Ethiopian Justice and Legal Research Institute

Teaching Material
On

JURISPRUDENCE

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COURSE INTRODUCTION

This is an introductory approach aimed mainly at law students who are just embarking on a course in the philosophy of law or jurisprudence. As such, its purpose is to introduce the kinds of argument which have been prominent throughout the history of law, to give a student new to the area the feel for the connection between morality and law, justice and law, role of law in society etc. It, moreover, deals with analyzing and reflecting on the nature of law, source of law, legal institutions, the relation between law and society, etc.

In writing this kind of material, there are no aspirations to a comprehensive treatment of a subject which has generated a vast literature and multiple perspectives. It is concentrated on what is taken to be the hard core of the mainstream tradition, running from the ancient Greeks through early modern philosophy and law to the present, in the belief that a firm grounding in this tradition - from Plato to Dworkin - is an essential preliminary to a wider study of the subject.

The module is presented in two parts, each of which covers one of the main areas in which philosophical analysis has been prominent. Each of the chapters into which these parts are divided is followed by a set of study questions and selections for suggested further discussion issues dealt with in that chapter. The questions can be used in various ways. The main point is to indicate the kind of questions a student should be able to discuss at each stage of the material.

Part I covers crucial points in the history and present state of legal theory, from natural law theory to positivism and the emergence of legal realism. In this part, different theories of law advocated by various school of jurisprudence will be discussed. Part II deals with other fundamental legal principles or ideas, such as enforcement of morality, theory of justice, liberty, and freedom. This connects the crucial areas of legal validity with disputes over the relation between morality and law, the controversial topics of personal privacy and limits of liberty.

In doing so, a wide range of legal thinkers, like Plato, Aristotle, from ancient Greek; Cicero and Seneca from Rome; St. Thomas Aquinas, Bentham, Mill and Austin from middle ages; Kelsen, Fuller, and Holmes from the 20th century; and Hart, Devlin, Berlin, Rawles and Dworkin, from more recent times of legal theory will be examined. This is an exemplary introduction to the subject, complete with study questions to help students focus and deepen their understanding.

COURSE OBJECTIVES

The study of jurisprudence affords an opportunity to stand back a little from the detail of substantive law and to consider the nature, purpose and operation of law as a whole. This course generally focuses on the discussion of main stream legal theories starting from classical natural law theory to the theory of justice and liberty of the 20th century. As such, its objectives are:

- To introduce the kinds of arguments raised in relation to the nature and source of law
- To enable students to understand the nature and function of law.
- To give the student the insight into the connection between legal theory and legal practice.
- To show the relationship between law and other values, such as, morality and justice
- To enable students to reflect and understand what they are expected to do and what their role is within society.

PART ONE

UNIT ONE

GENERAL CONSIDERATIONS

Introduction

Jurisprudence has been serving as a general philosophic approach to students who are expected to understand the nature of law and its basic significance in society. The purpose of this chapter is hence to give students highlights about jurisprudence and the aim of studying the course. This will serve students as a base to understand the higher level of the philosophy which is the subject matter of this module.

Objectives

After reading this introductory chapter, students will able to:

- Understand the concept and role of jurisprudence
- See why we need to study jurisprudence

1.1. What is Jurisprudence

The word comes from the Latin term *juris prudentia,* which means "the study, knowledge, or science of law." This signifies that like any other social study, law can also be studied scientifically or systematically. In modern law jurisprudence is understood as a term that embraces spectrum of questions about the nature and purpose of law and responses made to them.

Jurisprudence has many aspects, with four types being the most common. The most prevalent form of jurisprudence is that it seeks to analyze, explain, classify, and criticize entire bodies of law, ranging from contract to tort to constitutional law. Legal encyclopedias, law reviews, and law school textbooks frequently contain this type of jurisprudential scholarship.

The second type of jurisprudence compares and contrasts law with other fields of knowledge such as literature, economics, religion, and the social sciences. The purpose of this interdisciplinary study is to enlighten each field of knowledge by sharing insights that have proved important to understanding essential features of the comparative disciplines.

The third type of jurisprudence raises fundamental questions about the law itself. These questions seek to reveal the historical, moral, and cultural underpinnings of a particular legal concept. *The Common Law* (1881), written by Oliver Wendell Holmes, Jr., is a well-known example of this type of jurisprudence. It traces the evolution of civil and criminal responsibility from undeveloped societies where liability for injuries was based on subjective notions of revenge, to modern societies where liability is based on objective notions of reasonableness.

The fourth and fastest-growing body of jurisprudence focuses on even more abstract questions, including, what is law? What is its relation to justice and morality? What is the role of a judge? Is a judge more like a legislator who simply decides a case in favor of the most politically preferable outcome? What is justice? What is liberty and freedom?

Our aim here is to treat jurisprudence in this last sense.

1.2. Why we study Jurisprudence

At the practical level, reading and participating in jurisprudential discussions develops the ability to analyze and to think critically and creatively about the law. Such skills are always useful in legal practice, particularly when facing novel questions within the law or when trying to formulate and advocate novel approaches to legal problems. So even those who need a “bottom line” justification for whatever they do should be able to find reason to read legal theory.

At a professional level, jurisprudence is the way lawyers and judges reflect on what they do and what their role is within society. This truth is reflected by the way jurisprudence is

taught as part of a *university* education in the law, where law is considered not merely as a trade to be learned (like carpentry or fixing automobiles) but as an intellectual pursuit. For those who believe that only the reflective life is worth living, and who also spend most of their waking hours working within (or around) the legal system, there are strong reasons to want to think deeply about the nature and function of law, the legal system, and the legal profession.

Finally, for some, jurisprudence is interesting and enjoyable on its own, whatever its other uses and benefits. There will always be some for whom learning is interesting and valuable in itself, even if it does not lead to greater wealth, greater self-awareness, or greater social progress.

1.3. Schools of Jurisprudence

There are many schools of jurisprudence which concentrate on the nature and function of law. For our practical purpose we shall confine ourselves to the treatment of the most important schools. Hence, in this material the following schools shall be discussed briefly.

Natural Law School: the oldest school of jurisprudence, it upholds that beyond, and superior to the law made by man are certain higher principles, the principles of natural law. These principles are immutable and eternal. With regard to the highest matter man-made law should be in accord with the principles of natural law. And to the extent that man-made law conflicts with natural law, it lacks validity: it is not a valid, binding law at all.

***Legal Positivism*:** also called Analytical School of jurisprudence, it holds that there is no higher law than that created by governments, legitimate or self imposing, and that such law must be obeyed, even if it appears unjust or otherwise at odds with the “natural” law. Unlike the natural law theory, this one treats law and other values, such as, morality and religion separately.

Historical School: this school of jurisprudence views law as an evolutionary process and concentrates on the origin and history of the legal system. The law of a nation, like its language, originates in the popular spirit, the common conviction of right, and has already attained a fixed character, peculiar to that people, before the earliest time to which authentic history extends. In this prehistoric period the laws, language, manners and political constitution of a people are inseparably united and they are the particular faculties and tendencies of an individual people bound together by their kindred consciousness of inward necessity.

Sociological School**:** Unlike the Historical School that conceives a nation's law as tied to the primitive consciousness of its people, sociological conception of law locate the law in the present-day institutions of its society. The proponents of sociological jurisprudence seek to view law within a broad social context rather than as an isolated phenomenon distinct from and independent of other means of social control. The sociological questions in jurisprudence are concerned with the actual effects of the law upon the complex of attitudes, behaviour, organization, environment, skills, and powers involved in the maintenance of a particular society. They are also concerned with the practical improvement of the legal system and feel that this can be achieved only if legislation and court adjudications take into account the findings of other branches of learning, particularly the social sciences.

Legal Realism conceives law as judge made and by doing so it puts the court at the center. It contends that positive law cannot be applied in the abstract, rather, judges should take into account the specific circumstances of each case, as well as economic and sociological realities. In other words, the law should not be static, it must adapt to various social and economic realities. This theory emphasizes the role of the judge, that is it emphasizes that law is made not found, and considers judges as the true law makers.

UNIT TWO

CLASSICAL NATURAL LAW THEORY

Introduction

Natural law theory is one of the jurisprudential approaches to law. It generally advocates that some laws are basic and fundamental to human nature and are discoverable by human reason without reference to specific legislative enactments or judicial decisions. The concept of natural law originated in Greece and received its most important formulation in Stoicism. The Stoics believed that the fundamental moral principles that underlie all the legal systems of different nations were reducible to the dictates of natural law. This idea became particularly important in Roman legal theory, which eventually came to recognize a common code regulating the conduct of all peoples and existing alongside the individual codes of specific places and times. Christian philosophers such as St. Thomas Aquinas perpetuated this idea, asserting that natural law was common to all peoples—Christian and non-Christian alike—while adding that revealed law gave Christians an additional guide for their actions. In modern times, the theory of natural law became the chief basis for the development by Hugo Grotius of the theory of international law. Later writers and philosophers continued to consider natural law as the basis of ethics and morality. The influence of natural law theory declined greatly in the 19th century under the impact of Positivism. In the 20th century, however, such thinkers as Lon L. Fuller saw in natural law a necessary intellectual opposition to totalitarian theories.

For practical reasons in this unit we shall confine ourselves to the investigation of the Greeks, Stoics, and the Middle Age Christian Fathers. In the next chapter, where we investigate the downfall of natural law theory, we will also look at Lon L. Fuller in the Revival of Natural Law Theory.

Objectives

After reading this unit students will be able to:

- Understand the notion of natural law
- Explain the classical approaches to natural law theory
- Identify the relation between law and morality, law and justice, and law and religious rules

2.1 The Notion of Natural Law

The Word and Its Significance

In order to grasp some ideas about the notion of the theory, read the following dialogues, in the box, carefully and try to understand the meaning behind it. With little modification, it is taken from a writer on legal theories.

The Dilemma of the Child

Let's suppose that a fair-haired child returns from school one day and says to his father
Child: Mr. Smith (the head master of the school) has made a new rule. No children with fair hair are to get arithmetic lessons. They are to do extra woodwork instead. I think it's stupid,
Father: Wow
Child: After all, we're at school to learn aren't we? How can I do what I'm there for if I get arithmetic?
Father: Well, it seems unfortunate, I agree. But Mr. Smith is the head master. He makes the rules. What he says goes.
Child: But surely, he can't make a rule like that? I mean, it goes against what the school is for. The school governors wouldn't allow it. It can't really be a rule at all, can it?
Father: Um!
Child: Well, I don't think it is a rule. It can't be.
Father: And do you intend to disobey it?
Child: Um!

The views expressed by the child bear a degree of resemblance to those held by one who believes in the doctrine of natural law. The adherent of natural law believes that beyond, and superior to the law made by man are certain higher principles, the principles of natural law.

? What do you think is meant by natural law? What is natural about it?

In dealing with this matter we must explain first that ‘natural law’ is not to be understood as meaning the same as the law of nature – in the sense of laws that govern the physical world. Also distinct must be kept with the notion of a ‘state of nature’, indicating the condition in which man lived, or is by some philosophers supposed to have lived (e.g. Hobbes & Locke), before the birth of ordered society.

The word ‘natural’, in natural law, refers to an idea that provides the foundation of natural law – namely the reason why natural law ought to be obeyed. The idea is this. Man is part of nature. Within nature, man has his own nature. His nature inclines him towards certain ends – to procreate children, to protect his family, to ensure his survival. To seek such ends is natural to him. Those things which assist the achieving of such ends assist the purpose of nature. Thus laws that further the achievement by man of his natural ends assist the achievement of the purpose of nature. Such laws, laws that are in accord with the ultimate purpose of man, constitute natural law. Natural law is thus that which furthers the attainment by men of the ends that nature has made it man’s nature to seek to achieve.

To elaborate it in negative explanation we can also put it in the following way. Those things which impede man attaining his natural ends are contrary to natural law. Thus, if a man-made law obstructs the achievement by man of what has been decreed by nature as his ends, then the law is contrary to natural law.

What does natural law consist of? What are its precepts? Natural law ordains that society should be ordered in such a way as to assist man in fulfilling his purpose. Since violence will impede this fulfillment, violence is contrary to natural law. Since peace assists the fulfillment, man should honor promises, since to dishonor a promise can lead to disharmony or even violence.

Since man’s natural ends are the same for all mankind, and remain the same for all time, it is natural that the principles of natural law are constant. Thus natural law comprises a

body of permanent, eternal truths, truths embodying precepts of universal applicability, part of immutable order of things, unaffected by changing human beliefs or attitudes.

?

Assuming that you are a strong natural law follower would you obey the rules of the school master?

2.2 Ancient Greece: Natural Law as Source of Justice and Virtue

2.2.1. General

***Of political justice some are natural and others legal*…..Aristotle**

Two giants whose legacy still survives in today's world bestride through the philosophy of the ancient world. In addition to others forms of philosophies, they contributed a lot to the classical Hellenistic legal theory. These are Plato and Aristotle. Neither can be described as natural jurisprudent, but in the philosophy of each we see strands that find a place in natural law thinking as it was later to develop. In addition, we have the teacher himself, Socrates, who transmitted some messages about his conception of laws.

2.2.2 Socrates

Socrates was one of the famous Greek philosophers who contributed a lot to the western philosophy. In here we shall see his idea of law as recorded in *Apology* and *Crito,* two different writings written by his pupil Plato. Apology is all about Socrates' defense in court, while Crito is a discourse made between Socrates and his friend Crito in prison.

Socrates was at the age of 70 when he appeared before court to defend himself. He was prosecuted because he was said to be corrupting the youth and second he did not believe in the gods of the state. In Plato's *Apology*, Socrates refuted the accusations made by his opponents. Justifying his teaching of philosophy and his consistency in continuing same work, he importantly said that it was good to obey the law and the order of a commander

so long as they are just. But if the command was illegal or the laws unjust, then no man shall obey the order or the laws. From this argument he had also developed the principle that the command of god is more pious and just and as a result it is above and beyond any other human laws. Hence, it is wise to obey god's command than human laws when they are in conflict. He believed that he was commanded by god to teach people philosophy, to question and convince them whenever he got the chance.

If we investigate both cases in detail we infer two main conclusions. The first principle is that citizens must obey and uphold the positive laws. In the case of the ten generals, Socrates simply upholds the laws. The law prohibited to try accused people together. But the government (assembly) nevertheless ordered him to violate these laws. For Socrates, to follow the order was unjust since it was against the Athenian laws. Thus he preferred to obey the laws to the government. He was sticking to the rule of law. He strictly followed the positive law and disobeyed the action of the officials which is contrary to the written law.

? Find an article from the criminal code that shows that a subordinate should not obey his superior if the order is illegal. Write what you understand in connection to Socrates' view.

The second principle is that we shall obey the law if it is only a just law. Just law, for Socrates, is measured based on the perfect laws of the gods. If the laws are unjust and unholy we shall refuse obedience. In the case of Leon the Salamis, namely his refusal and disobedience of the order to go to arrest Leon of Salamis fall under this conclusion. Under the thirty's dictatorship he was ordered, together with others, to arrest and kill this man just for the sake of taking/stealing his property, and Socrates refused to obey the order since the order by itself was unjust. At this time too there was a government and this government had laws to this effect. Socrates did not say that he refused because they were not legitimate governments. His disobedience was rather based on the idea that arresting Leon of Salamis with intent of putting him to death (just to expropriate his wealth) was characterized as unjust and unholy.

A conflicting, and yet important, idea of law is found in the second writing, *Crito*. He subscribed that he would obey the laws irrespective of their moral values, whether they are just or not. Socrates was unsuccessful in his argument and was sent to prison preceding his death. While in prison, his friend, Crito, visited him and told him that plans were in place to prepare for his escape and journey to another country.

Socrates justified the coercive power of the state laws (positive law) and thereby upholding and respecting the decision of the courts (not to escape from prison) on three grounds. First, on moral grounds, in that it is bad and disgraceful to harm or to do injustice to another. He also argued that to do injustice in return for injustice or in other words, to return harm for harm is also bad. Thus, to do wrong to others or to return harm for harm is both equally bad and dishonorable. Although the judges sentence him to death, by escaping from prison he harms the laws since Socrates' refusal would send a message of disobedience to the laws, which truly would harm them. Other people may follow his examples, since he is still very influential, and disobeying the laws, and as a result, the laws would become useless. If the laws try to destroy Socrates it would not be just for Socrates to try to destroy them in return. This will be immoral and unjust. Secondly, Socrates analogized the power and status of laws to one's parents, for it was the laws which administer the marriage of his family, ordered his family about his upbringing and education etc. It is a great evil to make wrong to parents whatever they do to you. Similarly citizens are not justified to back-harm their country whatever harm the country caused to them. Thirdly, there was a tacit agreement between Socrates (and other citizens for that matter) and the state of Athens, stipulating that Socrates either obey the laws or, when he sees the laws unjust, he should persuade the city to act in a more suitable fashion. If he was not pleased with the laws he could move to other countries. This means his living in the country shows that he agreed to be governed by the law of the country.

He summarizes his argument by stating his alternatives and the consequences of each alternative as brought out by his argument: if he chooses to obey the court, he will die wronged (as victim of injustice) not by the laws but by men, but if he escapes, he will

disgracefully return injustice for injustice and harm for harm, he will be breaking the contracts and agreements he made with the laws, and he will be doing harm; to those he must least harm, his friends, his country, and the laws. Thus, he thinks that if he obeys the court he will be suffering but not doing injustice, whereas if he escapes he will be doing injustice and harm.

? Do you find any contradiction in both of Socrates' arguments?

2.2.3. Plato

In the restless intellectual and political climate of 5th-century Athens, Plato was concerned to redefine the nature of justice by relating it to something far more permanent and absolute than the *nomos* (man-made laws) of the city-state. He assigned "reality" to the unchanging archetypal forms—i.e., the ideas—of things rather than to the ephemeral phenomena as superficially and confusedly perceived by individual men unenlightened by philosophy. He says that what for us are abstractions, example redness, square-ness, roundness, sharpness, honor, courage, beauty, equality, justice each had a permanent and unvarying existence, an existence that is independent of the fact that certain things or actions in the world as we know them reflect the qualities themselves. This is Plato's doctrine of 'forms'.

Plato's forms are transcendental archetypes that exist independently of the physical world, independently of the human mind, independently of space and time. Thus there is a 'form' of beauty, of which things on earth which have the quality of beauty are mere manifestations. Qualities such as justice and truth exist in their own form, too. All men this earth can do is to attempt to reproduce them. To reproduce these qualities, men must seek knowledge of the eternal truths, a quest that is man's finest endeavor (for your information, this school of thought is known as idealism). It refers to the notion that the *idea* of a thing has its own existence. The chair you are sitting on may be of wood, metal, plastic or something of a mixture. It is not perfect in design or quality. The perfect chair with all essential qualities cannot be found on this earth; it exists only in the transcendental world, a world beyond time and space.)

Since for Plato the forms of ‘goodness’, ‘virtue’, ‘honesty’ were eternal and immutable, they constituted moral principles of universal and timeless validity existing above and unaffected by changing human attitudes or beliefs, moral principles by reference to which all human actions and views must be judged.

2.2.4. Aristotle

Aristotle did not subscribe to Plato's theory of forms. But there was an element in his thinking that contributed a further strand to what was to become part of natural law doctrine. Aristotle was concerned with the world as he saw it existing around him (as opposed to Plato, Aristotle was materialist). He was a zoologist, in particular a marine zoologist, with an acute observation of the minutest details of organisms observable by the human eye. From his studies of the natural world he became conscious of the fact that natural phenomena were in a state of perpetual change – the child growing into an adult; the seed growing into a plant. There was always progress. Throughout the living world, Aristotle saw that, in the birth and growth of animals and plants, the earlier stages always lead up to a final development. Yet we should not think of this end as a termination. The process is constant. Thus, for Aristotle the universe is dynamic, always engaged in the process of becoming, of moving towards an end immanent within itself from the start.

For Aristotle, the highest form of human society lay in the Greek city state (a *polis*). It was the *Polis* that provided the society in which man could achieve his culminating fulfillment. Thus from the start of organized human society, from its most primitive forms, through the various stages of agricultural existence to the building of cities, and the creating of political societies such as that at Athens, mankind was progressing towards that which had been its end from the beginning. In his book, *politics*, Aristotle says, ‘Because it is the completion of associations existing by nature, every polis exists by nature, having itself the same quality as the earlier associations from which it grew. It is the end to which those associations move and the ‘nature’ of things consists in their end or consummation; what each thing is when its growth is completed, we call the nature of that thing, whether it be a man or a horse or a family.’

In his discussion on the nature of justice, Aristotle says:

> *There are two sorts of political justice, one natural and the other legal. The natural is that which has the same validity everywhere (as fire burns both in Greek and in Persia are the same) and does not depend upon acceptance; the legal is that which in the first place can take one form or another indifferently, but which once laid down, is decisive: e.g. that the ransom for a prisoner of war is one mina (Greece money), or that a goat shall be sacrificed to the gods and not two sheep…. Some hold the view that all regulations are of this kind. They can see that notions of justice are variable. But this contention is not true as stated, although it is true in a sense. Among the gods, indeed, justice presumably never changes at all; but in our world, although there is such a thing as natural law, everything is subject to change; but still some things are so by nature and some are not, and it is easy to see what sort of things, among those that admit of being otherwise, is so by nature and what is not, but is legal and conventional…. Rules of justice established by convention and on the ground of expediency may be compared to standard measures; because the measure used in the wine and corn trades are not everywhere equal: they are larger in the wholesale and smaller in the retail trade. Similarly laws that are not natural but man-made are not the same everywhere, because forms of government are not the same either; but everywhere there is only one natural form of government, namely that which is best.*

Speaking otherwise, Aristotle has declared that we have two types of laws. One is natural law, and the other man-made. The latter kind of law is not the same everywhere for the custom and behavior of people of different nations and tribes is different. But with regard to the former one, it is one and same for it is immutable and beyond human touch. Moreover, the state made law is usually binding and decisive compared to the natural law. In case of conflict between the two, Aristotle tells us to resort to the natural law:

> *If the written law tells against our case, clearly we must appeal to universal law, and insist on a greater equity and justice.…… We must urge that the principle of equity are permanent and changeless, and that the universal law does not change either, for it is the law of nature, whereas written laws often do change.*

This kind of thinking makes, hence, Aristotle one of the natural law thinkers. It seems that Aristotle accepted that there is a natural and universal right and wrong, apart from any human ordinance or convention. For Aristotle and the men of Greek of his time, the existence of higher laws (natural law) is as sure enough as the existence of higher beings, which they called ‘gods.’

Thus in Plato's and Aristotle's early notion of philosophy of *a law higher than that of men*, we can see strands that were later, with other elements, to form the full doctrine of natural law.

2.3 The Stoics: Natural Law as a Reason

2.3.1 Introduction

> *Law is the highest reason, implanted in nature, which commands what ought to be done and forbids the opposite. True law is right reason in agreement with nature. To curtail this law is unholy, to amend it illicit, to repeal it impossible.* Cicero

The next steps in the history of the doctrine are to be found in the writings of certain of the authors who form what has come to be termed the Stoic School of Philosophy. Stoicism existed from the life time of its founder Zeno (during the 3rd century BC) down to about the fourth century AD. It was thus the prevailing philosophy during the greater part of the Roman Republic and Empire. The contribution of the Stoic School of Philosophy may be represented by the writings of Cicero, Seneca, and the Emperor Marcus Aurelius.

Three important ideas of modern law and legal theory were derived mainly from Stoic philosophy:

- The conception of a universal law for all mankind under which all men are equal;
- The idea of a method of deriving universal principles of law from the observation of the laws of different people;
- And the conception of a law binding upon all states, which has got today the name “international law”.

But what does this philosophy say in general? We recommend that you read attachment A annexed at the end of this material before looking into this sub-section.

2.3.2. Cicero

Cicero was a Roman orator, politician, lawyer and a Stoic philosopher. In his book *On Duties* he discusses "true law", transcending the enactments and customs of particular nations, and identified with "right reason", which is immanent in nature, in the universe and in the minds of the wisest men. The following well known passage illustrates the idea of law of Stoic philosophy:

> *Law is the highest reason, implanted in nature, which commands what ought to be done and forbids the opposite. True law is right reason in agreement with nature. To curtail this law is unholy, to amend it illicit, to repeal it impossible..the Stoic's ideal is to live consistently with nature. Throughout our lives we ought invariably to aim at morally right course of action.*

The universality and immutability of natural law or "true" law was indicated in another passage:

> *True law is right reason in agreement with nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands, and averts from wrong doing by its prohibition. And it does not lay its commands or prohibitions upon good men in vain, though neither have any effect upon the wicked.*

He moreover declares:

> *Indeed this idea – that one must not injure anybody else for one's profit – is not only natural law, an international valid principle: the same idea is also incorporated in the statutes which individual communities have framed for their national purposes. The whole point and intention of these statutes is that one citizen shall live safely with another.*
>
> *….the finest and noblest characters prefer a life of dedication to a life of self-indulgence; and one may conclude that such men conform with nature and are therefore incapable of doing harm to their fellow men.*
>
> *For there is an ideal of human goodness: nature itself has stored and wrapped this up inside our minds. Unfold this ideal, and you will straightaway identify the good man as the person who helps everybody he can, and, unless wrongfully provoked, harms none*

For Cicero, law is the highest product of the human mind which is in tune with the elemental force of nature. The validity of human law depends upon its harmony with these forces. It was the blending of the ideas of reason and law with *nature* that contrived to suggest that, while it was possible for rulers to ignore the constraints of natural law, such actions ran against the grain of the natural order of things in a way that was unholy and blasphemous.

2.3.3. Seneca

In his letter Seneca, another Roman lawyer and Stoic philosopher, wrote:

Man is a sprit and his ultimate goal is the perfection of his reason in that sprit. Because man is a rational animal, his ideal state is realized when he has fulfilled the purpose for which he was born. And what is it that reason demands of him? Something very easy – that he live in accordance with his own nature. Yet this is turned into something difficult by the madness that is universal among men; we push one another into vices. And how can people be called back to spiritual well-being when no one is trying to hold them back and the crowd is urging them on?

What has the philosopher investigated? What has the philosopher brought to light? In the first place, truth and nature; and secondly, a rule of life, in which he has brought life into line with things universal.

One can observe that Seneca has also emphasized the need for rational approach, i.e. that man shall live in harmony with nature. If we were to single out the principal contribution of Stoic's thinking to the evolution of the doctrine of natural law, it would perhaps be its universality. Stoics saw mankind as one brotherhood. They looked outside the city state, outside the Empire and saw the whole of human race as being bound and united by the brotherly love that the precept of natural law enjoined.

One can also see that the Stoics added flesh to the bones of natural law. Tolerance, forgiveness, compassion, fortitude, uprightness, sincerity, honesty – these were the qualities that the Stoics believed that natural law required of men. These were the qualities that man should aspire for in order that he might live in accordance with what nature had ordained. These qualities in many ways are the bases for the Roman law and thereby the modern western law.

Based upon these natural law qualities, historically, compared to the Greeks, the Stoics contributed much to the practical development of the Roman law. Greek law scarcely survived as a system, because it never developed a class of legal specialists or abandoned to its lay administrators or its popular tribunals of grotesque size. Roman law, on the other hand, developed through the efforts of expert *jurisconsults* (learned lawyers) and *praetors* (judges) into a permanent heritage of Western society. By its adoption into works such as Cicero's *De republica* as well as other works of the great *jurisconsults*,

Stoic speculation concerning reason and nature was brought onto the level of precepts for concrete problem solving. The crude, tribal *jus civile* ("civil law") of the Romans was thus transformed into a natural-law-based *jus gentium* (law applying to all people), a set of principles common to all nations and appropriate, therefore, equally applied for foreigners as well as the Romans.

2.4. Christianity: Natural Law as Morality

2.4.1 Introduction

The parallels between the tenets of Stoicism and the teaching of Christ come readily to mind. But Christianity offered an advantage not made available by the Stoicism or any other religion of that time competing to fill the place left by the decline of the old state religion of Rome. Stoicism taught that men should love one another, since this was in accord with nature and thus was man's duty. Christianity taught – 'Love one another', and it added 'and if you do, there is a reward – life everlasting.

The teaching of Christ provided a code of conduct, but not a comprehensive theology. The creation of the latter was the accomplishment of the fathers of the church, principally St. Augustine and St. Thomas Aquinas. Having been born into the Roman world it was natural that these men should reflect in their writings aspects of the philosophies of Greece and Rome that could be enlisted to give intellectual support to the teachings of the new church.

2.4.2 St. Augustine of Hippo

The incorporation of natural law into Christian theology was accomplished at a later period, but when St. Augustine wrote 'if a law be unjust, it is no law at all'; we can see foreshadowed what was to come later: the idea that if a man-made law conflicts with natural law, it is invalid. In the eye of Christian theologists, natural law is anterior in time and superior in hierarchy to the man-made law.

In his greatest work, *De Civitate Dei* (the City of God), St. Augustine portrayed the human condition as torn between the attraction of good and evil, with the perfect state

being one voluntary submission to the will of God. The will of God is then seen as the highest law, eternal law, for all people, playing something of Stoic cosmic reason. Positive law (state created law) is for St. Augustine relegated to an even less honored place. Indeed, Augustine makes it mandatory for a positive law to rely on the eternal law. *Nothing which is just is to be found in positive law which has not been derived from eternal law*. Thus an unjust law is one which does not concord with the higher (divine) reason and which is thus conceived, or directed, for an improper law. A positive law so devised might, of course, be coercively enforced but could not be argued to have any moral force. The argument, in short, relates to the moral obligation attaching to law rather than the ability of a State actually to do wrong through its laws.

Hence, in the eye of St. Augustine, to the extent that man-made law ran counter to natural law, it was null and void, and unjust governments were equated with criminal gangs.

2.4.3 St. Thomas Aquinas

It was in the work of St. Thomas Aquinas, principally in the *Summa Theologica*, that the final and most complete synthesis of the classic doctrine of natural law and doctrine of the Christian church was achieved. Aquinas proposed that the essential quality setting human beings apart from the rest of the animal world was that of reason. In a development of Aristotle's theory, Aquinas asserts that all men naturally possess an internalized divine spark of reason, which serves as the guide to an autonomous and responsible decision making process.

Aquinas distinguishes four kinds of laws: (1) Eternal Law; (2) Divine Law; (3) Natural Law; and (4) Human Law

A. **Eternal Law:** is comprised of those laws that govern the nature of an eternal universe; as one writer observed, one can "think of eternal law as comprising all those scientific (physical, chemical, biological, psychological, etc.) ‘laws’ by which the universe is ordered."
B. **Divine Law**: is concerned with those standards that must be satisfied by a human being to achieve eternal salvation. One cannot discover divine law by natural reason alone; the precepts of divine law are disclosed only through divine

revelation. For example, it is revealed to man by the Holy Scriptures that Jesus Christ is the son of god, who was sent into the world; that, by his death on the cross, a means of salivation should be offered to all those who confess their sins and acknowledge Christ as their savior; further that it is God's will that on six days should man labor, and on the seventh, rest. No man can attain such knowledge without revelation. One cannot know such things using his reasoning power.

C. **Natural Law**: is comprised of those precepts of the eternal law that govern the behavior of beings possessing reason and free will. On the level that we share with all substances, the Natural Law commands that we preserve ourselves in being. Therefore, one of the most basic precepts of the Natural Law is not to commit suicide. On the level we share with all living things, the Natural Law commands that we take care of our life, and transmit that life to the next generation. Thus, almost as basic as the preservation of our lives, the Natural Law commands us to rear and care for offspring. On the level that is most specific to humans, the fulfillment of the Natural Law consists in the exercise of those activities that are unique of humans, i.e. knowledge and love, and in a state that is also natural to human persons, i.e. society. The Natural Law, thus, commands us to develop our rational and moral capacities by growing in the virtues of intellect (prudence, art, and science) and will (justice, courage, temperance). Natural law also commands those things that make for the harmonious functioning of society ("Thou shalt not kill," "Thou shalt not steal.") Human nature also shows that each of us have a destiny beyond this world, too. Man's infinite capacity to know and love shows that he is destined to know and love an infinite being, God.

The first precept of the natural law, according to Aquinas, is the somewhat vacuous imperative to do good and avoid evil. Here it is worth noting that Aquinas holds a natural law theory of morality: what is good and evil, according to Aquinas, is derived from the rational nature of human beings. Good and evil are thus both objective and universal.

D. Human Law: is a dictate of reason from the ruler for the community he rules. This dictate of reason is first and foremost within the reason or intellect of the ruler. It is the idea of what should be done to insure the well ordered functioning of whatever community the ruler has care for. (It is a fundamental tenet of Aquinas' political theory that rulers rule for the sake of the governed, i.e. for the good and well-being of those subject to the ruler.)

But Aquinas is also a natural law legal theorist. In his view, a human law (i.e., that which is promulgated by human beings) is valid only insofar as its content conforms to the content of the natural law. As Aquinas puts the point:

> *[E]very human law has just so much of the nature of law as is derived from the law of nature. But if in any point it deflects from the law of nature, it is no longer a law but a perversion of law.*

This, in effect, paraphrases the earlier Augustine's famous remark, *an unjust law is really no law at all*.

2.5 Nature of Man and Justification for Law

The medieval power of the church dissolved with the coming of Renaissance and political writers such Hobbes, Locke and Rousseau. These theorists all sought to base a view of the purpose and authority of law upon a social contract, a covenant that underlines the surrender of the powers of the individual to a state organization, the 'Sovereign'.

2.5.1 Thomas Hobbes

Thomas Hobbes, an original thinker and political philosopher, has supported a strong and absolute sovereign that can maintain peace and security. He argued that the proper purpose of government and law was primarily to guarantee peace and order. In his work, *Leviathan,* Hobbes postulates a natural condition of mankind in order to explain the origin and nature of the state and to show the justifications behind a strong sovereign power. He imagined a natural condition of man, termed as *State of Nature,* in which there was no law and government. The outstanding character of the state of nature is War, where every man is enemy to every man. Men compete with each other for the same

thing: food, clothing, and so on, but as they have a rough equality of power to attain their ends, the inevitable result is war and conflict. Furthermore, men are vainglorious creatures who crave for honor and felicity and this makes matters worse. The result is that man's life in the sate of nature is "solitary, poor, nasty, brutish and short."

In the state of nature each man possesses the natural right to do whatever he thinks fit to preserve his life. He is bound also by the law of nature which forbids a man to do anything which doesn't favor the preservation of his life. By the law of nature he discovers through his reason, man should attempt to find peace and he can only do so if he renounces his natural right to all things. It is the equal natural rights of all men which make life in the state of nature so insecure. This mean, in the state of nature men are roughly equal physically (an ability to kill each other), intellectually (mainly experience), and in right. Thus, he declared that man's only hope to escape from the natural conditions is to make social contract and enter in to a commonwealth (civil society). To do this they must transfer all their natural rights, except few, to one absolute sovereign (king, Parliament).

Hobbes argued that an unlimited governmental authority is the only alternative to harness the wild and evil nature of mankind. For man by nature is neither social nor political, civil society is the artificial deterrent to man's basically antisocial tendencies. He goes on to declare that whatever the sovereign does can not injure his subjects because it is done with the authority of all. He cannot, therefore, be accused of injustice. Since the sovereign is the ultimate law maker, he is above all laws and thus he cannot be said illegal and unjust. Thus, we can see in the philosophy of Hobbes both natural law and positivist ideas. As we shall see it later, Bentham and Austin of the positivist school of jurisprudence have been influenced by this mode of thinking.

2.5.2 John Locke

Locke is also another English, natural right political philosopher who depicted the nature of man and the state of nature in a different way. Unlike Hobbes, who believes that man by nature is evil and self oriented, Locke, in his book, *The Second Treatise of Civil*

Government, started his argument from an opposite premise that claims the human decency. The state of nature is, for Locke, a state of perfect freedom and equality. Unlike the Hobbessian picture of man's natural condition, which was a state of perpetual warfare, Locke depicts the state of nature as one of peace in which most men respect the lives, liberties, and estates of others. These are the natural rights of man, given to him by the law of nature which commands that "no one ought to harm in his life, health, liberty, and possession". Hobbes has declared that men were bound by no moral obligation other than their own self-interest. Locke, on the other hand, argued that the law of nature was a moral precept absolutely binding upon man at all times.

Of the natural rights of man, none is regarded by Locke as more important than the right to property. Such is its preeminence that at times Locke implies that the preservation of private property is the main reason for entering into political society. According to Locke, originally men possessed the earth and its fruits and the beasts (animals) therein in common. Private property is derived from the mixing of a person's labour with land or anything that was originally communally owned. As one's person (labour of the body or intellect) is indisputably one's own, anything t with which it is blended becomes equally one's own property. At first, property appropriated in this way was limited to the amount a person could use. Anything taken beyond that from the common stock belongs to others. Moreover, the right of appropriation was limited by the necessity of leaving "enough and as good" for others. However, Locke said, the introduction of money transcended these limitations, and thereby enables men to accumulate property beyond their immediate needs without spoilage.

In the state of nature men have a further right, which is to judge and punish transgressors of the natural law. As there is no formal authority to enforce the natural law and protect him, each man must protect his own life, liberty, and property. Each man has also a right to enforce the law by punishing the wrong doers. This procedure entails several obvious disadvantages; men become "judges in their own cases" and hence their reaction to crimes against themselves, relatives or friends likely to be extreme and inconsistent. The remedy to protect this problem is to enter into social contract and establish a government.

Although Locke admits that the establishment of government is the remedy for the inconveniences of the state of nature, he points out that the arbitrary government of an absolute monarchy is more intolerable than the natural state. If government is to be set up to improve man's natural condition, it must be based upon the consent of the governed.

To setup a government the people as a political entity must first be established by a social contract. Each individual contracts with others to form a political community by agreeing to transfer, to the community as a whole, his rights to execute the law of nature. The agreement also involves obedience to the majority will which is taken to represent the whole community. Such a contract is the only kind which will eventually produce lawful government.

Having established the state, men's first task is to erect the law making body that is the supreme power of the commonwealth. Members will be elected from among the people. Then an organ to execute this laws will also be established. This government which is established on trust should not betray this trust. It shall guarantee the protection of the natural rights to life, liberty, and possessions of citizens otherwise the people will have the right to revolt.

2.6 Kelsen's Criticism on Natural Law Theory

A. Natural law confuses value and reality

Natural law, he says, obliterates the essential difference between the scientific laws of nature, the rule by which the science of nature describes its objects, and the rule of ethics, or morality. We may describe certain behaviors that are in conformity with a pre-existing standard as a good, right, or correct and behavior that are not in conformity with the norm as wrong, or incorrect. But these are value judgments. Such value judgments may be expressed by saying that a person ought or ought not to behave as he does. But, and this is the heart of Kelsen's attack:

> *Value is not immanent in natural reality. Hence value cannot be deduced from reality. It does not follow from the fact that something is, that is ought to be or to*

be done, or that is ought not to be or to be done. The fact that in reality big fish swallow small fish does not imply that the behavior of the fish is good or bad. There is no logical inference from the 'is' to the 'ought', from natural reality to moral or legal value.

The content of human laws, Kelsen explains, depends on the purpose of the laws, what the laws are designed to achieve. And what they are designed to achieve depends on the kind of society that the law-making authority wishes to see exist. A decision about this entails a value judgment. Value here may conflict, for example, between personal freedom and social security. On such on issue a decision has to be made: which of the two is to be preferred. This question cannot be answered in the same way as the question whether iron is heavier than water, or water heavier than wood. The question as to which of two conflicting values is to be preferred can only be decided emotionally, according to the feeling or wishes of the whoever makes the decision. So, what is law is what is decided to be law by the law-maker, not some other thing, ought.

B. Good/Bad contradiction

In a second attack on natural law, Kelsen found out another flaw. Natural lawyers justify positive law (man-made or human law) on the ground that these are needed because of man's badness. At the same time their doctrine requires an assumption that man is good, because it is from human nature that the principle of natural law are to be deducted. Thus natural lawyers entangle themselves in a contradiction.

C. Insincerity

Next Kelsen criticizes natural lawyers on the ground of their insincerity: they fail to carry their doctrine to its logical conclusion. According to their doctrine, if positive law conflicts with natural law, it is void. But do they, Kelsen asks, abide by the consequences of this test? Where a law of the state conflicts with natural law do natural lawyers in fact say that a citizen should disobey it? If the answer is in the negative (he examines a lot of natural lawyers most of whom prefer silence), then as Austin once said that natural law is 'nothing but a phrase'.

D. Absolute values and Relative values

Is value absolute or relative? This means what is right and wrong? Is it one and an absolute one, or relative with civilizations, religions, and a different period of time? This is as old as European philosophy. That ethical judgments and values are relative was the tenet of Greek philosophers known as Sophists. For them there can be belief, but not knowledge, in the sense of knowledge of absolute truth. All knowledge is relative to the person seeking it. Sophists pointed out that customs and standards of behavior earlier accepted as absolute and universal, and of divine institution, were, in fact local and relative. Habits abhorrent to one society and time may be accepted as normal elsewhere. The view of the Sophists was reflected by Democritus: '….we know nothing, for truth is in the depth, and either truth does not exist or it is hidden from us.' The notion of 'truth' and 'knowledge' are thus illusions. What *seems* to each man, *is* as far as he is concerned. Reality exists only in relation to our own feelings and convictions. Kelsen summarizes, 'there is one nature but we have different systems of law; different beliefs of goodness and badness.'

Summary

The adherent of natural law believes that beyond, and superior to, the law made by man are certain higher principles, the principles of natural law. These principles are immutable and eternal. Man-made laws may vary from one community to another with respect to matters of everyday importance (e.g. the sides of the road on which citizens are required to drive) but with regard to the highest matters, man-made law should be in accord with the principles of natural law. And to the extent that man-made law conflicts with natural law, it lacks validity: it is not a valid, binding law at all. Natural law is, as H L A Hart once said, 'the theory that there are certain principles of human conduct, awaiting discovery by human reason, with which man-made law must conform if it is to be valid.'

To sum it up, then, we can say that natural law:

- is not made by human beings;
- is based on the structure of reality itself;
- is the same for all human beings and at all times;
- is an unchanging rule or pattern which is there for human beings to discover;
- is the naturally knowable moral law;
- is a means by which human beings can rationally guide themselves to their good.

By doing so, natural law theorists blended morality and law. There is no clear difference between law and morality, law and justice etc. They claim that every human law shall have moral background. This is because morality is one expression of natural law, and at any time man-made law (except few) shall fit to the principle of morality and thereby to natural law principles.

Questions for Discussion

1. Name some of the ancient natural law philosophers.
2. Discuss the difference between Plato's and Aristotle's approach.
3. Do you see any contradiction in Socrates' idea of law as presented in *Apology* and *Crito*?
4. What is the similarity and difference between the Greek and the Stoic natural law philosophy?
5. How many laws do we have in St. Aquinas approach? Which is relevant for this discussion?
6. When the natural law theorist teachs that we should resort or appeal to natural law in case of contradiction between natural law and state law, do you think it is practical?
7. Assume you are a judge, and one day a man applies to the court for the court to give him permission to change his sex, to change himself to a woman. That you can't find any law that allow or prohibit this practice in our laws it becomes your responsibility either to allow or forbid. What would be your decision? Why? On whatgrounds?
8. Give two examples of law (from the Penal or Civil Code) which in your opinion fit to principle of natural law. Why?
9. Give two other provisions, from any one or both codes, which can be considered contrary to natural law principle. Use morality and justice as a test

UNIT THREE

THE REVIVAL OF NATURAL LAW

Introduction

During the nineteenth century natural Law was dominated and overshadowed by the positivist school of thought. However, the massive human delinquencies by the Nazis during the Second World War and the emergence of totalitarian States and dictators stimulate in the 20th c the rethinking of natural law theory. Jurists raised questions whether positive law is adequate enough to protect mankind. Besides to others, Lon L. Fuller's theory is the main theory in this camp. Fuller's theory is known as 'procedural naturalism' that sets out the minimum requirements for a recognizable 'legal system'. The basis for this analysis was the perceived weakness of law in the Third Reich and the extent to which it could realistically have been considered to have been 'law' in any meaningful sense. By doing so Fuller wanted to show a point about the nature and function of a legal system. His system is based on the procedural aspect of law than its substantive one. We will begin by his story in a narrative form. Beside to this we shall also to briefly see John Finnis' *Natural Law and Natural Rights* as another concept of modern natural law theory.

Objectives

After studying this chapter students will able to:

- Know the reasons for the revival of natural law theory in the 20th century
- Explain the procedural natural law of Fuller
- Show Fuller's inner moralities of law
- Understand the theories of Finnis
- Demonstrate the difference between Finnis and other classical natural lawyers
- To discuss the features of the inner moralities of law

3.1. Procedural Natural Law: Lon L. Fuller

3.1.1 The Story

The pivot or at least the common starting-point in the beginning was the attitude taken by Gustav Radbruch (German Professor of law) to the legality of laws passed during the Nazi era in Germany. Radbruch had originally been positivist, holding that resistance to law was a matter for personal conscience, the validity of a law depends in no way on its content. However, the atrocities of the Nazi regime compelled him to think again. He noted the way in which obedience to a posited law by the legal profession had assisted the perpetration of the horrors of the Nazi regime, and reached the conclusion that no law could be regarded as valid if it contravened with certain basic principles of morality.

After the war it was this thinking that was followed in the trials of those responsible for war crimes, or who had acted as informers for the former regime. In 1949 a woman was convicted based on this principle. She denounced her husband and told authorities because he insulted Hitler. The woman in defense claimed that her action had not been illegal since her husband's conduct had contravened a law prohibiting the making of statements against the government. The court found that the Nazi statute, being 'contrary to the sound conscience and sense of justice of all decent human beings', did not have a legality that could support the woman's defense, and she was found guilty. The case thus illustrated a conflict between positivism and natural law, the latter triumphing. The principle adopted in the decision was followed in many latter cases.

3.1.2 Morality of Aspiration and of Duty

Fuller considered that debate upon the morality of law had become confused in part through a failure adequately to distinguish between two levels of morality which he defined as moralities of 'aspiration' and of 'duty'. Fuller states the distinction between the two moralities in terms of the level of the demand imposed:

> *The morality of aspiration…is the morality of the Good Life, of excellence, of the fullest realization of human powers…Where the morality of aspiration starts at*

> *the top of human achievement, the morality of duty starts at the bottom. It lays down the basic rules without which an ordered society is impossible, or without which an ordered society directed toward certain specific goals must fail of its mark.*

The essential difference is indicated by Fuller's choice of terms. The morality of 'aspiration' is a goal of excellence, or even perfection, closely related as Fuller points out, to the platonic ideal. It is in a sense a maximum goal. The morality of 'duty' on the other hand is a minimum standard which must be attained before the enterprise can be recognized to have the identity which it claims at all. One may aspire to excellence but the standard of 'duty' is the minimum required for viable social order so that failure to achieve it is not merely, in some sense or to some degree, a lapse but is actually a wrong.

Fuller contends that the division between these two moralities is not separating polar extremes, but a point upon a graduated scale. Thus:

> *….we may conveniently imagine a…scale…which begins …with the most obvious demand of social living and extends upwards to the highest reaches of human aspiration. Somewhere along this scale there is an invisible pointer that marks the dividing line where the pressure of duty leaves off and the challenge of excellence begins.*

Fuller argues that, wherever the pointer might be fixed, the appropriate standard of evaluation in the analysis of law, in terms of its claim to be 'law', is one of 'duty' rather than 'aspiration'. This relates partly to a view of the basic function of law. It is implicit in Fuller's analysis that it is not the business of law to prescribe for excellence but rather to ensure the minimum baseline from which development towards excellence might moved.

To express the point in somewhat different terms, law cannot make people 'good' but rather establish a base for the inhibition of 'badness' from which a good life may develop. This is rather minimalist moral analysis of the limits of the moral questions which may be asked about law. Beyond the establishment of the base for a viable society, it does not seem unreasonable to suggest that law may also facilitate, or hinder, aspiration towards higher social conditions, even accepting the validity of the distinction between 'aspiration' and 'duty'. This indeed figures prominently amongst the concerns of some of

the classical naturalist theories. The analysis of moral criteria and their relationship with law advanced by Fuller is important in itself but also to a large extent informs the nature of his general legal theory. Ultimately this goes to the root of the question which may be raised upon the claim of the theory fully to fit into a naturalist context.

3.1.3 Fuller's Law Making Criteria

King Rex's Law

Professor Fuller believes that the German courts were correct in their approach. He proposes that a system of government that lacks what he terms 'inner morality of law' cannot constitute a legal system, the system lacking the very characteristic – order – that is a sine qua non of a legal system. In his book, *Morality of Law*, published in 1963, Fuller explains what characteristics a system must show in order to be capable of constituting a legal system. He begins his explanation with an allegory about 'the unhappy reign of a monarch who bore the convenient, but not very imaginative and not very regal sounding name of 'Rex.' King Rex was determined to reform his country's legal system, in which procedures were cumbersome, remedies expensive, the language of the law archaic and the judges sometimes corrupt.

