge posed by the socialist critique of liberal democracy and by the conservative critique of the modern welfare state. The first principles state that each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for other. The second distinctive feature of Rawls's first principle is that it requires fair value of the political liberties. The political liberties are a subset of the basic liberties, concerned with the rights to hold public office, the right to affect the outcome of national elections and so on.

These principles primarily apply, to the basic structure of society and govern the assignment of rights and duties and regulate the distribution of social and economic advantages. They lay foundation for the aspect the social system that define and secure the equal basic liberties and the aspects that specify and establish social and economic inequalities.

24.7 Review Questions



1. How can you define theory of justice? Explain its relevance
2. Describe the basic ideas of John Rawls's theory of Justice.
3. Discuss the principles of John Rawls' theory of justice.
4. Demonstrate the application of John Rawls' theory of Justice
5. To what extent John Rawls' theory of justice is reflected in Tanzania legal system.

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CHAPTER TWENTY FIVE

ROBERT NOZICK THEORY OF JUSTICE

25.0 Introduction

Robert Nozick theory of justice is called entitlement theory. Entitlement theory is a theory of distributive justice and private property created by Robert Nozick in his book Anarchy, State, and Utopia. The theory is Nozick's attempt to describe "justice in holdings" (Nozick 1974:150) - or what can be said about and done with the property people own when viewed from a principle of justice.

25.1 Objectives



At the end of this chapter students should have: -

- Acquired basic knowledge of concepts such as justice, theory of justice, equality according to Robert Nozick theory of Justice
- Acquainted with understanding of basic ideas and propositions of the Robert Nozick theory of Justice.
- Acquainted with ability to understand and examine the principles of the Robert Nozick theory of Justice.
- Developed ability to account for application of the Robert Nozick theory of Justice.

25.2 Robert Nozick

Robert Nozick**,** was born Nov. 16, 1938, Brooklyn, N.Y., U.S.—died Jan. 23, 2002, Cambridge, Mass and American philosopher, best known for his rigorous defense of libertarianism in his first major work, Anarchy, State, and Utopia (1974). A wide-ranging thinker, Nozick also made important contributions to epistemology, the problem of personal identity, and decision theory.[1190]

A thinker with wide-ranging interests, Robert Nozick was one of the most important and influential political philosophers, along with John Rawls, in the Anglo-American analytic tradition.[1191]

[1190] See https://www.britannica.com/biography/Robert-Nozick. Accessed on 20th October 2016 at 7:28 am

[1191] See A.R. Lacey, Robert Nozick (Acumen Publishing Ltd., 2001)

His first and most celebrated book, Anarchy, State, and Utopia (1974), produced, along with his Harvard colleague John Rawls' A Theory of Justice (1971), the revival of the discipline of social and political philosophy within the analytic school. Rawls' influential book is a systematic defence of egalitarian liberalism, but Nozick'sAnarchy, State, and Utopia is a compelling defence of free-market libertarianism.[1192]

Nozick neglected political philosophy for the rest of his philosophical career. He moved on to address other philosophical questions and made significant contributions to other areas of philosophical inquiry.[1193]

In epistemology, Nozick developed an externalist analysis of knowledge in terms of counterfactual conditions that provides a response to radical scepticism. In metaphysics, he proposed a "closest continuer" theory of personal identity.[1194]

25.3 Robert Nozick Theory of Justice

Robert Nozick theory of justice or entitlement theory implies that a distribution is just if everyone is entitled to the holdings they possess under the distribution.[1195] Unfortunately, not everyone follows these rules as some people steal from others, or defraud them, or enslave them, seizing their product and preventing them from living as they choose, or forcibly exclude others from competing in exchanges.[1196] Thus the third principle of rectification is needed.

25.3.1 Rights

Each person's talents and abilities belong to them. They therefore have a right to keep or do whatever they want with whatever these talents and abilities gain for them. To forcibly redistribute what they earn is to fail respect their autonomy.[1197]

In his account of the possible justification of the state, and in his entitlement theory of justice, Nozick postulates absolute rights not merely prima facie rights which might be overridden, but boundaries not to be

[1192] See David Schmidtz, ed., Robert Nozick (New York: Cambridge University Press, 2002)
[1193] See Simon Hailwood, Exploring Nozick: Beyond Anarchy, State, and Utopia (Sydney: Avebury, 1996)
[1194] See Jonathan Wolff, Robert Nozick: Property, Justice, and the Minimal State (Stanford, CA: Stanford University Press, 1991)
[1195] See Robert Nozick. Anarchy, State, and Utopia. New York: Basic Books, 1974.
[1196] See Robert Nozick. The Examined Life. New York: Simon and Schuster, 1989.
[1197] See Friedman, M., 2011, Nozick' Libertarian Project, London: Continuum.

crossed without the free consent of the persons whose rights they are. Other people's rights are constraints upon our actions toward our own goals.[1198]

Why must we respect such constraints? When a person makes a thing, or finds it un-owned and appropriates it, why must others not use it without his permission no matter how great their need, no matter how such things are distributed?[1199]

Nozick's answer is that such constraints express the inviolability of other persons; a person is not to be used to benefit others - this would not sufficiently respect the fact that he is a separate person, that his is the only life he has. There is no transcendent social whole for the sake of which individuals can be sacrificed, there are only other individuals.[1200]

In effect Nozick agrees with Rawls's criticism of Utilitarianism: in adding and subtracting the costs and benefits to all the persons affected, and in allowing benefits to one person to offset costs to others, Utilitarianism does not sufficiently acknowledge the separateness of persons.[1201]

25.3.2 Minimal State Interference

Nozick emphasizes that his vision of the minimal state is inclusive and is compatible with the existence of smaller communities based on varying theories of justice. A group that wished to form a socialist community governed by an egalitarian theory would be free to do so, as long as it did not force others to join the community against their will. Indeed, every group would enjoy the same freedom to realize its own idea of a good society. In this way, according to Nozick, the minimal state constitutes a "framework for utopia.[1202]

Nozick claims that no more than the minimal state is justified, because any state with more extensive powers would violate the natural rights of its citizens. Thus the state should not have the power to control

[1198] See http://www.csudh.edu/DearHabermas/nozick01bk.html. Accessed on 19th October 2016 at 3:11 pm

[1199] See https://en.wikipedia.org/wiki/Entitlement_theory. Accessed on 20th October 2016 at 7:37 am

[1200] See Edward Feser, On Nozick (Belmont, CA: Wadsworth, 2003)

[1201] See Rawls, John. A Theory of Justice. Rev. ed. Cambridge: Harvard University Press, 1999.

[1202] See G.A. Cohen, Self-Ownership, Freedom, and Equality (New York: Cambridge, University Press, 1995)

prices or to set a minimum wage, because doing so would violate the natural right of citizens to dispose of their property.[1203]

The state should not have the power to establish public education or health care through taxes imposed on citizens who may wish to spend their money on private services instead. Indeed, according to Nozick, any mandatory taxation used to fund services or benefits other than those constitutive of the minimal state is unjust, because such taxation amounts to a kind of "forced labour" for the state by those who must pay the tax.[1204]

25.3.3 Justice

Robert Nozick bases his theory of justice on rights. The rights come from the concept of entitlement. In other words, rights mean entitlement. One has right or claim to anything means that one is entitled to it. If justice means the distribution of right, duties, privileges etc. then the idea of justice can appropriately be interpreted as entitlement theory of justice.

Justice is about respecting people's (natural) rights, in particular, their rights to property and their rights to self-ownership. The minimal state is the most extensive state that can be justified. Any state more extensive violates people's rights.[1205]

We must allow people the freedom to decide what they want to do with what they own. Each person is separate, an individual, and we must respect their autonomy, People are 'ends – in – themselves', and we cannot use them in ways they do not agree to, even if that would lead to some supposed 'greater good' (e.g. other people getting what they need).[1206]

[1203] See Robert Nozick, Anarchy, State, and Utopia (New York: Basic Books, 1974)

[1204] See https://www.britannica.com/biography/Robert-Nozick. Accessed on 19th October 2016 at 3:21 pm

[1205] See Robert Nozick, Philosophical Explanations (Cambridge, MA: Belknap Press, 1981)

[1206] See Robert Nozick, The Examined Life: Philosophical Meditations (New York: Simon and Schuster, 1989)

Robert Nozick is primarily concerned with the distribution of property. Nozick's theory of justice claims that whether a distribution is just or not depends entirely on how it came about. This theory is called **Entitlement theory.**[1207]

25.4 Robert Nozick's Principles of Justice

The general outlines of the theory of justice in holdings are that the holdings of a person are just if he is entitled to them by the principles of justice in acquisition and transfer, or by the principle of rectification of injustice as specified the first two principles.[1208]

25.4.1 Justice in acquisition

When a man acquires a holding (we can interpret it as property though Nozick does not use this particular term) according to the principle of justice and law, then the person concerned is entitled to that holding. In other words, property acquired in a legal and justifiable way shall cause under the authority of the person who has acquired it and it is a type of justice.[1209]

How you first acquire property rights over something that has not previously been owned. A person who acquires a holding in accordance with the principle of justice in acquisition is entitled to that holding.[1210]

25.4.2 Justice in transfer

If a person happens to acquire a holding by means of transfer and here in this case the basic principles of justice has been strictly adhered to, then this justice- based transfer can reasonably be called an entitlement. The transfer takes place from one person to another. There are different forms of transfer such as voluntary exchange, gifts or any other type.[1211]

[1207] See Jeffrey Paul, ed., Reading Nozick: Essays on Anarchy, State, and Utopia (Totowa, NJ: Rowman and Littlefield, 1991)

[1208] See Robert Nozick, The Nature of Rationality (Princeton, NJ: Princeton University Press, 1993)

[1209] See http://www.politicalsciencenotes.com/theories-of-justice/nozicks-view-on-theory-of-justice/755. Accessed on 19th October 2016 at 2:58 PM

[1210] See Schmidtz, D. (ed.), 2002, Robert Nozick, Cambridge: Cambridge University Press.

[1211] See http://www.politicalsciencenotes.com/theories-of-justice/nozicks-view-on-theory-of-justice/755. Accessed on 19th October 2016 at 2:58 PM

How you acquire property right over something that has been transferred e.g. by gift or exchange to you by someone else. A person who acquires a holding in accordance with the principle of justice transfer, from one else entitled to the holding is entitled to the holding.[1212]

25.4.3 Rectification of injustice

In all societies not all transfers or acquisitions take place in proper or legal or justifiable ways. There may be illegal transfers or acquisitions and it has been found that such cases are not at all rare. Naturally the rectification of this injustice or wrong can lead to another type of holding. Nozick calls it the "rectification of injustice in holding.[1213]

How to restore something its rightful owner, in case of injustice in either acquisition or transfer? No one is entitled to a holding except by (repeated) applications of 1 and 2. Therefore all property that derives from injustice acquisition is unjustly held. You do not have a right to transfer property you stole, nor does the new owner have a right to what they receive.[1214]

25.5 Application of Robert Nozick Principles of justice

If a scheme or distributive system is unjust or defective this can be rectified of course if possible or removed and in this way, the distributive process moves from one stage to another or one scheme to another.[1215]

In the concept of historical principle there lies a clear hint of evolution of the theory of justice. There has occurred a gradual development of justice and this is chiefly due to the reason that the material circumstances of society change and this influences justice.[1216]

Nozick demands that only the end result principles can tell us what would be the exact nature of justice. If the procedure of distribution is incomplete or defective or cannot assure us of justice, then the procedure can be changed.[1217]

[1212] See Paul, J., 1981, Reading Nozick, Totowa, NJ: Rowman and Littlefield.

[1213] Ibid

[1214] See http://www.politicalsciencenotes.com/theories-of-justice/nozicks-view-on-theory-of-justice/755. Accessed on 19th October 2016 at 3:07 pm

[1215] See Bader, R., 2013, Robert Nozick, London: Bloomsbury Academic.

[1216] See Chapman, J. and J. Pennock (eds.), 1978, Anarchism, New York: NYU Press.

He also claims that this is the most reliable way of building up a theme of justice. We also partially agree with Robert Nozick partially because other factors are to be considered.[1218]

25.6 Critiques

History shows that great deal of initial acquisition of property was unjust, based on theft, exploitation, slavery and colonization. But of course, we cannot now rectify the injustice of the past. We have no way of establishing what belongs to whom.[1219]

So Nozick's theory as no application if we do not start from a just beginning we must therefore work out a different theory of justice that is not so sensitive to past justices that we cannot correct. The historical nature of Nozick's theory turns out to be weak spot.[1220]

Patterned principles only stress the patterned way of distribution of property and rights. But it is silent on the entitlement principles of holding and Nozick believes that only through the strengthening of this principle can justice be achieved. Hence its inability is not helpful for justice.[1221]

In the opinion of Nozick justice depends on both receiving and giving of holdings or property. These two combined form the fabric of justice. But patterned principle only emphasises the receiving aspect and ignores the giving of property. So the patterned principle of distributive justice is a theory of recipient justice.[1222]

Again there is a conflict between patterned principle and end-state principle. The patterned principle emphasises that men should be rewarded according to the deserts is historical because it directs attention towards their past action.[1223]

[1217] See Cohen, G.A., 1995, Self-Ownership, Freedom, and Equality, Cambridge: Cambridge University Press.

[1218] See Hailwood, S.A., 1996, Exploring Nozick: Beyond Anarchy, State and Utopia, Aldershot: Avebury.

[1219] See Simon Hailwood, Exploring Nozick: Beyond Anarchy, State, and Utopia (Sydney: Avebury, 1996)

[1220] See Robert Nozick, Invariances: The Structure of the Objective World (Cambridge, MA: Belknap Press, 2001)

[1221] See Lomasky, L., 2002, "Nozick's Libertarian Utopia" in Schmidtz 2002: 59–82.

[1222] See Mack, E., 1978, "Nozick's Anarchism" in Chapman and Pennock 1978: 43–62.

[1223] See Nagel, T., 1975, "Libertarianism without Foundations" reprinted in Paul 1981: 191–205.

25.7 Conclusion



In above chapter we have learnt that Robert Nozick theory of justice is called entitlement theory. Entitlement theory is a theory of distributive justice and private property created by Robert Nozick in his book Anarchy, State, and Utopia.

Entitlement theory implies that a distribution is just if everyone is entitled to the holdings they possess under the distribution. Unfortunately, not everyone follows these rules as some people steal from others, or defraud them, or enslave them, seizing their product and preventing them from living as they choose, or forcibly exclude others from competing in exchanges. Thus the third principle of rectification is needed. Each person's talents and abilities belong to them. They therefore have a right to keep or do whatever they want with whatever these talents and abilities gain for them. To forcibly redistribute what they earn is to fail respect their autonomy. Justice is about respecting people's (natural) rights, in particular, their rights to property and their rights to self-ownership.

