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Nature and Scope of Jurisprudence

The term "jurisprudence" comes from the Latin word "juris-prudentia," which translates to "knowledge of law" in its broadest sense. Specifically, "juris" means law and "prudentia" means skill or knowledge. Therefore, jurisprudence refers to the understanding of law and its practical application.

Jurisprudence is the study and theory of law, particularly the philosophy of law. It involves examining the fundamental principles and concepts of law, the role and function of law in society and the methods and techniques used to interpret and apply the law.

Jurisprudence explores the nature of law, legal systems and legal institutions and seeks to understand the social, political and cultural contexts in which law operates. It is a broad field that encompasses a range of perspectives, including legal positivism, natural law, legal realism and critical legal studies. Through the study of jurisprudence, scholars and practitioners seek to develop a deeper understanding of the law and its role in shaping society. **Definitions of Jurisprudence**

Oxford Dictionary defines 'Jurisprudence' as the systematic and formulated knowledge or the science of human law,

- Definitions by various jurists Ulpian a Roman Jurist defines jurisprudence as " Jurisprudence is the knowledge of things divine and human, the science of just and unjust."
- Cicero defines Jurisprudence as "Jurisprudence is the philosophical aspect of the knowledge of law". Austin defines Jurisprudence as the "philosophy of positive law".
- By positive law or jus positivism, he means the law laid down by a political superior for controlling the conduct of those subject to his authority
- Holland has defined jurisprudence as the "formal science of positive law".
- Salmond defines jurisprudence as "the science of the first principles of the civil law."
- Kant defines jurisprudence as "the science of right." Roscoe Pond defines jurisprudence as "the science of law".
- Gray defines jurisprudence as "the science of law, the statement and systematic arrangement of the rules followed by the courts and the principles involved in these rules."
- Allen defines jurisprudence as "the scientific synthesis of the essential principles of law."
- Keeton defines jurisprudence as "Jurisprudence' is the study and systematic arrangement of the general principles of law."
- Jullius Stone defines jurisprudence as a "lawyer's extraversion."
- Laski defines jurisprudence as "Jurisprudence' is an eye of law." **Nature and Scope of Jurisprudence**

Nature of Jurisprudence

Jurisprudence is the study and theory of law and it plays a critical role in shaping our understanding of the legal system. This field provides insights into the fundamental principles and concepts of law, including the meaning of rights, duties, possessions, property and remedies. By examining these concepts, jurisprudence helps us to better understand the role and function of law in society.
One of the key aspects of **jurisprudence is its focus on the sources of law**. This field provides insights into the various sources of law, including statutory law, common law and constitutional law. Through the study of jurisprudence, scholars and practitioners seek to develop a deeper understanding of how these sources of law interact with each other and how they influence the development of legal systems over time.

Another important aspect of jurisprudence is its role in **clarifying the concept of law itself**. While the law is often thought of as a set of rules and regulations, jurisprudence helps us to understand that law is a complex and multifaceted concept that cannot be reduced to a simple definition. Instead, the law is a dynamic and evolving concept that is shaped by a range of social, cultural and political factors.

It is important to note that jurisprudence is not a substantive or procedural law. Rather, it is an **uncodified law that provides a framework for understanding the legal system as a whole.** Jurisprudence serves as the "eye of law," providing insights into how the law operates and how it can be used to achieve justice and fairness in society.

While some scholars view jurisprudence as a science, others view it as a social science. Scholars of the historical school of jurisprudence, for example, view jurisprudence as a social science that is shaped by historical, cultural and political factors. Regardless of how one views jurisprudence, however, it is clear that this field plays a critical role in shaping our understanding of the legal system and in guiding the development of legal theory and practice over time.

Scope of Jurisprudence

Jurisprudence is a field of study that encompasses a wide range of topics and disciplines. It explores the relationship between law, culture and society and it seeks to understand the fundamental principles and concepts that underpin the legal system. One of the key aspects of jurisprudence is its focus on legal logic, which involves the study of legal frameworks, bodies of law and the reasoning behind legal decisions.

However, the scope of jurisprudence goes beyond just the study of legal logic. It also encompasses other fields, such as psychology, politics, economics, sociology and ethics. This is because the law is not created in a vacuum, but rather is shaped by the social, cultural and political context in which it operates. Therefore, jurisprudence seeks to understand how these various fields intersect with the law and how they influence the development and application of legal principles.

The study of jurisprudence is also important for understanding the nature of law itself. It explores questions such as the origin of law, the need for law and the utility of law and seeks to develop a deeper understanding of how the law operates in practice. This includes studying various legal systems and traditions and how they have evolved over time.

Justice P.B. Mukherjee noted that jurisprudence is both an intellectual and idealistic abstraction, as well as a study of human behaviour in society. It encompasses political, social, economic and cultural ideas and covers the study of individuals in relation to the state and society.

Overall, the scope of jurisprudence is vast and wide-ranging and includes a variety of disciplines and topics. It is an essential field of study for understanding the legal system and the role of law in society and it continues to play a critical role in shaping legal theory and practice today.

Difference Between Jurisprudence and Legal Theory

Jurisprudence and legal theory are two related but distinct fields of study. Jurisprudence is a broader field that encompasses the study of the nature of law and its principles, while legal theory is a subset of jurisprudence that specifically examines the philosophical content of the law. As Fitzgerald has pointed out, jurisprudence covers a wider field of study compared to legal theory. It involves an investigation of abstract, general and theoretical aspects of the law. In contrast, legal theory seeks to clarify the most fundamental legal concepts and answer the question,

"what is law?".

Legal theory is just one aspect of jurisprudence, which is concerned with the evaluative and philosophical study of law in terms of its ends, values and goods. It is focused on living law, which is based on social forces and felt needs and it rejects purely technical, analytical or conceptual perceptions of the law.

