Chapter Twenty One

Legal Theory

LEGAL THEORY reveals the manner in which people in different countries at different times have speculated about some of the problems concerning law. Speculations about law by past and present thinkers should be a part of intellectual culture. Even where legal theories are open to criticism, they possess value and later theories can be better understood in the light of them. It is not enough for a lawyer to understand what law is today but he should also study how people have been thinking about law in the past. That is the only way to stimulate thinking on law. Hence the importance of legal theory for students of law.

Dr. W. Friedmann writes in his book *Legal Theory* that all systematic thinking about legal theory is linked at one end with philosophy and at the other end, with political theory. Sometimes the starting point is philosophy and political ideology plays a secondary part and sometimes the starting point is political ideology as is the case with legal theories of Socialism and Fascism. Sometimes, the theory of knowledge and political ideology are welded into one coherent system. However, all legal theory must contain elements of philosophy and gain its colour and specific content from political theory. All thinking about the end of law is based on conceptions of man both as a thinking individual and a political being. (p. 3).

Some legal philosophers have been philosophers first and foremost and jurists for the sake of the completeness of their philosophical system. Some legal philosophers have been politicians first and foremost and jurists because they felt the need to express their political thought in a legal form. Before the 19th century, legal theory was essentially a by-product of philosophy, religion, ethics or politics. The great legal thinkers were primarily philosophers, churchmen and politicians. The shift from the philosopher or politician's legal philosophy to lawyer's

legal philosophy has taken place in recent times. There have been researches in law on a large scale and also changes in the techniques. The new era of legal philosophy arises mainly from the confrontation of the professional lawyer with the problems of social justice in his legal work. Earlier, legal theories rested on general philosophical and political theories but modern legal theories can be discussed in the idiom and thought of the lawyer. The modern legal theory is based on beliefs whose inspiration comes from outside law itself.

Legal theory stands between philosophy and political theory. It takes its intellectual categories from philosophy and ideas of justice from political theory. Its contribution lies in formulating political ideas in terms of legal principles.

Legal theory reflects the fundamental philosophical controversy whether the universe is an intellectual creation of the ego or the ego is a particle in the universal order of things. All kinds of theories on the natural law place an objective order of things above the individual. The intellectual priority of the ego over the world was first established by Descartes and was developed by Kant. The latter established the individual as the creator of the intelligible world of phenomena. The view of Fichte was that the world was the result of the self-consciousness of the individual. Hegel projected the individual into the universe.

In the philosophy of Kant, the domain of will is practical reason and the domain of knowledge is pure reason. Ethical and legal ideals are a matter of will and not of thought. The legal philosophy of Hegel established the supremacy of the will of the State. Relativist legal philosophy as developed by Jellinek and Radbruch acknowledges the subjective character of legal ideologies by stating the principal ideological issues and leaving the choice between them to individual decision.

There was a cyclical movement in legal theory. The "charismatic" law-finder of primitive communities found the law intuitively. The philosopher-king of Plato knew and applied justice because his personality gave him insight and virtue. Systematisation of law goes parallel with a more rational attitude. When a generation is dissatisfied with positivism, instinct and intuition come to the fore. The Dutch jurist Krabbe appeals to the Rechtsbewusstsein in order to limit the unfettered legislative sovereignty of the State. Petrazhitsky opposes intuitive law to an objective and positive law. Del Vecchio establishes a theory of juristic sentiment of right capable of weighing specific grades of truth. According to Edmond Cahn, the "sense of injustice" is the motive force which drives the law forward. Geny allocates the principles of reason to the facts of law which are the object of intellectual perception. Juristic action moulds those facts in accordance with the

needs of life. In modern totalitarian legal theories, there is emphasis on instinct and feeling and not on intellect and reason.

Legal theory reflects the struggle of law between tradition and progress, stability and change, certainty and flexibility. Legal theories and lawyers are inclined to put more emphasis on stability than change. Kelsen suspects all natural law theories as devices for strengthening the existing authorities and suppressing change. Max Weber emphasises the revolutionary aspect of certain natural law ideologies.

The scholastic theory of natural law attempted to stabilise the existing order of things by anchoring it in the divine order acting through natural law. Scholars like Le Fur and Cathrein oppose socialist revolution.

The historical school of Savigny opposes legal change. According to that school, the function of law is to stabilise and not to be an agent of progress. The task of a jurist is to verify and formulate the existing legal customs. Analytical positivism tends to regard stability and certainty as the paramount objectives of legal interpretation. All utilitarian and sociological theories emphasize the changing content of law. Law must change in a manner to get pleasure and avoid painful change with social circumstances.

Ihering rejects the idea of a universal law for all nations for all times. According to him, that idea is "no better than that medical treatment should be the same for all patients".

According to Duguit, the needs of the community change with social circumstances. The claims of employers and employees and landlords and tenants change as life and organisation of a community change. Law must be elastic. It must create a just balance in accordance with the social needs and ideals prevailing at the time. Roscoe Pound calls it "Social Engineering". The Marxian legal theory and modern totalitarian theory made the law changeable at will by making it dependent upon outside agencies. The legal changes are made quickly through the constitutional machinery of a totalitarian State. The machinery of the American Constitution keeps legal change within bounds. A written constitution tends to stabilise law. The British constitutional system facilitates legal change. However, technique is always subordinate to the mind which directs it. The ultimate legal ideals decide the use to which the machinery is to be put.

Idealistic legal theories deduce law from first principles based on man as an ethical and rational being. Positivistic legal theories consider law as necessarily determined by the subject-matter. The two principal types of positivism in legal theory are analytical and functional or pragmatic positivism. Analytical positivism concentrates on the

analysis of legal concepts and relations. Functional positivism regards social facts as determining legal concepts. Marxism regards all law as a superstructure determined by economic substratum or the ownership of the means of production.

Duguit is an idealist disguised as a materialist, an empiricist by profession and a *priori* philosopher at heart. His "social solidarity" is in reality a modern natural law idea. The legal theory of Herbert Spencer is the expression of the belief in the evolution of man towards greater freedom through industrial organisation.

Legal theories assume one of three attitudes. Either they subordinate the individual to the community, or they subordinate the community to the individual or they attempt to blend the two. We find in Plato the supremacy of the community over the individual. In the Republic of Plato, there is no room for private rights or private institutions like family and property. These institutions are recognised in the "Laws" of Plato but they are still under the strict supervision of the State. In the philosophy of Plato, there is no protection for the development of the individual. The Greek conception of life is inseparable from the development of personality. Under modern totalitarianism, there is supremacy of the community and the destruction of the rights of the individual. The Catholic theory of society makes the community supreme over the individual. He has to accept the place and function into which he is born. Authority over the individual is divided between the Church and the State. However, the Church is supreme as the authoritative interpreter of divine and natural law. Individualism is the basis of the political and legal theory of Locke. Individualism underlies the legal philosophy of Stammler and Del Vecchio. Bentham's utilitarianism and the theory of evolution of Spencer embody an individualistic philosophy. The American Constitution expresses individualistic philosophy of law. The Legal philosophy of Hegel combines the idea of individual autonomy with the superior power of the community. The individual of Hegel must will the State or his will is not rational. He has no individual rights which can be put against the will of the State. According to Hegel, the State will always protect individual liberty. According to Fichte, there is a genuine synthesis of individual autonomy and needs of the community. Individual liberty is considered in the framework of the social and economic life of the community. According to Radbruch, while translating the equality of man in terms of formal and legal rights and social and economic reality, there must not be absolute subservience of the individual to the community.

The theories of Locke and Rousseau do not explain how the supreme rights of the majority can go together with the inalienable rights of the

individual. The individualism of Hobbes is associated with absolutism. The collectivism of Duguit is strongly autocratic. It subjects governors and the governed to an objective principle.

Individualist legal theories are often cosmopolitan theories. The assertion of natural rights is linked with a revolt against the State. Politically, the issue between nationalism and internationalism is one of clashing political ideals. However, from the law point of view, it is merely a question of the entity to which legal sovereignty is to be attributed.

SUGGESTED READINGS

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Chapter Twenty Two

Analytical Legal Positivism

Different Approaches

AT VARIOUS times and places, jurists have made their approaches to the study of law from different angles. They have defined law, determined its sources and nature and discussed its purpose and ends. For the sake of clarity and convenience in understanding their points of view, the jurists are divided into different schools on the basis of their approaches to law. It is not denied that any such division may not be comprehensive or exact. There may be jurists who may not fall within the strict bounds of any one school. Some of the schools may be merely a synthesis of two approaches. However, in spite of all this, the division is helpful in understanding the evolution of legal philosophy.

Great attention was given to the study of law by men belonging to the profession of law, whether as teachers of law or as practising lawyers. They were merely concerned with positive law which had little to do with vague and abstract notions of natural law. They started demarcating the proper bounds of law and analysing and systematising it. They advocated the reform of law in the light of changed social needs and conditions and not on extraneous considerations. They laid more and more emphasis on the analysis of positive law and they came to be called "positivists" or "analysts". Though John Austin is considered to be the father of the new approach, he owed much to Bentham and on many points his propositions were no more than a "paraphrasing of Bentham's theory".

Positivism in Law

In the words of Prof. Dias, the positivist movement started at the beginning of the 19th century. It represented a reaction against the *a priori* methods of thinking which turned away from the realities of actual law in order to discover in nature or reason the principles of universal

validity. Actual laws were explained or condemned according to those principles.

Prof. Hart points out that the term "positivism" has many meanings. One meaning is that laws are commands. This meaning is associated with Bentham and Austin who are the founders of British positivism. The second meaning is that the analysis of legal concepts is worth pursuing, distinct from sociological and historical inquiries and critical evaluation. The third meaning is that decisions can be deduced logically from pre-determined rules without recourse to social aims, policy or morality. The fourth meaning is that moral judgments cannot be established or defended by rational argument, evidence or proof. The fifth meaning is that the law as it is actually laid down has to be kept separate from the law that ought to be. It is the fifth which seems to be currently associated with positivism. It may spring from a love of order which aims at the clarification of legal concepts and their orderly presentation. Precision may be difficult but it is commendable and profitable. Positivism flourishes best in stable social conditions. It is the intellectual reaction against naturalism and a love of order and precision.

Positivists do not deny that judges make law. As a matter of fact, a majority of them admit it. They also acknowledge the influence of ethical considerations of judges and legislators as a judge or legislator adopts a proposition when it is considered to be moral and just. What they maintain is that it is only incorporation in precedent, statute or custom that imparts a quality of law to a precept. Even if an unjust proposition is embodied in precedent or statute, it will be law. Every proposition which passes through one or other of the accepted media is law irrespective of all other considerations. The positivists distinguish between formal analysis and historical and functional analysis. They do not deny the value of historical and functional analysis but maintain that they should be kept apart from formal analysis. There is one inherent difficulty as it is seldom possible to study institutions as they are except in the light of their history and function. Many can be understood only in the light of their origins and past influences.

A total separation of the law as it is and the law as it ought to be cannot be maintained. However, there must be some degree of separation for practical purposes. Such a separation is desirable in the interest of society. A separation between the "is" and the "ought" is useful in providing a standard by which positive law can be evaluated and criticised. The importance of being able to tell as clearly and simply as possible whether this is, or is not, a law at any given point of time is obvious. The introduction of morality will create difficulties. Moral-

ity is a diffuse idea and no one, not even a naturalist, maintains that everything which is moral is law. As the area of law is bound to be narrower than that of morality, its boundary should be made as clear as possible.

Analytical School

The analytical school is known by different names. It is called the Positive School because the exponents of this school are concerned neither with the past nor with the future of law but with law as it exists, *i.e.*, with law "as it is" *(Positum)*. The school was dominant in England and is popularly known as the English School. It's founder was John Austin and hence it is also called the Austinian School. This school takes for granted the developed legal system and proceeds logically to analyse its basic concepts and to classify them in order to bring out their relation to one another. This concentration on the systematic analysis of legal concepts has given this school the name of Analytical Jurisprudence. The first concern of the jurists is to understand the structural nature of a legal system and for this purpose, discussions of justice are not only irrelevant but also dangerously confusing. Such an approach to law is commonly termed analytical and such writers are often styled Analytical Positivists. The term positivism was invented by Auguste Comte, a French thinker.

The purpose of analytical jurisprudence is to analyse, without reference either to their historical origin or development or their ethical significance or validity, the first principles of law. According to Salmond, a book of analytical jurisprudence will deal with such subjects as an analysis of the concept of law, an examination of the relation between civil law and other forms of law, an analysis of the various constituent ideas of which the complex idea of law is made up such as the State, sovereignty and administration of justice, an account of the legal sources from which law proceeds, together with an investigation of the theory of legislation, judicial precedents and customary law, an inquiry into the scientific arrangement of law into distinct departments along with an analysis of distinctions on which the division is based, an analysis of the concept of legal rights along with the general theory of the creation and transfer of rights, an investigation of the theory of legal liability in civil and criminal cases and an examination of other relevant legal concepts.

The main task of the Analytical School is the lucid and systematic exposition of the legal ideas pertinent to ampler and maturer system of law. It starts from the actual facts of law as it sees them today. It endeavours to define those terms, to explain their connotation and show their relations to one another. One purpose of the Analytical School is

to gain an accurate and intimate understanding of the fundamental working concepts of all legal reasoning.

The Analytical School takes law as the command of the sovereign. It puts emphasis on legislation as the source of law. The whole system is based on its concept of law. Analytical jurisprudence does not create its premises: these premises are furnished by law itself. It is the function of Analytical Jurisprudence to accept these premises and to decompose them into their final atomic elements in an organised juristic system. This school regards law as a closed system of pure facts from which all norms and values are excluded. Friedmann writes: "The analytical lawyer is a positivist. He is not concerned with ideals; he takes the law as a given matter created by the State whose authority he does not question. On this material he works, by means of a system of rules of a legal logic, apparently complete and self-contained. In order to be able to work on this assumption, be must attempt to prove to his own satisfaction that thinking about the law can be excluded from the lawyer's province. Therefore the legal system is made watertight against all ideological intrusions and all problems are concluded in terms of legal logic."[1]

The importance of analytical jurisprudence lies in the fact that it brought about precision in legal thinking. It provided us with clear, definite and scientific terminology. It fulfilled the object of "clearing the heads and untying knots" as envisaged by Austin. It deliberately excluded all external considerations which fall outside the scope of law. Prof. Gray writes: "Especially valuable is the negative side of analytical study. Most of us hold in our minds a lot of propositions and distinctions, which are in fact absurd, and which we believe, or pretend to ourselves to believe, and which we impart to others, as true and valuable. If our minds and speech can be cleared of these, there is no small gain."

Julius Stone observes: "Analytical jurisprudence as the study of logical relations within the law serves, therefore, a useful purpose. Its main tasks are to deter and define the terms actually employed, to state the axioms actually employed, to examine whether legal propositions ostensibly deduced from them do follow in logic and to inquire what definitions and axioms might yield a maximum of self-consistency in the body of legal propositions."[2]

The chief exponents of the Positivist or Analytical School in England are Bentham, Austin, Sir William Markby (1829-1914), Sheldon Amos (1835-1886), Holland (1835-1926), Salmond (1862-1924) and Prof.

[1] *Legal Theory*, p. 241.

[2] *The Province and Function of Law*, p. 52.

H.L.A. Hart (1907). This school received encouragement in the United States from Gray and Hohfeld and on the continent of Europe from Kelsen, Korkunov and others.

Bentham (1742-1832)

Prof. Dias points out that until recently John Austin used to be styled the "father of English Jurisprudence", but it is now clear from a work of Bentham first published in 1945 that it is he, if any one, who deserved such a title. Lord Lloyd writes that *Of Laws in General* is Bentham's main contribution to analytical jurisprudence but it was not until 1970 that we had an authoritative edition. Its editor writes with justification that "had it been published in his lifetime, it, rather than John Austin's later and obviously derivative work, would have dominated English jurisprudence". Lord Lloyd maintains that this work does not stand in isolation from Bentham's censorial jurisprudence. Bentham was a life-long reformer of law and he believed that no reform of substantive law could be brought about without a reform of its form and structure. A thoroughly scientific conceptual framework was a prelude to reform.[3]

Like Austin's theory, Bentham advocated an imperative theory of law in which the key concepts are those of sovereignty and command. Bentham "expounds these ideas with far greater subtlety and flexibility than Austin and illuminates aspects of law largely neglected by him". Austin's sovereign is postulated as an illimitable, indivisible entity but Bentham's sovereign is neither. There may be sound practical reasons for having one all-powerful sovereign, but Bentham saw the distinction between social desirability and logical necessity, which Austin did not. From a conceptual standpoint, there is no necessity for a sovereign to be undivided and unlimited. As a matter of fact, in the complex societies which have now developed, quite the reverse is true. Bentham accepts divided and partial sovereignty. He discussed the legal restrictions that may be imposed upon the sovereign power. To quote him: "The business of the ordinary sort of law is to prescribe to the people what *they* shall do: the business of this transcendent class of laws is to prescribe to the sovereign what he shall do." Bentham believes a sovereign may bind his successors. "If by accident a sovereign should in fact come to the throne with a determination not to adopt the covenants of his predecessors, he would be told that he had adopted them notwithstanding." Though he thought that enforcement would be extra-legal (moral or religious), he did not rule out the use of legal sanctions.

Sanctions generally play a less prominent part in the theory of Bentham than they do in that of Austin. Bentham thought that a sov-

[3] *Introduction to Jurisprudence*, p. 174.

ereign's command would be law even if supported only by religious or moral sanctions. Bentham's account admits "alluring motives", the concept of rewards.

What chiefly differentiates Bentham from Austin and makes him an interesting philosopher of law is that he was a conscious innovator of new forms of enquiry into the structure of law. He made explicit his method and general logic of enquiry in a way in which no other writer on those topics does. When Austin's definition of law is compared with that of Bentham, the contrast becomes clear. On the surface they are similar. Both are framed in terms of superiority and inferiority, in terms of conduct to be adopted by those in the habit of obedience to a sovereign. The similarity ends here. The model of Austin was the criminal statute. Bentham has undertaken "rational reconstruction" which is wider than the model of Austin.

There is another difference between Austin and Bentham regarding the concept of law. According to Bentham, a command is only one of four "aspects" which the will of the legislator may bear to the acts concerning which he is legislating. Bentham believes that an understanding of the structure of law entails an appreciation of the "necessary relations" of "opposition and concomitancy" between these four aspects of the will of the legislator. To demonstrate these relationships, Bentham developed the logic of imperatives. Bentham can rightly claim to be the discoverer of this pattern of thought. This committed Bentham to the view that there are no laws which are neither imperative nor permissive. All laws command or prohibit or permit some form of conduct.

Lord Lloyd writes that the analysis of Bentham steers clear of a number of pitfalls into which Austin fell. Bentham's *Of Laws in General* is undoubtedly the best defence of the imperative theory. Like Austin, Bentham is rooted to the concepts of sovereignty and the habit of obedience which are deficient in aim and unsatisfactory in scope.[4]

Bentham was a fervent champion of codified law and of reforming English Law which was in utter chaos at that time. He distinguished between what he called an exegetorial jurisprudence and "censorial" jurisprudence. In his book *An Introduction to the Principles of Morals and Legislation*, he was moved to ask questions about the penal code and civil code. While seeking the answer, he had to investigate the nature of law which led him to *Of Laws in General*. What was originally conceived as an appendix developed into a major contribution which was finished in 1782. It was published for the first time in 1945 as *The Limits*

[4] *Ibid*, p. 177.

of Jurisprudence Defined. A revised edition was published in 1970, *Of Laws in General*, under the editorship of Prof. Hart.

According to Bentham: "A law may be defined as an assemblage of signs, declarative of a volition, conceived or adopted by the *sovereign* in a State, concerning the conduct to be observed in a certain *case* by a certain person or class of persons who in the case in question are or are supposed to be subject to his power". Thus Bentham's concept of law is an imperative one. This definition is flexible enough to cover "a set of objects so intimately allied and to which there would be such continual occasion to apply the same propositions". The idea of mandate is so much watered down that it is not appropriate to rank Bentham among the imperative jurists. The imperative aspect of his theory is the least happy part of it.

Every law may be considered in eight different respects viz., source, subjects, objects, extent, aspects, force, remedial appendages and expression. The source of law is the will of the sovereign who may conceive laws which he personally issues or adopt laws previously issued by former sovereigns or subordinate authorities or he may adopt laws to be issued in future by subordinate authorities.

Bentham's sovereign is "any person or assemblage of persons to whose will a whole political community are (no matter on what account) supposed to be in a disposition to pay obedience and that in preference to the will of any other person". The attributes of sovereignty are interesting. Such power is indefinite unless limited by express convention or by religious or political motivations. The sovereign may consist of more than one body, each of which is obeyed in different respects. Habitual obedience may be divided and partial.