The minimal state is the most extensive state that can be justified. Any state more extensive violates people's rights. The general outlines of the theory of justice in holdings are that the holdings of a person are just if he is entitled to them by the principles of justice in acquisition and transfer, or by the principle of rectification of injustice as specified the first two principles. If a scheme or distributive system is unjust or defective this can be rectified of course if possible or removed and in this way, the distributive process moves from one stage to another or one scheme to another.

However, history shows that great deal of initial acquisition of property was unjust, based on theft, exploitation, slavery and colonization. But of course, we cannot now rectify the injustice of the past. We have no way of establishing what belongs to whom.

25.8 Review Questions



1. Describe the basis of Robert Nozick theory of Justice
2. Discuss the principles of justice according to Robert Nozick
3. Differentiate between John Rawls and Robert Nozick theories of justice

4. What are strengths and weaknesses of entitlement theory of justice

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CHAPTER TWENTY SIX

RONALD DWORKIN THEORY OF JUSTICE

26.0 Introduction

Dworkin made important contributions to what is sometimes called the equality of what debate. In a famous pair of articles and his book Sovereign Virtue he advocates a theory he calls equality of resources.[1224] This theory combines two key ideas. Broadly speaking, the first is that human beings are responsible for the life choices they make. The second is that natural endowments of intelligence and talent are morally arbitrary and ought not to affect the distribution of resources in society.[1225] Like the rest of Dworkin's work, his theory of equality is underpinned by the core principle that every person is entitled to equal concern and respect in the design of the structure of society. Dworkin's theory of equality is said to be one variety of so-called luck egalitarianism, but he rejects this statement.[1226]

26.1 Objectives



At the end of this chapter students should have:-

- Acquired knowledge and understanding of the basic concepts of law, justice, equality, liberalism etc.
- Acquainted with knowledge and understanding on principles of justice according to Ronald Dworkin.
- Developed ability to explain the contributions of Ronald Dworkin in theory of justice.
- Acquired competency to illustrate reflections and application of Ronald Dworkin theory of Justice in modern democratic countries.
- Developed ability to explain the critiques posed against Ronald Dworkin theory of Justice.

[1224]Hershovitz, Scott, ed. Exploring Law's Empire: The Jurisprudence of Ronald Dworkin. Oxford: Oxford University Press, 2006.

[1225] See Burke, John J.A. The Political Foundation of Law: The Need for Theory with Practical Value. San Francisco: Austin & Winfield, 1992.

[1226] See Gaffney, Paul. Ronald Dworkin on Law as Integrity: Rights as Principles of Adjudication. Lewiston, New York: Mellen University Press, 1996.

26.2 Ronald Dworkin

Ronald Myles Dworkin, (December 11, 1931 – February 14, 2013) was an Americanphilosopher, jurist, and scholar of United States constitutional law. At the time of his death, he was Frank Henry Sommer Professor of Law and Philosophy at New York University and Professor of Jurisprudence at University College London, and had taught previously at Yale Law School and the University of Oxford, where he was the Professor of Jurisprudence, successor to Herbert Lionel Hart.[1227]

An influential contributor to both philosophy of law and political philosophy, Dworkin received the 2007 Holberg International Memorial Prize in the Humanities for "his pioneering scholarly work" of worldwide impact.[1228]

According to a survey in The Journal of Legal Studies, Dworkin was the second most-cited American legal scholar of the twentieth century.After his death, the Harvard legal scholar Cass Sunstein said Dworkin was one of the most important legal philosophers of the last 100 years. He may well head the list.[1229]

Ronald Dworkin is one of the greatest contemporary political and legal philosophers.[1230] He started developing his comprehensive liberal theory of a central position of the concept of equality firstly in a field of philosophy of law.[1231]

He turned back to a field of jurisprudence with his book Justice in Robes, published in 2006, then followed liberal political theory of justice political morality based on “equality of resources” account of justice[1232], and finally he attempted to clarify philosophical foundations3 of this theory of political morality.[1233] His last book

[1227] See http://www.haaretz.com/jewish-world/jewish-world-news/ronald-dworkin-dies-at-81-1.503643,

[1228] See Ronald Dworkin, New York Review of Books. Nybooks.com. Accessed 29 September 2009.

[1229] See Shapiro, Fred R. (2000). "The Most-Cited Legal Scholars".Journal of Legal Studies.**29** (1): 409–426.

[1230] See Ripstein, Arthur, ed. Ronald Dworkin (Contemporary Philosophers in Focus). Cambridge: Cambridge University Press, 2007.

[1231] See Dworkin, Ronald, Taking Rights Seriously, Gerald Duckworth &Co Ltd, London 1977

[1232] See Dworkin has collected all the articles concerned with his liberal political theory of justice, which he had written during twenty years, in his book Sovereign Virtue – The Theory and Practice of Equality, Cambridge, Massachusetts, London, England: Harvard University Press, 2000.

[1233] See Dworkin turned back again to the field of jurisprudence with his book Justice in Robes, Cambridge, Massachusetts: Harvard University Press, 2006

Justice for Hedgehogs has had an ambition to complete philosophical foundations of his theory, and especially to illustrate a unity of ethical and moral values.[1234]

He has developed his theory of justice in a referential framework of liberal theoretical attempts initiated by John Rawls in the 70s of the 20th century to redeem political philosophy and theory of justice, in order that political and economic order be reconsidered and rearticulated as based on justice, i.e. just redistribution of resource.[1235]

Dworkin, as positivism's most significant critic, rejects the positivist theory on every conceivable level. Dworkin denies that there can be any general theory of the existence and content of law; he denies that local theories of particular legal systems can identify law without recourse to its moral merits, and he rejects the whole institutional focus of positivism.[1236]

A theory of law is for Dworkin a theory of how cases ought to be decided and it begins, not with an account of the political organization of a legal system, but with an abstract ideal regulating the conditions under which governments may use coercive force over their subjects.[1237]

26.3 Ronald Dworkin theory of Justice

In a just society there may have to be some paternalism, restriction of people's liberty, against their will, for their own sake, to prevent or mitigate the effect of really bad self-harming.[1238]

Dworkin's aim is to specify a scheme that allows the distribution of resources at any point of time to be both ambitions sensitive, in that it reflects the cost or benefit to others of the choices people make, but not be endowment sensitive, it allows scope for differences in ability among people with the same ambitions.[1239]

[1234] See Justice for Hedgehogs, Cambridge, Massachusetts, London, England: Harvard University Press, 2011.

[1235] See Epstein, R.. Review: Impractical Equality, R. Dworkin, Sovereign Virtue: The Theory and Practice of Equality, Reason, , October 2000, Vol. 32. Issue 5, p.60.

[1236] See Gaffney, Paul. Ronald Dworkin on Law as Integrity: Rights as Principles of Adjudication. Lewiston, New York: Mellen University Press, 1996.

[1237] See Guest, Stephen. Ronald Dworkin (Jurists: Profiles in Legal Theory). Stanford: Stanford University Press, 2012.

[1238] See Dworkin, R. "Foundations of Liberal Equality", op.cit, p.7.

[1239] See Dworkin, R. Sovereign Virtue, op.cit. pp.3-4.

26.3.1 Equality

Equality of resources account of justice represents a central point of Dworkin`s attempt to present egalitarian face of liberalism, to defend unity of values of equality and liberty, and to affirm value of equality as the central value of liberalism.[1240]

26.3.2 Free Market

A feature of Dworkin's ideal of justice as equality of resources is that acapitalist market economy is a necessary ingredient in the idea of justice and in the actual operation of thejust society. The just initial distribution is determined by a hypothetical market device, an auction.[1241]

Once the initial auction with insurance markets is completed, justice requires that people be free to interactwith each other as they choose in a free market economy be allowed to set up firms, hire workers, applyfor employment, engage in self-employment or unemployment, sell shares in the enterprise one owns towould-be investors, whatever. The fair framework of interaction is roughly a society with contract law andtort law as we know it in contemporary capitalist market economies.[1242]

26.3.3 Individualism and Liberalism

He wants to keep individualism and value of liberty as an essence of liberalism, but also wants to demonstrate that equality has been even prior value in relation to liberty, that value of equality has been embedded in individuals and their interrelations through basic principles of humanism equal concern or respect for the human life as such and special responsibility of each individual for his or her own life.[1243]

26.3.4 Justice and Sovereign Power

He wants to approve that justice has been a sovereign virtue of a political power[1244], as well as that individuals do not have only egoistic interests, but have been inherently also committed to a common

[1240] See Dworkin, R. A Matter of Principle, op.cit. pp. 190-199.

[1241] See Dworkin, R. Law's Empire, Cambridge, Massachusetts: Harvard University Press, 1986.

[1242] See Dworkin, R. A Matter of Principle, Cambridge, Massachusetts: Harvard University Press, 1985;

[1243] See R. Dworkin, ipid. P. 205. He went on to develop a "strategy of continuity" in his articles, manuscripts, and books written after 1985 , in: 1990, 1999, 2000, 2002

[1244] See Dowrkin, R., Sovereign Virtue: The Theory and Practice of Equality. Cambridge, MA: Harvard University Press, 2000.

good.[1245] Justice represents a parameter also of individual ethics; that there exists continuity strategy of continuity between pluralism of individual value orientations and common sharing of basic principles of humanism, between individualism and common good, and between pluralism and neutrality of the state.[1246]

26.3.5 Liberty and Equality

Dworkin contends that the values of liberty and equality do not necessarily conflict. He criticizes Isaiah Berlin's conception of liberty as "flat" and proposes a new, "dynamic" conception of liberty, suggesting that one cannot say that one's liberty is infringed when one is prevented from committing murder.[1247] Thus, liberty cannot be said to have been infringed when no wrong has been done. Put in this way, liberty is only liberty to do whatever we wish so long as we do not infringe upon the rights of others.[1248]

26.4 Principles of Justice

26.4.1 Equality of resource

Means equal concern and that equal concern is the sovereign virtue of political communities, i.e. the virtue of justice which finds its concrete articulation in the equality of resource. A just distribution of resources together with equal respects of human rights the framework of political legitimacy.[1249]

Equality of resources presupposes an economic market, not only as an analytical device, but also to a certain extent as an actual political institution; second, that equality of resources is matter of equality in whatever resources are owned privately by individuals.[1250]

We should care about equality of resources not welfare. Equality of resources would beachieved if material resources were distributed as follows: There is a theoretical equal auction among themembers of society, in

[1245] See Cohen, Marshall, ed. Ronald Dworkin and Contemporary Jurisprudence. London: Duckworth, 1984.

[1246] See Dworkin, R. Justice for Hedgehogs, op.cit. pp. 327-351.

[1247] See Benjamin Brown, From Principles to Rules and from Musar to Halakhah - The HafetzHayim's Rulings on Libel and Gossip

[1248] See Is Democracy Possible Here? Principles for a New Political Debate, Princeton, NJ: Princeton University Press, 2006.

[1249] See Kimlicka, W. Contemporary Political Philosophy – An Introduction**,** Oxford: Clarendom Press, 1990,
pp. 84-85

[1250] See Kimlicka, W. Kimlicka, W. Review: Ronald Dworkin, Sovereign Virtue: The Theory and Practice of Equality, ISUMA, Vol. 2, No 1, Spring 2001, pp.1-2.

which all members are given equal bidding power and all resources are up forauction. People bid until equilibrium, no one wants to change her bid, given how others have bid.[1251]

26.4.2 Choices and Circumstances

Ronald Dworkin postulates that people's fates are determined by their choices and theircircumstances. Their choices reflect their personality, which is itself a matter of two main ingredients such asambition and character.[1252]Someone's ambitions include all his tastes, preferences, and convictions as wellas his overall plan of life. His ambitions furnish his reasons or motives for making one choice rather thananother.[1253]

Someone's character consists of those traits of personality that do not supply him with motivesbut that nevertheless affect his pursuit of his ambitions. Someone's circumstances consist of his personaland his impersonal resources.[1254]

Inequalities are acceptable if they result from voluntary choices, but not if they result from disadvantages that have not been chosen. Personal physical and mental powers should not influence equality of resources, being normally arbitrary characteristics.[1255]

Even if everyone start from the same position one person may better than another because of her good luck, or, alternatively, because of her lesser handicaps or greater talents. While belonging to one's natural endowment and according to a requirement for an endowment insensitive redistribution, they should be equalized in order to enable an equal share.[1256]

26.5 Strengths

His theory is an attempt at removal of some of the shortcomings of Rawls' theory. Dworkin takes a so called envy-test as the criterion of just distribution. This test says that distribution of goods is not satisfactory if after it a person envies someone else because a bundle of resources he has received. This problem is

[1251] See Dworkin, R. Sovereign Virtue, op.cit. p. 295
[1252] See Dworkin, R. Law's Empire, Cambridge, Massachusetts: Harvard University Press, 1986
[1253] See Dworkin, R. A Matter of Principle, Cambridge, Massachusetts: Harvard University Press, 1985
[1254] See Dworkin, Ronald, Taking Rights Seriously, Gerald Duckworth &Co Ltd, London 1977
[1255] See Baume, Sandrine (2011). Hans Kelsen and the Case for Democracy, ECPR Press, pp. 53–54.
[1256] See Dworkin, R., Religion Without God. Cambridge, MA: Harvard University Press, 2013.

resolved with the help of an auction in which everyone gets the same initial amount of money that enables him to bid for all the resources that are at disposal of this community.[1257]

The meaning of this procedure is to ensure that an individual must sacrifice more of his initial resources to get a good that is highly valued by others, and much less if he bids for something that is not so popular. However, such an auction could satisfy the envy-test only if there were no great differences among people in respect of their personal abilities and talents.[1258]

Since this is not so, and since Dworkin wants to prevent that anyone suffers or profits because of his (undeserved) natural abilities, a new procedure must be introduced. Thus, the auction is supplemented by insurance. That is, it is supposed that people in the moment of auction do not know whether they have some mental of physical handicap, whether talents they possess are in demand on the market or not, and the like.[1259]

In such circumstances everyone rational would like to buy insurance against these risks, so one part of their initial sum intended for the auction would be used for this purpose too. The amount invested for insurance would go to the common fund from which those who turn to be handicapped or insufficiently talented would be supported. [1260]

The main ambition of this theory is to remove impact (on the distribution of goods) of the factors that are not under control of individuals and to allow influence only of such ones that are under personal control. Dworkin's scheme has to be implemented in practice by complex tax and money-transfer system of the welfare state.[1261]

26.6 Critiques

There are a number of problems with Dworkin's auction scheme: for example, it is not clear that the auctioneer will ever discover prices at which there is precisely one would be purchaser for each

[1257] See http://www.distributive-justice.com/theory/dworkin-en.htm. Accessed on 25th October 2016 at 10:21 am

[1258] Ibid

[1259] Ibid

[1260] See The Philosophy of Law (Oxford Readings in Philosophy). Ed. New York: Oxford University Press, 1977.

