Chapter One

Nature and Scope of Jurisprudence

What is Jurisprudence?

IT IS DIFFICULT to give a universal and uniform definition of jurisprudence. Every jurist has his own notion of the subject-matter and the proper limits of jurisprudence depend upon his ideology and the nature of society. Moreover, the growth and development of law in different countries has been under different social and political conditions. The words used for law in different countries convey different meanings. The words of one language do not have synonyms in other languages conveying the same meaning. The word "jurisprudence" is not generally used in other languages in the English sense. In French, it refers to something like "case law". The evolution of society is of a dynamic nature and hence the difficulty in accepting a definition by all. New problems and new issues demand new solutions and new interpretations under changed circumstances. However, scientific inventions have brought the people of the world closer to each other which helps the universalisation of ideas and thoughts and the development of a common terminology.

The study of jurisprudence started with the Romans. The Latin equivalent of "jurisprudence" is jurisprudentia which means either "knowledge of law" or "skill in law". Ulpian defines jurisprudence as "the knowledge of things divine and human, the science of the just and unjust". Paulus, another Roman jurist, maintained that "the law is not to be deduced from the rule, but the rule from the law". The definitions given by the Roman jurists are vague and inadequate but they put forth the idea of a legal science independent of the actual institutions of a particular society.

In England, the word jurisprudence was in use throughout the early formative period of the common law, but as meaning little more than the study of or skill in law. It was not until the time of Bentham and his

disciple Austin in the early part of the 19th century that the word began to acquire a technical significance among English lawyers. Bentham distinguished between examination of the law as it is and as it ought to be ('expositorial' and 'censorial jurisprudence). Austin occupied himself with "expository" jurisprudence and his work consisted mainly of a formal analysis of the structure of English Law. Analytical exposition of the type which Bentham pioneered and Austin developed, has dominated English legal thought up to the modern times. The word jurisprudence has come to mean in England almost exclusively an analysis of the formal structure of law and its concepts.

There has been a shift during the last one century and jurisprudence today is envisaged in an immeasurably broader and more sweeping sense than that in which Austin understood it. To quote Buckland: "The analysis of legal concepts is what jurisprudence meant for the student in the days of my youth. In fact it meant Austin. He was a religion; today he seems to be regarded rather as a disease." Julius Stone describes jurisprudence as "the lawyer's extraversion. It is the lawyer's examination of the precepts, ideals and techniques of the law in the light derived from present knowledge in disciplines other than the law".[1] Lord Radcliffe writes, "You will not mistake my meaning or suppose that I deprecate one of the great humane studies if I say that we cannot learn law by learning law. If it is to be anything more than just a technique, it is to be so much more than itself: a part of history, a part of economics and sociology, a part of ethics and philosophy of life."[2]

Austin

The view of Austin is that the science of jurisprudence is concerned with positive law, with "laws strictly so-called". It has nothing to do with the goodness or badness of law. Austin divided the subject into *general and particular jurisprudence.* General jurisprudence includes such subjects or ends of law as are common to all systems while particular jurisprudence is confined only to the study of any actual system of law or any portion of it. To quote Austin, "I mean then by general jurisprudence the science concerned with the exposition of the principles, notions and distinctions which are common to all systems of law, understanding by system of law the ampler and maturer systems which, by reason of their amplitude and maturity, are pre-eminently pregnant with instructions." Again, "the proper subject of general or universal jurisprudence is a description of such subjects and ends of laws as are common to all systems and those resemblances between

[1] *Legal System and Lawyers' Reasonings*, p. 16.

[2] *The Law and Its Compass*, pp. 92-93.

different systems which are bottomed in the common nature of men or correspond to the resembling points in the several portions". General jurisprudence is an attempt to expound the fundamental principles and broadest generalisations of two or more systems. It is the province of general, pure or abstract jurisprudence to analyse and systematise the essential elements underlying the indefinite variety of legal rules without special reference to the institution of any particular country. Particular jurisprudence is the science of particular law. It is the science of any system of positive law actually obtaining in a specifically determined political society. To quote Austin, "Particular jurisprudence is the science of any actual system of law or any portion of it. The only practical jurisprudence is particular."

General and particular jurisprudence differ from each other not in essence but in their scope. The field of general jurisprudence is a wider one. It takes its data from the systems of more than one State while particular jurisprudence takes its data from a particular system of law. Its principles are coloured and shaped by the concrete details of a particular system. However, in both cases, the subject of jurisprudence is positive law.

The relation of general and particular jurisprudence may be shown by an example. Possession is one of the fundamental legal concepts recognised by all systems of law. The function of jurisprudence is to explain its characteristics, its legal value, mode of its acquisition and extinction. General jurisprudence will analyse it without reference to any particular legal system, but particular jurisprudence will do the same thing but with reference to some particular system of law.

Austin's classification of jurisprudence into general and particular jurisprudence has been criticised by Salmond, Holland and other jurists. The main contention in rejecting the classification of Austin is based upon its impracticability. Salmond points out that the error in Austin's idea of general jurisprudence lies in the fact that he assumes that unless a legal principle is common to many legal systems, it cannot be dealt with in general jurisprudence. There may be many schools of jurisprudence but there are not different kinds of jurisprudence. Jurisprudence is one integral social science. The distinction between general and particular jurisprudence is not proper. It is not correct to use such terms as Hindu jurisprudence, Roman jurisprudence or English jurisprudence. Actually what we are dealing with are not different kinds of jurisprudence but different systems of law. It is more appropriate to use the term jurisprudence alone without any qualifying epithet. Jurisprudence is a social science which deals with social

institutions governed by law. It studies them from the point of view of their legal significance.

Holland also has criticised the classification of Austin. Referring to the particular jurisprudence of Austin, Holland points out that it is only the material which is particular and not the science itself. The study of a particular legal system is not a science. Giving the example of the geology of England, Holland points out that, "A science is a system of generalisations which, though they may be derived from observation over a limited area, will hold good everywhere assuming the subject-matter of the science to possess everywhere the same characteristics." Again, "principles of geology elaborated from the observation of England alone hold good all over the globe insofar as the same substances and forces are everywhere present and the principles of jurisprudence, if arrived at entirely from English data, would be true if applied to the particular law of any other community of human beings, assuming them to resemble in essentials to the human beings who inhabited England".

The criticism of Holland is based on the assumption that law has the same characteristics all over the world but that is opposed to human experience. Maitland points out that "races and nations do not travel by the same roads and at the same rate". Lord Bryce writes, "The law of every country is the outcome and result of the economic and social conditions of that country as well as the expression of its intellectual capacity for dealing with these conditions." Buckland observes, "Law is not a mechanical structure like geological deposits; it is a growth and its true analogy is that of biology." Savigny says, "Law grows with the growth and strengthens with the strength of people and its standard of excellence will generally be found at any given period to be in complete harmony with the prevailing ideas of the best class of citizens." Puchta writes, "The progress in the formation of law accordingly keeps pace with the progress in the knowledge of the people of the facts which they observe and hence it is that law has its provincialisms no less marked than language."

Dias and Hughes point out serious ambiguities in Austin's definition of general jurisprudence. Austin gives no criterion for amplitude and maturity. He also does not explain whether the common principles are those which are in fact found to be common or those which for some reason are treated as being necessarily common. There is no demonstration that the notions which he put into his book are in truth shared by "ampler and natural system." whatever they may be. When we look at the substance of his book, we find that it is drawn mainly from Eng-

lish Law with occasional superficial references to Roman Law. His jurisprudence is essentially "particular", at the most comparative.

Buckland points out that Austin and others who profess "general jurisprudence" do not adhere to it in practice.

Holland

Sir Thomas Erskine Holland defines jurisprudence as *"the formal science of positive law"*. It is a formal or analytical science rather than a material science. The term positive law has been defined by Holland as "the general rule of external human action enforced by a sovereign political authority". Holland follows the definition of Austin but he adds the term formal which means "that which concerns only the form and not its essence". A formal science is one which describes only the form or the external side of the subject and not its internal contents. Jurisprudence is not concerned with the actual material contents of law but with its fundamental conceptions. Holland came to the conclusion that jurisprudence is not a material science but merely a formal science. To quote him, "The assertion that jurisprudence is a general science may perhaps be made clearer by an example. If any individual should accumulate a knowledge of every European system of law, holding each part from the rest in the chambers of his mind, his achievements would be best described as an accurate acquaintance with the legal systems of Europe. If each of these systems were entirely unlike the rest except when the laws had been transferred in the course of history from one to the other, such a distinguished jurist could do no more than endeavour to hold fast and to avoid confusing the heterogeneous information of which he had become possessed. Suppose, however, as is the case, that the laws of every country contain a common element; that they have been constructed in order to effect similar objects, and involve the assumption of similar moral phenomena as everywhere existing; then such a person might proceed to frame out of his accumulated materials a scheme of the purposes, methods and ideas common to every system of law. Such a scheme would be a formal science of law, presenting many analogies to grammar, the science of those ideas of relation which, in greater or less perfection, and often in the most dissimilar ways, are expressed in all the languages of mankind. Just as similarities and differences in the growth of different languages are collected and arranged by comparative philology and the facts thus collected are the foundations of abstract grammar, so comparative law collects and tabulates the legal institutions of various countries and from the results thus prepared, the abstract science of jurisprudence is enabled to set forth an orderly view of the ideas and methods which have been variously realised in actual systems. It is, for instance, the office of

comparative law to ascertain what have been at different times and places the periods of prescription or the requisites of a good marriage. It is for jurisprudence to elucidate the meaning of prescription in its relation to ownership and to actions; or to explain the legal aspects of marriage and its connection with property and the family. We are not indeed to suppose that jurisprudence is impossible unless it is preceded by comparative law. A system of jurisprudence might conceivably be constructed from the observation of one system of law only at one epoch of its growth". Again, "jurisprudence is therefore not the material science of those portions of the law which various nations have in common, but the formal science of those relations of mankind which are generally recognised as having legal consequences". Jurisprudence "deals rather with the various relations which are regulated by legal rules than with the rules which themselves regulate these relations".

Many eminent jurists have criticised the view of Holland that jurisprudence is a formal science of positive law. According to Gray: "Jurisprudence is, in truth, no more a formal science than physiology. As bones and muscles and nerves are the subject-matter of physiology, so the acts and forbearances of men and the events which happen to them are the subject-matter of jurisprudence and physiology could as well dispense with the former as jurisprudence with the latter." Again, "the real relation of jurisprudence to law depends upon not what law is treated but how law is treated. A treatise on jurisprudence may go into the minutest particulars or be confined to the most general doctrines and in either case deserves its name; what is essential to it is that it should be an orderly, scientific treatise in which the subjects are duly classified and subordinated". Dr. Jenks asks: "Can jurisprudence be truly said to be a purely formal science? Not, it is submitted, unless the word "formal" be used in a strained and artificial sense. It is true that a jurist can only recognize a law by its form; for it is the form which, as has been said, causes the manifold matter of the phenomena to be perceived. But the jurist, having got the form as it were, on the operating table, has to dissect it and ascertain its meaning. Jurisprudence is concerned with means rather than with ends, though some of its means are ends in themselves. But to say that jurisprudence is concerned only with forms is to degrade it from the rank of a science to that of a craft."

Professor Platt also criticises the definition of Holland in these words: "Without resorting to acts and forbearances and to the state of facts under which they are commanded law cannot be differentiated at all; not so much as the bare framework of its chief departments can be erected. An attempt to construct quite apart from all the matter of law even the most general conception of ownership or contract would be

like trying to make bricks not merely without straw but without clay as well."

Holland's definition of jurisprudence appears to be a good one. There is no reasonable reason to criticise it. The criticism of Gray is not without doubt. In his view a scientific treatise on any department of the law may be described as jurisprudence. Such usage is by no means uncommon, but if we understand by jurisprudence "the science of law in general", we must admit it to be a misapplication of this ponderous quadrisyllable. Dr. Jenks seems to confuse a formal science with a "formalistic" manner of dealing with the science. If the jurist attaches undue importance to mere forms, takes positive view as the highest law and fails to penetrate to the social forces which would mould the law, his treatment of his subject would be formalistic and unworthy of a great social science. Jurisprudence, as a science, is concerned only with the form which conditions social life, with human relations that have grown up in society and to which society attaches legal significance. In this sense, jurisprudence is a formal science. Being the systematised and properly coordinated knowledge of a subject of intellectual inquiry, jurisprudence is a science. The subject of inquiry is the mutual relations of men living together in an organised society. The term "positive law" confines the inquiry to those social relations which are regulated by the rules imposed by the State and enforced by its courts. The prefix "formal" indicates that the science deals only with the purposes, methods and ideas at the basis of the legal system as distinct from a "material science" which deals with the concrete details of law.

Salmond

Salmond defines jurisprudence as "the science of law". By law he means the law of the land or civil law. In that sense, jurisprudence is of three kinds. Expository or systematic jurisprudence deals with the contents of an actual legal system as existing at any time, whether in the past or in the present. Legal history is concerned with a legal system in its process of historical development. The purpose of the science of legislation is to set forth law as it ought to be. It deals with the ideal of the legal system and the purpose for which it exists.

Salmond makes a distinction between the use of the term jurisprudence in the generic and specific sense. Generic jurisprudence includes the entire body of legal doctrines whereas specific jurisprudence deals with a particular department of those doctrines. In the latter sense, it may be called theoretical or general jurisprudence. Salmond says that his book is concerned only with this jurisprudence which he defines as "the science of the first principles of the civil law".

Taking the word jurisprudence in its "specific" sense, Salmond has made a division of the subject into three branches, viz., analytical, historical and ethical jurisprudence. For a comprehensive treatment of the subject, all the three branches must be studied. About his own book, Salmond says that it is "primarily and essentially a book on analytical jurisprudence. In this respect, it endeavours to follow the main current of English legal philosophy rather than that which prevails upon the continent of Europe, and which, to a large extent, is primarily ethical in its scope and method". He further adds that he has not excluded the historical and ethical aspect altogether because by their total exclusion, it is not possible to give a complete analytical picture of law.

It is submitted that although Salmond tried to demarcate the boundary of the subject very clearly, he failed to give an accurate and scientific definition. On the basis of his definition, the same word may be used to mean things quite different in nature and many vague notions will enter into the domain of the subject.

Keeton

Keeton considers jurisprudence as "the study and systematic arrangement of the general principles of law". Jurisprudence considers the elements necessary for the formation of a valid contract but it does not attempt to enter into a full exposition of the detailed rules of the law of contract, either in English Law or in other systems. It analyses the notion of status and considers the most important examples, but it does not consider exhaustively the points in which persons of abnormal status differ from ordinary persons. Jurisprudence deals with the distinction between public and private laws and considers the contents of the principal departments of law.[3]

Pound

Dean Roscoe Pound defines jurisprudence as "the science of law, using the term law in the juridical sense, as denoting the body of principles recognised or enforced by public and regular tribunals in the administration of justice". According to Gray, jurisprudence is "the science of law, the statement and systematic arrangement of the rules followed by the courts and the principles involved in those rules". Lee writes that jurisprudence "is a science which endeavours to ascertain the fundamental principles of which law is the expression. It rests upon the law as established facts; but at the same time it is a power in bringing law into a coherent system and in rendering all parts thereof subservient to fixed principles of justice". According to C. K. Allen, "jurisprudence is the scientific synthesis of all the essential principles of law". The view

[3] *Elementary Principles of Jurisprudence*, pp. 1-2.

of G.W. Paton is that "jurisprudence is a particular method of study, not of law of one country, but of the general notion of law itself. It is a study relating to law". Clark writes that jurisprudence is the science of law in general. It does not confine itself to any particular system of law but applies to all the systems of law or to most of them. It gives the general ideas, conception and fundamental principles on which all or most of the systems of laws of the world are based.

The view of Julius Stone is that jurisprudence is the lawyer's extra version. It is the lawyer's examination of the precepts, ideals and techniques of the law in the light derived from present knowledge in disciplines other than the law.

Dias and Hughes describe jurisprudence as "any thought or writing about law, other than a technical exposition of a branch of the law itself. So, if X writes a book about the economic effect on the families of convicted prisoners on their convictions, this could be called a contribution to jurisprudence. If Y writes a book on theories of justice in the ancient world, this too would be a contribution to jurisprudence. If Z, describes how the development of English case law is governed by the psychology of the judges, this would also fall within the scope of our subject.

Sometimes qualifying adjectives are tacked on to the noun, so that X's book might be called a study in 'Economic Jurisprudence', Y's book an example of 'Philosophical Jurisprudence', and Z's book one on 'Psychological Jurisprudence'; but, with or without the qualifying adjectives, it would be within the modern sense of the word to describe all three books as being works of jurisprudence".[4]

Jurisprudence is a study of the fundamental legal principles. At the present juncture, the term jurisprudence may tentatively be described as any thought or writing about law and its relation to other disciplines such as philosophy, psychology, economics, anthropology and many others. It is to be determined from the expositions of law itself. Modern jurisprudence trenches on the fields of social sciences and philosophy. It digs into the historical past and attempts to create the symmetry of a garden out of the luxuriant chaos of conflicting legal systems. It includes whatever law thinks, says and does in any field of human society. It includes political, social, economic and cultural ideas.

Scope of Jurisprudence

There is no unanimity of opinion regarding the scope of jurisprudence. Different authorities attribute different meanings and varying premises to law and that causes difference of opinions with regard to the ex-

[4] *Jurisprudence*, pp. 3-4.

act limits of the field covered by jurisprudence. Jurisprudence has been so defined as to cover moral and religious precepts also and that has created confusion. It goes to the credit of Austin that he distinguished law from morality and theology and restricted the term to the body of rules set and enforced by the sovereign or supreme law-making authority within the realm. Thus, the scope of jurisprudence was limited to the study of the concepts of positive law and ethics and theology fall outside the province of jurisprudence.

There is a tendency to widen the scope of jurisprudence and at present we include what was previously considered to be beyond the province of jurisprudence. The present view is that the scope of jurisprudence cannot be circumscribed or regimented. It includes all concepts of human order and human conduct in State and society. Anything that concerns order in the State and society falls under the domain of jurisprudence. P.B. Mukherji writes that new jurisprudence is "both an intellectual and idealistic abstraction as well as behaviouristic study of man in society. It includes political, social, economic and cultural ideas. It covers the study of man in relation to Slate and society".

Thurman W. Arnold defines jurisprudence "as the shining but unfulfilled dream of a world governed by reason. For some, it lies buried in a system, the details of which they do not know. For some, familiar with the details of the system, it lies in the depth of an unreal literature. For others, familiar with its literature, it lies in the hope of a future enlightenment. For all, it is just around the corner".

The view of Lord Radcliffe is that jurisprudence is a part of history, a part of economics and sociology, a part of ethics and a philosophy of life.[5] Karl Llewellyn observes: "Jurisprudence is as big as law—and bigger".[6]

Approach to Study of Jurisprudence

The traditional classification of approaches into analytical, historical, ethical and sociological has been rejected. The new approaches are the empirical and *a priori* approaches. The former proceeds from facts to generalisations and the latter starts with a generalisation in the light of which facts are examined. An *a priori* generalisation must have been constructed on an empirical basis and an empirical investigation is often greatly facilitated by *a priori* concept as a starting point. Thus, a constant use is made of both the approaches. The particular basis of approach derives its material exclusively from one system of Law. The

[5] *The Law and Its Compass*, pp. 92-93.

[6] *Jurisprudence*, p. 372.

comparative basis of approach derives its material from more than one system. The general basis presupposes certain notions common to all or a large number of systems. Jurisprudence is regarded primarily as a discipline in how to think for oneself and not something to know. Its value lies in the analysis from which conclusions may be drawn and not the formulation of any final conclusion.

Significance and Utility of Jurisprudence

It is sometimes said that jurisprudence has no practical utility as it is an abstract and theoretical subject. Salmond does not agree with this view. According to him, there is its own intrinsic interest like other subjects of serious scholarship. Just as a mathematician investigates the number theory not with the aim of seeing his findings put to practical use but by reason of the fascination which it holds for him, likewise the writer on jurisprudence is impelled to his subject by its intrinsic interest. It is as natural to speculate on the nature of law as on the nature of light. Researches in jurisprudence may have repercussions on the whole of legal, political and social thought.

Jurisprudence also has practical value. Progress in science and mathematics has been largely due to increasing generalisation which has unified branches of study previously distinct, simplified the task of both scientist and mathematician and enabled them to solve by one technique a whole variety of different problems. Generality can also mean improvement in law. The English Law relating to negligence has progressed from a host of individual rules about particular types of situations to a general principle. One of the tasks of jurisprudence is to construct and elucidate concepts serving to render the complexities of law more manageable and more rational. In this way, theory can help to improve practice.

Jurisprudence also has an educational value. The logical analysis of legal concepts sharpens the logical technique of the lawyer. The study of jurisprudence can also help to combat the lawyer's occupational view of formalism which leads to excessive concentration on legal rules for their own sake and disregard of the social function of law. Law is to be put in its proper context by considering the needs of society and by taking note of the advances in related and relevant disciplines. A proper grasp of the law of contract may require some understanding of economics and economic theory, a proper grasp of criminal law, some knowledge of criminology and psychiatry and a proper grasp of law in general and some acquaintance with sociology. Jurisprudence can teach the people to look, if not forward, at least sideways and around them and realise that answers to new legal problems

must be found by a consideration of the present social needs and not in the wisdom of the past.

Jurisprudence is often said to be "the eye of law". It is the grammar of law. It throws light on the basic ideas and the fundamental principles of law. To quote Holland: "The ever renewed complexity of human relations calls for an increasing complexity of legal details, till a merely empirical knowledge of law becomes impossible."[7]

By understanding the nature of law, its concepts and distinctions, a lawyer can find out the actual rules of law. It also helps in knowing the language, grammar, the basis of treatment and assumptions upon which subject rests.

Some logical training is necessary for a lawyer which he can find from a study of jurisprudence. Jurisprudence trains the critical faculties of its students so that they can detect fallacies and use accurate legal terminology and expression. In his practical work, a lawyer has to tackle new and difficult problems which he can handle through his knowledge of jurisprudence which trains his mind into legal channels of thought. For example, a question may arise whether a certain person is entitled to certain property by virtue of his adverse possession for more than the prescribed period of time. His knowledge of jurisprudence will tell him what constitutes possession and that will help him in tackling the problem before him.

