JURISPRUDENCE

CONTENTS

SCHOOLS OF JURISPRUDENCE

- **Jurisprudence** is the study of law. It is a type of science that explores the creation, application, and enforcement of laws. Jurisprudence is the study of theories and philosophies regarding law.
- If we understand the theories and philosophies behind law, then we can better understand our laws. The word 'jurisprudence' is derived from the Latin phrase *juris prudential*. This means 'knowledge of the law.'
- Jurisprudence id different from other legal subjects. This subject deals with ideas/

Cont..

- To be good student IN JURISPRUDENCE YOU HAVE TO THINK AT YOUR OWN IDEAS TO DEVELOP SKILLS OR KNOWLEDGE.

In developing such skills try to learn what other philosophers said and whether they are correct or not.

Give reasons why you are concurring with the past philosophers.

Find out what is the base of these ideas.

Develop your own free thinking apart from those advanced by other philosophers.

Be independent and critical and not absolve everything said by other philosophers.

Cont..

Legal philosophy has many aspects but four of them are most common:

1. The first form of jurisprudence seeks to analyze, explain and criticize entire bodies of Law.
2. The second type of jurisprudence compares and contrasts law with other fields of knowledge such as literature, economics, religion and social science
3. The third type of jurisprudence seeks to reveal the historical, moral and cultural basis of particular legal concept
4. The fourth form of jurisprudence focuses of finding the answers to such abstract questions as to what is law…?, How does judges decide cases….?

TREND OF JURISPRUDENCE

1. THE IDEALISTIC TREND
2. THE MATERIALIST TREND

The main point of departure between the two trends is what is primary between the spirit and matter…? Is the world knowable or recognizable…?

1. <u>THE IDEALISTIC TREND</u>

They believe that the spirit is primary and that it existed prior to matter. They believe that the material world is dependent on the spiritual world i.e the material world is determined by the spiritual world.

The spirit or mind came and exists in separation from matter

That there exist a realm of mysterious and unknowable above and beyond what can be known and ascertained by perception, experience or science.

MATERIALISTIC TREND

They say that matter is primary and spirit is secondary. They believe that matter is eternal i.e. no one created matter it is there and it will continue to be there with no end.

Matter is objective reality existing outside and independent of mind. They believed that material world is knowable i.e. there is nothing you cant know it is just a matter of time.

Schools of Jurisprudence

- There are many schools of Jurisprudence and they do differ from one school to another they include:
  - The Natural Law school
  - Legal Positivism
  - Sociological School
  - Realism /independent School
  - Historical School
  - The Marxist School

Basic Text: Lord Lloyd : Introduction to Jurisprudence

I. NATURAL LAW

- **Natural law** is a philosophy of law that focuses on the laws of nature. This school of jurisprudence represents the belief that there are inherent laws that are common to all societies, whether or not they are written down or officially enacted.
- This school of thought tells us that law is rational and reasonable. Natural law proposes that laws are logical progression from morals.

Cont…

- Therefore, actions that are considered to be morally wrong will be against the law. But also, actions that are considered to be morally right can't truly and justly be against the law. Natural law exists regardless of what laws are enacted.
- Natural law is determined by material conditions. There is no universal standard of what is “natural law.”
- Natural Law has a long history from the ancient Greek societies.

Cont…

- In this school, everything was explained in the context of nature.
- The term “natural law” is used on many ways and in different meaning. There is no agreed definition of the term Natural law.

Consider 4 examples of what is Natural law

- A)Natural law is theory of natural rights based on the supposed state of nature.
- B)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
- C) Natural law is the use of reason in the making and administration of law.

Cont…

- d) Natural law is the norm of conduct discoverable by experience and observation as prevalent and useful among different people.

- Question: What is Natural law/ Natural Rights?
- - Natural law is determined by material conditions. There is no universal standard of what is “natural law.”

FREDRICK ENGELS.

- He gave the materialistic conception of Natural Law
- “He argued that Natural law is always the ideologies, glorified explanation of the existing economic relation, how they are consecutive and now from revolutionary angles”. (Selected Works Vol. II pg 365)
- To him natural law is an ideology of what you believe. It is an ideology of the ruling and sometimes an ideology of the rulers depends on the material conditions of the epoch concerned

Cont…

- Others argues that Natural law like a harlot is at the disposal of everyone and can always be invoked to suit what is wanted.
- Natural law has appeared in different forms Religious or Secular.

CONTENTS 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:
  - 1st trend : 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 rule/ order in the society.
  - 2nd trend : Where 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. In this way N L has play a revolutionary / radical role

Cont..

- Two versions/trends therefore are noticeable in Natural law.
  - I. Official version: Natural law is used to explain the situation in the existing order.
  - II. Popular version: Normally, natural law is used for consolation or it may be used for protecting the existing order.
- The two trends sometimes interrupt i.e. agree to each other.
- Ordinarily, when a new class took power, the popular version changes to the official version by explaining the situation in the existing

Natural Law and The Early Greek Philosophers.

- Natural law is located from the Greeks. Before Plato and Aristotle, 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 very important role in the society. Around 5th C Philosophy was separated from religion. This was brought about by changes in the material conditions.

Changes that necessitated the separation of Religion from Philosophy

- The discovery of Iron tools gave small farmers a sort of individualist outlook and independence.
- There was development of city-states and with this the rise of commodity production and trade was inevitable.
- Development of money as a universal medium of exchange.
- The invention of alphabets and printing techniques.
- There was a theory of numbers (mathematics)

Cont..

- Out of these changes, two things happened:
  - *The monopoly of religion as an institution was broken.*
  - *The break allowed the re-appraisal problems in the society.*

SOPHISTS IDEAS

- They were very instrumental in trying to see changes, as they wanted to study society basing on the material condition. (The break away from religion).
  - Read: Protagoras, Callicals & Thrysimucus

Protagoras:

- Is the leading thinker in this school.
- He was saying that being is nothing but subjective colors appearance.
- He was talking about law, by saying that law is an invention of human being.
- What was important to the Sophists was practical knowledge for the ordinary person.
- Thus the Sophists were concerned with man and his place in the society.

Cont...

- He said the state and religion was one thing.
- His basic premise was to think about law, and own view.
- He wanted to be independent by having his own ideas.
- He was trying to separate religion from philosophy.

Callicles and Thrysimacus

- They put together another theory.
- There are right of the strong as the basis of “natural” as contrary with the conventional law.
- They were trying to explain the legal phenomenon in the context of their society where existed slave and slave owners and the god of the state was a ‘totem’ of the particular clan.
- People who are stronger are the one to decide what is right.

Cont…

- The stronger are the ones who make law.
- They 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.

Thrysimacus:

- “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.
- Just men always sufferers and unjust men live at the cost of justice men.

ANTI- SOPHIST IDEAS

- These were against the Sophist ideas.

  SOCRATES :

  He opposed the doctrine of justice. Dealt with the small ethical matters than the natural world.

  He said that knowledge should **be about ideas.**

  He said that a distinction must be made between the impression of sense and reason product. Begun living with knowledge.

PLATO : (427-347 BC)

- Like Socrates, he was against Sophist ideas. He was a disciple of Socrates.
- He maintained that, is not possible to know the material world. In his ideas he creates a number of ideas as follows:

  He talks about "**justice**" and not the law specifically and its relation with politics esp. how the society should be governed to create justice.

  Both Socrates and Plato derive their ideas from Sophists but they reject some points by Sophists

Cont…

- Plato also views the “**state**”

  as s man with a large scale.

  He says a state is a perfect organism. For this reason both an “individual” and the "state” must be in harmony obtained by nature.

  He says in the state there are individuals having reason, courage and sense.

  - He says reason dominates courageous acts
  - sense obeys.
    - [Read chapter His Book REPUBLIC]

Cont..

- In his book, he explained on the ideal society and he says;

  An ideal society shall naturally be divided into classes and each class shall have inherent quality i.e. human beings are unequal.

  - There are some people meant to rule, some to assist them to be ruled and produce. In this case he said the ideal society is divided into three classes:
  - 1. <u>MEN OF GOLD:</u>

  Here he meant the wise men. People with reasons. In the society, philosophers or wise men should be the rulers.

Cont..

- He was looking for philosopher kings, because he thought that philosophers have reason hence they are capable of showing others the way.
- He said because of their wisdom these people should render justice according to their intelligence and wisdom not to be guided by law.
  - 2. MEN OF SILVER

E.g. soldiers, warriors; these are guardian of the state. They are meant to protect the state and defend the social organism. These people have the courage ready to fight.

Cont…

- 3. BASED METALS: (BRONZE)

  These group consist of producing classes i.e. slaves, artisans and farmers. These are the ruled people, they had a duty of feeding themselves and to feed others. He said these people have sense.

N.B:

- **In Plato's scheme,** 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.
- Law is only an alternative to govern the society .In addition, he says that in society these are inherent and inequalities. i.e. there is no need 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

Cont....

- In his later book, **Plato** changed his altitude . The book is called the **"LAWS BOOK"** In this Book he said that authorities should not be guided by discretion alone but by written code; and enactments in the administration of justice.
- 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 / brain

ARISTOTLE (384-322)BC

- He came after Plato. He was a student of Plato. The father of Aristotle was court physician to the king of Macedonia. He studied at Plato's academy.

  He did not have blue print of Plato's society but he put a society **based on law**.

  He agreed with Plato that a superman/ wise man philosopher should be the ruler but such ruler should be guided by the law.

  That means the rule of law should be supreme in any governing society

  Rightly constituted law must base on reason and ethical principles must be taken into account

Cont..

- Aristotle was advocating the **rule of law in the society**. That there must be a body of laws to guide the society even if the Government is governed by a good man.

He wrote a book called the "LOGIC".

- In his book he said that "the world constitute the whole of nature". And a human being is part of that nature in two aspects:
  a) Is a creature of God
  b) Is endowed with reason as distinct from all other creatures.
- He said man can control nature. Man can live according to reason. If man lives according to reason he is living naturally.

Cont..

- Aristotle distinguished between Natural justice and Legal Justice.