[1261] Ibid

lot.[1262]However, these may be avoided by adopting outcome of the auction, that is, as a free market outcome in which everyone has the some wealth, as a specification of justice in its own right. But the problems with the insurance scheme are deeper, as Roemer's argument (presented above) demonstrates.[1263]

26.7 Conclusion



In this chapter we have seen that Ronald Dworkin is one of the greatest contemporary political and legal philosophers. He started developing his comprehensive liberal theory of a central position of the concept of equality firstly in a field of philosophy of law. He has developed his theory of justice in a referential framework of liberal theoretical attempts initiated by John Rawls in the 70s of the 20th century to redeem political philosophy and theory of justice, in order that political and economic order be reconsidered and rearticulated as based on justice, i.e. just redistribution of resource.

His theory is an attempt at removal of some of the shortcomings of Rawls' theory. Dworkin takes a so called envy-test as the criterion of just distribution. This test says that distribution of goods is not satisfactory if after it a person envies someone else because a bundle of resources he has received. This problem is resolved with the help of an auction in which everyone gets the same initial amount of money that enables him to bid for all the resources that are at disposal of this community. The meaning of this procedure is to ensure that an individual must sacrifice more of his initial resources to get a good that is highly valued by others, and much less if he bids for something that is not so popular. However, such an auction could satisfy the envy-test only if there were no great differences among people in respect of their personal abilities and talents. Since this is not so, and since

Dworkin wants to prevent that anyone suffers or profits because of his undeserved natural abilities, a new procedure must be introduced. Thus, the auction is supplemented by insurance. That is, it is supposed that people in the moment of auction do not know whether

[1262] See Shapiro, Fred R. (2000), "The Most-Cited Legal Scholars". Journal of Legal Studies, **29** (1): 409–426.

[1263] See The Associated Press (February 14, 2013), LONDON: US legal scholar Ronald Dworkin dies in UK aged 81 MiamiHerald.com. Retrieved 2013-02-14.

they have some mental of physical handicap, whether talents they possess are in demand on the market or not, and the like. In such circumstances everyone rational would like to buy insurance against these risks, so one part of their initial sum intended for the auction would be used for this purpose too. The amount invested for insurance would go to the common fund from which those who turn to be handicapped or insufficiently talented would be supported. The main ambition of this theory is to remove impact on the distribution of goods of the factors that are not under control of individuals and to allow influence only of such ones that are under personal control. Dworkin's scheme has to be implemented in practice by complex tax and money-transfer system of the welfare state.

26.8 Review Questions



1. Describe Ronald Dworkin theory of justice
2. Discuss the principles of justice according to Ronald Dworkin
3. What critiques posed against Ronald Dworkin and his theory of Justice
4. Compare and contrast between John Rawls theory of justice and Ronald Dworkin theory of justice.

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CHAPTER TWENTY SEVEN

THEORIES OF PUNISHMENTS

27.0 Introduction

Punishment is a consequence of an offense. Punishments are imposed on the wrong doers with the object to deter them to repeat the same wrong doing and reform them into law- abiding citizens. The kind of punishment to be imposed on the criminal depends or is influenced by the kind of society one lives in.[1264]

27.1 Objectives

At the end of this chapter students should have:-

- Acquired knowledge and understanding of the basic concepts of punishment, fine, capital punishment, retribution, reformation etc.
- Acquainted with knowledge and understanding on nature and essence of punishment.
- Developed ability to explain the philosophical foundations of the imposition of punishment.
- Acquired competency to illustrate reflections and application of theories of punishment in modern democratic countries.
- Developed ability to explain the critiques posed against theories of punishment.

27.2 Punishment

Defining the concept of punishment must be kept distinct from justifying punishment. A definition of punishment is, or ought to be, value-neutral, at least to the extent of not incorporating any norms or principles that surreptitiously tend to justify whatever falls under the definition itself.[1265]

Punishment is an imposition of an undesirable or unpleasant outcome upon a group or individual, in response and deterrent to a particular action or behaviour that is deemed unacceptable, threatening to some norm and/or breaks the rules or laws by which the social group is governed.[1266]

[1264] See Davis, Angela Y., 2003, *Are Prisons Obsolete?*, New York: Seven Stories Press

[1265] See Butler, Joseph, 1723, "Sermon Upon Resentment", in Butler, *Works* (Volume 2), Oxford: Oxford University Press, 1850, pp. 87–98

The unpleasant imposition may include a fine, penalty, or confinement, or be the removal or denial of something pleasant or desirable. The individual may be a person, or even an animal. The authority may be either a group or a single person, and punishment may be carried out formally under a system of law or informally in other kinds of social settings such as within a family.[1267]

Punishment, according to the dictionary, involves the infliction of pain or forfeiture; it is the infliction of a penalty, chastisement or castigation by the judicial arm of the State. But if the sole purpose of punishment is to cause physical pain to the wrong-doer, it serves little purpose.

However, if punishment is such as makes the offender realize the gravity of the offence committed by him, and to repent and atone for it, it may be said to have achieved its desired effect. Thus, punishment involves the infliction of pain or forfeiture; it is a judicial visitation with a penalty, chastisement or castigation.

27.3 Rationale behind Punishment

Justification of any act of punishment is to be done by reference to the norms[1268] defining the institutional practice such as the classic norms of Roman law, nullapoena sine leges and nullapoena sine crimen.[1269] Justification of the practice itself, however, necessarily has reference to very different considerations social purposes, values, or goals of the community in which the practice is rooted.[1270]

The values and considerations appropriate to justifying acts are often assimilated to those that define judicial responsibility, whereas the values that bear on justifying the punitive institution are akin to those that govern statutory enactments by a legislature.[1271]

27.3.1 Deterrence

A goal of punishment is to discourage future offenses. Crimes are made less profitable by increasing the severity of the punishment proportionally as the severity of the crime or the likelihood of its success

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[1266] See https://sites.google.com/site/practiceenglishfamily/classroom-news/crime-and-punishment/4theoriesofcriminalpunishment. Accessed on 28th October 2016 at 10:35 am

[1267] See Peters, Richard Stanley (1966). *Ethics and Education* pp. 267–268.

[1268] This includes rules, standards, principles

[1269]This means no punishments outside the law, no punishments except for a crime

[1270] See Card, Claudia, 1973, "Retributive Penal Liability," *American Philosophical Quarterly Monographs*, 7: 17–35

[1271] See Currie, Elliot, 1985, *Confronting Crime: An American Challenge*, New York: Pantheon

increase.[1272]Deterrence prevents future crime by frightening the defendant or the public. The two types of deterrence are specific and general deterrence.[1273]

Specific deterrence applies to an individual defendant. When the government punishes an individual defendant, he or she is theoretically less likely to commit another crime because of fear of another similar or worse punishment.[1274]

General deterrence applies to the public at large. When the public learns of an individual defendant's punishment, the public is theoretically less likely to commit a crime because of fear of the punishment the defendant experienced. [1275] When the public learns, for example, that an individual defendant was severely punished by a sentence of life in prison or the death penalty, this knowledge can inspire a deep fear of criminal prosecution.[1276]

27.3.2 Rehabilitation

Rehabilitation seeks to strengthen the criminal's ability to stay within the law by changing his character and habits through therapy. It focuses on the criminal's background, rather than the severity of his crime.[1277]Rehabilitation prevents future crime by altering a defendant's behaviour. Examples of rehabilitation include educational and vocational programs, treatment centre placement, and counselling. [1278]

The court can combine rehabilitation with incarceration or with probation or parole. In some states, for example, nonviolent drug offenders must participate in rehabilitation in combination with probation, rather

[1272] See http://www.casebriefs.com/blog/law/criminal-law/outline-criminal-law-law/concepts-of-punishment/justification-of-punishment/. Accessed on 28th October 2016 at 9:05 am

[1273] See Lynch, James P.; Danner, Mona J. E. "Offense Seriousness Scaling: An Alternative to Scenario Methods". *Journal of Quantitative Criminology*. **9** (3): 309–322.

[1274] See Zaibert, Leo (2006). *Punishment and retribution* Aldershot, Hants, England: Ashgate.

[1275] See Kleining, John (October 1972). "R.S. Peters on Punishment". *British Journal of Educational Studies*. **20** (3): 259–269.

[1276] See Hugo, Adam Bedau (February 19, 2010). "Theory of Punishment".Stanford Encyclopaedia of Philosophy.

[1277] Ibid

[1278] See http://www.casebriefs.com/blog/law/criminal-law/outline-criminal-law-law/concepts-of-punishment/justification-of-punishment/3/. Accessed on 28th October 2016 at 9:08 am

than submitting to incarceration.[1279] This lightens the load of jails and prisons while lowering recidivism, which means reoffending.

27.3.3 Retribution

Retribution prevents future crime by removing the desire for personal avengement in the form of assault, battery, and criminal homicide, for example against the defendant. When victims or society discover that the defendant has been adequately punished for a crime, they achieve a certain satisfaction that our criminal procedure is working effectively, which enhances faith in law enforcement and our government.[1280]

27.3.4 Denunciation

Denunciation addresses the fear that a lesser penalty would depreciate the seriousness of the crime and thereby foster imitation. It seeks to reaffirm society's moral standards and the view that the offense is not tolerated.[1281]

27.3.5 Incapacitation

Incapacitation deprives the criminal of his liberty in order to protect the public from his future criminality. Incapacitation prevents future crime by removing the defendant from society.[1282] Examples of incapacitation are incarceration, house arrest, or execution pursuant to the death penalty.[1283]

27.3.6 Restitution

Restitution prevents future crime by punishing the defendant financially. Restitution is when the court orders the criminal defendant to pay the victim for any harm and resembles a civil litigation damages

[1279] See, http://law.justia.com/arizona/codes/title13/00901-01.html. Accessed on 28th October 2016 at 8:48 am

[1280] See http://cata:log.flatworldknowledge.com/bookhub/reader/4373?e=storm_1.0-ch01_s05. Accessed on 28th October 2016 at 8:50 am

[1281] Ibid

[1282] See Dawkins, Richard (1979). Twelve misunderstandings of kin selection

[1283] See Eileen Gardiner, *Visions of Heaven and Hell Before Dante* (New York, Italica Press, 1989), p. 43.

award.[1284] Restitution can be for physical injuries, loss of property or money, and rarely, emotional distress. It can also be a fine that covers some of the costs of the criminal prosecution and punishment.[1285]

27.4 Nature of Punishment

Punishments differ in their degree of severity, and may include sanctions such as reprimands, deprivations of privileges or liberty, fines, incarcerations, ostracism, the infliction of pain, amputation and the death penalty.[1286] .

Punishments may be judged as fair or unfair in terms of their degree of reciprocity and proportionality[1287] to the offense. Punishment can be an integral part of socialization, and punishing unwanted behaviour is often part of a system of pedagogy or behavioural modification which also includes rewards.[1288]

First, punishment is an authorized act, not an incidental or accidental harm. It is an act of the political authority having jurisdiction in the community where the harmful wrong occurred.[1289]

Second, punishment is constituted by imposing some burden or by some form of deprivation or by withholding some benefit.[1290] Specifying the deprivation as a deprivation of rights is a helpful reminder that a crime is a violation of the victim's rights, and the harm thus done is akin to the kind of harm a punishment

[1284] See http://catalog.flatworldknowledge.com/bookhub/reader/4373?e=storm_1.0-ch01_s05. Accessed 28th October 2016 am

[1285] See http://catalog.flatworldknowledge.com/bookhub/reader/4373?e=storm_1.0-ch01_s05. Accessed on 28th October 2016 at 8:54 am

[1286] See Hugo, Adam Bedau (February 19, 2010). "Punishment, Crime and the State" Stanford Encyclopaedia of Philosophy

[1287]See *McAnany, Patrick D. (August 2010). "Punishment" Online. Grolier Multimedia Encyclopaedia*

[1288] See Mary Stohr; Anthony Walsh; Craig Hemmens (2008). *Corrections: A Text/Reader*. Sage. p. 3

[1289] See Ackerman, Bruce A., 1980, Social Justice in the Liberal State, New Haven: Yale University Press

[1290] See Alexander, Michelle, 2010, The New Jim Crow: Mass Incarceration in the Age of Colorblindness, New York: The New Press.

does. Deprivation has no covert or subjective reference; punishment is an objectively judged loss or burden imposed on a convicted offender.[1291]

Third, punishment is a human institution, not a natural event outside human purposes, intentions, and acts. Its practice requires persons to be cast in various socially defined roles according to public rules.[1292] Harms of various sorts may befall a wrong-doer, but they do not count as punishment except in an extended sense unless they are inflicted by personal agency.[1293]

Fourth, punishment is imposed on persons who are believed to have acted wrongly. Being found guilty by persons authorized to make such a finding, and based on their belief in the person's guilt, is a necessary condition of justified punishment. Actually being guilty is not.[1294]

Fifth, no single explicit purpose or aim is built by definition into the practice of punishment. The practice, as Nietzsche was the first to notice, is consistent with several functions or purposes.[1295]

Sixth, not all socially authorized deprivations count as punishments; the only deprivations inflicted on a person that count are those imposed in consequence of a finding of criminal guilt. [1296] What marks out non-punitive deprivations from the punitive ones is that they do not express social condemnation. This expression is internal, not external, to the practice of punishment.[1297]

[1291] See Diana Kendall (2009). *Sociology in Our Times: The Essentials* (7th revised Ed.). Cengage Learning

[1292] See Allen, Francis A., 1981, The Decline of the Rehabilitative Ideal, New Haven: Yale University Press.

[1293] See Friedrich Nietzsche (1886) Beyond Good and Evil: Prelude to a Philosophy of the Future

[1294] See Barry, Brian, 1989, Theories of Justice, Berkeley: University of California Press.

[1295] See Beccaria, Cesare, 1764, On Crimes and Punishments, tr. David Young, Indianapolis: Hackett, 1986.

[1296] See Allen, Elizabeth, et al. (1975). "Against 'Sociobiology'". [letter] New York Review of Books 22 (Nov. 13).