In summary, jurisprudence is a broader field that encompasses legal theory as well as other aspects of the study of law. Legal theory, on the other hand, is a subset of jurisprudence that specifically focuses on the philosophical content of the law.

Conclusion

Jurisprudence plays a crucial role in the development of legal systems and societies, as it provides a theoretical framework for understanding the law and its underlying principles. Through jurisprudence, we gain knowledge about the basic principles of law and the sources from which they are derived. It helps us to understand the legal systems of different countries and the cultural, social and economic factors that shape them.

Furthermore, jurisprudence is not just a theoretical abstraction; it has practical implications as well. It provides guidance to lawyers, judges and policymakers in making legal decisions that are just and equitable. Therefore, the study of jurisprudence is essential for anyone who wishes to understand the law and its role in society.

Overall, jurisprudence is a fascinating and multifaceted field of study that holds much importance in the vast field of law. It is a subject that requires deep critical thinking and analytical skills, as well as a broad understanding of the social, political and economic contexts in which the law operates.

Meaning of Classification of Law

The classification of law refers to the systematic arrangement and categorisation of various legal principles, rules and areas of law based on their nature, purpose and scope. It involves grouping

different types of laws together to facilitate better understanding, organisation and study of the legal system.

By classifying laws, legal experts and practitioners can easily identify and differentiate between different aspects of the law, making it more manageable to navigate the complex and diverse field of legal regulations. The classification helps in structuring legal education, practice and research and it assists in clarifying the relationships between different branches of law and their applications in various situations. Overall, the classification of law contributes to a clearer and more organised understanding of the legal framework.

Purpose of Classification of Law

The purpose of classifying law is to bring order and clarity to the intricate web of legal principles and regulations. By systematically categorising different types of laws based on their characteristics, nature and scope, the classification process enhances the understanding, interpretation and application of the legal framework. This organisation aids legal professionals, scholars and students in comprehending the diverse aspects of law more effectively.

What is Classification of Law?

The classification of law involves categorising different types of laws based on their nature, scope and purpose. This helps in organising and understanding the various branches of law. Here are some common classifications of law:

- **Public Law vs. Private Law:** This classification divides law into public laws that deal with government and society (like constitutional law and administrative law) and private laws that regulate relationships between individuals and entities (like contract law and tort law).
- **Substantive Law vs. Procedural Law:** Substantive law defines rights, duties and responsibilities, while procedural law outlines the process of enforcing those rights and resolving disputes.
- **Civil Law vs. Criminal Law:** Civil law deals with disputes between individuals or entities, seeking compensation or specific actions, while criminal law addresses offences against society, aiming to punish wrongdoers.
- **National Law vs. International Law:** National law pertains to rules within a specific country, while international law governs relations between countries and entities on a global scale.

International Law

International Law is a classification of law that deals with the rules for how countries interact with each other. It's like a set of guidelines that countries follow when they have dealings with one another. These rules are based on traditions and agreements that countries agree to follow when they interact.

To put it another way, International Law is a collection of traditional and agreed-upon rules that are considered official by well-behaved countries when they deal with each other. According to the Oxford Dictionary, International Law is defined as "a set of rules that are created by tradition or agreements between countries and are seen as binding when countries interact with each other." This type of law mostly comes from agreements (treaties) between well-behaved countries.

International Law can be divided into two main parts:

(a) Public International Law

This is the set of rules that controls how one country behaves toward other countries. For instance, if two countries agree to send back criminals who have run away to the other country, that's an example of Public International Law.

(b) Private International Law

This means the rules that decide what happens when situations involve different countries. For example, if an Indian person and a British person make a deal in India but it's supposed to be carried out in Nepal, the rules that decide what rights and duties the people have are called 'Private International Law'.

Municipal Law or National Law

Municipal Law refers to the laws of a specific nation, the laws that apply within a country's borders. It's the internal law that governs the people who are part of that country. This is different from International Law, which deals with how countries interact on a global level. Municipal Law handles things like how individuals relate to each other within the country and how the country's government interacts with its citizens. The government approves these laws. It's usually limited to the country's territory.

Municipal Law can be classified into two main parts:

- Public law
- Private law

Classification of Law As Public and Private Law

The classification of Law can be done as Public and Private Law.

How Law as an Instrument of Social Change in India

To illustrate the instrumental role of law in social change, it is essential to examine key transformations that have occurred in India. Change is inevitable and understanding these changes demonstrates the dynamic nature of societal evolution.

Abolition of Sati System

The Sati system, an ancient Hindu custom where widows were expected to immolate themselves on their husband's funeral pyre, was formally abolished in the Bengal Presidency on December 4th, 1829, by Governor Lord William Bentinck. This act was made illegal and punishable under criminal law.

Although the ban was initially challenged, it was finally implemented in 1832. While the abetment of Sati was not explicitly listed as a special offence under the Indian Penal Code (IPC), the judiciary has ruled that the abetment of Sati is akin to the abetment of suicide, punishable under section 306 IPC. The Sati Prevention Act of 1987 was introduced to address the resurgence of Sati cases in regions like Uttar Pradesh, Madhya Pradesh and Rajasthan between 1980 and 1983.

This legislation made the abetment of Sati punishable by death sentence. Today, the Sati system is virtually eradicated in India, demonstrating the law's significant role in transforming societal customs.

Maintenance Rights for Muslim Women

In the landmark case of Mohd. Ahmad Khan v. Shah Bano Begum **(AIR 1985 SC 945)**, the Supreme Court ruled that if a divorced Muslim woman is unable to maintain herself after the period of iddat (post-divorce waiting period), she is entitled to maintenance under section 125 of the Code of Criminal Procedure (CRPC), 1973. Introduction of Public Interest Litigation (PIL)

The Supreme Court has adopted a broader approach to locus standi, allowing public-spirited individuals to bring matters of general or group interest before the courts, even if they are not directly affected. For example, if individuals are unable to approach the court due to economic constraints, a public-spirited person can file a PIL on their behalf. This approach has enabled greater access to justice for marginalised and disadvantaged groups.