His first step was to repeal all existing laws and to set about replacing these with a new code. But, inexperienced in such matters, he found himself incapable of formulating the general principles necessary to cover specific problems and, disheartened, gave up the attempt.

Instead he announced that in future he would decide all disputes that arose himself. He accordingly heard numerous cases but it became clear that no pattern was to be discerned running through the judgments that he handed down. The confusion that ensued caused the fiasco to be abandoned.

Seeking to learn from his mistakes, Rex undertook a course of study on making generalizations. Having completed the course he resumed the task of providing a code and after much labor produced a lengthy document, and announced that in the future he would be governed by its principles in deciding cases. But, he decreed, the code was to

remain a state secret known only to himself and his scrivener (a scribe or a registrar). The resentment of his subjects was such that the plan had to be abandoned.

Next, Rex resolved that reform should be achieved by his deciding at the beginning of each year all the cases that had arisen during the preceding year. This method would enable him to act with the benefit of hindsight[1]. His ruling would be accompanied by his reasons for making them. But, since his object was to act with the benefit of hindsight, it was to be understood that reasons given for deciding previous cases were not to be regarded as necessarily applying to future cases.

After his subjects (the people) had explained that they needed to know *in advance* the principles according to which decision would be made, Rex realized that he had no choice but to publish a code setting out the rules by which future disputes would be determined and after further labours a new code was published. But when the code was finally published Rex's subjects were dismayed to find that its obscurity was such that no part could be understood either by laymen or lawyers.

To overcome this defect Rex ordered a team of experts to revise the code so as to leave the substance intact but clarify the wording so that the meaning was clear to all. However, when this was accomplished it became evident that the code was a mass of contradictions, each provision being nullified by some other.

Undeterred by this latter failure, Rex ordered that the code should be revised to remove the previous contradictions and that at the same time the penalties for criminal offences should be increased, and the list of offences enlarged. This was done, and it was made, for example, a crime punishable by ten years' imprisonment to cough, sneeze, hiccup, faint or fall down in the presence of the king. Failure to understand, believe in, and correctly profess the doctrine of evolutionary, democratic redemption was made treason.

The near revolution that resulted when the code was published caused Rex to order its withdrawal. Once again a revision was undertaken. The new code was a masterpiece of

[1] Understanding the nature of an event after it has happened

draftsmanship. It was consistent, clear, required nothing that could not reasonably be complied with, and distributed freely. However, by the time that the new code came into operation its provisions had been overtaken by events (became obsolete or lagging behind time). To bring this code into line with current needs, amendments had to be issued daily.

With time the number of amendments began to diminish and public discontent to ease. But before this had happened Rex announced that he was resuming the sole judicial role in the country: all cases would be tried by himself. At first all went well. His decisions indicated the principles that had guided him, and those by which future issues would be determined. At least a coherent body of law seemed to be appearing. But with time, as the volumes of Rex's judgments were published, it became clear that there was no link between Rex's decisions and the provisions of the code.

Leading citizens met to discuss what should be done but before any decision was reached Rex died 'old before his time and deeply disillusioned with his subjects'.

3.1.4 The Inner Morality of Law

Corresponding to the eight defects illustrated by Rex's mistakes Fuller lists eight qualities of excellence. In a legal system the laws must be:

1. Generality (not made ad hoc or for temporary purpose only)
2. Published
3. Prospective, not retroactive
4. Intelligible (clear or understandable)
5. Consistent
6. Capable of being complied with
7. Endure without undue changes
8. Applied in the administration of the society

These qualities make up the 'inner morality of law'. The word 'morality' is misleading. The word carries ethical connotations, yet none are intended. What Fuller refers to is the inner character of a legal system, the characteristics without which a system cannot

properly be regarded as a legal system. The phrase also used by Fuller as ‘fidelity to law’, reflects the notion that a citizen can owe a duty to obey only where the features that make up the inner morality of law are present.

Does Fuller’s view that a system of government that lacks the ‘inner morality of law’ can command no allegiance from a citizen mean that Fuller is to be regarded as a natural lawyer? In one sense Fuller stands outside the natural law camp. Imagine a law that required all children of ten who were left-handed to be executed. To a natural lawyer the law would, being in conflict with a code higher than man-made decrees, be void. Yet the law would not conflict with any of the Fuller requirements: the law would display the inner morality of law. So for Fuller the law would, we must presume, be valid. In this sense Fuller stands as a positivist. And yet the flavor of natural law hangs about him. Consider this passage from his book:

> *To me there is nothing shocking in saying that a dictatorship which clothes itself with a tinsel of legal form can so far depart from the morality of order, from the inner morality of law itself, that it ceases to be a legal system. When a system calling itself law is predicted upon a general disregard by judges of the terms of the laws they purport to enforce, when this system habitually cures its legal irregularities, even the grossest, by retroactive statutes, when it has only to resort to forays of terror in the streets, which no one dares challenge, in order to escape even those scant restraints imposed by the pretence of legality – when all these things have become true of dictatorship, it is not hard for me, at least, to deny to it the name of law.*

Here and elsewhere in his writing we gain the impression that it is not so much the failure to observe the inner morality of law that sticks in Fuller’s throat as the evil that in practice results from this failure. Be that as it may, what we can say is this: under mainstream natural law thinking a law is not a valid law if it conflicts with a higher moral code. For Fuller a law is not valid if it forms part of a purported legal system that fails to comply with a higher code, the code in Fuller’s case, however, being one based not on ethical values, but on values stemming from rationality. In this sense, in that he judges a law’s validity by reference to an outside standard, Fuller’s thinking can fairly be regarded as forming a strand in the natural law tradition.

3.1.5 Criticisms on Fuller

Hart's well-known criticism of Fuller's equally well known eight principles of the 'inner morality' of law is one we choose as a criticism on this point. These principles, which loosely describe requirements of procedural justice, were claimed by Fuller to ensure that a legal system would satisfy the demands of morality, to the extent that a legal system which adhered to all of the principles would explain the all important idea of 'fidelity to law'. In other words, such a legal system would command obedience with moral justification.

Fuller's key idea is that evil aims lack 'logic' and 'coherence' that moral aims have. Thus paying attention to the 'coherence' of the laws ensures their morality. The argument is unfortunate because it does, of course, claim too much. Hart's criticism is that we could, equally, have eight principles of the 'inner morality' of the poisoner's art ('use tasteless, odourless poison'; 'use poisons that are fully eliminated from the victim's body'; etc). Or we can improve further. We can talk of principles of the inner morality of Nazism, for example, or the principles of the inner morality of chess. The point is that the idea of principles in themselves with the attendant explanation at a general level of what is to be achieved (elimination of non-Aryan races) and consistency is insufficient to establish the moral nature of such practices.

Kramer provides another version of Hart's criticism of Fuller. He concludes that, in the end, the idea that Fuller's theory captures a moral 'reciprocity' between rulers and the ruled ultimately fails. The forces of this idea of reciprocity is that however much we can imagine 'evil' legal systems of a highly efficient kind appear to comply with the 'inner morality' of law, evil legal systems built on such lines can still exist.

3.2 Substantive Natural Law: John Finnis

3.2.1 Introduction

Unlike Fuller's concept of procedural natural law the theory of 'natural rights' advanced by John Finnis falls unequivocally into the category of naturalist theory. Finnis has almost single-handedly tried to resurrect the natural law tradition in moral philosophy and law since the mid 1960s. Since the 1980s he has had several more companions, some of whom teach in elite schools in the USA. He tries to offer a "neo-Aquinian" natural law philosophy which does not presuppose a divine being. Instead of speaking, as would Plato, about the Form of the Good, or seeking the Good, he will speak about human desires to pursue "basic *goods*" in life. By focusing attention on *goods* rather than *a single Good*, Finnis skillfully articulates what he calls a theory of moral action for our day. Or, in other words, he seeks a theory of how to live well.

3.2.2 Finnis' Defence of Naturalism

Hart says of Finnis' restatement of natural law that it is of very great merit. By drawing upon the works of natural lawyers such as Aquinas and Aristotle, Finnis attempts to dispose of what he regards as two cardinal misconceptions about the theory.

a. Finnis denies that natural law derives from the objectively determinable patterns of behaviour, but instead asserts it is ascertainable from inward knowledge of innate motivations.
b. Natural law does not entail the view that law is not law if it contradicts morality.

In his book, *Natural Law and Natural Rights,* Finnis seeks to distance his own position and that of his philosophical predecessors from these much-vaunted criticisms. Natural law may be the set of principles of practical reasonableness in ordering human life and human community, but he asserts that they are pre-moral. By this he means that they are not the product of logical deduction, nor are they merely passions verified with reference to something objectively regarded as good. The latter position represents the view of the

empiricists such as Hume, and is that all moral values are subjective whims that have the extra force of validity because others accept them as being good.

To the extent that the empiricists' and also positivists' (see next chapter) criticism of some natural lawyers might be right, he states that there is no inference from fact to value. Therefore the goods that Finnis speaks of are not moral goods, but they are necessary objects of human striving. The peculiar nature of this view is that theses goods are subjective so far as they require no justification from the outside world, but are really objective since all human must assent to their value. Finnis argues that these are the result of innate (inborn) knowledge.

As stated above, there is a strong affinity between Finnis' view of natural law and that of Aquinas. However, the major difference is that, for Finnis, the existence of God is only possible explanation for the comparative order of that he seeks to project on human values, not the necessary reason. Finnis instead states that his goods are self-evident. This is demonstrated by, though not inferred from, the consistency of values that are identified throughout all human societies, such as a respect for human life.

Finnis' process of reasoning is to address any individual with the question, 'X is good, don't you think?' He maintains that it is because of the consistency of these basic values of human nature that one gets one's ability sympathetically, though not uncritically, to see the point of actions, life-styles, characters and cultures that one would not choose for oneself. This argument about consistency of human nature is a compelling one. Often we refer to the writings of Shakespeare whose observations about humanity are as relevant today as they were when he was writing. Finnis can certainly say with justification, that, as a speculative truth, human nature seems remarkably constant.

3.2.3 The Basic Goods of Human Nature

The theory may be briefly stated as follows: all rational agents set out to preserve or obtain things they perceive to be good for themselves. Even the most rational actors,

however, can be mistaken. We need to exercise practical reason (he takes this term from Aristotle) to obtain that good at any one time. Based on the consistent behaviour of human kind he isolates what he calls seven "basic goods" in life, goods that are fundamental, underived from other goods and irreducible to other things that are the motivation and goal of action.

Finnis' seven basic goods are generally the following:

a. Life, meaning not merly existence but also the capacity for development of potential. Within the category of life and its preservation Finnis includes procreation.
b. Knowledge, not only as a means to an end but as a good in its own right which improves life quality.
c. Play, in essence the capacity for recreational experience and enjoyment.
d. Aesthetic experience, in some ways relate to play but not necessarily so, this is broadly a capacity to experience and relate to some perception of beauty.
e. Sociability or friendship, occurring at various levels but commonly accepted as a 'good' aspect of social life. One might add that this 'good' would seem to be an essential aspect of human conducts as social creatures, as put by Aristotle.
f. Practical reasonableness, essentially the capacity to shape one's conduct and attitude according to some 'intelligent and reasonable' thought process.
g. Religion, this is not limited to, although it clearly includes, religion in the formal sense of faith and practice centered upon some sense of the divine. The reference here is to a sense of the responsibility of human beings to some greater order than that of their own individuality.

2.3.4 Evaluation

It may be seen that Finnis' list is not radically different from the list of other philosophers. The difference Finnis asserts is that these goods are not the result of speculative reason. They are not goods because of anything, they are just good. The problem is that they are, according to Finnis, 'primary, indemonstrable and self-evident.'

The student may be tempted to view life as a necessary material pre-condition to all of the others. One cannot play football or study law if s/he is a corpse. However, Finnis, with his emphasis on life as being a good rather than an empirical necessity, forestalls this criticism. The value of life is nothing without the other goods in some measure. Simply, the student must ask him/her self: 'Do I believe that any of these seven goods is intrinsically good?'

Many jurists simply agree or prefer silence in Finnis approach. Micheal Doherty comments about Finnis' methodology as follows:

> *By employing the principle that goods are self-evident, rather than derived from objectively observable facts, Finnis not only avoids being accused of deriving an 'ought' from 'is', but also deprives us of any attack on his methodology. Since we cannot show precisely where values came from, we are reduced to attacking the paucity of analogous arguments.*

Questions for Discussion

1. What is the reason that causes the revival of natural law?
2. What is 'inner morality of law'? Is it similar to the ethical morality of the classical natural law theorist?
3. What do you understand by morality of aspiration and morality of duty?
4. Give at least five elements of a valid legal system, which are the features of inner morality of law.
5. What makes Finnis a natural lawyer and what makes him different from the other classical natural lawyers?

UNIT FOUR

POSITIVISM

Introduction

Positivism, also known as analytical jurisprudence is another school of jurisprudence whose advocates believe in basically two concepts: first they consider law as a social fact rather than a set of rules derived from natural law. Thus law is essentially posited, that is created by human beings…be it the individual sovereign or the state as an organized group of human persons. This works for Hart, Austin, Raz or Coleman. The second point is that they sharply separate law and morality, and that legal rules do not derive their legitimacy from universal moral principles. A related issue is the separation thesis of "is" and "ought" argument. It says that unlike natural law concept which is based on the belief that all written laws must follow universal principles of morality, religion, and justice, a theory of law should focus on defining the concept of law as it is rather than discussing what it ought to be/ moral standards that it needs to meet to be considered as valid. The task of jurisprudents for positivists therefore is analytical, i.e. defining and analyzing the concepts of law and legal system, identifying its essential features and outlining its meaning from a social, logical and even semantic/linguistic perspective.

Positivism serves two values. First, by requiring that all law be written or somehow communicated to society, it ensures that the government will explicitly apprise the members of society of their rights and obligations. In a legal system run in strict accordance with positivist tenets, litigants would never be unfairly surprised or burdened by the government imposition of an unwritten legal obligation that was previously unknown and nonexistent. This argument was basically propagated by Jeremy Betham during his attack of the common law.

Second, positivism reduces the power of the judge to the application of laws, it does not allow judges to make laws. In some cases judges are not satisfied with the outcome of a case that would be dictated by a narrow reading of existing laws. For example, some judges may not want to allow a landlord to evict an elderly and sick woman in the middle of muddy *Kiremt*, even if the law requires such action when rent is overdue. However, positivism requires judges to decide cases in accordance with the law. Positivists believe that the integrity of the law is maintained through a neutral and objective judiciary that is not guided by subjective notions of equity.

The above introduction is, of course, a general approach to the ideas of the positivist school of jurisprudence. But in this part we shall not investigate all jurisprudents from this school of thought. Only the most prominent will be discussed here. Hence, John Austin (together with Hume & Bentham), H L A Hart, and Hans Kelsen will be the main subjects of our discussion.

Objectives

After reading this chapter students will be able to:

- See the different authorities in this stream of philosophy
- Understand the basic feature of positivism that differtiotes it from natural law
- Compare the different approaches within the positivist camp
- Understand the words ‘positivism’, ‘is’ and ‘ought’.
- Observe qualities of positivism

The Command Theory: John Austin's Positivism

Introduction

The word positivism is related to the English word 'posit' which means put something firmly, or imposing something on somebody. The idea is that since positivists believe that law is made by an authority and imposed on the people for obedience, the name positivism stems from this root word. Positivism is also known in two other names: Imperative, and Analytical Jurisprudence. The main proponent of this school is John Austin who boldly tried to define law on the bases of state authority. He was influenced by Hobbes and Bentham. In here we shall see David Hume, Jermy Bentham, and John Austin himself.

Objectives

After reading this section students will able to:

- Understand the basic difference between "is" and "ought" principles.
- Define law from positivists perspective
- Identify the basic elements in Austin's definition of law

4.1. Influence of David Hume[2]

The exact nature of the influence of David Hume on European philosophy has always been controversial, but there is a hard core which is undisputed. Our concern here is limited to the themes which are relevant to legal theory, in particular the rise of positivism and the eclipse of natural law. Hume's fundamental purpose in his philosophical writing was twofold: to challenge the traditional framework of moral philosophy in such a way that morality and law would be humanized by becoming more relative to human interests; and to undermine the overblown pretensions to knowledge of the rationalist philosophers of the Enlightenment. In carrying out this purpose, Hume

[2] English Philosopher on Human Nature1711-1776

inadvertently did much to establish the conceptual framework within which the transformation of every discipline into a rigorous science would be undertaken.

Hume stipulated two conditions for speaking good sense on any subject.
The first - which is known as 'Hume's Fork' - is that all investigation should be confined to the reporting of experimental observation on the one hand ('matters of fact') and the rational elucidation of 'relations between ideas' (logical connections) on the other. The second condition is that such matters of fact should be understood in complete independence from any subjective evaluation of the factual subject matter (the much quoted 'separation of fact and value' or 'is' and 'ought'). Reasoning which moves from matters of fact to matters of value results in confusion and nonsense. This is the philosophical source of the separation thesis in jurisprudence for it gives the positivists the tool to attack natural law principle (ought principle) which usually blends facts and values.

To these two claims, Hume added a third essential point concerning the nature of this reasoning. Contrary to the suppositions of his predecessors, Hume argued that the faculty of human reason is perfectly inert and morally neutral: 'It is not contrary to reason to prefer the destruction of the entire world to the scratching of one's little finger.' The idea here is that reason has no bearing on human interests one way or the other. When this idea is applied to the first two conditions, the Humean implications for the human sciences become clear. If reason is morally neutral, the rational investigation of any kind of human behavior or institution will make no reference beyond what is either empirically observable or logically demonstrable. The two cannot be combined. Second, the investigation will have nothing to reveal about the moral content of its subject matter. The moral worthiness of any human activity is simply not open to rational analysis. Hume is saying reason is merely an instrument. It is about achieving something through the most efficient means…but cannot be used to evaluate the end itself. Approval or condemnation may be felt by a subjective moral sense, but this is no more than the projection of an inner feeling on to an external object. The implications of Hume's austere proposals, when drawn out, would transform the very idea of law.

Do you see any similarity between Hume's idea and Kelsen's criticism against natural law?

In effect, it was Hume who first opened the eyes of positivists who challenged the close relationship of law and morality; that law has nothing to do with morality or religion. Law should be investigated beyond any bias of morality.

4.2. Jeremy Bentham[3]

His attack on the Common Law that was guided by natural law, custom etc

The beginning of the decline of natural law theory can be dated quite precisely from the time of Bentham's scathing attack on Blackstone's (1723-80) Commentaries on the Laws of England. With hindsight, this can be seen as the historical turning point, the successful launching of modern legal positivism.

Bentham had many specific complaints about common law theory and its practice. He regarded much of what happened in the English courts as 'dog- law': that is, as the practice of waiting for one's dog to do something wrong, and then beating it. His low opinion of the doctrine and practice of judicial precedent was illustrated by his likening of the doctrine to a magic vessel from which red or white wine could be poured, according to taste. This 'double fountain effect', whereby the decisions of judges are seen as capricious selection of whichever precedent suits their prejudice, was regarded by Bentham as the inevitable outcome of a legal system which is not controlled by universal rational legislation.

Bentham's overriding passion for legal reform required the kind of clarification which would mercilessly expose the shortcomings, the corruption and obfuscation which he found in the common law as it existed at the turn of the nineteenth century. This clarity, Bentham believed, could only be achieved with a rigorous separation of law and morality. As we have seen, the exact meaning of this 'separation thesis' has become

[3] English Utilitarian philosopher and Jurist, 1748-1832

deeply controversial. What Bentham himself meant by it was reasonably clear. If the law was to be subjected to systematic criticism in the cause of reform, it was essential that its workings should first be described in accurate detail. This was a matter of dispassionate factual reporting of the nature and workings of law, which he termed ‘expository’ jurisprudence. What he found obstructing this project of clarification was the blurring of the boundary between legal reality and value judgment.

This was precisely what Bentham accused traditional legal writers of doing. Blackstone, as one of the most eminent of these writers, was singled out by Bentham as a prime example of one who clothed moral preaching in the language of law. When law is analyzed in such a way that each law is represented as the embodiment of a Christian moral principle, the result is the kind of vagueness and indeterminacy which is inherently resistant to radical reform on the basis of the utility of the laws. When, by contrast, law is analyzed according to Bentham’s expository principles, the way is prepared for a clear-headed ‘censorial’ jurisprudence, subjecting the law to moral criticism, based on the principles of utility.

Remember that Bentham is the leading authority in the utilitarian school of thought that teaches the greater happiness for the greater part of the society. Utility, hence, requires that law-making and legal institutions be designed to promote the greatest happiness of the greatest number of people. Utility would replace traditional, self-serving or subjectively moral evaluation with a rational evaluation of the worth of particular practices, institutions and policies. These would be judged in terms of how far they served the common good, measured in terms of maximization of satisfaction of the actual desires of the greatest possible number of the population.

? As a Utilitarian, putting yourself in Bentham’s place, would you allow cloning?

4.3 John Austin on Positivism and Separation thesis

Law is a command of the sovereign enforced by sanction. Austin

John Austin was another English jurisprudent who for the first time boldly criticized natural law and gave direct and clear definition of law. Before giving his definition of law, Austin identified what kind of law it is he is seeking to define. In this part of his theory we shall see what he called positive law and positive morality and his command theory. His idea was given in a series of lectures.

4.3.1 Positive Law and Positive Morality

From one viewpoint, the most valuable contribution of Austin's legal theory is its attempt to distinguish clearly law from other phenomena (for example, moral rules, social customs) with which it could be confused. Strongly influenced by Hume and Bentham, Austin wrote that the starting point for the science of law must be clear analytical separation of law and morality. Such a strategy would in no way imply that moral questions were unimportant. Indeed, the separation would make clear the independent character of legal and moral arguments and the special validity and importance of each.

So Austin's lecture begins by asserting that the subject-matter of jurisprudence, as he understands it, is positive law[4] , 'law, simply and strictly so called: or law set by political superiors to political inferiors'. Immediately, law is defined as expression of power. In its wider proper sense, a law is 'a rule laid down for the guidance of an intelligent being by an intelligent being having power over him'. Austin's view of law recognizes it not as something evolved or immanent in community life, as in the implicit common law conception, but as an imposition of power.

The lectures then embark on a rather tedious classification of law, some of which, however, is of the greatest importance in understanding key points of Austin's legal

[4] Emphasis is added by the writer.

theory. Austin distinguishes laws ‘properly so called’ from phenomena improperly labeled as law. There are two classes of laws properly so called: *divine law* (set by God for human kind) and *human laws* (others called them man-made) which are set by human beings for other human beings. The most significant category of human laws comprises what Austin calls ***Positive law***. These are laws set by superior acting as such or by people acting in pursuance of legal rights conferred on them by political superiors (that is acting as delegates of political superiors in making laws). The term ‘positive’ refers to the idea of law placed or laid down in some specific way and, as such, could apply to divine law, which Austin conceives as God’s command. But he wants to reserve the term positive law for human laws laid down by, or on the authority of, political superiors – the true subject of legal science. So the word ‘positive’ indicates a positing or setting of rules by human creators.

The other category of human law consists of rules laid down by persons having power over others but not as political superiors or in pursuance of legal right. This seems to cover many rules which lawyers would not usually regard as law, although Austin has no doubt that the term ‘law’ can be used here ‘with absolute precision or propriety’. Since he uses the word ‘power’ in a general sense, it seems to include the capacity of any authority figures – for example, priests or religious leaders, employers, teachers, parents, guardians or political orators – to control or influence the actions of followers, dependants or those in their charge. Austin clearly regards rule-making in such cases as significant in shaping the attitudes, opinions or moral sentiments of individuals or groups. Indeed, it forms part of what he calls ***positive morality.*** As morality it is distinguished from positive law; and it is positive because it is laid down by human beings for human beings. Positive morality also contains another category of rules: those without particular creators but set by the opinion or sentiment of an indeterminate body of people – that is, by public opinion or community opinion. Austin calls these authorless rules laws ‘by analogical extension’; they are not laws ‘properly so called’ even though we sometimes talk of laws of fashion, etiquette or honor.

Finally, for completeness, he mentions one other category of laws ‘improperly so called.’ *Scientific laws* are not laws in the jurisprudential sense. They are the regularities of nature

which science discovers but which are not laid down as laws. Austin calls them 'metaphorical laws.'

We can say, therefore, that for Austin:

i. The term 'law' is often improperly applied to rules or regularities that are in no strict sense 'legal'; but
ii. The concept of law can properly embrace more than most lawyers would accept. Like many social scientists writing long after him, Austin considers that some rules created 'privately' outside the particular provisions or procedures of the legal system of the state can usefully be recognized as law.
iii. On the other hand, only positive law is the appropriate concern of jurisprudence, which as we shall see in the next sections is backed and enforced by the state.

Look at the following attachment and understand more the classification of laws by Austin.

4.3.2 Austin's Concept of law

If you look back once again into the discussion made so far, you can see the definition of law given by Austin, *law is a command of the sovereign enforced by sanction.* But remember again this is positive law. From this definition we can identify three essential elements: sovereign, command, and sanction.

A. Sovereignty[5]

To amplify his definition of law Austin goes on to examine the nature of sovereignty. Sovereignty exists, Austin says, where the bulk of a given political society are in the habit of obedience to a determinate common superior[6], and that common superior is not habitually obedient to a determinate superior. He amplifies certain aspect of this concept.

[5] For more clarification of the word one can read Hobbes' book *Leviathan.*
[6] According to Hobbeasian philosophy, the sovereign is subject to no one. It is supreme beyond any law. The same idea is advocated by Austin.

i. Sovereign may be a king or a parliament: The common superior must be 'determinate'. A body of persons is 'determinate' if 'all the persons who compose it are determined and assigned'. Determinate bodies are of two kinds. (1) In one kind the 'body is composed of persons determined specifically or individually, or determined by characters or descriptions respectively appropriate to themselves'. (In this category would be placed a sovereign such as the king.) (2) In the other kind the body 'comprises all the persons who belong to a given class…. In other words, every person who answers to a given generic description…is… a member of the determinate body.' (In this category could be placed a sovereign such as a supreme legislative assembly.)

ii. Society must obey the sovereign: The society must be in 'the habit of obedience'. If obedience is 'rare or transient and not habitual or permanent' the relationship of sovereignty and subjection is not created and no sovereign exists. (But isolated acts of disobedience will not preclude the exercise of sovereignty.)

iii. Obedience only to Sovereign: '…habitual obedience must be rendered by the generality or bulk of the members of a society to…one and the same determinate person (king) or determinate body of persons (parliament).' For example, if a part of society gives obedience to one body/king and another part to another body, and if each society is in the habit of obeying only its own king, then the given society is simply or absolutely in a state of nature or anarchy.

iv. Sovereign must be determinate: in order that a given society may form a political society, 'the generality or bulk of its members must habitually obey a superior determinate as well as common… for… no indeterminate body is capable of corporate conduct, or is capable, as a body, of positive or negative deportment.' In other words, the sovereign must be defined, best known by all the society. How? Maybe someone who came to the throne through blood from the former king, or someone elected by the people.

v. Sovereign obeys no one else: the common determinate superior to whom the bulk of the society renders obedience must not himself be habitually obedient to a

determinate human superior. For example, a regional prince may be superior to the people he governs. But he is yet not really superior within his province, nor are he and his society an independent society. Thus, in the strictest sense of Austin's sovereignty the prince is not a sovereign for he obeys another human superior, e.g. the king.

vi. Supreme in power: the power of the sovereign is incapable of legal limitation. Austin says: 'Supreme power limited by positive law is a flat contradiction in terms.' One may ask what about his position in relation to the constitution? May a body be sovereign yet subject to the constitutional law? Austin answers, **no**. A sovereign is subject to no legal limitation. He explains that whenever there is a conflict between the principles of the constitution and the act of the sovereign, the latter must thwart the former.

From the above explanation you can easily conclude that in Austin's theory of law the sovereign is an absolute supreme, one similar to the Hobbessian sovereign. This is because it is the sovereign who creates and gives laws to his subjects. He is above and beyond any laws and fellow men. He is the ultimate author of laws, executor and decision maker.

B. Command

According to Austin, law is a command given by a determinate common superior to whom the bulk of a society is in the habit of obedience and who is not in the habit of obedience to a determinate human superior, enforced by sanction. It is the element of command that is crucial to Austin's thinking, and the concept of law expressed by Austin is described as 'the command theory' or 'the imperative theory' of law.

Like Hobbes, Austin defines a law as a kind of command. Power is again made central to law. Austin states: 'a command is distinguished from other significations of desire, not by the style in which the desire is signified, but by the power and purpose of the party commanding to inflict an evil or pain in case the desire be disregarded'. Thus, the power to inflict punishment (sanction) in case of non-compliance is what makes an expression a

command. Remember again that moral commands are not laws or commands in the Austinian sense of the word.

This is one aspect of his legal theory, which indicates that his view of law is very different from that of many liberal theories. The latter tend to see law as a set of rules whose purpose should be to mark out a general sphere of liberty of the individual guaranteed against the risk of arbitrary state power. Austin, by contrast, sees law as a technical instrument of government or administration, which should, however, be efficient and aimed at the common good as determined by utility.

C. Sanction

Austin's view of law is also reflected clearly in the emphasis he attaches to punitive sanctions in the structure of a law. Since sanctions are essential for the existence of commands, they are, for Austin, essential to the existence of laws. There must be, he said, 'a power to inflict an evil to the party' in case of non compliance. There is here an important difference from Bentham's legal theory, which also treats sanctions as essential to laws. Bentham (and other writers) saw no reason why legal sanction could not include rewards as well as penalties. Austin, after considering this, rejects it. A reward held out for compliance would indicate a promise or inducement but not a command, on the basis of ordinary usage of the word which specifies non-optional conduct.

Laws, by their nature, provide for sanctions, he said. Sanctions are analytically essential to laws, whether or not they are sociologically necessary. Thus, any disadvantage formally specified directly or indirectly by a law as to be imposed in case of non-compliance can serve as that law's sanction. Mere inconvenience or the fact that a transaction or document is rendered null and void by law would count as sufficient sanction. A sanction can also be a further legal obligation. Thus, breach of one law (say, a traffic offence) might lead to a further obligation (to appear in court to answer charges). A chain of legal obligation is possible. At the end of the chain, however, there must be a sanction. 'Imperative laws', lacking sanctions completely, are not laws in the Austinian sense. Neither are declaratory nor repealing 'laws', since they command nothing. For

example, most of the rules in the civil code are without sanction and hence, according to Austin, they are no laws. Now as we shall see in the next parts, this is one of the reasons for his criticism.

4.3.3 The Separation Thesis

> *The existence of law is one thing, its merit or demerit is another... Austin*

Austin is the first serious thinker in the positivism school of jurisprudence. Actually, as we have seen before, he was strongly influenced by Hume and Bentham. Now, in this section we shall see his version of positivism and his stand on natural law theory.

Since ancient Greece all the way up to early Christian times, it had been widely considered that a relationship existed between the validity of a law and its moral content. For example, as we have discussed before, in the middle ages the view took a form of a belief that if a man-made law conflicted with the law of God[7] then the law was not a valid law. The doctrine that a man-made law is valid only if it does not conflict with a higher law – religious or secular- constitutes a key element of the natural law theory.

This notion is totally rejected by Austin. For Austin, a law is valid law if it is set by a sovereign. It is valid if it exists, regardless of its moral content. If it is commanded by the sovereign, if the law is decreed, placed in position, posited, then it is valid law. Thus, what he called as 'positive law' is a law whatever its source or contents. A positivist is, hence, one who regards a law as being valid not by reference to some higher law or moral code, but by reason of no more than its existence. Austin clearly declares:

> *The existence of law is one thing, its merit or demerit is another. Whether it be or be not [i.e. whether law exists or does not exist] is one enquiry; whether it be or be not conformable to an assumed standard is a different enquiry.*

[7] Look, for example, our discussion on the Christianity, ideas of St. Augustine and St. Thomas Aquinas.

Austin has no problem with making the enquiries. But it should not go beyond that; simple comparison. This means, when we say that human law is good or bad, or is what it ought to be or what it ought not to be, we mean that the law agrees with or differs from something (E.g. Morality) to which we tacitly refer it to measure or test. He makes a clear separation between the question and what the law *ought to be* (it is possible one can make reference to higher laws) and the determination of what the law *is.* 'Is' and 'Ought' must be kept separate. For Austin, the fact that the law, according to some higher principle, is not what it ought to be is no reason for saying that it is not. In other words, ought can be identified (to simplify) with criteria for distinguishing between good and bad law. A law might be bad, but it is still law and must be obeyed by the subjects so long as it is made by the sovereign.

Just to make it clearer, take, for example, the issue of abortion or homosexuality. Both are contrary to morality and God's laws since in most religious scriptures (at least the Bible and the Koran) these acts are sins. When you think of an 'Ought', you must think as a natural law theorist. If you are to obey the law it ought to be in conformity with the higher laws, such as morality or divine laws (the Bible or the Koran.) As a positivist, however, what comes to your mind first is whether the law is (means actually exists). You will not consider whether it should have been conforming to a higher law or not. Thus, if a government legalizes abortion or homosexuality, the natural law believer will not recognize it, as the new law doesn't conform to his ideals (for him what the law ought to be was prohibiting these acts). But for a positivist, the problem is simple. If the sovereign says so, then let it be.

Please read 'the dilemma of the child' in the beginning of the previous chapter, on natural law theory, and consider the position of the child and his father. This is the dilemma of today's world, too

The scientific investigation and analysis of law must revolve around or concentrate on the positive law, law created by sovereign power.

4.3.4 Criticism on Austin

HLA Hart is himself another positivist who approaches the concept of law from different vantage point. He made a critical criticism on Austin's concept of law and his criticisms fall under three main heads.

A. Laws as we know them are not like orders backed by threats

There are three reasons why this so.

i. The content of law is not like a series of orders backed by a threat. Some laws, Hart concedes, do resemble orders backed by threats, for example criminal laws. But there are many types of laws that do not resemble orders backed by threats, For example, laws that prescribe the way in which valid contracts, wills or marriages are made do not compel people to behave in a certain way (as do laws that, for example, require the wearing of seat belt in a car). The function of such laws is different. They provide individuals with facilities for realizing their wishes by conferring legal powers upon them to create, by certain specified procedures and subject to certain conditions, structures of rights and duties…' Thus, such laws are laws which simply provide rights. E.g. Every man has the right to marry or not to marry. In the eye of Austin this is not law. But that is his default.

   Again, laws of public nature, in the field of constitutional and administrative law, and in the field of procedure, jurisdiction and judicial process, are not comparable with orders backed by threats. Such laws are better regarded as power-conferring rules.

ii. The range of application of law is not the same as the range of application of an order backed by a threat. In Austin's scheme the law-maker (sovereign) is not bound by the command he gives: the order is directed to others, not to himself. It is true, Hart concedes, that in some systems of government this is what may occur. But in many systems of law legislation has a force that is binding on the body that makes it. So, as a law-maker can be bound by his own law, the Austinian concept of sovereign – command – obedience – sanction can not be of universal application and so fails. In modern democracies, for example, the power of the law maker (parliament) is limited by the constitution which precedes it and

defines its power. If the lawmaker violates these limits, the law might be nullified.

iii. The mode of origin of law is different from the mode of origin of an order backed by a threat. This means, Austin assumes the sovereign as the only source of law. But in reality, laws can be created by other bodies outside the law maker. For example, most customary laws that are usually enforced by courts (in common law) can be good examples. Laws can also be created by an administrative body.

B. Austin's notion of the habit of obedience is deficient

To explain the ways in which he finds the notion of the habit of obedience to be deficient Hart tells a story. Suppose, he says, there is a country in which an absolute monarch has ruled for a long time. The population has generally obeyed the orders of the king, Rex (his name), and are likely to continue to do so. Rex dies leaving a son Rex II. There is no knowing, on Rex II's accession, whether the people will obey the orders he begins to give when he succeeds to the throne. Only after we find that Rex II's orders have been obeyed for some time can we say that the people are in a habit of obedience to him. Yet, in practice, if Rex II was Rex I's legal successor we would regard Rex II's orders as laws from the start. So the notion of the habit of obedience fails to account for what our experience tells us in fact happens: it fails to account for the continuity to be seen in every normal legal systems when one ruler succeeds another.

What Hart in short means is that law should not be based on one particular body. It rather must be a system that gives uninterrupted continuity. What is in fact found in any legal system is the existence of rules which secure the uninterrupted transition of power from one law-maker to the next. These rules regulate the succession in advance, naming or specifying in general terms the qualifications of and mode of determining the law giver. In short, Austinian laws lack institutional strength. Look for example at the Ethiopian civil code, which even after 40 years still continues to be obeyed. Change of the sovereign doesn't change its applicability.

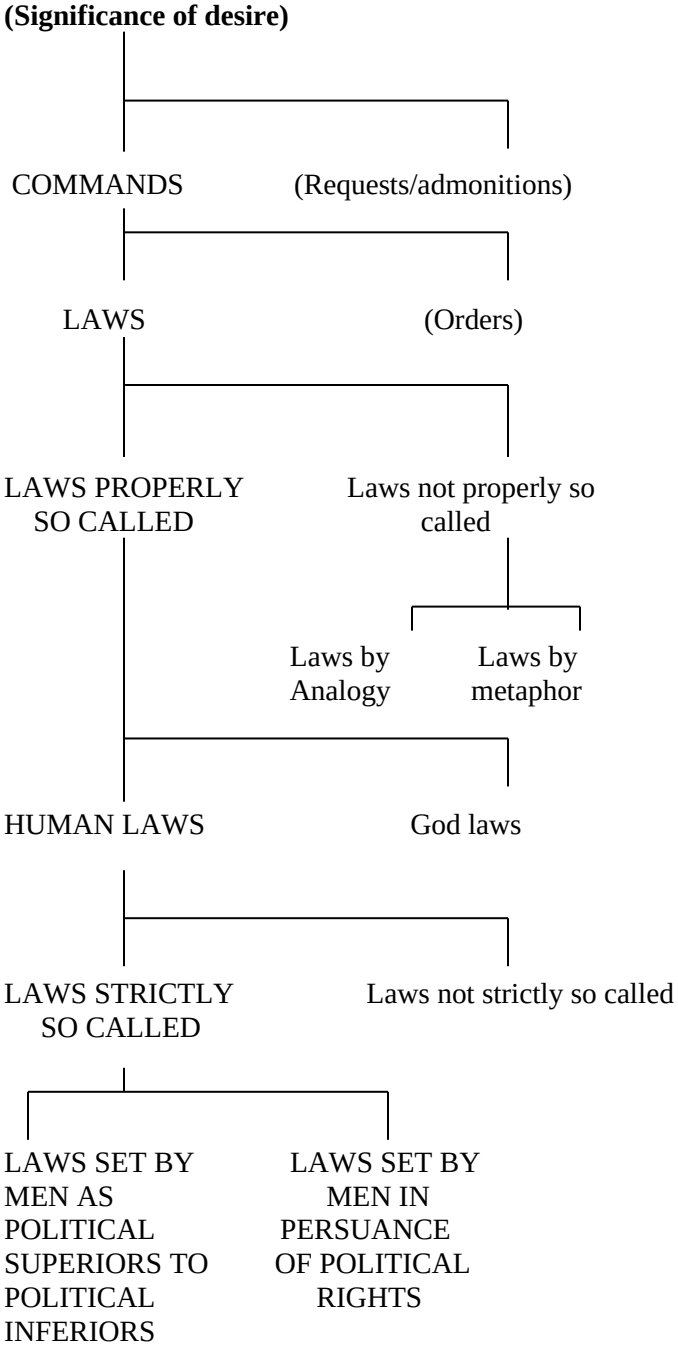
C. Austin's notion of sovereignty is deficient

In Austin's theory of law, there is no legal limit on a sovereign's power, since, if he is sovereign, he does not obey any other legislator. Thus, according to Austin, if law exists within a state, there must exist a sovereign with unlimited power. But when we examine states in which no one would deny that law exists we find supreme legislatures, the powers of which are far from unlimited. For example, the competence of a legislature may be limited by a written constitution under which certain matters are excluded from the scope of its competence to legislate upon. If the legislature acts beyond that competence/power given by the constitution, then usually courts declare it as invalid. We can also add another point at this juncture that Austin's theory on sovereignty doesn't conform to the well accepted principle of separation of power.

Questions for Discussion

1. How does Austin define law?
2. Discuss the similarity and difference between the Austinian positive morality and positive law.
3. What are the characteristics of Austinian Sovereign?
4. Do you think declaratory and rules that declare a right or define a rule are laws in Austin's view? Why?
5. What does positivism signify? Discuss the meaning and its view on laws?
6. What do you understand by law as 'Is' and 'ought'?
7. Do you agree to Austin's definition of law, particularly as being a command and on the sovereign power?

Austin's Analysis of Laws



4.4 Pure Theory of Law: Hans Kelsen

Introduction

Kelsen is most famous for his studies on law and especially for his idea known as the pure theory of the law. It is said his theory of law is the most complex one. He declares that law must be studied as a pure science independent of other incidents, like morality and justice, which makes him part of the positive school of jurisprudence. In this part we will look at two main things. First his criticism on natural law theory, and second, his 'Pure theory of law'.

Objective

After reading this part it is hoped students will have the notion of:

- The idea of Grundnorm
- Similarity and difference between Hart and Kelsen

Pure Theory of Law

As we tried to see above, Kelsen found out that natural law has flaws and it contaminates law with other standards, which makes it imposible for scientific study of the subject matter. Hence, instead, Kelsen suggested a 'pure' theory of law which would avoid contamination of any kind. Jurisprudence, Kelsen propounded, "characterizes itself as a 'pure' theory of law because it aims at cognition focused on the law alone" and this purity serves as its "basic methodological principle."

A. **The Basic Norm (Grundnorm)**

The law, according to Kelsen, is a system of norms. Norms are 'ought' statements, prescribing certain modes of conduct. Unlike moral norms, however, Kelsen maintained that legal norms are created by acts of will. They are products of deliberate human action. For instance, some people gather in a hall, speak, raise their hands, count them, and promulgate a string of words. These are actions and events taking place at a specific time and space. To say that what we have described here is the *enactment of a law*, is to

interpret these actions and events by ascribing a normative significance to them. Kelsen, however, firmly believed in Hume's distinction between ‘is’ and ‘ought’, and in the impossibility of deriving ‘ought’ conclusions from factual premises alone. Thus Kelsen believed that the law, which is comprised of norms or ‘ought’ statements, cannot be reduced to those natural actions and events which give rise to it. The gathering, speaking and raising of hands, in itself, is not the law; legal norms are essentially ‘ought’ statements, and as such, cannot be deduced from factual premises alone.

How is it possible, then, to ascribe an ‘ought’ to those actions and events which purport to create legal norms? Kelsen's reply is enchantingly simple: we ascribe a legal ought to such norm-creating acts by, ultimately, *presupposing* it. Since ‘ought’ cannot be derived from ‘is’, and since legal norms are essentially ‘ought’ statements, there must be some kind of an ‘ought’ presupposition at the background, rendering the normativity of law intelligible.

As opposed to moral norms which, according to Kelsen, are typically deduced from other moral norms by syllogism (e.g., from general principles to more particular ones), legal norms are always created by acts of will. Such an act can only create law, however, if it is in accord with another ‘higher’ legal norm that authorizes its creation in that way. And the ‘higher’ legal norm, in turn, is valid only if it has been created in accordance with yet another, even ‘higher’ legal norm that authorizes its enactment. Ultimately, Kelsen argued, one must reach a point where the authorizing norm is no longer the product of an act of will, but is simply presupposed, and this is, what Kelsen called, the Basic Norm or Grundnorm. More concretely, Kelsen maintained that in tracing back such a ‘chain of validity’ (to use Raz's terminology), one would reach a point where a ‘first’ historical constitution is the basic authorizing norm of the rest of the legal system, and the Basic Norm is the presupposition of the validity of that first constitution. It is like constructing a pyramid, starting from wider bases to reach the pick, the apex, i.e. the Grundnorm.

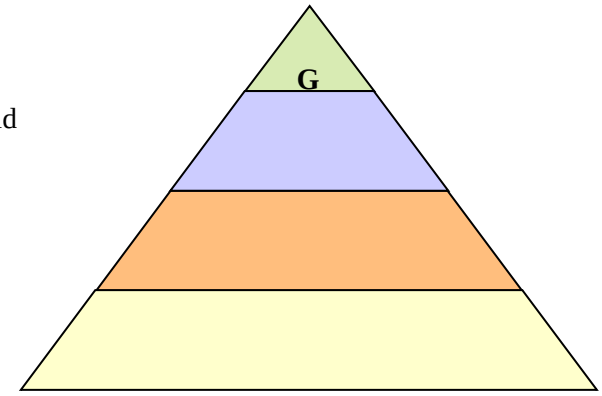
Kelsen wants to identify a basic legal principle which will ultimately include or define the legal structures of all cultures. The Grundnorm or Basic Norm is a statement against which all other duty statements can, ultimately, be validated. The Basic Norm is

ultimately a sort of act of faith--it is the belief in a principle beyond which one cannot go and which ends up being the foundational principle for all subsequent legal statements. You cannot "go beyond" the Grundnorm because it is an improvable first step. Ultimately it appears that the Grundnorm for Kelsen is a belief that one's respective legal system ought to be complied with. Lots of other principles can then flow from this basic realization.

The basic norm, then, is the most general norm which is hypothesized as the norm behind the final authority to which all particular valid norms can be traced back. This is the only norm which cannot itself be questioned or validated. It is in this sense that its validity is presupposed or tacitly assumed in any legal activity - for example, the relevant actions of a court official, a police officer, a solicitor, a gaoler - which acknowledges the validity of particular norms. It should be noticed especially that the basic norm is not the actual constitution - of the USA, UK, Germany or wherever - which would be the empirical object of political science.

Kelsen attributed two main explanatory functions to the Basic Norm: it explains both the unity of a legal system and the reasons for the legal validity of norms. Apparently, Kelsen believed that these two ideas are very closely related, since he seems to have maintained that the legal validity of a norm and its membership in a given legal system are basically the same thing. Furthermore, Kelsen argued that every two norms which derive their validity from a single Basic Norm necessarily belong to the same legal system and, *vice versa*, so that all legal norms of a given legal system derive their validity from one Basic Norm. It is widely acknowledged that Kelsen erred in these assumptions about the unity of legal systems. Generally speaking, in spite of the considerable interest in Kelsen's theory of legal systems and their unity that derives from a single Basic Norm, critics have shown that this aspect of Kelsen's theory is refutable. Although it is certainly true that the law always comes in systems, the unity of the system and its separation from other systems is almost never as neat as Kelsen assumed.

Kelsen's Grundnorm as the top of the Pyramid



B. Hart and Kelsen

There are, of course, clear parallels between Hart's rule of recognition as the source of legal validity and Kelsen's basic norm. They both serve the same vital function in grounding the positivist interpretation of the idea of a legal system. The rule of recognition, like the basic norm, is the linchpin which gives the system unity, and every other rule must be referred to it. The differences, however, are as great as the similarities. Hart's basic rule is a (secondary) rule of law, not a Kelsen-style norm, or 'ought-statement'. As such, it is a social fact, rather than a hypothetical norm which is presupposed by all legal activity. As a social fact and a rule of law, it is itself a part of the legal system, whereas the Kelsenian basic norm lies outside of the system. There is also a different reason for its validity being unchallengeable. For Hart, it is a meaningless question to ask whether or not the rule of recognition is valid. The demand for a demonstration of its validity, he says, is equivalent to demanding that the standard metre bar in Paris is correct.

Legal validity is measured against this basic rule of law; it cannot be measured against itself.

Questions for Discussion

1) What are the main criticisms made by Kelsen against the natural lawyers?
2) What kind of approach does Kelson prefer to study the law?
3) What is Grundnorm or Basic norm?
4) Mention some differences and similarities between Hart and Kelsen's source of legal validity.

4.5 H L A Hart- The Concept of Law

Introduction

Hart (1907-1992) was a Barrister, a professor and well known legal philosopher in England and in the world. *The Concept of Law* by H L A Hart was published in 1961. Hart is said to be the leading philosopher in the positivist camp who extensively wrote about the nature of law. His approach is grouped as soft positivism in which he rejects Austin's command theory but holds on to the separabilty of law and moral thesis. In this part we will look at Hart's view of the law. His criticism on Austin was presented in the previous chapter

Objectives

After finalizing the reading of this part students are expected to:

- analyze Hart's concept of law
- understand the concept of primary and secondary laws

4.5.1 Hart's Concept of Rules

Having rejected the command theory of Austin, as discussed in the Austin's part, Hart develops and rebuilds his own positivist theory of legal validity. Arguing that what is missing from Austin's analysis is the concept of an accepted rule, as shall be discussed below again, Hart unfolds his own analysis which aims at a more sophisticated understanding of the social practice of following a rule. He distinguishes first between social rules which constitute mere regularity from social habits. These and the other kind of rules will be treated in the following pages.

