Chapter Twenty Six

Sociological School

THE RELATIONS between the individual, society and the State have been changing and various theories regarding them have been propounded from time to time. In the beginning, society was governed by customs which had only a social sanction. Then came the supremacy of priests. After that, the secular State emerged and dominated all institutions. As a reaction, the importance of the individual was asserted by thinkers and philosophers. There were revolutions and political changes. There was the Industrial Revolution. The necessity of balancing the welfare of the society and individual was realised. There was a tendency towards socialisation. Then came the view that the importance of the society should be considered in the light of the individuals and *vice-versa*. The approaches made from this point of view are called sociological approaches. The sociological school gained ascendancy in the first decade of the 20th century.

The sociological school devotes its attention not to the ethical content and aim of law but to the actual circumstances which give rise to legal institutions and which condition their scope and operation. This is the functional view of law, regarded as one and only one of the many factors in the morphology of society. It is essentially concerned not with man as an individual but with man-in-association. The whole theory of the sociological school is a protest against the orthodox concept of law as an emanation from a single authority in the State, or as a complete body of explicit and comprehensive propositions applicable by accurate interpretations, to all claims, relationships and conflicts of interests. The sociological jurists look upon law as a phenomenon. Law is a social function, an expression of human society concerning the external relations of its individual members. The jurist should concentrate his attention not so much on individuals and abstract right as "willing agent" as on the social purposes and interests served by law.

Sociological jurisprudence has pointed law towards social justice and has assumed that law must seek to attain certain ends. What it needs is "(*a*) philosophy which will explain its method and furnish it with a rationale; and (*b*) one which will provide the sociological jurist with tools and show him how to use them by furnishing him with some scale of values by which he can hew and weigh through the experimental flux of the same legal order". Dean Roscoe Pound writes: "The sociological movement in jurisprudence is a movement for pragmatism as a philosophy of law ... for putting the human factor in the central place and relegating logic to its true position as an instrument." It is a movement that does not disparage the force of logic, or of custom or of history. It is always busy in combating the exclusive consideration of any one of these factors and of a purely logical completeness of the law in particular and emphasising the final task of the balancing of interests.

Ehrlich has written thus: "At the present as well as at any other time, the centre of gravity of legal development lies not in legislation, nor in juristic science, nor in judicial decision, but in society itself. This sentence, perhaps, contains the substance of every attempt to state the fundamental principles of the sociology of law."

The sociological approach to jurisprudence which resulted out of the change in the political shift from doctrine of *laissez faire*, the industrial and technological revolution and finally the historical school bringing into focus the relationship between law and social welfare State of the modern century, has attempted to study law as seeking social origin of law and legal institutions, testing law as a given social phenomenon and lastly judging law by its social utility.

Montesquieu (1689-1755)

Montesquieu, the French philosopher, was the forerunner of the sociological method in jurisprudence. He was the first to recognise and take account of the influence of social conditions on the legal process. In *The Spirit of Laws*, Montesquieu wrote that law should be determined by the characteristics of a nation so that "they should be in relation to the climate of each country, to the quality of each soil, to its situation and extent, to the principal occupations of the natives, whether husbandmen, huntsmen or shepherds; they should have relation to the degree of liberty which the constitution will bear, to the religion of the inhabitants, to their inclinations, riches, numbers, commerce, manners and customs". He perceived the importance of history as a means of understanding the structure of society and also drew attention to the part played by economic factors.

Auguste Comte (1798-1857)

The honour of being the founder of the science of sociology belongs to Auguste Comte, another French philosopher. According to him, the legitimate object of scientific study is society itself and not any particular institution of government. He emphasized the fact that men have ever been associated in groups and it was in the social group and not in isolated individuals that the impulses originated which culminated in the establishment of law and government. He definitely rejected the view that society rests upon an individualistic basis and the individual is the focal point of law.

According to Comte, society is like an organism and it can progress when it is guided by scientific principles which should be formulated by observation and experience of facts excluding all metaphysical and similar other considerations.

The implications of Comte's theory are many. He had great influence on the philosophical and scientific thought of his time. In the field of legal theory, his ideas inspired Durkheim who in his turn inspired Duguit.

Durkheim (1858-1917)

Emile Durkheim, the great French sociologist, took considerable interest in legal phenomena and added to our understanding of them. He was one of the earliest thinkers about the criminal process. His view was that law was the measuring rod of any society. Law "reproduces the principal forms of social solidarity". There are two basic types of societal cohesion (which he called solidarity): mechanical solidarity to be found in homogeneous societies and organic solidarity which was found in more heterogeneous and differentiated modern societies which rest on functional inter-dependence produced by the division of labour. In a society based on mechanical solidarity, law is essentially penal. With increased differentiation societal reaction to crime becomes a less significant feature of the legal system and restitutive sanction becomes the main way of resolving disputes.

There are serious flaws in the arguments of Durkheim but his formulation on the evolution of law are still worth our attention. His discussion of the meaning of repressive law is particularly useful to an understanding of the social significance of crime and punishment. His emphasis on restitutive law is a corrective to those who think of all law as punitive. Twentieth century developments have vindicated his ideas on contract.

Herbert Spencer (1820-1903)

The infant science of sociology received a tremendous impetus from the works of Herbert Spencer. By calling to aid ethnographical and anthropological material, Spencer demonstrated that society resembles individual organisms. Originating in small beginnings, they develop complex structures the component parts of which become more and more inter-dependent while the social organism itself becomes more and more independent of its constituent units.

In *Principles of Sociology*, Spencer traced his theory of the origin of Law. According to him, law arises from four sources: inherited usages with quasi-religious sanctions, injunctions of deceased leaders, the will of the predominant man and collective opinion of the community. Laws of supposedly divine origin are first differentiated from laws of recognised human origin. Human laws become further differentiated into those which are sanctioned by the ruler and those which are sanctioned by the aggregate of social interests and of these the latter, in the course of social evolution, tend more and more to absorb the former. Ultimately, "law will have no other justification than that gained by it as a maintainer of the conditions to complete life in the associated State".

For Spencer, evolution was the key to the understanding of human progress and legal and social development could best be left to evolve by a natural selection parallel to that operating in the sphere of biology. Such a conclusion was regarded as in the highest sense scientific.

Spencer promulgated three fundamental laws of society: the principle of the persistence of force, the indestructibility of matter and the continuity of motion. The combination of these principles with other laws results in the process of evolution. "Evolution is an integration of matter and a concomitant dissipation of motion during which the matter passes from a relatively indefinitely incoherent homogeneity to a relatively coherent heterogeneity and during which the retained motion undergoes a parallel transformation".

Prof. Allen writes: "The interdependence of organisms in its sociological aspect means the mature relation of all members of civilised society and a distribution of a sense of responsibility far wider than can be comprised within the formula 'sovereign and subject'. It directed attention to the necessity of considering law in relation to other social phenomena."

Duguit (1859-1928)

Leon Duguit was a Professor of Constitutional Law in the University of Bordeaux in France. He attacked traditional concepts of State, sover-

eignty and law and sought to fashion a new approach to those matters from the angle of society.

Principle of Social Solidarity.—According to him, the outstanding fact of society is the interdependence of the people. This interdependence has always been there, but it has increased in modern times on account of the increasing knowledge of man and his mastery over the physical world. In modern society we cannot live without the services provided to us by our fellowmen. Our food, our housing, our clothing, our recreation and entertainment are always dependent on the activities of other people. Specialisation has increased to such an extent that we can exist only by virtue of our membership of a community. Social interdependence is not a theory or a conjecture but a fact. It is an all-important fact of human life. All human activity and organisation should be directed to the end of ensuring the harmonious working of man with man. Duguit calls it the *principle of "social solidarity"*.

As all human activity and organisations are to be judged from the manner in which they contribute to social solidarity, the State can claim no special position or privileges. It is only one of the various human organisations which are necessary to protect the principle of social solidarity. It can be justified insofar as it defends and furthers the principle of social solidarity. It is nothing more than an organisation of men who issue commands backed by force. If the State acts in a way which promotes social solidarity, it is entitled to be upheld and encouraged. If it does not perform that function, the people have a right to revolt against it and suppress the State itself. The whole idea of sovereignty is meaningless. All power is limited by the test of social solidarity. Every man and every grouping of men is under a duty arising out of the facts of social existence. That duty is to further social solidarity. To quote Duguit: "Man must so act that he does nothing which may injure the social solidarity upon which he depends; and more positively, he must do all which naturally tends to promote social solidarity".

Implications of Social Solidarity.—Social solidarity is the touchstone of judging the activities of individuals and all organisations. The State is a human organisation whose duty is to ensure social solidarity. Duguit was in favour of strong checks on the abuse of State power through the establishment of the strict principles of State responsibility. To quote him: "The State is sovereign, but such sovereignty has its limits. The foundation for and the determination of these limitations are found, according to the individualistic doctrine, in the existence of the natural rights of the individual anterior to the State, which the latter must respect and guarantee, but to which it can add limitations to the extent necessary to protect the rights of all". Again, "either the autonomy of

the individual comes to limit the power of the State, to determine the extent of the restrictions which it can bring to bear upon the individual activity of each in which case the State ceases to be sovereign, since there is a will other than its own which comes to determine the limitations upon the manifestations of its own will, and so the sovereignty of the State disappears."

Duguit's disbelief in an all-powerful State, combined with his belief in the greatest possible division of labour, leads him to put much stress upon decentralisation and group government. The different classes cooperate with each other and defend individuals belonging to them against the excessive claims of other classes as well as against the arbitrary actions of the central power.

Another implication of social solidarity is his rejection of the intervention of the State as the decisive factor in turning a social into a legal norm. The conclusions of Duguit in this connection resemble very much those of the historical and some of the sociological theories. He writes: "But it is not the intervention which gives the character of a juridical norm to the rule; it would be powerless to prove it if the rule did not already possess it itself. An economic or moral rule becomes a juridical norm when there has penetrated into the consciousness of the mass of individuals composing a given social group, the notion that the group itself, or those in it who constitute the greatest force, can intervene to repress violation of this rule. In other terms, a rule of law exists whenever the mass of individuals composing the group understands and admits that a reaction against the violation of the rule can be socially organised."

Another implication of social solidarity is that law is a spontaneous product of individual consciousness, inspired at the same time by social necessity and the sentiment of justice. This and only this can be the norm of law. That being so, legislation can only be conceived of as a means of expression of the rules of law. The legislator does not create it; he defines it. Legislation imposes itself only in proportion as it is in conformity with this rule. Obedience is not owed to laws as such but only to those laws that give expression to or put into practice a juridical norm. Likewise, Duguit does not conceive of justice as a rational, absolute idea, revealed by reason. It is a sentiment belonging to human nature. The activity of a man is always dominated by the double sentiment of his social character and his individual autonomy. That is the sentiment of justice. Every act which attacks it directly, attacks at the same time social solidarity and is contrary to fundamental social norm.

Another implication is the denial by Duguit of any distinction between private and public law. According to him, both must serve the same end of social solidarity. There is no difference in their nature. Such a division will elevate the State above the rest of the society which is not accepted by Duguit. The concept of public service unsettles the concept of sovereignty as the foundation of public law. The position of Duguit in this respect is very much akin to Kelsen as both of them have shown deep distrust in the arbitrariness of authority disguised under the special status of public law and both have deprecated the distinction. There is another way where Duguit seems to follow Kelsen in his rejection of the concept of private rights. In his view, the idea of social function "crowds out" the concept of subjective right. The necessity of individual rights disappears with the absence of anyone that can and must exercise it. As all the governors and the governed cooperate for the common end by discharging certain functions, the concept of subjective rights either of the State or of the individual becomes superfluous. According to Duguit: "The only right which any man can possess is the right always to do his duty."

Individuals working in any capacity are parts of the same social organism and each is to play his part in the furtherance of the same end of social solidarity. The essence of law is duty.

Prof. Dias points out that while the interdependence of man is a fact, "social solidarity" is an ideal. In practice it becomes a matter of personal evaluation when the question to be decided is whether a given course of conduct is conducive to social solidarity or not. The question is whether a law imposing or forbidding racial segregation promotes social solidarity or not. The view of Dias is that it is difficult to see how this question can be answered objectively and otherwise than in the light of political, religious and moral evaluations. Another question is whose evaluation of social solidarity is to prevail. There is evidence that the forces of social disruption are as potent as those of solidarity. The view of Dias is that Duguit fell into the error of enlarging a limited truth into an absolute.

The view of Duguit is that a law which does not stand the test of social solidarity is not a valid law. He denies that statutes and decisions make law in themselves. There are three formative laws, namely, respect for property, freedom of contract and liability only for fault. The precepts of positive law should conform to these formative laws, and they only achieve validity when received and approved by the mass of public opinion. "A rule of law exists whenever the mass of individuals composing the group understands and admits that a reaction against the violation of the rule can be socially organised". Public opinion is

thus the expression of the social solidarity principle by which the validity of law should be judged. Dias points out that the vagueness and unsatisfactory nature of mass opinion are obvious and it is difficult to say how that is to be discovered. Situations very frequently arise as to which no particular feeling exists and others as to which opinion is divided. It is unrealistic to suggest that a court will, or will be allowed to, decline to receive an enactment as law because it can be shown that public opinion does not subscribe to it.[1]

Criticism.—Though Duguit is a positivist and excludes all metaphysical considerations from law, his principle of social solidarity itself is a natural law ideal. His special emphasis is on the valuation of law on a social plan. The facts of social life to which he confines his study, tend to become a theory of 'justice' in practice. Duguit wants to establish an absolute and uncontestable rule of law. Like 'natural law' theories, he establishes the standard of social solidarity to which all positive law must conform. It is nothing but natural law in a different form. It has rightly been said that Duguit "pushed natural law out through the door and let it come by the window".

If a question arises whether a particular act or rule furthers social solidarity or not, the matter has to be decided by judges and that might prove to be dangerous. Judges have their weaknesses and limitations and that may lead to judicial despotism.

The idea of social solidarity can be differently interpreted and used to serve divergent purposes and actually that has been done. Duguit's insistence on the identity of interests of the various groups in society and the minimisation of conflicts was used by the Fascists to serve an absolutely different end. They used it to glorify the State by giving it a towering personality. They also used it to suppress trade unions. Duguit himself would not have approved those interpretations. The jurists of the Soviet Union have used the theory of Duguit to establish that individuals have no rights. His denial of the distinction between private and public law, his idea of minimising State intervention were welcomed by the jurists of the Soviet Union.

While defining law, Duguit confused it with what law ought to be. His view was that if law does not further social solidarity, it is not law at all. His definition of law confused it as was done by the advocates of natural law.

Duguit advocated the minimisation of State intervention at a time when the State was becoming all important. He overlooked the fact that the social problems of a modern community were becoming complex and could be tackled only by the State. With the development of

[1] *Jurisprudence*, pp. 607-8.

society, the sphere of State activity has expanded tremendously and instead of the State withering away, it has become stronger.

Duguit was inconsistent at many places. On the one hand, he expressed faith in the biological evolution of society. On the other hand, he attacked the idea of collective personality. He denied any personality to State or groups distinct from the individuals who constitute it.

After recognising the services of Duguit to jurisprudence by emphasizing that law is essentially the product of social forces, Prof. Allen writes: "But he goes far beyond any sociological theory of law which had yet been advanced when he attempts to evaporate all ethical content out of law. To banish the notion of right wholly from law, as M. Duguit seeks to do, is to make it meaningless and to revolt an instinct which is deepseated in human nature."

Paton points out that solidarity may be filled with any content we desire. It is not an end in itself but a mere means to the purposes which man wishes to achieve. Men may join together to collect the scalps of their neighbours or to preserve the peace of the world. A community of masters and slaves may have greater cohesion than a democracy. While law is based on facts, it is created only when men use their wills to choose between one set of facts and another. Rules are created because men say that "this is better than that" and because they agree to place their wills at the service of the chosen end. No theory is satisfactory which divorces law from the wills of men.

Contribution of Duguit.—In spite of various defects in his theory, the contribution and influence of Duguit were great. His approach was comprehensive and sincere. Though his theory ultimately became a theory of natural law or a theory of justice, the idea of justice we find in him is in perfectly social terms and was derived from social facts. He shaped a theory of justice out of the doctrines of sociology. Though proceeding from different premises, many later jurists reached similar conclusions as Duguit had reached, particularly about the State, rights and public and private law. Both the National Socialists and the Soviet jurists adopted many of the principles from the theory of Duguit, but they interpreted it in such a way as to suit their purpose or took only such part of the theory which supported their activities. Inspired by Duguit's emphasis on the importance of "group", many later jurists like Hauriou and Renard propounded the "institutional theory". Though Duguit's theory holds good on hardly any point, he is given the credit for his original and comprehensive approach which inspired many jurists to propound new theories.

Prof. Dias writes thus about Duguit; "His functional approach to laws, his denial of the distinction between public and private law and

his advocacy of a form of the 'withering away' of centralised authority and its replacement by a decentralised 'administration of things' had some attraction to the early Marxist interpreters. His work had influence in another direction also. The emphasis that he placed on the importance of the group, coupled with advances in later sociological thought shifted the focus of attention to group behaviour."[2]

The view of Gurvitch is that the great merit of Duguit lies more in pointing out the existence of certain problems which had escaped Durkheim than in having solved them. Basically, he continued and applied to his time the researches of the doctrinaires who pointed out the existence of a jural framework of society opposed to the State. His contribution to the sociology of law lies rather in his struggle against certain consecrated dogmas and in his description of the recent transformation of law than in a methodical study of the problem. Duguit's work in jurisprudence influenced and stimulated different movements of thought.

Gierke (1841-1921)

Gierke, a German jurist, was one of the most important original thinkers in the early fields of sociological jurisprudence. According to him, the reality of social control lies in the way in which groups within society organise themselves. He proceeded to trace the progress of social and legal development in the form of the history of the law and practice of associations. He propounded a classification of associations on the following lines: firstly, he contrasts collective persons organised on a territorial scheme among which is numbered the State, with those organised on a family or extra-territorial scheme. Secondly, he contrasts associations based on the idea of fraternal collaboration with those which are based on the idea of domination. In his own period, Gierke felt that the collaborative principle had prevailed and the State encouraged the growth of independent collaborative organisations within its own framework.

Gierke represents the final reaction against 18th century individualism. He was the pioneer of the modern approach to society. His doctrine of the *real personality and will of the group* was a fascinating anticipation of the lines of enquiry of modern psychology. He himself never found it easy to reconcile his doctrine of the independence of autonomous corporate bodies with the Supreme corporate power of the State. His writings are an illustration of the new organic approach to society. Though he himself disclaimed the use of the biological term in connection with corporate associations, his work runs on the lines parallel to those of Comte and Spencer.

[2] *Jurisprudence*, p. 609.

Hauriou (1856-1929)

The theory of Hauriou is best appreciated in conjunction with the theories of Gierke and Duguit. It has the following three essential elements:

(i) The idea of an undertaking or enterprise which is realised and persists juridically in a social *milieu*,

(ii) For the realisation of this idea, a power is organised which gives it órgans.

(iii) Between the members of the social group interested in the realisation of the idea, manifestations of communion arise which are directed by the organs and regulated by rules of procedure.

According to Hauriou, there are two kinds of institutions: *"institutions-personnes"* (groups of human beings) and *"institutions-choses"* (institution-things, e. g. rules of law, marriage). However, he developed seriously only the former type. He approached the problem of the institution as a sociologist. He saw in it the synthesis of subjective will and objective reality. To him, the institution was not only an analysis of social facts but also a juristic ideal as the best combination of sovereignty and liberty. In the institution, individuals communicate through combined action. The institution becomes something more than an intellectual creation when individuals communicate through combined action. From the three elements which constitute the essence of an institution results the personification of an organised group bent on the realisation of a common purpose. The objective reality of the institution is not only a sócial reality, but also the source of legal personality. Hauriou considers the formal incorporation of an institution as of subordinate importance. Through the participation of all its members in the government of the institution and the consequent passing of the idea of the institution into the consciousness of all its members, moral personality is achieved.

Hauriou was a pluralist. He did not integrate the *institution* in the State as the highest type of institution.

Hauriou repudiated the organic theory, but his definition of an institution as a social organism in which those who have the power have to submit to the idea which inspires the enterprise is, in fact, an organic theory. Whether the institution is a commercial company, a political party, a trade union or the State, the myth of its super-personal purpose demands obedience and subordination.

The institution is the medium through which individual activity serving a higher cause fulfils the divine purpose.

The theories of Spencer, Gierke, Duguit and Hauriou all lead to a similar result which is the subordination of the individual to a new social discipline and service to a collective. All these jurists were strongly inspired by the idea of corporate autonomy. In different ways they disliked the idea of a State-Leviathan. However, their theories were fated to lead to a new State despotism which cunningly used the idea of devotion to a collective for the glorification of individual power.

Hauriou took account of only those ideas which are innate in men as social animals and in the very nature of social life, i. e., principles of constitution and regulation without which no kind of group activity would be possible.

Hauriou's theory about the formation and development of institutions, their personality and their relations with the State etc. throw light on the sociological aspect of law.

Max Weber (1864-1920)

Max Weber started his career as a lawyer, both as a teacher and practitioner, but social science and economics became his dominating interest.

Weber's *Sociology of Law* has for its main theme the analysis of the transformation of law from a "charismatic" finding of a law to a state of rationalisation. This transformation is followed up in various legal phenomena: in the gradual distinction of public from private law, in the evolution from the decision of individual cases to general principles and eventually a systematisation of law, in the development from the early formal status-contract to the elastic and formless purpose-contract, from the autonomous legal personality of the Middle Ages to the modern State monopoly of the creation of legal personality. All these legal developments are closely linked with social, political and economic factors. Thus, a development of an exchange economy with its increasing use of money leads to the development of modern contract with its free assignability. The most interesting part of Weber's analysis is concerned with the influence of legal professionalism and of different forms of political government on the development of law.

Weber has made a valuable contribution to jurisprudence and earned for himself a place among the sociological jurists. His historical method links him with Sir Henry Maine but the principles which he deduces from the course of development is Marxian.

Rudolf von Ihering (1818-1898)

Ihering was born in 1818 at Aurich in East Friesland. He became a teacher of Roman Law and published his *magnum opus* from 1852 to 1865 in four volumes under the title *The Spirit of the Roman Law in the*

Various Stages of Its Development. This publication was translated into many European languages and that brought him recognition. In 1867, he became Professor in the University of Vienna. The busy life of Vienna interfered with his academic work and therefore he joined the Gottingen University where he spent the last decades of his life in pioneering a new school of jurisprudential thought.

Ihering developed his legal philosophy through an intensive study of the spirit of Roman law. Reflections on the evolution of Roman law and the genius of Roman jurisprudence led him to detest more and more what he called the jurisprudence of concepts. The study of Roman law taught him that its wisdom lay not so much in the logical refinement of concepts as in the moulding of concepts to serve social purposes. Through his studies, Ihering became aware of the paramount necessity for law to serve social purposes. That made Ihering a utilitarian. The philosophical basis of his utilitarianism is the recognition of *purpose* as the universal principle of the world, embracing all creation. The purpose of human action is not the act itself but the satisfaction derived from it. The debtor pays his debt in order to free himself from it.

According to Ihering, *the purpose of law* is the protection of interests. He defined interest as the pursuit of pleasure and avoidance of pain. Individual interest is made partly of a social purpose by connecting one's own purpose with the interests of other people. By converging interests for the same purpose, cooperation is brought about and commerce, society and the State result from it.