Every law has a "directive" and a "sanctional" or "incitative" part. The former concerns the aspects of the sovereign's will towards an act-situation and the latter concerns the force of a law. Command is only one of four aspects of sovereign's will, permutations of which comprehend the whole range of laws. Bentham evolved a "deontic logic" with which to demonstrate the relationship between command, prohibition and permission.

As regards the force of a law, a law is dependent upon motivations for obedience. The wish of the sovereign in respect of a class of acts is a law as long as it is supported by a sanction. It includes physical, political, religious and moral motivations, comprising threats of punishment and rewards. The failure to do or not to do what a law supported by punishment requires is illegal, but it is not illegal to do or not to do what a law supported by rewards requires. Bentham's analysis of sanction resembles that of Kelsen and the implication that sanction is a

prediction based on probabilities foreshadows the views of American realists. However, he differed from both in separating the regulation of conduct and stipulation of sanction into two distinct laws.

According to Bentham, sanctions are provided by subsidiary laws, but they themselves require a further set of subsidiary laws, "remedial appendages", addressed to judges with a view to curing the evil, stopping the evil or preventing future evil.

The ways in which the will of the sovereign may be expressed are various. Expression may be complete and in that case a judge should adopt a literal interpretation. A judge can adopt a liberal interpretation only where the expression of the will of the sovereign is incomplete. Bentham was the enemy of judge-made law and he sought to minimise judicial discretion by trying to ensure that laws were complete, not only in expression, but also in "connection" and "design".

According to Bentham, the individuality of a law "results from the *integrality* and the *unity* of it laid together". The purpose of individuation "is to ascertain what a portion of legislative matter must amount to in order on the one hand not to contain less, on the other hand not to contain more than one whole law". A law should be complete in expression, in "connection" and in "design". Every law contains an imperative provision which may be qualified or unqualified, further expounded or unexpounded. If it is unqualified and unexpounded, it is complete in expression in itself. If it requires qualification or exposition, it is incomplete without these. Qualifications and expositions cannot be complete in themselves without the principal provision.

According to Bentham, more often than not parts of a law "lie scattered up and down at random, some under one head, some under another, with little or no notice taken of their mutual relations and dependencies". Those parts may have been brought into existence by different bodies at different times. They needed to be coordinated before a law could be said to be complete in point of connection.

According to Bentham: "The unity of law will depend upon the unity of the species of the act which is the object of it." The way in which different species of acts are designated is largely a matter of wording dictated by convenience. Each act-situation is object of a separate law. Bentham did not assert that one species of act could give rise to only one offence. Two different laws can create two separate offences out of the same act, as where criminal offences are also tort.

According to Bentham, a penal code consists of laws creating "offences". A civil code consists of expository and qualificatory matter. Bentham's ultimate objective was an ideal code consisting of laws analysable jurisprudentially. Its penal and civil branches should be sepa-

rated. Its advantages would be to minimise the risk of incompleteness of laws and the "licentiousness" of interpretation, to exhibit a common standard by which different systems might be compared and to create and improve the method of teaching the art of legislation. Bentham was so much convinced of the merits of a code that he remained a lifelong enemy of judge-made law. He was in favour of reducing the judicial functions,

Bentham's legal philosophy is called "Utilitarian Individualism". He criticised the method of law-making, corruption and inefficiency in the administration of justice and restraints on individual liberty. He was an individualist. His view was that the function of law is to emancipate the individual from bondage and restraint upon his freedom. Once the individual was made free, he would be able to look after his welfare. In this respect, he was a supporter of the *laissez faire* principle.

Bentham was also a utilitarian. According to him, the end of legislation is the "greatest happiness of the greatest number". He defined utility as the "property or tendency of a thing to prevent some evil or to produce some good". The consequences of good and evil are respectively pleasure and pain. To quote Bentham: "Nature has placed man under the empire of pleasure and pain. We owe to them all our ideas, we refer to them all our judgments and all the determination of our life. He who pretends to withdraw himself from this subjection knows not what he says. His only object is to seek pleasure and to shun pain ... . These eternal and irresistible sentiments ought to be the great study of the moralist and the legislator. The principle of utility subjects everything to these two motives."

The purpose of law is to bring pleasure and avoid pain. Pleasure and pain are the ultimate standards on which a law should be judged. A consideration of justice and morality disappears from this approach.

Friedmann refers to two shortcomings in the legal philosophy of Bentham. The first weakness was his abstract and doctrinaire rationalism which prevented him from seeing man in all his complexity. The result was that Bentham over-estimated the powers of the legislature and underestimated the need for individual discretion and flexibility in the application of law. The view of Bentham was that if the work of legislation was based on rational principles, there was the possibility of complete scientific codification of law. The differences among the various States did not discourage him. He did not attach much value to the interpretation of law by the judges. Another weakness was that Bentham failed to develop clearly has own conception of the balance between the individual and community interests. Bentham believed in the identity of the individual and communal happiness. He believed

that freedom of enterprise will automatically lead to greater equality. Many of the propositions of Bentham are neither convincing nor true in practical application. The view of Bentham was that the interests of an unlimited number of individuals shall be automatically conducive to the interests of the community, as the freedom of enterprise will automatically lead to greater equality. However, this gave just the reverse results when it was put into practice. Likewise, pleasure and pain alone cannot be the test to judge a law.

According to Friedmann, the importance of Bentham in the history of legal thought is due to the fact that he linked philosophical premises with practical legal propositions. He placed individualism on a new materialistic basis. He related and subordinated the rights of the self-contained individual to the happiness of the greatest number of individuals living in a community. He directed the aims of law to practical social purposes instead of abstract propositions. According to him, the main function of law was to provide subsistence, to aim at abundance, to encourage equality and to maintain security. The function of security was the most important. Bentham laid the basis for a new relativist tendency in jurisprudence called sociological jurisprudence. He related law to definite social purposes and a balance of interests. He put emphasis on the need and developed the technique of conscious law-making by codification as against judicial law-making or evolution by custom. It was the belief of Bentham that there were certain scientific principles of codification which could be applied in every country irrespective of the national and historical differences.[5]

The constructive thinking and zeal for legal reform on the part of Bentham heralded a new era of legal reform in England. Legislation has become the most important method of law-making in modern times. Bentham's definition of law and analysis of legal terms inspired many jurists who improved upon them and laid down the foundations of new schools of jurisprudence. He examined the problems of international law. As a matter of fact, he coined that name. The view of Prof. Dias is that had all the writings of Bentham been known before, he could have been the greatest single contributor to European Jurisprudence.[6]

John Austin (1790-1859)

John Austin was born in 1790. He joined the Army at the age of 16 and served as a lieutenant in Malta and Sicily up to 1812. He resigned his commission in the army and started studying law. In 1818, he was called to the Bar. For seven years, he practised law but without success.

[5] *Legal Theory*, p. 275.

[6] *Jurisprudence*, p. 469.

In 1819, he married Sarah Taylor, a woman of great intelligence, energy and beauty. After their marriage, the Austins became neighbours of Bentham and the Mills in London.

When the University of London was founded, Austin was appointed Professor of Jurisprudence and he spent the next two years in preparing his lectures. His opening lectures in 1828 were attended by John Stuart Mill, Romilly and others. After initial success, Austin failed to attract new students and he resigned the Chair in 1832. Through the efforts of his wife, an expanded version of the first part of the lectures was published in 1832 under the title of *The Province of Jurisprudence Determined.* Austin repeated the lectures in 1834 but without success and hence he gave up the teaching of jurisprudence altogether. In 1833, he was appointed to the Criminal Law Commission but he resigned after signing the first two reports. In 1836, he was appointed Commissioner to advise on the legal and constitutional reform of Malta and he got £ 3000 for his services. For the next ten years, he lived abroad in Germany and in Paris, supported by the earnings of his wife as a writer and translator. In 1848, the Austins went back to England and lived there in retirement. Austin died in 1859.

Austin wrote with extreme difficulty. He imposed on himself standards of precision and clarity that made work a torment. Between 1832 and 1859, he published only a couple of articles and a pamphlet *A Plea for the Constitution.* The second edition of *The Province of Jurisprudence Determined* was published by his widow in 1861. She also reconstructed from the notes of her husband *Lectures on Jurisprudence* or *The Philosophy of Positive Law* and published them in 1863.

Austin is called the father of English jurisprudence and the founder of the Analytical School. However, the title of Analytical School is misleading as it suggests that analysis is the exclusive property of this school instead of being the universal method of jurisprudence. Allen prefers to call Autsin's school as the imperative school. However, it is contended that Austin does not fit exactly into any of the important schools. In some ways, he was the precursor of the pure science of law as he drew somewhat narrowly the boundaries of jurisprudence. He was not unmindful of the part played by ethics in the evolution of law. As a matter of fact, he devoted several lectures to the theory of utility. Finding work on jurisprudence full of confusion, he decided to confine jurisprudence to a study of law as it is, leaving the study of ideal forms of law to the science of legislation or philosophic jurisprudence.

Austin's Theory of Law: Austin's most important contribution to legal theory was his substitution of the command of the sovereign for any ideal of justice in the definition of law. He defined law as "a rule laid

down for the guidance of an intelligent being by an intelligent being having power over him". Law is strictly divorced from justice. Instead of being based on ideas of good or bad, it is based on the power of a superior. This links Austin with Hobbes and other theories of sovereignty. The first division of law is that into laws set by God to men (law of God) and laws set by men to men (human laws). In Austin's positivist system, the law of God seems to fulfil no other function than that of serving as a receptacle for Austin's utilitarian beliefs. The principle of utility is the law of God.

Human laws are divisible into laws properly so called (positive law) and laws improperly so called. The former are either laws set by political superiors to political subordinates or laws set by subjects, as private persons, in pursuance of legal rights granted to them. As an example, Austin gives the rights of a guardian over his ward. As the legal nature of such rights derives from the indirect command of the superior who confers such right on the guardian, every enforceable private right must fall within this category. Laws improperly so called are those laws which are not set, directly or indirectly, by a political superior. In this category are diverse types of rules such as rules of clubs, laws of fashion, laws of natural science, the rules of so-called international law etc. To all these, Austin gives the name of "Positive Morality". Laws improperly so called also included a final category called "laws by metaphor" which covered expression of the uniformities of nature.

According to Austin, positive law has four elements viz., command, sanction, duty and sovereignty. In the words of Austin: "Laws properly so called are a species of commands. Being a command, every law properly so called flows from a determinate source. Whenever a command is expressed or intimated, one party signifies a wish that another shall do or forbear and the latter is obnoxious to an evil which the former intends to inflict in case the wish is disregarded. Every sanction properly so called is an eventual evil annexed to a command. Every duty properly so called supposes a command by which it is created and duty properly so called is obnoxious to evils of the kind. The science of jurisprudence is concerned with positive laws, or with laws strictly so called, as considered without regard to their goodness or badness. All positive law is deduced from a clearly determinable law-giver as sovereign. Every positive law is set by a sovereign or a sovereign body of persons, to a member or members of the independent political society wherein that person or body is sovereign or supreme."

Prof. Dias points out that the distinctions drawn by Austin were entirely arbitrary. Although Austin did not say so specifically, he fash-

ioned his concept out of the material of English Law with an occasional sprinkling of Roman law, but he proceeded to use it as a criterion of law in general and so excluded international law. He was also misguided in applying the epithet "proper" to what was, after all, his own stipulative definition of "law".

According to Austin, a law is a command of the sovereign backed by a sanction. Duty and sanction are correlative terms, the fear or sanction supplying the motive for obedience. Prof. Dias criticises this view. His view is that the fear of sanction is not the sole or even the principal motive for obedience. There are many objections to the association of duty with sanction. Another weakness is that Austin found himself compelled to treat nullity as a sanction in order to accommodate, e.g., the rule, "you must make a gratuitous promise under seal", within his command-duty-sanction model.

To define law as a command can mislead us in many ways.

(1) Though the definition of Austin applies to certain portions of law such as criminal law, the greater part of a legal system consists of laws which neither command nor forbid things to be done, but which 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 making of wills. The bulk of the law of contract and of property consists of such power-conferring rules.

(2) The term command suggests the existence of a personal commander. In modern legal systems, the procedures for legislation may be so complex as to make it impossible to identify any commander in this personal sense. This is particularly so where sovereignty is divided as in federal States.

(3) Command conjures up the picture of an order given by one particular commander on one particular occasion to one particular recipient, but law can and does continue in existence long after the extinction of the actual law-giver. An argument is put forward that laws laid down by a former sovereign remain law only insofar as the present sovereign is content that they should continue. What the sovereign permits, he impliedly or tacitly commands. However, it is not always true that the present sovereign can repeal any law. In certain States, the law-making powers of the sovereign are limited by the Constitution which prevents the repeal by ordinary legislation of the entrenched clauses. In such cases, the question of the present sovereign allowing or adopting does not arise. Moreover, the notion of an implied or tacit command is suspect. An implied command seems not to be a command at all. It is better to accept the possibility of laws which are not commanded by

the present sovereign and to give up the notion of command and adopt the analogy of the rule of a religious order which can continue in force long after the death of its founder.

(4) The bulk of English Law has been created neither by ordinary nor by delegated legislation, but by the decisions of the courts. The argument of Austin is that judges are the delegates of Parliament which has conferred upon them law-making powers. It is true that judges are appointed in England by a Government answerable to Parliament and there are parliamentary procedures for their removal, but to describe the judges as delegates is wholly 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 would confuse subordinate powers with derivative powers.

(5) There are laws which are not commands, e.g., declaratory statutes, repealing statutes and "laws of imperfect obligation" which include laws defining what a contract is, what a crime is or a law which lays down that no action shall succeed after the lapse of the limitation period. Austin treated them as exceptions. Buckland points out that declaratory statutes could have been treated as repeating earlier commands, while repealing statutes may be said to create fresh claims and duties by their cancellation of earlier ones and hence can be called command. However, this view is not accepted by Prof. Dias.

(6) Prof. Dias raises the question whether a determinate person or body of persons can be discovered who might be regarded as having commanded the whole corpus of the law. His answer is that such a person or a group of persons was not discoverable at any point in history. It is not possible to say who commanded the rule that precedents shall be binding. A sovereign is a sovereign within a State which is a legally defined organisation consisting of territory, population, government and a measure of independence in external relations. It is not possible to say who commanded those requirements. It might be thought that the present monarch and members of both Houses of Parliament can command any law they please. However, Prof. Olivercrona points out that the individuals who comprise the sovereign body have attained their positions by virtue of the rule of law. The question is who commanded those rules. Whoever commanded them in turn owed their authority to command to the observance of those rules. There is no sense in saying that the rules which brought them to their positions were their own commands. Even if the Crown in Parliament is taken as the uncommanded commander, a study of the events of 1688-89 shows that this body in no sense commanded the rule that its command shall be law. It was the acceptance of it as the supreme commander, par-

ticularly by the judges, that entitled it to command henceforth. It is artificial to pretend that any member of Parliament believes that the law of the land has emanated from his commands. The fact is that the vast majority of the laws existed before he was born. To attribute commands to people who neither commanded nor believe that they had commanded, is a fantasy. Although the Grown in Parliament was accepted in 1689 as the Austinian commander, the bulk of the common law and much legislation was already in existence and continued to exist unaffected. Even if it is assumed that those laws had emanated from earlier commands, the question is why and how the commands of a former sovereign continue to be laws under his successor. Austin's reply was that this comes about by virtue of "tacit command" which means what the sovereign permits, he commands. This implies that the sovereign knows of the earlier commands and decides not to interfere with them. Prof. Hart has demolished the whole idea of "tacit command". Tacit command fails to explain why the laws and systems which continue are the same laws and systems. Prof. Dias concludes that if tacit command is rejected, as it must be, what remains is the proposition that laws remain in force until repealed.

(7) Even the actual commands of a sovereign acquire the character of laws when certain procedures have been followed and not otherwise. Even if the Queen and the members of the House of Lords and the House of Commons unanimously assent to a measure at a garden party in the Buckingham Palace, it would not become a law as the appropriate parliamentary procedures have not been observed. If these procedures are laws, they cannot be called command. If they are not laws, they are indistinguishable from the dictates of etiquettes and morals. This shows the inadequacy of the view that law is a command. The view that law is a command of the sovereign suggests as if the sovereign is standing just above and apart from the community giving his arbitrary commands. This view treats law as artificial and ignores its character of spontaneous growth. The sovereign is an integral part of the community or State and his commands are the commands of the organised community. Most of the theories regarding State in modern times say that sovereignty does not remain in the shape in which it was conceived by the writers in the past. The State itself is sovereign and law is nothing but the general will of the people. That means that law cannot be a command.

The view of Austin is that it is the sanction alone which induces men to obey law. This is not a correct view. According to Lord Bryce, the motives which induce a man to obey law are indolence, deference, sympathy, fear and reason. The power of the State is the *ratio ultima.* Force is the last resort to secure obedience.

Critics point out that law is not an arbitrary command as conceived by Austin but a growth of an organic nature. Dr. J. Brown points out that even the most despotic of legislators cannot think or act without availing himself of the spirit of his race and time. Moreover, law has not grown as a result of blind force but has developed consciously and has been directed towards a definite end.

Austin put international law under positive morality and not law as it lacked the main ingredient of sanction. However, nobody will accept the view that international law is not law. The definition of Austin excludes a very important branch of law.

In the opinion of Duguit the notion of command is not applicable to modern social legislation which binds the State itself rather than the individual. This view is also accepted by the Supreme Court of India.

Laski and Dewey point out that political affairs are actually in the hands of certain officials who were placed there by various means but who always represent a combination of personal and group interests. As all the powers of government are in the hands of individual persons and are exercised by them, the idea of State has no reality apart from the institutions of government. Far from originating from on high, the powers of government are erected by men to serve human purposes and are valuable only as long as they do so. Considered in relation to society as a whole, there is an association of the people of a given society organised for political purposes. If this view of the State is accepted, the State is an agent of society to promote social welfare and the question of law as a command does not arise.

Sovereignty.—The sovereign is defined by Austin thus: "If a determinate human superior, not in the habit of obedience to a like superior, receives habitual obedience from the bulk of a given society, that determinate superior is sovereign in that society and the society (including the superior) is a society political and independent." The sovereign may be an individual or a body or aggregate of individuals.

Sovereignty has a positive mark and a negative mark. The former is that a determinate human superior should "receive habitual obedience from the bulk of a given society" and the latter is that that superior is "not in the habit of obedience to a like superior".

It is contended that Austin confused that *de facto* sovereign or the body that receives obedience, with the *de jure* sovereign or the law-making body. In Britain, the Crown receives allegiance from its subjects but the Crown in Parliament is the supreme law-maker. When Austin referred to the uncommanded commander who makes laws, he was referring to the *de jure* sovereign. The "negative mark" is not so much the concern of municipal lawyers as of international lawyers. For the mu-

nicipal lawyers, the question is whose enactments constitute "laws". It is a matter of indifference to them that the law-maker obeys some other body in the international sphere. It has been questioned whether it is necessary to have a sovereign in a State. The answer depends upon the meaning of "necessary" and of "State". A sovereign may be "necessary" because definition has made it so. In another sense, the question is whether a sovereign is "necessary" as a practical matter. As regards the State, there is no need for only one law-making body, though in practice that is convenient.

According to Austin, the sovereign must be illimitable, indivisible and continuous. As regards illimitability, Austin denied that his sovereign could be limited. Substantial areas of constitutional law did not consist of laws but of positive morality. The sovereign cannot be under a duty as he cannot command himself. To be under a duty implies that there is another sovereign who commands the duty and imposes a sanction. Jethro Brown maintains that the sovereign can be bound by a duty but that is denied by Buckland. The view of Prof. Dias is that Austin overlooked limitations through disabilities rather than duty. The exercise of sovereign powers may be limited by special procedures. Bentham has shown how sovereignty may be divided in such a way that each component has a limited power to prescribe for the other. The view of Austin was that a sovereign can have no claim as a claim has to be conferred by a sovereign on someone. To say that one sovereign confers a claim on another is to deny the sovereignty of the latter. The Crown-in-Parliament is the sovereign in the Austinian sense and not the Crown alone. According to Austin, another attribute of sovereignty is indivisibility. Bentham has shown how sovereignty could be divided. There are also examples of divided sovereignty, e.g., the old Roman assemblies, the United States of America and the concurrent powers of a colonial legislature and the British Parliament.

Another attribute of Austinian sovereignty is continuity. The question is asked where sovereignty resides during a dissolution of Parliament. The view of Austin was the sovereignty lies with the Queen, the members of the House of Lords and the electorate. This is contrary to another view of Austin that sovereignty lies with the Queen, the House of Lords and the House of Commons. The question is who in this case is the commander and the commanded.

Lord Bryce found in Austin's definition of sovereignty a confusion between the notions of unlimited power of final authority which, even in the case of the United Kingdom to which his analysis was best suited, obscured the essential features. 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 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 habitual obedience from the bulk of a given society and that obviously was not circular. We should not accuse Buckland of having misrepresented Austin because what he said was that superficially Austin' argument looked circular. Buckland himself observed: "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."