A. Social Habits vs. Social Rules

An example of a social habit might be the habit of a group to go to the cinema on Saturday evening. Habits are not rules. If some people in the group do not go to the cinema on Saturday evenings, this will not be regarded as a fault, nor render them liable to criticism. When a group have a particular habit, although this may be observable by an outsider, no member of the group may be conscious of the habit – either that he is in the

habit of going to the cinema on Saturday evening, or that others in the group do not in any way consciously strive to see that the habit is maintained.

An example of social rule might be a rule that a man should take his hat off in church. If someone breaks the rule, this is regarded as a fault, and renders the offender liable to criticism. Such criticism is generally regarded as warranted, not only by those who make it but also by the person who is criticized. Further, for a social rule to exist, at least some members of the group must be aware of the existence of the rule, and must strive to see that it is followed, as a standard, by the group as a whole.

The internal and external aspects of rules

This awareness of, and support for, a social rule Hart calls the *internal aspect* of rule.

The fact that something is a social rule will be observable by anyone looking at the group from outside. The fact that the rule can be observed to exist by an outsider is referred to by Hare as the *external aspect* of the rule.

A statement about a rule made by an outside observer may be said to be made from an external *point of view*; a statement made by a member of the group who accepts and uses the rules as a guide to conduct may be said to be made from an internal *point of view*. Suppose that an observer watches the behavior of a certain group, for example, suppose that he watches traffic approaching traffic lights, and records everything that happens. After a while he concluded that red sign is for stop. But he may not know the reasons immediately. But this way of looking at the matter is very different from that of the people in the cars approaching the lights. For them it is a simple rule. Whenever it turns red they stop. The observer was looking at the rule from an external point of view. The person in the car looks at the rule from an internal point of view. Since social habits are observable by an outsider, but the group is not aware of them, they have an external aspect, but not an internal one. Social rules have both an external and internal aspect. Remember, for example, the rule of the taking off of the hat inside a church. It can not only be observable by outsiders but also felt by the members.

Hence internal point of view signifies that the law would be taken as a standard by the citizen to evaluate his own conduct and that it would be taken as a sufficient reason/justification for an action or omission, and the external point of view emphasizes that the law will be used not only to guide one's own conduct but also to evaluate the conduct of others. This is manifested by the conduct of members of society towards an illegal act…social protest…reprimand or disapproval.

B. Social Rules

If something is a social rule, then we would find that such words as 'ought', 'must', 'should' are used in connection with it. Social rules are of two kinds.

i. Those which are no more than social conventions, for example, rules of etiquette or rules of correct speech. These are more than habits, as a group strives to see that the rules are observed, and those who break them are criticized.
ii. Rules which constitute obligations. A rule falls into this second category when there is an insistent demand that members of the group conform, and when there is great pressure brought to bear on those who break the rule, or threaten to do so.

Rules of this second kind are regarded as important because they are believed to be necessary to maintain the very life of the society, or some highly prized aspect of it. Examples are rules which restrict violence or which require promise to be kept. Rules of this kind often involve some kind of sacrifice on the part of the person who has to comply with the rule – a sacrifice for the benefit of the others in the society.

C. Obligations

Rules which constitute obligations may be sub-divided into two categories:

i. Rules which form part of the moral code of the society concerned: these rules are therefore moral obligations. Such obligations may be wholly customary in origin. There may be no central body responsible for punishing breaches of such rules, the only form of pressure for conformity being a hostile reaction (stopping short of physical action) towards a person who breaks the rule. The pressure for conformity may take the form of words of disapproval, or appeals to the

individual's respect for the rule broken. The pressure may rely heavily on inducing feelings of shame, remorse or guilt in the offender.

ii. Rules which take the form of law – even if a rudimentary or primitive kind of law. A rule will come into this category if the pressure for conformity includes physical sanctions against a person who breaks the rule – even if the sanctions are applied, not by officials, but by the community at large.

In the case of both (i) and (ii), there is *serious* social pressure to conform to the rule, and it is this which makes the rule an obligation (as opposed to mere social convention, or even a habit).

D. Primary and Secondary rules

Third, the crucial distinction is drawn between different types of legal rules, which Hart calls primary and secondary. Primary rules of law are said to be those which are essential for any kind of social existence, those which prescribe, prevent or regulate behavior in every area with which the law is concerned. These are all the rules constraining anti-social behavior; rules against theft, cheating, violence and so on. As such, they constitute the great bulk of the positive laws which the legal system consists of. In simple words, primary rules define the rights and duties of citizens and that the bulk of law including criminal and civil law…or what we call substantive law falls under this category). These are standards of conduct set for citizens.

Basically primary rules are rules that govern primitive society. These rules are not legislated or made rather they evolve through the process of practice and acceptance. Their validity is to be verified by checking whether they are accepted substantially by all members of the community. However, such rules serve only a small number of people and one that has close tribal relations. In other words, for reasons mentioned below, primary rules no longer serve a modern society. A modern legal system must comprise more than this; it must also include what Hart called secondary rules, the function of which is exclusively addressed to the status of the primary rules. The secondary rules are fundamentally different in kind from the primary rules. They bring primary rules into being, they revise them, they uphold them, or they change them completely. In other

words, secondary rules are those that stipulate how, and by whom, such primary rules may be formed, recognized, modified or extinguished. The rules that stipulate how parliament is composed, and how it enacts legislation, are examples of secondary rules. Rules about forming contracts and executing wills are also secondary rules because they stipulate how very particular rules governing particular legal obligations (i.e., the terms of a contract or the provisions of a will) come into existence and are changed. Hart argues that the creation of secondary rules marks the transition from a pre-legal society to a legal system. Why? How? Let's look at Hart in detail.

The function of secondary rules

It is possible to imagine a society which does not have a legislature, courts or officials of any kind. Many societies of this kind have in fact existed, and have been described in detail. In this kind of society, the only means of social control is the attitude of the group towards behavior that it will accept as permissible. Such society is one that lives by primary rules of obligations alone. For such society to exist, certain conditions must be satisfied. They are as follows:

1. In view of human nature, the primary rules must include rules which contain restrictions on violence, theft, and deception.
2. Although there may be a minority who reject the rules, the majority must accept them.
3. The society must be a small one, with close ties of kinship, common sentiments and beliefs.
4. The society must live in a stable environment.

If either of the last two conditions were not satisfied, the society could not continue to exist by means of such a simple system of social control. In other words, if the society was large and there was no relative stability, then, the primary rules would not continue to exist. Specifically the following defects would show themselves.

1) If doubts arose as to what the primary rules were, there would be no means of resolving the uncertainty. There would be no procedure for determining what the rules were (e.g. by referring to some authoritative text, or asking guidance from an official whose function it was to decide such matters).
2) There would be no means of altering the rules according to changing circumstances. The rules would be static.
3) There would be no means of settling a dispute as to whether a rule has been broken. (This is the most serious defect of all.)
4) There would be no one with authority to impose punishments for breaches of the rules. Conformity with the rules would only be secured by defuse social pressure, or by punishments meted out by the group as a whole. This would be an inefficient way of ensuring that the rules were observed. Unorganized efforts by the group to catch and punish offenders would waste time: punishment inflicted by individuals might lead to vendettas.

All these defects can be rectified by supplementing primary rules by other rules of different kind, rules already referred to as secondary rules.

Secondary rules have something in common with primary rules and are connected with them. Primary rules are concerned with what people must do or must not do. Secondary rules are concerned with the primary rules in that they lay down the ways in which primary rules may be introduced, varied, and abandoned; the way in which primary rules may be ascertained; and the way in which it can be decided whether a primary rule has been broken.

Thus, in effect, secondary rules can provide remedies for the defects listed above. Following are these remedies.

1) The defect of uncertainty as to what the primary rules are, can be remedied by having secondary rules which provide a way of knowing whether a suggested rule is or is not in fact a rule of the group. There are many ways in which this can be

achieved. For example it may become accepted that the rules are as written in some text (e.g. statute). Or the secondary rule may be that a primary rule is to become a rule of group if it is enacted by a certain body (e.g. parliament) or it is decreed by a judge.

There may be more than one way of deciding what the primary rules are. And if there is more than one way, there may be a means of resolving possible conflicts by having an order of superiority (e.g. a proclamation overriding judicial decisions). A secondary rule which enables one to know what the primary rules are is referred to by Hart as a 'rule of recognition'. If a society has a 'rule of recognition' then it has a way of determining whether a law is valid or not.

2) The other defect (in society having only primary rules) that the rules are static can be remedied by having secondary rules that provide for ways in which the primary rules can be changed. Secondary rules of this kind, which are known as 'rules of change' may specify the persons who are to have power to alter the law, and lay down the procedure to be followed in order to do so.

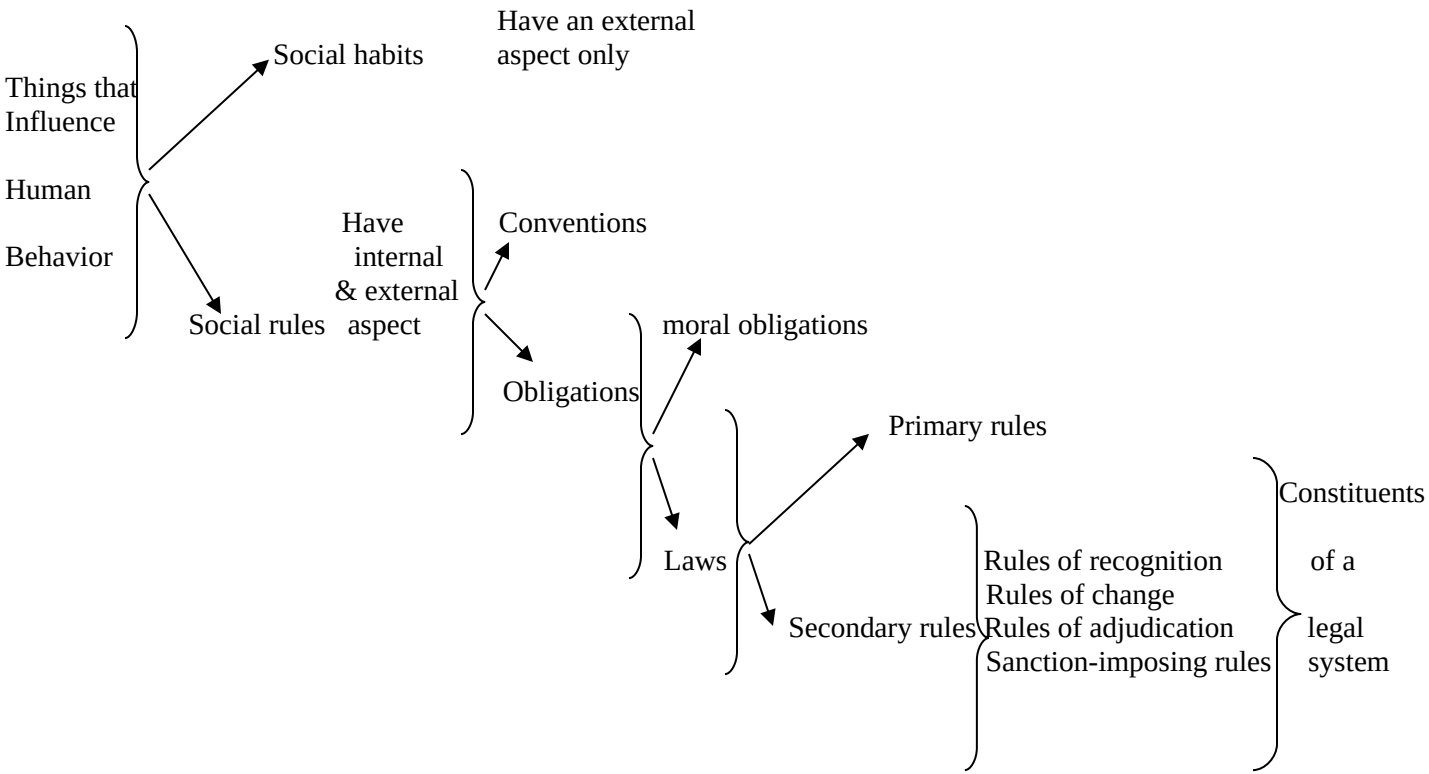
   There may be a closed relation between rules of recognition and rules of change. For example, it may be a rule of change that the king can change the law. It may be a rule of recognition that what is enacted by the king is the law.

3) The third defect mentioned above under (3) can be remedied by having secondary rules which enable any individual to find out whether or not a primary rule has been broken. Such rules can lay down who is to decide this (e.g. a judge) and any procedure which must be followed. These rules will be concerned with judges, courts, jurisdiction and judgments. These are rules of adjudication. But what you shall remember is that rules that confer power to a judge are rules of recognition.

4) The defect which we set out under (4) above can be remedied by having secondary rules which prohibit individuals from taking into their own hands the punishment of others for breach of primary rules, and instead provide for an official system of penalties, with maximum penalties, administered by officials (e.g. a judge). These rules provide the sanctions of the system.

The structure made up of the combination of primary rules and secondary rules of recognition, change and adjudication, and sanction imposing rules make up the heart of a legal system.

The Hart's Diagram



The Rule of Recognition

The most fundamental of these secondary rules is what Hart calls 'the rule of recognition'. This is the rule to which the authority of all the primary rules is referred. Dworkin in his book Taking Rights Seriously (Third Indian Reprint, 2005), pp.20-21 describes it as follows:

Primitive communities have only primary rules, and these are binding entirely because of practices of acceptance. Such communities cannot be said to have 'law,' because there is no way to distinguish a set of legal rules from amongst other social rules, as the first tenet of positivism requires. But when a particular community has developed a fundamental secondary rule that stipulates how legal rules are to be identified, the idea of a distinct set of rules, and thus of law, is born.

Hart calls such a fundamental secondary rule a 'rule of recognition'. The rule of recognition of a given community may be relatively simple ('What the king enacts is law') or it may be very complex (the United States Constitution, with all its difficulties of interpretation, may be considered as a single rule of recognition). The demonstration that a particular rule is valid may therefore require tracing a complicated chain of validity back from that particular rule ultimately to the fundamental rule. Thus a parking ordinance of a city of New Heaven is valid because it is adopted by a city council, pursuant to the procedures and within the competence specified by the municipal law adopted by the state of Connecticut, in conformity with the procedures and within the competence specified by the constitution of the state of Connecticut, which was in turn adopted consistently with the requirement of the United States Constitution.

Of course, a rule of recognition cannot itself be valid, because by hypothesis it is ultimate, and so cannot meet tests stipulated by a more fundamental rule. The rule of recognition is the sole rule in a legal system whose binding force depends upon its acceptance. If we wish to know what rule of recognition a particular community has adopted or follows, we must observe how its citizens, and particularly its officials, behave. We must observe what ultimate arguments they accept as showing the validity of a particular rule, and what ultimate argument they use to criticize other officials or institutions. We can apply no mechanical test, but there is no danger of our confusing the rule of recognition of a community with its rules of morality. The rule of recognition is identified by the fact that its province is the operation of the governmental apparatus of legislatures, courts, agencies, policemen, and the rest.

E. Hart and legal positivism

We have to be clear about the sense in which Hart was a legal positivist. His concept of law was certainly a radical revision of what had previously been known as positivism.

This was due largely to its association with the command theory. Hart firmly believed, as we have seen, that there was continuity as well as discontinuity between himself and the Austinian tradition. What he objected to in the command theory was that it concealed the real structure of law as the interplay between different types of rules, as revealed by his own analysis. He did not, however, regard the command theory as a complete distortion. Hart agrees with Austin that valid rules of law may be created through the acts of officials and public institutions. But Austin thought that the authority of these institutions lay only in their monopoly of power. Hart finds their authority in the background of constitutional standards against which they act, constitutional standards that have been accepted, in the form of a fundamental rule of recognition, by the community which they govern. This background legitimates the decisions of government and gives them the cast and call of obligation that the naked commands of Austin's sovereign lacks. Thus Hart's criterion for the unity of a legal system is more general than Austin's.

Summary

With the command theory displaced, Hart's idea of a positivist approach to law is defined by its commitment to two theses: the morality-law separation thesis and the thesis that analysis of legal concepts should be the main task of jurisprudence.

4.5.2. Dworkin's criticism on Hart/Positivism

As opposed to the separation thesis, the idea that the conditions of legal validity are at least partly a matter of the moral content of the norms is articulated in a sophisticated manner by Ronald Dworkin's legal theory. Dworkin is not a classical Natural Lawyer, however, and he does not maintain that morally acceptable content is a precondition of a norm's legality. His core idea is that the very distinction between facts and values in the legal domain, between what the law is and what it ought to be, is much more blurred than Legal Positivism would have it: Determining what the law is in particular cases inevitably depends on moral-political considerations about what it ought to be. Evaluative judgments partly determine what the law is.

Dworkin's legal theory is not based on a general repudiation of the classical fact-value distinction, as much as it is based on a certain conception of legal reasoning. This conception went through two main stages. In the 1970's Dworkin argued that the falsehood of Legal Positivism resides in the fact that it is incapable of accounting for the important role that legal principles play in determining what the law is. Legal positivism envisaged, Dworkin claimed, that the law consists of rules only. However, this is a serious mistake, since in addition to rules, law is partly determined by legal principles. The distinction between rules and principles is basically a logical one. Rules, Dworkin maintained, apply in an 'all or nothing fashion'. If the rule applies to the circumstances, it determines a particular legal outcome. If it does not apply, it is simply irrelevant to the outcome. On the other hand, principles do not determine an outcome even if they clearly apply to the pertinent circumstances. Principles basically provide the judges with a reason to decide the case one way or the other, and hence they only have a dimension of weight. That is, the reasons provided by the principle may be relatively strong, or weak, but they are never 'absolute'. Such reasons, by themselves, cannot determine an outcome, as rules do.

Dworkinn gives an example of a legal principle in the case of *Riggs v Palmer* (read attachment B), in which a New York court had to decide whether a murderer could inherit under the will of the grandfather he had murdered. The court held that the relevant statutes literally gave the property of the deceased to the murderer. But then the court reasoned:

> *…all laws as well as all contracts may be controlled in their operation and effect by general, fundamental maxims of the common law. No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime.*

As a result the court denies the murdered his inheritance. Such, kind of grounds are, according to Dworkin, principles to which the courts may stretch their hands in the absence of the legal rules emphasized by positivists like Hart. Yet positivists deny the existence of such kinds of laws.

The most interesting, and from a Positivist perspective, most problematic, aspect of legal principles, however, consists in their moral dimension. According to Dworkin's theory, unlike legal rules, which may or may not have something to do with morality, principles are essentially moral in their content. It is, in fact, partly a moral consideration which determines whether a legal principle exists or not. Why is that? Because a legal principle exists, according to Dworkin, if the principle follows from the best moral and political interpretation of past judicial and legislative decisions in the relevant domain. In other words, legal principles occupy an intermediary space between legal rules and moral principles. Legal rules are posited by recognized institutions and their validity derives from their enacted source. Moral principles are what they are due to their content, and their validity is purely content dependent. Legal principles, on the other hand, gain their validity from *a combination* of source-based and content-based considerations. As Dworkin put it in the most general terms: ‘According to law as integrity, propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice.’ (*Law's Empire*, at p. 225) The validity of a legal principle then, derives, from a combination of facts and moral considerations. The facts concern the past legal decisions which have taken place in the relevant domain, and the considerations of morals and politics concern the ways in which those past decisions can best be accounted for by the correct moral principles.

Needless to say, if such an account of legal principles is correct, the separation thesis can no longer be maintained. But many legal philosophers doubt that there are legal principles of the kind Dworkin envisaged. There is an alternative, more natural way to account for the distinction between rules and principles in the law: the relevant difference concerns the level of generality, or vagueness, of the norm-act prescribed by the pertinent legal norm. Legal norms can be more or less general, or vague, in their definition of the norm-act prescribed by the rule, and the more general or vague they are, the more they tend to have those quasi-logical features Dworkin attributes to principles.

In the 1980's Dworkin radicalized his views about these issues, striving to ground his anti-positivist legal theory on a general theory of interpretation, and emphasizing law's profound interpretative nature. Despite the fact that Dworkin's interpretative theory of law is extremely sophisticated and complex, the essence of his argument from interpretation can be summarized in a rather simple way. The main argument consists of two main premises. The first thesis maintains that determining what the law requires in each and every particular case necessarily involves an interpretative reasoning. Any statement of the form "According to the law in S, *x* has a right/duty etc., to *y*" is a *conclusion* of some interpretation or other. Now, according to the second premise, interpretation always involves evaluative considerations. More precisely, perhaps, interpretation is neither purely a matter of determining facts, nor is it a matter of evaluative judgment *per se*, but an inseparable mixture of both. Clearly enough, one who accepts both these theses must conclude that the separation thesis is fundamentally flawed. If Dworkin is correct about both theses, it surely follows that determining what the law requires *always* involves evaluative considerations.

Both of Dworkin's two theses are highly contestable. Some legal philosophers have denied the first premise, insisting that legal reasoning is not as thoroughly interpretative as Dworkin assumes. Interpretation, according to this view, is an exception to the standard understanding of language and communication, rendered necessary only when the law is, for some reason, unclear. However, in most standard instances, the law can simply be understood, and applied, without the mediation of interpretation. Other legal philosophers denied the second premise, challenging Dworkin's thesis that interpretation is necessarily evaluative.

Dworkin's legal theory shares certain insights with the Inclusive version of Legal Positivism. Note, however, that although both Dworkin and Inclusive Legal Positivists share the view that morality and legal validity are closely related, they differ on the grounds of this relationship. Dworkin maintains that the dependence of legal validity on moral considerations is an *essential* feature of law which basically derives from law's profoundly interpretative nature. Inclusive Positivism, on the other hand, maintains that

such a dependence of legal validity on moral considerations is a contingent matter; it does not derive from the nature of law or of legal reasoning as such. Inclusive Positivists claim that moral considerations affect legal validity only in those cases which follow from the social conventions which prevail in a given legal system. In other words, the relevance of morality is determined in any given legal system by the contingent content of that society's conventions. As opposed to both these views, traditional, or as it is now called, Exclusive Legal Positivism maintains that a norm is never rendered legally valid by virtue of its moral content. Legal validity, according to this view, is entirely dependent on the conventionally recognized factual sources of law.

It may be worth noting that those legal theories maintaining that legal validity partly depends on moral considerations must also share a certain view about the nature of morality, namely, they must hold an objective stance with respect to the nature of moral values. Otherwise, if moral values are not objective and legality depends on morality, legality would also be rendered subjective, posing serious problems for the question of how to identify what the law is. Some legal theories, however, do insist on the subjectivity of moral judgements, thus embracing the skeptical conclusions that follow about the nature of law. According to these skeptical theories, law is, indeed, profoundly dependent on morality, but, as these theorists assume that morality is entirely subjective, it only demonstrates how the law is also profoundly subjective, always up for grabs, so to speak. This skeptical approach, fashionable in so called post-modernist literature, crucially depends on a subjectivist theory of values, which is rarely articulated in this literature in any sophisticated way.

4.5.3. Law and Morality: Hart/Devlin debate

The relationship between law and morality, or more accurately between legal validity and moral quality, has posed major questions for jurisprudence over the centuries. The moral criteria for the evaluation of positive law and the implication of their application are particular concerns of naturalist theories but have at various times troubled positivists also. A particular interest in this section is the famous debate made between Lord Devlin

and H.L.A. Hart on the issue of enforcement of morality, whether the law should enforce morality or not.

4.5.3.1. Liberalization and the Wolfenden Report

The debate was initiated in 1957, when the Wolfenden Committee made two recommendations to the government: (1) that private prostitution should remain legal, and public soliciting be outlawed; and (2) that male homosexual acts in private between consenting adults over the age of 21 should be legalized. What was of particular importance was the Wolfenden view of the function of the criminal law, which was stated with exceptional clarity as follows:

> *The function of the criminal law, as we see it, is to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide safeguards against exploitation and corruption of others….particularly the specially vulnerable, the young, weak and inexperienced…. It is not, in our view, the function of the law to intervene in the private lives of citizens, or to seek to enforce any particular pattern of behaviour.*

Their justification for saying so was

> *the importance which society and the law ought to give to individual freedom of choice and action in matter of private morality. Unless deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality which is, in brief and crude terms, not the law's business.*

In short, Wolfenden was advocating a new spirit of tolerance. Any private individual activities that presented no threat to other citizens, or to the maintenance of public order and decency, should remain beyond the reach of the criminal law. It should be noted that the emphasis of the recommendation was firmly on the private sphere; there were no liberal implications for the publication or public display of pornography, or any other kind of public behaviour that might be found offensive. Also the spirit of the report was morally neutral, in that it passed no judgment on what was taking place in private place. It simply declared that it was none of the law's business.

But what is private or public morality in this sense? This is a question that must be answered. Does private mean here ‘out of public view’, or does it mean that it is the individuals business? Are privacy and publicness separate? What is harm? We shall discuss them briefly.

4.5.3.2. John Stuart Mill and Liberty

The findings of the Wolfenden Committee were clearly based on Mill’s classic essay *On Liberty*. In one of the most influential statements in modern political and legal philosophy, Mill had declared that:

> *The sole end for which mankind is warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or mental, is not a sufficient warrant.*

This is, as one might recall from the reading of Mill, called the principle of harm. According to this principle, there is no justification for the use of the law (i.e. mankind collectively) against citizens for any purpose other than the prevention of harm to other citizens. The law is limited in its function to the ‘self-defense’ of society, and is legitimately employed if an individual’s action is threatening society in some way. The second point Mill is making is that the law should also be limited to protecting people against others, not against themselves. These two points are easy to conflate, under the heading of a single ‘no-harm’ principle, but they need to be kept distinct. According to the first point, if there is no threat to others, there is no justification for legal intervention. According to the second point, if the action is only a threat to the agent, there is no justification. The first point is an argument against legal moralism, or the enforcement of moral norms regardless of whether there is any danger. The second point is an argument against paternalism, or the interference in a person’s freedom of action, when it is ostensibly for that person’s own good.

4.5.3.3. Lord Patrick Devlin

Lord Patrick Devlin, a prominent British High Court Judge and philosopher, was the first and foremost to attack the conclusion and the rationale behind the conclusion of the Wolfenden Report. In a lecture entitled *The Enforcement of Morals,* Devlin defended society's right to pass judgment on all matters of morality, but especially on what he described as "society's constitutive morality". The detail of his argument is presented in the following pages.

On Consent

One of the conclusions of the committee was that *male homosexual acts in private between consenting adults over the age of 21 should be legalized*. As far as it is made between consenting adults, it is none of the law's business. Here, there are two essential elements, namely: consent and majority (above the age of 21 years).

Devlin's attack begins and concentrates on the first element, consent. According to Devlin, consent is not a sufficient ground for an action to be private morality and thereby a private issue, not the law's (or the society's) concern. In effect, it means consent can overcome any immoral action. Devlin argues that this is inconsistent with the fundamental principles of criminal law. The criminal law of England (and other countries for that matter) has concerned itself with moral principles. Subject to certain exceptions inherent in the nature of particular crimes, the criminal law has never permitted consent of the victim to be used as a defense. For example, consent of the victim is not a defense in a murder charge. That is why the victim cannot forgive the aggressor in a criminal act and require the prosecutor to drop the case. Consent and forgiveness are irrelevant. He also mentioned criminal offences like suicide, attempt to suicide, euthanasia (killing another at his own request), incest between brother and sister, abortion, duel etc. All these may be acts committed privately and between consenting adults. But they are still crimes and prohibited by law. Why? Because, according to Devlin, 'it is an offence against society….there are certain standards of behaviour or moral principles which society requires to be observed; and the breach of them is an offence not merely against the person who is injured but against society as a whole'.

His argument here is that if consent between prostitutes and their clients, and between adult homosexuals, is made the basis of their legality, then consistency will demand that all of these other acts are legalized as well.

This shows, according to Devlin, that the criminal law is based on moral grounds and the function of the law is enforcement of moral principles and nothing else.

Justifications for Legal Enforcement of Morality

Now, we know the position of the criminal law. In reality, in most of the cases, the law is serving to enforce morality. But what is the justification? Why should a private action be considered as an issue of public morality that concerns the society?

In an attempt to answer this question, Lord Devlin has framed three questions addressed to himself to answer:

a) Has society the right to pass judgment at all on matters of morals? Ought there, in other words, to be a public morality, or are morals always a matter for private judgment?
b) If society has the right to pass judgment, has it also the right to use the weapon of the law to enforce it?
c) If so, ought it to use the weapon in all cases or only in some; and if only in some, on what principles should it distinguish?

Lord Devlin answers the above questions in the following way.

a) Regarding the first question his answer is in the positive. Yes, there is a shared morality. Yes, there is a public morality. Society is a community of ideas. These ideas could be moral or political. These ideas are foundations or bondages to the unity of the society. He gives marriage as an example. For example, in the western Christian society marriage is concluded between one man and one woman. The moral background which emanated from Christianity forbids bigamy or polygamy. So the idea of this morality, which is adopted by the couple, serves as a base for the continuity of the marriage institution. One cannot remove this

morality without bringing down the marriage itself. If one of the spouses commits adultery (which is immoral) with another consenting adult, this immoral act will be felt by the other spouse and the marriage will collapse. In other words, 'the institution of marriage would be gravely threatened if individual judgments were permitted about the morality of adultery; on these points there must be a public morality'. There is such thing as public morality and society has the right to make judgment on morality.

Now to enlarge his argument of 'society is a community of ideas', Devlin says:

> *…without shared idea on politics, morals, and ethics no society can exist. Each one of us has ideas about what is good and what is evil; they cannot be kept private from the society which we live. If men and women try to create a society in which there is no fundamental agreement about good and evil they will fail; if, having based it on common agreement, the agreement goes, the society will disintegrate. For society is not something that is kept together physically; it is held by the invisible bonds of common thought. If the bonds were too far relaxed the members would drift apart. A common morality is part of the bondage. The bondage is part of the price of society; and mankind, which needs society, must pay its price.*

b) In the above we have seen the existence of public morality and that society has the right to judge morality. In this second part, Devlin answers the next question: has society the right to pass law to enforce morality? Lord Devlin says:

> *…if society has the right to make a judgment and has it on the basis that a recognized morality is necessary to society as, say, a recognized government, then society may use the law to preserve morality in the same way as it uses it to safeguard anything else that is essential to its existence. If therefore the first proposition is securely established with all its implications, society has a prima facie right to legislate against immorality as such.*

But what is the rationale behind? In other words, why should society be given this power? Devlin analogizes morality to a government, and immorality to treason. An established government is necessary for the existence of society. Treason (conspiracy to overthrow the government) is in effect against the security of the society. An established morality is as necessary as a good government to the

welfare of the society. Society disintegrates within more frequently than they are broken up by external pressures. Historically, the fracture of common morality is the first stage of disintegration of a society. Thus, the suppression of vice (immoral acts) is as much the law's business as the suppression of subversive activities. Hence, Devlin concludes that: 'it is no more possible to define a sphere of private morality than it is to define one of private subversive activity. There are no theoretical limits to the power of the state to legislate against morality.'

c) In what circumstances should the state exercise its power is the third of the framed questions. Now this is a tough question. It is obvious that the society/government cannot forbid every kind of immoral act. For example, refusing to share your wealth with your poor neighbor may be immoral, but difficult to incorporate into the criminal law. Thus, Devlin prefers to be selective. But how are the moral judgments of society to be ascertained? Who decides that an act is immoral so as to condemn it to illegality? In whose eye is an act to be immoral? What are the clues for the legislature?

   Devlin takes the judgment of a reasonable man. A reasonable man should not be confused with a rational man, however. A reasonable man is the man in the street, a man with a right frame of mind. The reasonable man 'is not expected to reason about anything and his judgment may be largely a matter of feeling'. 'Immorality then, for the purpose of law, is what every right-minded person is presumed to consider being immoral.' Moreover, it must be 'capable of affecting society.´

One point which should be noted is that this argument seeks to establish a conclusion diametrically opposed to that of Mill. Where Mill argued that there was an empirical link between a healthy and enduring society and allowance of maximum freedom to individuals in choice of moral principles and lifestyle, Devlin argues that it is a necessary truth that without individual conformity with the consensus, society will collapse.

Restraints

It may be dismaying that Lord Devlin argues that any immoral acts can be made illegal if the reasonable man feels so. Yet, there are about three guidelines for the legislature follow before outlawing a certain immoral act. What are they?

i. Nothing should be punished by law that does not lie beyond the limits of tolerance. Devlin says an immoral act which is tolerated by the society need not to be outlawed. Now, you may ask: when will an action be beyond tolerance. Devlin puts three kinds of feelings that can lead us to the conclusion: intolerance, indignation, and disgust. Thus, if the man on the street becomes intolerant, indignant and disgusted by a certain action, that is a good clue for the legislature to act. Devlin asks for maximum tolerance. It is nevertheless a vague and highly subjective standard that he is proposing, which opens the door to the perpetuation of popular prejudice as the guiding force behind the use of the criminal law.

ii. Laws should be slow in matters of moral. The human mind always needs greater freedom of thought. After a time the mind can become accustomed to an action and relaxed. The feeling of society or its moral standard on a certain matter is different from generation to generation. Thus since tolerance can be shifted soon, the legislature shall act slowly.

iii. As far as possible privacy should be respected. 'English man's home is his castle.' This shows that privacy is something respected. Devlin says for the sake of respect for privacy, police should not violate individual privacy unless a complaint is made for investigation.

4.5.3.4. Hart's reply to Devlin

In 1963, H. L. A. Hart published the text of three lectures as Law, Liberty and Morality, in which he developed a qualified defense of Mill's liberalism, supporting the recommendations of the Wolfenden Commission and countering Devlin's critique of both. His main purpose was to clarify the issues at stake, and in so doing to argue that the

use of the criminal law to enforce morals was deeply misguided. Much more in step than Devlin with the liberalizing spirit of the early 196Os, Hart set out to undermine moral conservatism and to defend the Wolfenden contention that there is an area of private behaviour which should be no business of the criminal law.

Mindful at the outset of the vulnerability of Mill's libertarian position to a criticism of its dangerous implications, Hart took care to distinguish between coercion for the sake of enforcing society's moral norms, and coercion for the agent's own good. According to the version of liberalism which Hart was developing in these lectures, it is only the latter form of state coercion which is to some extent defensible. Society does have the right to prevent its members from harming themselves as much as from harming others, but it does not have the right to enforce conformity with collective moral standards. The particular example he has in mind here is the prohibition of the sale and use of hard drugs, which is justified on paternalistic grounds. In the name of liberty, Mill had opposed any state interference into such activities, but Hart sets a new limit to the 'no-harm' principle, which is in fact a more literal interpretation of this phrase. What he argues is that the proper reach of the criminal law stops at the point of tangible harm as such - to self or others - whereas for Mill it stops only at the point of harm to others. What Hart endorses in Mill is his defense of the right to follow one's own lifestyle; what he rejects is his insistence that this right has no internal limits.

With this modified version of Mill's defense of individual liberty to hand, Hart was able to confront Devlin's arguments on more solid ground. One of his main complaints about Devlin's case against liberty is that he blurs the distinction between paternalist law and what Hart now labels 'legal moralism'. This is the distinction between laws for people's own protection (e.g. to prohibit one from using drugs for the sake of his safety) and laws which merely seek to enforce moral standards (e.g. to prohibit one from committing private homosexual activity). It is easy to see how this distinction can be blurred and the issue confused. If behaviour deemed to be immoral, it is widely regarded as by definition harmful and self- destructive; laws prohibiting it will be seen as paternalistic and

defensible. In Devlin’s view, both are immoral and shall be forbidden; but in Hart’s view only the first one shall be included in the criminal law.

With this distinction now drawn clearly, however, it becomes a question of whether Devlin’s other arguments are strong or not.

Hart disputes Devlin's thesis saying that ‘it assumes that immorality jeopardizes society, when in fact there is no evidence of that proposition.’ There are no empirical or practical evidences that show that the change of morality of a society is followed by its destruction. While Hart conceded that *some* shared morality is essential to the existence of society, he questioned Devlin's leap from there to the proposition that a change in society's morality is tantamount to destroying it-- that society is equal to its morality-- because that implies that the morality of a society cannot change, or rather that if it does, one society is actually disappearing, and being replaced by another. According to Hart, Devlin's argument amounts to an assertion that law should preserve existing morality, not that legal enforcement of morality is good in and of itself. By contrast, Hart asserted that society cannot only survive individual differences in morality but can profit from them, though he does not specify exactly how it might profit. The idea is society can live with its differences. We can call it in our own way as unity in diversity; don’t you agree?

Hart also said that even if there is a valid argument for the legal enforcement of morality, Devlin's argument as to how that morality should be ascertained is flawed: ". . . no one should think even when popular morality is supported by an 'overwhelming majority' marked by widespread ' intolerance, indignation, and disgust' that loyalty to democratic principles requires him to admit that its imposition on a minority is justified." Hart's view of the connection between society and society's morality is more flexible than Devlin's. A society's morality can change without the society disappearing and democracy does not require the enforcement of uniform morality, as Devlin suggested.

In place of Devlin's justification for the full enforcement of morality, Hart developed his own argument for the partial enforcement of morality based on a distinction he drew between immorality which affronts public decency and that which merely 'distresses'

others based on the knowledge that immoral acts are taking place. In Hart's view, society may, for example, outlaw the public expression of bigamy or prostitution, because such could be considered an affront to public decency, as a nuisance, while it would not be justifiable to outlaw purely private manifestations of these types of behavior, or of consensual homosexual behavior in private, even though some might claim to be distressed by the private behavior as well. At this point, Hart viewed it as a matter of balancing the distress from the knowledge that something immoral is taking place with individual liberty: "[n]o social order which values individual liberty could also value the right to be protected from this type of distress."

Questions for Discussion

1. What are the three basic criticisms made by Hart against Austin?
2. Discuss the internal and external aspects of a rule.
3. In a society without a legal system what kind of laws can exist? What are the defects of this system? What are the solutions given by Hart?
4. Which rules are the sources of legal validity?
5. What makes Hart positivist like Austin?
6. Briefly discuss Dworkin’s criticism made against Hart’s concept of law.
7. What are the three questions framed by Lord Devlin?
8. Discuss public vs. private morality.
9. Is there a division of public and private morality in Devlin’s view?
10. Why is morality so important for society (why do we need legal enforcement of morality)?
11. Is there a limit for enforcement of morality in Devlin’s argument? Do you think every kind of immoral act should be made illegal? What are Devlin’s restraining measures here?
12. Mention at least two criticisms by Hart against Devlin.

13. Discuss briefly Mill’s position on individual liberty.

14. Compared to the diametrically opposite position of Mill and Devlin, where do you put Hart’s approach? What is his version of argument?

4.6. Summary

In this chapter we tried to discuss legal positivism based on the works of writers such as Hume, Bentham, Austin, Hart, and Kelsen. All of them insist on the analytical separation of law from morality. In no case, however, does this imply that morality is unimportant. But it does entail the claim that clear thinking about the nature of law necessitates treating it as a distinct phenomenon capable of being analyzed without invoking moral judgment. Hence, as Austin explains in a famous passage: ‘the existence of law is one thing; its merit or demerit is another.’ A law, which actually exists is a law, though we happen to dislike it. It is this kind of law that a positivist takes as a law and applies for study.

UNIT FIVE

HISTORICAL AND SOCIOLOGICAL LEGAL THEORY

Introduction

The so called historical school of the nineteenth century, led by the different theories of von Savigny and Henry Maine, shows us that law cannot be fully understood until its historical and social context is studied and appreciated. The present unit will give a concise survey of the legal theories of the historical school of the German Savigny and English jurist Maine.

The sociological school of jurisprudence is largely a product of the 20th century. Its approach to the analysis of law differs from that of the other schools in that it is concerned less with the nature and origin of law than with its actual functions and end results. The proponents of sociological jurisprudence seek to view law within a broad social context rather than as an isolated phenomenon distinct from and independent of other means of social control. The sociological questions in jurisprudence are concerned with the actual effects of the law upon the complex of attitudes, behaviour, organization, environment, skills, and powers involved in the maintenance of a particular society. They are also concerned with practical improvement of the legal system and feel that this can be achieved only if legislation and court adjudications take into account the findings of other branches of learning, particularly the social sciences. The main propagators of this school of jurisprudence are Eugen Ehrlich and Roscoe Pound.

Objectives

After reading and learning this chapter students will be able to;

- Understand the end of law from historical and sociological school perspective
- Know the genesis of law from both schools perspective
- Explain Pound's theory of interest

5.1 Historical School

For the purpose of this chapter, we shall take the theories of von Savigny and of Maine together. They represent two very different approaches to an understanding of law and the legal process.

5.1.1 The Spirit of the People: Savigny

The German historical school of jurisprudence was launched on its way by Savigny's little published book. A scholar of the Roman law, he was a professor and energy to the new jurisprudential school. His arguments on the nature and source of law as well as his view of historical development of law is presented as follows:

1. Law originates in custom which expresses national uniqueness. The principles of law derive from the beliefs of the people.
2. At the next stage, juristic skills are added, including codification which does no more than articulate the Volkgeist but adds technical and detailed expression to it.
3. Decay and sets in.

The first is that the law of a nation, like its language, originates in the popular spirit, the common conviction of right, and has already attained a fixed character, peculiar to that people, before the earliest time to which authentic history extends. In this prehistoric period the laws, language, manners and political constitution of a people are inseparably united and they are the particular faculties and tendencies of an individual people bound together by their kindred consciousness of inward necessity. This popular spirit (*Volksgeist*) is the foundation of all of a nation's subsequent legal development. Custom is its manifestation. The popular spirit is shown, for example, in the various symbolic acts by which legal transactions are solemnized. The origin of the popular spirit is veiled in mysticism, and its crude beginnings are colored with romanticism.

But Savigny knew that the popular spirit did not create the complex system of rights in land in Roman law or in any other advanced culture. Accordingly, he supplemented his 'popular spirit' origin with the theory that the jurists (legal scholars including professors

and judges), who become legal specialists with the advance of civilization, are the representatives of the community spirit and are thus authorized to carry on the law in its technical aspects. Then after, law has a twofold existence: First, as part of the aggregate life of the community, and, secondly, as a distinct branch of knowledge in the hands of the jurists. Thus legal history has the 'holy duty' of maintaining a lively connection between a nation's present and its primitive state; to lose this connection will deprive the people of the best part of their spiritual life.

In short, his three stage developmental process is that fist he sees principles of law deriving from the conviction of the people; second, law reaches its pinnacle, with juristic skills which he calls the "political element in law" added to these convections. It is at his stage that codification is desirable, to retain the perfection of the system. The third stage is one of decay.

What idea in Savigny's theory still have value for our times jurisprudence? His distinction between the 'political' and 'technical' elements in law is essentially the same to the modern time thinkers like Cardozo. The principle also provides greater latitude to Law professors in assisting technically the development and improvement of law, which is common in today's world. It seems in today's Ethiopia law faculties are given such a chance in drafting and improving existing laws.

Evaluation

The whole concept of Savigny's discussion of the *Volksgeist* is said to be obscure. The whole concept of the work, the spirit of the people, is difficult to accept for any less than homogenous, or pluralistic, society. Nineteenth century Germany may have fitted the concept, but it is relatively rare to find societies of which the same can be said. Some fundamentalist Muslim societies might fit his model.

5.1.2 The Changing process of Ancient Law: Henry Maine

The German historical school had a profound influence upon jurisprudence and legal scholarship, and even some influence on legal practice, in England and in the United

States. England already had its own historical jurists in Coke, who glorified the English common law as at once the common custom of the realm and the embodiment of reason. Moreover, Blackstone, whose theory that judges only find in? The law is akin to the popular-spirit idea of Savigny.

The chief representative of the historical school in England was Sir Henry Maine who was for many years professor of civil law at Cambridge. Maine partly accepted Savigny's view of the importance of primitive legal institutions when he said that the rudimentary ideas of early law are to the jurist what the primary crusts of the earth are to the geologist. "They contain," he said, "potentially all the forms in which law has subsequently exhibited itself." While this may seem to be the *Volksgeist* garbed in a scientific analogy, Maine departed from Savigny in two important respects: he believed in stages of legal evolution, in which the primitive ideas might be discarded; and he sought to discover by comparative studies of different systems of law the ideas which they had in common.

With regard to jurisprudence Maine's chief contribution is his analysis of legal change. After due study of laws of the ancient world, Maine comes to the conclusion that the development of legal systems followed a pattern of six stages. Static societies passed through the first three stages; progressive societies then moved through at least some of the latter three. Maine stated that the origins of legal development can be traced to religion and ritual. This can be seen in societies that never developed literacy, at least so far as the majority of their population are concerned. Their ritual is used as a means of education in circumstances where it would be futile to reduce instructions into writings. Examples of ritual washing may demonstrate this point. From this initial pool of ritual and religion flowed the stream of the development of the law. The pattern of development that Maine was so concerned to identify was as follows.

Royal Judgments

Royal judgments, divinely inspired, were the first stage. This was a primitive stage which should not be confused with the command of a sovereign as it was not a law making process, but dispute settlement. An example is the story of King Solomon and the two mothers, proposing to divide the live baby in two as the mothers could not agree on who

was the real mother. There was no rule or principle that King Solomon was applying. Within the context of Maine's theory it can be observed firstly that it was to King Solomon that the parties turned for resolution of the dispute and secondly that the was divinely inspired in order to draw out the real mother who could rather have her child live but away from her than die.

Custom

Custom and the dominion of aristocracies follow royal judgments; the prerogative of the king passes to different types of aristocracies (in the east religious; in the west, civil or political), which were universally the depositaries and administrators of law. What the juristical oligarchy now claims is to monopolize the knowledge of the laws, to have exclusive possession of the principles by which quarrels are decided. Customs or observances now exist as a substantive aggregate, and are assumed to be precisely known to an aristocratic order or caste (interestingly in England it was judges). This is the stage of unwritten law; knowledge of the principles is retained by being kept by a limited number.

Codes

The third stage is the period of codes. This is when written and published laws replace usages deposited with the recollection of a privileged oligarchy. This is not an era of change, but rather a period at which, because of the invention of writings, the usage are written down as a better method of storage. In Roman law, the Twelve Tables, and in England the gradual move to written law reports, represent the code stage.

Static societies stop here and progressive societies move on. The major difference of the next three stages from the first three is that they are stages of deliberate change. Most of the changes in the content of law in those first stages were the result of spontaneous development. But to move to the next step it needed a deliberate act which according to Maine consists of the following three stages.

Legal fictions
That is any assumption which conceals, or affects to conceal, the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified. Examples would be false allegations in writs to give a court jurisdiction.

Equity
The development of a separate body of rules, existing alongside the original law and claiming superiority over it by virtue of an inherent sanctity, is a second mode of progress and change. Such a body grew up under the Roman praetors, and the English chancellors.

Legislation
This is the final stage of the development sequence. It is the enactment of a legislature in the form of either an autocrat prince, or a sovereign assembly (parliament). These encasements are authoritative because of the authority of the body and not, as with equity, because of something inherent n the content of the principles.

Criticism
In a single sentence, we may evaluate Maine's contribution to jurisprudence by saying that while his conclusions have not been proved, his scientific and empirical method was the forerunner of much modern jurisprudence and sociology.

Some doubt the sequential development of a legal system of which Maine wrote. They argue that considerable latitude is inherent in the content of primitive people's customary practice. It is not clear that primitive societies move through the first three stages, nor that they are static. Some studies of primitive tribes show use of legislation, for example. Nor is it clear that the Anglo-Roman experience of fictions and equity as the first two progressive stages is universally experienced. An evolution along the six-stage pattern should not be expected for every legal system.

5.2 Sociological School

5.2.1 Living Law: Eugen Ehrlich

Eugen Ehrlich (Austro-Hungarian) is the leading jurist of this school of thought. Unlike the Historical School that conceives a nation's law as tied to the primitive consciousness

of its people, Ehrlich's sociological conception of law located the law in the present-day institutions of its society. In his book, *Fundamental Principles of the Sociology of Law*, he points the law's place in society:

> *At present as well as at any other time, the center of gravity of legal development lies not in legislation, nor in juristic science (jurisprudence), nor in judicial decision, but in society itself.*

While studying the effects of written law on the day to day commercial activities, Ehrlich was led to the conception of the Living Law of a community. He argued that there was a living law independent of legal propositions and that this living law is a proper study of the science of law:

> *This then is the living law in contradistinction to that which is being enforced in the courts and other tribunals. The living law is the law which dominates life itself even though it has not been posited in legal propositions. The source of our knowledge of this law is, first, the modern legal document; secondly, direct observation of life, of commerce, of customs, and usages, and of all associations, not only those that the law has recognized but also of those that it has overlooked and passed by, indeed even of those it has disapproved.* (Patterson P. 79)

He noted that earlier legal theories that recognize law as a sum of statutes and judgments gave an inadequate view of the legal reality of a community. He drew a distinction between norms of decision and social norms or norms of conduct. The latter actually govern the life in a society and can be regarded in popular consciousness, if not necessarily by lawyers, as law. For example, commercial usage and custom may develop and be recognized and respected by courts of law. The point Ehrlich sought to make was that the "living law" which regulates social life may be quite different from the norms for decision applied by courts. Norms for decision regulate only those disputes that are brought before a judicial or other tribunal. Living law is a framework for the routine structuring of social relationships. Its source is in the many different kinds of social associations in which people co-exist. Its essence is not dispute and litigation, but peace and co-operation.

