JURISPRUDENCE AND COMPARATIVE LEGAL THEORY

DR.HAMIDUDDIN KHAN

AIN PROKASHAN-DHAKA

JURISPRUDENCE
&
COMPARATIVE LEGAL THEORY

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Jurisprudence
&
Comparative Legal Theory

Dr. Hamiduddin Khan

Preface

The object of this study is not only to explain the nature and principles of Jurisprudence but also to present, within the bounds of a handy volume, a comparative study of the various legal theories underlining and drawing attention to those views of the jurists which are particularly important and worthy of attention.

Jurisprudence is a wide field crossed by many paths and theories, none being superior to another, since much depends on whither one wishes to go. The long debate about the concept of law has different facets and different jurists provided different theories about law. So, it was thought useful to distinguish these different ideas and the problems they generate. Care has been taken to the chief requirements of a student's text book that it should deal with and take into account all those aspects of the subject which one has to study. Although there are a good many standard but expensive foreign books on the subject yet, as a teacher on the subject, I feel that the necessity of a book of its kind has always been keenly felt by our students. It is in view of these difficulties and requirements that this short text book has been compiled in a lucid and narrative form giving all the topics arranged systematically. As the work is primarily intended and designed for the students of law, the views have been discussed in such a compass as to be within the reach of a student, and all minute details and discussions have been left out and for facility of reading and continuity of discussions I did not quote all the sources.

For convenience of study the work has been divided into three main parts and all the topics into nineteen Chapters. The introductory part deals with the nature of Jurisprudence; the second part with the nature and sources of law stating the views of different jurists of important schools of thought including a comparative study of the Muslim, Hindu and Western Jurisprudence; and the third part with the various legal concepts and specific elements of law as well as the law of procedure. A list of more familiar and important legal maxims, which provide a useful means for expressing in intelligible from the leading doctrine of law, has been added in the appendix. A synopsis of consolidated and important topics arranged chapterwise has also been added at the end for convenience of the students. It is confidently felt that this treatise will go a long way towards meeting the need of an inexpensive book of this nature.

Contents

I claim no originality in preparing this book. I have drawn largely on the works of Salmond, Paton, Allen, Holland, Hart, Roscoe Pound and others to whom I am greatly indebted. I trust the book will be useful not only to the LL.B and LL.M. students in the legal institutions, but that it will reach the wider circle of academic and practicing lawyers and other interested in law. The study of jurisprudence is also an opportunity for the lawyers to bring theory and life into focus, for it concerns human thought in relation to social existence, With a view to giving effect to this aim an attempt has been made in this book to provide a text which might serve as a guiding thread on the topics dealt with which, it is hoped, will give readers a picture of those topics and some idea of the issues and problems they involve.

The book was rushed through the press to meet the urgent damand of the students and I must express my sincere thanks to Mr. S. M. Hasan Talukdar, a young lawyer and promising researcher, for taking the trouble of reading the final proof gladly and promptly while I was in disposed. I am also highly appretiative of the courtesies and efforts of the publisher in connection with this publication.

It is hoped that the book will meet in a great measure the needs of those for whom it is meant in which case I shall consider my work greatly rewarded.

Dhaka
11.07.93

Author.

Foreword

I am happy to be able to introduce this book to the reader. The treatise of the author, who is an academician of high standing and an eminent professor of Law, of which I have seen the first print seems to me to be a useful collection of the views of distinguished jurists on basic concepts of legal theories and principles underlying the subject systematically arranged and presented in a lucid form.

Although the work is mainly based on ideas of Western origin which no doubt, have become part of Eastern life and tradition, the author has attempted to give the subject an Eastern orientation by making a comparative study of the Hindu, Muslim and Western jurisprudence, which is really a new and commendable feature.

I trust the book will be useful not only to the students in law, but will reach the wider circle of academic and practicing lawyers and others interested in law.

Justice Kemaluddin Hossain
(Former Chief Justice of Bangladesh)

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PART 1

CHAPTER 1

THE NATURE OF JURISPRUDENCE

1. The term 'Jurisprudence'

The term 'Jurisprudence' is derived from its Latin equivalent Jurisprudentia which according to the English Oxford Dictionary means knowledge of or skill in law. 'Juris' means 'law' 'prudentia' means and 'science' or a "systematic body of knowledge". Thus etymologically 'jurisprudence' means science of law, the science which treats of human laws (written or unwritten) in general i.e. philosophy of law. In this general sense all law books, which directly or indirectly treat of the science of law, are books of jurisprudence e. g. Medical jurisprudence, Dental jurisprudence and Architectural Jurisprudence. But this is not the use to which the term is put in this work. We find the word jurisprudence being used in its etymological sense to describe and exposition of a particular branch of law. By law in this connection is meant exclusively the Civil Law, the law of the land regulating the life of the society as opposed to all other allied subjects to which the name of the law has been extended by analogy and merely as an imposing synonym for law, as when we speak of medical jurisprudence and the law of gravitation.

In English and French, the word jurisprudence has acquired more limited meaning, though the French is quite different from the English. In French and also sometimes in German, jurisprudence means specially a course of decisions by the Courts, i.e. case law. In English language the term came to mean vaguely as 'general and theoretical' discussion about law and its underlying principles as opposed to the study of actual rules of law.

2. Nature and Value of Jurisprudence

Jurisprudence is the name given to a certain type of investigation into the nature of law, an investigation of an abstract, general and theoretical nature which seeks to lay bare the essential principles of law and legal systems. It is a study relating to law, but it differs in kind from other subjects on the legal syllabus. For the typical Subject like contract or tort consists of a body of rules and principles derived from authoritative sources and applied to factual situations in order to solve practical problems. But in jurisprudence we are not concerned to derive rules from authority and apply them to problems; we are concerned rather to reflect on the nature of

legal rules, on the underlying meaning of legal concepts and on the essential features of legal system. Thus, in law we look for the rule relevant to the given situation, but in jurisprudence we ask what it is for a rule in order to be a legal rule, and what distinguishes law from morality, etiquette and other related phenomena. In this respect, jurisprudence comprises philosophy of law, and is a second order subject whose object is not to discover new rules but to reflect on the rules already known, just as the philosopher of science concerns himself with the scientific law already discovered rather than with the discovery of new law.

The importance of the study of Jurisprudence cannot be exaggerated. It is valuable as a substantive part of our knowledge of law which enables us to have clear ideas about the fundamental legal conceptions as well as the social function and the purposes of law.

It is essential for a lawyer in his practical work to have a knowledge of jurisprudence, the aim of which is to formulate the fundamental principles which are adopted by the society to adjust the relation between man and man; because the knowledge of general ideas and principles lying at the root of all rules of law, which jurisprudence imparts, serves—(1) to train the mind into legal way of thought and (2) afford a key to the solution of many provisions of law which would otherwise appear to be singular and unaccountable. Without such knowledge, no lawyer however practically eminent can really measure the assumptions upon which his subject rests. When no statutory provision nor any precedent is available to decide a particular case, jurisprudence affords a grand help to the lawyers. They can take recourse to the general principles dealt with in jurisprudence which may concern the peculiarities of such a case and decide accordingly.

The basic features of a legal system are chiefly to be found in its authoritative sources; and the investigation of the nature and working of legal authority naturally forms a subject of jurisprudential enquiry. On the other hand, jurisprudence consists of analysis of the legal concepts which are used in the study and practice of ordinary or typical legal subjects concerning different kinds of rights which one person may have against another, and investigates and examines such other legal concepts as "act", "intention", "negligence", "ownership", "possession" and so on. In this respect the jurists appear in the guise of a logician, elucidating synthesis of legal concepts.

Jurisprudence is also a functional study of the concepts which the legal systems develop and of the social interest which the law protects. For, one task of jurisprudence is to link law with other disciplines and so help to locate it within its wider social context. Thus, in analysing legal concepts, we must try to present them against a background of social developments and changing economic and political attitudes. This kind of inquiry into law is a part of the wider problem of investigating the consistency between legal system and the way of life of the society in which it operates.

Although, in general, jurisprudence appears to be a subject without applicability in practice unlike other legal subjects, it has its own intrinsic interest in which it resembles any other subject of serious scholarship. Just as, for example, the mathematician investigates number theory, not with the aim of his findings put to practical use, but by reason of the fascination which it holds for him, so the writer on jurisprudence may well be impelled to his subject by nothing more than its intrinsic interest. The number theory has significance for general mathematical thought, which in turn has implications for science, philosophy, logic and indeed the whole spectrum of human thought, Similarly, researches into jurisprudence may have repercussions on the whole of legal, political and social thought, And indeed one of the tasks of jurisprudence is to construct and elucidate organising concepts serving to render the complexities of law more manageable and more rational; and in this way theory can help to improve practice. So, jurisprudence is not without practical value of long-term character.

Finally, jurisprudence has also an educational value, since the logical analysis of legal concepts sharpens the lawyer's own logical technique. In addition, the study of jurisprudence can help conduct the lawyers' occupational vice of formalism, which leads to excessive concentration on legal rules for their own sake and to resulting disregard of the social function of law. This is best remedied by setting the law in its proper context, by considering the needs of society and by taking note of advances in related and relevant disciplines. A proper grasp of the law of contract may well-need some understanding of economics and economic theory, a proper grasp of the criminal law some knowledge of criminology and psychiatry, and a proper grasp of law in general some acquaintance with sociology. Thus jurisprudence can teach a lawyer to look, if not forward, at least sideways and around him, and to realise that the

answers to new legal problems must be found by consideration of present social needs rather than in the distilled wisdom of the past.

Jurisprudence may also, in one sense, be compared to the science of grammar, which is called the formal science of languages. It is seen that languages differ from one another in many respects viz. vocabulary, accounts, etc., but despite these differences, there are certain thing common in them. For example, the ideas of past, present and future tense are common and so also are the subject and object. Similarly, jurisprudence as a formal science or the science of the first principles of civil law, may also be called the grammar of law, as it deals with the purpose, method and principles common to every system of law as distinct from material science which deals with the rules of different systems. Hence, G. W. Paton remarks "Jurisprudence is a particular method of study, not of the law of one country, but of the general notion of law itself."

3. Science of Jurisprudence

According to Holland, jurisprudence is a science and it is progressive in nature. He defines jurisprudence as the "formal science of positive law". Firstly, it is a science, because, it tries to generalise the principles underlying legal rules and it is not a bare collection of rules haphazardly put together.

Secondly, it is a formal science as it deals with the purposes, method, ideals and principles common to every system of law as distinct from a material science which deals with rules of different systems of law. Holland again points out that science of jurisprudence deals with the relationship of mankind which are regarded as having legal consequence but not with the rules which create these relationship. Thus, the essentials of valid marriage have varied in different countries but the legal aspect of marriage and its connection with property and family is more or less the same. The essentials of valid marriage do not fall within the scope of science of jurisprudence though the underlying principles, legal aspects and effects of marriage fall within that scope.

Thirdly, jurisprudence is a science of positive law. It is positive, because, it deals with the law which is actually imposed by some political authorities. According to Holland, jurisprudence is a progressive science and its generalisation must keep pace with the movements of the system of actual law. Its broader distinctions, corresponding to deep-seated human characteristics, will no doubt be permanent, but, as time goes on, new distinctions must be constantly developed with a view to the co-ordination of the ever-increasing variety of legal phenomena.

Sir C. K. Allen describes jurisprudence as the scientific synthesis of the essential principles of law. He also holds the same view as that of Holland that jurisprudence is a science as it deals with the essential principles of law systematically arranged.

Prof. Salmond defines jurisprudence in its generic sense as "the Science of Civil Law" and in its specific sense as "the Science of the first principle of the Civil Law."

He defines jurisprudence as "the Science of Civil Law" using the term 'Science' in its widest permissible sense. In its generic sense, 'Science' includes systematised knowledge of any subject of intellectual enquiry. First of all jurisprudence is a science as it tries to generalise and systematise the principles that underlie legal rules, subject of enquiry being the principles of law. Science may be distinguished from art in this that art is a body of rules for government of action, but science is a body of abstract principles underlying art. An art lays down what is to be done; science lays down the reason for which it is required to be done.

Secondly, Civil Law is the law of Civitas or State i.e. the law of the land; it does not mean the body of rules administered by Civil Court. Hence, in its generic sense jurisprudence means the systematised knowledge of the law of the land.

But from jurisprudence in its generic sense, as including the entire body of the law of the land, Salmond distinguishes jurisprudence in a more specific sense as "the science of the first principles of the Civil Law".

Civil Law is divided into two parts.

The first part consists of the fundamental and general principles which serve as a basis for the second part i.e. the concrete details of the law. A systematised knowledge of such fundamental principles is called Theoretical or General Jurisprudence, as being concerned with theory of the law and its fundamental and general principles rather than its practical and concrete details. It is also called the philosophy of law, not in the sense of metaphysics but in the sense of an enquiry into the first principles of any department of thought. Salmond used the term jurisprudence in this specific sense.

By General Jurisprudence, however, is not meant the study of the legal system in general, but it means the study of general and fundamental principles of a particular legal system.

The second part of law consists of the concrete details of an actual legal system, which takes into account many things which are the proper subjects of enquiry of the Theoretical Jurisprudence.

4. Legal Theory and Jurisprudence

Legal theory is in general an attempt to answer the question "what is law" i. e. it is concerned with the definition and analysis of the malure system of law as it exists at present without reference to its historical origin or development in the past or the law as it ought to be in future. The need to provide a definition springs from the necessity of clarifying the most basic of all legal concepts i.e. the concept of law itself. Jurisprudence has been defined in generic sense as the Science of Civil Law i. e. the law of the land, and in its specific senses the theory or philosophy of law in which law is dealt with systematically, historically and critically in respect of its contents, development and conformity with justice and public interests respectively. In this sense, legal theory is one of the species of jurisprudence. For if jurisprudence is a study relating to law and concerned with the analysis of legal concepts, surely the first problem is to analyse the basic concept of law.

But in fact there is a difference between legal theory and jurisprudence in this that the former deals only with the law as it exists at present and the latter, which is a study relating to law, also deals with other legal concepts as "right", "duties", "ownership", "possession", "consideration" and so on which are used by lawyers to draw conclusions and solve legal problems. The concept of law itself is not one that gives rise to conclusions with practical significance and no judge ever hinges on the definition of law. What constitutes "consideration" is a typical legal question of practical importance; but "what is law" is a theoretical question, not the question of law, but a question about law.

Although vast majority of legal problems entail no reference to concept of law, it does not mean that the concept is entirely without practical significance, e. g. without a definition of law we cannot decide such practical matters as to whether international law or an unjust law is really law? This kind of problem, however, does not entail that the definition of law has itself a practical use unless the lawyers and law courts were to decide actual legal cases by reference to definition of law as, in fact, the answer is connected with, but not dependent on, the definition of law. But if law is not a legal concept, it is nevertheless the basic concept of jurisprudence and its analysis is relevant to that of all other legal concepts such as 'right', possession, etc. Although such legal notions as "right" and "possession" can largely be explored without reference to the concept of law, but for completeness of their notions legal rights have to be distinguished from other non-legal rights and

"possession in law", from "possession in fact" and so on which leads back to the definition of law itself.

The desire for a definition of law springs also from the desire for generalisation which is also the aim of jurisprudence. Definition of various specific crimes leads to general definition of the notion of crime. Thus various theories of law advanced by legal theorists are of particular value, for they not only constitute the starting point for our investigation, but also serve to emphasise the difficult fact of law and so build up complete and rounded picture of the concept.

Now jurisprudence is a study relating to the law of the land, but different theorists have different attitudes about the concept of law and as such have defined law from different point of view, thus giving rise to different schools of thought about law. According to the Analytical School, jurisprudence is concerned with positive law and concentrates on "law as it is" while others enquire what law "ought to be" rather than "what it is". According to the Historical School, law is the reflection of the will of the people, the volkgeist, and sociological School concentrates on the needs of different sections or groups of people, the social engineering. The imperative theory of law defining law as the command of the sovereign is diametrically opposed to the natural school or the theory of natural law which defines law as a rule in accordance with right reason. Hence the different approaches to law gave rise to different schools of jurisprudence and legal theory.

Since different schools have put forward different views about the boundaries of jurisprudence which are in fact complementary to each other, and as all the views together give a full picture of the subject, some of the important schools, which stand in order of historical evolution on account of the influence which they have had and the insight which they provide into the nature of the law, will be considered along with a comparative study of the different theories of law.

PART II

THE NATURE OF LAW

CHAPTER II

THE SCHOOLS OF JURISPRUDENCE
(Comparative Legal Theory)

5. Salmond's Classification of Schools

Most popular among our students is the definition of jurisprudence given by Salmond. He defines jurisprudence as the Science of Civil Law. By civil law he means law of the land and, in its specific sense, the theory or philosophy of laws. According to him as stated in the first edition of his "Jurisprudence", the law of the land may be studied from three different standpoints—analytical method of study, historical method of study and ethical method of study, and accordingly Jurisprudence has been divided into three branches distinguished as Analytical Jurisprudence, Historical Jurisprudence and Ethical Jurisprudence. Analytical Jurisprudence is the general or philosophical part of systematic exposition of the mature system of law as it exist at present without taking into account the historical origin and development or the ethical significance or validity of law. Historical jurisprudence is the general or philosophical part of the legal history taking into account the law as it was in the past. And ethical jurisprudence is the general or philosophical part of the science of legislation i.e. the law as it should be in future. This school puts stress on the ideal future of law rather than on its past and present condition, estimates the value of the existing law and deduces therefrom what changes therein are desirable and thereby considers the law as it ought to be in order to meet the needs of the society.

Of all these three branches of Jurisprudence, as Salmond says about his own book, it is primarily and essentially concerned with analytical jurisprudence and the other two only play a secondary part. In this respect it endeavours to follow the main current of English legal philosophy rather than that which prevails upon the continent of Europe which, to a large extent, is primarily ethical in its scope and method. But although the essential purpose of this study is an analysis of the first principles of actual legal system, he says, this purpose is not pursued to the total exclusion and neglect of the historical and ethical aspects from the study because by their total exclusion one shall not be able to give a complete analytical picture of the law. He further says that the three aspects of the law,

analytical, historical and ethical, are so involved with each other that the isolated treatment of any one of them is necessarily inadequate; that none of these schools is really self-sufficient as they act and re-act upon each other, and that a complete treatise of jurisprudence would deal fully with all the branches. Hence he remarks, "the law must be dealt with systematically (i. e. analytically) in respect of its contents, historically in respect of the process of its development and ethically in respect of its conformity with justice and public interests".[1]

6. The Theory of Natural Law as the Dictate of Reason

Sociable as he is by instinct any by necessity, man has since his birth lived in small or large societies according to the state of his development. On the other hand, man is not only a social animal but also a rational being and in order to prove his rationality[2] and superiority over other animals he has to abide by a set of values and principles which are collectively called law i.e. a set of rules regulating the conduct and relationship of the members of the society. Thus, since the very inception of human civilization law has the greatest role to play in deciding the course of action in the practical world. It traces its origin to man's common sense i.e. the natural sense of right, wrong, justice, injustice, truth, falsity, honesty, dishonesty, fair, unfair, goodness and badness, etc, which are imprinted in the hearts of man by the fingers of nature and can be discovered by natural reason, a rare quality, a providential gift to mankind. These principles of natural justice and morality based on common sense and natural reason constitute natural law. In jurisprudence the term 'Natural Law' means those rules and principles which are considered to have emanated from some supreme sources other than any political or wordly authority. On the other hand, man has developed this common sense day by day under the natural pressure of necessity for a regulated life which ultimately led to the forming of certain conditions[3] , which are just

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1. Prof. Salmond on "Jurisprudence", 1st edn. (1902). But this classification of jurisprudence into three branches has gone out of use in the 12th edn of his book (1966) though his remarks still hold good.

2. Rationalism became the creed of the later Medieval Age under Renaissance Theory of secularised 'reason' which developed new ideas e. g. Nationalism, State Sovereignty overthrowing church-domination in the garb of theological 'reason' and social contract basis of society.

3. The forms a special feature of natural law based on 'Social Contract' theory of Medieval Age : also mentioned in Plato's Republic, by which contract man surrendered to sovereign or community part of their freedom for order and security of life and property.

reflection of rights and obligation of man in the society. The very code of these conditions of human conduct, which is formulated by some sovereign authority, who demands and enforces obedience to it, is the human law or positive law which offers a body of rules to regulate human life in action. Thus the government or sovereign or ruler came into being.

The idea that in reality law consists of rules in accordance with reason and nature, has formed the basis of a variety of natural law theories ranging from classical times to the present day[1] Although a survey of these theories reveals that its concept has been changing from time to time, but 'reason' has always been the foundation-stone of all these theories[2] The central notion is that there exist objective moral principles which depend on the essential nature of the universe and which can be discovered by natural reason, and that ordinary human law is only true law in so far as it conforms to these principles. These principles of justice and morality constitute the natural law, which is valid of necessity, because the rules for human conduct are logically connected with truths concerning human nature. This connection enables us to ascertain the principles of natural law by reason and common sense and in this the natural law differs from rules of ordinary human law (positive law) which can be found only by reference to legal sources such as constitutions, codes, statutes and so on. But since law can only be true law if it is obligatory, and since law contrary to the principles of natural law cannot be obligatory, a human law at variance with natural law is not really law at all, but merely an abuse or violation of law. Positive law, therefore, must conform to the natural law, as the dictate of man's 'reason' which is a part of 'universal reason', otherwise it will not be accepted, rather may be revolted if thought unreasonable. It is the human nature which led man to live in

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1. For a general view, see Friedmasm, Legal Theory (4th edn., ch. 5-12); Jolwiez, Lectures on Jurisprudence; ch. 2-5; Lloyd The Idea of Law, ch. 3-4; Hart, The Concept of Law, ch. 9; Dias, Jurisprudence (2nd edn, ch. 20.)