Right to Information (RTI)

The right to information is a crucial instrument of law for social change. The Supreme Court has upheld that the freedom of speech and expression, as guaranteed by the Constitution, includes the right to receive and impart information. This was affirmed in the landmark case of **State of UP v Raj Narain** (1975), where the court recognised the importance of transparency and accountability in governance.

Compulsory Registration of Marriage

Marriage laws in India are governed by personal laws. While the Christian Marriage Act of 1872 mandates the compulsory registration of valid marriages, Hindu law originally left registration as an option. However, the Supreme Court of India has ruled that marriage registration is mandatory across the country, irrespective of religion. This directive ensures that marriages are recorded in a secular manner, enhancing legal recognition and protection for couples.

Law Relating to Prisoners

The philosophy behind laws relating to prisoners emphasises reformation over punishment. The idea is that since criminals are part of society, efforts should be made to reform them rather than simply punishing them. Prisoners are entitled to all constitutional rights, including the right to read and write books, use of parole and release on bail, ensuring that their fundamental rights are protected even while incarcerated.

Abolition of Polygamy

Polygamy, the practice of having more than one spouse simultaneously, was prevalent in India with few restrictions. Under Islamic law, a man could have up to four wives, but the Indian Penal Code of 1860 made bigamy (marrying another person while already married) a specific offence under section 494, except where permitted by custom. The Indian Christian Marriage Act of 1872 also prohibits polygamy among Christians, reflecting a broader societal move towards monogamy as the accepted norm. Prohibition of Child Marriage

During colonial times in India, child marriages were common, with spouses often unaware of the implications of marriage at such a young age. To address this issue, laws prohibiting child marriage were introduced. These laws recognise that children are not capable of understanding the complexities of marriage and aim to protect them from early and often harmful marital relationships.

The Child Marriage Restraint Act of 1929

This act aimed to restrict child marriages rather than abolish them altogether. It defined a child as a person who, if male, had not completed 21 years of age and if female, had not completed 18 years.

The Act was introduced after the recognition that all religions prohibit child marriage to some extent. While the Act did not completely eradicate child marriage, it marked a significant step towards recognizing the harmful effects of early marriage and seeking to prevent them.

Abolition of the Slavery System

To eradicate slavery from India, several legislative measures were introduced to criminalize and penalize the practice. Section 370 of the Indian Penal Code (IPC) makes it an offence to import, export, remove, buy, sell or detain a person as a slave, punishable by imprisonment of up to seven years and a fine. Similarly, Section 371 of the IPC imposes penalties on those who habitually engage in slave-related activities.

AUSTIN'S SCHOOL OF LAW

The school founded by Austin is variously called *"analytical"*, *"positivism"*, *"analytical positivism"*, etc. Jurists defined the first use of the word "positivism" by *Auguste Comte* to indicate particular type of study. The word "positivism", thus would alone be insufficient to denote the Austin contribution. Also, the term "analysis" can't be separated from the given phraseology. Professor *Allen* thought to call Austin's school as the "Imperative School".

Salmond has critiqued Austin's theory of law which completely divests law from morality and held that law to be effective must have in it elements of ethics and justice. Lon Fueller in the USA said that the purpose of law is to subject the human conduct to the governance of rules. The law, therefore, can't be devoid of morality which includes values, ideals, natural law and notions of justice. The German legal philosopher Gustav Radbruch has asserted that a purposive law can never be separated from justice and morality which are pre-conditions of a good law. Dwarkin has rejected the positive conceptions of law and interpretation and observed instead that, rights are premised upon a comprehensive set of moral precepts that make the individual rights valuable and act as "trumps".

COMMAND

Every directive is a command, the threat of evil is a sanction and the party commanded and threatened is under an *obligation* or *duty*. Duty and sanction are correlative and fear of sanction is the motive for obedience. A command may be *"particular"* or *"general"*. Particular command is addressed to one person or group of persons whereas general commands are addressed to the community at large and enjoin classes of acts and forbearances. General commands are continuing commands.

LAW

Austin divided law as "a rule laid down for the guidance of an intelligent being by an intelligent being having power over him". He has divided law into two parts-

1. Laws made by God- These laws include the laws of nature which are drafted by God for the human race for the survival. They can't be grabbed by any human organisation. They are being with every individual from its birth till the death.
2. Laws made by Men-

CRITICISM

Many jurists had criticised the theory on the basis of following points:

1. **Sanction**– According to him, the sanction alone induces man to obey law which is not correct.
2. **Artificial Concept**– Austin view makes explanation of law artificial in real life.
3. **Relation of law**– Austin doesn't consider the relation of law with morals which makes it an arbitrary command of sovereign.
4. **Sources**– Sources of law such as judge made laws, conventions, international law, customs, etc. are not taken into consideration in definition of law by Austin, but in reality it plays a very important role for the definition of law.
5. **Law conferring privileges**– It is also exclude by Austin, but in reality, it plays important role for the immunities granted to many of the sovereigns.
6. **Rules by private persons**– The consideration hasn't been taken by Austin, but to maintain a general code of conduct, it should be included within the purview.

- **John Salmond's Definition of Law: A Comprehensive Analysis**

Aspects of Salmond's Definition of Law

This concise yet profound definition encapsulates several essential aspects of law that warrant further exploration.