There were jurists in Europe by that time who believed that people should be governed and administered by the written-books. They needed to be reminded that law is only one

means of social control. Although, there are still critics against calling ‘law’ those living laws, Ehrlich’s conception of Living Law was a useful rhetorical device to call attention to his real contribution, the sociological method of inquiry into the grounds for making and interpretation of law. In his other work he made a stern attack against the traditional understanding of law and legal doctrine was followed:

> *For most lay people and for many lawyers it is evident today that the main task of judicial decision-making is to deduce the decisions in the individual case from what the laws and statutes say. There is so much which is not evident from this evidence that it takes the combined forces of the theory of knowledge, legal history, logic, psychology and sociology to find out where this assumption which dominates all of the modern jurisprudence comes from, what it means, how far it reaches and where it leads to.*

In his sociological study he observed that what the law-books said and what actually are followed by the people as well as by courts are different. It is this approach that enabled him to show that law in his town as in ancient Rome had none of the qualities that legal doctrine attributed to it but a host of qualities on which legal doctrine had nothing to say. It was this gap between the law as it operated and what legal doctrine said it was which fascinated Ehrlich from his earliest works.

Ehrlich tried to show this discrepancies by studying and analyzing ‘social associations’. He did identify a great number of associations ranging from family, inheritance, clan, or tribe to state, nation, or the community of nations. The associations could be religious, political, economic or social in character. All these associations have ‘inner order’ which has a character of law, but developed long ago before the creation of the positive law. Examples, the rules followed in marriage or inheritance by the people have nothing to do with the positive law. Not only that but also that they originated a long time ago. And he concluded that such inner order of associations still exists independent of the positive law, and hence courts need to consider such rules during decision giving.

This approach of law has great similarity with the present realism approach. From its inception this approach has indeed impressed the American Realists and especially Roscoe Pound, the American leader of the Sociological school of law.

5.2.2 Law in Action: Roscoe Pound

5.2.2.1 General

Pound was the principal advocate of the sociological based study of the law in the United States. His concern was to examine law in action as opposed to the topic of law in books. In a series of law review articles published between 1905 and 1923, Roscoe Pound of the Harvard Law School discusses different issues pertaining to the sociological concept of law. All his philosophy (Programs of Sociological Jurisprudence) is included and classified in to six main points:

- The first is the study of the actual social effects of legal institutions and legal doctrines.
- The second is sociological study in preparation for law making. It is not enough to study other legislation analytically. It is much more important, says this school, to study its social operation and the effects it produces when put into action.
- The third point is study of the means of making legal rules effective. This has been neglected almost entirely in the past. But the life of the law is in its enforcement, and accordingly Pound considers it part of the jurist's work to study the question of how best to bring about effective enforcement of law.
- The fourth point is sociological legal history, that is, a study not only of how legal rules have evolved and developed, but also of how they have worked in practice and of the social effects they have produced and of the manner in which they have produced them.
- The fifth point is the importance of reasonable and just decisions in individual cases. In general this school conceives of the legal rules as guide to the judge, leading him toward the just result, but insists that within wide limits he should be free to deal with the individual case so as to meet the demands of justice between the parties.
- Finally, the sociological jurists stress the point that the end of juristic study is to make effort more effective in achieving the purposes of law.

If we compare sociological jurisprudence with the concept of the three other (Natural, Analytical, and Historical) schools the following characteristics may be emphasized:

- It is concerned more with the working of the law than its abstract content.
- It regards the law as a social institution capable of improvement by intelligent human effort, and it considers that it is the sociologist jurist's duty to discover the best means of aiding and directing such effort.
- It emphasizes the social purposes which law subserves rather than its sanction.
- It looks upon legal doctrines, rules and standards functionally and regard the form as a matter of means only.

5.2.2.2 Legal Education

Roscoe Pound, who ranks in America as the founder of "sociological Jurisprudence" was the first to turn Holmes' criticisms into complete new program. Pound and his school saw a legal system as being a phenomenon which intimately interacts with the prevalent political, economic, and social circumstances in a given society and which constantly alters with them in a living process of development. They are not interested in the abstract content of rules or in the logical and analytical connections which may exist between them in a particular system. What they want to discover about legal rules is what concrete effects in social reality they aim to produce as soon as they become "law in action" by the behaviour of judges or administrative authorities.

Thus for Pound, law is in the first place a means for the ordering of social interests, and the judge in balancing out these interests should be a "social engineer" who can only perform his task properly if he has an accurate knowledge of the actual circumstances on which his decision will have an effect.

Pound in his first works attacked the existing legal education which depended more on theoretical concepts and only inward looking. He insisted that teachers of law should have a wider knowledge:

> *The modern teacher of law should be a student of sociology, economics, and politics as well. He should know not only what the court decide and the principles*

by which they decide, but quite as much the circumstance and conditions, social and economic, to which these principles are to be applied…..and the state of popular thought and feeling which makes the environment in which the principles must operate in practice. Legal monks who pass their lives in an atmosphere of pure law, from which every worldly and human element is excluded, cannot shape practical principles to be applied to the restless world of flesh and blood.

5.2.2.3 Theory of Interest

Pound's theory of interest is said to be by many the focal point of his philosophy. Hence, among his bulky thoughts we select this theory to discuss in here. The following is taken from 47 S. African L.J. 248 1930.

In the nineteenth century the prevalent idea was that the end of law was to promote or allow the maximum of free individual self assertion. The individual human will was the central point of jurisprudence. But ''by the end of the last and the beginning of the present century,'' says Pound, ''a new way of thinking grew up. Jurists began to think in terms of human wants or desires rather than of human wills. They began to think that what they had to do was not simply to equalize or harmonize the satisfaction of wants. They began to weigh or balance and reconcile claims or wants or desires, as formerly they had balanced or reconciled wills. They began to think of the end of law not as a maximum satisfaction of self-assertion, but as a maximum of wants. Hence for a time they thought of the problem of ethics, of jurisprudence, and of politics as chiefly one of valuing; as a problem of finding criteria of the relative value of interests. In jurisprudence and politics they saw that we must add practical problems of the possibility of making interests effective through governmental action, judicial or administrative. But the first question was one of the wants to be recognized-of the interest to be recognized and secured. Having inventoried the wants or claims or interests which are asserting and for which legal security is sought, we were to value them, select those to be recognized, determine the limits within which they were to be given effect in view of other recognized interests, and ascertain how far we might give them effect by law in view of the inherent limitation upon effective legal action.''

Difficulties arise chiefly in connection with criteria of value. Philosophers have failed to discover any method or valuation which commands general assent. Pound frankly admits this difficulty, but says that it is not for the jurists to solve the problem. All the jurists need do is to recognize the problem and perceive that it is presented to him as one of securing all social interest so far as he may, of maintaining a balance or harmony among them that is compatible with the securing of all of them. ''I am content,'' says Pound, ''with a picture of satisfying as much of the whole body of human wants as we may with the least sacrifice. I am content to think of law as a social institution to satisfy social wants-the claim and demands involved in the existence of civilized society- by giving effect to as much as we may with the least sacrifice, so far as such wants may be satisfied or such claims given effect by an ordering of human conduct through politically organized society.''

Now returning to Pound's ***Theory of Interest,*** *he defines an interest as a claim or want or desire of a human being or group of human beings which the human being or group of human beings seeks to satisfy, and of which, therefore, the ordering of human relations in civilized society must take account. The first task of the jurist is to take a census of the claims and demands actually asserted. The next is to generalize them in terms of social interests because the concern of the law, as a social institution, is strictly only with social interests. It is the social interest in securing the individual interest that determines the law to secure the latter. The third task confronting the jurist is to decide on the principles upon which conflicting interests should be weighed or balanced in order to determine the extent to which the respective interests are to be secured. Thereafter, the jurists must consider the means by which the law may secure the interests which it recognizes, and in this connection we must take account of the limitations upon effective legal action which preclude the complete securing of these interests. It is important to remember, that these interests are not created by the law; they exist independently of the law. It is the task of the law to take cognizance of their existence and to secure them, subject to the conditions already mentioned.*

Pound points out that though the law is, strictly speaking, concerned only with social interests, it is nevertheless convenient to classify interests as individual, public and social. Recognition of individual interests as Pound shows, follows the recognition of group interests. In ancient law, as you doubtless know, the group was the unit and the individual had no legal persona apart from the group. But with the development of commerce .and trade individual interests gradually grew out of the group interests and became recognized and secured by the law until we reach what may be called the apotheosis of individual interests in the Natural Law philosophers of the eighteenth century. It is important to remember that there is a social interest in the securing of individual interests with a view to protecting the individual moral and social life. Hence there is not, as Pound shows, a conflict between individual and social interests. There is a problem of balancing the social interest in the individual life with other social interests; which is, of course, a very different thing.

Pound classifies individual interests as (1) Interests of personality; (2) Interests in the domestic relationships; and (3) Interests of substance. Let us consider first the interests of personality. These Pound divides under three heads:-

(1) the physical person,
(2) honour and reputation,
(3) belief and opinion.

It is clear that there is an individual interest in the inviolability of the physical person. In this connection three questions are pertinent: firstly, what is the extent of this interest; secondly, how far has this interest been recognised by the law; and thirdly, how far is this interest protected by law to-day. In regard to the extent of the interest Pound shows that it covers five points: (1) Immunity of the body from direct or indirect injury; (2) Preservation and furtherance of bodily health; (3) Immunity of the will from coercion; (4) Immunity of the mind and the nervous system from injury; (5) Preservation and furtherance of mental health. The first three interests have long been recognised by the

law and are secured by the law to-day. The last two interests present a new problem, and the law thereon is still in a process of growth. Pound's view is that the difficulties in regard to the recognition and securing of these two interests are largely practical ones of proof, and that so long as the chances of fraudulent claims remain as large as at present these phases of the interest of personality must remain insufficiently secured. But he adds that though we should recognise such practical difficulties we must not forget that a man's feelings are as much a part of his personality as his limbs. It is to be hoped that the actions which protect the latter from injury will in the ordinary course of legal development be made to protect the former also.

The second interest of personality, namely, the interest in honour and reputation is equally as important as the interest in the inviolability of the physical person, but it is much more difficult to secure legally. In determining the nature and extent of the interest in honour Pound stresses the importance of distinguishing it from the interest in reputation as part of one's substance. The former is the claim of the individual to be secured in his dignity and honour as part of his personality. The latter is the claim of the individual to be secured in his reputation as a part of his substance because, in a world in which credit plays so large a part one's good reputation has a definite money value.

In our law the individual interest in honour as distinct from an interest of substance in reputation is recognised and protected by the. (lctio injuriarum. The case of Banks v. Ayres,) furnishes an illustration of such protection. It was held that to solicit a. woman in a private letter to immoral conduct was an injuria and actionable. Another case in which the individual interest in honour and dignity was recognised and protected though no interest of substance was involved is Epstein v. Epstein. The respondent employed private detectives to follow about and spy on his wife whom he suspected of adultery. The applicant asked for an interdict to put a stop to this shadowing and WESSELS, J. granted the application. This case also illustrates the usefulness of an interdict as a means of securing interests of personality. Another suitable remedy for securing such interests which existed in the Roman Dutch law of the Netherlands but which is apparently obsolete in South Africa is the action for honourable amends.) In my view the revival of this action in our law might well serve a useful purpose since it is difficult to protect the individual interest and honour adequately merely by money damages. In this respect it is interesting to note that the German code.preserves one very useful form of the amende honourable, namely, publication of the judgment at the cost of the wrongdoer.

Lastly, there is the individual interest in free belief and opinion. This interest has been legally entrenched in many constitutions in Europe and America. There is of course a social interest in free speech and belief and opinion not merely as guarantees of political efficiency and instruments of social progress but also as furthering the moral and social life of the individual. But this social interest often comes in conflict with another very important social interest, namely, the interest in the security of social and political institutions, and consequently it happens that it is often not granted that recognition and protection which we may think it deserves. South Africa is full of examples (of which section 29, sub- section 1 of the Native Administration Act 1927 is the latest) of failure to

protect this interest, lest the institutions under which we live be endangered by so-called seditious talk.

Having dealt with the individual interests of personality, the individual interests in the domestic relationships next demand attention. Pound points out that one must consider the individual interests of the individual parties to these relationships in the maintenance and integrity thereof, and the securing of these interests both against the world at large and between the parties. Domestic relationships are both personal and economic in their nature and the individual interests therein therefore involve both the individual personality and the individual substance. There are according to Pound four types of interests in the domestic relations which the law is called upon to secure. These are (I) interests of parents- demands which the individual makes arising out of parental relation; (2) interests of children-demands which the individual makes arising out of the filial relation; (3) interests of husbands -demands which the individual makes arising out of the marital relation; and (4), interests of wives- demands which the individual makes arising out of the conjugal relation. These claims are made both against the other party to the relationship and against the world at large.

Let us deal first with the relation of parent and child. The claims of parents against the world at large in respect of their children are enumerated by Pound under three heads: (1) the claim of the society of their children and to their custody and control; (2) the claim to the chastity of a daughter which is intimately connected with the honour and mental comfort of the parent; and (3) the claim to the services of the child which is, of course, an interest of substance. The claims of parents against their children are, firstly, obedience and respect (an interest of personality); secondly, service for the profit of the household (an interest of substance); and thirdly, support from an adult child in case the parent is poor. It is evident that certain other interests must be weighed against these individual interests of parents. There is, as Pound points out, a social interest in the protection of dependent persons. Accordingly the claim of parents to the custody of their children and to control over their upbringing has in modern times come to be greatly limited in order to secure this social interest. All civilized states have statutes providing for' the compulsory education of children and many have laws making the detention of children in public institutions compulsory in all cases where the parents are not fit to have control of their children.

The first and third of the parental claims against the world at large are recognised and secured by our law, though such security in the case of the first claim, which is an interest of personality, is not as complete as in the case of the third claim which, being a claim of substance, is more easily secured through rules of law and judicial machinery. The second claim is apparently not secured by our law, since the Roman 'Dutch law, differing in this respect from the Anglo-American common law, allows an action for seduction only at the instance of the seduced woman and not at the instance of her parents. In regard to the first claim a recent American case, Pyle v. Waechter, is of great interest. The plaintiff alleged that the defendant intentionally and maliciously poisoned the mind of her son, then seventeen years old, and wholly alienated his natural love and affection, esteem, and regard for her. It was held that the complaint stated no cause of

*action and defendants' demurrer was sustained. It is clear that the plaintiff based her action on her interest in the society of her child, but though there was alienation of the child's affections, there does not seem to have been 'deprivation of custody. Was the judgment of the Court in denying relief sociologically correct? Now there is undoubtedly a *social interest in the preservation of the affections that exist between a child and its mother. Is there any other social interest of such weight as to preclude our giving effect to this interest? There is, of course, the social interest in guarding against the danger of imposture and of the abuse of legal process for purposes of blackmail, a danger which is particularly strong in this type of case. There is further the social interest in the emancipation of the child and in free individual life, an interest of particular importance in this case as the child had already reached the age of seventeen. It may be submitted that the best way of dealing with such a case as the present is to inquire as to the motive of the defendant. If it can be shown that lie acted with an improper motive, that-to use a technical term of our law-he was actuated by animus injuriandi, he ought to be liable. Once the defendant's improper motive is proved the danger of imposture largely disappears and the defendant can no longer shield himself, as otherwise he- might, behind the social interest in free speech, belief and opinion. Turning now to the claims of the parent against the child it is clear that the interest in respect and obedience is hardly capable of being secured by law. The most the law can do is to allow the parent the privilege of moderate chastisement.(6) Legal recognition of the interest in the child's services for the profit of the household is in modern law much restricted in view of the social interests that are secured by legislation as to child labour. The third interest, namely, the interest of an indigent parent in support by an adult child of means, is recognised and secured in our lawn,1) but not in the Anglo-American common law.*

We come now to consider the interests of children. As against the world at large a child, as Pound points out, has an interest iii the relationship because of the duty of the parent to support him during infancy or even after majority if he is unable to support himself and the parent has sufficient means. This is an interest of substance recognised and protected by our law, though not in the Anglo-American law. The child also has an interest in the society and affection of the parent. Whether the law should secure this interest depends on the considerations which I pointed out in connection with Pyle's case. As against the parent a child has three claims: (1) support during infancy; (2) education, as far as the financial position of the parent allows; and (3) in the case of indigent adult children unable to support themselves, maintenance in as far as the means of the parent permit. All these interests are recognised and secured by our law, though not by the Anglo-American common law.

The claims of a husband against the world at large arising out of the marital relationship are classified by Pound under four heads. The first is his interest in the society of his wife. The second is his interest in the affection of his wife. The third is his interest in the chastity of his wife; and the fourth is his interest in the services of his wife in the household. The first three are interests of personality, the fourth is an interest of substance. In our law the first of these interests is recognised and protected either by an action for damages or by a interdict against the third person who harbours a man's wife

and keeps her away from him. The third interest is recognised and secured by an action for damages against an adulterer. This action is independent of the action for divorce because, as the case of Viriers v. Kiliann shows, it will lie even though the husband has forgiven his wife and is therefore unable to obtain a divorce. That the hmus- band's interest in his wife's services in the household is amply protected by our law is shown by the cases of Union Government v. Warneke and Abbott v. Beryinam. Whether the husband's interest in his wife's affection is protected by our law is a point on which I have been unable to find any authority, but I should think that the actio injuriarum is wide enough to protect it.

As against the wife the claims of the husband are, as tabulated by Pound, firstly, to her society and affection, secondly, to her services for the benefit of the household, and thirdly, in the case of an indigent husband to support. In our law the husband acquires the personal guardianship of the wife and thus his claim to her society is secured. The husband as the administrator of the community has un- fettered control of his wife's earnings. Our law also recognises and secures the third interest, for a wife may be compelled to maintain her husband when he is in want.

Against the world at large a wife has four claims arising out of the conjugal relationship. Pound classifies them as follows: (1) An interest in the society of her husband; (2) An interest in the affection of her husband; (3) An interest in the chastity and constancy of her husband; and (4) an interest of substance in that her husband supplies her with the necessaries of life. Whether the first two of these interests are protected by our law seems to be doubtful. There is conflict of authority as to whether the third interest is protected. It has been held on the one hand that a wife is not entitled to damages against a female co-respondent and on the other hand that she is so entitled. There can be little doubt that the latter is the better decision. Our law recognises and protects the fourth interest by allowing the wife to pledge her husband's credit for necessaries and by giving her an action if she suffers pecuniary loss through the wrongful death of her husband.

As against her husband the claims of a wife are, firstly, a claim to his society and affection, and, secondly, a claim to support. The first claim is left by the law to the protection afforded by morality and good feeling. The second is fully recognised and protected by our law.

You will have noticed that the law does not recognise and secure all the interests in the domestic relationships. The reason for this appears from the following words of Dean Pound. "Three difficulties," says Pound, "are involved in the attempt to secure these interests. In the first place the interests which have to be weighed against them are more numerous and important than in other cases. There is not only the individual interest of the other party to the relation, but there are the social interests in the family as a social institution, in the protection of dependent persons, and in the rearing and training of sound and well-bred citizens for the future. Again, serious infringements of the individual interests in the domestic relations, such as tale bearing and intrigue, are often too intangible to be reached effectively by legal machinery. Finally, in 'so far as these interests are in effect interests of personality, they are so peculiarly related to the

mental and spiritual life of the individual as to involve in the highest degree the difficulties incidental to all legal reparation of injuries to the person."

A RARE EXAMPLE OF SOCIOLOGICAL JURISPRUDENCE AND JUDICIAL REALISM IN SOUTH AFRICA (The source of this case is 106 S. African L.J. 595 1989)

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On 24 April 1989 in the Witwatersrand Local Division of the Supreme Court a decision was rendered that is a memorable example of sciological jurisprudence. The decision was that of Van der Walt J in S v Moses Mayekiso & others (unreported case 115/89). After all the media publicity it is perhaps trite to note that Mayekiso and others (the 'Alexandra Five') were acquitted on charges of subversion or alternatively sedition (charges of treason were dropped at the dose of the defence evidence). It is a pity that this case was not considered to be worthy of reporting, for it establishes precedents in two important areas. First, it shows that where a people have democratically devised mechanisms for their own social welfare, the government should respect and recognize them instead of branding them as subversive or seditious. Second, the case provides a clear-cut example of judicial realism and sociological jurisprudence, which is a rare event for a South African court.

On the surface the facts of the case were fairly straightforward. The State endeavoured to show 'that the Alexandra Action Committee(AAC), of which all five accused were executive members, was the vehicle through which residents of Alexandra were mobilized and politically conscientized' as part of the so-called national liberation struggle to bring about or promote a constitutional, social, political and economic change in the Republic. (Typed judgment at C 239/9.)

The State endeavoured to show that, in order to achieve this end, the AAC conspired with the Alexandra Youth Congress and other youth groups to launch rent and consumer boycotts and campaigns against the police and town councilors. It was alleged that the aim of the AAC was to cause disorder in the township, to impede police and local authority services, to disrupt law and order, and to defy or subvert or assail the authority of the State. According to the lengthy indictment, the accused, through the AAC, attempted to seize control of Alexandra township and render it ungovernable, with the

intent to achieve one or more of the objects set out in s 54(1) of the Internal Security Act 74 of 1982 and/or with the aim of subverting the authority of the State. (Typed judgment at C 238/32.)

The judge observed that the AAC was a people's organization with democratically elected leaders. He noted that in order to improve the squalid living conditions in Alexandra, the AAC had initially approached the authorities, but to no avail. After it had been ignored by the authorities it approached certain welfare organizations, such as the South African Council of Churches (SACC). At one stage the SACC helped to resolve a potentially explosive confrontation between the police and Alexandra residents represented by the AAC. The AAC was recognized as legitimate by the people of Alexandra. The judge candidly noted that South African blacks do not have the vote and thus have no say in central political decision making. He recognized the AAC as a legitimate expression of their wish to be heard and their right to have democratically elected leaders.

The charges against the accused had been brought as the result of events that had taken place in Alexandra during the period 1985 to June 1986 and the role the State alleged the accused played in these events. The court took into account the deplorable living conditions which prevailed in Alexandra, in spite of the Alexandra redevelopment master plan scheme introduced in 1980 by the township authorities. The court recognized that the Alexandra community was legitimately dissatisfied with this scheme and that, for good reason, they lacked trust and faith in the authorities. The formation of the AAC emanated from this lack of confidence in the authorities and from the feeling of helplessness and despair suffered by the residents of Alexandra.

The AAC formed street or avenue committees in Alexandra so as, in the words of the accused, 'to unite the people of Alexandra and to look at people's problems in order that they may be solved'. According to the accused, the street and yard committees were a step 'towards conscientizing and building unity among residents' (typed judgment at C 239/10), so that they could act collectively to solve their problems. The judge noted that there was a relationship of trust between the AAC and the community based on a feeling of confidence that the AAC was a democratic and fair organization.

The AAC formed people's courts as a mechanism for settling disputes. The formal legal system had lost all legitimacy in the eyes of the township residents and was seen as a tool of oppression rather "than an instrument of justice. Some of the accused took part as officials in these people's courts, which entertained mostly domestic disputes and problems relating to living conditions in the township. Although corporal punishment was sometimes used by these courts, in one of the AAC executive meetings it had been decided that corporal punishment should be discouraged and that an emphasis be placed on mediation and moral authority. All of these facts were noted by his lordship.

People's courts in Alexandra were pounced on by the police soon after they were introduced. Their officials were branded as political agitators whose aim was to undermine the South African state and foment revolution. It is true that during the political upheavals that followed in the wake of the 1983 white referendum on the new

tricameral Parliament (that excluded blacks), gangsterism sometimes took its toll in the guise of popular justice. For example, during the consumer-boycott period there were reported instances of muggings in the guise of enforcing the boycott. They demonstrated what can happen when the authorities undermine genuine popular justice-it degenerates into lawlessness. In fact, people's courts had legitimacy in their communities. The hearing by them of many domestic disputes discredited, in the judge's view, allegations made by the State that they were subversive institutions. Quite the opposite-they had the effect of holding the community together at a time when the formal legal system was unresponsive to its needs.

Funerals involving deaths of activists have always been viewed as subversive by South African police and authorities. In the 'Alexandra Five' case the State at one stage submitted that a certain mass funeral in which the AAC was involved was an act of subversion against the state. Van der Walt J noted that although a funeral is a highly emotional occasion, it is not prima facie subversive or seditious. To establish its subversive or seditious character, much more evidence was required than had been led by the State. Van der Walt J, by putting a heavy burden on the State to prove the subversiveness of a funeral, demonstrated a high degree of judicial realism. His sociological sensitivity is also shown by his taking judicial note of the fact that the police were viewed as having played a role in attacks upon the homes and lives of certain 'radical' elements in Alexandra. This, coupled with the apparent refusal of the police to entertain serious and legitimate complaints lodged by residents prior to the time of people's courts, was a major cause of the loss of legitimacy of the police in the Alexandra community, and was recognized to be so by his lordship.

Van der WaltJ demonstrated the kind of sociological jurisprudence that is longed for by many in South Africa. He put himself right into the boots of the people of Alexandra township. At one stage of the trial he made an in loco inspection of the township. He made many inquiries during the trial and again and again called for more factual detail. He expressed interest in the attitudes and social context of the township people. He noted in his judgment that they saw the discrimination inherent in the system of apartheid as wrong and unacceptable and endeavoured to propagate their rights as citizens in a democratic and fair way. He noted that they wanted to vote and participate in some way or other in the electoral process, so that they could have responsive and democratically elected representatives. The judge did not allow the fact that the accused adhered to socialistic ideals to taint his reasoning with a 'total onslaught' bias. In short, he departed from the normal South African jurisprudential approach that often makes certain 'thoughts' a crime against the state.

Most important is the fact that the judge noted as important to the case before him the fact that black citizens of South Africa are not allowed to vote. 'For obvious reasons this [is] a cause of resentment among the black citizens of South Africa', he said (at C 238/21). Again and again his lordship emphasized that all this (sociological) background was important for an understanding of the social causes of the events that took place in Alexandra during the period covered by the charges.

The judicial realism and sociological jurisprudence displayed by Van der Walt J is a clear departure from the usual approach taken by South African judges. The usual approach is lucidly described in an article by Raymond Suttner entitled 'The Ideological Role of the Judiciary in South Africa' ((1984) 13 Philosophical Papers, reprinted in John Hund (ed) Law and Justice in South Africa (1988) 81; all citations are to the anthologized version of the Suttner paper). Suttner notes that the way disputes are structured in South African courts and the consequent narrowing of issues have 'ideological effects' (at 92). He says that '[i]n directly political cases, court proceedings are merely one phase of a wider struggle between a particular state and its opponents'(idem). In discussing the Barbara Hogan treason trial (S v Hogan 1983 (2) SA 46 (W)), Suttner notes that '[what happens in these [political] trials is that it is sought to criminalise people who often belong to movements enjoying wide popular support and/or who have acted in support of beliefs that enjoy considerable popularity' (idem). This is exactly what was the case with the accused in the Mayekiso case. The AAC enjoyed support among the residents of Alexandra, otherwise many residents of Alexandra would have testified against the accused at the trial. To the surprise of no one, this did not happen. Nor was it a case of 'intimidation', as the State alleged.

Suttner says that one way of legitimizing ordinary court proceedings against 'anti-social' elements in South Africa is 'by the abstraction of the individuals and their acts from much of their context-primarily from those aspects that the accused consider most relevant' (idem).This was precisely the approach taken by Van Dyk J in the trial of Barbara Hogan. For Van DykJ, according to Suttner, 'Barbara Hogan's motivations, the social and political circumstances against which she acted, are of little consequence' (at 94). Van der Walt J's approach to the Mayekiso case is a direct and interesting contrast to the positivistic approach that is normal in South African jurisprudence. It represents a refreshing breath of change from the jurisprudence of Van Dyk J, which Suttner rightly criticizes on jurisprudential and ideological grounds.

Van der Walt J recognized that, from the point of view of the people living in Alexandra township, the AAC was a legitimate organization, and the South African government was illegitimate. From the judge's sociological and historical account of the events in Alexandra township we'' can see that the 1980s in Alexandra involved a complex interaction between repression, reform and popular justice. People dialectically responded to the denial of basic rights by creating democratic mechanisms at grass-roots level. They hoped to speak with one voice to the authorities of the day in order to be heard and to better their life chances. The authorities reacted repressively to the community's needs, so that the community lost all confidence in state-created structures of local government. In a nutshell, this was the context of the Mayekiso case, a context that was admirably described and taken note of in Van der Walt J's illuminating judgment.

The 'Alexandra Five' case demonstrates that the state should take cognizance of representative structures which people have devised for themselves. To do so would show the government's genuine desire to create conditions for negotiating real reform in a post-apartheid South Africa. It is a denial of basic human rights to brand such structures

as purely subversive or seditious. It is to be hoped that this case will represent a new wave in South African jurisprudence. It is an outstanding and rare example of judicial realism and sociological jurisprudence. (106 S. African L.J. 595 1989)

Questions for Discussion

1. How many laws do we have according to the views of Ehrlich?

2. According to Pound how many interests are there? What are they?

3. What is interest in Pound's view?

4. What are the different interests under individual interest?

5. What do you understand from the South African Alexandra case? Why is it said that from sociological point of view it is relevant?

UNIT SIX

LEGAL REALISM

Introduction

Legal realism had its origins in the twentieth century. The term realism is used in many ways to characterize intellectual and philosophical movements. In the art of painting, 'realism' refers to portraying a picture exactly as what the painter saw without idealizing it, choosing his subject from what was the ugly and commonplace of everyday life. In literature 'realism' designates an approach that attempts to describe life without idealizing or romantic subjectivity.

Similarly, legal realism attempts to describe the law without idealizing it, to portray the law as it is – not how it should be or how it was depicted in traditional theories that ignored the law's actual day-to-day operation – and to reform it. American legal realists were concerned with portraying actual practice: the centrality of the court and the unimportance of rules in statute books for predicting what courts do. They sought to make law an empirical science. Scandinavian legal realists wanted to expose and eliminate the hidden basis of the law – the metaphysical assumptions of orthodox legal thought – and to base law on sociological and psychological facts. The difference is that the Scandinavian realists were interested in the legal system as a whole rather than the narrow area of interest of the courts adopted by the Americans.

The relation of legal realism to natural law theory is straight forward: Americans reject appeals to natural law. Legal realists are not legal positivists in the classical sense of Bentham and Austin, since they do not embrace the idea of command theory. For more clear understanding of the two concepts please read **Attachment B**

Objective

After reading this chapter students will able to:

- Understand the different concepts of law within the realist school of thoughts
- Explain the conception of law in view of the jurisprudents from the realist school.
- Observe the role and influence of courts in creation of laws

American Realists

6.1 Pragmatist approach

Oliver Wondel Holmes and John Chipman Gray are greatly considered as the two mental fathers of the American Legal Realism. Prominent are also other writers in this class of philosophy. In this discussion, besides the two giants, we shall in particular investigate the philosophical approaches of Karl Llewellyn and Jerome Frank.

As with many new attitudes and schools of thought, the American brand of realism was a reaction to an earlier school. Especially, it was against school of formalism, which concentrated on logical and a priori reasoning, and was thus thought to be only theoretical and not practical or pragmatic. Formalism, so the realist thought, had no regard to the facts of life experience. Realism attempted to be both practical and pragmatic, rejecting theoretical and analytical approaches to jurisprudential questions, and attempting to look at what it perceived to be the reality in the question: how does law work in practice?

At this juncture, it seems practical and relevant to raise briefly the idea of pragmatism. It is always considered that the American legal realism found its source in the pragmatism of William James. The pragmatism of William James, the general philosophy in the second and third decades of the twentieth century, was decidedly similar to realism in its approach. In the words of James:

> *A pragmatist turns away from the abstraction and insufficiency, from verbal solutions, from bad a priori reasons, from fixed principles, closed systems, and pretended absolute and origins. He turns towards concreteness and adequacy, towards facts, towards actions and towards power. That means the empiricist temper regnant and rationalist temper sincerely given up. It means the open air and the possibilities of nature, as against dogma, artificiality, and the pretence of finality in truth.*

In applying the doctrine to law, James anticipated the realist skepticism of legal rules as controlling factors in judicial decisions. He said:

Given previous law and a novel case the judge will twist them into fresh law….All the while, however, we pretend that the eternal is unrolling, that the one previous justice, grammar or truth are simply fulgurating and not being made. But imagine a youth in the courtroom trying cases with his abstract notion of "the" law (or the censor of speech with his "mother-tongue," a professor with his Truth), and what progress do they make? Truth , land and language fairly boil away from them at the least touch of novel fact…. Far from being antecedent principles that animate the process, law, language, truth are but abstract names for results.

Pragmatism has, thus, stimulated a new approach to law, that "of looking towards last things, fruits, consequences or results. Generally speaking, how the rule of law works, not what they are on paper, is the theme of pragmatic approach to legal problems.

6.2. Law as prophesy of the court: Oliver W. Holmes

IMPORTANT

The prophesies of what the court will do in fact, and nothing more pretentious, are what I mean by the law.
The life of the law has not been logic, it has been experience

Oliver Wendell Holmes

A. On the Nature of Law

It was the remark of Oliver Wendell Holmes, a US Supreme Court Judge. His predictive view of the law has greatest influence on American legal realism. Concerning his contribution, Patterson has (in his book, Jurisprudence, *Men and Idea of Law*) remarked that the aggregation of ideas which came in time to be known as American Legal Realism contained many which were either genuinely derived from Holmes or were inspired by his ripped-out aphorism. For legal realism the two most influential Holmes' ideas were his prediction concept of law and his view that policies and prejudices have more to do with judicial decisions than the logical application of rules.

Holmes was a pragmatist in that he recognized the relevance of extra-legal factors. As early as his publication in 1881 of *The Common Law* Holmes in a famous passage

attacked the view that the Common Law was an entirely valid manifestation of higher reason hovering over the troubled waters of the present, which could be concretized for the individual case by an act of perception on the part of an intellectually detached judge operating on logical and deductive principles:

> *The actual life of the law has not been logic: it has been experience. The felt necessities of the times, the prevalent moral and political theories, institutions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.*

In his celebrated essay, *The Path of the Law,* he provided his most known realist concept of law: *The prophesies of what the court will do in fact, and nothing more pretentious, are what I mean by the law.* Let's see more from this essay.

> *Take the fundamental question, what constitutes the law? You will find some text writers telling you that it is ….a system of reason, that it is deduction from principles of ethics or admitted axioms or what not, which may or may not coincide with the decisions. But if we take the view of our friend the bad man we shall find that he does not care two straws for the axioms or deductions, but that he does want to know what the Massachusetts or English court are likely to do in fact. I am much of his mind. The prophesies of what the court will do in fact, and nothing more pretentious, are what I mean by the law.*

In speaking of the 'bad man' it is clear that Holmes was intending to include any person who is having to contemplate legal proceedings, whether (as a bad man) as an accused in criminal proceedings or a litigant, whether plaintiff or defendant, in a civil action. When the bad man hires a lawyer, all he wants is to know the practical consequences of doing a certain act (which might be considered illegal). The bad man is pragmatic in that he wants to know the consequences not because he is a moralist, but because he knows there is what one may call the law, a force he cannot challenge as applied by courts.

The whole of Holmes' idea of bad man prediction can be better understood by reading attachment B. Although the dialogues are perfectly fictitious, the case was what really happened.

B. On morality

Legal positivists, such as Austin argued that without the distinction between law and morality, legal thinking became confused. Holmes agreed with the legal positivists on this point. Indeed, it was Holmes's belief that if all words with moral connotation were eliminated from the law, the law would gain in precision.

> *For my own part, I often doubt whether it would not be a gain if every word of moral significance could be banished from the law altogether, and other words adopted which should convey legal ideas uncolored by anything outside the law. We should lose the fossil records of a good deal of history and majesty got from ethical associations, but by ridding ourselves of unnecessary confusion we should gain very much in the clearness of thought.*

C. Criticism

The limitation of this notion that the essence of law consists of predictions have been well explored. It has been pointed out for, example, that:

i. This approach disregards the rules and laws that establish the judiciary itself.
ii. It also left out multitude rules particularly in the field of public administrative law that are properly described as law but which do not lie in the field of litigation and therefore are not a matter of prediction.

6.3 Centrality of the judge: John Chipman Gray

A. **The Centrality of the Role of the Judge**

Another strand in American realism, linked with the first but distinct from it, is that which emphasizes the significance of the role of the courts in any consideration of the nature of law. It is the role of the judge that is central to a proper understanding.

This view was carried to its limit by J. C. Gray, who regarded all law as judge-made law. Statutes (legislations made by parliament) are not laws by virtue of their enactment. They

only become law when applied by a decision of the courts. Only then does a legislative enactment spring to life and acquire actual force.

In his book, *The Nature and Source of the Law,* Gray defines law as follows:

> *The law of the state or of any organized body of men is composed of the rules which the courts, that is, the judicial organs of that body, lay down for the determination of legal rights and duties.*

Legislation is therefore no more than a source of law. According to his view, it is not a law until it had been interpreted by the courts, for "the courts put life into the dead words of the statutes." Hence by relegating statutory legislation from the center of the law and putting it as one form of source of the law, he puts the judge in the center, instead.

Gray distinguishes 'the law' from 'a law'. 'A law' ordinarily means a statute passed by the legislature of a state. 'The law' is the whole system of rules applied by the courts. Thus, Gray considered 'a law', that is, a statute passed by the legislature (as well as precedents, custom, and morality) as source of the law not the law itself. Thus, statute, precedent, custom, and morality are on Gray's view, the basis for the rules that the courts lay down for making their decision. This means all of them are not binding. The judge's choice is what matters.

Accordingly, one may conclude that the Austinian sovereign lies in the person of the judge. In his book he cited Bishop Hoadley's words which say: "Nay, whoever hath an absolute authority to interpret any written or spoken laws, it is He who is truly the Law Giver to all intents and purposes, and not the person who first wrote and spoke them." Carrying his definition to its full logical extent, Gray concluded, "The law of a great nation means the opinions of half-a dozen old gentlemen," for "if those half-a-dozen old gentlemen form the highest judicial tribunal of a country, then no rule or principle which they refuse to follow is Law in the country."

Gray offers two lines of evidence in support of this argument. First, he points to the common circumstances where a situation before the court is entirely novel. In the absence of statutes, precedents, or custom on the issue, there is absolutely no doubt but that the

court will still come to a conclusion and state 'the law' governing the matter. Second, Gray points to the mutability of law itself through judicial decision making. Both through review of trial court decisions at the appellate level, and through appellate reconsideration of its own prior decisions, the 'law' becomes very much a product of judicial function.

B**. On analytical Jurisprudence**

Irrespective of the difference on centrality of the sovereign on Austin's concept of law, and the centrality of the judge in Gray's philosophy, Gray warmly accepts the sharp distinction of science of law and other forms of ideologies. Speaking of the contribution made by analytical/positivism jurisprudence, he says*:*

> *The great gain in its fundamental conceptions which jurisprudence made during the last century was the recognition of the truth that the law of a state or other organized body is not an ideal, but something which actually exists. It is not that which is in accordance with religion, or nature, or morality; it is not that which it ought to be. But that which it is.*

5. Criticism

As discussed above, Gray suggests that until a statute had been enforced by a court, it was not a rule at all, but only a source of law. Likewise, the power of an appellate court to overrule its precedents, and the power of any court to interpret precedents, led Gray to a similar conclusion that precedents are not law but merely sources of law. Yet he defines law as "the rules that the courts…..lay down for the determination of legal rights and duties." Thus he was led to the curious position that the rules laid down by a court in deciding a case are "the law" for the case but are only sources of the law for the "next case."

Another criticism observed by Patterson goes as follows. By making precedents (and statutes for that matter) as sources of the law, rather than the law itself, Gray did not classify or differentiate them from other lesser sources of law such as, opinions of legal experts and principle of morality. To place these latter on the same plane with the case

law of the highest court of the jurisdiction in which the "next" case is to be decided, is misleading.

A third criticism provided by Michael Doherty is that Gray's definition of the law denies the facilitative function of certain statutes, such as, for example, the Companies Act (any law that incorporates a company). One does not go to a court in order to incorporate a company, and yet the procedures and requirements for doing that are prescribed in statute.

6.4. Rule Skepticism: Karl Llewellyn

A. On the nature and purpose of law

Karl Llewellyn is another realist jurist in the American realism movement. In his book, *The Bramble Bush,* he explains the concept and nature of law in the following manner:

> *This doing of something about disputes, this doing of it reasonably, is the business of law. And the people who have the doing in charge, whether they be judges or sheriffs or clerks or jailors or lawyers, are officials of the law. What these officials do about disputes is, to my mind, the law.*

Holmes and gray gave the power of making law to the judges of higher courts, but Llewellyn widens it to all officers of the law. In fact, within the decade, Llewellyn subsequently disagreed with himself, and suggested that no definition of law has really proved adequate to the task. Law for Llewellyn was a means for the achievement of social ends and for this reason it should not be backward looking for its development but should be forward looking in terms of moulding the law to fit the current and future needs of society. Furthermore, realists should be concerned with the effects of law on society and he insisted that law should be evaluated principally in terms of its effects.

B. Rule Skepticism

Llewellyn is described as "rule skeptic" in that he distrusts rules as laws. Jerome Frank (another American jurist) called this aspect of realism as 'rule skepticism' – skepticism as to whether rules, if they exist, in practice play the part traditionally ascribed to them. For

Llewellyn, legal rules do not describe what the courts are purporting to do nor do they describe how individuals concerned with the law behave. Legal rules as found in books and emphasized in judicial decisions do not accord with reality. Rules, as described in books and judicial decisions, have essentially taken on a life of their own, and as such bear little resemblance to the actuality of legal process. Legal rules are not the 'heavily operative factors' in producing the decisions of courts although they appear to be on the surface. The realist should be concerned with discovering those factors that really influence judges, and judges in return should be more open about using them.

C. Functions of Law

The requirement that law must be evaluated in terms of its consequences led Llewellyn to developing a sophisticated analysis of the purpose of law in his later works. In one of his works, *My Philosophy of Law*, Llewellyn described the basic functions of law as 'law-jobs.' He lists them in five groups as follows:

1. The disposition of trouble cases (wrong, grievance, dispute), which he likened to garage repair work. The continuous effect was to be the remarking of the order of society.
2. The preventive channeling of conduct and expectations so as to avoid trouble, and together with it, the effective reorientation of conduct and expectations in a similar fashion. This does not mean merely, for instance, new legislation; it is instead, what new legislation is about, and is for.
3. The allocation of authority and the arrangement of procedures which mark action as being authoritative; which includes all of any constitution, and much more.
4. The net organization of society as a whole so as to provide integration, direction and incentive.
5. Juristic method as used in law and the settlement of disputes.

The first three jobs ensure society's survival and continuation, whilst the latter two increase efficiency and expectations. One may disagree with Llewellyn's list of the jobs of the law but they do provide a more holistic approach to law making and judicial activity than others. You can also compare the list with Fuller' inner morality of laws.

D. Characters of Realism

By analyzing the realist movement in America, Llewellyn came up with a list of characteristics of the American legal realism. Hence, the realist concept of law can be better explained in the following ways:

1. The conception of law *in flux*, of moving law, and of judicial creation of law.
2. The conception of law as a means to social ends not as an end in itself; so that any part needs constantly to be examined for its purpose, and for its effect, and to be judged in the light of both and of their relation to each other.
3. The conception of society in flux, and in flux typically faster than the law, so that the probability is always given that any portion of law needs re-examination to determine how far it fits the society it purports to serve.
4. The temporary divorce of Is and Ought for purpose of study. By this Llewellyn means that whereas appeal must always be made to value judgments in order to determine objectives for inquiry itself into what Is, the observation, the description, and the establishment of relations between the things described are to remain as largely as possible uncontaminated by what the observer wishes might be or thinks ought (ethically) to be.
5. Distrust of traditional rules and concepts insofar as they purport to describe what either courts or people are actually doing. Here, the emphasis is upon rules as 'generalized predictions of what courts will do.'
6. Distrust of the theory that traditional prescriptive rule-formulations are the heavily operative factor in producing court decisions. This involves the tentative adoption of the theory of rationalization for the study of options.
7. The belief in the worthwhile-ness of grouping cases into narrower categories than has been the practice in the past.
8. An insistence on evaluation of any part of the law in terms of its effect, and an insistence on the worthwhile-ness of attempting to ascertain these effects.
9. Insistence on sustained and pragmatic attack on the problems of law along any of these lines.

All of these did not being to Llewellyn, but to all of the preceding realists we discussed. For example, Gray's theories are readily evident under numbers 1 and 6 above; Holmes' influence is apparent in all nine, and in particular in 2 and 8; Pound's ideas are particularly obvious in 1,2,3,5,6,and 8; James' influence is manifested in 2 and 8.

6.5. Fact Skepticism: Jerome Frank

A. On Rule skepticism

Judge Jerome Frank categorizes the whole realist movement into "rule skepticism" and "fact skepticism." As shown above, Llewellyn and others grouped under the former class, and Frank himself in the latter. According to rule skepticism, those formal rules found in judicial decisions and in books, were unreliable as guides in the prediction of decisions. The fact that such a multiplicity of rules exists and that some can lead to conflicting results may mean that, in practice, in reaching a decision a judge does not explore the whole corpus of the relevant law, the statutes and the earlier cases, and from these by a process of distillation find the principle that guides him to the correct decision. He may pretend to do this, and his judgment may be written in a way that suggests that he has done this. But it may be that what has happened is that the judge has thought about the matter, decided who he thinks has the best case, and then gone to his law books to work out the chain of reasoning that will lead to his predetermined conclusion.

Dear reader, Can you see to what extent the realists go? Frank is saying that he has a doubt if the judge can do all the research before decision. In the common law a judge has to read a huge amount of case books and maybe also statutes. Jerome Frank, he himself being one of the federal judges, is saying that judges in reality do not go all the way. They decide first based on the arguments and evidences provided by both parties, and then search for statute or case to support his reasoning.

Thus the main thrust of Frank's attack was directed against the idea that certainty could be achieved through legal rules. This, in his view, was absurd. If it were so, he argued, why would anyone bother to litigate? To strength his argument he gave an example from the US Supreme Court cases. In 1917 the court ruled the validity of a certain statute. But

in 1923, by majority vote, the court ruled that the statute was invalid. In between the two years judges were changed. He said that the answer to the validity of the statute turned, not on the certainty of the applicable rule, but on the personnel of the court. He said that this is natural. We want the law to be certain. But this cannot happen. It is only our deep need for security and safety, like children who place their trust in the wisdom of their fathers that we want to rely on the law. We should, he urged, grow up.

B. On Fact Skepticism

But Frank expounded a theory more extreme than the above approach. Judge Frank has persuasively argued that the greatest uncertainties of the judicial process are not in the law-finding but in the fact finding part; or at least, primarily in the witness-jury part. He points out that the assumption that a fat-trial is intended to bring out "the truth" is contradicted by the "fight" theory, that the best way to get the truth out is to have two skilful advocates hammering away at each other's witnesses. The contradiction comes when in their patrician zeal the advocates distort or cover up the truth.

Hence, the chief reason why legal rules do not more adequately perform the principal tasks they are supposed to do –guide and predict the decisions of trial courts-is, he maintains, because of the uncertainty as to what facts the *trier* of fact (especially the jury) will find as the ones to which the legal rule or principle is to be applied. A man in possession of real property has a right to use "reasonable" force in repelling willful intruders, but how can he tell, when confronted with an intruder, what a jury will subsequently find to be "reasonable" force? Thus, one of the supposedly securest of legal rights in American law, a basic part of the ownership of real property, is rendered insecure by the uncertainty as to what the trier of fact will find.

But why do the others fail to see that? Because the rule skeptics see only the practice of the higher courts, the appellate and supreme courts. Frank underlines that in the lower courts prediction of the outcome litigation was not possible. The major cause of uncertainty is not the legal rule, but the uncertainty of the fact finding process. Much depends on witness, who can be mistaken as to their recollections; and on judges and

juries, who bring their own beliefs, prejudices and so on, into their decisions about witness, party etc. It is not unusual for the jury to give a decision (guilty or not-guilty) which is not expected and sometimes surprising.

Further, the uncertainty can also be found in the process by which a judge determines a particular fact to be a material fact. This means whenever the judge decides a case he weighs facts and chooses the material which as very relevant for his decision. Hence, the argument is that different judges may come to different outcomes of same case because of application of different facts.

Summary

The realist legal movement which originated and dominated in the United States focuses on the role of the court as opposed to the positivist school which emphasizes the sovereign. The role f the judge differs from jurist to jurist as discussed above. But generally all realists opposed any formalism approach to law. For realists the law is unpredicted and highly biased by the thinking of the judge.