2. Ancient Theories of (1) Greek thinkers- Heraclitus (birth of Natural Law), Socrates (470-399 B. C.) and Plato on Human insight; Aristotle (384-322 B. C.) on natural justice by reason; Stoics of Rome on Man's reason as part of 'Universal reason'; (2) Medieval Theories of Catholic jurists (theological reason) (3) Renaissance Theories—modern secularised 'reason' and 'Rationalism' after Renaissance movement; Grotius (1583-1645 AD) on Natural Law by man's reason; Hobbes (1588-1679) on 'Social contract' supporting absolutism; Locke (1632-1704) on Social Contract supporting individualism ; Rousseau's (1712-1778) 'General Will' theory and hypothetical construction of 'reason'; (4) Sociological approach of Stammler, Kohler & Dean Pound.

societies according to reason and nature of necessity and moral duty. That is why Grotius, the famous representative of rationalist school, sarcastically designated human nature as the grandfather, natural law as the father and positive law as the son.[1]

Evaluation

As pointed out earlier, the concept of natural law has undergone changes through different ages and has been used to support any ideology—theocracy, absolutism, individualism and so on. It has provided a firm ground for theorizing and voicing the ideas and thoughts of a particular age. Natural law is now relative and not abstract and unchangeable. The new approach is concerned with practical problems and not with abstract ideas. In fact it has greatly influenced positive law and modified it. As law is an instrument not only of social control but also of social progress, it must have certain ends. The natural law theories have essentially been theories regarding the ends of law. The jurists like Kelsen and Duguit, who defended only the positive law, could not brush aside the natural law theories which in reality have greatly helped the legal development, Many important natural law principles are enshrined in the legal rules of various legal systems as their golden principles. Instances may be cited from English, American and our legal systems.

In England, where 'natural law' never flourished in the form of a theory, its principles found place in the body of the law. The judicial control of administrative tribunals, recognition of foreign judgments and application of foreign law in case of conflict of laws are founded on the principles of natural justice.[2] Many concepts of English law such as quasi-contracts, unjust enrichment, etc. are based on 'natural law' principles. The equitable principles of 'justice, equity and good conscience' which have exercised a great formative influence on the English law, are also founded on 'natural law' ideas.

In America the 'natural law' theories have effected a great legal development. In no other legal system the principles of natural justice have so much moulding and creative effect as in America. The 'Declaration of Independence' reflects a great influence of the ideas of Locke and Rousseau on it. It says that the rights to life, liberty and the pursuit of happiness are the 'inalienable rights' of

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1. Cited by Shamsur Rahman 'Jurisprudence', translated from his book "Bhebohar Sastra" in Bengali version.

2. Dr. B. N. M. Tripathi, Jurisprudence (Legal Thought), 11th edn. p. 67.

men, which came to be embodied in many constitutions[1], and guaranteed to the individual. The power of legislation is limited by the principles of natural justice and the Supreme Court has the power of judicial review of legislation. In determining the validity of enactments the principles of natural justice play a very important part.

In Indo-Pak-Bangladesh Sub-continent a number of legal principles and concepts have been borrowed from England and America. As pointed out earlier, many of these principles are based on 'natural law' principles, such as, quasi-contract, reasonableness in tort, 'justice, equity and good conscience', and constitutionality of legislation. All these constitutions following the written constitution of USA embody a number of 'natural law' principles. They guarantee certain basic liberties i.e. fundamental rights to citizens, and empower the superior courts to exercise control over administrative and quasi-judicial tribunals in case of violation of the principles of natural justice. As observed by the Appellate Division of the Bangladesh Supreme Court, "It is now well recognised that the principle of natural justice is a part of the law of the country"[2]. The principle of natural justice has been incorporated in the constitution[3] providing that no civil servant can be dismissed or removed or reduced in rank until he has been given reasonable opportunity of showing cause against the action proposed to be taken against him. In recent years 'natural justice' has gained an increasing importance in the field of administrative law. As observed by the Supreme Court of India,[4] "The aim of the rules of natural justice is to secure or, to put in negatively, to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. In other words they do not supplant the law of the land but supplement it."

7. Analytical School (Legal Positivism : Imperative Law) :

Diametrically opposed to the theory of natural law is the analytical legal positivism or the imperative theory of law.[5] When Hume asserted that the validity of normative rules cannot logically

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1. Similar provision has been made in Article 31 part III (Fundamental Rights) of Bangladesh Constitution.
2. Abdul Latif Mirza Vs. Govt. of Bangladesh, 31 DLR (1979) S. C, 1.
3. Article 319 of the Indian Constitution and Art, 135(2) of the Bangladesh Constitution.
4. A. K. Kraipak Vs. Union of India, AIR 1970 S. C. 150.
5. Salmond ofn'Jurisprudence' 12th edn. (1966), p. 25.

be treated as an objective fact, but depends on the relative viewpoint of these who apply them, the concept of natural law, as a system of norm, was finally rejected and the positive law took its place in the sense of the law of the state which is something ascertainable and valid without regard to subjective consideration, although as earlier pointed out, the importance of natural law cannot be kept away from legal theories. The idea that law is the command of the sovereign was advanced by such writers as Bodin, Hobbes and Bentham, but found its chief expression in Austin as contained in 'The Province of Jurisprudence Determined', first published in 1832, although Austin owes much to Bentham whose many books have lately came to light, which heralded a new era in the history of legal thought and laid the foundation of positivism in the modern sense of the term.

Bentham[1] and Austin[2] : Comparison

Such positivism as styled analytical legal positivism in Britain, owes its birth to Bentham though his disciple Austin used to be recognised until recently as the 'Father of English Jurisprudence'. The reason is that the most important work of Bentham "Of Laws in General" was published only in 1945 and its improved edition by Prof. H. L. A. Hart saw light in 1970. Therefore, a complete study of Bentham was impossible during his time and now such a study clearly reveals that on many points Austin's propositions are not more than para-phrasing of Bentham's theory and as such it is Bentham who really deserves the title. It appears that no subsequent writer developed a formal concept of legal system with such ingenuity which Bentham did. As observed by Prof. D. Lloyd, lawyers will still read Austin as the fount of 19th century positivism. He appeals to lawyers because he was a lawyer and his jurisprudence is full of painstaking searching of legal analysis. But there is no doubt who is the master, who the student.

These two have developed and established analytical legal positivism on a sound footing. Their theories relate to imperative law and represent attack against natural law theory and, therefore, they have similar views in common. Still they are different from each other so far as the legal philosophy and the technicalities are concerned, which will be pointed out in the following discussion.

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1. John Austin (1790-1859). His lectures delivered in the London University were published under the title "The Province of Jurisprudence Determined".

2. John Austin (1790-1859). His lectures delivered in the London University were published under the title "The Province of Jurisprudence Determined".

Philosophical Difference

While Austin was a jurist only, Bentham was both a jurist and a social and legislative reformer. This marks the distinction between the two so far as the legal philosophy is concerned.

When 'natural law' was dethroned, the question arose : could some scientific or rational standard be found? Hume[1] suggested that only utility could supply the answer, but it was left to Bentham to expound in detad the significance and working of the principles of utility. Accordingly Bentham formulated it as the principle of greatest happiness of the greatest number and sought to establish himself as the Newton of legal and moral world by establishing the principles of an experimental science governing that sphere.

Thus, as a jurist, he was indulged in providing a theory of law as well as a reformer in providing various aspects and the ultimate aim of law. This was made quite clear in his 'An Introduction to the Principles of Morals and Legislation' where he based his legal philosophy on utilitarian individualism. His individualism inspired his legislative efforts, directed towards the emancipation of the individual from many constitutional restrictions and inequities which impeded in England the free play of forces that was to give full scope to individual development. To him, utility is the tendency of a thing to prevent some evil (pain) or to procure some good (pleasure). The task of law is to serve the good and to avoid the evil. In doing so, the individual must be recognised as an end in himself and thus, the aim of law is the creation of conditions which make possible the maximum freedom of each individual so that he may pursue what is good for him. The law must serve the totality of individuals in a community and the ultimate end of legislation is the "greatest happiness of the greatest number".

On the contrary, Austin's most important contribution to legal theory was his substitution of the command of the sovereign for any ideal of justice in the definition of law. As pointed out by him, the science of jurisprudence is concerned with positive laws or with laws strictly so called without regard to their goodness or badness. As a positivist, he was an attacker against natural law conception like Bentham but, unlike his master, he sought to show that law really is opposed to any kind of moral which was of great importance to Bentham. Thus, Austin was never thoughtful of the purpose of law i.e. the realm of legal philosophy and this linked him with Hobbes instead of Hume and Bentham.

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1. Hume, David (1711-1776), Scottish Philosopher and historian.

Theory of Law : Their respective views

Both Bentham and Austin were positivist to whom positive law is the system of normative rules in the sense of the law of the State. To them, law is an aggregate of laws, and a law in its most comprehensive significance is a rule laid down for the guidance of an intelligent being by an intelligent being having power over him.

Bentham in his 'Of Laws in General' defined law as an assemblage of signs declarative of a volition either conceived or adopted by the sovereign in a State. It concerns the conduct to be observed in a certain case by a certain person or class of persons who are supposed to be subjects of sovereign's power. Similarly, Austin in his "The Province of Jurisprudence Determined" observed every law or rule as a command, or as a species of command. Thus, the key concept of both the theories are those of sovereignty and command representing imperative theory of law. But while their respective definitions of these concepts are clearly related, Bentham, as observed by Prof. Hart, expounded these ideas with far greater subtlety and flexibility than Austin. The salient features of Bentham's originality as opposed to Austin are as follows.

(a) Sovereignty—its elements

Austin's sovereign was postulated as an illimitable, indivisible entity. With regard to illimitability, his sovereign cannot be limited and cannot be under a duty since there is no other sovereign above him and he cannot command himself, Similarly, sovereign is indivisible as sovereign authority cannot vest in more than one body.

Both these characteristics of sovereignty have been criticised by the jurists and in this respect Bentham's concept of sovereignty is much more logical. There may be sound practical reasons for having an all powerful sovereign, but Bentham saw the distinction, though Austin did not, between social desirability and logical necessity, and could realise that from a conceptual standpoint there is no necessity for a sovereign to be undivided and unlimited. Hence Bentham's sovereign is any person or assemblage of persons to whose will a whole political community is to pay obedience in preference to the will of any other person. It is indefinite unless limited by express convention or by religion or political motivation. It may consist of more than one body and habitual obedience may thus be divided and partial. When divided in this way, the power of each is limited by the other and each has limited power to

prescribe for the other (rules of legal restrictions). The result is that, while the business of the ordinary sort of laws is to prescribe to the people what they shall do; the business of this transcendental law of legal restrictions is to prescribe to the sovereign what he or they shall do and thereby created a self-bindingness on the sovereign which has a legal quality. Thus Bentham's rules of legal restrictions are rules against absolutism limiting the unlimited power of Austin's sovereign.

(b) Command and Sanction

To Austin, law is the command of the sovereign and, therefore, the only aspect of law is the command. But for Bentham, command is not the whole range of law; it is the permutation of four aspects (Command, Prohibition, Non-prohibition and Non-command) which comprehend the whole range of law. The demonstrate this permutable relationship between these four aspects of the legislator's will, he developed the logic of imperatives and he can rightly claim to be the discoverer of this pattern of thought.

To Austin, command is a coercive order coupled with the power and purpose of inflicting an evil (sanction) in the event of disobedience. Duty and sanction are correlative terms, the fear of sanction supplying the motive of obedience. But Bentham understood that fear of sanction is not the sole or even the principal motive of obedience and in his theory, he was prepared to undertake a more detailed, and less crude, taxonomy of motivating forces. Thus, he thought that a sovereign's command would be law even if supported only by religious or moral sanctions. They may even be accompanied by rewards and, therefore, there is no need to resort to 'sanction by nullity' which was treated by Ausin as sanction in order to accommodate the rule : "you must make gratuitous promise under seal 'within his command-duty-sanction model".

(c) An enquiry into the structure of law

What chiefly differentiates Bentham from Austin is that he was a conscious innovator of new forms of enquiry into the structure of law. On the surface the definitions of Bentham and Austin appear to be similar, framed in terms of superiority and inferiority. But Austin's model was the criminal statute whereas Bentham anticipated the trend in modern analytical jurisprudence and took rational reconstruction wider than Austin's model and current usage disregarding the utility and desirability as the purposes of law. There the similarity ceases. The ultimate goal to Bentham was the creation of a structure within which law reform could take place and

he was prepared to fix meaning of the terms so as not to be restricted by contemporary patterns. Thus, in his definition of law as an expression of volition, he covered not only general laws made by the legislatures (supreme or subordinate) but also judicial, administrative and even domestic orders (e. g. order given by a parent to a child : reflecting moral right and duty). Declaratory laws are also within its ambit.

The reason why Bentham preferred this model is that a statute only contains a part of a law and frequently contains parts of different laws. This has been made clear when he classified law under eight heads[1], remedial appendages (under which sanctions themselves require a further set of subsidiary laws, addressed to judges with a view to curing evil, stopping evil or preventing future evil).

Last of all, it should be pointed out that Austin was only a jurist who depended on the purity of law, but Bentham was one of the most active and successful social reformers through the instrument of legislation and he devoted his life to the removal of the numerous inequalities which hampered the rising English democracy and to the survival from the age of feudalism and gentry. To him law was something more than pure theory and he was successful in linking philosophical premises with practical legal propositons. No wonder the edition of "Of Laws in General" (published only in 1970) has remarked with justification, "had it been published in his life time, obviously it would have dominated English jurisprudence".

Evaluation : Despite some criticisms directed against Bentham's hedonistic philosophy, his materialism, abstract and doctrinaire rationalism and other shortcomings[2] of his theory, which every theory is bound to have, his constructive thinking and zeal for legal reforms heralded a new era of legal reforms of England. Bentham was one of the most successful and active reformers through the instrument of legislation, which has become the most important method of law making in modern times. In the field of jurisprudence, his definition of law and analysis of legal terms inspired many jurists who improved upon it and laid down the formulations of new schools. As stated earlier Austin owes much to Bentham.

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1. They are ; (1) Source; (2) Subjects; (3) Objects; (4) Extent; (5) Aspects ; (6) Force of a law; (7) Expression; and (8) Remedial appendages.

2. For weaknesses and shortcomings of Bentham's theory, see Friedman's Legal Theory.

The problem of 'is' and 'ought' in the realm of Law

The nineteenth century was the age of positivism. The positive law is a general rule of conduct laid down by a political superior to a political inferior. Bentham and Austin, the two positivists with difference of opinion in some respects as pointed out earlier, saw the law 'as it is' distinguishing it from "what it ought to be" and separated positive law sharply from such social rules as those of custom and morality. They like to see the existing law without reference to its ideal future and the needs of the society. This view of the positivist thinkers gave rise to the problem of 'is' and 'ought' in the definition of law.

The most fundamental philosophical assumption of legal positivism is the separation, in principle of the law "as it is" and the law "as it ought to be". The jurisprudence implication of rigid separation between "is" and "ought" in the definition of law is that it gave rise to difference of opinion amongst the jurists with regard to the correct method of an approach to the study of jurisprudence.

The positivist view regarding separation between "is" and "ought" of the definitions of law states in a nutshell the fundamental philosophical assumption of a number of approaches which, in the early 19th century, decided to investigate existing law objectively leaving aside the misty speculation of natural law theorist.

One of the fundamental premises of these approaches, collectively known as positivism is that a theory of law must distinguish between law as it is actually laid down and the law as it ought to be and that it must consider the law as it is without considering the ideal future of law.

This approach to the study of law strictly based on philosophical distinction between "is" and "ought" opened a new path and particularly accounted for subsequent development of legal theories in many directions.

While considering the positivist approach to the study of law, we have to examine the particular premise of legal positivists, and the analogous questions to be dealt with in this connection are :

(1) Why such a distinction between "is" and 'ought'?

(2) Is it necessary at all for a study of law?

(3) Can these terms be really separated and how far can these be distinguished?

Answer to the above questions shall pose before us an important consideration as to the jurisprudential implications of such a rigid separation between 'is' and 'ought'. It is never denied by

the Legal Positivists that 'ought' does exist in the realm of law. What they insist is that it should not be the subject of a study of law proper. Though John Austin. Jeremy Bentham, Kelsen and their followers. who are generally known as Positivists, differ in many respects, they never compromise with any other view on the above point.

Though historically the rise of legal positivism may be traced back to Austin[1], the famous English jurist, who defines law as a 'command of the sovereign', Bentham, the famous English utilitarian philosopher, who was a man of great learning and varied interests and an ardent campaigner for legal reforms, can, according to Paton, really claim the title of the father of Analytical Jurisprudence. As a born critic of 'Judge-made law', he advocated 'legislation' as a source of law on a drastic scale. But, at the same time, he felt that the necessity of thorough study of the nature, purpose and scope of law must precede any attempt at legislation. The feeling which crept in his mind in course of his writing an Introduction to the Principles of Legislation led him to study the phenomena of law. His observations and analysis of law remained in manuscript form in the University College, London, for long and subsequently Professor Everest and Hart published two separate editions under different titles. Bentham, no doubt, has revolutionized law as expository i.e. the 'law is it is' and not as we should like it to be, but he was the advocate of the utilitarian theory of law. He separated morality from law but he expected revolutionary reformation of law.

Today society has been changed drastically from the position it obtained at the time of Austin. Complexity in the social environment is growing deeper and deeper. Class interest has been regarded as one of the main features for any development of law. Our wants are unlimited but the means are very limited. Therefore, for the development of the society or, rather say, for a better community, we have to adjust our legal system with the needs of the people. Dias says that it is neither desirable not possible to distinguish between 'is' and 'ought' in an unstable social environments. It is therefore, not desirable only to study 'what the law is' without considering the aim, effectiveness, development and suitable reformation ignoring the social and political conditions of a country.

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1. Austin's first book "The Province of Jurisprudence Determined" and posthumous publication of his "Lectures on Jurisprudence" discussed his premises.

In fact, there is a close relation between 'is' and 'ought' in the realm of law, and while considering the law as it is actually laid down one must examine its goodness or badness and its ideal future. Although lawyers are concerned with the validity and invalidity of the law as it exists and the judges are duty-bound to apply the existing law, but in the absence of a relevant law to be applied in a particular case and while interpreting the ambiguous statutory provision, the judges have to make law as it ought to be based on the principles of morality. Justice Sazzad Ahmed of Pakistan Supreme Court[1] observes that law must conform to the rules of morality; that a law cannot be regarded as a just law if it is opposed to morality, and that if such law is applied the decision will be morally wrong and open to criticism and dispute.

Thus, it has already been established that while examining the impact of the existing law in the society, the jurist should also consider the law as it 'ought to be' for the benefit of the society and for ends of real justice. Therefore, rigid separation in principle between law 'as it is' and the law as it 'ought to be' in the definition of law cannot be left uncriticized.

8. Kelsen's 'Pure Theory of Law' (Vienna School)

The 'Pure Theory of Law', which is also known as the 'Vienna School of Legal Thought, was propounded by Hans Kelsen[2], a professor in Vienna (Austria) University. It is also known as Normativism, because, according to Kelsen, law is a 'normative science', but law norms, which deal with legal theory of purely normatic character, is distinguished from natural science which deals with physical facts. Basically Kelsen's theory is skin to that of Austin in this that both point out the eoercive character of law and both are positivists, but Kelsen does not admit the command theory of Austin as it introduces a psychological element into the definition of law which Kelsen avoids. The main point of his theory is that it proceeds to free the law from the metaphysical mist with which it has been covered at all times by the speculations on justice or by the doctrine of jus naturale. He desires to create a pure science of law, stripped off all irrelevant materials and to separate jurisprudence from all social sciences. Therefore, his theory is called the "Pure Theory of Law".

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1. Malik Ghulam Jillani Vs. State of Pakistan. PLD 1972 SC 139.

2. Kelsen, a famous Austrian jurist, was the exponent of Vienna School of Jurisprudence first in 1911, which was in full bloom in post-war Europe.

Kelsen's theory of law also rejected the idea of natural law which had its footing in the continent till early 20th century though it was rejected in England as early as the 19th century which was the age of positivism. Secondly, Kelsen represents a reaction against the modern schools which have so far widened the boundaries of jurisprudence by including the topics of social sciences. Thirdly, the idea of 'Grundnorm', which may be said to be the foundation stone of the 'Pure Theory', and the definition of law as the 'hierarchy of norms', seem to be inspired by the idea and principle of a fundamental law reflected in the written constitution adopted by most of the countries in the continent after the first world war. At the turn of the 20th century, when positivism also began to lose ground to some of the more advanced schools like sociological, psychological, existential, etc. Kelsen in all sincerity responded to the new situation by his pure theory in a missionary zeal to rescue positivism from that apparent disaster posed by the fatal off-shoots.

Kelsen did not at all like the new proliferation of multiple variants within bourgeois jurisprudence. He says that in an utterly unscientific way jurisprudence has become a hotchpotch of biology, sociology and ethics. The result, according to him, was the need of a true science of law, which to him, is the knowledge of hierarchy of normative relations. This method of building the new science as Pure Theory or Normativism is initially and also admittedly based on Kant's theory of knowledge known as Neo-Kantianism which Kelsen extends to law also. In his attempt to build up the pure edifice Kelsen resorted to the famous "elimination principle", Like the positivist of the classical times he sharply counterpoised any trace of morality. So, he does not want to include in his theory what the law 'ought to be' and speaks of law as a structural analysis of the positive law, free of all ethical or political judgments of value. In this way 'pure theory' on the one hand, avoids any discussion of ethics or natural law, and, on the other hand, it reacts against the modern sociological approaches, which go to widen the boundaries of jurisprudence to a great extent. The result was a pure logical structure of law, based not on any material garbage, where legal norm could take any content, as he says. As already stated, his method is Neo-Kantian inasmuch as he extended the epistemological dualism, which Kant confined to his 'Theory of knowledge' and proposed for man—(1) man as an object of nature and (2) man as a willing being working through imperative— to the field of law as well. The difference between 'ought' and 'is' starts from here.