[1297] See Bedau, H. A., 2001, "Feinberg's Liberal Theory of Punishment," *Buffalo Criminal Law Review*, 5: 103–44

27.5 General Philosophies of Punishment

Theories of punishment can be divided into two general philosophies: utilitarian and retributive. The utilitarian theory of punishment seeks to punish offenders to discourage, or "deter," future wrongdoing. The retributive theory seeks to punish offenders because they deserve to be punished.[1298]

27.5.1 Utilitarian Philosophical Theory

The utilitarian theory is "consequentialist" in nature. It recognizes that punishment has consequences for both the offender and society and holds that the total good produced by the punishment should exceed the total evil. In other words, punishment should not be unlimited.[1299]

One illustration of consequentialism in punishment is the release of a prison inmate suffering from a debilitating illness. If the prisoner's death is imminent, society is not served by his continued confinement because he is no longer capable of committing crimes.[1300]

Under the utilitarian philosophy, laws that specify punishment for criminal conduct should be designed to deter future criminal conduct. Deterrence operates on a specific and a general level. General deterrence means that the punishment should prevent other people from committing criminal acts. The punishment serves as an example to the rest of society, and it puts others on notice that criminal behaviour will be punished.[1301]

Specific deterrence means that the punishment should prevent the same person from committing crimes. Specific deterrence works in two ways. First, an offender may be put in jail or prison to physically prevent

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[1298] Read more: Punishment - Theories Of Punishment - Utilitarian, Society, Theory, and Criminal – Jrank Articles http://law.jrank.org/pages/9576/Punishment-THEORIES-PUNISHMENT.html#ixzz4OLuocf93

[1299] See Davis, Michael, 1992, *To Make the Punishment Fit the Crime: Essays in the Theory of Criminal Justice*, Boulder, CO: Westview, pp. 42–68

[1300] See Duff, R. A., 1986, *Trials and Punishments*, Cambridge University Press.

[1301] See Dworkin, Ronald, 1986, *Law's Empire*, Cambridge, MA: Harvard University Press

her from committing another crime for a specified period. Second, this incapacitation is designed to be so unpleasant that it will discourage the offender from repeating her criminal behaviour.[1302]

Rehabilitation is another utilitarian rationale for punishment. The goal of rehabilitation is to prevent future crime by giving offenders the ability to succeed within the confines of the law. Rehabilitative measures for criminal offenders usually include treatment for afflictions such as mental illness, chemical dependency, and chronic violent behaviour.[1303] Rehabilitation also includes the use of educational programs that give offenders the knowledge and skills needed to compete in the job market.[1304]

27.5.2 Retributive Philosophical Theory

Under this theory, offenders are punished for criminal behaviour because they deserve punishment. Criminal behaviour upsets the peaceful balance of society, and punishment helps to restore the balance.[1305]The retributive theory focuses on the crime itself as the reason for imposing punishment. Where the utilitarian theory looks forward by basing punishment on social benefits, the retributive theory looks backward at the transgression as the basis for punishment.[1306]

According to the retributivist, human beings have free will and are capable of making rational decisions. An offender who is insane or otherwise incompetent should not be punished. However, a person who makes a conscious choice to upset the balance of society should be punished.[1307]

There are different moral bases for retribution. To many retributivists, punishment is justified as a form of vengeance: wrongdoers should be forced to suffer because they have forced others to suffer.[1308] This ancient principle was expressed succinctly in the Old Testament of the Judeo-Christian Bible: "When a man

[1302] See Feinberg, Joel, 1965, "The Expressive Function of Punishment," *The Monist*, 49: 397–423

[1303] See Fingarette, Herbert, 1978, "Punishment and Suffering," *Proceedings of the American Philosophical Association*, 50: 499–525

[1304] See Garland, David, 1990, *Punishment and Modern Society*, Chicago: University of Chicago Press

[1305]See http://law.jrank.org/pages/9576/Punishment-THEORIES-PUNISHMENT.html. Accessed on 28th October 2016 at 8:03 am

[1306] See Gibbs, Jack P., 1975, *Crime, Punishment, and Deterrence*, New York: Elsevier

[1307] See Goldman, Alan, 1982, "Toward a New Theory of Punishment," *Law and Philosophy*, 1: 57–76

[1308] See Henberg, Marvin, 1990, *Retribution: Evil for Evil in Ethics, Law, and Literature*, Philadelphia: Temple University Press

causes a disfigurement in his neighbour. It shall be done to him, fracture for fracture, eye for eye, tooth for tooth.[1309]

To other theorists, retribution against a wrongdoer is justified to protect the legitimate rights of both society and the offender. Society shows its respect for the free will of the wrongdoer through punishment.[1310] Punishment shows respect for the wrongdoer because it allows an offender to pay the debt to society and then return to society, theoretically free of guilt and stigma.[1311]

A third major rationale for punishment is denunciation. Under the denunciation theory, punishment should be an expression of societal condemnation. The denunciation theory is a hybrid of utilitarianism and retribution. It is utilitarian because the prospect of being publicly denounced serves as a deterrent. Denunciation is likewise retributive because it promotes the idea that offenders deserve to be punished.[1312]

27.6 Theories of Punishment

27.6.1 Deterrent Theory

The term "Deter" means to abstain from doing an act. The main purpose of this theory is to deter (prevent) the criminals from doing the crime or repeating the same crime in future.[1313] Under this theory, severe punishments are inflicted upon the offender so that he abstains from committing a crime in future and it would also be a lesson to the other members of the society, as to what can be the consequences of committing a crime. This theory has proved effective, even though it has certain defects.[1314]

[1309] See Gross, Hyman, 1979, *A Theory of Criminal Justice*, New York: Oxford University Press

[1310] See Hart, Herbert L. A., 1968, *Punishment and* Responsibility*: Essays in the Philosophy of Law*, Oxford: Oxford University Press

[1311] See Hampton, Jean, 1984, "The Moral Education Theory of Punishment," *Philosophy and Public Affairs*, 13: 208–3

[1312] See Hart, Jr., Henry M., 1958, "The Aims of the Criminal Law," *Law and Contemporary Problems*, 23: 401–41

[1313] See http://lawnn.com/theories-punishment-kinds-punishment-criminal-law/. Accessed on 28th October 2016 at 10:08 am

[1314]See http://lawnn.com/theories-punishment-kinds-punishment-criminal-law/. Accessed on 28th October 2016 at 10:08 am

The theory of deterrent punishment fails to achieve its goal. A hardened criminal becomes accustomed to the severity of the punishment, and deterrence does not always prevent him from committing a crime. On the other hand, it also fails to affect an ordinary criminal, as very often, a crime is committed in a moment of excitement. If the crime is pre-mediated, the offender commits the crime, knowing fully well, the consequences arising from his act and performs the act because he cannot help but do it

27.6.2 Retributive Theory

This theory of punishment is based on the principle "An eye for an eye, a tooth for a tooth". Retribute means to give in turn. The object of this theory is to make the criminal realize the suffering of the pain by subjecting him to the same kind of pain as he had inflicted on the victim. This theory aims at taking a revenge rather than social welfare and transformation.[1315] This theory has not been supported by the Criminologists, Penologists and Sociologists as they feel that this theory is brutal and babric.[1316]

27.6.3 Preventive Theory

This theory too aims to prevent the crime rather than avenging it. As per this theory, the idea is to keep the offender away from the society. This criminal under this theory is punished with death, life imprisonment etc. This theory has been criticized by some jurists.[1317]

If the deterrent theory tries to put an end to the crime by causing fear of the punishment in the mind of the possible crime-doer, the preventive theory aims at preventing crime by disabling the criminal, for example, by inflicting the death penalty on the criminal, or by confining him in prison, or by suspending his driving license, as the case may be.

According to this theory, the state should not take revenge but create so much terror in the mind of the criminal that others also start shunning sue ghastly and despicable crimes. We well remember the works of a judge who uttered the following sentence, while awarding punishment to the criminal, "I am giving punishment to you not because you stole the sheep but because of the fact that people should not steal

[1315] See https://blog.udemy.com/theories-of-punishment/. Accessed on 28th October 2016 at 10:10 am

[1316] See http://link.springer.com/referenceworkentry/10.1007%2F978-1-4614-5690-2_512. Accessed on 28th October 2016 at 10:17 am

[1317] See http://www.legalserviceindia.com/articles/pun_theo.htm. Accessed on 28th October 2018 at 10:12 am

sheep in future". This sentence makes it very clear that this theory aims at giving heavy punishment in the form of a warning to others.

27.6.4 Reformative Theory

This theory is the most humane of all the theories which aims to reform the legal offenders by individual treatment. The idea behind this theory is that no one is a born Criminal and criminals are also humans.[1318] Under this theory, it is believed that if the criminals are trained and educated, they can be transformed into law abiding citizens. This theory has been proved to be successful and accepted by many jurists.[1319]

The supports of reformative theory maintain that crime is a kind of disease and the criminal should be treated well so that he may be able to recover from this disease. They maintain that just as a disease is diagnosed before the actual treatment, so crime should be diagnosed and then Proper treatment should be given to the criminal.[1320]

27.7 Conclusion



In this chapter we have seen that the concept of punishment its definition and its practical application and justification during the past half-century have shown a marked drift away from efforts to reform and rehabilitate offenders in favour of retribution and incarceration. Punishment in its very conception is now acknowledged to be an inherently retributive practice, whatever may be the further role of retribution as a justification or goal of punishment.

Punishment is an imposition of an undesirable or unpleasant outcome upon a group or individual, in response and deterrent to a particular action or behaviour that is deemed unacceptable, threatening to some norm and/or breaks the rules or laws by which the social group is governed.

A liberal justification of punishment would proceed by showing that society needs the threat

[1318] See http://shodhganga.inflibnet.ac.in/bitstream/10603/45012/9/09_chapter%204.pdf. Accessed on 28th October 2016 at 10:29 am

[1319] See http://ccarerevision.weebly.com/844-theories-of-punishment.html. Accessed on 28th October 2016 at 10:20 am

[1320] See http://www.politicalsciencenotes.com/articles/4-theories-of-punishment-for-the-smooth-running-of-society/284. Accessed on 28th October 2016 at 10:15 am

and the practice of punishment, because the goal of social order cannot be achieved otherwise and because it is unfair to expect victims of criminal aggression to bear the cost of their victimization. Constraints on the use of threatened punishments are of course necessary, given the ways in which authority and power can be abused. Such a justification involves both deontological as well as consequentialist considerations.

In modern word theory of punishment involves combination of all theories. Retributive theory is applied in the civil courts. In other words, the monetary loss of the sufferer is compensated and the criminal has to compensate for the loss. Preventive and deterrent theory is applied to the old and habitual criminals so that they feel harassed and terrified enough not to repeat the crimes. However, the deterrent theory aims at giving a warning to society at large that crime does not pay, whereas the preventive theory aims at disabling the criminal from doing further harm. If the old and habitual criminals are not given severe punishment, law and order cannot be maintained in the state and there will be a rapid increase in the number of criminals. Therefore, it is wise to punish such criminals severely. By so doing the sufferers are also appeased and the other criminals are warned. Reformative Theory is applied only to the new criminals and juvenile delinquents.

27.8 Review Questions



1. What do you understand the term punishment? Explain its relevance in the modern world.
2. Describe the nature and rationale behind the imposition of punishment.
3. Discuss theories of punishment.
4. To what extent reformative theory of punishment is reflected in Tanzania legal system?
5. Compare and contrast deterrent and preventive theories of punishment.
6. Argue for and against the justification of the capital punishment.

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CHAPTER TWENTY EIGHT

RIGHTS AND DUTIES IN JURISPRUDENCE

28.0 Introduction

It is familiar he that a purpose of law is to create, delimit, and protect r and to define and enforce duties. Therefore it is of important to inquire what is meant by "a right" and by "a duty" when these terms in legal discussion. Therefore, in this chapter we are going to learn about the concept of the rights and duties in jurisprudence. This chapter also covers the theories of rights and classification of rights and duties.

28.1 Objectives



At the end of this chapter students should have:-

- Acquired knowledge and understanding of the basic concepts of right, duty, power, liberty, claim, freedom, wrong, etc.
- Acquainted with knowledge and understanding on nature and essence of right and duty.
- Developed ability to explain the philosophical correspondence between the rights and duties.
- Acquired competency to illustrate reflections and application of theories of rights in modern democratic countries.
- Developed ability to classify the rights and duties in various kinds.

28.2 Legal Right

A legal right is the legal capacity, or ability, to enforce action or forbearance performance by another. Illustrations of rights are contracts, property, personal safety, reputation, etc. A right is one's affirmative claim against another. A legal right is the capacity residing in one man of controlling with the assent and assistance of the state, the actions of others.[1321]

[1321] See Mahajan, V.D., Jurisprudence and Legal theory, EBC. 256

A right is the legal relation of two where society enforces action or forbearance for one.[1322] Legal rights are, clearly, rights which exist under the rules of legal systems or by virtue of decisions of suitably authoritative bodies within them.[1323]

According to positivists, legal rights are essentially those interests which have been legally recognized and protected. Salmond said that a legal right is an interest recognized and protected by rule of law and violation of such an interest would be a legal wrong.

Therefore, legal right can be defined to mean power which a man has, to make a personor persons to do or refrain from doingcertain act or acts. Interest recognised and protected by theState. It is the capacity to control the action of others withthe assent and assistance of the State.[1324]

28.3 Legal Duty

When the law recognizes an act as a duty, it commonly enforces the performance of it, or punishes the disregard of it, or punishes the disregard of it. But this sanction of legal force is in exceptional cases absent. A duty is legal because it is legally recognized, not necessarily because is legally enforced or sanctioned. There are legal duties of imperfect obligation, as they are called.[1325]

28.3.1 Legal Duty defined

Legal duty is obligation to do or not to do any act. It is the responsibility to others to act according to the law. Proving the duty[1326]is required element of any lawsuit for damages due to negligence or intentional injuries.[1327]Not all the acts which a man ought to do constitute duty.

[1322] Corbin.

[1323] See Pound on jurisprudence west publishing co.1959

[1324] See Ashok H. Desai and S. Muralidhar, Public Interest Litigation: Potential and Problems" in B.N. Kirpalet. al. (eds.), Supreme but not Infallible – Essays in Honour of the Supreme Court of India (OUP, 2000) at p. 159-192; Also see K.G. Balakrishnan, Growth of Public Interest Litigation in India", Fifteenth Annual CHAPTER, Singapore Academy of Law (October 8, 2008), Text
available from <www.sal.org>

[1325] See (3) Rights & Duties | Rajeev Ranjan - Academia.edu ,
https://www.academia.edu/8794413/Rights_and_Duties

[1326] such as not to be negligent, to keep premises safe, or to drive within the speed limit and then showing that the duty was breached

[1327] See http://dictionary.law.com/Default.aspx?selected=1130. Accessed on 2nd November 2016

According to Salmond, a duty is an obligatory act. This is to say, it is an actopposite of which would be a wrong. The duties and the wrongs are not strictly identical. Duties and wrongs are correlatives. The commission of wrong is the breach of duty and performance of a duty is the avoidance of wrong.[1328]

Salmond further said that:-

1. A legal duty is an act that obliges to do something and act, the opposite of which would be a legal wrong.
2. Whenever law ascribes duty to a person, a corresponding right also exists with the person on whom the duty is imposed.
3. There are two kinds of duties: Moral Duty and Legal Duty.
4. Rights are said to be the benefits secured for persons by rules regulating relationships.