The expression obedience often suggests deference to authority and not merely compliance with orders backed by threats. The idea of obedience in fact fails in two different ways to account for the continuity to be observed in every normal legal system when one legislator succeeds another. An illustration of this kind is the change in law of incest made in Rome by the then Emperor Claudius for his own private purposes. In order to marry Agrippina, the daughter of his brother, he procured a change in the law which permitted a marriage between an uncle and a niece or aunt and nephew so that they did not remain incestuous. Moreover, habitual obedience to the old law-giver cannot by itself render probable that the new legislator's orders will be obeyed. If there is to be this right and this assumption at the moment of succession during the reign of the earlier legislator, there must have been the acceptance of the rule under which the new legislator is entitled to succeed.

Notion of sovereignty as understood in India.—The Constitution of India provides for three different entities viz., the Union, the States and the Union Territories. It also creates three major instruments of power viz., the legislature, the executive and the judiciary. It also demarcates their separate jurisdictions minutely and expects them to exercise their powers without overstepping their limits. In short, the scope of the powers and the manner of their exercise are regulated by law. The result is that no authority created under the Constitution is supreme. It is the Constitution that is supreme and all authorities function under this supreme law of the land. In a federation like India the powers are so divided that a particular reform may be carried out only through the cooperation of the Union of India and the States. There may be some powers which cannot be achieved even by their cooperation. Sovereignty in the Austinian sense is not to be found in India. Sovereignty in India is not unlimited, illimitable and indivisible. It could not be otherwise as India has a federal Constitution.

It is true that the Directive Principles of State Policy cannot be enforced in a court of law, but they are nevertheless fundamental in the governance of the country. Even if they are not justiciable, they occupy a place of prominence in the hierarchy of Indian jurisprudence by laying down the governing norms of Indian society. No government can ignore them. Even the Supreme Court has to take them into consideration while interpreting the validity of the fundamental rights. They lay down the direction in which the government of the country is to be carried and also the limitations on their exercise.

Contribution of Austin.—No impartial observer can deny the great contribution made by Austin to the study of jurisprudence. English jurisprudence has been and still is predominantly analytical in character and other influences are merely secondary. It is true that there is little originality in Austin and he was inspired above all by Bentham from whom he inherited hatred of mysticism and unreality and a passion for classification, legislation and codification. It is also true that the main doctrines of Austin can be identified in his predecessors. His definitions of law, sovereign and political society can be found in the works of Hobbes and Bentham. However, the achievement of Austin lay in the fact that he was able to segregate those doctrines from the political and philosophical discussions in which they were embedded. He also restated them with a new firmness, grasp of detail and precision. Both lawyers and political thinkers could not only understand them but also use them to dispel the haze which still blurred the distinction between law, morality and religion and obstructed a rational criticism of legal institutions. Likewise, it was Austin who first demonstrated to English lawyers in their own idiom how the understanding even of unsystematised English Law, with its forest of details, could be increased and its exposition improved by the use of a theoretical structure and precise analysis.

The view of Hart is that even the defects of Austin's theory have been a source of further enlightenment on the subject. To quote him: "But the demonstration of precisely where and why he is wrong has proved to be a constant source of illumination; for his errors are often the misstatement of truths of central importance for the understanding of law and society." Olivecrona acknowledges him as the pioneer of the modern positivist approach to law.

Austin was intimate with great thinkers and philosophers of his time like Bentham and J.S. Mill and he was praised by Mill. Austin removed many false notions which had obscured the true meaning of law and legal terms. His stand was to expel from the mind all ethical notions while considering the nature of positive law. He gave a death-

blow to the theory of natural law. The view of Sir Henry Maine was that "no conception of law and society has ever removed such a mass of undoubted delusions" as was done by Austin and "his works are indispensable, if for no other object, for the purpose of clearing the head."

The influence of the Austinian theory of law was great due to its simplicity, consistency and clarity of exposition. Gray writes: "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 the law is at the mercy of the State." Prof. Allen observes: "For a systematic exposition of the methods of English jurisprudence, we will have to turn to Austin."

Hart points out that from Austin has descended a line of English analytical jurists. Amos, Markby, Hearne, Holland and Salmond did not differ from Austin in their conception and arrangement of the subject even when they opposed his doctrines. Although his influence was less direct in the United States, yet the same could be seen in *Nature and Sources of Law* by Gray. There is a lot in common between the views of Austin and Kelsen. The students of jurisprudence are very much indebted to Austin.

Austin's command theory of law became the starting point for subsequent analytical theories of great importance. Holland accepted the command theory in principle but substituted enforcement for the command of the sovereign. According to him, law is a general rule of human action enforced by a determinate authority. About Austin's contribution to analytical jurisprudence, Gray says that it was "the recognition of the truth that the law of State or another organised body, is not ideal but something which actually exists. It is not that which is in accordance with religion or nature or morality, it is not that which it ought to be, but that which it is".

Bentham and Austin.—Prof. Dias has attempted a comparison of Bentham and Austin and comes to the conclusion that the former provided a deeper and more adaptable theory than the latter. His concept of sovereignty was flexible as it avoided the shackles of indivisibility and illimitability. He was able to accommodate the division of authority between organs as in a federation, or division in certain areas as well as restrictions of authority and self-bindingness. His concept of law was broader than that of Austin and he avoided the absurdity of "law properly so-called". His sanction was both wider and less important than that of Austin. Laws are laws even though they are supported by moral or religious sanctions. They may be accompanied even by rewards. He had no need to resort to "sanction by nullity". The im-

perative foundation was a weakness in his theory but it was so much broader and less uncompromising than that of Austin that he was able to accommodate permissions up to a point. He avoided the fiction of "tacit command".[7]

Neo-Austinian School.—The chief defect in the conclusions of the Analytical School lay in ignoring the social aspects of law and its ethical basis and emphasizing the capacity for its coercive enforcement and its enunciation by the sovereign political authority. While the Historical School regards custom as the very type of law, the Austinians denied entirely the claim of customary law to be recognised as law in the strict sense of the term. International law, the existence and binding force of which Grotius took great pains to establish, is relegated by the Austinians to the category of positive morality.

In *Civilisation and the Growth of Law,* Prof. Robson deplores the fact that "English legal thought since Bentham has run in narrow grooves, remaining crabbed and practical in the worst sense of the word, unimaginative and devoid of any philosophical, ethical or sociological background. It is scarcely too much to say that jurisprudence hardly exists in Great Britain. Philosophy and law are barely on speaking terms, while sociology and law are strangers who have never even met."[8]

The Neo-Austinian School is responsive to the criticisms by other schools of juristic thought. Jethrow Brown has recast the Austinian definition of law in these words: "Law is an expression of the general will affirming an order which will be enforced by the organised might of the State and directed to the realisation of some real or imaginary good.[9]" The admission that law is not a more command of the sovereign and that it proceeds from the general will coupled with the recognition of the fact that law discharges a social function by the "realisation of some good", shows an unmistakable attempt to supply the missing ethical element in Austin's concept of law. Sir John Salmond recognises customary law as a legal material source of law and hence entitled to be regarded as law in the strict sense of the term. In the opinion of Salmond, International Law is not mere positive morality but a species of Conventional Law.

While the English jurists of the Analytical School are appreciating the importance of the ethical aspects of law, continental jurists are realising that coercive force is also an essential element in the concept of law. Ihering writes: "A legal rule without coercion is a fire which does

[7] *Jurisprudence,* p. 479.

[8] p. 254.

[9] *Austinian Theory of Law,* p. 354.

not burn, a light that does not shine."[10] Ihering considers international law as an incomplete form of law.

H. L. A. Hart (1907)

Prof. Hart is regarded as the leading contemporary representative of British positivism. His influential book, *The Concept of Law,* was published in 1961 and that shows that he is a linguistic, philosopher, barrister and a jurist.

Prof. Hart approaches his concept of law in this way. According to him: "Where there is law, there human conduct is made in some sense non-optional or obligatory." Thus the idea of obligation is at the core of a rule. He commences in his book by criticising Austin's view of law as a command. The idea of command explains a coercive order addressed to another in special circumstances but not why a statute applies generally and also to its framers. Moreover, there are other varieties of laws, notably powers. The continuance of pre-existing laws cannot be explained on the basis of command. Hart demolished the myth of "tacit command". Austin's "habit of obedience" fails to explain succession to sovereignty because it fails to take account of the important differences between "habit" and "rule". Habits only require common behaviour which is not enough for a rule. A rule has an "internal aspect" which people use as a standard by which to judge and condemn deviations. Habits do not function in this way. Succession to sovereignty occurs by virtue of the acceptance of a rule entitling the successor to succeed and not because of a habit of obedience.

The view of Prof. Hart is that the significance of rules has been neglected. He uses "rule" to distinguish between "being obliged" and "having an obligation". A gunman orders *B* to hand over his money and threatens to shoot him if he does not do so. In this case, *B* is obliged to hand over the money but he has no obligation to do so. *B* believed that some harm or other unpleasant consequences would befall him if he did not hand over the money to the gunman and he handed over the money to avoid those consequences. The statement that a person was obliged to obey someone is, in the main, a psychological one referring to the beliefs and motives with which an action was done. However, the statement that someone *had an obligation* to do something is of a very different type. In the case of the gunman there was no obligation as such. The statement that someone was obliged to do something normally carries the implication that he actually did it. One has an obligation only by virtue of a rule.

[10] *Law as Means to an End,* p. 241.

Rules are conceived and spoken of as imposing obligations when the general demand for conformity is insistent and the social pressure brought to bear upon those who deviate or threaten to deviate is great. Such rules may be wholly customary in origin. There may be no centrally organised system of punishments for the breach of those rules. The social pressure may take only the form of a general diffused hostile or critical reaction which may stop short of physical sanctions. It may be limited to verbal manifestations of disapproval or of appeals to the individuals' respect for the rule violated. It may depend heavily on the operation of feelings of shame, remorse and guilt. When the pressure is of the last-mentioned kind, we may classify the rules as a part of the morality of the social groups and the obligation under the rules as a moral obligation. When physical sanctions are prominent or usual among the forms of pressure, even though those are neither closely defined nor administered by officials but are left to the community at large, we can classify those rules as a primitive or rudimentary form of law. We may find both types of serious social pressure behind the same rule of conduct. Sometimes this may occur with no indication that one of them is appropriate as primary and the other secondary. The question whether we are confronted with a rule of morality or rudimentary law, is not easy to answer. The insistence on importance or seriousness of social pressure behind the rules is the primary factor determining whether they are thought of as giving rise to obligations.

Two other characteristics of obligation go naturally together with this primary one. The rules supported by serious social pressure are thought important because they are believed to be necessary to the maintenance of social life or some highly prized feature of it. Rules so obviously essential as those which restrict the free use of violence are thought of in terms of obligation. Rules which require honesty or truth require the keeping of promises, or specify what is to be done by one who performs a distinctive role or function in the social group are either obligation or duty. The conduct required by these rules may, while benefiting others, conflict with what the person who owes the duty may wish to do. Hence, obligations and duties involve sacrifice or renunciation. There is always the possibility of a conflict between obligation or duty on the one hand and interest on the other. The figure of a bond binding the person obligated, which is buried in the word obligation, and the similar notion of a debt latent in the word duty are explicable in terms of these three factors which distinguish rules of obligation or duty from other rules. In this figure, the social pressure appears as a chain binding those who have obligations so that they are not free to do what they want to do. The other end of the chain is sometimes held by the group or their official representatives who in-

sist on performance or exact the penalty. Sometimes it is entrusted by the group to a private individual who may choose whether or not to insist on performance or its equivalent in value to him. The first situation typifies the duties or obligations of criminal law and the second those of civil law where we think of private individuals having rights co-relative to obligations.

Primary and Secondary Rules

Prof. Hart makes a distinction between basic or primary rules and secondary rules. Under primary rules, human beings are required to do or abstain from certain actions whether they wish or not. Secondary rules are in a sense parasitic upon or secondary to primary rights. They provide that human beings may by doing or saying certain things introduce new rules of the primary type, extinguish or modify old rules, or in various ways determine their incidence or control their operations. Primary rules impose duties. Secondary rules confer powers, public or private. Primary rules concern actions involving physical movement or changes. Secondary rules provide for operations which lead not merely to physical movement or change but to the creation or variation of duties or obligations. The union of primary and secondary rules results in law.

According to Prof. Hart, it is possible to imagine a society without a legislature, courts or officials of any kind. There are many studies of primitive communities which depict in detail the life of a society where the only means of social control is the general attitude of the group towards its own standard modes of behaviour in terms of the rules of obligation. A social structure of this kind is often referred to as one of custom but Hart prefers to refer to such a social structure as one of *primary rules of obligation.* If a society is to live by such primary rules alone, there are certain conditions which must be satisfied. The first condition is that the rules must contain in some form restrictions on the free use of violence, theft and deception to which human beings are tempted but which they must repress if they have to live together. Such rules are in fact always found in primitive societies of which we have knowledge, together with a variety of others imposing on individuals various positive duties to perform services or make contributions to the common life. The second condition is that though such a society may exhibit the tension between those who accept the rules and those who reject the rules except where fear of social pressure induces them to conform, the latter cannot be more than a minority. Only a small community closely knit by ties of kinship, common consent and belief and placed in a stable environment could live successfully by such a regime of unofficial rules. In any other conditions, such a simple form

of social control must prove defective and will require supplementation in different ways.

Defects in Primary Rules: Prof. Hart refers to three defects.

(1) The first defect in the simple social structure of primary rules is *uncertainty.* The rules by which the group lives will not form a system but will simply be a set of separate standards, without any identifying or common mark. They will resemble our own rules of etiquette. If doubts arise as to what the rules are or as to the precise scope of some given rule, there will be no procedure for settling them, either by reference to an authoritative text or to an official whose declarations on that point are authoritative. Such a procedure and acknowledgment of either authoritative text or persons involved the existence of certain rules which do not exist and hence the uncertainty.

(2) The second defect is the *static character of the primary rules.* The only mode of change in the rules known to such a society will be the slow process of growth, whereby courses of conduct once thought optional, become first habitual or usual and then obligatory, or when deviations once severely dealt with, are first tolerated and then passed unnoticed. In such a society, there will be no means of deliberately adapting the rules to changing circumstances, either by eliminating old rules or introducing new ones. The possibility of doing this presupposes the existence of rules of a different type from the primary rules of obligation by which alone the society lives. In an extreme case, the rules may be static in a more drastic sense. In this extreme case there will be no way of deliberately changing the general rules and the obligations which arise under the rules in particular cases could not be varied or modified by the deliberate choice of any individual. Each individual would simply have fixed obligations or duties to do or abstain from doing certain things. If there are only primary rules of obligation, they would have no power to release those bound from performance or to transfer to others the benefits which would accrue from performance. For such operations of release or transfer or change in the initial positions of individuals under the primary rules of obligation, there must be rules of a sort different from the primary rules and those did not exist.

(3) The third defect of the simple form of social life is *inefficiency.* Disputes as to whether an admitted rule has or has not been violated, will always occur and will, except in the smallest societies, continue interminably if there is no agency specially empowered to ascertain finally and authoritatively the fact of violation. Punishments for violations of rules are not administered by a special agency but are left to the individuals affected or to the group at large. The waste of time involved in

the group's unorganised efforts to catch and punish offenders and the smouldering vendettas which may result from self-help in the absence of an official monopoly of sanctions, may be serious.

Remedies for Defects.—According to Hart, the *remedy for each of the three main defects in the simplest form of social structure consists in supplementing the primary rules of obligation with secondary rules*, which are rules of a different kind. The introduction of the remedy for each defect might, in itself, be considered a step from the pre-legal into the legal world. As each remedy brings with it many elements that permeate law, all three remedies together are enough to convert the regime of primary rules into a *legal system. Law is a union of primary rules of obligation with secondary rules.* Though the remedy consists in the introduction of rules which are certainly different from each other as well as from the primary rules of obligation which they supplement, they have important features in common and are connected in various ways. They may all be said to be on a different level from the primary rules as they are all about such rules. While primary rules are concerned with the actions which the individuals must or must not do, secondary rules are concerned with the primary rules themselves. They specify the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied and the fact of their violation conclusively determined.

(1) The simplest form or remedy for the uncertainty of the regime of primary rules is the *introduction of a "rule of recognition"* which may take any of a huge variety of forms, simple or complex. It may be no more than an authoritative list or text of the rules found in a written document or carved on some public monument. This step from pre-legal to legal may be accomplished by the reduction to writing of hitherto unwritten rules. Where there is such an acknowledgment, there is a very simple form of secondary rule for conclusive identification of the primary rules of obligation.

In a developed legal system, the rules of recognition are of course more complex. Instead of identifying rules exclusively by reference to a text or list, they do so by reference to some general characteristic possessed by primary rules.

(2) The remedy for the static quality of the regime of primary rules consists in the *introduction of "rules of change"*. The simplest form of such rule empowers an individual or body of persons to introduce new primary rules for the conduct of the life of the group, or of some class within it and to eliminate old rules. It is in terms of such a rule that the ideas of legislative enactment and repeal are to be understood. Such rules of change may be very simple or very complex. The pow-

ers conferred may be unrestricted or limited in many ways. The rules may define in more or less rigid terms the procedure to be followed in legislation. There will be a very close connection between the rules of change and rules of recognition. Usually some official certificate or official copy will be taken as a sufficient proof of due enactment. If there is a social structure so simple that the only source of law is legislation, the rule of recognition will simply specify enactment as the unique mark or criterion of validity of the rules.

(3) The defect of inefficiency will be remedied by secondary rules empowering individuals to make authoritative determination of the question whether, on a particular occasion, a primary rule has been broken or not. Those are called *"rules of adjudication"*. Besides identifying the individuals who are to adjudicate, those rules will also define the procedure to be followed. Like other secondary rules, these are on a different level from the primary rules. Though reinforced by further rules imposing duties on judges to adjudicate, they do not impose duties but confer judicial powers and a special status on judicial declarations about the breach of obligations. These rules define a group of important legal concepts of judge or court, jurisdiction and judgment. Rules of adjudication have intimate connection with other secondary rules. The rule which confers jurisdiction will also be a rule of recognition, identifying the primary rules through the judgments of the courts and those judgments will become a source of law.[11]

In a few legal systems, judicial powers are confined to the authoritative determination of the fact of violation of the primary rules. Most systems have seen the advantages of further centralisation of social pressure and partially prohibited the use of physical punishments or violent self-help by private individuals. They have supplemented the primary rules of obligation by further secondary rules by which penalties for violation have been limited and exclusive power has been given to the judges to direct the application of penalties by other officials. *If we consider the structure which results from the combination of primary rules of obligation with the secondary rules of recognition, change and adjudication, we have the heart of a legal system.*

The Legal System.—The legal system of Hart is explained by Lord Lloyd in this manner. In place of Austin's monolithic model, Hart suggests a dual system consisting of two types of rules which he describes as primary and secondary rules. Primary rules lay down standards of behaviour and are rules of obligation which impose duties. Secondary rules are ancillary to and concern the primary rules in various ways. They specify the ways in which primary rules may be ascertained,

[11] *The Concept of Law*, pp. 89-95.

introduced, eliminated or varied and the mode in which their violation may be conclusively determined. Secondary rules are mainly procedural and remedial and include not only the rules governing sanctions but also go far beyond them. They extend to the rules of judicial procedure and evidence and the rules governing the procedure for new legislation. It is conceivable that a society might have a legal system consisting solely of primary rules but as a society develops and becomes more complex, the need for secondary rules will inevitably become manifest and those will grow in complexity with the further development of society. The view of Hart is that a society which is legally so undeveloped as to have no secondary rules but only primary rules of obligation, would not really possess a legal system at all but a mere set of rules. The view of Hart is that it is the union of primary and secondary rules which constitutes the core of a legal system. It is only in this condition that we may speak of officials. It is in the relationship of citizens and officials to primary and secondary rules that Prof. Hart finds his criteria for the existence of a legal system.

"Internal Aspect" of Law.—Hart refers to the "internal aspect" or "inner point of view" that human beings take towards the rules of a legal system. According to him, law depends not only on the external social pressures which are brought to bear on human beings to prevent them from deviating from the rules but also on the inner point of view that human beings take towards a rule imposing an obligation. In a society which has only primary rules, it is necessary for citizens not only generally to obey the primary rules but also consciously to view such rules as common standards of behaviour whose violations were to be criticised. In such a primitive society, an internal point of view on the part of the members of the society is necessary for the society to be held together in terms of obligation.