Questions for Discussion

1. What is the central argument in Realism approach?
2. Which body is the main actor in American realism?
3. What are the differences in a positivist and realist view points of law?
4. Is there any similarity between the two (mentioned in Q.3) worth discussing?
5. What do you understand by “rule skepticism” and “fact skepticism”?
6. Give three definitions of law based on the realist school of jurisprudence.

PART TWO

UNIT SEVEN

RADICAL LEGAL THEORIES

Critical Legal Studies

7.1.1 Introduction

The critical legal studies movement, which initially emerged in the United States in the 1970s in part as a successor to the American realist movement, is essentially offering a radical alternative to established legal theories. It puts forward the proposition that all other legal theories are fundamentally flawed in their belief that sense and order can be discerned from a *reasoned* analysis of law and the legal system:

> *While traditional jurisprudence claims to be able to reveal through pure reason a picture of an unchanging and universal unity beneath the manifest changeability and historical variability of laws, legal institutions and practices, and thus to establish a foundation in reason for actual legal systems, critical legal theory not only denies the possibility of discovering a universal foundation for law through pure reason, but sees the whole enterprise of jurisprudence as operating to confer a spurious legitimacy on law and legal systems. (A. Thomson, 'Critical approaches to law: who needs legal theory?', in I. Grigg-Spall, and E Ireland, The Critical Lawyers' Handbook (London: Pluto Press, 1992), p. 2.)*

The main thrust of their attack is against liberal legal theories, in which they group together as one target most of the other theories identified in this material, although their principal targets are the theories of positivism presented by Kelsen and Hart, in addition to the rights-based theories such as those put forward by Dworkin, Rawls and Finnis. The analysis below will show that the critical legal scholars characterize liberal legal thought as an ideology whose surface character hides its true nature. Furthermore, for the critical legal scholars, liberal legal theory claims to be a politically neutral and objective way to resolve conflicts. The critical legal scholars deny this and state that liberal legal thought is a conflict-ridden structure beneath its purportedly objective exterior, an exterior which also conceals the political judgments and power structures within the law.

The critical legal scholars go far beyond American realism, although they are often seen as the inheritors of the sceptical approach. While the realists rejected formalism they still saw legal reasoning as distinct. Indeed, the realists were committed to liberalism. They did not directly attempt to undermine the liberal ideal of the rule of law, and in many ways, particularly in the later writings of Llewellyn, they were trying to improve the legal system by bringing it more in line with modern social conditions. Indeed, it could be said that the urging of judges and jurists to reject formalism in favour of a realistic approach to jurisprudence was an attempt in many ways to bring law more into line with the power structures and commercial environment of the day. The critical scholars share, and indeed take further a profound scepticism of law in books, but they reject any attempt, whether realist or formalist, to present a value-free model of the law.

In many respects, it will be seen that the major themes of the critical legal studies movement are similar to those ideas developed by the Marxists, particularly modern Marxist writers such as Gramsci and Collins. Critical legal scholars appear to reject the theory of instrumentalism and the argument that law is simply a part of the superstructure of society. Indeed, they see the operations of law as being *essential* for the continuation of liberal society. Kennedy comments:

> *. . . law cannot be usefully understood as . . . 'superstructural'. Legal rules the State enforces and legal concepts that permeate all aspects of social thought constitute capitalism as well as responding to the interests that operate within it. Law is an aspect of the social totality, not just the tail of the dog.*

Nevertheless, this does not completely distinguish the critical legal scholars from the modern-day Marxists whose sophisticated analysis in terms of competing ideologies often appears a long way from the simple instrumentalist view of Marxism. Perhaps the more telling distinction is that critical legal studies form part of the post-structuralist (post-modernist) phenomenon which is pervading many areas of thought, not just simply legal philosophy, whereas Marxism is essentially structuralist in its content. Whether a simple instrumentalist view is taken or whether a more sophisticated link is perceived between base and superstructure as is found in modern versions, Marxism is still a structured theory as Thomson points out:

Politically inspired largely by the perceived failure of Marxist socialism to deliver its promise of a society that overcomes exploitation, the last two decades have witnessed a growing doubt about the Marxist project and a growing feeling that it is infected with the same weakness as the liberal capitalist system it opposes, and of which, as the counter-culture, it is , arguably a part. That weakness is seen by many as the continuing faith, shared with its liberal protagonist, in the capacity of reason to realise progress. Thus many argue that domination and exploitation are not the monopoly of any one theory, but are characteristic of all theories, especially those, such as Marxism, which make claims to truth on a grand scale.

The overall aim of critical theory is to destroy the notion that there is one single 'truth', and that by disclosing the all-pervasive power structures and hierarchies in the law and legal system, a multitude of other possibilities will be revealed, all equally valid. Herein lies the problem for the critical legal scholars, for while they may be able to deconstruct the 'truth' of liberal legalism, they cannot, within the terms of their own methodology, put forward *the* alternative, only *an* alterative. One such alternative, indeed the only complete one, is offered by Unger's vision of a super-liberal society which will be discussed below. To start with, however, a review of the fundamental tenets of the critical legal scholars' attack on the liberal legal tradition will be undertaken.

7.1.2. The Critique of the Liberal Legal Tradition

As with American realism, the critical legal scholars form part of a movement in jurisprudence, rather than offering a unified theory. The unifying feature of the realists was their attack on formalist modes of reasoning. This is indeed one of the features of the critical legal studies movement and is one that links them to early realism tradition, but it is not the common bond that unites it. Rather, the uniting feature is a profound disenchantment with liberal legalism as a whole. This encompasses not only a fundamental disbelief that the law has objective content and is neutral in its operation, but also a belief that the liberal legal tradition has used this portrayal of the legal system to mask the fundamental contradictions inherent in the law. The law is portrayed as rational, coherent, necessary and just by liberal legal scholarship, when in fact, according to the critical legal scholars, it is arbitrary, contingent, unnecessary and profoundly unjust. This constitutes a direct attack on the ideal found embedded in Western legal and political thought, the rule of law.

Furthermore, critical legal studies is an attack on Western liberal concepts of basic civil and political rights which purportedly guarantee, in a legal sense, the individual's freedom of speech, assembly, religion, and in a political sense liberal democracies are based on the concept of the freedom of the individual. These rights and freedoms are portrayed in the Western tradition as being the only true way to self-realisation and freedom of the individual. The critical legal scholars' aim is to show that these rights and freedoms, although put forward as essential to an individual's fulfilment, actually serve the political and economic requirements of liberalism. For instance, the concept of freedom of contract, though not a civil and political right in the recognised sense, is not a liberating concept but one that ties individuals to the market-place and serves the basic aims of capitalism. Contract law along with all other bodies of law in a liberal society serves political ends. Indeed, for the critical scholars they are simply politics in disguise. Why then do people accept the liberal traditions of the law?

> *People do not hold to theories of the kinds I have been criticising [liberal legal theories] simply because they serve conservative ends. At least some people believe in them because they think they're true, even though it seems to them too bad that they are true. . . . For a lot of people, legitimating theories, theories that show the rationality, necessity, and (often) efficiency of things as they are, serve as a kind of defence mechanism. These theories are a way of denying, of avoiding, of closing one's eyes to the horribleness of things as they are. (D. Kennedy, 'Cost-reduction theory as legitimation' (1981) 90 Yale LJ 1275 at p. 1283.)*

More will be said on this point as the specific themes of the critical legal studies movement are analysed. However, at this point it is worth noting the similarities between Kennedy's idea that people accept liberal philosophy because they think it's true, and the Marxist idea of false consciousness when the victims of capitalism embrace the ideology that is responsible for their situation. To put it in its wider context, the Western media, politicians and the Establishment in general consistently put forward as a statement of the truth that Western liberal democracy is the only natural form of society and that the freedom of the market-place is as fundamental to society as the political freedoms found in the West. This ideology has been reinforced by the defeat of communism with the West's victory in the Cold War. It is inevitable that many individuals in Western societies will believe this to be true and, given the routine of their daily lives, will not be susceptible to fundamental change or be able

to perceive the fact that they are being exploited let alone be able to accept an alternative approach.

It is informative to look now at the specific criticisms that the critical legal studies movement has of liberal legalism.

7.1.3 An attack on formalism

This prong of the critical legal scholars' attack is derived from the realists' disbelief that formal rules provide an answer to a dispute. However, whereas the realists concentrated their critique of formalism on this aspect and were particularly concerned to try to find the real rules operated by the judge and jury, the critical legal scholars seem to take this element as read. They add little to the realist critique in this area apart from a few generalities. Indeed, such is the lack of detail in this area that the following criticism of the critical scholars' approach to formalism appears justified. It appears from their attack that formalism is:

> *. . . the CLS [critical legal studies] caricature of the notion that law is a deductive and autonomous science that is self-contained in the sense that particular decisions follow from the application of legal principles, precedents, and rules of procedure without regard to values, social goals, or political or economic context. (L. Schwartz, 'With gun and camera through darkest CLS-land' (1984) 36 Stanf L Rev 413 at p. 431.)*

As the remainder of this book reveals, traditional and modern mainstream legal theory does not simply put forward a simplistic scientific approach to the law. Theorists such as Hart, Dworkin and Finnis all recognised that law is a much more complex machine. Hart and Dworkin recognise the fact that policy in the form of social values and goals plays a role in the legal system, though they differed over whether or not the judge should be instrumental in its application. Finnis's central thesis is more concerned with the issue of the role of morality in the definition and application of law, and indeed both Hart and Dworkin also attempt to deal with the issue of morality. It appears that the critical legal scholars are too quick to condemn mainstream theory by lumping the diversity of views together as formalism.

Indeed, formalism in its strict black-letter sense is not to be found in legal theory, only in some law teaching and academic writing and in legal practice. It seems that the critical scholars' agenda stretches both to theory and practice, with the aim of enlightening practicing lawyers as to the 'wider implications and consequences of certain courses of action, and in particular [to] reveal that unless legal actions are seen in the context of larger political action, they may well be counter-productive, at least in the long term' (A. Thomson, 'Critical approaches to law - who needs legal theory?', in I. Grigg-Spall and P. Ireland, *The Critical Lawyers' Handbook*, (Loidon: Pluto Press, 1992), p. 8).

However, the lack of a detailed critique of formalism may be due to the fact that the thrust of the critical lawyers' attack is on the wider issue of whether there is in fact a distinct mode of legal reasoning. If they successfully demonstrate that there is no separate mode of legal reasoning at all then it is unnecessary for them to have to deal directly with formal legal reasoning as such. Roberto Unger, one of the leading exponents of critical legal studies, indicates that this is the real point of the movement's critique of formalism.

> *By formalism I do not mean what the term is usually taken to describe: belief in the availability of a deductive or quasi-deductive method capable of giving determinate solutions to particular problems of legal choice. What I mean by formalism in this context is a commitment to, and therefore also a belief in the possibility of, a method of legal justification that can clearly be contrasted to open-ended disputes about the basic terms of social life, disputes that people call ideological, philosophical, or visionary. (R. Unger, 'The critical legal studies movement' (1983) 96 Harv L Rev 563 at p. 564.)*

It can be seen from this how wide and potentially destructive to established legal traditions the critical legal studies movement is. In effect it is a criticism of the positivists' idea, exemplified perhaps by Kelsen's pure .theory that it is possible to separate law from other areas and that legal reasoning and exposition are essentially apolitical. From this it is clear that the aim of the movement's attack on formalism is to 'demonstrate that a doctrinal practice that puts its hope in the contrast of legal reasoning to ideology, philosophy, and political prophecy ends up as a collection of makeshift apologies' (R. Unger, 'The critical legal studies movement' (1983) 96 Harv. L Rev 563 at p. 573). It is to this attack that the analysis now turns.

7.1.4 Critique of legal reasoning

The rejection of legal reasoning has already been outlined above, and it was seen that the problem for the critical legal scholars was that while they reject all the theories and practices which are dependent on the autonomy of law and legal reasoning, they do not subscribe to the equally structuralist approach of the Marxists, who, while denying the existence of legal reasoning, tend to adopt a deterministic position which presents law as simply a reflection of economic forces. The critical scholars address the problem by concentrating, as the American realists did, on the existence of external factors that operate on the judge. However, whereas the realists did recognise that legal reasoning and rules played a part, albeit a minor one, in the judge's decision, the critical legal scholars are of the opinion that these external factors are the sole operative factor in the judgment. The explanation is not put in Marxian terms of the laws simply reflecting the economic relations within society but instead is expressed in terms of judicial values and choices of a *political* nature (Hunt calls this the problem of 'relative autonomy': A. Hunt, 'The theory of critical legal studies' (1986) 6 Oxford J Legal Stud 1 at pp. 28-9).

A problem with the critical legal studies approach to legal reasoning is that, like its critique of formalism, it appears to lack any detail or precision. The following is an analysis of Kairys's examination of legal reasoning (D. Kairys, 'Legal reasoning', in D. Kairys (ed.), *The Politics of Law. A Progressive Critique* New York: Pantheon Books, 1982), pp. 11-17). Kairys concentrates on 'one of the basic elements or mechanisms of legal reasoning, *stare decisis',* the notion that judges are bound by precedent, an obligation which, according to the traditional approach, leads to the judge acting on the legal, not the political, plane. Kairys then reiterates the realists' view that:

> *. . . anyone familiar with the legal system knows that some precedents are followed and some are not. . . . The important questions, largely ignored by judges, law teachers, and commentators, are: How do courts decide which precedents to follow? How do they determine the significance of ambiguous precedents? Do precedents really matter at all? Why do lawyers spend so much time talking about them?*

So far Kairys's analysis does not differ from any of the early realists and indeed, if anything, seems more simplistic. He then provides a thumbnail sketch of a handful of

American cases on freedom of speech which at the level of abstraction presented do appear contradictory. He then concludes his case analysis by saying:

> *Unstated and lost in the mire of contradictory precedents and justifications was the central point that none of these cases was or could be decided without ultimate reference to values and choices of a political nature. The various justifications and precedents emphasised in the opinions serve to mask these little-discussed but unavoidable social and political judgments. In short, these cases demonstrate a central deception of traditional jurisprudence: the majority claims for its social and political judgment not only the status of law . . . but also that its judgment is the product of distinctly legal reasoning, of a neutral, objective application of legal expertise. This latter claim, essential to the legitimacy and mystique of the courts, is false.*

There is little attempt to assess these external factors accurately, except that they are ‘a composite of social, political, institutional, experiential, and personal factors’. So far there is no difference between Kairys's critique and the realists' approach, except perhaps for a greater attempt to ascertain the exact nature of the external factors that lead to judicial decisions on the part of the realists. For the critical lawyers, however, there is no need for this because the answer is obvious and in no need of testing. Judges share social and political assumptions, in other words they share an ideology which, because of their background, leads them to make consistent decisions that reinforce the liberal order in which they operate and depend on for their livelihoods. This then distinguishes the realist from the critical lawyer.

7.1.5 Contradictions in the law

It is the critical lawyers' view that liberal legalism represents the *status quo* in society and that it seeks to mask the injustice of the system. They attempt to seek out the conflict-ridden substance that is hidden beneath that apparently smooth surface.

> The descriptive portrait of mainstream liberal thought … is a picture of a system of thought that is simultaneously beset by internal *contradiction* (not by 'competing concerns' artfully balanced until a wise equilibrium is reached, but by irreducible, irremediable, irresolvable conflict) and by systematic *repression* of the presence of these contradictions. (M. Kelman, *A Guide to Critical Legal Studies* (Cambridge, Mass: Harvard University Press, 1987), p. 3.)

Kelman proceeds to identify the central contradictions in liberal thought that have been identified by the critical lawyers. First Kelman identifies:

> *. . . the contradiction between a commitment to mechanically applicable rules as the appropriate form for resolving disputes (thought to be associated in complex ways with the political tradition of self-reliance and individualism) and a commitment to situation-sensitive, ad hoc standards (thought to correspond to a commitment to sharing and altruism) (A Guide to Critical Legal Studies, p. 3.)*

The contradiction between rules and standards is one that Kelman identifies with the writings of Duncan Kennedy. Kennedy contrasts the individualism present in the dominant liberal legal thinking, in the form of the application of rigid and precise rules, with the notion of altruism or collectivism:

> *Altruism denies the judge the right to apply rules without looking over his shoulder at the results. Altruism also denies that the only alternative to the passive stance is the claim of total discretion as creator of the legal universe. It asserts that we can gain an understanding of the values people have woven into their particular relationships, and of the moral tendency of their acts. These sometimes permit the judge to reach a decision, after the fact, on the basis of all the circumstances, as a person-in-society rather than as an individual. (D. Kennedy, 'Form and substance in private law adjudication' (1976) 89 Harv L Rev 1685 at p. 1773.)*

There are some aspects of this approach which hark back to Jerome Frank's idea that justice should be done in each case because there is insufficient certainty and objectivity in the legal process on which to build a sustainable doctrine of precedent. However, Kennedy goes further than this. The fundamental contradiction between individualism and altruism is a problem not only for a judge but is symptomatic of society in general. 'The fundamental contradiction - that relations with others are both necessary to and incompatible with our freedom . . . is not only an aspect but the very essence of the problem' (D. Kennedy, 'The structure of Blackstone's Commentaries' (1979) 28 Buffalo L Rev 205 at p. 213). In the law this fundamental contradiction can be seen in the competing and contrasting legal terminology found present, for example, in the debate between subjectivity and objectivity in such diverse areas as criminal law and international law (see further M. Tushnet, 'Legal scholarship: its causes and cures' (1981) 90 Yale LJ 1205). More specifically in the law of contract, for example, there is a clear dichotomy between those concepts which favour individualism, for example, freedom of contract which may result in a defenceless individual being taken advantage of by a more powerful individual or company, and those concepts which favour altruism, such as

duress and undue influence. Within the capitalist legal order with its liberal philosophy, contract law is dominated by the former.

The second contradiction Kelman identifies in the critical lawyers' critique of liberalism is:

> *. . . the contradiction between a commitment to the traditional liberal notion that values or desires are arbitrary, subjective, individual, and individuating while facts or reason are objective and universal and a commitment to the ideal that we can 'know' social and ethical truths objectively (through objective knowledge of true human nature) or to the • hope that one can transcend the usual distinction between subjective and objective in seeking moral truth. (A Guide to Critical Legal Studies, p. 3. Kelman identifies a third contradiction between intentionalism and determinism, see A Guide to Critical Legal Studies, pp. 86-113.)*

The second contradiction is pointed at one of the central tenants of positivism - the separation of law from value judgments. Nevertheless, as with the first contradiction between individualism and altruism, this aspect goes further than simply a critique of writers such as Kelsen. The main thrust is that both everyday culture and the liberal theory that supports and legitimates it downgrade values and beliefs to the extent that they are simply seen as matters of taste, peculiar to the individual, whereas reasoned analysis of facts and laws yields universal maxims which can guide any individual's behavior.

The aim of the critical scholars is to show that these contradictions are to be found in all legal concepts and rules, even in the so-called clear cases where the contradiction has simply been successfully repressed over a period of time. The assumption behind this is that within each contradiction one set of values is paramount in liberal legal theory, namely individualism over altruism and objectivism over subjectivism.

7.1.6 Deconstruction: trashing, delegitimation and dereification

These are the various techniques the critical lawyers use to reveal the underlying contradictions in the law and the deep-rooted hierarchies of power that are also hidden beneath the neutral exterior of the law. The political motivations behind these techniques must be understood for they too tend to be obscured in the dense, often

incomprehensible, language of the critical lawyer. These motivations are made clear in the following extract:

> *There is little systematic work on law and power despite the fact that a defining feature of law is that it operates to facilitate exploitation and discrimination. . . . We therefore need to explain how this concept of 'law' is used to justify the political order of modern society. . . . The pervasiveness of law in modern society means that law must be challenged from within by means of what we call legal insurgency. It is not enough to be critical of law and its underlying political structures; we need to move beyond mere criticism to critique and thereby expose the contradictions underpinning the principles, policies and doctrines of bourgeois law. The material effects of law and the ideological bases upon which it is manufactured must be analysed and deconstructed in order to comprehend the power of modern legal discourse as a dominant intellectual paradigm. (S. Adelman and K. Foster 'Critical legal theory: the power of law', in I. Grigg-Spall and E Ireland (eds), The Critical Lawyers' Handbook (London: Pluto Press, 1992), p. 39.)*

Deconstruction of law and legal language takes three main forms. 'Trashing' is essentially aimed at revealing the illegitimate hierarchies (power structures) that exist within the law and society in general. The task of the critical lawyers is to reveal those hierarchies and undermine them. The hierarchy of power is not the simple one envisaged by Marxists, who see it in terms of classes, but is much more complex and found at every level, including universities where there is a power relationship between lecturer and student (see A. Freeman, 'Truth and mystification in legal scholarship' (1981) 90 Yale LJ 1229).

Indeed, trashing or debunking the traditional methods of teaching law is an important element in critical legal studies and has led to some universities in the United States and the United Kingdom actively pursuing a critical agenda. The following extract from Kelman explains the purpose of trashing or debunking:

> *We are also engaged in an active, transformative anarcho-syndicalist political project. . . . At the workplace level, debunking is one part of an explicit effort to level, to reintegrate the communities we live in along explicitly egalitarian lines rather than along the rationalised hierarchical lines that currently integrate them. We are saying: Here's what your teacher did (at you, to you) in contracts or torts. Here's what it was really about. Stripped of the mumbo-jumbo, here's a set of problems we all face, as equals in dealing with work, with politics, and with the world. (M. G. Kelman, 'Trashing' (1984) 36 Stanf L Rev 293 at p. 326.)*

'Delegitimation' appears from the writings of the critical scholars to be a slightly different aspect of the deconstruction process. It is aimed at exposing what the scholars

see as one of the most important functions of law in a liberal society, namely the legitimation of the socio-economic system of that society. To delegitimate law the scholars attempt to strip away the veneer of legitimacy to reveal the ideological underpinnings of the legal system. To many scholars the legitimacy conferred on the social system by the law is vitally important to the continuance of that system with all its unfairness and exploitation:

The law's perceived legitimacy confers a broader legitimacy on a social system and ideology that . . . are most fairly characterised by domination by a very small, mainly corporatised elite. This perceived legitimacy of the law is primarily based on notions of technical expertise and objectivity and the idealised model of the legal process. . . . But it is also greatly enhanced by the reality that the law is, on some occasions just and sometimes serves to restrain the exercise of power. (D. Kairys, 'Introduction', in D. Kairys, (ed.), *The Politics of Law. A Progressive Critique*, rev. ed. (New York: Pantheon Books, 1990), p. 7.),

Generally speaking the law serves to mask exploitation by using the imagery of fairness, equality and justice. The summary of the critical approach to contract law given below (see 2.1) will illustrate this.

Finally an aspect of the deconstruction process which is firmly linked to trashing and delegitimation is 'dereification'. For critical scholars like Gabel, the law is characterised by reification, which involves a gradual process whereby abstractions, originally tied to concrete situations, are then themselves used, and operate, instead of the concrete situations. Simply put, the abstraction or concept takes on the form of a thing. This process can be seen in the law, which over the centuries of its development gradually becomes divorced from the actual human relations it is attempting to regulate. The process is not obvious but is clouded in legal mystification so that people both within the law, and outside the law but subject to it, mistake the abstraction for the concrete. Concepts like mortgages, consideration, trusts, wills, take on a life of their own and become totally divorced from their original conception. In so doing the purpose behind

the concept becomes disguised. In the case of the legal terms listed, the purpose behind these was the facilitation of monetary exchange in a society built on the control and movement of capital. 'Legal reification is more than just distortion: it is also a form of coercion in the guise of passive acceptance of the existing world within the framework of capitalism'. Dereification is simply the recognition and exposure of such fallacies, to reveal the law as it really is.

7.1.7 The constitutive theory of law

This final trend in the critical legal studies movement is not only part of its critique of the liberal legal tradition, but is also part of the movement's attempt to escape from the Marxist shackles of determinism.

> *. . . law is not simply an armed receptacle for values and priorities determined elsewhere; it is part of a complex social totality in which it constitutes as well as is constituted, shapes as well as is shaped. (D. Kairys, 'Introduction', in D. Kairys (ed.), The Politics of Law. A Progressive Critique, rev. ed. (New York: Pantheon Books, 1990), p. 6.)*

The idea that law plays an important role in shaping society is part of the wider post-modernist perspective that ideas, and not the economic base, constitute (form or make up) society. It follows from this that if there is to be some sort of order in society, there must be a convergence of ideas including ideas and beliefs about law, in other words a 'shared world-view'. The critical legal scholars' critique is therefore directed at 'the analysis of world-views embedded in modern legal consciousness'. The aim is to attack the shared world-view embedded in legal consciousness, to reveal its link to domination in capitalist legal societies, and to change that consciousness. This is not an easy task because the constitutive power of the dominant shared world-view in society is grounded in that world-view's claim to be the truth, and since 'every world-view is hostage to its claim to be true, its constitutive force can be undermined [only] if this claim can be refuted'. The shared world-view that the liberal order is the only true and natural system can be refuted if it is shown that there is any number of alternative ways which would not result in exploitation and injustice. One suggestion of an alternative way is contained in the writings of Roberto Unger reviewed below. First, however, a more specific example of CLS work will be examined.

7.2. Critical Legal Studies and Feminist Legal Theory

Feminist legal theories represent a most important modern development in the analysis of law, concerned with the treatment of women by the legal system and the perception, or lack of perception, of women's experience and needs in legal provision. In engaging with this agenda feminist theories not only seek to identify and counter a traditionally male-oriented legal system but also to question male-oriented theories and ideologies. Part of this latter element of feminist thought emphasises a rejection of a search for objective 'truths' about law and puts in its place a contextual understanding of law as a social construct which is a product of a variety of influences, some of which are covert or even unrecognised. It is also suggested in some feminist theory that a 'male'-oriented appreciation of law emphasises individualism and 'rights' at the expense of 'female' emphases upon interaction and cooperation. This in turn demands a radical new methodology in legal theory which is, to a significant extent, found in the critical legal method.

Feminist theory is by no means limited to the context of critical legal studies; if it were, that might be seen as fundamentally inconsistent with the dynamic of the feminist approach to legal theory. Anne Bottomley, Susie Gibson and Belinda Meteyard remark that:

Feminism and critical legal studies are, of course, two entirely different creatures. Feminism is only partially and peripherally concerned with academic theorising. It is motivated by the dissatisfactions of a wide spectrum of ... women and by the everyday experience of such women. ('Dworkin; Which Dworkin? Taking Feminism Seriously' in P Fitzpatrick and A. Hunt, eds., Critical Legal Studies (Oxford: Basil Blackwell, 1987), p. 47.)

In this context, therefore, critical legal studies contribute a useful method rather than a defining context. The method is, however, important as a means of demonstrating the explicit and implicit male orientation of law and legal administration and the resulting

disadvantage and marginalisation often suffered by women. Katherine T. Bartlett offers three basic elements which characterise a feminist legal theory. These are:

(a) asking the 'woman question', i.e the extent of the presence and recognition of women's experience in law;

(b) feminist practical reasoning, meaning a reasoning which proceeds from context and values difference and the experience of the unempowered; and

(c) consciousness raising, meaning an exploration of the collective experience of women through a sharing of individual experiences.

(Katherine T. Bartlett, 'Feminist Legal Method' (1970) 103 Harv L Rev, 829.) Upon these bases feminist legal theory seeks to articulate women's perspective upon law and thereby to empower women in the future development or redevelopment of law.

From a feminist perspective the expression of male domination in law may, in common with other power structures subjected to critical legal analysis, take both overt and covert, or even unrecognised, forms. Overt discrimination against women, as, for example, in certain historic and sometimes continuing employment practices, is by definition obvious when encountered. It is closely similar to race discrimination and other forms of illegitimate disadvantage and falls more into the realm of policy making than theoretical analysis. Covert or unrecognised bias presents much more difficult issues in the areas of both theory and practice.

The key question here is the extent to which an inherently 'male' legal mindset implicitly discriminates against women because it is framed in terms of male experience which does not necessarily relate to that of women. Examples may be found, significantly, even in some of the legal practices and provisions which are in principle directed towards securing gender equality. Equality is often taken to mean simply the establishment of identity in the treatment of women and men. It must first be said that in a broad range of situations the establishment of the co-equal treatment of men and women as people is, of course, precisely what gender equality does mean. However, in other issues, where the needs and experiences of women and men and their respective experiences are not the

same, such an approach tends to treat women 'as if they are men with oppressive consequences. In this context Joanne Conaghan and Louise Chudleigh remark that:

> *Current conceptions of employment reflect a male norm: they are built upon a notion of the male worker who is full-time, long-term and unionised. Women workers tend to deviate from this norm . . . their working patterns are often interrupted and part-time. . . . Thus, labour law both embodies and conceals the gender division of labour and, by focusing exclusively on the world of paid work, ignores the differing responsibilities [of] . . . men and women . . . ('Women in Confinement: Can Labour Law Deliver the Goods?' in Critical Legal Studies, p. 133 at p. 137.)*

Women may be disadvantaged even by legal structures which purportedly seek to take account of female needs and experience but which do so on the basis of analogy with irrelevant, and sometimes outdated, male experience. An example of this is the treatment of maternity leave as, in effect, analogous to the sick leave of a male employee, as well as the assumption that parenting is an exclusively female role, shown in the very limited provision for paternity leave. Other failures of law to deal adequately with women's experience may readily be found. The issue of domestic violence and its treatment by criminal law and law enforcement agencies is an obvious area of concern, characterised by the recognition by English law in *R v R* [1991] of the possibility of rape within marriage. Again in the employment sector, different retirement ages and pension entitlement for women and men, which may prejudice either men or women who might want to retire earlier or work later, has also been an issue of concern in the 1990s, with a major compensation award to three women workers in the gas industry in June 1996. The essential point in many, although not all, of these concerns has been put shortly by Katherine T. Bartlett in her statement that the essential 'woman question' in law is:

> *how the law fails to take into account the experiences and values that seem more typical of women than of men, for whatever reason, or how existing legal standards and concepts might disadvantage women. ('Feminist Legal Methods' (1970) 103 Harv L Rev, p. 829 at p. 837.)*

The value of critical methodologies in the display and analysis of such gender distortions in law and legal administration should be evident. The point to be emphasised is perhaps that of the disadvantaging effect of concealed and frequently unrealised bias in a legal order which has for the most part developed from male rather than female experience. This is not to assert a 'conspiracy theory' or to claim that all law discriminates against

women. It is also not necessary to assert a gender-exclusive model in which there are claimed to be wholly incompatible 'individualist' male and 'collectivist' female viewpoints. This latter claim is also sometimes made in relation to different human cultures and in both cases it can unwisely be forgotten that we are, in an Aristotelian sense, social individuals, i.e. each person, woman or man, is an individual who lives in association with others in a social structure. The key endeavour of feminist legal theory may rather be to identify a fact of social, political and legal history which in many important respects fails adequately to take account of the experience of somewhat more than half of the human population. This is expressly a failure to afford mutuality and recognition not only to women as members of society but, in fact, a failure to recognise the mutuality of all society's members, women and men. Such failures, based upon whatever form of improper discriminatory selectivity, generate alienation and, ultimately, disfunctionality in the working of a legal order. The ways in which this has happened and the present real extent of the problem are the issues central to the interface between feminist legal theory and critical legal studies. This then opens the question of deconstructive and positive agendas. Much of the critical legal endeavour is concerned with the identification of defects and concealed agendas in law; feminism is at least as much concerned with establishing proper recognition of women's experience in society and law. Nonetheless, the identification of the sources of marginalisation and alienation may be seen as at least an important stage in a process of response.

Postmodern Legal Theory

7.3.1 Introduction

Postmodern legal theory is the latest radical theory to challenge the liberal orthodoxies that society has a natural structure and that history is simply a process of evolution towards that truth. Grand claims made by Fukuyama, for instance, that history has come to an end 'since the entire world - or those parts of it that counted for anything - had converted to free market capitalism and liberal democracy', are ridiculed by the postmodernists (C. Norris, *The Truth about Postmodernism* (Oxford: Blackwell, 1993), p. 1. See F. Fukuyama, *The End of Liberty and the Last Man* (London: Hamish Hamilton,

1992)). Liberalism and capitalism are not the end of the road but are simply the major components of what the postmodernists call 'modernity'. Modernity's structures, its laws, its literature, its architecture, its art, in fact any of its products, are all subject to 'deconstruction', a process which reveals numerous alternatives. An inherent aspect of this process is a recognition that society is simply made up of a complex network of subjectivities and contains no objective truths or natural laws upon which it can be grounded.

Developing the radical critique promulgated by the Critical Legal Studies movement in the 1980s, postmodern legal theory offers a more profound, indeed more disturbing vision of law and society in the 1990s.

7.3.2 A Critique of the Enlightenment

Postmodernism groups 'progressive' versions of history under the label 'Enlightenment'. Followers of these versions believe that the 'Enlightenment brings "light", and modernity's task is to finish the task that the Enlightenment began. The progressives, the Lockeans, Benthamites, Millians, Social-Darwinists and most Marxists see the Enlightenment as the unleashing of a great potential for good'. 'The shackles' of superstition 'that held back political organisation, thought, individual liberty, and production were overthrown' by the Enlightenment (C. Douzinas and R. Warrington, *Postmodern Jurisprudence* (London: Routledge, 1991), pp. 6-7). Followers of modernity deride the postmodern as 'chaotic, catastrophic, nihilistic' and 'the end of good order'. Postmodernists, on the other hand, characterise modernity as 'an iron cage of bureaucratization, centralisation and infinite manipulation of the psyche by the "culture industry" and the disciplinary regimes of power and knowledge', while portraying postmodernism as 'an exhilarating moment of rapture'.

It defies the system, suspects all totalising thought and homogeneity and opens space for the marginal, the different and the 'other'. Postmodernism is here presented as the celebration of flux, dispersal, plurality and localism. (Douzinas and Warrington, *Postmodern Jurisprudence,* p. 15.)

The post-Enlightenment concept of progress, of constant modernisation, with its overriding sense of movement towards the truth or 'meta-narratives' is rejected. In law, modernist theories such as those presented by Hart, Kelsen, Dworkin and Finnis try to portray law as a unified whole, and posit the rule of law as the method of 'neutral, non-subjectivist resolution of value disagreement and social conflict'. However, in the reality of the postmodern world where such rigid homogeneity is recognised as being imposed arbitrarily, 'the panglossia of statutes, delegated legislation, administrative legislation and adjudication, judicial and quasi-judicial decision-making; the multiform institutions and personnel; and the plural non-formal methods of dispute avoidance and resolution cannot be seen any longer as a coherent, closed ensemble of rules or values'. Despite this, modernist theories still attempt to legitimate the idea of a closed, logical legal order.

The lineage of postmodernism in law can be traced back to Legal Realism's fundamental tenet that law is an instrument of policy, which was amplified by the Critical Legal Studies movement's statement that all law is politics. However, the postmodernist disenchantment with the rationalist desire to make sense of the world is much more wide ranging than either of its predecessors. Its targets are everything from art to science and beyond. Indeed, its scepticism is so profound that it inherently knows no bounds, for there are none, only 'flux, dispersal, plurality and localism' (Douzinas and Warrington, *Postmodern Jurisprudence.*, p. 15).

> *Postmodernism, then, is the rejection of . . . faith in rationalism, and a recognition that any argument, no matter how perfectly logical, is only as good as its presuppositions. Thus the postmodernist proclaims the death of western 'meta-narratives' such as capitalism, liberalism, and marxism. But along with their rejection of rationality comes the rejection of the possibility of truth.*

Nevertheless, there is the possibility that postmodernism, by rejecting many aspects of modern society, does have a positive agenda. Postmodernism, as shall be seen, has an image problem of its own in the sense that it is viewed as nihilistic, having no purpose except to undermine. As shall be seen, though many proponents seem to offer no solutions, others hold out a more positive agenda. This is revealed in Balkin's rejection of the Enlightenment:

The Enlightenment sought to free humanity from the chains of unthinking tradition and religious bigotry. It sought to master the world through science and remake the world according to the dictates of reason. It sought to understand and recast society in rational and scientific terms, and it was confident about the ability of the human intellect to do this. Two centuries later, humanity is imprisoned by new chains that the Enlightenment forged for us. These are the chains created by science, technology, and rationality, which in the course of liberating us subjected us to new forms of control, bureaucracy, mediaization, suburbanization, and surveillance. We still need liberation, we still need emancipation, but now it is from the products of our previous emancipation - from computer data bases, sound bites, political action committees, voodoo economics, electronic surveillance, commodified video images, and the industrialization of professional culture. The emancipation we now require cannot be on the same terms as those proposed by the Enlightenment. It must, at least in part, be a rejection of the terms by which we freed ourselves from pre-Enlightenment thinking. (J. M. Balkin, 'What is Postmodern Constitutionalism?' (1992) 90 *Michigan Law Review* p. 1966 at p. 1989.)

7.3.3 LYOTARD AND FOUCAULT

The postmodernist dialectic is perhaps too narrowly portrayed as simply a recipe for relativism when in fact it is a positive method of forcing individuals to confront and change the rigid contexts and structures (including laws) within which they have arbitrarily confined themselves. In this sense it is a liberating philosophy. This can be understood by Lyotard's depiction of the world of the painter and the writer:

> *If they do not wish to become supporters (of minor importance) of what exists, the painter and the writer must refuse to lend themselves to such therapeutic uses. They must question the rules of the art of painting or of narrative as they have learned and received them from their predecessors. Soon those rules must appear to them as a means to deceive, to seduce, and to reassure, which makes it impossible for them to be 'true'. Under the common name of painting and literature, an unprecedented split is taking place. Those who refuse to reexamine the rules of art pursue successful careers in mass conformism by communicating, by means of the 'correct rules', the endemic desire for reality with objects and situations capable of gratifying it. (Lyotard, The Postmodern Condition, pp. 74-75.)*

Those painters and writers who do not conform to the accepted rules struggle to get their works seen or read, for they are not accepted as 'real' artists. However, a realisation that those rules will have originated in a context breaking piece of art or literature shows the falsity of the belief in the truth as represented by those rules. Those rules in fact just represent one view or approach, they have no superior or prior claim than any other view or approach. A context breaking writer may start a literary school which becomes so established that it eventually becomes the orthodoxy. The mistake is then made to elevate the orthodoxy to the level of a received truth.

> *A postmodernist painter or writer is in the position of a philosopher: the text he writes, the work he produces are not in principle governed by pre-established rules, and they cannot be judged according to a determining judgment, by applying familiar categories to the text or to the work. Those rules and categories are what the work of art itself is looking for. The artist and the writer, then, are working without rules in order to formulate the rules of what will have been done. Hence the fact that work and text have the characters of an event; hence also, they always come too late for their author, or, what amounts to the same thing, their being put into work, their realization (mise en oeuvre) always begin too soon. Post modem would have to be understood according to the paradox of the future (post) anterior (modo). (Lyotard, The Postmodern Condition, p. 81.)*

In essence, postmodernism is not anti-modernism, for as Lyotard's example illustrates 'a work can only become modern if it is first postmodern', so that postmodernism is definitely 'a part of the modern', not a historical period beyond modernity.

In some ways it is better to view postmodernism as post-structuralism or post-positivism - a rejection of the structured, logical and internally consistent picture of society and law exemplified in legal theory by Hart's union of primary and secondary rules, or Kelsen's pyramid of norms. 'Positivist structuralism . . . treats the given order as the natural order' when in reality 'all truths are, in fact, products of past practices'. Those past practices are founded upon power (F. Nietzsche) particularly if power is seen as something much more than repressive coercion. As Michel Foucault points out:

> *. . . power is not to be taken as a phenomenon of one individual's consolidated and homogenous domination over others, or that of one group or class over others. What, by contrast, should always be kept in mind is that power, if we do not take too distant a view of it, is not that which makes the difference between those who exclusively possess it and retain it, and those who do not have it and submit to it. Power must be analysed as something which circulates, or rather something which only functions in the form of a chain. It is never localised here or there, never in anybody's hands, never appropriated as a commodity or a piece of wealth. Power is employed and exercised*

through a net-like organisation. And not only do individuals circulate between its threads; they are always in the position of simultaneously undergoing and exercising this power. They are not only its inert or consenting target; they are also the elements of its articulation. In other words, individuals are the vehicles of power not the points of application. (M. Foucault, 'Two Lectures' in C. Gordon (ed.), Power/Knowledge (New York: Harvester, 1980), p. 96.)

Foucault's neo-Marxism shares with postmodernism an emphasis on the 'shifting relationships between self and other' , in that at one point a person is exercising power and in another instance she or he is subject to it.

7.3.4 Identity and the 'Other'

The postmodernist concern with the 'other' combats to a certain extent the perception that it has no ethical content. In simple terms the 'other' appears to be the individual who is outside the system, who is disadvantaged by it, though with Foucault in mind this categorisation must necessarily take place at a macro level, for at a micro level we are both powerful and powerless. In the legal sphere the 'other' cannot assert that the law is on their side within the current structures since the system alienates them. Postmodernism recognises that they have an equal claim to consideration since their assertions are no less valid than those who are advantaged by the system, indeed no less valid than the views of lawyers, judges or politicians. The concept of the 'other' is important in postmodernism, given that much of our traditional thinking is based on presumptions, what the postmodern feminist would label white, male, and middle class, thereby excluding lots of other groups and individuals from the structures of society. In essence postmodernism is inclusive in that it purports to embrace the 'other'. Indeed, following Foucault, by embracing the 'other' we are also embracing ourselves.

Take for example the case of *R* v *Bentley* (11 December 1952. The original trial is recounted by the Court of Appeal on 30 July 1998 when Bentley's conviction was quashed. The judgment can be found at http/Avww.courtservice.gov.uk/bentley.htm). Bentley, aged 19, but with a much lower mental age, was convicted of murdering a police constable after he was in a struggle with another officer. He shouted to his younger friend, who had a gun, 'Let him have it Chris'. What does that mean? The prosecution argued it meant 'shoot him', whereas Bentley's defence counsel argued 'let him have the gun'.

Bentley was convicted and hanged. It could be strongly argued that Bentley was only guilty of 'using ambiguous language'. He did not shoot the officer, but he was a victim of the system that needed to find someone guilty and to execute them, particularly when the murder involved an attack on the representatives of order, and the individual who fired the gun was too young to be sentenced to death. The law was simply a reflection of society's attitudes. Postmodernism considers such cases, and given the inherent absence of 'truth' in any case, recognises the plight of the defendant as well as the victim.

However, clearly the case of *R* v *Bentley* is a hard case in terms of establishing intent. In the case of someone who in a similar case shouts 'shoot him dead', then the positivist would contend that there is no ambiguity in language and the defendant is clearly guilty. The postmodernist, however, would contest the rigid invocation of the issue of intent by the courts. A parallel can be drawn with Camus' discussion of suicide (A. Camus, *The Myth of Sisyphus* (London: Penguin, 1981), p. 13). Camus states that there are multiple explanations for why a person commits suicide including the fact that the individual's friend addresses him indifferently on the day in question. Similarly, there are multiple explanations for why the defendant uttered those words, including the possibility that he feared for his own life.

In essence there is no truth, only versions of it. Presumably, for the postmodernist, the court should cease to apply rigid rules of law on intention for instance and widen its doors to let in an open-ended discussion about the responsibility of other individuals and the wider community for the crime. In essence this was the end result of the inquiry into the death of the London teenager, Stephen Lawrence (Report of Sir William MacPherson, *The Stephen Lawrence Inquiry*, Cm 4262-1 (London: The Stationery Office, 24 February 1999)), where responsibility for the death of the black teenager was widened beyond the five suspected of the stabbing to the police, and then to society as a whole where there is clearly still a high level of racism. However, this 'postmodernist' conclusion seems to have been forced only because institutional racism in the police led to the failure to prosecute the five suspects. If a 'proper' case had been mounted against them, then responsibility would have stopped at the five individuals.

The rigid structures of the law have been variously used to provide an artificial definition of a 'tribe' and of 'native title' thus denying land rights to the Mashpee Indians of Cape Cod in the United States (J. Wicke, 'Postmodern Identity and Legal Subject', p. 465), and the Yorta Yorta people of Australia *(Guardian Weekly*, 21 March 1999, p. 13). Although it is inherently unclear as to what a postmodernist 'result' would be in these cases, it is contended that the coming together of 'postmodernism and the Law, with its stern capital "L" intact, promises to be a dynamic coupling, postmodernism offering to put its delirious spin on the rigor and fixity of the body of the law'. Presumably then, given postmodernist concern with the 'other', the law should seek to accommodate their claims but to what extent and in what manner cannot be determined until we have a truly fluid postmodernist debate in such disputes.

7.3.5 Postmodernism and Fundamental Values

There appears to be a contradiction at the heart of the postmodernist concern with the 'other', at least if this concern results in the elevation of certain 'truths' over other contrasting ones. In many societies women and racial minorities have been disadvantaged, there is no doubt about that, but the question remains whether postmodernism can embrace these 'others' over their oppressors, namely the sexists and racists still found in great numbers in society. Hilaire Barnett recognised that postmodernism presents a problem for feminism:

> *The implications of the postmodern critique for feminist jurisprudence are profound. If 'grand theory' is no longer sufficient to explain women's condition, concepts such as patriarchy and gender, the public and private, loose their explanatory force, and throw doubt on the potential for a convincing coherent theoretical understanding of women's lives and conditions. In place of grand theory, there must be developed critiques which concentrate on the reality of the diversity of individual women's lives and conditions, critiques which reject the universalist, foundation a list philosophical and political understanding offered by modernism. With the 'age of innocence' lost, in its place there exists diversity, plurality, competing rationalities, competing perspectives and uncertainty as to the potentiality of theory. (H. Barnett, Introduction to Feminist Theory (London: Cavendish Publishers, 1998), p. 180.)*

This certainly challenges the different branches of feminist thought, from liberal through to cultural and radical, to re-think their generalisations over the condition of women in society.

Inherent in the postmodernist tradition is what Foucault has labelled the 'death of the Subject' (M. Foucault, *Power I Knowledge* (New York: Pantheon Books, 1972), p. 117), which simply means 'recognising the multiplicity of subjectivities, identities, which inhere in the individual and recognising that each individual is comprised of multiple subjectivities. The postmodern Subject has multiple identities as he or she moves in and out of differing milieux'. The question, in the radical tradition, is why a particular individual is oppressed or is the oppressor. For women the answer is not always because of male dominance, or at least that is the implication of postmodernism. Hilaire Barnett, provides a way forward for feminism if it is to embrace the latest radicalism:

> *Feminist theory which fails to identify the differences between women, and the impact which those differences have on women's lives, fails to be inclusive. The scepticism with gender may be helpful in so far as it obliges feminist scholarship to 'demote' gender as an organising concept, in so far as it has been the dominant concept in feminist modernist theory, and to set gender alongside crucial other factors such as race, class, age, sexual orientation, the local and specific (as opposed to the universalising and general) and so forth. Thus a postmodern feminism must focus on the specificities of women's lives, rather than assuming the commonality of all women's lives. Feminist pluralism must replace feminist modernism. (Barnett, Introduction to Feminist Jurisprudence, p. 197.)*

Nevertheless, within the all pervading relativism of postmodernism there appears to be no grand theory which explains why feminism is to be preferred to sexism. What makes sexist attitudes wrong? What makes racist attitudes wrong? The extent to which postmodernism can recognise, however fleetingly, a shared morality within society is questionable. Certainly postmodernists have been heavily critical of liberal attempts to overcome the subjectivity inherent in moral discourse. Liberal appeals to 'We the People' (Ackerman), 'the Interpretive Community' (Fiss), 'Persons in the Original Position' (Rawls), or even 'Hercules' (Dworkin), are simply conveniently abstracted 'supra-individual subjects' with no base in the world of real individuals. They represent the 'mythical fashioning of supra-individual subject identities' with the sole purpose of legitimating liberalism (P Schlag, 'The Empty Circles of Liberal Justification' (1997) 96

Michigan Law Review 1 at p. 13. Schlag is deconstructing, B. Ackerman, *We the People - Foundations* (Cambridge Mass.: Harvard University Press, 1991), pp. *6-7;* R. Dworkin, *Law's Empire* (London: Fontana, 1986), pp. 238-40; J. Rawls, *A Theory of Justice* (Cambridge Mass.: Harvard University Press, 1971), p. 11; O. Fiss, 'Objectivity and Interpretation' (1982) 34 *Stanford Law Review* 739 at p. 745). The refusal of liberalism to enforce even what appears to be shared morality in favour of an elitist academic representation of that morality is perhaps evidence of the force of the postmodernist critique. Even Lord Devlin's shared morality, criticised by many for coming too close to opinion poll morality, is based on the hypothetical *man* on the Clapham omnibus. Modernity's denial that society's 'values' are based on a shifting, prejudiced, majoritarian morality is unconvincing. The moral relativism revealed by postmodernism may be nearer to reality but its potential reduction of the views of Martin Luther King to the same level as those of the Grand Wizard of the Ku Klux Klan is, to say the least, deeply disturbing.