  He said justice is of two types;

  - Natural Justice or Natural Law: this is the same every where i.e. it does not change.
  - Legal Justice: this can change from place to place and from time to time he referred to normal convention of law

INFLUENCE OF STOIC SCHOOL

- The ideas of Aristotle brought the influence of the doctrine of Natural Law in this ERA. Aristotle regarded man as part of nature and he is endowed by reason.
- The stoic school pick much of the Aristotle's ideas and the earliest philosopher in this school includes:
  - ZENO 350 – 260 BC

ZENO 350 — 260 BC

- **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. One of their statements was “the Universe is a human being of which God is a soul, the governing intelligence, the sovereign laid the motives principles and an “lmenting wolf” i.e. gives life.

Cont...

- The object of the stoics was to teach virtual as the right living. For these to reason correctly and to understand the nature of the universe of which man is part.
- Principles propounded by Stoics to explain nature are as follows:
  - *Law and Justice originate from reasons which is conceived as universal force*
  - *There is only one common law of Nature based on reason and binds every body*
  - *To follow nature and to lead life according to nature*

Cont..

- To seek pleasure as the highest goal in life is contrary to human nature which is based to reason and virtue.

The Stoic School contributed much to the present thinking as follows:

- *(1) The conception ideas universal law for all mankind under which all men are equal; e.g. Human Rights*
- (2) *The ideas of deriving universal principle of law from the observation of law of different people, (i.e. such common principles which are common to all)*
- (3) *The conception of law being binding upon all states which since the time of BETHAM is now called International Law.*

THE ROMAN ERA

- **CICERO 106 – 63 BC**

  He is a greatest thinker who adopted the stoic thinking and expanded further the scope and the ideas of Natural Law.

  Cicero wrote a book called "DE RE- PUBLICA"

  He argues that:

  - True law is the right reason in agreement with nature
  - Natural Law has a universal application, it is unchanging and everlasting

  Cicero conception of thinking was linked with the heavenly law (Lex Caeletis)

Cont…

- He said: Natural Law is the product of reasoning. Law is not law if the same is unjust in nature.
- He define “Law” as the highest reason implanted by nature which command what ought to be done and forbids the opposite.
- He adds to the definition that; “law is the mind and reasoning of the intelligent man, the standard by which justice and injustice are measured.”.

Cont…

- He said since right reason is law, men have law in common with God. He said law is not a product of human thought or enactment but the ultimate mind of God.
- Finally he said that N L is binding upon all human being because it is the product of God's will. Hence is binding on all human being
- This shows the link between heavenly law and the present laws.

THE INFLUENCE OF STOICSM ON ROMAN JURISPRUDENCE OR ROMAN EMPIRE

- This is the transformation from slavery mode of production to feudalism.
- Stoicism as a philosophy was attractive to Roman Empire. The Roman picked the ideas of the stoic thinking and put in practice especially the universality concept of Natural Law. It was important to them because:
  - The concept of universality enabled the Roman to spread their own laws to other parts that they ruled
  - It helps the Roman to adopt certain elements of laws which are approved.

Cont..

- They tried to establish a group of laws called the Natural code, which covers all the laws that are universal in nature around 534 AD.
- The code was called CORPUS IURIS CIVILIS which means the corpus of civil law. This code was used to support the universal system of law.

There were three main parts within the Code:

Cont…

- The institute - was simply a short educational hand book published around Nov. 533 AD.
- The Digest - which contains fragments of opinions / comments of earlier jurists published around Dec. 533 AD.
- The codex — which was a codification of empirical constitution of Rome, published on 534 AD.

THE DIGEST

This was a portion giving the commentary of the jurist. This part explains what contained in the law

It states that Law is of three types:

1. IUS CIVILE : that means civilian law/ civil law. These are laws which express the interests of a particular group or nation.

Cont...

2. JUS GENTIUM: means laws of the nations, this is governing the relations of the Nation.
3. JUS NATURALE: means natural law, which is the law of Nature, the highest law, it is a standard or yardstick for measuring other laws.

According to the Roman jurists law of first category (civil law) and law of second category (law of nation) must be validated by Natural law.

NATURAL LAW IN THE MIDDLE AGES

This is the time when slavery mode of production had collapsed completely and feudalism as a mode of production was at its peek.

This time, Natural law was carried up by the church furthers. During this time important changes occurred in natural law. During this also there was emphasis on centrality of the church.

Church fathers were the philosophers and they include the following:

ST. AUGUSTINE 354 — 430 AD

- He was a Bishop of Roman Catholic church and he represent the ideas of Natural law as developed by church fathers.
- He came with different theories based on justice and the state. He wrote a book called “THE CITY OF GOD” or “DE CIVITATE DEI”
- In this book he discussed about human institution. He said all man social institutions are sinful including the State.
- Man can only justify his institution by creating those which corresponds to the likeness of the City of God.
- He said since man’s mission is to approximate the likeness of God, it follows that this institution

Note:

- These views were restrictive and consecutive, they based on belief.
- His views were very subjective hence they were not based on objective analysis of the society.

The early church fathers tried to make something similar to the corpus ius civile. It was called corpus canonich i.e. canon law, the oldest collection of canon law was named Decretium Gratian which was published in 1140 A.D.

Gratia had a number of things about Natural law:

Cont..

1. That man is ruled by two laws; i.e. Natural law and customs. Natural law is that which is contained in scriptures and the gospel.
2. Natural law is divine revelation on how to conduct human affaires, therefore it is absolutely binding and it overrules other law.
3. Natural law does not vary, it remains unchangeable.
4. Natural law prevails over customs and constitutions, if any one contradicts it, then it will be declared null and void

ST. THOMAS AQUINAS 1226-1274

- He was a church father and a professor of theology. During that time the church and the state were very close
- He wrote a book called SUMMA THEOLOGICA, the book was for two main purposes:
  - To prove that the new interests in natural science and rationalism was consistence with Christian and religious truth. There is no contradiction between the two.
  - He tried to reconcile the conflicts between Natural law and positive law.
  - He defined law as an ordinance of reason for common good made and promulgated by him who

Cont…

- He disagree with ST. AUGUSTINE that human beings are evil.
- He said, the foundation of all laws is divine law.
- That human inclination and reasoning have a certain role in realization of law.
- St. Thomas classified law into four groups:
  1. Lex eterna (Eternal law)
  2. Lex naturale (Natural law)
  3. Lex humana (Human law)
  4. Lex divina (divine law)

1. LEX EXTERNAL (Eternal Law)

To him Lex eternal means the divine wisdom governing the universe. Knowledge of which is outside human capacity to apprehend except blessings of God himself.

Since the world is governed by of divine providence (God caring nature); then the whole of man's mind is governed by divine reasons. Hence 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 i.e. ETARNAL LAW

2. LEX NATURALE (Natural Law)

He said all creatures are subject to divine providence and they are regulated by eternal law.

Human beings as rational creatures are subject to divine providence in a special way different from other creatures

In the process of enjoying divine providence, then human beings share in the divine reason. Therefore human beings derives natural inclinations and they adjust to their action accordingly.

This sharing of divine reason which matured in law, becomes natural law.

3. LEX HUMANA (Human Law)

Through the use of reasons which human being derive from natural law principles, certain rules which are suitable for use under certain situations are developed. Therefore these concepts assists us in creating other laws

4. LEX DIVINA (Divine Law)

This is the law revealed by God through scripture, he said divine law regulates the interior party of man(the inside of man).

There are four premises in his arguments;

a). Do good and avoid evil. Natural law operates on complete precepts such as the desire for self preservation. All law makes 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.

Cont..

b). Law and morality coincide and there is a necessary connection between them. There is a nexus between law and morality. 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.

c). 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.

Cont..

d). He says 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. i.e. Natural law doesn't talk everything. There is an emphasis on human law.

ASSESSMENT OF THOMAS AQUINAS

1. Unlike earlier philosophers who characterizes Natural law Natural law as law of God. Thomas consider natural law as been directed from God but interpreted by man.

Thomas said that there is possibility of era when someone consider natural law as God phenomenon, therefore in this case the law (N L) is unchangeable but modifiable

2. Thomas interpreted history and natural law in a purely theological context. That the church and the state was almost one.

Cont..

3. The theories propounded by Thomas Aquinas are in favor of the status quo. That means they are conservative in nature they glorified the present situation.

St. Thomas argues that “reason” is superior to “will”. That means reason is the one that determine the nature of human being

JOHN DUN SCOTUS 1265 - 1308

He has ideas which led to development of philosophy.

He said, freedom of man to do good or bad means that the will independent from reason.

It is not intellectual insight that directs the will but it is the will that directs intellectual insight. Therefore he shows supremacy of will over reason.

He is against St. Thomas who said that only in God reason and will are one but in human beings reason is superior to will. The reason should direct your will and not otherwise.

Cont..

He said there is only one principle of Natural law. This is to love God. All laws including the Ten Commandments are only derivatives and relating in so far as they are consonant with the love of God. Therefore make your law but should be aligned with love of God.

WILLIAM OF OCCAM 1290 - 1349

Develops further the idea of Duns Scotus. He laid down the hierarchy of rules that shadowed some modern doctrine of natural law.

- (i) He talked about universal rules of conduct detected by reasons. Such rules which are accepted as reasonable are binding in society.
- (ii) He talked about rules that would be acceptable and binding in a society governed by natural equity without positive law.
- (iii) About rules, which are deduced from general principles of law of nature, which are not found as mental character; are liable to be modified by authority. i.e. Fundamental rules can be changed later on .While natural law remains unchangeable

NB:

Looking unto the two philosophers you may note that they contributed the following:

- They prepared the way of the supremacy of the will over reason
- Their philosophy prepared the society of their time for the acceptance of absolutism.

NATURAL LAW IN THE 17 — 18th C

OR CLASSICAL N.L ERA.

Around 16th C there was decline of feudalism as a system ad slowly elements of capitalism begun to rise. At this point there were several Economic levels like:

1. Commercial Revolution: where more goods where produced and this facilitated trade, both National and International trade. Increase of commodity started to dissolve the organic and fabrics of feudalism, because when people went to market they were treated as individuals and not as serfs or landlords. Hence meetings in the market places were based on what you sell or buy and not the status i.e. equality.

It was in this time the concept of Right grew, the principled of contract as we know them today, concepts of free will was amplified.

Cont..

2. Development at political and National level

The key element here is the rise of national states as opposed to city states during feudalism. During this time people rejected to be under the rule of pope unlike in feudalism, they wanted their independence.