Grundnorm : One of the fundamental aspects of the 'Pure Theory' is the Grundnorm. According to Kelsen, every legal act relates to a norm, (an external source called 'ought norm' or 'sanction') which gives validity to it. But Kelsen differs from Austin about the conception of sanction, which, according to Austin, stands outside the rule of law, but Kelsen's 'sanction' is itself another norm not different in nature from the norm it supports. In this way every legal norm gains its force from the higher or more general norm which backs it. Thus, the sphere of jurisprudence, which is a study relating to law, is a study of the nature of this hierarchy of norms, the validity of each norm depending on its being laid down in accordance with a superior norm until we reach the initial hypothesis, called Grundnorm, which is the starting point at the apex in a legal system and which jurisprudence can only accept and cannot hope to prove. The initial hypothesis is abstract, but as we descend the ladder the norms gradually becomes more concrete until we reach the final norm which imposes and obligation on a particular individual, e. g. either by the judgment of a court or the order of an administrative officer, or making of a contract between two citizens. All these three operations, being lower norms, merely carry out a superior norm[1] e. g. constitution, or Act or contract as the case may be. Kelsen calls this process gradual concretization of Grundnorm. In every legal system there is always a grundnorm or the basic norm although its forms are different in different legal systems. For example, in Britain the Crown-in-Parliament is the grundnorm and in USA and our country it is the constitution.

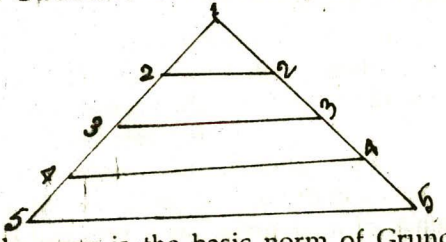
According to Kelsen, the law or a legal order is a system or legal norms, but "It is not a system of equal side by side norms. It is a hierarchy with different lawyers". The first question that arises here for consideration is "what constitutes the unity in diversity of legal norms" and secondly "whe does a particular legal norm belongs to a particular legal order". In fact, a multiplicity of legal norms constitutes the unity in diversity when the validity can be traced back to a final source of a single basic norm, which constitutes the unity in diversity of all norms which make up the system. That a legal norm belongs to a particular legal system can only be determined by tracing back its validity to the basic norm constituting the order i.e. the 'Grundnorm'. A norm is not legal by virtue of its content, because any content whatsoever may be 'legal'. A norm becomes a legal norm only when it is constituted in

1. G. W. Pator,. A textbook of jurisprudence. 4th edn., 17.

a particular fashion, e. g. law is valid only as a positive law i. e. statute or constituted law. The indvidual legal norms of a legal system are to be derived from the basic norm (grundnorm) By the rnethod of deduction as pointed out in the foregoing pages.

The existence of the 'Grundnorm' depends upon the minimum effectiveness principle i.e. it must secure for itself minimum effectiveness i.e. support of a certain number of persons who are willing to abide by it. When a grundnorm ceases to derive a minimum of support, it ceases to be the basis of legal order ond then any other proposition that does derive such support replaces the former. For example, in Russia, the will of the 'Tsar is no more the grundnorm for it has lost effectiveness, the grundnorm is now socialism. The above analysis brings to light a special peculiarity of the legal order—" law regulates its own growth and its own making". The formal pattern of the proposition that "the law is not a system of equal side by side norm, it is hierarchy with different layers" is roughly the following :

Pyramidal Structure of hierarchy of norms :



No. 1 at the apex is the basic norm of Grundnorm. Nos. 2-5 indicate different norms at different layers and have the process of gradual concretisation towards the lowest layer (No. 5) which is the most concrete norm or order.

The above pyramidal structure of hierarchy of norms and the process of concretisation can best be illustrated by an example. In Britain the Crown-in-Parliament is the 'Grundnorm' which can make and unmake any law i.e. it has effectiveness. From it follows other legal norms in layers. When a thief is convicted and imprisoned, such act of compulsion derives its validity from the judicial decision, which derives its validity from rules, regulating the competence of the court. Such competence derives its validity from the criminal substantive and procedural laws, which derive their validity from the Act of the Crown-in-Parliament. Thus, each norm derives its validity from a higher norm standing behind it and step by step reaches the 'Grundnorm'. It must always be remembered that where a legal norm does not work within the

framework prescribed by the higher norm, that becomes invalid. For example, where the Congress of USA passes a law inconsistent with the U. S. Constitution, that becomes unconstitutional and as such void (Murbury Vs. Madison). The same applies to administrative organs and action against their ultra vires activities in brought under the writ jurisdiction.

In conclusion, it may be stated that Kelsen's pure theory is based on monism and it rejects dualism. If a legal order is considered as a system of side by side norms, that leads to dualism where two norms may stand on equal footings and come into clash with each other. Moreover, there may exist two conflicting Grundnorms if such dualism is allowed. But since a legal order is a unity in diversity of a single Grundnorm, all other legal norms must stand as a hierarchy— each higher norm giving validity to its subordinate lower norm.

Implications of the 'Pure Theory'

The implication of Kelsen's theory are wide and many covering concepts of State, sovereignty, private and public law, legal personality, right and duty and international law.

According to Kelsen, State and law are the same and the difference between them appears when we look at them from two different points. The State can be discovered only in a legal system regulating the social behaviour in a normative order. He denies the existence of State as an entity distinct from law. In the same way he denies the existence of a sovereign as a personal entity. When all derive their power and validity from the 'Grundnorm', there can be no superior person as sovereign.

Similarly, when all law derives its force from the same 'Grundnorm', there is no difference between public and private law as the two entirely different characters cannot be attributed to it. On the same principles Kelsen does not admit any legal difference between physical and juristic persons as legal personality is artificial deriving its validity from superior norms and legal order confers personality and rights as well as imposes duties. These conclusions are akin to those of sociological jurists.

Kelsen's conception of law as a system of normative relations leads to the conclusion that there is no such things as individual right in law; that the concept of right is not basically essential for a legal system, rather duties are the essence of law; and that in criminal law the idea of individual right has ceased and it may disappear from contract also. The implications of these propositions are that there can be no inalienable rights of the individual as

modern theories have established.[1] So far as the 'Grundnorm' of International law is concerned, Kelsen says that the International law should also be regarded as 'juridical order'. He postulates primacy of International law over municipal law on the ground of 'pacta sunt servenda' i. e. treaty must be obeyed.

Criticism

With regard to Kelsen's 'Pure Theory of Law', a question arises for consideration as to whether his pure theory is possible, desirable and practicable. The first point in Kelsen's theory which is greatly criticised is his concept of 'Grundnorm', which appears to be the crux of the whole matter, for everything depended on it and followed from it. Though Kelsen has given its characteristic as 'minimum effectiveness', it is vague, confusing and difficult to trace it out in every legal system. In tracing the 'Grundnorm' by applying the test of minimum effectiveness, one will have to took into political and social facts, which will cause adulteration in the 'Pure Theory'. Here Kelsen cannot keep his science of law pure for the initial premises for any legal order can be discovered only by a study of the facts in the particular community. The point is that Kelsen's method does not even give us a picture of law, for jurisprudence must go beyond the formal hierarchy of norms to study the social forces that create law[2]. So, the 'Grundnorm' cannot be kept pure, because in reality social and political power of the organised community determines the grundnorm, which is really very impure activity and purity of the theory ceases here. Therefore, Kelsen's 'Pure Theory' does not appear to be so pure, because its effectiveness is really based on sociological factors which he vehemently ousted from his pure theory.

According to Kelsen, the highest norm (Grundnorm) of a country is the 'Sovereign', which being a political term. cannot be found without looking at the political condition of that country. Here purity of his theory ceases. Again hierarchical arrangement of norms from abstract to concrete norms downward from the initial hypothesis at the apex is not effective in case of revolution. So, the Grundnorm theory does not apply in a revolutionary situation, e. g. in Dosso's case[3] in 1958 Pakistan Supreme Court conferred legality on the Martial Law of Ayub Khan calling it a 'victorious' revolution' relying on Kelsen's positivist theory of efficacy, but the same

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1. Dr. B. N. M. Tripthi, Jurisprudence (Legal Theory), 11th edn, 50.
2. Paton, ibid, p.18.
3. State Vs. Dosso, PLD 1958 S. C. 533 per Munir C. J.

Supreme Court overruled Dosso's case holding the Martial Law of Yahya Khan in 1969 as illegal under changed circumstances in Asma Jilani's case[1] in 1972 for nonfulment of the requirement of the doctrine of necessit".

Sociological jurists criticise Kelsen's theory on the ground that it lacks practical significance, Kelsen ousted all factors like natural law, history, sociology, etc. but does not deny custom, which in practice has become a source of law and it is based on natural law theory. Therefore, if custom is a source of law, then the 'Pure Theory' looses its purity. A more potent and substantial criticism is put forward against Kelsen's views of International law. His comparison of International law with primitive law is artificial and no juristic conclusion can be based upon it. In his effort to establish primacy of International law Kelsen applies the pure theory on it also, but it gives a ridiculous result as thereby he presents a picture International law as that it ought to be instead of what it is.

Nowadays, it is neither desirable nor practicable only to study the law as it is. The aim, effectiveness, development and reformation of law must be considered. What is obtained from the pure theory is not a theory of legal development, but simply the formal principle of juristic thought. To exclude the whole of sociology and ethics, leaves jurisprudence but a mental exercise in abstract notion which is less important in practical utility.

From the above discussion, it is evident that 'Grundnorm'—a hypothetical proposition or, as Kelsen later modified, a symbol or fiction—which is generally taken to task by critics[2], appears to be the weakest point of the whole Kelsenian system.

Public Law and Private Law

Since the work of Dicey[3], the division of private and public law is familiar to us. The division of law into public and private springs out of the Roman law distinction between jus privatium and jus publicum as the most fundamental division of corpus juris. Public law comprises the rules which specially relate to the structure, powers, rights and activities of the State. Private law includes all the residue of legal principles and it comprises all those rules which specially concern the subjects or citizens of the state in their relation

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1. Asma Jilani Vs. Govt. of Punjab, PLD 1972 S. C. 139 per Hamoodur Rahman C. J.

2. Pashukanis, a leading exponent of Marxist Jurisprudence, criticises Kelsen and remarked that such a theory can be called a theory in the sense that the theory of chess can be called a theory.

3. Dicey, A. V. "Conflict of Laws", 1st edn. 1898, 7th edn. 1958.

to each other, together with those rules which are common to the state and its subjects. This traditional division is based on two-fold arguments from which the distinction between the two are deducible : (1) That obligations in public law arise from a unilateral command, but obligations in private law arises from mutual agreement. Thus, in private law, an individual may co-operate in the law-making process, e. g. by signing a contract, but in public law he may be bound by a norm in the creation of which he plays no part ; (2) That in case of public law the organs from which the order is passed can also enforce it, whereas a sanction in private obligations is provided by the state which stands above the parties. However, where the duties are of private concern, the choice of remedies are left to individuals to pursue in the event of their breach. But even in private law a duty may be imposed against a person's will, e. g. in quasi-contract.

While drawing a distinction between public law and private law, it has been suggested by the modern jurist that the distinction is practically useless. The underlying ideas may be developed further in the following manner.

Public Law is that branch of law which deals with the rights and obligations existing between the State and the subjects. Thus the Constitutional Law, the Penal Code, the Criminal Procedure Code, the Landlaws, Fiscal Law and the Revenue Law are the public laws. These laws, however, are enforced by the state although the state is a party to an action. Criminal laws are vindictive providing for the punishment of those who disobey or flout the laws of the country and thus affect the good government in the state.

Private law, on the other hand, is that branch of law which deals with the rights and obligations between the objects and the citizens. These laws are enforced by the state which, however, is not a party to any dispute or grievance. The Code of Civil Procedure, The Trust Act, the Wakf Act, the Majority Act and thousands of other Acts in every country comprise the private law of the country.

In public law one of the parties to the rights and obligations created by law is the state whether legislative, executive and judicial, which controls the method of the operation of each. It also includes the rules which govern the relation of private individuals with administrative authorities of the state. In private law both the parties are private individuals and the concern of the private law is the relation of private individuals amongst themselves. In private law, however, the state comes between the individuals as an

arbiter, while in public law, the state is not only the arbiter but also a party interested therein as it regulates the relation between the state and its subjects. These distinctions are mainly based on the practical test applied by Holland.

Austin thought that the main feature of private law was the peculiarity of one of the persons to the relationship, and hence it was most conveniently treated under that branch of the law which deals with the diversities or the variations in the legal capacity of persons and the law relating thereto.

Kelsen, however, holds that both the public and the private laws are merely the individualisation of the general norm and they originate from the same Grundnorm and as such there should not be any distinction between public and private law. The ultimate effect of law, as he considered, was to impose constraint on the individuals, and accordingly an obligation might be imposed either by the order of the administration, by the passing of a statute, the judgment of a court, or the completion or execution of a contract. The power to make a contract will depend on the Civil Codes and the power of a judge to sentence a criminal depends on the Criminal Codes, or any administrative Act or Statute. All these methods of creating obligations represent law-making within the limits prescribed by a superior norm. We can, therefore, easily perceive that the only distinction between the public and private laws is that, in the latter an individual may co-operate in the process of law-making, but in the public law, he is bound by a norm, in the making of which he takes no part.

The real crux of the matter is whether we should regard a private individual making a contract as sharing in the law-making powers given by the legal order. It is true that the judge may have a limited power of creation of law i. e. power of law-making, which is known as the 'judge-made law' and it is difficult to define precisely the distinction between legislation and the judicial process necessary to put them in motion or action. But the distinction is of practical importance in most of the systems of law. Jurisprudence, however, distinguishes between the law and the rights and duties created under the law. It is, therefore more reasonable to admit the importance of the peculiar character of the state by recognising a fundamental division between public and private laws.

The distinction, however, has not been clearly maked or well-defined, although there are distinct definitions for both the branches of law. Public law itself is too feeble and shapeless unless and until the state, which is due to enforce it, assumes a stable and strong

form. There was much confusion between the private laws during the days of Feudalism in the mediacval England. Because in those days, it was not possible to draw clearly the line of division between the public and private capacities of the king under absolute monarchy. The democratic rights and obligations had not yet taken any shape and the king for all practical purpose was regarded as the owner of the whole country and holding full and unfettered jurisdiction and authorities over all his subjects, and even the kingship was looked upon as property in some form or other, so that, in those days, the public laws might be regarded as a 'mere appendix' to the law of real property, inasmuch as the feudal ideals were realised.

Holland applies a very simple and practical test. If one of the parties to the rights and obligations created under any law would happen to be the state itself, the law is a public law. In the days of Laissez-faire such a creation of rights and obligations would not give a great scope to the public law. But with the entry of the state in the business world today, the sphere of the private law is getting reduced or diminished. In a community where the idea of the state socialism was realised, public law would cover all the instruments of production. The test of public or private policy depends on a concept of public interest, yet much of it belong to the private law.

Public law, according to Salmond, is not whole of the law applicable to the state in its relation with the subjects but only those parts of it which are different from the private law, concerning the subjects of the state, and their relations to one another. Private law, therefore, is the residue of the law, after we subtract the public law from the sum total.

The growing importance of the public law, however, is one of the marked features of the present age. G. W. Paton expressed that "Even it is impossible and misleading today to study the property norm in isolation from public law."

Moreover, private law precedes public law in the order of exposition. The latter pre-supposes knowledge of the former. This is evident from the fact that in many actions and relation, the state stands on the same level as its subjects and subjects itself to the ordinary principle of private law. It owns lands, makes contracts, employs servants and agents, enters into various forms of commercial understanding and in all these matters it differs little in its juridical position from its own subjects.

From the above discussions it appears that the suggestion that the distinction between public and private law is practically useless,

cannot be accepted as a whole truth. Despite the growing importance of the public law in modern times, the existence of the private law as the residue, after subtracting the public law from the sum total, cannot be completely overruled.

Now, as to the question whether there are some aspects or areas which do not belong to either of these divisions, there is an aspect or area of law which does not belong to either of the divisions. That is the International law. Both public and private law are enacted by the legislature, but International law is not created by any legislature. There is a sanction behind the public and private law, but there is no similar type of sanction in case of international law. *Pacta Sunt Servanda* (i. e. Treaty must be obeyed) serves the purpose of sanction behind International law, which is created by treaty, protocol, conference, etc. The ratifying States are bound to abide by the provisions of International Treaty or deed. In case of public and private law an individual can be a party to a litigation, but in International law an individual cannot be a party to any litigation. In this aspect, International law does not belong to either of the divisions.

Kelsen, however, desires to show that there is no great gulf between public and private law as the foundation both of private and public law lies in the legal order itself; that the law of a legal system is a hierarchy of norms and the norm at the apex is fundamental and not deducible i. e. 'Grundnorm'; and that both public and private law originate from the same 'Grundnorm'. So, there should not be any distinction between public law and private law.

9. The Historical School

By 'Historical School' is meant the school of legal thought (about the sources of law) of which Savigny[1], is considered to be the exponent. His theory came in the 19th century as a powerful reaction against 18th century 'rationalism' and principle of 'natural law'. According to Savigny, law is valid because it is the inner sense of right of the people. Therefore, according to this school, people's inner sense of right is the source of law. The organic evolution of law with the life and character of people develops with the ages, and in this it resembles language. 'Law evolved as did

1. Von Savigny was a teacher in the University of Berlin, Germany, and is considered by many to be the greatest jurist of 19th century. Ihering said that with the appearance of Savigny's work in 1803 modern jurisprudence was born.

language by a slow process, and, just as a language is a peculiar product of a community so is the law'[1]

The name 'Historical School' seems to be deceptive, because in jurisprudence it is applied to that trend of legal opinion which originated, as stated earlier, in a reaction to natural law ideology and which believes customary law to be the sole source of law. According to Savigny, a nation's true laws are to be found in its customary law, in the traditions, conventions and usages. The famous term used by Savigny is 'volksgeist' or the spirit or genius of the people, which will be discussed in detail in the succeeding pages. This school stands in diehard opposition to legislation and does not bother for consciousness of the people. It also lightens the contribution or role of judges in the development of legal system.

Historically speaking the historical school arose around controversy in Germany about the necessity of legislation after the Napoleonic was and at the heat of the reactionary feudal aristocracy. Savigny successfully advocated the cause to custom and tradition as against legislation as the mode of law-making. Though apparently it was a storm in the tea-cup of merely formal criteria, actually it secreted the underlying philosophical antagonism arising out of social class differences.

Volksgeist

The term 'Volksgeist' comprises two parts—'Volks' meaning the 'people' and 'geist' meaning the spirit. Therefore, 'Volksgeist' means the spirit of the people. It is the will of the state and law of the people who comprise the state. This concept was imported by Savigny, a jurist and exponent of the historical school. According to him, in every society there exist a volksgeist which ultimately creates and shapes the law and as such it is a source of law. To him, law evolves from custom, usage and conscience of the people and gradually grows like a language. It is confined only in a particular nation and not applicable to other states or societies. In Savigny's own words "law grows with the growth and strengthens with the strength of the people and finally dies away as a nation looses its nationality". So law is made by practice and cannot be created at a given time by any legislative body. To sum up his views, from the earliest time to which the authentic history relates, law is found to have already attained its shape by custom and popular faith. Laws are present in the society through ages and what binds them into

1. Paton, ibid, p. 19.

one whole is the common conviction of the people. This excludes any change of accidental or arbitrary law-making process.

In ordinary language, the law is first developed by custom and good faith, then by jurisprudence and at the last stage by legislation (if needed). It is, therefore, clear that legislation is not the original source of law but actually it is the volksgeist which is the origin of law, and as such the spirit of the people (Volksgeist)—what people thought and did for themselves from time immemorial—should be the content of law.

The emphasis on the spirit of the people was supported by the prevalent romantic concept of folk culture and folk adoration. This eternal and unique character of a nation's spirit did not permit the imposition of any legal system from above, which made it impossible for the protagonists of legal reforms to get any chance, Sovigny's chief defence argument was that there are stages of growth to which Germany till then did not reach. His influence was great and, as a matter of historical fact, effective legislation had been prevented in Germany uptill and late as 1894 when the civil code was adopted. Savigny's view that law is closely connected with people and closely evolves contained the germs of future sociological theories for which he is called by some as Darwinian before Darwin and sociologist before sociologists.[1]

Apart from Savigny and his predecessor Hugo in whose writing the idea was actually articulated first, his followers like Puchta, Ihering and Gierke also improved upon his theory and has made it more logical. England also had its own genius in Edmund Burke of historical school emphasising immemorial custom. English were a more advanced nation and they were not as dogged as the Germans.

Sir Henry Maine, a great English jurist, made valuable contribution to legal philosophy by way of historic comparative method. He made a comparative study of legal institutions of various communities and laid down a theory of evolution of law[2]. His method of study was a great improvement upon historical school and yielded fruitful result. On the one hand, differing from Savigny, Maine recognised legislation as a potent source of law, and on the other hand, he avoided the excesses of the 'philosophical' or the 'metaphysical' school (but Friedman[3] calls it 'philosophical

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1. Dr. B. N. M. Tripthi, ibid p. 24.

2. Ancient Law' 'Village' Community, 'Early History of Institutions', are Maine's important contributions.

3. Prof. Friedman, "Legal History".

historicism') of Germany which was developed by Schelling, Hegel, Kuhler, Spengler and others. Maine's Ancient Law was published in 1861, the year Savigny died. His arguments were more closely lined up with the scientific development of ethnology and anthropology. He was more in resonance with Darwin and anticipated Morgan. His main import was in the scientific development of society from the state of 'status'[1] to that of contract. So, to him customary law was important but only historically as earlier source of law and other factors like economics, geography and technical factors were equal contributors to the common fund of law.