The problem before Ihering was to reconcile individual and collective interests and he did so by means of the principle of levers of social motion. In those levers, he combined egoistic and altruistic motives. The existence of society is made possible by a combination of the two. The egoistic levers are reward and coercion. The desire for reward produces commerce and the threat of coercion makes law or State possible. Ihering joins those to whom coercion is an essential element of law and State alike. The altruistic or moral levers of social motion are the feelings of duty and love. The four combine to make society possible. The object of society is to secure the satisfaction of human wants.

Ihering divides into the following three categories the totality of human wants:

(*i*) Extra-legal (solely belonging to nature) human wants offered to man by nature with or without effort on his part, e.g., the produce of soil.

(*ii*) Mixed-legal human wants, i.e., conditions of life exclusive to man. In this category are the four fundamental conditions of

social life viz., preservation of life, reproduction of life, labour and trade. These are specific aspects of social life, but independent of legal coercion.

(*iii*) The purely legal conditions which depend entirely on legal command, such as the command to pay debts or taxes. No legislation is needed for such matters as eating and drinking, or the reproduction of the species.

The realisation of the social purpose, i.e., the conditions of social existence, may be pursued by morality, ethics or law. The characteristic approach of law is by means of the power of the State which exercises external coercion.

According to Ihering, the content of law not only may but must be infinitely various. Purpose is a relative standard and hence law must adapt its regulations to the varying conditions of the people, according to the degree of their civilisation and the needs of the time. Ihering opposed the idea of natural law as giving certain permanent and universally valid contents to law.

If law is coercion, the question arises how it can coincide with the pursuit of individual interest. The reply of Ihering is that the basis of all legal measure is undoubtedly man, whether the measures belong to private, criminal or public law. Social life adds to man as a simple being, man as a social being, as a member of a higher unit, e.g., State, church or association. The jurist must conceive a higher legal subject, society, as standing above the particular individual. The individual is enabled to desire the common interest, in addition to his own. The law never secures the good of the individual as an end in itself, but only as a means to the end of securing the good of society. Ihering was opposed to Kant's atomistic conception of society.

According to Ihering, property exists not solely for the owners but also for society. Law must try to reconcile the interest of the owner with that of society. In this way, it justifies expropriation or legal restriction imposed upon the exercise of individual property rights. Expropriation solves the problem of harmonising the interests of society with those of the owner. Ihering was the first jurist who developed a theory of balance of purposes or interests. His classification of three main groups of interests—those of the individual, the State and the society, was later on developed by Roscoe Pound.

According to Ihering: "Law is the sum of the conditions of social life in the widest sense of the term as secured by the power of the State through the means of external compulsion."

In *The Struggle for Law* published in 1872, Ihering developed the thesis that *the origin of law is to be found in social struggles.* To quote him:

"The birth of law, like that of men, has been uniformly attended by the violent throes of childbirth".

In *Law as a Means to an End,* the first volume of which appeared in 1877, Ihering showed that law is a system of reconciling conflicting-interests. To quote him: "Purpose is the creator of the entire law" Referring to the philosophical school, he declared: "You might as well hope to move a loaded wagon from its place by means of a lecture on the theory of motion as the human will by means of the categorical imperative. *The real force which moves the human will is interest,*" The doctrine of the historical school that law evolves spontaneously like language was attacked by Ihering. He wrote pungently that according to the historical school, the Roman law of debtor slavery grew in the same way as "the grammatical rule that *cum* governs the ablative."

He was modern in the sense that he recognised the coercive character of law and thus could meet the positivists on common ground. His approach to law is not a denial of the efficacy of analytical jurisprudence but a convincing demonstration of its inadequacy. He did not claim that he was solving the problems of law and society. His task was merely to reconcile the conflicting interests although he did not tell us in which direction that was to be done. Although he drew our attention to the problems of society, he did not solve them.

According to Ihering, law is not the only means to control the social organism. It alone cannot protect and further all the social purposes. Law is only one factor among many others. There are some conditions of social life for which no intervention by law is needed. There are some others where only part intervention is made by law. However, there are some conditions of social life which are secured exclusively by law.

According to Ihering: "Human conduct is determined not by a 'because' but by a 'for' by a purpose to be effected, the 'for' is as indispensable for the will as is the 'because' for the stone. The stone cannot move without a cause, no more can the will operate without a 'purpose".

Criticism.—Dr. Friedmann writes that with Ihering, utilitarianism ceased to mean the pursuit of individual pleasure and became the balance between individual and communal interests. In that respect, Iherings system represented a further step away from Bentham, in the direction shown by Mill, Through the development of the idea of balance as the purpose of law, *Ihering became the father of modern sociological jurisprudence.* He prepared the more elastic legal technique required to meet new and changing legal problems by his fight against the "Jurisprudence of Concepts". Moreover, his insistence that law is realised

through struggle and self-assertion was opposed to the romantic conception of an unconscious manifestation of the Volksgeist through the law. By insisting at the same time on coercion as the characteristic of law and making the power of the State the instrument of the law, Ihering created the essential foundations of a modern jurisprudence, suitable for the practical lawyer, because it was in much closer contact with the social realities of the 19th and 20th centuries than Kant's idealism or the romanticism of Savigny.

Prof. J. Stone writes that "Ihering had drunk deeply from the orthodox 19th century juristic springs. When he attacked his former teachers, he did so in terms which they could not but understand. His iconoclasm operated from within the juristic fold, rejecting the absolutism of *a priori* theories of justice and individualism of both the Kantians and Benthamites. As a result, his criticism entered the mainstream of juristic thought and all who have followed him had to reckon with his achievement."[3]

Ihering's theory of justice was generally labelled as social utilitarian. He pressed the "fundamental idea that the highest principle of classification from the philosophical point of view is the subject for whose sake the law is made; and that in addition to the individual and the State, society also, in the narrower sense, must be recognised as a subject". Looked at from the viewpoint of the subject, this was an assertion of the primacy of interests or claims. Ihering drew the attention of those who were seeking an ideal of law in some absolute *a priori* concepts, to the relative elements of all theories of justice.

One criticism of Ihering is that he built his system upon an assumed egocentric individual who gradually developed into the socially-minded member of the group and in the modern sense such sharp opposition of individual and society is false.

Ihering did not provide us with a criterion of justice at all. While he drew attention to the conflicting purposes which lie behind law, he gave no satisfactory guide for deciding whether this compromise embodied in the law is a just one or how a more just one could be attained. To say that individual purposes must give way to social purposes, is no answer at all: The question is how much way they should give. It is also difficult to distinguish social interests from individual interests.

According to many critics, law protects 'will' and not purpose. However, Korkunov has very stoutly defended Ihering's theory of purpose by presenting a number of illustrations to show that law protects purpose and not will.

[3] *The Province and Function of Law*, p. 311.

His Contribution.—As regards the contribution of Ihering, he rendered invaluable services to the science of jurisprudence. He was an investigator of ancient law, a philologist and an anthropologist and made study of various legal systems by the comparative method. He traced the evolutionary character of law and declared that law develops by conscious efforts. He launched a vigorous attack on Savigny's historical theory, philosophical theory and natural law theory. In the fulfilment of social purposes, he found the fruition of individual purposes which later on became the motto of the socialist States.

By pointing out the coercive character of law, by indicating that law has only a relative value, by evaluating it with the social context and by speaking of it as an instrument to secure social purpose, Ihering laid the foundations of sociological jurisprudence. One finds in him all the chief traits of sociological jurisprudence.

J. Stone writes that to admit the ultimate failure of Ihering's social utilitarianism is not to deny its significance. Fundamentally, that significance lay in powerfully drawing attention to the stuff to be weighed in the scales of justice. He did for German and perhaps for continental thought what Bentham and his followers had already done for English thought. He did even more. He insisted on the relativism of justice which Bentham's calculus of pains and pleasures tended in practice to obscure. He insisted that there were some important interests to which the law must have regard which cannot be easily fitted into a calculus of pains and pleasures. He insisted that thought in terms of society naturally finds room for the individual, but thought in terms of the individual tends to overlook those interests which are not easily identifiable in terms of the individual.[4]

Ihering inspired the sociological school of jurisprudence. Prince Leo Gallitizin, a Russian prince who was one of his disciples, referred to Ihering as the Prometheus who had brought the light of jurisprudence to mankind. Ihering's work was taken up by his disciple, Eugen Ehrlich. Earnest Fuchs, leader of the German free law school, derived his inspiration from Ihering. The American School of Sociological Jurisprudence was also influenced by the works of Ihering.

Eugen Ehrlich (1862-1922)

Ehrlich was born in 1862 at Czernowitz in the Duchy of Bukowina which at that time was a part of Austria-Hungary. He became Professor of Roman Law at the University of Czernowitz. He was primarily concerned with the social basis of law. According to him, law is derived from social facts and depends not on State authority but on social

[4] *The Province and Function of Law*, p. 313.

compulsion. Law differs little from other forms of social compulsion and the State is one among many associations. The real source of law is not statutes but the activities of society itself. To quote him; "The centre of gravity of legal development lies not in legislation, nor in juristic science, nor in judicial decision, but in society itself. There is a "living law" underlying the formal rules of the legal system and it is the task of the judge and jurist to integrate these two types of laws. Commercial law, as embodied in statutes and cases, involves a constant attempt to try to keep up with commercial usage, for the "centre of legal gravity lies ... in society itself." Hence, great emphasis is placed on fact-studies, as against analytical jurisprudence, in exploring the real foundations of legal rules, their scope and meaning and potential development.

The view of Ehrlich was that laws found in formal legal sources such as statutes and decided cases, give only an inadequate picture of what really goes on in a community. He drew a distinction between norms of decision and norms of conduct. There will always be an inevitable gap between the norms of formal law and those of actual behaviour. The "living law" of society has to be sought outside the confines of formal legal material. It is to be sought in society itself. One learns little of the living law in factories by reading only the Factories Acts, the enactments and the common law relating to master and servant, trade unions etc. One has to go to a factory if one is to observe how far the formal law is followed, modified, ignored and supplemented. Only a very small fraction of social life comes before courts and even then it usually represents some form of breakdown of social life.

According to Ehrlich, certain facts underlie all laws. Those are usage, domination, possession and declaration of will. Propositions of law with reference to them arise in three ways: by endeavouring to give effect to the relations (they create, by controlling or invalidating them or by attaching consequences to them. A formal concept of law consists of the synthesis of generalisations constructed from the various propositions of law. According to Ehrlich, 'living law' is to be discovered from judicial decisions, modern business documents against which judicial decisions have to be checked and observation of people by living among them and noting their behaviour.

According to Ehrlich, a statute which is habitually disregarded is no part of the living law. Enforcement by the State is not the distinction between formal and living law. The difference lies in social psychology. Some types of rules evoke different feelings from others. There are many reasons why a person obeys even a legal rule other than fear of State enforced sanction. The characteristic of formal rules lies in the

kind of feelings they arouse by virtue of their generality and social significance. Different societies and even the same society at different times, have had different feelings about what is socially important, the line between legal and moral and social rules has constantly shifted.

According to Ehrlich, the real law of the community is not to be found in the traditional formal legal sources. The norms governing life in society are imperfectly and partially reflected in the formal law of that society. A commercial usage becomes established as it is convenient and efficient. With the passage of time, it is recognised by courts and incorporated into contracts. Ultimately, it is given a statutory form as in the Sale of Goods Act, 1893. As fresh commercial usages grow up, those are also ultimately incorporated in the law of the country. The net result is that the formal law can never catch up with the "living law". There is always a gap between what the law says about a given topic and the way in which people actually behave in the context of that topic. In certain cases, law contradicts the practice of that topic. Sir Carleton Allen writes: "The London Stock Exchange, despite the express provisions of Leeman's Act, persistently refuses to specify the serial numbers of the shares in a contract for the sale of banking shares; underwriters constantly disregard Section 4 of the Marine Insurance Act, 1906 which provides that every insurer of a cargo or bottom must have an insurable interest in the same". Likewise, it is provided in the Moneylenders Act, 1900 that if interest is excessive and the transaction is harsh and unconscionable, the borrower may obtain relief. "When it is found that the interest charged exceeds the rate of 48 per cent per annum, there is a presumption that the interest charged is excessive and that the transaction is harsh and unconscionable." In spite of this, there are moneylenders who charge interest @ 48 per cent per annum and although thousands of transactions take place on that basis, no cases are brought before the courts by the borrowers. Obviously, the practice differs from law. Likewise, a large number of technical assaults and batteries are committed, but those are not brought to the notice of courts. In actual practice, the police also do not prosecute all those who are guilty of various offences, particularly when it is considered inexpedient to do so. The conclusion of Ehrlich is that if we want to know the living law of a society, we cannot confine ourselves, to the formal legal material but we have to go beyond that in order to find out how people actually live in society.

Ehrlich does not find any difference between law and custom. It appears to him that both of them have the same sanction in the form of social pressure. Whether the norm is a statute or the practice of a group, the reason for its observance is exactly the same and that is the communal urge which arises from the facts of social life. To quote

Ehrlich: "The individual is never actually an isolated individual; he is enrolled, placed, embedded, wedged into so many associations that existence outside of these would be unendurable."

The view of Ehrlich was that law which is not habitually observed is not a part of the living law of the community. His calculation was that about one-third of the sections of the Austrian Civil Code had no influence whatsoever upon the life of the people.

According to Ehrlich, the traditional scope of jurisprudence was hopelessly narrow and the same must be enlarged if the subject is to have contact with reality. The jurists should study not only the formal legal system but also the rest of the living law. He must see to it that the formal law keeps pace with the way in which people actually lived. To quote Ehrlich: "The law does not consist of legal propositions but of legal institutions. In order to be able to state the sources of the law, one must be able to tell how the State, the church, the commune, the family, the contract, the inheritance came into being, how they change and develop." If one were to follow the process suggested by Ehrlich, a lifetime would be required to deal with one Act. Without "disrespect to the labours of a very learned, sincere and original jurist", Allen has attempted to term this kind of project as "megalomaniac jurisprudence". However, some limit has to be drawn because otherwise jurisprudence will dissipate its energy over too wide an area.

Ehrlich advised the jurists to come out of their ivory tower of analytical jurisprudence and walk on the fields of actual life where law must work and be tested. His work was undoubtedly stimulating and beneficial. However, Ehrlich did not attach sufficient importance to the way in which formal law itself influences and reforms the practices of society. The view of Ehrlich that formal law merely confirms the real norms of social law tends to give to conscious law-making only a rubber stamp efficacy and deprives it of its creative power. It is true that reforming legislation is very often the formal expression of a public feeling, but there are cases where legislation imposes a novel idea of public opinion and it is only in course of time that public opinion accepts it and approves of it. This aspect of the matter was not given due recognition by Ehrlich.

The central point in Ehrlich's approach is his minimisation of the differences between law and other norms of social compulsion. The difference is relative and smaller than usually asserted because the essential compulsion behind legal and social norms is social compulsion and not State authority. Tribal allegiance, family and religion provide motives of obedience to social norms, including most legal norms. Many legal norms never find expression in legal provisions even in

developed systems. Law is something much wider than legal regulation. The State is only one of a number of legal associations. The State, as the principal source of law, is to Ehrlich historically a much later development. It remains at all times essentially an organ of society.

Ehrlich distinguishes between static and dynamic principles of justice. Such institutions as contract, succession, the interest in one's own labour, have certain ideal forms. Justice demands the perfect economic contract or the legal prohibition to enrich oneself by the labour of someone else.

Dr. Friedmann points out that Ehrlich's work is full of stimulating suggestions for a scientific approach to law which relates the law more closely to the life of society. It has played a leading part in the reaction of legal thinking towards the turn of the century against the surfeit of analytical jurisprudence which had characterised legal thinking of the preceding generation. The practical impact of his teaching was the stimulus given to fact-study in law. His approach was more scientific and comprehensive. He suggested the study of law in its social context and emphasized its close relation with the life of society. Though Ehrlich appears to have adopted Savigny's line of thought, he differs from him in many respects. In Savigny's view, law is tied to the primitive consciousness of the people. However, Ehrlich locates law in the present-day institutions of society. While legal provisions were addressed to courts and administrative officials, there is living law which dominates life even though it may not have been formulated as living proposition, Ehrlich's approach is more practical and purposeful. He concentrates more on the present than on the past law. He emphasises the social function of law. In making and administering law, the requirements of society should be taken into consideration.

The view of Dias is that the work of Ehrlich was a powerful influence in inducing jurists to abandon purely abstract preoccupations and to concern themselves with the problems and facts of social life.[5]

Criticism of Ehrlich.—Dr. Friedmann refers to three main weaknesses in the work of Ehrlich. In the first place, Ehrlich gives no clear criterion by which to distinguish a legal norm from any other social norm. The interchangeability does not diminish the need for a clear test of distinction. Ehrlich's sociology of law is always on the point of becoming a general sociology. Secondly, Ehrlich confuses the position of custom as a "source" of law with custom as a type of law. In primitive society as in the international law of our time, custom prevails both as source of law and the chief type of law. In modern society, it is still important in the first, but less and less important in the second, role. Modern society

[5] *Jurisprudence*, p. 590.

demands articulate laws made by a definite lawgiver. Thirdly, Ehrlich refuses to follow up the logic of his own distinction between specific legal State norms and legal norms where the State merely adds sanction to social facts. As modern social conditions demand more and more active control, the State extends its purposes. Consequently, custom recedes before deliberately made law, mainly statute and decree. At the same time, law emanating from central authority as often moulds social habits as it is moulded itself.[6]

Dias also points out certain drawbacks in Ehrlich's philosophy. The difference between formal and living law is necessary and important, but there is some danger of a merely verbal discussion as to whether both should be called law, or only one, and if so which. He deprived formal law of any creative activity and gave it too much the appearance of trailing in the wake of social developments. It is true that reforming legislation is sometimes the formal expression of a tide of public feeling, but it is also true that many norms of behaviour have been given shape and direction by the constant enforcement of law. Ehrlich's distinction between norms of decision and norms of behaviour is important, but he failed to emphasise sufficiently their mutual interaction. Ehrlich's contentions were somewhat outmoded even when he propounded them. State organisation is now and has been for a long time playing an ever increasing part in the regulation of social life. It is not merely ancillary to the living law. It occupies a place of transcendent importance. The picture drawn by Ehrlich was truer of the past than of today and it was ceasing to be true even in his own day. His conception of jurisprudence could make it unwieldy and amorphous. The way in which Ehrlich proposed to conduct the study of society would all but submerge the significance of laws and might lead to the death of jurisprudence as a subject.[7]

The view of Lord Lloyd is that Ehrlich unduly belittled the primary role of legislation in creating new law, both in the public and private sector. A grasp of underlying social phenomena may not in itself point the way to appropriate solutions, either in new legislation or decisions of the courts. The legal process may need to be invoked as in itself an educative factor, as, for instance, in the attempt in the United States to impose desegregation by judicial decree and so set the educative forces in motion which might ultimately produce a change in the social climate, rather than yielding to existing social pressures. The same is the case with such reforms as town-planning or the abolition of capital

[6] *Legal Theory*, pp. 202-3.

[7] *Jurisprudence*, p. 590.

punishment which may have to be forced by a progressive minority upon a recalcitrant majority for the time being.[8]

According to Dr. Gurvitch, the essential defect in the philosophy of Ehrlich is the total lack of micro-sociological and differential analysis, that is to say, any accounting for the forms of sociality and jural types of groupings. Ehrlich's sociological and jural pluralism is an exclusively vertical one. It leads him to confuse under the term "law of society" a series of different kinds of law and this confusion is repeated with respect to rules of decision and abstract propositions. According to him, whatever is institutional or spontaneous in law comes from society opposed to State and has the character of internal law of association. Contractual law, law of property and law of unilateral domination are only masked forms of law of society and the objective and spontaneous order of individual law does not exist. At the same time, the State is seen only under the form of abstract legal propositions as though there were not levels of depth within the order of the State and as though there did not exist a spontaneous political union distinct from other spontaneous unions. The absence of micro-sociology and jural typology of groupings leads to sharply monastic conceptions. The law of society is artificially impoverished by being confined solely to the sphere of the spontaneous, as though it did not have its own abstract propositions in autonomous statutes of groups and its own rules of decision elaborated in the functioning of Boards of Arbitration and similar bodies.

Roscoe Pound (1870-1964)

In the words of Dr. Gurvitch, the sociology of law in the United States had its most elaborate and detailed, its most broadly conceived and subtle, expression in the rich scientific productions of Dean Pound, the unchallenged chief of the school of sociological jurisprudence. His thought was formed by a constant confrontation of sociological problems, philosophical problems, problems of legal history and problems of the work of American courts. This multiplicity of centres of interest and of points of departure aided Pound to broaden and clarify the very vast perspective of legal sociology and to develop gradually its different aspects.

The view of Sir G.K. Allen is that Pound was "a moderate of moderates—a relativist with a strong conviction of the provisional nature of all legal creeds and expedients".[9] It is not correct to describe his attitude as purely pragmatic or utilitarian. He was not an enemy of abstract philosophy of law. He did not underestimate the part played by

[8] *Introduction to Jurisprudence*, p. 355.

[9] *Law in the Making*, p. 34.

speculative idealism in the development of legal institutions. However, he was impressed by certain limitations of legal philosophy which history had constantly illustrated. Philosophical theory is conditioned by the circumstances of time and place. Again and again, whole trends of thought have been coloured by the desire to justify a theory of government, to solve a pressing problem of the government, to resolve doubts created by a phase of social change or to bridge transition from one order of society to another. Though each in its turn has considered itself a decisive revelation of truth, none of them is or can be final. The conclusion is that all juristic truth is relative truth.

The whole trend of Pound's legal philosophy is cautiously experimental—to the point where some may think that it is hesitating and unsatisfying, but there is much warrant in experience for believing that modesty of objective in social experiment is more fruitful in the long run than a vaulting ambition which overlaps itself. Pound's legal philosophy is essentially one of practical compromise.

Roscoe Pound was born in Lincoln, Lebraska. He was devoted to classics and botany in his youth. In 1901, he was appointed an auxiliary judge of the Supreme Court of Lebraska. In 1903, he became Dean of the Law School of the University of Lebraska. He was Dean and Carter Professor of Jurisprudence at the Harvard University from 1916 to 1936. It was from Harvard that he published a series of articles on Sociological Jurisprudence.

Among the advocates of the sociological method, the name of Roscoe Pound stands preeminent. He, more than any other in recent times, was responsible for the growth of the functional attitude in juridical science, the attitude of looking to the working of law rather than to its abstract content and regarding law as a social institution which it should be our endeavour to improve by conscious and intelligent effort along lines which jurists shall determine as the most efficacious for achieving the ends and purposes to be served. In his book *Interpretations of Legal History,* Pound wrote: "Law is the body of knowledge and experience with the aid of which a large part of social engineering is carried on. It is more than a body of rules. It has conceptions and standards for conduct and for decision, but it has also doctrines and modes of professional thought and professional rules of art by which the precepts for conduct and decision are applied and developed and given effect. Like an engineer's formulae, they represent experience, scientific formulations of experience and logical development of the formulations, but also inventive skill in conceiving new devices and formulating their requirements by means of a developed technique."