- **Recognition and Application by the State:** Salmond's definition of law underscores the significance of state recognition and application of legal principles. Law is not a mere collection of abstract rules but rather a body of principles that the state acknowledges and enforces. This recognition by the state distinguishes law from other norms or rules that may exist in society. **Administration of Justice:** One of the central themes in Salmond's definition is the idea that law serves as a means to achieve justice. Law provides a framework within which disputes can be resolved, rights and responsibilities are defined and justice can be administered. This perspective emphasises the ethical purpose of law in maintaining order and fairness in society.
- **Courts of Justice:** Salmond's definition of law points to the pivotal role that courts play in the legal system. The application and interpretation of legal principles occur within the context of the administration of justice by courts. Rulings and judgments by courts are the means by which law is applied and given binding force.
- **Enforceability:** Salmond emphasises that the true test of law is its enforceability through the courts of law. Laws are not mere theoretical concepts but practical rules that can be enforced through legal processes. This underscores the practical aspect of law as a tool for resolving disputes and maintaining social order.

Analysis of Salmond's Definition of Law

Salmond's definition of law has been the subject of significant analysis and debate among legal scholars and philosophers. Let's explore some of the key points and implications of this definition:

Emphasis on Justice

Salmond's definition highlights the close connection between law and justice. In his view, the primary purpose of law is to facilitate the administration of justice. This ethical dimension of law

is a critical aspect of his definition, emphasizing the role of the legal system in upholding fairness and equity. State Recognition

Salmond's definition of law stresses that law is not a matter of personal opinion or private agreement but is recognised and enforced by the state. This concept is foundational to modern legal systems, where the state acts as the ultimate authority in determining what is legally valid and binding. Role of Courts

The importance of courts in the legal system is a key feature of Salmond's definition. Courts are the institutions responsible for applying, interpreting and enforcing the law. Their rulings and decisions provide precedents and establish legal principles.

Enforceability

The idea that law must be enforceable in courts is a practical and essential aspect of Salmond's definition. Without enforceability, laws would remain abstract and ineffective. The legal system's ability to compel compliance and resolve disputes is central to maintaining social order. Abstract and Philosophical Perspective

Salmond's definition of law can be considered abstract and philosophical. It emphasises the broader ethical and societal purpose of law rather than delving into the specific content of legal rules. This abstract approach has had a profound impact on legal thought and jurisprudence.

Analytical School of Jurisprudence

The Analytical School of Jurisprudence focuses on the present form of law. This school is referred to by various names, such as the Austinian School, named after John Austin who established this methodology. It is also known as the Imperative School, as it considers law as the direction or command of the sovereign and the Positivist School, as its proponents are only concerned with law as it exists presently and not with its past or future.

The term "positivism" was coined by August Comte. John Austin was responsible for developing the theory of positive law, which was initially founded by Bentham.

One of the primary functions of the Analytical School is to analyse or decompose the law into its irreducible elements. John Austin

John Austin, known as the father of English Jurisprudence, defined law as "a command of the sovereign backed by a sanction." According to him, the law is the direction of the politically powerful authority backed by a sanction, which means that the Law-Maker has the authority to make laws and it supersedes judgments by judges or precedents. He also distinguished law from morality and divided law into two parts: divine law and human law.

Types of Laws Recognised by Austin:

Merits

Austin's definition of law is simple and clear, which lays down exact boundaries within which jurisprudence has to work. His positivist approach further laid down the foundation of English jurisprudence. He stated an important universal truth that law **is created and enforced by the State.**

Demerits

However, his definition of law overlooks customs, which regulated the conduct of the people in early times. Austin ignores the permissive character of the law and there is no place for judgemade law. He does not include conventions of the Constitution in his definition of law, although they are the subject matter of a study in jurisprudence.

Austin also does not treat international law as a law because it lacks sanction. The rules set by private persons in pursuance of legal rights are included in "positive law," which is an undue extension because their nature is vague and indefinite. Austin overemphasizes the command aspect of the law, which cannot be applied to modern democratic countries.

Bentham

Bentham, a prominent English philosopher, defined law as a collection of signs indicating the will of the sovereign in a state regarding the conduct to be followed by a particular person or group of people subject to the sovereign's power. He also supported the concept of laissez-faire, which advocates for minimal State intervention in individuals' economic activities. **Principle of Utilitarianism**

Bentham proposed the principle of utilitarianism, which states that legislation's appropriate aim is to promote the greatest amount of utility. He defined utility as the capacity of a thing to prevent evil or promote good. Bentham argued that the consequences of an action were either pleasure or pain.

Merits Bentham's legal reforms thinking and enthusiasm ushered in a new era of legal reforms in England. He contributed new ideas on law-making and legal research.

- His definition of law and analysis of legal terms inspired many jurists, who improved upon it and laid the groundwork for new schools.
- Bentham also provided solutions to issues regarding the nature of positive law. *Demerits* Bentham's theory has some shortcomings, according to Friedmann.
- Firstly, in his attempt to merge materialism with idealism, Bentham underestimated the importance of individual discretion and flexibility in law application, overestimating the power of the legislator.
- Secondly, the theory does not balance individual interests with those of the community.
- Additionally, the theory is too abstract and fails to account for the complexities of human nature. Furthermore, the theory has no practical application and using pain and pleasure as the sole test for judging law is inadequate. **Sociological School of Jurisprudence**

The Sociological School of Jurisprudence emphasises the relationship between law and society, arguing that law is a social phenomenon with a significant impact on society. This school maintains that every problem and change that occurs in society should be viewed from a legal perspective.

Law as a Social Phenomenon

The Sociological School of Jurisprudence posits that law is a social scenery and it directly or indirectly relates to society. This school's main focus is to balance the welfare of the state and the individual and it believes that the present-day socio-economic problems cannot be solved by existing laws.

Logic-Based Approach

This school's approach is based on logic and rationality, rather than metaphysical entities or divinities.

Roscoe Pound

Roscoe Pound is known for his functional approach to law, which emphasises the practical application of law and its role in creating a better society. According to Pound, the main objective of law should be to satisfy the maximum number of wants with the minimum amount of friction.

He also developed the theory of social engineering, which seeks to balance competing interests in society by protecting various interests through the law.