28.3.2 Kinds of duties

28.3.2.1 Legal and Moral Duty

Legal Duty is an act recognized as a duty by law and treated as such for the administration of justice. A legal duty is an act and the opposite of which is a legal wrong.[1329]

Moral Duty is an act which ought to be done according to the dictates of morality. It can also be defined as an act the opposite of which is a moral or natural wrong.[1330] For instance, if a person is in problem at the time of swimming then the person stands nearby, has a moral duty to rescue him if he knows swimming

28.3.2.2 Positive and Negative Duty

Positive Duty occurs when the law obliges us to do an act; the duty is called positive duty. For instance when the law provides that a person who comes into knowledge of the commission of the crime must report to the police, this is positive duty because it obliges people to perform an act.[1331]

Negative duty arises when the law obliges us to forbear from doing an act, the duty is negative. For instance when the law prohibits killing another human being, such duty is negative because it obliges people to abstain from doing an act.[1332]

[1328] See Gray J.C The nature and sources of the law Macmillan Co. New York 1921

[1329] See R. W. M. Dias, Jurisprudence (Fifth edn.) Chapter 12

[1330] See Paton, A Textbook of Jurisprudence (2007) 391-426

[1331] See M. Hidayatullah, U.S.A. and India, A.I.R. Rotary printing press, 1977.

28.3.2.3Primary and Secondary Duty

Primary duties are those which exist per se and independently of any other duty. An example of a primary duty is to forbear from causing personal injury to another. For instance, duty not to injure or cause bodily harm another person.[1333]

A secondary duty is that which has no independent existence but exists only for the enforcement of other duties. An example of a secondary duty is the duty to pay a man damages for the injury already done to his person. It is also called a remedial, restitutory or sanctioning duty.[1334]

28.3.2.4Absolute and Relative Duty

Absolute duties are owed only to the state. Those duties do not have a corresponding right. Examples of absolute duties are self-regarding duties such as a duty not to commit suicide or become intoxicated, a duty to intermediate persons or the Public such as a duty not to commit a nuisance, a duty to one not a human being such as a duty towards God or animals and a duty to sovereign or state. The breach of an absolute duty is generally a crime and remedy is the punishment of the offender and not the payment of any compensation to the injured party.[1335]

Relative duties are owed to a person other than the one imposing them. The breach of a relative duty is called a civil injury and its remedy is compensation or restitution to the injured party.[1336]

28.4 Correspondence between legal right and duty

A right possessed by one person involves, on the part of another or of others, the obligation to respect that right. This obligation is called a duty. Therefore, duty in the abstract is a moral bond or obligation of doing or omitting certain acts in favour of another person. The act itself that ought to be done or omitted is

[1332] See Ronald Dworkin, Social Rules and Judicial Legislation, 81, Yale L.J.856

[1333] See The Nature of Legal Rights and Duties https://www.jstor.org/stable/pdf/1274761.pdf

[1334]See Corbin, Arthur, "Rights and Duties" (1924).Faculty Scholarship Series. Paper 2932

[1335] See (3) Rights & Duties | Rajeev Ranjan - Academia.edu
https://www.academia.edu/8794413/Rights_and_Duties

[1336]ibid

the concrete duty. Every duty then supposes a corresponding right, and every right a duty: right and duty are correlative and inseparable.[1337]

There can be no duty without a right and according to Hibbert, a right is one person's capacity of obliging others to be or forbear by means not of his own strength but by the strength of a third party. If such third parts are God, the right is Divine. If such third party is the public generally acting through opinion, the right is moral. If such third party is the state acting directly or indirectly, the right is legal. According to Salmond, every legal has some essential to qualify as legal right.[1338]

Salmond said that a perfect right is one which corresponds to a perfect duty and a perfect duty is one which is not merely recognized by law but also enforced by law. In a fully developed legal system, there are rights and duties which though recognized by law are not perfect in nature.[1339]

The rights and duties are important but no action is taken for enforcing these rights and duties. The rights form a good ground for defence but duties do not form a good ground for action. However, in some cases, an imperfect right is sufficient to enforce equity.[1340]

Some jurists hold that a right may not necessarily have a correlative duty. They say that legal rights are legal concepts and these legal concepts have their correlatives which may not necessarily be a duty.[1341]

Jural Correlatives represent the presence of in another. Thus, right is the presence of duty in another and liability is the presence of power in another.Jural Opposites represent the absence of in oneself. Thus, no right is the absence of right in oneself and disability is the absence of power in oneself.[1342]

[1337] See Brief Textbook of Moral Philosophy 4 available at https://www3.nd.edu/~maritain/jmc/etext/mp04.htm

[1338] See Q18. Define legal right. Discuss the essentials of a legal right. Available at http://www.vuhelp.net/threads/11910-Q18-Define-legal-right-Discuss-the-essentials-of-a-legal-right

[1339] seeKramer, Matthew H. (2010). "Refining the Interest Theory of Rights", *American Journal of Jurisprudence*, 55: 31–39

[1340] See Explain the concept of "Right and Duty" ? - Bayt.com Specialties https://www.bayt.com/en/specialties/q/120120/explain-the-concept-of-right-and-duty/

[1341] See Hohfeld's work has been published by the Yale Press in a volume entitled Fundamental Legal Conceptions (1923)

[1342] seeHohfeld, Wesley Newcombe (1919). *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, W.W. Cooke (ed.), New Haven: Yale University Press

28.4.1 Claim and Duty

As a person's right is an expression of a wish that the other person against whom the right or claim is expressed has a duty to obey his right or claim. Claim signifies same as rights in strict sense signifies. Right in strict sense simply means having a corresponding duty.[1343]

Thus, a claim also means that same person ought to behave in a certain way due to claim lies in a duty. Duty is the prescriptive pattern of behaviour. Duty is the prescriptive pattern of behaviour. Thus, where there is a claim there is a duty.[1344]

28.4.2 Liberty and No-Claim

A person's freedom is an expression of a right that he may do something against other person to change his legal position. Hohfeld distinguished the freedom which a person has to do or not to do something from claim (right) and called it privilege; but the term liberty is preferred.[1345]

According to Hohfeld privilege, thus, means the freedom which a person has i.e. to do or not to something law cannot interfere in case of privilege. Liberty is a legal freedom on the part of one person to do a given act or a legal freedom not to do a given act. Another person has no no-claim with respect to first person. Liberty cancels out duty when content is altogether different opposite. Content of duty and content of liberty cannot reconcile.[1346]

28.4.3 Power and Liability

A person's power is an expression of a right that he can alter other person's legal position. Power denotes ability in a person to alter the existing legal condition of the other person for the better or worse. When the legal status is altered by volition act, it is power. When legal condition is altered by non-volition act, it is subjection.[1347]

[1343]See N. K. Jayakumar, CHAPTER in Jurisprudence, , Lexis-Nexis, students review, and second edition

[1344] Ibid

[1345] See GokuleshShsarma, An introduction to jurisprudence, fifth edition,2007

[1346]See N. K. Jayakumar, CHAPTER in Jurisprudence, , Lexis-Nexis, students review, and second edition

[1347] See Plato, The Republic, transl. A.D. Lindsay (Everman‟s Library ed., 1950).

Power is ability on the part of a person to produce a change in a given relation by doing or not doing a given act. The correlative of a power is liability. These Hohfeldian incidents define what Hart called secondary rules. The Hohfeldian power is the incident that explains how agents can alter primary rules.[1348]

28.4.4 Immunity and Disability

Immunity connotes exemption from the legal power of some other person. It is an exemption enjoyed from having a given relation changed by another.A person's disability is an expression of a wish that another person must not alter the person's legal position.[1349]

28.5 Characteristics of legal rights

In any right there must be people who are the parties to such right. These are persons[1350] on whom the right is conferred and persons on whom the duty is imposed. Hence state which confers a right on the individual and imposes corresponding duties on others. The person possessing the right is called the subject.[1351]

According to Salmond, there are five important characteristics of a Legal Right[1352]:-

i. It is vested in a person who may be distinguished as the owner of the right, the subject of it, the person entitled, or the person of inherence. This means a person who has right. So there must be a **person for rights**.

ii. It avails against a person, upon whom lies the **correlative duty**. He may be distinguished as the person bound, or as the subject of duty, or as the person of incidence. For right there must be a correlative duty. In the above example 'A' has the right to live in the house but other

[1348] See Aristotle, The politics, Transl. E. Baker (Oxford 1946)

[1349] See Edgar Bodenheimer, Jurisprudence The Philosophy and Method of Law, 2004, pg. 196

[1350] See Persons are those legal entities to which the law gives legal capacity and liability. Persons are such, not because human beings, but because of their legal capacities and legal liabilities. When slavery was recognized, slaves were not persons, yet they were human beings.

[1351] See Honore, Anthony M. (1960). "Rights of Exclusion and Immunities Against Divesting", *Tulane Law Review*, 34: 453–468

[1352] See Salmond on Jurisprudence, 12th Edition, Page 246,

persons have correlative duty not to disturb him. Almost all jurists agree on the point because one cannot exist without the other.

iii. It obliges the person bound to an act or omission in favour of the person entitled. This may be termed the content of the right. Right means some standard of action permitted by law. In a right either an act is done or an act is forbidden. This is also called as **content of right**.

iv. The act or omission relates to something (in the widest sense of that word), which may be termed the object or subject matter of the right. There must be an **object** upon which the right is exercised.

v. Every legal right has a title, that is to say, certain facts or events by reason of which the right has become vested in its owner. Right has got also a title. Title may be in the form of the owner or co-owner or mortgager or leaser or buyer etc.

28.6 Classification of rights

John Austin made a distinction between legal rights and other types of rights such as Natural rights or Moral rights. By legal rights, he meant rights which are creatures of law, strictly or simply so called. He said that other kind of rights are not armed with legal sanction and cannot be enforced judicially.[1353]

Roscoe Pound also gave an analysis of such legal conceptions. He believed that legal rights are essentially interests recognized and administered by law and belong to the 'science of law' instead of 'law'. He proposed that such Rights are conceptions by which interests are given form in order to secure a legal order.[1354]

28.6.1 Perfect and Imperfect Rights

According to Salmond, 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 though recognised, is not enforceable by law. In other words, a perfect right is one in respect of which an action can be successfully brought in a court of law, and the decree of the court, if necessary, enforced against the defaulting judgment-debtor.[1355]

[1353] See Dias on Jurisprudence, 3rd Edition, Pages 369-70,

[1354] See Black's Law Dictionary, Eighth Edition.

[1355] See Salmond on Jurisprudence, P J Fitzgerald, Twelfth edition, Indian Economy Reprint, 2010.

But an imperfect right is incapable of legal enforcement18. A time-barred debt is a typical example of imperfect right. Thus in case of an imperfect right, though remedy in a court of law is denied but the right itself does not come to an end. Likewise, part payment of a time-barred debt converts the imperfect right into a perfect right.[1356]

28.6.2 Primary and Secondary Rights

Primary right is an independent right while secondary right means dependent right. They are also called as principal right and helping right or remedial right. Remedial rights are those which arise because of a breach of a primary one.[1357]

Clearly they arise also outside the law, for example a duty to apologise or make amends even if there is no legal obligation to do so. But legal remedial duties are generally more precise, and, just by the nature of law, institutionalised.[1358]

For instance 'A' has right of reputation which is his primary and independent right. If any person defames A then A has the right of damages against the defamer. This right of damages is called secondary right or remedial right.[1359]

28.6.3 Positive and Negative Rights

A positive right corresponds to a corresponding duty and entitles its owners to have something done for him without the performance of which his enjoyment of the right is imperfect. In the case of positive rights, the person subject to the duty is bound to do something.[1360]

[1356] See G. W. Paton, A Text of Jurisprudence, Oxford Universities press, Fourth edition first, Indian edition, 2004.

[1357] See V. D., Mahajan , Jurisprudence & legal theory, , eastern book company, fifth edition, 2006

[1358] See Salmond on Jurisprudence, 11th Edition, 1957, Page 265,

[1359] See, Law Notes (LL.B Notes): JURISPRUDENCE available at http://kuklawnotes.blogspot.com/p/jurisprudence-1-what-is-administration.html

[1360] See, Meyer, Lukas H., Paulson, Stanley L., and Pogge, Thomas W. (eds.) (2003), Rights, Culture and the Law: Themes from the Legal and Political Philosophy of Joseph Raz, Oxford: Oxford University Press.

The satisfaction of a positive right results in the betterment of the position of the owner. In case of positive rights, the relation between subject and object is mediate and object is attained with the help of others. In case of positive rights, a duty is imposed on one or few individuals.[1361]

Negative rights have negative duties corresponding to them and enjoyment is complete unless interference takes place. Therefore, majority of negative rights are against the entire world.[1362]

In case of negative rights, others are restrained to do something. The position of the owner is maintained as it is. The relation is immediate; there is no necessity of outside help. All that is required is that others should refrain from interfering case of negative rights. The duty is imposed on a large number of persons.[1363]

28.6.4 Real and Personal Rights

A real right corresponds to a duty imposed upon persons in general. A real right is available against the whole world. All real rights are negative rights. Therefore, a real right is nothing more than a right to be left alone by others. It is merely a right to their passive non-interference. The relation is to a thing. Real rights are derived from some special relation to the object.[1364]

Personal right is the relation to other persons who owe the duties which is important. Personal rights are derived from special relation to the individual or individuals under the duty. A personal right corresponds to

[1361] See Raz, Joseph (1984a). "The Nature of Rights", Mind, 93: 194–214; reprinted in his The Morality of Freedom, Oxford: Clarendon Press, 1986, 165

[1362] See Raz, Joseph (1984b). "Legal Rights", Oxford Journal of Legal Studies, 4: 1–21; reprinted in his Ethics in the Public Domain: Essays in the Morality of Law and Politics, Oxford: Clarendon Press, 1994, 238.

[1363] See Wellman, Carl (1999). *The Proliferation of Rights: Moral Progress or Empty Rhetoric?*, Boulder, Colorado: Westview Press

[1364] See Wellman, Carl (1995). Real Rights, New York: Oxford University Press.

a duty imposed upon determinate individuals. A personal right is available only against a particular person. Most personal rights are positive rights although in a few exceptional cases they are negative[1365].