This grew very strong in 16th C, example King Henry VIII 1554 moved the parliament to pass the Act of supremacy in which the King declared to be the head of the church in England. This changes had something to do with development of philosophy.

These philosophical ideas were spreaded by Merchants and Bourgeoisie class. The early philosophers emphasized on the power of the state to be strong but it must changeaccording to the nature of Natural Law.

MAIN FEATURES IN PHILOSOPHICAL DEVELOPMENT OF THIS TIME

1. The central thing tried to be explained by these philosophers was based on reason and rationality.
2. There was a divorce/separation of law from theology i. e. law was separated from theology.
3. Intellectual renewal expressed itself in religious form i.e. there was a revolt against church teachings. The revolt against the church teachings was meant that individual states asserted "independence" from the domination of the church.
4. There were some substantive development at various levels e.g. Reformation in Religion, individualism in economy, liberalism in politics.

Early philosophers of this time include:

MACHIAVELLI 1469 - 1527

He wrote a book called the PRINCE, in his book he tried to give some ideas to rulers on how to rule.

He was geared towards a strong state. To him, any means is justified if what you are doing is good. He was of the view that the state can use any means so long as whatever it uses is good. According to him any means used by the ruler justified the end(goal).

JEAN BODIN 1530 - 1597

He was advocating on the doctrine of National sovereignty which was intended to wad off any kind of external interference from other places. (The principle of non interference of internal affairs of the state).

There after come another group which led to the development of philosophy near where we are today. This people include:

HUGO GROTIUS 1583 -1645

H is the father of international Law. He argued for separation of law from theology and religion. He said that theory of law can be build independent from theological assumptions.

He prepared the coming of secular and nationalist ration of Natural Law. He said reason is the basis of legal thinking.

He said Natural Law is the set of immutable principles of law (you can not change them).

He said Natural Law is so immutable to the extent that it can not be changed even by God himself. Principles of law can be deuced into two ways:

Cont..

1. APRIORI: that means before, by examining anything in relation to nature of man. i.e. to test whether it fits exactly in the criteria of man ,check whether that thing goes with the rational nature of man ,if it fits exactly then NL is good.
2. APOSTEORI: that means after, this is by examining the acceptance of the principle among people (Nation). To him the first way is more effective than the second one.

He said Natural Law is based on the nature of man and his inward need of living in the society. Since Natural law consists of set of rules which are absolutely valid, their treatment should base on internal appearance of Necessity since these principles are self

SAMWEL PUFENDORF 1632 -1694

He was a German law professor and a land owner. He wrote two books/works.

1st book — De Vire Neture; in which he condemned the Roman Catholic church which he linked with the Roman Imperialism

2nd book — De Habitus Religionis. He advocated the supremacy of the state over the church. I

He said that 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. It was the time of absolute monarch. He was defending the ruling class.

Cont..

He also said that; the state is the manifestation of human reason. It is also a manifestation of an individual's will. It all began with the will of individual man, family and then society.

He said in order to make state acceptable, the state must aim at general good of the community and human peace. He said natural law and God prohibit conflicts. Human nature always seeks peace and good things.

He said Natural Law is based on two sides of human nature

1. The need to protect personal property or private property
2. The need to keep peace in the society

Cont…

General observation:

Puffendorf did not distinguish between criminal law, civil law and the law of nature. He was more general

To him the "will" of the ruling class was Natural law.

JEAN JACQUES BARLAMAQUI 1694-1748

He was a follower of Puffendorf. He says that reason is the only means at the disposal of man to attain happiness. He also says that law is nothing but what reason detect as a reliable law to happiness.

CHRISTIAN WOLF 1679-1754

He was a German jurist. He believed that complete liberty of man can not ensure social peace and happiness. He says to live harmony man should be governed by the benevolent sovereign power. He advocated a comprehensive system of law designed to facilitate protection of people and the operation of natural law.

ConIn

The first four philosophers were defending status quo. As time

went there was some kind of conflict between natural law principles and the government. N L principles were in conflict with the interests of the govt. The govt did not want to consider the NL principles, which were immutable. Hobbes, Locke, Rousseau tried to correct these conflicts; these philosophers tried to correct the conflicts between the natural law principles and the govt interests.

NATURAL LAW AND SOCIAL CONTRACT

THOMAS HOBBES(1588 — 1679)

He wrote extensively on political matters and society. He wrote a book called Element of Law 1640, The Civil Society 1642 and The Leviathan 1641.

According to Thomas Hobbes society has developed in two phases:

1. The State of Nature, (The pre modal condition of human being
2. The Civil Society

THE STATE OF NATURE

In the state of nature man is guided by his own idea only because of this man will be selfish, aggressive, malicious.

Due to man being guided by nature the concequences are:

1. He can not know what is right and what is wrong
2. Everybody is at war with another. Because of these two reasons, nothing is secured and no one is secured in that society.

Naturally man prefer peace and not war.

Through the use of reason man realizes that there are certain basic principles which may bring peace in society and make people leave good life. These principles are:

Cont…

1. Every man ought to endeavor to seek peace
2. In order to secure peace, and enforce the law of nature, human being 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. This is called social compact i.e. 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.

Cont…

3. He said that man should keep his covenant we agreed upon. He argued that 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.

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. By keeping the contract man move from the first stage of pre modal society to civil society.

CIVIL SOCIETY

This is the stage reached when the society passed through the three principles of the pre modal stage. He tried between the demand of Natural Law and the demand of the state of power

SPINOZA 1632 — 1677

He is generally in agreement with Hobbes but differed with him in that he advocated liberty as the highest aim of the govt. which must rule according to the dictates of reason and refrain from curtailing the freedom of thought and speech of citizens. to Spinoza a sovereign is restrained by natural law i.e. wherever the state is ruling it must rule within the limit of the law.

Development of Philosophy around 17 — 18th C

In this era the capitalist class grew very strong and the feudal system was collapsing . The effect was that Law was taken as an instrument of change. On that account N.L was used by the bourgeoisie class to fight the existing order , so N.L played a Revolutionary role.

Philosophers of this time were focusing on putting effective safeguard against violation of N.L by the government. These Philosophers includes:

JOHN LOCKE (1632 – 1704)

He was a N. L thinker who lived when bourgeoisie revolution in Europe. The political philosophy of John Locke was based on Natural rights of man. i.e. human rights. John Locke was reacting against the absolute monarch in Europe which did not care individual liberty and freedom . He was emphasizing on:

Right to life

Property and right to liberty

He wrote number of books like

1. Essays concerning human understanding.
2. On civil Government
3. Letters of Toleration.
4. The reasonableness of Christianity

Cont…

In his book Civil Government was written for two purposes:

1. To refuse the argument for the divine right of Kings to Rule
2. To uphold the need for democratic government.

You may note that John Locke's arguments have two main objectives.

1. To justify establishment of the government and show the purpose for which the government is established
2. He wanted to show the limitations of the power of the government.

In order to justify his position John Locke used the concept of social contract used by Thomas Hobbes. He

Cont...

1. Man is originally in state of Nature and he called that state of nature a pre political society.
2. The Members of that society entered in a social contract by which they established a government
3. The powers of the government established limited by the terms of the social contract.

PRE POLITICAL STATE

In a state of nature all men are equal and no one has power or jurisdiction than his fellows men.

Each man's liberty is governed by the Law of Nature and the law of reason which teaches that no one ought to harm another in his life, health, liberty or possession.

Cont...

In a state of nature every man /person would have the right to enforce the law of nature to punish the wrong doer in order to restrain him from the future wrong doing and to get reparation from him. (This is typical in criminal process) i.e. In civil litigation to get remedy for damages sustained or suffered by him.

He argued that in the original state of nature, man was made unsafe for 3 reasons/ factors namely:

a) The absence of un-established and unknown set of laws/rules i.e. there was no system of law, which was a security in the society.

b) The absence of powers sufficient to execute and enforce judgments. i.e. there must be an instrument to enforce decision passed by courts of law. In defending the social contract theory he gave two more arguments namely;

Cont…

Since by the law of nature no man can give another an arbitrary absolute power over himself. Therefore he cannot alienate to the government any such arbitrary power because no man can transfer anymore power than he has. i.e. he is looking on the nature and the law of nature, i.e. men in a pre-society seat down and agree to give power to the ruler. We elaborate the relationship between the ruled and the ruler. No way can the

arbitrariness move from the govt if there is arbitrariness then the govt is infringing the terms of the contract. There is a concept of inalienable rights. i.e. their rights can not move from citizens to the govt.

Cont...

When the government so established goes contrary to the trust imposed on it i.e. when the govt 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 govt by a new social contract.

Later he is qualifying the second argument by saying that "the right to revolution must be exercised as a last resort; citizens must learn to tolerate great mistakes by the government."

His theory on right to revolution provided in ideological justification for two major reasons which was influenced by the English Rev. of 1688 and the American Rev of 1776 and French Revolution of 1789.

Cont..

Importance of John Locke's ideas in Jurisprudence

- The idea of John Locke influenced the French Revolution of 1789.
- Locke's conception of natural law was revolutionary in character. He was arguing

contrary to the status quo of maintaining the ruling class.

- Locke's ideas were the basis of all Bourgeoisie constitutions in Europe and

America. He advocated for liberal democratic state.

MONTESQUIEU (1689 — 1755)

He basically agreed with John Locke's ideas, but added 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 i.e. there must be frame work where people are really enjoying their liberty. He says that 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 (the legislature).They must check each other and independent to each otherwise i.e. .There should be no interference of one organ of state to the function of the other organs of the state. His intention was to ensure the theory of liberty and independence in the society

ROUSSEAU J.J (1712 — 1788)

He endorsed the social contact He said that to him “law” is an expression of the general will of the community.

He says the individuals composed the state sovereignty wholly and therefore the sovereign (leader) cannot have separate interests apart from that of the community as a whole.

When you talk about the sovereign govt it is simply a union of the individuals. The interests of the govt can not be in separation with the interests of the community. The govt always have an interest about the individual and having no separate interests. When an individual obeys the law; obeys himself because an “individual will” is made in a “general will” which is the law.

Cont...

He says after the state is formed by a social contract, subsequent manifestations of the general will are seen through majority decisions. He is trying to show the importance of obeying the law.

