What is Jurisprudence

- Latin term *juris prudentia*, which means "the study, knowledge, or science of law.
- understood as a term that embraces spectrum of questions about the nature, purpose of law and responses made to them.
- First, it seeks to analyze, explain, classify, and criticize entire bodies of law, ranging from contract to tort to constitutional law
- Second compares and contrasts law with other fields of knowledge such as literature, economics, religion, and the social sciences.
- The third type of jurisprudence raises fundamental questions about the law itself
- The fourth and fastest-growing body of jurisprudence focuses on even more abstract questions,

1.2. Why we study Jurisprudence

- develops the ability to analyze and to think critically and creatively about the law
- jurisprudence is the way lawyers and judges reflect on what they do and what their role is within society
- to think deeply about the nature and function of law, the legal system, and the legal profession.

1.3. Schools of Jurisprudence

Natural Law School:

- the oldest school of jurisprudence
- immutable and eternal principle
- man-made law should be in accord with the principles of natural law

Legal Positivism:

- called Analytical School of jurisprudence
- is no higher law than that created by governments, legitimate or self-imposing, and that such law must be obeyed
- treats law and other values, such as, morality and religion separately.

Historical School

- views law as an evolutionary process
- concentrates on the origin and history of the legal system
- conceives a nation's law as tied to the primitive consciousness of its people

***Sociological School*:**

- locate the law in the present-day institutions of its society
- seek to view law within a broad social context
- concerned with the actual effects of the law upon the complex of attitudes
- concerned with the practical improvement of the legal system

Legal Realism

- conceives law as judge made
- puts the court at the center.
- contends that positive law cannot be applied in the abstract
- judges should take into account the specific circumstances of each case
- the law should not be static
- emphasizes the role of the judge
- it emphasizes that law is made not found, and considers judges as the true law makers.

UNIT TWO

CLASSICAL NATURAL LAW THEORY

- is one of the jurisprudential approaches to law
- advocates that some laws are basic and fundamental to human nature
- are discoverable by human reason without reference to specific legislative enactments or judicial decisions.
- 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.
- St. Thomas Aquinas perpetuated this idea
  asserting that natural law was common to all peoples—Christian and non-Christian
- The influence of natural law theory declined greatly in the 19th century under the impact of Positivism.

2.1 The Notion of Natural Law

The Word and Its Significance

- 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

- Such laws, laws that are in accord with the ultimate purpose of man, constitute natural law
- Those things which impede man attaining his natural ends are contrary to natural law.
- society should be ordered in such a way as to assist man in fulfilling his purpose
- violence is contrary to natural law.

Ancient Greece: Natural Law as Source of Justice and Virtue

Plato and Aristotle

- they contributed a lot to the classical Hellenistic legal theory.

2.2.2 Socrates

- famous Greek philosophers
- law as recorded in *Apology* and *Crito*, two different writings written by his pupil Plato.
- Apology is all about Socrates' defense in court
- Crito is a discourse made between Socrates and his friend Crito in prison.
- age of 70 when he appeared before court to defend
- prosecuted because he was said to be corrupting the youth
- second he did not believe in the gods of the state.

2.2.3. Plato

- was concerned to redefine the nature of justice
- by relating it to something far more permanent and absolute
- what for us are abstractions, example redness, square-ness,
- This is Plato's doctrine of 'forms'.
- for Plato the forms of 'goodness', 'virtue', 'honesty' were eternal and immutable

2.2.4. Aristotle

- did not subscribe to Plato's theory of forms.
- Aristotle was concerned with the world as he saw it existing around him (as opposed to Plato, Aristotle was materialist).
- Aristotle saw that, in the birth and growth of animals and plants, the earlier stages always lead up to a final development
- Aristotle the universe is dynamic
- 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.
- Aristotle says, 'Because it is the completion of associations existing by nature, every polis exists by nature

Aristotle says:

- *There are two sorts of political justice, one natural and the other legal*
- *natural is that which has the same validity everywhere and does not depend upon acceptance*
- *the legal is that which in the first place can take one form or another indifferently*
- Aristotle has declared that we have two types of laws. One is natural law, and the other man-made.
- 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

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
- its founder Zeno
- was the prevailing philosophy during the greater part of the Roman Republic and Empire
- Cicero, Seneca, and the Emperor Marcus Aurelius.
- modern law and legal theory were derived mainly from Stoic philosophy:

2.3.2. Cicero

- Roman orator, politician, lawyer and a Stoic philosopher.
- he discusses "true law"
- and identified with "right reason", which is immanent in nature, in the universe and in the minds of the wisest men
- *Law is the highest reason, implanted in nature*
- *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.*
- *it is of universal application, unchanging and everlasting*
- *that one must not injure anybody else for one's profit*
- For Cicero, law is the highest product of the human mind
- with the elemental force of nature
- validity of human law depends upon its harmony with these forces.

2.3.3. Seneca

- *Man is a sprit*
- *his ultimate goal is the perfection of his reason in that sprit*
- *man is a rational animal*
- *his ideal state is realized when he has fulfilled the purpose for which he was born*
- emphasized the need for rational approach, i.e. that man shall live in harmony with nature

- 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.