According to Pound, sociological jurisprudence should ensure that the making, interpretation and application of laws take account of social facts. In order to achieve that end, there should be a factual study of the social effects of legal administration, social investigations as preliminaries to legislation, a constant study of the means for making laws more effective, which involves the study, both psychological and philosophical, of the judicial method, a sociological study of legal history, allowance for the possibility of a just and reasonable solution of individual cases, a ministry of justice in English-speaking countries and the achievement of the purposes of the various laws. This comprehensive programme covers every aspect of the social study of laws.

According to Pound, the common law Still bears the impress of individual rights. In order to achieve the purposes of the legal order, there has to be a recognition of certain interests, individual, public and social, a definition of the limits within which such interests will be legally recognised and given effect to, and the securing of those interests within the limits as defined. When determining the scope and subject-matter of the system, the following five things have to be done: *(i)* preparation of an inventory of interests, classifying them, *(ii)* selection of the interests which should be legally recognised, *(iii)* demarcation of the limits of securing the interests so selected, *(iv)* consideration of the means whereby laws might secure the interests when those have been acknowledged and delimited, and *(v)* evolution of the principles of valuation of the interests.

Theory of Social Engineering.—Pound likened the task of the lawyer to engineering and he repeated that analogy frequently. The aim of social engineering is to build as efficient a structure of society as possible which requires the satisfaction of the maximum wants with the minimum of friction and waste. In involves the balancing of competing interests. For that purpose, interests were defined by Pound as claims or wants or desires (or expectations) which men assert *de facto,* about which law must do something if organised societies are to endure. It is the task of the jurists to assist the court by classifying and expatiating on the interests protected by law. For facilitating the tasks of social engineering, Pound classified the various interests which are to be protected by law under three heads: private interests, public interests and social interests.

(*i*) *Private Interests*: *The* private interests to be protected by law are the individual's interests of personality. These include his physical integrity, reputation, freedom of volition and freedom of conscience. They are safeguarded by the criminal law, law of torts, law of contracts and by limitations upon the powers of the government to interfere in

the matter of belief and opinion. Individual's interests in domestic relations include marriage, relations of husband and wife and parents and children and claims to maintenance. Interests of substance include proprietary rights, inheritance and testamentary succession, occupational freedom, freedom of association, freedom of industry and contract, continuity of employment etc.

(ii) Public Interests: Public interest are claims or demands or desires asserted by individuals involved in or looked at from the standpoint of political life. There are two kinds of public interests: interests of the State as a juristic person and interests of the State as a guardian of social interests. They include the integrity, freedom of action and honour of the State's personality, and claims of the politically organised society as a corporation to property acquired and held for corporate purposes.

(iii) Social Interests: Social interests are claims or demands or desires thought of in terms of social life and generalised as claims of the social group. Social interests are said to include *(a)* social interest in the general security, *(b)* social interest in the security of social institutions, *(c)* social interest in general morals, *(d)* social interest in the conservation of social resources, *(e)* social interest in general progress and *(f)* social interest in individual life.

Social interest in the general security embraces those branches of the law which relate to general safety, general health, peace and order, security of acquisitions and security of transactions.

Social interest in the security of social institutions comprises domestic institutions, religious institutions, political institutions and economic institutions. Divorce legislation may be adduced as an example of the conflict between the social interests in the security of the institution of marriage and the individual interests of the unhappy spouses. There is tension between the individual interest in religious freedom and the social interest in preserving the dominance of an established church.

Social interest in general morals covers a variety of laws, e.g., laws dealing with prostitution, drunkenness and gambling.

Social interest in the conservation of social resources covers conservation of social resources and protection and training of dependents and defectives, i.e., conservation of human resources.

Social interest in general progress has three aspects: economic progress, political progress and cultural progress. Economic progress covers freedom of use and sale of property, free trade, free industry and encouragement of inventions by the grant of patents. Political progress covers free speech and free association. Cultural progress covers free

science, free letters, free arts, promotion of education and learning and aesthetics.

Social interest in individual life involves self-assertion, opportunity and conditions of life.

The problem which juridical science faces is the evaluation and balancing of these interests. For facilitating that process, Pound provided what he called the *jural postulates of civilised society.* In 1919, he summarised those postulates as follows: Every individual in civilised society must be able to take it for granted that:

(i) he can appropriate for his own use what he has created by his own labour and what he has acquired under the existing economic order;

(ii) that others will not commit any intentional aggression upon him;

(iii) that others will act with due care and will not cast upon him an unreasonable risk of injury;

(iv) that the people with whom he deals will carry out their undertakings and act in good faith.

In 1942, Pound added to that list the following three new postulates: *(i)* that he will have security as a job-holder; *(ii)* that society will bear the burden of supporting him when he becomes aged; *(iii)* that society as a whole will bear the risk of unforeseen misfortunes such as disablement.

The jural postulates are to be applied both by the legislators and the judges for evaluating and balancing the various interests and harmonising them. Justice Cardozo writes: "If you ask how he is to know when one interest outweighs another, I can only answer that he must get his knowledge from experience and study and reflection; in brief from life itself."

Criticism.—Pound's theory of social engineering has been criticised on various grounds. It is contended that the classification of interests by Pound is in the nature of a catalogue to which additions and changes have constantly to be made and which is neutral as regards the relative value and priority of the interests enumerated. As soon as interests are ranked in a specific order or given any appearance of exclusiveness or permanence, they lose their character as instruments of social engineering and become political manifesto. Pound himself has inserted a certain evaluation by describing the Interest in individual life as the most important of all. However, there is a danger of an implicit evaluation in the grading of interests as either individual, public or social. What is an individual and what is a social interest is itself a matter of changing political conceptions. Many interests come under differ-

ent categories. The protection of inventions by exclusive patent may be an individual interest of personality as well as a social interest in economic progress. It is not only the enumeration of interests as such but also their respective weight which is a matter of changing political and social philosophies. Pound's four legal policies for the protection of general progress can be hotly contested today both in practice and theory. Freedom of property is subject to increasing limitations according to the prevailing social philosophy ranging from the transfer of means of production to the community to prevention of the abuse of rights. The degree to which patents should be protected is a subject of much controversy in view of the danger of the exclusive right of the patentee being used for sterilising inventions rather than for economic and social progress. A conservative legal order would stress most strongly the freedom of individual rights of established institutions. A totalitarian system would suppress or severely restrict the interests of personality in favour of the interests of the State. The very conception of neutrality in the catalogue of interests, the evaluation of which depends upon changing political and social systems, is the trait of a liberal approach.

Pound's metaphor of "Engineering" has been criticised on the ground that it suggests a system of merely mechanical expedients, mechanically administered to social exigencies. However, a metaphor should not be pressed too far. That hardly seems to be the meaning of Pound. After all, engineering is a matter of nice calculation and ingenious resource as well as of cogs and wheels and levers.

It is also contended that if we stress upon the experimental aspect of law, we shall be in danger of falsifying the manner in which it does in fact operate within a large part of its territory, Experiment implies initiative and a ceaselessly "engineering" law suggests the picture of a science which is always seeking new instruments, new expedients, for new needs new goods, in short good life. The picture is accurate enough for a great deal of what is called social legislation in the modern state. It is true that in the world of today no enlightened system of law is content with being merely static. It must also be dynamic and a great detail of thought and knowledge is necessary to make it usefully dynamic. Much of the modern law is dynamic. Much is and must be static in the sense that it aims at regulation of behaviour and maintenance of order. Pound himself has admitted that whole theories of law in the past have been content with the dominating purpose of keeping peace and students of English common law are aware how much of it has grown up round the cardinal notion of King's peace. Hence, if we are to regard law as an engine, let us think of it as a dynamo. Sometimes the dynamo drives a crane, a drill, a riveter or even a mechanical

shovel, but frequently it also actuates a gyroscope to maintain stability.

Sir C. K. Allen points out that if we are to think of "wants and desires" as the essential subject-matter of law, we should give that term the widest interpretation, so wide that it becomes difficult to draw a line of demarcation between the scope of sociological jurisprudence and that of any other kind of jurisprudence. The sociological point of view suffers from the same besetting sin as the utilitarian. It is apt to thrust on society what society ought to want and desire, just as Bentham offered, as actual goodness and happiness, what ought to make men good and happy and what would make men good and happy, if they were not sometimes strangely obstinate about their likes and dislikes.

The danger in Pound's theory lies in interpreting wants in their subjective immediacy. This is not what Pound intended. However, as his thesis remains undeveloped, it is open to this interpretation. If the satisfaction of wants is the end of law, then the politician can hardly be blamed if he estimates demands in terms of letters and telegrams, nor the judge if he keeps his ear to the ground to catch the public clamour. Those who demand nothing will get nothing. Those who want little will get little. Those who make extravagant claims will get less than they demand but more than they deserve. A need of which people are not conscious can hardly be counted and one which is unexpressed will not be likely to be given consideration. According to Prof. Fite, there is no obligation to respect the personal interests of those who evade the responsibility of standing for themselves. This attitude results in the pressure-group theory of government which sees the legislature as a scene of struggle between competing interests and the cabinet as made up of the representatives of various classes. Another evil which attaches to this view is that if justice consists in satisfying as much as possible of the whole body of existing wants with as little sacrifice as possible, then there is no injustice in taking care that embarrassing wants do not arise. Beyond the bare necessaries of life, wants are not a native endowment. They emerge with widening experience as the taste for luxuries or music, or they can be created artificially.

The theory is no better if wants are interpreted to include potential or possible wants. Then the aim would be to create as many wants as possible in order to satisfy them. It is not clear that a life full of many wants all of which can be satisfied, is better than a well-ordered life with simple and noble ends. Wants in themselves are impulses to action and not ends of action. They become ends when that which will satisfy them is subject to rational consideration. Ends become public

ends, an integral part of public policy and constructive legislation when the organisation is set which will achieve its realisation.

The judge is not compromising conflicting interests and trying to conserve as many wants as possible. He is not merely an umpire presiding over a fight between the plaintiff and defendant and trying to reach a decision that will satisfy as? much as possible of the demands of each. He is judging the right. Even in cases of private litigation, he is the representative of the State and gives primary consideration to the social bearings of his decision. He is guided by the ideals which control public policy.

Pound's theory shifts the centre of gravity in the legal order from legislation to court judgments, but the judiciary has its limitations. It does not have the machinery of enforcing its decisions and therefore cannot really do effective social engineering. For example, despite the famous judgment of the Supreme Court of America in *Brown* v. *Board of Education* (1954), discrimination against Negros continues in practice in the United States. Moreover, in a scientific society the law must conform to a scientific plan which can be prepared only by legislators. Judges can give *ad hoc* judgments on specific issues coming up before them but they cannot frame a broad plan for restructuring society. Of course, a judge can focus attention on a pressing social problem and through his judgment can create a modern legal principle or suggest some alteration in the law, but he cannot do what the legislature can do.

The concept of harmonising conflicting social interests raises several problems. It presumes that all conflicting social interests can be reconciled which may not always be true. For example, it is debatable whether the interests of labour and capital can be reconciled. There may be certain backward or reactionary interests which should be suppressed and not reconciled if society is to progress. Why should such interests be harmonised with interests that are progressive in nature? Pound's theory is in fact "neutralist" or rather *status quoist* in this respect.

Justice without law can result in total lawlessness and arbitrariness. The rule of law, that is, the view that decisions should be made by the application of known rules and principles, was a great achievement of positivist jurisprudence. To abandon it would be a retrograde step.

Prof. Dias points out that Pound's engineering analogy is apt to mislead. What, for instance, is the "waste and friction" in relation to the conflict of interests? Further, the construction, for example of a bridge, is guided by a plan of the finished product and the stresses and strains to be allowed to each part are worked out with a view to producing

the best bridge of that kind in that place. But with law there can be no plan, worked out in detail, of any finished product, for society is constantly developing and changing and the pressures behind interests are changing too. Therefore, the value or importance to be allotted to each interest cannot be predetermined.[10]

Dias also points out that Pound assumed that *de facto* claims pre-exist laws which are required to "do something" about them. However, it can be contended that claims are consequent on law, e.g., those that have resulted from welfare legislation. Moreover, what does "do something" about them mean? It is not enough to say that law has to select those that are to be recognised. "Recognition" has many gradations which makes it necessary to specify in what sense an interest is recognised. It is difficult to say in what sense the law recognises or does not recognise an interest.[11]

It is not interests as such but the yardsticks with reference to which they are measured that matter. It may happen that some interest is treated as an ideal in itself and in that case it is not the interest as an interest, but as an ideal that will determine the relative importance between that interest and other interests. Whether the proprietary right of a slave-owner is to be upheld or not depends upon whether sanctity of property or the sanctity of the person is considered as the ideal. The choice of an ideal or even a choice between competing ideals, is a matter of decision and not of balancing. Lawyers are concerned with the choice made by the judges and the ideals adopted by them.[12]

The balancing metaphor is also misleading. If two interests are to be balanced, that presupposes some "scale" or "yardstick" with reference to which they are measured. One does not weigh interests against one another, even "on the same plane". With reference to some ideal, it is possible to say that the upholding of one interest is more consonant with, or more likely to achieve it, than another. That means that with reference to that given ideal, one interest is entitled to preference over the other. Moreover, the "weight" to be attached to an interest will vary according to the ideal that is used. With reference to the ideal of freedom of the individual, all interests pertaining to individual self-assertion will carry more weight than social interests. With reference to the ideal of the welfare of society, the opposite may be true. The whole idea of balancing is subordinate to the ideal in view. The march

[10] *Jurisprudence*, p. 601.
[11] *Ibid*, pp. 601-2.
[12] *Ibid*, p. 602.

of society is gauged by changes in its ideals and standards for measuring interests.[13]

All questions of interests and ideals should be considered in the context of particular issues as and when they come up for decision. Each situation has a pattern of its own and the different types of interests and activities that might be involved are infinitely various. It is for the judge to translate the activity involved in the case before him in terms of an interest and to select the ideal with reference to which the competing interests are to be measured. The listing of interests is not as important as the views which particular judges take of given activities and the criteria by which they evaluate them.[14]

Interests exist and are made articulate when they are presented in litigation. Lists of interests can be drawn up, not in advance of, but after the various interests have been contended for in successive cases.[15]

The recognition of a new interest is a matter of policy. The mere presence of a list of interests is of limited assistance in helping to decide a given dispute. Interests need only be considered as and when they arise in disputes. What is important is the way in which they are viewed and evaluated by the particular judge.[16]

It is difficult to see how the balancing of interests will produce a cohesive society where there are minorities whose interests are irreconcilable with those of the majority. How does one "balance" such interests? Whichever interest is favoured, the decision will be resented by those espousing the other. A compromise will most likely be resented by both. There is a different problem where a substantial proportion of the population is parochially minded and have little or no sense of nationhood. The theory of Pound cannot be accepted generally.[17]

DIAS points out that although Pound did not ignore ideals of guidance, he devoted too little attention to them. His awareness of them is evident in his distinction between "natural natural law" and "positive natural law". According to him, the former is "a rationally conceived picture of justice and an ideal relation among men, of the legal order as a rationally conceived means of promoting and maintaining that relation, and of legal precepts as rationally conceived ideal instruments of making the legal order effective for its ideal end". The latter is "a system of logically derived universal legal precepts shaped to the experience of the past, postulated as capable of formulation to the exigencies

[13] *Ibid*, p. 602.
[14] *Ibid*, p. 603.
[15] *Ibid*, p. 603.
[16] *Ibid*, p. 603.
[17] *Ibid*, p. 604.

of universal problems and so taken to give legal precepts of universal validity." The view of Dias is that it would have been preferable if Pound had enlarged on the criteria of evaluating interests instead of developing particular interests. His work has not much practical impact on account of his sterile preoccupation with interests and too little attention to the criteria of evaluation.[18]

Pound on Social Justice.—Pound also advanced and elaborated a theory of social justice. Although his theory of justice was avowedly inspired by German sociological jurisprudence, it expressed tendencies clearly recognizable in English and American judicial and legislative practice. As his theory is in fact the development of Bentham's theory of utility as applied in the sphere of law, many English lawyers who have received the tradition of utilitarian doctrine are disposed in its favour.

Pound wrote thus in 1912: "In general, sociological jurists stand for what has been called the equitable application of law, that is, they conceive of the legal rule as a general guide to the judge, leading him towards the just results but insist that within wide limits he should be free to deal with the individual case so as to meet the demands of justice between the parties and accord with the general reason of ordinary men."

In *Justice According to Law,* Pound said: "We come to an idea of a maximum satisfaction of human wants or expectations. What we have to do in social control and so in law, is to reconcile and adjust these desires—wants or expectations, so far as we can, so as to secure as much of the totality of them as we can."

In dealing with a specific social problem, Pound stressed that the just solution could only be achieved if the interests involved were assembled within one of these classes. He was inclined to resolve most social problems by weighing or adjusting the relevant social interest. Many will conflict so that all cannot be satisfied in full. Before a just order of that society can be achieved, some selection of the interests which are to be satisfied must be made.

While not denying that dispensing justice according to fixed rules has the advantages of certainty and uniformity, Pound suggested that in order to harmonise conflicting interests in modern dynamic society, the judge will often have to dispense "justice without law", that is, without following any prescribed rule or precedent. That was due to the fact that in view of the fast changes in industrial society, new situations and problems were cropping up which had no precedent and for which law has laid down no rule.

[18] *Ibid,* pp. 604-5.

Pound argued that while on the one hand society was fast changing in the era of science and technology, men seek stability due to their desire for security. Therefore, the problem was put in these words by Pound: "Law must be stable and yet it cannot stand still."

Pound's solution to the problem was his concept of "justice without law", that is, decisions given not on the basis of any fixed legal norm but in a purely *ad hoc*, empirical manner. This notion leads to the lawlessness of the realist school which had an important impact on American jurisprudence.

Pound's Contribution.—Pound's contribution to jurisprudence is considerable. He, more than anyone, helped to bring home the vital connection between laws, their administration and the life of society. His work set the seal on prior demonstrations of the responsible and creative task of lawyers, specially the judges. Insofar as his theory laid such heavy emphasis on the existence of varied and competing interests and the need for adjustment between them, it will have enduring value.[19]

The legal philosophy of Pound was free from all dogmas. He took a middle way avoiding all exaggeration. He spoke of values but called them relative. He put emphasis on "engineering" but did not forget the task of maintaining a balance. His approach was experimental. His theory stood on a practical and firm ground and inspired great practical field work. He put emphasis on studying the actual working of legal rules in society. He stressed the importance of social research for good law-making. He pointed out the great constructive function performed by law. He pointed out the responsibility of the lawyer, the judge and the jurist and gave a comprehensive picture of the scope and field of the subject. His influence on modern legal thought was great.

The view of Lord Lloyd is that Pound leaned heavily on Ihering, Ross, Ward and Small and contrived to impart to the American approach a distinctive flavour which brought it into harmony with contemporary trends in the United States.[20]

Pound can rightly be called the father of sociological jurisprudence in the United States. It is true that there were sociological jurists before him like Ross, Ward and Small, but no one before him had created such an elaborate theory which had such a large impact on legal thought.

D. Wigoder writes: "Pound was the perfect type to direct the transmission of new learning to an intellectually rigid profession... . His legal theory was marred by its contradictions and ambivalence, but there was nothing ambivalent about his influence. In the last analysis,

[19] Dias: *Jurisprudence*, p. 601.

[20] *Introduction to Jurisprudence*, p. 356.

his most important legacy was in the questions he posed rather than the answers he provided."[21]

Karl Renner

Renner is a socialist. He attacks the capitalist system of law on the ground that under that system the formal legal concepts do not coincide with the actual contents of the concepts in practice. In the beginning, the concept of ownership was a relation between an individual and a thing. However, due to economic evolution, it now implies a complex aggregate of things known as capital. Through capital, the capitalist exercises power over others. The result is that ownership now indicates a relationship between man and man which was not so in the beginning. Under the name of ownership, the capitalist has assumed a power of command over men which is a public power. Renner maintains that ownership in modern times must be recognised as a branch of public law and the State must intervene to protect the citizen. He stands for creating legal norms which may completely express the trend of social development. His view that legal concept must be accompanied by and based on economic reality may be described as "functional jurisprudence" under Marxian colour. He pleads forcefully the need for revaluation of legal concepts so that they coincide with the economic conditions of society. He also says that legal norm has its own creative force.

Pashukanis

Pashukanis is a Marxist from the Soviet Union. His main thesis is that law, like the State, is an instrument of oppression in a capitalist society. When means of production pass into the hands of the community, it withers away.

Many other Soviet jurists have given their theories regarding the development and end of law but very little of it has any place in textbooks on jurisprudence because much of it has only propaganda value.

Parsons

Parsons sees the major function of the legal system as integrative. To quote him: "It serves to mitigate potential elements of conflict and to oil the machinery of social intercourse. It is, indeed, only by adherence to a system of rules that systems of social interaction can function without breaking down into overt or chronic covert conflict." Parsons insists on the analytical separation of the "legal system" and the "political system", though he admits that they are closely related. The analytical separation is made easier by Parsons' assertion that the

[21] Roscoe Pound: *Philosophy of Law*, (1974), p. 287.

interpretative work of the courts is the central feature of the legal order. The legislature which is the centre of the political system, formulates policy.

Stone

Prof. Stone is a representative of modern sociological jurisprudence in arguing for theory to enable us to use the social and economic order in its complex unity. According to him, one of the main faults of classical sociological jurisprudence was its *ad hoc* approach, the treatment of particular problems in isolation. "The sociological jurist of the future will generally have to approach his problems through a vast effort at understanding the wider social context." The view of Stone is that in spite of its defects and faults, the Parsonian "social system" is the type of model to which sociological jurists must aspire. A common malaise in sociological jurisprudence is its prevalent methodology of working outwards from legal problems to the relevant social science. What is needed is "a framework of thought receptive of social data which will allow us to see the 'social system' as an integrated equilibration of the multitude of operative systems of value and institutions embraced within it."

Conclusion

About the sociological school of law, Prof. Dias writes that the greatest practical contribution of various sociological approaches has been fieldwork in examining the interaction between law and its social *milieu*. Another outcome is likely to be a pointer to the evolution of ideals on an empirical basis. It has been abundantly demonstrated that laws play a significant and creative role in society and such a dynamic function presupposes the existence of ideals which provide directing force. The transcendental idealism of the past suffered a blow at the hands of positivism from which it could never hope to recover. Positivism in turn faltered in the face of the problems that confronted it. The rise of sociological study has made possible a synthesis between the two by restoring ideals in a way that could satisfy and give life to the exacting positivist discipline. It is no coincidence that the functional approach has heralded a revival of natural law in the 20th century. It was a necessary precursor.[22]

Howsoever divergent the views of various sociological jurists may appear, they have one common point that law must be studied in relation to society. This view has a great impact on modern legal thought.

Paton writes that the greatest achievement of the functional school is that it has infused new life into both the body and development of

[22] *Jurisprudence*, p. 616.

law. A promising beginning has been made from which much can be expected in the future. The actual functioning of certain parts of law has been intensively studied. Perhaps the most valuable results are a new understanding of the judicial method and a broader outlook both in the universities and in the courts. A determined attempt is now being made to teach law as a function of society instead of a mere abstract set of rules, while the courts are canvassing freely the reasons of social policy which lie behind certain rules of law. Allen says that "the whole theory of the sociological school is a protest against the orthodox conceptions of law as an emanation from a single authority in the State or as a complete body of explicit and comprehensive propositions applicable by accurate interpretation to all claims, relationships and conflicts of interests."