The later English historians developed Maine's scheme better. Pollock, Maitland and Vinogradoff gave it more scientific characters thereby reducing the question as to what extent customary law remains the sources of law. Historically, custom, precedent and legislation are among the better known sources of laws. They refer to forms corresponding to the respective stages of historical development of respective societies. To raise any one ot them to an immutable level and base everything elso on that is utterly unscientific and dogmatic. But at least in one more sense, as Friedman notes, historicism is applied, but this has nothing to do with the reactionary school of 19th century Germany. This is termed by Friedman as "Philosophical Historical" to which Vico, Montesquieu, Hegel, Kohen, Splengler, all contributed. They developed philosophies of law from philosophies of history. Subsequently Marxism used historical method to the extent that it is also called historical materialism which has nothing to do with historical school of law as such Historicism is not the prerogative of the historical school of law. It should better have been called customary school of law.

10. The Sociology of Law and Sociological Jurisprudence

The growth of the literature styled "the sociology of law" or "Sociological Jurisprudence" is comparatively modern, and its distinguishing features are not easy to determine. The term "sociology" was invented at the beginning of the nineteenth century by the French Philosopher Auguste Comte as a generic name for the social sciences, such as, economics and anthropology. Sociology is, in brief, the study of man in society. The emphasis of the study is on society and law as a mere manifestation, whereas

1. Status' means right of member of a family or community depending on his belonging to a particular group.

Pound rather concentrates on law and considers society in relation to it.[1] It is a science which investigates the laws by which politically organised societies came into existence and the various social groups are related to each other. In fact, law regulates the life of the society and, as such, law and life of the society cannot be isolated.

Law is. however, concerned with the external conduct of man who is, above all, a social animal. So, law cannot shut its eyes to the principles of social organisation. It may be mentioned here that in the recent times attempts are being made to explain law as a social institution and to interpret legal rules in terms of social advantages and disadvantages. The province of society is, of course, larger than that of jurisprudence. Jurisprudence is undoubtedly a social science but the field of its inquiry is confined to only those social relations of men which are generally recognised as having legal consequences.

Jurisprudence also differs from sociology in this that the former is a science of law and deals with the abstract fundamental principles of law and that the fields of its investigation is, as already stated, confined to the consideration of those social relations which are generally recognised as having legal consequences. Sociology, on the other hand, attempts to investigate the laws by which societies and the various social groups are related to each other irrespective of having any legal consequence. So the province of 'sociology', which means study of man in the society from its different aspects of which law is only one, is naturally wider than that of jurisprudence".

The purpose of sociological school is to carry on a comparative study of legal system, legal doctrines and legal institutions as social phenomena and to criticise them with respect to their relation to social condition and social progress. It is a characteristics of this school to look more to the working of the law than to its abstract principles. It lays emphasis on the social objects and studies the effect of law upon the society in regulating its life rather than upon sanctions by which they are sought to be enforced. But school of jurisprudence is yet to attain maturity and receive universal recognition of the society.

Scope and purpose of Sociological Jurisprudence :— Among the phenomena and subjects which a sociologist is expected to study one is the law, but he looks at it from a different way as a lawyer would do. The lawyer in his professional capacity is concerned with the rules that men are expected to observe. He is concerned with the

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1. Dean Roscoe Pound, "Sociology of Law and Sociological Jurisprudence

rules as such. For example, the lawyer is only interested with the rules and the breaches of such rules. In other words, the lawyer is mostly concerned with the law as it is, while the sociologists think of its effect upon society, to what extent it is being observed and to what extent it is not and the effect upon the society caused by such non-observance and so on. The fundamental tenet of this school is that we cannot understand what a thing is unless we study what it does.

The lawyer is generally not much concerned to know whether and to what extent these rules actually govern the behaviour of ordinary citizens except when he takes part in some action or prosecution. A textbook of the law of Tort or Contract, for instance, states the rules relating to Torts and Contracts, but does not state how often torts and breaches of contracts are committed.

Whereas the lawyer is concerned with what legally ought to be the behaviour, the sociologist is concerned with what is actually the behaviour of man. When the sociologist turns his attention to law he is concerned with it as a social phenomenon. He is much more interested in actual behaviour than in views as to desirable behaviour, and thus his chief concern is not with the rules themselves but with the extent to which they are observed, the causes of non-observance, the extent to which the rules fulfil their purpose and the human consequences of the working of the legal machinery. This is the way in which the sociologist looks at the subject of law and this type of study is styled as "Sociology of Law" of "Legal Sociology". In fact a number of valuable monographs exist upon particular branches of it : Examples are "The Modern Corporation and Private Property" (U. S. A. 1932) by Barle and means; "The Economics of Inheritance" (1929) by Wedg=Wood; "Old Age Pensions" (1941) by Sir Wilson and Mackey and a number of works on divorce, alcoholism, drugs and imprisonment for debt as well as innumerable reports of royal commission, parliamentary committees and other bodies on the working of legal rules preparatory to reforms.

The most important branch of legal sociology is criminology or penology, the study of punishment in relation to crime. It studies the causes of the crime, the behaviour of criminals, and the effects of different kinds of punishments upon criminals, particularly their effect in diminishing or increasing crime. Until recently Judges and Legislatures had to gauge the effect of punishment. Now exact data are becoming available through the efforts of Criminologists who use scientific method (case work and statistics) of determine the

actual effect of punishment upon the incidence of crime in the community as well as the effect of other methods of dealing with crime. Work of this kind is obviously of the first importance for law refoming which should be based upon an exact knowledge as to how the existing law is working. Every law reformer is necessarily interested in the sociology of law.

But the general work on the sociology of law, for example,—Dean Pound's article "The Scope and Purpose of Sociological Jurisprudence" and Dr. Timasheffs "Introduction to the Sociology of Law" (1939), do not take one very far. They are largely a review of previous literature or chiefly a somewhat over-refined classification of types of law and society. The conclusion would seem to be that time is not yet ripe for general works on the sociology of law; what we need are factual works on the various branches of it. The study is not one for which the training of a lawyer is an adequate preparation, for, the research worker must also have, at the least, a knowledge of statistics.

Some writers take "Legal Sociology" to mean the study of the influences that shape the law, such as, economic conditions and moral ideas. But a study of this would better be called Historical Jurisprudence or Ethical Jurisprudence or the science of legislation. The best representative of this type of writing is "Interpretation of Legal History" by Dean Roscoe Pound, who is usually credited as being the American leader in the school of Sociological Jurisprudence.

Social Engineering—Social engineering is a method of social science which the sociological school of jurists want to use. According to Roscoe Pound, the American leader of the sociological school of jurists,[1] law evolves from time immemorial and changes gradually according to the needs of the society and this method of social science is called social engineering by which Pound means a balance between the competing interests in society. He said that to establish rule of law, first of all, we have to protect some interests—public, private and social; and for this purpose a list of such interests should be made and in doing so, a fact finding programme must be undertaken to collect information and data of the social needs and changes. Thereafter the law-making agencies would make law on the basis of these informations.

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1. Other jurists are : Herbert Spencer, Duguit, Gireke, Ihering, Ehrlich etc.

The sociological school thinks that source of law is not the command of the sovereign as Austin believes nor the 'Grundnorm' according to Kelsen, but it is the demand of the society itself and as such needs of the society is the source of law. According to this school, the task of law is to balance the conflicting interests, and for that purpose, the method which they use is to find out the needs and desire of the society through a data process in order to make law on that basis so that personal interest, family interests and group interest are satisfied by the law. The collection of data can only determine the contents of law. Thus if it is proved through data that much of the hijacking or highway robbery are due to the unemployment, then law is to be made providing unemployment allowances for those jobless youths who commit such offences. So this data supplies the contents of .law of the unemployment allowance.

In fine, it many be added that Pound's 'sociological jurisprudence', as distinguished from 'sociology of law', naturally creates confusion caused by the similarity of these terms, which is an added ground for preferring the name 'functional school' as the best description of the work of Pound.

11. The Functional School

The Functional School is really another name of sociological school which considers society in action or law in action as a source of law. Dean Roscoe Pound is usually credited as being the American leader in the sociological school of jurisprudence, as pointed out earlier, but it is unfortunate that the term 'sociological' was never used in this connection—to speak of the functional method would have been more accurate and less confusing.[1] The fundamental tenet of this school is that we do not and cannot understand a system unless we see a system in its functioning. Pound says "we cannot understand what a thing is unless we study what it does". A system is as good as it functions, or stated otherwise, from the functional effectivity of a system it can be deduced. In this sense, the source of law is the functioning institution. The judges are, therefore, accredited as primary role in the scheme of sources of law. To this school functionalism is an attribute of institutions, e. g. courts, police, Bar etc. including the executive organ of the state, which really make substantive law. As the most notable representative of this school as well as of the historical school, Dean Pound remarks that 'social engineering' is

1. Paton, op. cit, p. 22.

the aim of law. So, it recognizes diverse forms of sources of law not excluding legislation.

The functional school sees law within society. So, society as a whole is important as a source of law. Law cannot be understood unless viewed in actual operation i.e. in actual social setting. Law in action may be very different from the law in book. So, emphasis is more on the real source rather than formal source. Again, law itself is a social phenomenon counteracting in the society. This school is generally known as also skeptics, rule-skeptics and fact skeptics, the difference being in relation to the court of appeal and the court of trial.

The functional school is also the product of developed capitalist society where law-making procedure becomes absolutely sophisticated. After legislation it emphasises judicial rule-making at a much higher rate. Dean Pound is blessed by Paton as the father of the Functional School. Pound is of the opinion that the society has been changed largely and has become complicated and, therefore, we have to ensure our satisfaction with the minimum of friction. In this regard social milieu should be discussed and laws should be made for fulfilment of the social ends. Functional school studies the laws which govern the people and also the way in which law is administered by the judges.

Functional and Historical School : Comparison

It is very unfortunate that the names 'historical' and 'functional' are used in Jurisprudence in a most arbitrary way as to identify the distinct trends of legal philosophy, for neither the 'historical' nor the 'functional' school really rest on their respective nomenclature; However, the similarities and dissimilarities between the two may be pointed out as follows :

Both the schools preach in their study the development of the society and its environments.

Both the schools do not regard the State as the source of law. But when functional school emphasises that certain criteria are the sources of law as administered by the judges, the historical school expresses the views that the inner sense of right of the people as expressed in custom is the source of law. But it may be observed that the question regarding the validity of law is closely tied with the sources of law. Today legislation is regarded as the main source of law. The judges to make law by their interpretation of the ambiguous provision of law and by their remarkable decisions, the *ratio decidendi*, called precedent, but the custom, is regarded as the

source of law only when it is validated by the authority, say, the court or the parliament.

According to the historical school, it seems law is not the development of man's conscious effort whereas the functional school enunciated by Pound advocates for making law consciously to secure satisfaction of the maximum wants with minimum friction. Pound's view may be correct but it cannot be said that the early stage of law has grown in the way Pound wishes. In fact, law is made to meet the wants and needs of the dominating class of the community, remarks Laski.

Regarding the source of law, functional school largely depends on the performance of the courts whereas the historical school lightens the function of the judges. However, we are of the opinion that though the judges generally declares what the law is they also make laws by way of interpretation of the ambiguous and uncertain provisions lf law.

12. The Realist School

The realist school is better known as the 'left wing of the functional school', which is really another name of sociological school, as pointed out earlier. But it differs from the sociological school in this that it is little concerned with the ends of law. It rather concentrates on a scientific observation of law in its making and working and studies law as it is in actual working and its effects. The jurists[1] of this school avoid any dogmatic formulation of law and concentrate on the decision given by law courts, based not only on formal law but also on the 'human factor'. They laid greater emphasis on the non-legal factors in decisions.

According to Salmond, legal realism means law as the practice of the court, and theories of legal realism too, like positivism, look on law as the expression of the will of the State, but see this as made through the medium of the court.[2] Like Austin, the realist looks on law as the command of the sovereign but his sovereign is not parliament but judges; for the realist the sovereign is the court. Accordingly, he defined law as the body of principles recognised and applied by the State in the administration of justice, as the rules recognised and acted on by courts of justice.

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1. E. g. Gray, "Nature and Sources" 2nd ed; O. W. Homes, The Path of the Law (1897); Llewellyn, The Bramble Bush, 2nd ed; Jerome Frank, Law and the Modern End and many other American realists.

2. Salmond, op. cit. p. 35.

According to Llewellyn, realism means a movement in thought and work about law. He takes law as a means to social ends and, since society changes faster than law, it is the duty of the jurists to examine how law meets contemporary social problems. Realism assumes a temporary separation between 'is' and 'ought' for the purpose of study which means that ethical purpose of law is ignored and put aside. According to Friedman.[1] realism insists on the evolution of any part of law in terms of its effect and worth-whileness of trying to find these effects. Some Swedish jurists, namely Hagerstrom and Llivercrona, are also associated with this movement.

In short, the realist movement lays great emphasis on the social effects of law and puts special attention on legal decisions. Therefore, essentially it is a part of sociological approach and rather complementary to it, but the realists differ in this that they lay great emphasis on some aspects of it. Their main concentration on litigation cannot be justified as there is a great part of law which never comes before the courts. The approach of American jurists is based on their own local judicial setting and does not give a universal method. Although the realist approach is criticised on many grounds the realist movement has made some very valuable contribution to jurisprudence. The jurists of this school says that society moves faster than law and 'certainty of law' is a myth. Frank[2] rightly observes that it has contributed in parts to the liberation of judges from enslavement by unduly rigid legal concepts and gave them liberty to ground their reasoning on human rule premises. According to Friedman,[3] it is an attempt to rationalise and modernize the law—both for administration of justice and for legislative change. Allen[4] observes that the Realist School appears as another avatar of the sociological jurisprudence. Julius Stone also thinks that the realist movement in a 'gloss' on the sociological approach. What is needed is that this approach should take a more balanced view so that it can be of great help in studying the legal problems. The recent realist writings are, however, moderate and they have started recognising the importance of principles and rules.[5]

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1. Friedman. W. Legal Theory, (3rd ed.) p. 200.
2. Law and the Modem Mind.
3. Legal Theory.
4. Law in the Making.
5. B. N. M. Tripthi, op. cit, p. 47.

13. English and Foreign Jurisprudence

If an English lawyer without any knowledge of the terminology of Roman Law, ventures into the region of continental legal philosophy i.e. if he comes to the study of a practical law book of France or Germany, he finds himself on ground wholly unfamiliar as if a stranger in a strange land where men speak to him in a unknown tongue. Following are the reasons for this divergence or difference between the juristic thought and literature of England and that of the continental jurisprudence.

(1) The English Jurisprudence is generally analytical and historical, while the continental Jurisprudence is ethical and metaphysical.

(2) In English language the term "law" means only law and nothing else; but in continental languages it appears to be ambiguous and means not only law but also right and justice. Hence, in continental jurisprudence there is no distinction between law, right and justice. But the English Jurisprudence maintains this distinction.

(3) Another distinction between English and foreign usages is that the use of the term "jurisprudence" to denote theoretical or general jurisprudence is a peculiarity of English nomenclature. In German literature, jurisprudence includes the whole of legal knowledge and is not used in this specific or limited significance.

Dean Roscoe Pound has attributed the difference of approach not only to this finguistic difference but to the absence of University teaching of Anglo-American law in the continental countries.

14. Muslim, Hindu and Western Jurisprudence

Sharia and Islamic Law

Of all the divine religions sent down on the mortal earth by the Almighty Allah, Islam came down as the last religion. This religion, revealed to the Holy Prophet Hazrat Muhammad (Sm.), has set down a model code of conduct, which is embodied in the SHARIA or SHAR.

Sharia means divine law, which is contained in the Holy Quran; which was revealed to Allah's chosen messenger Hazrat Muhammad (Sm.) over a period of 23 year from the year of the receipt of Nabuyat in 610 A.D. to his sad demise in 632 A.D. It consists of 30 Paras, each consisting of everal Suras (114 Suras in total), each on different topics, and 6666 Ayats or verses. Of these 600 verses deal with legislation, morality and about 80 specifically with law. This number is considered by the jurists in Islam to be adequate for the purpose.

The concept of Sharia occupies the central position in Islamic jurisprudence. Sharia is the central core of Islamic law i.e. the totality of Allahs' commandments. Sharia is indeed the epitome, the kernel or core of Islamic law itself. It is around the Sharia that the entire Muslim jurisprudence revolves. It lays down the code of conduct for the Muslims all over the world. It is mostly concerned with the private life of the Muslim which, it scems, becomes the totality of all the lives in the Muslim umma. The fundamental sources of Islamic law rests on these verses of the Holy Quran which says : "Obey Allah and His Prophet".[1]

By Allah we understand His di vine and revealed book the Holy Quran, and by Prophet we mean, the SUNNA, the traditions, precepts, sayings and actions of the Prophet inspired by divine power. Thus Quran and Sunna are the sources of Islamic law. A Muslim is under obligation to observe and obey Sharia law, failing which he falls into a stage of sin for which wrath of God will fall upon him and he will be punished thereafter. On the other hand, if one does not obey the dictates of the Sharia as regards his conduct in this world, he will be punished both in this world as well as the hereafter. This is the main sanction of the Sharia.

As regards historical development of Sharia, we begin with the pre-Islamic customs and usages, Hazrat Muhammad (Sm.) came down in this earth not to enact law but to lay a code of conduct to be followed by the followers and which, if automatically followed, will lead to establishment of just and equitable society.

During the period of Revelation there was no discord or dissension about Sharia. It was regarded as the Divine Revelation from Allah through His messenger archangel Gebrail to Hazrat Muhammad (Sm.). After demise of the Prophet came the state of collection and assimilation. The Prophet was succeeded by the Caliphs whose main task was compilation of the Sharia Law. Not long after the Prophet's death his successor Abu Bakr, the first Caliph of Islam, asked the former head scribe. Zaid Ibn Thabit, to whom the Prophet used to repeat the Revelation, to make the copy, which he did. Thus, the first authentic text of the Holy Quran was compiled by the first caliph Abu Bakr. On Omar's (the future Second Caliph) initiative Zaid consulted all the information he could assemble at Medina, the witness of Hafizuns, copies of the books written on various materials belonging to the private individuals, all with the object of avoiding possible errors in transcription. Thus

1. Kalima No. 1.

an extremely faithful copy of the Book was obtained which does not pose any problem of authenticity.[1]

After this period came the Umayyads who strictly followed the Sharia Law. Later came Abbasides who called for a revision in view of the changed circumstances. According to AL-JUMHYA and AL-GHAZALI, there was no dispute about the authority of Sharia Law till the end of 11th century. But the spread of Islam far and wide and its expedition by the people of diverse nationalities, languages, cultures and customs led to disputes about the interpretation of Sharia Law. It must be emphasised on this point that there never was any dispute as regards the Quran and Sunna being the fundamental sources of law in Islam. The dispute arose as regards interpretation of certain provisions thereof here and there. Due to interpretational differences there arose orthodox Sects or Ribs. As regards Sunnites, they were divided into four distinct schools—Hanafis, Malikis, Shafis, and Hambelis.

The Hanafites under Imam Abu Hanifa are considered to be the House of Rationalists. This has the maximum adherents and is prevalent in Turkey, Afghanistan, Pakistan, India and Bangladesh. They are liberal in their attitude. The Malikites under Imam Malek from Medina, called the House of Traditionalists, subscribed to the Sunna, Imam Malik wrote the first book on Islamic law—AL-MUNATTA. He begins his exposition of law by quoting a tradition. He was supported by Ash Shaybani who mainly developed the school and, as Snell says, he intertwined round the mighty oak. The Shafites under Imam As-Shafi was the mixture of the above two. Imam Shafi is considered to be the master architect of Islamic jurisprudence. He studied for long in all the main centres–Mecca, Medina, Syria, Iraq and later gave his exposition in a Congress at Cairo during the last five years of his life. The Hanbolites arose under Imam Abu Hanbal who compiled 80,000 Hadiths in his book. They arose as a protest against liberalisation and insisted on following the Sharia law blindly.

After the Bab-Al-Ittehad, the door of free judgment by Ijtthad was closed and Taqlid came in vogue. This demanded blind obedience to Sharia law as set down by the doctors of Muslim jurisprudence and no question could be entertained about the validity of any such law.

Then arose the rise of Islam in Africa and India. In India, Sharia law was accepted by the Mughals in the 16th century. In 18th and

1. Dr. Maurice Bucailie, The Bible, Quran and Science, p. 127.

19th century, Sharia law further developed in Algeria and in India under the English. This led to the development of Droit Islamic Algeria and Anglo-Muhammedan Law in India. In the present century, Sharia law has assumed great importance, Writers like Sehacht, Coulson and W. Montgomery Watt advocate the bare exposition of the Sharia law. Schacht says that today law needs development and we must develop law keeping pace with the needs of the time, but we cannot and must not aspire to change the basic tenets and premises of the law. That would amount to interference and sacrilege. This view is also subscribed by Montgomery Watt.

The view of most of the Islamic jurists is that Sharia law is on a different plane, a disembodied spirit hovering above and guiding us. Unlike other laws, Sharia law regulates also state law and duality exists here. State can never regulate Sharia law which is immutable and illimitable. It can never be interfered with. The task of Code is to apply this law and demand obedience. They cannot go behind the Sharia law and enquire about its purpose. The jurists can invoke the unchanging nature of Sharia law as a defence to rulers who demand decision based on their desire. The jurists by pleading this fact can avoid or escape conforming to such wishes and maintain the inviolability of Sharia Law.

Thus, Sharia law is indeed central to the entire theme of Islamic jurisprudence. It is a divine law (Fiqh) set down clearly by Faqihs for the regulation of the conduct of Muslims. Sharia shapes our lives in every aspect here in this world as well as in the hereafter. It encompasses within its ambit the feature of a life destined by the Almighty Allah. It shapes the social life of a Muslim community dealing with various aspects and subject matters, such as, religion, ethics, politics, social, ecomomic, business transactions, war and peace, ecclesiastical law, administration of justice etc. It is a perfect and complete code of life demanding obedience. This law is not for Muslims alone. As Islam is the revealed religion, Sharia law came down for all men of all times, and to achieve this end we must all but strive as Allah has said in the Holy Quran "Strive and you shall be helped".