- 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
- the Stoics contributed much to the practical development of the Roman law.
- Roman law, on the other hand, developed through the efforts of expert *jurisconsults* (learned lawyers) and *praetors* (judges)

2.4. Christianity: Natural Law as Morality

- Stoicism taught that men should love one another
- 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

2.4.2 St. Augustine of Hippo

- wrote 'if a law be unjust, it is no law at all
- if a man-made law conflicts with natural law, it is invalid.
- portrayed the human condition as torn between the attraction of good and evil
- work, *De Civitate Dei* (the City of God)
- The will of God is then seen as the highest law, eternal law, for all people, playing something of Stoic cosmic reason
- Augustine makes it mandatory for a positive law to rely on the eternal law.
- Unjust law is one which does not concord with the higher (divine) reason
- man-made law ran counter to natural law, it was null and void
- unjust governments were equated with criminal gangs.

2.4.3 St. Thomas Aquinas

- It was in the work of St. Thomas Aquinas, principally that the final and most complete synthesis of the classic doctrine of natural law and doctrine of the Christian church was achieved
- asserts that all men naturally possess an internalized divine spark of reason

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

Eternal Law

- comprised of those laws that govern the nature of an eternal universe;

Divine Law

- concerned with those standards that must be satisfied by a human being to achieve eternal salvation

- precepts of divine law are disclosed only through divine
- One cannot discover divine law by natural reason alone

Natural Law

- comprised of those precepts of the eternal law that govern the behavior of beings possessing reason and free will
- natural law theorists blended morality and law
- There is no clear difference between law and morality, law and justice
- This is because morality is one expression of natural law
- the principles of natural law. These principles are immutable and eternal.
- man-made law should be in accord with the principles of natural law.
- is not made by human beings
- is based on the structure of reality itself;
- commands that we preserve ourselves in being.
- one of the most basic precepts of the Natural Law is not to commit suicide.
- commands that we take care of our life, and transmit that life to the next generation
- to rear and care for offspring.
- commands us to develop our rational and moral capacities by growing in the virtues of intellect
- commands those things that make for the harmonious functioning of society ("Thou shalt not kill," "Thou shalt not steal
- according to Aquinas, is derived from the rational nature of human beings.

Human Law:

- ♥ It is the idea of what should be done to insure the well ordered functioning
- ♥ Aquinas' political theory that rulers rule for the sake of the governed
- ♥ Aquinas is also a natural law legal theorist.
- ♥ In his view, a human law is valid only insofar as its content conforms to the content of the natural law.
- ♥ *According to acquinas 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*

2.5 Nature of Man and Justification for Law

- political writers such Hobbes, Locke and Rousseau.

2.5.1 Thomas Hobbes

- supported a strong and absolute sovereign that can maintain peace and security
- argued that the proper purpose of government and law was primarily to guarantee peace and order
- declared that men were bound by no moral obligation other than their own self-interest

- his work, *Leviathan*,
- explain the origin and nature of the state and to show the justifications behind a strong sovereign power
- termed as *State of Nature*, in which there was no law and government.
- character of the state of nature is War,
- Men compete with each other for the same thing: food, clothing, and so on
- the inevitable result is war and conflict.
- The result is that man's life in the sate of nature is "solitary, poor, nasty, brutish and short.
- each man possesses the natural right to do whatever he thinks fit to preserve his life
- 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)
- we can see in the philosophy of Hobbes both natural law and positivist ideas.

2.5.2 John Locke

- depicted the nature of man and the state of nature in a different way
- in his book, *The Second Treatise of Civil Government*, started his argument from an opposite premise
- The state of nature is, for Locke, a state of perfect freedom and equality
- depicts the state of nature as one of peace in which most men respect the lives, liberties, and estates of others
- no one ought to harm in his life, health, liberty, and possession
- argued that the law of nature was a moral precept absolutely binding upon man at all times.
- none is regarded by Locke as more important than the right to property.
- preservation of private property is the main reason for entering into political society.
- Anything taken beyond that from the common stock belongs to others.
- admits that the establishment of government is the remedy for the inconveniences of the state of nature
- 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

2.6 Kelsen's Criticism on Natural Law Theory

- he says,NL 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
- *Value is not immanent in natural reality.*
- *value cannot be deduced from reality.*
- Says The content of human laws depends on the purpose of the laws
- Depends on what the laws are designed to achieve
- depends on the kind of society that the law-making authority wishes to see exist

- what is law is what is decided to be law by the law-maker, not some other thing, ought.

Good/Bad contradiction

- 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
- their doctrine requires an assumption that man is good
- Thus natural lawyers entangle themselves in a contradiction

Insincerity

- fail to carry their doctrine to its logical conclusion
- Kelsen asks, abide by the consequences of this test

Absolute values and Relative values

Sophists.

- For them there can be belief, but not knowledge,
- 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.
- view of the Sophists was reflected by Democritus
- The notion of 'truth' and 'knowledge' are thus illusions
- Kelsen summarizes, 'there is one nature but we have different systems of law; different beliefs of goodness and badness.