Critics of the sociological school of law point out that its advocates desire to teach a little of everything except law. A textbook on sociology cannot become a work on jurisprudence by merely changing the title. A knowledge of the properties of clay may be useful to a modeller but 20 years spent in scientific analysis of that material would be a waste of the talent of the artist. Manning compares a sociological jurist to a Professor of Mathematics who is concerned about the bridges of the country and who urges his students to form the advance guard of creative engineering and who stresses that mathematics cannot be studied in isolation from town planning.

Another writer observes: "Anatomy is all you need to know. It is true that you will gain your knowledge from a dissection of the dead and in your practice you will be concerned with the bodies of those who, at least until they receive your merciful attentions, are still in the land of the living. It is true also that in the case of the patient psychological forces, business worries and married life may affect his health. But the study of these things is difficult and if we want an impartial science we must leave them alone. Austin, our founder, recognised that some of these things would affect your professional practice, but he wisely concentrated on anatomy alone. I advise you to do the same and to save your profession from having a little knowledge of everything save anatomy."

The relationship between law and social interests can be studied by jurisprudence for three reasons. The first reason is that it enables us to understand the evolution of law in a better manner. What is required is not a dogmatic assumption that economic self-interest or some such force has determined the volition of law but an analysis of the interaction between a tradition which has sanctified the structure of law and the immediate pressure of social demands. The second reason is that

although the views of man on ethics and his social needs have changed, yet the element of human interest provides a greater substratum of identity than the logical structure of the law. Comparative law shows that while the legal theories of two systems may be very much different, each may be forced for reasons of convenience to modify itself in application so that ultimately the practical results are not far removed. The third reason is that a study of the social interest is essential to the lawyer to enable him to understand the legal system.

SUGGESTED READINGS

Allen, C.K.	:	*Law in the Making*, 6th edn., Oxford, 1958.
Allen, C.K.	:	*Legal Duties*, Oxford, 1931.
Bendix, R.	:	*Max Weber: An Intellectual Portrait.*
Buckland, W.W.	:	*Some Reflections on Jurisprudence*, Cambridge University Press, 1945
Cairns, H.	:	*The Theory of Legal Science*, University of North Carolina Press, 1941
Cardozo, B.N.	:	*The Growth of the Law*, Yale University Press, 1924.
Cardozo, B.N.	:	*The Nature of the Judicial Process*, Yale University Press, 1921.
Carlston, K.S.	:	*Law and Structure of Social Action*, Stevens & Sons, Ltd., 1956
Castberg, F.	:	*Problems of Legal Philosophy*, 2nd edn., Oslo University Press, Allen & Ilnwin Ltd., 1957
Cohen, F.S.	:	*Ethical Systems and Legal Ideals*, Falcon Press, 1933.
Cohen, J., Robson, R.A. and Bates, A.	:	*Paternal Authority: The Community and the Law*, Rutgers U.P., 1958.
Cowan, T.A.	:	The *American Jurisprudence Reader*, Oceana Publications, 1956.
Dias, R.W.M.	:	*Jurisprudence*, London, 1976.
Duguit, L.	:	*Law in the Modern State*, trans. F. and H. J. Laski, Allen & Unwin Ltd., 1921.
Duguit, L.	:	*Modern French Legal Philosophy*, trans. F. W. Scott and J.P. Chamberlain, The Marmillan Co., New York, 1921.
Ehrlich, E.	:	*Fundamental Principles of the Sociology of Law*, trans. W.L. Moll, Harvard University Press, 1936.
Friedmann, W.	:	*Law in a Changing Society*, Stevens & Sons Ltd., 1959.
Friedmann, W.	:	*Legal Theory*, 5th ed., Stevens & Sons Ltd., 1967.
Ginsberg, M.	:	*Reason and Unreason in Society*, Longman, Green and Co., 1947.

Gurvitch, G.	:	*Sociology of Law,* Routledge & Kegan Paul Ltd., 1947.
Hall, J.	:	*Comparative Law and Social Theory,* Louisiana State U.P., 1963.
Hall, J.	:	*Foundations of Jurisprudence,* The Bobbs-Merrill Co. Inc., 1973.
Hall, J.	:	*Living Law of Democratic Society,* The Bobbs-Merrill Co. Inc., 1949.
Hall, J.	:	*Readings in Jurisprudence,* The Bobbs-Merrill Co., 1938.
Hunt	:	*The Sociological Movement in Law,* 1978.
Ihering, R. von	:	*Law as a Means to an End.*
Ilbert, C.	:	*Great Jurists of the World,* ed.J. MacDonell and E. Manson, John Murray, 1913.
Johnson, H.M.	:	*Sociology: A Systematic Introduction,* Routledge & Kegan Paul Ltd., 1961.
Jolowicz, H.F.	:	*Lectures on Jurisprudence,* ed. J.A, Jolowicz, The Athlone Press, 1963.
Jorgensen, S.	:	*Law and Society,* Akademisk Boghandel, 1972.
Kocourek, A.		*An Introduction to the Science of* Law, Little, Brown & Co., 1930.
Lasswell, H.D.	:	*Power and Personality,* Norton and Co., New York, 1948.
Lloyd, D.	:	*Introduction to Jurisprudence,* 4th edn., Stevens & Sons Ltd., 1979.
Lloyd, D.	:	*The Idea of Law,* Penguin Books Ltd., 1964.
Morris, C.	:	*The Great Legal Philosophers,* University of Pennsylvania Press, 1959.
Paton, G.W.	:	*A Text-Book of Jurisprudence,* 4th edn., G.W. Paton and D.P. Derham, Clarendon Press, Oxford, 1972.
Patterson, E.W.	:	*Jurisprudence,* The Foundation Press Inc., 1953.
Pound, R.	:	*An Introduction to the Philosophy of Law,* Yale University Press, 1922.
Pound, R.	:	*Contemporary Juristic Theory,* War Ritchie Press, 1940.
Pound, R.	:	*Interpretations of Legal History,* Cambridge University Press, 1923.
Pound, R.	:	*Jurisprudence,* West Publishing Co., 1959.
Pound, R.	:	*My Philosophy of Law,* Boston Law Book Co., 1941.
Pound, R.	:	*Social Control Through Law,* Yale University Press, 1942.

Pound, R.	:	*The Spirit of the Common Law,* Marshall Jones Co., Boston, 1921.
Reuschlein, H.G.	:	*Jurisprudence: Its American Prophets,* The Bobbs-Merrill Co. Inc., 1951.
Sawer, G.	:	*Law in Society,* Oxford, 1965.
Seagle, W.	:	*The Quest for Law,* Alfred A. Knopf, 1941.
Selznick	:	*The Sociology of Law.*
Simpson (Ed.)	:	*Oxford Essays in Jurisprudence,* (Second Series).
Simpson, S.P. and Stone, J.	:	*Cases and Readings on Law and Society,* West Publishing Co., 1949.
Sorokin, P.	:	*Contemporary Sociological Theories,* Harper and Bros., 1928.
Stone, J.	:	*Human Law and Human Justice,* Stevens & Sons Ltd., 1965.
Stone, J.	:	*Social Dimensions of Law and Justice,* Stevens & Sons Ltd., 1966.
Timasheff, N.S.	:	*An Introduction to the Sociology of Law,* Harvard University Committee on Research in the Social Sciences, 1939.
Wigdor, D.	:	*Roscoe Pound, Philosopher of Law,* Greenwood Press, Connecticut, 1974.

Chapter Twenty Seven

American Realism

THE REALIST movement is a part of the sociological approach and it is sometimes called the "left wing of the functional school". It differs from the sociological school as it is little concerned with the ends of law. It concentrates on a scientific observation of law in its making and working. The movement is called "realist" as it studies law in its actual working and rejects the traditional definition of law that it is a body of rules and principles which are enforced by the courts. The advocates of the realist movement concentrate on the decisions given by law courts. They not only study the judgments given by the judges but also the human factor in the judges and lawyers. They study the forces which influence judges in reaching their decisions.

The American realist movement is a combination of the analytical positivist and sociological approaches. It is positivist in the sense that it regards law as it is and not as it ought to be. The ultimate aim is to reform the law, but that cannot be done without understanding it. Law is the product of many factors and therefore the realists are interested in those sociological factors which influence law. They share with the sociologists an interest in the effects of social conditions of law as well as the effect of law on society. They put too much emphasis on judges. To them law is what judges decide. That is partly due to the fact that judges have played a very important part in the growth of the American Constitution and law. The approach of the realists is essentially empirical. Their view is that the decisions of the judges are brought about by ascertainable facts. Some of them are the personalities of the individual judges, their social environments, the economic conditions in which they have been brought up, business interests, trends and movements of thought, emotions, psychology etc. The importance of the personal element is not new, but the contribution of the realists lies

in the fact that they have put too much emphasis on it. Emphasis on this point has been put by Gray in these words: "Suppose, Chief Justice Marshall had been as ardent a Democrat (or Republican, as it was then called) as he was a Federalist. Suppose, instead of hating Thomas Jefferson and loving the United States Bank, he had hated the United States Bank and loved Thomas Jefferson, how different would be the law under which we are living today."

While calling American realism a revolt against formalism, Lord Lloyd points out that in the nineteenth century and at the beginning of the twentieth century, *laissez faire* was the dominant creed in America. That creed was associated with a certain attachment to what has been called "formalism" in philosophy and the social sciences. That was marked by a reverence for the role of logic and mathematics and *a priori* reasoning as applied to philosophy, economics and jurisprudence, with but little urge to link them empirically to the facts of life. However, empirical science and technology were increasingly dominating American society and with that development arose an intellectual movement in favour of treating philosophy and the social sciences as empirical studies not rooted in abstract formalism. That movement in America was associated with the name of Justice Holmes in jurisprudence.[1]

Dr. Friedmann also points out that no country could offer richer material for the study of law as it worked in fact than the United States, with a Federal and forty-eight State jurisdictions, together producing innumerable precedents, with the function which the Supreme Court exercised in the political and social life of the country; with the contrast between the theoretical and practical aspect of constitutional principles; with the development of powerful corporations protected by the same individual rights as the pioneer farmer in the Wild West; with the manifold political machinations within the judicial system. These and many other factors contributed to develop a scepticism symptomatic of the crisis which affected the nineteenth century's outlook on life in the law no less than in other fields.[2]

The organisation of the judicial system in the United States also played its part. The Supreme Court is the final authority not only to interpret law but also to decide its validity. The judges of the lower courts in the United States are elected and they are influenced by extraneous considerations while deciding cases. The existence of separate State jurisdictions caused a multiplicity of laws and decisions. All these made

[1] *Introduction to Jurisprudence*, p. 451.

[2] *Legal Theory*, p. 245.

some jurists concentrate more on courts to know the actual working of law and to study those factors which determine and influence it.

Gray (1839-1915)

Dr. Friedmann considers John Chipman Gray (1839-1915) and Oliver Wendell Holmes (1841-1935) as the mental fathers of the realist movement[3]. Gray, although a distinguished exponent of the analytical tendency in jurisprudence, relegated statutory legislation from the centre of the law to one of several sources and placed the judge in the centre instead. His own definition as well as his comments admit and emphasise the great influence of personality, prejudice and other non-logical factors upon the making of law. The illustrations given by him show how political sympathy, economic theory and other personal qualities of particular judges have settled matters of the gravest importance for millions of people and hundreds of years. Gray prepared the ground for a more sceptical approach.

Justice Holmes (1841-1935)

That tendency was made articulate by Justice Holmes who, in an essay published in 1897, gave an entirely empirical and sceptical definition of law in these words: "Take the fundamental question, what constitutes the law... you will find some text writers telling you that it is something different from what is decided by the courts of Massachusetts or England, that it is a system of reason, that it is a deduction from principles of ethics or admitted actions, or what not, which may or may not coincide with the decision. But if we take the view of our friend, the bad man, we shall find that he does not care two straws for the action or deduction, but that he does want to know what Massachusetts or English courts are likely to do in fact. I am much of his mind. *The prophecies of what the courts will do in fact and nothing more pretentious are what I mean by the law".*

Prof. Dias points out that Justice Holmes was not giving a final definition of law. The statement that law is only what courts do is iconoclastic and suggests that ethics, ideals and even rules should be put on one side. Holmes himself had no such intention as he himself insisted in the same paper on the need to restrict the area of uncertainty and the need for more theory. To quote him: "We have too little theory in the law, rather than too much." When he wrote, he did not have any suspicion that he would be hailed as the prophet of a new faith.[4] Dr. Friedmann points out that the abovementioned statement was taken as a gospel by the followers of realism and jurisprudence and they

[3] *Ibid*, p. 246.

[4] *Jurisprudence*, pp. 621-22.

followed that and some similar statements of Holmes with almost religious fervour.[5]

Both in his writings and his long tenure as a judge of the Supreme Court of America, Holmes played a fundamental part in bringing about a changed attitude to law. He put emphasis on the fact that the life of law was experience as well as logic. He stressed the empirical and pragmatic aspect of law. For him, legal history was to be studied primarily as a first step towards a deliberate reconsideration of the worth of rules developed historically. According to him, law must be strictly distinguished from morals. A lawyer is concerned with what the law is and not with what it ought to be. Holmes was never tired of asserting how "policy" governed legal development, especially in the form of the "inarticulate" convictions of those engaged in creating law. Holmes felt that the development of law could be justified scientifically. In this respect, Holmes relied more on practical than on pure science, the lawyer trained in economics and statistics though he nowhere clearly indicated how an objectively sound "policy" was to be attained. Holmes accepted the possibility of scientific valuation in law, but he did not go so far as Dewey in the view that the choice between different values can also be verified scientifically. For Holmes, the arbiter of this choice could only be naked force.

Holmes' view of law as "prediction" placed both litigation and the professional lawyers in the centre of the legal stage. His emphasis on what courts may do, rather than on abstract logical deduction from general rules, focussed attention of the empirical factors which constitute a legal system. There was much in the American system which made this new approach acceptable to American lawyers, Holmes' reliance on practical social science seemed to point the way to future progress. His dissenting judgments in *Lochner* and *Adams* cases were thought to point the way to a more rational and scientific application of the Constitution to the actual social needs of the highly industrialised modern society.

The view of Lord Lloyd is that despite Holmes' great influence both as part of the general movement and as the outstanding American jurist of his day, it was not until towards the end of his career that a positive legal movement under the designation of "legal realism" began to manifest itself.[6]

Prof. Dias points out that there was no such thing as a "school" of American realists. The difficulty in presenting in a coherent manner their views arises from the fact that there are varying versions of real-

[5] *Legal Theory*, p. 247.

[6] *Introduction to Jurisprudence*, p. 455.

ism as well as changes of front. Positions previously defended with zest have been given up. Justice Jerome Frank preferred the phrases "experimentalists" or "constructive skeptics". He described his own attitude as one of "constructive skepticism". He repudiated the charge that the realist school embraced fantastically inconsistent ideas by pointing out that "actually no such school existed". To quote him, the common bond is "skepticism as to some of the conventional legal theories, a skepticism stimulated by a zeal to reform, in the interests of justice, some courthouse ways."

Jerome Frank (1889-1957)

Frank preferred to call himself a "constructive legal sceptic" rather than a realist. He insisted that there were really two groups of realists: "rule-sceptics" and "fact-sceptics". The rule sceptics rejected legal rules as providing uniformity in law and tried instead to find uniformity in rules evolved out of psychology, anthropology, sociology, economics, politics etc. The fact-sceptics of whom Frank is one, depart not only from the idea of rule certainty but also point to the uncertainty of establishing facts in the trial courts. According to Frank, a legal decision is the result of the application of a rule of law to the facts as found by the judge. If the facts are wrongly found, the decision must be erroneous and an appellate court on which jurisprudence has tended to concentrate, not having seen the witnesses, is loath to interfere with the findings of fact. Moreover, the difficulty of determining whether the guess of the judge as to the facts does correspond to the actual facts is sufficiently difficult where the testimony appears in the form of a printed record. The difficulty is still greater where the testimony, which the judge has heard, was oral as well as conflicting. The courts have often noted that the printed page omits the witness's tone of voice, the hesitation or readiness with which he gives his answer and similar phenomena. The result is that there is no yardstick for measuring the accuracy of the judge's finding of facts in a contested case. The judge often states the facts so loosely that it is not possible with any degree of accuracy to determine which part of the statement was the F (fact) he used in multiplying R x F (rules into facts). The same is often true of the court's statement of the R (rule). It sometimes makes it difficult to use opinions as analogies for future cases. Commentators disagree as to both the R factors and the F factor present in many opinions. Thus the facts of the cases cannot be ignored as they alone could cause uncertainty in decisions. If and insofar as, Frank is stressing only the uncertainties introduced into the judicial process by the difficulty of finding the true facts, few would disagree with him. It is the lower courts which deal with an overwhelming percentage of the cases and

to a submissive plaintiff, it may not matter whether be loses because of misunderstanding of the law or an error regarding facts. If the realist plea is that the court should improve the technique of fact finding, they emphasise a point which was not adequately stressed in the past.

In actual practice, all legal arguments have a litigious setting. There is always the opponent prepared to come forward with an argument founded upon divergent authorities. This divergence and opposition of authorities which makes it probable for lawyers to argue and for judges to rationalise either of the two contradictory decisions is, in the opinion of Frank, one of the main sources of uncertainty in the settlement of an issue at law and evidence of the futility of viewing judicial decisions as products of deductive logic. The divergence of authorities is one of the conditions of the probability of any prediction of future judicial decisions. On account of the litigious and hence dialectical setting of legal argument, its authoritarian form is thoroughly justified. The authorities chosen by one side of a legal dispute are its postulates. They are chosen as a result of a desired conclusion by processes of logically valid reasoning. The opposite side chooses its postulate in the same way and for the same end. The choice of postulates as authoritative for an argument is not a matter of logic. It is a matter of sagacity and knowledge. The only logical question is whether the conclusion desired to be drawn can be exhibited as tenable in terms of the authorities chosen deliberately for that purpose.

In his book *Law and the Mordern Mind* (1930), Frank emphasised the fact that law is not certain. "Certainty of law is a legal myth." It is the "father-complex" which makes a man think in terms of the certainty of law. It is not proper for judges and lawyers to stick to the myth of certainty in the name of precedents and codifications. It is their duty to do some constructive work in every case and not merely follow precedents. It is very essential that the facts of every case must be examined in the background of the changed social conditions and only that decision must be given which is warranted by the changed circumstances. It is not proper to follow precedents blindly. According to Frank, the craving for certainty and guidance which men seek in law may stem, in part at any rate, from the yearning for security and safety which is an inescapable legacy of childhood. The child puts his trust in the power and wisdom of his father to provide an atmosphere of security. In the adult, the counterpart of this feeling is the trust reposed in the stability and immutability of human institutions. Frank suggested that the quest for certainty in law is in fact a search for a "father-symbol" to provide an aura of security. Although he attributed great prominence to this factor, he offered it only as a "partial explanation" of what he called the "basic myth" and listed fourteen other explanations as well.

He called on the lawyers to outgrow their childish longings for a "father-controlled world" and follow the example of Justice Holmes, the "completely adult jurist".

Rules are merely word formulae. If they are to have any meaning at all, that meaning has to be sought in the facts of real life to which they correspond. Frank adopted the following quotation from Holmes: "We must think things not words, or at least we must constantly translate our words into the facts for which they stand if we are to keep to the real and the true."

Frank shows no acquaintance at all with formal logic. He has failed to realise that the subject-matter of formal logic does not embrace the psychological phenomena of human thinking. He appears to have misrepresented formal logic as if it pretended to be a psychological account of human thinking. Frank's failure to follow the character of formal logic has serious consequences for his interpretation of the judicial process.

Logic of probability which Frank mentions very often as antithetical to the logic of certainty, is only a special branch of formal, deductive logic. Frank, Cardozo and Wurzel make only empty references to the logic of probability as the logic of law. They are partially correct but they show no understanding of the nature of the logic of probability. Certainty and probability are truth-values of proposition. Probability is merely the class of all truth-values ranging between but not including ignorance and certainty. If any proposition is probable, its contradictory proposition must also be probable. If the proposition predicting a judicial decision is only probable, contradictory propositions making other predictions must also be probable. The logic of probability is the formal analysis of the deduction of opposing predictions from opposing hypotheses in terms of available knowledge.

The fact that propositions predicting judicial decisions are only probable is linked with the fact that the demonstration of the proposition of law which every judicial decision must express explicitly or implicitly in terms of authorities or principles is absolutely certain. Unless the proof can be shown to be logically formally invalid, a judicial argument that demonstrates a given proposition as a tenable rule of law, renders that rule of law certain. However, the prediction of decisions should not be confused with the demonstration of rules. The argument predicting a judicial decision is deductive in form and involves both legal and extra-legal factors. It involves a knowledge of law, of principles of Policy, of social trends, of the personality of the judge etc. The prediction of the future decision and the formal analysis of legal arguments are closely related.

Frank failed to distinguish law in action and discourse and to appreciate the logical pluralism which is at the same time a source both of certainty and fertility. Law in the first sense is a term which designates all the actual processes which take place in time, the prosecution of litigation, the advisory work of the law office, the judicial administration of disputes and so on. Law in the second sense is an academic subject-matter, a body of propositions having certain formal relations capable of analysis. Mortimer J. Adler writes that there is no reason why there should not be a science of law in both these sense of the term, but the two sciences are quite different things and all the trouble comes from confusing them. The science of law as official action is an empirical observation and includes a study of sociological and psychological phenomena as well as knowledge of law. The science of law in discourse is a purely formal science like mathematics. Its subject matter is completely propositional. Its only instrumentality is formal logic. It deals with certainties and nothing else.

Carl N. Llewellyn (1893-1962)

Institutions and Law-jobs.—According to Llewellyn, law is an institution. An institution is an organised activity which is built around doing a job or a "cluster" of jobs. In the case of a major institution, its "job-cluster" is fundamental to the continuance of the society or group in which it operates. The institution of law in our society is an extremely complex one. It consists not only of a body of rules organised around concepts and permeated by a large number of principles, but also the use of precedents and ideology. In addition to these, there are many practices some of which are flexible and some rigid, which determine how certain things within the legal system may or may not be done. All such matters control in various ways the activities of the "men-of-law". Much of the interest of Llewellyn is centred upon what he calls the ways in which in various types of communities the "law-jobs" are actually carried out.

Llewellyn describes "law-jobs" as the basic functions of law which are twofold: "to make group survival possible", but additionally to "quest" for justice, efficiency and a richer life. To this end, he lists "law-jobs" as the disposition of "trouble cases"; "preventive rechannelling", the reorientation of conduct and expectations to avoid trouble; the provision of private law activity by individuals and groups such as the autonomy inherent in a law of contract; and "the say", the constitutional provision of procedures to resolve conflict. The first three jobs describe "bare bones" law, but out of them may emerge the additional "questing" phase of the legal order. For Llewellyn, the problem was to find the best way to handle "legal tools to law-job ends." This brings

one to his notion of a "craft" as a minor institution. A craft in this sense consists of a kind of "know how" among a body of specialists who are engaged in performing certain of the jobs within the framework of an institution. It consists of an organised and continuous body of skills developed by specialists and handed on from generation to generation by a process of education and practical example. The practice of the law is the practice of a set of crafts and the most important is the juristic method.