28.6.5 Right in rem and Right in personam

Right in rem is derived from the Roman term 'actio in rem'. An action in rem was an action for the recovery of dominium. The right protected by an action in rem came to be called jus in rem. Jus in rem means a right against or in respect of a thing. A right in rem is available against the whole world.[1366]

Right in personam is derived from the Roman term 'action in personam'. An action in personam was one for the enforcement of obligato i.e. obligation. A right protected by action in personam came to be called as jus in personam. Jus in personam means a right against or in respect of a person. A right in personam is available against a particular individual only.[1367]

28.6.6 Proprietary and Personal Rights

Proprietary rights means a person's right in relation to his own property. Proprietary rights have some economic or monetary value. Proprietary rights are valuable. Proprietary rights are not residual in character. Proprietary rights possess not merely judicial but also economic importance. Proprietary rights are the elements of wealth for man. Proprietary rights are transferable.[1368]

Personal rights are rights arising out of any contractual obligation or rights that relate to status. Personal rights are not valuable. Personal rights are the residuary rights which remain after proprietary rights have been subtracted. Personal rights are not transferable. Personal rights are merely elements of his well-being. Personal rights possess merely judicial importance.[1369]

[1365] See Waldron, Jeremy (1988). *The Right to Private Property*, Oxford: Clarendon Press

[1366] See Steiner, Hillel (1994). *An Essay on Rights*, Oxford: Blackwell Publishers

[1367] See Sumner, L.W. (1987). *The Moral Foundation of Rights*, Oxford: Clarendon Press

[1368] See Becker, Lawrence C. (1977). Property Rights: Philosophic Foundations, London: Routledge&Kegan Paul.

[1369] See Campbell, Kenneth (1992). "On the General Nature of Property Rights", King's College Law Journal, 3: 79–97

28.6.7 Vested and Contingents Rights

Vested rights are the rights are of permanent nature that depends upon the happening of an uncertain event. Thus contingents' right becomes full right only when such uncertain events happen according to the condition.[1370]

28.7 Theories of rights

28.7.1 Will theory

This theory is based upon the will of human beings. It says that a right reflects the inner will of a human being. Austin, Holland, Halmes and Dov recognised this theory of right. According to them a person wants to remain in the world freely and according to his own choice because a man is born free.[1371]

According to Austin, right is faculty which resides in a determinate party or parties by virtue of a given law and which avails against a party or parties or answer to a duty lying on party or parties other than the party or parties in whom it resides.[1372]

According to him, a person can be said to have a right only when another or others are bound or obliged by law to do something or forbear in regard to him. It means that a right has always a corresponding duty. This definition is not quite satisfactory as every right implies a corresponding duty, but every duty does not imply a corresponding right.[1373]

[1370] See Law Notes (LL.B Notes): JURISPRUDENCE available at http://kuklawnotes.blogspot.com/p/jurisprudence-1-what-is-administration.html

[1371] See Sreenivasan, Gopal (2005). "A Hybrid Theory of Claim-Rights", Oxford Journal of Legal Studies, 25: 257–274

[1372] See legal rights and duties in jurisprudence pdf - P(1) - Docs-Engine.com http://www.docs-engine.com/pdf/1/legal-rights-and-duties-in-jurisprudence.html

[1373] See Legal Rights jurisprudence notes – LLB Notes https://lawnotes.wordpress.com/2015/10/24/legal-rights-jurisprudence-notes/

Gray defines a legal right as that power which a man has to make a person or persons do or refrain from doing a certain act or certain acts, so far as the power arises from society imposing a legal duty upon a person or persons.[1374]

He points out that the right is not the interest itself; it is the means by which the enjoyment of the interest is secured. If it is my interest to receive a watch from X and if by the law X is bound to give it to me, I have a legally protected interest and I have a legal right. The legal right, however, is not the giving of the watch. It consists in my power to get the watch from X

28.7.2 Interest theory

This theory says that interest is the base of the right. It is only interest which is recognized by law. This theory reflects the external nature of the human beings. Supporter of this theory say that there are many interests in the world. These interests which are protected and recognised by law are called right.[1375]

Salmond define right to mean is an interest recognized and protected by rules of right that is by legal rules. It is an interest respect for which is a duty, and disregard of which is a wrong.[1376]

Ihering defines rights as legally protected interests. The protection of human interests is the chief purpose of social organization. The law, however, does not protect all such interest. The interests of men conflict with one another and law, being the rule of justice, appraises such interests and selects only some for protection. He regards as legal rights such of these interests as have obtained legal protection.[1377]

[1374] see The theory of legal duties and rights, an introduction to analytical jurisprudence : Hearn, William Edward, 1826-1888 : Free Download & Streaming : Internet Archive https://archive.org/details/theoryoflegaldut00hearuoft

[1375] See Raz, Joseph (1978). "Professor Dworkin's Theory of Rights", Political Studies, 26: 123–131

[1376] See Karl Marx, Critique of the Gotha Program, ed. C.P. Dutt (New York, 1966) p. 10

[1377] See John Rawls, A theory of Justice (Cambridge, Mass. 1971) p 60

28.8 Conclusion



In above chapter we have learnt that legal right can be defined to mean power which a man has, to make a personor persons to do or refrain from doingcertain act or acts. Interest recognised and protected by theState. It is the capacity to control the action of others withthe assent and assistance of the State. Legal duty is obligation to do or not to do any act. It is the responsibility to others to act according to the law. Proving the duty is required element of any lawsuit for damages due to negligence or intentional injuries. Not all the acts which a man ought to do constitute duty. It is debatable question whether rights and duties are necessarily correlative. According to one view, every right has a corresponding duly.

Therefore, there can be no duty unless there is someone to whom it is due. There can be no right without a corresponding right, just as there cannot be a husband without a wife, or a father without child. Every duty is a duty towards some person or persons in whom a corresponding right is vested. Likewise, every right is a right against some person or persons upon who a correlative duty is imposed. Every right or duty involves a vinculum jurisor a bond of legal obligation by which two or more persons are bound together. There can be no duty unless there is someone to whom it is due.

Likewise, there can be no right unless there is someone from whom it is claimed. According to Austin, right is faculty which resides in a determinate party or parties by virtue of a given law and which avails against a party or parties or answer to a duty lying on party or parties other than the party or parties in whom it resides. Jhering defines rights as legally protected interests. The protection of human interests is the chief purpose of social organization. The law, however, does not protect all such interest. The interests of men conflict with one another and law, being the rule of justice, appraises such interests and selects only some for protection. He regards as legal rights such of these interests as have obtained legal protection.

28.9 Review Questions



1. What do you understand about the terms rights and duties?
2. Describe essential features of legal rights.
3. There is neither right without nor duty without right. Discuss.
4. Explain the theories of rights and illustrate their strengths and weaknesses.
5. How can you classify the rights?
6. What are the kinds of duties?

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CHAPTER TWENTY NINE

POSSESSION AND OWNERSHIP

29.0 Introduction

Possession is a polymorphous term which may have different meaning in different contexts. It is impossible to work out a completely logical and promise definition of possession uniformly applicable to all situations in the context of all status. Ownership consists of an innumerable number of claims, liberties, powers and immunities with regard to the thing owned. [1378] This chapter contains the concepts and theories related to possession and ownership. It lays profound conceptual and theoretical understanding of the concepts. Since possession and ownership are part and parcel of the legal study and has their complexities, their understanding is much more vital especially philosophical foundations. This chapter has the task of doing so.

29.1 Objectives

At the end of this chapter students should have:-

- Acquired knowledge and understanding of the basic concepts of possession and ownership.
- Acquainted with knowledge and understanding on nature and essence of possession and ownership.
- Developed ability to explain the relations and differences between possession and ownership.
- Acquired competency to illustrate reflections and application of theories of possession in modern democratic countries.
- Developed ability to classify ownership and possession.

29.2 Ownership

According to some jurist a person owns a house means he has just those claims in respect of it. According to them there is no point in having the concept of ownership without these claims. Though may jurists do

[1378] See Rama Jois, "Legal and Constitutional History", Universal Law Publishers, New Delhi (1986).

not agree with this view, according to them it is undesirable to have this concept of ownership only linked with certain claims?[1379]

29.2.1 Meaning of ownership

According to Salmond, ownership in most comprehensive significance denotes the relation between a person and any right that is vested in him. That, which a man owns, according to him, is in all cases a right. Ownership in this wider sense extends to all classes of rights, whether proprietary or personal, in rem or in personam, in re-propria or in re-aliena. He adds that it applies not only to rights in the strict sense but also to liberties, powers and immunities.[1380]

Thus, according to Salmond ownership vests in the owner a complex of rights which s/he exercises to the exclusion of all others. For Salmond what constitutes ownership a bundle of rights which in here in an individual.[1381]

John Austin defines ownership as a right which avails against everyone who is subject to the law conferring the right to put thing to user of infinite nature. According to him full ownership is defined as a right indefinite in point of user, unrestricted in point of disposition and unlimited in point of duration. Therefore, it is right in rem. i.e. against the whole world.[1382]

Generally, ownership connotes the following: -

a) Ownership is a right which comprises of powers, claims, privileges, etc.
b) Ownership is in respect of a thing which may be corporeal or incorporeal.
c) The rights relating to or in connection with ownership are subject to state regulation i.e., can be limited or restricted by law.
d) Owner is he who is entitled to the residue of rights with respect to an object left after the limitation resulting from the voluntary acts of the owner (mortgage, lease or hire) or those imposed by law are exhausted

[1379]See http://lawschooleducation.blogspot.com/2013/09/jurisprudential-concept-of-ownership.html. Accessed on 18th October 2016 at 9:13 PM

[1380] See Salmond Jurisprudence, 5 ed, above 4, 483

[1381] See salmond-simpson.pdf http://www.victoria.ac.nz/law/research/publications/vuwlr/prev-issues/pdf/vol-38-2007/issue-4/salmond-simpson.pdf

[1382]See Salmond, "Jurisprudence", 4thEdn. Butterworth's Publications, New Delhi.

e) Ownership does not imply or indicate absolute or unlimited rights either regarding use, disposal or duration.

29.2.2 Elements of ownership

29.2.2.1 Indefiniteness

First, ownership is indefinite in point of user. It is impossible to definite or sum up exhaustively the wide variety of ways in which the thing owned might be used by the person entitled to its ownership. A person not being the owner may be entitled to possess or use a thing for a limited period.[1383]

But in case of an owner, it is of an intermediate duration. Interest of the owner is perpetual. Under all mature legal systems, qualifications have been imposed on the user of the property. It is now a settled principle that every owner must not injure others for enjoying the property.

29.2.2.2 Un-limitation or un-restriction

Second, ownershipis unrestricted in point of disposition. The right of alienation is considered by Austin as a necessary incident of ownership. An owner can effectively dispose of his property by way of conveyance during his lifetime or by will after death. But it is not completely free from restrictions. If it is found that the aim of this transfer is to defeat the creditors, then it can be restricted.[1384]

29.2.2.3 Possession

Third, ownership includes right to possess the thing, which he owns. It is immaterial whether he has actual possession of it or not. But the essential thing is that he should have the right possession.An owner may part with several rights in respect of the thing that is owned by him. In spite of that, he continues to be the owner of the thing in view the residuary character of ownership.

29.2.2.4 Use or disuse

The owner has the right to destroy or alienate the thing he owns. Now right to destroy is no more an essential.

[1383]See Holland, "Jurisprudence", 4th edn. Sweet & Maxwell Publishers (London).

[1384]See Articles on Jurisprudential concept of property, Course material on Property Law–I, National Law Institute University, Bhopal.

29.2.3 Classification of ownership

There are different kinds of ownership; some of them are corporeal and incorporeal, sole ownership and co-ownership, legal and equitable ownership, vested and contingent ownership, trust and beneficial ownership, absolute and limited ownership.

29.2.3.1 Corporeal and incorporeal ownership

Corporeal ownership is the ownership of a material object e.g. house, vehicle and others and incorporeal ownership is the ownership of a right e.g. intellectual property.[1385]

29.2.3.2 Sole ownership and co-ownership

When a person owns a property in one time it is called sole ownership. If the property is owned by more than one person then it is called joint ownership. By means of partition one person can have co-ownership converted into sole ownership.[1386]

29.2.3.3 Legal and Equitable Ownership

Legal ownership is that which has its origin in the rules of common law and equitable ownership is that which proceeds from the rule of equity. There are some cases where equity recognizes ownership where law does not recognize ownership owing to some legal defect. First right can be enforced in rem whereas second one is available in person.[1387]

29.2.3.4 Vested and contingent ownership

If the owner of a property is having perfect title over a future property, then that will be called as property with vested interest. If the owner is having imperfect title over such future property, then that is called as a property with contingent interest. In the first case the person is having perfect title over such property while in the second case the person is not having such title.[1388]

[1385] See Rama Jois, "Legal and Constituional History", Universal Law Publishers, New Delhi (1986).

[1386] See KunalChatterjee, "Indian Concept of ownership", AIR 2004 Journal 222

[1387] See Salmond, "Jurisprudence", P.328.

[1388] See Jurisprudence and legal essays, at pp.97-98

29.3 Nature of possession

Possession of a chattel is not acquired when mere physical control is taken; such acquisition waits upon knowledge by the taker of the nature of the thing acquired.[1389] For instance, the owner and possessor of land may be in possession of a chattel on his land in spite of fact that he does not know the nature of the thing or even that it exists.[1390]The owner and possessor a shop is not in possession of chattels on the floor his shop until he knows of their presence.[1391]

The owner of a house, who may well have been in possession of the house for the purpose of taking action against a trespasser, may not be in possession of a chattel found on the premises if he has never physically occupied the house.[1392]

The owner and possessor land may not be in possession of chattels on his land even though he owns those chattels- another person, not on the land, may be in possession of them.[1393] The finder of a lost chattel obtains possession of it, and hence title to it as against those who have no claim to it prior to his.[1394]A finder of a chattel who finds in the course of his employment does not obtain possession of it his master does.[1395]

As between two or more persons who are in apparent physical control and enjoyment of the use of chattels, the owner of the chattels is in possession of them.[1396] As between two or more persons apparently in physical control and enjoyment of the use of the use of land, which is owned by one of them and of chattels upon that land, where ownership of the chattels and hence is presumptively the owner of them[1397]

To acquire possession of a thing it is necessary to exercise such physical control over the thing as the thing is capable of, and to evince an intention to exclude others[1398] but possession may be acquired of a thing,

[1389]See e.g., R.v. Ashwell ; R.V. Hudson.

[1390] See e.gElwesv.Brigg Gas Co.: R.v.Rowe; south staffordshire Water Co.v.Sharman

[1391] See e.g., R.v. Moore; Bridges v. Hawkesworth.

[1392] See Hannah v. Peel.

[1393] See Anconav.Rncona; Wrightson v. Mc Arthur &Hutchisons.

[1394]See Armory v. Delamiri9e.

[1395] See Willey v. Synan.

[1396] See Ramsay v. Margrett; French v. Gething.

[1397] See Re Cohen.

[1398] See The Tubontia; Young v. Hichens.1

by transfer from another in possession, without any change in the physical control of the thing concerned.[1399]

29.4 Relation between possession and ownership

Generally, ownership and possession have the same subject matter. Possession has been treated as an external evidence of ownership. A person in possession of a thing may be presumed to be the owner of it. The person in possession need not prove his ownership; instead, the burden of disproving ownership of the possessor is on the person who disputes his ownership. A long continuous and uninterrupted possession is an effective method of realization of ownership. [1400]

According to Salmond, the subject matter of possession and ownership is more or less the same, a thing which may be owned, may also be possessed. Likewise, a thing which may be taken into possession may also be owned.