UNIT THREE

THE REVIVAL OF NATURAL LAW

- the rethinking of natural law theory
- Jurists raised questions whether positive law is adequate enough to protect mankind
- 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

Procedural Natural Law: Lon L. Fuller

3.1.2 Morality 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*
- *morality of aspiration starts at the top of human achievement*
- *morality of duty starts at the bottom*
- The morality of 'aspiration' is a goal of excellence, or even perfection,

- The morality of 'duty
  - is a minimum standard
  - is the minimum required for viable social order
  - 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'
  - law cannot make people 'good' but rather establish a base for the inhibition of 'badness

3 Fuller's Law Making Criteria

King Rex's Law

- inner morality of law cannot constitute a legal system
- his book, *Morality of Law*,
- King Rex was determined to reform his country's legal system
- His first step was to repeal all existing laws

3.1.4 The Inner Morality of Law

Fuller lists eight qualities of excellence. In a legal system the laws must be:

- Generality (not made ad hoc or for temporary purpose only)
- Published
- Prospective, not retroactive
- Intelligible (clear or understandable)
- Consistent
- Capable of being complied with
- Endure without undue changes
- Applied in the administration of the society

- The phrase also used by Fuller as 'fidelity to law', reflects the notion that a citizen can owe a duty to obey
- Fuller stands as a positivist
- For Fuller a law is not valid if it forms part of a purported legal system that fails to comply with a higher code

- he judges a law's validity by reference to an outside standard

3.1.5 Criticisms on Fuller by hart's

- loosely describe requirements of procedural justice
- paying attention to the 'coherence' of the laws ensures their morality
- Hart's criticism is that we could, equally, have eight principles of the 'inner morality'
- Or we can improve further.
- consistency is insufficient to establish the moral nature of such practices.

Kramer provides another version of Hart's criticism

- says Fuller's theory captures a moral 'reciprocity' between rulers and the ruled ultimately fails.
- evil legal systems built on such lines can still exist.

3.2 Substantive Natural Law:

John Finnis

- tried to resurrect the natural law tradition in moral philosophy and law
- he has had several more companions, some of whom teach in elite schools in the USA
- tries to offer a "neo-Aquinian" natural law philosophy
- he seeks a theory of how to live well
- speak about human desires to pursue "basic *goods*" in life

3.2.2 Finnis' Defence of Naturalism

- 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.
- Natural law does not entail the view that law is not law if it contradicts morality
- his book, *Natural Law and Natural Rights*
- he asserts that they are pre-moral
- states that there is no inference from fact to value.
- there is a strong affinity between Finnis' view of natural law and that of Aquinas.
- 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

3.2.3 The Basic Goods of Human Nature

- he calls seven "basic goods" in life, goods that are fundamental, underived from other goods
- Finnis' seven basic goods are

a Life,procretion

a. Knowledge, not only as a means to an end but as a good in its own right which improves life quality.
b. Play, in essence the capacity for recreational experience and enjoyment.
c. Aesthetic experience,
d. Sociability or friendship Practical reasonableness, essentially the capacity to shape one's conduct and attitude according to some 'intelligent and reasonable' thought process.
e. Religion,

2.3.4 Evaluation

- The difference Finnis asserts is that these goods are not the result of speculative reason
- they are just good

UNIT FOUR

UNIT FOUR

POSITIVISM

- also known as analytical jurisprudence
- consider law as a social fact
- law is essentially posited, that is created by human beings
- they sharply separate law and morality
- legal rules do not derive their legitimacy from universal moral principles

- Hart, Austin, Raz or Coleman.
- A related issue is the separation thesis of "is" and "ought" argument.
- theory of law should focus on defining the concept of law as it is rather than discussing what it ought to be/ moral standards
- task of jurisprudents for positivists therefore is analytical, i.e. defining and analyzing the concepts of law and legal system
- its essential features and outlining its meaning

Positivism serves two values.

- First, by requiring that all law be written or somehow communicated to society, government will explicitly apprise the members of society of their rights and obligations
  basically propagated by **Jeremy Betham**
- Second, positivism reduces the power of the judge to the application of laws
  - not allow judges to make laws
  - requires judges to decide cases in accordance with the law
  - believe that the integrity of the law is maintained through a neutral and objective judiciary

The Command Theory

John Austin's Positivism

- believe that law is made by an authority and imposed on the people for obedience
- 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

Influence of David Hume

Hume's fundamental purpose

- 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
- to undermine the overblown pretensions to knowledge of the rationalist philosophers of the Enlightenment.
- argued that the faculty of human reason is perfectly inert and morally neutral:

- reason has no bearing on human interests one way or the other
- stipulated two conditions for speaking good sense on any subject.
    - Hume's Fork'

      all investigation should be confined to the reporting of experimental observation

      rational elucidation of 'relations between ideas
    - such matters of fact should be understood in complete independence from any subjective evaluation
        - 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
    - it was Hume who first opened the eyes of positivists who challenged the close relationship of law and morality;

Jeremy Bentham[1]

- The beginning of the decline of natural law theory
- Regarded as 'dog- law'
- Blackstone,
- one who clothed moral preaching in the language of law
- expository principles,
- 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
- maximization of satisfaction of the actual desires of the greatest possible number of the population.