A study of jurisprudence helps legislators by providing them a precise and unambiguous terminology. It relieves them of the botheration of defining again and again in each Act certain expressions such as right, duty, possession, ownership, liability, negligence etc.

The study of jurisprudence enlightens students and helps them in adjusting themselves in society without causing injuries to the interests of other citizens. J.G. Phillimore observes: "Such is the exalted science of jurisprudence, the knowledge of which sends the students into civil life, full of luminous precepts and notions, applicable to every exigency of human affairs."[8]

Jurisprudence helps the judges and the lawyers in ascertaining the true meanings of the laws passed by the legislatures by providing the rules of interpretation.

According to Dr. M.J. Sethna, the value of jurisprudence lies in examining the consequences of law and its administration on social welfare and suggesting changes for the betterment of the superstructure of laws.

[7] *Elements of Jurisprudence*, p. 1.

[8] *Principles and Maxims of Jurisprudence*, p. 30.

The true purpose of the study of jurisprudence should not be confined to the study of positive law alone but must include normative study. That study should deal with the improvement of law in the context of prevailing socio-economic and political philosophies of time, place and circumstances. We agree with Pound's theory of the "functional attitude", regarding law as "social engineering, the utility of which should be tested every now and then by the jurists who should improve its quality at every stage. The very vagueness of the concept should serve as a challenge to legal thinkers in the country and that should encourage all lawyers and jurists on an inquiry as to the sense of societal values which should be nursed and nurtured in order to build a proper legal system which will serve as an efficient vehicle of socio-economic justice".

Prof. R.W.M. Dias writes that the study of jurisprudence is an opportunity for the lawyer to bring theory and life into focus, for it concerns human thought in relation to social existence. Teachers of law hope to encourage their pupils to learn how to think rather than what to know and jurisprudence is peculiarly suited to this end.[9]

Relation of Jurisprudence with other Social Sciences

Different branches of knowledge are so inter-related that none of them can be studied in isolation. All social sciences stand in close connection with one another. All of them study the actions of human beings living in society, though from different angles and with different ends. To quote Paton: "Modern jurisprudence trenches on the fields of social sciences and of philosophy; it digs into the historical past and attempts to create the symmetry of a garden out of the luxuriant chaos of conflicting legal systems."[10] Julius Stone defines jurisprudence in terms of the knowledge of other sciences. To quote him: "Jurisprudence then in the present hypothesis is the lawyer's extraversion. It is lawyer's examination of the precepts, ideals and techniques of the law in the light derived from present knowledge in disciplines other than law."[11] Justice McCardie emphasises the indispensability of the study of other social sciences in these words: "There never was a time when the barrister had greater need of a wide culture and of a full acquaintance with history, with economics and with sociological science."

Dean Roscoe Pound of the Harvard Law School writes: "Jurisprudence, ethics, economics, politics and sociology are distinct enough at the core, but shade out into each other. When we look at the core or chiefly at the core, the analytical distinctions are sound enough.

[9] *Jurisprudence*, Preface, p. *vii*.

[10] *A Text Book of Jurisprudence*, p. 1.

[11] *Province and Function of Law*, p. 25.

But we shall not understand even that core, and much less the debatable ground beyond, unless we are prepared to make continual deep incursions from each into each of others. All the social sciences must be co-workers and emphatically all must be co-workers with jurisprudence."[12]

Jurisprudence and Sociology

According to Salmond, jurisprudence is the knowledge of law and in that sense all law books can be considered as books on jurisprudence. Among the phenomena studied by sociologists is law also and that makes sociology intimately connected with jurisprudence. The attitude of the sociologists towards law is different from that of a lawyer who, in his professional capacity, is concerned with the rules which have to be obeyed by the people. He is not interested in knowing how and to what extent those rules actually govern the behaviour of the ordinary citizen. A book on the law of torts or contract deals with the rules relating to torts and contract but does not mention how often torts and breaches of contract are committed. A lawyer is essentially interested in those who frame the rules and execute them in a given society.

There is a separate branch of sociological jurisprudence based on sociological theories and is essentially concerned with the influence of law on society at large, particularly social welfare. The sociological approach to legal problems is essentially different from that of a lawyer. In the case of crime in society, its causes are to a very great extent sociological and to understand their pros and cons, one must have a knowledge of society.

Sociology has helped jurisprudence in its approach to the problem of prison reforms and has suggested ways and means of preventing social wrongs. Previously, judges and legislators came to their conclusions regarding the effect of punishment by depending upon popular opinion and personal impressions, but now they have at their disposal precise data through the efforts of criminologists. Their decisions are no more conjectural but are based on solid facts. There is a general indignation against hanging as the extreme form of punishment and hence its abolition in many countries of the world.

Behind all legal aspects, there is something social. The causes of crimes are partly sociological and an understanding of sociology helps the legislators in their task of prison reform and prevention of crime. Topics like motives, aims and theories of punishment and the efficacy of the various types of punishments are considerably helped by sociol-

[12] *Law and Morals*, p, 115.

ogy. The birth and growth of sociology has given a new orientation to the study of jurisprudence.

There is a distinction between sociological jurisprudence and the sociology of law. The latter differs mainly from the former in that "it attempts to create a science of social life as a whole, and to cover a great part of general sociology and political science". In the sociology of law, the emphasis is on society but in sociological jurisprudence emphasis is on the relation between law and society. The sociology of law is a branch of sociology dealing with law and legal institutions in the light of sociological principles, aims and methods.

The view of Paton is that the relationship between law and social interests can be usefully studied by jurisprudence for three reasons. It enables us to understand better the evolution of law. For example, an attempt to explain law on a purely logical basis ignoring social interests, is equivalent to interpreting a graph of the vibrations in a speeding motor car without taking into account the surface of the road. Although man's view of ethics and his social needs have changed over the centuries, the element of human interest provides a greater substratum of identity than the logical structure of law. Although German law adopted the subjective theory of contract and English Law has preferred an objective approach, each has been forced to adapt its theoretical basis to the needs of modern commerce. Although the view of certain jurists like Kelsen that jurists should not discuss the question of social interests, is attractive, yet such a study is essential to a lawyer in order to enable him to properly understand the legal system.

Jurisprudence and Psychology

Psychology has been defined as the science of mind and behaviour. It is recognised that no human science can be discussed properly without a thorough knowledge of the human mind and hence its close connection with jurisprudence. In the study of criminal jurisprudence, there is great scope for the study of psychological principles in order to understand the criminal mind behind the crime. Both psychology and jurisprudence are interested in solving such questions as the motive for crime, a criminal personality, whether a criminal gets pleasure in committing a crime, why there are more crimes in one society than in another and what punishment should be given in any particular case. In criminology, psychology plays an important part. It is the duty of a lawyer to understand the criminal and the working of a criminal mind.

It is the duty of a law-giver to understand man and not to pass judgments and say what man ought to do or ought not to do. Psychology

can help the law-maker considerably in the approach to the problem of not only making the law but also of executing it.

Jurisprudence is concerned with man's external conduct and not his thoughts and mental processes, but penology has benefited from the knowledge made available by psychological researches.

There is a school of jurists which holds the view that the sanction behind all laws is a psychological one. Study of negligence, intention, motive and other cognate mental conditions forms part of both jurisprudence and psychology.

Jurisprudence and Ethics

Ethics has been defined as the science of human conduct. It deals with how man behaves and what should be the ideal human behaviour. There is the ideal moral code and the positive moral code. The former belongs to the province of natural law, while the latter deals with the rules of positive or actual conduct. Ethics is concerned with good or proper human conduct in the light of public opinion. Public opinion varies from place to place, from time to time and from people to people. Dr. Sethna writes: "It changes in the furnace of social evolution, social culture and social development. What may be a rule of good morality at one time may be a bad moral today."

Jurisprudence is related to positive morality insofar as law is considered as the instrument through which positive ethics tries to assert itself. Positive morality is not dependent upon the good actions of a good man only. It requires a strong coercive influence for maintaining public conscience. There is a separate branch of ethical jurisprudence which tries to examine the existing ethical opinions and standards of conduct in terms of law and makes suggestions for necessary changes so that it can properly depict the public conscience.

There are many ethical rules of conduct which are not considered as crimes. The law ignores trifles. It may be immoral to tell a lie but it is not a crime. Many acts are unethical but all unethical acts are not necessarily criminal. One has to consider the problem of laws which are considered undesirable by society. All that is prohibited by law is not necessarily immoral. For enforcing certain ethical conduct, ethics depends upon law through the instrumentality of the police, law courts, judges and the system of courts and punishment. Legislation must be based on ethical principles. It must not be divorced from human values. No law can be good law if it is not based on sound ethical principles.

Ethics lays down the rules for human conduct based upon higher and nobler values of life. Laws are meant for regulating human con-

duct in the present and subordinating the requirements of the individual to that of society at large. A jurist must be adept at the science of ethics because he cannot criticise a law unless he examines that law through the instrumentality of ethics.

Although Austin separated jurisprudence from ethics, jurisprudence must not be divorced from ethics altogether. The reason is that if ethical values are excluded from jurisprudence, it shall be in "the formalistic vacuúm of the sanctuary of the State barring the road to all contact with life or society". It shall be reduced to a "system of rather arid formalism".

Dr. Sethna writes: "In the mirror of a community's laws are reflected its culture, its ideology and its Miranda. On the high level of its laws is perceived the glory of a country's civilisation—the depth of its positive ethics. Hence the relationship between ethics and jurisprudence".

Jurisprudence and Economics

Economics studies man's efforts in satisfying his wants and producing and distributing wealth. Economics is the science of wealth and jurisprudence is the science of law. There is a close relationship between the two. Very often, economic factors are responsible for crimes. Economic problems arise from day to day and it is the duty of the lawgiver to tackle those problems. The aim of the economist is to improve the standard of life of the people and also to develop their personality. Jurisprudence teaches legislators how to make laws which will promote social and economic welfare. Both jurisprudence and economics aim at the betterment of the lives of the people. There are laws relating to workmen's compensation, factory legislation, laws relating to labour, insurance, maternity welfare, bonus, leave facilities and other concessions given to workmen. There are laws for the benefit of the agriculturists such as the Zamindari Abolition Acts, Agricultural Debtors Relief Acts, Acts preventing the fragmentation and sub-division of agricultural holdings and regulation of agricultural labour. Both jurisprudence and economics help each other in furthering the welfare of society.

The intimate relation between economics and jurisprudence was first emphasized by Karl Marx and the interpretation of jural relations in the light of economic factors is receiving serious attention at the hands of jurists.

Jurisprudence and History

History studies past events in their different perspectives. The relation between jurisprudence and history is so close that there is a separate

historical school of jurisprudence. History furnishes the background in which a correct idea of jurisprudence can be realised.

Jurisprudence and Politics

Friedmann rightly points out that jurisprudence is linked at one end with philosophy and at the other end with political theory, Politics deals with the principles governing governmental organisation. In a politically organised society, there exist regulations which may be called laws and they lay down authoritatively what men may do and what they may not do.

Synthetic Jurisprudence

The necessity for synthetic jurisprudence arises from the fact that it is necessary to determine the truth from all aspects and from different angles. Analytical jurisprudence, studied separately, does not give anything more than an understanding of the legal concepts as they prevail in various legal systems. This in itself is useful but we cannot stop after merely analysing the problem. We will be in a better position if we discuss the historical aspects of the legal ideas, problems or principles and go further in the light of philosophical norms and sociological requirements. The historical jurists lay emphasis on historical jurisprudence and refuse to recognise the other branches of jurisprudence.

The first thing to be done in the study of jurisprudence is to understand the fundamental principles analytically. When that is done, we should turn to its historical aspects. We must trace the origin of the legal ideas and principles and sources of law. Our knowledge and experience of the past would help us to be wise in the present and forewarned for the future. Philosophical jurisprudence enables us to trace the philosophical basis of our laws and consider the legal principles in the light of philosophical norms. A comparative study of law is useful as a thorough study of the legal systems of other countries enables us to improve the legal machinery of our own country. Sociological jurisprudence helps us to study the fundamental principles of law.

Knowledge is a synthetic whole and cannot be divided into watertight compartments. It is our duty to amalgamate half-truths in order to form the whole truth. Synthesis enables us to reconcile the conflicting theories. In synthetic jurisprudence, we study the various topics and theories from the point of view of synthesis. We analyse, we retrospect, we compare, we philosophise, we socialise and we synthesise. The fruits of synthesis are well-balanced and well-digested truths. The advocates of synthetic jurisprudence consider jurisprudence as a study of fundamental legal principles, including their historical, philosophical, scientific and sociological basis and including an analysis of legal

concepts. They point out that jurisprudence is history; it is philosophy; it is a science and it is concerned with altruistic utilitarianism.

There are many advocates of synthetic jurisprudence. Prof. Jerome Hall is an advocate of integrated jurisprudence in the United States. His view is that "if we could cultivate the aesthetic impulse of the system-builder, we would have all the interests needed to achieve a significant synthesis of jurisprudential thought". He wants that the legal philosophers should concentrate upon legal theory which has been constructed slowly and painstakingly over the centuries by specialists in contracts, torts, criminal law and other basic branches of law, as the bridge between jurisprudence and law.

Though Dean Roscoe Pound does not speak of synthetic jurisprudence, his treatment of the subject is similar to that of Hall. He explains all the methods of jurisprudence and then discusses the various topics of jurisprudence in a systematic form, after giving an account of the various schools of jurisprudence. He deals with the nature of law and justice according to law. He explains the scope and subject-matter of law and also the sources, forms and modes of the growth of law. He discusses under various headings all the branches or types of jurisprudence and applies practically all the recognised methods.

Julius Stone deals with all kinds of jurisprudence, whether analytical, comparative, philosophical, historical or sociological, in a systematic manner. He does not stand for a hotch-potch of them but he believes in dealing with ail types of jurisprudence in one book. Lord Dennis Lloyd is also an advocate of synthetic jurisprudence. In his book *Introduction to Jurisprudence*, advocated the necessity for synthesis.

Dr. M. J. Sethna is the strongest exponent of synthetic jurisprudence in India. According to him, jurisprudence is the study of fundamental legal principles, including their philosophical, historical and sociological basis and an analysis of legal concepts. Dr. Sethna refers to his definition of civil law. According to him, civil law is all that body of principles, decisions and enactments made, passed or approved by the legally constituted authorities or agencies in a State for regulating rights, duties and liabilities and enforced through the machinery of the judicial process, securing obedience to the sovereign authority in the State. The view of Dr. Sethna is that his definition of civil law gives a complete idea of civil law as it includes both abstract and concrete aspects of civil law. Dr. Sethna also refers to his theory of negligence. According to him, negligence is the faulty behaviour arising out of the lethargy of the mind or faulty thinking. Negligence is a faulty negative act. It is a failure of the duty to take as much care as a normal person is

expected to take under the circumstances. Negligence is both objective and subjective.

Dr. Sethna refers to his quasi-realist theory regarding the personality of corporations. According to the fiction theory, the personality of a corporation is not real but fictitious. According to the realist theory, a corporation has real and not a fictitious personality. According to Dr. Sethna, the correct view is the synthetic view according to which the personality of the corporation is neither completely real nor truly fictitious. It is quasi-real and quasi-fictitious.

The view of Dr. Sethna is that every topic should be fully considered from all angles—historically, philosophically, analytically, comparatively and sociologically. It is only then that a true picture emerges. If we deal with the subject of property, we should analyse the concepts of property, proprietary rights, personal rights, legal and equitable rights etc. We should make a comparative study of those concepts and examine them historically and critically. What Dr. Sethna emphasises is that all the jurisprudential aspects of the subject must be considered at one place. He does not believe in having separate chapters on analytical jurisprudence, historical jurisprudence, philosophical jurisprudence or sociological jurisprudence. He stands for combining- all the types and thus give a synthetic discussion under each topic heading.

SUGGESTED READINGS

Allen, C.K.	:	*Legal Duties,* Oxford, Clarendon Press, 1931.
Austin, J.	:	*Lectures on Jurisprudence,* 5th Edn., R. Campbell, John Murray, 1885.
Bentham, J.	:	*An Introduction to the Principles of Morals and Legislation,* (Eds. J.H. Burns and H.L.A. Hart), The Atholonc Press, 1970.
Bodenheimer, E.	:	*Jurisprudence,* Harvard University Press, 1962.
Brett, P.	:	*An Essay on Contemporary Jurisprudence,* Buttcrworths, 1975.
Brown, W.J.	:	*The Austinian Theory of Law,* John Murray, 1906.
Bryce, J.	:	*Studies in History and Jurisprudence, Oxford, 1901.*
Buckland, W.W.	:	*Some Reflections on Jurisprudence,* Cambridge University Press, 1945.
Cairns, H.	:	*Legal Philosophy from Plato to Hegel,* John Hopkins Press, 1949.
Cairns, H.	:	*The Theory of Legal Science,* The University of North Carolina Press, 1941.

Castberg, F.	:	*Problems of Legal Philosophy,* 2nd Edn., Oslo University Press; Allen & Unwin Ltd., 1957.
Cohen, M.R.	:	*Reason and Law,* The Free Press, Glencoe, 1950.
Del Vecchio, G.	:	*Philosophy of Law,* trans. T.O. Martin, The Catholic University of America Press, 1953.
Dias, R.W.M.	:	*A Bibliography of Jurisprudence,* Butterworths, London, 1979.
Dias, R.W.M.	:	*Jurisprudence,* Butterworths, London, 1976.
Dias and Hughes		*Jurisprudence.*
Eastwood, R.A. and Keeton, G.W.	:	*The Austinian Theories of Law and Sovereignty,* Methuen & Co. Ltd, 1929.
Freeman, M.D.A.	:	*The Legal Structure,* London, 1974.
Goodhart, A.L.	:	*Interpretations of Modern Legal Philosophies,* Ed. P. Sayre, Oxford University Press, New York, 1947.
Gray, J.C.	:	*The Nature and Sources of the Law,* 2nd Edn., R. Gray, The Macmillan Co., New York, 1921.
Hall, J.	:	*Foundations of Jurisprudence,* The Bobbs-Merrill Co. Inc., 1973.
Hall, J.	:	*Studies in Jurisprudence and Criminal Theory,* Oceana Publications Inc., 1958
Hart, H.L.A.	:	*Essays in Jurisprudence and Philosophy.*
Holland, T.E.	:	*The Elements of Jurisprudence,* 13th Edn., Oxford, Clarendon Press, 1924.
Hostie	:	*Outlines of Jurisprudence.*
Jenks, E.	:	*The New Jurisprudence,* John Murray, 1933.
Jolowicz, H.F.	:	*Lectures on Jurisprudence,* Ed. J.A. Jolowicz, The Athlone Press, 1963.
Keeton, G.W.	:	*The Elementary Principles of Jurisprudence,* 2nd Edn., Pitman & Sons Ltd., 1949.
Lightwood, J.M.	:	*The Nature of Positive Law,* Macmillan & Co., 1883.
Lindley	:	*Introduction to the Study of Jurisprudence.*
Llewellyn, Karl	:	*Jurisprudence,* 1962.
Lloyd, D.	:	*Introduction to Jurisprudence,* 3rd Edn., Stevens & Sons Ltd., 1979.
Lloyd, D.	:	*The Idea of Law,* Penguin Books Ltd., 1964.
Markby	:	*Elements of Law.*

Mukherji, P.B.	:	*New Jurisprudence.*
Osborne	:	*Jurisprudence.*
Paton, G.W.	:	*A Text Book of Jurisprudence,* 4th Edn., G. W. Paton and D.P. Derham, Oxford, Clarendon Press, 1972.
Patterson, W.E.	:	*Jurisprudence,* The Foundation Press Inc., 1953.
Phillimore, J.G.	:	*Principles and Maxims of Jurisprudence.*
Pollock, F.	:	*Essays in Jurisprudence and Ethics,* Macmillan & Co., 1882.
Popper, K.R.	:	*Poverty of Historicism,* Routledge & Kegan Paul, 1957.
Pound, R.	:	*Jurisprudence,* West Publishing Co., 1959.
Pound, R.	:	*Jurisprudlerce in Action,* Baker, Voorhis & Co. Inc., 1953.
Radcliffe, Lord	:	*The Law and Its Compass,* 1961.
Ross, A.	:	*On Law and Justice,* Stevens & Sons Ltd., 1958.
Salmond, J.W.	:	*Jurisprudence,* 7th Edn. by J.W. Salmond; 12th Edn. by P.J. Fitzgerald, Sweet & Maxwell Ltd., 1979.
Sawer	:	*Law in Society.*
Sethna, M.J.	:	*Essays in Jurisprudence in Honour of Roscoe Pound,* Ed. R.A. Newman, The Bobbs-Merill Co. Inc., 1962.
Sethna, M.J.	:	*Synthetic Jurisprudence.*
Stone, Julius	:	*Legal System and Lawyer's Reasonings,* 1964.
Stone, Julius	:	*The Province and Function of Law.*
Summers, R.S.	:	*Essays in Legal Philosophy,* Ed. R.S. Summers, Basil Blackwell, Oxford, 1968.
Synder, O.C.	:	*Preface to Jurisprudence,* 1954.
Vinogradoff, P.	:	*Outlines of Historical Jurisprudence,* Oxford University Press, 1922.

CHAPTER TWO

THE NATURE OF LAW

Definition of Law

IN THE WORDS of Thurman Arnold: "Obviously, law can never be defined. With equal obviousness, however, it should be said that the adherents of the legal institution must never give up the struggle to define law, because it is an essential part of the ideal that it is rational and capable of definition. Hence the verbal expenditure necessary in the upkeep of the ideal of 'law' is colossal and never ending. The legal scientist is compelled by the climate of opinion in which he finds himself to prove that an essentially irrational word is constantly approaching rationality."[1] A similar view is expressed by Lord Lloyd: "Since much juristic ink has flowed in an endeavour to provide a universally acceptable definition of law, but with little sign of attaining that objective."[2] R. Wollheim points out that much of the confusion in defining law has been due to the different types of purpose sought to be achieved.