Neo-Ijtihad

Primarily the word 'Ijtihad' means effort. When used in the sense of Islamic jurisprudence, it connotes 'exercise of judgment' and roughly translated, the word means 'determined judgment'.

'Neo-Ijtihad' connotes here new Ijtihad and needs for new exercise of judgment in developing Islamic law in the modern

world. While discussing the role of Neo-Ijtihad in developing Islamic law it may be assumed here that Islamic law needs necessary changes to suit the needs of the modern world. And why does it need a change? Because of the manifold developments of the modern civilization in all aspects of life science, crafts, literature, economy, technology, etc., Schacht in his 'Islamic Law' and W. Montgomery Watt in his treatise "What is Islam" laid particular and great stress on the role of Neo-Ijtihad in the development of Islamic laws in the modern world. They have devoted much on the imperative need for their change and in their desire for change they are ardent advocates of Neo-Ijtihad.

Before proceeding further we shall naturally have to discuss 'Ijtihad' in the first instance. Ijtihad was used as a tool by Mujtahids, learned lawyers of Islamic jurisprudence in the period from 6th to 10th century A.D., in developing Islamic law by interpretation. This was a period of great efforts by the jurists and their important expositions resulted in the development of Islamic law during the period. The Mujtahids applied themselves with religious zeal and fervour to the task of analysing, interpreting and thus developing the Sharia law.

Thereafter, a time came when the source of exposition by further analysis and interpretation became exhausted. There was no aspect of law left to be developed further all possible aspects having considered. At this state, Islam spread far and wide in diverse regions with diverse elements. Questions about the validity of many new transactions and activities in the eye of Islamic law arose necessitating further analysis and interpretation covering those activities. But in order to maintain the sacredness and immutability of Islamic law and to signify the end of the period of Ijtihad, the door of Ijtihad "BAB-AL-LJTIHAD" was closed and no further Ijtihad was allowed.

And thus, we came to the period of TAQLID i. e. blind obedience to the law 'as it is' without any question. To question the law laid down would result in sacrilege and a state of sin. The Cadis (Kazis) were also to enforce the law as it existed. This led to a period of CASUISTRY. Thus, the use of button for lighting a flame was prohibited, because a morse had fallen in it and drowned. Riding on a camel's back which had drunk wine was prohibited because its sweat would have drunk in it. Schacht has criticised against continuity of this stage vehemently in his book.[1]

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1. Schacht, Origins of Muhammadan Jurisprudence, (Oxford 1950).

The modern world is the age of great advancement of knowledge and science. Man has landed men in the moon and brought them safely back to earth. They have sent spacecraft and space shuttle into space and brought them back successfully. These achievements find support from the Quran which in a verse stated that "the stars of heaven are for men". So the voyager is exploring the surface of the planet Venus. Communication has advanced so far that we can reach any corner of the globe in a second by telephone. Advances in culture have also been made considerably. Knowledge has contributed to the widening of the horizon of man's outlook when all aspects of human civilization are advancing at a dizzying rate, religion must not lag behind if not at the same frenzied pace, Otherwise it will become obsolete and antiquated and will lose any bearing with reality.[1]

So the dire need for Neo-Ijtihad in developing Islamic law in the modern world. The Bab-Al-Ijtihad—the door of Ijtihad, must be reopened and a new period of Ijtihad i.e. Neo-Ijtihad is the need of the hour. Our religion, which is the best and last revealed religion and which is considered to be the universal religion, must also have a boost. As the poet and philosopher Sir Allama Iqbal has said, "Islam is a religion of movement". Islam in the modern world must move forward. But Schacht and Watt, both the ardent advocates of Neo-Ijtihad, have issued a word of caution in this respect that while stressing the need for exercise of judgment for developing Islamic law in line with the need of the modern world, we must not depart, deviate or derogate from the basic fundamental principles of our religion. The tenets, principles, precepts, must remain unaltered, unchanged and cannot be touched. One must exercise extreme caution in striking the perfect balance while trying to make necessary changes in the law for the purpose of its development. Then and then only Islamic law, already a very potent force, will become more powerful and assertive.

The modern world especially in the last two decades has seen the earning of great wealth by most of the Muslim nations. Allah has given His unlimited bounty in the form of petroleum to the Muslims. This has also resulted in economic prosperity and consequently attainment of political power in the modern world. To balance this new position through toleration and moderation, it is necessary to continue to maintain calls for adhering to Islamic law

1. Ibid.

and principles. And Neo-Ijtihad by adopting Islamie law to the present circumstances can contribute to the general need of this Islamic world. Hence, the imperative role of Neo-Ijtihad in developing Islamic law in the modern world.

Sources of Hindu Law and Muslim Law (Comparison and Contrast)

Both Hindu law and Muslim law are laws based upon religion. Among the existing religions of the world, Hindu religion is said to be the oldest one whereas Islam is the youngest and latest of all semitic religions. But undoubtedly both of them are today standing among the most populous religions of the world. Hinduism is at least three times as old as Islam. Yet some of the processes of law-making are remarkable similar.

Islam is a comparatively modern religion of the semitic family. But Hinduism is a religion of the time immemorial in the Aryan tribe. The differences also accrue from and because of these historic dissimilarities.

Islam claims itself to be a revealed religion. Its fundamental law is laid down in the Holy Quran. The legislation in the Quran is mainly of ethical quality and in quantity also not so numerous. In all, as already stated, the Quran has about 600 verses referring to legal and moral behaviour of which only 80 verses refer strictly to legal affairs. Anyway even in rudimentary form Quranic legislation remains the supreme source of all laws in Islam, a sort of preamble to the whole complex of Sharia law that developed in the next 300 years. The sources of Hindu law are also imputed to be the Vedas, which are claimed to be the divine origin. But as far as specific legal material they are scanty.

In Islam, the next great source of law, an almost equal-footing one, is the Sunnah of the Prophet consisting of his exemplary behaviour and express words. The Prophet of Islam was very much a historical and political figure. His legislation based in the Quran, transformed the primitive nomadic tribal society of Arabia into a modern community of behaviour of the common faith.

But in Hinduism a comparable Prophet is not to be found. It had generated the Rishis or Saints who had contributed to the legal literature through such works as are known as Smiritis i. e. heard from the Rishis similar to those heard from the Prophet. They are important sources of law in Hinduism.

In the Islamic world, the third root or source of law is named as Ijma[1] or consensus of the judicial opinion of juristic community, which is comparable to the consensus of Pundits of ancient India. This tradition (Ijma) developed from the internal need and democratic character of Islam.

In Hinduism a parallel institution is hardly to be found. Though in Darmashastra and later Shastras the activities are reflected much in the style of Muslim Imams, but it is hardly comparable. Actually the rise of the Metakshara and Dayabhagh schools of Hindu law around the 11th and 12th centuries in India and Bengal respectively, may be compared to the Islamic Mazhabs.

The fourth source of Muslim law, Qiyas or analogical reasoning as the effective cause or methodology in Islamic jurisprudence has no comparable source in Hindu law. To some extent it may be compared to the commentaries of the Pundits.

Similarities and Dissimilarities

1. Both the laws are divine but Islamic law is based on Revealed Book- the Holy Quran, but Hindu law is not so revealed.

2. In both there is a difference between secular and religious laws.

3. In Islamic law, the divine book is supplemented by Prophet but in Hindu law no such purpose arises as the comparable Prophet is not to be found in Hinduism.

4. In Hindu law there is no such source as Ijma and Qiyas. The commentaries of Pundits are not comparable with Qiyas.

5. Custom is regarded as very important source in Hindu law and family customs are also given importance (Collector of Madura Vs. Ramalinga) but it is not so in Islamic law. Pre-Islamic Arabic custum, not in conflict with the Islamic law, is also incorporated in the Holy Quran, but later customs are not so incorporated.

6. Judicial decisions are given much prominence in Hindu law but it plays a minor part or role in Muslim or Islamic law, because, in Islam, law is for the judges and not judge to make law for Islam.

7. In Islamic law Quranic punishments are still being followed but in Hindu law it has been merged in the secular law.

8. Islamic law is more scientific than Hindu law.

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1. Ijma of Mujtahid— the unanimous opinion of jurists and lawyers.
   Ijma of Sahabis— the unanimous opinion of Sahabis.
   Ijma of People— the unanimous opinion of people.

9. Legislation has so much changed the original Hindu law that it is very difficult to get it in original form, but Islamic law has not been subjected to such change. In the last 100 years, legislation by Indian Parliament has changed the entire tenor of Hindu law, e. g. Indian Succession Act; Hindu Womens' Right to Property Act ; Hindu Widows Remarriage Act; ect. But in Muslim law, legislation has not assumed such a great importance with the exception ot the Family Law Ordinance, 1961 modifying the rule of succession.

10. Sources of Hindu law are mostly evolutionary and varied while the sources of Muslim law did not undergo such a long period of evolution and its sources are also not that varied.

11. Hindu law has its sources scattered in various places as Vedas, Vedangas and Upanishads, but Muslim law has its sources in the Holy Quran and Sunna, which formed the fundamental sources of all Muslim law and the rest are all its various interpretations. But there are no such sources of Hindu law.

12. The fundamental sources of Hindu law is the Shrutis i. e. what was heard, which are considered to be the revelation from the Deity. Here we find an element of divinity, it we take the Hindu views. These Shruties, which are to be found in Vedas, Vedangas and Upanishads, are considered to be the Holy Books of the Hindus, but the Muslims have only one Holy Book i. e. the Book of Holy Quran.

13. Smriti as source of Hindu law means what was remembered as saying of Deity—They are not as fundamental as Shrutis. The Smriti was later codified as the Code of Monu and the Code of Jagyavalka. Although apparently Smriti appears to have similarity with Sunnah inasmuch as both were written long after the death of the Prophet and the so-called saying of the Deity, but in fact the provisions of Sunnah and Hadiths are the sayings and actions of the Prophet as witnessed by Sahabas, but there is no such witness to the saying of Deity.

14. Equity, justice and good conscience contitute a source of Hindu law as well as of Muslim law where the law does not cover any eventuality.

15. As Muslims have their various Schools or Madhabs of Majhabs so also the Hindus. Muslim Majhabs are—Hanafis, Malikis, Shafiis and Hambalis. Principal Hindu schools are only Metakshara prevalent all over India except Bengal and Dayabhaga prevalent in West Bengal, Assam and Bangladesh.

16. In Hindu law minor text, such as, Upanishada, do constitute source of Hindu law, but in Muslim law it is not so.

Thus, we find that there are similarities as well as dissimilarities between the sources of Hindu law and Muslim law and such a comparative study will certainly be helpful to a student of Comparative Legal Theory.

Western Jurisprudence, Islamic and Hindu Jurisprudence : Comparison

It is stated that "unlike Western jurisprudence, Islamic and Hindu jurisprudence are partly divine and partly man-made". It is a statement of the very fact that Islamic and Hindu jurisprudence are not only divine in nature but also contains a lot of rules and canons which are man-made and get their validity in these religious community by their crying demand. We must, however, remember that man-made laws of both the religions are basically dependent on and get their sanction from the Holy Books.

It may be mentioned here that the Western jurisprudence is now in the very developed stage as a consequences of a long struggle between the church and the state during which the Eastern and Western Europe had very bad, hot and peaceless days. On the other hand, the Muslim world as well as the Hindus, faced less difficulties and the climate of these areas was also favourable for peaceful living existence, but from economic point of view they were very poor.

Let us now examine the various sources of Western jurisprudence and those of the Hindus and Muslims. Sources of Western jurisprudence are the following :

1. Customs and Conventions (usages);
2. Precedent;
3. Text books;
4. Legislation;
5. Divine law; and
6. Common law.

From the above sources of Western jurisprudence it appears that almost all of the sources are man-made and there is a very limited scope of Divine or God-make law.

It would really be very difficult for a jurist, if not impossible, to find out the exact or direct contribution of divine law in Western jurisprudence.

So, without any deep and detailed analysis a layman of law will no doubt make a mistake that the Western jurisprudence is wholly man-made. But it is not the whole truth. Because the usages and customs which are the basic sources of Western law came to be law

by practice under the influence of religion of that community. Thus divine law is indirectly one of the historical sources of law, if not a direct legal source. So, Western jurisprudence is, in fact, not only man-made but also, to some extent, God-made and shaped by their religious attitude toward national and international affairs of that community although human contribution appears to be very clear, definite and direct nowadays. After a satisfactory conclusion regarding Western jurisprudence, we may now examine the Hindu and Muslim jurisprudence for the purpose.

Hindu Jurisprudence

The main sources of Hindu law are : (1) Shruti; (2) Smriti; (3) Custom; (4) Legislation ; and (5) Equity and good conscience.

As already pointed out, Shruti, which was heard by Munis and Rishis as saying of the Deity, is a fundamental sources of Hindu law. Major Srurtis are different Vedas : (1) Rig Veda; (2) Sham Veda; (3) Zaju Veda, etc. And Smriti, which was remembered and subsequently written from memory by the Munis and Rishis is another important source of Hindu law. Major Smritis are : (1) Code of Monu; (2) Code of Jagyavalka; and (3) Code of Narada.

According to Hindu theology, it is believed that at the very primary stage of Hindu religion Dev and Devis delivered orders and advices to the people, which were heard (Shruti) and remembered (Smriti) to regulate their lives which were subsequently written as stated above. Customs also play a good role in shaping the life of the people but they cannot stand as valid, independent or religion as customs get their validity from the religious books—Vedas and Codes.

All other sources of Hindu law are man-make in modern times, e. g. statutes or legislations, and equity, which are getting prominence day by day by public opinion, and the role of religion is gradually deteriorating and losing its importance, and thereby giving place to legislations, modifying or repealing very many provisions of law based on religion, e. g. Hindu Women's Right to Property Act; Hindu Widows Remarrage Act of India; Abolition of Child Marriage Act; ete.

The principles of equity, justice and good conscience entered into the legal system of the whole Indo-Pak-Bangladesh Sub-continent through the interpretation of English judges in case of ambiguity of the provisions of both Hindu law and Muslim law.

Muslim Jurisprudence

The main sources of Islamic law are : (1) The Holy Quran ; (2) Sunnah; (3) Ijma; (4) Qiyas; (5) Taqlid; (6) Ijtihad.

The Quran is divine, and revealed by Allah through Gabriel to His messenger the Prophet Muhammad (Sm.) It is imperative and so must be followed by the Muslims, Sunnah is the collection of actions, sayings and behaviour of the Prophet which are ideal and equally imperative as the same are in agreement with the main source Quran and are based on divinely advices coming to the Prophet by Gabriel. Since the other sources— Ijma and Qiyas must be in agreement with Quran and Sunnah, so, they are also equally divine sources.

Ijtihad is based on interpretations of Mujtahid, Imam and Muslim jurists and their well-reasoned opinions, which appear to be man-made, but they cannot also be contradictory to Quran and Sunnah.

Opinion of a section of jurists that door of Ijtihad was closed after the four Imams is not tenable as the door may be reopened and new interpretation on new facts may be given in fit cases to meet the needs of the growing society although precaution must be taken so that any new opinion does not come in conflict with the Quran and Sunnah.

From the above discussion, we may conclude with this observation that sources of Hindu law are no doubt partly divine and partly man-made; but those of Muslim law are wholly divine since the man-made sources must also be in consonance with the main sources—Quran and Sunnah which are purely divine.

As regards the sources of Western law, they have no divine origin although custom, as a source of Western law, may indirectly and historically be based on religious faith and practice.

So, the observation under quotation in question is accepted with the above modification.

CHAPTER III

KINDS OF LAW

15. General Law

The term law generally means any rule of action. In the words of Hooker, "We 'term' any kind of rule or canon whereby actions are framed a law", Blackstone says, "Law in its most general and comprehensive sense signifies a rule of action, and is applied indiscriminately to all kinds of action—whether animate or inanimate, rational or irrational". Thus, we say, the laws of motion, of gravitation or of mechanics, as well as the law of nature and of nations. In its widest sense there are many kinds of law, and Salmond mentions the following as sufficiently important and distinct to deserve separate mention and examination : (1) Imperative Law; (2) Physical or Scientific Law; (3) Natural or Moral Law; (4) Conventional law; (5) Customary Law; (6) Practical or Technical Law; (7) International Law or the Law of Nations; (8) Civil Law or the Law of the State.

16. Imperative Law

Imperative law means a precept or a rule of action imposed upon men by some authority which enforces obedience to it. In other words, an imperative law is a command, or a rule in the form of a command, which is enforced by some superior power. Law is taken here in the sense of command; and it is imperative because it must be obeyed. A rule, the observance of which is left to the good pleasure of those of whom it is laid down, is not a law in this sense, Austin says. "A law is command which obliges a person or persons to a course of conduct". According to many eminent jurists, civil law—the law of the State—in nothing more than a particular form of imperative law. They consider that Civil law consists of general commands issued by the State to its subjects, and enforced, if necessary, by the physical force of the State. "The Civil Law" says Hobbes, "are the commands of him who is endued with supreme power in the State concerning the future actions of the subjects". Man, according to Hobbes, is an altogether selfish animal. He is anything but a social animal; indeed he finds nothing but grief in the company of his fellows, and lives in a continual fear of danger and violent death. Therefore, man is driven by evident necessity to join some authority, however, despotic. According to him, law has its source not in custom, not in consent but in the will and power of him who, in a commonwealth beareth not the sword in vain. In other words. it is men and arms that are responsible for the

maintenance of law and order in the State, and we must obey the law whether it is pleasant or not, Similar opinions have been expressed by Bentham and Austin and accepted by other English writers. This view to a certain extent expresses an important aspect as to the nature of civil law, though it falls short of an adequate analysis. It rightly emphasises the central fact that the civil law is based on the will and physical power of the State. To what extent it falls short will be considered when we come to the imperative theory of civil Law.

Sanction—The instrument of cocrcion by which any system of imperative law is enforced is called a sanction, and any rule so enforced is said to be sanctioned. Thus, physical force in various methods of its application is said to be the sanction applied by the State in the administration of justice, Censure, ridicule and contempt are the sanctions by which society (as opposed to the State) enforces rules of positive morality. War is the last and most formidable of the sanctions with which the society of nations (UNO) maintains the law of nations, Threatenings of evils to flow here or hereafter from divine anger are the sanctions of religion so far as religion assumes the form of a regulative or coercive system of imperative law.

A sanction is not necessarily punishment or penalty. To punish law-breakers is an effective way of maintaining the law, but it is not the only way. The State enforces the law not only by imprisoning the thief but also by depriving him of his plunder and restoring it to the true owner, and each of these applications of the physical force of the State is equally a sanction.

Salmond in his jurisprudence says that every society whether organised or not tends to develop imperative laws formulated by the governing authority of that community or society for the control of its members in order to secure the purposes for which it exists. Not only States, but also a church, an army, a school, a social club, a Trade Union, a family or any other organised institution tend to develop them. And again—"Just as an individual State develops within itself a system of imperative law imposed by it upon its members, so the society of States develops a system of imperative law for the regulation of the conduct of those States towards each other".

But it is doubtful whether the laws framed by the churches, clubs or even the States with respect to each other approach the strict theory of imperative law, in the first place, membership of a church, club or society of States is purely voluntary. And secondly, any member of such organisation can leave the membership.

Neither censure, sense of ridicule or the threat of war can deter any member of such organisation from doing in any way he pleases. Strictly speaking, the laws made by such organisations should come under the category of conventional law.

17. Physical or Scientific Law

Physical laws or the laws of science are expressions of the uniformities of nature—general principles expressing the regularity and harmony observable in the activities and operations of the Universe, such as, law of gravitation, the laws of tides, or the laws of chemical combination. Even the actions of human beings, so far as they are uniform are the subject of law of this description as, for example, when we speak of the law of psychology. These are rules expressing not what men ought to do but what they do. In other words, physical laws is an expression of actions as they are, whereas civil law is an expression of actions as they ought to be.

Physical laws are also and more commonly, called natural laws; but the latter terms are ambiguous, for they signify also the moral law; that is to say, the principles of natural right or wrong.

18. Natural or Moral Law

By natural law or moral law is meant the principles of natural right or wrong—the principles of natural justice. Salmond used the term 'justice' in its widest sense to include all forms of rightful action. Justice is of two kinds, distinguished as natural and positive, Natural justice is justice as it is in deed and in truth, that is, an ideal form of justice which ought to prevail, although in fact it may not. Positive justice is justice as it is conceived, recognised, expressed and enforced by human society. Hence the term natural law means the aggregate of rules of morality or natural justice.

This natural law was conceived by the Greeks as a body of imperative rules imposed upon mankind by Nature, the personified Universe. The Stoics, more particularly, thought of Nature of the Universe as a living organism, of which the material world was the body, and of which the Universal Reason was the pervading, animating and governing soul; and natural law was the rule of conduct laid down by this Universal Reason for the direction of mankind. When the Greek philosophy passed from Athens to Rome it appeared there as *lex naturale or jus naturale.*

Natural law has received many other names expressive of its various aspects : (1) It is Divine Law—the command of God imposed upon man; (2) Natural law is also the Law of Reason, as being established by that Reason by which the world is governed;

and also as being addressed to and perceived by the rational nature of man; (3) It is also the unwritten law in the sense that it is written not in Statute Book but solely by the fingers of nature in the hearts of men; (4) It is the Universal Law or Common Law as being of universal validity, the same in all places and binding on all people and not confined to one particular nation or State; (5) It is the Eternal law as having existed from the commencement of the world, (6) Lastly, it is also called the Moral Law—as being the expression of the principles of morality.