John Austin on Positivism and Separation thesis

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

John Austin

- *Law is a command of the sovereign enforced by sanction*

4.3.1 Positive Law and Positive Morality

- Austin's legal theory
  - attempt to distinguish clearly law from other phenomena
  - wrote that the starting point for the science of law must be clear analytical separation of law and morality
  - says law, simply and strictly so called: or law set by political superiors to political inferiors'
  - 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
  - but as an imposition of power.
  - 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)
    - *human laws* (others called them man-made) which are set by human beings for other human beings
    - divine law, which Austin conceives as God's command.

Positive morality

- set by the opinion or sentiment of an indeterminate body of people

Scientific laws

- are not laws in the jurisprudential sense
- are the regularities of nature which science discovers
- Austin calls them 'metaphorical laws.

4.3.2 Austin's Concept of law

- *law is a command of the sovereign enforced by sanction*

three essential elements: sovereign, command, and sanction.

Sovereignty

- says Sovereignty exists where the bulk of a given political society are in the habit of obedience to a determinate common superior
- Sovereign may be a king or a parliament

  The common superior must be 'determinate'
- Society must obey the sovereign

  ___society must be in 'the habit of obedience

  But isolated acts of disobedience will not preclude the exercise of sovereignty
- Obedience only to Sovereign

  _____to…one and the same determinate person (king) or determinate body of persons (parliament).
- Sovereign must be determinate
- Sovereign obeys no one else:
- Supreme in power

In Austin's theory of law the sovereign is an absolute supreme,

Command

According to Austin,

- law is a command given by a determinate common superior
- element of command that is crucial to Austin's thinking
- that is why concept of law expressed by Austin is described as 'the command theory' or 'the imperative theory' of law
- sees law as a technical instrument of government or administration

Sanction

- for Austin,sanction is essential to the existence of laws.
- a power to inflict an evil to the party' in case of non compliance.

- Bentham's legal theory also treats sanctions as essential to laws.
- he said. Sanctions are analytically essential to laws,
- Imperative laws', lacking sanctions completely, are not laws in the Austinian
- Neither are declaratory nor repealing 'laws'
- example, most of the rules in the civil code are without sanction and hence, according to Austin, they are no laws

The Separation Thesis

Austin

- *The existence of law is one thing, its merit or demerit is another.*
- strongly influenced by Hume and Bentham.
- 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,
- 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.
- He makes a clear separation between the question and what the law *ought to be*
- and the determination of what the law *is*. 'Is' and 'Ought' must be kept separate.

4.3.4 Criticism on Austin

HLA Hart CRITICS

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

- content of law is not like a series of orders backed by a threat.
- for example LIKE criminal laws.
- Thus, such laws are laws which simply provide rights HE SAID

The range of application of law is not the same as the range of application of an order backed by a threat

- law-maker (sovereign) is not bound by the command he gives
- : the order is directed to others, not to himself
- command – obedience – sanction can not be of universal application and so fails

The mode of origin of law is different from the mode of origin of an order backed by a threat

- Austin assumes the sovereign as the only source of law.
- But in reality, laws can be created by other bodies outside the law maker.
- Example from custom
- Laws can also be created by an administrative body.

  - **Austin's notion of the habit of obedience is deficient**

- it fails to account for the continuity to be seen in every normal legal systems when one ruler succeeds another.
- Hart says law should not be based on one particular body
- It rather must be a system that gives uninterrupted continuity
- Says Austinian laws lack institutional strength

  - **Austin's notion of sovereignty is deficient**

- there is no legal limit on a sovereign's power
- according to Austin, if law exists within a state, there must exist a sovereign with unlimited power.
- Austin's theory on sovereignty doesn't conform to the well accepted principle of separation of power.

4.4 Pure Theory of Law:

Hans Kelsen

- his idea known as the pure theory of the law.
- declares that law must be studied as a pure science
- characterizes itself as a 'pure' theory of law
- because it aims at cognition focused on the law alone"
- this purity serves as its "basic methodological principle."
- Says The law is a system of norms
- Says legal norms are created by acts of will.

- Says are products of deliberate human action
- however, firmly believed in Hume's distinction between ‘is’ and ‘ought
- Says norms are essentially ‘ought’ statements
- ought’ cannot be derived from ‘is’

- says there must be some kind of an ‘ought’ presupposition at the background, rendering the normativity of law intelligible.
- Says legal norms are always created by acts of will.
- one must reach a point where the authorizing norm is no longer the product of an act of will, but is simply presupposed
- this is, what **Kelsen** called, the Basic Norm or Grundnorm
- the Basic Norm is the **presupposition** of the validity of the rest legal system
- means the basic authorizing norm of the rest of the legal system
- The Grundnorm or Basic Norm is a statement against which all other duty statements can, ultimately, be validated
- Is ultimately a sort of act of faith
- Is foundational principle for all subsequent legal statements.
- Says is a belief that one's respective legal system ought to be complied with.
- Says is the only norm which cannot itself be questioned or validated
- So its validity is presupposed or tacitly assumed in any legal activity
- all legal norms of a given legal system derive their validity from one Basic Norm
- says legal validity of a norm and its membership in a given legal system are basically the same thing
- It is widely acknowledged that Kelsen erred in these assumptions about the unity of legal systems.