Rousseau was referring to the parliament where the majority "will" can be located. It is therefore said; law is a collect will of ourselves. Manifestation of the general will: This referred to the parliament. He was arguing in the favour of the parliament, which is the highest authority where the majority will can be located. He said that the government existed by the sovereign body i.e. (the Parliament). He said that at any time the parliament can revoke and limit its will, i.e. it could amend the laws.

Cont....

Finally, he says that under social contract individuals surrender all their natural rights to the whole community for common good and in return citizens & individuals are granted civil liberty and security of the property/possession. Rousseau believed that a law that has not been ratified by the people as a whole is null and void. He tried to discard the previous law, which was not passed by the parliament that it was null and void.

THEORIES OF NATURAL RIGHTS.

At the time of American and French Revolution of 18th C. The theory of natural Law was now popularly known as a theory of Natural Rights.

Those notions of right which were propounded by the philosophy of the time and writers of this era turned as liberating principles which could change the situation. The principles were used to challenge the existing order. During this time Natural Law played a Revolutionary role. It was used to fight the unacceptable aspects in the community and not supporting the status quo.

In Europe they called the Natural Rights but in America they call them Fundamental Rights. These were used as a weapon to protect human life and human properties.

Cont...

These philosophy were included in the capitalist constitution which were enactacted in the 18th and 19th C. The constitution were used to be as the custodian of these Rights eg. The French Declaration of Rights of Man 1789. The declaration was intended to lay down the Natural Inalienable and secured rights of man.

The American declaration of Independence of 1776 reflect the similar thing.

In summary by this time when one talk of Natural Rights these rights were taken as undisputable principles or rights which are important in any society. This concept is not based in theology, they are based on rationality and Reason.

These rights are said to be of a Universal character, no one is allowed to go against them. Sometimes latter, philosophers had taken these ideas to the extreme point and some of them took a radicalism.

That when you talk about Natural Rights it gives the obligation to the state to honour these rights.

Cont..

If the government does not honour these rights people has power revolt to the government.

REJECTION OF NATURAL LAW

Around 18th the capitalist class had already establish itself as the ruling class after the death of feudlism. It was controling political power and economy. Because of that it no lo longer needed speculation of NL. As everything which goes contrary to N L was declared null and void. NL was used to judge what is right and what is wrong. During this time the capitalist were in all three organs of the state i. e. Executive, Legislature and Judiciary, therefore they need nothing to measure their actions and challenge their system.

They used NL to fight feudalism but now they reject it. Even the social contract theory which was used to build up the system of the government was not needed therefore NL did not cross 18th C

Some experts argued that two philosophers played a big role towards the collapse of N. L

Montesquieu

Regarding this philosophers it is said that, although he propounded on development of Natural Law, some of his ideas were negatively impacting N. L.

He said law should be influenced by influenced by environment and other factors like religion, custom, commerce etc. Law should not hang alone, there are some of influencing condition. With this idea he embarked on the compact study of law and environment, this exercise was undermining the foundation of Natural Law.

David Hume 1711 — 1776

REVIVAL OF NATURAL LAW
NEO — KANTIAN N.L

From the time of 18 -20th C positivism was the basis of philosophy. But after the WWII Natural Law was revived .

Why..?

Positivists discouraged the philosophical speculations about the purpose and nature of law as propounded by Natural Law lawyers.

They argued that there is no need of searching for ultimate value of behind the law.

Reasons for Revival of Natural Law in 1945 after the WWII

1. Conflicts within the capitalist system which led to two world wars where by many people died and great suffering was occasioned i.e. The events of WWI & WWII prompted the attitude of evaluating human action which led to evaluation of Law.
2. The fascist government which were the authors of the two wars had very repressive state as a result citizen and foreigners under this regime suffered a lot under the hand of this government.

Cont..

Therefore the international community of the state had to re think in order to prevent such actions and make it not to recur again. Individual nations tried to change politics and philosophical thinking at that time. Therefore in order to show that capitalism is still good they decided to go back to Natural Law.

Natural law that was re adopted was not introduced as it was, there were some changes and modification so as to suit the place. This philosophy had some of its characteristics:

1. Much of Natural law is theory today rest on moral idealism. That means there is general conception that law should be based on the moral community.
2. The new Natural law is based on " Law with a changing content", i. e it does not rest on principles of immutability. The new N . L has a room for change according to the material condition.
3. Due to development of science and technology the current concept of nature is different from what was accepted in earlier centuries.

Cont...

4. The concept of justice is emphasized in the contemporary N L theory as an Indispensable standard in the evolution of man.
5. Social experience has been accepted as being the basis of constructive search of legal criteria. Eg. Treaties in human rights had precede much experience of human being.

NATURAL LAW IN INTERNATIONAL POLITICS.

Natural Law that was re introduced after wwII came mostly through international institutions. After WWII UN was established to ensure peace and security in the world. The UN Charter had a lot of Natural law sentiments in its article like peace, security and human dignity. UN had affiliate organs which had a lot of Natural Law thinking. In 1948 through UN — system there was Universal Declaration of Human Rights. 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 in Municipal Law

The ideals, which were reflected, by the UN Charter and Universal Declaration were incorporated in the constitution of many countries. Example, in German in 1948 the government enacted what was called the Basic Law of German. Some provisions in the constitution deals with basic rights like right of liberty, equality before the law, freedom of faith and so on.

Article 19 of German constitution provide that "any law restricting the right of the individual must apply generally and not solely to an individual case.

Where the public authority violates the individual right; recourse to him is open. i.e. He has a right to go to the court if his right has been violated. In Britain courts also invoked NL principles to declare inhuman legislations null and void.

Cont...

Cases:

1. ANISMINIC V. FOREIGN COMPANY (1969)2AC 147
2. WISEMAN V. BORNEMEN (1969)2 ALLER 279
3. RIDGE V. BALDWIN (1963)2 ALLER 66
4. OPPENHEIMER V. CATTERMOLE (1976)AC 249 (pick one local case which explain N L concept.

In the 4th case the House of Lords refused to recognize the NAZI decree of 1941 that deprived the German Jews of their Nationality and that had the effect in British of denying Jews the right to an exemption from UK or England tax on pension paid by the federal Republic of German.

Held: Lord Cross

"To my mind a law of this sort constitute so grave and infringement of human rights that courts of this country ought to refuse to

REVIVAL OF NATURAL LAW IN LEGAL PHILOSOPHY / NEO KANTIAN NL

Why is it called Neo - Kantian? Reasons why the revival was called Neo Kantian were as follows:

1. The revival of natural law relied heavily on Kant theory of knowledge by the majority of philosophers.
2. The new philosophy accepted and adopted Kant's rejection of a pre-existing discoverable and universally valid natural law. They accepted what Kant was saying. Kant says that NL is changing.
3. All of these new philosophers adopted Kant's basic conception of ethics. i.e. considered importance of ethics in natural law.

INDIVIDUAL PHILOSOPHERS

RUDOLF STAMMLER (1856 - 1938)

He was a Germany professor and a father of Modern Natural law and a disciple of Emmanuel Kant.

He accepted Kan's conception of ethics as something that has to do with motive or the intention of the Act. He also accepted Kant's conception of law of regulation of external conduct.

Stamler accepts positive law as a body of norms characterized by the their inviolability.

- He was thinking that law should be sovereign without interference and inviolable.
- There is neither ethics nor feeling nor conception of justice superior to positive law.

  He was saying that once you have a positive law such law must be superior i.e. the law must be the sovereign. The law must be final without any other criterion to interfere with such positive law.

Cont...

STAMLER distinguished two things namely:

a) Technical legal science. In this he says that science concerns a legal system.

b) Theoretical legal science. He says that this concern rules giving effect to find a mental principle relating the contents of the law. i.e. You try to formulate

fundamental principles to govern good laws.

He proceeds to distinguish two things

-1. The concept of law and,

- 2. The idea of law.

The Concept of Law.

To Stamler law is inviolable and autocratic collective will, manifestation of social life and instrument of Social Corporation. i.e. once law is made/enacted it is compulsory and binding to all despite someone's inclination to follow it or not. He tried also to define "law" without reference to any content. He says, "Law is specie of will, other regarding self authoritative and inviolable."

- Law is a specie of will- because it is concerning with ordering of conduct.
- Other regarding because it is concerned with man's relation with other man.
- - Self-authoritative — because it must be obeyed and it is inviolable because of its claim of a compulsory force.

- **THE IDEA OF LAW**

Is the application of the concept of law in the realisation of justice. He

Cont..

- 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.
- b) To attain this goal, individual desired must be adjusted to the aim of the community i.e. the social ideal is a commodity of free willing of men. Harmony should be maintained in the society and people should obey the law.
- c) In realisation of justice the specific content of a rule of law will vary from place to place and from age to age. i.e. he talks of justice as being relative as to material condition This relativity aspect of material was read by other thinkers with NL contents that are changing with time.

Stamler tries to identify two problems

(i) The subordination of the individual to the law of the society. What is the way of making someone to obey the law?

(ii) The reconciliation of egoism and altruism.

Altruism: to consider others interest than yours. The aim of just law is to achieve the highest possible harmony in the society. Stamler has his own ideal of society. (i.e. the best society).Is a community of free willing man. He needs a society with harmony.

There must be free willing men obeying the law in order to build a harmonious society. He propounded basically two principles to have the harmony society.

The Principle of Respect

a) The principle of respect : There are two principles in it:

i) The content of a person's volition must not depend upon the arbitrary will of another. i.e. his obedience should not depend on the arbitrariness of another. i.e. Don't harass them in order to obey.

ii) Every legal demand can only be maintained in such way that the person obligated may remain a fellow creature i.e. If you want to make your law to run ensure that the dignity of any person is maintained. There is an element of respect also.

The Principle of Participation

The principle of Participation:

i) A person lawfully obligated must not be arbitrary excluded from the community. i.e. when you enact the law don't segregate people.

ii) Every lawful power may exclude the person affected by it from the community only to the extent that the person may remain a fellow i.e. don't degrade anybody in the society.

LOAN FULLER .

Fuller's ideas concerned with the basic conditions for a good system of law as we know it today. He argued that there is a basic orderliness in all things which is natural one. He says in the case of law one has to seek a natural order that underlies group. i.e. in law you have to look the natural order of sustaining such a group. i.e. you learn how the law is operating in such a group. He says that from this, one can abstract the nature of law. He begins by asking questions like;

QN: What is a general purpose of having law in a society?