7.3.6 Derrida and Deconstruction

Poststructuralism is at the heart of postmodernism, and Jaques Derrida is commonly seen as its founder. Derrida, Foucault and Lyotard are not academic lawyers, but their postmodernist/poststructuralist writing in the areas of literary criticism, history, and philosophy respectively, have made their impact. Derrida's deconstruction, in particular, has been tremendously influential, since law is like literature:

> *Language is a complex web of signs and, for Derrida, is metaphorical. ? Metaphor is a figure of speech in which a word or a phrase is applied to an object or action that it does not literally denote in order to imply a resemblance, as in he is a lion in battle. Language can never mean literally what it says - language is made up of metaphors and symbolisms. (Hilaire Barnett, Introduction to Feminist Jurisprudence, p. 185.)*

In the use of language, modernism posits the belief that language discloses dire relationship between the word and the world - the principal function of language is representational - it depicts the way things are. The proposition depicts reality. 'This is a chair' is a statement of truth. However, even modernists admit that some statements are simply statements of opinion - this chair is beautiful'. The postmodern approach is that there is no division of language into fact and opinion, all statements are opinions. How

can this be? How can a challenge be made to the basic proposition that 'this is a chair'? The answer is because language is inherently indeterminate. The postmodernist would argue that there is no true meaning to the concept of chair - even what appear to be factual statements are open to debate and deconstruction.

This is all the more so in law in which the language is already an abstraction from reality - the concepts of 'family' or 'property' in law are removed from the ones in 'reality' - and the debates revolve around them. Nevertheless, the question to be asked is if there is no meaning in legal language, why do postmodernists concern themselves with it? The answer lies within semiotics which aims at an understanding of 'the system of signs which creates meaning within a culture'. Language is all there is. 'There is nothing outside the text' - that is the postmodernist message - language has to be examined to see what it reveals about the person using it or the class of persons using it (see J. M. Balkin, 'Being Just with Deconstruction' (1994) 3(3) *Social and Legal Studies* 393 at p. 394). Statements in law are assertions - assertions of the truth but simply assertions. In choosing between competing assertions, an individual will favour those which clash least with everything else that person takes to be true. In legal terms the law is self-reinforcing since individuals agree with the 'right' legal propositions because they fit into the legal system which is presumed to be 'right' -the whole system is based on dominant assertions which must ultimately be built on pure ideology or power. In this way the law and the legal system are self-perpetuating hierarchies.

The overriding postmodernist message is that the truth is, there is no truth. If everything is subjective, there are no meta-narratives, no overriding values, then is deconstruction simply painting a desperate picture of society in the late twentieth century - a cultural and moral wasteland? Binder's evaluation of Derrida is that 'probably no one has contributed more to the . . . disenchantment with cultural identity than this Algerian born post-structuralist' (G. Binder, 'Representing Nazism: Advocacy and Identity at the Trial of Klaus Barbie' (1989) 98 *Yale Law Journal* 1321 at p. 1373). Furthermore, Binder points to the inherent problem with post-structuralism - its valueless-ness. There is no measure by which we can evaluate the Holocaust, nor any other inherently evil act such as the

genocide in Rwanda in 1994. Derrida was clearly aware of this consequence when trying to defend another deconstructive theorist, Paul de Man, who had been accused of pro-Nazism. Although Derrida tried to define 'deconstruction as opposition to Nazism, he employs the very logic he condemns. In so doing, he unacceptably implicates those who identify with Judaism in their own persecution' (Binder, 'Representing Nazism', p. 1373). Binder expands on this conclusion:

> *First because deconstruction shows every argument to contain its opposite, it seems nihilistic. Second because deconstruction is said to 'annihilate the subject' - to deny the individual identities of authors and of characters - it seems to deny individual responsibility for evil. Third, because it exposes the futility of efforts to deny loss, contradiction and violence, deconstruction seems to urge acceptance of their necessity. Perhaps an 'antihumanist' philosophy that attempts to annihilate the subject sees no great loss in the annihilation of subjects. (Binder, 'Representing Nazism', p. 1377.)*

Derrida denies that an individual, group or culture can be identified by adherence to scripture or moral code, because such codes will always be contradictory. It might be supposed that the deconstruction of identity in this way may lead to a better world, in the sense that a realisation that such identities are meaningless may result in a world where individuals do not define themselves and identify others in terms of race, ethnicity, religion, or sex, thereby making persecution of individuals or groups of individuals on these bases less likely. However, that (possibly hypothetical) gain may be argued to be outweighed by the fact that deconstruction actually seems to legitimate the beliefs or codes of the persecutors by placing them at the same level as those beliefs of the persecuted. Indeed, Derrida seems to argue that 'like Nazism, all creeds define themselves by their antipathies'. Thus, 'Derrida is . . . driven to the unacceptable conclusion that one cannot claim a Jewish identity as authentically one's own without becoming a Nazi' (Binder, 'Representing Nazism', p. 1324).

The question then is whether cultures and minorities will disappear because of possible post-structuralist 'enlightenment', or because Nazism or a similar ideology has already 'cleansed' them. Individuals within ethnic, religious or other minorities, whatever our views of their creed, deserve better protection from persecution than this - one such form of protection is the law, for instance the rights of minorities contained in Article 27 of the

International Covenant on Civil and Political Rights, and its accompanying mechanisms. International law is not posited as a panacea, but at least it provides a universal, concrete, and in many ways 'moral' code - a form *of jus gentium.* Of course, the texts of international laws are equally susceptible to the pens of the deconstructionists.

Nevertheless, postmodernism contains within it what has been labelled 'affirmative postmodernism', where 'not all socio-political action is decried, not all values are rejected', as well as 'sceptical postmodernism' which focuses 'on the negative: the uncertainties and ambiguities of existence'. Representing the former stream, Balkin, for instance, makes the following statement:

> *The deconstruction of legal concepts, or of the social vision that informs them, is not nihilistic. Deconstruction is not a call for us to forget moral certainty, but to remember aspects of human life that were pushed into the background by the necessities of the dominant legal conception we call into question. Deconstruction is not a denial of the legitimacy of rules and principles; it is an affirmation of human possibilities that have been overlooked or forgotten in the privileging of particular legal ideas . . . By recalling the elements of human life relegated to the margin in a given social theory, deconstructive readings challenge us to remake the dominant conceptions of our society. (J. M. Balkin, 'Deconstructive Practice and Legal Theory' (1987) 96 Yale Law Journal 743 at p. 763. Emphasis added.)*

The question remains as to where those moral certainties can be found. That it is wrong to kill a person for no reason - killing for killing's sake - is a moral certainty for affirmative postmodernists as well as natural lawyers, but while the latter can point to their universal, unchanging, rational moral code, all the former has is a *conviction* that it is wrong: 'the point is that morality is not a matter of truth or logical demonstration. It is a matter of conviction based on experience, emotion and conversation' (J. W. Singer, 'The Player and the Cards: Nihilism and Legal Theory' (1984) 94 *Yale Law Journal* 1 at p. 39). Nevertheless, 'the positive ethical thrust of deconstructive theory' is inherent in its challenges to the dominant conceptions which govern liberal (legal) orders. Deconstruction reveals the law's inadequacies. Often legal language is clearly indeterminate. Thus a deconstruction of how it is used to control and to oppress is clearly ethical. Deconstruction helps individuals towards liberation upon realisation that the system or society they are part of has no superior claim than a system or society they

might prefer. Deconstruction may appear anarchical but it does reveal the coercive, arbitrary and contingent nature of the legal system, and the broader societal structures.

Derrida himself makes the claim that 'deconstruction is justice', and that justice itself is not susceptible to deconstruction (which implies that deconstruction has become the meta-narrative). The logic of deconstruction does not simply apply to legitimating legal concepts such as the Rule of Law, or the constitution, but to much more basic 'truths', whereby good is given priority over evil, and life over death. Derrida's analysis of these dichotomies or polarities is intended to reveal that there is no rational process whereby one is given priority over the other.

It may be because of deconstruction's lack of any limits - there are no concepts that are protected from its application - that Norris, while attracted by deconstruction, states that 'deconstruction is . . . an activity of thought which cannot be consistently acted on - that way madness lies - but which yet possesses an inescapable rigour of its own'. Personal moral convictions may not be enough to stop a general descent into the heart of darkness. Is it enough for deconstructionists to state that '[p]eople do not want to be beastly to each other . . . The evidence is all around us that people are often caring, supporting, loving, and altruistic, both in their family lives and in their relations with strangers'. From the killing fields of Cambodia of the 1970s, the genocide in Rwanda in 1994, to the indiscriminate shootings occurring within the United States and other developed States on a regular basis, there does appear to be plenty of evidence of inhumanity. Postmodernism does not provide any answers to this, any criteria for universalising the clear wrongness of these acts, indeed its reduction of all 'positive' values to the same level as all 'negative' values, may be said to condone, even encourage it. At most all that Derridian deconstruction seems to provide is stated by its chief proponent in drawing conclusions on the Holocaust:

> *I do not know whether from this nameless thing called the final solution one can draw something which still deserves the name of a lesson. But if there were a lesson to be drawn, a unique lesson among the always singular lessons of murder, from even a singular murder, from all the collective exterminations of history (because each individual murder and each collective murder is singular, thus infinite and incommensurable) the lesson that we can draw today - and if we can do so then we*

must - is that we must think, know, represent for ourselves, formalize, judge the possible complicity between all these discourses and the worst (here the final solution). (J. Derrida, 'Force of Law', pp. 62-3.)

It may be because of this sort of equivocation that 'most liberals . . . are utterly repelled by postmodernism's more extravagant visions, which are cognitively relativist, morally nihilistic, and politically anarchistic' (M. Osiel, *Mass Atrocity, Collective Memory, and the Law* (New Brunswick: Transaction, 1997), p. 294).

Questions for discussion

1. Identify and define the main attacks on liberal legal theory by CLS.
2. What alternatives do the CLS provide?
3. Identify the major elements the CLS share with neo-Marxism.
4. Analyze the relationship between Feminist legal theory and CLS
5. Why do post-modernists reject modernity?
6. What is deconstruction? What is its place in CLS and Post-modernism?

UNIT EIGHT

JUSTICE

8.1 Introduction

In the previous chapters, students are able to understand the subject matter of jurisprudence and the different endeavours made to provide a complete theory of law. You must have noticed that most theories, especially natural law, tried to explain what law is through its ultimate end, i.e. justice. This and the following two chapters (since liberty and equality are principles of justice) are about Justice. Justice concerns the proper ordering of things and persons within a society. Usually, people use a simplistic division of justice such as corrective justice, referring to the manner with which society address or redress wrong and distributive justice, concerned with how basic social resources are distributed among members. These aspects of justice are treated in detail by many courses in law and other disciplines like economics. In jurisprudence, we are concerned with how society can cooperate for the interest of all and how the fundamental institutions of such cooperation can be just or founded up on principles of justice. The issues are broadly analyzed so that they apply to every situation in which they arise; for example, chapter ten (equality) has similar approach. In addition, we are also concerned with the fundamental concept of justice behind the two aspects. As a concept, it has been the subject of philosophical, legal, and theological reflection and debate throughout history. A number of important questions surrounding justice have been fiercely debated over the course of western history: What is justice? What does it demand of individuals and societies? What are liberty and equality? Why are they principles of justice? What is the proper distribution of rights, duties, opportunity, wealth and resources in society: equal, meritocratic, according to status, or some other arrangement? There is a myriad of possible answers to these questions from divergent perspectives on the political and philosophical spectrum. That will be the concern of this chapter and the next two chapters but this chapter provides the foundation for the rest.

8.2. Objectives

After studying this chapter students will able to:

- Define justice
- Distinguish the concept and conceptions of justice
- Identify the principles of justice
- Identify under what condition those principles are selected
- State the circumstances, which give rise to the question of justice
- Explain the concept of justice as fairness
- Define group differentiated rights
- Identify why group differentiated rights are the question of justice
- Explain how a just system can accommodate group differentiated rights

8.3 John Rawls: Justice as Fairness

Q. What is justice? What are the principles of justice? What circumstances give rise to the question of justice? What is fairness?

The most complete argument for the theory of justice is possibly that provided by Rawls, who argues for his two principles of justice in "Theory of Justice" (1972). His theory is of justice as fairness, accepting those principles that would result from an 'original position' for the purpose of social cooperation. In this original position the parties set out, subject to conditions considered reasonable (also under veil of ignorance) and fair, to agree the principles by which their society should be organized. The original position is thus a social contract position (remember natural rights theory?) although the contract is a hypothetical one. The conditions to be fulfilled before the contract are basic democratic freedoms (also known as pre-conditions for democracy) such as expression, demonstration, association, and vote and to be voted for. The 'veil of ignorance' requires parties to temporarily put aside their backgrounds such as envy, sex and status (social and

economic) because those are unnecessary for the parties to reach agreement on reasonable and fair principles for all.

Rawls makes a distinction between the concepts of justice and conception of justice. He claims that any theory of justice must deal with both of these. By a concept of justice, Rawls means the role of its principles in assigning rights and duties and in defining the appropriate division of social advantage. It is essentially an objective phenomenon. By a conception of justice, he means the interpretation of the role of these principles in a particular situation; for example, equal distribution can be interpreted in many ways for many particular situations to provide us conceptions like liberal, utilitarian and so on. He acknowledges that this is much more subjective.

Rawls' theory in its own terms is designed to cope with situations where mutually disinterested (self-interested) persons put forward conflicting claims to a division of goods and services under conditions of moderate scarcity. His theory is of no application in conditions of total scarcity.

The conception of justice for Rawls can be stated in the form of two principles as follows: first, each person participating in a practice, or affected by it, has an equal right to the most extensive liberty compatible with a like liberty for all; and
Second, inequalities are arbitrary unless it is reasonable to expect that they will work out for everyone's advantage (especially for the least advantaged), and provided the positions and offices to which they attach, or from which they may be gained, are open to all.

The first principle is about providing everyone with basic human freedoms such as freedom of thought, religion, belief, expression…etc. This principle highlights equality of liberty for all, which means nobody is entitled to more or less liberty. The liberty referred to here should be the most extensive that includes all the list of freedoms and each to its most extent possible (limitations which do not apply for all are not allowed on some). There is no absolute freedom and therefore all of them have to be limited at some point in order to make them compatible with other people's freedom (for a detailed discussion,

refer to the chapter on Liberty). The second principle is about equal distribution of primary social resources to everyone and inequalities are arbitrary but incentives should be provided to the least advantaged without sacrificing the interest of the rest. The public offices should be open for all under fair electoral system and positions should be allocated on the basis of merit (again, there is more discussion in the chapter on Equality). The parties will choose these principles since they are rational self-interested people under the veil of ignorance and the principles serve the interest of all. The parties also want the social cooperation to work and therefore, they want everyone to agree to the principles.

The first principle has absolute priority over the second. This means there cannot be a trade-off of liberty for the sake of distribution or economic development. However, Rawls admits that under scarcity or poverty this rule can be relaxed until a certain level of economic development is reached because the question is of survival rather than justice. In addition, the question of justice does not arise among the community of saints but only between self-interested people. The parties in the contract treat each other in farness, as reasonable person averting any risk since it means treating others as one wants to be treated. The contract affects not only those participating in it but also those affected by it or those benefiting from the practice. Consequently, the contract involves future generations and the parties will be saving, as they are self-interested on family basis too. Once the two principles are selected out of various alternatives, all the basic institutions of the community will be found upon them and such system is considered as just and the result as fair. There will be more discussion on the two principles, in chapter nine and ten. In the mean time, the Canadian philosopher, Kymlicka, most notable for his works on communitarianism, identifies a major gap (unaddressed issue) in Rawls' theory in the following section.

8.4 Will Kymlicka: Justice and Minority Rights

Q. What are group specific rights? What is the best mechanism to accommodate and protect these rights?

Virtually, all liberal democracies are either multinational or Polyethnic, or both. The 'challenge of multiculturalism' is to accommodate these national and ethnic differences in a stable and morally defensible way. It is increasingly accepted in many countries that some forms of cultural difference can only be accommodated through special legal or constitutional measures, above and beyond the common rights of citizenship. Some forms of group difference can only be accommodated if their members have certain group-specific rights. For example, a recent government publication in Canada noted that:

In the Canadian experience, it has not been enough to protect only universal individual rights. Here, the Constitution and ordinary laws also protect other rights accorded to individuals as members of certain communities. This accommodation of both types of rights makes our constitution unique and reflects the Canadian value of equality that accommodates difference. The fact that community rights exist alongside individual rights goes to the very heart of what Canada is all about. (Government of Canada 199 1 a: 3)

Such a combination exists in many other federal systems in Europe, Asia, and Africa. Even the constitution of the United States, which is often seen as a paradigm of individualism, allows for various group-specific rights, including the special status of American Indians and Puerto Ricans.

There are at least three forms of group-specific rights: (1) self-government rights; (2) polyethnic rights; and (3) special representation rights.

8.4.1 Self-government Rights

In most multination states, the component nations are inclined to demand some form of political autonomy or territorial jurisdiction, so as to ensure the full and free development of their cultures and the best interests of their people. At the extreme, nations may wish to secede, if they think their self-determination is impossible within the larger state.

The right of national groups to self-determination is given (limited) recognition in international law. According to the United Nations' Charter, 'all peoples have the right to self-determination'. However, the UN has not defined 'peoples', and it has generally applied the principle of self-determination only to overseas colonies, not internal national minorities, even when the latter were subject to the same sort of colonization and conquest as the former. They demand certain powers of self-government which they say were not relinquished by their (often involuntary) incorporation into a larger state.

One mechanism for recognizing claims to self-government is federalism, which divides powers between the central government and regional subunits (provinces/ states/ cantons). Where, national minorities are regionally concentrated, the boundaries of federal subunits can be drawn so that the national minority forms a majority in one of the subunits. Under these circumstances, federalism can provide extensive self-government for a national minority, guaranteeing its ability to make decisions in certain areas without being outvoted by the larger society. For example, under the federal division of powers in Canada, the province of Quebec (which is 80 percent francophone) has extensive jurisdiction over issues that are crucial to the survival of the French culture, including control over education, language, culture, as well as significant input into immigration policy. One difficulty in a federal system is maintaining the balance between centralization and decentralization. While most Quebecois want an even more decentralized division of powers, most English Canadians favour a stronger central government

Similar systems of self-government exist, or are being sought, by many other indigenous peoples. A recent international declaration regarding the rights of indigenous peoples emphasizes the importance of political self-government. In many parts of the world,

however, the hope for political powers is almost utopian, and the more immediate goal is simply to secure the existing land base from further erosion by settlers and resource developers. Indeed, a recent study showed that the single largest cause of ethnic conflict in the world today is the struggle by indigenous peoples for the protection of their land rights.'

Self-government claims, then, typically take the form of devolving political power to a political unit substantially controlled by the members of the national minority, and substantially corresponding to their historical homeland or territory. It is important to note that these claims are not seen as a temporary measure, or as a remedy for a form of oppression that we might (or ought) someday eliminate. On the contrary, these rights are often described as 'inherent', and so permanent (which is one reason why national minorities seek to have them entrenched in the constitution).

8.4.2. Polyethnic Rights

Immigrant groups in the last thirty years have successfully challenged the 'Anglo-conformity' model, which assumed that they should abandon all aspects of their ethnic heritage, and assimilate to existing cultural norms and customs. At first, this challenge simply took the form of demanding the right freely to express their particularity without fear of prejudice or discrimination in the mainstream society. It was the demand, as Walzer put it, that 'politics be separated from nationality as it was already separated from religion'.

These group-specific measures – which Kymlicka calls ‘polyethnic rights’ - are intended to help ethnic groups and religious minorities express their cultural particularity and pride without it hampering their success in the economic and political institutions of the dominant society. Like self-government rights, these polyethnic rights are not seen as temporary, because the cultural differences they protect are not something we seek to eliminate. But, unlike self-government rights, polyethnic rights are usually intended to promote integration into the larger society, not self-government.

8.4.3. Special representation right

While the traditional concern of national minorities and ethnic groups has been with either self-government or polyethnic rights, there has been increasing interest by these groups, as well as other non-ethnic social groups, in the idea of special representation rights.

However, there is increasing interest in the idea that a certain number of seats in the legislature should be reserved for the members of disadvantaged or marginalized groups. Group representation rights are often defended as a response to some systemic disadvantage or barrier in the political process, which makes it impossible for the group's views and interests to be effectively represented. In so far as these rights are seen as a response to oppression or systemic disadvantage, they are most plausibly seen as a temporary measure on the way to a society where the need for special representation no longer exists - a form of political 'affirmative action'. Society should seek to remove the oppression and disadvantage, thereby eliminating the need for these rights.

However, the issue of special representation rights for groups is complicated, because special representation is sometimes defended, not on grounds of oppression, but as a corollary of self-government. A minority's right to self-government would be severely weakened if some external body could unilaterally revise or revoke its powers, without consulting the minority or securing its consent. Hence it would seem to be a corollary of self-government that the national minority be guaranteed representation on any body which can interpret or modify its powers of self-government (e.g. the Supreme Court in USA hypothetically and the House of Federation in Ethiopia actually). Since the claims of self-government are seen as inherent and permanent, so too are the guarantees of representation which flow from it (unlike guarantees grounded on oppression).

What are the justifications for these rights?

8.5. The Equality Argument

Many defenders of group-specific rights for ethnic and national minorities insist that they are needed to ensure that all citizens are treated with genuine equality. On this view, 'the accommodation of differences is the essence of true equality', and group-specific rights are needed to accommodate our differences. This argument is correct, within certain limits.

Group-differentiated rights - such as territorial autonomy, veto powers, guaranteed representation in central institutions, land claims, and language rights - can help rectify this disadvantage, by alleviating the vulnerability of minority cultures to majority decisions. These external protections ensure that members of the minority have the same opportunity to live and work in their own culture as members of the majority.

Any plausible theory of justice should recognize the fairness of these external protections for national minorities. They are clearly justified, Kymlicka believes, within a liberal egalitarian theory, such as Rawls's and Dworkin's, which emphasizes the importance of rectifying unchosen inequalities. Indeed inequalities in cultural membership are just the sort which Rawls says we should be concerned about, since their effects are 'profound and pervasive and present from birth' (Rawls 1971, Dworkin 1981)."

This equality-based argument will only endorse special rights for national minorities if there actually is a disadvantage with respect to cultural membership, and if the rights actually serve to rectify the disadvantage. Hence, the legitimate scope of these rights will vary with the circumstances. In North America, indigenous groups are more vulnerable to majority decisions than the Quebecois or Puerto Ricans, and so their external protections will be more extensive. For example, restrictions on the sale of land, which are necessary in the context of indigenous peoples, are not necessary, and hence not justified, in the case of Quebec or Puerto Rico (check FDRE Constitution concerning land). One of the most important determinants of whether a culture survives is whether its language is the

language of government - i.e. the language of public schooling, courts, legislatures, welfare agencies, health services, etc.

So the real question is what is a fair way to recognize languages, draw boundaries, and distribute powers? And the answer is that we should aim at ensuring that all national groups have the opportunity to maintain themselves as a distinct culture, if they so choose. Hence group-differentiated self-government rights compensate for unequal circumstances which put the members of minority cultures at a systemic disadvantage in the cultural marketplace; regardless of their personal choices in life. This is one of many areas in which true equality requires not identical treatment, but rather differential treatment in order to accommodate differential needs.

This does not mean that we should entirely reject the idea of the cultural market place. Once the societal cultures of national groups are protected, through language rights and territorial autonomy, then the cultural market-place does have an important role to play in determining the character of the culture.

8.6 The Role of Historical Agreements

A second argument in defence of group-differentiated rights for national minorities is that they are the result of historical agreements, such as the treaty rights of indigenous peoples, or the agreement by which two or more peoples agreed to federate.

The equality argument assumes that the state must treat its citizens with equal respect. But there is the prior question of determining which citizens should be governed by which states. For example, how did the American government acquire the legitimate authority to govern Puerto Rico or the Navaho? And how did the Canadian government acquire legitimate authority over the Quebecois and the Metis? (It is helpful to ask this question for the state of Ethiopia. Especially, you should focus on where the authority of the state came from its people in the Axumit era, Zagwe, Zemene Mesafint, Gonder, Emperor Yohanis IV, before and after Emperor Menlik II)

United Nations declarations state that all 'peoples' are entitled to 'self determination' - i.e. an independent state. Obviously this principle is not reflected in existing boundaries, and it would be destabilizing, and indeed impossible, to fulfil. Moreover, not all peoples want their own state. Hence, it is not uncommon for two or more peoples to decide to form a federation. And if the two communities are of unequal size, it is not uncommon for the smaller culture to demand various group-differentiated rights as part of the terms of federation. Forming a federation is one way of exercising a people's right of self-determination, and the historic terms of federation reflect the group's judgment about how best to exercise that right.

In short, the way in which a national minority was incorporated often gives rise to certain group-differentiated rights. If incorporation occurred through a voluntary federation, certain rights might be spelled out in the terms of federation (e.g. in treaties or constitutions), and there are legal and moral arguments for respecting these agreements. If incorporation was involuntary (e.g. colonization), then the national minority might have a claim of self-determination under international law, which can be exercised by renegotiating the terms of federation so as to make it a more voluntary federation. (Consider whether FDRE Constitution is the result of renegotiation).

While the equality and historical arguments often lead to the same result, they are none the less quite distinct. On the historical argument, the question is not how should the state treat 'its' minorities, but rather what are the terms under which two or more peoples decided to become partners? The question is not how the state should act fairly in governing its minorities, but what are the limits to the state's right to govern them?

Where historical agreements are absent or disputed, groups are likely to appeal to the equality argument. For example, how should we respond to agreements that are now unfair, due to changing conditions? Because of these changing circumstances, and because the original agreements are hard to interpret, many minority communities want to renegotiate their historical agreements. They want to make their group-differentiated

rights more explicit in the constitution, and often more expansive. This is a major cause of the current constitutional crisis in Canada.

This suggests that, if we wish to defend group differentiated rights, we should not rely solely on historical agreements. Since historical agreements must always be interpreted, and inevitably need to be updated and revised, we must be able to ground the historical agreements in a deeper theory of justice. The historical and equality arguments must work together.

8.7 Rawls Revisited

How can and why should a liberal theory of justice (like Rawls) accommodate such rights?

Liberals can and should accept a wide range of group-differentiated rights for national minorities and ethnic groups, without sacrificing their core commitments to individual freedom and social equality. Kymlicka tried to show how freedom of choice is dependent on social practices, cultural meanings, and a shared language. Our capacity to form and revise a conception of the good is intimately tied to our membership in a societal culture, since the context of individual choice is the range of options passed down to us by our culture. Deciding how to lead our lives is, in the first instance, a matter of exploring the possibilities made available by our culture.

However, minority cultures in multination states may need protection from the economic or political decisions of the majority culture if they are to provide this context for their members. For example, they may need self-governing powers or veto rights over certain decisions regarding language and culture, and may need to limit the mobility of migrants or immigrants into their homelands.

While these group-differentiated rights for national minorities may seem discriminatory at first glance, since they allocate individual rights and political powers differentially on

the basis of group membership, they are in fact consistent with liberal principles of equality. They are indeed required by the view, defended by Rawls and Dworkin, that justice requires removing or compensating for undeserved or 'morally arbitrary' disadvantages, particularly if these are 'profound and pervasive and present from birth' (Rawls 1971). Were it not for these group differentiated rights, the members of minority cultures would not have the same ability to live and work in their own language and culture that the members of majority cultures take for granted. This can be seen as just as profound and morally arbitrary a disadvantage as the inequalities in race and class that liberals more standardly worry about.

This equality-based argument for group-differentiated rights for national minorities is further strengthened by appeals to historical agreements and the value of cultural diversity. And it is confirmed by the way that liberals implicitly invoke cultural membership to defend existing state borders and restrictions on citizenship. Kymlicka has also argued that polyethnic rights for ethnic groups can be justified in terms of promoting equality and cultural diversity within the mainstream culture.

Each of these claims is plausible. Anyone who disputes them would be required to provide some alternative account of what makes meaningful choices available to people, or what justice requires in terms of language rights, public holidays, political boundaries, and the division of powers. Moreover, one would also have to offer an alternative account of the justification for restricting citizenship to the members of a particular group, rather than making it available to anyone who desires it. It is not enough to simply assert that a liberal state should respond to ethnic and national differences with benign neglect. That is an incoherent position that avoids addressing the inevitable connections between state and culture.

The idea that group-differentiated rights for national and ethnic groups can and should be accepted by liberals is hardly a radical suggestion. In fact, many multination liberal democracies already accept such an obligation, and provide public schooling and government services in the language of national minorities. Many have also adopted

some form of federalism, so that national minorities will form a majority in one of the federal units (states, provinces, or cantons). And many polyethnic liberal states have adopted various forms of polyethnic policies and group-specific rights or exemptions for immigrant groups. Providing a liberal defence of minority rights does not create a mandate for vast change. It merely ratifies and explains changes that have taken place in the absence of theory.

QUESTIONS FOR DISCUSSION

1. Can you relate the process of making of the FDRE Constitution with Rawls' original position?

2. Examine how and where the two principles of justice are incorporated within the FDRE Constitution.

3. Why do you think Rawls failed to include group specific rights within the first principle? Do you think his theory of justice becomes complete with group specific rights?

4. How does the FDRE Constitution accommodate group specific rights?
Apply and analyse the historical argument to the history of state formation in Ethiopia.
5. According to Rawls, what is fairness?

CHAPTER NINE

LIBERTY

9.1 Introduction

In the previous chapter, you studied justice and its principles. One of the two principles is maximum compatible liberty for all. The concept of liberty and the rationale behind its protection is the focus of this chapter. Liberty is generally considered as a concept of political philosophy that identifies the condition in which an individual has the ability to act according to his or her own will. However, there are two different concepts of liberty based on 'ideological' differences. One is concerned with the autonomy of the individual and absence of external interference. This has been embraced by the West from the natural right theories and American Constitution up until today. All individual rights are considered to be of this sort. The second idea of liberty focuses on people in general and groups but does not rule out individuals. It is concerned with not only external interferences but also mostly internal ones, which means that people may not be capable of freedom even in the absence of external interference and thus may need assistance from the state. This idea crudely formulated by the Greeks in the form of democracy (government of the people), developed by Enlightenment philosophers, incorporated in American Constitution, reformulated by Marx and used/abused by Communists and dictators. All group rights are examples of the second version. However, both concepts have been recognized by the UN and given protection in international human rights instruments. In Rawls' theory of justice, liberty refers to the first version only. Why did he choose that? What justifies one over the other? Is there a third way, which encompasses and compromises both? This chapter will introduce students with different theories of liberty and tries to respond to these questions.

9.2. Objectives

After studying this chapter, students will be able to:

- Define liberty
- Differentiate negative liberty from positive liberty
- Identify the situations in which liberty may be limited
- Explain the meaning of internal and external interferences
- Distinguish opportunity and exercise concepts

9.3. Isaiah Berlin: Two Concepts of Liberty

The first of the two political senses of liberty which Berlin calls the 'negative' sense, is involved in the answer to the question 'What is the area within which the subject - a person or group of persons - is or should be left to do or be what he is able to do or be, without interference by other persons?' The second, which Berlin calls the ‘positive’ sense, is involved in the answer to the question 'What, or who, is the source of control or interference that can determine someone to do, or be, this rather than that?'

9.3.1 The Notion of 'Negative' Freedom

Q. What is negative freedom? What is coercion? Why should it be limited? Where should it be limited?

Berlin states, I am normally said to be free to the degree to which no man or body of men interferes with my activity. Political liberty in this sense is simply the area within which a man can act unobstructed by others. If I am prevented by others from doing what I could otherwise do, I am to that degree unfree; and if this area is invaded by other men beyond a certain minimum, I can be described as being coerced, or, it may be, enslaved. Coercion is not, however, a term that covers every form of inability. Coercion implies the

deliberate interference of other human beings within the area in which I could otherwise act. You lack political liberty or freedom only if you are prevented from attaining a goal by human beings.

Mere incapacity to attain a goal is not lack of political freedom. If my poverty were a kind of disease which prevented me from buying bread, or paying for the journey round the world or getting my case heard, (as lameness prevents me from running) this inability would not naturally be described as a lack of freedom, least of all political freedom. It is only because I believe that my inability to get a given thing is due to the fact that other human beings have made arrangements where by I am, whereas others are not, prevented from having enough money with which to pay for it that I think myself a victim of coercion or slavery. In other words, this use of the term depends on a particular social and economic theory about the causes of my poverty or weakness. The criterion of oppression is the part to be played by other human beings, directly or indirectly, with or without the intention of doing so, in frustrating my wishes. The wider the area of non-interference means that the wider my freedom.

This is what the classical English political philosophers meant when they used this word. They disagreed about how wide the area could or should be. They supposed that it could not be unlimited because if it were, it would entail a state in which all men could boundlessly interfere with all other men. This kind of 'natural' freedom would lead to social chaos in which men's minimum needs would not be satisfied; or else the liberties of the weak would be suppressed by the strong. Because they perceived that human purposes and activities do not automatically harmonize with one another, and because (whatever their official doctrines) they put high value on other goals, such as justice, or happiness, or culture, or security, or varying degrees of equality, they were prepared to curtail freedom in the interests of other values and, indeed, of freedom itself. For, without this, it was impossible to create the kind of association that they thought desirable. Consequently, it is assumed by these thinkers that law must limit the area of men’s free action.

Equally it is assumed, especially by such libertarians as Locke and Mill in England, and Constant and Tocqueville in France, that there ought to exist a certain minimum area of personal freedom which, must on no account be violated. For if it is overstepped, the individual will find himself in an area too narrow for even that minimum development of his natural faculties which alone makes it possible to pursue, and even to conceive, the various ends which men hold good or right or sacred. It follows that a frontier must be drawn between the area of private life and that of public authority. Where it is to be drawn is a matter of argument. Men are largely interdependent, and no man's activity is so completely private as never to obstruct the lives of others in any way. The liberty of some must depend on the restraint of others. 'Freedom for an Oxford don', others have been known to add, 'is a very different thing from freedom for an Egyptian peasant.'

It is true that to offer political rights, or safeguards against intervention by the state, to men who are half-naked, illiterate, underfed, and diseased is to mock their condition; they need medical help or education before they can understand, or make use of, an increase in their freedom. What is freedom to those who cannot make use of it? Without adequate - conditions for the- use of freedom, what is the value of freedom? First things come first: there are situations in which boots are superior to the works of Shakespeare; individual freedom is not everyone's primary need. For freedom is not the mere absence of frustration of whatever kind; this would inflate the meaning of the word until it meant too much or too little. The Egyptian peasant needs clothes or medicine before, and more than, personal liberty, but the minimum freedom that he needs today, and the greater degree of freedom that he may need tomorrow, is not some species of freedom peculiar to him, but identical with that of professors, artists, and millionaires.

What troubles the consciences of Western liberals is not the belief that the freedom that men seek differs according to their social or economic conditions, but that the minority who possess it have gained it by exploiting, or, at least, averting their gaze from, the vast majority who do not. They believe, with good reason, that if individual liberty is an ultimate end for human beings, others should deprive none of it; least of all, that some should enjoy it at the expense of others. Equality of liberty; not to treat others as I should

not wish them to treat me; payment of my debt to those who alone have made possible my liberty or prosperity or enlightenment; justice, in its simplest and most universal sense- these are the foundations of liberal morality.

Philosophers with an optimistic view of human nature and a belief in the possibility of harmonizing interests, such as Locke, Adam Smith or Mill, believed that social harmony and progress were compatible with reserving a large area for private life over which neither the state nor any other authority must be allowed to trespass. Hobbes, and those who agreed with him, especially conservative or reactionary thinkers, argued that if men were to be prevented from destroying one another and making social life a jungle or a wilderness, greater safeguards must be instituted to keep them in their places; he wished correspondingly to increase the area of centralized control and decrease that of the individual. However, both sides agreed that some portion of human existence must remain independent of the sphere of social control. To invade that preserve, however small, would be despotism. We must preserve a minimum area of personal freedom if we are not to 'degrade or deny our nature'. We cannot remain absolutely free, and must give up some of our liberty to preserve the rest. What then must the minimum be? This has been, and perhaps always will be, a matter of infinite debate. But whatever the principle in terms of which the area of non-interference is to be drawn, liberty in this sense means liberty from; absence of interference beyond the shifting, but always recognizable, frontier.

'All the errors which a man is likely to commit against advice and warning are far outweighed by the evil of allowing others to constrain him to what they deem is good.' The defence of liberty consists in the 'negative' goal of warding off interference. To threaten a man with persecution unless he submits to a life in which he exercises no choices of his goals; to block before him every door but one, (no matter how noble the prospect upon which it opens, or how benevolent the motives of those who arrange this), is to sin against the truth that he is a man, a being with a life of his own to live. This is liberty, as has been conceived by liberals in the modern world.

Freedom in this sense is not, at any rate logically, connected with democracy or self-government. Self-government may, overall, provide a better guarantee of the preservation of civil liberties than other regimes, and has been defended as such by libertarians. But there is no necessary connexion between individual liberty and democratic rule. The answer to the question 'Who governs me?' is logically distinct from the question 'How far does the government interfere with me?' It is in this difference that the great contrast between the two concepts of negative and positive liberty, in the end, consists." For the 'positive' sense of liberty comes to light if we try to answer the question, not 'What am I free to do or be?' but 'By whom am I ruled?' or 'Who is to say what I am, and what I am not, to be or do?' The connexion between democracy and individual liberty is weaker than it seemed, to many advocates of both. The desire to be governed by myself, or at any rate to participate in the process by which my life is to be controlled, may be as deep a wish as that of a free area for action, and perhaps historically older. But it is not a desire for the same thing. So different is it, indeed, as to have led in the end to the great clash of ideologies that dominates our world. For it is this - the 'positive' conception of liberty: freedom to - to lead one prescribed form of life - which the adherents of the 'negative' notion represent as being, at times, no better than a specious disguise for brutal tyranny.

9.3.2 The Notion of Positive Freedom

Q. What is positive liberty? What is the defect of positive freedom?

The 'positive' sense of the word 'liberty' derives from the wish on the part of the individual to be his own master. I wish my life and decisions to depend on myself, not on external forces of whatever kind. I wish to be the instrument of my own, not of other men's, acts of will. I wish to be a subject, not an object; to be moved by reasons, by conscious purposes, which are my own, not by causes which affect me from outside. This is at least part of what I mean when I say that I am rational, and that it is my reason that distinguishes me as a human being from the rest of the world. I wish, above all, to be

conscious of myself as a thinking, willing, active being, bearing responsibility for my choices and able to explain them by references to my own ideas and purposes. I feel free to the degree that I believe this to be true, and enslaved to the degree that I am made to realize that it is not.

The freedom which consists in being one's own master, and the freedom which consists in not being prevented from choosing as I want may, on the face of it, seem concepts at no great logical distance from each other - no more than negative and positive ways of saying much the same thing. Yet, the 'positive' and 'negative' notions of freedom historically developed in divergent directions not always by logically reputable steps, until, in the end, they came into direct conflict with each other.

One way of making this clear is in terms of the independent momentum which the, initially perhaps quite harmless, metaphor of self-mastery acquired. 'I am my own master'; 'I am slave to no man'; but may I not be a slave to nature? May I not be a slave to my own, uncontrolled passions? Have not men had the experience of liberating themselves from spiritual slavery, or slavery to nature, and do they not in the course of it become aware, on the one hand, of a self which dominates, and, on the other, of something in them which is brought under control? This dominant self is then variously identified with reason, with my 'higher nature', with the self which calculates and aims at what will satisfy it in the long run, with my 'real', or 'ideal', or 'autonomous' self, or with my self 'at its best'. This is then contrasted with irrational impulse, uncontrolled desires, my 'lower' nature, the pursuit of immediate pleasures, my 'empirical' self, swept by every blast of desire and passion, needing to be rigidly disciplined if it is ever to rise to the full height of its ‘real’ nature. For example, my higher or rational self wants to live longer and have grandchildren but my lower nature (self) wants to smoke two packs of cigarette and have unprotected sex with many partners. If I want to be truly free (to achieve my goal) my higher self must control my lower self.

This entity is then identified as being the 'true' self which, by imposing its collective, or 'organic', single will upon its disobedient 'members', achieves its own, and therefore their,

'higher' freedom. (Imagine the above example for an individual applying for a community and its leaders where some follow their leaders and others disobey.) The risks of using organic metaphors to justify the coercion of some men by others in order to raise them to a ‘higher’ level of freedom have often been pointed out. But what gives such plausibility to this kind of language is that we recognize that it is possible, and at times justifiable, to coerce men in the name of some goal (let us say, justice or public health) which they would, if they were more enlightened, themselves pursue, but do not, because they are blind or ignorant or corrupt. This renders it easy for me to conceive of myself as coercing others for their own sake, in their, not my, interest. I am then claiming that I know what they truly need better than they know it themselves. What, at most, this entails is that they would not resist me if they were rational and as wise as I and understood their interests as I do

The 'positive' conception of freedom as self mastery has, in fact, and as a matter of history, of doctrine and of practice, lent itself more easily to this splitting of personality into two: the transcendent, dominant controller, and the empirical bundle of desires and passions to be disciplined and brought under control. It is this historical fact that has been influential. This demonstrates that conceptions of freedom directly derive from views of what constitutes a self, a person, and a man. Enough manipulation with the definition of man and freedom can be made to mean whatever the manipulator wishes. Recent history has made it only too clear that the issue is not merely academic.

9.4 Charles Taylor: What’s wrong with Negative Liberty?

Q. What is the problem of Berlin’s theory?

In what follows, Taylor makes an attempt to resolve one of the issues that separate 'positive' and 'negative' theories of freedom, as these have been distinguished in the

previous section. There clearly are theories, widely held in liberal society, which want to define freedom exclusively in terms of the independence of the individual from interference by others, be they governments, corporations or private persons; and equally clearly these theories are challenged by those who believe that freedom resides at least in part in collective control over the common life. We unproblematically recognise theories descended from Rousseau and Marx as fitting in this (the latter) category.

When people attack positive theories of freedom, they generally have some Left totalitarian theory in mind, according to which freedom resides exclusively in exercising collective control over one's destiny in a classless society, the kind of theory which underlies, for instance, official Communism. This view, in its extreme form, refuses to recognise the freedoms guaranteed in other societies as genuine. The destruction of bourgeois freedoms is no real loss of freedom, and coercion can be justified in the name of freedom if it is needed to bring into existence the classless society in which alone men are properly free. Men can, in short, be forced to be free.

Even as applied to official Communism, this portrait is a little extreme, although it undoubtedly expresses the inner logic of this kind of theory. But it is an absurd misrepresentation if applied to the whole family of positive conceptions. This includes all those views of modern political life which owe something to the ancient republican tradition, according to which men's ruling themselves is seen as an activity valuable in itself, and not only for instrumental reasons. It includes in its scope thinkers like Tocqueville, and even arguably the J.S. Mill of On Representative Government. It has no necessary connection with the view that freedom consists purely and simply in the collective control over the common life, or that there is no freedom worth the name outside a context of collective control. And it does not therefore generate necessarily a doctrine that men can be forced to be free.

On the other side, there is a corresponding misrepresented version of negative freedom, which tends to come to the forefront. This is the tough-minded version, going back to Hobbes, or in another way to Bentham, which sees freedom simply as the absence of

external physical or legal obstacles. This view will have no truck with other less immediately obvious obstacles to freedom, for instance, lack of awareness, or false consciousness, or repression, or other inner factors of this kind. It holds firmly to the view that to speak of such inner factors as relevant to the issue about freedom, to speak for instance of someone's being less free because of false consciousness, is to abuse words. The only clear meaning, which can be given to freedom, is that of the absence of external obstacles.

Now we have to examine more closely, what is at stake between the two views. The negative theories, as we saw, want to define freedom in terms of individual independence from others; the positive also want to identify freedom with collective self-government. But behind this lie some deeper differences of doctrines.

What are exercise and opportunity concepts?
What is their relationship?

Isaiah Berlin points out that negative theories are concerned with the area in which the subject should be left without interference, whereas the positive doctrines are concerned with who or what controls. Taylor wants to put the point behind this in a slightly different way. Doctrines of positive freedom are concerned with a view of freedom, which involves essentially the exercising of control over one's life. On this view, one is free only to the extent that one has effectively determined oneself and the shape of one's life. The concept of freedom here is an exercise-concept.

By contrast, negative theories can rely simply on an opportunity-concept, where being free is a matter of what we can do, of what it is open to us to do, whether or not we do anything to exercise these options. This certainly is the case of the crude, original Hobbesian concept. Freedom consists just in there being no obstacle. It is a sufficient condition of one's being free that nothing stands in the way.

Plainly, this kind of view can't rely simply on an opportunity-concept. We can't say that someone is free, on a self-realisation view, if he is totally unrealised, if for instance he is totally unaware of his potential, if fulfilling it has never even arisen as a question for him, or if he is paralysed by the fear of breaking with some norm which he has internalised but which does not authentically reflect him. Within this conceptual scheme, some degree of exercise is necessary for a man to be thought free. Or if we want to think of the internal bars to freedom as obstacles on all fours with the external ones, then being in a position to exercise freedom, having the opportunity, involves removing the internal barriers; and this is not possible without having to some extent realised myself. So, with the freedom of self-realisation, having the opportunity to be free requires that I already an exercising freedom. A pure opportunity-concept is impossible here.

But if negative theories can be grounded on either an opportunity- or an exercise-concept, the same is not true of positive theories. The view that freedom involves at least partially collective self-rule is essentially grounded on an exercise concept, for this view (at least partly) identifies freedom with self-direction, i.e., the actual exercise of directing control over one's life. An exercise-concept of freedom requires that we discriminate among motivations. If we are free in the exercise of certain capacities, then we are not free, or less free, when these capacities are in some way unfulfilled or blocked. But the obstacles can be internal as well as external. And this must be so, for the capacities relevant to freedom must involve some self-awareness, self-understanding, moral discrimination and self-control. Otherwise, their exercise couldn't amount to freedom in the sense of self-direction; and this being so, we can fail to be free because these internal conditions are not realised.

What are the problems of the negative concept?

There are some considerations one can put forward straight off to show that the pure (negative) concept won't work, that there are some discriminations among motivations which are essential to the concept of freedom as we use it. Even where we think of freedom as the absence of external obstacles, it is not the absence of such obstacles

simply, for we make discriminations between obstacles as representing more or less serious infringements of freedom. And we do this, because we deploy the concept against a background understanding that certain goals and activities are more significant than others.

Thus we could say that my freedom is restricted if the local authority puts up a new traffic light at an intersection close to my home; so that where previously I could cross as I liked, consistently with avoiding collision with other cars, now I have to wait until the light is green. In a philosophical argument, we might call this a restriction of freedom, but not in a serious political debate. The reason is that it is too trivial, the activity and purposes inhibited here are not significant. It is not just a matter of our having made a trade-off, and considered that a small loss of liberty was worth fewer traffic accidents, or less danger for the children; we are reluctant to speak here of a loss of liberty at all; what we feel we are trading off is convenience against safety.

By contrast a law which forbids me from worshipping according to the form I believe in is a serious blow to liberty-, even a law which tried to restrict this to certain times (as the traffic light restricts my crossing of the intersection to certain times) would be seen as a serious restriction. Why this difference between the two cases? Because, we have a background understanding of some activities and goals as highly significant for human beings and others as less so. One's religious belief is recognised, even by atheists, as supremely important, because it is that by which the believer defines himself as a moral being. By contrast, my rhythm of movement through the city traffic is trivial. We don't want to speak of these two in the same way. *Freedom is no longer just the absence of external obstacle but the absence of external obstacle to significant action, to what is important to man.* There are discriminations to be made; some restrictions are more serious than others, some are utterly trivial. Therefore, some discrimination among motivations seems essential to our concept of freedom. A minute's reflection shows why this must be so. *Freedom is important to us because we are purposive beings.* But then there must be distinctions in the significance of different kinds of freedom based on the distinction in the significance of different purposes.

Although we have to admit that there are internal, motivational, necessary conditions for freedom, we can perhaps still avoid any legitimating of second-guessing (anticipate or predict) of the subject. If our negative theory allows for strong evaluation, allows that some goals are really important to us, and that other desires are seen as not fully ours, then can it not retain the thesis that freedom is being able to do what I want? That is, what I can identify myself as wanting, where this means not just what I identify as my strongest desire, but what I identify as my true, authentic desire or purpose. The subject would still be the final arbiter of his being free/unfree, and we are retaining the basic concern of the negative theory. *Freedom would be modified to read: the absence of internal or external obstacle to what I truly or authentically want.*

Taylor asserted that this hybrid or middle position is untenable, where we are willing to admit that we can speak of what we truly want, as against what we most strongly desire, and of some desires as obstacles to our freedom, while we still will not allow for second-guessing. For to rule this out in principle is to rule out in principle that the subject can ever be wrong about what he truly wants. And how can he never, in principle, be wrong, unless there is nothing to be right or wrong about in this matter?

What are internal obstacles?