Classification of Interests

Pound's theory of social engineering classifies interests into three categories: private, public and social. Private interests include physical integrity, reputation, freedom from violation and freedom of conscience. Interest in domestic relations involves marriage, parents and children and maintenance. Interests in substance involve inheritance, occupational freedom and property. Public interests include the preservation of the state, administration of trusts, charitable endowments, territorial waters and the natural environment. Social interests are those that are thought of in terms of social life and are generalised as claims of social groups. *Merits*

- The theory has focused on the practical implications of the law and the role of jurists in building a welfare state.
- It considers the working of law rather than its abstract concepts.
- It regards law as a social institution that can be improved by human effort and to discover and effect such improvement.
- It lays stress on the social ends of law rather than sanctions.
- This theory suggests that legal precepts be used as guides to socially desirable results.
- His idea of functional law led to the creation of the functional school.
- His theories gave the most influential exposition of the American sociological viewpoint. *Demerits*
- Classification of interests is not useful because social interests always change with society and putting them into a specific order will cause them to lose their character and importance. The term "social engineering" is used to indicate the problem that law faces, the objectives that have to be fulfilled and the methods which it will adopt for the purpose of interest.
- There is no ideal scale of values with reference to interest.
- The word "engineering" does not provide a balance between social needs and interests, but only recognises or approves it.
- The theory ignores the fact that law evolves and develops in society according to social needs and wants.
- The dynamic feature of the law is undermined in this theory.
- The conflict between social and individual interests is not considered by him.
- Professor Allen criticised him for focusing on wants and desires to fulfil material welfare, which might be harmful to personal freedom.

Dugit's Theory

Dugit, a sociologist, proposed a theory of social solidarity that emphasises the importance of interdependence and mutual assistance within a society. According to him, there are two types of needs in society: common needs, which are fulfilled by mutual assistance and adverse needs, which are fulfilled by the exchange of services. Social solidarity is necessary to fulfill these needs and it requires a division of labour to meet all the requirements of the society. *Merits* Dugit's theory advocates for peace and solidarity in society.

- He also challenges the concept of state sovereignty by comparing the state to any other organisation.
- Dugit argues that the functions of individuals in society depend on each other and the aim of the law is to safeguard interdependence and fulfil all necessities. He stresses that the end result of all

human activities and organisations should be to ensure social solidarity and the formation of law is crucial for community life.

- Additionally, his theory minimises the role of the state and the legislator, promoting interdependence among individuals in society. *Demerits*
- Dugit's theory has some drawbacks.
- He believes that the state's duty is to ensure social solidarity and is against state sovereignty.
- He sees no difference between public and private law, which may lead to the elevation of state power above the rest of society.
- The concept of social solidarity is vague and can lead to judicial despotism, as judges will decide whether an act or rule is furthering social solidarity.
- His theory confuses natural law theories as a law that does not promote social solidarity is not considered law.
- Dugit's theory does not perform well due to the minimum interference of the state, as social problems of modern communities can be solved better by state activity.
- Moreover, his use of "is" instead of "ought" confuses the definition of law with natural law theories and his theories are inconsistent, with contradictory claims about the structure and role of the state.

Historical School of Jurisprudence

The historical school of jurists, which was founded by Friedrich Karl von Savigny (1779-1861), is a school of thought that describes the origin of law. According to this school, the law was found, not made. The historical school believes that law is made by people in response to their changing needs and that it is an outcome of the development of society. The law originates from the conventions, customs, religious principles and economic needs of the people. The basic source of the historical school is custom.

Customs are defined as traditional and widely accepted ways of behaving or doing something that is specific to a particular society, place or time. In the historical school, customs are considered superior to legislation. The emergence of this school was due to its opposition to the ideology of the analytical school of jurisprudence, as well as being a reaction to the natural school of law.

Friedrich Carl Van Savigny

Friedrich Carl Van Savigny, a prominent legal scholar from the 19th century, believed that law is a matter of unconscious and organic growth. His theory emphasised the influence of culture and the character of the people on the evolution of law. Savigny's theory also traced the course of the evolution of law in various societies.

Main Points of Savigny's Theory

- Law is found, not made. It is a matter of unconscious and organic growth. Law is not universal in its nature and varies with people and age.
- Custom precedes legislation and is superior to it. The law should always conform to the popular consciousness.
- As laws grow into complexity, the common consciousness is represented by lawyers who formulate legal principles. Lawyers remain only the mouthpiece of popular consciousness and their work is to shape the law accordingly. Legislation is the last stage of law-making and therefore, the lawyers or the jurists are more important than the legislators. *Merits*
- Savigny's theory emphasised the influence of culture and the character of the people on the evolution of law.
- The theory laid the seeds for the development of sociological and evolutionary jurisprudence.

Demerits

- Savigny's theory is inconsistent as he argued that the origin of law is in the popular consciousness, but some of the principles of Roman law were of universal application.
- While advocating for the national character of law, he entirely rejected the study of German law and took inspiration from Roman law.
- Savigny claimed that popular consciousness is the main source of law, which is not always true as sometimes an alien legal system is successfully transplanted in another country or a single personality greatly influences a legal system that is not based on popular consciousness.
- Customs are not always based on popular consciousness and many customs and practices have been declared illegal. Charles Allens criticised him for emphasising the idea of law made by customs as he was of the view that customs are not based on the consciousness of people but on the powerful ruling class.
- Savigny's theory ignored the judge-made law, although judges have played an important and creative role in making law.
- His theory did not explain many things that developed in certain powerful communities, such as slavery and untouchability in India.
- Despite its limitations, Savigny's theory remains significant in the development of legal thought and continues to influence the study of law.

George Friedrich Puchta

George Friedrich Puchta was a student of Savigny and a significant jurist whose ideas were more logical and improved. He used the term "right" instead of "law" and believed that men always lived in unity, but people are different in their behaviour and unequal, which gave rise to the concept of law.