Answer

Our duty of making law is to subject human conduct to follow the law. People must obey the law made by the state. To Fuller there is a necessary connection between law and morality. He was different with the earlier thinkers in that law should conform to natural law / to morals. Fuller is saying that law should comply with internal morality. The different between Fuller and earlier philosophers was that; once law is complied with NL then it is a good law (earlier philosophers). Fuller does not want this argument. He wants that law should have a moral input in it. The earlier philosophers wanted the law to comply with natural law.

Cont...

According to Fuller: morality in law has 2 aspects:

1. The internal morality of law and
2. An external morality of law. These must be present to a legal system.

INTERNAL MORALITY OF LAW

Deals with the procedural aspect of law. He said that without morality in law such law would give un-desired results that are not good in law. For the purpose of building inner morality of law, Fuller laid down some principles to build the internal morality of law. There are eight fundamental principles to be followed in order to build the inner morality

in law:

Cont..

a). Generality , i.e. forms of law must be sufficiently general to cover activities of the society. i.e. should cover society generally.

b) Promulgation: He said that forms of law must be publicly promulgated. Decretive law / rules will make impossible to subject society to good governance.

c) Absence of retrospective legislation. He says law should be prospective and not retrospective.

d) Clarity: i.e. Laws should be clear to the people. Vague laws make it difficult to be obeyed by the people in the society.

cont...

e) No contradictory rules, i.e. law must be free from contradictions and internal inconsistence.

f) There must be avoidance of frequency change. There must be a system on how to change laws so that people must obey the same; without hesitation.

g) The absence of laws that require impossible actions. Do not require people to do things which they can not do.

h) Congruent between rules as announced and the administration i.e. the administration of laws should be in harmony with the laws itself.

Don't do it contrary from what it is enacted. Do it in accordance to its object in which it was enacted / passed.

EXTERNAL MORALITY

This deals with contents i.e. what does the law contain. Consists of fundamental rules without which society cannot survive. Fuller's thinking is that of human survival.

He was not clear as to what these principles will make the society to survive. He agreed with the principles laid down by Hart in what he called the "minimum contents of natural law" Fuller called the minimum contents of NL as "the minimum of morality of duty''

They include:

Cont..

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

HART — FULLER DEBATE

This debate originated from an article in Harvard Law Review (1951) 16 at pg 1005.The report concerning a decision made in post WW II in German regarding grudge informers.

During the WW II positivism was at its best especially in Hitler's light in German, called Gesetz. i.e. Law is law. Follow the law as it is. This was used by the Nation Party of Hitler. A very strong spy system was established and any form of decent was dealt very severely.

The SPY system was used to eliminate the grudge of Hitler and their friends. There was a case of a German wife who pursuant to Nazi statutes informed her husband for explaining anti- Nazi sentiments.

The Grudge Informers Case

Sometimes in 1944 the wife reported to the government that her husband made some statements against NAZI while at home which the particular husband was at leave in the army . The H was arrested, charged and convicted to death.

After the fall of Hitler the provisions were repealed and that man went to war as a front line .He survived the war and brought the suit to the court. He sued the judge and the wife. The wife and the Judge were convicted for unlawful deprivation of another's liberty under the German Penal Code.

ON APPEAL: The appellate court acquitted the Judge but upheld the sentence of the woman. They affirmed the sentence of a woman b'se she had utilized her free choice of a Nazi Law which was contrary to concise and sense of justice in all decent of human being to bring about the death of her husband. Unlike the judge who had only one option of judging the case.

Is the conviction of a Wife proper?

Begins by Radbruch for changing his position simply because he saw the problem that took place between Hitler and his regime. They want to blame lawyers as they failed to protest against Hitler. They obeyed the law as it is. He goes to German case; he said to punish this woman was a question of choosing between two evils.

- If the woman was to be punished it must be pursuant to a retrospective law and with full consciousness of what was actually sacrificed. i.e. If you deal with retrospective law you must know that you are dealing with the law which does not exist. It seems that the use of that legislation used to convict the wife, it was much stretched.

To him (Hart) the law was given an interpretation that was not there. He said that legislation should not be retrospective one.

Cont..

He said if she was to go and punished; that law which is indorsed by most legal system.

If he were to choose between the two evils, he would have acquitted the woman because of immoral issues, which are minor to the laws. He wanted the law to be used and nothing else.

FULLER'S REPLY

The word by Hart can be summarised in two ways:

Order and good order. According to Fuller "order is what the law says but "good order" is law corresponding to the demand of justice and morality". He argued that strict positivism is incomplete because law can not be built on law. He said that;

- That the authority to make law must be supported by moral attitude of the society.
- There must be the internal morality of law in order to build a good order.

To have a good order law must be built on internal and external morality of law.

POSITIVISM
Analytical Jurisprudence.

This is the philosophy of the bourgeoisie class. It is the philosophy of the Bourgeoisie when they gained power. This philosophy developed in the following stages:

- 1st stage: An egg of the Bourgeoisie philosophy is sovereignty. This means how people give sovereign to their state, who creates sovereign for a sovereign state.
- 2nd stage: Lava — represented by utilitarianism and analytical jurisprudence. i.e. what is the duty of the of the state to the citizen and the role of each person to the community.
- 3rd stage: Pupa stage- represented by sociological jurisprudence.
- 4th stage: Adult Stage American and Scandinavian Realism

Looking on the above you can realize that Prof . Mihyo ignored the position of Natural Law

Individual Philosophers
AGUSTE COMTE 1798-1857

He was the father of positivism and born in Europe during the revolutionary period. He said methods of natural science could equally be used in physics and social science etc.

He said that there must be as scientific approach of explaining law. He said man's development has passed three stages namely:

(i) Theological stage : This is when man understanding was limited to supernatural powers. (Limited to the sphere of religion)

(ii) Metaphysical stage : At this stage there are certain abstractions which replace God in explaining nature. They had designed their own gods.

(iii) Positivism stage: In this stage there refusal of all the metaphysical abstractions.

Knowledge is acquired through senses. i.e. science is used to understand nature. And you must have a way of explaining.

JEREMY BENTHAM (1748 — 1832)

He is a father of Utilitarian theory and he wrote books:

1. An Introduction to Principles of Moral and Legislation
2. The fragment on Government

He laid down the foundation of the utilitarianism as a philosophy

To Bentham legislation is a science. He argued that science is the basis for good government, because science creates certainty in law. He says scientific legislation is the second matter of jurisprudence. When you deal with legislation you, deal with science. He said jurisprudence is divided into 2 parts namely;

(I) Sensorial Jurisprudence

(II) (II) Expositorial Jurisprudence

Cont..

It deals with "ought" and therefore "utility" is employed. (Dealing with either law is moral or not.

Expositorial jurisprudence

This deals with analysis of positive law. It deals with "is" in which interpretation of the law as it is, is dealt with. If you want to look at the rationale of the law then you are outside the ambit of jurisprudence. He says that a legal philosophy deals with the law without regard to any morals or value judgment.

Question: What is the basis of good principles in making legislation?

Answer: There is one principle that is not natural law but "utility" (the use). A good principle in making law is utility. The greatest happiness to the number greatest number of people. i.e. make a legislation and ensure that many people are happy.

He distinguished the function of the court and of the parliament.

Cont..

Parliament/ legislature made and reforms the law and courts do interpret these laws.

The philosophy of Bentham was grounded into the concept of utilitarianism that was a philosophical movement of the Bourgeoisie class. i.e. it must be some good use (utility).He as saying that man is ruled by pain and pleasure and consciously and unconsciously seeks pleasure and shiver pain. He said the legislator has to ensure the greatest happiness of the greatest number of people. i.e. when the law maker legislates must be sure that what he legislates is useful.

He was advocating for just law as opposed to unjust laws. The core principle of utilitarianism in the context of J. Bentham is the greatest pleasure to the greatest number of people.

Cont...

J. Bentham said that there are three principles to guide the process of legislation namely:

a) It is a principle of utility that must guide legislation i.e. what is the use of such law.

b) Every individual action must conform to the need of the society. The reason that by doing so the society attains the greatest happiness

c) Any one who do not conform to these standards must face sanctions and those who conform must be awarded.

SANCTIONS

Punishment or awards for conforming to standard or not conforming are in four areas.

1) Popular or moral sanctions. These are sanctions based on the approval or disproval of others in the society.

Cont..

2) Legally / Political sanction: This is based on political power of the government.

3) Religious sanctions: imposed by divine agents.

4) Physical/ natural sanctions: occur accidentally and they are independent of human nature.

J.Bentham in his book called "the Fragment of Government, said/ discussed and

elaborated about the sources of law which to him can be explained in the political and geographical context.

He says in order to find the sources of law one have to look at a political society. He says when a number of people are supposed to be in a habit of paying obedience to a person or assemblage of persons of a known /certain description such persons all together are seen to be in a state of political society. i.e. emphasis is on habit on obeying another person /persons.

Cont....

He is saying that law arises out of these relationships. The person or body of persons who assign duties is the sovereign (it may be a king or parliament of other authority). He added that sovereignty can only arise in a political society and independent. He says the "will" of the sovereign is absolute. He says the sovereign expresses its "will" through command and others should obey.

He says the sovereign expresses its "will" through command and others should obey. The commands addressed to the government. The commands of the sovereign is the law. According to J.Bentham, all law commands / prohibits some form of conduct, although sometimes the imperative character of the law is concealed. Always law is a command although some imperative character is hidden.

Cont…

J. Bentham defined law as follows: "Law is an assemblage of signs declarative

of evolution conceived or adopted by a sovereign in a state concerning the conduct to be observed in a certain case by a certain person / class of persons who in case in question are supposed to be subjects of his power".

He also explains the methods through which the sovereign issues law:

1st Conception. When the sovereign issued law in a statute

2nd Tacit approval this is when law is given by delegated power. A person gives commands on behalf of the sovereign.

3rd Quasi Command/Law by adoption — he referred the law given by the father to his children, to wife etc

Critisms Ass

JOHN STUART MILL

He has based on Bentham's theory but in sometimes he criticized him. Heis insisting in putting more efforts in quality performance. He said that you should not compromise with quality in the extent of number. Make each individual enjoy pleasure. By appreciating the element of quality a man can be distinguished from a pig i.e. you can distinguish an intelligent and a fool.