Morris writes: "To a zoologist, a horse suggests the genus mammalian quadruped, to a traveller a means of transportation, to an average man the sports of kings, to certain nations an article of food." Likewise, law has been variously defined by various individuals from different points of view and hence there could not be and is not any unanimity of opinion regarding the real nature of law and its definition. There is a lot of literature on the subject of law and in spite of that, different definitions of law have been given.

Various schools of law have defined law from different angles. Some have defined it on the basis of its nature. Some concentrate mainly on its sources. Some define it in terms of its effect on society. There are others who define law in terms of the end or purpose of law. A definition which does not cover various aspects of law is bound to be imper-

[1] *The Symbols of Government*, 1935, pp. 36-37.

[2] *Introduction to Jurisprudence*, p. 42.

fect. Moreover, law is a social science and grows and develops with the growth and development of society. New developments in society create new problems and law is required to deal with those problems. In order to keep pace with society, the definition and scope of law must continue to change. The result is that a definition of law given at a particular time cannot remain valid for all times to come. A definition which is considered satisfactory today may be found narrow tomorrow. Prof. Keeton rightly points out that "to attempt to establish a single satisfactory definition of law is to seek to confine jurisprudence within a straitjacket from which it is continually striving to escape". Prof. H. L. A. Hart writes: "Few questions concerning human society have been asked with such persistence and answered by serious thinkers in so many diverse, strained and even paradoxical ways as the question 'What is law ?'."[3] Pollock observes: "No tolerably prepared candidate in an English or American Law School will hesitate to define an estate in fee simple; on the other hand, the greater a lawyer's opportunities for knowledge have been, and the more time he has given to the study of legal principles, the greater will be his hesitation in the face of the apparently simple question 'What is law?'."

According to Justinian: "Law is the king of all mortal and immortal affairs, which ought to be the chief, the ruler and the leader of the noble and the base and thus the standard of what is just and unjust, the commander to animals naturally social of what they should do, the forbidder of what they should not do." Ulpian defined law as "the art or science of what is equitable and good". Cicero said that law is "the highest reason implanted in nature". Pindar called law as "the king of all, both mortals and immortals".

Demosthenes wrote: "Every law is a gift of God and a decision of sages." Again, "this is law to which all men yield obedience for many reasons and especially because every law is a discovery and gift of God and at the same time a decision of wise men, a rightening of transgressions, both voluntary and involuntary, and the common covenant of a State, in accordance with which it beseeches all men in the State to lead their lives".

Chrysiphus defined law as "the common law which is the right reason, moving through all things, and identical with Zeus, the Supreme Administrator of the universe". According to Capito, "a lex is a general command of the people or the plebs on question by a magistrate". Anaximenes writes: "Law is a definite proposition, in pursuance of a common agreement of a State intimating how everything should be done." According to Hobbes: "Law is the speech of him who by right

[3] *The Concept of Law*, p. 1.

commands somewhat to be done or omitted." Again, "law in general is not counsel but command; nor a command of any man to any man but only of him whose command is addressed to one formerly obliged to obey him. And, as for civil law, it addeth only the name of the highest person commanding which is *persona civitatis,* the highest person of the commonwealth."

Blackstone writes: "Law in its most general and comprehensive sense signifies a rule of action and is applied indiscriminately to all kinds of actions, whether animate or inanimate, rational or irrational. Thus, we say the laws of gravitation, or optics or mechanics, as well as the laws of nature and of nations."

Hooker defines law as "any kind of rule or canon whereby actions are framed...that which reason in such sort defines to be good that it must be done". Again, "of law there can be no less acknowledged than that her seat in the bosom of God, her voice the harmony of the world, all things in Heaven and Earth does her homage, the very least as feeling her care and the greatest as not exempted from her power; both angels and men and creatures of what condition so ever; though each in different sort and manner, yet all with uniform consent, admiring her as the mother of their peace and joy".

The view of Kant was that law is "the sum total of the conditions under which the personal wishes of one man can be combined with the personal wishes of another man in accordance with the general law of freedom". Hegel defined law as "the abstract expression of the general will existing in and for itself".

Sir Henry Maine writes: "The word 'law' has come down to us in close association with two notions, the notion of order and the notion of force."

Savigny says that law is "the rule whereby the invisible borderline is fixed within which the being and the activity of each individual obtains a secure and free space". According to Vinogradoff, law is a set of rules imposed and enforced by a society with regard to the distribution and exercise of powers over persons and things".

According to Austin, "law is the aggregate of rules set by men as politically superior, or sovereign, to men as politically subject". In other words, law is the command of the sovereign. It imposes a duty and is backed by a sanction. Command, duty and sanction are the three elements of law.

Kelsen defines law as the depsychologised command. Though Kelsen defines law in terms of command, he uses that term differently from Austin. The sovereign of Austin does not come into the picture in the definition of law as given by Kelsen.

Duguit defines law as essentially and exclusively a social fact. The foundation of law is in the essential requirements of the community life. It can exist only when men live together. The sovereign in not above the law but bound by it. Law should be based on social realities. Duguit excluded the notion of 'right' from law.

Ihering defines law as "the form of the guarantee of the conditions of life of society, assured by State's power of constraint". Law is treated only as a means of social control. It is to serve social purpose. It is coercive in character. Obedience to law is secured by the State through external compulsion.

Ehrlich includes in his definition of law all the norms which govern social life within a given society. Pound defines law as "a social institution to satisfy social wants".

Justice Holmes says: "Law is a statement of the circumstances in which the public force will be brought to bear upon men through courts". Again, "the prophecies of what the court will do in fact and nothing more pretentious, are what I mean by law." According to Gray: "The law of the State or of any organised body of men is composed of the rules which the courts— that is, the judicial organs of that body— lay down for the determination of legal rights and duties."

Cardozo writes: "A principle of rule of conduct so established as to justify a prediction with reasonable certainty that it will be enforced by the courts if its authority is challenged is a principle or rule of law." Holland says: "More briefly, law is general rule of eternal human action enforced by a sovereign political authority. All other rules for the guidance of human action are laws merely by analogy; and propositions which are not rules for human action are laws by metaphor only."

According to Bentham: "Law or the law, taken indefinitely, is an abstract or collective term, which when it means anything, can mean neither more nor less than the sum total of a number of individual laws taken together" Salmond defines law as "the body of principles recognised and applied by the State in the administration of justice."

According the Paton, the term law may be defined from the point of view of the theologian, the historian, the sociologist, the philosopher, the political scientist or the lawyer. Law may be used in a metaphorical sense. Law may be defined firstly by its basis in nature, reason, religion or ethics. Secondly, it may be defined by its source in customs, precedents or legislation. In the third place, it may be defined by its effect on the life of society. Fourthly, it may be defined by the method of its formal expression or authoritative application. In the fifth place, it may be defined by the ends that it seeks to achieve. Paton himself defines law in these words: "Law may be described in terms of a le-

gal order tacitly or formally accepted by a community, and it consists of the body of rules which that community considers essential to its welfare and which it is willing to enforce by the creation of a specific mechanism for securing compliance. A mature system of law normally sets up that type of legal order known as the State, but we cannot say *a priori* that without the State no law can exist."

According to Lord Moulton: "Law is the crystallized commonsense of the community".

Prof. M. J. Sethna writes: "Law in its widest sense means and involves a uniformity of behaviour, a constancy of happenings or a course of events, rules of action, whether in the phenomena of nature or in the ways of rational human beings. In the synthetic sense, civil law is all that body of principles, decisions and enactments made, passed or approved by the legally constituted authorities or agencies in a State, for regulating rights, duties and liabilities (between the State and the citizens, as also the citizens *inter se*, and the citizens of the State in relation to members of foreign States), and enforced through the machinery of the judicial process, securing obedience to the sovereign authority in the State."

From what has been stated above, it follows that law presupposes State. There may be law even without the State such as primitive law, but law in the modern sense of the term implies a State. The State makes or authorises to make, recognises or sanctions rules which are called law. For the rules to be effective, there are sanctions behind them. Rules are made to serve some purpose. That purpose may be a social purpose or the personal ends of a despot.

Austin's Theory of Law

Austin's theory of law is also known as the imperative theory of law. According to Austin, positive law has three main features. It is a type of command. It is laid down by a political sovereign. It is enforceable by a sanction. A typical example would be the Road Traffic Act, 1960 which could be described as a command laid down by the sovereign under the English legal system. This Act lays down certain rules which have to be followed (command). It has been passed by the Queen-in-Parliament (laid down by the sovereign authority of England). Its violations are met with penalties (sanction).

According to Austin, requests, wishes etc. are expressions of desire, while commands are expressions of desire given by superiors to inferiors. The relationship of superior to inferior consists for Austin in the power which the former enjoys over the other, i.e., his ability to punish him for disobedience. In a sense, the idea of sanction is built into the

Austinian notion of command. Logically, it might be more correct to say that law has two rather than three distinguishing features.

There are commands which are laws and there are commands which are not laws. Austin distinguishes laws from other commands by their generality. Laws are general commands. Laws are not like the transitory commands given on parade grounds and obeyed there and then by the troops. Laws are like the standing orders of a military station which remain in force generally and continuously for all persons on the station. However, there can be exceptions. There can exist laws such as acts of attainder which lack the characteristic of generality. Hence, generality alone is neither necessary nor sufficient to serve as the distinguishing feature of law.

Some have criticised the positivist theory of law as a theory of "gunman law" on the ground that it makes no real distinction between a law and the command of a bank robber who points his gun at the bank clerk and orders him to hand over the contents of the till. This criticism overlooks Austin's second requirement of law which requires that only that command is law which is given by a political superior or sovereign. To Austin, a sovereign is any person or body of persons whom the bulk of a political society habitually obeys and who does not himself habitually obey some other person or persons. One difference between the order of a gunman and the decree of a dictator is that the latter enjoys a general measure of obedience while the former secures a much more limited compliance.

According to Austin, law is law only if it is effective and it must be generally obeyed. Perfect obedience is not necessary. Many contravene the law without depriving it of all effectiveness. Without general obedience, the commands of the law-maker are as empty as a language which is no longer spoken or a monetary currency which is no longer in use. They have the appearance of law but not the reality of law. A sovereign may enjoy obedience through conquest, usurpation or election. What is sufficient for a legal theorist is that such obedience exists.

According to Austin, laws are of two kinds, viz., divine law and human law. Divine law was given by God to men. Human laws are set by men for men. Human laws are of two kinds. There are certain human laws which are set by political superiors and are called positive laws and there are others which are not set by political superiors. To the second category belong the rules of a club or any other voluntary association.

According to Austin, laws strictly so called are one particular species of set rules and consist only of those which are set by a sovereign

person or a sovereign body of persons to a member or members of an independent political society wherein that person or body is sovereign or supreme. Positive law consists of commands set as general rules of conduct by a sovereign to a member or members of the independent political society wherein the author of the law is supreme. A command is the expression of a wish or desire to another so that he shall do a particular thing or refrain from doing a particular thing. In case of non-compliance with the command, he is to be visited with certain evil consequences. The power to inflict evil must be there and it should be intended to be exercised in the case of non-compliance. The sanction behind law is the evil which is to be inflicted in case of disobedience.

Austin puts great emphasis on the relation between law and sovereign. Law is law because it is made by the sovereign and sovereign is sovereign because it makes the law. The relation between the sovereign and law is the relation between the centre and the circumference.

Criticism of Austin's Theory of Law

Laws before State

Austin's theory of law has been criticised on many grounds. The definition of law in terms of State has been criticised by the jurists belonging to the historical and sociological schools. Critics belonging to the historical school concede that in modern societies where there are established States, laws may be in the nature of command, but there existed laws even prior to the existence of the State. The law which existed prior to the State was not the command of the State. It had its source in custom, religion or public opinion and not in any authority vested in a political superior. According to this school, law is prior to and independent of political authority and enforcement. A State enforces it because it is already law. It is not correct that it becomes law because the State enforces it.

Although Salmond is not a supporter of the imperative theory of law but he does not accept the criticism of the historical school. He points out that the rules which were in existence prior to the existence of a political State were not laws in the real sense of the term. They resembled law. They were primitive substitutes for law but not laws. Salmond considers it to be a virtue of the imperative theory of law that it excludes those rules which resemble law but are not laws. Salmond supports his argument with an analogy. Apes might have resembled human beings. They might be in existence prior to men, but it is not a defect of a definition of man if it excludes apes from such definition. As a matter of fact, it is a merit of the definition.

Lord Bryce writes: "Broadly speaking, there are in every community two authorities which can make law: the State, i.e., the ruling and directing power, whatever it may be, in which the government resides, and the people, that is, the whole body of the community regarded not as incorporated in the State but as merely so many persons who have commercial and social relations with one another. Law cannot be always and everywhere the creation of the State because instances can be adduced where law existed in a community before there was any State."[4] Pollock observes: "Not only law, but law with a good deal of formality has existed before the State had any adequate means of compelling its observance and indeed before there was any regular process of enforcement at all." Sir Henry Maine says: "At first sight, there can be no more perfect embodiment than Ranjit Singh of sovereignty as conceived by Austin. But he never made a law. The rules which regulated the lives of his subjects were derived from their immemorial usages and those rules were administered by domestic tribunals in families or village communities."

Malinowski maintains that even in primitive society there are rules behind which the community throws the whole weight of its organisation. The very structure of society is such that primitive man suffers if the rules are disobeyed. Although there is no intricate system of courts or police, the community directly entrusts itself in securing the observance of those rules which it considers essential. If primitive man does not meet his customary obligations, he knows that in future no one will help him. Apart from the community, primitive man is helpless. The threat of expulsion or death is a salutary one for prospective offenders. Because in so many cases the community leaves primitive man to enforce his own rights by self-help, we must not leap to the conclusion that there are no rules the breach of which is regarded as fatal to community life.

Generality of Law

According to Austin, law is a general rule of conduct, but that is not practicable in every sphere of law. A law in the sense of the Act of the legislature may be particular in the fullest sense of the word. A Divorce Act is law even if it does not apply to all persons. Law, in the sense of the legal system, can be particular. The requirement that law should be general is extremely difficult to maintain. There are degrees of generality. The question whether a contract can create law for the parties has peculiar urgency for the international lawyer. In his view, treaties are a source of international law. They are so only if law need not be general as normally treaties are binding only on those States which have rati-

[4] *Studies in History and Jurisprudence*, Vol. II, p. 44.

fied them. The international lawyer who declares that a bilateral treaty makes law for the parties is implicitly declaring that law need not be general.

Some particular precepts may concern especially important persons such as the king. Are we going to deny the name law to them? Consider an Abdication Act providing for the abdication of one monarch and accession of another. Such an Act has to be considered a part of law.

Promulgation

According to Austin, law is a command and that command has to be communicated to the people by whom it is meant to be obeyed or followed. This view of Austin is not tenable. Promulgation is usually resorted to but it is not essential for the validity of a rule of law. Up to 1870, laws in Japan were addressed only to the officials whose duty was to administer them and might be read by no one else. The Chinese maxim "let the people abide by, but not be apprised of the law" lends further support to the argument.

Law as Command

According to Austin, law is a command of the sovereign but all laws cannot be expressed in terms of a command. The greater part of a legal system consists of laws which neither command nor forbid things to be done. They empower people by certain means to achieve certain results, e.g., laws giving citizens the right to vote, laws conferring on leaseholders the right to buy the reversion, laws concerning the sale of property and the making of wills. The bulk of the law of contract and of property consists of power-conferring rights. To regard a law conferring a power on one person as in fact an indirect order to another is to distort its nature. The term "command" suggests the existence of a personal commander. In modern legal systems, it is impossible to identify any commander in this personal sense. This is especially so where sovereignty is divided as in federal States. Commands conjure up the picture of an order given by one particular commander on one particular occasion to one particular person. Laws differ as they can and do continue in existence long after the extinction of the actual law-giver. It might be .contended that laws laid down by a former sovereign remain law only insofar as the present sovereign does not repeal them and allows them to remain in force. It cannot be said that what the sovereign permits, he impliedly or tacitly commands. In certain States, the law-making powers of the sovereign are limited by the Constitution which prevents the repeal by ordinary legislation of "entrenched" clauses. In such cases, no question arises of the present sovereign allowing or adopting such clauses. The notion of an implied or tacit command is suspect. An implied command is no command.

The bulk of English Law has been created neither by ordinary legislation nor by delegated legislation, but by the decisions of the courts. To describe the judges as delegates is misleading. The fact that Parliament can always overrule any judicial decision of the courts does not entail that judicial law-making is of a delegated nature. This confuses subordinate with derivative powers.

Sanction

Austin's definition of law may be true of a monarchical police State, but it cannot be applied to a modern democratic country whose machinery is employed for the service of the people. The sanction behind law is not the force of the State but the willingness of the people to obey the same. To define law in terms of sanction is like defining health in terms of hospital and diseases. Force can be used only against a few rebels and not against the whole society. If law is opposed by all the people, no force on earth can enforce the same.

Sanction is not an essential element of law. If we apply this fact to every kind of law, we are liable to arrive at absurd conclusions. It is true that there is such a thing as sanction in case of criminal law but no such sanction is to be found in case of civil law. If we accept Austin's definition, the whole of civil law will have to be excluded from the scope of positive law.

The writers of historical, sociological and philosophical schools of law criticise the idea of sanction as advocated by Austin. They point out that although international law and conventions are not backed by any authority, yet they are obeyed like any other law of the State. To quote Miller : "The machinery of law may include sanction or artificial motive, but in all societies the laws imposed or recognised are enforced and obeyed without any artificial sanction because if men are to live, they must act in some way and in society it is generally found that the path of law is the path of least resistance." Paton writes: "It cannot be explained psychologically as to how laws are obeyed on account of the sanction. Sanction can be applied only if there are only a few to oppose the law. However, if everyone decides to challenge law, it is bound to fail in its objective and no sanction can enforce the same." Pollock observes: "Law is enforced on account of its validity. It does not become valid merely because it is enforced by the State."

Not applicable to International Law

Austin's definition of law cannot be applied to international law. Although international law is not the command of any sovereign, yet it is considered to be law by all concerned. The view of Austin was that

international law was positive morality and he described it as "law by analogy". Austin has been repudiated on this point.

Not applicable to Constitutional Law

Austin's definition of law does not apply to constitutional law which cannot be called a command of any sovereign. As a matter of fact, the constitutional law of a country defines the powers of the various organs of the State. Nobody can be said to command himself. Even if one makes a command to bind one's self, it cannot have much force. Constitutional law is regarded law by all concerned and if the definition of Austin does not apply, that definition must be taken to be defective.

Not applicable to Hindu Law etc.

Austin's definition of law cannot be applied to Hindu law, Mohammedan law and the Canon law. These laws came into existence long before the State began to perform legislative functions. It might be contended by the supporters of the Austinian theory that "what the sovereign permits, he impliedly commands". However, Parker points out that what the sovereign can permit is merely their enforcement. The sovereign cannot create them. It is too much to maintain that the personal laws of the Hindus and Muslims have been created by the command of a sovereign.

Disregard of ethical elements

Austin's theory of law is defective in as much as it disregards that ethical element which is an essential constituent of a complete conception. Austin's theory is silent about the special relation between law and justice.

The main criticism of Salmond against Austin's theory of law is that it disregards the moral or ethical elements in law. The end of law is justice. Any definition of law without reference to justice is inadequate. Law is not right alone, or might alone, but the perfect union of the two. Law is justice speaking to men by the voice of the State. As Austin's theory excludes the ethical elements in law, it cannot be accepted as a complete definition of law.

The view of Salmond is that Austin's definition of law refers to "a law" and not "the law". The term "a law" is used in a concrete sense to denote statute, e.g., the law of contract etc. However, the term "the law" is used in an abstract sense to denote legal principles in general. Austin's definition refers to law only in the concrete sense and not in the abstract sense. A good definition of law must deal with both aspects of the law.

Purpose of Law ignored

Austin's theory of sovereignty ignores altogether the purpose of law and hence is one-sided and incomplete. Paton writes that justice is the command of law and it is only fitting that an instrument should be defined by a delineation of the purpose which is its *raison d'etre*. The view of Sir Henry Maine is that Austin's theory is founded on a mere artifice of speech and it assumes courts of justice to act in a way and from motives of which they are quite unconscious. The purpose of law should be included in the definition of law.

About Austin's view of law and sovereignty, Buckland writes: "This, at first sight, looks like circular reasoning. Law is law since it is made by the sovereign. The sovereign is sovereign because he makes the law." As it is put, the statement is undoubtedly circular. Law is defined in terms of the sovereign and the sovereign is defined in terms of the law. However, Austin did not do so. He defined law in terms of the sovereign, but he defined the sovereign as the body that receives the habitual obedience of the bulk of a given society and that was obviously not circular. We should also not accuse Buckland of having misrepresented Austin because what he said was that superficially Austin's arguments looked circular. Buckland himself observed thus: "But this is not circular reasoning; it is not reasoning at all. It is definition. Sovereign and law have much the same relation as centre and circumference."

Salmond on Austin's theory of law

The view of Salmond is that Austin's theory of law is one sided and inadequate. It does not contain the whole truth. It eliminates all elements except that of force. By doing so, Austin has missed the ethical element in law or the idea of right or justice. It is not by accident that the expressions law and justice are regarded as synonymous and courts of law are described in popular parlance as courts of justice. Essentially, law is the declaration of a principle of justice. As Austin's theory of law does not take into consideration the purpose of law, it is not an adequate definition of law.

Salmond maintains that the Austinian theory not only misses the ethical aspect of law but over emphasises its imperative aspect. It is true that State enforcement is an essential ingredient in law but it is true only in the sense that law requires the coercive administration of justice by the State. It is not true in the sense that every legal principle is the command enforced by a sanction. What is true is that while some principles of law are imperative principles, others are not.