The state comes into existence as a result, but neither the people nor the state alone is the source of law. Instead, all laws come into existence through Volksgeist, the spirit of the people. Popular consciousness unites people into one community, similar to a common language or religion. According to Puchta, customary law is the best expression of the national spirit or Volksgeist, making custom superior to legislation. *Merits* Puchta's ideas were more logical and improved compared to Savigny's.

- He distinguished between the general will and individual will, which helped explain conflicts.
- His division and explanation of conflicts between the general will and the individual will make the state intervention theory more logical.
- He presented a two-fold aspect of human will and the origin of a state, which was absent in Savigny's theory, making it rigid. *Demerits*
- Puchta ignored the historical aspects of legal development.
- His ideas were initially rejected due to ambiguity, which he later corrected.

Philosophical School of Jurisprudence

The Philosophical School, also known as the Ethical or Natural School, posits that legal philosophy should be based on ethical values in order to encourage people to live uprightly. The purpose of law, according to this school, is to maintain social harmony, preserve law and order in society and justify legal restrictions only if they promote individual freedom.

The Philosophical or Moral School focuses primarily on the connection between law and the specific objectives that the law seeks to achieve. It seeks to explore the rationale behind the establishment of a particular law.

This school upholds the principles of logic and reason.

Prominent figures in this school include Grotius (1583-1645), Immanuel Kant (1724-1804) and Hegel (1770-1831), who view the law as the product of human reason, aimed at enhancing and glorifying human identity. Grotius

Grotius is widely regarded as the founder of international law and he believed that a system of natural law could be derived from the social nature of man. According to Grotius, natural law is the dictate of right reason, which indicates whether an act is in conformity with rational nature and possesses a quality of moral baseness or moral necessity. *Merits* Grotius emphasised the importance of morals in describing righteous conduct in society and built a system of natural law that should command universal respect by its inherent moral worth.

- He also stressed the significance of reasons and the origin of law based on morals.
- According to Grotius, the agreement of mankind concerning certain rules of conduct is an indication that those rules originated for the right reason. *Demerits* Grotius' theory was based on morality and there is a difference between ethics and morality. Ethics refers to the behavioural patterns of a person, whereas morality refers to the values imbibed in them.
- Additionally, there are other factors such as social, economic and political patterns of the society that are crucial in the formation of law. Legislation, customs, precedents, etc., are also significant sources of law.
- Furthermore, Grotius believed that natural law deserved universal command, which is not possible in modern times since laws are formed by considering the state, people and nature and making laws according to the needs of society. Grotius' definition is dependent on logic/reason, which varies from person to person and hence there wouldn't be uniformity of law.
- The same goes for moral baseness and necessity since something that may feel morally correct to one person may not to another and vice versa.

Immanuel Kant

Immanuel Kant, a famous philosopher, described the law as the set of conditions under which personal desires can be reconciled with the desires of others according to a general law of freedom. He emphasised the importance of legal duties and legal rights, as well as the distinction between natural and acquired rights. He believed that the state's primary function is to protect and guard the law, with the ultimate aim of establishing a universal world state.

Kant's View on Ethics and Law

Kant differentiated between ethics and law, arguing that ethics pertains to spontaneous acts of individuals while law pertains to acts that individuals are compelled to perform by society and the state. Ethics is concerned with inner life and consciousness, while law regulates external conduct. Kant also stressed that legislation is only effective if it represents the united will of the people. He believed that justice is a relative concept, depending on the conditions, place and social values in which an action takes place. Kant believed that laws must be metaphysical and derived from reason in order to be just. *Merits*

- Recognised the natural right to freedom of an individual in the presence of others' freedom under general law
- Aimed to establish a universal world state
- Emphasised the role of the state in safeguarding and protecting the law
- Differentiated between ethics and laws and highlighted the importance of the united will of people in legislation. *Demerits*
- Focused on what law ought to be and disregarded the past and present of the law
- Denied the significance of natural law in the formation of laws

- Theoretical differences between ethics and laws with little practical application Insufficient consideration of other sources of law, such as customs.

Realist School of Jurisprudence

The Realist School is a sociological approach that focuses on decisions and evaluations of law. It challenges traditional legal values and concepts by examining what courts and common people are actually doing. This movement emphasises the importance of the judicial organisation in the application of the law. The realist school believes that law is real and co-relates law with reality. There are two types of realist schools: the American Realist and the Scandinavian Realist. The former learned from their own experiences and also observed judgments, while the latter believed only in their own experiences.

John Chipman Grey

John Chipman Grey considered the father of American Realism, believed that the Law of the State or any organised body is composed of the rules that the courts lay down for the determination of legal rights and duties. He emphasised that codified laws are immaterial unless they are applied by a judge and that law is basically the judgment that the court passes. *Merits*

Merits of Grey's theory include its relatability to real-life situations, a chance for own interpretation by people and a focus on "what law is" rather than "what law ought to be." He also observes similar cases in the past.

Demerits

Grey's theory has some demerits. He does not take into account the statute law, puts excessive faith in judges and does not consider that the judgment may include the judge's personal bias. Additionally, his definition is not concerned with the nature of law, but rather its purpose and ends.

Jerome Frank

Jerome Frank is a prominent philosopher of the realist school. In his work, he compared the relationship between the certainties of law in men to a father-son relationship, where a man gets protection from the law, just as a son gets protection from his father.

What is Volksgeist Theory?

The Volksgeist theory, developed by Friedrich Carl Von Sevigny of the historical school of jurisprudence, is a jurisprudential concept that posits that the law of a nation is a reflection of its collective spirit or will. The term "Volksgeist" combines "Volks" (people) and "Geist" (spirit), signifying the common will of a people.