He said it is better to be a human dissatisfied than to be a pig satisfied, it is better to be Socrates dissatisfied than to be a fool satisfied

JOHN AUSTINE 1790 — 1859

He was an English jurist: he 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. He dealt with expository jurisprudence. According to him expositorial jurisprudence deals with the law as it is. He says the subject matter of jurisprudence is positive law. He always deals with the law as it is. He says the term "law" embraces a number of things, he said that every command is law and that law shall be either positive law or moral law.

He said Law is a rule laid down for the guidance of an intelligent beign by another intelligent being having power over him.

Law = A rule/ command

Created by an intelligent being

To govern another intelligent being

The law maker is powerful than the governed

Cont..

Every law has four characteristics

Command

Sanction

Duty

Sovereignty

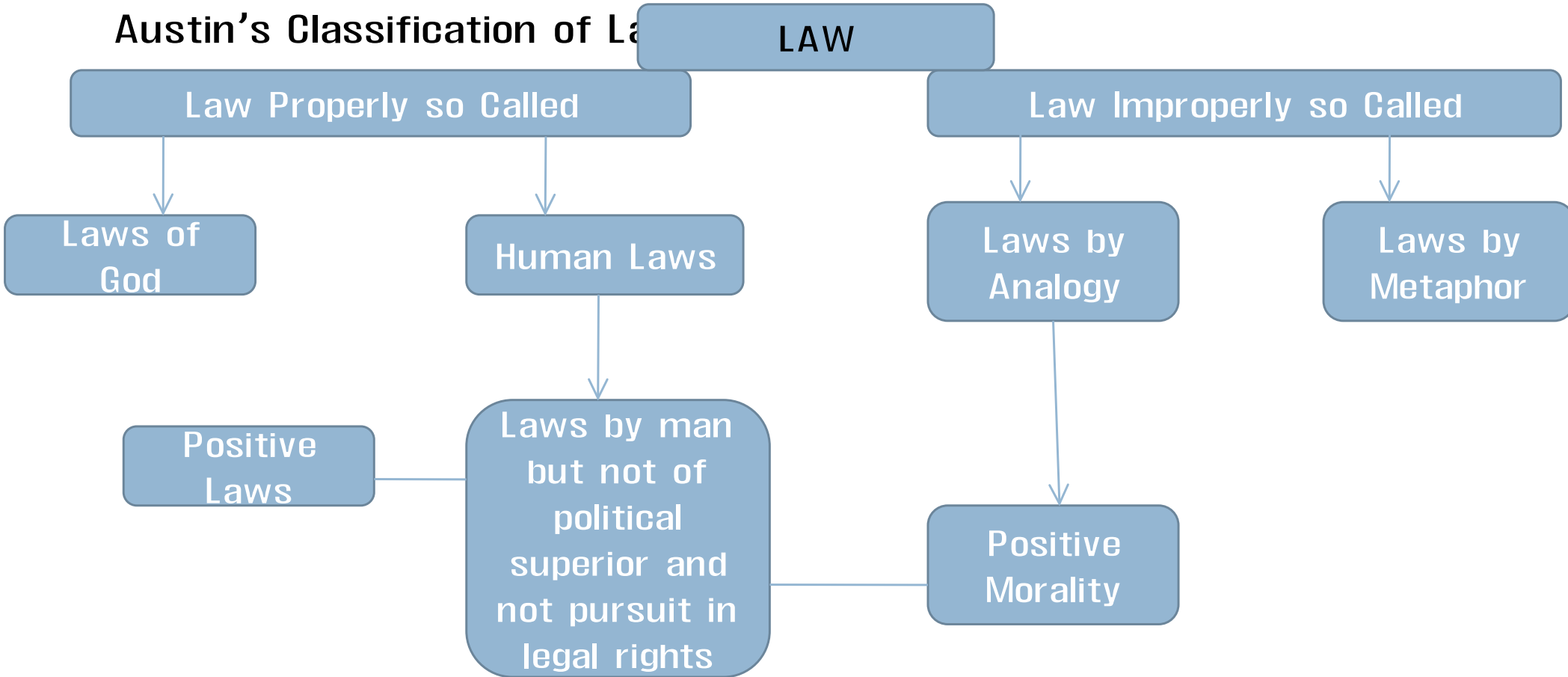
In relation to command it involves three things

1. It is the desire of an intelligent being directing another intelligent being to do or forbear. There are evils pronounced by the maker for the recipient who does not act according to the wish or desire.
2. The pronouncement of the expression of the said desire by the maker. It must be through words or signs. A law with such characteristics is the law properly so called.
3. Improper law does not add any new value . If they can not impose a duty or sanction it can be ignored and therefore is not law properly so called

Cont..

If a law comes from the sovereign and it speaks a law which does not impose a duty then this is not a law. To be a proper law there must be penal sanctions. Therefore law must create duty and impose sanction.

Austin's Classification of La



Cont..

Positive morality may help the creation of positive law.

Laws by Analogy: these are opinions not commands, are popular convictions. They are positive morality because people themselves have chosen it on how to behave.

International laws are laws improperly so called because are not command of the superior body (sovereign). They are positive morality because they purport the sovereign what to do. A sovereign need not to be limited by other commands.

Laws by Metaphor are rules of nature, they can not be obeyed as they do not impose duty. These are more or less symbolic which are principles which can not be amended.

Laws of God are said to be laws properly so called Discuss

Cont..

According to Austin "law properly so called" must be a specie of command. He said a command imposes duty and failure of which entails sanctions. He said there must be a superior who makes a command. In his categories of command customary law does not qualify to be law. It becomes law only where the political superior has adopted it. He said the essential elements in this set up is that the political superior must be independent i.e. must be politically sovereign not under any person. He says sovereignty is an expression of a positive mark and negative mark.

He said that in order that a given society to form a political society and being independent, the political superior in it must not be in a habitual obedience to a determinate human superior.

According to Austine sovereign can not be limited. It can do anything. He makes three propositions in relation to the sovereign as follows:

Cont..

a) Even if the sovereign raises unconstitutional rules; they are binding. Whatever the law is unjust and provided by a political superior; such law must be binding. To him constitutional is positive morality.

b) The sovereign can do nothing illegal. i.e. everything done by the sovereign is legal.

c) The origin of political government is the habit of obedience.

The sovereign can only give commands and does not receive commands.

Sovereignty is undividable, it is impossible to divide the power of the sovereign between different people. He challenged the concept of separation of power because it reduces the power of the sovereign.

The intention of Austine was to determine the province of jurisprudence. He is stressing the correlation between duty, command, sanctions and sovereignty. These elements are inseparable in the law properly so called. i.e. duty, command, sovereign and sanctions are inseparable. Failure to obey the same

Cont...

Positive law is characterized by 4 elements namely Command, Sanctions, Duty and Sovereignty. These four elements are inseparable.

MORALITY OF LAW

According to Austin law is law no commentators. The implementers of the law must not be questioned. In practice sometimes the implementers of the law have been guided by what the law ought to be i.e. they are guided by morals to decide cases. See Shah v. DPP; courts uses morals in deciding cases. E.g. equity is more / less morality because there is morality in built i.e. there is a necessary connection btn law and morality.

PROF: HART- IDEAS OF MORALITY

He is a positivist & philosopher. He says that:-

I. One of the basic tenets of positivism is separation of law from morality. i.e. there is no necessary connection between law and morality.

II. 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.

III. He says a 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, policies or moral standards. i.e. once, you have law that law is a logical system. It is sufficient and close. No need to go outside to make a decision.

LOGICAL POSITIVISM / NEO — POSITIVISM

This movement which arose within Positivism and it occurred after the 2nd WW. In this movement positivism is taken at its highest level. This movement insisted on the logical structure of law.

Logical positivism is partly the result of the second WW. The electricity of second ww, and the human action of regime of Italy and German made some philosophers revived Natural Law. One of them was Fuller. However other philosophers objected this option. Otherwise they strengthened positivism by using analysis and logical law. One of those who were interested was Hart.

They were advocating on separation of Law from morality

They advocated on the meaning and the language of Law, and the earl advocates of this trend was influences by linguistic experts.

WITTGESTEIN LUDWIN

He was an English Expert, he wrote a book called Philosophical investigation this book influenced another philosopher " Granville William saying Jurisprudence need language and semantic analysis.