Salmond contends that all laws are not commands. A lot of modern law is of a purely permissive character and confers privileges. When

law permits a man to make a will, it does not command him to do so. The same is true of the rules relating to judicial procedure and interpretation of statutes. As a matter of fact, Austin himself found three exceptional cases in civil law where there was no command. To quote Salmond: "All legal principles are not commands of the State and those which are such commands are at the same time and in their essential nature, something more, of which the imperative theory takes no account."

Salmond finds another defect in Austin's definition of law. Austin's definition attempts to answer the question "What is a law ?" but the true enquiry should be "What is law?" Law in the abstract sense is more comprehensive in its signification than law in the concrete sense. To quote Salmond: "The central idea of juridical theory is not *lex* but *jus*, in *gestez and recht*." By trying to define "a law" Austinian theory is led to the wrong conclusion that statute law is typical of all law and the form to which all law reduces itself in root analysis. The error lies in the wrong method of approach by Austin.

It is sometimes said that the chief defect in Austin's definition lies in the method adopted by Austin to arrive at the definition. Austin says that positive law is the "aggregate of the rules established by political superiors". Salmond does not agree with this view. To quote him: "All law is not produced by laws and all laws do not produce law." Law represents the whole body of rules recognised and applied by the courts. A law usually arises from the exercise of legislative authority of the State and is one of the sources of law in the abstract sense. Judicial precedents and customs are also sources of law and they produce case law and customary law. Although they are not enacted by any law, they are also applied by courts. Hence it is correct to say that "all law is not produced by law".

Salmond further says that "although laws commonly produce law, that is not invariably the case." Every Act of Parliament is called a law but not all Acts of Parliament formulate rules of law. Before the system of judicial divorce was introduced in England by the Matrimonial Causes Act of 1857, a divorce could be got by means of a private Act of Parliament. Although the private Act was passed by Parliament by which the parties ceased to be husband and wife, no legal principle was created. That is why Salmond observed: "All law is not produced by laws and all laws do not produce law."

Merit of the Theory

In spite of the criticism of Austin's theory of law, it cannot be denied that Austin rendered a great service by giving a clear and simple definition of law. Before him, there was a lot of confusion about the na-

ture of law. By separating law completely from morality, Austin tried to avoid a lot of confusion. His theory of law contains an important element of universal and paramount truth. The law is created and enforced by the State. To quote J. C. Gray: "If Austin went too far in considering the law as always proceeding from the State, he conferred a great benefit on jurisprudence by bringing out clearly that law is at the mercy of the State." Salmond observes thus about Austin's theory of law: "It contains an important element of truth. It rightly recognises the essential fact that civil law is the product of the State and depends for its existence on the physical force of the State exercised through the agency of judicial tribunals. Where there is no State which governs a community by the use of physical force, there can be no such thing as civil law. It is only if and so far as any rules are recognised by the State in the exercise of this function that these rules possess the essential nature of civil law."

Salmond's Definition of Law

According to Salmond: "Law may be defined as the body of principles recognised and applied by the State in the administration of justice." In other words, law consists of the rules recognised and acted upon by the courts of justice. Law may arise out of popular practice. Its legal character becomes patent when it is recognised and applied by a court of law in the administration of justice. Courts may misconstrue a statute or reject a custom. It is only the ruling of the court that has binding force as law. If the highest court of the State wilfully misconstrues an Act of the Legislature, the interpretation so placed on that Act would *ipso facto* be law since *ex hypothesi* there is no higher judicial tribunal with jurisdiction and authority to decide to the contrary. The true test of law is enforceability in the courts of law.

Salmond has defined law in the abstract sense. His definition brings out also the ethical purpose of law. Law is an instrument of justice and that idea is prominently brought out in the definition of Salmond.

Criticism

Vinogradoff has criticised Salmond's definition of law. According to him: "The direct purpose for which judges act is, after all, the application of law. A definition of law starting from their action would therefore be somewhat like the definition of a motorcar as a vehicle drawn by a chauffeur." Vinogradoff asks: "What should we think of a definition of medicine as a drug prescribed by a doctor?"

The administration of justice by a court means and involves the enforcement of law. When the administration of justice is to be defined as the application of law, no useful purpose would be served by defining

law as what is applied in the administration of justice. To seek for a definition of law in the function of the court is to beg the very question which we have set out to answer. The definition of Salmond suffers from the vice of running in a circle.

Vinogradoff points out that the definition of law by reference to the administration of justice inverts the logical order of ideas. The formulation of law is a necessary precedent to the administration of justice. Law has to be formulated before it can be applied by a court of justice. The definition of Salmond is defective as it assumes that law is logically subsequent to the administration of justice. A rule is law because courts of justice would apply and enforce it while deciding cases. The vice of hypallage vitiates the definition of law by Salmond.

The view of Sir John Salmond is that the above objection is based on a misapprehension of the essential nature of the administration of justice which is primarily the maintenance of right and Justice. For that purpose, law is not necessary. Justice may be dispensed by judges who are allowed an unfettered discretion to decide cases according to equity, good conscience and natural justice. Such was the case in early times when a court of justice was not a court of law also. In the administration of justice, the corpus of law is built up and legal principles are collected from different sources. A legal system consisting of inflexible and pre-established principles is not a condition precedent but a product of the administration of justice. Law consists of those authoritative principles. Law is the instrument for the attainment of the ends of justice. It is in the fitness of things that the instrument is defined with reference to its end.

The definition of law adopted by Salmond destroys the very nature of the thing which it seeks to define. If a statute is not law because it may be misinterpreted, it is also not a judicial decision because it may be overruled. Justice Cardozo writes: "In that view even past decisions are not law. The courts may overrule them. Law never is, but is always about to be. It is realised only when embodied in a judgment, and in being realised, expires. There are no such things as rules and principles; there are only isolated dooms."[5]

Another criticism of Salmond's definition of law is that he uses the term "the body of principles" in his definition. The term implies more of abstract, basic principles and fails to give due importance to concrete law, the law made up of statutes. In reality, civil law deals more with the concrete than the abstract. Salmond's definition fails to bring out that aspect.

[5] *The Nature of the Judicial Process.*

Another criticism is that Salmond defines law in terms of justice. It follows from this that an unjust law cannot exist because it would amount to a fatal self-contradiction, as for instance the term "square-circle". It is pointed out that law does not cease to be law merely because it is unjust.

Another criticism of Salmond's definition is that the goal of justice is not the only purpose of law. Law serves many ends which may vary from time to time and place to place. Today, the ends which seem to be universally accepted are those of securing order in society, the greatest happiness of the largest number and the reconciliation of the will of one with the liberty of another. Goodhart criticises Salmond's definition of law in these words: "Admirable as this definition may be as an ideal, it can hardly be expected as a practical solution of the question. The obvious answer to it is that it does not include laws which are unjust. Such rules nevertheless are laws. A definition of the whole must include all the parts. A minor criticism of this definition is that certain laws are recognized and enforced solely by administrative officers and the courts of law are not permitted to take cognizance of them. This has always been true on the Continent and can even be found in exceptional cases in England, as, for example, in the case of the exclusion of aliens. As Professor Pound has pointed out, administrative law has been developing rapidly in the United States and many questions are no longer justiciable in the courts of law. Is not the primary purpose of the law order rather than justice? Law and order are two terms which cannot come into conflict. Law and justice are terms which, unfortunately, are frequently contrasted."

Paton writes: "The purpose of law is essential to an understanding of its real nature; but the pursuit of justice is not the only purpose of law: the law of any period serves many ends and those ends will vary as the decades roll by. To seek for one term which may be placed in a definition as the only purpose of law leads to dogmatism. The end that seems most nearly universal is that of securing order, but this alone is not an adequate description; indeed, Kelsen regards it as a pleonasm, since law itself is the order of which we speak." Again, "we must distinguish clearly between justice and law, for each is a different conception. Law is that which is actually in force, whether it be evil or good. Justice is an ideal founded in the moral nature of man. The conception of justice may develop, as men's understanding develops, but justice is not limited by what happens in the actual world of fact. It is wrong, however, to regard law and justice as entirely unrelated. Justice acts within the law as well as providing an external test by which the law may be judged, e.g., justice emphasizes good faith and this conception has greatly influenced the development of legal system".

Pound says that Salmond's definition of law reduces law to a mere collection of isolated doctrines. The view of Jerome Frank is that Salmond's definition is narrow and ignores administrative law.

Salmond puts emphasis on the purpose of law in his definition. Undoubtedly, the end of law is justice and law can appropriately be described in terms of justice. Gray writes: "The law of a great nation means the opinions of half a dozen old gentlemen, for if those half a dozen old gentlemen form the highest tribunal of a country, then no rule or principle which they refuse to follow is law in that country."[6]

Like Austin, Salmond has defined law with reference to its source. He gives prominence to the courts instead of the sovereign or the legislature. Austin's definition has two principal defects. It does not associate law with its essential elements of right and justice. It fails to include rules which are not reducible to the form of commands. The definition of Salmond avoids those defects. It satisfies the requirements of logic. All laws are recognised by the courts and no rules are recognised and administered by the courts which are not rules of law.

Legal Sanctions

The term "sanction" is derived from Roman law. *Sanctio* was originally that part of a statute which established a penalty or made other provisions for its enforcement. In the ordinary sense, the term sanction means mere penalty. It can also be some motivating force or encouragement for the purpose of better performance and execution of laws.

According to Salmond, a sanction is the instrument of coercion by which any system of imperative law is enforced. Physical force is the sanction applied by the State in the administration of justice. Censure, ridicule and contempt are the sanctions by which society enforces the rules of positive morality. War is the ultimate sanction for maintaining the law of nations.

Writers like Hobbes, Locke and Bentham include even the element of reward, benefit or pleasure in sanction because a reward offered for an act or forbearance induces a party to act or forbear and thus has a similar effect to sanction. The same view is supported by Jethrow Brown. Austin writes: "It is only by conditional evil that duties are sanctioned or enforced. It is the power and the purpose of inflicting eventual evil and not the power and purpose of imparting eventual good which gives to the expression of a wish the name of a command. Prof. Hibbert puts forward three objections to bracketing reward with sanction. The parties who do not earn the reward do not suffer any evil. No one is under a duty to earn a reward. If the term sanction is

[6] *The Nature and the Sources of the Law*, p. 82.

applied to rewards because they induce acts or forbearance, then the term should be applied to inducements of all kinds.

Pollock gives a very clear picture of the nature of sanction. According to him, in a modern State, the sanction of law means, both for lawful men and for evildoers, something much more definite. It means nothing less than the constant willingness and readiness of the State to use its power in causing justice to be done.

A sanction can be distinguished from punishment. Sanction is the genus of which punishment is the species. Sanction consists in the application of the physical force of the State for the enforcement of law. Punishment or penalty is an evil inflicted upon a wrongdoer. Punishments are pre-eminently the sanction of criminal law. They are ultimate sanctions. The term sanction is wider than punishment. It is one of the kinds of sanction. There are sanctions other than punishment. Civil sanctions have restitution or compensation as their object.

Sanction also differs from liability. Sanction is a conditional evil to be incurred by disobedience to law. Law is "the State of exposedness to the sanctions of the law".

Professor Hibbert has given an exhaustive classification of sanctions in England. A legal sanction may be civil or criminal. Criminal sanction may be capital punishment, imprisonment, corporal punishment, fine, deprivation of civil and political rights, forfeiture of property and deportation. Civil sanctions are damages, costs, restitution of property, specific performance and injunction. Injunctions can be prohibitory and mandatory. Damages can be liquidated and unliquidated damages. Liquidated damages are nominal, ordinary and special.

Sanction of nullity is a civil sanction which regulates the rules of evidence and procedure. It consists in a refusal by the court to help a party who has disregarded the law. A document which requires to be registered will not be given effect if it is not so registered.

There is a controversy on the point whether sanction is an essential element of law or not. The majority of the jurists who follow Austin are of the view that sanction is an indispensable element of law. Hobbes writes: "It is men and arms that made the force and power of the laws." The view of Ihering is that law without sanction is like fire that does not burn and light that does not shine.

Pollock writes: "The appointed consequences of disobedience, sanction of law as they are commonly called, seem to be not only a normal element of civilised law, but a necessary constituent." Salmond says: "The civil law has its sole source, not in consent, or in custom, or in reason, but in the will and the power of him who in a commonwealth beareth not the sword in vain."

Those who do not subscribe to the above view point out that though sanction is commonly present in every law, it is not absolutely necessary to constitute a legal rule. It may be a good instrument to enforce law but it cannot be called the essence of legal relations. Law is powerless to provide complete sanction to guarantee against any injury. The presence of sanction shows the undeveloped stage of civilisation. As society develops, it goes on losing its importance by and by. Force is not the only thing which induces men to obey law. That can be due to indolence, deference or respect for law, sympathy or the emotion to subordinate individual will to the general will, reason which guides thoughtful minds to obey law and fear which puts a restraint on criminal nature. Convenience, habitual observance, inclination, sense of duty and social necessity provide forceful incentives for obeying the law. If the whole society decides to disobey the law, no amount of force can enforce it. Miller writes: "The machinery of law may include a sanction or artificial motive but in all societies the laws imposed or recognised are enforced and obeyed without an artificial sanction because if men are to live they must act in some way, and in society it is generally found that the path of law is the path of least resistance."

Territorial Nature of Law

The enforcement of law is territorial in the same way as a State is territorial. The territoriality of law flows from the political divisions of the world. As a general rule, no State allows other States to exercise powers of government within it. The enforcement of law is confined to the territorial boundaries of the State enforcing it. A person who commits a crime or a tort in State *A* and who then removes himself and his property to State *B*, cannot be reached by the authorities of State *A*. He has certainly violated the law of State *A* but the enforcement of that law is impossible so long as the offender is outside the territory of that State. In the case of crimes, the remedy lies in the practice of extradition. States conclude treaties with each other by which each agrees to surrender to the other State persons found in its territory who are wanted for crimes committed in the territory of the other party to the treaty. Extradition is not practised in civil cases. However, every State gives a remedy in its own courts for civil wrongs wherever they may be committed.

The proposition that a system of law belongs to a defined territory means that it applies to all persons, things, acts and events within that territory. It does not apply to persons, things, acts or events elsewhere. The part of English Law which is emphatically territorial is criminal law. With a few exceptions, it applies to all offences committed in England and not to offences committed elsewhere. The land law of English

courts applies only to land situated in England. It is not a universal non-territorial doctrine applied to land situated elsewhere. The law of marriage, divorce, succession and domestic relations applies only to those persons who by residence, domicile or otherwise are sufficiently connected with the territory of England.

There are many cases in which the above principle does not apply. States like Turkey apply their criminal law even to foreigners in respect of crimes committed abroad if the victims are their subjects and the foreigner concerned ventures or comes within their territory. The rule that title to land is governed by the *lex citus* is not invariable. An English court of equity will apply certain equitable rules even to lands situated abroad. In the case of *Penn* v. *Lord Baltimore,* the English Court of Equity acted on the maxim that equity acts *in personam* and took cognizance of the case although the transaction had taken place beyond its jurisdiction. Italian law rejects the *lex citus* in favour of the law of the owner's nationality in cases of succession on death.

The English Law of torts knows comparatively little of any territorial limitation. If action for damages for negligence or other wrongful injury committed abroad is brought in an English court, it will in general be determined in accordance with English Law and not otherwise. The law of procedure is not territorial in any respect. The English Law of procedure is the law of English courts rather than the law of England. It is the same for all litigants who come before those courts, whatever may be the territorial connections of the litigants or their cause of action.

A law is said to have extra-territorial operation when it operates also outside the limits of the territory within which it is enacted. By virtue of the Indian Penal Code and the Code of Criminal Procedure, Indian courts are empowered to try offences committed outside India on land and on the high seas. The latter is known as admiralty jurisdiction which is based on the principle that a ship on the high seas is a floating island belonging lo the nation whose flag she flies.

In *Savarkar's* case, the accused Savarkar was in the custody of police officers who had to bring him from London to Bombay. On the way, he escaped at Marseilles (in France). He was rearrested there and brought to Bombay. He was committed for trial by the special magistrate at Nasik. It was held by the High Court that the trial and committal of Savarkar were valid.

In the case of *Mobarik Ali Ahmed* v. *State of Bombay,* the appellant, though at Karachi, was making representations to the complainant through letters, telegrams and telephone talks, sometimes directly to the complainant and sometimes through a commission agent that he

had ready stock of rice, that he had reserved shipping space and on receipt of money, he would be in a position to ship the rice forthwith. Those representations were made to the complainant at Bombay, notwithstanding that the appellant was making the representations from Karachi. It was as a result of those representations that the complainant parted with his money to the tune of about Rs. 5 ½ lakhs on three different dates. It was found that the representations were made without being supported by requisite facts and with an initial dishonest intention. It was held by the Supreme Court of India that all the ingredients necessary for finding the offence of cheating under Section 420 of the Indian Penal Code read with Section 415 occurred at Bombay. In that sense, the entire offence was committed at Bombay and not merely the consequence of it, viz., delivery of money which was one of the ingredients of the offence. Though the appellant was a Pakistani national at the time of the commission of the offence, he must be held guilty and punished under the Indian Penal Code. The fastening of criminal liability on the appellant who was a foreigner, was not to give any extra-territorial operation to the law in as much as the exercise of criminal jurisdiction in the case where all the ingredients of the offence had occurred within the territory of India.[7]

The conclusion of Salmond is that as territoriality is not a logically necessary part of the idea of law, a system of law is conceivable the application of which is limited and determined not by reference to territorial considerations, but by reference to the personal qualifications of the individuals over whom jurisdiction is exercised: qualifications such as nationality, race or religion.[8]

Purpose and Function of Law

There has been a lot of speculation about the purpose and function of law. There is nothing dogmatic about it. Law changes from time to time and from country to country. Law is not static. It must change with changes in society. That is the reason why there is no unanimity with regard to the purpose and function of law.

According to one school of thought, the object of law is to maintain law and order in the country. It has to perform police functions. Plato says: "Mankind must either give themselves a law and regulate their lives by it or live no better than the wildest of the wild beasts." According to Hobbes: "Law was brought into the world for nothing else but to limit natural liberty of particular men in such a manner as they might not hurt but assist one another and join together against a common en-

[7] AIR 1957 SC 857.

[8] *Jurisprudence*, p. 82.

emy". Locke says that "the end of law is not to abolish or restrain but to preserve or enlarge freedom". According to Kant: "The aim of law is freedom and the fundamental process of law is the adjustment of one's freedom to that of every other member of the community. "

According to Bentham: "Of the substantive branch of the law, the only defensible object or end in view is the maximisation of the happiness of the greatest number of the members of the community in question."

Holland says: "Law is something more than police. Its ultimate object is no doubt nothing less than the highest well-being of society; and the State from which law derives its force, is something more than an institution for the protection of rights."

Roscoe Pound says that there are four purposes of law. The first purpose of law is to maintain law and order within a given society and that has to be done at any cost. The second purpose of law is to maintain the *status quo* in society. The third purpose is to enable individuals to have the maximum of freedom to assert themselves. The fourth purpose of law is the maximum satisfaction of the needs of the people.

According to Justice Holmes: "The object of law is not the punishment of sins but to prevent certain external results."

According to Savigny, law is "the rule which determines the sphere within which the existence and activity of each individual may obtain secure and free play".

A school of jurists of which Krause and Ahrens are representatives demand that law should be conceived of as harmonising the conditions under which human race accomplishes its destiny by realising the highest good of which he is capable. The pursuit of this highest good of the individual and of society needs a controlling power, which is law, and an organisation for the application of its control, which is the State.

The Hindu view regarding the purpose of law is that it should aim at the welfare of the people in this world and also from salvation after death. According to the Mohammedan law, the purpose of law is the discipline of the soul, the improvement of morals and the preservation of life, property and reputation. Sir Abdur Rahim writes: "The end of law is to promote the welfare of man both individually and socially, not merely in respect of life on this earth but also of future life."

According to Salmond, the object of law is justice. To Salmond, law is those principles which are applied by the State in the administration of justice.

Justice can be used in a wider or a more restricted sense. In the wider sense, justice appears to be roughly synonymous with morality. In the narrower sense, as in the expressions "courts of justice", "natural justice" and "denial of justice", the term refers to but one area of morality.

Justice operates at two different levels, distributive justice and corrective justice. Distributive justice works to ensure a fair division of social benefits and burdens among the members of a community. Distributive justice serves to secure a balance or equilibrium among the members of society. That balance can be upset as when *A* wrongfully seizes *B's* property. At that point, corrective justice will move in to correct the disequilibrium by compelling *A to* restore the property to *B*. The function of the courts is to apply justice in its corrective sense. In a fair legal system, there are procedural or other rules which give each party an equal opportunity of presenting his case and calling evidence and to prevent judicial prejudice in favour of either.

Fair and equal dispensation of justice demands more than equality between the parties to individual law suits. It requires that all be equal before the law. Legal rights which each person has should be given equal protection by the courts. In each case, both the plaintiff and defendant should get an equal "crack of the whip". Judges should mete out justice without fear or favour, without distinction between high and low, rich and poor and so forth. Like cases should be treated alike not only as regards the hearing but also in respect of the finding. Major discrepancies in sentencing mean in fact inequality before the law.

According to Roscoe Pound, law is a species of social engineering whose function is to maximise the fulfilment of the interests of the community and its members and to promote the smooth running of the machinery of society. Bodily security, property, reputation and freedom of speech are all interests in this sense. All of these interests do not necessarily receive recognition and protection by law. The right to privacy is not fully recognised by English Law. The reconciliation of conflicts between competing interests is in a broad sense part of the problem of justice.

Justice is not the only possible or desirable goal of law. The notion of law represents a basic conflict between two different needs, the need for uniformity and the need for flexibility. Uniformity is needed partly to provide certainty and predictability. Where rules of law are fixed and generalised, the citizen can plan his activities with a measure of certainty and predict the legal consequences of his behaviour. In some areas of law such as contract and property, this need may outweigh all others and fixed rules may be preferable to rules that are fairer but less

certain. Another benefit' is stability and security which the social order derives from uniform, unchanging and certain rules of law.