Well, to resume what we have seen: our attributions of freedom make sense against a background sense of more and less significant purposes, for the question of freedom/ unfreedom is bound up with the frustration/fulfilment of our purposes. Further, our significant purposes can be frustrated by our own desires, and where these are sufficiently based on misapprehension, we consider them as not really ours, and experience them as restraints. A man's freedom can therefore, be curtailed by internal, motivational obstacles, as well as external ones. A man who is driven by malice to jeopardise his most important relationships, in spite of himself, or who is prevented by unreasoning fear from taking up the career he truly wants, is not really made freer if one lifts the external obstacles to act on his ill feeling or acting on his fear. Or at best he is liberated into a very impoverished freedom.

Once we see that we make distinctions of degree and significance in freedoms depending on the significance of the purpose fettered/ enabled, how can we deny that it makes a difference to the degree of freedom not only whether one of my basic purposes is frustrated by my own desires but also whether I have grievously misidentified this purpose? The only way to avoid this would be to hold that there is no such thing as getting it wrong, that your basic purpose is just what you feel it to be. But there is such a thing as getting it wrong, as we have seen, and the very distinctions of significance depend on this fact.

But if this is so, then the crude negative view of freedom is untenable. Freedom can't just be the absence of external obstacles, for there may also be internal ones. And nor may the internal obstacles be just confined to those that the subject identifies as such, so that he is the final arbiter; for he may be profoundly mistaken about his purposes and about what he wants to repudiate. And if so, he is less capable of freedom in the meaningful sense of the word. Hence we cannot maintain the incorrigibility of the subject's judgements about his freedom, or rule out second-guessing, as we put it above. And at the same time, we are forced to abandon the pure opportunity-concept of freedom. *For freedom now involves my being able to recognise adequately my more important purposes, and my being able to overcome or at least neutralise my motivational fetters, as well as my being free of external obstacles. I must be actually exercising self-understanding in order to be truly or fully free.* We can no longer understand freedom just as an opportunity-concept.

QUESTIONS FOR DISCUSSION

1. Identify the negative and positive freedoms in the FDRE Constitution?

2. Based on such identification and also Taylor's analysis, why do you think has the FDRE Constitution incorporated both freedoms?

3. What is liberty? Why should we protect it?

4. What is negative liberty? What is positive liberty? What is the difference between the two? Why are freedoms limited?

5. When can we say that someone is not free?

6. Do you think Berlin is right about positive freedom?

7. What about negative freedom? What are exercise and opportunity concepts? What are external and internal obstacles?

8. Discuss their applicability in the social, economic and political reality of the Ethiopian Society?

CHAPTER TEN

EQUALITY

10.1 Introduction

This chapter is concerned with social and political equality which is one of the principles of justice as indicated in chapter eight. In its prescriptive usage, ‘equality’ is a loaded and ‘highly contested’ concept. On account of its normally positive connotation is that it has a rhetorical power rendering it suitable as a political slogan. At least since the French Revolution, equality has served as one of the leading ideals of the body politic; in this respect, it is at present probably the most controversial of the great social ideals. There is controversy concerning the precise notion of equality, the relation of justice and equality (the principles of equality), the material requirements and measure of the ideal of equality (equality of what?), the extension of equality (equality among whom?), and its status within a comprehensive (liberal) theory of justice (the value of equality). Each of these five issues will be discussed in turn in the present chapter.

10.2 Objectives

At the end of this chapter, students will be able to:

- Define Equality
- Explain the principles of Equality and Justice
- Elaborate the concept of Distributive Equality or equality of what?
- Determine to whom equality should be extended or equality among whom?
- Discuss the Value of Equality or why we seek equality

10.3 Equality: Defining the Concept

Q. What is Equality? What are the contexts for which the term can be applied?

'Equality' is a contested concept: "People who praise it or disparage it disagree about what they are praising or disparaging". Our first task is therefore to provide a clear definition of equality in the face of widespread misconceptions about its meaning as a political idea. The terms "equality", "equal," and "equally" signify a qualitative relationship. *'Equality' (or 'equal') signifies correspondence between a group of different objects, persons, processes or circumstances that have the same qualities in at least one respect, but not all respects, i.e., regarding one specific feature, with differences in other features*. 'Equality' thus needs to be distinguished from 'identity' -- this concept signifying that one and the same object corresponds to itself in all its features: an object that can be referred to through various individual terms, proper names, or descriptions. For the same reason, it needs to be distinguished from 'similarity' -- the concept of merely approximate correspondence. Thus, to say e.g. that men are equal is not to say that they are identical. Equality rather implies similarity but not 'sameness.'

In distinction to numerical identity, a judgment of equality presumes a difference between the things being compared. According to this definition, the notion of 'complete' or 'absolute' equality is self-contradictory. Two non-identical objects are never completely equal; they are different at least in their spatiotemporal location. If things do not differ they should not be called 'equal,' but rather, more precisely, 'identical,' as e.g., the morning and evening star. Here usage might vary. Some authors do consider absolute qualitative equality admissible as a borderline concept.

'Equality' can be used in the very same sense both to describe and prescribe, as with "thin": "you are thin" and "you are too thin." The approach taken to defining the standard of comparison for both descriptive and prescriptive assertions of the concept of equality is very important. In the case of *descriptive* use of equality, the common standard is itself

descriptive, e.g. two people weigh the same. A *prescriptive* use of equality is present when a prescriptive standard is applied, i.e., a norm or rule, e.g. people ought to be equal before the law. The standards grounding prescriptive assertions of equality contain at least two components. On the one hand, there is a descriptive component, since the assertions need to contain descriptive criteria, in order to identify those people to which the rule or norm applies. The question of this identification -- who belongs to which category? -- may itself be normative, e.g. to whom do the Ethiopian or U.S. laws apply? On the other hand, the comparative standards contain something normative -- a moral or legal rule, in the example, the U.S. laws -- specifying how those falling under the norm are to be treated. Such a rule constitutes the prescriptive component. Sociological and economic analyses of (in-)equality mainly pose the questions of how inequalities can be determined and measured and what their causes and effects are. In contrast, social and political philosophy is in general concerned mainly with the following questions: *what kind* of equality, if any, should be offered, and to *whom* and *when*? Such is the case in this chapter as well.

'Equality' and 'equal' are incomplete predicates that necessarily generate one question: equal in what respect. Equality essentially consists of a tripartite relation between two (or several) objects or persons and one (or several) qualities. Two objects a and b are equal in a certain respect if, in that respect, they fall under the same general terminus. 'Equality' denotes the relation between the objects that are compared. Every comparison presumes a concrete attribute defining the respect in which the equality applies -- equality thus referring to a common sharing of this comparison-determining attribute. This relevant comparative standard represents a 'variable' (or 'index') of the concept of equality that needs to be specified in each particular case; differing conceptions of equality here emerge from one or another descriptive or normative moral standard. There is another source of diversity as well: various different standards might be used to measure inequality, with the respect in which people are compared remaining constant. The difference between a general concept and different specific conceptions (Rawls 1971) of equality may explain why according to various authors producing 'equality' has no unified meaning -- or even is devoid of meaning.

For this reason, it helps to think of the idea of equality or for that matter inequality, understood as an issue of social justice, not as a single principle, but as a complex group of principles forming the basic core of today's egalitarianism. Depending on which procedural principle one adopts, contrary answers are forthcoming. Both equality and inequality are complex and multifaceted concepts. In any real historical context, it is clear that no single notion of equality can sweep the field. Many egalitarians concede that much of our discussion of the concept is vague and theoretical. But they believe that there is also a common underlying strain of important moral concerns implicit in it. Above all it serves to remind us of our common humanity, despite various differences. In this sense, egalitarians tend to think of egalitarianism as a single coherent normative doctrine -- but one in any case embracing a variety of principles. Following the introduction of different principles and theories of equality, we will return in the last section of this chapter to the question of how best to define egalitarianism and the value of equality.

10.4 Principles of Equality and Justice

Q. What are the principles of Equality and Justice?

Equality in its prescriptive usage has, of course, a close connection with morality and justice in general and distributive justice in particular. From antiquity onward, equality has been considered a constitutive feature of justice. Throughout history, people and emancipatory movements use the language of justice to denounce certain inequalities. But what exactly is the connection between equality and justice, i.e., what kind of role does equality play in a theory of justice? The role and correct account of equality, understood as an issue of social justice, is itself a difficult philosophical issue but we are already introduced to the matter through Rawls' theory of justice. To clarify this more, philosophers have defended a variety of principles and conceptions of equality, many of which are mentioned in the following discussion. This section introduces four well-

known principles of equality, ranging from highly general and uncontroversial to more specific and controversial.

Through its connection with justice, equality, like justice itself, has different *justitianda*, i.e., objects the term ‘just’ or ‘equal’ or their opposites can be applied to. These are mainly actions, persons, social institutions, and circumstances (e.g. distributions). These objects of justice stand in an internal connection and order that can here only be hinted at. The predicates "just" or "unjust" are only applicable when *voluntary* actions implying responsibility are in question. Justice is hence primarily related to individual actions.

Individual persons are the primary bearer of responsibilities (ethical individualism). Persons have to take responsibility for their individual actions and for circumstances they could change through such actions or omissions. Although people have responsibility for both their actions and circumstances, there is a moral difference between the two *justitianda*, i.e., an injustice due to unjust treatment through an individual or collective action and an injustice due to a failure to correct unjust circumstances. The responsibility people have to treat individuals and groups they affect in a morally appropriate and, in particular, even-handed way has hence a certain priority over their moral duty to turn circumstances into just ones through some kind of equalization.

Establishing justice of circumstances (universally and simultaneously) is beyond any given individual's capacities. Hence one has to rely on collective actions. In order to meet this moral duty, a basic order guaranteeing just circumstances must be justly created. This is an essential argument of justice in favour of establishing social institutions and fundamental state structures for political communities with the help of such institutions and structures, individuals can collectively fulfil their responsibility in the best possible manner. If circumstances can be rightly judged to be unjust, all persons have the responsibility and moral duty, both individually and collectively, to change the pertinent circumstances or distributive schemes into just ones.

In the following sections, the objects of equality may vary from topic to topic. However, as indicated, there is a close relationship between the objects. The next three principles of equality hold generally and primarily for all actions and treatment of others and for resulting circumstances. From the fourth principle onward, i.e., starting with the presumption of equality, this section is mainly concerned with distributive justice and the evaluation of distribution.

10.4.1 Formal Equality

What is formal equality? Accordingly, when can we say people are equal and in what respect?

When two persons have equal status in at least one normatively relevant respect, they must be treated equally with regard to this respect. This is the generally accepted *formal* equality principle that Aristotle formulated in reference to Plato: "treat like cases as like" (Aristotle, *Nicomachean Ethics*, V.3.; *Politics*, III). Of course the crucial question is which respects are normatively relevant and which are not. Some authors see this formal principle of equality as a specific application of a rule of rationality: it is irrational, because inconsistent, to treat equal cases unequally without sufficient reasons. But most authors instead stress that what is here at stake is a moral principle of justice, basically corresponding with acknowledgment of the impartial and universalizable nature of moral judgments, namely, the postulate of formal equality demands more than consistency with one's subjective preferences. What is more important is possible justification vis-à-vis others of the equal or unequal treatment in question -- and this on the sole basis of a situation's objective features.

10.4.2 Proportional Equality

What is proportional equality and what is its difference from formal equality?

According to Aristotle, there are two kinds of equality, numerical and proportional (Aristotle, *Nicomachean Ethics*, cf. Plato, *Laws*,). A form of treatment of others or as a result of it a distribution is equal *numerically* when it treats all persons as

indistinguishable, thus treating them identically or granting them the same quantity of a good per capita. That is not always just. In contrast, a form of treatment of others or distribution is *proportional* or relatively equal when it treats all relevant persons in relation to thei r due. Just *numerical* equality is a special case of proportional equality. Numerical equality is only just under special circumstances, viz. when persons are equal in the relevant respects so that the relevant proportions are equal. Proportional equality further specifies formal equality; it is the more precise and detailed, hence actually the more comprehensive formulation of formal equality. It indicates what produces an adequate equality.

Proportional equality in the treatment and distribution of goods to persons involves at least the following concepts or variables: Two or more persons ($P1$, $P2$) and two or more allocations of goods to persons (G) and X and Y as the quantity in which individuals have the relevant normative quality E. This can be represented as an equation with fractions or as a ratio. If $P1$ has E in the amount of X and if $P2$ has E in the amount Y, then $P1$ is due G in the amount of X and $P2$ is due G in the amount of Y, so that the ratio $X/Y = X/Y$ is valid. (N.B. For the formula to be usable, the potentially great variety of factors involved have to be both quantifiable in principle and commensurable, i.e., capable of synthesis into an aggregate value.)
When factors speak for unequal treatment or distribution, because the persons are unequal in relevant respects, the treatment or distribution proportional to these factors is just. Unequal claims to treatment or distribution must be considered proportionally: that is the prerequisite for persons being considered equally.

This principle can also be incorporated into hierarchical, inegalitarian theories. It indicates that equal output is demanded with equal input. Aristocrats, perfectionists, and meritocrats all believe that persons should be assessed according to their differing deserts, understood by them in the broad sense of fulfilment of some relevant criterion. And they believe that reward and punishment, benefits and burdens, should be proportional to such deserts. Since this definition leaves open who is due what, there can be great inequality when it comes to presumed fundamental (natural) rights, deserts, and

worth -- and such inequality is apparent in both Plato and Aristotle (such as what slaves and women deserve).

Aristotle's idea of justice as proportional equality contains a fundamental insight. The idea offers a framework for a rational argument between egalitarian and non-egalitarian ideas of justice, its focal point being the question of the basis for an adequate equality. Both sides accept justice as proportional equality. Aristotle's analysis makes clear that the argument involves the features deciding whether two persons are to be considered equal or unequal in a distributive context.

On the formal level of pure conceptual explication, justice and equality are linked through these principles of formal and proportional justice. Justice cannot be explained without these equality principles; the equality principles only receive their normative significance in their role as principles of justice.

Formal and proportional equality is simply a conceptual schema. It needs to be made precise -- i.e., its open variables need to be filled out. The formal postulate remains quite empty as long as it remains unclear when or through what features two or more persons or cases should be considered equal. All debates over the proper conception of justice, i.e., over who is due what, can be understood as controversies over the question of which cases are equal and which unequal (Aristotle, *Politics*). For this reason equality theorists are correct in stressing that the claim that persons are owed equality becomes informative only when one is told -- what *kind* of equality they are owed. Actually, every normative theory implies a certain notion of equality. In order to outline their position, egalitarians must thus take account of a specific (egalitarian) conception of equality. To do so, they need to identify substantive principles of equality, discussed below.

10.4.3 Moral Equality

What does it mean to say human beings are morally equal? What are the grounds of moral equality?

Until the eighteenth century, it was assumed that human beings are unequal by nature i.e., that there was a natural human hierarchy. This postulate collapsed with the advent of the

idea of natural right and its assumption of an equality of natural order among all human beings. Against Plato and Aristotle, the classical formula for justice according to which an action is just when it offers each individual his or her due took on a substantively egalitarian meaning in the course of time, viz. everyone deserved the same dignity and the same respect. This is now the widely held conception of substantive, universal, moral equality. It developed among the Stoics, who emphasized the natural equality of all rational beings, and in early New Testament Christianity, which elevated the equality of human beings before God to a principle: one to be sure not always adhered to later by the Christian church. This important idea was also taken up both in the Talmud and in Islam, where it was grounded in both Greek and Hebraic elements in both systems. In the modern period, starting in the seventeenth century, the dominant idea was of natural equality in the tradition of natural law and social contract theory. Hobbes (1651) postulated that in their natural condition, individuals possess equal rights, because over time they have the same capacity to do each other harm. Locke (1690) argued that all human beings have the same natural right to both (self-) ownership and freedom. Rousseau (1755) declared social inequality to be a virtually primeval decline of the human race from natural equality in a harmonious state of nature: a decline catalyzed by the human urge for perfection, property and possessions. For Rousseau (1755, 1762), the resulting inequality and rule of violence can only be overcome by tying unfettered subjectivity to a common civil existence and popular sovereignty. In Kant's moral philosophy (1785), the categorical imperative formulates the equality postulate of universal human worth. His transcendental and philosophical reflections on autonomy and self-legislation led to a recognition of the same freedom for all rational beings as the sole principle of human rights. Such Enlightenment ideas stimulated the great modern social movements and revolutions, and were taken up in modern constitutions and declarations of human rights. During the French Revolution, equality -- along with freedom and fraternity -- became a basis of the *Déclaration des droits de l´homme et du citoyen* of 1789.

The principle of equal dignity and respect is now accepted as a minimum standard throughout mainstream Western culture. Some misunderstandings regarding moral

equality need to be clarified. To say that men are equal is not to say they are identical. The postulate of equality implies that underneath apparent differences, certain recognizable entities or units exist that, by dint of being units, can be said to be ‘equal.’ Fundamental equality means that persons are alike in important relevant and specified respects alone, and not that they are all generally the same or can be treated in the same way. In a now commonly posed distinction, stemming from Dworkin, moral equality can be understood as prescribing treatment of persons as equals, i.e., with equal concern and respect, and not the often implausible principle of treating persons equally. This fundamental idea of equal respect for all persons and of the equal worth or equal dignity of all human beings is accepted as a minimal standard by all leading schools of modern Western political and moral culture. Any political theory abandoning this notion of equality will not be found plausible today. In a period in which metaphysical, religious and traditional views have lost their general plausibility, it appears impossible to peacefully reach a general agreement on common political aims without accepting that persons must be treated as equals. As a result, moral equality constitutes the ‘egalitarian plateau’ for all contemporary political theories (Kymlicka 1990).

To recognize that human beings are all equally individuals does not mean having to treat them uniformly in any respects other than those in which they clearly have a moral claim to be treated alike. Disputes arise, of course, concerning what these claims amount to and how they should be resolved. That is the crux of the problem to which we now turn.

Since "treatment as an equal" is a shared moral standard in contemporary theory, present-day philosophical debates are concerned with the kind of equal treatment normatively required when we mutually consider ourselves persons with equal dignity. The principle of moral equality is too abstract and needs to be made concrete if we are to arrive at a clear moral standard. Nevertheless, no conception of just equality can be deduced from the notion of moral equality. Rather, we find competing philosophical conceptions of equal treatment serving as interpretations of moral equality. These need to be assessed according to their degree of fidelity to the deeper ideal of moral equality (Kymlicka

1990). With this we finally switch the object of equality from treatment to the fair distribution of goods and ills or bads.

10.4.4 Presumption of Equality

What is presumption of equality? When does it apply? What is equal distribution? What goods or things are the objects of distribution? Are there any criteria for equal distribution? What type of equality is required for various objects of distribution?

Many conceptions of equality operate along procedural lines involving a *presumption of equality*. While more materially concrete, ethical approaches, as described in the next section below, are concerned with distributive criteria; the presumption of equality, in contrast, is a formal, procedural principle of construction located on a higher formal and argumentative level. What is here at stake is the question of the principle with which a material conception of justice should be constructed -- particularly once the above-described approaches turn out inadequate. The presumption of equality is a prima facie principle of equal distribution for all goods politically suited for the process of public distribution. In the domain of political justice, all members of a given community, taken together as a collective body, have to decide centrally on the fair distribution of social goods, as well as on the distribution's fair realization. Any claim to a particular distribution, including any existing distributive scheme, has to be impartially justified, i.e., no ownership will be recognized without justification. Applied to this political domain, the presumption of equality requires that everyone, regardless of differences, should get an equal share in the distribution unless certain types of differences are relevant and justify, through universally acceptable reasons, unequal distribution. This presumption results in a principle of prima facie equal distribution for all distributable goods. A strict principle of equal distribution is not required, but it is morally necessary to justify impartially any unequal distribution. The burden of proof lies on the side of those who favour any form of unequal distribution.

The presumption in favour of equality can be justified by the principle of equal respect together with the requirement of universal and reciprocal justification; that requirement is

linked to the morality of equal respect granting each individual equal consideration in every justification and distribution. Every sort of public, political distribution is, in this view, to be justified to all relevantly concerned persons, such that they could in principle agree. Since it is immoral to force someone to do something of which he or she does not approve, only reasons acceptable to the other person can give one the moral right to treat the person in accordance with these reasons. The impartial justification of norms rests on the reciprocity and universality of the reasons. Universal norms and rights enforced through inner or external sanctions are morally justified only if, on the one hand, they can be reciprocally justified, i.e., if one person asks no more of the other than what he or she is willing to give (reciprocity), and if, on the other hand, they are justified with respect to the interests of all concerned parties, i.e., if everyone has good reasons for accepting them and no one has a good reason for rejecting them (universality). In the end, only the concerned parties can themselves formulate and advocate their (true) interests. Equal respect, which we reciprocally owe to one another, thus requires respect for the autonomous decisions of each non-interchangeable individual.

This procedural approach to moral legitimation sees the autonomy of the individual as the standard of justification for universal rules, norms, rights etc. Only those rules can be considered legitimate to which all concerned parties can freely agree on the basis of universal, discursively applicable, commonly shared reasons. Equal consideration is thus accorded to all persons and their interests. In a public distribution anyone who claims more owes all others an adequate universal and reciprocal justification. If this cannot be provided, i.e., if there is no reason for unequal distribution that can be universally and reciprocally recognized by all (since, lets assume, all are by and large equally productive and needy), then equal distribution is the only legitimate distribution. How could it be otherwise? Any unequal distribution would mean that someone receives less, and another more. Whoever receives less can justifiably demand a reason for he or she being disadvantaged. Yet there is no such justification. Hence, any unequal distribution is illegitimate in this case. If no convincing reasons for unequal distribution can be brought forward, there remains only the option of equal distribution. Equal distribution is therefore not merely one among many alternatives, but rather the inevitable starting point

that must be assumed insofar as one takes the justificatory claims of all to be of equal weight.

The presumption of equality provides an elegant procedure for constructing a theory of distributive justice. The following questions would have to be answered in order to arrive at a substantial and full principle of justice.

- What goods and burdens are to be justly distributed (or should be distributed)? Which social goods comprise the object of distributive justice?
- What are the spheres (of justice) into which these resources have to be grouped?
- Who are the recipients of distribution? Who has a prima facie claim to a fair share?
- What are the commonly cited yet in reality unjustified exceptions to equal distribution?
- Which inequalities are justified?
- Which approach, conception or theory of egalitarian distributive justice is therefore the best?
- What goods and burdens are to be justly distributed (or should be distributed)? There are various opinions as to which social goods comprise the object of distributive justice.
- Does distributive justice apply only to those goods commonly produced, i.e., through social and economic fair cooperation, or to other goods as well, e.g. natural resources that are not the result of common cooperation? (At present, the former approach is most apparent in Rawls (1971) and many of his adherents and critics follow Rawls in this respect.)

In the domain of public political distribution, the goods and burdens to be distributed may be divided into various categories. Such a division is essential because reasons that speak for unequal treatment in one area do not justify unequal treatment in another. What are the spheres (of justice) into which these resources have to be grouped? In order to reconstruct our understanding of contemporary liberal, democratic welfare states, four

categories seem essential: 1. Civil liberties 2. Opportunities for political participation 3. Social positions and opportunities 4. Economic rewards. Despite views to the contrary, liberties and opportunities are seen in this view as objects of distribution. For all four categories, the presumption of equality is the guiding principle. The results of applying the presumption to each category can then be codified as rights.

After dividing social goods into categories, we must next ask what can justify unequal treatment or unequal distribution in each category. Today the following postulates of equality are generally considered morally required.

Strict equality is called for in the legal sphere of civil freedoms, since -- putting aside limitation on freedom as punishment -- there is no justification for any exceptions. As follows from the principle of formal equality, all citizens of a society must have equal general rights and duties. These rights and duties have to be grounded in general laws applying to everyone. This is the postulate of legal equality. In addition, the postulate of equal freedom is equally valid: every person should have the same freedom to structure his or her life, and this in the most far-reaching manner possible in a peaceful and appropriate social order.

In the political sphere, the possibilities for political participation should be equally distributed. All citizens have the same claim to participation in forming public opinion, and in the distribution, control, and exercise of political power. This is the postulate -- requiring equal opportunity -- of equal political power sharing. To ensure equal opportunity, social institutions have to be designed in such a way that persons who are disadvantaged, e.g. have a stutter or a low income, have an equal chance to make their views known and to participate fully in the democratic process.

In the social sphere, social positions equally gifted and motivated citizens must have approximately the same chances at offices and positions, independent of their economic or social class and native endowments. This is the postulate of fair equality of social

opportunity. An unequal outcome has to result from equality of chances at a position, i.e., qualifications alone counting, not social background or influences of milieu.

Since the nineteenth century, the political debate has increasingly centered on the question of economic and social inequality (this running alongside the question of -- gradually achieved -- equal rights to freedom and political participation). The main controversy here is whether, and if so to what extent, the state should establish far-reaching equality of social conditions for all through political measures such as redistribution of income and property, tax reform, a more equal educational system, social insurance, and positive discrimination.

The equality required in the economic sphere is complex, taking account of several positions that -- each according to the presumption of equality -- justify a turn away from equality. A salient problem here is what constitutes justified exceptions to equal distribution of goods -- the main sub field in the debate over adequate conceptions of distributive equality and its currency. The following sorts of factors are usually considered eligible for justified unequal treatment: (a) need or differing natural disadvantages (e.g. disabilities); (b) existing rights or claims (e.g. private property); (c) differences in the performance of special services (e.g. desert, efforts, or sacrifices); (d) efficiency; and (e) compensation for direct and indirect or structural discrimination (e.g. affirmative action).

These factors play an essential, albeit varied, role in the following alternative egalitarian theories of distributive justice. The following theories offer different accounts of what should be equalized in the economic sphere. Most can be understood as applications of the presumption of equality (whether they explicitly acknowledge it or not); only a few (like strict equality, libertarianism, and sufficiency) are alternatives to the presumption.

10.5 Conceptions of Distributive Equality: Equality of What?

What should be equalised? What are the arguments of the following seven conceptions of distributive equality? What are the objections to such arguments, if any?
What are the objections to equality and on what grounds?

Every effort to interpret the concept of equality and to apply the principles of equality mentioned above demands a precise measure of the parameters of equality. We need to know the dimensions within which striving for equality is morally relevant. What follows is a brief review of the seven most prominent conceptions of distributive equality, each offering a different answer to one question: in the field of distributive justice, what should be equalized, or what should be the parameter or "currency" of equality?

10.5.1 Simple Equality and Objections to Equality in General

Simple equality, meaning everyone being furnished with the same material level of goods and services, represents a strict position as far as distributive justice is concerned. It is generally rejected as untenable.

Hence, with the possible exception of Barbeuf (1796), no prominent author or movement has demanded strict equality. Since egalitarianism has come to be widely associated with the demand for economic equality and this in turn with communistic or socialistic ideas, it is important to stress that neither communism nor socialism -- despite their protest against poverty and exploitation and their demand for social security for all citizens -- calls for absolute economic equality. The orthodox Marxist view of economic equality was expounded in the *Critique of the Gotha Program* (1875). Marx here rejects the idea of legal equality, on three grounds. In the first place, he indicates, equality draws on a merely limited number of morally relevant vantages and neglects others, thus having

unequal effects; right can never be higher than the economic structure and cultural development of the society it conditions. In the second place, theories of justice have concentrated excessively on distribution instead of the basic questions of production. In the third place, a future communist society needs no law and no justice, since social conflicts will have vanished.

As an idea, *simple* equality fails because of problems that are raised regards to equality in general. It is useful to review these problems, as they require resolution in any plausible approach to equality.

(i) We need adequate indices for the measurement of the equality of the goods to be distributed. Through what concepts should equality and inequality be understood? It is thus clear that equality of material goods can lead to unequal satisfaction. Money constitutes a usual-index -- although an inadequate one; at the very least, equal opportunity has to be conceived in other terms.

(ii) The time span needs to be indicated for realizing the desired model of equal distribution. Should we seek to equalize the goods in question over complete individual lifetimes, or should we seek to ensure that various life segments are as equally well off as possible?

(iii) Equality distorts incentives promoting achievement in the economic field, producing an inefficiency grounded in a waste of assets arising from the administrative costs of redistribution. Equality and efficiency need to be placed in a balanced relation. Often, pareto-optimality is demanded in this respect -- for the most part by economists. A social condition is pareto-optimal or pareto-efficient when it is not possible to shift to another condition judged better by at least one person and worse by none. A widely discussed alternative to the Pareto principle is the Kaldor-Hicks welfare criterion. This stipulates that a rise in social welfare is always present when the benefits

accruing through the distribution of value in a society exceed the corresponding costs. A change thus becomes desirable when the winners in such a change could compensate the losers for their losses and still retain a substantial profit. In contrast to the Pareto-criterion, the Kaldor-Hicks criterion contains a compensation rule. For purposes of economic analysis, such theoretical models of optimal efficiency make a great deal of sense. However, the analysis is always made relative to starting situation that can be unjust and unequal. A society can thus be (close to) pareto-optimality -- i.e., no one can increase his or her material goods or freedoms without diminishing those of someone else -- while also displaying enormous inequalities in the distribution of the same goods and freedoms. For this reason, egalitarians claim that it may be necessary to reduce pareto-optimality for the sake of justice if there is no more egalitarian distribution that is also pareto-optimal. In the eyes of their critics, equality of whatever kind should not lead to some people having to do with less even, though this equalizing down does not benefit any of those who are in a worse position.

(iv) *Moral objections*: A strict and mechanical equal distribution between all individuals does not sufficiently take into account the differences among individuals and their situations. In essence, since individuals desire different things, why should everyone receive the same? Intuitively, for example, we can recognize that a sick person has other claims than a healthy person, and furnishing each with the same things would be mistaken. With simple equality, personal freedoms are unacceptably limited and distinctive individual qualities insufficiently regarded; in this manner they are in fact unequally regarded. Furthermore, persons not only have a moral right to their own needs being considered, but a right and a duty to take responsibility for their own decisions and their consequences. Working against the identification of distributive justice with simple equality, a basic postulate of virtually all present-day egalitarians is as follows: human beings are themselves responsible for certain inequalities resulting from their free decisions; aside

from minimum aid in emergencies, they deserve no recompense for such inequalities. On the other hand, there are due compensations for inequalities that are not the result of self-chosen options. For egalitarians, the world is morally better when *equality of life conditions* prevail. This is an amorphous ideal demanding further clarification. Why is such equality an ideal, and equality of what, precisely? By the same token, most egalitarians presently do not advocate an equality of outcome, but different kinds of equality of opportunity, due to their emphasis on a pair of morally central points: firstly, that individuals have responsibility for their decisions; and secondly, that the only things to be considered objects of equality are things serving the real interests of individuals. The opportunities to be equalized between people can be opportunities for well being (i.e. objective welfare), or for preference satisfaction (i.e., subjective welfare), or for resources. It is not equality of objective or subjective well being or resources themselves that should be equalized, but an equal opportunity to gain the well-being or resources one aspires to. Such equality of opportunity (to well-being or resources) depends on the presence of a realm of options for each individual equal to the options enjoyed by all other persons, in the sense of the same prospects for fulfilment of preferences or the possession of resources. The opportunity must consist of possibilities one can really take advantage of. Equal opportunity prevails when human beings effectively enjoy equal realms of possibility.

(v) Simple equality is very often associated with equality of results (although these are two distinct concepts). However, to strive only for equality of results is problematic. To illustrate the point, let us briefly limit the discussion to a single action and the event or state of affairs resulting from it. Arguably, actions should not be judged solely by the moral quality of their results as important as this may be. One also has to take into consideration the way in which the events or circumstances to be evaluated have come about. Generally speaking, a moral judgment requires not only the assessment of the results of the action in question (the consequentialist aspect) but, first and foremost, the assessment of the intention of the actor (the deontological aspect). The source

and its moral quality influence the moral judgment of the results. For example, if you strike me, your blow will hurt me; the pain I feel may be considered bad in itself, but the moral status of your blow will also depend on whether you were (morally) allowed such a gesture (perhaps through parental status, although that is controversial) or even obliged to execute it (e.g. as a police officer preventing me from doing harm to others), or whether it was in fact prohibited but not prevented. What is true of individual actions (or their omission) has to be true *mutatis mutandis* of social institutions and circumstances like distributions resulting from collective social actions (or their omission). Hence, social institutions are to be assessed not solely on the basis of information about how they affect individual quality of life. A society in which people starve on the streets is certainly marked by inequality; nevertheless, its moral quality, i.e., whether the society is just or unjust with regard to this problem, also depends on the suffering's caused. Does the society allow starvation as an unintended but tolerable side effect of what its members see as a just distributive scheme? Indeed, does it even defend the suffering as a necessary means, e.g. as a sort of Social Darwinism? Or has the society taken measures against starvation, which have turned out insufficient? In the latter case, whether the society has taken such steps for reasons of political morality or efficiency again makes a moral difference. Hence, even for egalitarians, equality of results is too narrow and one-sided a focus.

(vi) Finally, there is a danger of (strict) equality leading to uniformity, rather than to a respect for pluralism and democracy. In the contemporary debate, this complaint has been mainly articulated in feminist and multiculturalist theory. A central tenet of feminist theory is that gender has been and remains a historical variable and internally differentiated relation of domination. The same holds for so called racial and ethnic differences. These differences are often still conceived of as marking different values. The different groups involved here rightly object to their discrimination, marginalization, and domination, and an appeal to equality of status thus seems a solution. However, as feminists and multiculturalists have pointed out, equality, as

> usually understood and practiced, is constituted in part by a denial and ranking of differences; as a result it seems less useful as an antidote to relations of domination. "Equality" can often mean the assimilation to a pre-existing and problematic ‘male’ or ‘white’ or ‘middle class’ norm. In short, domination and a fortiori inequality often arise out of an inability to appreciate and nurture differences -- not out of a failure to see everyone as the same. To recognize these differences should however not lead to an essentialism grounded in sexual or cultural characteristics. In contemporary multiculturalism and feminism, there is a crucial debate between those who insist that sexual, racial, and ethnic differences should become irrelevant, on the one hand, and those believing that such differences, even though culturally relevant, should not furnish a basis for inequality: that rather one should find mechanisms for securing equality, despite valued differences. Neither of these strategies involves rejecting equality. Rather, the dispute is about how equality is to be attained (McKinnon 1989, Taylor 1992).

Proposing a connection between equality and pluralism, Michael Walzer's theory (1983) aims at what he calls "complex equality". According to Walzer, relevant reasons can only speak in favour of distribution of specific types of goods in specific spheres -- not in several or all spheres. Against a theory of simple equality promoting equal distribution of dominant goods, hence underestimating the complexity of the criteria at work in each given sphere the dominance of particular goods needs to be ended. For instance, the purchasing power in the political sphere through means derived from the economic sphere (i.e., money) needs to be prevented. Actually, Walzer's theory of complex equality is not aimed at equality but at the separation of spheres of justice, the theory's designation thus being misleading. Any theory of equality should however follow Walzer's advice not to be monistic but recognize the complexity of life and the plurality of criteria for justice.

We thus arrive at the following desideratum: instead of *simple* equality, we need a concept of more *complex* equality: a concept managing to resolve the above problems

through a distinction of various classes of goods, a separation of spheres, and a differentiation of relevant criteria.

10.5.2 Libertarianism

Libertarianism and *economic liberalism* represent minimalist positions in relation to distributive justice. Citing Locke, they both postulate an original right to freedom and property, thus arguing against redistribution and social rights and for the free market (Nozick 1974; Hayek 1960). They assert an opposition between equality and freedom: the individual (natural) right to freedom can be limited only for the sake of foreign and domestic peace. For this reason, libertarians consider maintaining public order the state's only legitimate duty. They assert a natural right to self-ownership (the philosophical term for "ownership of oneself" -- i.e., one's will, body, work, etc.) that entitles everybody to thus far unowned bits of the external world by means of mixing their labour with it. All individuals can thus claim property if "enough and as good" is left over for others (Locke's proviso). Correspondingly, they defend market freedoms and oppose the use of redistributive taxation schemes for the sake of social justice as equality. A principal objection to libertarian theory is that its interpretation of the Lockean proviso -- nobody's situation should be worsened through an initial acquisition of property -- leads to an excessively weak requirement and is thus unacceptable (Kymlicka 1990). With a broader and more adequate interpretation of what it means for one a situation to be worse than another, however, justifying private appropriation and, *a fortiori*, all further ownership rights, becomes much more difficult. If the proviso recognizes the full range of interests and alternatives that self-owners have, then it will not generate unrestricted rights over unequal amounts of resources. Another objection is that precisely if one's own free accomplishment is what is meant to count, as the libertarians argue, success should not depend strictly on luck, extraordinary natural gifts, inherited property, and status. In other words, *equal opportunity* also needs to at least be present as a counterbalance, ensuring that the fate of human beings is determined by their decisions and not by unavoidable social circumstances. Equal opportunity thus seems to be the frequently vague minimal

formula at work in every egalitarian conception of distributive justice. Many egalitarians, however, wish for more -- namely, an *equality of (at least basic) life conditions*.

In any event, with a shift away from a strictly negative idea of freedom, economic liberalism can indeed itself point the way to more social and economic equality. For with such a shift, what is at stake is not only assuring an equal right to self-defense, but also furnishing everyone more or less the same chance to actually make use of the right to freedom. In other words, certain basic goods need to be furnished to assure the equitable or ‘fair value of the basic liberties’ (Rawls).

10.5.3 Utilitarianism

It is possible to interpret utilitarianism as concretising moral equality -- and this in a way meant to offer the same consideration to the interests of all human beings. From the utilitarian perspective, since everyone counts as one and no one as more than one (Bentham), the interests of all should be treated equally without consideration of contents of interest or an individual's material situation. For utilitarianism, this means that all enlightened personal interests have to be fairly aggregated. The morally proper action is the one that maximizes utility. But this utilitarian conception of equal treatment has been criticized as inadequate by many opponents of utilitarianism. At least in utilitarianism's classical form -- so the critique reads -- the hoped for moral equality is flawed: this because all desires are taken up by the utilitarian calculation -- including "selfish" and "external" preferences, all having equal weight, even when they diminish the ‘rights’ and intentions of others. And this, of course, conflicts with our everyday understanding of equal treatment. What is here at play is an argument involving "offensive" and "expensive" taste: a person cannot expect others to sustain his or her desires at the expense of their own. Rather, according to generally shared conviction, equal treatment consistently requires a basis of equal rights and resources that cannot be taken away from one person, whatever the desire of others.

In line with Rawls, many hold that justice entails no value to interests insofar as they conflict with justice. According to this view, unjustified preferences will not distort mutual claims people have on each other. Equal treatment has to consist of everyone being able to claim a fair portion, and not in all interests having the same weight in disposal over my portion. Utilitarians cannot admit any restrictions on interests based on morals or justice. As long as utilitarian theory lacks a concept of justice and fair allotment, it must fail in its goal of treating all as equals. As Rawls also famously argues, utilitarianism that involves neglecting the separateness of persons does not contain a proper interpretation of moral equality as equal respect for each individual.

10.5.4 Equality of Welfare

The concept of welfare equality is motivated by an intuition that when it comes to political ethics, what is at stake is the individual's well-being. The central criterion for justice must consequently be equalizing the level of welfare. But taking welfare as what is to be equalized leads into major difficulties, which resemble those of utilitarianism. If one contentiously identifies subjective welfare with preference satisfaction, it seems implausible to count all individual preferences as equal, some -- such as the desire to do others wrong -- being inadmissible on grounds of justice (the offensive taste argument). Any welfare-centred concept of equality grants people with refined and expensive taste more resources -- something distinctly at odds with our moral intuitions (the expensive taste argument) (Dworkin 1981). However, satisfaction in the fulfilment of desires cannot serve as a standard, since we wish for more than a simple feeling of happiness. A more viable standard for welfare comparisons would seem to be success in the fulfilment of preferences. A fair evaluation of such success cannot be purely subjective, rather requiring a standard of what should or could have been achieved. And this itself involves an assumption regarding just distribution; it is thus no independent criterion for justice. An additional serious problem with any welfare-centred concept of equality is that it

cannot take account of either desert or personal responsibility for one's own well-being, to the extent this is possible and reasonable.

10.5.5 Equality of Resources

Represented above all by both Rawls (also refer back to ch.8) and Dworkin, resource equality avoids such problems (Rawls 1971; Dworkin 1981). It holds individuals responsible for their decisions and actions, not, however, for circumstances beyond their control -- race, sex, and skin-colour, but also intelligence and social position -- which thus are excluded as distributive criteria. Equal opportunity is insufficient because it does not compensate for unequal innate gifts. What applies for social circumstances should also apply for such gifts, both these factors being purely arbitrary from a moral point of view and requiring adjustment.

According to Rawls, human beings should have the same initial expectations of "basic goods," i.e., all-purpose goods; this in no way precludes ending up with different quantities of such goods or resources, as a result of personal economic decisions and actions. When prime importance is accorded an assurance of equal basic freedoms and rights, inequalities are just when they fulfil two provisos. On the one hand, they have to be linked to offices and positions open to everyone under conditions of fair equality of opportunity; on the other hand, they have to reflect the famous ‘difference principle’ in offering the greatest possible advantage to the least advantaged members of society. Otherwise, the economic order requires revision. Due to the argument of the moral arbitrariness of talents, the commonly accepted criteria for merit (like productivity, working hours, effort) are clearly relativized. The difference principle only allows the talented to earn more to the extent this raises the lowest incomes. According to Rawls, with regard to the basic structure of society, the difference principle should be opted for under a self-chosen "veil of ignorance" regarding personal and historical circumstances and similar factors. The principle offers a general assurance of not totally succumbing to the hazards of a free market situation; and everyone does better than with inevitably

inefficient total equal distribution, whose level of well-being is below that of those worse off under the difference principle.

Since Rawls' *Theory of Justice* is the classical focal point of present-day political philosophy, it is worth noting the different ways his theory claims to be egalitarian: First, Rawls upholds a natural basis for equal human worth: a minimal capacity for having a conception of the good and a sense of justice. Second, through the device of the "veil of ignorance," people are conceived as equals in the "original position." Third, the idea of sharing this "original position" presupposes the parties having political equality, as equal participants in the process of choosing the principles by which they would be governed. Fourth, Rawls proposes fair equality of opportunity. Fifth, Rawls maintains that all desert must be institutionally defined, depending on the goals of the society. No one deserves his or her talents or circumstances -- all products of the natural lottery. Finally, the difference principle tends toward equalizing holdings.

Dworkin's equality of resources stakes a claim to being even more ‘ambition-sensitive’ and endowment-insensitive’ than Rawls' theory. Unequal distribution of resources is considered fair only when it results from the decisions and intentional actions of those concerned. Dworkin proposes a hypothetical auction in which everyone can accumulate bundles of resources through equal means of payment, so that in the end no one is jealous of another's bundle (the envy test). The auction-procedure also offers a way to precisely measure equality of resources: the measure of resources devoted to a person's life is defined by the importance of the resources to others (Dworkin 1981).

In the free market, how the distribution then develops depends on an individual's ambitions. The inequalities that thus emerge are justified, since one has to take responsibility for one's "option luck" in the realm of personal responsibility. In contrast, unjustified inequalities based on different innate provisions and gifts as well as brute luck should be compensated for through a fictive differentiated insurance system: its premiums are established behind Dworkin's own ‘veil of ignorance,’ in order to then be distributed in real life to everyone and collected in taxes. For Dworkin, this is the key to

the natural lottery being balanced fairly, preventing a "slavery of the talented" through excessive redistribution.

Objections to all versions of "brute-luck egalitarianism" come from two sides. Some authors criticize its, in their view, unjustified or excessively radical rejection of merit: The egalitarian thesis of desert only being justifiably acknowledged if it involves desert "all the way down" not only destroys the classical, everyday principle of desert, since everything has a basis that we ourselves have not created. In the eyes of such critics, along with the merit-principle this argument also destroys our personal identity, since we can no longer accredit ourselves with our own capacities and accomplishments. Other authors consider the criterion for responsibility to be too strong, indeed inhuman in its consequences, since human beings responsible for their own misery would be left alone with their misery (Anderson 1999).

10.5.6 Equality of Opportunity for Welfare or Advantage

Approaches based on equality of opportunity can be read as revisions of both welfarism and resourcism. Ranged against welfarism and designed to avoid its pitfalls, they incorporate the powerful ideas of choice and responsibility into various, improved forms of egalitarianism. Such approaches are meant to equalize outcomes, insofar as they are the consequences of causes beyond a person's control (i.e., beyond circumstances or endowment), but to allow differential outcomes in so far as they result from autonomous choice or ambition. But the approaches are also aimed at maintaining the insight that individual preferences have to count, as the sole basis for a necessary linkage back to the individual perspective: otherwise, there is an overlooking of the person's value. In Arneson's (1989, 1990) concept of *equal opportunity for welfare*, the preferences determining the measure of individual well-being are meant to be conceived hypothetically -- i.e., a person would decide on them after a process of ideal reflection. In order to correspond to the morally central vantage of personal responsibility, what should

be equalized are not enlightened preferences themselves, but rather real opportunities to achieve or receive a good, to the extent that it is aspired to.

G.A. Cohen's (1989) broader conception of *equality of access to advantage* attempts to link and integrate the perspectives of welfare equality and resource equality through the overriding concept of advantage. For Cohen, there are two grounds for egalitarian compensation. Egalitarians will be moved to furnish a paralyzed person with a compensatory wheelchair independently of the person's welfare level. This egalitarian response to disability overrides equality of (opportunity to) welfare. Egalitarians also favour compensation for phenomena such as pain, independent of any loss of capacity -- for instance by paying for expensive medicine. But, Cohen claims, any justification for such compensation has to invoke the idea of equality of opportunity to welfare. He thus views both aspects, resources and welfare, as necessary and irreducible. Much of Roemer's (1998) more technical argument is devoted to constructing the scale to calibrate the extent to which something is the result of circumstances. An incurred adverse consequence is the result of circumstances, not choice, precisely to the extent that it is a consequence that persons of one or another specific type can be expected to incur.

10.5.7 Capabilities Approaches

Theories that limit themselves to the equal distribution of basic means -- this in the hope of doing justice to the different goals of all human beings -- are often criticized as fetishistic, in that they focus on means, rather than on what individuals gain with these means (Sen 1980), For the value goods have for someone depends on objective possibilities, the natural environment, and individual capacities. Hence, in contrast to the resourcist approach, Amartya Sen proposes orientating distribution around "capabilities to achieve functionings," i.e., the various things that a person manages to do or be in leading a life (Sen 1992). In other words, evaluating individual well-being has to be tied to a capability for achieving and maintaining various precious conditions and "functionings" constitutive of a person's being, such as adequate nourishment, good

health, the ability to move about freely or to appear in public without shame, and so forth. Also important here is the real freedom to acquire well-being -- a freedom represented in the capability to oneself choose forms of achievement and the combination of "functionings." For Sen, capabilities are thus the measure of an *equality of capabilities* human beings enjoy to lead their lives. A problem consistently raised with capability approaches is the ability to weigh capabilities in order to arrive at a metric for equality.

The problem is intensified by the fact that various moral perspectives are comprised in the concept of capability. Martha Nussbaum (1992, 2000) has linked the capability approach to an Aristotelian, essentialistic, "thick" theory of the good -- a theory meant to be, as she puts it, "vague," incomplete, and open-ended enough to leave place for individuality and cultural variations. On the basis of such a "thick" conception of necessary and universal elements of a good life, certain capabilities and functionings can be designated as foundational. In this manner, Nussbaum can endow the capability approach with a precision that furnishes an index of interpersonal comparison, but at some risk: that of not being neutral enough regarding the plurality of personal conceptions of the good, a neutrality normally required by most liberals (most importantly Rawls 1993).

10.6 Equality Among Whom?

Justice is primarily related to individual actions. Individual persons are the primary bearers of responsibility (the key principle of ethical individualism). This raises two controversial issues in the contemporary debate.

One could regard the norms of distributive equality as applying to groups rather than individuals. It is often groups that rightfully raise the issue of an inequality between themselves and the rest of society -- e.g. women; racial and ethnic groups. The question arises of whether inequality among such groups should be considered morally

objectionable in itself, or whether even in the case of groups, the underlying concern should be how individuals (as members of such groups) fare in comparative terms.

Do the norms of distributive equality (whatever they are) apply to all individuals, regardless of where (and when) they live? Or rather, do they only hold for members of communities within states and nations? Most theories of equality deal exclusively with distributive equality among people in a single society. But there does not seem to be any rationale for that limitation. Can the group of the entitled be restricted prior to the examination of concrete claims? Many theories seem to imply this when they connect distributive justice or the goods to be distributed with social cooperation or production.