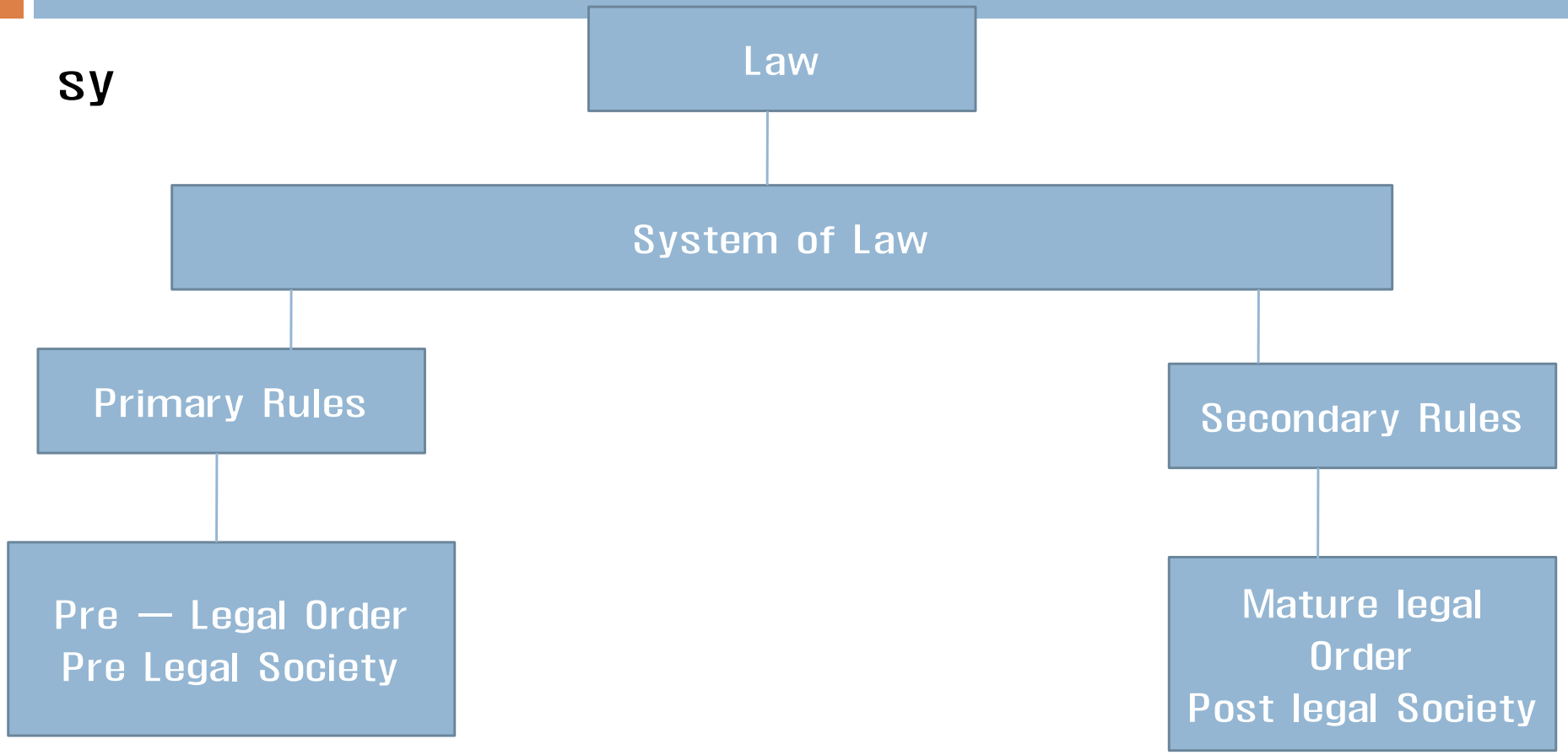
HART'S CONCEPT

OF LAW AND LEGAL SYSTEM

He is trying to break from the command theory which Austin was propounding. This theory attacks the Bentham's and Austin's theory. According to Hart Law is a system of rule.

cont,...

sy


Law
System of Law
Primary Rules
Secondary Rules
Pre — Legal Order
Pre Legal Society
Mature legal
Order
Post legal Society

Cont...

a) PRIMARY RULES: (1st part)

Initially exists in a pre-legal order / society: Are rules of obligation. They provide for rights and duties of citizens and this initially existed in pre-legal stage. i.e. in a primitive society. Later the society developed and became mature.

b) SECONDARY RULES: (2nd part)

Appears in matured legal order or post legal society. More rules are made here where the society developed. In a developed legal which makes use of primary and secondary rules. He is saying that primary rules have defects however secondary rules can cure those defects:

1. The Problem of Uncertainty of origin among primary rules
2. Primary Rules are static in nature there is no room for change
3. Primary rules are inefficient in their operation.

cont,...

In explaining how secondary rules correct the defects in primary rules. He gives the types of secondary rules which are used to correct primary rules. These are:

a) Rules of recognition : He says these rules which determine the criteria or validity of a rule in any legal system they help in

Identifying primary rule and how to locate primary rules

how to reconcile / choose the superior rule and

assist to locate where to find authoritative version of primary.

b) Rules of change :These regulate the process of change. They may confer powers to enact new laws or change it according to specific procedures. They may give power to individuals to affect changes, due to the fact that primary rules are static in nature, secondary rule may change it, amending or making new laws.

c) Rules of adjudication are added to overcome this weakness.

Cont...

These rules confer competency to officials to pass judgment in cases where there is an alleged wrong. Primary rules when they get no assistance they will be of no use.

The union between primary and secondary rules is the heart of any legal system.

Hart Says:

Austins theory of law was not correct because law was not built exclusively of on a coercive order. Command theory is derivered from a criminal pattern of law and this criminal,

1. There are two elements which make law operate efficient.
2. The Internal Aspect of Law and the External Aspect of Law

PURE THEORY OF LAW

This is the highest abstraction or level of positivism. The key proponder of this theory is HANS KELSEN (1881- 1973). Some used to call him positivists of positivists. Hans Kelsen gave more contribution towards development of this theory that's why sometimes it is called HANS PURE THEORY OF LAW.

Origin of Pure theory of Law

The origin started from AUSTIN. The material condition and the economy of that time was competitive capitalism, it was when the government took a neutral position , not engaging in economy. The notion was the economy need to grow without being interfered by politics. The crisis of positivism at emerged at the end of 19th c and was caused among others by two reasons namely:

i. The rise of Monopoly Capitalism: where the government was involving it self in economy. Within corporations people make their own laws to be followed apart from the king. Hence it was no longer the political superior who make commands and the AUSTIN theory start

Cont..

ii. Development of Marxist principles; who thought that law is an instrument of protecting the ruling class and not a command as said buy AUSTIN. This was also a challenge towards command theory, hence positivism was in a problem.

Apart from the two challenges, there was another school of thought which tried to explain law as a social phenomenon better called the SOCIOLOGICAL SCHOOL. Therefore Hans Kelsen noted that a remedy to cub the problem, to save positivism hence he came up with what called the pure theory of Law.

Therefore Kelsen decided to purify the law. He said other school of thoughts were trying to induce into law other factors like economic, sociological, political and religious factors, to him all these pollutes the law, he said make the law as the law, make it pure. He tried to elaborate positivism to a higher abstraction by ignoring all social factors and purifying the law from all other elements. This theory of law is also called the VIENNA SCHOOL

Cont..

Kelsen borrowed ideas from Emmanuel Kant and David Hume; he said that the study of law is a science and he called it LEGAL SCIENCE.

THE LEGAL SCIENCE

Kelsen said that the subject of jurisprudence is positive law. He was arguing that where other aspects are mixed up with other areas its no longer a legal science, because to him jurisprudence is a study if normative science as opposed to Natural Science.

In natural science the connecting link is the "causality" i.e. the cause and effect relationship. Legal science is the knowledge of norms and norms is the subject matter of legal science and the connecting link is "imputation".

Natural science is based on the principle of "causality" which jurisprudence describes its principle by using the principle of "normativity". He says that in the law of nature **if A is; then B must be**, i.e. in natural science there is the cause and the effect

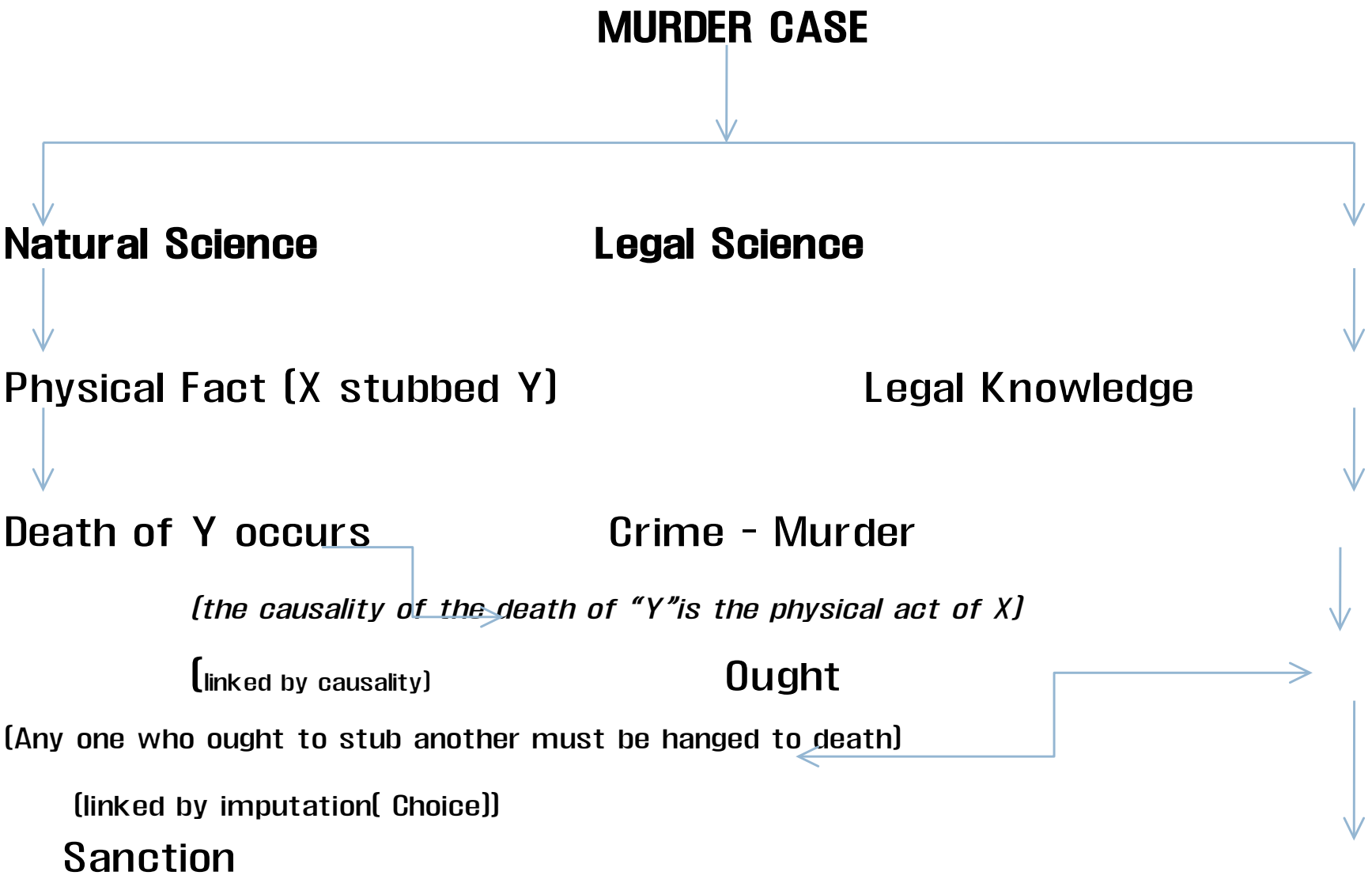
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In legal science, the legal rule is, **if A is; then B ought to be** i.e. when you say B "ought to be" Ought to be is simply an imputation and not causality as in natural science. He says a crime is not a cause of punishment of sanctions but liability is a consequence of a norm. i.e.