Common Law Tradition.—In his book, *The Common Law Tradition,* Llewellyn develops his idea of a craft in great detail. The book is a kind of handbook of the craft both of judging and of advocacy within the framework of the common law tradition, though applied specially to appellate cases. The aim of the book is to deal with what it describes as a "crisis of confidence within the Bar", concerning particularly the question whether there is a reasonable degree of "reckonability" in the work of the appellate courts in the United States. Llewellyn points out that the legal profession in the United Slates is exceedingly worried because it is believed that the courts have moved away from a basis of stable decision-making, in favour of deciding cases on the basis of their sentiments and then seeking for *ex-post-facto* justification in their judgments.

According to Llewellyn, there is a large measure of predictability in case law which is due to the general craft of decision-making in the common law tradition. He examines what he calls a "cluster of factors" which tend to have a major steadying influence in producing stability in the work of the courts. These include such matters as "law-conditioned officials", known doctrinal techniques, the limiting of issues, the adversary arguments of counsel etc. In this book, Llewellyn emphasizes the importance of what he calls the general "period style" employed by the courts. Llewellyn makes no attempt to test empirically the steadying factors. He gives no indication of how an assessment could be made of the relative weight of each and how each can be used for productive purposes.

Llewellyn's discussion of "period-style" is of great interest. In the common law, the practice of the courts has fluctuated between two types of style called the Grand Style and the Formal Style. The Grand Style is based essentially on an appeal to reason and does not involve a slavish following of precedent. Regard is paid to the reputation of the judge deciding the earlier case and principle is consulted in order to ensure that precedent is not a mere verbal tool, but a generalisation which yields patent sense as well as order. Policy comes in for explicit examination. Under the Formal Style, the underlying notion is that the

rules of law decide the cases. Policy is for the legislature and not for the courts. Hence the approach is authoritarian, formal and logical. The Grand Style is also characterised by resort to "situation-sense". The Formal Style is not so concerned with social facts. The Grand Style is concerned with providing guidance for the future far more than is the Formal Style.

Llewellyn does not assert that the styles are ever found in their absolute purity at any given moment. There is a tendency for this movement from one period to another between the opposite poles. Llewellyn regarded the Grand Style as characteristic of the creative period of American law in the early part of the 19th century. After that, there was a rapid move towards the Formal Style. The view of Llewellyn is that in recent times the appellate courts in the United States have been moving steadily back towards the earlier type of Grand Style. It is this tendency which has misled the legal profession into thinking that there is a higher measure of unpredictability in their decisions than there was in the previous formal period. This was due to a misconception regarding the ways in which the court used precedent and the tremendous "leeways" which are afforded by the system of precedent.

Llewellyn confines his evidence almost exclusively to the material which appears from the actual decisions of appellate courts. He insists that we must learn to read those cases not for what they decide but for their "flavour". Do not look to "what was held", but look to "what was bothering and helping the court". Llewellyn virtually ignores subjective factors. He concentrates entirely on the actual decisions of the court as opposed to extrinsic factors. It is possible to show that there is an exceptionally high measure of "reckonability" in American appellate decisions.

What Llewellyn claims to have attempted and to some extent achieved is to establish a jurisprudence which may serve the needs of the ordinary student of law, the ordinary practitioner and the ordinary judge. In this process, many myths have to be eliminated.

The view of Llewellyn is that the common law system produces a remarkably high measure of predictability so that a skilled lawyer may be able to average correct predictions in 8 out of 10 cases.

Principal Features of Realist Approach.—Llewellyn outlines the principal features of the realist approach as follows:

(*i*) There has to be a conception of law in flux and of the judicial creation of law.

(*ii*) Law is a means to social ends and every part of it has constantly to be examined for its purpose and efforts and judged in the light of both and their relation to each other.

(iii) Society changes faster than law and so there is a constant need to examine how law meets contemporary social problems.

(iv) There has to be a temporary divorce of "is" and "ought" for purposes of study. This does not mean that the ideas of justice and teleology are to be expelled altogether, but they are to be put on one side while investigating what the law is and how it works. By this divorce, both the processes will be improved. The realists are vitally interested in the aims and ends of the law and it was with a desire to improve law that the realist movement was started. Adequate reform has to be preceded by an examination of how the law operates in actual practice. Such an investigation will be defective if the ideas of justice are also mixed up during the investigation of facts.

(v) The realists distrust the sufficiency of legal rules and concepts as descriptive of what courts do.

(vi) The realists do not have trust in the traditional theory that the rules of law are the principal factors in deciding cases. They have drawn attention to many other influences which play a decisive role. It is absurd to define law solely in terms of legal rules.

(vii) The realists believe in studying the law in narrower categories than has been the practice in the past. They feel that part of the distortion produced by viewing the law in terms of legal rules is that rules cover hosts of dissimilar situations where in practice utterly different considerations apply.

(viii) The realists insist on the "evaluation of any part of the law in terms of its effects" and on "the worthwhileness of trying to find these effects."

(ix) There must be a sustained and programmatic attack on the problems of the law along the lines indicated above.

Llewellyn admitted that these nine points were not new. The first three furnish an obvious foundation for any sociological approach to jurisprudence. The main characteristics of realism lay first in the peculiar prominence attached to the fourth, fifth, sixth, seventh and eighth points and secondly in the amalgamation of all nine points into a working programme and the actual carrying out of research along those lines.

The view of Lord Lloyd is that what Llewellyn claims to have attempted and to some extent achieved is to establish a jurisprudence which may serve the needs of the ordinary student of law, the ordinary practitioner and the ordinary judge. In this process, a good many myths have to be eliminated, and in particular both the myth that cer-

tainty can be achieved under a legal system or its opposite that predictability is unattainable. The view of Llewellyn is that the common law system produces a remarkably high measure of predictability so that a skilled lawyer proceeding on the basis discussed in his latest book ought to average correct predictions in eight out of ten cases.[7]

The borderline between realist jurisprudence and sociological jurisprudence is not very clear. F. S. Cohen, a prominent realist, defines the realm of realist jurisprudence as the "definition of legal concepts, rules and institutions in terms of judicial decisions other acts of State force" and the realm of sociological jurisprudence as "the appraisal of law in terms of conduct of human beings who are affected by the law". Cohen is aware of the fact that both the movements are in part complementary and in part overlapping, while both emerge out of common sceptical, scientific, anti-supernatural functional outlook. In spite of their commonness, both the movements differ in one respect that the former concentrates or limits itself to a scientific observation of law in its making and working, whereas the latter sets out to define the ends of law.

Computer Prediction.—It has been suggested that insofar as there is consistency in decision and attitude, the prediction of judicial opinions by computers becomes possible. Computer techniques in this connection have been of fact-studies and attitude-studies. With regard to the former, it is said that the acceptance of a fact by an appellate court rests on identifiable conditions surrounding the way in which it was presented to the trial court. If the accepted facts are combined in certain ways, the decisions will go one way. Personal attitudes are also said to be capable of being scaled by means of scalogram analysis. The basis of this is that a person who acts positively to a weak stimulus will react similarly to any stronger stimulus, while a person who reacts negatively to a strong stimulus will react similarly to any weaker stimulus. If a line of cases can be made to scale in this way, that would show that a set of values is shared by the members of that court. The future behaviour of that court then becomes predictable.

The view of Prof. Dias is that such attempts at prediction are destined to fail. The personal element cannot be eliminated from judicial decisions. Everything depends on how facts are viewed and stated. The same set of facts may be stated in different combinations and at different levels of generality. No mechanical aid can predict which combination or level is to be chosen. Different *rationes* can be extracted from a decision depending on whether the later court wishes to see resemblances or differences. If it is known which way a judge is going to regard a rule, a computer is not needed and if it is not known, a

[7] *Introduction to Jurisprudence*, p. 465.

computer is useless. Moreover, the predictability of judicial decisions depends upon consistency in the attitude of the judges to values. The attitudes of the people change with age and experience. Computer prediction can only work on the basis of reported decisions and a majority of them, particularly those of lower courts, are never reported. The result is that the bulk of a judge's early decisions are not available and the basis for predicting his reactions is inadequate. Prediction requires constant working material. It cannot operate when new matter is introduced, whether in the form of legislation or creative decisions. Computers are of no help in such cases. Where the computer analysis has indicated that a judge's decision will be such and such in a particular case or a type of cases, that very fact could induce the judge either to decide accordingly or to decide the opposite deliberately so as not to be dictated by a machine. Both the reactions are not desirable. The data programmed into a computer will reflect personal quirks of the programmer which will be substituted for the quirks of the judge. That is wholly undesirable. Under the present system, the judge works in the open while the programmer works behind the scene.

Assessment of the Realist Movement in 1961

In 1961, Prof. Yntema, himself a leading realist, attempted to assess the present and future of the realist movement. After stressing both the importance and influence of legal realism upon American law, lawyers and law schools, he conceded that a major defect of the realist movement had been the neglect of the more humanistic side of law, particularly revealed both in its neglect of the comparative and historical aspects of law and the tendency to place overemphasis upon current "legal practice". The result was a certain loss of perspective and in particular a failure to distinguish between what is trivial or ephemeral on the one hand and what is of wider import on the other. His suggestion for the future is not to abandon the critical achievements of realism but to develop them on more constructive lines. That would involve a more humanistic conception of legal science, with due attention being paid both to the systematic analysis of legal theory and historical and comparative research. Whatever may be the future of legal realism as a movement, it cannot be denied that its impact has been such that things can never seem to be quite the same again. Moreover, the realist movement has indirectly engendered two movements viz., Jurimetrics and Behaviouralism. These movements have such an impact in the United States that they cannot be ignored. In one sense, they take over where realism left off. While the realists had some inspired ideas, developed a number of theoretical models and urged us to exploit the social and technological sciences, the two new movements are firmly

established within the mainstream of the social sciences and use techniques associated with them freely and to valuable effect.

The realist movement in the United States has suffered from its own exaggerations. It can be accused of causing a great deal of controversy and confusion in a number of directions. Kantorowicz, a spokesman of the American realists, has levelled several charges against them. His contention is that the realists confuse natural and cultural sciences. Natural science deals only with real events governed by law of nature. Cultural sciences deal with human actions and are governed by laws of men and those actions can either be lawful or unlawful. As a matter of fact, they are more often unlawful. It is precisely the existence of unlawful acts that makes legal science necessary. It alone prepares us to evaluate unlawful acts and that presupposes the knowledge of how they ought to have been, These unlawful acts are as real as the lawful acts. For this very reason, natural science which knows nothing of unlawful and therefore of unreal acts nor of unreal and unlawful acts, can teach us nothing decisive. Ours is a science that must learn to differentiate between lawful and unlawful acts, which must be able to judge the unlawful ones and therefore must previously know the unreal acts which ought to have been real. The natural science which a realist should study is that part of astronomy which might teach us how stars ought to move and they move and choose to violate the laws of celestial mechanics. Unfortunately such a branch of astronomy has not been developed. If a person actually develops it, he would probably took to legal science for guidance, not vice versa.

The realists have been accused of confusing explanation and justification. If legal science were an empirical science, the chief method would be explanation through cause and effect. If it were a rational and normative science, its chief category would be justification through reason and consequence. Genetic explanation and normative justification should be kept apart. This is one of the most significant lessons of modern epistemology. It may be sense or nonsense to explain with Jerome Frank that the "childish" desire to attribute inviolable certainty to law is caused by a "father-complex". The truth or untruth of that alleged attribution is perfectly independent of its psychoanalytic or any other genetic explanation. Of course, the genetic method may be used as a tool in the service of the normative method and the vice versa.

The realists create a confusion between law and ethics. That is the reproach which the realists make to the classical, normative conception. Their misgivings are due to their own mistakes, their confusion of legal with moral norms. The former requires some external behaviour

and can be complied with whatever may be the motives. The latter always takes notice, for example, of a selfish or altruistic aim.

The realists fail to distinguish between realities and their meaning. The lawyer is concerned with the meaning of observable realities, but meanings are not observable and still less tangible. It is the history of law that finds its interest in observable and unobservable facts. Much of the work of the realists is nothing but contemporary American legal history.

The realist confusion is between the concept and one of the elements which compose that concept. If the law is what courts of law do, one would prefer to say that religion is what the universities teach, medicine is what the doctor prescribes, art is what the artist produces and shoes are what the shoemaker makes. All this is putting the cart before the horse. Law is not what the courts administer but courts are the institutions which administer the law.

The realists confuse cases and case law. The realist movement could make progress only in a case law country because there the law appears to be a heap of decisions and therefore a body of facts. However, the cases themselves are not binding. They are not the case law. Only the *rationes decidendi* are binding. These cannot be arrived at by an inductive method. They should be construed by purposive interpretation and in turn be generalised and fixed into the whole body of law that is more or less a system. The system into which these are administered is the case law and therefore something quite different from a mere fact that could be an object of empirical research. The entire temple of case law is erected upon a rule and not upon a fact. Those who deny that rules are binding, can hardly admit the binding force of precedents which they profess to worship.

The critics of American realism point out that the followers of the realist school put too much emphasis on the uncertainty of law. Law is not always uncertain and there is so much in the whole of the legal system which makes law certain. A lot of transactions are carried out everyday with the certainty of law. Otherwise, the work of society will come to a standstill. The advocates of the realist approach have exaggerated the human factor in judicial decisions. The background of every judge who gives the decision has some effect on it but that is not much. He has to base his decision on the law as a whole. The scope for personal discretion is not much.

The approach of American jurists is conditioned by the circumstances prevailing in that country and what they have said is not capable of universal application. The realists have undermined the importance of the legal principles and rules. They regard law as a jumble of uncon-

nected decisions. In their eyes, "law never is, but is always about to be." Their view is that law cannot be predicted. Law is merely a series of application and execution. That is not correct. The very use of the term application shows the prior existence of the principles and rules. Moreover, they concentrate only on litigation although there is that part of law which never comes before the courts.

Estimate

Lord Lloyd writes that the realists have done good work in emphasising both the essentially flexible attitude of the judiciary towards developing precedent, even within the four corners of a rigid doctrine of precedent and the operation of concealed factors in judicial law-making. The realists have played their part in bringing about a changed outlook and attitude towards the legal system and the function of the law and the legal profession in society which has made itself felt in all but the most traditionalist of the law schools of the common law world.[8]

SUGGESTED READINGS

Abraham, H. J.	:	*The Judicial Process*, 3rd edn., New York and the Oxford University Press, 1976.
Arnold, T. W.	:	*Symbols of Government*, Yale University Press, 1935.
Beutal, F. K.	:	*Some Potentialities of Experimental Jurisprudence as a New Branch of Social Science*, University of Nebraska Press, 1957.
Bodenheimer, E.	:	*Jurisprudence*, Harvard University Press, 1962.
Cardozo, B. N.	:	*The Growth of the Law*, Yale University Press, 1924.
Cecil, H. (Leon, H. C.)	:	*The English Judge*, Hamlyn Lectures, Stevens and Sons Ltd., 1970.
Dias, R. W. M.	:	*Jurisprudence*, London, 1976.
Frank, J. N.	:	*If Men were Angels: Some Aspects of Government in a Democracy*, Harper & Bros., New York, 1942.
Frank, J. N.	:	*Courts on Trial, Myth and Reality in American Justice*, Princeton University Press, 1949.
Frank, J. N.	:	*Law and the Modern Mind*, English edn., Stevens & Sons Ltd., 1949.
Friedmann, W.	:	*Legal Theory*, Stevens & Sons Ltd., 1960.
Garlan, E. N.	:	*Legal Realism and Justice*, Columbia University Press, 1941.

[8] *Introduction to Jurisprudence*, p. 459.

Gray, J. C.	:	*The Nature and Sources of the Law*, 2nd edn., R. Gray, The Macmillan Co., New York, 1921.
Hart, H. L. A.	:	*The Concept of Law*, Oxford, Clarendon Press, 1961, reprinted 1975.
Jolowicz, H. F.	:	*Lectures on Jurisprudence*, ed. J. A. Jolowicz, The Athlone Press, 1963.
Jones, J. W.	:	*Historical Introduction to the Theory of Law*, Oxford, 1940.
Kelsen, H.	:	*General Theory of Law and State*, trans. A. Wedberg, Harvard University Press, 1949.
Llewellyn, K. N.	:	*Jurisprudence: Realism in Theory and Practice*, University of Chicago Press, 1962.
Llewellyn, K. N.	:	*The Bramble Bush*, Columbia University School of Law, 1930.
Llewellyn, K. N.	:	*The Common Law Tradition, Deciding Appeals*, Little, Brown & Co., 1960.
Lloyd, D.	:	*Introduction to Jurisprudence*, 4th Edn., Stevens & Sons Ltd., 1979.
Lloyd, D.	:	*The Idea of Law*, Penguin Books Ltd., 1964.
Marke J.J. (Ed.)	:	*The Holmes Reader*, Oceana Publications, 1955.
Paton, G. W.	:	*A Text Book of Jurisprudence*, 4th Edn., G. W. Paton and D. P. Derham, Clarendon Press, Oxford, 1977.
Patterson, E. W.	:	*Jurisprudence*, The Foundation Press Inc., 1953.
Paul, J.	:	*The Legal Realism of Jerome N. Frank*, Matinus Nijhoff, The Hague, 1959.
Pound, R.	:	*The Ideal Element in Law*, University of Calcutta, 1958.
Radin, M.	:	*Law as Logic and Experience*, Yale University Press, 1940.
Robinson, E. S.	:	*Law and Lawyers*, The Macmillan Co., New York, 1935.
Rumble, W. E.	:	*American Legal Realism, Skepticism, Reform and the Judicial Process*, Cornell University Press, 1968.
Schubert, G. and Danielski, D. (Eds.)	:	*Comparative Judicial Behaviour*, Oxford University Press, 1970.
Shetreet, S.	:	*Judges on Trial*, Ed. G. J. Borrie, North Holland Publishing Co., 1976.
Stone, J.	:	*Legal System and Lawyers' Reasonings*, Stevens & Sons Ltd., 1964.
Tapper, C. F. H.	:	*Computers and the Law*, Weidenfeld and Nicolson, 1973.

Twinning, W.	:	*Karl Llewellyn and the Realist Movement*, Weidenfeld and Nicoson, 1973.
Ulman, J. N.	:	*A Judge Takes the Stand*, Alfred A. Knopf, 1933.
Weyrauch, W. O.	:	*The Personality of Lawyers*, Yale University Press, 1964.

Chapter Twenty Eight

The Scandinavian Realists

THE VIEW of Prof. Dias is that there is hardly a "school" of Scandinavian realism. The individuals who are thought to belong to this group, show important differences among themselves. However, they agree in the main in denying the possibility of a science of justice or values. To them, these are purely subjective reactions, or else reflective of class or political ideology. It is not possible to construct a science on such a basis.[1]

While the American realists were practising lawyers or law teachers who sought to approximate legal theory to legal practice, the Scandinavian jurists approached their tasks on a more abstract plane and with the training of philosophers. The Scandinavian realism has been described as "metaphysics-sceptical". It is essentially a philosophical critique of the metaphysical foundations of law. It is couched with a distinct continental flavour in its critical and often abstract discussion of the first principles. The Scandinavian realists have played a vital but important part in the total rejection of natural law philosophy and of any absolute ideas of justice as controlling and directing any positive system of law. The Scandinavian realists are relativists. They deny that rules of legal conduct can be compellingly deduced from immutable and inalienable principles of justice. The realist movement in Scandinavia looks to Hagerstrom as its spiritual father, but its important exponents are Olivecrone, Ross and Lundstedt.

In the words of Passmore, J: "No one (of Lundstedt, Olivecrone and Ross) is wholly self-contained. To understand them or effectively criticise them, one must constantly return to Hagerstrom. They presume the substantial truth of his subtle and detailed analysis."

[1] *Jurisprudence*, p. 642.

Hagerstrom (1868-1939)

Axel Hagerstrom was not a lawyer but a philosopher whose attention was directed to law and ethics as particularly fertile sources of metaphysics. His aim was to destroy transcendental metaphysics and he started with law. He declared: "All metaphysical concepts are sham concepts." They are "mere word-play". Legal philosophy for Hagerstrom is a sociology of law without empirical investigation but built upon conceptual, historical and psychological analysis. Much of his writing is a critique of the errors of juristic thought.

Empirical basis of rights.—As regards the method of Hagerstrom, he first reviews the attempts that have been made to discover the empirical basis of a right and dismisses each one of them. According to him: "The factual basis which we are seeking cannot be found either in *protection guaranteed* or commands issued by an external authority." His conclusion is that there are no such facts. The "idea" has nothing to do with reality. Its content is some kind of supernatural power with regard to things and presents. Hagerstrom sought a psychological explanation for a right. To quote him: "One fights better if one believes that one has right on one's side." It is clear from the writings of Hagerstrom that though rights may not exist, they are useful tools of thought.

Historical basis of right.—Hagerstrom also investigated the historical basis of the idea of a right. For that purpose, he made extensive study of Greek and Roman law and history. His studies were conceived to demonstrate that the framework of the *jus civile* was a system of rules for the acquisition and exercise of supernatural powers. He believed that modern law is also a ritualistic exercise. One thinks of the legal oath, the black cap, the wedding ring or the coronation ceremony. *Ritual is to law as a bottle is to liquor.* You cannot drink the bottle, but equally you cannot cope with liquor without the bottle. There is a danger in assimilating legal with ritual symbols, for ritual can only be understood if the beliefs underlying it are investigated, but legal symbols perform a *function* and are not just concerned with beliefs.

Objective values.—Hagerstrom denied the existence of objective values. It appeared to him that there were no such things as goodness and badness in the world. The words represent emotional attitudes of approval and disapproval towards certain facts and situations. The word "duty" expresses an idea, the association of a feeling of compulsion with regard to a desired course of conduct. There is no possibility of any science of the "ought". All questions of justice, aims, purposes of law are matters of personal evaluation. They are not susceptible to any scientific process of examination.

Hagerstrom examined the concepts of classical Roman law and came to the conclusion that those were rooted in magical beliefs. They were developments of the primitive belief in the power of words to affect happenings in the world of facts. The concept of obligation was a magical bond giving power to the creditor over the debtor. Power over property, dominium or ownership wag also a magic power. The mode of conveyance was a ceremony based on magic. Law starts in religion and the monopoly enjoyed by the priestly class in early law is evidence of the idea that law is based on magic.

It is possible that Hagerstrom was making too much of a point which has some substance. It is probably true that adherence to form and ritual is rooted in word-magic, but how far Roman law should be interpreted along such lines is a matter on which opinion should be reserved. Word-fetishism is a habit that is easily formed. The ground for belief in the word magic is prepared very early and during the most receptive period of consciousness. Insofar as law gives a person power to control property and the actions of other persons, it is not surprising that it should have become associated with word-magic from the earliest times. To put the machinery of law into operation, the proper incantations have to be suffered. New uses are found for the original forms and they keep formality and ritual alive long after the inner belief in word-magic drops out. According to Hagerstrom, the interpretation of a classical law on the basis purely of word-magic is questionable.

Olivecrona (1897—)

Law.—Prof. Olivecrona did not define law. To quote him: "I do not regard it as necessary to formulate a definition of law." Again, "a description and an analysis of the facts is all that will be attempted". If one seeks to investigate the nature of law, it begs the question to begin by assuming what it is. He insists that facts must be examined first. The method of identifying these "will be simply to take up such facts as are covered by the expression rules of law."

Binding force of Law.—There is a lot of concern about the validity of law. Olivecrona approaches it from the angle of bindingness. Law has "binding force" insofar as it is valid. An invalid law is not binding. There is no such thing as "the binding force behind law". Many attempts have been made to find out where the binding force resides. Natural law lawyers have asserted that it lies in natural law. If asked why natural law is binding, the answer is a confession of faith. Natural law is said to be binding *per se*. Morality cannot be substituted in place of natural law, as law is treated as binding whether or not it is consistent with morality.