Key Principles of the Volksgeist Theory

To gain a deeper understanding of the Volksgeist theory, let's explore its fundamental principles:

a. Law as a Product of Society

According to Savigny, law is not an abstract concept but rather a product of the people's lives within a specific society. It embodies the entire history and culture of a nation and reflects the inner convictions deeply rooted in the common experience of its members. In this view, the law is intimately tied to the society that creates it.

b. Law Develops Like a Language

Savigny drew an analogy between the development of law and the evolution of language. Just as language naturally evolves within a society to facilitate communication, law evolves in conjunction with a nation's cultural and social development. This development is not a separate entity but an intrinsic part of the nation's identity. c. Continuous and Organic Process

Law, according to Savigny, is a continuous and unbroken process that grows organically within society. Customary practices and usages initially gain consensus within the society and are

willingly adhered to by its members. Over time, these practices become entrenched and accepted, ultimately forming the basis of legal norms. d. Opposition to Codification

Savigny vehemently opposed the codification of law, arguing that legal development should be rooted in historical knowledge rather than arbitrary legislative acts. He believed that true legal principles should emerge naturally from the historical and cultural context of a nation. e. Natural and Jurist-Driven Development

The theory acknowledges that law initially develops naturally, responding to the internal needs and values of a society. However, as a society reaches a certain level of civilisation, various national activities contribute to further legal development. Legal scholars and jurists play a vital role in shaping and refining legal principles.

Implications of the Volksgeist Theory

The Volksgeist theory has several significant implications within the field of jurisprudence: a. Emphasis on Historical Understanding

One of the central tenets of the theory is the importance of historical knowledge in comprehending the development of law. To study the law accurately, one must have a thorough understanding of a society's history, culture and traditions.

b. Recognition of the Organic Nature of Law

The theory recognises that law is not a static entity but rather an organic and evolving construct that mirrors the society from which it emerges. This perspective encourages a nuanced appreciation of legal systems as products of their cultural and historical contexts.

Relevance in Modern Jurisprudence

The Volksgeist theory continues to hold relevance in modern jurisprudence. Its emphasis on historical understanding, recognition of the organic nature of law and the role of legal scholars in legal development are concepts that resonate with contemporary legal scholars and practitioners. In an era of globalization and multiculturalism, the theory reminds us of the importance of understanding the cultural and historical contexts within which legal systems operate. It encourages legal scholars to consider the societal and historical factors that shape legal norms and practices, thereby fostering a more comprehensive and nuanced approach to jurisprudence. Furthermore, the theory's opposition to codification and its emphasis on the gradual evolution of law serve as a counterpoint to the positivist view of law as a product of human legislation. It challenges us to appreciate the complexities and subtleties of legal systems, recognizing that they are deeply intertwined with the cultures and histories of the societies they govern.

Legal Status and Rights of Lunatic and Drunken Person

Legal status of lunatic and drunken person

Status of lunatic and drunken person have some special position. They are natural persons and have legal identity but are not capable o enter into contract. If at the time of entering into a contract

lunatic or drunken person is incapable of understanding the nature of contract, then they are considered to be incapable of entering into a contract.

Law of contract provisions for Lunatics

By virtue of S. 12 of Indian Contract Act 1872, a sane person can be said as person who while entering into a contract, understands the nature of contract and hence can form rational judgment regarding the same. Therefore we can say that a person is said to be of unsound mind if he is not capable to understand the nature of contract and is unable to form a reasonable judgment. As per S. 11 of this Act, if a person of unsound mind enters into a contract, it will be declared as void. Now, a person of unsound mind can be a lunatic or an idiot. **o IDIOT-** A person who is of unsound mind by birth or permanently of unsound mind is said to be an idiot. Therefore, the contracts entered upon by him are void-ab-initio.

o LUNATIC- A person who is not permanently of unsound mind but during specific periods he is of sound mind is regarded as a lunatic. They are allowed to enter into a contract only during a period of their sanity.

Insanity/lunatic – Mc'naghten rule

In 1843, the law of insanity was formulated in the case of R v. Mc'Naghten[1] Principles in Mc'naghten case:-

1. Every person is presumed to have sanity unless the opposite is established.
2. In order to take the plea of insanity, it has to be proved that at the time of committing the crime the person was so insane that he didn't understand the nature of the act or had no idea that the act he was doing was of criminal nature.
3. The test of wrongfulness of the act is in the ability to distinguish between right and wrong not in general but related to that particular act committed.

Law of Contract provisions for drunken person

A person having a majority age is considered to be capable of entering into a contract usually. But to a contrary there are certain exceptions as to this that under certain circumstances a drunk person is incapable of entering into a valid contract. Generally the Contractual capacity of a drunken person is regarded same as that of one who is a lunatic. [2]Therefore the burden of proving drunkenness rests on the person asserting it.

Contracts entered into by the drunken person are not binding on him in the following cases :- 1. When he was too drunk to understand the nature of contract ;

2. The opposite party took advantage of it knowing of his condition. [3]

By this it can be assumed that a drunk may ratify the contract entered into by him at the time of his incapability to understand the nature of contract. Also in certain circumstances, an infant, a lunatic and a drunk is bound to pay a price as compensation for goods sold and delivered to him according to Sale of Goods Act (1893). Thus, a drunken and lunatic person has to pay not only when goods are sold to them but even when delivered and also for necessary goods. According to Sale of Goods Act, goods delivered to drunken must be suitable to the condition of his life.

Indian penal code provisions as regards Intoxication

The provisions for intoxication is provided under Sections 85 and 86 of IPC. The major difference between these is that S.85 deals with a person who is involuntarily intoxicated whereas S.86 is a person who is voluntarily intoxicated. Thus according to S. 85 a person is not liable criminally but in case of S. 86 a person cannot take a defense of intoxication.

Essential elements under S. 85 for a person to be safeguarded from action against him:- 1. The person was incapable of knowing the nature of act committed.