The law gives a duty to an individual which duty entails the consequences. Crimes and sanctions are not linked casually but they are linked by imputation in a legal science.

Example:

Cont...


MURDER CASE
Natural Science
Legal Science
Physical Fact (X stubbed Y)
Legal Knowledge
Death of Y occurs
Crime - Murder
(the causality of the death of "Y"is the physical act of X)
(linked by causality)
Ought
(Any one who ought to stub another must be hanged to death)
(linked by imputation(Choice))
Sanction

“OUGHT” VS “IS” In Kelsen Theory

“Ought” to Kelsen is not a moral question but purely logical link between a fact and a consequence.

1. In Natural Law School; the law “is” but they think that it is not good but ought to be in a certain way.
2. The Positivism ; they say that law “is” they don’t want “ought” to them any ought is the link of natural law which is not part of law.
3. Kelsen with pure theory of law; he uses ought as a link. i.e. The law “is” then what ought to happen…? Ought is simply a logical category or li

THE DOCTRINE OF PURE THEORY

Pure theory of Law is a theory of positive law. It is exclusively concerns with the accurate definition of its subject matter. It attempt to answer the question what “is” Law but not the question what “ought” to be the Law. The main aim of this theory is to remove from law any kind of ideological impurities. So he is distinguishing what the Law “is” from the ideological question on

Cont..

The basic propositions on Kelsen's theory:

1. The object of Legal Science is to understand Law in a way that the law works irrespective of its contents.
2. Normative statements are made by human beings, hence to him it is human being who made the law.
3. The only Law is positive law, law is that which is the product of the will of the people, this intend to throw away Natural Law.
4. A valid norm can only be derived from another norm or another law. That means a valid law must have authority from another Law.

NORMS AND THE BASIC NORM (GRUND NORM)

According to Kelsen "norms" are regulations which set forth on how man should behave. Positive law is simply a normative order regulating human conduct in a specific way. He defined law as an aggregate or system of norms. A norm is an ought proposition expressing what ought to be done in a certain conditions.

He tried to distinguish a legal norm and other norms.

He said; a legal norm is created by an act of a human will, but other norms come out of experience. Legal norm can be recognised if it is a part of a legal normative order i.e. there must be some part of a legal order/system in the society- in order for a legal norm to be recognised.

He said it can be recognised through a test of validity i.e. by checking whether it is valid or not. If it is within the legal order it is valid. It must follow within a certain system to be valid. You look its authority to ascertain its validity in the society.

VALIDITY OF LEGAL NORM

He says for norm to be valid there are two requirements:

1) It must be a part of a system of norms.

2) The system of norms in which it belongs must be efficacious i.e. efficacy (efficient system of norms). In the sense that all men and large group behave in accordance with the norms.

He says the validity of norms can not be merely factual. It depends mainly on relations with highest norm in that hierarchy.

QN: What is the highest norm...?

He said that tracing norms to the ultimate source authority it can not be ad-infinitum. There must be some ultimate norm postulated on which other norms rest. This process of tracing norms /authority of norms is called concretization or step and stair theory. It sees the legal system as a pyramidal structure. He says the original norm is called the apex norm i.e. the parent norm /basic norm or the Grundnorm.

GRUND NORM

According to Kelsen

The Grundnorm in an extra legal because it does not rest on other norm (it does not rest on parent).The choice of the grundnorm is not arbitrary, it is chosen by legal science on the principle of efficacy. i.e. in general the people do conduct themselves in conformity with it.

The grund norm is non positive therefore is not the concern of Legal Science. The grund norm is a formal norm and it is very important element in giving unit to a legal system. It also marks the limit of norms of a particular society.

In a normal county the highest positive Law is the constitution. It is the constitution in the material sense. It is essential for the functioning of a legal system in that particular state.

But to Kelsen this is not a grund norm. To him the grund norm is above the constitution. The grund norm is a constitution in a legal logical sense. Other experts called it constitution in a transdental

Cont...

Grundnorm is therefore self independent. It does not only validate the legal order in that system but also it grants efficacy to this system. A legal system is a hierarchy of different norms, it goes up the ladder, the unity of a legal system.

The change of Grundnorm:

He discusses on where and how the grundnorm changes example; where there is a revolution and if the revolution succeeds and the new order becomes efficacious then that new order is valid and a new grund norm will come into existance.

If the revolution fails the old order is valid and the new order is illegal.

The issue of efficiency has been subject to discussions to grundnorm cases. There were number of cases followed the thinking of Kelsen to decide in Revolution situations.

Cont..

1) Asma Jilai vs. Govt of Punjab PLD 1972 Sc 139

2) Begun N.Bhuto vs. Chief of the Army Staff PLD 1977 Sc 657

3) The state vs. Dosso PLD.1958 Sc 533

The case of Dosso had a great influence on other cases which were decided later in deciding cases. These include:

a) Uganda vs. Commissioner of Prisons ex parte Matovu 1966 E.A 514

b) Mazimbamto vs. Lardner Burke (1969) 1 A.C 645

UGANDA VS. EX-PARTE MATOVU [1966] A.C 514.

Up to 1966 Uganda was a federal state The power of the central government was shared also by a district authority Later it occurred a class struggle between petty bourgeoisie headed by Obote and the Aristocratic class was also in power. Obote took over the reign of the government and abolished the constitution on 22nd Apr.1966.At one time Matovu 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.1966Matovu'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.

Issues:

i/. Whether the court has jurisdiction to entertain the matter

cont

The applicant's argument:

The 1966 constitution was valid "in fact" but doubtful whether it was valid in law (de jure).He was challenging the validity of the new constitution

Argument of government: (the respondent) the court was not competing to try the validity of the 1966 constitution. As the judges of the High Court of Uganda they were precluded from trying the matter because they had sworn to uphold the constitution of the nation. That the court had not jurisdiction to inquire into the matter because the making of the constitution is the political matter that is outside the court.

Held: by CJ of Uganda (SIR UDO UDOMA)

i/ . The 1962 constitution having been abolished as a result of victorious revolution no longer existed and therefore did not form part of the law of Uganda

ii/ . The 1962 constitution was deprived of its defacto and dejure

Cont..

Become effective in 15 April 1966. Therefore the 1966 constitution was a valid constitution of Uganda.

iii/. Applying the Kelsens theory of concretization the court held the law which the applicant was challenging was valid.

Begun Nusrat Bhuto V. Chief of the Army Staff PLD (1977)SC 657

-In Bhuto's case the court said; Kelsen theory is also open to serious criticism on the ground that by making effectiveness of the political change as the sole condition or conditions of its legality, it excludes from consideration sociological factors of morality and justice that contribute to the acceptance /effectiveness of the new legal order. It must not be forgotten that the continued validity of the grundnorm has an ethical background in so far as an element of morality is built in it as part of the criterion of its validity.

Cont..

Pof:Shivji- In his book “The Legal Foundations of the Union of Tanganyika and Zanzibar: He says one of the basic criterion ought to be “whether or not the new order has political legitimacy”.

KELSEN AND THE STATE

The elaboration of positivists on the state is not consistency. Austin confused between state and law by mixing the two. To him law was a command of the political superior /sovereign. In this sense one can say that what it meant is that a state is a centralized power.

Hart by passed all together the question of state. In Kelsenian theory the state merges with the legal order i.e. the state fused together with the law. The state is the centralized legal order. He does not distinguish the state and the law i.e. H e did not discuss them separately.

KELSEN AND SANCTION

To him every norm for it to be legal it must have a sanctions. He used a unique word called "DELICT" i. e breach of any norm is a delict whether criminal or civil. No conduct can amount to delict unless a sanction is provided for it.

Kelsen assumed that every provision may create sanction. Eg Law govering will does not have sanction b'se it is at the decretion of

POSITION OF INTERNATIONAL LAW AND PRIMITIVE LAW

It has been argued by many scholars whether international law is a true law.

To Kelsen IL is a real law because it contains all elements of a legal order, it has been in a coercive order just like domestic law. It obligates states to define mutual behavior and provide for sanctions where a state contravenes such order. Sanctions like economic sanctions, war sanctions etc

However according to kelsen I/ L has two weaknesses

1. I/L is primitive because there is no central organ to enforce it as in the case of national laws. The execution of orders in I/L are left in national countries. This weakness is also applicable to primitive norms
2. International law can bind the state only if that state recognize that law and codify it

CRITICSMS

1. Kelsens theory is abstract and it ignores the social origin of law
2. The theory is more restrictive because it focuses more in positive law only unlike other positivists.
3. In Kelsens theory the issue of legitimacy is not given much weight instead weight is given to the issue of validity i.e he does not care the nature of a legal system eg dictatorial apartheid.
4. Kelsens Grundnorm is fictious and it does not have material base, it is a logical thought, he failed to know thet constitution arises according to the material condition of a particular place.
5. In Kelsen's theory the law and the state are merged. He does not want to realise the two that are distinct where the law served the state. Law is an instrument of the state.

SOCIOLOGICAL SCHOOL

What is Sociological Jurisprudence..?

There is no clear answer of what is sociological jurisprudence. There are numerous philosophers wrote but they don't have much in common. Sociological philosophers do view law from the society as opposed to Kelsen who argued that law is a command from a political superior or authority. To them law is a social phenomena. There is no coherent theory characterising the sociological school.

For this reason it is difficult to identify or official philosophy of the sociological school. Arguments within the sociological school border between natural law and positivism. But they agree that law is a social phenomenon as opposed to Kelsen who argued that law is a command from the political superior / authority.

Cont..

SOCIAL ECONOMIC BASIS OF SOCIOLOGICAL JURISPRUDENCE

The rise of sociological jurisprudence was a result of a change from competitive capitalism to monopoly capitalism. This change brought about a crisis in positivism failing to explain what is going on in the society. i.e. positivism failed to account for " what is" and "what is becoming" that was taking place in the society. Competitive capitalism was at 1860-1870.

Monopoly gained ground from 1870-1900, where the state was not involving in economy at competitive capitalist. The rise of monopoly changed the situation and what is called "the becoming".

TREND IN SOCIOLOGICAL SCHOOL

1. The European Trend
2. The American Trend
3. Realism Trend

The European Trend

It is divided into sub trends

1. Social Solidarism
2. Living Law
3. Institutionalism

EMILE DURKHEIM (1858 – 1917)