Another view is that the binding force of law is "the will of the State". This is imaginary as the will of the State as distinct from the wills of individuals is a myth. The question is whether any individual or group of individuals is discoverable in whose will the binding force of law resides. The answer must be in the negative. It is also fictitious to imagine that the binding force rests in the wills of legislators or citizens collectively. Such persons have other matters to think of than willing laws or their binding force.

The binding force of law is also not derived from unpleasant consequences which follow if law is broken. The reason is that unpleasant consequences follow in a host of situations which have nothing to do with law. Likewise, there are occasions when law is treated as binding although unpleasant consequences do not follow. A person may commit a breach of the law and still go undetected.

Prof. Olivecrona rejects the idea of "the" binding force of law as illusory and meaningless. It is not an observable fact in the milieu of society. "The" binding force of law is a mirage of language. It "exists" only as an idea in individual minds. Most people have a feeling of being bound by law which is different from saying that there is some impalpable binding force existing somewhere outside the mind. What requires to be explained is the feeling of being bound.

According to Olivecrona, the feeling of being bound stems from the psychological associations connected with this mode of expression by certain agencies. The feeling of being bound by "law" is psychologically associated with certain agencies when they follow certain procedures, together with the publication of law-texts through certain media. Law is a set of "independent imperatives" prescribed by these agencies. Law prescribes models of conduct and consists of "ought" propositions.

Rights.—Olivecrona does not dismiss the idea of rights altogether. However, he calls it a "hollow" word. A court could pronounce on a factual situation without calling "right" in aid. The proof of a right is accomplished by proving certain facts or events. Those facts are called "title".

According to Olivecrona, the idea of a "right" connotes a multitude of other ideas relating to behaviour patterns, not only for the "possessor of the right" but also of other persons. It implies directives as to how the right-bearer and others can and should act. The conclusion of Olivecrona is that "law is nothing but a set of social facts" based on the application of organised force.

The view of Prof. Dias is that some people are left with a feeling of dissatisfaction after reading the exposition of Olivecrona. Its very

simplicity raises a doubt. However, the view of Dias is that the commonsense which Olivecrona brings to bear in his discussions is the best feature of his work. The clear pages of Olivecrona's presentation are preferable to the turgid complexities of many another.

Prof. Dias also points out that if a person searches the book of Olivecrona for guidance in the solution of legal problems, he will fail. There is no hint of values or other such considerations from which law draws its vitality. Prof. Dias further says that a person should not be criticised for not having said something which he never set out to say and which he would not have denied. The object of Olivecrona was limited to a formal analysis of law as it is. The picture of law which emerges is that it consists largely of propositions phrased in an imperative form and emanating from certain agencies. Although Olivecrona has stated at many places that law is nothing but a set of social facts, he does not explain in his book what he means by "fact". Law also provides a model of behaviour which presumably is a social fact.

The view of Prof. Dias is that the chief merit of the work of Olivecrona is that he destroyed many traditional myths concerning law, e.g., binding force and command. He has given a moderate, sane and commonsense approach to some highly abstract problems of legal philosophy. His approach should not be regarded as self-sufficient, but it is an invaluable corrective to some others.[2]

Lord Lloyd observes that Olivecrona was mainly concerned to show that there is nothing mystical about the working of a legal system and there is no need to rely on fictitious entities or concepts such as the State or the binding validity of law.[3]

Olivecrona's works can never be said to have lost all their teeth. He deserves the credit for his utter disregard of the superstition that law emanates from a god. For him, every rule of law is a creation of men. The rules have always been established through legislation, or in some other way, by ordinary people of flesh and blood. Another great merit of his work lies in his reversal of the general notion of moral standards as embodied in law by the idea that it is moral ideas that are themselves largely determined by law. There are some moral feelings which are natural phenomena such as love and compassion, but these are inadequately strong to produce the restraints necessary for civilised life. To quote Olivecrona: "Law certainly cannot be a projection of some innate moral convictions in the child or adolescent, since it existed long before he was born. When he grows up and becomes acquainted with the conditions of life, he is subjected to its influence. The first indelible

[2] *Jurisprudence*, p. 648.

[3] *Introduction to Jurisprudence*, p. 578.

impressions in early youth concerning the relations to other people are directly or indirectly derived from the law. But the effect is not only to create a fear of the sanctions and cause the individual to adjust himself so as to be able to live without fear. The rules also have a positive moral effect in that they cause a deposit of moral ideas in the mind".[4]

Ross (1899—)

Alf Ross is a Danish jurist. He admits the normative character of law. He distinguishes between laws which are normative and statements about laws in books which are descriptive. He confines his attention to particular legal orders. He maintains that laws need not be interpreted in the light of social facts but he is concerned with the problem of validity. He tends to highlight the position of courts.

Valid Law.—Ross does not seek to reduce all law to sociological phenomena. His conclusion is that "valid law" means the abstract set of normative ideas which serve as a scheme of interpretation for the phenomena of law in action. From here Ross moved to a position which as formulated in his book, *On Law and Justice,* was narrow and less tenable and hence criticised. Ross formerly held that the validity of law could properly be considered only from one point of view viz., as a scheme of interpretation enabling us to comprehend and within such limits as are practicable, to predict the activities of judges. Accordingly, he asserted that a legal norm such as a statutory rule was primarily a directive not to the population at large, but to the judge. In his later book *Directives and Norms,* he shifted his ground somewhat and countered some of the criticism against his original view. He now differentiates a logical and psychological point of view. Legal rules are rules about the exercise of force and as such are directed to officials. Their observance is based on "the experience of validity." A statutory prohibition against murder is *implied* in the rule directing the courts and other administrative agencies to deal with any case of murder brought before them in the requisite manner. Logically, the rule of substantive law or primary law has no independent existence. But, "from a psychological point of view...there do exist two sets of norms." For "rules addressed to citizens are felt psychologically to be independent entities which are grounds for the reactions of the authorities." These primary rules must be seen as "actually existing norms, insofar as they are followed with regularity and experienced as being binding." What Ross now suggests is that there is "no need" to describe two sets of directives, one to the population at large and the other to the courts, for the former can be understood from the latter. "To know these (secondary) rules is to know everything about the existence and content of law."

[4] *Law As Fact,* pp. 151-156.

Ross now recognises the social dimensions of law. What he now says in *Directives and Norms* is that as a matter of juristic precision, it is possible to reduce all laws to directions to officials. But he is admitting that this is not how society functions. A reference to the psychological existence of two sets of directives is a recognition that the behaviour and feelings of *all* members of society are the "social facts" required to determine the existence of rules of law. Ross now accepts what he earlier scorned in Olivecrona as "psychological realism". When Ross refers to "all members of society", it must be noted that he qualifies this by limiting his norm to those to whom it applies. "Thus the directive that shops are to be closed at a certain hour relates only to those members of society who are shopkeepers.

Neither in his book *On Law and Justice* nor in his book *Directives and Norms*, Ross has limited himself to a purely behaviouristic interpretation of judicial or social activity. With reference to the judge, Ross has insisted that "a behaviouralist interpretation achieves nothing", but one must take into consideration his "ideological" or "spiritual" life. Only on the hypotheses of the allegiance which the judge feels towards the Constitution, its institutions and the traditionally recognised sources of law, is it possible to interpret the changing judicial reactions as a coherent whole as regularities constituted by an ideology. The future behaviour of the courts cannot be predicted on the basis of past decisions alone. Judicial regularity is not external, habitual and static, but rather internal, ideological and dynamic.

Norm.—According to Ross: "A *norm is a directive which stands in a relation of correspondence to social facts.*" To say that a norm exists means that a certain social fact exists. This in turn means that the directive is followed in the majority of cases by people who feel bound to do so. The principal feature of legal norms is that they are directives addressed to courts. A norm may derive from a past decision, but all norms, including those of legislation, should be viewed as directives to courts. The judgment or order of the court then forms the basis for action by the State which is a "monopoly of the exercise of force." It follows from this that norms directed at individuals with regard to behaviour are only "derived and figurative."

Norms of law may be divided into "norms of conduct" which deal with behaviour and "norms of competence or procedure" which direct that norms brought into existence according to a declared mode of procedure shall be regarded as norms of conduct. These norms of competence are indirectly expressed norms of conduct.

Norms are operative "because they are felt by (the judge) to be socially binding and therefore obeyed". A norm is "valid" if a prediction

can be made that a court will apply it. Validity is not "all or nothing" concept as it is with other writers. The degree of predictability that a norm will be applied determines the degree of its validity. "The degree of probability depends on the material of experience on which the prediction is built (sources of law)." Where the probability is high because the basis is a statute or an established precedent, the degree of validity of a rule is high. Where the probability is low because there is no decisive authority, the degree of validity is low.

The "Verifiability" Principle.—Ross was particularly influenced by logical positivism. In his book *On Law and Justice,* he wrote that "there is only one world and one cognition. All science is ultimately concerned with the same body of facts and all scientific statements about reality—that is, those which are not purely logical, mathematical—are subject to experimental test." He regarded the doctrinal study of law as "an empirical social science". Olivecrona and Lundstedt were not so influenced. Nevertheless, Ross is open to the criticisms that have been levelled at early logical positivism. The view that meaning is given by factual verifiability and therefore any proposition which is not verifiable is meaningless or nonsense has difficulties. The word "nonsense" is itself a highly metaphysical concept. It was realised that this would not do. It is a pity that the Scandinavian writers neglected the later works of Wittgenstein, in which he exposes the errors which he earlier shared with others, in attributing a single function to language, to which all propositions must conform in order to make sense at all.

"Reductionism" and Legal Concepts.—Ross is involved in a fallacy once associated with logical positivism, that of assuming that concepts can always be reduced by analysis to a series of factual propositions to which they are equivalent and for which they can be substituted. Hence it was thought at one time that all the so-called fictional entities of philosophy could be spirited away by this process. Unfortunately, it later became apparent that this form of reductionism would not even work in regard to such simple everyday concepts as "England" or "France" in such a sentence as "England declared war in 1939". It will be found that no amount of conversion into factual statements will altogether eliminate the hard core of such concepts as rights and property as such reduction ignores the normative factor.

The criticism originally levelled at Ross that he ignored the regulative function of norms by saying that they are only addressed to courts was partly met by him in his later book. However, his continued insistence that only the former (courts) matter and not the individuals still underplays the regulative function. To admit, as he now does, that norms directed at individuals also exist, thereby implying that they too

are social facts, dilutes the foundations of his structure. The thesis that there can be degrees of validity follows from an identification of validity with eventuality, what actually happens. That is not legitimate. The closely related point is his adoption of an exclusively descriptive point of view, but the resulting picture is unsuited to a point of view of a legislator or judge. A judge can hardly be predicting his own feeling or behaviour. It is unrealistic to suggest that validity has no significance for him.

A.V. Lundstedt

Lundstedt rejects everything normative, including the entire concept of justice which he identifies with the metaphysical. His argument is that any attempt to develop law on the basis of the commonsense of justice assumes that natural justice represents a kind of "material law" underlying the actual legal system. This he dismisses as non-existent metaphysical. For him, everything that is not a physical fact is a pure fantasy. All concepts such as rights and duties are dismissed as unrealistic. That applies to legal rules also. They are mere labels, unreal superstructure on the legal machinery. Lundstedt writes: "The principal argument in my criticism of legal ideology is that the entire substratum for legal ideology, the so-called material law and its basis natural justice, lacks the character or reality; that accordingly, even legal rights, legal obligations, legal relationships and the like lack such a character; that the commonsense of justice (the feeling or sentiments of justice) far from being able to support the material law, on the contrary receives its entire bearing through the maintenance of law i.e., legal machinery which takes the commonsense of justice (the feeling of justice) into its service and directs it in grooves and furrows advantageous to society and its economy, and that consequently legal ideology does not perceive and cannot perceive those realities appertaining to the legal machinery such as they are, but places them right on their head."[5]

In his denunciation of the concepts of rights and duties and rejection of transcendental ideas of justice, Lundstedt is one with the other Scandinavian realist jurists. His rejection of "the method of justice" is the characterisation and condemnation of all traditional jurisprudence.

According to Lundstedt, one of the greatest mischiefs of traditional jurisprudence is to have regarded the sense of justice or right as encouraging and guiding the law, but in fact feelings of justice are guided and directed by laws as enforced or maintained. Law is nothing but the very life of mankind in organised groups and the conditions which make possible peaceful coexistence of masses of individuals and social groups and the cooperation for other ends than mere existence and

[5] *Legal Thinking Revised*, p. 53.

propagation. At any particular time and in any particular society, it is determined by "social welfare." The "method of social welfare" is a guiding motive for legal activity. It means in the first place the encouragement in the best possible way of that according to what everybody standing above a certain minimum degree of culture, is able to understand. That consists of such basic requirements of human beings as "suitable and well-tasting food, appropriate and becoming clothes according to one's own or general taste, dwellings furnished in the best and most comfortable way, security of life, limb and property, the greatest possible freedom of action and movement along with limitation of the amount of work a person may be required to do within a specified period of time, possibilities of education etc. That includes all conceivable material comfort as well as protection of spiritual interests."

According to Lundstedt, all other jurists have followed the road of legal ideology or the method of justice. That means that they have relied in one way or another on material objective law, underlying the actual legal system and depending on the commonsense of justice to develop the law and to fill the gaps in the legal system. This is condemned by him both as metaphysical nonsense and as an attempt to invoke natural law or justice to supply an objective valuation in what can only be purely subjective, since for them value judgments depend purely on individual feelings and emotions and are incapable of scientific objectivity. Lundstedt directs an impassioned onslaught on many of those modern thinkers whose thought might be believed to resemble his own, as for instance, the utilitarians, the sociological jurists and the American realists. According to Lundstedt, jurisprudence must be a natural science, based on observation of facts and actual connections and not on personal evaluations or metaphysical entities. Science has not so far progressed sufficiently in this field to enable us to establish or demarcate those connections with precision. Hence the need for what Lundstedt calls "constructive" jurisprudence which has to work practically on the hypotheses of certain social evaluations such as that legal activities are indispensable for the existence of society and their aim must be to produce the most frictionless functioning of the legal machinery. Lundstedt maintains that his approach differs from that of Bentham and Pound as he proceeds not on an ideological basis but on arguments based solely on social realities, that is, on people as they are actually constituted. The "social welfare method" propounded by Lundstedt is quite distinct from such common ideas as the needs of society or social policy, as it means nothing but what is actually considered useful to men in society, with the way of life and aspirations that they have at a particular time. That implies the encouragement in the best possible way of what people in general actually strive to attain

and not what they ought to strive for. As knowledge increases, legal activities may eventually be able to be based on a legal science which has a more or less complete knowledge of the facts and which can establish social evaluations on that foundation.

Lundstedt's devotion to actual aspirations presumably adds up to the dominant views of the bulk of society and seems to leave but little, if any, scope for the reforming impulses of a minority in advance of the sluggish opinions of the mass or scope for the possibility of moral pluralism.

According to Lundstedt, criminal law exists not so much to deter criminals but to foster the moral instincts against crime and it does this by the regular enforcement of sanctions. He dismisses as a "ridiculous idea" all the pious phrases about improving the criminal morally or socially, for the actual effect, "the naked reality" of the penalties imposed, is to "break down the criminal".

Although Lundstedt castigates Pound's jural postulates as nothing more than phrases heaped upon phrases without the possibility of finding any line of thought, it is difficult to see why his own hypotheses as to the basis of the legal system are not equally *a priori*, drawn as they are not from sociological research, but from personal reflection and individual evaluations. If it is true that Pound discusses law "in complete abstraction from our experience of it, the same criticism applies to the formulation of the social welfare method by Lundstedt. In natural and in other science, hypotheses are only valuable insofar as they can be and are tested against verifiable observations."

Criticism.—It is worthy of notice that the critical aspects of the Scandinavian realists are more significant than their positive achievement. Their main contribution has been to pursue the detection of open or hidden legal ideologies beyond the general criticism and condemnation of natural law rules into the positivist concepts of command, sovereignty, rights and duties. The Scandinavian realists represented an idea that the legal order should always be subjected to certain scales of values which in turn should be assessed not in absolute terms but with regard to the social needs changing with times, nations and circumstances. Whether law is considered as a "fact" or as a machinery in action, or in any other form and manner, it is directed to certain ends.

Scandinavian and American Realism.—The Scandinavian realists share with sociological jurists a weakness for *a priori* assertions, while at the same time insisting on the need for basing the law on the needs of social life. They linked this attitude with varying degrees of hostility to all conceptual thinking which they stigmatize as metaphysical or ideological. The American realists are not much interested in general

theorising about law. Although they may share with the Scandinavian realists the feeling that rules do not decide cases, they do not altogether reject the normative aspect of legal rules. What they are mainly interested in is the practical working of the judicial process, whereas the Scandinavians are more concerned with the theoretical operation of the legal system as a whole. Although the Scandinavians are the most extreme of empiricists it is the Americans who primarily stress the need for factual studies in working out proper solutions for legal problems. The Scandinavians appear to rely mainly on an argument of *a priori* kind to justify legal solutions or developments. The view of Lord Lloyd is that for all its positivism, the Scandinavian movement remains essentially in the European philosophical tradition, whereas the American movement bears many of the characteristic of English empiricism.[6]

Criticism of the Realists in General

The realist approach can be criticised on many grounds. The realists have undermined the importance of legal principles and rules. They regard law as a jumble of unconnected decisions. For them, law never is, but is always about to be. They have been impressed by the variability of decisions and have come to the conclusion that law is not predictable at all but it is only a series of applications and executions Their main concentration is on litigation but there is a great part of law which does not come before the courts. The realists launched a vigorous attack against juristic complacency and the myth of "certainty". However, in actual practice we find a large measure of certainty and very many transactions are regulated on that basis. The realists have exaggerated the human factor in judicial decisions. It is true that the human factor plays a part in arriving at decisions, but that does not mean that judicial decisions are the result only of the personality of the judge. The approach of the American realists is based on their own local judicial setting and does not give a universal method. It can be applied only in a society where the social forces had their play in law-making. In societies where the will of the legislator dominates every sphere of law, as in totalitarian States, the realist approach, cannot be adopted. The analysis of the Scandinavian jurists does not suffer from these weaknesses. According to Olivecrona, the nature of law has universal validity.

The realists have undermined the importance of the legal principles and rules. They regard law as a jumble of unconnected decisions. In their eyes, "law never is, but is always about to be." Their view is that law cannot be predicted. It is merely a series of applications and execu-

[6] *Introduction to Jurisprudence*, p. 583.

tions. However, this is not correct. The very use of the term "application" shows the prior existence of principles and rules.

Contribution of the Realists

The realist movement has made a valuable contribution to jurisprudence. Its approach to law is in a positive spirit. It is not concerned with any theory of justice or natural law. It demands a comprehensive approach and examination of all the factors which lead to decisions. The realists have goaded on the lawyers and judges to realise the importance of their work and not to do their work blindly. Jerome Frank writes: "It has contributed in parts to the liberation of judges... from enslavement by unduly rigid legal concepts, caused those judges to ground their reasoning on broader and more human rule premises". The view of Julius Stone is that the realist movement is a gloss on the sociological approach. What is required is that it should be a balanced one and then alone it will be a help to solve legal problems. According to Allen: "The realist school appears as another *avatar* on the sociological jurisprudence." Friedmann writes that the realist approach is "an attempt to rationalise and modernise the law—both administration of law and the material for legislative change—by utilising scientific methods and the results reached in those fields of social life with which this social law is inevitably linked."

SUGGESTED READINGS

Castber, F.	:	*Problems of Legal Philosophy*, 2nd edn., Oslo University Press: Allen & Unwin Ltd., 1957.
David and Briefly	:	*Major Legal Systems of the World*, 1968.
Dias, R.W.M.	:	*Jurisprudence*, London, 1976.
Finch, J. D.	:	*Introduction to Legal Theory*, 2nd edn., Sweet & Max well Ltd., 1974.
Hagerstrom, A.	:	*Inquiries into the Nature of Law and Morals*, ed. K. Olivecrona, trans. C.D. Broad, Almqvist & Wiksell, Stockholm, 1953.
Hagerstrom, A.	:	*Philosophy and Religion*, 1964.
Lloyd, D.	:	*Introduction to Jurisprudence*, 1979.
Lundstedt, A. V.	:	*Legal Thinking Revised*, Almqvist & Wiksell, Stock holm, 1956.
Olivecrona, K.	:	*Interpretations of Modern Legal Philosophies*, ed. P. Sayre, Oxford University Press, New York, 1947.
Olivecrona, K.	:	*Law as Fact*, Einar Munksgaard, Copenhagen; Humphrey Milford, London, 1939; reprinted Wildy & Sons, 1962; 2nd ed., Stevens & Sons Ltd., 1971.

Olivecrona, K.		*Scandinavian Studies in Law.*
Ross, A.	:	*Directives and Norms*, Routledge & Kegan Paul Ltd., 1968.
Ross, A.	:	*On Law and Justice*, Stevens & Sons Ltd., 1958.
Ross, A.	:	*Towards a Realistic Jurisprudence*, trans. A.I. Fausboll, Einar Munksgaard, Copenhagen, 1946.
Stone, J.	:	*Legal System and Lawyers' Reasonings*, Stevens & Sons Ltd., 1964.

Chapter Twenty Nine

Natural Law

IN THE WORDS of Lord Lloyd of Hampstead, natural law thinking has occupied a pervasive role in the realms of ethics, politics and law from the earliest times. At some periods, its appeal may have been religious or supernatural, but in modern times it has formed an important weapon in political and legal ideology. It has afforded a valuable aid to the powers that be, desirous of justifying the existing law and the social and economic system it embodies. Natural law has often been pictured as an ideal system laid up in heaven of which positive law can be but an imperfect simulacrum. Natural law has been envisaged as a mere law of self-preservation, or as an operative law of nature constraining man to a certain pattern of behaviour.[1]

Prof. R. W. M. Dias,writes that natural law theory has a history reaching back centuries B. C. and the vigour with which it flourishes is a tribute to its vitality. There is no one theory of natural law and there are many versions of it. However, there is no other firmament of legal or political theory which is so bejewelled with stars as that of natural law which scintillates with contributions from all ages. The term natural law has been understood to mean a variety of things to different people at different times viz., ideals which guide legal development and administration, a basic moral quality in law which prevents a total separation of the "is" from the "ought", the method of discovering perfect law, the content of perfect law deducible by reason and the conditions *sine quibus non* for the existence of law. On account of these differences, it is not always possible to classify a given writer as naturalist or positivist. There are wide differences among those who are normally classed as naturalists or positivists. Natural law think-

[1] *Introduction of Jurisprudence,* pp. 79-81.

ing in one form or another is pervasive and is encountered in various contexts. Natural law theory has tried to meet e paramount needs of successive ages throughout history.