There is also a need for a certain degree of flexibility. The existing rules may not provide for a borderline case. As a matter of fact, no rule can make provision for every possible case. Some measure of discretion is necessary. Flexibility is necessary to enable law to adapt itself to social change. If law is unalterable, the necessary changes will come by revolution, violence and upheavals. Law that is capable of adaptation, whether by legislation or judicial development, allows for peaceful change from time to time.

In conclusion, it can be said that the function of law is to achieve stability and peaceful change in society.

Uses or Advantages of Law

(1) There are many advantages of the fixed principles of law. They provide, *uniformity and certainty* to the administration of justice. The same law has to be applied in all cases. There can be no distinction between one case and another case if the facts are the same. Law is no respector of personality. Not only this, law is also certain. The legal system of a country is put down in black and white and it is possible for all the people to know the law of the land. The uniformity and certainty of law add to the convenience and happiness of the people. The rules of the road make it possible for millions of people to drive with relative safety. Without these rules, it would have been impossible for them to attend their offices daily in time. Society is becoming more and more complicated everyday and without the existence of an elaborate system of laws, it is not possible to live in safety.

(2) The existence of fixed principles of law *avoids the dangers of arbitrary, biased and dishonest decisions*. Law is certain and known. Therefore, a departure from a rule of law by a judge is visible to all. It is not enough that justice should be done, but it is also necessary that it should be seen to be done. If the administration of justice is left completely to the individual discretion of a judge, improper motives and dishonest opinions could affect the distribution of justice. Salmond writes: "It is to its impartiality, far more than its wisdom (for this latter virtue it too often lacks) that are due the influence and reputation which the law has possessed at all times; wise or foolish, it is the same for all." Locke writes: "The legislative or supreme authority cannot assume to itself a power to rule by extemporary, arbitrary decrees, but is bound to dispense justice and to decide the rights of the subjects by promulgating standing law and known, authorised judges." According to Cicero: "We are the slaves of the law that we may be free."

(3) The fixed principles of law protect the administration of justice from the errors of individual judgment. In most cases, the law on the subject is clear and judges are not expected to twist the same. They are not expected to substitute their own opinion for the law of the country. Experience shows that people have lived happier lives when they are ruled by the fixed principles of law than when there are no laws as such. There is greater mischief if judges are allowed to decide every case according to what seems to them to be the best. Aristotle writes: "To seek to be wiser than the law is the very thing which is by good laws forbidden." Salmond observes: "The establishment of the law is the substitution of the opinion and conscience of the community at large for those of the individuals to whom the judicial functions are entrusted. The law is not always wise, but on the whole and in the long run, it is wiser than those who administer it."

(4) Another advantage of law is that it is *more reliable* than individual judgment. Human mind is fallible and judges are no exception. The wisdom of the legislature which represents the wisdom of the people is a safer and more reliable means of protection than the momentary fancy of the individual judge.

Disadvantages of Law

(1) Law has not only advantages but also disadvantages. One disadvantage is the *rigidity of law.* An ideal legal system keeps on changing according to the changing needs of the people. Law must adjust itself to the needs of the people and cannot isolate itself from them. However, law is not usually changed to adjust itself to the needs of the people. There is always a gap between the advancement of the people and the legal system of the country. The lack of flexibility in law results in hardship and injustice in several cases.

(2) Another disadvantage of law is its *conservative nature.* Both the lawyers and judges favour the continuation of the existing law. The result is that very often law is static. This is not desirable for a progressive society.

(3) Another defect of law is *formalism.* More emphasis is put on the form of law than its substance. A lot of time is wasted in raising technical objections of law which have nothing to do with the merits of the case in dispute. While insisting on the formalities of law, injustice may be done in very many cases. While an innocent person may suffer, the clever and the crooked may profit thereby.

(4) Another defect of law is its undue and needless *complexity.* It is true that every effort is made to make law as simple as possible but it is not possible to make every law simple. That is due to the complex

nature of modern society. Lawyers also insist on drawing fine distinctions on the various points of law. There is a lot of hair-splitting. This does not bring justice nearer but merely helps the clever and the crooked. It is true that some of the defects can be removed by codification but the difficulty with codification is that within a few years, so much of case law comes into existence that the real law of the country cannot be understood by a reference to the code alone. Law must change with the changing condition but codes cannot be changed frequently.

The conclusion of Salmond is that if the benefits of law are great, the evils of too much law are also not small.

Questions of Law and Fact

It is commonly said that all questions which arise for consideration and determination in a court of justice are of two kinds. They are either questions of law or questions of fact. In a sense, this is true but the matter has to be considered in detail because both the terms questions of law and questions of fact are ambiguous and possess more than one meaning.

Questions of Law

According to Salmond, the term question of law is used in *three* distinct, though related, *senses.*

(1) In the *first* place, it means a question which the court is bound to answer in accordance with a rule of law which has already been authoritatively answered by the court. All other questions are questions of fact. Every question which has not been determined before and authoritatively answered by law is a question of fact. Whether a contractor has been guilty of unreasonable delay in building a house is a question of fact as the law does not contain any rule for its determination. 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 Bills 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 accused is over the age of 10 years in England and 7 years in India. It is a question of law if he is under that age.

(2) In the *second sense,* a question of law is a question as to what the law is. An appeal on a question of law means an appeal in which the question for decision is what the true rule of law is on a certain matter. Questions of law in this sense arise out of the uncertainty of law. If the whole law could be definitely ascertained, there would be no question of law in this sense. When a question first arises in a court of justice as to the meaning of an ambiguous statutory provision, the question

is one of law in the second sense. It is a question as to what the law is. It is not a question of law in the first sense but a question of fact. The business of the court is to determine what, in its own judgment and in fact, is the true meaning of the words used by the legislature. An authoritative answer to the question becomes a judicial precedent which is law for all other cases in which the same statutory provision is in question. The judicial interpretation of a statute represents a progressive transformation of the various questions of fact as to the meaning of that statute into questions of law to be answered in conformity with the decided cases.

(3) As regards the *third* sense in which the term questions of law is used, there is a general rule that questions of law are for the judges and questions of fact are for the jury to decide. It is true that questions of law are never referred to the jury, but questions of fact can be referred to a judge. The interpretation of a particular document is a question of fact but very often it is done by the judge himself. The question of reasonable and probable cause for prosecution in a suit for malicious prosecution is decided by a judge although it is a question of fact. Paton points out that although a judge lays down the law and the jury applies it to facts and arrives at a conclusion, that is a mixture of law and fact and not fact alone.

Questions of Fact

The term question of fact has more than one meaning. In a general sense, it includes all questions which are not questions of law. Everything is a matter of fact which is not a matter of law. According to Salmond, a question of fatt means either any question which is not predetermined by a rule of law, or any question except the question as to what the law is or any question which is to be answered by the jury. In a narrower sense, a question of fact is opposed to a question of judicial discretion which includes questions as to what is right, just, equitable or reasonable. Evidence can be led to prove or disprove a question of fact. It can be proved by evidence whether a particular person lives at a particular place or not and it is a question of fact. However, it is a question of law to decide how much punishment should be inflicted for any particular offence. It is a question of fact whether the offence of adultery has been committed or not but it is a question of law what punishment should be given to the adulterer.

A question of fact is a matter of fact as opposed to a matter of opinion. Evidence is given to find out the true facts of the case. It can also be proved by means of demonstrations. However, a question of opinion cannot be proved by demonstration or by evidence.

Regarding the distinction between questions of law and fact, Paton observes: " However difficult it may be to define the exact difference between law and fact, the distinction itself is fundamental for any legal system. Law consists of abstract rules which attempt to reduce to order the teeming facts of life. Facts are the raw material on the basis of which the law creates certain rights and duties."

According to Salmond, all matters and questions which come before a court of justice are of three kinds viz., matters and questions of law, matters and questions of judicial discretion and matters and questions of fact. In the first case, it is the duty of the court to ascertain the law and decide the case accordingly. In the second case, the court can exercise its own judgment and decide the dispute according to what it considers to be right, just, equitable or reasonable. In the third case, it is the duty of the court to weigh the evidence an then come to its conclusion. As the legal system grows, there is a tendency to transform questions of fact and questions of judicial discretion into those of questions of law. As case law increases and legislative activity grows, the scope for the moral judgment of the court becomes narrower. Even in questions of pure fact, there are already pre-determined and authoritative answers.

Parker writes that actual cases may involve questions of law, fact and discretion at the same time. Whether a company should be wound up involves the question of fact as to what was done when it was alleged created, the question of law whether that was sufficient to create a company, question of fact as to its present assets and liabilities and the question of discretion whether in view of the circumstances, it is just and equitable that it should be wound up.

Questions of Fact and Discretion

Questions of fact are questions of what actually is and questions of discretion are questions of right and of what ought to be. In questions of fact, the court tries to find out the truth. In questions of discretion, the court decides what is just. Questions of fact have to be proved by evidence and demonstration but questions of discretion are subjects of reasoning and argument. It is a question of fact whether a particular person has committed a crime or not and this can be proved or demonstrated. However, it is a question of discretion for the court to decide what punishment should be given to a person who has been found guilty of a particular offence. Likewise, it is a question of fact whether a valid contract subsists between the parties or not and whether a breach of the contract has taken place or not. It is a question of discretion how much damages are to be awarded or whether the specific performance of the contract can be enforced.

Mixed Questions of Law and Fact

Experience shows that in actual practice, questions of law and fact are mixed. In the same case, the court has to decide questions of law and fact. If there is a dispute whether a partnership exists among certain parties or not, it is a question of fact as to what is the basic relationship between the parties. It is a question of law whether the basic relationship between the parties constitutes a partnership in the eyes of law or not. Thus we have a mixed question of law and fact. Very often, in criminal cases questions of fact are decided by the members of the jury and questions of law are decided by the judge and both of them are involved in the same case.

Transformation of questions of Fact into Law

The existence and development of a legal system represents the transformation of questions of fact and judicial discretion into questions of law. As more and more cases are decided, identical decisions are given by the judges in those cases which have similar facts. Old case law is quoted in fresh cases. If the facts of the two cases are identical, the discretion of the judge disappears and he is bound to give his decision according to the precedent on the subject. To a lesser extent, even questions of fact are converted into questions of law. If similar facts are to be found in two cases, the decision arrived at in the previous case is also the conclusion arrived at in the next case.

Discordance between Law and Fact

According to Salmond:,"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." This discordance between law and fact generally arises in two ways: by the establishment of legal presumptions and by the device of legal fictions.

Legal Presumptions

A legal presumption is a rule of law by which courts and judges draw a particular inference from particular facts or from particular evidence unless and until the truth of that inference is disproved. One fact is recognised by law as sufficient proof of another fact, whether it is in truth sufficient for the purpose or not. A notification in the official gazette is presumed by law to have been duly signed by the person by whom it is purported to have been signed. In fact, the person concerned may have signed or may not have signed. However, the fact of notification is considered by law to be sufficient proof of the fact of the signature.

Presumptions are of two kinds: presumptions of law and presumptions of fact. Presumptions of law can be further subdivided into two parts: conclusive and rebuttable presumptions. A conclusive presumption is one which constrains the courts to infer the existence of one fact from the existence of another, even though that inference could be proved to be false. Law prohibits leading evidence to the contrary. If a child is born during the continuance of marriage and within 280 days after its dissolution that child is considered to be legitimate. Law does not allow any evidence to the contrary. A child under 7 years of age is conclusively presumed to be incapable of committing a crime and courts refuse to hear evidence to prove that the child realised the malicious or criminal nature or quality of the act. The Companies Act lays down that a Certificate issued by the Registrar of Companies that the requirements of the Act regarding registration have been fulfilled will be conclusive evidence that such requirements have been duly discharged. The certificate is final even if the signatures of some of the applicants were actually forged. Conclusive presumptions are called *presumptio juris et de jure.*

A rebuttable presumption is one where the law requires the court to draw an inference even though there is no sufficient evidence to support it. However, if sufficient evidence is given to contradict a rebuttable presumption drawn by the court, the latter is bound to reject it. A negotiable instrument is presumed to be given for value unless the contrary is proved. A person who has not been heard of for 7 years or more by those who would naturally have heard of him if he had been alive is presumed to be dead. Any person accused of an offence is presumed to be innocent but the prosecution can prove that he has committed a particular offence.

Legal Fiction (*Fictio Juris*)

According to Sir Henry Maine, a fiction means "any assumption which conceals or tends to conceal the fact that the rule of law had undergone any alteration, its letter remaining unchanged but its operation being modified". Salmond defines fiction as a device by which law deliberately departs from the truth of things whether there is any sufficient reason for the same or not. By means of a legal fiction, a child can be adopted from one family into another. A limited company is given a personality in the eye of law which is distinct from that of its members. Case law is based on a fiction that while enacting a particular rule of law, the legislature had a particular intention. If a particular term has been given a definite meaning by the courts of law and the same term is used by the legislature in another enactment or in the amendment of

the law, it is presumed that the legislature has accepted the particular interpretation put on it by the courts of law of the country.

Fiction played an important part as a source of law in ancient times. There was a rule of procedure in Rome by which a non-Roman was allowed to make a false allegation that he was a Roman citizen and thereby *praetor urbanus* was able to try his case. The fiction of citizenship was adopted merely for the purpose of extending the Roman law to non-Romans. In the same way, courts of justice in England resorted to various kinds of fictions to add to their jurisdiction. The Court of Exchequer got jurisdiction over civil cases by means of a legal fiction that the plaintiff was the debtor of the King. The Court of King's Bench got jurisdiction over civil cases by the fiction that the defendant was in custody for breach of peace. The fictions adopted by the courts actually did not exist. They were adopted as devices to add to the jurisdiction of the courts.

The view of Gray is that historical fictions were the means employed in the past for the development of law. The people at that time were conservative and it was not possible to change law directly and boldly. Therefore, various devices were employed to change the law in effect without changing its letter.

The old Roman law was laid down in XII Tables and additions to it were made by *Responsa Prudentium* or the judgments of the men learned in law. The interpretations put by them may not have been thought of by the compilers of the XII Tables but those were regarded as valid as a result of fiction. Law was actually altered although the fiction was maintained that it had not been changed.

In England also, the fiction of interpretation was employed for the growth of law. It was maintained that justice was administered according to the ancient and immemorial customs of the realm. Even when new cases came up for decision before courts of justice, the presumption was that those were to be disposed of according to the pre-existing rules of law although the courts did not hesitate to change the old law by giving judgments in new cases. Law continued to grow although the fiction was maintained that the ancient customs were being adhered to.

The view of Sir Henry Maine is that while in undeveloped countries, there was the necessity of fictions, that is not the case under modern conditions. The people are not conservative and law can be changed to meet the changing needs of the people. Fictions stand in the way of the codification of law. Legislative amendments should be preferred to legal fictions. Sir Frederick Pollock does not accept this view. According to him, the age of fictions is not over. Even now, we require

the help of fictions. Even now we require the fiction of the personality of a limited company as distinct from its members. The same is the case with the concept of constructive possession, constructive trust and constructive fund. A property may be in the actual possession of X but the same may be in the constructive possession of Y, the owner. No trust may have been created but law may presume the same. The same is the case with fraud. By fiction, a Hindu child in the womb becomes entitled to family property. A gift can validly be made to a child in the womb. These fictions are given the title of dogmatic fictions by Gray. According to him: "Fictions of the dogmatic kind are compatible with the most refined and most highly developed systems of law."

SUGGESTED READINGS

Austin	:	*The Province of Jurisprudence Determined.*
Brown	:	*The Austinian Theory of Law.*
Bryce	:	*Studies in History and Jurisprudence.*
Buckland	:	*Some Reflections on Jurisprudence.*
Campbell	:	*Austin's Jurisprudence.*
Del Vecchio	:	*Formal Basis of Law.*
Eastwood and Keeton	:	*The Austinian Theories of Law and Sovereignty.*
Fitzgerald, P.J. (Ed.)	:	*Salmond on Jurisprudence*, 12th Edn., Sweet and Maxwell, London, 1979.
Goodhart	:	*Law and the Moral Law.*
Gray		*The Nature and Sources of Law.*
Hart, H.L.A.	:	*The Concept of Law.*
Howe	:	*Studies in the Civil Law.*
Jennings (Ed.)	:	*Modern Theories of Law.*
Kantorowicz	:	*The Definition of Law (Ed. A.H. Campbell, 1958).*
Lightwood	:	*Nature of Positive Law.*
Robson	:	*Justice and Administrative Law.*
Sayre (Ed.)	:	*Interpretations of Modern Legal Philosophies*, Oxford University Press, New York, 1947.

Chapter Three

Kinds of Law

SIR JOHN SALMOND refers to eight kinds of law viz., imperative law, physical or scientific law, natural or moral law, conventional law, customary law, practical or technical law, international law and civil law.

Imperative law

According to Salmond: "Imperative law means a rule which prescribes a general course of action imposed by some authority which enforces it by superior power either by physical force or any other form of compulsion." The chief advocate of imperative law is Austin who defines law as a command which obliges a person or persons to a course of conduct.

It is in the very nature of law to be imperative, otherwise it is not law but a rule which may or may not be obeyed. Imperative laws have been classified with reference to the authority from which they proceed. They are either divine or human. Divine laws consist of the commands imposed by God upon men and they are enforced by threats of punishment in this world or in the next world. Human law consists of imperative rules imposed upon men. Those are of three kinds: civil law, law of positive morality and law of nations or international law. Civil law consists of commands issued by the State to its subjects and enforced by its physical power. The law of positive morality consists of rules imposed by society upon its members and enforced by public censure or disapprobation. International law consists of rules imposed upon States by the society of States and enforced partly by international opinion and partly by the threat of war. The rules of international law are followed compulsorily and their breach is visited by punishment. Those may be war, the severance of diplomatic relations, enforcement of economic sanctions and condemnation by other States.

Salmond refers to two essential characteristics of imperative law. The first characteristic is that the command of the sovereign must be in the form of a general rule. It must not be a particular command addressed to a particular individual and not to others. Law must be general or it is not law at all. However, critics point out that complete generality is neither possible nor desirable. Sometimes, a law is applicable only to a particular class and not to the whole population. Moreover, the class may be limited to a single person and to a particular occasion. In spite of this, it cannot be denied that law must not make any distinction between individuals and should apply to all and not to some of them.

The second characteristic of imperative law is that it should be enforced by some authority. The observance of law must not depend upon the pleasure of the people. Law has to be enforced by the machinery of the State. The source of law is not consent, custom or reason but the strength of the State. The instrument of coercion by which law is enforced is called sanction. Sometimes, sanction is in the form of censure, ridicule or contempt and sometimes in the form of physical force. Sanction is not necessarily a punishment.

Physical or Scientific Laws

According to Salmond: "Physical laws or the laws of science are expression of the uniformities of nature—general principles expressing the regularity and harmony observable in the activities and operations of the universe." An example of physical laws is the law of tides. Physical laws are also called natural laws or laws of nature. There is uniformity and regularity in those laws. They are not the creation of men and cannot be changed by them. Human laws change from time to time and country to country but physical laws are invariable and immutable for ever.

Hooker writes: "His commanding those things to be which are and to be in such sort as they are, to keep that tenure and course which they do, importeth the establishment of nature's law. Since the time that God did first proclaim the edicts of His law upon it, heaven and earth have hearkened unto His voice and their labour hath been to do His will. See we not plainly that the obedience of creatures unto the law of nature is the stay of the whole world." Again, "of law there can be no less acknowledged than that her seal is the bosom of God, her voice the harmony of the world, all things in heaven and earth do her homage."

Natural Law or Moral Law

According to Salmond: "By natural law or moral law is meant the principles of natural right and wrong—the principles of natural justice if

we use the term justice in its widest sense to include all forms of rightful action." Natural law has been called divine law, the law of reason, the universal or common law and eternal law. It is called the command of God imposed upon men. It is established by that reason by which the world is governed. It is unwritten law and is not written on brazen tablets or pillars of stone but by the finger of nature in the hearts of men. It is universally obeyed in all places and by all people. It has existed from the beginning of the world and hence is called eternal. Divine law is also called natural law as its principles are supposed to have been laid down by God for the guidance of mankind. It is called rational law as it is supposed to be based on reason. It is called unwritten law as it is not to be found in the form of a code. All these names are not considered to be satisfactory but they point out the various characteristics of natural law. Natural law appeals to the reason of man. It is addressed to intelligent human beings. It does not possess physical compulsion. It embodies the principles of morality. Its principles are common to all the States. Natural law exists only in an ideal State and differs from positive law of a State.

From time to time, great writers have expressed their views on natural law or the law of nature. A reference in this connection may be made to the views of Aristotle, Cicero, Hobbes, Grotius, Pufendorf and Blackstone.

The law of nature has performed a very useful function. It was with the help of the law of nature that the *jus civile* or civil law of the Romans was transformed into *jus gentium* which later on became the basis of international law. Grotius based his principles of international law on the law of nature. An appeal was made to the law of nature to put a check on the arbitrary powers of the government and thereby to protect the liberties of the people. Judges also refer to the law of nature while interpreting the Constitution. This has been done in the United States and the same is being done in India. The law of nature puts forward an ideal to be followed. This was actually done by writers like Hegel, Kant, Paine, Aristotle, Locke, Hume etc. During the Middle Ages, the law of nature was considered to be a higher law which was imposed on the people by the command of God. The law of nature sets up an ideal which the legal systems of the countries try to achieve.

Salmond points out that from a practical standpoint, natural law terminology might seem to offer advantages. First, as an antidote to legal rigidity, it could provide flexibility, allowing rules of law to be changed from what they are to what they ought to be, on the ground that the law always is what it ought to be. Secondly, the natural lawyer's terminology, it is claimed, would weaken the authority of unjust

and immoral laws. Yet surely it may be better in such cases to highlight the conflict between law and morals and to stress that mere formal legality alone is no title to obedience. Adoption of natural law terminology could even weaken our capacity to criticise the law. It is easy to move from the premise that if a rule is unjust it is not law to the conclusion that if a rule is law it is just and this without realising that in the conclusion we may be determining in the first place that the rule is one of law by purely formal criteria. Moreover, natural law terminology tends to obscure the possibility of criticising law on other than purely moral grounds. For law must be evaluated by reference to its efficacy, general convenience, simplicity and many other factors, as well as by reference to the demands of justice and morality. To use natural law terminology to secure a conviction of those whose action at the time of the performance contravened no rules of positive law, by finding them guilty of violating the natural law, runs counter to the moral principle that no one should be held criminally liable for acts legally innocent at the time of their commission. Even in the trials of men like Eichmann this principle should not be lightly abandoned.[1]

The view of Dias and Hughes is that some of the contributions of the philosophy of natural law to human progress are epoch-making:

(1) The various doctrines have always served the social need of the age. They have helped to maintain stability against changes as in the time of the Greeks and the medieval church. They have inspired change against stability, notably after the Reformation and the Renaissance.