The term 'Natural Law' in the above sense has now fallen out of use in England, except outside the circle of those particularly interested in philosophy. We speak of the principle of natural justice or of natural morality but seldom of the law of nature. For this, Salmond says there are at least two reasons. Firstly, the term natural law is now used to signify physical law—the expression of the uniformities of nature. Secondly, the term law as applied to the principles of natural justice, brings with it certain misleading association—suggestions of command, imposition and legislation—which are not in harmony with the moral philosophy of the day.

19. Conventional Law

According to Salmond, by conventional law is meant any rule or system of rules agreed upon by persons for regulating their conduct towards each other. Agreement is a law for the parties to it. So, conventional law presupposes an agreement between the parties. Examples are the rules and regulations of a club or other voluntary society, and the laws of football, cricket, golf or any other game. These are the rules which the players have expressly or tacitly agreed to observe in their conduct of the game.

The most important branch of conventional law is the law of nations or the public international law which consist of the rules which have been expressly or impliedly agreed upon by States as governing their conduct and relations to each other.

20. Customary Law

According to Salmond, customary law is any rule of action which is actually observed by men—any rule which is the expression of sone uniformity of voluntary action. Custom is a law for those who observe it—a law or rule which they have set for themselves and to which they voluntarily conform their actions. They are the laws of dress, deportment and etiquette.

The operation of custom as one of the sources of civil law will be considered later. That portion of the civil law which has its source in

custom is itself called customary law, but it is not in this sense that the term is here used, Customary law in the present sense is not a part of civil law, but a different kind of law in the generic sense.

21. Practical or Technical Law

Practical or technical law consists of rules for the attainment of some practical ends, and which guide us to the fulfilment of our purposes; which inform us as to what we ought to do, or must do, in order to attain a certain end. They are those rules which are required by us for the fulfilment of our purpose, such as the laws of health, the laws of musical and poetical composition, the law of style, the law of architecture and the rules for the efficient conduct of any art or business. The laws of a game are of two kinds—some are conventional, being the rules agreed upon by the players; others are practical or technical, being the rules for successful playing of the game.

22. International Law

International Law, or the law of nations, consists of those rules which govern sovereign States in their relations and conduct towards each other. All men agree that such a body of law exists and that States do in fact act in obedience to it; but there is a difference of opinion over its proper classification. Salmond classifies the various competing theories regarding the essential nature of international law as follows :

Natural Law Theory—According to some writers, International Law is a branch of natural law, namely, the rules of natural justice as applicable to sovereign States in their relations towards one another.

Customary Law Theory—Others hold the view that International Law is a kind of customary law, namely, the rules actually observed by States in their relation to each other.

Imperative Law Theory—According to this theory, international law is a kind of imperative law, viz. the rules enforced upon States by international opinion or by the threat or fear of war.

Conventional Law Theory—Some other writers hold the view that it is a kind of conventional law having its source in international agreement.

It is the last view that has received most support from the Courts of England. Lord Russel of Killowen defined international law as "the aggregate of the rules to which nations have agreed to conform in their conduct towards one another". Lord Chief Justice Coleridge says. "The Law of nations is that collection of usages

which civilized States have agreed to observe in their dealings with each other". Lord Esher says. "The Authorities seem to me to make it clear that the consent of nations is requisite to make any proposition part of the law of nations". Lord Cockburn says, "To be binding the law must have received the assent of the nations who are to be bound by it. This assent may be express, as by treaty or the acknowledged concurrence of Governments, or may be implied from established usage". There is, however, nothing to prevent us from regarding international law as belonging, in part, to each of the four categories mentioned above and it does not seem possible to say that it falls wholly within any one of the categories.

Of the four views, the most plausible is the one that would place international law in the category of conventional law but even this is open to objection. When a new State is recognised by other States, it becomes subject to international law, and there is no necessity for any agreements on its part so to be bound. To say that a State's agreement is 'implied' from the mere fact of its statehood, or of its being recognised, is to introduce a fiction and in effect to abandon the theory of agreement. Even with regard to the long established States like France and Great Britain, it cannot be shown that they have actually agreed through their representatives to all the rules of international law.

In spite of the facts as above, the most popular view is that the law of nations is essentially a species of conventional law and, according to Salmond, it has its source in international agreement and it consists of the Salmond, it has its source in international agreement and it consists of the rules which the sovereign States have expressly or impliedly agreed to observe in their dealings with each other. Hence, it is to be classified as a form, and indeed the most important form, of conventional law. This international agreement, which is the source of international law, is of two kinds — (1) express, and (e) implied.

(1) Express agreement is made by treaties and international conventions. International law derived from express agreement is called the "Conventional Law of Nations".

(2) Implied agreement is based on the customs and practices of the States. By observing certain rules in the past, States have impliedly agreed to abide by them in future.

International law derived from implied agreement is called the "Customary Law of Nations".

International law is again divisible into two classes which may be distinguished as follows :

(a) The Common Law of Nations— The common law is that which prevails universally, or at least generally, among all civilised States, being based on their 'unanimous or general agreement, express or implied'.

(b) The Particular Law of Nations—The particular law is that which is in force solely between two or more States, by virtue of an agreement made between them alone.

Prof, Holland regards "International law as the vanishing point of jurisprudence". He also observed that 'Law of Nations is but private law writ large'. These statements may be explained in the manner as follows :

International law is that law which governs the relations of independent states inter se. Since these independent states are not under the sovereignty of any one state, it is difficult to see how this law could be enforced. Our definition of law postulates the existence of a sovereign political authority, which, however, is absent in International law where each state is paramount and not subordinate. It follows, therefore, that the term law cannot be strictly applied to customs and conventions which govern the relations of independent states inter se. Since jurisprudence is a science of positive law i.e. law enforced by the sovereign political authority, we can find no political system in the world which can govern the independent states of the world. We can find no place for International law is a logical scheme for jurisprudence. Hence Prof. Holland regards International law as the vanishing point of jurisprudence.

On the other hand, International law bears strong resemblance with private law. Just as in private law i. e. municipal law, we have to deal with persons, so in international law we have to deal with states. Just as in private law, we have normal and abnormal persons, so also in international law we have normal and abnormal states. Like private law, international law deals with antecedent and remedial rights, rights in rem and rights in personam. Here, as in private law one has to deal with substantive law which defines the rights of the states inter se and adjective law which defines the process of enforcement of the right as agreed upon by the states. The law of agency can be seen both in private and international law. It appears, therefore, that international law consists in an application to political communities of those ideas which were

originally applied to the relations of individuals in a state. The striking resemblance between private and international law has led Prof. Holland to remark that 'Law of Nations is but private law writ large'.

But this definition of Holland seems to be narrow inasmuch as it keeps out of purview the laws which are not enforced by the sovereign political authority. According to Holland, international law is not a law proper as it is not enforced by the sovereign political authority. However, no modern jurists would say that international law is not a law.

International law also sometimes deals with rights of the citizens and state. The private law also deals with private rights which are applicable to citizens of a state. But international law is the law which is generally framed through conference in between different states of the world. The rules framed by the conference of different states are applicable to different states and in case of violation of the rules the dispute is settled by the International Court of Justice which adjudicates and arbitrates in disputes between states.

No doubt, International law is less imperative and less explicit than the State law, but nevertheless it is law inasmuch as it is enforced partly by those influences which make it difficult for a man or body of men to act in defiance of strongly held views of those with whom they associate. Compulsion alone is not the conction behind law. It is enforced by the consideration of justice as much as of force. The elements of sanctions and fear that violation might make the nemesis fall on the violators are also not absent. United Nations can and does apply political and economic sanction against defaulting state as also military sanctions to enforce peace. In the words of Brierly "it is not the existence of a police force that makes a system of law strong and respected, but the strength of the law that makes it possible for a police force to be effectively organised".

Modern writers like Hall and Lawrene treat International law as law in the proper sense. To term 'International law' is habitually treated and enforced as law; like certain kind of positive law it is derived from custom; precedent forms a source of this law also as it does of positive law and the observance of its rules is compulsory, and it is generally observed by States, though like ordinary law International law is also sometimes evaded, but that does not mean that the law does not exist, It is no more reduced to a nullity by being sometimes broken, than are the laws of the land because the habitual criminals disregard them with impunity.

Just as man cannot live in isolation, a modern State cannot lead an isolated life in the present context of world affairs. The conduct of individuals of a State is governed by municipal law, while that of States inter se or society of states by International law. It is thus clear that the solution of the question whether International law is a law in the proper sense depends on the definition of law which one may choose to adopt.

23. Civil Law (Corpus juris)

The term Civil Law has many meanings. The Romans used the term *'jus civile'* in the sense of the law that was applicable only to the Roman citizen as opposed to the law that was to be applied to the foreigners. It is also used to distinguish the Roman law (Corpus juris civile) from Canon law (Corpus juris canonici) and other law. It is also used to signify, not the whole law of the land, but only the residue of it after deducting some particular portion having a special feature of its own. Thus, Civil Law is opposed to Criminal Law or to Military Law. But what we mean by Civil Law, is the law of the Civitas or the State, the law of the lawyers and of the law-courts. The name is derived from the jus civile of the Romans.

The difficulty and importance of the question as to the true nature of Civil Law deserve a separate and detailed consideration as in the following Chapter.

CHAPTER IV

CIVIL LAW

24. Nature of the term 'Law'

There are many uses of the term Law :

(1) The term 'law' as indicating the law of the land, is sometimes spoken of as positive to denote law made or established by human authority as opposed to natural law which is not created by any human agency and is immutable. It is, however, not possible to confine positive law to the law of the land. All law is positive that is not natural. International law, for example, is a kind of positive law no less than the Civil Law itself, although it is not the law of the land.

(2) The term 'law' is used in two senses, which may be conveniently distinguished as the abstract and the concrete. In its abstract application we speak of the 'law of England', 'law of libel' 'criminal law' and so forth. Similarly, we use the phrase 'law and order', 'law and justice', 'courts of law', etc. In its concrete application, on the other hand, we say that Parliament has enacted or replaced a law. We speak of the bye-laws of a Railway Company, or Municipality. In the abstract sense we speak of 'law' or 'the law', which means the entire body of legal principles prevailing in a particular legal system, for example, the law of Bangladesh. Law in the abstract is jus, e. g. the law of Rome is called jus civile.

On the other hand, in the concrete sense, we speak of 'a law' or 'laws', A law means a statute passed by the Legislature of a State. Every act of Parliament is called 'a law' and 'laws' mean plurality of 'a law', Law in the concrete is lex. Lex, a statute, is one of the sources of jus.

The Generality of Law

The law need not necessarily be general, that is, the rules of conduct addressed to all people in general, but it may also be certain precept addressed to an individual person. An example of a general rule would be the general rule that judges may grant divorce on specified grounds. This is general as it applies to all married couples and to all acts coming thereunder. An example of a precept concerned with an individual case would be an eighteenth century Private Act of Parliament divorcing a particular married couple, or the former Acts of Attainder whereby individual persons were sentenced to death or otherwise penalised. Similarly, an Act of

Parliament, or a judicial decree for a divorce operates as the law but it is not itself a part of the law. Some types of legal pronouncements are intermediate between these two extremes—general or particular. For instance, a rule may be general as to acts though particular as to persons, or it may be general as to persons though particular as to acts; and other elements of particularity may also be imagined, thus, it may apply to a narrow class of people or within a narrowly defined geographical area, or for a short period of time. Similarly, there are also degrees of generality of law. In the present book the term 'law' is used to cover all rules enforced by the courts, however, the degree of their generality.

25. The definition of Law

The definition of the word 'Law' is the most discussed question in jurisprudence. It will be remembered that the term 'law' is now being used to mean the Civil Law exclusively. Consequently, it is no objection to the definition that it does not cover international law, for it is not meant to do so.

The term 'law' may be defined from the point of view of the theologian, the historian, the sociologist, the philosoper, the political scientist, or the lawyer. Even within Jurisprudence there are difference of approach. Law may be defined firstly by its basis in nature, reason, religion or ethics; secondly, by its source, in custom, precedent, or legislation; thirdly, by its effects on the life of the society; fourthly, by the method of its formal expression or authoritative application; fifthly, by the ends that is seeks to achieve. We are, however, concerned with the definition of the civil law with which ordinary lawyers are professionally concerned.

Salmond defines law as the body of principles recognised and applied by the State in the administration of justice. In other words, the law consists of the rules recognised and acted upon by courts of justice. It is, therefore, to the court we should turn to ascertain the true nature of law. Because, all law is not made by legislature. There are also other sources from where we get laws. For example, the Courts also create a certain form of law, called a precedent or judge-made law. All law, whatever may be its cources, is recognised and administered by the courts and negatively no rules are recognised and administered by courts which are not rules of law. There are other persons or bodies besides the law-court who enforce rules of conduct. For instance, there are the Labour Tribunals appointed under the Trade Disputes Acts. If such a tribunal lays down a rule which it intends to follow in exercising its

discretion, such a rule will come under the category of a 'law'. Similarly, if the Parliament were to pass a rule regulating the conduct of its members, the rule would amount to a law. So long as the courts recognise and act upon as a rule of law, it is a law.

26. The Imperative Theory of Law

The definition and characteristics of Imperative Theory of Civil Law, as propounded by Austin, and also known as Austinian theory of law, have been dealt with in Section 16 of Chapter 3.

In this well-known analysis, Austin first attempts to define the genus law and then to mark the differentiae which distinguish law as the subject-matter of jurisprudence. Austin defines law as the command of the sovereign. In the broadest sense in which the term 'law' should be used, it signifies a command which obliges a person or persons to a course of conduct. Being a command, it must issue from a determinate person or group of persons with the threat of displeasure if the rule be not obeyed. The person who receives the command must realised that there is a possibility of incurring some evil in the event of disobedience.

Having thus discovered the genus law, Austin distinguished the species—positive law as he terms it. Positive law is laid down by a political superior for an inferior. He postulates, firstly, political society and secondly, a superior in the society, who is politically obeyed by the bulk of the community and who is not in the habit of obedience to any other person or body. The instrument of coercion or the physical force is said to be the sanction applied by the State to command obedience. The sovereign, of course, may consist either of one person or a number of persons.

Holland defines law as the rule of external human behaviour enforced by sovereign political authority. Law deals with only the external behaviour of men and not with the internal motive. It is true, law is more concerned with the social consequences of action than with their effects on the character of the actor. It insists merely on the compliance of conduct with certain standards and seldom worries as to the inner motives of men which is considered by ethics as all important.

The imperative theory recognises that the Civil Law is the product of the State and depends for its existence on the physical force of the State; where there is no such State which governs a community by the use of physical force, there can be no such thing as Civil Law. So, this theory puts undue emphasis on force totally ignoring the ethical element of justice in the conception of law.

Salmond's Criticism of the Imperative Theory of Law

According to Salmond, the Imperative theory is inadequate and one-sided for the following reasons :

Firstly, the theory has altogether ignored the ethical character of law. It totally ignores the relationship between law and justice. Hence, it places undue emphasis and importance to the coercive power or physical force of the State eliminating all other elements from the idea of law. The idea of law is inseparably connected with right and justice. Law and justice together constitute the complete conception of law. Law is not might alone or justice alone but the perfect union of the two. It is justice speaking to men by the voice of the State. The rules of law may be studied from the following two standpoints :

(i) They are commands issued by the State to its subjects and enforced by physical force of the State; and

(ii) They are also the principles of justice, that is, the right or wrong declared and recognised by the Civil law and enforced by the State in the administration of justice.

Secondly, all legal principles are not commands of the State. Law is a great deal more than commands. The law includes the whole of the principles accepted and applied in the admisistration of justice whether they are imperative in nature or not. Hence, there are many non-imperative legal principles which create liberties rather than obligations. Some illustrations are :

Permissive rules—Such as, certain persons are allowed to sit as a juror or assessor to assist the court, but there is no command here.

Enabling Statutes—These statutes merely permit certain acts which one is otherwise unable to do, e. g. the law allowing a man to make a will; it does not force him to do so. How then are they commands?

Rules of Judicial procedure-There are certain rules of procedure and of judicial construction which cannot be regarded as commands, for example, hearsay is no evidence.

Hence, according to Salmond, the purely imperative theory of civil law is inadequate and one-sided. His view is that all the three elements-imperative, non-imperative and the ethical, constitute the true theory of law.

Hence, Salmond rejects the purely Austinian theory of law and looks upon law as administered by court rather than as derived from sovereign.

Objection—To the above view of Salmond the following objections are made by the jurists of the imperative school:

(i) It is remarked that the primary function of the State is the application and enforcement of the law; hence it is not permissible to say that the law is the boby of rules observed in the administration of justice.

(ii) It is also maintained that the law is first in the logical order of ideas and administration of justice is the second; but this proper order of ideas has been reversed in defining law by reference to the administration of justice.

Salmond's reply to the above objection

According to Salmond, the primary function of the State is not the enforcement of the law, but to administer justice, that is, to maintain right, redress wrong and to uphold justice. The administration of justice may be defined as the maintenance of right or justice through the agency of the courts by means of physical force of the State. Hence, the administration of justice precedes the law in the logical order of things. Justice is administered according to law. Justice is the ends, law is merely the instrument and the means for achievement of that end. So, law must be defined by reference to justice.

Prof. Salmond goes a step further to observe that the administration of justice is perfectly possible without law at all. He has given the following reasons for the above observations :

(i) The first and foremost function of the State is not the enforcement of the law but to administer justice i. e. to protect right, redress wrong and to uphold justice. The sole object of the administration of justice is to maintain right of justice through the agency of courts by means of physical force of the State. Hence, the administration of justice precedes the law according to which justice is administered. Justice is the end Law is the means for achievement of that end. Hence, administration of justice is possible, though not expedient, without law.

(ii) Secondly, in administering justice it is necessary, however, expedient it may be, that the courts should act according to law. The courts, no doubt, act according to predetermined rules and principles called the law; but there may be a court which administers justice in such a fashion as it thinks just and proper according to the circumstances of the case regardless of the predetermined general principles of law. Such a tribunal may not be an efficient or trustworthy tribunal but is perfectly possible one. The Court of Chancery

administered justice in this way when the Court of Common Law failed to do the real justice.

(iii) Thirdly, in many cases the Judges have to act according to their own discretion and not according to law when no express provision can be found in the general principles of law. However great the development of law may be, certain amount of justice according to the discretion of Judge must remain. Total exclusion of judicial discretion by legal principles is not only impossible but also inexpedient. In order to do the real justice the judge must be given a certain amount of discretion within which he should act. Of course, the degree within which the Judge should exercise his discretion is a question for which no fixed rules can be laid down. Therefore, the existence of law is not essential to the administration of justice.

Historical argument against the Imperative Theory of Law

Against this fact of the Imperative Theory that Civil Law is the product of the State and depends for its existence upon the coercive power of the State and that where there is no such State which governs a community by the use of physical force, there can be no such thing as State, the following historical argument is advanced.

Maine has pointed out that many rules of conduct, which are enforced like laws, do not proceed from the sovereign. According to him, Austin's view is found to be radically false when applied to many non-European communities. The village customs of the Punjab, were laws, because they were customs and not because they were commanded by Ranjit Singh. Hence. the Austinian definition of Law is inapplicable to more primitive States, specially to oriental States. Early law is not the command of the State, it has its customs, religion or public opinion. So, according to him, "Law is prior to and independent of, political authority and enforcement". It is enforced by the State because it is already law; it is not law merely because the State enforces it.

But against this historical view on the imperative theory of law, Salmond argues that if there are laws prior to, and independent of the State; they may greatly resemble law and may be historical sources of law; but they are not themselves law. They are nothing but 'positive morality' and cannot be termed 'Civil Law'. The historical argument, according to Salmond, fails to appreciate the distinction between the formal and material sources of law.

The law derives its sanction and validity from the formal source, that is, the State. Hence there can be no law unless there is an organised political community. Therefore, the law is not prior to or independent of political authority and enforcement by it. The law derives its material contents from the material sources, that is, custom and religion to which the formal source, i. e. the State gives the force and status of law.

27. Ethical element of justice in the conception of Law

Ethics is a study of the supreme good— an attempt to discover those rules which should be followed because they are good in themselves. Law lays down what is convenient for the time and place. The law has been defined as the body of legal principles recognised and applied by the State in the administration of justice. In other words, law has been defined by reference to justice. This element of justice in the definition of law emphasises the idea that law and justice are synonymous terms. Thus, we say that courts of law are also courts of justice, and the administration of justice is also the enforcement of law. A complete analysis of the idea of law, therefore, involves an analysis of the ethical element of justice involved in it. A question naturally arises as to why law is spoken of in terms of justice.

Any act, which a man performs, is either for obtaining happiness or warding off unhappiness. The highest goal of man in this world is the happiness of all human beings. It is from its effect on human welfare that our action must be judged. This effect is two-fold. An action may be considered either as to its effect on the doer himself, or to its effect on the well-being of mankind at large. Viewed solely with regard to the doer himself, his act is to be judged as being either wise or foolish— wise if it promotes his well-being and happiness, foolish if it diminishes it. Viewed with regard to the general well-being, his act is to be judged as right or wrong, just or unjust. It is right and just if it promotes the public welfare, wrong and unjust if it diminishes it. In other words, the rule of wisdom instructs a man how he must act in order to promote his own welfare and the rule of justice instructs him how he must act in order to secure and promote the general welfare of mankind. But if the interests of each individual were in all respects identical with the interests of mankind, if it were possible for each man to seek his own good without thereby interfering with the similar activities of other men, there would be no need or place for the rule of justice, and the rule of practical wisdom and self-interest would serve all

purposes. But this is not so. The world is so made that there is not enough goods sufficient for all. So, if every man were allowed to take as much of it as he can get, the stronger and the more favourably placed will have all or most of it while the rest and less fortunate will have less or none. The rule of apportionment is the rule of justice. Justice consists in giving every man what he deserves. The law of justice is, therefore, the promotion of public welfare. The idea underlying every law is not that of command but of advice. The statement that a man ought to take care of his health and to practice temperance means that this is the way of his welfare. That he ought to keep his promises and abstain from violence and fraud means that this is the way of the general welfare. Every law assumes or presupposes a certain end or purpose and lays down the rules of action by which that end or purpose is to be reached. With that end in view, if command is to be added to advice and authority to purpose, the additional element is to be found in some regulative or coercive system of Government such as the administration of justice by the State in support of those rules which are recognised within any society as being the rules of right.