Har

t and Kelsen

- both serve the same vital function in grounding the positivist interpretation of the idea of a legal system
- The differences are Hart’s basic rule is a (secondary) rule of law, not a Kelsen-style norm, or ‘ought-statement’.
- rule of law, itself a part of the legal system
- whereas the Kelsenian basic norm lies outside of the system
- For Hart, it is a meaningless question to ask whether or not the rule of recognition is valid.

4.5 H L A Hart- The Concept of Law

H L A Hart

- the leading philosopher in the positivist camp
- Extensively wrote about the nature of law.
- His approach is grouped as soft positivism
- rejects Austin's command theory but holds on to the separabilty of law and moral thesis
- develops and rebuilds his own positivist theory of legal validity
- Argue that what is missing from Austin's analysis is the concept of an accepted rule
- **He distinguishes social rules from social habits**.
- Said Habits are not rules ,no fault
- 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
- for a social rule to exist, at least some members of the group must be aware of the existence of the rule
- must strive /aware to see that it is followed, as a standard,
- awareness and support a social rule Hart calls the ***internal aspect* of rule.**
- the rule can be observed to exist by an outsider is called the ***external aspect* of the rule**
- Social rules have both an external and internal aspect.

  - **Social Rules**

- words as 'ought', 'must', 'should' are used in connection with it
- . Social rules are of two kinds.
  - ❖ Those which are no more than social conventions.

    Example rules of correct speech
  - ❖ Rules which constitute obligations.

    are believed to be necessary to maintain the very life of the society,

Obligations

- Rules which constitute obligations is sub-divided into two categories

- **Rules which form part of the moral code of the society concerned:**

  Are moral obligations

  Such obligations may be wholly customary in origin

- **Rules which take the form of law**

In the case of both there is *serious* social pressure to conform to the rule, and it is this which makes the rule an obligation

Primary and Secondary rules

Primary rules of law

- are said essential for any kind of social existence
- are all the rules constraining anti-social behavior; rules against theft, cheating, violence and so on.
- constitute the great bulk of the positive laws
- define the rights and duties of citizens and that the bulk of law including criminal and civil law
- substantive law falls under this category
- are standards of conduct set for citizens
- are rules that govern primitive society
- they evolve through the process of practice and acceptance
- serve only a small number of people and one that has close tribal relations.
- no longer serve a modern society

The secondary rules

- They bring primary rules into being,
- revise them, they uphold them, or they change them completely.
- 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.

Hart argues that the creation of secondary rules marks the transition from a pre-legal society to a legal system

The function of secondary rules

For society which does not have a legislature, courts or officials of any kind. certain conditions must be satisfied.

- primary rules must include rules which contain restrictions on violence, theft, and deception
- majority must accept the
- society must live in a stable environment
- society must be a small one

- if the society was large and there was no relative stability, then, the primary rules would not continue to exist
- there would be no means of resolving the uncertainty.
- There would be no means of altering the rules according to changing circumstances.
- There would be no means of settling a dispute
- There would be **no one with authority to impose punishments** for breaches of the rules.
- inefficient way of ensuring that the rules were observed
- 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;

secondary rules can provide remedies for the defects listed above

- The defect of uncertainty
  - if it is enacted by a certain body
  - it may become accepted

  -There may be more than one way of deciding what the primary rules are.

  -A secondary rule which enables one to know what the primary rules are is referred to by Hart as a '**rule of recognition**'
- The defect of having only primary rules

  Is remedied by rules of change'
- rules of adjudication. Is the other remedy
- by having secondary rules which prohibit individuals from taking into their own hands the punishment of others for breach of primary rules

The Rule of Recognition

- is the rule to which the authority of all the primary rules is referred.

Hart and legal positivism

- 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's criterion for the unity of a legal system is more general than Austin's.

4.5.2. Dworkin's criticism on Hart/Positivism

Dworkin

- Makes distinction between facts and values in the legal domain,
- not based on a general repudiation of the classical fact-value distinction
- based on a certain conception of legal reasoning
- says law consists of rules only.
- maintained, apply in an 'all or nothing fashion'
- Principles basically provide the judges with a reason
- Says Legal rules are posited by recognized institutions and their validity derives from their enacted source
- Legal principles gain their validity from *a combination* of source-based and content-based considerations
- if they figure in or follow from the principles of justice, fairness, and procedural due process
- maintains that the dependence of legal validity on moral considerations is an *essential* feature of law

4.5.3.1. Liberalization and the Wolfenden Report

- The debate was initiated in 1957 on two issues

- that private prostitution should remain legal, and public soliciting be outlawed;
- male homosexual acts in private between consenting adults over the age of 21 should be legalized

- Wolfenden was advocating a new spirit of tolerance.