Those who contribute nothing to cooperation, such as the disabled, children, or future generations, would have to be denied a claim to a fair share. The circle of persons who are to be the recipients of distribution would thus be restricted from the outset. Other theories are less restrictive, insofar as they do not link distribution to actual social collaboration, yet nonetheless do restrict it, insofar as they bind it to the status of citizenship. In this view, distributive justice is limited to the individuals within a society. Those outside the community have no entitlement to social justice. Unequal distribution among states and the social situations of people outside the particular society could not, in this view, be a problem of social distributive justice. Yet here too, the universal morality of equal respect and the principle of equal distribution demand that we consider each person as prima facie equally entitled to the goods, unless reasons for an unequal distribution can be put forth. It may be that in the process of justification, reasons will emerge for privileging those who were particularly involved in the production of a good. But prima facie, there is no reason to exclude from the outset other persons, e.g. those from other countries, from the process of distribution and justification. That may seem most intuitively plausible in the case of natural resources (e.g. oil) that someone discovers by chance on or beneath the surface of his or her property. Why should such resources belong to the person who discovers them, or on whose property they are located? Nevertheless, in the eyes of many if not most people, global justice, i.e., extending distributive justice globally, demands too much from individuals and their

states. The charge, open, of course, to challenge, is one of excessive demands being made.

10.7 The Value of Equality: Why Equality?

Does equality play a major role in a theory of justice, and if so, what is this role?

A conception of justice is *egalitarian* when it views equality as a fundamental goal of justice. L. Temkin has put it as follows: "an egalitarian is any person who attaches *some* value to equality *itself* (that is, any person that cares *at all* about equality, over and above the extent it promotes other ideals). So, equality needn't be the only value, or even the ideal she values most.... Egalitarians have the deep and (for them) compelling view that it is a bad thing -- unjust and unfair -- for some to be worse off than others through no fault of their own." In general, the focus of the modern egalitarian effort to realize equality is on the possibility of a good life, i.e., on an equality of life prospects and life circumstances -- interpreted in various ways according to various positions in the "equality of what" debate (see above).

Many writers maintain the presence of three sorts of egalitarianism: intrinsic, instrumental and constitutive. Intrinsic egalitarians view equality as an intrinsic good in itself. As pure egalitarians, they are concerned solely with equality, most of them with equality of social circumstances, according to which it is intrinsically bad if some people are worse off than others through no fault of their own. But it is in fact the case that we do not always consider inequality a moral evil. Intrinsic egalitarians regard equality as desirable even when the equalization would be of no use to any of the affected parties -- e.g. when equality can only be produced through depressing the level of everyone's life. But something can only have an intrinsic value when it is good for at least one person, i.e., makes one life better in some way or another. The following "levelling-down" objection indicates that doing away with inequality in fact ought to produce better

circumstances -- it otherwise being unclear why equality should be desired. Sometimes inequality can only be ended by depriving those who are better off of their resources, rendering them as poorly off as everyone else. This would have to be an acceptable approach according to the intrinsic concept. But would it be morally good if, in a group consisting of both blind and seeing persons, those with sight were rendered blind because the blind could not be offered sight? That would in fact be morally perverse. Doing away with inequality by bringing everyone down contains -- so the objection -- nothing good. Such leveling-down objections would of course only be valid if there were indeed no better and equally egalitarian alternatives available; and nearly always there are such: e.g. those who can see should have to help the blind, financially or otherwise. In case there are no alternatives, in order to avoid such objections, intrinsic egalitarianism cannot be strict, but needs to be *pluralistic*. Then intrinsic egalitarians could say there is something good about the change, namely greater equality -- although they would concede that much is bad about it. Pluralistic egalitarians do not have equality as their only goal; they also admit other values and principles -- above all the principle of welfare, according to which it is better when people are doing better. In addition, pluralistic egalitarianism should be *moderate* enough to not always grant equality victory in the case of conflict between equality and welfare. Instead, it needs to be able to accept reductions in equality for the sake of a higher quality of life for all (as e.g. with Rawls' difference principle).

At present, many egalitarians are ready to concede that equality in the sense of equality of life circumstances has no compelling value in itself; but that, in a framework of liberal concepts of justice, its meaning emerges in pursuit of other ideals: universal freedom, full development of human capacities and the human personality, the mitigation of suffering and defeat of domination and stigmatization, the stable coherence of modern, freely constituted societies, and so forth. For those who are worse off, unequal circumstances often mean considerable (relative) disadvantages and many (absolute) evils; and as a rule these (relative) disadvantages and (absolute) evils are the source for our moral condemnation of unequal circumstances. But this does not mean that inequality as such is an evil. Hence, the argument goes, fundamental moral ideals other than equality stand behind our aspiring for equality. When we are against inequality on such grounds, we are

for equality either as a by product or as a means and not as a goal or intrinsic value. In its treatment of equality as a derived virtue, the sort of egalitarianism -- if the term is actually suitable -- here at play is *instrumental*.

As indicated, there is also a third, more suitable approach to the equality ideal: a *constitutive* egalitarianism. According to this approach, we aspire to equality on other moral grounds -- namely, because certain inequalities are unjust. Equality has value, but this is an extrinsic value, since it derives from another, higher moral principle of equal dignity and respect. But it is not instrumental for this reason, i.e., it is not only valued on account of moral equality, but also on its own account. Equality stands in relation to justice, as does a part to a whole. The requirement of justification is based on moral equality; and in certain contexts, successful justification leads to the above-named principles of equality, i.e., formal, proportional equality and the presumption of equality. Thus according to constitutive egalitarianism, these principles and the resulting equality are justified and required by justice, and by the same token constitute social justice. We should further distinguish two levels of egalitarianism and non-egalitarianism, respectively.

On a first level, a constitutive egalitarian presumes that every explication of the moral standpoint is incomplete without terms such as ‘equal,’ ‘similarly,’ etc. In contrast, a non-egalitarianism operating on the same level considers such terms misplaced or redundant. On a second level, when it comes to concretizing and specifying conceptions of justice, a constitutive egalitarian gives equality substantive weight. On this level, we can find more and less egalitarian positions according to the chosen currency of equality (the criteria by which just equality is measured) and according to the reasons for unequal distributions (exemptions of the presumption of equality) the respective theories regard as well grounded. Egalitarianism on the second level thus relates to the kind, quality and quantity of things to be equalized. Because of such variables, a clear-cut definition of second level egalitarianism cannot be formulated. In contrast, non-egalitarians on this second level advocate a non-relational entitlement theory of justice.

Alongside the often-raised objections against equality mentioned in the section on "simple equality" there is a different and more fundamental critique formulated by first level non-egalitarians: that equality does not have a foundational role in the grounding of claims to justice. While the older version of a critique of egalitarianism comes mainly from the right side of the political spectrum, thus arguing in general against "patterned principles of justice", the critique's newer version also often can be heard in liberal circles. This first-level critique of equality poses the basic question of why justice should in fact be conceived relationally and (what is here the same) comparatively. Referring back to Joel Feinberg's (1974) distinction between comparative and non-comparative justice, non-egalitarians object to the moral requirement to treat people as equals and many demands for justice emerging from it. They argue that neither the postulate nor these demands involve comparative principles -- let alone any equality principles. They reproach first-level egalitarians for confusion between "equality" and "universals." As the non-egalitarians see things, within many principles of justice -- at least the especially important ones -- the equality-terminology is redundant. Equality is thus merely a by product of the general fulfilment of actually non-comparative standards of justice: something obscured through the unnecessary inserting of an expression of equality. At least the central standards of dignified human life are not relational but "absolute." As Harry Frankfurt puts it: "It is whether people have good lives, and not how their lives compare with the lives of others." And again: "The fundamental error of egalitarianism lies in supposing that it is morally important whether one person has less than another regardless of how much either of them has."

From the non-egalitarian vantage, what is really at stake in helping those worse off and improving their lot is *humanitarian concern*, a desire to alleviate suffering. Such concern is understood as not egalitarian. It is not centred on the difference between those better off and those worse off as such (whatever the applied standard), but on improving the situation of persons in bad circumstances. Their distress constitutes the actual moral foundation. The wealth of those better off only furnishes a means that has to be transferred for the sake of mitigating the distress, as long as other, morally negative consequences do not emerge in the process. The strength of the impetus for more equality

lies in the urgency of the claims of those worse off, not in the extent of the inequality. For this reason, instead of equality the non-egalitarian critics favor one or another *entitlement theory of justice*, such as Nozick's (1974) libertarianism (cf. 10.4.2. above) and Frankfurt's (1987) *doctrine of sufficiency*, according to which "What is important from the moral point of view is not that everyone should have *the same* but that each should have *enough*. If everyone had enough, it would be of no moral consequence whether some had more than others." Parfit's (1997) *priority view* accordingly calls for focus on improving the situation of society's weaker and poorer members and indeed all the more urgently the worse off they are, even if they can be less helped than others in the process. In any case, entitlement-based non-egalitarian arguments can result in praxis in an equality of outcome as far-reaching as egalitarian theories. Hence fulfilling an absolute or non-comparative standard for everyone (e.g. to the effect that nobody should starve) frequently results in a certain equality of outcome, such a standard comprising not only a decent living but a good life. Consequently, the debate here centres on the basis -- is it equality or something else? And not so much on the outcome -- are persons or groups more or less equal, according to a chosen metric? Possibly, the difference is even deeper, lying in the conception of morality in general, rather than in equality at all.

Egalitarians can respond to the anti-egalitarian critique by conceding that it is the nature of some (if certainly far from all) essential norms of morality and justice to be concerned primarily with the adequate fulfilment of the separate claims of individuals. However, whether a claim can itself be considered suitable can be ascertained only by asking whether it can be agreed on by all those affected in hypothetical conditions of freedom and equality. This justificatory procedure is all the more needed the less evident -- indeed the more unclear or controversial -- it is if what is at stake is actually suffering, distress, an objective need. In the view of the constitutive egalitarians, all the judgments of distributive justice should be approached relationally by asking which distributive scheme all concerned parties can universally and reciprocally agree to. As described at some length in the pertinent section above, many egalitarians argue that a presumption in favor of equality follows from this justification requirement. In the eyes of such

egalitarians, this is all one needs for the justification and determination of the constitutive value of equality.

Secondly, even if -- for the sake of argument -- the question is left open of whether demands for distribution according to objective needs (e.g. alleviating hunger) involve non-comparative entitlement-claims, it is nonetheless always necessary to resolve the question of what we do owe needy individuals. This is tied in a basic way to the question of what we owe persons in comparable or worse situations, and how we need to invest our scarce resources (money, goods, time, energy) in light of the sum total of our obligations. While the claim on our help may well appear non-relational, determining the kind and extent of the help must always be relational -- at least in circumstances of scarcity (and resources are always scarce).

Claims are either "satiable" i.e., an upper limit or sufficiency level can be indicated after which each person's claim to X has been fulfilled, or they are not so. For insatiable claims, to stipulate any level at which one is or ought to be sufficiently satisfied is arbitrary. If the standards of sufficiency are defined as a bare minimum, why should persons be content with that minimum? Why should the manner in which welfare and resources are distributed above the poverty level not also be a question of justice? If, by contrast, we are concerned solely with claims that are in principle "satiable," such claims having a reasonable definition of sufficiency, then these standards of sufficiency will most likely be very high. In Frankfurt's definition, for example, sufficiency is reached only when persons are satisfied and no longer actively strive for more. Since we find ourselves operating, in practice, in circumstances far beneath such a high sufficiency level, we (of course) live in (moderate) scarcity. Then the above mentioned argument holds as well -- namely, that in order to determine to what extent it is to be fulfilled, each claim has to be judged in relation to the claims of all others and all available resources. In addition, the moral urgency of lifting people above dire poverty cannot be invoked to demonstrate the moral urgency of everyone having enough. In both forms of scarcity, i.e., with satiable and insatiable claims, the social right or claim to goods cannot be conceived as something absolute or non-comparative. Egalitarians may thus conclude that

distributive justice is always comparative. This would suggest that distributive equality, especially equality of life-conditions, is due a fundamental role in an adequate theory of justice in particular and of morality in general.

Questions For Discussion

1. Why should society be concerned about equality? Analyse the main arguments for and against equality.
2. What are the types of equality?
3. What are the objections to simple equality and how can they be addressed?
4. What is distributive equality?
5. What are the modes of distribution recommended by various theories?
6. What are the objects of distribution?
7. Identify the principles of equality and determine their meaning.
8. Examine the FDRE Constitution and determine the type/types of equality and the conceptions of equality it has endorsed.
9. Related to the above, examine how the FDRE Constitution addresses the questions posed in developing a theory of distributive justice (listed under ‘presumption of equality’).

Attachment A

The Stoics believe in the monism (oneness) of this world. Unlike Plato who declared the dualism of this world (as material world and transcendental one), the Stoics taught the oneness of it. Their basis of knowledge is material perception of the outside world. In other words, they place knowledge in physical sensation, and reality -- what is known by the senses -- is matter. All things, they said, even the soul, even God himself, are material and nothing more than material. As the soul is for the body, God is for the world. God is the soul of this world.

But in spite of this materialism, the Stoics declared that God is absolute reason. This is not a return to idealism, and does not imply the incorporeality of God. For reason, like all else, is material. It means simply that the divine fire is a rational element. Since God is reason, it follows that the world is governed by reason, and this means two things. It means, firstly, that there is purpose in the world, and therefore, order, harmony, beauty, and design. Secondly, since reason is law as opposed to the lawless, it means that universe is subject to the absolute sway of law, is governed by the rigorous necessity of cause and effect. Hence the individual is not free. There can be no true freedom of the will in a world governed by necessity. We may, without harm, say that we choose to do this or that, and that our acts are voluntary. But such phrases merely mean that we assent to what we do. What we do is none the less governed by causes, and therefore by necessity.

The Stoic ethical teaching is based upon two principles already developed in the above kind of approach; first, that the universe is governed by absolute law, which admits of no exceptions; and second, that the essential nature of humans is reason. Both are summed up in the famous Stoic maxim, "Live according to nature." This maxim has two aspects. It means, in the first place, that men should conform themselves to nature in the wider sense, that is, to the laws of the universe, and secondly, that they should conform their actions to nature in the narrower sense, to their own essential nature, reason. These two expressions mean, for the Stoics, the same thing. For the universe is governed not only by law but also by the law of reason, and we, in following our own rational nature, are *ipso facto* conforming ourselves to the laws of the larger world. In a sense, of course, there is no possibility of our disobeying the laws of nature, for we, like all else in the world, act of necessity. And it might be asked, what is the use of exhorting a person to obey the laws of the universe, when, as part of the great mechanism of the world, we cannot by any possibility do anything else? It is not to be supposed that a genuine solution of this difficulty is to be found in Stoic philosophy. They urged, however, that, though we will in any case do as the necessity of the world compels us, it is given to us alone, not merely to obey the law, but to assent to our own obedience, to follow the law consciously and deliberately, as only a rational being can. Virtue, then, is the life according to reason. Morality is simply rational action. It is the universal reason which is to govern our lives, not the caprice and self-will of the individual. The wise man consciously subordinates his life to the life of the whole universe, and recognizes himself as a cog in the great machine.

Attachment B

A young man named Elmer E. Palmer living in New York State in 1882 who decided to kill his grandfather was the bad man. Of course, murder was clearly defined as a crime, but Elmer thought that by committing the act he would inherit under his grandfather's will. Perhaps he calculated that a long prison term plus eventual parole was worth the money. In any event, there was no law on the New York books that said that a murderer could not inherit under the terms of a will if he kills the testator. In the following dialogues he asks his lawyer whether a murderer can inherit the estate of the victim. As it is said it was an actual case that happened in the above mentioned state and year. The outcome is shown at the end of the dialogue.

SCENE ONE: office of an Attorney in Upstate New York, February, 1882

- *Attorney*: Have a seat, Elmer. What's on your mind these days? Miss Fetch says you have a question to ask me.
- *Elmer*: That is right, I do. I want to know whether an heir under a will would still get the property even if he killed the testator.
- *Attorney:* I didn't know you knew all those legal terms, like "testator" and "heir". Have you been looking up Blackstone or Kent?[8]
- *Elmer*: As a matter of fact, I did take out the Blackstone book from the library. But it wasn't any help on this issue.
- *Attorney*: Well, I'm glad you're so interested in the law. But I'm a bit surprised about the question you asked. What made you think of it?
- *Elmer*: Well…..
- *Attorney*: I can imagine you would come up with lots of questions after reading some of Blackstone. But a question that doesn't even exist in Blackstone is another matter. Was there actually something in Blackstone's book that made you come up with this particular question?
- *Elmer*: No. I read about it in a dime novel the other day.
- *Attorney*: And you rushed out to look up the law?
- *Elmer*: That is right.
- *Attorney*: Are you sure you don't know anyone who is planning to kill his rich old uncle?
- *Elmer*: Oh, no sir.
- *Attorney*: Do you know anyone who has any notions of murder in mind?

[8] Legal scholars who wrote legal books.

- *Elmer*: No, I don't
- *Attorney*: Now don't get me wrong in my asking this, Elmer, but just of curiosity, your grandfather has quite a bit of money, and you'd be the only logical beneficiary.
- *Elmer*: I don't see what that has to do with it.
- *Attorney*: Nothing, my boy, nothing at all. You just set my mind thinking. Would you know, by the way, whether you are the beneficiary under your grandfather's will?
- *Elmer*: Isn't that something you would know?
- *Attorney*: No, as a matter of fact. Your grandfather used other lawyers in town. But I know he has a will, all right.
- *Elmer*: Well, I think I'm mentioned in his will. But I can't be sure. Anyway, my question has nothing to do with me.
- *Attorney*: I know that, Elmer, and I'm glad of it. I suppose it would be natural for a beneficiary under a will sometimes to wonder when the testator is going to die, or whether he might change the will before he dies. But I'm sure that those thoughts are not at all what prompted your question.
- *Elmer*: Not at all. But I would like to know the law on the point.
- *Attorney*: I can't give you an answer offhand. But I'll do some research on it, just out of curiosity. Here are a couple of books you might look into, too. You can come back in about a week and we'll discuss it at that time.
- *Elmer*: Thanks. I'll see what the books say. May be there's a rule in one of them that covers the point.
- *Attorney*: I tend to doubt it since there was no rule in Blackstone. But we'll see. Meanwhile I want you to know one thing.
- *Elmer*: Yes?
- *Attorney*: Murder, as you know, is the most heinous crime of all. Anyone who kills anyone else deserves to be hanged. I wouldn't hesitate to turn over any information I have about any murder to the police, even if it's information about someone who is a client of mine.
- *Elmer*: A client?
- *Attorney*: A client whom I know committed murder – so long as I didn't get the information in confidence from the client himself after the fact as my part of my job in representing him. Even then, I wouldn't know whether to represent him, but I don't suppose I could turn him into the police. But if someone is my client and I find out that he committed a murder, the fact that he is my client won't stop me from calling the police.
- *Elmer*: I think I understand. But why are you telling me this?
- *Attorney*: I just want you to know, Elmer, about how I view my responsibility as a lawyer. The very fact that you came in here and asked me a question about murders and testators is a fact that I have to regard as a piece of evidence. Oh, it probably will never be useful in any regard. But just suppose, Elmer, that your grandfather dies an unusual death. In such a situation, the fact that you asked me the question about a murder inheriting under a will would tend to throw a tiny bit of suspicion your way-
- -*Elmer:* But….
- -*Attorney*: - even if you were perfectly innocent! You see, now that you have asked me the question in a connection that has absolutely nothing to do with any action that you yourself are contemplating, I would not regard it as confidential information under an

attorney-client privilege if subsequently there is an investigation of any possible unnatural death of your grandfather.

- *Elmer*: I see.
- *Attorney*: All right, then. Come in next week and we'll discuss your interesting question.
- *Elmer*: (thinking for himself) Drat, I shouldn't ask him. I should have done the research by myself. But how? I don't know how to do the research. I had to ask an attorney. Oh, well, now that I asked him, I might as well go through with the investigation. Whatever damage has been done can't be undone. I'll see him next week and get his opinion.

Commentary

In one sense, nothing has happened so far. Elmer has simply asked a question of his attorney. But in other sense something important has been suggested about the meaning of "law". In the context of this story, you should know that in the British legal system the attorney himself is part of the legal system in more than just the technical sense that he is an "officer of the court" in its fullest sense.

The attorney represents Elmer's first contact with the legal process that is beginning to take shape around Elmer's question. As Elmer himself has discovered by failing to find the question even mentioned in Blackstone or Kent, the two most consulted works of the time, "Can a beneficiary inherit if he murders the testator?" is not an inquiry to which the legal system provided an easy answer. But the legal system, through the attorney himself, has started to respond. Even though the attorney has only said so far that he doesn't know the answer to the question, in fact he has begun to reveal the answer by the very attitude that he has taken towards Elmer's question. His attitude, Elmer has discovered, is markedly negative. The attorney will research it as an "interesting" question, but he has made it clear that he would be repelled if this question had any practical significance to Elmer.

Thus, if Elmer were a very discerning chap, he might have said to himself that the lawyer's attitude is a good indication that the legal system as a whole will also have a negative attitude toward such a question, for the lawyer is part of the legal system. But Elmer is not even looking for a "hint" in these quarters. Instead, he is only upset that he has aroused the suspicions of any unsympathetic attorney.

Elmer, as we shall see in more detail, is basically a "positivist." In other words, he believes that the legal system is simply a set of rules. Either there is a specific rule to answer his question, or there is no special rule. In the latter case Elmer would conclude that the other rules in the system would continue to apply and the beneficiary would collect under the will. Since he views law as a neutral collection of rules, Elmer naturally doesn't feel the attorney he is consulting has anything to do with the content of law. The attorney is simply, to Elmer's mind, a research assistant.

SCENE TWO: The same, a week later

- *Attorney*: Come in, Elmer, I've had a chance to research that question of yours now. I've turned up some interesting information.
- *Elmer*: Is there any law on the subject?
- *Attorney*: Well, that's a large question. Let's break it down. What do you mean by "law"? Or, what is one of the things you mean by that term?
- *Elmer*: A statute?
- *Attorney*: Fine, we'll start with that. I've done the research and the fact is that there is no New York statue that deals with the subject of beneficiary taking if he murdered the testator. There are lots of statutes, of course, that deal with taking under wills, but there is none on the particular question you raised. In addition, there are no relevant federal statutes.
- *Elmer*: How about other states? Or don't they count?
- *Attorney*: In fact, I've not been able to come up with any legislation of any other state on this matter, and suspect that if I looked at the legislation of other countries I wouldn't find anything either. Of course, statutes in other states or countries would no be binding in New York, but it is interesting that your question never seems to have occurred to any legislative body in all recorded history.
- *Elmer*: How about cases?
- *Attorney*: Very good, Elmer. I can see that you've learned something from the books I have given you. You are telling me that "law" means to you not only the rules found in statutes but also the rules found in judicial decisions. Is that right?
- *Elmer*: Yes. From my point of view, I suppose that rules that are passed by the legislature and rules that are passed by judges are the same- I mean they have the same effect.
- *Attorney*: That is right, they do. A court will apply "precedent" just as it will apply a statute. So I did some research on precedents.
- *Elmer*: And….?
- *Attorney*: There is no case in the books involving the murder of a testator by the beneficiary.
- *Elmer*: None at all?
- *Attorney*: That's right, to be precise about the matter. But you see, Elmer, an attorney's job can't end by just looking up the question of whether there was exactly the same case ever decided previously. There may be what we call an analogous case -- A case where somewhat the same issue has come up in a different setting.
- *Elmer*: I don't know what that might be.
- *Attorney*: Well, I'll tell you. I found a case that was decided in North Carolina that involved a wife's right to dower. She had been convicted of being an accessory before the fact to the murder of her husband. In other words, she was involved in the murder of her husband, and yet she was claiming a share of his estate (property).
- *Elmer*: That sounds pretty close to the question I asked you.
- *Attorney*: I thought so too.
- *Elmer*: What was the ruling?

- *Attorney*: The court held that the wife was entitled to dower.
- *Elmer*: And that's the only case on the books?
- *Attorney*: Right. The only case tends to suggest that a murderer can inherit anyway.
- *Elmer*: That just about answers my question, then.
- *Attorney*: Not so fast. There are several things we have to consider. In the first place, as I told you, it was a North Carolina case, not a New York case.
- *Elmer*: Does that mean it has no effect in the New York state?
- *Attorney*: No, not exactly. As a matter of fact, I suspect that the New York courts would want to follow the only precedent in point even if it is a decision in another state. Judges, you might know, have some feeling that the law should be consistent, and so that would feel a pressure to reach the same result as North Carolina. But they are not bound to do so.
- *Elmer*: Not bound, you mean, like they would be if it were a New York decision?
- *Attorney*: Exactly. And even if it were a New York case, a later court can always reverse the former precedent. But such instances of overrunning a precedent are very rare.
- *Elmer*: So what you are saying is that a New York court probably would follow North Carolina case?
- *Attorney*: Yes. At least, judges in this state would take the North Carolina case into account as important factor. But now let's look at a second issue. Just how close is a case of dowry to a case involving a will?
- *Elmer*: It is exactly the same thing.
- *Attorney*: But a will isn't a dowry.
- *Elmer*: I mean, the principle is the same.
- *Attorney*: You're right that we have to look to the principle. But what is the principle?
- *Elmer*: The principles inheriting an estate from someone you've killed.
- *Attorney*: Well, Elmer, that's one principle. But let's analyze it a different way. Suppose we have a testator who announces to the beneficiary that he is going to change his will, and the beneficiary fears that the change may be quite adverse to the beneficiary. If the beneficiary hurries up and murders the testator before the testator can change the will, then he will have profited enormously by the murder. But look at the dowry situation. There the husband can't change the way the estate will devolve.
- *Elmer*: But the wife gets the estate sooner by murdering her husband.
- *Attorney*: Very true. But that's true for the will situation as well. Indeed, the murderer in both cases gets the property sooner than he would have if the owner died a natural death. So that is a point of similarity. But I have been talking about a point of difference.
- *Elmer*: Suppose the husband divorced the wife? Wouldn't the wife lose her dowry interest?
- *Attorney*: Excellent question, Elmer. No, I think the situation would be different. A beneficiary under a will has no claim whatsoever to the estate except the claim that the will provides to him. If the will is changed and the beneficiary distinguished, he has no claim that the will provides to him. If the will is changed

and the beneficiary disinherited, he has no claim (so long as the will is proper and so forth). But a wife has a dowry interest when she is lawfully married. Therefore, any divorce proceeding would have to take place in light of this dowry interest. The wife might not agree to a divorce, or she might get a much more favorable property settlement as part of the divorce than she would have received if there were no dowry.

- *Elmer*: So then the cases are different?
- *Attorney*: Yes. Or at least I should say, a judge could find a difference between a will case and dowry case if he wanted to.
- *Elmer*: What might make him want to?
- *Attorney*: Well, we'll have to go into that. I have some other business to attend to now, but we can talk if you come back later this afternoon. But let me say this much. The case for the murderer taking under the will is pretty strong on its face. There is no statute anywhere that says he can't. The only case on a slightly different point suggests that he can. And in addition to that, there are numerous statutes regulating how a will is to be construed. These statutes, as well as judicial precedent, instruct a judge to apply the terms of the will as written, and not to attempt to change them. You know, if courts were to make exceptions in wills that are not specified in the wills themselves, the amount of litigation in the probate area would be contested, and all kinds of exceptions would be claimed. People who make out wills would not be able to predict what exceptions a court write in. The whole idea of a will would be eroded. That is why the statutes are so clear on the point. Estate law is one branch of the law that adheres extremely closely to the written word. If the testator himself does not make an exception cutting off any beneficiary who murders him, the courts have no statutory authority to write such an exception into a will. So, let me leave the situation with you for the moment as saying that it looks like a pretty iron-cad case for the murderer taking under the will, at least as far as the law on the books is concerned.

Commentary

Under positivist theory, "law" is a set of rules or norms or commands. In New York in 1882, there was no such rule regarding murderers taking under a will. Therefore, a positivist would have to conclude that the rules pertaining to wills must be applied as written, and a murderer must take. But our attorney is starting to suggest to Elmer a different conception of "law" may be more accurate. The attorney has started to talk in terms of predicting what a court will do. Elmer might have wished that a court would simply apply "the law" which, to Elmer, consists of the rules on the books. But the attorney has begun to suggest that a court might not act in such a root-like manner.

Elmer might not like the way this matter is proceeding. But he has an interest in predicting what a court will actually do. A pure positivist might not have such an interest. The positivist might simply want to know what the "rule" is, and simultaneously concede that for one reason or another a particular court might not act as it "should". If the court acts contrary to the "rule," the positivist might conclude that the court was acting illegally, or as a matter of "discretion," or like a "legislature."

Such concessions on the part of a positivist might not seem to him to be important to his "theory". But to Elmer they would be important, because at bottom Elmer is interested in predicting what the court will do and not in vindicating a jurisprudential approach to the meaning of law. Elmer is a real person asking a real question that has real consequences for him, and therefore, we can say that the meaning of "law" as revealed to Elmer is likely to accord with the usage of the term in ordinary language. Abstract definitions of "law" formulated by philosophers interested in the term for "its own sake" (whatever that means) are of little if any significance to Elmer.

SCENE THREE: Same, later that afternoon

Elmer: Well, sir I've done some thinking about what you have said and I'm convinced that the answer to my question is that the murderer would take under the will. I think it is clear as a matter of law. And there's probably good reason for it too.

Attorney: Good reasons? Yes. I think there are some good reasons. But I'm glad you brought up the matter of reasons. A mere rule itself is a fragile thing if there aren't good reasons to back it up. So we really should look at the reasons favoring the outcome that you suggest and see if they are convincing.

Elmer: Well, I know one reason – the reason you suggested: a court which writes exceptions into wills ruins the idea of wills.

Attorney: That certainly is one reason. But let's take another. Why should a murderer get rewarded for his crime by being allowed to inherit the estate?

Elmer: I don't know. But isn't it something outside the law to say whether someone gets rewarded or not? I mean, shouldn't the judges just apply the law, and not at the effects of their decisions?

Attorney: that certainly is an approach, and a thoughtful one. But I think judges won't ignore the effect of what you do. Why should they? Justice isn't "blind" in that sense. A judge is part of the real world.

Elmer: Yes, but a judge is also someone who applies the law.

Attorney: Elmer, "the law" isn't just the statutes and the cases, as I'm trying to point out to you. Certainly the law is partly that, in fact mainly that. But it can be bit more, too. It can involve the reasons behind the law. It can involve deep-seated principles that we all share. It can involve looking at the effects of decisions. It can involve "justice". All these things are the things a judge should "apply"

Elmer: But all that looks pretty vague to me.

Attorney: Well, the question you ask hasn't come up yet, so what do you expect? Surely you don't expect the law to provide answers in the books to questions that haven't come up! So we have to proceed in what you call a vague fashion, since there isn't a better alternative. But let's get down to brass tacks. There is a second answer to my question about a murderer rewarded for what he has done.

Elmer: I can't think of it.

Attorney: It is simply this. The United States Constitution and the Constitution of the State of New York provide certain procedures and safeguards for a person accused of a crime. A person may be declared guilty only after he has been given the right to a jury trial, the right to confront witnesses, and after the case has been proved against him

beyond a reasonable doubt. When all that happen and a person is declared guilty, he cannot be punished beyond the punishment prescribed by the law. A person convicted of a felony for which the maximum penalty is 10 years in prison cannot be sentenced by a judge to 20 years in prison, for example.

Elmer: what does this have to do with my question?

Attorney: Simply this. We assume that you have a murderer who has been convicted of murder. Whatever his punishment is, it is that which has been prescribed by the criminal law. Now a person can argue that no other court or official can add to that punishment. Any additional punishment would be something that exceeds the punishment prescribed by the criminal law. Moreover, any additional punishment from a different court will be imposed upon the murderer without his having had the benefit of a right to jury trial, proof beyond a reasonable doubt, and so forth. Thus, in a basic constitutional sense, to take a murderer's inheritance away from him would constitute an additional penalty imposed upon him solely because of his crime, and that additional penalty would not have been imposed according to the constitutional safeguards to which the murderer was entitled.

Elmer: So it would be illegal for a court to deny the murderer his inheritance?

Attorney: I didn't say that. I'm only giving you an argument, a reason perhaps that was in the minds of the judges in the North Carolina in the dowry case.

Elmer: But surely a court can't act contrary to the constitution?

Attorney: That's right. But remember, a court interprets the constitution. If it doesn't think it is acting contrary to the constitution nothing I can tell you in this office is going to change that fact. Besides, a court might get around the problem of additional punishment.

Elmer: How?

Attorney: By saying that the murderer isn't being deprived of his property, because the property hasn't been "vested" in him. If the property isn't vested in him, the court isn't taking it away.

Elmer: That sounds fishy.

Attorney: It is, in a way. What the court would be saying is that the property isn't the murderer's until the court itself has construed the will. If part of the court's construction of the will is to read in an exception for murderers, then the exception has been read in before the property got to the murderers. So the court would be taking nothing away from him

Elmer: That's not only fishy. Surely the court would be taking away from the murderer something that would otherwise be his.

Attorney: Not quite. It would be "his" if he weren't a murderer! But, I agree, this line of argument is pretty suspicious. I only want to point out to you that a court would be capable of coming up with it just in order to refute the "additional penalty" argument that I gave you. So we have to conclude that the additional penalty point is only an argument, not a conclusive thing by any means.

Elmer: Well, can I ask if there are any more reasons in favor of allowing the murderer to take under the will?

Attorney: I have thought of a third one, though it's not likely that a court would pay much attention to it comes up in argument. But let me give you a possible situation. Suppose the testator has an estate worth a million and five dollars. He draws up a will dividing

his estate into two parts absolute: a million dollars goes to his son, and five dollars for a tiny organization called citizens for the Restoration of British Sovereignty in America. Then his son murders him. Suppose the court were to decide that the son cannot inherit the million dollars because he murdered the testator. Should the million dollars then be paid over to the other beneficiary? You see, the estate has to go somewhere. It can't revert back to the state because any such rule would encourage the judiciary, which is part of the state, to find such reversions. There are laws that require that the estate go to the beneficiaries. So who would the court be benefiting by disinheriting the murderers?

Elmer: You mean, in any will at all there will be a question of who gets the money if the murderer doesn't get it?

Attorney: Exactly. Giving the money to the other persons in the will might be worse than giving it to the murderer. Of course, it is not really a question of worse or better, but of the intent of the testator. Suppose a court says that it cannot imagine that the testator, if he was aware of the problem, would have intended to give the money to a murderer? All right, but then what would have been his intent? To make my preceding example stronger, suppose his son has several children, but the father instead of providing directly for the children in the will gave the estate outfights to the son. Then the son murders the father. Suppose in addition that the son is going to be hanged for murder and will thus die shortly. If the court takes the money away from the son and instead gives it to the citizens for the Restoration of British Sovereignty, the court in fact will be depriving the grandchildren of the estate. Surely, the testator would not have wanted such a result. We can suppose that even if he knew about the murder, he would still have wanted his grandchildren to inherit at least part of the estate and not be left penniless after their father is hanged.

Elmer: Will the court always construe a will according to the intent of the testator?

Attorney: Well, they construe wills as written, but the written words are taken to indicate the testator's exact intent. When the words are ambiguous, courts may look to other evidences of the testator's intent. Now, in your murderer question, there is no ambiguity whatsoever in the will, and hence there is no cause at all for a court to look for other indications of the testator's intent. Even if a court did want to look beyond the will for evidence of intent an argument would be possible, along the lines I've suggested, that the testator might have intended that the person who murdered him take the estate anyway, especially if the facts are as strong as the ones I've suggested in my fanciful example.

Elmer: As long as these speculations seem to have something to do with the law, I might as well mention a couple of ideas I've had since our last conversation.

Attorney: such as?

Elmer: Well, you said that a murderer might act so that the testator doesn't have a chance to change the will. But suppose the testator would have changed the will to give more of the estate to the person who murdered him. You know, a change in a will can act to a person's benefit as well as to his harm. We can't just assume that the murderer gets an advantage by killing the testator.

Attorney: Very good. What else?

Elmer: Suppose the testator wants the beneficiary to murder him? Suppose he's told the beneficiary that he's looking for some way to die but doesn't believe in suicide or is

afraid to commit suicide. Or, he might be in great pain and ask the beneficiary to put him out of his pain?

Attorney: Also very good. Elmer, you've been doing a powerful lot of thinking about all this.

Elmer: It looks like you have too.

Attorney: Yes, it is an interesting problem and I've put more time in it than I should have, just because it interests me. But you've never taken any interest in the law before. Why this great interest on your part?

Elmer: Nothing in particular. It's just that your ideas have led me to think about it.

Attorney: Well, your ideas do have some merit. A court shouldn't simply assume that the murder is committed so that an adverse change in the will can be prevented. And sometimes, though this one seems far-fetched, the testator might want to be murdered. Of course, that would still be murder, but I take it your real point is that if the testator wanted to be murdered he would still have intended that the murderer take under the will.

Elmer: Yes.

Attorney: So what do you think?

Elmer: Well, as I said at the beginning, I think the case is more solid than ever. There's no statute or case saying a murderer should be read out of his victim's will. And as I count them, there are at least five reasons, some of course a lot stronger than others, which support allowing a murderer to collect under the will. I agree that you have shown that each of the reasons is not itself conclusive on the court-it can wriggle out of any one of them by some idea or other like the one you call "vesting". But taken together they should be conclusive. Don't you agree?

Attorney: No.

Elmer: What?

Attorney: Just as I said.

Elmer: Why?

Attorney: Let's look at the reasons on the other side. Now, some of them we've already considered. There's the one about the murderer acting to prevent the will from being changed. You're right, that won't always necessarily be the situation but a court will probably think that the murderer felt he had good reason to commit a crime. If the murderer thought he would benefit from the testator's living a bit longer and changing the will, then the murderer would no act.

Elmer: But the murderer might not know what the testator would do.

Attorney: I'll grant you that. Yet, you see, there is something to the argument concerning change, and it does to an extent distinguish the North Carolina case. Also, the "vesting" point I mentioned is a possible argument on the other side. In addition, there is something to the notion of the court's assumption that the testator would not have intended to have the murderer take under the will had the testator though about the problem, though there too a lot of difficulty attaches to a court's taking such a position and rewriting a will to accord to what it thinks the testator would have wanted.

Elmer: The policy against rewriting wills makes all of those arguments weak.

Attorney: May be so, but there are better arguments against the opposite result, arguments which in my opinion – well, I won't give you my final verdict until we have looked at the arguments.

Elmer: O.K. what can they be?

Attorney: First of all, let's look at the effect of a decision allowing a murderer to take under a will. The public will be put on notice that one way to get an estate would be to murder the testator. Lots of crazy people might be encouraged to do so.

Elmer: But-

Attorney: I know, you're going to say that it would make no sense for someone to commit murder if he wants to enjoy the property he receives. But remember, life insurance contracts typically have a provision that disallows suicide, because people have been known to commit suicide so that their families will inherit the life insurance proceeds. The courts might simply not want to be a party to any decision that would encourage such a fundamentally immoral act as murder.

Elmer: I was going to say, what business is it of a court to make the judgment in the first place?

Attorney: Well, if you are saying a legislature should deal with the question, I agree. It would be better if a legislature did so. But a legislature might not get around to doing it, and meanwhile a court is faced with a decision to make. The court can't reach a "bad" result simply by thinking that the legislature will come along later and correct it. A court is under some pressure to come up with good results irrespective of what the legislature will do.

Elmer: All right, may be the result isn't desirable. But on what law can the court base the decision you seem to be predicting?

Attorney: Not any "law" in the sense of rules in statues or cases. But let's look at some other sorts of "law". For instance, there are various principles in the law that have been repeated in many cases and approved by many writers. You can find them in Blackstone and Kent, among other places. In particular, it's often been said that "no one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own inquiry, or to acquire property by his own crime.

Elmer: But are those statements rules of law?

Attorney: No, they are maxims, or standards, or principles, or whatever you want to call them. Sometimes they apply and sometimes they don't, which is a rather frustrating feature that they have. For example, they don't apply to the rule in property known as adverse possession, where a person gains the property of another by virtue of his own wrongful trespass exercised openly for a period of years! Or take the case of an employee who breaks his contract to take a high-paying job. He might have to pay damages to his first employer, but he can keep his new salary, and therefore the law allows him to profit by his own breach of contract.

Elmer: So sometimes they are rules and sometimes they aren't. Just what do you think a court will do?

Attorney: Well, Elmer, after all this thinking and research, it comes down in my mind to a kind of intuitive feeling. I predict, on the basis of what I know about court and judges and the legal system, that a court simply will not want to be party to a murderer's scheme to collect under a will. It's as simple as that. The judiciary will not want to be involved in that kind of enterprise. A court faced with the question would probably hold that the murderer cannot take the inheritance. The court will perceive its decision to be in accordance with "justice". That might not mean precisely that the right party will receive the funds (recall my citizens for British Sovereignty example), but it will help

guarantee that criminals get what most people would probably say is coming to them. In other words, the court simply might not want to think of itself as any sort of an instrument enabling a murderer to profit from his crime.

Elmer: That is very vague.

Attorney: I know. That's why I've mentioned other arguments, like listing some principles that have been used in many other cases. You can view these as make-weights if you want to, or you might view them as suggestive of the same general result. The maxim that a person should not be allowed to profit by his own wrongdoing is perhaps another way of starting that the courts will not allow themselves to be instrumental in a person's scheme to profit from his own wrong. Of course, sometimes courts do exactly that, as in the case of adverse possession, or perhaps in the North Carolina case concerning dower. But although courts sometimes do it, I don't think they want to, and I do think that they will try to avoid it whenever they will try to avoid it whenever they can. Thus, I would conclude that there is considerably more of a chance than not that a court would not allow the murder to take under the will.

Elmer: So you think the court would probably act contrary to the law?

Attorney: Not at all, Elmer. It might be acting contrary to some rules, and it might not be able to cite a statutory rule in its favor. But the law is something more than those rules. *In fact, the law, as I've tried to suggest to you, is really a prediction of what courts will decide*. If you want to have my prediction right now at this moment, I would have to say that there's a better chance than not that a court will hold against the murderer.

Elmer: This is your intuition?

Attorney: Yes, in a way. It's the same intuition I had when I first heard your question. All the research we've done in between hasn't really changed my opinion.

Elmer: Well, thank you very much for your opinion. I can't see how you could reach that result in the light of all the statutes and cases and other considerations that we talked about. Your idea of law is too vague for me. I guess I just don't think of law that way.

Attorney: You are entitled to your opinion. I just hope that in your lifetime and mine no court will ever be faced with this particular question. As much as I'd like to know whether my idea of the law is right or not, I hope your question is never answered by any court.

- The End –

Postscript

The murder is committed off-stage, after the performance, by Elmer. A following drama, *People v. Palmer,* is a straightforward criminal trial ending in a conviction of second-degree murder. After that there is a new courtroom drama taking place in Probate Court entitled *Riggs v.Palmer*, where Elmer is stripped of his rights under the will and the estate passes instead to his aunts.

CONCLUSION

If Elmer was, as it was hypothesized, a pure positivist, the decision by the probate court must have come as a complete surprise to him. I have tried to show by means of a fictitious dialogue that a lawyer could have predicted the result in advance. Of course, no prediction served to stop the original Elmer Parmer. But something like it might have deterred other nameless would-be murderers before 1889; the idea of killing a testator in order to take under a will was at least conceivable for centuries before that time. There is no way we will ever know whether any such deterrent was operative, but if the lawyer's intuitive reactions are any persuasive indication, in a very real sense "the law" could have so operated in this peculiar situation.

I hope the dialogue concerning "Elmer's Law" has helped to clarify the notion of law as a prediction of official behavior. Justice Holmes was apparently the first to write that "law" is a prophecy of what courts will do, but this seminal idea became distorted in the later writings of the *American realist school* into an equation of "law" with the actual decision of officials. A great deal now remains to be sorted out about the predictive theory of law. But one thing seems clear. If "law" is to mean something that can affect (change, modify) human behavior, then it must operate at the time that a person has a choice to make concerning his own plans or activities. If it only operates after the fact – i.e., when an official finally is called in to make some judgment about the person's compacted act – then it can hardly be called "law". A *prediction* of official behavior, however, does operate in the present. It comes into play when a person such as Elmer, is contemplating whether to do or refrain from doing something. A lawyer is not needed to make the prediction, although the more one knows about law the better the prediction will be. Elmer himself could have reached some conclusions regarding the New York courts' most probable course of action. The real Elmer may in fact have looked up the law in Blackstone and proceeded to commit the crime, secure in his own mind that he would receive the estate even if convicted of murder.

If Elmer did do so, then he fell into the positivist trap of equating the law with “rules” on the books. To be sure, a rule is usually a good predictor of official behavior. But it doesn’t always work, particularly in the common law system.

Attachment D – A practical case from the US supreme court on enforcement of morality

Part II--*Bowers v. Hardwick*

Majority decision

In 1986 the Supreme Court faced the same question the Wolfenden Report dealt with in 1957: whether private consensual homosexual sodomy could be properly prohibited by law. The majority of the Court held that it could, while four justices dissented. The arguments of the two sides, represented by Justice White's majority opinion and Justice Blackmun's dissent, correspond with remarkable similarity to the respective positions of Devlin and his critic, Hart. It is interesting that, despite the intense criticism Devlin's position has come under since its articulation over twenty-five years ago, the majority in *Bowers* case adopted it, while the dissent was left to point out the more contemporary counterarguments, both legal and philosophical, by which the majority remained unmoved.

By rejecting the privacy argument presented by the defendant, the majority decision refuses to recognize Hart's distinction between what is indecent and offensive, for example committing sodomy in public, and what is simply immoral, committing the same act in private. Refusing to extend privacy to consensual sexual practices, the majority decision undermines personal liberty and permits the state to regulate its citizens' most intimate decisions. By refusing to consider the areas of private consensual sexual activity off-limits for criminal legislation, the Court ignored the more recent philosophical arguments, and permitted itself to reject Hardwick's claim based on the substance of his activity.

The majority of the Court that engaged in a Devlinian analysis, emphasizing the consensus on the issue of the immorality of consensual sodomy, pointing out that sodomy was illegal at common law, forbidden by the original thirteen colonies, outlawed by all 50 states until 1961 and still illegal in 24 states on the District of Columbia. The Court's reliance on history and common conceptions of morality illustrates its allegiance to Devlin's way of thinking: the state has a right to regulate private activity to preserve current morality.

The majority opinion rejects Mill's principle, saying that victimless crimes should not escape the law, even when committed consensually and in private. If privacy in the home

were permitted for this purpose, the Court asserted, "it would be difficult, except by fiat, to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest and other sexual crimes even though they are committed in the home." The Court ignored the fact that Mill's principle would permit the state to regulate these other sexual crimes because they cause harm to other and are therefore not regulated as immoral *per se*.

In general, the majority's argument is generally Devlinian and leaves itself open to criticism. Instead of examining an individual instance of the interaction between law and morality to determine whether it amounts to an enforcement of morality *per se* without other justification, the majority opinion says simply that the law cannot stay wholly separate from morality, and believes that the inquiry should end there. In this way it confuses "sometimes" and "always" in the same way Feinberg's (another Devlin's critique) Devlin did, and assumes that the present morality is the only morality which should be protected.

Blackmun's dissent

Justice Blackmun's dissent on behalf of three of the four dissenting justices represents an expression of the Hart position. His opinion frames the issue in terms of individual liberty saying that the challenged statute "denies individuals the right to decide for themselves whether to engage in particular forms of private, consensual sexual activity." Blackmun's dissent views the question as one of privacy and individual liberty, rather than a fundamental right to commit homosexual sodomy; that "the Constitution embodies a promise that a certain private sphere or individual liberty will be kept largely beyond the reach of government." The question of private consensual sodomy should be left out of moral machine of the criminal law.

Blackmun challenged the majority's willingness to base its decisions on familiar moral judgments, that such moral judgments, "ought not to conclude [the Court's] judgment upon the question whether statutes embodying them conflict with the Constitution of the United States." If the Court wants to enforce morality, Blackmun would have it adopt a concept of privacy that "embodies the 'moral fact that a person belongs to himself and not others nor to society as a whole.'"

Blackmun's opinion directly opposes Devlin's disintegration thesis, and points out that, in an earlier decision, the majority of the Court did as well: he quotes a 1943 case in which the Court said "we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will *disintegrate the social organization*." Further, freedom to disagree with the majority on important matters is the most important to protect; since the issue of sexuality, "touches the heart of what makes individuals what they are we should be especially sensitive to the rights of those whose choices upset the majority."

The dissent also recognizes Hart's distinction between indecent and immoral acts: the fact that the conduct could be punished if in public does not mean that the state should be

permitted to regulate that behavior when it takes place in private. Blackmun's decision actually quotes Hart on the issue and points out that the majority of the Court fails to see the difference between laws that protect the public sensibilities and those that enforce private morality.

Conclusion

John Stuart Mill proclaimed in 1859 that "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others." Justice White said in 1986 that "victimless crimes . . . do not escape the law [even] when committed at home," and held that private consensual sodomy could be criminally prohibited by state. An analysis of *Bowers* in light of the philosophical debate indicates that the majority of the Court remains in the 1960s mindset of Lord Devlin, while the dissenters have considered and applied the more recent arguments of Hart.

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