For a legal system to exist, there must be general obedience by citizens to the primary rules of obligation but it is not necessary for them to possess "an internal point of view". In such a case, the importance of the internal point of view relates to the officials of the system and not to citizens. Those officials must not merely obey the secondary rules but must take an inner view of those rules. This is a necessary condition for the existence of a legal system. Official compliance with secondary rules must involve both a conscious acceptance of those rules as standards of official behaviour and a conscious desire to comply with those standards. Whether this appropriate state of mind exists or not is a question of fact. Hart concedes that there will be a number of borderline cases such as governments in exile or countries subject to military occupation, but he insists that to establish the existence of a

legal system in the full sense, the two types of rules and the view taken of the secondary rules by the officials are essential ingredients.[12]

Criticism.—The view of Lord Lloyd is that Hart's description of a developed legal system in terms of a union of primary and secondary rules is undoubtedly of value as a tool of analysis of much that has puzzled both the jurists and the political theorists, but one may wonder whether too much is not being claimed for the new view of some of the old problems. Prof. Hart himself seems to recognise that his legal system is not necessarily as comprehensive as he appears to indicate since he suggests that there are other elements in a legal system, and in particular the "open texture" of legal rules as well as the relationship of law to morality and justice. Lord Lloyd asks the question whether it is possible to reduce all the rules of the legal system to rules which impose duties and to rules which confer powers. This is an oversimplification of a point. It can be said that many of the so-called rules of recognition do not so much confer power but specify criteria which are to be applied in particular cases, such as the rules of procedure and evidence. It is doubtful whether all the so-called secondary rules can properly be treated as a unified class. There seems little in common between a rule governing the formal validity of a will and a rule governing the traditional limitations of a legislature. Prof. Hart himself concedes that a "full detailed taxonomy of the varieties of law still remains to be accomplished".[13]

Prof. Ronald Dworkin has criticised Hart for representing law as a system of rules and for suggesting that, at certain points, the judges use their discretion and play a legislative role. The view of Dworkin is that a conception of law as a system of rules fails to take account of what he calls "principles". He also maintains that judges do not have discretion as even in hard cases, there is only one "right answer". The contention of Dworkin is that principles are to be distinguished from rules in a number of ways. Principles such as the standard that no man may profit by his own wrong, differ from rules "in the character of the direction they give". While rules are applicable in an all or nothing fashion, principles state "a reason that argues in one direction but do not necessitate a particular decision... . All that is meant when we say that a particular principle is a principle of our law, is that the principle is one which officials must take into account, if it is relevant as a consideration inclining in one direction or another". Principles have a dimension of weight or importance which rules do not have.

[12] *Introduction to Jurispurdence*, pp. 189-91.

[13] *Ibid*, pp. 192-3.

Dworkin further contends that the positivist models of judicial process like that of Hart cannot accommodate principles and that makes them fall back on discretion. "We can no longer speak of the judge being bound by standards, but must speak rather of what standards he characteristically uses." This casts doubt on the positivist contention that law must be identified by some ultimate test of validity such as the rule of recognition. Though Hart accepts permissive as well as mandatory sources of law, it is hardly surprising that the use which judges make of principles cannot be explained by this rule of recognition. That rule gives us the capacity to identify a law and principles are standards which are to be considered as inclining in one direction or another. There is no reason why an ultimate test of validity should not be formulated by which rules and principles could be identified. "In the absence of binding statute and governing precedent, courts must take into account principles to be found in legislation and the decisions of courts".

Eckhoff contends that what is binding and what forms a part of a legal system are really two different questions. A legal system contains standards or "guidelines" which provide the judges with reasons or arguments which may or should be taken into account where the decision is to depend upon weighing of reason. Such guidelines are of various kinds, *e.g.*, the maxims of equity, the concept of reasonableness, principles of the type that "no man may profit from his own wrong", canons of statutory interpretation, public policy and the principles governing the application of precedent.

Regarding Hart's view of the inner aspect of law, the view of Lord Lloyd is that it is difficult to avoid the feeling that here also there is some oversimplification. It is really nor possible to identify the precise viewpoint which necessarily animates officials towards the secondary rules of recognition. Officials are human beings like others and are influenced by all the many conflicting and mixed motives which move humanity. It seems excessive to qualify the existence of a legal system on such a comparatively tenuous criterion as the exact mental attitude of officials towards their own legal system.

The attempt to reduce legal systems to nothing more than a congeries of rules, linked to society in which they operate solely by the fact that the primary rules are habitually obeyed and the secondary rules are recognised by the officials, seems to ignore certain of the sociological foundations of the legal systems without which the concept of law itself may be incapable of being fully grasped. One feature of a legal system which appears to be missing from Hart's analysis is the concept of an institution. The view of Llewellyn is that one of the most impor-

tant features of a legal system is "the way the law-jobs" get done. It is not just the rules which reveal this but the institutional framework within which those rules operate. A legal system contains not only rules but also a mass of institutions such as the legal profession, a set of law courts, a judicial hierarchy, various types of law-making bodies, administrative officials divided between different ministries and so forth and the structure of the legal rules comprising the system.

Hart's view of the continuity of law cannot be explained purely in terms of a habit of obedience. It is doubtful whether his attempt to explain this purely in terms of the acceptance of a rule of recognition by officials is sufficient. Max Weber, the German legal sociologist, points out that authority in human society may take one of three forms, *viz.*, charismatic, traditional or legal. The word "charismatic" is used to refer to that peculiar form of personal ascendancy which individuals may acquire in a particular society and which confers an indisputable aura of legitimacy over all their acts. Such charisma may be associated with the founder of a dynasty, but after his death the question arises whether his legitimate authority will pass to his descendants who may not have any charismatic quality. If such legitimate authority is inherited, the original charisma may become "institutionalised" and so embodied in permanent institutions to be formed largely by traditional usages. A further stage may develop into "legal domination". The legitimate domination becomes impersonal and legalistic. The institutional character of authority largely displaces the personal one. In a modern democratic State an institutionalised legislature, administration and judiciary operate impersonally under the legal order to which is attached a monopoly of the legitimate use of force.

The view of Lord Lloyd is that this institutional view of the continuity of law provides a more objective criterion for the continuance or persistence of law in a State governed by legal domination than any attempt to scrutinise the particular psychological motivation of officials who operate the system. It is not practicable to qualify in purely general terms the exact type of motivation which is to be associated with the attitudes of officialdom.[14]

The view of Prof. Dias is that the system of a private club can exist only within and presupposes a legal system but Hart does not appear to give an adequate criterion for distinguishing between them. The difference lies in the nature of the institutions of which the theory of Hart takes no account. A club is an institution and so is law and legal system. It is at the institutional level that the distinction has to be found.

[14] *Ibid*, pp. 193-7.

Prof. Dias further says that the distinction between a legal and a pre-legal state of affairs is not at all clear. If a rule of recognition is not essential to the validity of primary rules in social systems that have not advanced, what precisely is the criterion? The view of Hart is that in these societies "we must wait and see whether a rule gets accepted as a rule or not" but Dias does not accept this view. He points to the difficulty of finding the rule of recognition *de novo*.[15]

According to Hart, the rule of recongnition is a secondary rule, but the view of Prof. Dias is that it looks more like the acceptance of a special kind of rule than a power. Moreover, there are some rules of recognition which are not powers such as those which indicate the criteria to be applied, *e.g.*, the rules of procedure. It is also suggested by Raz that the rule of recognition is not a power but a duty addressed to officials.[16]

Hart's concept is based on the distinction between rules creating duties and rules creating powers as a legal system is constituted by their union, but the view of Dias is that it is questionable whether such a sharp distinction can be drawn. The same rule can create a power plus a duty to exercise it, or a power plus a duty not to exercise it. Prof. Fuller gives the example of a situation where the same rule may confer power and duty, or power or duty according to the circumstances.[17]

According to Dias, Hart's avowed positivism in relation to his concept of law is open to criticism. Hart says that the acceptance of a rule of recognition rests on social facts, but he does not concern himself with the reasons why, or the circumstances in which, it comes to be accepted. Social and moral considerations may set limits on a rule of recognition at the time of acceptance.[18]

According to Prof. Dias, there appears to be a greater separation between Hart's concept of law and his positivism than he ever alleges between law and morality. For the limited purpose of identifying laws, his concept seeks to accomplish more than is necessary, For the purpose of portraying law in a continuum, it does not go far enough.[19]

[15] *Jurisprudence*, p. 482.
[16] *Ibid*, pp. 482-3.
[17] *Ibid*, pp. 483-4.
[18] *Ibid*, p. 485.
[19] *Ibid*, p. 486.

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Chapter Twenty Three

Pure Theory of Law

IN THE WORDS of Prof. Dias, the pure theory of law of Hans Kelsen (1881-1973) represents a development in two different directions. It marks the most refined development to date of analytical positivism. It also marks a reaction against the welter of different approaches that characterised the opening of the 20th century. This does not mean that Kelsen reverted to ideology. As a matter of fact, he sought to expel ideologies of every description and present a picture of law, austere in its abstraction and severe in logic.[1]

Kelsen Started his theory from certain premises. According to him, a theory of law must deal with law as it is actually laid down and not as it ought to be. In this, he agreed with Austin and insistence on this point got him the title of "positivist". A theory of law must be distinguished from the law itself. Law consists of a mass of heterogeneous rules and the function of a theory of law is to organise them into a single, ordered pattern. Kelsen evolved his theory out of a profound study of the legal material actually available. What he did was to proffer it as a way of regarding the entire legal order and to demonstrate the pattern and shape into which it falls.

According to Kelsen, a theory of law should be uniform. It should be applicable to all times and in all places. Kelsen advocated general jurisprudence. He arrived at generalisations which hold good over a very wide area.

Kelsen writes that a theory of law must be free from ethics, politics, sociology, history etc. In other words, it must be pure. If a theory is to be general, it has to be shorn of all variable factors. It is true that Kelsen did not deny the value of ethics, politics, history, sociology etc. but his view was that a theory of law must keep clear of those considerations.

[1] *Jurisprudence*, p. 488.

The aim of a theory of law is to reduce chaos and multiplicity to unity. Legal theory is a science and not volition. It is knowledge of what the law is and not of what the law ought to be. Law is a normative and not a natural science. As a theory of norms, legal theory is not concerned with the effectiveness of legal norms. A theory of law is formal, a theory of the way of ordering, changing contents in a specific way. The relation of legal theory to a particular system of positive law is that of possible to actual law.

To Kelsen, Knowledge of law is a knowledge of "norms". A norm is a proposition in hypothetical form: "If *X* happens, then *Y* should happen". The science of law consists of the examination of the nature and organisation of normative propositions. It includes all norms created in the process of applying some general norm to a specific action. According to Kelsen, a dynamic system is one in which fresh norms are constantly being created on the authority of an original, or basic norm which is named by him Grundnorm. A static system is one which is at rest and the basic norm determines the content of those derived from it in addition to imparting validity to them.

Kelsen drew a distinction between propositions of law and those of science. Prepositions of science deal with what necessarily happens while propositions of law deal with what ought to happen. If *A* commits theft, the proposition of law is that he must be punished according to law of the country. Even if a person is not punished for committing an offence, that does not disprove the proposition. The proposition remains the same that if a person commits an offence, law demands that he must be punished. The legal propositions deal with what ought to be. To quote Kelsen: "The principle according to which natural science describes its object is casualty, the principle according to which the science of law describes its object is normativity."

According to Kelsen, the distinction between legal "oughts" and the other "oughts" is that the former is backed by force. To this extent, the view of Kelsen and Austin agree, but they differ in the elaboration of the idea. The view of Austin is that law is a command backed by a sanction. However, Kelson rejects the idea of command as it introduces a psychological element into a theory which should be "pure". All that Kelsen is prepared to concede is that law is a "depsychologised command, a command which does not imply a will in a psychological sense of the term". Another difference is that to Austin sanction is something outside the law which imparts validity to law. However, Kelsen maintains that the legal "ought" cannot be derived from any fact outside the law. The validity of any legal "ought" is derived from some other legal "ought". It was in this way that Kelsen was able to

analyse the Austinian sanction into rules of law. The view of Austin is that if a person commits a theft, he is to be punished according to law and that is the sanction. The view of Kelsen is that the operation of the sanction itself depends on other rules of law. One rule says that if a man commits a theft, he should be arrested. Another rule says that after arrest, he should be brought for trial. These rules regulate his trial. Another rule says that if he is found guilty by jury, the judge should sentence him. Still another rule lays down that the sentence should be executed by certain officials. Thus, sanction itself dissolves into rules of law and the distinction between law and sanction disappears.

The Basic Norm

The view of Kelsen is that in every legal system, no matter with what propositions of law we start, an hierarchy of "oughts" is traceable to some initial or fundamental "ought" from which all others emanate. This is called by him *Grundnorm* or the basic or fundamental norm. This norm may not be the same in every legal system, but it is always there. It is not necessary that there should be one fundamental law. Every rule of law derives its efficacy from some other rule standing behind it, but the *Grundnorm* has no rule behind it. The *Grundnorm* is the initial hypothesis upon which the whole system rests. We cannot account for the validity or the existence of the *Grundnorm* by pointing to another rule of law. The *Grundnorm* is the justification for the rest of the legal system. We cannot utilise the legal system or any part of it to justify the *Grundnorm*. A *Grundnorm* is said to be accepted when it has secured for itself a minimum of effectiveness. That happens when a certain number of persons are willing to abide by it. There must not be a total disregard of the *Grundnorm*, but there need not be universal adherence to it. All that is necessary is that it should command a minimum of support. When a *Grundnorm* ceases to derive a minimum of support, it ceases to be the basis of the legal order and it is replaced by some other *Grundnorm* which obtains the support of the people. Such a change in the state of affairs amounts to a revolution.

Kelsen does not give any criterion by which the minimum of effectiveness is to be measured. It is contended that in whatever way the effectiveness is measured, Kelsen's theory ceases to be "pure". The effectiveness of the *Grundnorm* depends upon sociological factors which are excluded by Kelsen himself.

The *Grundnorm* is the starting point for the philosophy of Kelsen. The rest of the legal system is considered as broadening down in gradations from it and becoming progressively more and more detailed and specific. The entire process is one of gradual concentration of the basic norm and the focussing of the law to specific situations. It is a

dynamic process. The application of a higher norm involves the creation of new lower norms. The application of the general norm by the judge to a particular situation involves a creative element insofar as the judge, by his decision, creates a specific norm addressed to one or other of the parties. The final stage is the carrying out of the compulsive act. In the application of the general norm, the judge may be left with a large amount of discretion or he may consciously have to choose between alternative interpretations which the norm permits. The application of a general norm may depend upon the act of the parties who may themselves come to some agreement.

Implications of Pure Theory

Certain conclusions were drawn by Kelsen. There is no distinction between public and private law. That is due to the fact that all law emanates from the same *Grundnorm*. Both public and private laws are a part and parcel of a single process of concretisation.

Another conclusion is that the legal system is an ordering of human behaviour. The idea of duty is the essence of law. That is evident in the "ought" of every norm. The idea of a right is not essential. It is said to occur "if the putting into effect of the consequence of the disregard of legal rule is made dependent upon the will of the person who has an interest in the sanction of the law being applied". The idea of right is merely a by-product of law. The idea of individual rights is not the foundation of criminal law today. Formerly, the machinery of law was set in motion by the injured person, but now the same is set in motion by the State. It is true that the idea of right is still the basis of the law of property, but it is possible that the same may be dispensed with in the future. The idea of "personality" is simply a step in the process of concretisation. By a "person" is meant a totality of rights and duties. Kelsen rejects the distinction between natural persons and juristic persons. Natural persons are biological entities and are outside the province of legal theory. The State is a system of human behaviour and an order of social compulsion. "La is also a normative ordering of human behaviour backed by force". Thus, the State and law are identical. It is not correct to say that law is the will of the State as both the State and law are identical. The State as person is simply the personification of law. According to Kelsen, legal dualism is nothing but a reflection of and substitute for theology with which it has substantial identity. To quote Kelsen: "When we have grasped, however, the unity of State and law, when we have seen that the law, the positive law (not justice), is precisely that compulsive order which is the State, we shall have acquired a realistic non-personificative, non-anthropomorphous view, which will demonstrate clearly the impossibility of justifying the State

by the law, just as it is impossible to justify the law by the law, unless that term be used now in its positive sense, now in the sense of right law, justice. The attempt to justify law by law is vain, since every State is necessarily a legal State. Law, says positivism, is nothing but an order of human compulsion. The State is neither more nor less than the law, an object of the normative, juristic knowledge in its ideal aspect, that is, as a system of ideas, the subject-matter of social psychology or sociology in its material aspect, that is, as a motivated and motivating physical act (force)."

As the State is nothing but a legal construction, there is no demarcation between physical and juristic persons. As law is a system of normative relations and uses personification merely as a technical device to constitute points of unification of legal norms, the distinction between natural and juristic persons is irrelevant. All legal personality is artificial and deduces its validity from superior norm. According to Kelsen, the concept of person is merely a step in the process of concretisation and nothing else.

Once the hierarchic character of law is grasped, the distinction between law-making or legislation on one hand and execution or application of law on the other, has not the absolute character which the traditionalists attribute to it. The majority of the legal acts are at once legislative and judicial acts. With every such act, a norm of superior degree is put into execution and a norm of inferior degree set up. For example, the first form of the Constitution which is a law-making act of the highest degree, is the execution of the basic norm. Legislation which is the making of general norms, is the execution of the Constitution. Judicial decision and the administrative act by which individual norms are set up, are the execution of statute and the compulsive act is execution of the administrative order and the judicial decision. According to Kelsen, there is no difference between legislative, executive and judicial processes as they are all norm-creating agencies. For Kelsen, the distinction between substantive and procedural law is relative, procedure assuming greater significance. It is the organ and the process of concretisation that constitute the legal system.

The distinction between questions of law and fact becomes relative. The "facts" are a part of the condition contained in the "if *X*" part of the formula. "If *X*, then Y ought to happen". The application of a norm concretises every part of it. The finding of fact by a judge is not necessarily what actually happened but what he regards as having happened for the purpose of applying the particular norm.

The legal order is a normative structure which so operates as to culminate in the application of sanctions for certain forms of human

behaviour. The idea of duty is of its essence. Kelsen made no specific allowance for powers. Liberty, in his view, "is an extra-legal phenomenon". It is the jural opposite of duty. Kelsen's stand reflects a wider issue between an "open" and a "close" concept of law. Liberty and duty are two sides of the same coin. Kelsen's theory is an open concept of law. Liberty may result from the fact that judges and legislators have not yet pronounced on the matter. It may result from a deliberate decision not to interfere. It may result from a deliberate abolition of a pre-existing duty. Liberty in the first case lies outside law. Claim is only a by-product of law. Modern criminal law has for the most part discarded the ancient ideas of law being set in motion by the injured person. It is now being enforced directly by officials. The idea of individual claims is no longer the foundation of criminal law although it is still the basis of the law of property and contract etc.

The most significant feature of Kelsen's doctrine is that the State is viewed as a system of human behaviour and an order of compulsion. Law is a normative ordering of human behaviour backed by force which "makes the use of force a monopoly of the community". A State is constituted by territory, independent government, population and ability to enter into relations with other States and each of these requirements is legally determined. The conclusion is that State and law are identical but this does not mean that every legal order is automatically a State, *e.g.*, orders in primitive communities. Only relatively centralised legal orders are States.

Kelsen also applied his theory to the system commonly known as "international law". His earliest work did not touch on this field. It was only after Verdross had started to adapt his approach to international law that Kelsen himself took interest in it. However, his theory, when applied to international law, revealed many limitations. The Pure Theory demands that a *Grundnorm* be discovered. However, if there are conflicting possibilities, his theory provides no guidance in choosing between them. What Kelsen said was that the *Grundnorm* should command a minimum of support. In the international sphere, there are two possible *Grundnormen*, the supremacy of each municipal system or the supremacy of international law. Every national legal order cannot recognise any norm superior to its own *Grundnorm*. The English legal order does not apply in France and the vice versa is also correct. However, the English legal order recognises the validity of the French legal order in France. If the only *Grundnorm* known to English Law is its own, it follows that the English legal order regards the validity of the French legal order in France as being in some way a delegated normative order from the English *Grundnorm*.

The view of Prof. Dias is that the theory of pure law requires a *Grundnorm* for international order but that is not clear. It may be the principle of *pacta sunt sevanda*, or "coercion of State against State ought to be exercised under the conditions and in the manner that conforms with the custom constituted by the actual behaviour of the States". Prof. Dias is of the view that with reference to international law, the *Grundnorm* is a pure supposition unlike that of municipal law. Assuming that a monist legal theory has to be offered to account for the present state of international society, one way of explaining the assertion of equality by States would be by hypothesising a norm superior to that of each national order from which equality might be said to derive. One can ask the question whether there is any *Grundnorm* which commands the necessary minimum of effectiveness demanded by Kelsen's theory. There is no answer to it. It is not easy to reconcile a monistic theory of the primacy of international law over municipal law in the face of the conflict between the two.

Kelsen says that sanctions of international law are war and reprisal, but nobody would agree to the proposition that war and reprisal are a sanction in the legal sense. International law has not completely outlawed war as an instrument of national policy. International organisations also have no tribunal to decide with a binding effect whether war is under a sanction or not. A number of wars have taken place not as sanction but in utter violation of international law. International law does not fit in the "pure theory of law" and it should be taken as a limitation of the theory. His arguments are based on natural law principles.