28. The Division of Justice

The term justice, in its widest sense, includes all forms of rightful action. Here the terms right and justice are being used as synonymous. The true nature of justice is that its rule advises a man how he must act in order to secure and promote the general welfare of mankind. Hence, all rules of justice exist for the protection of the interests of men against the acts of one another.

Justice is of two kinds :

(i) Natural or moral justice—Natural justice means justice in action and truth.

(ii) Legal Justice—Legal justice means justice which is actually declared and recognized by the Civil Law and enforced in the courts of law. Those portions of natural justice which are maintainable and enforceable by the State are incorporated in the legal rules and are called legal justice.

Natural justice is not, however, an ideal or perfect form of legal justice for the following reasons :

(i) Natural justice is the genus of which legal justice is a species. There is a large number of instances of natural justice which is not fit for enforcement by the State at all, for example, envy no one.

(ii) Even if it is fit for enforcement, it is inexpedient to reduce it to rigid rules and hence it is entirely left to the discretion of the courts.

Natural Justice and Positive Morality

Positive morality consists of Those rules of conduct which are approved by the public opinion of the society, and the breach of which is visited by public censure. Positive morality is thus an imperfect attempt to enforce the rule of justice by the sanction of public disapprobation and censure. But natural justice should not be identified with the rules of positive morality. For example, polygamy, or infanticide may be approved by positive morality of a particular community while natural morality may disapprove of both.

Private and Public Justice

Justice may again be divided into Private and Public. The rule of private justice is concerned with the dealings of men with one another privately, that is, without the help of judicial tribunal; while the rule of public justice is concerned with the dealing of a judicial tribunal with those who come before it for justice, Public justice, therefore, is that which a plaintiff demands and receives from a judicial tribunal because he has failed to obtain private justice from his opponent on demand. For example, if a creditor gets payment of his debt from his debtor on the stipulated date or thereafter on demand, then he need not go to court for relief as the debt has been satisfied privately. This is private justice. On the contrary, in the above case, if the debtor fails or refuses to satisfy the debt on demand, the creditor will go to court for justice. This is called public justice. Public justice is of two kinds—Civil and Criminal, Civil Justice is remedial—because it gives to the injured party compensation or restitution, while Criminal Justice is retributive or punitive—because it gives punishment to the wrongdoer.

29. Justice according to Law

In the modern State, the administration of justice according to law is commonly taken to imply the recognition of fixed rules. It is, indeed, perfectly possible for the courts to function without fixed rules at all. However expedient and useful it may be, it is not necessary that the courts should act according to those fixed and predetermined principles which are called the law. A tribunal where cases are decided not according to the rigid and artificial rules but according to the conscience of the judge, which he seems

just in the particular case, regardless of the general principles, may not be an efficient or trustworthy tribunal, but is a perfectly possible one. Such tribunal is a court of justice (e. g. the Court of Chancery which is not a Court of Law (i. e. the Court of Common Law).

But it must be remembered that our notion of justice presupposes certain fixed rules, and is incompatible with a system of free judicial discretion, and as such, the Judges are appointed to dispense justice according to law and not according to the dictates of their conscience. For instance, if criminal punishment were meted out at the discretion of a Judge, we should not call the result justice, for justice demands that a man should not be punished except for breach of a knowable rule. So, our notion of justice is often dependent upon the establishment of fixed rules. The more complex our civilization becomes, the greater we feel the necessity for its regulation by fixed rules and not according to individual conscience and reason of a Judge. Jeremy Taylor says, "Reason is such a box of quick-silver that it abides nowhere; it dwells in no settled mansion; it is like a dove's neck; .....and if we enquire after the law of nature (i. e. the principles of justice) by the rules of our reason, we shall be as uncertain as the discourses of the people or the dreams of disturbed fancies". In other words, our reasons vary so much and change so often that a tribunal which acts in accordance with its own conscience, not guided by fixed rules, will never attain uniformity and certainty in the administration of justice. Law is the reason and opinion of the community which should not be superseded by individual reason and conscience of a Judge. The law may not always be wise, but in the long run it is found to be wiser than the wisdom of an individual person who administers it. Aristotle says, "To seek to be wiser than the law is the very thing which is, by good law, forbidden".

These are the reasons why in civilized communities fixed rules have grown up and the Judges and Magistrates, entrusted with the duty of maintaining justice, are bound down by such rules.

No one can seriously doubt that it is on the whole expedient that fixed rules should grow up. Yet the elements of evil involved in a strict application of these rules unfettered by any discretion on the part of the judge are too obvious to escape attention. "Laws are in theory", as Hooker says, "the voice of right reason", they are in theory the utterance of justice speaking to men by the mouth of the State; but too often in reality, they fall far short of this ideal. Too often they turn judgment to wormwood (i. e. the judgment according to fixed rules becomes perverse) and make the judgment

a reproach. It is, therefore, thought necessary that although justice according to law presupposes the existence of certain fixed rules the total exclusion of judicial discretion by legal principles is impossible in any system. The Judge must be given a certain amount of discretion with which he should act. The degree within which the Judge should exercise his discretion is a question for which, as already stated, no fixed rule can be laid down.

30. Chief used and defects (i. e. advantages and disadvantages) of Law

The chief uses or advantages of law are three in number :

(i) Uniformity and Certainty—The first of the advantages of law is that it imparts uniformity and certainty to the administration of justice. It is vitally important not only that judicial decisions should be just, but also that people should be able, in most matters, to know beforehand the decision to which the courts of justice will come. This provision is impossible unless the course of justice is uniform, and the only effectual method of procuring uniformity is the observance of those fixed rules which constitute law. It is often more important that a rule should be definite, certain, known and permanent, than that is should be ideally just. The law is certain and predetermined and as such people can know beforehand their respective rights and liabilities and can thus adjust their conduct in their relationship towards each other. the more complex our society and civilization become, the more needful is its regulation by law, and not by individual conscience and reason, which varies from time to time and place to place, Reason varies so much and changes so often that uniformity and certainty of law become an impossibility. Jeremy Tailor has rightly compared reason to quick silver and dove's neck which abides nowhere and dwells in no settled mansion.

Equality and impartiality—The law is made for no particular person or for no individual case and so admits no respect of person, which is incompatible with justice. All are equal in the eye of law irrespective of their ranks and position in the society. It is necessarily impartial. It does not show any particular favour to any man. None can escape from the clutches of law. This principle of equality and impartiality prevents the administration of justice from being corrupted. Given a definite rule of law, a departure from it by a hair breadth is visible to all men; but within the sphere of individual judgment the differences of honest opinion are so manifold and serious that dishonest opinion can pass in great part unchallenged and undetected. So, the existence of fixed rules is a

protection against arbitrary and faulty decisions. Human nature being what it is, the observance of fixed rules protects the administration of justice to a large extent from the disturbing influence of improper motives on the part of those entrusted with judicial functions. The administration of justice according to law is rightly regarded as also one of the first principles of political liberty, Lockey says, "The legislative or supreme authority cannot assume to itself a power to rule by ex-temporare, arbitrary decrees, but is bound to despense justice and to decide the rights of the subject by promulgated standing laws, and known authorised Judges", So, in the words of Lockey : "We are the slaves of the law that we may be free". Hence law has procured its influence and reputation for all times for its principles of impartiality.

Protection from errors—The law serves to protect the administration of justice from the errors of individual judgment. The establishment of the law is the substitution of the opinion and conscience of the society at large for those of the individual to whom judicial functions are entrusted. The principles of justice are not always clearly legible by the light of nature. Very often problems requiring judicial decision are dark and difficult to grasp, and it requires the guidance of some accepted principles, which, although not always wise, are likely to lead to wiser decisions. The law is not always wise, but on the whole and in the long run, it is wiser than those who administer it. Aristotle observes : "To seek to be wiser than the law is the very thing which is by good laws forbidden". The law expresses the will and reason of the body politic, and claims by that title to override the will and reason of the judges and Magistrates, Hence, the law reflects the opinion and conscience of the whole society and the judges in giving effect to such opinion and conscience are saved from falling into errors of their individual judgment.

These are the chief advantages to be derived from the exclusion of individual judgment by fixed principles of law. Nevertheless, these benefits are not obtained save at a heavy cost. Salmond observed; "The law is without doubt a remedy for greater evils, yet it brings with it the evils of its own". The evils or defects of law are discussed below.

The defects or disadvantages of law are four :

Rigidity—The first defect of a legal system is its comparative rigidity. Because of this rigidity, law is to be applied without any allowance for special circumstances and without turning to the right hand or to the left. The result of this inflexibility is that, however

carefully and cunningly a legal rule may be framed, there will in all probability be some special instances in which it will caused hardship and injustice and prove a source of error instead of a guide to truth. So infinitely varied are the affairs of man that it is impossible to lay down general principles which will be true and just in every case. So, the provisions of law are not exhaustive and there will be cases and circumstances which are not covered by its express provisions. The law being rigid in its application, making no allowance for special circumstances, it causes great hardship and injustice in cases which are not provided for. But, if we are to have general rule at all, we must be content to pay this price.

Conservatism—Analogous to the vice of rigidity is that of conservatism. The former is the failure of the law to conform itself to the requirements of special circumstances and unforeseen clssses of cases; the latter is its failure to conform itself to those changes in circumstances and in men's views of truth and justice which are inevitably brought about by the lapse of time. Progressive societies are always in advance of law. In a progressive society the needs of the people may outgrow the provisions of the existing law. The existing body of rules may be found inapplicable to such changed circumstances. That which is true today may become false tomorrow by change of circumstances. In such a case legal development is absolutely necessary and some method is requisite whereby the law, which is by nature stationary, may be kept in harmony with the circumstances and opinions of the time. If the law is to be a living organism, and not a mere petrification, it is necessary to adopt and use with vigilance some effective instrument of legal development. The judges can do something to mould the law in the course of administering it; but the most efficient instrument of legal change is direct legislation. But legislation cannot keep pace with the progressive opinion and opinion cannot progress as rapidly as the changing circumstances require. So, the evils of legal conservatism remain as it is. However perfect we may make our legislative machinery, the law will lag behind public opinion, and public opinion behind the needs of the time.

Formalism—Another vice of the law is formalism. By this is meant the tendency to attribute more importance to technical requirements than to substantive rights and wrongs. The formalism of ancient law is too notorious to require illustration. In modern times registration and attestation are examples of formalities.

Needless Complexity—The fourth defect of law is undue and needless complexity. The law becomes more and more complex due

to the development of legal system and it becomes too difficult for people to understand the law without difficulty and the tendency of the lawyer to draw fine distinctions has made it all the more difficult to understand the actual law.

From the foregoing considerations as to the advantages and disadvantages which are inherent in the administration of justice according to law, we must guard against the excessive development of legal system. If the benefits of law are great, the evils of too much law are not small. Salmond observed; "Too much law may be an evil as too little". This may be avoided by reducing the law to a system of moderate size and intelligible simplicity. European countries prove the possibility of reducing the law in size and increasing its intelligibility. To eradicate such evils much has been done by way of judicial reforms during recent years. In many matters judicial discretion has been freed from the bonds of legal principles. The rules of pleadings have been relaxed, the credibility of witnesses has become a matter of fact, instead of formerly as one of law; a discretionary power of punishment has been substituted for the terrible legal uniformity which once disgraced the administration of Criminal justice, Moreover, Judges are now given a wide discretion in the matter of costs, in the apportionment of loss between joint and concurrent Tort feasors and in cases of contributory negligence.

In spite of all that is done by way of legal reforms, it will be seen that legal principles are rigid and inflexible and must be followed blindly by the Courts even against their judgment. There seems to be no reason, however, why in the nature of things, the law should not, to a considerable extent, be flexible instead of being rigid— should not aid, guide and inform judicial discretion instead of excluding it. There is no apparent reason why the law should say to the Judge, "Do this in all cases whether you consider it reasonable or not" instead of "Do this except in those cases in which you consider that there are special reasons for doing otherwise". Such flexible principles are not unknown even at the present day and it seems probable that, in the more perfect system of the future, much law that is now rigid will be made flexible. We have not so far realised to what extent flexible principles are sufficient to attain all the good purposes of the law while avoiding much of its attendant evil.

31. Authority of Law

The law has been defined as consisting of the rules in accordance with which justice is administered by the judicial

tribunals of the State. This brings us to the consideration of the true nature of the duty of the courts of justice to recognise and apply those principles which constitute the law. To what extent are the courts under a duty to observe the law in the exercise of their function of administering justice instead of acting in accordance with their own views of right or wrong? Is it a legal duty or only moral obligation? In other words, is the duty of court to administer justice according to law, legal or moral?

All the Judges in general are no doubt under a moral duty to observe the law. This is the business for which they are appointed and they are sworn to administer justice according to law. The observance of this moral duty is secured and enforced by the pressure of public opinion and more especially by the opinion of the Bar which would be quick to notice and to censure any departure by the Bench from the established principles of law. Moreover, the wilful refusal of a Judge to apply the established principles of law would amount to a misconduct in office for which he could be removed by the proper authority.

To this moral duty is also added the legal duty to administer justice according to law, so far as the inferior courts are concerned, that is, those courts which are subject to a superior courts in appellate or superintending jurisdiction. Thus, if the lower court gives a wrong judgment, it will be reversed and a correct judgment in accordance with law will be substituted by the appellate Court. Similarly, if the lower court refuses to exercise its lawful jurisdiction or claims to exercise jurisdiction beyond that which is conferred on it by law, superintending or reversional jurisdiction of the higher court may be invoked to compel observance of the law. Thus, so far as the inferior courts are concerned, there is not merely a moral but also a legal duty to administer justice according to law.

But in the case of a Supreme Court[1] , that is, the highest court of justice, which is not subject to any appellate authority, such a legal duty is impossible. There is no other court in which any such obligation could be recognised or enforced. The duty of the final tribunal that is, our Supreme Court, to administer justice according to law must be recognised as only a moral duty. If the Supreme Court wilfully misconstrues an Act of parliament, the interpretation so placed cannot be questioned because there is no other judicial tribunal with jurisdiction and authority to decide to the contrary.

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1. Supreme Court of Bangladesh consists of two Divisions-High Court Division and Appellate Division, the latter being the highest court of justice.

Thus, the authority of the law in the last resort has its source in the moral obligation of the Judges to observe their judicial oath by administering justice according to law. In other words, law is law not because the courts are under any legal obligation to observe it but because they do in fact observe it.

32. Territorial Nature of Law

Generally speaking a particular system of law belongs to a defined territory and it applies to all persons and things within that territory. It means that the laws of a particular State are not applicable to persons, things, acts and events beyond that territory. For instance, when we speak of the English Criminal Law, it applies with a few exceptions to all offences committed in England and does not apply to offences committed elsewhere. Similarly, the land law of English Courts applies only to land situated in England and does not apply to land Situated elsewhere. This territorial nature of law is merely the recognition by individual States to assert their supremacy over their territories. In many instances, however, different States conclude treaties with each other by which each agrees to recognise the laws promulgated by the other. A person, who had committed a crime in one State and removed himself and property to another State, may be brought back by extradition. Extradition is not practised in civil cases, but, as a

general rule, every State gives a remedy in its own courts for civil wrongs wherever they may be committed, If a valid judgment is obtained in a court of one State, it may generally be enforced through the courts of another State if the conditions laid down in the law of that State are complied with.

The above proposition that a system of law applies only to persons, things, acts and events within a defined territory is, however, subject to certain qualifications. For example, the English Criminal Law, although it is territorial in the sense that it applies with few exceptions to offences committed in England and not to offences committed elsewhere, there are several offences with which the English Courts will deal, and will apply the English law though committed elsewhere than in England. This extra-territorial jurisdiction extends to crimes such as piracy, treason, murder or bigamy, committed by British subject in any part of the word. Similarly the rule that the land-law of English Courts applies only to land situated in England and not elsewhere, has also its exception. An English Court of Equity will apply certain equitable rules even to land situated abroad. Then again, the law of

procedure is hardly in any respect territorial. The English law of procedure is the law of English Courts and is the same for all litigants who appear before those courts whether they be British subjects or foreigners. Finally a great qualification upon territoriality of law is to be found in every system of law by way of recognition of what is known as conflict of law. If, for example, two persons make a contract in France and one of them sues on it in an English Court, the issue is decided, to meet the ends of justice, by the French law. Thus, occasions do arise when rule of foreign systems of law is recognised and applied in English Courts to the exclusion of the general law of England.

From what is stated above it will be seen that although the enforcement of law can be regarded as territorial, the law itself cannot be said to be territorial and it can have no local habitation. Territoriality is not a part of the idea of law and the application of law is limited and determined not by territorial consideration but by reference to the personal qualification of the individuals over whom jurisdiction is exercised—qualifications, such as nationality, race or religion. The truth of the statement can be seen from the fact that in India Hindus are governed by Hindu law in certain matters while the Mohammedans are governed in such matters by their own personal law. We have also several different systems of law for regulating matters like the devolution of property on death, and the law applied is the law of personal status and not the law of the land even though the property consisted of land.

33. Law and Fact

The task of the court in actual litigation is to discover the facts of the case, to declare the rule of law that is applicable, and then to make a specific order which is the result of the application of the law to such facts as are considered relevant. The distinction between fact and law is important in pleading and proof, the functions of Judge and Jury, appellate procedure, the theory of precedent, and the doctrine of res judicata.

All questions which arise for consideration and determination in a court of justice are of two kinds, being either questions of law or questions of fact, In other words, every question which requires an answer in court of justice is either one of law or one of fact. In a sense this proposition is true, but it requires careful examination, because both the expressions "question of law" and "question of fact" are ambiguous and possess more than one meaning.

Question of Law

The term "question of law" is used in three distinct though related senses :

(i) It means, in the first place, a question which the court is bound to answer in accordance with a rule of law—a question which has already been authoritatively answered by some rule or principle of law and which the courts consider to be binding on them irrespective of their own opinion in the matter. All other questions are questions of fact, using the term fact in its widest sense to include everything that is not law, In this sense every question which has not been pre-determined and authoritatively answered by the law is a question of fact. Thus, the question as to what is reasonable and proper punishment for murder is a question of law, individual judicial opinion being exclusively excluded by fixed rule of law (section 302, Penal Code). But what is the proper and reasonable punishment for theft is (save so far as judicial discretion is limited by the statutory appointment of a fixed maximum under section 379, Penal Code) a question of fact on which the law has nothing to say. Whether a contractor has been guilty of unreasonable delay in building a house is a question of fact; law contains no rule for its determination. But whether the holder of a bill of exchange has been guilty of unreasonable delay in giving notice of dishonour is a question of law to be determined in accordance with certain fixed principles laid down in the Bill of Exchange Act. The question whether a child, accused of crime, has sufficient mental capacity to be criminally responsible for his acts is one of fact, if the child over seven years (Section 83, Penal Code); but one of law if he is under that age (to be answered in the negative, vide section 82, Penal Code). The question what is reasonable time under section 56 of the Sales of goods Act is a question of fact. This means that there is no rule of law laid down for determination of a question of fact.

(ii) Secondly, in a different signification, a question of law is a question as to what the law is. Question of law in this sense arises not because the law on that question is silent but on account of the uncertainty and ambiguity of the law. When a question arises in the court of justice for determination of an ambiguous statute, the question is a question of law, that is, it is a question as to what the true meaning of the law is. Thus an appeal on a question of law means the determination by the

court as to what the true rule of law on the point is. In other words, question of law in this sense is a question which the court is to decide in order to set at rest all disputes regarding the same in future. If the whole law was definitely ascertained, there would be no question of law in this sense.

(iii) The question of law in the third sense arises from the composite character of the typical English tribunal and the resulting division of judicial functions between a Judge and a Jury until recent years. The general rule is that all questions of law (in both of the foregoing senses) are for the Judge, and that all questions of fact (that is to say, all other questions) are for the Jury. This rule, however, is subject to numerous and important exceptions. Though question of law are never left to the Jury, very often questions of fact are determined by the Judge himself and not by the Jury. Thus, though the interpretation of a document very often, is a question of fact, it nevertheless falls within the province of the Judge to answer it. So, the question of reasonable and probable cause for prosecution—which arises in actions for malicious prosecution—is one of fact and yet for the Judge himself, whose duty it is to decide whether there is any sufficient evidence to justify a verdict for the plaintiff in such a suit. By an illogical though convenient usage of speech, any question which is thus within the province of the Judge instead of Jury is called a question of law, even though it may be a pure question of fact in the proper sense. It is called a question of law because it is committed to and answered by the authority which normally answers questions of law only.

Hence, in matters of questions of law, it is the duty of the court to ascertain the predetermined rule of law and to decide in accordance with it. For example, in case of a theft, the question whether the fact alleged to have been done amounts to theft is a question of law—to be determined by application of the rules which define the nature and scope of the offence of theft.

Question of Fact

Question of fact has been incidentally dealt with in connection with the question of law. In its most general sense it includes all questions which are not questions of law. The term question of fact has also more than one meaning. As the expression question of law' has three distinct applications, it follows that a corresponding

diversity exists in the application of the contrasted term. A question of fact, therefore, as opposed to a question of law, means either :

(1) any question which is not predetermined by a rule of law; or

(2) any question except a question as to what the law is; or

(3) any question that is to be answered by the Jury instead of by the Judge. A Jury gives no reasons for its decision on the question of fact and, therefore, lays down no principles of law. Therefore, it may be said that the decision of a Jury, cannot establish any precedent.