4.5.3.2. John Stuart Mill and Liberty

- principle of harm
- law is limited in its function to the 'self-defense' of society
- law should also be limited to protecting people against others, not against themselves.
- no-harm' principle
- interference in a person's freedom of action

Lord Patrick Devlin

- the first and foremost to attack the conclusion and the rationale behind the conclusion of the Wolfenden Report.
- defended society's right to pass judgment on all matters of morality
- especially on what he described as "**society's constitutive morality**

The detail of his argument

- **On Consent**
  - Argue 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
  - Devlin argues that this is inconsistent with the fundamental principles of criminal law.
  - . He also mentioned criminal offences **like suicide, attempt to suicide, euthanasia (killing another at his own request), incest between brother and sister, abortion, duel**
  - **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.**
  - according to Devlin, that the criminal law is based on moral grounds and the function of the law is enforcement of moral principles

Justifications for Legal Enforcement of Morality

Lord Devlin has framed three questions

- Has society the right to pass judgment at all on matters of morals?
- has it also the right to use the weapon of the law to enforce it?
- on what principles should it distinguish?

Lord Devlin answers the above questions

- Regarding the first question his answer is in the positive. Yes,
- *Said without shared idea on politics, morals, and ethics no society can exist*
- *they cannot be kept private from the society which we live*
- *said Each one of us has ideas about what is good and what is evil*
- Said it is no more possible to define a sphere of private morality than it is to define one of private subversive activity.
- Said There are no theoretical limits to the power of the state to legislate against morality.
- Devlin takes the judgment of a reasonable man
- Lord Devlin argues that any immoral acts can be made illegal if the reasonable man feels so
- Nothing should be punished by law that does not lie beyond the limits of tolerance
- Laws should be slow in matters of moral
- As far as possible privacy should be respected.

4.5.3.4. Hart's reply to Devlin

- took care to distinguish between coercion for the sake of enforcing society's moral norms, and coercion for the agent's own good.
- argues that the proper reach of the criminal law stops at the point of tangible harm as such - to self or others
- he rejects is his insistence that this right has no internal limits.
- legal moralism'
- said society is equal to its morality
- morality of a society cannot change
- said society cannot only survive individual differences in morality but can profit from them, though he does not specify exactly how it might profit.
- Said society can live with its differences.

- Developed partial enforcement of morality based on a distinction he drew between immorality

UNIT FIVE

HISTORICAL AND SOCIOLOGICAL LEGAL THEORY

historical school

- von Savigny and Henry Maine
- says law cannot be fully understood until its historical and social context is studied and appreciated

The sociological school

- concerned less with the nature and origin of law
- seek to view law within a broad social context
- 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
- concerned with practical improvement of the legal system
- Eugen Ehrlich and Roscoe Pound are the main prpogatores

Savigny

- Said Law originates in custom
- Said The principles of law derive from the beliefs of the people.
- *Volksgeist* is the foundation of all of a nation's subsequent legal development.
- Custom is its manifestation.
- sees principles of law deriving from the conviction of the people;
- law reaches its pinnacle, with juristic skills which he calls the "political element in law
- The third stage is one of decay.
- Makes distinction between the 'political' and 'technical' elements in law

The Changing process of Ancient Law: Henry Maine

Henry Maine

- They contain," he said, "potentially all the forms in which law has subsequently exhibited itself"
- believed in stages of legal evolution,
- said development of legal systems followed a pattern of six stages.
  - **Royal Judgments**
  - **Custom**
  - **Codes**
  - **Legal fictions**
  - **Equity**
  - **Legislation**

Criticism

- It is not clear that primitive societies move through the first three stages
- An evolution along the six-stage pattern should not be expected for every legal system.

Sociological School

Eugen Ehrlich LAW IS LIVING

- is the leading jurist of this school of thought.
- located the law in the present-day institutions of its society
- his book, *Fundamental Principles of the Sociology of Law*
- he points the law's place in society
- *said The center of gravity of legal development lies in society itself*
- led to the conception of the Living Law of a community
- 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:
- drew a distinction between norms of decision and social norms or norms of conduct.
- show this discrepancies by studying and analyzing 'social associations'
- identified a great number of associations ranging from family, inheritance, clan

Law in Action: Roscoe Pound

Roscoe Pound

- examine law in action
- his philosophy is included and classified in to six main points
    - ♥ the study of the actual social effects of legal institutions and legal doctrines.
    - ♥ sociological study in preparation for law making
    - ♥ study of the means of making legal rules effective
    - ♥ sociological legal history
    - ♥ the importance of reasonable and just decisions in individual cases.
    - ♥ sociological jurists stress the point that the end of juristic study is to make effort more effective in achieving the purposes of law.

Characteristics of sociological school of thought from historicsl school of law analytical and natural

- It is concerned more with the working of the law than its abstract content
- 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.
- 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

Legal Education

- Rousco takes Law as social engineer

- insisted that teachers of law should have a wider knowledge:
- *said The modern teacher of law should be a student of sociology, economics, and politics as well.*

5.2.2.3 Theory of Interest

Rouscou Pound's theory of interest

- *defines an interest as a claim or want or desire of a human being or group of human being*

- *the jurists must consider the means by which the law may secure the interests*
- *to classify interests as individual, public and social.*
- *Pound classifies individual interests as (1) Interests of personality; (2) Interests in the domestic relationships; and (3) Interests of substance.*

interests of personality.