Criticism

Lord Lloyd observes that Kelsen's analysis of the formal structure of law as a hierarchical system of norms and his emphasis on the dynamic character of this process are certainly illuminating and avoid some of the perplexities of the Austinian system. A legal system is not an abstract collection of bloodless categories but a living fabric in a constant state of movement. Kelsen himself recognises that to call the function of a judge as political does not deprive it of its legal quality. There is a great danger that if we take the watch to pieces and analyse each part separately, we shall never attain the overall picture which shows how it works.

The view of Lord Lloyd is that the basic norm is a very troublesome feature of Kelsen's system. We are not clear what sort of norm this really is, nor what it does, nor where we can find it. A part of the problem lies in Kelsen's own obliqueness. In his latest formulation, Kelsen tells us that it is not "positive", which means that it is not a norm of

positive law created by a real act of will of a legal organ but is presupposed in juristic thinking. He maintains that it is "meta-legal". It is legal "if by this term we understand anything which has legally relevant function". As it enables anyone to interpret a command, permission or authorisation as an objectively valid legal norm, its legal functions are not in doubt, but we are told that it is purely formal, is a juristic value judgment and has a hypothetical character. It forms the keystone of the whole legal arch. It is at the top of the pyramid of norms of each legal order. Prof. Goodhart was doubtful of the value of an analysis which did not explain the existence of the basic norm on which the whole legal system was founded. The view of Lord Lloyd is that in the majority of cases, certainly where stable democracies such as the United Kingdom are in issue, the basic norm is needless reduplication. The conclusion of Lord Lloyd is that Kelsen is only useful to the legal scientists and not the judge and only in a residual case. The kingpin of the whole structure rests upon the shaky foundation of a loose concept. It may be asked whether in this respect Kelsen really furthers our understanding of the legal order.

Austin relegated international law to the realm of positive morality, contrary to the universally accepted usage of modern States and lawyers. Kelsen seeks to overcome this difficulty by demonstrating how State laws can be dovetailed into the international order of norms so as to form one monistic system. The contention of Hart is that there is no reason at all why we should insist that international law as a legal system must have a basic norm. Such an assertion really depends upon a false analogy with municipal law. International law may simply consist of a set of separate primary rules of obligation which are not united in this particular will. Insistence upon the need for a basic norm, within the context of such a system as modern international law, often leads to a rather empty repetition of the mere fact that society does observe certain standards as obligatory. Hart refers to the rather empty rhetorical form of the so-called basic norm of international law to the effect that "States should behave as they have customarily behaved". This seems to be no more than an involved way of asserting the fact that there is a set of rules which are accepted by States as binding rules.

About international law, Prof. Stone writes: "It is difficult to see what the pure theory of law can contribute to a system which it assumes to be law, but which it derives from a basic norm which it cannot find."

The quality of purity claimed by Kelsen for all norms dependent on the basic norm has been the subject of attack for a long period. Julius Stone writes: "Since that basic norm itself is obviously most impure, the very purity of the subsequent operations must reproduce that original

impurity in the inferior norm; we are invited to forget the illegitimacy of the ancestor in admiration of the pure blue-blood of the progeny. Yet the genes are at work down to the lowliest progeny."[2]

Lauterpacht, a follower of Kelsen, has questioned if the theory of hierarchy of legal norms does not imply a recognition of natural law principles, despite Kelsen's blatant warning of natural law ideology. Many natural law theories do not establish absolute ideals but affirm the principle of higher norm superior to positive law. As mankind becomes legally organised, natural law rules become positive norms of a higher order. The difference between Kelsen's theory and those of modern law theories disappears. Hagerstrom appears to have unfolded the natural law philosophy concealed in Kelsen's assumption of the unconditional authority of the supreme power.

About Kelsen's theory of pure law, C.K. Allen writes: "Without the examination not only of law but of the implications of law as a function of society, the 'pure' essence distilled by the jurist is a colourless, tasteless and un-nutritious fluid which soon evaporates. But because we apply a critical as well as an analytical method to the juridical order we do not on that account forget that the existing positive law still remains positive law, and must be administered as such. Kelsen, in his just anxiety to repudiate the muddled jurisprudence which has often confounded law with ethics, does less than justice to some of the theories which he attacks."[3]

The conclusion of many writers is that, notwithstanding the logical coherence of Kelsen's structure, he provided no guidance in the actual application of the law. He showed how, in the process of concretising the general norms, it may be necessary to make a choice either in decision or interpretation. The judge or the official concerned is already aware of that necessity and his need is for some guidance as to how he should make his choice. The answer is not to be found in the teachings of Kelsen. The view of Prof. Dias is that one should not level this point as a criticism against Kelsen who was most anxious to insist that he was not concerned with that aspect. To criticise him for not having done which he expressly disclaimed is not fair. He set out to achieve a limited objective of presenting a formal picture of the legal structure and what he set out to do, he actually did. To say that he should have aspired to do more is not a criticism of what he has done, but a criticism of his limited objective. (P. 510).

A legal order is not merely the sum total of laws, but includes doctrines, principles and standards, all of which are accepted as "legal"

[2] *The Province and Function of Law*, p. 105.

[3] *Law in the Making*, p. 57.

and which operate by influencing the application of rules. Their validity is not traceable to the *Grundnorm* of the order. The question is whether those are to be lumped with values and banished from a theory of law even though they are admitted to be legal. Dias says that it is a grave weakness in the theory of Kelsen.

The view of Lord Lloyd is the relation of Kelsen's logic structure to the actual facts of particular States is not clear. Kelsen aimed at presenting necessary form divorced from content, but nevertheless his whole argument is clearly aimed at a structure which can be shown to fit the facts. Kelsen seems to imply the universality of the system, but much of it is not relevant to anything but an advanced political state. It is very hard to grasp exactly to what extent Kelsen admits the relevance of fact at all. He nowhere examines specifically the link between fact and law.

Kelsen tells us that even if racketeers enforce a "tax" on night clubs by coercion, that is not a legal norm. The reason given by him is that a legal norm can be created by persons who are considered legal authorities under the Constitution. To be a legal norm, it must form a part of the official hierarchy of norms. Lord Lloyd asks the question whether it applies to bodies like trade associations which possess rules and sanctions which the legal hierarchy neither prohibits nor enforces. Those are presumably not legal norms, yet they not only resemble them closely but may be said to be lawful so far as the State does not prohibit them.

Prof. Laski once remarked that "granted its postulates, I believe the pure theory to be unanswerable, but ... its substance is an exercise in logic not in life". (*Grammar of Politics*). The view of Lord Lloyd is that to some extent, there is truth in this dictum, but it certainly does less than justice to the impressive display of learning, searching analysis and striking insights ranging over the whole vast field of law covered by Kelsen's General Theory of Law and the State and the Pure Theory of Law.[4]

Contribution of Kelsen

About the contribution of Kelsen to legal theory, Prof. Friedmann writes: "The merciless way in which Kelsen has uncovered the political ideology hidden in the theories which profess to state objective truth has had a very wholesome effect on the whole field of legal theory. Hardly a branch of it, whether natural law theories, theories of international law, of corporate personality, of public and private law has remained untouched. Even the bitterest opponents of the Vienna

[4] *Introduction to Jurisprudence*, p. 304.

school have conceded that it has forced legal theory to reconsider its position".[5] Again, "the chief merit of Kelsen's pure theory would seem to lie in the elucidation of the relation between the initial hypothesis (which might less abstractly be described as the basic political faith of the community) and the totality of legal relations derived from it. The conception of the law as a dynamic process of concretisation is a very fruitful one, and it gives a logical justification to conclusion which Gray and American Realists on the one hand and continental exponents of the modern sociological theories on the other hand have reached from very different angles".[6]

The view of Lord Lloyd is that it was the aim of Kelsen, in his Pure Theory of Law, to describe the essential structure of a legal system and thereby present what he argued was the only way legal science could describe the formal logic of such a system in an intelligible way. Despite the many valid criticisms of his theory, the basic theses underlying it, that legal rules are to be equated with norms and that a legal system is a collection of such norms interpreted as a non-contradictory field of meaning, appear to be basically sound. The most complete exposition of this approach has been given by Dr. J. W. Harris.[7]

The view of Paton is that Kelsen has made an original and striking contribution to jurisprudence. In 1832, Austin cleared away much deadwood and a century later, Kelsen, with critical acumen, exposed many fallacies. He further points out that "his impartiality in the conflicting social conflicts of today has led conservatives to call him a dangerous radical and the revolutionaries to dub him a reactionary".[8]

Kelsen made an original, striking and valuable contribution to jurisprudence. He considerably influenced the modern legal thought. His views regarding right, personality, State and public and private law have received great support from various quarters. His theories suggest the necessity of the revaluation of the above concepts. With his scientific precision and mighty and unparalleled legal subtlety, Kelsen analysed the legal order in a very convincing way.

The great contribution of Kelsen was that he demonstrated the unity of the legal system as well as the mechanics of its operation and that was really a valuable contribution.

[5] *Legal Theory*, p. 237.
[6] *Ibid*, p. 239.
[7] *Introduction to Jurisprudence*, p. 304.
[8] *A Textbook of Jurisprudence*, p. 13.

Kelsen and Bentham

Prof. Dias has compared the views of Kelsen and Bentham. He points out that although Kelsen has been hailed as having provided the outstanding theory of the twentieth century from a positivist point of view, it has to be remembered that Bentham's *Of Laws in General* was published after Kelsen had made his contribution. There are some differences between the two. Kelsen avoided the weakness of Bentham's imperative basis, but in some other respects, the analysis of Bentham is preferable to that of Kelsen. The most important of them is Kelsen's method of individuating a norm which minimises the regulatory function of law. Bentham took full account of the regulatory function and stated that one law prescribes behaviour and another prescribes a sanction. They are two different act-situations. Bentham kept them apart but Kelsen rolled them into one. Kelsen was also driven to the conclusion that laws are ultimately permissions to apply sanctions and "ought" includes "may" and "can" which Bentham had avoided. Bentham gave sanction a much broader meaning than Kelsen. However, both of them perceived that constitutional law is a part of every law as ordinarily formulated. The linkage for Bentham was that such laws are compounded of other laws enacted at other times and in other contexts. Kelsen traced the linkage to the *Grundnorm*. (P. 511).

SUGGESTED READINGS

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Chapter Twenty Four

Historical School of Law

IN THE WORDS of Salmond: "That branch of legal philosophy which is termed historical jurisprudence is the general portion of legal history. It bears the same relation to legal history at large as analytical jurisprudence bears to the systematic exposition of the legal system. It deals, in the first place, with the general principles governing the origin and development of law, and with the influences that affect the law. It deals, in the second place, with the origin and development of those legal conceptions and principles which are so essential in their nature as to deserve a place in the philosophy of law—the same conceptions and principles, that is to say, which are dealt with in another manner and from another point of view by analytical jurisprudence. Historical jurisprudence is the history of the first principles and conceptions of legal system."[1]

About the nature and functions of the Historical School of Law, G. G. Lee writes: "Historical Jurisprudence deals with law as it appears in its various forms at its several stages of development. It holds fast the thread which binds together the modern and the primitive conception of law, and seeks to trace through all the tangled mazes which separate the two, the line of connection between them. It takes up custom as enforced by the community and traces its development. It seeks to discover the first emergence of those legal conceptions which have become a part of the world's common store of law, to show the conditions that gave rise to them, to trace their spread and development, and to point out those conditions and influences which modified them in the varying course of their existence. But historical jurisprudence is not a mere branch of anthropology, except insofar as any science which deals with human life may be regarded as a department of these studies. It does not attempt to set forth all law and customs which may

[1] *Jurisprudence*, 11th edition, pp. 5-6.

be found in ancient and modern savage tribes, as well as in civilized nations of every clime. If such were its object, it would not be a science, nor would it be possible for it to be complete. It would be a mere collection of laws and customs having no necessary order or system. Its attainment or lack of perfection would depend upon the degree of completeness with which its collection had been made."

Prof. Dias points out that the Historical School arose more or less contemporaneously with the Analytical School at the beginning of the 19th century and should be regarded as a manifestation of the reaction against natural law theories. It did not emerge as something novel in European thought as it had been germinating long before then. The reaction against natural law theories provided a rich bed in which the seeds of historical scholarship took root and spread.

The Historical School was a reaction against *a priori* notion of natural philosophy. Natural law thinkers had thought of law which was always the same (unchangeable). They failed to see that law had grown and developed from the past. The natural law philosophers believed in ideal principles of law as revealed by reason and did not look to history, traditions, customs, habits and religions as true basis of law.

Historical approach to law derived its inspiration from the study of Roman law on the continent. Post Glossators commentators of Roman law attempted to relate Roman law to the problems of law. That accelerated the growth of many branches of law. The study of Roman law in this form was received in Germany in the 15th and 16th centuries. That contained the historical approach in its embryonic form.

Montesquieu

According to Sir Henry Maine, Montesquieu was the first jurist who followed the historical method. He made researches into the institutions and laws of various societies and came to the conclusion that "laws are the creation of climate, local situations, accident or imposture". He did not go further and did not lay down any philosophy underlying the relation between law and society, but his suggestion that law should answer the needs of the time and place was a step in the direction of new thinking.

Hugo

The view of Hugo was that law, like language and manners of the people, forms itself and develops as suited to the circumstances. The essence of law is its acceptance, regulation and observance by the people.

Burke

Burke laughed at an attempt to deduce a constitution from abstract principles and pointed out that it could only be the result of a gradual and organic growth.

Herder

Herder rejected the universalising tendencies of the French philosophers and stressed the unique character of every historical period, civilisation and nation. According to him, every nation possesses its own individual character and qualities and none is intrinsically superior to others. Any attempt to bridge these innumerable manifestations under the general command of a universal natural law based on reason was inimical to the free development of each national spirit (Volksgeist) and could result in imposing a crippling uniformity. To Herder is principally due a new approach to history as the life of a community, rather than concerned with the exploits of kings, statesmen, generals and other so-called great men. The originality and influence of Herder was due to his belief that different cultures and societies develop their own values rooted in their own history, traditions and institutions and the quality of human life and its scope for self-expression resided in the plurality of values, each society being left free to develop in its own way.

The issue which caused the expounding of the thesis of Historical School was the problem of the codification of law in Germany which had arisen due to the political changes brought about by the Napoleonic Wars. During the period of French domination, the *Code Napoleon* remained in force in many parts of Germany. After the restoration of the national government, the problem of codification drew the attention of the people. Many jurists were in favour of promulgating a new code incorporating the best points from foreign laws as neither the old code nor the customary laws were adequate enough to fulfil and suit the present needs and conditions of the people of Germany. The main supporter of codification was Thibaut (1771-1840), Heidelberg Professor who was inspired by the *Code Napoleon* and impressed by the movement for German national unification. He advocated the rationalisation and unification of the innumerable laws then ruling in different parts of Germany. He was opposed by Savigny who had knowledge of the defects of contemporary codes. His view was that a code was not a suitable instrument for the development of German law at that time. His contention was that law is a product of the lives of the people and a manifestation of their spirit. The source of law is the general consciousness of the people and cannot be borrowed from outside.

F. K. Von Savigny (1779-1861)

Savigny was born in Frankfurt in 1779. His interest in historical studies was kindled at the Univerities of Marburg and Gottingen and greatly encouraged when he came into contact with the great Neibuhr (historian) at the University of Berlin. He also acquired a lasting veneration for Roman law. In 1803 appeared his first major work, *The Law of Possession,* in which he traced the process by which the original Roman doctrines of possession had developed into the doctrines and actions prevailing in contemporary Europe. He studied the development of Roman law in medieval Europe and published between 1815 and 1831 in six volumes *The History of Roman Law in the Middle Ages.* In *The System of Modern Law,* he analysed Roman and local laws. He was not opposed to reform but maintained that reforms which went against the stream of a nation's continuity were doomed. The essential prerequisite to the reform of German law was a deep knowledge of its history. Historical research was necessary for understanding and reform of the existing law. His warning was that legislators should look before they leap into reform.

Savigny is regarded as the founder of the Historical School on the continent. According to him, law is "a product of times the germ of which like the germ of State, exists in the nature of men as being made for society and which develops from this germ various forms, according to the environing influences which play upon it" The essence of his thesis is to be found in his work of 1814 entitled *On The Vocation of Our Time for Legislation and Jurisprudence,* To quote him: "In the earliest times to which authentic history extends, the law will be found to have already attained a fixed character, peculiar to the people, like their language, manners and constitution. Nay, these-phenomena have no separate existence; they are but the peculiar faculties and tendencies of an individual people, inseparably united in nature and only wearing the semblance of distinct attributes to our view. That which binds them into one whole is the common conviction of the people, the kindred consciousness of an inward necessity, excluding all notion of an accidental and arbitrary origin." For law, as for language, there is no moment of absolute cessation; it is subject to the same movement and development as every other popular tendency; and this very development remains under the same law of inward necessity, as in its earliest stages. *Law grows with the growth and strengthens with the strength of the people, and finally dies away as the nation loses its nationality.* Law is henceforth more artificial and complex, since it has a twofold life; as part of the aggregate existence of the community which it does not cease to be and secondly as a distinct branch of knowledge in the hands of the jurists.

> "The sum, therefore, of this theory is that all law is originally formed in the manner in which, in ordinary but not quite correct language, customary law is said to have been formed, *i.e.*, that it is first developed by custom and popular faith, next by jurisprudence—everywhere, therefore, by internal silently operating powers, not by the arbitrary will of a law-giver."

According to Savigny, the nature of any particular system of law was a reflection of the spirit of the people who evolved it. This was later characterised as the *Volksgeist* by Puchta, a disciple of Savigny. All law is the manifestation of this common consciousness. The broad principles of the system are to be found in the spirit of the people and they manifest themselves in customary rules. Law is a matter of unconscious growth. Any law-making should follow the course of historical development. Custom not only precedes legislation but is superior to it. Legislation should always conform to the popular consciousness. Law is not of universal application. It varies with peoples and ages. The *Volksgeist* cannot be criticised for being what it is. It is the standard by which laws, which are the conscious product of the will as distinct from popular conviction, are to be judged. An individual jurist may misapprehend the popular conviction.

Savigny rejected natural law. To him, a legal system was a part of the culture of a people. Law was not the result of an arbitrary act of a legislator but developed as a response to the impersonal powers to be found in the people's national spirit. This *Volksgeist* was "a unique, ultimate and often mystical reality" which was linked to the biological heritage of a people.

Law is the product of the *Volksgeist*, the national spirit or the genius of the people. It is not of universal application as each people develops its own legal habits according to its environment. Law is found and not made as it develops as a matter of unconscious and organic growth. Custom is the main source of law and it precedes legislation.

Savigny successfully used his *Volksgeist* theory to reject the French Code and the move to codify law in Germany. The result was that German law remained, until 1900, Roman law adapted to German conditions with the injection of certain local ideas. Savigny was not only a theorist but as a historian, he set himself the task of studying the course of the development of Roman law from ancient times till its existing state as the foundation of civil law of contemporary Europe. That led him to the hypothesis that all law originated in custom and only much later was created by juristic activity.

Savigny sees a nation and its state as organism which is born, matures and declines and dies. Law is a vital part of that organism. Law

grows with the growth and strengthens with the strength of the people. It dies away as the nation loses its nationality. Nations and their law go through three developmental stages. At the outset of a nation, there is a "political" element of law. There are principles of law which are not found in legislation but are a part of "national convictions". These principles are "implicitly present in formal symbolic transactions which command the high respect of the population, form a grammar of the legal system of a young nation and constitute one of the system's major characteristics". In its middle period, law retains this "political" element to which is added the "technical" element of juristic skill. This period is the apogee of a people's legal culture and is the time when codification is feasible. It is desirable so that the legal perfection of the period can be preserved for posterity. With the decline of a nation, law no longer has popular support and becomes the property of a clique of experts. In due course of time, even their skill decays. Ultimately, there is the loss of national identity.

Criticism: Prof. Dias has made certain observations on Savigny's idea of *Volksgeist*. According to him, there is undoubtedly an element of truth in it as there is a stream of continuity and tradition, but the difficulty lies in fixing it with precision. Savigny made too much of it and he drew sweeping inferences from modest premises. The whole idea of the *Volksgeist* certainly suited the mood of the German people. It was a time of the growing sense of nationhood and a desire for unification. The idea of *Volksgeist* is acceptable in a limited way but Savigny extrapolated it into a sweeping universal. He treated it as a discoverable thing but even in a small group, people hold different views on different issues and "the" spirit does not exist. It appears that the historical sense of Savigny deserted him as he adopted an *a priori* preconception.