(2) The philosophy of natural law has inspired legislation and the use of reason in formulating systems of law.

(3) The period from the Renaissance down to the 18th century witnessed a lasting distinction drawn between positive law and morality.

(4) The same period also brought about the emancipation of the individual.

(5) A strong connection was established between positive law and freedom of the individual.

(6) The natural rights of the individual acquired great significance.

In the United States, they are enshrined in the Constitution. It is not always possible to justify arguments that have been founded on the doctrine of natural rights. Thus, slavery was justified on the ground that the right of property was a natural right. As slaves were property, slavery was a natural right and unalterable. Likewise, liberty in the Fourteenth Amendment of the American Constitution has been held to include unlimited freedom of contract and "person" has come to

[1] p. 25, *Salmond on Jurisprudence*, 12th edition, London, 1966.

cover corporations. The result is that big corporations have been able to protect themselves behind the cover of the natural rights of an individual.

The influence of natural law ideas on English lawyers was also great. One of the effects was the doctrine of the supremacy of law. Natural law theories are reflected in the writings of certain legal authors such as Fortesque, Blackstone and St. Jerman. The modern law of quasi-con tract was erected from avowed principles of natural justice. The conflict of laws was originally founded on natural justice. In cases of first impression, a judge must resort to his reason and sense of justice. The sense of justice of a judge plays a decisive role even when he is applying certain principles. It is all the more prominent where there are no principles to apply. The concept of reasonableness, particularly in tort, is the result of the ideas of natural law. The judicial control of administrative and quasi-judicial functions is based on the principle that those who administer them must abide by the principles of natural justice. Foreign law is not applied in English courts if it is found contrary to the principles of justice. Occasionally, cases also reflect natural justice. In the case of *Skarington* v. *Strotton,* the argument was drawn from natural law as to the purpose of marriage. In the case of *Calvin,* we find the following statement: First, that the allegiance or faith of the subject is due unto the King by the law of nature; secondly, that the law of nature is part of the law of England; thirdly, that the law of nature was before any judicial or municipal law; fourthly, that the law of nature is immutable." In the case of Somersett, Lord Mansfield accepted the contention that slavery was an institution so odius to natural law that the English courts could not countenance it. The Law Merchant was conceived of as being based on principles of natural law which may have had something to do with its adoption in the time of Lord Mansfield. In certain overseas territories, until a system of law was officially introduced, natural law was resorted to in the administration of justice.

There is widespread revival of the concept of natural law in the world and there are many reasons for it. There is a general desire to restore closer relations between law and morality. People are not satisfied with the Austinian view of law which ignores morality altogether. It is also felt that there is a necessity for a juristic basis for a progressive interpretation of positive law. The development of sociological theories demands that the theory of law should allow a judicial interpretation of positive law in accordance with changing ideas and circumstances. The development of the idea of relativity in modern law has removed the chief difficulty in the way of the old idea of natural law. Laws can be universal and still vary in their contents. No law is eternal and every

law must change according to circumstances. There is evolution everywhere. According to Kohler, law is based on reason and the actual law at any time in any country depends upon the stage of the development of the people concerned.

Conventional Law

According to Salmond, conventional law means "any rule or system of rules agreed upon by persons for the regulation of their conduct towards each other." It is a form of special law. It is law for the parties who subscribe to it. Examples of conventional law are the laws of cricket or any other game, rules and regulations of a club or any other voluntary society. Conventional law in some cases is enforced by the State. When it is enforced by the State, it becomes a part of the civil law. The view of some writers is that international law or the law of nations is also a kind of conventional law on the ground that its principles are expressly or impliedly agreed upon by the States concerned.

Customary Law

According to Salmond, customary law means "any rule of action which is actually observed by men—any rule which is the expression of some actual uniformity of some voluntary action." A custom may be voluntary and still it is law. When a custom is firmly established, it is enforced by the authority of the State. Customary law is an important source of law. This is particularly so among the conservative people who want to keep as much of the past as possible,

Customary laws come into existence due to a number of reasons. When some kind of action gets general approval and is generally observed for a long time, it becomes a custom. Sometimes, customs come into existence on the ground of expediency. Other reasons for their coming into existence are imitation, convenience etc. When they are recognised by the State, they become a part of the civil law.

There is a difference of opinion among the jurists about the scope and authority of customs. Some say that customs are valid law. There are others who say that they are simply a source of law. The former view is that of the jurists of the historical school and the latter view is that of the positivists. Both the views are exaggerations to a degree and give only a partial truth. Only a synthesis of the two views gives a true picture of custom. Customary law is a special kind of law and is different from civil law.

Prior to 1955, almost the whole of Hindu law was based on custom. Then came the Hindu Marriage Act in 1955. More Acts were passed on Hindu law in the succeeding years. The result is that the Hindu law regarding marriage, succession, minority and guardianship, adoption

and maintenance is codified and governed by appropriate statutes. Custom can never override statute law. The custom of *sati* cannot be pleaded to a charge of murder or its abetment.

Practical or Technical Law

Practical or technical law consists of rules for the attainment of certain ends e.g., the laws of health, the laws of architecture etc. These rules guide us as to what we ought to do in order to attain a certain end. Within this category come the laws of music, laws of architecture, laws of style, etc.

International Law

According to Lord Birkenhead, international law consists of rules acknowledged by the general body of civilised independent States to be binding upon them in their mutual relations. It consists of those rules which govern sovereign States in their relations and conduct towards each other.

According to Starke, international law may be defined, for its great part, of the principles and rules of conduct which States feel themselves bound to observe and therefore do commonly observe in their relations with each other and which includes also (*a*) the rules of law relating to functioning of international institutions and organisations, their relations with each other and their relations with States and individuals and (*b*) certain rules of law relating to individuals so far as the rights and duties of such individuals are the concern of the international community.

Hughes writes: "International law is the body of principles and rules which civilised States consider as binding upon them in their mutual relations. It rests upon the consent of Sovereign States". Hall observes: "International law consists in certain rules of conduct which modern civilised States regard as binding on them in their relations with one another with a force comparable in nature and degree to that binding the conscientious persons to obey the laws of the country and which they also regard as enforceable by appropriate means in case of infringement". According to Lord Russel of Killowen, international law is "the aggregate of the rules to which the nations have agreed to conform in their conduct towards one another". Oppenheim writes: "International law is the name for the body of customary and conventional rules which are considered legally binding (as distinguished from usage, morality and rules of so-called international comity) by civilised States in their intercourse with each other."

According to Salmond, international law is essentially a species of conventional law and has its source in international agreement. It con-

sists of those rules which the sovereign States have agreed to observe in their dealings with one another.

International agreements are of two kinds. They are either express or implied. Express agreements are contained in treaties and conventions. Implied agreements are to be found in the custom or practice of the States. In a wide sense, the whole of international law is conventional. In a narrow sense, international law derived from express agreement is called the conventional law of nations.

Nature of International Law

There is a considerable divergence of opinion regarding the true nature of international law. John Austin, Willoughby and Holland regard international law as positive morality or the moral code of nations and do not concede that it is law properly so-called. According to Austin: "The Law obtaining between nations is not a positive law for every positive law is set by a given sovereign to a person or persons in a state of subjection to its author". Austin defines positive law as a body of rules for human conduct set and enforced by a sovereign political authority. However, international law is not set or enforced by a political authority which is sovereign over other States for the regulation of whose relations that law is intended. In international relations, all States are theoretically equal however much they may differ in actual strength. There can be no common superior over sovereign States and in the relations between States, the notion of a positive law is excluded. According to Austin: "The law obtaining between nations is only set by a general opinion and the duties which it imposes are enforced by moral sanction". In international relations, there are no sanctions in the sense of coercion by a sovereign power as there is no such power over and above the sovereign States. There is no independent arbiter of disputed questions beyond public opinion and no tribunal exists for applying to particular cases the principles recognised by the comity of nations. In the absence of definite and compelling sanctions, the validity and obligatory force of international law is dependent on the preparedness of any particular State to accept its substance. If we accept Austin's definition of law as a command addressed to political inferiors by a political sovereign superior and followed by a sanction in the event of disobedience, international law cannot be called law.

According to Holland, international law is the vanishing point of jurisprudence as it lacks any arbiter of disputed questions save public opinion, beyond and above the disputant parties themselves. Such rules as are voluntary and though habitually observed by every State in its dealings with the rest, can be called law only by courtesy. International law differs from ordinary law in being unsupported by the

authority of a State. It differs from ordinary morality being a rule for States and not for individuals.

According to Lord Salisbury, international law "can be enforced by no tribunal and therefore to apply to it the phrase law is to some extent misleading". Coleridge observes: "Strictly speaking, international law is an inexact expression and it is apt to mislead if its inexactness is not kept in mind. Law implies a law-giver and a tribunal capable of enforcing it and coercing its transgressor, but there is no common law-giver to sovereign States and no tribunal has the power to bind them by decrees or coerce them if they transgress. The law of nations is that collection of usages which civilised States have agreed to observe in their dealings with one another. What these usages are, whether a particular one has or has not been agreed to, must be a matter of evidence. Treaties and acts of States are but evidence of the agreement of nations and do not, in England at least, *per se* bind the tribunals."

Professor Dias writes that it is an undoubted fact that the respect which States pay to international law is less than that which individuals pay to municipal law. There has always been a need to enhance the prestige of international law by calling in aid the magic of the word "law", especially in creating a sense of obligations. This is one reason why international lawyers are sensitive about Austin's exclusion of international law from the scope of law and want to prove that international law is really law.

Professor Dias refers to the view of Professor Hart on the subject. The view of Professor Hart is that there are sufficient analogies of content, as opposed to form, to bring the rules of international law nearer to municipal law. There are rules prescribing how States ought to behave which are accepted as guiding standards just as in municipal law. Appeals are made to precedent, writings and treatises as in municipal law and not to rightness or morality. Rules of international law, like those of municipal law, can be morally neutral. Like rules of municipal law, they can be changed by conscious act, e.g., by treaty.[2]

Professor Dias points out that in spite of these resemblances between international law and municipal law, there are two important differences between them which cannot be overlooked. One difference is that the subjects of international law are primarily States and the disparity in strength between them far exceeds that between individuals in society. Moreover, there are other institutions which have claims, duties etc. but which are not States. Examples are the United Nations Organisation, the Holy See between 1871 and 1929 and other specialised agencies. Individuals as such are increasingly becoming subjects

[2] *The Concept of Law*, Chapter 10.

of international law which enhances the disparity between the various subjects. The other difference is that whereas the courts of a municipal order appeal to the same criterion or criteria by which to identify "laws", there is no coordination in the ways in which rules of international law are identified. There is no single criterion of identification because there are unrelated sets of tribunals, each of which identifies international law differently.

When one considers international law in a continuum, the differences become all the more pronounced. No consistent answer can be given to the question why the different criteria were adopted. In most cases, the adoption is ad hoc for the purpose of the instant dispute and not once for all. The predictability of decisions in any international tribunal is less than in municipal tribunals because there are fewer agreed rules and because of the greater intrusion of political considerations and national interests.

The basis of the binding force of international law is commonly ascribed to consent, but this is not a satisfactory explanation. A basis in consent presupposes some rule which makes consent obligatory. The basis of that rule requires elucidation. If consent is the basis, it follows that once consent is withdrawn, the obligation to obey ceases. In municipal law, consent is unrealistic. Individuals are never asked if they consent to be bound by municipal laws, which are treated as binding regardless of consent. Even if some dissident declares that he no longer accepts a law, his withdrawal does not affect the coercive power of the State which comes into play irrespective of what the individual thinks. The so-called "binding force" rests in the psychological reactions inducing people to obey, among which fear of organised force is one factor. In the international sphere there is no effective machinery for applying overwhelming organised force. The principal reasons why States choose to obey international law are fear, if at all, of their neighbours and self-interest. Fear operates through war, reprisals, retortion, pacific blockade and naval and military demonstrations. These are calculated to deter weak rather than strong States. Fear of action by the United States Organisation is very slight on account of the use of veto in the Security Council. The greatest shortcoming of international law is the absence of effective machinery to carry out sanctions. In any case, such action is more likely to influence weak rather than strong States. Whether or not a given State at any time abides by a given rule of international law depends upon various considerations such as a desire to secure fair treatment for its own nationals at the hands of other States, nationalism, tradition, morality, diplomacy, economic interests and possibly fear. This shows that the working of international

law is different from that of municipal law. International law continues mainly because States find in it a useful instrument of policy.[3]

According to Oppenheim, international law is law in the true sense of the term. For hundreds of years, more and more rules have grown up for the conduct of the States with one another. These rules are to a great extent customary rules but along with them are daily created more and more written rules by international agreements. Oppenheim admits that there is at present no Central Government above the governments of several States which could in every case secure the enforcement of the rules of international law. For this reason, compared with municipal laws and the means available for its enforcement the law of nations is certainly weaker of the two. A law is the stronger, if more guarantees are given that it can and will be enforced. Starke writes: "International law is weak law. It is mainly customary. Existing international legislative machinery is not comparable in efficiency to State legislative machinery. In spite of the achievements of the United Nations in re-establishing a world court under the name of the International Court of Justice, there still is no universal compulsory jurisdiction for settling legal disputes between States. Finally, many of the rules of international law can only be formulated with difficulty and, to say the least, are quite uncertain. It was on this account that the attempt of the International Conference of 1930 at the Hague to codify certain branches of international law suffered a relative breakdown."

International law is regarded as a part of American law and is ascertained and administered by the courts of justice of appropriate jurisdiction. Likewise, the law the Prize Courts administer in England is not municipal law but international law.

Civil Law

According to Salmond, civil law is "the law of the State or of the land, the law of lawyers and the law courts". Civil law is the positive law of the land or the law as it exists. Like any other law, it is uniform and that uniformity is established by judicial precedents. It is noted for its constancy because without that, it would be nothing but the law of the jungle. It is enjoyed by the people who inhabit a particular State which commands obedience through the judicial processes. It is backed by the force and might of the State for purposes of enforcement. Civil law has an imperative character and has legal sanction behind it. It is essentially of territorial nature. It applies within the territory of the State concerned. It is not universal but general. It creates legal rights, whether fundamental or primary. It also creates secondary rights. Any

[3] *Jurisprudence*, 4th edition, pp. 686-90.

infringement of law is always attendant with attachments, fine or imprisonment, or some other form of punishment which the society inflicts on the wrong-doer in order to show its displeasure against the person who violates the law.

The term civil law is derived from *jus civile* or civil law of the Romans. It is not so popular today as it used to be. The term positive law has become more popular than civil law. Sometimes, the term municipal law is used in place of civil law.

Holland prefers to use the term positive law and writes thus: "A law in the sense in which that term is employed in jurisprudence, is enforced by a sovereign political authority. It is thus distinguished not only from other rules which, like the principles of morality and the so-called laws of honour and of fashion are enforced by an indeterminate authority, but also from all rules enforced by a determinate authority which is either, on the one hand, superhuman or on the other hand, politically subordinate. In order to emphasize the fact that laws, in the strict sense of the term, are thus authoritatively imposed, they are described as positive laws".

However, Salmond prefers to use the term civil law instead of positive law and observes: "The term civil law, as indicating the law of the land, has been partially superseded in recent times by the improper substitute, positive law. *Jus positivum* was a title invented by medieval jurists to denote law made or established by human authority as opposed to the *jus naturale* which was uncreated and immutable. It is from this contrast that the term positive derives all its point and significance. It is not permissible, therefore, 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 jus positivum*, no less than the civil law itself."

Common Law

The general law of England can be divided into three parts viz., statute law, equity and common law. Statute law is made by the legislature and equity was developed by the Court of the Chancery. According to Salmond: "The common law is the entire body of English Law, the total *corpus juris angliae* with three exceptions, namely (1) statute law, (2) equity and (3) special law in its various forms." The expression common law was adopted by English lawyers from the canonists who used it to denote the general law of the church as opposed to those divergent usages which prevailed in different local jurisdictions and superseded or modified within their territorial limits the common law of Christendom. The development of common law is closely associated with the growth of King's justice in England after the Norman conquest. Formerly, justice was administered by the barons in their localities. The

common law of England was produced during "the period which lies between William I and Edward I when royal justice gradually dwarfed and finally superseded all other justice." The triumph of the King's Court was achieved by the instrumentality of royal writs. By the time of Glanville, Chief Justiciar of Henry II (1154-89), a royal writ had been invented which could be sent to the Sheriff on a complaint by a tenant of the freehold that he was deforced of his land and thus have the case taken out of the court of the landlord. By means of the writ of right, the lord could be directed to do "full right" to the plaintiff and if he did not comply with the direction; the King's officer could do it for him. By the writ of 'Pone', the King's Court could call up a cause from the Sheriff's court. Holdsworth writes: "The invention of the writs was really the making of the English common law," which took place between 1150 and 1250 A. D. The special writs issued by the King's Bench were the writs of mandamus and certiorari. These writs undermined local jurisdictions and established the primacy of royal justice. By the time of Edward I (1272-1307), the King's justice was finally established in England and the judicial institutions assumed the form which they retained till 1875.

By the beginning of the 14th century, the Court of Chancery arose and began to administer justice by the side of common law courts. Equity was finally absorbed into the general law when the Judicature Act of 1873 united the common law and equity jurisdictions. Though equity and common law have become coordinate parts of a single system of general law, the original jurisdiction between them still persists and the term Common Law is even now used in contrast with Equity.

Upto 1873, there were two distinct systems of law in England administered by the ordinary courts of justice viz., the King's Bench, the Court of Common Pleas and the Court of Exchequer. In the Court of Chancery, the Chancellor decided cases not according to the common law but according to the principles of equity. The Judicature Act of 1873 provided for a High Court of Justice with a Court of Appeal over it. The High Court of Justice was divided into five divisions: the Chancery, the Queen's Bench, Common Plea, Exchequer and the Probate and the Divorce and Admiralty.

In its historical origin, common law was taken to mean the whole of the law of England including equity. Statute law was referred to separately because of its authority. In modern times, statute law has developed to a very great extent and even certain portions of the common law are undergoing a slow transformation into statute law by the process known as codification. The term Common Law is still used to

mean the whole of the law of England when it is contrasted with the foreign systems of law like Roman law or French law.

Equity

It was found during the 13th century in England that common law had become very rigid and that rigidity should be lessened by supplementing it by rules governed by the conscience of the judge. There were certain rules of natural justice prevalent at that time and those were used to supplement the principles of common law. The result was that a party who could not get any relief in the ordinary course, applied to the King who was the fountain of justice. The King referred those petitions to the Lord Chancellor who was "the keeper of the King's conscience". The Lord Chancellor considered those applications and gave relief in fit cases; particularly in those of frauds, errors and unjust judgments.

In course of time, the Lord Chancellor advised the judges of the Court of Chancery to supplement the law by principles of equity justice and good conscience. This resulted in a variety of decisions of a conflicting nature. It was found necessary to have uniformity in those judgments. That led to the formation of a body of equitable rules which were supplementary to the rules of common law. During the reign of Henry VI, the Lord Chancellor developed the *remedy of injunction* which emanated from Chancery Courts. By this remedy, the Chancellor prohibited the execution of decrees passed by the common law courts. It was in the matter of injunctions that there was a conflict between Lord Chancellor Ellesmere and Chief Justice Coke of the Common Law. Lord Chancellor issued an injunction prohibiting the holder of a decree obtained by fraud from executing it and that decree had been passed by Chief Justice Coke. The dispute was referred to Lord Bacon who was the Attorney-General of England and he decided in favour of the Lord Chancellor. The result was that equitable principles came to be recognised as principles superior to the rules of common law. During the Chancellorship of Lord Eldon, equity became a body of principles decided on the basis of precedents laid down by judges in the Equity Courts. Today equity has been merged into law. *"The two streams flow side by side but their waters do not mingle."* Equitable principles are as effective as the principles of common law.

According to Salmond, the term equity has at least three distinct though related meanings. In the first sense, it means morality, honesty and uprightness. In the second sense, it means the principles of natural justice which temper the fixed rules of law. Wherever law is inadequate, rigid or technical, it is supplemented by justice, equity and good conscience. In the third sense, equity consists of a set of fixed

rules. It is not something left to the good sense of the judge but it is a well-formulated set of rules. When we speak of equity under English Law, we use the term in this narrow, restricted sense.

Equity became a source of law. The principles emanating from the conscience of the judge were made uniform and they were made into a body of rules called the rules of equity or equitable law. Out of the equitable principles have emerged laws such as the Law of Trusts, the Law of Mortgages, the Law of Quasi-Contracts, the Doctrine of Subrogation, Assignments and the recognition of several principles in the Partnership Act and the Companies Act. Several principles of equity are embodied in the Specific Relief Act.

Constitutional Law

The term constitutional law has been defined by many writers. Hibbert defines Constitutional Law as "the body of rules governing the relation between the sovereign and his subjects and the different parts of the sovereign body".[4]

According to Dicey: "Constitutional law includes all rules which directly or indirectly affect the distribution or exercise of the sovereign power of the State. Hence it includes (among other things) all rules which define the members of the sovereign power, all rules which regulate the relation of such members to each other or which determine the mode in which the sovereign power or the members thereof exercise their authority."[5]

Bouvier writes that constitutional law implies "the fundamental law of a State directing the principles upon which the Government is founded and regulating the exercise of the sovereign powers, directing to what bodies or persons those powers shall be confided and the manner of their exercise".