These Pound divides under three heads:-

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

- *In regard to the extent of the interest Pound shows that it covers five points*
  - *Immunity of the body from direct or indirect injury;*
  - *Preservation and furtherance of bodily health*
  - *Immunity of the mind and the nervous system from injury;*
  - *Preservation and furtherance of mental health.*

the interest in honour and reputation

- *as important as the interest in the inviolability of the physical person*
- *, but it is much more difficult to secure legally.*
- *protected by the. (lctio injuriarum*

individual interest

- *legally entrenched in many constitutions in Europe and America.*
- *Pound points out that one must consider the individual interests of the individual parties*
- *There are according to Pound four types of interests in the domestic relations*

- *interests of parents- demands*
- *interests of children-demands*
- *interests of husbands –demands*
- *interests of wives- demands*

UNIT SIX

LEGAL REALISM

- describe the law without idealizing it
- Scandinavian legal realists wanted to expose and eliminate the hidden basis of the law
- Scandinavian realists were interested in the legal system as a whole
- Legal realists are not legal positivists in the classical sense of Bentham and Austin,

American Realists

6.1 Pragmatist approach

- Oliver Wondel Holmes and John Chipman Gray
- it was against school of formalism,
- . Realism attempted to be both practical and pragmatic, rejecting theoretical and analytical approaches
- Generally speaking, how the rule of law works, not what they are on paper, is the theme of pragmatic approach to legal problems

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

- policies and prejudices have more to do with judicial decisions than the logical application of rules
- *The actual life of the law has not been logic: it has been experience*
- *Said The prophesies of what the court will do in fact, and nothing more pretentious, are what I mean by the law*
- idea of bad man prediction

On morality

- Holmes's belief that if all words with moral connotation were eliminated from the law, the law would gain in precision.

Criticism

i. disregards the rules and laws that establish the judiciary itself

ii. left out multitude rules particularly in the field of public administrative law that are properly described as law

. Centrality of the judge: John Chipman Gray

- emphasizes the significance of the role of the courts
- It is the role of the judge that is central to a proper understanding
- regarded all law as judge-made law.
- Statutes (legislations made by parliament) are not laws by virtue of their enactment
- his book, ***The Nature and Source of the Law***
- Legislation is therefore no more than a source of law.
- it is not a law until it had been interpreted by the courts,
- distinguishes '**the law' from 'a law'**
- The judge's choice is what matters.
- Said The law of a great nation means the opinions of half-a dozen old gentlemen

.

Criticism

- suggests that until a statute had been enforced by a court, it was not a rule at all,
- conclusion that precedents are not law but merely sources of law.
- he defines law as "the rules that the courts…..lay down for the determination of legal rights and duties.
- 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."

- By making precedents as sources of the law, rather than the law itself, Gray did not classify or differentiate them from other lesser sources of law

Rule Skepticism:

Karl Llewellyn

- is another realist jurist in the American realism
- his book, *The Bramble Bush,*
- explains the concept and nature of law
- widens the power of making law to all officers of the law
- said law is 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
- insisted that law should be evaluated principally in terms of its effects
- said legal rules do not describe what the courts are purporting to do
- he is described as “rule skeptic
- said legal ruels do not accord with reality
- Jerome Frank (another American jurist) called this aspect of realism as ‘rule skepticism

Functions of Law

- Llewellyn described the basic functions of law as ‘law-jobs.’

Characters of Realism

- The conception of law *in flux*, of moving law, and of judicial creation of law.
- law as a means to social ends not as an end in itself
- any portion of law needs re-examination to determine how far it fits the society it purports to serve
- temporary divorce of Is and Ought for purpose of study.
- Distrust of traditional rules and concepts
- Distrust of the theory that traditional prescriptive rule-formulations are the heavily operative factor in producing court decisions
- involves the tentative adoption of the theory of rationalization for the study of options

Fact Skepticism: Jerome Frank

Jerome Frank

- categorizes the whole realist movement into “rule skepticism” and “fact skepticism.”

On Rule skepticism

- he has a doubt if the judge can do all the research before decision.
- the validity of the statute turned, not on the certainty of the applicable rule, but on the personnel of the court.

. On Fact Skepticism

- argued that the greatest uncertainties of the judicial process are not in the law-finding but in the fact finding part
- is intended to bring out “the truth”
- 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 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.

RADICAL LEGAL THEORIES

- Critical legal scholars appear to reject the theory of instrumentalism and the argument that law is simply a part of the superstructure of society.
- operations of law as being *essential* for the continuation of liberal society. Kennedy comments:
- *law cannot be usefully understood as . . . 'superstructural'*
- Marxism is essentially structuralist in its content
- 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

The Critique of the Liberal Legal Tradition

- attack on formalist modes of reasoning.