Dias further points out that the transplanting of Roman law in the alien climate of Europe nearly a thousand years later is inconsistent with Savigny's idea of a *Volksgeist*. It postulates some quality in law other than popular consciousness. His effort to establish that the reception of Roman law had taken place so long ago as to make the Germanic *Volksgeist* an expression of it, was unconvincing. A survey of the contemporary scene shows that the German Civil Code has been adopted in Japan, the Swiss Code has been adopted in Turkey and the French Code in Egypt without violence to popular susceptibilities. The French Code was introduced into Holland during the Napoleonic era after displacing the Roman-Dutch common law and the Dutch law was never reintroduced again. The Dutch took Roman-Dutch law to their colonies in the Cape of Good Hope and Ceylon. The reception of

English Law in many parts of the world is evidence of supra-national adaptability and resilience.

Prof. Dias further points out that the *Volksgeist* theory minimises the influence which individuals, sometimes of alien race, have exercised upon legal development. There are always men who by their superior genius are able to give legal development new direction. Ehrlich points out that customs are norms of conduct and juristic laws are norms for decision. They are always the creation of jurists.

Prof. Dias further points out that the influence of the *Volksgeist* is at the most a very limited one. The national character of law manifests itself more strongly in some branches than in others. This is more so in family law than in commercial or criminal law. The general reception of Roman law in Europe did not include Roman family law. The introduction of an alien legal system into India and Turkey affected least of all the indigenous family laws. Perhaps only family law and succession to some extent are really "personal" to a nation. In Turkey, new marriage laws contrary to the existing traditional laws, were introduced as a matter of deliberate policy. That shows that in modern times the function of the *Volksgeist* is that of modifying and adapting rather than creating. Even this function manifests itself only in the very "personal" branches of law. There is less evidence today of the creative force of the *Volksgeist* and none of its influence over the whole body of the law. The view of Dias is that today the *Volksgeist* is of little or no relevance as many existing laws have come from "outside". Savigny's theory of *Volksgeist* makes sense only to a limited extent in a continuum.

Dias further points out that law is sometimes used deliberately to change the existing ideas. It may also be used to further inter-State cooperation in many spheres. Bismarck, the Chancellor of Germany, introduced the Railway and Factories Accident Law, 1871 well before the social conditions were ripe and this he did with a view to weaken the socialist movement in Germany and not as demanded by the *Volksgeist*.

Dais maintains that many institutions have originated not in a *Volksgeist* but in the convenience of a ruling oligarchy. This applied to the institution of slavery. Many customs owe their origin to the force of imitation and not to any innate conviction of their righteousness. Some rules of customary law may not reflect the spirit of the whole population. That applies to legal customs. Some customs like the Law Merchant were cosmopolitan in origin and were not the creatures of any particular nation or race. It is not clear at all who the *Volk* are whose *Geist* is said to determine the law.

Important rules of law sometimes develop as a result of conscious and violent struggle between conflicting interests within the nation and not as a result of imperceptible growth. That applies to the law relating to trade unions and industry.

The opponents of Savigny pointed out that if his theory of *Volksgeist* was taken literally, that would have thwarted the unification of Germany permanently by emphasising the individuality of each separate State of Germany and by fostering a parochial sense of nationalism.

Another inconsistency in the work of Savigny was that while he was the protagonist of the *Volksgeist* doctrine, he worked for the acceptance of a purified Roman law as the law of Germany. At that time, there was in Germany a vigorous school of jurists who strongly advocated the revival of ancient Germanic laws and customs as the foundation of a modernised German legal system. Savigny's opposition to the expulsion of Roman law and its adoption as the law of Germany was inconsistent with his idea of the *Volksgeist* of the German nation. One explanation lies in his personal devotion to Roman law. In order to account for the original reception of an alien system, Savigny argued that at that date the Germanic law was not capable of expressing the *Volksgeist*. However, this fails to show how an alien system was better able to express the *Volksgeist* than the indigenous law of Germany. Far from the law being a reflection of the *Volksgeist*, the *Volksgeist* had been shaped by the law.

Savigny's veneration for Roman law led him to advance doubtful propositions. There was a strict adherence to the doctrine of privity of contract in Roman law and the law of negotiable instruments was opposed to it. Hence Savigny condemned negotiable instruments as "logically impossible". This was so although the feelings of the commercially minded people were strongly in favour of negotiable instruments. The weakness of Savigny's approach was due to the fact that he venerated past institutions without regard to their suitability to the present.

The view of Savigny was that the *Volksgeist* formulates only the rudimentary principles of a legal system and could not provide all the necessary details. Therefore, as society becomes more complex, a special body of persons is called into being whose business it is to give technical, detailed expression to the *Volksgeist* in the various matters with which law has to deal. That body of persons consisted of the lawyers whose task was to reflect accurately the prevailing *Geist*. Dias points out that this is nothing but a fictitious assumption to cover up an obvious weakness in its thesis which was not related to reality in any way.

There was another weakness of the thesis of Savigny. According to him, the only persons who talked of the *Volksgeist* were academic jurists who were not versed in the practical problems of legal administration. The *Volksgeist* resolved itself into what these academic jurists imagined it to be. Dias says that it is possible that there is a very limited sense in which the contention of Savigny is acceptable. The *Volksgeist* manifests itself, if at all, only in a few branches of law and even then by way of modifying and adapting any innovations that may be introduced. It may be presumed that in those spheres of law it would be helpful if the legislators took account of tradition while framing new laws.

The view of Savigny was that legislation was subordinate to custom and at all times it should conform to the *Volksgeist*. Savigny did not oppose legislation or reform by codification at some appropriate time in the future but his attitude was generally that of pessimism. He opposed the project of immediate codification on many grounds. He pointed out the defects in the contemporary codes which contained adventitious, subsidiary and often unsuitable rules of Roman law, even while they rejected the main principles. Another argument was that there were matters on which there was no *Volksgeist* and a codification might introduce new and unadaptable provisions and that would add to the prevailing difficulties. Another objection was that codification could never cater exhaustively for all problems that were likely to arise in the future and hence codification was not a suitable instrument for the development of law. Another objection was that an imperfect code would create the worst possible difficulties by perpetuating the follies underlying it. Lawyers were in a better position to create a perfect code and could cope with the emerging problems. Another objection was that codification would highlight the loopholes and weaknesses of the law and thereby encourage evasion. The view of Savigny was that codification should be preceded by "an organic, progressive, scientific study of the law" by which he meant a historical study of law and reform was to wait for the results of the work of the historians. Reformers were not to plunge into legislation without taking into consideration the past and the present. Savigny was overcautious in this matter. According to C. K. Allen, the doctrines of Savigny had the tendency "to hang traditions like fetters upon the hands of reformative enterprise".[2]

The view of Lord Lloyd is that the advocates of the *Volksgeist* seem to assume that every "people" is in some way an identifiable entity, with a corporate conviction or will of its own. This approach later crystallised in Gierke's theory of the "real"' personality of corporate bodies. We are required to accept that collective groups possess some kind of

[2] *Law in the Making*, p. 17.

metaphysical personality distinct from the members comprised in the group. It is also implied that the notion of a "people" is a perfectly definite one that can be applied to specific groups which possess this mysterious collective consciousness. This appears to postulate a degree of unity of thought and action in particular nations, races or the inhabitants of political units of which there is little evidence in human history. It seems to ignore the role and effects of conquest by war such as the position of enslaved and servile populations and the control of nations and empires by ruling minorities who may impose new patterns on their subjects. This theory also does not deal with the introduction of alien law and custom by peaceful penetration such as the adoption of a Western Code in Japan. Savigny was very much impressed by the remarkable phenomenon of the so-called "Reception of Roman Law" into Germany in the 16th century which he regarded as "the greatest and most remarkable action of a common customary law in the beginning of the modern age". His explanation that it was adapted into the popular consciousness of the German people is hardly convincing and is really little more than a legal fiction. The strangest of paradoxes in Savigny's thought was that "to probe the spirit of the German *Volk*, Savigny went straight back to Roman law".[3]

Lord Lloyd also points out that Savigny underrated the significance of legislation for modern society. Sir Henry Maine rightly pointed out that a progressive society has to keep adapting the law to fresh social and economic conditions and legislation has proved in modern times the essential means of attaining that end. With that objective, the legislative authority, while paying heed, if not lip service, to public opinion, has to provide a lead in many directions where the public is confused or undecided and even in some cases where there may be widespread hostility to a proposed reform. If the legislator had been obliged to wait upon the public mind to give clear guidance as to each future step, the history of law reform during the last century would have been deprived of most of its achievements.[4]

Criticising the views of Savigny, Paton points out that some customs are not based on an instinctive sense of right in the community as a whole but on the interests of a strong minority. That applies to the institution of slavery. While some rules may develop unconsciously, others are the result of conscious effort. That applies to the law relating to trade unions.

Paton contends that the creative work of the judge and jurist was treated rather too lightly by Savigny. The life of a people may supply

[3] *Introduction to Jurisprudence*, pp. 633-34.

[4] *Ibid*, pp. 635-36.

the rough material, but the judge must hew the block and make precise the form of law. It is dangerous to regard the judge as a mere passive representative of the *Volksgeist*. Both in equity and in common law, we can still trace the influence of the masters of the past.

Paton also points out that imitation plays a greater part than the Historical School would admit. Much Roman law was consciously borrowed. The countries of the East have borrowed from the codes of Germany and France.

Pound points out that Savigny encouraged "juristic pessimism" which means that legislation must accord with the instinctive sense of right or it was doomed to failure. Conscious law reform was to be discouraged.

Another criticism against Savigny is that he was "so occupied with the source of the law that he almost forgot the stream". He overlooked the forces and factors which influence and determine the growth of law.

Certain invariable traits like the mode of evolution and development noticeable in all the systems of the world, are left unexplained in the theory of Savigny. Legal developments in various countries show some uniformity to which Savigny paid no heed. Prof. Korkunove writes: "It does not determine the connection between what is national and what is universal".

Though Savigny has been described as Darwinian before Darwin, the sociologist before sociologists, his last published work appeared only six years before the publication of Darwin's *On the Origin of Species* in 1859. He was still living in 1861 when Darwin's book detonated upon the world. As at the beginning of his life-work a new era opened up in legal history, likewise at its end a new era of similar tendency started in natural history. Whether philosophically or scientifically considered, evolution was no new doctrine, but the principle of natural selection formulated as a law influenced every department of thought. Darwinian biology has enormously influenced every branch of study since it was first propounded and jurisprudence which had already set upon the path of a new historical method, could not escape that influence. Even the mind uninstructed in the principles of natural science could not fail to be impressed, almost awed by the fact of the extraordinary interdependence of all known forms of life. Darwinian theory gave a new scientific backing to the upholders of the Historical School. In the terminology of Pound, it substituted a biological for a mechanical interpretation of the facts of life. It reinforced the central theory of that school that the law of any nation is dependent on its history and hence there could be no proper understanding of the law of a nation

without a study of its history. Savigny also maintained that the law of a nation was as dependent on its history as its language or religion. A code ought to reflect the history of a nation's law and embody those national, characteristics which were the product of its history.

The view that law is closely connected with the people and closely evolves contained the germs of future sociological theories. After Savigny, Ehrlich stressed the importance of the study of "living law" which, according to him, is different from the dry skeleton of law, that is, law in its formal shape. Savigny sounded a note of warning against hasty legislation and the introduction of revolutionary ideas and aspirations based on abstract principles.

Savigny was himself trained under the powerful influence of the philosophical school. His own definition of law is remarkable for its resemblance to the Kantian definition. According to Savigny, law is "the rule whereby the invisible borderline is fixed within which the being and activity of each individual obtains a secure and free space". His divergence from the philosophical school is with reference to the true nature of law and the source from which it proceeds. While the philosophical school conceived of law as originating in man's reason and having its authority in its ethical or moral basis, Savigny saw law as a spontaneous evolution of the national spirit, having its justification in the social pressure behind it or in historic necessity.

Savigny's contribution.—Savigny is considered by many to be the greatest jurist of the 19th century. The view of Ihering was that with the appearance of Savigny's earliest work in 1803, modern jurisprudence was born. His theory came as a powerful reaction against the 18th century rationalism and principles of natural law. The view of Allen is the "the historical movement in jurisprudence may be called the revolt of fact against fancy". The view that the source of law is the instinctive sense of right possessed by the community negatived the conception of the unitary sovereign whose command is law. He made "the juristic world perpetually conscious of the iceberg quality of law, with its present pinnacle concealing and denying the hidden nine-tenths of its past". The only defect with the theory was that it exaggerated that aspect.

The view of Prof. Dias is that on the whole, the work of Savigny was a salutary corrective to the methods of the natural lawyers. He did undoubtedly grasp a valuable truth about the nature of law, but ruined it by overemphasis.[5]

The great truth in the theory of *Volksgeist* is that a nation's legal system is greatly influenced by the culture and character of the people.

[5] *Jurisprudence*, p. 526.

Savigny was mainly occupied with how law becomes and whether it tends, or what the conscious effort can make it to tend and his thesis still substantially holds good.

It was after Savigny that the value of the historical method was fully understood. Apart from his followers in his own country and on the continent, his method was followed in England by Sir Henry Maine, Vinogradoff, Lord Bryce and many others who made studies of the various legal systems on historical lines and traced the coarse of evolution of law in various societies. Pollock, Maitland, Holdsworth and Holmes pointed out in their works that the course of the development of Common Law was determined by social and political conditions of a particular period.

It was unfortunate that the doctrine of *Volksgeist* was used by the National Socialists in Germany for an entirely different purpose. To them, nation meant a racial group and it was the function of law to keep it pure and protected. This view led to the passing of brutal laws against the Jews during the regime of Hitler in Germany.

Puchta (1798-1856)

Puchta was not only a disciple of Savigny but also a great jurist of the Historical School. His work is considered to be more valuable as he made improvements upon the theory of Savigny by making it more logical. He started from the evolution of human beings and traced the development of law since that period. According to him, the idea of law came due to the conflict of interests between the individual will and general will. That automatically forms the state which delimits the sphere of the individual and develops into a tangible and workable system.

The contribution of Puchta lies in the fact that he gave twofold aspects of human will and origin of the State. It is true that there are some points of distinction between Puchta and Savigny, but mostly they are similar. On some points, Puchta improved upon the views of Savigny and made them more logical.

Gierke (1841-1921)

Gierke was profoundly interested in the "association". He denied that the recognition of an association as a person depends on the State. The reality of social control lies in the way in which autonomous groups within society organise themselves. He gave his classification of associations. He contrasted groups organised on a territorial basis, such as the State, with those organised on a family or extraterritorial basis. He contrasted associations founded on the idea of fraternal collaboration with those founded on the idea of domination. In his view, legal and

social history is most accurately portrayed as a perpetual struggle. In feudal society men were organised in tight hierarchical groups based on the holding of property. This system was opposed by groups such as the guild and the city. With the Renaissance and Reformation, the State appeared as the significant factor in social organisation.

Gierke represented a collectivist rather than an individualist approach. To that extent, his work touched on that of the sociologists, but his interpretation of this development on historical lines entitles him to be ranked among the historians. His doctrines of mass psychology anticipated modern enquiries. He failed to reconcile the independence of autonomous bodies with the supreme power of the State. He devised a pyramidal structure which made society consist of a hierarchy of corporate bodies culminating in the State.

Sir Henry Maine (1822-1888)

Sir Henry Maine was born in 1822. He was educated at the Pembroke College, Cambridge where he attained great distinction as a classical scholar. In the words of Sir Frederick Pollock, Maine "entered the university an unknown young man, he left it marked as among the most brilliant scholars of his time". (*Oxford Essays*, p. 149) After taking his degree, he started studying law and became law tutor of the Trinity Hall in 1845 and Regius Professor of Civil Law in 1847. He was a great success in both. He was called to the Bar in 1850 and in 1852, he became the First Reader on Roman Law at the Inns of Court. From 1862 to 1869, he was the Legal Member of the Viceroy's Executive Council in India and the Vice-Chancellor of the Calcutta University. During that period, he acquired knowledge of Indian law and institutions. On his return to England in 1869, he was appointed the first Corpus Professor of Jurisprudence at Oxford. In 1877, he became Master of Trinity Hall and in 1877 Whewell Professor of International Law at Cambridge. He died in 1888.

Maine began his work with a mass of material already published on the history and development of Roman law by the German Historical School. He could also rely on the information and experience gained during his stay in India. He was learned in English, Roman and Hindu law and had some knowledge of Celtic systems. He inaugurated the comparative approach to the study of law and of history in particular which was destined to play an important part in the years to come.

Maine published his first work *Ancient Law* in 1861. This was practically a manifesto to his lifework in which he stated his broadest general doctrines. His other important works were *Village Communities* published in 1871, *Early History of Institutions* published in 1875 and *Dissertations on Early Law and Custom* published in 1883.

Maine made a comparative study of the various legal systems and traced the course of their evolution. According to him, law develops through four stages. In the beginning, law was made by the commands of the ruler believed to be acting under divine inspiration, as the inspiration by the Themistes in the poems of Homer. In the second stage, commands crystallise into customary law. In the third stage, the knowledge and administration of customs goes into the hands of a minority, usually of a religious nature, due to the weakening of the power of original law-makers. The fourth stage was the time of codes. Law is promulgated in the form of a code, as Solan's Attic Code or the Twelve Tables in Rome.

Societies which do not progress beyond the fourth stage which closes the era of spontaneous legal development are called static societies by Maine. Their legal condition remains characterised by what Maine states as *status*. That is a fixed legal condition dominated by family dependence. The member of a family household, whether wife, child or slave, remains chained to the family nexus dominated by the *pater familias*.

Fiction.—Maine refers to a few progressive societies of history, for instance, the Romans and the nations of modern Europe which progressed beyond the phase of codes and status relationships because they are steered by a conscious desire to improve and develop. The three agents of legal development that are brought to bear upon the primitive codes are in historical sequence *legal fiction, equity* and *legislation*. By the use of legal fictions, law is altered in accordance with changing needs while it is pretended that it remains what it was. To quote Maine: "I employ the expression 'legal fiction' to signify any assumption which conceals or affects to conceal, the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified. It is not difficult to understand why fictions in all their forms are particularly congenial to the infancy of society. They satisfy the desire for improvement, which is not quite wanting, at the same time that they do not offend the superstitious disrelish for change which is always present. At a particular stage of social progress they are invaluable expedients for overcoming the rigidity of law, and, indeed, without one of them, the fiction of adoption which permits the family tie to be artificially created, it is difficult to understand how society would ever have escaped from its swaddling-clothes, and taken its first steps toward civilization."

While speaking about the special significance of the fiction of adoption, Maine had in mind that it was the family expanded by that fic-

tion which furnished the model and in some cases the actual historical forerunner of the larger political units of later societies.

The legal fiction of Maine has often been considered as a sort of clumsy, self-deluding kind of legislation. There are overtones of this view in Maine himself. However, this view of fiction is unjust and distorts the role it has played in the development of law. There is always the problem of legislative reform to fit changes into the established law so that they will not clash with those parts of the legal system which remain unaltered. With all carefully compiled statute books and elaborate indexes, modern legislation often fails to foresee points of rub between their innovations and the body of law against which they are projected. Modern legislature, with broad competence in law-making, is in a position to correct those oversights with curative legislation. No such recourse was available in primitive societies. Its legislation was piecemeal as there did not exist broad competence in law-making. In such a situation, the legal reformer acts wisely when he gives to his innovations a form that will facilitate their absorption into the existing law. Legal fiction probably owes its origin not so much to a superstitious disrelish for change or some instinct for self-deceit, as to an impulse towards harmony and system. By giving to the new law the verbal form of the old, it facilitated its absorption into the existing corpus of rules.

Equity is then used to modify the law "as a set of principles invested with higher sacredness than those of original law". The final stage was that of *legislation*. People came to recognise the simple fact that law can be brought into existence by explicit declarations of intention incorporated in the words of legal enactments. The transition to the phase of legislation was not as simple as the account of Maine makes it appear. In the Anglo-American countries, though the possibility of an explicit law-making power has been recognised for centuries, fiction still finds occasional employment as a device for extending or modifying existing law. The body of law in question is that it is obligatory for a landowner to keep his premises in a safe condition. In this connection, an understandable distinction had developed between trespassers and invitees. The landowner has no obligation towards trespassers to keep his property in a safe condition for them and if a trespasser falls into an uncovered hole, the landowner is not responsible for it. A different rule applies to those persons who come to the premises with the express or implied permission of the landowner, e.g., the guest, the postman and the delivery boy. If an invitee is injured on account of the carelessness of the landowner in keeping his property, he has to pay damages.