Wade and Phillips write: "There is no hard and fast definition of constitutional law. In the generally accepted use of the term, it means the rules of law, including binding conventions, which regulate the structure of the principal organs of government and their relationship to each other and determine their principal functions."

According to Dr. Keith, it is the function of constitutional law to examine the organs by which the legislative, executive and judicial functions of the State are carried out, their inter-relations and the position of the members of the community in relation to those organs and functions of the State.

[4] *Jurisprudence*, p. 199.

[5] *Law of the Constitution*, p. 76.

The view of John Austin is that positive law is a command of the sovereign and the sovereign himself is not bound by law as one cannot be bound by one's own commands. Constitutional law purports to control the sovereign. The conclusion of Austin is that constitutional law is not positive law or law in the strict sense, but is merely positive morality. Constitutional law derives its force only from public opinion regarding its expediency and morality. It belongs only to the class of moral rules and cannot be regarded as a part of positive law.

Willoughby points out that "constitutional provisions do not purport to bind these States but the Government. This vital distinction Austin did not grasp". The Government is only a limb of the State and a rule defining the manner of the exercise of governmental power need not necessarily impinge on the Austinian theory of sovereignty.

Salmond writes that the organisation of a modern State is of extraordinary complexity. It is usually divided into two distinct parts. The first part consists of its fundamental or essential elements. The second part consists of the details of State structure and State action. The first part is known as the Constitution of the State.

According to Salmond, constitutional law is the body of those legal principles which determine the Constitution of the State. The distinction between constitutional law and ordinary law is one of degree and not of kind. It is drawn for purposes of practical convenience. The more important fundamental and far-reaching any principle or practice is the more likely it is to be classed as constitutional. The structure of the supreme legislature and the methods of its action pertain to constitutional law. The organisation and powers of the Supreme Court of Judicature pertain to constitutional law. In some States, though not in England, the distinction between constitutional law and the remaining portions of the legal system is made definite by the embodiment of the former in a special and distinct enactment, the terms of which cannot be altered by the ordinary forms of legislation. Such constitutions are said to be rigid, as opposed to those which are flexible. The Constitution of the United States is set forth in a document agreed upon by the founders of the Commonwealth as containing all those principles of State structure and action sufficiently important to be deemed fundamental and therefore constitutional. The provisions of this fundamental document cannot be altered without the consent of three-fourths of the legislatures of the different States. The English Constitution is flexible and is not to be found in a document. The method of its amendment is easy.

Salmond points out that the concept of constitutional law presents some difficulty to students of jurisprudence. If constitutional law is the

body of those legal principles which determine the Constitution of a State, the problem is how the constitution of a State can be determined by law at all. There can be no law unless there is already a State and there can be no State without a Constitution. If the State and the Constitution are prior to the law, law cannot determine the Constitution. Therefore it can be said that constitutional law is not law in reality. The Constitution is both a matter of fact and law. It consists not only of legal rules but also of constitutional practices. Constitutional practices are logically 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 can have its source and basis in the law. It has an extra-legal origin.

The constitutional facts which are extra-legal are reflected with more or less accuracy in courts of justice as constitutional law. Law develops for itself a theory of the Constitution. The American Constitution had its extra-legal origin in the independence it achieved by rebellion against the lawful authority of the English Crown. The constituent States of the United States of America established their Constitutions by way of popular consent after attainment of independence. Before these Constitutions were actually established, there was no law save that of England. The Constitution was established in defiance of the law of England. Therefore, the origin of the American Constitution was not merely extra-legal, but it was also illegal. As soon as these constitutions succeeded in becoming *de facto* established, they were treated as legally valid by the courts of those States. Constitutional law followed hard upon the heels of the constitutional fact. Courts, legislatures and law have their origin in the Constitution and therefore the Constitution could not derive its origin from them. The same is the case with every Constitution which is altered by way of illegal revolution. The Bill of Rights was not passed by any legal authority and William III did not assume the Crown by legal title and in spite of that the Bill of Rights is now good law and the successors of William III have valid titles.

The basic rules of a Constitution and of a legal system must ultimately be of customary nature. This is so even in a written Constitution. Basic customary rules differ from ordinary customary rules of law in that strictly they are not amenable to alteration by legislation or judicial decision. Ordinary customary rules can be amended or abrogated by such methods. Fundamental rules are not in the same category as the rules of morality.

A complete account of a Constitution involves a statement of constitutional custom as well as of constitutional law. It involves an account

of the organised State as it exists in practice and in fact, as well as of the reflected image of that organisation as it appears in legal history.

The Constitution *de jure* and the Constitution *de facto* are not necessarily the same but they tend towards coincidence. Constitutional law and practice react upon each other, each striving to assimilate the other to itself. Constitutional practice may alter while constitutional law remains the same and vice-versa. The most familiar and effective way of altering the practice is to alter the law. The will of the body politic, as expressed through the legislature and the courts, will commonly realise itself in constitutional fact no less than in constitutional theory.[6]

Amendment

Every written Constitution has a provision for its amendment. The method of amendment of the American Constitution is highly rigid and complicated. The Constitution can be amended by three-fourths of the legislatures of the States in the United States. The English Constitution is unwritten and flexible. The method of its amendment is the same as that of passing an ordinary law. In India, Article 368 of the Indian Constitution deals with the amendment of the Indian Constitution.

Sources of English Constitutional Law

According to Lord Bryce, English constitutional law is to be found in "the mass of precedents carried in men's memories or recorded in writing, of dicta of lawyers or statesmen, of customs, usages, understandings and beliefs bearing upon methods of government, together with a certain number of statutes, some of them containing matters of petty detail, others related to private just as much as to public law, nearly all of them presupposing and mixing up with precedent and customs and all of them covered with a parasitic growth of legal decisions and political habits, apart from which the statutes would be almost unworkable, or at any rate, quite different from their working from what they really are. The English Constitution is to be found in the great constitutional landmarks, statutes, judicial decisions, common law and conventions".

The great constitutional landmarks are the Magna Carta of 1215, the Petition of Rights of 1628, Bill of Rights of 1689, Act of Settlement of 1701, Act of Union between England and Scotland of 1707, the Parliament Act of 1911 etc. All these constitutional landmarks form "only the addenda to the Constitution."

Another source of the English Constitution is the large number of statutes passed from time to time by the British Parliament. To this

[6] *Salmond on Jurisprudence*, pp. 83-87.

category belong the Reform Acts of 1832, 1867, 1884, 1918 and 1928. The Representation of the People Act of 1948 abolished the university constituencies. The Abdication Act of 1936, the Septennial Act, the Irish Free State Act of 1922, the Parliamentary and Municipal Elections Act of 1872, the Judicature Acts of 1873-76, the Ministers of the Crown Act of 1937 and the Statute of Westminster of 1931 belong to the same category.

Some of the judicial decisions on important matters are also a part of the English Constitution. Some of them are *Bainbridge* v. *Post-Master General* (1906), *Beatty* v. *Gillbanks, Wise* v. *Dunning, Godden* v. *Hales, Stockdale* v. *Hansard, Shirley* v. *Fagg, Bradlaugh* v. *Gosset Ashley, Osborne* v. *Amalgamated Society, Attorney-General* v. *De Keyser's Royal Hotel Co.* (1920), *Liversidge* v. *Anderson* (1942), *Local Government Board* v. *Arlidge* (1915), *Entick* v. *Carrington, O' Kelly* v. *Harvey,* etc.

Another source of English constitutional law is the common law of England which has been defined by Ogg as "the vast body of legal precepts and usages which through the centuries have acquired binding and almost immovable character". Prof. Munro writes that "the common law, like statutory law, is continual in process of development by judicial decisions".

Another source of English constitutional law is the textbooks on that subject. Anson's *Law and Customs of the Constitution,* May's *Parliamentary Practice,* Dicey's *Law of the Constitution* and Bagehot's *English Constitution* can be put in this category.

Another important source of English constitutional law are the conventions of the English Constitution. They consist of "understandings, practices and habits which alone regulate a large portion of the actual relations and operation of the public authorities".

Administrative Law

According to Prof. Wade: "Administrative law is primarily concerned not with judicial control nor even legislation by delegation but with administration." According to Dr. Jennings: "Administrative law is the law relating to the administration. It determines the organisation, powers and duties of administrative authorities".

The view of Austin is that administrative law determines "the ends and modes to end in which the sovereign powers shall be exercised directly by the monarch or sovereign member or shall be exercised directly by the subordinate political superiors to whom portions of those powers are dedicated or committed in trust".

Prof. Holland divides public law into six divisions and puts administrative law in the second category. According to him, constitutional

law is concerned with structure and administrative law is concerned with functions.

According to Prof. Robson, the term administrative law implies the jurisdiction of a judicial nature exercised by administrative agencies over the rights and property of citizens and corporate bodies.

In France, the term Droit Administratif is used in place of administrative law. According to Barthelemy, it "consists of all the legal rules governing the relations of public administrative bodies to one another and to individuals". Prof. Rene David defines Droit Administratif as "the body of rules which determine the organisation and the duties of public administration and which regulate the relations of the administrative authorities towards the citizens of the State".

A distinction is made between administrative law and constitutional law. According to Holland, constitutional law deals with various organs of sovereign power as at rest and administrative law deals with those organs as in motion. The first deals with the structure and the second with the functions of the State. The distinction between the two is one of degree and convenience and not of principle. While constitutional law deals with the general principles relating to organisation and powers of organs of the State and their relations *inter se* and towards the citizens, administrative law is that aspect of constitutional law which deals in detail with the powers and functions of administrative authorities.

General Law and Special Law

According to Salmond, the whole body of law can be divided into two parts: general law and special law. General law consists of the general or the ordinary law of the land. Special law consists of certain other bodies of legal rules which are so special and exceptional in their nature, sources or application that it is inconvenient to treat them as standing outside the general and ordinary law. General law consists of those legal rules which are taken judicial notice of by the courts whenever there is any occasion for their application. Special law consists of the legal rules which courts will not recognise and apply them as a matter of course but which must be specially proved and brought to the notice of the courts by the parties interested in their recognition. According to Salmond, *the test of distinction is judicial notice.* By judicial notice is meant the knowledge which any court, *ex officio,* possesses and acts upon as contrasted with the knowledge which a court is bound to acquire on the strength of evidence produced for the purpose. For example, the court is presumed and bound to take judicial notice of the fact that there is monarchy in England and a republic in India. This fact need not be proved by leading evidence. Examples of general law are

the law of contract as found in the Indian Contract Act, the penal law of India as found in the Indian Penal Code. Laws regarding prohibition, gambling etc., are special laws and have to be determined by a reference to the relevant clauses of the particular law enforced in any territory. If any party relies upon a particular law, it must bring that law to the notice of the court.

The matter can be illustrated by taking an example of one type of special law or custom. The court may not and ordinarily it does not, know what a particular custom is. The parties have to prove such a custom if they rely upon it.

Ordinarily, special laws are the very opposite of statute laws which courts are bound to know. Ignorance of law is no excuse. If a person does not take a licence for his dog due to negligence, he cannot take up the plea of his ignorance. He is liable to be fined even if in fact he did not know that such a licence was required. Some of the examples of special laws are the Maharashtra Ownership of Flats Act, the Tamil Nadu Gambling Act and the Calcutta Police Act.

The fact that the sun rises in the east and sets in the west need not be proved by evidence. The court is presumed and bound to know them *suo moto*. Likewise, the court is bound to take judicial notice of all the statute laws.

Kinds of Special Law

Salmond refers to six kinds of special laws and those are Local Law, Foreign Law, Conventional Law, Autonomic Law, Martial Law and International Law as administered in Prize Courts.

(*a*) *Local Law*: Local law is the law of a particular locality and not the general law of the whole country. There may be customs which have obtained the force of law in certain localities and within those localities, that customary law supersedes the general law. In England, before January 1, 1926, real property devolved in Kent according to the custom of Gavelkind and in Nottingham according to the custom of Borough-English. By Gavelkind custom, all the sons of the deceased owner and not merely the eldest son as under the general law, became equally entitled to his real property. Under Borough-English custom, the youngest son alone inherited such property. Customary law is found in India also. An easement right to privacy does not exist under the general law, but can be claimed by custom in Uttar Pradesh and Gujarat. A right of pre-emption in respect of immovable property cannot be claimed under the general law but such a right is recognised by custom in Bihar, Haryana and Delhi.

In addition to local customary law, there may be local enacted law which consists of enactments emanating from subordinate local legislative authority. They are recognised as having full force in the locality for which they have been formulated. The Madras City Improvement Trust Act, 1950 applies only to the city of Madras. It creates a local law only. In a sense, local law is older than the general law. Even before common law was evolved in England, there existed the customary law of the local communities.

(*b*) *Foreign Law*: It is essential in many cases to take account of a system of foreign law and to determine the rights and liabilities of the parties on that basis. Ignorance of law is no excuse and everyone is supposed to know the law of the land. However, ignorance of foreign law is like the ignorance of a fact and can be excused.

In some cases, foreign law has to be taken into consideration to do justice between the parties. In the case of a contract entered into in a foreign country, justice cannot be done fully unless the case is decided according to the law of the place where the contract was entered into. Every State has evolved a set of rules which prescribe the conditions and circumstances in which foreign law is enforced by its courts. This is done for the sake of international comity. There is a sort of reciprocity in this matter and if one State accepts, it can expect the same from other States. However, if foreign law on any particular point is repugnant to the law of the country, municipal courts are not bound to enforce the same. In *Robinson* v. *Bland*, a contract to pay a gambling debt was entered into in France between Englishmen and made payable in England. Lord Mansfield held that although such a law was valid in the eye of French law, it was illegal in England and hence English courts were not bound to enforce it. The rules which regulate the application of foreign law are known as the Conflict of Laws or Private International Law. The rules of Private International Law may vary from State to State. The French have different rules from those of England. The same is true of the United States. While public international law is concerned with States, private international law is concerned with individuals and never with States.

(*c*) *Conventional Law*: Conventional law has its source in the agreement of those who are subject to it. Agreement is law for those who make it. Examples of conventional law are the rules of a club or a cooperative society. Some other examples of conventional law are the articles of association of a company, articles of partnership etc.

(*d*) *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 and bodies of persons. A railway

company may make bye-laws for regulating its traffic. Likewise, a university may make statutes for the government of its members. An incorporated company can alter its articles and impose new rules and regulations upon the shareholders. Although autonomic law is not incorporated into the general law of the community, these rules are constituted by the exercise of autonomic powers of private legislation. Autonomic laws are made by autonomous bodies for the government of their members.

If we compare autonomic law with conventional law we find that both of them are made by the very persons whom they are intended to govern. Conventional law binds only those who actually agree to its authority, but autonomic law has authority even on the dissentient minority.

Sir John Salmond explains the distinction between autonomic law and conventional law by referring to an incorporated company governed by articles of association. When the company is first formed, all the shareholders agree to those articles and are bound by them because of that agreement. To start with, the articles of association are a body of conventional law. The shareholders are given by law the authority by virtue of which they can alter the original articles of association according to the majority decision of the shareholders. In exercise of that authority, the majority of the shareholders can impose their will upon a dissentient minority and when they do so and alter the articles of association, they exercise powers of autonomous legislation. Autonomous law is a species of legislative activity imposed by superior authority while conventional law is based purely on agreement.

(*e*) *Martial Law*: Martial law is the law administered in the courts maintained by military authorities. Martial law is of *three kinds*:

(*i*) It is the law for the discipline and control of the army itself and is commonly known as the military law. It affects the army alone and never the civil population.

(*ii*) The second kind of martial law is that by which in times of war, the army governs any foreign land in its military occupation. The country is governed by the military commander through the prerogative of the sovereign. The law in this case depends upon the pleasure of the military commanders.

(*iii*) The third kind of martial law is the law by which in times of war, the army governs the realm itself in derogation of the civil law so far as the same is required for public safety or military necessity. The temporary establishment of military justice can be justified on the ground of necessity. The establishment of a military government and military justice is known as the

proclamation of martial law. Courts cannot question the validity of the actions of a military commander if he had acted honestly.

Martial law is not to be confused with military law. The two are different concepts. While military law is a State law, martial law is based on common law. Military law is applicable to soldiers alone and is embodied in the Army Act. Offences under this Act are triable by the courts martial. As an ordinary citizen, a soldier is governed by the ordinary law of the land. While military law is applicable to soldiers alone, martial law is applicable to soldiers as well as civilians in times of war or tumult. Even when there is no war or rebellion, soldiers are governed by military law. Martial law is temporary while military law is permanent law.

According to Dicey, martial law cannot be declared even in times of war by the exercise of the prerogative of the Crown. That prerogative has not been exercised since the Petition of Rights of 1628 and has fallen into disuse. However, martial law was declared in Jamaica in 1865 and in Ireland in 1920 by an Act of Parliament and not by the exercise of the prerogative of the Crown. The protection given to the military men is also given by an Act of Indemnity. The Emergency Powers Act was passed in 1940 by the British Parliament and that Act authorised the creation of special war-zone courts to act in place of ordinary courts when the invasion actually took place.

(f) International Law as administered in Prize Courts (Prize Law): International law is a kind of conventional law. As a special law, it refers to that portion of the law of nations which is administered by the Prize Courts of the State in times of war. Prize law is that part of law which regulates the practice of the capture of ships and cargoes at sea in times of war. International law requires that all States desiring to exercise the right of capture must establish and maintain within their territories what are known as Prize Courts. It is the duty of those courts to investigate the legality of all the captures of ships and cargoes. If the seizure is lawful, the property is adjudged as a lawful prize of war. If the same is found unlawful, orders are passed for the return of that property. Prize Courts are established by and belong exclusively to the individual State by which the ships and cargoes are captured. In spite of that, the law administered by the Prize Courts is not the law of the country but international law. Lord Parker writes: "The law which the Prize Court is to administer is not national law or as it is sometimes called, the municipal law, but the law of nations—in other words, international law. Of course, the Prize Court is a municipal court and its decrees and orders owe their validity to municipal law. The law it en-

forces may therefore in one sense be considered a branch of municipal law".

Prize courts were set up to decide the fate of the ships and cargoes captured during the war between India and Pakistan in 1971.

(g) *Mercantile Customs*: Another kind of special law consists of the body of mercantile usage known as the Law Merchant. The whole of the Indian law relating to *hundis* derives its origin from mercantile customs.

SUGGESTED READINGS

Bodenheimer	:	*Jurisprudence.*
Bryce, Lord	:	*Studies in History and Jurisprudence.*
Buckland, W. W.	:	*Equity in Roman Law*, London, 1911.
D' Entreves	:	*Natural Law.*
Fuller, L L.	:	*Legal Fictions, 1967.*
Haines	:	*The Revival of Natural Law Concepts.*
Hart, H.L.A.	:	*The Concept of Law*, Oxford, 1970.
Hibbert	:	*Jurisprudence.*
Holland, T.E.	:	*Elements of Jurisprudence*, Oxford, 1924.
Jennings	:	*The Law and the Constitution.*
Keeton, R.E.	:	*Venturing to do Justice*, Oxford University Press, 1969.
Lightwood	:	*Nature of Positive Law.*
Lloyd, D.	:	*The Idea of Law*, 1973.
Maine, Henry	:	*International Law.*
Maine, Henry	:	*Early Law and Custom.*
Markby, W.	:	*Elements of Law*, Oxford, 1905.
Paton, G.W.	:	*A Textbook of Jurisprudence*, Oxford, 1972.
Pollock	:	*Essays in the Law.*
Pollock and Maitland	:	*History of English Law.*
Ritchie, D.G.	:	*Natural Rights.*
Rommen	:	*Natural Law* (1947).
Salmond	:	*Jurisprudence.*
Troeltsch	:	*Natural Law and Humanity.*
Wheaton	:	*International Law.*
Wright	:	*The American Interpretation of Natural Law.*

Chapter Four

Classification of Law

FOR A PROPER understanding of law, a classification of laws is not only desirable but also necessary. It makes clear the relation between different rules and their effect on each other. It also helps in arranging them in a concise and systematic manner. It can help a lawyer to understand the law.

Classifications of laws have been made from time to time. The Roman jurists attempted a classification of laws. The Hindu law-givers gave 18 titles or heads of *Vyavahara* or civil law. They made a distinction between civil and criminal law and also classified criminal law under various heads.

While classifying laws, we must not forget that no classification of laws is going to be permanent. Every classification is based on the law as it was when the classification was made. However, law keeps on changing according to the needs of the people at different times and in different places. Hence the nature and shape of law must continue to change. The result is that in every age, law needs a new classification. The classification which applies to a particular community may not apply to another community. Moreover, the distinctions between various kinds of laws may not be very clear.

International Law and Municipal Law

Law may be broadly divided into two classes: international law and municipal law. Whatever the objections raised against the claim of international law to be called international law, it is now recognised that international law is not only law but also a very important branch of law.

International law is divided into two classes: public international law and private international law. Public international law is that body of rules which governs the conduct and relations of the States with

each other. By private international law we mean those rules and principles according to which cases having foreign element are decided. If a contract is made between an Indian and a Pakistani which is to be performed in Sri Lanka, the rules and principles on which the rights and liabilities of the parties depend are to be determined by private international law. Critics point out that the term private international law is not correct. The adjective "international" is wrongly given to it as it does not possess any characteristics of international law. Private international law applies to individuals and not to States. Moreover, the rules and principles of private international law vary from State to State and there is no uniformity. Private international law is enforced by municipal courts which apply municipal law and not international law. In order to avoid controversy, it is suggested that private international law be called Conflict of Laws and should be treated as a branch of municipal private law.

Municipal Law

Municipal law is the law applied within a State. It can be divided into two classes: public law and private law. Public law determines and regulates the organisation and functioning of the State and determines the relation of the State with its subjects.