It figures prominently in offering help with two vital contemporary problems viz., the validity of the unjust law and the abuse of liberty. The constant readiness of natural lawyers to meet challenge is a tribute to the springs of their inspiration.[2]

Dr. W. Friedmann rightly points out that the history of natural law is a tale of the search of mankind for absolute justice and its failure. Again and again, the idea of natural law has appeared in some form or other, as an expression of the search for an ideal higher than positive law after having been rejected and derided in the interval. The problem is as acute and as unsolved as ever. With changing social and political conditions, the notions on natural law have changed. The only thing that has remained constant is the appeal to something higher than positive law. The object of that appeal has been the justification of the existing authority or a revolt against it. Natural law has fulfilled many functions. It was the principal instrument in the transformation of the old civil law of the Romans. It was used as a weapon by both sides in the fight between the Medieval Church and the German Emperors. In the name of natural law, the validity of international law was asserted. An appeal was made to natural law to defend individual freedom against absolutism. The judges of the United States appealed to the principles of natural justice while resisting the attempt of State legislation to modify and restrict the unfettered economic freedom of the individual. Natural law has helped various peoples and generations to formulate their ideals and aspirations. At different times, natural law has been used to support almost any ideology. However, the most important and lasting theories of natural law have been inspired by the ideal of a universal order governing all men and the inalienable rights of the individual. Through the theories of Locke and Paine, natural law has provided the foundation for the individualist philosophy of the American and other modern constitutions.[3]

Greece

Greek thinkers laid the basis of natural law and developed its essential features. Heraclitus laid the basis of natural law. He found it in the rhythm of events. This he termed destiny, order and reason of the world. Nature is not just substance, but a relation, an order of things. The thought of an order of nature in conformity with law dawned as clear knowledge upon Grecian minds. This provided the basis for the

[2] *Jurisprudence* pp. 653-54.

[3] *Legal Theory*, pp. 43-45.

Greek school of enlightenment (Sophists) which developed in the 5th century B. C. The contact between nature and institution is the most characteristic work of Greek enlightenment in the formation of conceptions. It dominated the whole philosophy of the period. If there is anything universally valid, it is that which is valid by nature for all men without distinction of people and time. What nature determines is justly authorised. Nature came to be opposed to the tyranny of man. Nature is something external, outside man. It is the order of things which embodies reason.

Socrates.—Socrates reflected upon that element which was the decisive factor in the culture of his time. He defined virtue, the fundamental ethical conception, as insight, in turn, as knowledge of the good, the concept of good with no universal content. One of the dictates of natural law is that authority and positive law should be obeyed. However, he did not argue blind adherence to positive law. That should be subjected to the critical evaluation in the light of man's insight.

Plato.—Plato laid the foundations for much of subsequent speculation of natural law themes. According to him, Gods gave to all men in equal measure a sense of justice and of ethical reverence so that in the struggle of life they may be able to form permanent unions for mutual preservation. He found the nature of practical life in primary ethical feelings which impel men to union in society and in the State. In the ideal State of Plato, each individual is given that role for which he is best fitted by reason of his capacities. His *Republic* is a constructive attempt to discover the basis of justice. The administration of justice is given to the philosopher kings whose education and wisdom is such that there is no necessity to link them up with a higher law.

Aristotle.—In his *Logic,* Aristotle sees the world as a totality comprising the whole of nature. Man is a part of nature in a twofold sense. On the one hand, he is a part of matter, part of the creatures of God. As such, he partakes of experience. Man is also endowed with active reason which distinguishes him from all other parts of nature. He is capable of forming his will in accordance with the insight of his reason. It is the recognition of human reason as a part of nature which provides the basis for the Stoic conception of the law of nature. The Stoics develop this principle into an ethical one. Reason governs the universe in all its parts. Man, as a part of universal nature, is governed by reason. Reason orders his faculties in such a way that he can fulfil his true nature. When man lives according to reason, he lives "naturally". Thus, the law of nature becomes identified with a moral duty.

Stoics.—To the Stoics, the postulates of reason are of universal force. They are binding on all men everywhere. Men are endowed with reason, irrespective of nationality and race.

Rome.—The theory of Stoics exercised great influence upon the Roman jurists and some of them paid high tribute to "natural law". In the Roman system, the theory of natural law did not remain confined to theoretical discussions only. The Romans used natural law to transform their narrow and rigid system into a cosmopolitan one. Natural law exercised a very constructive influence on Roman law. The Romans had three divisions of law viz., *jus civile, jus gentium* and *jus naturale. Jus civile* or civil law of the Romans was for Roman citizens only. On the principles of natural law, the Roman magistrates applied those rules which were common with foreign laws to foreign citizens. The body of law which grew up in this way was called *jus gentium* and it became a part of Roman law. It represented the good sense and universal legal principles and conformed to natural law. Later on *jus gentium* and *jus civile* became one when Roman citizenship was extended to all except a few classes of people. The Roman lawyers did not bother about the conflict between natural law and positive law. However, there were some jurists who considered natural law as superior to positive law but the majority of the Roman jurists did not enter into this problem.

Lord Lloyd writes that conquest and commerce necessitated the development of law which could be applied to foreigners. *Jus gentium*, the *jus civile* stripped of formalities and with cosmopolitan trimmings, was the result.[4]

Gaius wrote that all people who are governed by laws and customs applied partly their own law, partly law which is common to all mankind. The law which each people has made for himself is peculiar to that people and is called *jus civile*, the special law of the State, but that which natural reason has appointed for all men is in force equally among all peoples and is called *jus gentium*, being the law applied by all races.

Cicero.—Cicero wrote that law is the highest reason, implanted in nature, which commands what ought to be done and forbids the opposite. This reason when firmly fixed and fully developed in the human mind is law. Since law is a natural force, it is mind and reason of the intelligent man, the standard by which justice and injustice are measured. While divine reason is inherent in the universe, it is more or less identified with the physical ordering of the universe. Man stands highest in creation by virtue of his faculty of reasoning and his welfare

[4] *Introduction to Jurisprudence*, p. 83.

is the supreme purpose of creation. As welfare is the chief objective of creation, man should spare no efforts to help others.

Cicero not only held fast to the thought of a moral world order which determines with universal validity the relation of rational beings to each other, but also thought of the subjective aspect of the question in consonance with his theory that this command of reason is innate in all human beings equally and has grown with their instinct of self-preservation. Out of this natural law, the universally valid law which is above all human caprice and change of historical life, develop both the commands of morality in general and of human society in particular.

The Middle Ages

Aquinas.—Throughout the Middle Ages, the theology of the Catholic Church set the tone and pattern of all speculative thought. Two vital principles animated medieval thought and those were *unity* and *supremacy of law.* Unity was derived from God and involved one faith, one Church and one Empire. The supremacy of law was not merely man-made but was conceived as a part of the unity of the universe. Catholic philosophers and theologians of the Middle Ages gave a new theory of natural law. They gave it a theological basis. Their views were logical and systematic. The views of St. Thomas Aquinas (1224/5-1274) may be taken as representative of the new theory. His theory has to be set in the context of his time. There was a need for stability in a world emerging from the Dark Ages. The struggle between the Church and the State was beginning and there was the need for the Church to establish its supremacy by rational argument rather than by force. It was necessary for Christendom to unite in the face of the heathen menace and a need was felt for unifying Christian philosophy. Aquinas tried to meet all the three needs. In the doctrine of Aquinas, there is a connection between means and ends. There is a relation in the nature of things between a given operation and its result. Natural phenomena have certain inevitable consequences. Fire burns but it does not freeze. A tendency to develop in certain ways is naturally inherent in things. An acorn can only evolve into an oak and it will never evolve into a larch or pine. The appreciation of the relation between means and ends and the process of growth towards fulfilment is open only to intelligence and faculty of reason. An acorn does not think but man thinks. Man appreciates the relation between means and their ends. He also chooses for himself the ends which he wants and devises means of achieving them. A man in authority may decide that the health of society is an end worth achieving and then devise means to achieve the same and prescribe regulations for that purpose. Thus, laws consist of means of achieving ends. The relation between an end and the method

by which its fulfilment is sought is initially conceived in the mind of the legislator. Those who are required to conform to his directions can also appreciate the connection by the exercise of their own reasoning faculties. According to Aquinas, law is "nothing else than an ordinance of reason for the common good, made by him who has the care of the community, and promulgated." Man can control his own destiny to a large extent but he is subject to certain basic impulses which are the impulse towards self-preservation, the impulses to reproduce the species and rear children and the impulse to improve and to take such decisions as are necessary for the attainment of higher and better things. The basic impulses point in a definite direction which is not only survival and continuity but also perfection. They are a part of human nature and show that man is also limited by nature. The establishment of certain ends and the means of achievement originated in the reason of some superhuman legislator. That is the eternal law which is "nothing else than the plan of the divine wisdom considered as directing all the acts and motions" for the attainment of the ends. Man is free and rational and capable of acting contrary to eternal law. That law has to be promulgated to him through reason. That is natural law. There is no need of promulgating natural law to other created things as they lack the intelligence of man. To quote Aquinas: "The natural law is nothing else but a participation of the eternal law in a rational creature." It is the dictates revealed by reason reflecting on natural tendencies and needs. "The primary precept of the law is that good should be done and pursued and evil avoided: and on this are founded all the other precepts of the law of nature." By reflecting on his own impulses and nature, man can decide what is good.

The nature of man is such that he is necessarily impelled to seek good in survival, continuity and perfection. He must do things to achieve them and not to frustrate them. To go against the ends is morally wrong. It is not wrong because God has forbidden the contravention of natural law. God has forbidden it because it is wrong which means contrary to reason by which God himself is bound.

According to Aquinas, mankind "ought not only to be multiplied corporeally, but also to make spiritual progress. And so sufficient provision is made if some only attend to generation while others give themselves to the contemplation of divine things for the enrichment and salvation of the whole human race."

Aquinas divided laws into four categories viz., law of God, natural law which is revealed through the reason of man, divine law or the law of scriptures and human laws. Natural law is a part of divine law. It is that part which reveals itself in natural reason. It is applied by human

beings to govern their affairs and relations. The human law or positive law must conform to the law of the scriptures. Positive law is valued only to the extent to which it is compatible with natural law or in conformity with eternal law. The Church is the authoritative interpreter of the divine law. It is the authority to give verdict upon the goodness of positive law also.

The scheme of Aquinas dividing laws into four categories of eternal law, natural law, divine law and human law is regarded as the first of its kind in the history of jurisprudence. It combined ancient philosophy, the law of the Romans, the teachings of the Christian Fathers and contemporary pragmatism with consummate power and skill. Law was no longer the product of original sin. It became a part of the divine scheme. What is most striking is its uncompromising appeal to reason. Man was created so that he might strive towards perfection. Reason dictates that he has to be free. God cannot alter this state of affairs. To do so would contradict His own nature as God himself is bound by reason. The law of God was declared to be nothing else than the reason of divine wisdom. Christianity was said to be the supreme reason. Natural law furnishes principles rather than rules for detailed application. An interesting feature is the empirical approach to eternal and natural law. Inferences are drawn from human nature. Reason becomes the foundation for all human institutions. Social life is founded on human nature. Families and the State are necessary for the realisation of man's full potential and are thus natural institutions. An extension of this is the ideal of a single organisation of all mankind in a world State.

Aquinas tried to strengthen the authority of the Church by asserting that human dignitaries were responsible to the Church in matters relating to eternal law. The Church is the authoritative interpreter of divine law in the scriptures. The State existed before the Church and is itself a natural institution. It serves the common good and by means of its laws should bring about the conditions conducive to the proper development of man.

The test by which laws are to be judged is the following dictate: "Every human being has just so much of the nature of law as it is derived from the law of nature. If it departs from natural law on any point, it is no longer a law but a perversion of law." So far as human laws are founded on reason, there is a duty to obey them. If a law is unreasonable and unjust, no such duty arises. However, there may be subtle dictates of morality which enjoin obedience even to an unreasonable positive law. Unjust laws "do not bind conscience unless observance of them is required in order to avoid scandal or disturbance."

An unjust ruler may be overthrown unless revolution would create as bad or worse state of affairs than before. Sedition is a social evil and Aquinas warned against rebellion in circumstances which do not justify it.

The identification of natural law with reason was destined to bring about a separation of natural law from theology later on. After the Reformation, the Protestants denied the authority of the Church to interpret the law of God as man was said to have direct access to God through his own reason. Aquinas maintained that the use of things must be not by man for his own benefit but for the common good. He justified the difference between the rich and the poor and individual property.

Aquinas blended in a system of great logical power the austere ecclesiasticism of the Fathers of the Church and the political philosophy of Aristotle. In the struggle of political forces, his system vindicated the right of the Church to control the ecclesiastical appointments made by the Emperor.

For Aquinas himself, the law of nature was not merely a matter of expediency but it often deteriorated to that function in the controversies which accompanied the bitter struggle between the Pope and the Emperor for supremacy. The law of nature also served as a powerful weapon in the later struggle between the Catholics and the Protestants when either side appealed to it for the true interpretation of the Scripture or the right of the State to spiritual jurisdiction.

Grotius.—Hugo Grotius (1583-1645) gave classical expression to the new foundations of natural law as well as the principles of modern international law. According to him, the property peculiar to man is his desire for society, for a life spent in peace in common with fellowmen and in correspondence with the character of his intellect. The nature of human intellect desires a peaceful society and from that are derived the principles of natural law which are independent of divine command. To quote him: "*Natural law is so immutable that it cannot be changed by God himself.*" These principles of reason can be deduced in two different ways. One way is by examining anything in relation to the rational and social nature of man. The second way is by examining the acceptance of those principles among the nations.

On his principles of natural law, Grotius built his system of international law. The most fundamental of his principles is *pacta sunt servanda*, the respect for promises given and treaties signed. The other rules of natural law are respect for other people's property and the restitution of gain made from it, the reparation of damage caused by one's fault and the recognition of certain things as meriting punishment.

Natural law also supplied the basis of more concrete political controversy. While Grotius stipulated the freedom of the seas as a principle of natural law, Selden maintained that natural law permitted private and public dominion over the seas. In the writings of Grotius, the idea of natural law assumed a constructive and practical function comparable to that which it did in the time of the Roman Empire. In both cases, principles partly deduced, partly observed as being of general acceptance, gave the basis. In course of time, natural law was reduced from a position of superiority over State practice to an empty formula.

According to Grotius, natural law is based on the nature of man and his inward need of living in society. Grotius called human nature as the grandmother, natural law the parent and positive law the child. Human nature impels us to desire a society, From this nature of human intellect which desires a peaceful society, are deduced the principles of natural law, which are quite independent of divine command. Natural law is immutable and cannot be changed by God himself.

Pufendorf.—Like Grotius, Pufendorf based natural law on the two sides of human nature which bid him to protect his personal property but not to disturb the peace of society. From this, Pufendorf derived the following maxim: "Let no one bear himself towards a second person so that the latter can properly complain that his equality of right has been violated in his case."

Wolff saw in the duty of self-perfection the principal command of natural law. The conditions of such perfection are provided by a benevolent sovereign who promotes peace and security. Natural law is a living force. Pufendorf, Wolff and Selden asserted the supremacy of the law of nature.

According to *Vattel*: "The law of nations is originally no other than the law of nature applied to nations." Thus, natural law is necessary law and all nations are bound to observe it. It cannot be changed or abrogated. In spite of these assertions, natural law was relegated to a very low position by Vattel as compared with international law. He merely paid lip service to natural law and put emphasis on international law. According to him, all real international law was derived from the will of the nations.

Natural Law and Social Contract

The ideas of natural law were used for a very different purpose in the English Revolution of 1688, the American Declaration of Independence and the French Revolution of 1789. The Renaissance and the Reformation paved the way for the spiritual emancipation of the individual. The expansion of commerce gave economic prosperity to the new mid-

dle class which became the moving spirit in the struggle for individual emancipation. Political absolutism looked for a justification of its claim to unlimited authority over the people. The legal construction used by both sides in the political struggle was that of social contract.

The use of social contract as a definite concept in political and legal controversy can be traced to Marsilius of Padua (1270-1343). The concept of social contract is that in the beginning men lived in a state of nature. They had neither any government nor any law. That state of nature was described by some as that of hardship and oppression while by some others as that of bliss and joy. Men entered into an agreement for the protection of their lives and property and thus society came into existence. They undertook to respect each other and live in peace. They entered into a second agreement by which the people who had united together earlier, undertook to obey an authority and surrender the whole or a part of their freedom and rights and the authority guaranteed every one of them the protection of life, property and to a certain extent, liberty. It was in this way that the government, sovereign or the ruler came into being. There are many implications of the theory of social contract. People are the source of political power. The concept of society of these exponents of social contract theory is individualistic. The important exponents of the theory of social contract were Grotius, Hobbes, Locke and Rousseau.

Grotius.—Hugo Grotius used the social contract for two purposes, internally for the justification of the absolute duty of obedience of the people to the government and internationally to create a basis for legally binding and stable relations among the States. He put forward social contract as an actual fact in human history. According to him, each people had chosen the form of government they considered most suitable for themselves by means of a social contract. Once the people transferred their right of government to the ruler, they forfeited the right to control or punish the ruler howsoever bad his government may be. Grotius denied that all government is for the sake of the governed. He vacillated on the question how far a ruler is bound by the promises made by him to his subjects. He was bound to admit that the ruler was bound by natural law which was valid even without promise and the keeping of promises is a permanent principle of natural law. Grotius was not able to explain this anomaly. His main concern was the stability and orderliness of international society. His theory of social contract served that purpose by stressing the equivalence of different forms of government established by different peoples, by freeing the ruler from any internal restriction or fetters and by stressing the absolute force of a promise once made.

Hobbes.—Thomos Hobbes (1588-1679) was the author of two books, *De Cive* (1642) and *The Leviathan* (1651). He lived during the days of the Civil War in England and hence was convinced of the great importance of State authority which he wanted to be vested in an absolute ruler. Hobbes acknowledged the authority of natural law but he understood it in a sense different from those writers for whom natural law was superior to positive law. He shifted the emphasis from natural law as an objective order to natural right as a subjective claim based on the nature of man and prepared the way for individualism in the name of "inalienable rights". He still acknowledged objective rules of natural law of an immutable character but he divested them of any practical significance by depriving them of sanctions. He understood by natural law not certain ethical principles but laws of human conduct based on observation and appreciation of human nature. For him, the chief principle of natural law was the right of self-preservation. This was connected with his view of state of nature in which "men live without a common power to keep them all in awe, they are in that condition which is called war and such a war as is of every man against every man." In the state of nature, there was perpetual and devastating warfare which threatened everyone, but natural reason dictated to man the rule of self-preservation for which he tried to escape from the state of permanent insecurity. That he did by transferring all his natural rights to the ruler whom he promised to obey unconditionally. The individual transferred the whole of his natural rights to the ruler who became an absolute ruler. The subjects could not demand the fulfilment of any obligation by the ruler. The only condition was that the absolute ruler must keep order. Hobbes was against civil disobedience but where resistance was successful, the sovereign ceased to govern and the subjects were thrown back to their original position and then they could transfer their obedience to a new ruler. To quote Hobbes: "The obligation of subjects to the sovereign is understood to last as long and no longer than the power lasts by which he is able to protect them."

Hobbes enumerates 19 principles of natural law but they are shorn of all power. All law is dependent upon sanction. To quote him: "Governments without the sword are but words, and of no strength to secure a man at all." All real law is civil law. It is commanded and enforced by the sovereign. There is no distinction between State and society. There is no law between sovereign and subjects. All social and legal authority is concentrated in the sovereign. The Church is subordinated to the State. It is just like another corporation. The sovereign of Hobbes is not instituted and legitimised by any superior sanction like that of natural

law or divine right. He is merely a utilitarian creation. Natural law was not a superior law.

According to Hobbes: "A law of nature (*lex naturalis*) is a precept or general rule found out by reason, by which man is forbidden to do that which is destructive of life, or takes away the means of preserving the same and to omit that by which he thinks it may be best preserved". The fundamental law of nature is that every man ought to endeavour to obtain peace as far as he has hope of obtaining it. When he cannot obtain it, he can seek and use all helps and advantages of war. The second law of nature was that if others were willing to follow the same rule, man should be content with so much liberty against other men as he would allow to others against himself. The third law of nature was that men performed their covenants made. In that, law of nature was the fountain and origin of justice. According to Hobbes, injustice is nothing else than the non-performance of covenants. The nature of justice consists in the keeping of valid covenants which start with the constitution of a civil power sufficient to compel men to keep them.

According to Hobbes, the life of man in the state of nature was "solitary, poor, nasty, brutish and short". His theory was based upon the idea of force and compulsion. To quote him: "It is men and arms that make the force and power of the law." Natural law is little more than a fiction, ingeniously twisted to support a political dictatorship. Hobbes expressed the main precept of natural law in the form of man's right to self-preservation. He denied to the Church the authority to interpret the law of God. He gave all power to a utilitarian secular sovereign.

Hobbes was individualist, utilitarian and absolutist and all of these aspects had great influence upon the legal and political thought of the next few centuries. From his political and legal theory emerged the modern man who is self-centred, individualistic, materialistic and irreligious in the pursuit of organised power. His individualism linked him with Locke, his utilitarianism with Bentham and Mill and his absolutism with all the theories which stand for the enhancement of the powers of the State.

Locke.—John Locke (1632-1704) was the theoretician of the rising middle class which was individualistic and acquisitive and avoided conflict between ethics and profits. His ideas appealed to his generation and the following century. He restored the medieval concept of natural law insofar as he made it superior to positive law. He placed the individual in the centre and invested him with inalienable natural rights among which the right to private property was the most prominent. He used the social contract to justify government by majority which held the power in trust, with the duty to preserve individual

rights whose protection was entrusted to them by individuals. Locke was the opponent of Hobbes. In place of the theory of absolutism of Hobbes, he gave the theory of the inalienable rights of individuals. If Hobbes stood for authority, Locke stood for liberty.

Locke wrote after the Glorious Revolution of 1688 and justified the same. He adopted the individualistic premises of Hobbes but stated those values in terms of inalienable natural rights. The individual had a natural inborn right to "life, liberty and estate". He gave his chief attention to the right of private property. His state of nature is Paradise Lost. It was a state "of peace, goodwill, mutual assistance and preservation". In that state of nature, men had all the rights which nature could give them. What they lacked was organisation. The right of property existed prior to and independent of any social contract whose function was to preserve and protect not only the right to property but also other natural rights. The social contract of Locke performs two functions. By one contract, men agreed to unite into one political society and thereby create the commonwealth. A majority agreement is identical with an act of the whole society. The majority vote can take away property rights and other inalienable rights. After that, the majority vested its power in a government whose function is the protection of the individual. So long as the government is faithful to its pledge, it cannot be deprived of its power.

Locke appears to have gone back to a state of nature which was a state of peace, goodwill, mutual assistance and preservation. In that state of nature, all were equal and independent. No one was supposed "to harm another in his life, health, liberty or possessions; for men being all the workmanship of one omnipotent and infinitely wise maker, all the servants of one sovereign master, sent into the world by His order and about his business." In that state of nature, nobody could transfer to another more power than he himself had. Nobody had an absolute and arbitrary power over himself or over any other person, to destroy his own life or take away the life or property of another. A man cannot subject himself to the arbitrary power of another. He has no arbitrary power over the life, liberty or possessions of another. The limited power is given to the commonwealth for the good of society. The State can never have a right to destroy, enslave or impoverish the subjects. The law of nature stands as an eternal rule to all men, legislators and others. The rules which they enact for others must be conformable to the law of nature. The fundamental law of nature is the preservation of mankind and no human sanction can be good or valid against it.

The legal theory of Locke gave theoretical form to the reaction against absolutism and to the preparation of parliamentary democ-

racy. He put emphasis upon the inalienable rights of the emancipated individual. He had great influence on the American Revolution and the French Revolution. The combination of noble ideals and acquisitiveness, natural law philosophy and protection of vested interests in American history owes much to Locke.