The corollary to these agencies of legal development in progressive societies is the "gradual dissolution of family dependency and the growth of individual obligation in its place. The individual is steadily substituted for the family as the unit of which civil laws take account". The Roman family, the slave, the caste, the medieval guilds, the feudal nexus, are typical instances of status. Gradually the rigid position into which the individual is born and which he cannot leave, gives way to more freedom of will and movement. The authority of the *pater familias* loosens and the slave can be emancipated. As a slave, he can contract to the extent of the *peculium*, the medieval serf can become free by escaping into the town and eventually slavery and serfdom are abolished. They give way to a free contractual relation between employer and employee. Progressive societies are characterised by increasing legal freedom of movement of the individual. The development is summed up by Maine in the following celebrated phrase: "If then we employ status to signify the personal conditions only and avoid applying the term to said conditions as are the immediate or remote result of agreement, we may say that *the movement of the progressive societies has hitherto been a movement from status to contract.*"[6]

Sir Henry Maine did not reject the rationalising development of law. He accepted it as inevitable for the small number of progressive societies. His theory of the development of personal legal conditions from status to contract was a theoretical corollary to the freedom of labour and contract demanded by an expanding industrial and capitalist society. The effect of Maine's thesis was liberalising in spite of his personal tendency towards a conservative interpretation of history.

The views of Maine commended themselves to a society which had witnessed the American Civil War which resulted in the triumph of the industrial, commercial and progress-minded North over the agricultural, feudal and status-minded South. This means the victory of the free contract which is necessary for an industrialised and capitalist society which requires mobility of capital and labour. It meant the eclipse of status conceptions which tie the worker to an estate by an unchangeable slave status.

In Europe also, many peasant communities still living in a feudal condition were transformed into an industrial proletariat whose members entered into "free" contractual agreement with an employer. As long as the liberal and expansive phase of capitalism lasted, legal developments proved the thesis of Maine, e.g., abolition of legal prohibitions against labour and trade unions, the development of the legal position of married women in English Law, from the original merger in

[6] *Ancient Law*, p. 170.

husband's personality to complete legal independence achieved by the Act of 1935 or the gradual abolition of Catholic and Jewish civic disabilities. Within the sphere of Western civilization and up to the spread of modern totalitarian systems, the differences in personal status and capacities were abolished. Wives emerged from the legal tutelage of husbands. Servants ceased to be bound to the master and household. In most modern laws, infants acquired a considerable degree of commercial and professional freedom. However, Maine's thesis was always subject to important limitations. It was never meant to apply to personal conditions imposed otherwise than by natural incapacity. It did not apply to the development of feudalism which moved from contract to status rather than the other way round.

Dr. Friedmann refers to the dialectic development by which the very removal of fetters imposed by the status conditions of freedom of contract created the conditions for a new status. The counter-move came with the association of workers in trade unions which gradually succeeded in creating a more equal bargaining position and a growing amount of State interference in unmitigated freedom of contract, designed to remedy some of the worst consequences of the freedom of contract. Both movements developed in all countries affected by industrialisation. England took the lead in the development of trade unionism. The abolition of the Combination Acts accelerated development. In the field of protective social legislation, Bismarck took the lead by passing a series of Social Insurance Acts which were copied in England in 1911. Both of these developments were weak in the United States as the doctrine of freedom of contract was most firmly embedded there.

Social legislation leads to such "status fetters" on freedom of contract as Workmen's Compensation Acts, Minimum Wages Acts, Factory Acts, National Insurance Acts etc. The principle of social insurance which is based on compulsory contribution from employers and employees and thus limiting the freedom of fixing the terms of contract, has now led to the comprehensive British National Insurance Act, 1946 which covers the whole population.

The growth of trade unions and business associations leads to the replacement of individual bargaining by collective group agreements which curtail the freedom of the individual on both sides by penalising the outsider and compelling the member to submit to collective terms. The worker who joins the trade union and the industrialist who joins the cartel sacrifices his freedom to some extent. In return, the industrialist and the worker who adheres to a long-term collective agreement, gains security of price, production, employment or pension.

Another factor which has greatly modified the freedom of contract is the standardisation of contract terms which substitute, for freedom of bargaining, status-like conditions in the great majority of modern transport, insurance, mortgage or landlord and tenant contracts. Terms are largely fixed and the parties face each other as members of social classes and not individuals. In form, they bargain freely but in substance they do not. Another type of contract which differs from free contract between equal parties is the standard contract between government departments and private firms.

The rise of modern totalitarian government has produced a far-reaching return to a more direct status condition. Fascist labour legislation tied the workers to their jobs and created several classes of citizens, from a master class to a slave class. Even in non-Fascist countries, many limitations were imposed on the freedom of labour and contract during the World War II.

Dr. Friedmann points out that trends in the world are not uniform. It is an oversimplification to assert that "a progressive civilisation is marked by a movement from subjection to freedom", from "status to contract" and from "power to law" and "a retrogressive civilisation is characterised by the reverse process".

Sir Henry Maine himself never made such a sweeping statement and nearly a century of social upheavals have exposed the fallacy of this purely formal concept of freedom. Graveson sums up the present position in these words: "On the one hand the movement in domestic status is away form dependence on the head of the family, with its corollary of vicarious liability, towards full individual legal capacity; on the other, State interference in the terms and conditions of employment in industry has given rise to a new type of personal legal condition which bears many of the features of status."

The view of Prof. Dias is that an evaluation of the work of Maine must take into account the pioneer character of his comparative investigation. Since his time, anthropology has developed into a separate branch of learning. Modern research has corrected Maine's work at many points and departed from it at others. However, one should be charitable about his errors and marvel at his genius in accomplishing so much. As regards his view regarding development of society from status to contract, there was much to support it. In Roman law, there was the gradual amelioration of the condition of children, women and slaves, the freeing of adult women from tutelage and the acquisition of a limited contractual capacity by children and slaves. In English Law, the bonds of serfdom were relaxed and ultimately abolished. Employment came to be based on a contractual basis between master and

servant. In the time of Maine, legislation removed the disabilities of the Catholics, Jews, Dissenters and married women. Maine saw the triumph in the Civil War in America of North America, a community based on contract, over South America which was feudal and status-regulated. However, a return to status has been detected in modern times. The individual is no longer able to negotiate his own terms. We have standardised contracts and collective bargaining. The view of Dias is that these developments should not be held against Maine who was not purporting to prophesy and who expressly qualified his proposition by saying that the development had "hitherto" been a movement towards contract.

Prof. Dias further points out that modern anthropologists have many advantages which were not available to Maine. The conclusions of Maine about primitive law have been discredited or modified now. The idea that early development passed through the successive stages of personal judgments, oligarchic monopoly and code has been abandoned on the ground that it is too simple a picture of that period. Primitive societies were more complex than what was thought before. There have been several forms of such societies. It is now thought that there were seven grades of them. The degree of development of social institutions bears some correspondence with the degree of economic development. The conclusion is that primitive societies exhibited a wide range of institutions and there was nothing like a single pattern as supposed by Maine. There has also been a modification of the sequence suggested by Maine. Deliberate legislation is now seen to have been an early method of law-making with fiction and equity coming later on. The codes were chiefly collections of earlier legislation. Primitive law was not so rigid as was supposed by Maine. The people were bound to primitive law inflexibly. There was considerable latitude in the content of customary practices. It is generally agreed that even in primitive societies people controlled their destinies and were not blindly subservient to custom.[7]

It used to be accepted that law and religion were indistinguishable in primitive societies. However, the exact extent of their association is doubtful. Diamond criticises Maine most strongly for his assertion that they were indistinguishable. According to him, the association of law and religion is a comparatively later development. However, Maine is defended on this point by Hoevel.

The view of Dr. Friedmann is that Maine's theory, though careful in its generalisations, reflects the belief in progress through the emanci-

[7] *Jurisprudence*, pp. 534-36.

pation of the individual which reached its climax in the first-half of the 19th century.[8]

Critics point out that in totalitarian States, there has been a strong shift to status again. In those countries, no contract is allowed which is in any way not in consonance with the State plan or is harmful to society. According to Maine, societies have not remained progressive but have become retrogressive. The theory of Maine was true during his lifetime and was merely an echo of the industrial development and the formation of a capitalist class which demanded freedom of contract and labour. Another limitation of Maine's theory was that it was not meant "to apply to personal conditions imposed otherwise than by natural incapacity".

In one sense, Maine's theory still holds good. The trend of legislation in countries which are underdeveloped is still to remove personal disabilities which arise due to the membership of a class (status). The Hindu Marriage Act, the Hindu Succession Act etc. are examples of it. Likewise, labour laws and land laws passed during recent years have helped in the emancipation of workmen and peasants. The conclusion is that so long as capitalism has a stronghold, the theory of Maine holds good. When its forces start withering away, there is a contrary movement. In a totalitarian State, the freedom of contract is confined to the narrowest limits and the theory of Maine does not apply there.

Contribution of Maine.—The view of Dr. Friedmann is that the work of Maine stands out as the important and fruitful application of comparative legal research to a legal theory inspired by principles of historical evolution. His great contribution to legal theory lies in the combination of what is best in the theories of both. Montesquieu and Savigny, without the dangers involved in both. Maine's theory avoids the danger of an excessive disintegration of theoretical laws of legal evolution, inherent in Montesquieu's comparative and factual approach to the development of legal institutions. It is also free from the abstract and unreal romanticism which vitiates much of Savigny's theory about the evolution of law.[9]

Pospisil writes that Maine's contribution to jurisprudence lies not so much in his specific conclusions as in "the empirical, systematic and historical methods he employed to arrive at his conclusions and in his striving for generalizations firmly based on the empirical evidence at his disposal... . He blazed a scientific trail into the field of law, a field hitherto dominated by philosophizing and speculative thought".[10]

[8] *Legal Theory*, p. 170.

[9] *Legal Theory*, p. 164.

[10] *Anthropology of Law*, p. 150.

It has Introduction to Maine's *Ancient Law,* Sir Frederick Pollock writes: "We may toil the fields that the master left untouched, and one man will bring a better ox, yoke to the plough and another a horse, but it is master's plough still".

It is contended that none can impugn the originality of the methodology of Maine who did immense pioneer work on the growth of law and social institutions. Together with his remarkable pathfinding, Maine preserved a balance of approach which contrasts well with that of Savigny. It must be remembered that unlike Savigny, Maine did not allow his method of work to lead him into a fanciful theory of the nature of law. He did not seek to tell us what law is, but taught us many things of immense value about the way law grows up.

Maine presented a balanced view of the history of law. The other writers had put too much emphasis on the study of Roman law. The greatness of Maine lies in the fact that he added to Roman law the study of the legal systems of many other countries. His conclusions are based on a comparative study of the different systems of law and hence their value is greater than those studies which rely upon Roman law alone.

It is true that Maine recognised legislation as an important source of law, but while doing so he avoided the excesses of the Philosophical School of Germany. He used his knowledge of the history of law to understand what had been in the past and not to determine its future course. His greatness lies in the fact that he preached a belief in progress and that contained the germs of sociological approach. Men like Maitland, Vinogradoff and Lord Bryce were immensely influenced by his writings.

Maine gave a balanced view of history. Savigny had explained the relation between community and law but Maine went further and pointed out the link between the developments of both and purged out many of the exaggerations which Savigny had made.

Influence of Maine.—Many writers in England were influenced by the writings of Sir Henry Maine. Friedmann, Seeley and Sidg-wick made valuable studies in comparative politics. Dicey compared the English Constitution with other constitutions and also gave a historical survey of the legislation during the 19th century. His views are to be found in his *Law of the Constitution* (1885) and *Law and Public Opinion in England* (1905). Maitland applied the historical method to a study of the legal position of the groups within the State. Dr. Figgis traced the relation of the Church with the State and advocated the rights of ecclesiastical groups. His important works are *Churches in the Modern State, Divine Right of Kings* and *From Gerson to Grotius.* Lord Bryce travelled a

good deal and studied the political institutions in various countries and employed the historical and comparative methods in all studies. The names of some of his important works are *Modern Democracies*, *The American Commonwealth* and *Studies in History and Jurisprudence.*

From a comparative study of Roman and English legal evolution, Bryce drew a number of important conclusions. He considers as the law of best scientific quality "that which is produced slowly, gradually, tentatively, by the action of the legal profession". The high quality of the Roman system of private law is largely due to the existence of "an organ of government specially charged with the duty of watching, guiding and from time to time summing up in a concise form the results of the natural development of the law". The law more directly influenced by political changes is most successfully created "by the direct action of the sovereign power in the State, whether the monarch or the Legislative Assembly acting at the instance of the executive". The view of Dr. Friedmann is that the studies of Bryce serve as a corrective to Savigny's overemphasis on the law, influenced by the juristic profession, as compared with the "spontaneous and irregular" development of law due to economic and social phenomena.[11]

Estimate of Historical School

The one invaluable contribution which the Historical School has made to the problem of the boundaries of jurisprudence is that law cannot be understood without an appreciation of the social milieu in which it has developed. Historical jurisprudence is a movement for fact against fancy, a call for a return from myth to reality. In this sense it cannot be said to be a juristic school, independent of history, unless it furnishes a method of progress and evolution for interpreting and developing law. If law evolves, the Historical School must tell us how it evolves. If it is incapable of that or refuses to do that, it ceases to be a juristic school since it is powerless to furnish a creative method.

The view of Paton is that the historical method in jurisprudence should be supplemented by a critical approach based on a philosophy of law in order that a true perspective may be obtained. Evolution is not necessarily progress and one of the best aids to our own shortsightedness in dealing with the familiar common law is an acquaintance with many systems. This is well recognised by those who pursue the historical method today.

Saleilles gives his criticism of the Historical School of Law in these words: "The Historical School had opened the way; it remained as if glued to the spot, incapable of using the instrument of evolution and

[11] *Legal Theory*, p. 172.

practice which it had just proclaimed. The reason was that it had in advance clipped its wings and disarmed itself by declaring that it could not scientifically exert an influence on the development of the phenomena of law; it could merely wait, register and observe. It refused to become a method either of creative legislation or interpretation. The Historical School had abdicated... . To note after all is not to create. History in its application to the social sciences must become a creative force. The Historical School had stopped halfway".

Comparison of Historical and Analytical Schools

According to Dias and Hughes: "The distinction between analytical and historical jurisprudence is not one of kind, but of emphasis. They are both analytical in method, the distinction between them being that in the one case attention is fixed on concepts as they are today, while in the other case account is taken of a process over a period of time. Not only does it seem misleading to indicate this distinction by affixing the term analytical to one, but the distinction itself breaks down in the case of some concepts, notably ownership, where it is not possible to understand their nature at the present time without reference to their history[12]".

Historical School	*Analytical School*
1. Historical School concentrates its attention on the primitive legal institutions of society.	1. Analytical School confines itself to mature legal systems.
2. Law is found and not made. Law is self-existent.	2. Law is an arbitrary command of the sovereign. It is the deliberate product of legislation.
3. Law is antecedent to the State and exists even before a State comes into existence.	3. If there is no sovereign, there can be no law.
4. Law is independent of political authority and its enforcement. Law does not become law merely because of its enforcement by the sovereign.	4. The hallmark of law is its enforcement by the sovereign.
5. Law rests on the social pressure behind the rules of conduct which it enjoins.	5. Law rests upon the force of politically organised society.

[12] *Jurisprudence*, pp. 7-8.

6. Law is the rule by which the invisible borderline is fixed within which each individual obtains a secure and full space.	6. Law is the command of the sovereign.
7. Typical law is custom. "Human nature is not likely to undergo a radical change and, therefore, that to which we give the name of law always has been, still is and will forever continue to be custom." (Carter)	7. Typical law is a statute.
8. Custom is the formal source of law. It is transcendental law and other methods of legal evolution, e.g., precedent and legislation, derive their authority from custom. At any rate, custom derives its binding force from its own intrinsic vitality and not from judicial precedent or legislation purporting to follow or legalise it.	8. Custom is not law until its validity is established by a judicial decision or Act of the Legislature. It is only a source of law.
9. While interpreting a statute, judges should also take into consideration its history	9. While interpreting a statute, judges should confine themselves to a purely syllogistic method.

Distinction between Legal History and Historical Jurisprudence

Legal history is not synonymous with historical jurisprudence. Legal history sets forth the historical process by which a particular legal system has grown and taken its present shape. On the other hand, historical jurisprudence is the history not of the legal system but of the first principles and basic concepts of the legal system. It traces how the concepts of property and contract originated and developed. Legal history tells us how the law of property or contract was altered and developed from time to time. There is no doubt that legal history is the storehouse from which the historical jurist draws his conclusions. With the help of legal history, he can demonstrate how the fundamental notions lying at the bottom of the legal system have evolved and trace scientifically the history of the first principles of law.

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Chapter Twenty Five

The Philosophical School of Law

According to Salmond: "Philosophical jurisprudence is the common ground of moral and legal philosophy, of ethics and jurisprudence." The Philosophical School rivets its attention on the purpose of law and the justification for coercive regulation of human conduct by means of legal rules. Kant has shown that the chief purpose of law is the provision of a field of free activity for the individual without interference by his fellow men. Law is the means by which individual will is harmonised with the general will of the community. Law achieves this harmony by delimiting the sphere of permissible free activity of each individual. The individual will is moulded by ethics in the path of virtue so that it may freely acquiesce in and identify itself with the general will. Law works in the opposite direction. It moulds the general will so that it may accommodate itself to the free play of individual will and identify itself with it. Thus there is a tendency for ethics and law to overlap and ultimately to coincide in the highest stages of their development.

The Philosophical School concerns itself chiefly with the relation of law to certain ideals which law is meant to achieve. It investigates the purpose of law and the measure and manner in which that purpose is fulfilled. The philosophical jurist regards law neither as the arbitrary command of a ruler nor the creation of historical necessity. To him, law is the product of human reason and its purpose is to elevate and ennoble human personality.

The Philosophical School is interested primarily in the "development of the idea of justice as an ethical and moral phenomenon and its manifestation in the principles applied by the courts".

Jurisprudence and Ethics

As regards the relation between jurisprudence and ethics, the Philosophical School regards the perfection of human personality as the ultimate objective of law. The science of Ethics which deals with the principles and moral considerations affecting man's conduct and constituting his criterion of right and wrong, also sets for itself the goal of making man virtuous and perfect. As the ultimate objectives of jurisprudence and ethics are coincident, the philosophical jurists seek to differentiate between the subject-matter of the two sister sciences.

Kant made a clear distinction between law and ethics. To quote him: "Ethics concerns itself with the laws of free action insofar as we cannot be coerced to it, but the strict law concerns itself with free action insofar as we can be compelled to it." Ethics is the science of virtue and law belongs to the science of right. Ethics aims at the elevation of man's inner life while law seeks the regulation of his external conduct. Organised society should not exercise compulsion to make man virtuous. Compulsion should be confined to the regulation of man's external conduct. To quote Kant again: "Woe to the political legislator who aims in his Constitution to realise ethical purposes by force, to produce virtuous intuition by legal compulsion. For in this way he will not only effect the very opposite result, but will undermine and endanger his political Constitution as well."

The proximate object of jurisprudence is to secure liberty to the individual and its ultimate object is the same as that of ethics which is the attainment of human perfection. Liberty is an essential prerequisite to the perfection of human personality. In realising its proximate object, jurisprudence becomes a means towards the realisation of the ultimate object which is also the special object of ethics to achieve. It is in this way that philosophical jurisprudence becomes the meeting point and common ground of ethics and jurisprudence.

According to Salmond, a book of ethical jurisprudence may concern itself with all or any of the following matters: the concept of law, the relation between law and justice, the manner in which law fulfils its purpose of maintaining justice, the distinction between the sphere of justice as the subject-matter of law and other branches of right with which law is not concerned and which pertain to morals exclusively, and the ethical significance and validity of those legal concepts and principles which are so fundamental in their nature as to be the proper subject-matter of analytical jurisprudence. Salmond concludes that further than this "the proper scope of ethical jurisprudence does not extend. So far as any book goes beyond this general theory of justice in its relation to law, it passes over either into the sphere of moral phi-

losophy itself, or else into the sphere of that detailed criticism of the actual legal system, or that detailed construction of an ideal legal system, which pertains neither to jurisprudence nor to legal philosophy but to the science of legislation".

Philosophical jurisprudence is more ethical than law. Its theories mostly go beyond their proper scope. To quote Lord Bryce: "Some soar so high through the empyrean of metaphysics that it is hard to connect their speculations with any concrete system at all. Others flutter along so near the solid earth of positive law that we can see them perching on the stores and discover the view they take of questions with which the practical lawyer or legislature has to deal."

Exponents of Philosophical School

The chief exponents of the Philosophical School in England were Francis Bacon (1561-1626), Hobbes (1588-1671), Locke (1632-1704) and Blackstone, and on the Continent were Grotius (1583-1645), Kant (1724-1804), Hegel (1776-1831), Fichte (1762-1814), Kohler (1849-1919), Stammler (1856-1938), Del Vecchio and Lorimer. The historical jurists like Bruns (1816-1880), Gneist (1816-1895) and Windschild (1817-1892) also recognise the importance of the Philosophical School.