2. He was not in a sense to know the acts were wrong or against law.
3. The act committed by him was as a result of such intoxication.

Where the accused was persuaded by his father to drink alcohol, the plea of defense cannot be taken here since he had the knowledge of drink offered to him.[4] A similar decision was made in another case. [5]

Legal Rights: Nature, Characteristics, Kinds

What are legal rights?

The term right is defined as any action of a person that a law permits. Legal rights are the rights that are given to the citizens of a country by the government to enjoy certain freedoms. These rights affect every citizen. There is no remedy for the infringement of these except for the law itself. Legal rights can be differentiated from moral rights or natural rights or even fundamental rights. E.g. Right to vote, right to sue.

Essentials of a legal right:

- A person must be an owner of a right
- A legal right accurse against another person or persons under a corresponding duty to respect that right.
- Content or substance
- The object of the right
- Title of the right

Nature and Characteristic of Legal Rights:

1. Legal rights exist only in society– these rights are the consequence of humans being a social animal.
2. Spurs the development of the nation– these rights are the pillars to building a strong and constantly developing nation.
3. Rights are recognized by the all people in a society.
4. These are rational and moral claims– These are not illogical and do not depend on hit and trial methods.
5. Since rights are present in a society, these cannot be exercised against the society or against social good of the society.
6. Rights are equally available to all the people without any kind of discrimination.

Ownership in Jurisprudence: Meaning, Kinds, Incidents and Relevance in Contemporary Times

Introduction

The word ownership strikes the imagination with the picture of property, property without which there can be no ownership or possession. During the earliest of times when humans were nomads and did not posses the skill of cultivation and civilization the concept of ownership never crossed through the minds. However, the concept of possession was formulated before the concept of ownership and that too only when humans started to cultivate.

Property as a legal concept has been defined by the Supreme Court of India in Guru Dutt Sharma v/s State of Bihar, as ‘a sum of a bundle of rights and in case of tangible property would include the right to possession, the right to enjoy, the right to destroy, the right to retain, the right to alienate

and so on.' And along the clear concept of property comes the ideas of possession and ownership.

Concept of Ownership

With the growth of civilization, humans settling down to cultivate and produce their own food and staying at one place they began to develop the idea of ownership and recognized the terms 'mine and thine'[1]. First came the concept of possession then the concept of ownership evolved. The Roman Law had two distinct terms *'possessio'*, which denotes physical control over a thing and '*dominium*' which denotes the absolute right to a thing. Ownership as an absolute right in English Law evolved through the developments in the law of possession, according to Holdsworth and the term 'ownership' was first used in English Law in 1583.

Definition

Ownership has been defined by many jurists, some opine it is the relation between a person and a right vested in him and some opine that it is the relation between a person and the thing that is the object of the ownership. **Austin**

According to him, 'Ownership means a right which avails against everyone who is subject to the law conferring the right to put thing to user of indefinite nature'. And 'a right indefinite in point of user, unrestricted in point of disposition and unlimited in point of duration' when it comes to full ownership.

Austin's definition of ownership has three characteristics: –

Salmond

According to him, 'Ownership, in its most comprehensive significance, denotes the relation between a person and the right that is vested in him. That which a man owns is in all cases a right.' Also he states that 'Every right is owned, and nothing can be owned except a right. Every man is the owner of the rights which are his.'

Hilbert

According to him, ownership consists of four rights which are the right of using the thing, right of excluding others from using it, right to disposal of the thing and right of destruction of the thing. In this regard absolute ownership in land is not possible since land is indestructible, which is why in English Law one can have a legal interest in land. **Pollock**

According to him, 'Ownership may be described as the entirety of the powers of use and disposal allowed by law.'

Nature and Incidents of Ownership

On analyzing the concept of ownership one can find certain attributes which reveal the nature or characteristics of ownership such as usage, enjoyment, disposition etc. Nature of ownership is as follows: –

1. It is indefinite in point of user i.e., the user may use the thing owned in any way he so desires and is in no obligation to not to use it. The user is at liberty to use it.
2. It is unrestricted at point of disposition. The owner may transfer or dispose of the property by conveyance either during his lifetime or even after his demise by way of will.
3. The owner has the right to possess the thing owned although if he actually possesses it or not is immaterial, only the right o possess is of material in nature.
4. The owner has the right to exhaust the thing owned while using it if the nature of the thing is so.
5. It is residuary in nature. Even if some rights to a certain property may be given to someone else in way of lease or rent, still the owner remains to be the owner due to the residuary characteristics to it.

6. The owner has the right to alienate the property as well as the right to destroy it. **Incidents of ownership**
1. Right to possess – ownership entails the right to possess the thing owned even if there is no actual possession of it, only the right is of the essence.
2. Right to use – ownership implies that the owner can use or enjoy the thing owned in any manner he thinks fit without injuring others and within the limits of the law.
3. Right to manage – ownership contains within it the right to manage the property. It means that only the owner can decide what to do with it, how to do and by whom it is to be done, to transfer or to alienate or to destroy.
4. Right to income – ownership also entails the income generated out of it is owned by the owner. All benefits attached to the thing owned is the right of owner.

THEORIES OF PUNISHMENT

1. DETERRENT THEORY OF PUNISHMENT

Deterrence is the use of punishment to prevent the offender from repeating their offense and to deter potential offenders from committing crimes of a kind similar to that for which the punishment is now inflicted. It demonstrates to other potential offenders what will happen to them if they follow the wrongdoer's example.[2]

It was first advocated by Plato: "No one punishes a wrongdoer on account of his wrongdoing unless one takes unreasoning vengeance like a wild beast. But he who undertakes to punish with reason does not avenge himself for the past offense since he cannot make what was done as though it never came to pass; he looks to the future and aims at preventing that particular person and others who see him punished from doing wrong again."