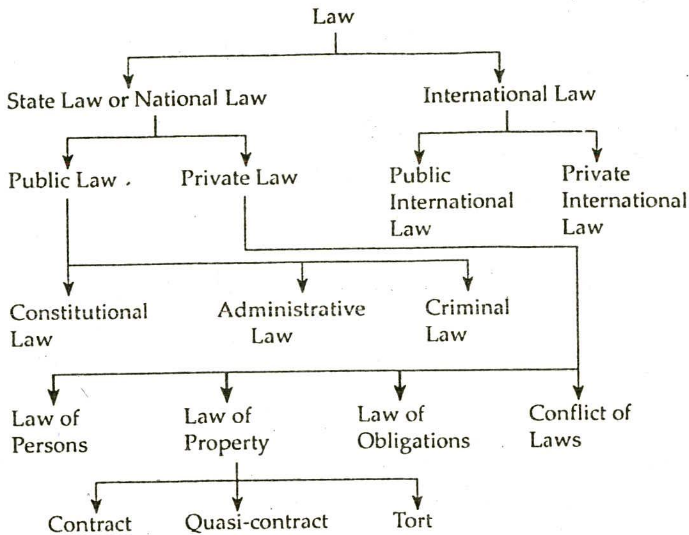
Public law is divided into three classes: constitutional law, administrative law and criminal law. Constitutional law determines the nature of the State and the structure of the government. It is superior to the ordinary law of the land. Constitutional law is written in India and the United States but it is unwritten in England. The modern tendency is to have written constitutions.

Administrative law deals with the structure, powers and functions of the organisation of administration, the limits of their powers, the methods and procedures followed by them and the methods by which their powers are controlled including the legal remedies available to persons whose rights have been infringed.

Criminal law defines offences and prescribes punishments for them. It not only prevents crimes but also punishes the offenders. Criminal law is necessary for the maintenance of law and order and peace within the State. In criminal cases, it is the State which initiates proceedings against the wrongdoers. The State is always a party in criminal cases.

Private law regulates and governs the relations of citizens with one another. The parties are private individuals and the State decides the disputes among the people. There is great difficulty in classifying private law. A general classification of private law is the law of persons, the law of property, the law of obligations, the conflict of laws, contracts, quasi-contracts and tort.

The following is a classification of laws:



Critics point out many defects in the above classification of laws. Many of the classes of laws do not exist in many legal systems of the world. Those branches of law which have recently been developed cannot be put under any classification. The result is that the classification given above is neither universal nor exhaustive. Many jurists have attempted classifications on different principles. New branches of law are growing and developing rapidly in different parts of the world and provision has to be made for them in any classification of laws. Industrial law and commercial law are such subjects.

CHAPTER FIVE

LAW AND MORALS

IN ANCIENT TIMES, there was no distinction between law and morals. The Hindu jurists in ancient India did not make any distinction between law and morals. However, later on, some distinction came to be made in actual practice. The *Mimansa* made a distinction between obligatory and recommendatory rules. By the time the commentaries were written, the distinction was clearly established in theory also. The commentators not only pointed out the distinction but also dropped in actual practice those rules which were based purely on morals. The *doctrine of "factum valet"* was recognised. That doctrine means that an act which is in contravention of some moral injunction should be considered valid if accomplished in fact. In its decisions, the Privy Council made a distinction between legal and moral injunctions. The same is the case with the Supreme Court of India.

The same was the condition in Europe. In the name of the doctrine of natural rights, the Greeks formulated a theoretical moral foundation of law. Likewise, the Roman jurists recognised, in the name of natural law, certain moral principles as the basis of law. During the Middle Ages, Christian morals were considered as the basis of law. After the Reformation in Europe, it was contended that law and morals were distinct and separate and law derived its authority not from morals but from the State. Morals had their source in religion or conscience. During the 17th and 18th centuries, the theories of natural law had a moral foundation and law was linked with morals. During the nineteenth century, John Austin maintained that law had nothing to do with morals and he defined law as the command of the sovereign. Law alone was the subject-matter of jurisprudence. Austin was supported by many jurists. Kelsen maintained that only the legal norms were the subject-matter of jurisprudence. He excluded from the study of law all other considerations, including morals. There is again a new trend

in modern times. The sociological approach to law indirectly studies morals also although a distinction is made between law and morals and law alone is considered as the proper subject-matter of study. However, they study other forces also including morals while tracing the origin, development, functions and ends of law.

Distinction between Law and Morals

There is a distinction between law and morals. Vinogradoff writes: "Law is clearly distinguishable from morality. The object of law is the submission of the individual to the will of organised society while the tendency of morality is to subject the individual to the dictates of his conscience." According to Pollock: "Though much ground is common to both, the subject-matter of law and ethics is not the same. The field of legal rules of conduct does not coincide with that of moral rules and is not included in it and the purposes for which they exist are different." Duguit writes: "Law has its basis in social conduct. Morals go on intrinsic value of conduct. Hence it is vain to talk about law and morals. The legal criterion is not an ethical criterion."

According to Paton: "Morals or ethics is a study of the supreme good. Law lays down what is convenient for that time and place, ethics concentrates on the individual rather than society; law is concerned with the social relationship of men rather than the individual excellence of their character; ethics considers motive as all important, law insists merely by conduct with certain standards and seldom worries for motive. But it is too narrow to say that ethics deals only with the individual or that ethics treats only of the interior and law only of the exterior, for ethics in judging acts must consider the consequences that flow from them. Moreover, ethical duties of man cannot be considered without considering his obligation to his fellows or his place in society." Pound observes: "Law and morals have a common origin but they diverge in their development." Bentham says: "In a word, law has just the same centre as morals but it has by no means the same circumference." According to Korkunov: "The distinction between morals and law can be formulated very simply. Morality furnishes the criterion for the proper evaluation of our interests; law marks out the limits within which they ought to be confined."

Arndts writes that there are four points of difference between law and morals.

(*i*) In law, man is considered as a person because he has a free will. In morals, we have to do with determining the will towards the good.

(*ii*) Law considers man only insofar as he lives in community with others; morals give a guide to lead him even if he were alone.

(*iii*) Law has to do with acts insofar as they operate externally, morals look to the intention—the inner determination and direction of the will.

(*iv*) Law governs the will so far as it may by external coercion; morals seek a free self-determination towards the good.

From the above it follows that whereas legal rules do require external conduct and are indifferent to motives, intentions or other internal accomplishments of conduct, morals do not require any specific external action but only a goodwill or proper intention or motive. If a person does something forbidden by moral rules or fails to do what they require, the fact that he did so unintentionally and in spite of every care is an excuse from moral blame. A legal system or custom may have rules of strict liability under which those who have violated the rules unintentionally and without fault may be liable for punishment.

Hart

Professor H.L.A. Hart writes that the vague sense that the difference between law and morals is connected with a contrast between the internality of the one and the externality of the other, is too recurrent a theme about law and morals to be altogether baseless and cannot be dismissed. He refers to four cardinal features which are designed to distinguish morality not only from legal rules but also from other forms of social rules. Those features are importance, immunity from deliberate change, voluntary character of moral offences and the form of moral pressure.

(*a*) *Importance*: As regards importance, the essential feature of any moral rule or standard, as something of great significance, may appear vague, yet it may manifest itself in a number of ways: (*i*) in the simple fact that moral standards are maintained against the drive of strong passions which they restrain and at the rate of sacrificing considerable personal interest; (*ii*) in the serious forms of social pressure exerted not merely to secure conformity in individual cases but to secure that moral standards are conveyed as a matter of course to all in society; (*iii*) in general recognition that if moral standards were generally accepted, far reaching and distasteful changes in the life of individuals would occur. In contrast with morals, the rules of deportment, manners, dress and a few rules of law occupy a relatively low place in the scale of serious importance. They may be tiresome to follow but they do not require much sacrifice. No great pressure is put to obtain conformity and no great alterations in other areas of social life would follow if they were not observed or changed. Much of the importance ascribed to the maintenance of moral rules may be simply explained on rationalistic lines. Though they demand sacrifice of individual interests on the

part of the person bound, compliance with them obtains vital interests which all share alike. It does so either by defending persons from harm or by maintaining the fabric of an orderly society. Legal rules may not have the same importance as moral rules have. For a legal rule may be thought quite important to maintain and may commonly be agreed that it should be repealed. It would be futile to think of a rule as a part of the morality of a society even though none thought it any longer important or worth maintaining.

(b) Immunity from Deliberate Change: It is correct to say of a legal system that new legal rules can be inserted and old ones changed or repealed, but there are some rules which may be saved from a deliberate change through a written Constitution limiting the competence of the supreme legislature. However, moral rules cannot be brought into existence or altered or done away with in this way. Standards of conduct cannot be endowed with or deprived of moral status by human fiat, though the day-to-day use of such concepts as enactment and repeal indicates that the same is not true of law. Though a moral rule or tradition is immune from repeal or change by deliberate choice or enactment, the enactment or repeal of laws may well be among the causes of a change or decay of some moral standard or tradition. The incompatibility of the idea of morality or tradition with that of change by deliberate enactment should be demarcated from that of the immunity enjoyed by certain laws in some systems through the restrictive clauses of the Constitution. Such immunity is not an indispensable condition in the status of law as a law as such immunity is removable by constitutional amendments. Unlike such legal immunity from legislative change, the incapacity of morals or traditions for similar modes of change is not something which varies from community to community or from time to time. It is incorporated in the meaning of these terms. The idea of moral legislature with competence to make and change morals, as legal enactments make and change law, is repugnant to the whole notion of morality.

(c) Voluntary character of moral offences: The contention that morals are connected with what is known as internal conduct while law is connected with external conduct, is in part a mis-statement of the two features. If a person whose action has offended against moral rules succeeds in establishing that he did that unintentionally and in spite of every precaution that was plausible for him to take, he is excused from moral responsibility and to blame him in these situations would be morally condemnable. Moral blame is excused because he has done all that he could do. In any developed legal system, the same is true up to a point as the general requirement of *mens rea* is an element in criminal-responsibility designed to secure that those who offend with-

out carelessness, unwittingly, or in conditions in which they lacked the bodily or mental capacity to conform to law, should be excused. A legal system would be open to serious moral criticism if this were not so, at any rate in cases of serious crimes carrying severe punishments. Legal responsibility is not inevitably excluded by the demonstration that an accused could not have kept the law which he has broken. In the case of morals, "I could not help it" is always an excuse and moral obligation would entirely be different from what it is if the moral "ought" did not in this sense imply "can". It is significant to note that "I could not help" is only an excuse and not justification. The claim that morals do not require external conduct rests on a confusion of the two notions. The internal aspect of morals does not always mean that morals are never a form of outward conduct, but it is a pre-condition for moral responsibility that the individual must have a certain kind of control over his conduct. Even in morals the distinction between "he did not do the wrong thing" and "he could not help doing what he did" is obvious.

(d) Form of Moral Pressure: The facts that have led to the interpretation of morality as internal are that if it were the case that whenever someone was about to break a rule of conduct only, threats of physical punishment or unpleasant consequences were used in argument to dissuade him, then it would be improbable to treat such a rule as a part of the morality of the society, though that would not be any objection to treating it as a part of its law. The typical form of legal pressure may be said to consist in such threats, whereas with morals, the typical form of pressure consists in appeals to the respect for rules. Moral pressure is exerted not by threats or by appeals to fear or interest, but by reminders of the moral character of the action contemplated and the demands of morality. It is true that sometimes moral threats are accompanied by threats of physical punishment or by appeals to ordinary personal interest, but deviations from the moral code meet with a number of hostile social reactions ranging from informal expressions of contempt to severance of social relations. However, emphatic reminders of what the rules demand appeals to conscience and emphasis on the operation of guilt and remorse are the characteristic and most important kinds of pressure used for the support of social morality. A simple result of the acceptance of moral rules and standards is that it should be supported in these ways as things which it is supremely and clearly important to maintain.

Morals are concerned with the individual and lay down rules for the moulding of his character. Law concentrates mainly on society and lays down rules concerning the relationships of individuals with each other and with the State. Morals look to the intrinsic value of conduct.

They take into consideration the motive. Law is concerned with the conduct of the individual for which it lays down standards. Morals are an end in themselves. They should be followed because they are good in themselves. Law is for the purpose of convenience and expediency. Its chief aim is to help smooth running of society. The observance of morals is a matter of individual conscience. Law brings into the picture the complete machinery of the State where the individual submits himself to the will of the organised society and is bound to follow its rules. Generally, morals are considered to be of universal value but law varies from society to society, time to time and place to place. Laws and morals differ in their application. Morals are applied after taking into consideration individual cases whereas the application of law is uniform.

Relationship between Law and Morals

A study of the various legal systems makes it clear that law and morals have had a long union with occasional desertion and judicial separation but have never been completely divorced. There are indeed many different types of relations between law and morals and there is nothing that can profitably be singled out for study as the relation between them. The view of Stammler is that jurisprudence depends much upon moral ideas as just law has need of ethical doctrine for its complete realisation. Positive law and just law correspond to positive morality and rationally grounded ethics. There is no difference and if any, it is only the difference of manner in which the desire for justice presents itself. C.K. Allen observes thus on the relationship between law and morality: "Our judges have always kept their fingers delicately but firmly upon the pulse of the accepted morality of the day." Lord Mansfield says that "the law of England prohibits everything which is *contra bonos mores*". It is true that the development of law, at all times and places, has in fact been profoundly influenced both by conventional morality and ideals of particular social groups and also by the forms of enlightened moral criticism of those people whose moral horizon has transcended the morality currently accepted.

View of Hart

The view of H.L.A. Hart is that there are many different types of relations between law and morals and there is nothing which can profitably be singled out for study as the relation between them. Instead it is important to distinguish some of the many different things which may be meant by the assertion or denial that law and morals are related. Sometimes what is asserted is a kind of connection which few, if any, have ever denied; but this indisputable existence may be wrongly accepted as a sign of some more doubtful connection, or even mistaken

for it. It cannot be seriously disputed that the development of law has been profoundly influenced at all times and places both by the conventional morality and ideals of particular social groups and also by the forms of enlightened moral criticism urged by individuals whose moral horizon has transcended the morality currently accepted. A legal system must exhibit some specific conformity with morality or justice or must rest on a widely diffused conviction that there is a moral obligation to obey it. Though this proposition may, in some sense, be true, it does not follow from it that the criteria of legal validity of particular laws used in a legal system must include tacitly, if not explicitly, a reference to morality or justice.[1]

Pound on four stages

Dean Roscoe Pound has described four stages in the development of law with respect to morality. (*i*) The first stage is a stage of indifferentiated ethical custom, customs of popular action, religion and law. Analytical jurists called it a pre-legal stage in the development of law and law and morals were the same thing. They were the two faces of the same coin. (*ii*) The second stage is that of strict law, codified or crystallised, which in time is outstripped by morality and has not sufficient power of growth to keep abreast. (*iii*) The third stage is that of infusion of morality into the law and reshaping it by morals. In that stage, both the ideas of equity and natural law are potential agencies of growth. (*iv*) The final stage is that of conscious constructive law-making, the maturity of law, in which morals and morality are for the law-maker and that law alone is for the judge.

A study of the relationship between law and morals can be made from three angles: (*a*) morals as the basis of law, (*b*) morals as the test of positive law, and (*c*) morals as the end of law.

(*a*) *Morals as basis of Law*: As regards morals as the basis of law, there was no distinction between law and morals in the early stages of society. All the rules originated from the common source and the sanction behind them was of the same nature which were mostly in the nature of supernatural fear. When the State came into being, it picked up those rules which were important from the point of view of society and whose observance could be secured. The State enforced those rules and they came to be called law. Thus, law and morals have a common origin but they came to differ in course of development. Hence it can be said that "law and morals have a common origin but diverge in their development." On account of their common origin, many rules are common to both law and morals.

[1] (*The Concept of Law*, p. 181).

Though law and morality are not the same and many things may be immoral which are not illegal, yet the absolute divorce of law from morality would result in fatal consequences. Morals are not the basis of all legal rules. There are a number of legal rules which are not based on morals and some of them are even opposed to morals. Morals will not hold a man vicariously liable. Likewise, in cases where both the parties are blameless and they have suffered by the fraud of a third party, law may impose the loss upon the party which is capable of bearing it but that may not be approved by morality.

(b) Morals as test of Law: As regards morals as the test of law, it has been contended by a number of jurists that law must conform to morals. That view was supported by the Greeks and the Romans. In Rome, law was made to conform to natural law which was based on certain moral principles and as a result, *jus civile* was transformed into *jus gentium*. Most of the ancient jurists were of the view that law, even if it was not in conformity with morals, was valid and binding. During the Middle Ages, the Christian Fathers maintained that law must conform to Christian morals and any law which did not conform to them was invalid. During the 17th and 18th centuries when the theory of natural law was popular, it was contended that positive law must conform to natural law and any law which did not conform to natural law was to be disobeyed and the government which made that law was to be overthrown. In modern times, a law is considered to be valid and binding even if it is not in conformity with morals. However, ordinarily, laws conform to morals. That is largely due to the fact that there is a close relation between law and the life of a community. In the life of a community, morals occupy an important place. Paton writes: "If the law lags behind popular standard, it falls into disrepute; if the legal standards are too high, there are great difficulties of enforcement."[2]

(c) Morals as end of Law: As regards morals as the end of law, morals have often been considered as the end of law and many eminent jurists have defined law in terms of justice. It is contended that the aim of law is to secure justice which is very much based upon morals. In most of the languages of the world, the words used for law convey the idea of justice and morals also. In Sanskrit, the word for law is *Dharma* which also implies morals. However, the view of the analytical jurists is that a study of the ends of law is beyond the domain of jurisprudence, but sociological approach considers that study as very important. According to this view, law has a purpose. It is a means to an end which is the welfare of society. The immediate end of law is to secure social interests which means that the conflicting interests of the members of

[2] *A Textbook of Jurisprudence.*

society should be weighed and evaluated and the interests which can bring greater benefit with the least sacrifice should be recognised and protected. Morals is an evaluation of interests. Law is and also seeks to be a delimitation in accordance therewith. According to Korkunov, the "idea of value is therefore the basal conception of ethics. No other term, such as duty, law or rights, is final for thought. Each logically demands the idea of value as the foundation upon which it finally rests. One may ask, when facing some apparent claim of morality, 'why is this my duty, I must obey this law, or why regard this course of action as right?' The answer to any of these questions consists in showing that the requirements of duty, law and right tend in each case to promote human welfare to yield what men do actually find to be of value."[3]

Morals as part of Law

It is contended by some writers that even if law and morals are distinguishable, morality is in some way an integral part of law or of legal development. Morality is "secreted in the interstices" of the legal system and to that extent is inseparable from it. This viewpoint has been put forward in various ways. It is said that law in action is not a mere system of rules but involves the use of certain principles, such as that of equitable and the good. By the skilled application of these principles to legal rules, the judicial process distils a moral content out of the legal order, though it is admitted that this does not permit the rules themselves to be rejected on the general ground of their morality. Another approach confers upon the legal process an inherent power to reject immoral rules as essentially non-legal. Even the positivist does not deny that many factors, including morality, may and do concur in the development of a legal rule and where there is a gap or a possible choice within the legal system, moral or other extra-legal pressures may cause that gap to be filled or the choice to be determined in one way rather than another. What the positivists insist is that once the rule is laid down or determined, it does not cease to be law because it may be said or shown to be in conflict with morality.

Legal Enforcement of Morals

A good deal of controversy has arisen in recent years as to whether the fact that conduct is, by common standards, regarded as immoral, in itself justifies making that conduct punishable by law. The view of Lord Devlin is that there is public morality which provides the cement of any human society and law, especially criminal law, must regard it as its primary function to maintain this public morality. Whether in fact in any particular case the law should be brought into play by spe-

[3] *General Theory of Law.*

cific criminal sanctions, must depend upon the state of public feeling. Conduct which arouses a widespread feeling of reprobation, a mixture of intoleration, indignation and disgust, deserves to be suppressed by legal coercion in the interests of the integrity of society. The conclusion of Lord Devlin is that if vice is not suppressed, society could crumble. To quote him: "The suppression of vice is as much the law's business as the suppression of subversive activities."

Prof. Hart also accepts the need for law to enforce some morality. The real area of dispute is where the line should be drawn. J. S. Mill drew it at harm to others. According to Hart, some shared morality is essential to society. If any society is to survive, if any legal system is to function, then there must be rules prohibiting, for example, murder. The rules essential for a particular society may also be enforced. "For any society there is to be found . . . a central core of rules or principles which constitutes its pervasive and distinctive style of life."

Influence of Morals on Law

Law and morals act and react upon and mould each other. In the name of justice, equity, good faith and conscience, morals have infiltrated into the fabric of law. Moral considerations play an important part while making law, interpreting law and exercising judicial discretion. Morals act as a restraint upon the power of the legislature. No legislature will dare to make a law which is opposed to the morals of society. All human conduct and social relations cannot be regulated and governed by law alone and very many relations are left to be regulated by morals and law does not interfere with them. Morals perfect the law. Paton writes: "In marriage, so long as love persists, there is little need of law to rule the relations of the husband and wife—but the solicitor comes in through the door as love flies out of the window."[4]

The sociological approach is very much concerned with the ends to be pursued by law. The result is that morals have become a very important subject of study for good law-making. Morals also exercise a great influence on international law. The brutalities committed during the World Wars have forced the people to turn back to morals and efforts are being made to establish standards and values which must be followed by nations. If law is to remain closer to the life of the people, it cannot ignore morals.

[4] *A Textbook of Jurisprudence.*

SUGGESTED READINGS

Berlin	:	*Two Concepts of Liberty*, 1969.
Devlin, Lord	:	*The Enforcement of Morals*, 1965.
Duster, Troy	:	*The Legislation of Morality*, 1970.
Fuller, Lon	:	*The Morality of Law*, 1969.
Hart, H.L.A.	:	*Law, Liberty and Morality*, 1963.
Hart, H.L.A.	:	*The Concept of Law*, 1961.
Lamont	:	*Value Judgment.*
Lloyd, Lord	:	*Introduction to Jurisprudence*, London, 1979.
Mitchell, Basil	:	*Law, Morality and Religion in a Secular Society*, 1967.
Ranulf	:	*Moral Indignation and Middle Class Psychology*, 1938.
Sinclair	:	*Prohibition: The Era of Excess*, 1962.
Summers	:	*Essays in Legal Philosophy*, 1968.