Grotius

Hugo Grotius, the celebrated founder of international law, is also regarded as the father of philosophical jurisprudence. In his book *The Law of War and Peace,* Grotius showed that a system of natural law may be derived from the social nature of man. He defined natural law as "the dictate of right reason which points out that an act, according as it is or is not in conformity with rational nature, has in it a quality of moral baseness or moral necessity". The view of Grotius was that the agreement of mankind concerning certain rules of conduct is an indication that those rules originated in right reason. Such general concordance eh demonstrated by referring to the utterances of poets and philosophers, the pronouncements of historians and men of letters and the teachings of the Roman law. In this way, he built up a system of natural law that should command universal respect by its own inherent moral worth.

The three great philosophers of Germany—Kant, Fichte and Hegel—devoted a considerable part of their philosophy to law. Although they differed in their systems and conclusions from one another, they shared some fundamental ideas. They all deduced their legal philosophy from certain fundamental principles which they discovered through an inquiry into the human mind. While studying the human mind, they started from the fundamental Aristotlean principle that

man is a rational free willing being distinct from nature. Man, as an animal, is a part of nature and thus subject to the physical laws of nature. As man is endowed with reason, he is distinct from nature and capable of dominating it.

Immanuel Kant (1724-1804)

Kant gave modern thinking a new basis which no subsequent philosophy could ignore. The "Copernican Turn" which he gave to philosophy was to replace the psychological and empirical method by the critical method, by an attempt to base the rational character of life and world not on the observation of facts and matter but on human consciousness itself. That was done by Kant by a systematic inquiry into the functions of human reason.

In his *Critique of Pure Reason*, Kant set himself the task of analysing the world as it appears to human consciousness. He drew a fundamental distinction between form and matter. Impressions of our senses are the matter of human experience which is brought into order and shape by human mind. Emotions become perceptions through the forms of space and time, perceptions become experience through the categories of understanding such as substance and causality, quality and quantity, the judgments of experience are linked with each other by general principles. Nature follows necessity but human mind is free because it can set itself purposes and have a free will.

Kant then inquires whether there are any general principles which can be laid down as a basis of man's volition and thus of all ethical action. Such basis cannot be gained from experience. It must be given *a priori*, but not logical, necessity. It can only be stated as a postulate for man, as a free and rational being. The freedom of man to act according to this postulate and the ethical postulate itself are necessary correlatives. No ethical postulate is possible without this freedom of self-determination and the ethical postulate is a necessary condition of freedom. The substance of this ethical postulate is the Categorical Imperative of Kant.

Kant's Categorical Imperative says: "Act in such a way that the maxim of your action could be made the maxim of a general action." This imperative is the basis of Kant's moral as well as legal philosophy. But the spheres of morality and law are clearly distinct. Morality is a matter of the internal motives of the individual. Legality is a matter of action in conformity with an external standard set by the law. Kant's legal philosophy is entirely a theory of what the law ought to be. His is the legal philosophy of a philosopher, not of a lawyer. From the Categorical Imperative, Kant deduces his definition of law in these words: "Law is the aggregate of the conditions under which the arbitrary will

of one individual may be combined with that of another under a general inclusive law of freedom."

It follows from the above that compulsion is essential to law and a right is characterised by the power to compel. Kant distinguished between legal duties and legal rights. He also distinguished between natural rights and acquired rights. He recognised one natural right of the freedom of man insofar as it can coexist with everyone else's freedom under a general law. Equality is implied in the principle of freedom. The right to property is considered by Kant as an expression of personality. Kant also discussed marriage through which an individual acquires a right over another. But the other person, by acquiring a similar right in return, recovers his personality.

Kant considered political power as conditioned by the need of rendering each man's right effective, while limiting at the same time through the legal right of others. Only the collective universal will armed with absolute power can give security to all. This transfer of power Kant based on the social contract which was not a historical fact but an idea of reason. The social contract is so sacred that there is an absolute duty to obey the existing legislative power. Rebellion is never justified. Kant considered a republican and representative State as the ideal. Only the united will of all can institute legislation. Law is just only when it is at least possible that the whole population should agree to it. Kant was in favour of separation of powers but was opposed to the privileges of birth, an established church and autonomy of corporations. He was also in favour of free speech.

According to Kant, the function of the State is essentially that of protector and guardian of the law. The State is not to undertake comprehensive functions in order to ensure the maximum liberty of the individual. It is not the task of the State to make the subject happy according to its own judgment. Kant writes: "When the sovereign limits himself to his proper task of maintaining the State as an institution of the administration of justice and interferes with the welfare and happiness of citizens only so far as it is necessary to secure this end, when, on the other hand, the citizen is allowed freely to criticise acts of government but never seeks to resist it—then we have this union of the spirit of freedom with obedience to law and loyalty to the State which is the political ideal of the State."

The aim of Kant was a universal world State. The establishment of a republican constitution based on freedom and equality of States was a step towards a League of States to secure peace. However, he was doubtful of the practical possibility of a "State of Nations". He saw

no possibility of international law without an international authority superior to the States.

Fichte

The legal philosophy of Fichte is deduced from the self-consciousness of the reasonable being. No reasonable being can think himself without ascribing free activity to himself. Freedom is of necessity mutual. The sphere of legal relations is that part of mutual personal relations which regulates the recognition and definition of the respective spheres of liberty on the basis of free individuality.

On the relation of law and morality, the view of Fichte is that whereas there is a moral duty to respect the liberty of others absolutely, a legal duty to do so is dependent on reciprocity. Unless my liberty is recognised in turn, the law gives me a right of compulsion to enforce my fundamental rights. According to Fichte, certain elementary rights of the individual must be protected by the State as those are the necessary conditions of personal existence. The law must realise justice and the State must be *Rechtstaat*. Fichte did not demand a written constitution to fix the fundamental rights. His Social Contract is divided into a property contract and a protection contract. Through property one becomes a citizen.

The relation between individual and State is defined in three principles: (*i*) Through fulfilment of civic duties, the individual becomes a member of the State. (*ii*) The law limits and assures the rights of the individual. (*iii*) Outside this sphere of civic duties, the individual is free and only responsible to himself. He is a man, not a citizen. The right to punish is a part of the social contract and is based on retaliation.

According to Fichte, the rights to be protected by the State are the right to live and the right to work. Without the latter, there can be no duty to recognise the property of others. The State has the duty to see that the necessities of life are produced in a quantity proportionate to the number of citizens and everyone can satisfy his needs through work. There are three main branches of public work, viz., natural production, trade and manufacture.

According to Fichte, war is based on force and not on law. Law can assert itself only in a League of Nations with a federal tribune endowed with authority to judge and military executive powers to enforce the judgment.

Hegel

Hegel was the most influential thinker of the Philosophical School. His system is a monistic one. The idea unfolds from the simple to the complex by means of the dialectical process. There can be no dualism of

any kind as any phase of reality is based on reason. To quote Hegel: "What is reasonable is real and what is real is reasonable."

According to Hegel, both the State and law are the product of evolution. Legal institutions are within the sphere of legal, ethical and political institutions. They are the expression of the free human mind which wishes to embody itself in institutions.

Hegel emphatically rejects the idea that marriage is essentially a contrivance for benefiting the individuals who marry. According to him, marriage is an institution based on reason and "being in love" is not its essential side. It cannot be dissolved like a contract.

The State is the synthesis of family and civil society. It is a unity of the universal principle of family and the particular principle of civil society. It is an organism in which the life of the parties is embodied. It is not an authority imposed from outside upon the individual. It is the individual himself which thus realises his true universal self. The State thus is freedom.

According to Hegel, the constitution of the State embodies individual freedom and interest as much as the universal. It preserves the citizens' liberty and rights, fosters and advances their interests, their property and persons. The State has three aspects: the universal, the particular and the individual. In its universal function, it is a sort of law. In its particular functions, it applies laws to special cases and its individuality is embodied in the monarch. Hegel does not approve of the doctrine of separation of powers because he thinks that different powers checking each other will lead to the dissolution of the State. Therefore, Hegel approves the English system. He rejects democracy and universal franchise. The State is not the embodiment of the common will, the will of the majority, but of the rational will. The monarch embodies the individual function of the State. Hereditary monarchy is a philosophical necessity.

The view of Hegel is that the human spirit achieves cognition of its personality once it transcends the stage of mere physical sensation. Having awakened to the knowledge of itself as the free ego, it proceeds to assert itself and thus comes into conflict with other egos. The purpose of the legal order is to produce a synthesis of the conflicting egos in society by attuning the self-consciousness of each to that of the others and so merge the self-centred consciousness of each ego in the universal consciousness. This purpose is achieved by the recognition of the freedom of the ego, limited only by the like freedom of other egos. Legal right is the objective realisation of such recognition by the universal will and aims at securing to each individual an external sphere of freedom, that is, of free activity as regards his person and property.

The great contribution of Hegel to philosophical jurisprudence is the development of the idea of evolution. According to him, the various manifestations of social life, including law, are the product of an evolutionary, dynamic process. This process takes on a dialectical form, revealing itself in thesis, antithesis and synthesis. The human spirit sets a thesis which becomes current as the leading idea of a particular historical epoch. In due course, against this thesis, an antithesis is set up and from the ensuing conflict a synthesis develops which, absorbing elements of both, reconciles them on a higher plane. This process repeats itself time and again in history.

In *Philosophy of Right and Law,* Hegel demonstrates that behind the colourful pageant of history is one pervading idea, the idea of freedom, and history is the march of the spirit of freedom. Legal history is the march of freedom in civil relations. Ecclesiastical bondage has given way to temporal freedom, tyrannical rule has given way to freedom of legal government and economic enslavement of the citizen has given way to economic freedom. Thus, society may change and has always changed. In the adaptation of the law to changing society, changes in law are governed by an ascertainable dialectic, the evolution of the grand idea of freedom. It is to this idea which is realising itself in history, that all law should conform. By conformance to this idea the purpose of the legal order would be fulfilled. That purpose is the raising of humanity to perfection.

Criticism: The influence which Kant, Fichte and Hegel have exercised on European legal philosophy is very great. As a legal philosopher, Kant did not produce a school of law. His contribution to legal philosophy stands between the rationalist natural law theories of the 17th and 18th centuries and liberalism of the 19th century. His critical philosophy of knowledge has been applied to law by the Neo-Kantian jurists.

As a legal philosopher, Fichte had not much influence in the 19th century but he had greater importance for the 20th century. Much of the teachings of del Vecchio were inspired by the general philosophy of Fichte. He exercised the greatest influence. His philosophy of the relation of the individual and the State laid the foundation of the ascendancy of the State over the individual and directly inspired modern Fascist ideas on the corporative and totalitarian State.

Much as they differed in their outlook and conclusions, none of them would have eliminated the individual in favour of the State, although the philosophy of Hegel lent itself to such an interpretation. Both Kant and Fichte emphasized the fact that the individual was man, apart from being a citizen and the State was bound to conform to the

law built upon that foundation. Kant provided no guarantee for this postulate and his absolute denial of any right to revolt made this assertion rather theoretical. The chief danger in the philosophy of Hegel was that it could lead and actually led to the absorption of the individual in a deified State.

The three philosophers mixed with their general philosophy some astonishing doctrines which were mere expressions of personal opinions and prejudices. All three were not only great thinkers but also Professors in Prussia. Kant taught and lived all his life in East Prussia.

Kant's definition of law has remained the basis for all those conceptions of law and State which may be described as atomistic which denies the State any organic character and definitely sees a paramount object of life in the development of the individual. However, his definition contains the germs of social reformism. Kant's conception of law will regain ascendancy whenever individualist and cosmopolitan ideas prevail over organic and nationalist ideas.

Hegel has provoked admiration on the one hand and bitter condemnation on the other. The ideas of Hegel on the relation between State and individual and the purpose of history have inspired different political and legal philosophies. Whether one accepts or rejects his basic ideas is essentially a matter of political conviction. The main criticism must be directed against Hegel's use of the dialectical method as a means of proving the logical and necessary character of his deductions in the field of law and other social sciences.

Hegel undoubtedly became the slave of his system. He was forced to cling to it if he wanted to prove the unity as well as the necessity of all parts of human life. His fundamental logical error lay in confusing opposites and distincts. The conception of being may be the logical opposite of nothing, but contract is not the logical opposite of property and police is not the logical opposite of administration of justice. Some regard Hegel as the greatest of philosophers while others condemn him as one of the greatest and most dangerous dilettantes in philosophy. Those who accept the political and legal principles of Hegel will derive great satisfaction from the impression of necessity created by the dialectic method. Men like Marx may use the dialectic method to prove the phases of historical evolution while completely rejecting the political assumptions of Hegel. Those who believe that the cardinal task of philosophy is to distinguish between objective truth and belief will condemn the influence of Hegel as dangerous in the extreme.

Neo-Hegelians: The disastrous effect of Hegel's spurious proof of the dialectic necessity is proved by the development of Neo-Hegelian phi-

losophy which has been directed towards the increasing glorification of the State as the embodiment of the spirit of world history.

Gioberti proclaimed the greatness of Italy as the centre of European civilisation and the culmination of history. Gentile emphasized the culmination of national development in Fascism.

Binder and Larenz were the modern German Neo-Hegelians. In the name of dialectic integration, they demanded the almost unqualified abandonment of the individual to the State. Bosanquet arrived at slightly more moderate conclusions by a similar and equally dangerous argument. The view of Bosanquet was that the real will of an individual is what he would desire if he were, morally and intellectually, fully developed. The State embodies the purified intellectual and moral conduct of which the average individual is not capable.

There was a decline in the Philosophical School when the Historical School gained ascendancy. Savigny attacked the view that law could be made consciously by human reason embodied in legislation. He put forward his theory that law is the product of a people's genius unfolding itself in history and expressing itself in custom or popular practice. There was a revaluation of the cardinal tenets of the Philosophical School in the light of the criticism by the exponents of the Historical School. The chief defect lay in the assumption of an ideal, immutable law or natural law discoverable by reason, to which actual systems of law should correspond. The Historical School demonstrated the untenability of this assumption. The result was a radical change which is to be seen in the works of Kohler, Stammler and del Vecchio.

Kohler (1849-1919)

Kohler was under the influence of the Hegelians. He defined law as "the standard of conduct which in consequence of the inner impulse that urges man towards a reasonable form of life, emanates from the whole, and is forced upon the individual".

In his book *Philosophy of Law,* Kohler postulates the promotion and vitalising of culture as the end achieved through the instrumentality of law. By culture he means the totality of the achievements of humanity. The assumption of a Law of Nature, a permanent law suitable to all times, is not correct as it involves the notion that the world has already attained the final aim of culture. The actual fact is that civilisation is changing and progressing and law has to adapt itself to the constantly advancing culture. Every culture should have its own postulates of law to be utilised by society according to requirements. There is no eternal law or universal body of legal institutions, suitable for all civilisations. What is good for one stage of culture may be ruinous to another.

Dean Pound writes that Kohler's "formation of the jural postulates of the time and place is one of the most important achievements of recent legal science".[1]

Stammler (1856-1938)

Stammler is a Neo-Kantian and his philosophical position is summed up in *The Theory of Justice*. According to him: "There is not a single rule of law the positive content of which can be fixed *a priori*." However, he emphasises the need for the development of a theory of just law in addition to the investigation of positive law. The content of a given law can be tested with reference to the theory of "just law".

A law is just if it conforms to the social ideal of bringing about a harmony between the purposes of the individual and society. The Social Ideal is "a community of men willing freely". It represents the union of individual purposes. It requires the maintenance of the proper interests of every associate and the maintenance of social cooperation. The first requirement leads to two principles: (*i*) The content of a volition must not be left to the arbitrary control of another. (*ii*) Juristic claim must not subsist except on the condition that the one bound may still remain his own neighbour. These formulae prevent a juristic precept from sacrificing an associate to the subjective purposes of another and being treated as a means to the accomplishment of the other party. The second requirement of social cooperation leads to two principles: (*i*) He who is juristically united with others cannot be arbitrarily excluded from the community. (*ii*) A power of disposition juristically granted cannot be exclusive except in the sense that the one excluded may still remain his own neighbour. Stammler developed the application of these principles to the important spheres of juristic life under the section "The Practice of Just Law".

Having given his Social Ideal, Stammler admits that two legal systems which have very different rules and principles of law may both be in conformity with the Social Ideal. His conception of the Social Ideal gives us natural law with a changing content.

According to Stammler, law is volition. It is not concerned with the perception of the external physical world. It relates means and purposes to each other. It is the universally valid element common to all legal phenomena whatever their content.

According to Stammler, the use of a universally valid concept of law is partly philosophical and partly practical. Philosophically, the quest for a universal concept of law is a manifestation of the desire of the human mind to reduce all phenomena to that unity which only the hu-

[1] *Interpretations of Legal History*, p. 150.

man mind can provide. To quote Stammler: "The idea of unity, as the highest condition of all imaginable scientific knowledge, is not a sum of legal details, but a peculiar ultimate way of ordering the contents of our consciousness. Thus the concept of law has also a pure conditioning mode for the ordering of our willing consciousness, on which depends the possibility of determining a particular question as a legal one."

The view of Stammler is that law is first of all volition because law is a mode of ordering human acts according to the relation of means and purposes. Sovereignty distinguishes law from arbitrary volition of an individual. A sound knowledge of law is not the knowledge of physical phenomena. It is the analysis of purposes to which the idea of law is to help in building up a fundamental conception of life.

Stammler maintains that just law is the highest universal point in every study of the social life of man. It is the only thing that makes it possible to conceive by means of an absolutely valid method, of social existence as unitary whole. It shows the way to a union with all other endeavours of a fundamental character. The concept of law gives the formal and universal elements of law. The ideal of law directs all possible means and purposes towards one aim.

The view of Stammler is that cartels, syndicates, trusts etc. achieve a social purpose by "opposing the anarchy of production and sale in the sphere of their activity... . They can lend protection and defence to the individual who, under conditions of unrestrained freedom, would not be able to realise his proper activity in the social economy, but on the other hand, they are a combination for personal ends and may become the means of abuse".

Before 1914, Stammler expressed the urge for scientific clarity and unity on the one hand and a new idealism on the other. He put the law scientifically on its own feet and revived legal idealism against the sterility of positivism.

About Stammler, Dr. Friedmann writes that he was torn between his desire as a philosopher to establish a universal science of law and his desire as a teacher of civil law to help in the solution of actual cases. The result was an "idea of justice" which is a hybrid between a formal proposition and a definition of social ideal, kept abstract and rather vague by the desire to remain formal. Stammler produces solutions dependent on their specific social and ethical valuations which it was his chief endeavour to keep out of an idea meant to be universal. His solutions were based on certain assumptions and those were the recognition of private property subject to certain limitations regarding

its use and equivalence of all uses of property regardless of their economic and social importance.[2]

Del Vecchio

Del Vecchio developed, independently of Stammler, a theory of law on essentially similar foundations. He was a jurist of much greater elegance and universality than Stammler. His writings display a profusion of philosophical, historical and juristic learning.

According to del Vecchio, the concept of law must have reference only to its form, to the logical type inherent in every case of judicial experience. The logical form of law is more comprehensive than the sum of judicial propositions. He shows the error of those theories which have defined law from history, ethics, religion or generalised content. The concept of law is juridically neutral. It cannot distinguish between good and bad law and just and unjust law. This idea is not meant to be formal. It is based on ideas which can be traced from Aristotle to Vico, Kant, Fichte and Bergson. Man has a double quality. He is at once physical and metaphysical, both part and principle of nature.

Law is not only formal but has a special meaning and an implicit faculty of valuation. Law is a phenomenon of nature and collected by history. It is also an expression of human liberty which comprises and masters nature and directs it to a purpose. Law is the object of a qualitative progress of phenomena from mere formless matter to progressive organisation and individualisation. The aim is perfect autonomy of the spirit.

According to del Vecchio, justice has an ideal content which is the "absolute value of personality" or the "equal freedom of all men". This ideal content is postulated by the inner conscience of man. It explains the ever-recurring quest for natural law.

There appears to be a definite break in del Vecchio's work. The models for his earlier and principal legal philosophy are Kant and the early Fichte. In his later work, it is definitely Hegel, particularly his theory on the relation between individual and State, between reality and idea and on the unfolding of an implied purpose of history. In his later work, del Vecchio abandoned his earlier philosophical position for his new political conviction without admitting it.

It is worthy of notice that historical jurists have now recognised the soundness of the main contentions of the Philosophical School. Bruns (1816-1880) writes that the emphasis laid by the Philosophical School upon the human and universal character of law led to the development of a purer legal philosophy "which no longer regards as its task

[2] *Legal Theory*, p. 137.

the discovery of an absolute law of nature, but only seeks to recognise in their universality and necessity the general conceptions and ideas which attain concrete historical manifestation in the single national system of law".

Gneist (1816-1895) regarded himself a follower of Savigny but he has come to the conclusion that a fuller development of legal science can be attained only by taking up once again the natural law Windschild (1817-1892) writes that the antithesis of Philosophical and Historical Schools has disappeared by each recognising the correctness of the main contention of the other.

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