Salmond held that whatever may be owned may be possessed, and whatever may be possessed may be owned. Salmond further pointed out that the law of prescription determines the process by which through the influence of time, possession without title ripens into ownership and ownership without possession withers away and dies.[1401]

According to Sethna, the relationship between ownership and possession is same as that of body with soul. Just as existence of body is necessary for the realization of soul, likewise possession is necessary and useful for the expression of the ownership because possession is external and formal.[1402]

Sir Henry Maine suggested that historically, the concept of possession is prior to that of ownership. In fact, right of possession has evolved out the right of ownership. Possession is the de facto exercise of a claim while ownership is the de jure recognition of it. Possession is the guarantee of fact whereas ownership is

[1399]See Ramsay v. Margrett; French v. Gething.

[1400] See Prof. NomitaAgrawal (2010), Jurisprudence (Legal Theory) (8th edition), Central Law Publications, India

[1401] Ibid

[1402]See Dr.BalBahadurMukhiya (2011), Comparative Jurisprudence, (1st edition)Mrs.Malati&TamannaMukhiya, Kathmandu.

the guarantee of law. A claim to possession is maintained by one's own self-asserting will but a claim to ownership is legally protected by the will of the State.[1403]

Ihering observed that possession is the objective realization of ownership. Possession in fact, is what ownership is in right. The distinction between possession and ownership on the basis of fact and right is not tenable. Fact and right are not quite separate and independent ideas. One cannot exist without the other.[1404]

29.5 Differences between ownership and possession

According to Jhering, possession is the objective realization of ownership." It is the external realization of ownership. It is a valuable piece of evidence to show the existence of ownership. It is in fact what ownership is in right. It is the de facto exercise of a claim while ownership is the de jure recognition of that claim. Possession is the de facto counterpart of ownership. It is the external form in which rightful claims normally manifest themselves. For example, a rented house is actually in possession of the tenant but the ownership of it is vested in the landlord.[1405]

According to Salmond, ownership in its widest sense implies the relation between a person and any right that is vested in him. Possession is in fact what ownership is in right. This brings out distinction between possession and ownership.[1406]

Salmond pointed out that a person is said to be the owner of a thing when his claim receives the recognition and protection from the law of the state, but possession may be exercised and realized even without such recognition or protection from the law. Thus ownership has the guarantee of law but possession has some measure of security and value from the facts, without any possibility of support from land.[1407]

[1403] See Dr. N. V. Paranjape, (reprint 2010) Studies in Jurisprudence & Legal Theory, (5th edition), Central law Agency, Allahabad.

[1404] See Dr. V.D. Mahajan (reprinted 2007), Jurisprudence and legal theory (5th edition), Estern book company Lucknow.

[1405] See Theory of Possession https://www.scribd.com/doc/132392354/Theory-of-Possession

[1406] See http://lawphilospher.blogspot.com/2012/02/q-discuss-difference-between-possession.html. Accessed on 2nd November 2016 at 1:28 pm

[1407] See Ownership and Possession | http://kulprasadpandey.com.np/ownership-and-possession/

According to Austin, ownership in its wider sense is a right "indefinite in point of user, unrestricted in point of disposition and unlimited in point of duration". The right of alienation of property is a necessary incident to the right of ownership, but there are many restrictions with regard to the alienation of property today.[1408]

According to Pollock, ownership may be described as the entirety of the powers of use and disposal allowed by law. The owner of a thing is not necessarily the person who at a given time has the whole power of use and disposal; very often, there is no such person. We must look for the person having the residue of all such power when we have accounted for every detached and limited portion of it, and s/he will be the owner even if the immediate power or control and user are elsewhere.[1409]

	Ownership		**Possession**
i.	Ownership is an absolute authority over the property.	i.	Possession is relative authority holding physical control over the property.
ii.	Ownership is perfectly legal right. It shows legal situation.	ii.	Possession is possessory right only. It shows real situation.
iii.	Ownership is a de jure concept.	iii.	Possession is a de facto concept.
iv.	Ownership right is wider concept.	iv.	Possession is a right of consumption only.
v.	Ownership holds unlimited and uncontrolled rights.	v.	Possession right is limited concept of right.
vi.	Transfer of ownership is not easy and it needs to legal or formal procedures, prerequisites of registration.	vi.	Possession is comparatively easy and practically no need to register and such formalities.
vii.	Ownership has no technical obstructions to transfer.	vii.	Possession faces the technical obstacles for transfer.
viii.	Ownership is a union of ownership and possession.	viii.	Possession is a single concept giving no right of ownership.
ix.	Ownership only does not carry practical use in the absence of possession.		

[1408] See P.J. Fitzgerland, Salmond on Jurisprudence (2004), (12th edition), Universal Law Publishing co. pvt. ltd

[1409] See P.J. Fitzgerland, Salmond on Jurisprudence (2004), (12th edition), Universal Law Publishing co. pvt. ltd

x. Ownership does not get priority if there is an equal right over the same property.

ix. Possession may create ground for the ownership as well.

x. Possession is the real and basis of priority for the situation of equal rights.

29.6 Theories of possession and ownership

There are various theories with regard to this idea of ownership. The great exponents of the two viewers are Austin and Salmond. According to one view, "ownership is a relation, which subsists between a person and a thing, which is the object of ownership. According to the second view, ownership is a relation between a person and a right that is vested with him.[1410]

29.6.1 Salmond theory of possession

According to Salmond, ownership in most comprehensive significance denotes the relation between a person and any right that is vested in him. That, which a man owns, according to him, is in all cases a right. Ownership in this wider sense extends to all classes of rights, whether proprietary or personal, in rem or in personam, in re-propria or in re-aliena. He adds that it applies not only to rights in the strict sense but also to liberties, powers and immunities.[1411]

Thus, according to Salmond ownership vests in the owner a complex of rights which s/he exercises to the exclusion of all others. For Salmond what constitutes ownership a bundle of rights which in here in an individual.[1412]

Salmond's definition thus points out two attributes of ownership such as ownership is a relation between a person and rights that is vested in him and ownership is incorporeal immaterial, having no material body or form. For Salmon a man may own a copyright or a right of way in the same way as s/he owns a piece of land because in all the cases s/he owns only a right and not a thing.[1413]

[1410]See Rama Jois, "Legal and Constitutional History", Universal Law Publishers, New Delhi (1986).

[1411] See John Salmond The First Principles of Jurisprudence (Stevens and Haynes, London, 1893). This is a small format book of 264 pages; Jurisprudence is a larger format book of 673 pages.

[1412] See Sir Erskine Holland The Elements of Jurisprudence (Clarendon Press, Oxford, 1880). Revised editions in 1882 (2 ed), 1886 (3 ed), 1887 (4 ed), 1896 (8 ed)

[1413] See JW Salmond Essays in Jurisprudence and Legal History (Stevens and Haynes, London, 1891).

29.6.2 Savigny theory of possession

Savigny postulates that both the corpus of possession and the animus possidendi must be present to constitute possession. By corpus is meant an effective physical control of the object. By animus is meant the mental demand or the intention to hold the object as owner against all other. The animus possidendi is an intent to exclude other people, which is simply an adoption of the modified animus domini of Savigny.[1414]

Savings theory explain as to why the tenant, the borrower and the agent had no possession in Rome law they had no animus domini as they did not intend to hold the object in their own rights.[1415] Yet, Savigny wrongly assumed that 'corpus'and 'animus' which were required for accusations constituted possession itself he did not make the change in the conception of possession which took place later.[1416] Also, Roman law did not protect a possession acquired unlawful the possession by thief was not protected in law. A person who last a possession by way of violence was still in possession.[1417]

29.6.3 Jhering's theory of possession

Jhering's theory is more objective and it a sociological approach to possession. He takes up the question as to why Roman law protected possession by means of interdicts. The answer according to him is that person holding the property in majority of the case would be owners and possession was attribute to such owners so that interdicts right be available to them. This theory is more in consonance with Roman law and this theory is flexible. It explain those cases which saving theory didn't.[1418]

However, it looks at possession from the point of view of interdicts and therefore it is incapable of explaining the cases where law refused possessory rights to the persons who were in effective control. The

[1414]See https://mylawnotesblog.wordpress.com/2016/06/12/explain-salmond-theory-on-possession/. Accessed on 2nd November 2016 at 12:52 pm

[1415] See Sir Frederick Pollock A First Book of Jurisprudence for Students of the Common Law (Macmillan and Co, London, 1896). There was a reprint in the same year and revised editions in 1904 and 1911.

[1416] See Sir Frederick Pollock Essays in Jurisprudence and Ethics (Macmillan and Co, London, 1882).

[1417]See Sir Frederick Pollock Essays in Jurisprudence and Ethics (Macmillan and Co, London, 1882).

[1418] See Alessandro Passerind'Entrèves Natural Law: an Introduction to Legal Philosophy (Hutchinson's University Library, London, 1951).

case in which the person did not look like an owner but for certain purpose law recognised them to be in possession cannot be explained by inhering theory.[1419]

29.7 Acquisition of possession or ownership

A thing is capable of being owned, the methods of acquiring ownership over it will vary from legal system to legal system. There are two modes of acquisition of ownership and those are original and derivative. Original acquisition can be absolute: res nullius and by occupation. Basically, one can acquire ownership in two ways such as by operation of law or human event or act.[1420]

This happens when statute might provide that all A's property should after a certain period of time vest in B. As to the second this may consist in the first taking or madding a thing, both being cases of original acquisition. Thirdly, the thing may fall into man's ownership without any human act, as would be the case if a piece of land were to break off from an island in a river and attach itself to my land on the opposite bank.[1421]

29.8 Conclusion



In above chapter we have learnt that ownership is a right which avails against everyone who is subject to the law conferring the right to put thing to user of infinite nature. Possession of a chattel is not acquired when mere physical control is taken; such acquisition waits upon knowledge by the taker of the nature of the thing acquired.

Ownership and possession have the same subject matter. Possession has been treated as an external evidence of ownership. A person in possession of a thing may be presumed to be the owner of it. The person in possession need not prove his ownership; instead, the burden of disproving ownership of the possessor is on the person who disputes his ownership. A long continuous and uninterrupted possession is an effective method of realization of ownership. Thus ownership has the guarantee of law but possession has some

[1419] See GDG Hall (ed) The Treatise on the Laws and Customs of the Realm commonly called Glanvill (Nelson, London, 1965) 3.
[1420] See M Rheinstein (ed) Max Weber on Law in Economy and Society (Harvard University Press, Cambridge (Mass), 1954) 213, 317, 351.
[1421] Ibid

measure of security and value from the facts, without any possibility of support from land.

Salmond explains that ownership vests in the owner a complex of rights which s/he exercises to the exclusion of all others. For Salmond what constitutes ownership a bundle of rights which in here in an individual Savigny postulates that both the corpus of possession and the animus possidendi must be present to constitute possession? By corpus is meant an effective physical control of the object. By animus is meant the mental demand or the intention to hold the object as owner against all other.

Jhering's theory is more objective and it a sociological approach to possession. He takes up the question as to why Roman law protected possession by means of interdicts. The answer according to him is that person holding the property in majority of the case would be owners and possession was attribute to such owners so that interdicts right be available to them. This theory is more in consonance with Roman law and this theory is flexible. There are two modes of acquisition of ownership and those are original and derivative. Original acquisition can be absolute: res nullius and by occupation

29.9 Review Questions



1. Define the term possession and ownership.
2. Possession and ownership are two sides of the same coin. Substantiate.
3. Describe the kinds of ownership.
4. Discuss the theories of the possession.
5. Illustrate the nature and relevance of possession in the modern democratic countries.

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CHAPTER THIRTY

JURISTIC PERSONALITY

30.0 Introduction

The term person has been subjected to various definitions historically due to the development of legal systems in the world. It varied depending on the philosophical development and manifestation of the interests of the rulers. In an ordinary meaning any living human being either male or female is person. In old Roman law slaves were not supposed to be person because they were not possessed rights. In legal term a being who is capable to possess rights and obligation and liabilities is person. All human being are person. Any being that law regards as capable of rights and duties.

Therefore in this chapter we are going to learn the concept of personality on jurisprudence. We shall be striving to understand who is person in the eyes of law. Also, we shall be dealing with the effect of such personality in the law and theories behind the personality concept in jurisprudence. It intends to acquaint ourselves with the conceptual understanding of the person, personality, types of persons etc.

30.1 Objectives



At the end of this chapter students should have:-

- Acquired knowledge and understanding of the basic concepts of person, juristic person, entity, corporation etc.
- Acquainted with knowledge and understanding on jurisprudential elements of personality
- Developed ability to explain the theories of juristic personality
- Acquired competency to illustrate applicability of theories of personality in the contemporary world

30.2 Person

The word “person” has multiple meanings.[1422] From an etymological sense this word is derived from personare[1423], a term that denotes larva histrionalis, meaning “mask.” In this manner, the person acted as

[1422] See Eduardo G. Maynez, Introduction to Law 273 (Porrúa 31st ed. 1980).

[1423] Ibid

the mask covering the face of an actor who recited verses during a scene in a play because the purpose of the mask was to make the actor's voice resonant and loud. Later, people used the term "person" in reference to the masked actor himself. In view of the above, it is quite understandable to associate the person as a natural being of the human species.[1424]

A juridical person is a natural or individual person as well as a collective or compound person, and both hold a common characteristic: they are the meeting point of the economic and juridical element. The latter differs from the fact that it is not a single individual in that position; instead it is two or more individuals who are united by a collective interest.[1425]

Savigny postulated that a person is any entity capable of having obligations and rights because the juridical persons are legal fictions, therefore they do not have free will and is not subjects of law. According to this trend of thought, the term "person" applies only to the human being because it holds the will to acquire rights and duties, and for the same reason, becomes a subject of law.

For Kelsen the natural person and the juridical person are merely a set of rights and obligations which, when taken together, are metaphorically expressed as the concept of "person."[1426] In this way, the natural or juridical person as a holder has legal obligations and subjective rights which are metaphorically expressed in the concept of person, which is nothing more than the personification of that unity.