- disbelief that the law has objective content and is neutral in its operation

Deconstruction: trashing, delegitimation and dereification

- 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.
- '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
- 'Delegitimation' is aimed at exposing what the scholars see as one of the most important functions of law in a liberal society,

The constitutive theory of law

- *Law is part of a complex social totality in which it constitutes as well as is constituted, shapes as well as is shaped*

Feminist theory

- Anne Bottomley, Susie Gibson and Belinda Meteyard remark that:
- only partially and peripherally concerned with academic theorising.
- motivated by the dissatisfactions of a wide spectrum of ... women and by the everyday experience of such women.
- *fails to identify the differences between women, and the impact which those differences have on women's lives*
- Equality is often taken to mean simply the establishment of identity in the treatment of women and men.

Postmodern Legal Theory

- is the latest radical theory to challenge the liberal orthodoxies
- Modernity's structures
- society has a natural structure and that history is simply a process of evolution towards that truth
- Poststructuralism is at the heart of postmodernism, and Jaques Derrida is commonly seen as its founder.

JUSTICE

John Rawls: Justice as Fairness

- makes a distinction between the concepts of justice and conception of justice
- His theory is of no application in conditions of total scarcity.
- inequalities are arbitrary unless it is reasonable to expect that they will work out for everyone's advantage
- highlights equality of liberty for all, which means nobody is entitled to more or less liberty
- 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
- equal distribution of primary social resources to everyone and inequalities are arbitrary but incentives should be provided
- said 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.

Will Kymlicka: Justice and Minority Rights

Self-government Rights

- 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

8.4.2. Polyethnic Rights

- - are intended to help ethnic groups and religious minorities
- Like self-government rights, these polyethnic rights are not seen as temporary
- polyethnic rights are usually intended to promote integration into the larger society, not self-government.

CHAPTER NINE

LIBERTY

. Isaiah Berlin: Two Concepts of Liberty

- negative'
  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
- 'positive'

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

The Notion of 'Negative' Freedom

- You lack political liberty or freedom only if you are prevented from attaining a goal by human beings.
- . The wider the area of non-interference means that the wider my freedom.

The Notion of Positive Freedom

- the wish on the part of the individual to be his own master.
- the freedom which consists in being one's own master,
- 'I am my own master'; 'I am slave to no man'; but may I not be a slave to nature

4 Charles Taylor: What's wrong with Negative Liberty?

- define freedom exclusively in terms of the independence of the individual from interference by others, be they governments, corporations or private persons; and equally
- 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.
- Doctrines of positive freedom are concerned with a view of freedom
- negative theories can rely simply on an opportunity-concept,

What are the problems of the negative concept

EQUALITY

- Equality' is a contested concept:
- signify a qualitative relationship
- Equality' thus needs to be distinguished from 'identity' -- this concept signifying that one and the same object corresponds to itself in all its features:
- Equality' and 'equal' are incomplete predicates that necessarily generate one question
- Equality essentially consists of a tripartite relation between two (or several) objects or persons and one (or several) qualities

10.4 Principles of Equality and Justice

- Formal Equality
  - equal status in at least one normatively relevant respect
  - is principle that Aristotle formulated

Proportional Equality

- A form of treatment of others or as a result of it a distribution is equal *numerically* when it treats all persons as indistinguishable,
- Just *numerical* equality is a special case of proportional equality
- Proportional equality further specifies formal equality
- It indicates what produces an adequate equality.

Moral Equality

- This is now the widely held conception of substantive, universal, moral equality.

Presumption of Equality

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

Conceptions of Distributive Equality: Equality of What?

- Simple Equality and Objections to Equality in General

- **Libertarianism**
  ___represent minimalist positions in relation to distributive justice
  libertarians consider maintaining public order the state's only legitimate duty
  They assert a natural right to self-ownership
  All individuals can thus claim property if "enough and as good"

10.5.3 Utilitarianism

- all enlightened personal interests have to be fairly aggregated.
- Is concretising moral equality
- Is to offer the same consideration to the interests of all human beings.
- The morally proper action is the one that maximizes utility.

the critique

- 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 conflicts with our everyday understanding of equal treatment.
- 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,
- Utilitarians cannot admit any restrictions on interests based on morals or justice.
- utilitarian theory lacks a concept of justice and fair allotment, it must fail in its goal of treating all as equals.
- utilitarianism that involves neglecting the separateness of persons but fails to have a proper interpretation of moral equality as equal respect for each individual

10.5.4 Equality of Welfare

- is the individual's well-being.
- equalizing the level of welfare.

Equality of Resources

- According to Rawls, human beings should have the same initial expectations of "basic goods
- *Theory of Justice* is the classical focal point of present-day political philosophy

Capabilities Approaches

- Theories that limit themselves to the equal distribution of basic means
- often criticized as fetishistic

The Value of Equality: Why Equality?

- L. Temkin has put it as follows: "an egalitarian is any person who attaches *some* value to equality *itself*
- Egalitarians have the deep and (for them) compelling view that it is a bad thing -- unjust and unfair
- Egalitarianism on the second level thus relates to the kind, quality and quantity of things to be equalized.
-