Hence, in matters of question of fact, it is the duty of the court to ascertain the truth of the matter by exercising its intellectual judgment on the evidence submitted to it. For example, on the trial of a person accused of theft the question whether he has done the act as alleged against him is a question of fact to be determined in accordance with the evidence adduced in the case.

Question of fact as opposed to question of judicial discretion

Salmond uses the term 'question of fact' in a narrower sense in which it does not include all questions that are not questions of law but only some of them. In this sense a question of fact is opposed to a question of judicial discretion.

The sphere of judicial discretion includes all those questions as to what is right, just, equitable and reasonable so far as not predetermined by any authoritative rules of law but have been left out to the discretion of the court to take a decision as it thinks just and proper. In determining the questions of fact, the court tries to find out the truth of the matter, while in determining the question of judicial discretion the court tries to discover the justice of the matter. Thus, whether the accused of theft has committed the crime is a question of fact to be ascertained on the evidence adduced; but whether, if found guilty, he should be punished with fine or with imprisonment is a question of judicial discretion—to be determined in accordance with moral judgment of the court. Here it is the duty of the Court to exercise its moral judgment in order to ascertain the right and justice of the case.

In the widest sense of the term 'fact', a question whether an act is right or just or reasonable (i. e. a question of judicial discretion) is no less a question of fact than the question whether that act has been done, it not being predetermined by any rule of law, but it is not a question of demonstrable fact. The questions of judicial

discretion are not the subject of evidence and demonstration to be dealt with by a purely intellectual process, but of argument and are submitted to the reason and conscience of the court; it involves an exercise of moral judgment and it is, therefore, differentiated from question of pure fact.

Having regard to the above distinction, all metters and questions which come before a court of justice are of three kinds:

(1) Matter and questions of law; that is, all that are already determined by authoritative legal principles;
(2) Matter and questions of judicial discretion—that is to say, all matters and questions as to what is right, just, equitable reasonable, except so far as pre-determined by law.
(3) Matters and questions of pure fact—that is to say, all other matters and questions whatever.

In matters of the first kind, the duty of the court is to ascertain the rule of law and to decide in accordance with it. In matters of the second kind, its duty is to exercise its moral judgment in order to ascertain the right and justice of the case. In matters of the third kind, its duty is to exercise its intellectual judgment on the evidence submitted to it in order to ascertain the truth. On the trial of a person accused of theft, for example, the question whether the act alleged to have been done amounts to the criminal offence of theft is a question of law to be answered by the application of the rules which determine the scope and nature of the offence of theft and distinguish it from other offences, such as that of obtaining goods by false pretences; the question whether he has done the act so alleged against him is a question of fact, to be determined in accordance with the evidence; and the question as to what is the just and reasonable punishment to be imposed upon him for his offence is a question of right or judicial discretion, to be determined in accordance with the moral judgment of the court.

Now the same question may be partly one of law and partly one of fact or judicial discretion. The question, for example, whether a partnership exists between A and B partly one of fact (viz. whether an agreement has been made between them) and partly one of law (viz. whether such an agreement is sufficient to constitute the legal relation of partnership). Similar composite questions are innumerable. Secondly, there are many cases in which the freedom of judicial discretion on any point is not wholly taken away by a fixed rule of law but is merely restrained and limited by such a rule, and is left to operate within the restricted sphere so allowed to it. In such a case the question to be determined by the court is one

of law so far as the law goes, and one of fact or judicial discretion as to the rest. The proper penalty for an offence is usually the question of this nature. The law imposes a fixed maximum but leaves the discretion of the court to operate within the limits so appointed.

Transformation of question into another

In connection with the question of law and fact, a question arises as to whether one can be transformed into another. The answer will be in the affirmative in this, that question of fact in its general sense may be transformed into that of law through judicial interpretation of ambiguous statutory provisions. The existence and development of the legal system represents the transformation, to a greater or less extent, of questions of fact and of judicial discretions into question of law. The process of transformation proceeds chiefly within the sphere of judicial discretion and only to a smaller extent within the sphere of pure fact.

When a particular rule of law becomes uncertain on account of ambiguous statutory provisions which cannot settle the dispute between parties to any case, it goes before the court for judicial interpretation of the said provision of law. It becomes a question as to what the true law is, which is a question of judicial discretion and not a question of law in the first sense. When the question is authoritatively answered it is no more a question of judicial discretion; it becomes a question judicially determined and hence a question of law (i. e. a precedent to be followed in similar other cases in future).

In this way, new precedents (case-law) are always created by judicial interpretation of the ambiguous statutory provisions. Thus, the development of a legal system represents gradual transformation of the question of judicial discretion (a question of fact in the first sense) into question of law.

To a lesser extent even questions of pure fact are similarly transformed into question of law through *legal presumptions and legal fiction.*

Legal Presumption (Presumptiones juris)

The law is the theory of things, as received and acted upon within the courts of justice, and this theory may or may not conform to the reality of things outside. The eye of law does not infallibly see things as they are. Partly by deliberate design and partly by the errors and accidents of historical development, law and fact, legal theory and the truth of things may fail in complete co-

incidence. What exists in deed and in truth may not exist in law, and *vice versa*.

This discord between law and fact has given rise to legal presumption whereby one fact is recognised by law as sufficient proof of another fact, whether in truth it is sufficient to support that view or not. A legal presumption is a rule of law by which judges shall draw a particular inference from particular facts or from particular evidence. Presumptions are either presumption of law or presumption of fact. Presumption of law may again be subdivided into (i) rebuttable and (ii) conclusive presumption.

Rebuttable presumption means a particular inference drawn by court from presumptive or conditional proof of a particular fact which amounts to a proof only so long as there exists no other fact amounting to disproof. It is a provisional proof, valid until overthrown by contrary proof. A rebuttable or conditional presumption is the acceptance of a fact by the law as conditional proof, which may be rejected if sufficient evidence is given in contradiction of a particular inference drawn by the court, Thus, a person not heard of for seven years is presumed to be dead (although actually he may not be so) until the contrary is proved to overthrow the presumption. Similarly an accused person is presumed to be innocent until it is conclusively proved that he is guilty and so on. In case of rebuttable presumption a fact is presumed to be proved so long as the contrary cannot be proved to establish the contrary inference.

On the other hand, by conclusive persumption is meant the acceptance or recognition of a fact by the law as conclusive proof. In this case, on proof of one fact, the court shall regard the other fact to have been actually proved and shall not admit further evidence to disprove the same. Thus, a child born during the continuance of a marriage and within 280 days after its dissolution, unless non-access is proved, shall be conclusively taken to be legitimate.

Legal fiction (Fictio juris)

Another method by which the law on occasion deliberately departs from the truth of things for sufficient or insufficient reasons, is the use of a device known as a legal fiction. This was a device familiar to primitive legal system though mostly fallen out of use in modern law. For example, Roman responsa prudentium is an illustration of legal fiction. Roman law was considerably improved by the use of legal fiction or interpretation of laws by jurisconsults without, in fact, changing the letter of the law. Thus by interpreting

the law of sale, the Romans developed the law of gift and mortgage and considerable improvement had also been made on the law of property and obligation.

In modern law also an extensive use of legal fictions is found. An important legal fiction recognised by modern system is that of the adoption of children. In Hindu law an adopted son is regarded as a son born into the family. An adoptive child is a child who is not in fact the child of its adopting parent, but is deemed to be such by a legal fiction, with much the same results in law as if this fictitious parentage was real. So, also a child in the mother's womb is regarded as a child born for many purposes, e. g., to take an estate as a legatee. In English law, the relation of a master and servant is supposed to be the ground of action for damages when a father brings an action against the seducer of his daughter. In this action the daughter is alleged to be the servant of the plainfiff-father and the cause of action is based upon the consequent loss of service of the daughter.

34. Law and Equity

Until the year 1875, in England, two distinct systems of law were being administered at the same time be different tribunals. These two different systems are called the common law and equity. Common law was the older and it was administered in older courts, namely, the King's Bench, the Court of Common Pleas and the Exchequer. Equity was the more modern body of legal doctrine developed and administered by the Chancellor in the Court of Chancery as supplementary to and corrective of the older law. To a large extent the two systems were identical and harmonious, for it was a maxim of the Chancery that equity follows the law and does not oppose it unless there was some sufficient reason for their rejection or modification. The Judicature Act of 1875 put an end to this distinction between the two by the fusion of these two systems into one single court called the High Court of Justice.

Although the distinction between law and Equity has ceased, still there remain some distinctions which require attention. The distinction between legal and equitable ownership and legal and equitable rights and remedies illustrate the distinction between the two systems.

The term equity is used at least in three distinct though related senses :

(1) In the first sense equity is synonymous with natural justice, which means equality—the virtue which gives every man his own.

(2) In the second and legal sense, equity means natural justice, not simply, but in a special aspect, that is to say, natural justice as opposed to the vigours of inflexible rules of common law. The law is not exhaustive and hence there may be cases and circumstances which are not covered by its provisions. In such cases, the law does not Supply any remedy to the aggrieved suitor. In order to give relief to the aggrieved party, it may be necessary to go beyond the law and to administer justice according to the dictates of natural reason. In this sense, equity is opposed to law. This distinction was received in the juridical theory both of Greeks and Romans. Aristotle defines equity as the correction of the law where it is defective on account of its generality and the definition is constantly repeated by later writers. Elsewhere he says : "An arbitrator decides in accordance with equity, a Judge in accordance with law; and it was for this purpose that arbitration was introduced, namely, that equity might prevail".

(3) In the third sense, equity is no longer opposed to law but a particular kind of law which was enforced by the Courts of chancery, Originally, the Court of Chancery administered equity by the application of natural justice and good conscience. Hence, equity was not law at all but natural justice in the beginning and the Chancellor administered justice without law. But in course of time the equity changed its nature and meaning and the hands of Chancellor were restrained and he had to administer justice in accordance with the predetermined rules and precedents already established by Equity Court. Hence, equity, as administered in the Court of Chancery, lost its original meaning. As a result, a second system of law developed in England—a system of predetermined rules. The law thus developed was also called equity, because it had its source in equity.

Closely analogous to this equity—law of the English Chancellor is the *jus praetorium* of the Roman praetor. The praetor, the supreme judicial magistrate of the Roman republic, had much the same power as the Chancellor of supplying and correcting deficiencies and errors of the older law, by recourse to *acquits*. Just as the exercise of this power gave rise in England to a body of Chancery law, standing by the side of the common law, so in Rome a *jus praetorium* grew up distinct from the older *jus civile*. The chief distinction between the Roman and the English cases is that at Rome the two systems of law co-existed in the same court, the *jus*

praetorium practically superseding the *jus civile* so far as inconsistent with it. whereas in England, law and equity were administered by distinct tribunals. Moreover, although the *jus praetorium* had its source in the *acquitus* of the praetor, it does not seem that this body of law was ever itself *acquitus*. This transference of meaning is peculiar to English usage.

35. General Law and Special Law

The whole body of Civil Law may be divided into two parts which may be distinguished as General Law and Special Law. General Law consists of the general and ordinary law of the land. This is the general law of the whole realm. The latter consists of certain other bodies of legal rules which are so special and exceptional in their nature, source and application that it is convenient to treat them as standing outside the general and ordinary law of the land.

The chief forms of *jus speciale,* namely, Special Law are : (1) Local Law, (2) the Foreign Law or Private International Law (Conflict of Law); (3) Conventional Law; (4) Autonomic Law;(5) Martial Law; (6) International Law or Prize Law as administered in Prize Courts.

Local Law— General law is the law of whole realm and is in force throughout the territory of the State, Standing apart from this there are particular rules of law which are in force in and applicable only to particular parts of the State. Such law is local in its nature and application and is called local law. Local law is of two kinds : (a) Locally enacted law and (b) Local Customary law.

Locally Enacted Law—It has its source in the local legislative authority, as for example, The Bengal Tenancy Act, a locally enacted law, relating to land tenure system of Bengal only. In England, the locally enacted law has its source in the local legislative authority of boroughs and other self-governing communities empowered to govern their own districts by by-laws supplementary to the general law.

Local Customary Law—It has its source in those immemorial customs which prevail in particular parts of the State, such as, mercantile custom of any particular locality of the State having the force of law in derogation of the general law of the land.

All such local laws are parts of the law of the land, but they are not part of the general law of the country.

Foreign law or Private International Law or Conflict of Laws— Sometimes it becomes necessary for the State-Court to take into

consideration the foreign law in order to do justice to the parties, that is, to decide the rights and liabilities of the parties to an agreement made in foreign country, For example, two persons enter into a contract in America and one of them sues the other on it in a Bangladesh Court. In such a case justice cannot be done fully unless the case is decided according to the law of the place where the contract had been entered into. So, the validity and effect of the contract should be determined by American Law rather than by Bangladesh Law. Thus foreign law is nothing but the body of foreign legal principles recognised and applied by the State-court in the administration of justice. But it is no part of the general law of the land.

Conventional Law—Conventional law has been described in Chapter 3. It may be observed further that the rules laid down in an agreement for the determination of the rights and liabilities of the parties may be regarded as the rules of law which the parties have agreed to substitute or add to the general law. But although conventional law is the true law as between the parties to the agreement, it does not form part of the general law of the land, for this law is not general in its application.

Autonomic Law—By autonomic law is meant that species of law which has its source in various forms of subordinate legislative authority possessed by private persons or bodies of persons. Private bodies such as Railway Companies, Universities, Registered Companies, etc. are entrusted with delegated authority to frame by-laws for their regulation. The laws so created are called autonomic laws and are recognised as such and enforced by law courts, but they cannot be incorporated as the general law of the land.

The distinction between conventional law and autonomic law is shortly this :

(1) Conventional law has its source in the agreement between two or more parties. But autonomic law has its source in the delegated power of legislation and hence it is independent of any agreement.

(2) Conventional law has its force and validity in the agreement of the parties who are subject to it. Hence, conventional law is binding only on those persons who are parties to the agreement.

Autonomic law is binding on all concerned, whether they have agreed to it or not. Thus, a particular law passed by a majority at a Company meeting is binding not only on the majority but also on the dissentient members who form the minority. Therefore, we may

say that it is conventional law for the majority and autonomic law for the minority.

Martial Law—Martial law is that species of law which is observed and applied by Military Tribunals called Courts Martial for the administration of military justice, Courts Martial are the courts of the army.

The term 'martial law' is used in three senses :

(1) It is sometimes used to denote military law, that is, the Code governing the soldier in war and peace, at home and abroad.

Now, military law may be distinguished from the martial law in the following respects :

(a) Only military men are subject to military law. Martial law governs the soldier as well as the c ilian in times of war, rebellion or insurrection.

(b) While military law governs the soldier in times of war or peace, martial law is applied only in times of rebelion or war.

(c) In England, military law is embodied in a statute to Parliament ; while Martial law is based on Common Law.

(2) Martial law means the law by which the Army governs foreign territory in its occupation in time of war.

(3) Martial law means a certain state of relation between the military and the civil authorites in time of grave emergency. If the civil courts have, on account of hostilities, ceased to function for the time being, the maintenance of law and other passes from the civil authorities to the military. Salmond is of opinion that even within the country itself the existence of a grave emergency justifies in law the temporary establishment of a Military Government in temporary suspension of ordinary law of the land.

International law (or Prize Law) as administered in Prize Court —International law as a species of conventional law has been dealt with in Chapter 3. But here we want to distinguish it from the general law of the land. Prize law is that portion of international law which is administered in Prize Courts of the State in times of war. It has its source in the agreement of Sovereign States among themselves, and not in the legislative authority of the individual State to which the Prize Courts belong. Prize law is that portion of the law of nations which regulates the practice of the capture of

ships and cargoes at sea in times of war. Prize Courts investigate the legality of all captures of ships and cargoes, and administer justice as between the captors and the persons interested in the property seized. By a rule of international law all the States which desire to exercise this right of capture are under an obigation to establish and maintain within their dominion what are called Prize Courts, whose function is to investigate the legality of all captures of ships and cargoes at sea. If the seizure is lawful, the property is adjudged as a lawful prize of war, and if unlawful, orders are made to return the property as the law requires.

It must be understood that a Prize Court is not an international tribunal. It is a court established by and belonging exclusively to the individual State by which the ships and cargoes have been taken. Nevertheless, the law which is administered by these tribunals is the law of the nations but this law does not form part of the general law of the land because of its exceptional nature and source.

36. Common Law (jus commune)

The general law of England is itself divided into three parts—statute law, equity and common law, Statute law is that portion of the law which is derived from legislation including the exercise of subordinate and delegated legislative power by public authorities under the authority of Parliament, as for example, regulation made under a statute. It is enacted or written law (jus scriptum) as opposed to unenacted or unwritten law (jus non scriptum). Equity, on the other hand, had its origin in the Court of Chancery which has already been considered in section 34 of this Chapter. It is a form of case law having its source in the judicial precedent of that court and of the modern court by which the legal system of the Court of Chancery is now administered and developed. All the residue of the general law of England, after excepting statute law and equity, is known as Common Law.

Common law is a form of case-law having its source in the judicial decisions of the old courts of King's Bench, Common Pleas and Exchequer, and of the modern courts by which the system so established is now administered and developed. It is a rule of law as opposed to a rule established by statute, or as opposed to a rule of special law in its various forms, as already discussed.

In its historical origin the term common law (jus commune) was identical in meaning with the general law as already defined. It was the general law of the land—the lex terrae as opposed to special

law, jus special. By a process of historical development, however, the common law has now become, not the entire general law but only the residue of that after deducting equity and statute law. It is no longer possible, therefore, to use the expression common law and general law as synonymous. Although equity is now just as much part of the ordinary or general law of England as is the common law itself and has now become jus commune in truth, the legal nomenclature 'equity'—has remained unchanged and has not acquired a title to that designation—jus commune i. e. common law.

With regard to the relation between statute law and common law, due to immense development of statute law in modern times and its invasion of almost every portion of the old common law, they (common law and statute law) must now be regarded as fused into a single system of general law just as in the case of common law and equity. Indeed a very large portion of the general law has its sole source in statutes, and the residue of the common law is undergoing a slow transformation into statute law by codification. Although statute law is a part of the general law of the land, it is still distinguished in name from the common law, just as equity is still distinguished from it.

The expression "Common Law" is also used to mean the whole law of England. It frequently bears this meaning when "Common Law" is contrasted with a foreign system like Roman Law or French Law. Alternatively, in a context like this, the phrase may, in an extended sense, mean the principles of English law as they have been adopted in the other common law countries, like the United States of America, Canada, Australia, New Zealand and the Irish Republic.

37. Constitutional Law

The Constitution of a modern State is of extraordinary complexity, and it is usual to regard it as divisible into two distinct parts. The first consists of its fundamental or essential elements, the second consists of its secondary elements—the details of State structure and State action. The first, essential and basal portion, is known as the Constitution of the State. The second has no generic title.

Prof, Salmond defines constitutional law as the body of those legal rules and principles which determine the constitution of the State; that is, which determine the essential portion of a State's organisation. It is not possible to draw any hard and fast aline between the laws which belong to the Constitution proper and the

remaining portion of the laws of the State; neither, therefore, it is possible to draw any such line between constitutional law and other branches of the legal system. The distinction is one of degree, rather than one of kind; and is drawn for purposes of practical convenience, rather than in obedience to any logical requirement. The more important, fundamental, and far-reaching any principle or practice is, the more likely it is to be classed as constitutional. Conversely, the more special, detailed and limited in its application, the less likely it is to find a place in any exposition of the law and practice of the Constitution. Thus, the organisation and powers of the Supreme Court of Judicature pertain to the constitutional law, while it is otherwise with courts of inferior jurisdiction.

Inasmuch as constitutional law has been defined as the body of those rules which determine the constitution of a State, a question arises whether constitution of a State can be determined by law at all. There can be no law unless there is already a State whose law it is, and there can be no State without a Constitution. The State and its Constitution are, therefore, necessarily prior to law. How then does the law determine the constitution? Is constitutional law in reality law at all? Is not the constitution a pure matter of fact with which the law has no concern? The answer is that the Constitution is both a matter of fact (de facto) and a matter of law (de jure). Constitutional law involves concurrent constitutional practice. It is merely the reflection within courts of law, of the external objective of reality of the de facto organisation of the State. It is the theory of the Constitution, as received by courts of justice. It is the Constitution, not as it is in itself, but as it appears when looked at through the eye of law.

The constitution, as a matter of fact, is logically prior to the constitution as a matter of law. In other words, constitutional practice is prior to constitutional law. There may be a State and a Constitution without any law, but there can be no law without a State and a Constitution. No Constitution, therefore, can have its source and basis in the law. Unless some form of Constitution has already been established, constitutional facts will be taken notice of in Courts of justice as constitutional law. Constitutional law follows hard upon the heels of constitutional fact. Courts, legislature and law had alike their origin in the Constitution; therefore, the Constitution could not derive its origin from them, Constitution may have an extra-legal or even illegal origin, such as, that of United States of America. Before these Constitutions were established, there

was no law in these colonies save that of England, and it was not by the authority of this law, but in open forcible defiance of it that these colonial communities set up new States and new Constitutions. So also with every constitution that is altered by way of illegal revolution. Constitutional law, therefore, is the judicial theory, reflection, or image of the Constitution de facto, that is to say, of Constitutional practice. Here, as elsewhere, law and fact may be more or less discordant. The Constitution as seen by the eye of law may not agree on all points will the objective reality. Much constitutional doctrine may be true in law but not in fact, or true in fact but not in law. Power may exist de jure but not de facto, or de facto but not de jure. For example, British Crown has no longer any power of refusing its assent to the bill passed by the Parliament and conversely, the control exercised by the House of Commons over the executive is as unknown in law as it is well established in fact.

Although the Constitution de jure and the Constitution de facto are not necessarily the same, they nevertheless tend towards coincidence. Constitutional law and practice react upon each other, each striving to assimilate the other to itself. The objective facts of State organisation tend to mould legal theory into conformity with themselves.