Garcia Maynez defines a "person" as "any being capable of having powers and duties." He maintains that juridical persons are classified as either natural persons or legal entities. While the first group refers to human beings as a subject of rights and obligations, the second group focuses on those associations endowed with personality such as unions or commercial corporations.[1427]

Maynez prefers to distinguish between the two groups by using the terms "individual juridical person" and "collective juridical person"[1428] with the purpose of distinguish them." In a moral or ethical sense, a "person"

[1424]See Royal Spanish Academy, Dictionary Of Spanish Language, voice, person (Espasa, 1593)
[1425]SeFrancisco Carnelutti, General Theory Of Law 149 (1955)
[1426]See Hans Kelsen, Pure Theory of Law 178 (Robert J. Vernengo trans., 2000).
[1427]See Eduardo G. Maynez, Introduction to Law 21 (31st ed., 1980).
[1428]Ibid

is a subject endowed with free will and reason, capable of establishing its own purposes freely as well as finding means to complete them.[1429]

30.3 Classification of juristic personalities

30.3.1 Natural persons

All the human beings are natural persons. The entire male and female are persons. All the living beings which are recognized as person by state, they are persons in law and persons in fact.[1430]

30.3.2 Legal personality

Legal personality is an artificial creation of law. Entities recognized by law are capable of being parties to a legal relationship.[1431] A natural person is a human being whereas legal persons are artificial persons, such as a corporation, created by law and given certain legal rights and duties of a human being; a being, real or imaginary, which for the purpose of legal reasoning is treated more or less as a human being.[1432]

Legal persons are created artificially and law regards them as legal person. They are persons only in the eyes of law. They are also created by legal fiction so called as fictitious also.[1433] They are also called juridical, conventional, imaginary, and they have rights and obligations as natural person. They can sue and be sued.[1434] These can be institutions, corporations, funds or estates etc.

It can be concluded that jurisprudenceestablishes the following elements of the legal entities[1435]:-

i) The existence of a juridical being
ii) A will from said being which shall be foreseen in its bylawscontained in the incorporation deed and expressed in itsrepresentation bodies.

[1429]Ibid

[1430] See http://ba-llb-handout-notes.blogspot.com/2015/11/persons-in-jurisprudence-notes.html. Accessed on 27th October 2016 at 7:41 am

[1431]See Arcelia Quintana, Commercial Law Science 270 (2d ed. 2004).

[1432]See Black's Law Dictionary, 8th Edition.

[1433]See See Francisco Carnelutti, General Theory Of Law 153 (1955)

[1434] Ibid

[1435]See Thesis, General Managers, cases in Which They Lack Standing to Obtain an AmparoRemedy, III Judicial Weekly of the Federation and its Gazette 846 (1996).

iii) The legal entity is holder of rights and susceptible ofacquiring obligations, which the legal entity exercises andfulfils.

iv) It has a juridical personality of its own that distinguishes thesame from the partners who incorporate and convert it ina subject of law.

30.4 Theories of Juristic Personality

Ethical Natural law philosophers of the 17th and 18th centuries as well as the metaphysical theorists of 19th century postulated the concept of will as an essential requirement for exercising legal right. They also believed that personality is the subjective possibility of a rightful will.[1436]

30.4.1 Fiction Theory

This theory was put forward by V**on Savigny[1437], Salmond, Coke, Blackstone, and Holland** etc. According to this theory, the personality of a corporation is different from that of its members.[1438] Savigny regarded corporation as an exclusive creation of law having no existence apart from its individual members who form the corporate group and whose acts are attributed to the corporate entity. As a result of this, any change in the membership does not affect the existence of the corporation.[1439]

Savigny sustains that a person is any being capable of obligations and rights, and rights are only for beings that are endowed with will, therefore, the juridical subjectivity of collective persons is a result of this fiction, since such beings do not have a free will.[1440]

It is essential to recognize clearly the element of legal fiction involved in this process. A company is in law something different from its shareholders or members[1441]. The property of the company is not in law the property of the shareholders. The company may become insolvent, while its members remain rich[1442].

[1436]See Jurisprudence Notes- Theories of Juristic Personality or Corporate Personality | DesiKanoon- Law, Economics and Politics available at http://www.desikanoon.co.in/2014/05/jurisprudence-notes-theories-of.html

[1437]See Karl Friedrich Savigny (1779-1861) was born in Frankfurt, Germany. He studied at the University of Gitinga and University of Merburg, and was a professor of law in Universitu of Merburg, University of Landshut and at University of Berlin. He was a leader in the field of legal history

[1438]See Jose L. De Benito, the Legal Personhood of Companies 32 (1955).

[1439]See Eduardo G. Maynez, Introduction to Law 21 (31st ed., 1980).

[1440]Ibid

[1441]See Salomon v. Salomon & Co., (1897) A.C. 51.

Gray supported this theory by saying that it is only human beings that are capable of thinking, therefore it is by way of fiction that we attribute 'will' to non-human beings through human beings who are capable of thinking and assign them legal personality.Wolf said that there are three advantages of this theory. It is analytical, more elastic and it makes easier to disregard juristic personality where it is desirable.[1443]

30.4.2 Concession Theory

This theory is concerned with the Sovereignty of a State. It pre-supposes that corporation as a legal person has great importance because it is recognized by the State or the law. According to this theory, a juristic person is merely a concession or creation of the state.[1444]

Concession Theory is often regarded an offspring of the Fiction Theory as both the theories assert that the corporation within the state have no legal personality except as is conceded by the State. Exponents of the fiction theory, for example, Savigny, Dicey and Salmond are found to support this theory.[1445]

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 to the question of the reality of a corporation in as much as it focuses only on the source (State) from which the legal power of the corporation is derived.[1446]

30.4.3 Group Personality Theory or Realist Sociological Theory

This theory was propounded by Johannes Althusius and carried forward by Otto Van Gierke. This group of theorists believed that every collective group has a real mind, a real will and a real power of action. A corporation therefore, has a real existence, irrespective of the fact whether it is recognized by the State or not.

The realist theories affirm that private and public juridical persons are realities, therefore, the concept of subject of law is not limited to man, and does not exclusively refer to beings endowed with will. These

[1442]See Salmond on Jurisprudence.
[1443]SeeFrancisco Ferrara, Theory of Legal Persons 342 (Eduardo Shepherd &Maury trans., 1929)
[1444]See Francisco Ferrara, Theory of Legal Persons 342 (Eduardo Shepherd &Maury trans., 1929)
[1445]Ibid
[1446]Ibid

theories also include the "organisms,"[1447] the collective soul theory,[1448] and the thesis of the social organism.[1449]

Gierke believed that the existence of a corporation is real and not based on any fiction. It is a psychological reality and not a physical reality. He further said that law has no power to create an entity but merely has 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. This theory was favoured more by the sociologists rather than by the lawyers. While discussing the realism of the corporate personality, most of the realist jurists claimed that the fiction theory failed to identify the relationship of law with the society in general. The main defect of the fiction theory according to the realist jurists was **the ignorance of sociological facts that evolved around the law making process**.

Horace Gray, however, denied the existence of collective will. He called it a figment. He said that to get rid of the fiction of an attributed by saying that corporation has a real general will, is to derive out one fiction by another.[1450]

30.4.4 The Bracket Theory or the Symbolist Theory

This theory was propounded by Rudolph Ritter von Jhering (also Ihering). According to Ihering, the conception of corporate personality is essential and is merely an economic device by which we can simplify the task of coordinating legal relations. Hence, when necessary, it is emphasized that the law should look

[1447]SeeEduardo G. Maynez, Introduction to Law 21 (31st ed., 1980). At 287 (organisms is based on the notion that "collective entities are real entities compared to the human individual.").

[1448]According to this school of thought, in every society there exists a soul or collective spirit that is different than the individual souls of those who make up the group, which is why it is not problematic that collective legal entities coexist alongside physical persons.

[1449]See Eduardo G. Maynez, Introduction to Law 21 (31st ed., 1980) at 287 (The chief proponent of the theory of social organism is Otto Gierke, who says that "the collective person is not like a third party compared to its members, it is the organic link that binds them together, from which stems the possibility of connecting the rights of the unit and the whole. The corporative person is undoubtedly above, but not separate from, the collective group of persons who make it up; . . . it is an entity that is both unique and collective.").

[1450]See Hallis, F., Corporate Personality: A Study in Jurisprudence. (1930).

behind the entity to discover the real state of affairs. This is also similar to the concept of ***lifting of the corporate veil***.[1451]

This group believed that the juristic personality is only a symbol to facilitate the working of the corporate bodies. Only the members of the corporation are 'persons' in real sense of the term and a bracket is put around them to indicate that they are to be treated as one single unit when they form themselves into a corporation.[1452]

30.4.5 Purpose Theory or the theory of *ZweckVermogen*

The advocates of this theory are Ernst Immanuel Bekker and Alois von Brinz. This theory is also quite similar to the fiction theory. It declared that only human beings can be a person and have rights.[1453]

This theory also said that a juristic person is no person at all but merely a **"subjectless"** property destined for a particular purpose. There is ownership but no owner. Thus a juristic person is not constructed round a group of persons but based on an object and purpose.[1454]

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 corporations for the purpose of being capable of having rights and duties.[1455]

30.4.6 Hohfeld's Theory

He said that juristic persons are creations of arbitrary rules of procedure. According to him, human beings alone are capable of having rights and duties and any group to which the law ascribes juristic personality is

[1451]See Dewey, J (1926). "The Historic Background of Corporate Legal Personality" Yale Law Journal **35**

[1452]Machen, A.W (1910). "Corporate Personality". Harvard Law Review. **24**.

[1453]See Duff, P.W (1938). Personality in Roman Private Law.

[1454]See Roberto L. Mantilla Molina, Commercial Law 207 (29th ed. 2002)

[1455]See Antonio Brunetti, Joint Stock Company 45 (1960)

merely a procedure for working out the legal rights and jural relations and making them as human beings.[1456]

30.4.7 Kelsen's Theory of Legal Personality

Kelsen defines the juridical personality of the legal entity, which means that the legal order provides obligations and rights and their content is the conduct of human beings who are the bodies or members of the corporation organized by its bylaws and may be described with advantages by means of a personification of the corporation´s charter.[1457]

He said that there is no difference between legal personality of a company and that of an individual. Personality in the legal sense is only a technical personification of a complex of norms and assigning complexes of rights and duties.[1458]

30.5 Status of dead human beings

They cease their rights and obligation at the moment they go away from this world and their connection is cut down. They are immune from duties and not subject of rights. Law recognizes the compliance of will, burial ceremony, no defamation, no desecration of graves, but despite of this fact they are not persons and these duties lie to their legal heirs or living society members.[1459]

30.6 Status of unborn babies

In civil law they can sue after they are born through their next friends or at attaining the age of majority. A child in womb has certain rights and inherits property. These all things are subject to his living birth.[1460]

Unborn babies are entitled legalistically the following[1461]:-

i. They can claim damages after birth, for the injuries he received before birth.

[1456]See Rudolf Von Ihering, the Spirit of Roman law 1033, 1040 (1998).

[1457]See Hans Kelsen, Pure Theory of Law 196 (Robert J. Vernengo trans., 2000).

[1458]Ibid

[1459]See Thesis, Legal Representation and Corporate Manager, Differences Between Functional or Organic Representation and Mandates, XII Judicial Weekly of the Federation and its Gazette 759 (2001).

[1460]See Thesis, Directors, The Inherent Powers of a Trustee are Governed by the General Law of Business Corporations, XVI Judicial Weekly of the Federation and its Gazette 1237 (2002)

[1461]See Thesis 892, Personhood Derived Representation or Support, VI Semanario Judicial de la Federación 1917-1995 613

ii. He can claim compensation for the death of his father or mother in fatal accidents.

iii. He inherits even his father is died before his birth. He is natural person even his birth is only for a moment.

iv. A woman cannot be punished after conviction if she is pregnant, till birth of baby.

30.7 Requirements of legal personality

In order to produce the individualization of the subject of law, three requirements must be fulfilled. These refer in a certain manner to the real factor and the formal factor:[1462]

30.7.1 The existence of a being or a subject of law

To specify the personality we require the existence of a being or a subject of law, a volitional entity considered legally real, that could be expressed in juridical relations.

30.7.2 A situation of fact that individualizes it in the holdership of rights and the fulfilment of obligations

Juridical relations, who can be established as a result of a natural phenomenon, achieve this or the will externalized by that subject. This one is situated or has a *status* which allows differentiating it from the other volitive subjects; that is, it is legally individualized.

30.7.3 The recognition of individualization by the normative legal order

This third requirement refers to legitimation[1463] of the volitive subject as a holder of determined rights or certainobligations in a juridical relationship. It is necessary thatthe being or volitive subject and the situation of fact areunder a legal rule in order to individualize that person, thatis, acquire a certain legal status.

[1462]See Jurisprudential Thesis II, Personhood: Its Study can be made in any Stage of Trial, Even Officiously, Semanario Judicial de la Federación 1917-1995 41.

[1463]See Legitimacy comes from –legitimo- that, in turn derives from the Latin legitimus (-a, um). In common language it means “under the rules”. In the legal literature, legitimusmeans, “according to law”, “fair”. For the Romans, “designate something practiced or maintained as correct; produces a favorable reaction, approval

30.8 Conclusion



In this chapter we have seen that personality is the individualization of the juridical person by means of a factual situation in which it is placed, foreseen by a legal norm that allows personality to distinguish it from other volitive beings in the commercial-legal relationships in an environment of law where the concrete case develops. Juridical personality is a creation of law, which function is to individualize the subjects with rights and obligations, granting them legitimacy in the ownership of said rights to exercise them, and fulfil its corresponding obligations.

A person is juridically classified in two groups: natural persons and juridical persons. The first group refers to a human being, who is an individual being capable of assuming obligations and capable of holding rights. The second group refers to those entities endowed with juridical personality who are usually known as a collective person, social person, or legal entity. The legal entity is a subject of an abstract existence, legallyconstructed with a will of its own, including rights, obligations and ajuridical personality that individualizes it in the relationships of law andmake it a centre that generates rights and obligations of an economic,financial and commercial nature.

Ethical Natural law philosophers of the 17th and 18th centuries as well as the metaphysical theorists of 19th century postulated the concept of will as an essential requirement for exercising legal right. They also believed that personality is the subjective possibility of a rightful will. Theories of personality associate personality with will or capacity. For that reason, these theories affirm that only the natural person holds a real personality, since a human being exclusively has a will, the collective beings are only a fiction or an appearance.

To specify the personality we require the existence of a being or a subject of law, a volitional entity considered legally real, that could be expressed in juridical relations. Juridical relations, who can be established as a result of a natural phenomenon, achieve this or the will externalized by that subject. This one is situated or has a *status* which allows differentiating it from the other volitive subjects; that is, it is legally individualized. It is also necessary thatthe being or volitive subject and the situation of fact areunder a legal rule in order to individualize that person, thatis, acquire a certain legal status.

30.9 Review Questions



1. How can you define the term person in your own words?
2. Describe with authorities classification of persons.
3. Discuss theories underlying juristic personality
4. Illustrate elements that establish legal personality in jurisprudence.
5. Discuss the status of unborn babies and deceased persons.

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