Rousseau.—Rousseau (1712-88) gave his theory of social contract in his two books, namely, *The Social Contract* and *Emile.* According to him, the state of nature was an era of idyllic felicity. Reason did not guide the actions of individuals who were moved by their emotions. To quote Rousseau: "Man by nature never thinks and he who thinks is a corrupt creature." Every individual had unlimited liberty. There was no private property, no competition and no jealousy. Every individual lived the free life of a savage. He knew neither right nor wrong and was away from all notions of virtue and vice. There was innocence everywhere. However, this state of affairs did not last long. The increase in population and the dawn of reason were mainly responsible for the change. Simplicity and happiness disappeared. People started thinking in terms of mine and thine. The arts of agriculture and metallurgy were discovered and in the application of them man needed the help of others. Cooperation revealed and emphasized the diversity of man's talents and the inevitable result followed. The stronger man did the greater amount of work and the craftier got more of the product. Thus appeared the differences between the rich and the poor which was the prolific source of all other sources of inequality. Life became intolerable. There were wars and murders everywhere. The problem was "to find a form of association which protects with the whole common force the person and property of each associate, and in virtue of which everyone, while uniting himself to all, remains as before." The problem was solved through a social contract.

By a social contract, everyone surrendered to the community all his rights and the result was that the community became sovereign. Even after the contract, the individual remained as free as he was before. To quote Rousseau: "Since each gives himself up to all, he gives himself up to no one; and as there is acquired over every associate the same right that is given up himself, there is gained the equivalent of what is lost, with greater power to preserve what is left." Law is the expression of the general will. Sovereignty can never be alienated or represented or divided. The sovereign can be represented only by himself. The government is not the same thing as the sovereign. The government is not a party to the contract. The government was created in this manner. First of all a law was passed by the sovereign to the effect that there shall be a government and after that, the governors were appointed. Rousseau identifies sovereignty with the general will

or the common interests of the community. His sovereignty is infallible, indivisible, unrepresentable and illimitable. It is unrepresentative because it lies in the general will which cannot be represented. The sovereignty of the State is absolute like that of Hobbes. The only difference is that while Hobbes assigns sovereignty to the head of the State or a monarch, Rousseau gives it to the whole community. In the case of Rousseau, the sovereign people cannot divest themselves of their sovereignty even if they wish, but Hobbes makes the people alienate for ever their sovereignty. Rousseau unites the absolute sovereignty of Hobbes and the popular consent of Locke into the philosophic doctrine of popularity. To Hobbes the sovereign and the government are identical but Rousseau makes a distinction between the two. He rules out a representative form of government. Even after giving absolute powers to the sovereign, Rousseau lays down that the sovereign must rule properly. It must not do anything which is not in the interest of the whole people. It must ensure equality of all before law and maintain a rule of justice. It "cannot impose upon its subjects the fetters that are useless to the community". Rousseau's view of sovereignty was a compromise between the constitutionalism of Locke and absolutism of Habbes. According to Rousseau, sovereignty lies in the general will which cannot impose any limitations on itself. It can have no interest apart from those of the people and therefore there is no need for any limitations on it.

According to Rousseau, just as nature gives each man an absolute power over all his parts, likewise the social contract gives an absolute power to the body politic over all its parts. It is this power which is called sovereignty when it is directed by the general will. This absolutism is based not on fear or compulsion but on consent. The various powers such as legislative, executive etc. are only emanations of sovereignty which is one and unified and which collectively belongs to the people. Sovereignty is the source of all laws. Separation of powers is not the division of sovereignty but the exercise of it for the sake of convenience.

Rousseau maintains that the individual is free in the State because he does not surrender his rights to an outside authority but to the corporate body of which he himself is a member. Restrictions on the liberty of individuals are self-imposed. The rights of liberty, equality and property are rights of the citizen and not the natural and inherent rights of the individual. Liberty is civil liberty and not natural liberty. Men are equal by law and not by nature. In actual practice, man alienates only such of "his powers, goods and liberty as it is for the community to control but it must also be guaranteed that the sovereign is the sole judge of what is important." An individual is free while following his

real will. He is also free while following the general will and obeying the laws which proceed from it because his real will is an organic part of the general will and is in agreement with it. The liberty of Rousseau is not licence. It is not the unrestricted conduct of an isolated and independent individual. It is the rational freedom of an individual who lives a common life with others and whose welfare is integrally related to the welfare of others.

According to Rousseau, law is the expression of the general will. "A law is a resolution of the whole people for the whole people, touching a matter that concerns all." The law must relate to general interest. Law represents the general will with general interest in view and never persons or actions. The enactments of the government are merely a corollary of the general will. Nobody in the State is above law as everybody is a member of the sovereign body which is the source of law. Laws representing the general will cannot be unjust because nobody is unjust to himself. One is free when he is obeying laws because laws merely reflect his own will. Law re-establishes equality which belongs to man in the state of nature. A State is legitimate only when it is ruled by law. Laws are the sole motive power of the community "which acts and feels only through them". "The law considers the subjects collectively and their actions in the abstract; it never has for its object an individual man or particular action."

Rousseau put great emphasis on the General Will. According to him, in any society, we start with what he calls the will of all, i.e., the particular wills of the members of society. Everybody is allowed to will his own will and thus the majority will is found. When the majority will is found, those who did not vote with the majority must say to themselves that they did not will the general will and hence must will what the majority will is. It is in this way that the majority will becomes the general will by the minority willing as the majority had willed. The general will is the expression of the highest in every man. It is the spirit of citizenship taking concrete form and shape. General will is the manifestation of sovereignty. When sovereignty acts for the common interest, it is the exercise of the general will. So long as laws are in the common interest, they are the expression of the general will which is the key to self-expression.

General will cannot be self-contradictory. It is a reasonable will. It makes for unity in variety. The general will is permanent. It is not to be found "in the tempests of popular feeling, in the vagaries of statesmen. It is to be sought in the character of the people." The general will is always the right will. It always tends to the welfare of the whole. It is infallible. It can never be wrong. There can be no justification for diso-

beying it. Whenever an individual differs from the general will, he is in the wrong because his will is merely a selfish will and not the general will. There is no coercion even when a man is made to do something which is against his will. Since his real will is to be found in the general will which is manifested in the authority of the State, he is free even when he is being coerced by the general will. The understanding is that whoever refuses to obey the general will, shall be compelled to do so by the whole body. The general will is inalienable and indivisible. It cannot be represented in any legislature. "As soon as the nation appoints representatives, it is no longer free, it no longer exists." The view of Rousseau was that Englishmen were free only during the election days and after that they were "enslaved and count for nothing". The general will cannot be delegated. The moment it is delegated, it loses its character. The moment there is a master, there is no longer sovereign. Rousseau stood for popular sovereignty.

The view of Rousseau was that the State should be a small one so that all the people may be able to assemble at one place and make laws. "The larger the State, the less the liberty."

Critics point out that Rousseau's doctrine of the general will is too abstract and narrow to be found in the practical world. The general will is neither general nor will. It can be determined only by a majority vote and not otherwise. The doctrine of general will may lead to State absolutism. In the name of the general will, the worse kind of tyranny may be practised. The doctrine of general will is based on the idea of common interests which are difficult to define. Even the worst of tyrants can justify their actions on the ground of common good.

Dr. Friedmann points out that the most immediate and far-reaching influence of Rousseau's doctrine was on the makers of the French Revolution who took up his theory of popular sovereignty to justify revolution without end or measure. His doctrines of liberty and equality, added to those of law, exercised a strong influence upon the formative era of American independence and the rights of man. Rousseau glorified the collective will as the embodiment of what is good and reasonable and this line of thought was developed by Fichte and Hegel to a dangerous climax.[5]

The social contract theories of the law of nature were both the causes and symptoms of profound changes in the European scene. They involved a separation of law from moral duty by their new emphasis on rights rather than on duties. They liberated the individual from the ties of feudalism and the Church. They prepared the ground for modern theories of government. They inspired the revolutions in the United

[5] *Legal Theory*, p. 77.

States and France. They also eventually inspired totalitarian theories of government through Rousseau's doctrine of the general will. They spurred on the development of modern international law.

The doctrines of natural law and social contract were prominent in the legal philosophies of Kant (1724-1804) and Fichte (1762-1814). Both operated with certain fundamental rights of the individual which law must satisfy. Both used the construction of social contract as a hypothesis of reason and not a historical fact.

Kant.—Kant taught that insofar as man is a part of the world of reality, he is subject to its laws and to that extent is not free. However, his reason and inner consciousness make him a free moral agent. The ultimate aim of the individual should be a life of free will. It is when free will is exercised according to reason and uncontaminated by emotion that free-willing individuals can live together. People are morally free when they are able to obey or disobey a moral law.

An important feature of Kant's doctrine is his proclamation of the autonomy of reason and will. Human reason is law-creating and constitutes moral law. Freedom in law means freedom from arbitrary subjection to another. Law is the complex totality of conditions under which maximum freedom is possible for all. The sole function of the state is to ensure the observance of law. The individual should not allow himself to be made a means to an end as he is an end in himself. If need be, he should retire from society if his free will would involve him in wrongdoing. Kant saw the necessity of rules for social existence, guided by a just general policy. Society unregulated by right results in violence. Man has an obligation to enter into society and avoid doing wrong to others. Such a society has to be regulated by compulsory laws. If those laws are derived by pure reason from the whole idea of social union under law, man will be able to live in peace. What is needed is a rule of law and not of men. Kant's ideal of laws does not bear any relation to any actual system of law. It is purely an ideal to serve as a standard of comparison and not as a criterion of the validity of law.

Kant made a distinction between natural rights and acquired rights. He recognised only one natural right: 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. From this fellow a number of rights pertaining to the individual, in particular the right to property as an expression of personality.

Kant considered political power as conditioned by the need of rendering each man's right effective, while limiting it 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 is based on social contract which is 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. A republican and representative State is the ideal State. 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 the separation of powers and was opposed to privileges of birth, an established church and autonomy of corporations. He was in favour of free speech. The function of the State was essentially that of protector and guardian of that law.

Fichte.—Fichte's Social Contract was divided into a property contract and a protection contract. Through property one became a citizen and hence everyone must have property so that he may not be excluded from the legal community. The right to punish was a part of the social contract and was based on retaliation. Fichte saw property as an emanation of personality.

Decline of Natural Law Theories

The social contract theory did not survive the 18th century. One reason was that an individualistic conception of society put forward by the rationalism of the 18th century gave way to a collective conception stimulated by the rising tide of nationalism. Another reason was that the stupendous growth of natural science gave strength and emphasis to empirical methods against deductive Methods. Still another reason was that the new and increasingly complex European society demanded a comparative and sociological approach to the problems of society and not an abstract one. It is maintained that Montesquieu (1689-1755) and Hume (1711-1776) destroyed the foundations of natural law. Although Montesquieu superficially adhered to the doctrine of the law of nature, he maintained that law must be influenced by environment and conditions such as climate, soil, religion, custom, commerce etc. It was with this idea that Montesquieu embarked upon his comparative study of law and governments. His approach undermined the doctrine of natural law.

David Hume (1711-1776) destroyed the theoretical basis of natural law. The theory of natural law was based upon a conception of reason as a faculty inherent in all men which produced certain immutable norms of conduct. Hume showed that reason as understood in the systems of natural law was based on confusion.

According to Hume, values are not inherent in nature, nor is justice. Reason can only work out the means that will lead to specified results. Hume was in favour of the firm and inflexible application of rules although those should be widely designed and changed with the cir-

cumstances. On these lines, Hume attacked the prevailing conceptions of natural law. He challenged the conception of a perfect, complete and discoverable system. If there had been such a thing, there would not have been many divergent interpretations and the necessity of positive law.

At the dawn of the 19th century, there was a reaction against excessive individualism fostered by later natural law theories which resulted in the French Revolution. There grew up a collectivist outlook on life and natural law theories declined.

Objections to natural law theories also came from other quarters. The teachings of historians and sociologists put stress on environment. Historical investigations exploded many assumptions. Researches into the early history of society exposed the mythical nature of the social contract. The unit in early society was not the individual but the family or clan. The social contract theory had ascribed the validity of law to a contract but normally it was found to be the opposite. Some rule had to be presupposed which prescribed that agreements are to be kept. Even as a hypothesis to account for the present state of affairs, the social contract theory fell short. It only heaped fiction upon fiction. The alternative explanations of the origin of society not only fitted with the facts of today but were truer in themselves.

The *a priori* methods of natural law philosophers were not acceptable to those who were brought up in the pragmatic spirit of science. The postulates of natural law were subjected to critical examination and their bases were found to be false or the results of false inferences. It was found that there was no foundation for the sweeping assertion that man must always seek society or that man is always selfish. It is wild inference that because certain institutions are alike in different countries, they must reflect some universal law. It was contended that the whole idea of natural law was no more than a psychological reflex. The very diversity observable in the systems of positive law raises in the mind an antithesis of a fixed and changeless law. It became evident that the complex problems of the 19th century required a realistic and practical approach and not that of natural law which was based on abstract pre-conceptions. In the new climate of opinion, the prevailing natural law theories could not survive and their place was taken by analytical and historical positivism.

Bentham.—Bentham (1748-1832) regarded natural law as nothing but a phrase. He mercilessly criticised the idea of natural rights and described them as "simple nonsense; natural and imprescriptible rights, rhetorical nonsense, nonsense upon stilts." About the principle of equality, he wrote: "Absolute equality is absolutely impossible.

Absolute liberty is directly repugnant in the existence of every kind of government... . All men are born free? All men remain free? and not a single man... . All men, to the contrary, are born in subjection." Bentham criticised Blackstone for basing political obligation upon an original social contract. His view was that there was no such thing as a social contract in the past and even if there was such a contract in the past, that could not bind the present generation.

Austin.—John Austin (1790-1859) rejected natural law on the ground that it was ambiguous and misleading. According to him, the science of jurisprudence is concerned with positive law by which he meant a science of laws. Austin was opposed to the concept of natural rights of individuals against the State. His view was that all rights were created and regulated by the State. The State did not originate in a social contract. The people did not obey the State on account of any formal consent but on account of the force of their habit of obedience. The State continues to exist on account of its utility to the people.

Although the 19th century was hostile to natural law theories, the natural law tradition was continued on the continent, but with decreasing force and without essential new contributions by Ahrens, Krause and others. Lorimer restated the orthodox natural law theory as determining the ultimate objects of positive law and elaborated a catalogue of rights revealed by nature.

Natural Law Ideas in English Law

It is true that utilitarianism and positivism had strong influence upon England in the 19th century and natural law thinking declined, but the ideas of natural law had their influence on English Law. Chief Justice Coke vigorously asserted the supremacy of common law over Acts of Parliament. To quote him: "It appears in our books that in many cases the common law will control Acts of Parliament and sometimes judge them to be utterly void, for when an Act of Parliament is against common right or reason or repugnant or impossible to be performed, the common law will control it and adjudge such to be void."

The view of Prof. Holdworth is that from the 16th century onwards the supremacy of law and supremacy of Parliament had merged and were not challenged again. However, lip service continued to be paid to the idea of natural law. In his *Commentaries*, Blackstone wrote: "This law of nature being coeval with mankind and dictated by God himself is, of course, superior in obligation to any other. It is binding over all the globe, in all countries, and at all times; no human laws are of any validity if contrary to this; ... Upon these two foundations, the law of nature and the law of revelation, depend all human laws."

In some branches of modern English Law, principles of natural justice are openly invoked to test the validity of legal acts but that does not apply to test the validity of any Act of Parliament as Parliament is supreme in England. The most important examples are the supervision of administrative acts and decisions by law courts, recognition of foreign judgements and custom. A custom is not admitted by courts if it is not reasonable. By means of an order of prohibition or *certiorari*, the High Court in England can control administrative acts and quasi-judicial decisions of administrative bodies which are contrary to the rules of natural justice. A foreign law applicable or a foreign transaction recognised in a case before an English court is not enforced if certain principles of natural justice such as fair trial, freedom of person, freedom of action are disregarded by such application or recognition. In this sense, natural law ideas have exercised great formative influence upon English Law in various phases of its development. The view of Maitland is that natural law ideas were of considerable importance in England. Natural law ideas have exercised the most profound and enduring influence upon English Law as guiding principles in law making. The attempt of Lord Mansfield to introduce the doctrine of unjust enrichment in English Law was an application of the principles of natural justice. "Reasonableness" in tort and elsewhere is the outcome of natural law ideas. The concept of quasi-contract in English Law is based on natural law principles. The principles of "justice, equity and good conscience" are based on natural law ideas. While welcoming the American Bar Association to London in 1957, Lord Kilmuir, L. C. referred to "the doctrine which we share with a wider community even than that of the Common Law but which has for various reasons become a little dusty and old-fashioned in recent years and which I myself would like to see refurbished and restored to the position which it once used to occupy. I refer to the doctrine of *the law of nature, one of the noblest conceptions in the history of jurisprudence.*" Lord Morris also asserts a bigger role for natural law in modern English Law.

Natural Law in American Jurisprudence

The principles of natural law and natural rights have exercised great influence on the Constitution of the United States and also on the State Constitutions. Since the case of *Marbury* v. *Madison* in 1803, the Supreme Court of the United States has asserted its right to test the validity of any legislative or administrative act in the light of the Constitution. The Declaration of Independence refers to man's inalienable right of life, liberty and pursuit of happiness. These are also reflected in the constitutions of many American States. The principle of the limitation of legislative power by certain basic principles of justice is an applica-

tion of natural law. The Supreme Court has asserted the sanctity of vested rights against social legislation and extended the "indestructible right of the individual" to the corporation. According to Justice Story, a grant of title to land by the legislature is irrevocable upon the principles of natural law. Cooley refers to the principles of "inalienable rights", "due process" and "eminent domain" in American law. The power to impose taxes is restricted to "public purposes" and those are what the judges understand them to be. Eminent domain can be exercised only for public purposes and with adequate compensation. The "due process of law" was extended to protect unrestricted liberty of contract.

Rommen refers to the natural law thinking in the United States as a guarantee against ethical relativism and legal positivism.[6]

Undoubtedly, natural law thinking inspired the fathers of the American Constitution and has dominated the American Supreme Court more than any other law court in the world. The American Constitution gives as near an approach to the unconditional embodiment of "natural" rights as can he imagined. Where the battle is fought in terms of fundamental rights embodied in the written Constitution, the natural law appeal will be direct and powerful.

Revival of Natural Law Theories

Towards the end of the 19th century, there was a revival of natural law theories. That was due to many reasons. There was a reaction against the 19th century legal theories which had exaggerated the importance of positive law. It was realised that abstract thinking or *a priori* assumptions were not completely futile. The pure positivist approach failed to solve the problems created by the new social conditions. The material progress and its effect on society made the thinkers look for some values and standards. Western society was shattered by the first World War and there was a search for an ideal of justice. Science began to become doubtful about itself and the certainty of scientific facts. The youth rebelled against the self-satisfaction of the bourgeoisie, money worship and modern life. Social reformers and socialists attacked inequalities in society. Lawyers began to feel that law was not simply a matter of applying statutes or precedent to any given case or situation by means of pure logic. The unsolved problems demanded a guide higher than positive law. As the faith of certainty wavered, idealistic philosophy revived. There was a search for the ideals of justice. The result was the revival of natural justice. The emergence of ideologies

[6] *Natural Law*, p. 41.

such as Fascism and Marxism caused the development of counter ideologies which contributed to the revival of natural law theories.

The new theories of natural law took into account the various approaches to law such as analytical, historical and sociological approaches. They also sought guidance from contemporary theories in other branches of knowledge. The revived natural law is relative and not abstract and unchangeable. The new approach of natural law is concerned with practical problems and not abstract ideas. It tries to harmonise natural law with the variability of human ideals. It takes into account new legal theories which put emphasis on society. To distinguish this approach to natural law from the old theories of natural law, the former has been called "natural law with a variable content."

One form which the revival of natural law has taken is the adaptation of the doctrines of St. Thomas Aquinas. Neo-Thomists, the followers of Aquinas, are prepared to accept the descriptions of reality provided by scientists but they maintain that it is for philosophy to give full explanation of reality through reason and reflection. They adopt the humanism of Aquinas to steer a course between an exclusively individualist view of man and a totalitarian view of society in which the individual counts for nothing. Natural law is both anterior and superior to positive law.

Dabin.—One of the principal representatives of this school is Jean Dabin. According to him, the law of nature was "deduced from the nature of man as it reveals itself in the basic inclinations of that nature under the control of reason". As human nature is identical in people everywhere, the precepts of natural law are universal in spite of historical, geographical, cultural and other such variations. One of the precepts of natural law is concerned with the good of society which is the purpose of State and law. The State provides order and laws are means to that end. The State is superior to all other groups. State law "is the sole true law". Laws may be expressed variously in the form of statutes, precedents or customs but they are general regulations of conduct, not of conscience. Ordinarily they are obeyed and when they are not obeyed, compulsion under the authority of the State has to be employed. Laws are directed to conduct and not conscience. There is a moral duty to obey those positive laws which conform to the natural law principles of promoting the common weal. If a law fails to conform to that principle, it is not morally binding because "everybody admits that civil laws contrary to natural law are bad laws and even that they do not answer to the concept of a law". If they are not laws, there is no question of moral binding. In order to fulfil the common good, laws have to be adapted to the needs and ethos of the particular community.

The actual making and applying of positive law with a view to giving effect to the dictates of natural law is an art which only jurists are competent to exercise. The rules of law do not simply put natural law into effect and in most cases a great many practical factors have to be taken into account. This shows an attempt to harmonise the restoration of natural law with the variability of human society and to follow the new emphasis on society.

Stammler.—Stammler (1856-1938) was an exponent of "natural law with a variable content". He first distinguished between technical legal science which concerns a given legal system and theoretical legal science which concerns rules giving effect to fundamental principles. The former deals with the content of law and the latter relates them to ultimate principles. In this way, Stammler distinguished between the concept of law and the idea of law or justice. He approached the concept of law in this manner. Order is appreciable through perception or will. Community or society is "the formal unity of all conceivable individual purposes and by this means the individual may realise his ultimate best interest. Law is necessary *a priori* because it is inevitably implied in the idea of cooperation". It just aims at harmonising individual purposes with that of society. Stammler sought to provide a formal, universally valid definition of law without reference to its content. He defined law as "a species of will, others-regarding, self-authoritative and inviolable". Law is a species of will because it is concerned with orderings of conduct. It is others-regarding because it concerns a man's relations with other men. It is self-authoritative because it claims general obedience. It is inviolable on account of its claim to permanence. The idea of law is the application of the concept of law in the realisation of justice. Every rule is a means to an end. One must seek a universal method of making just laws. A just law is the highest expression of man's social activity. Its aim is the preservation of the freedom of the individual with the equal freedom of other individuals. In the realisation of justice, the specific content of a rule of positive law will vary from place to place and from age to age. It is for this reason that his theory has been given the name of "natural law with a variable content".

According to Stammler, in order to achieve justice, a legislature has to bear in mind two *principles of respect* and two *principles of participation*. The two principles of respect are that the content of a person's volition must not depend upon the arbitrary will of another. Every legal demand can only be maintained in such a way that the person obligated may remain a fellow creature. The two principles of participation are that a person lawfully obligated must not be arbitrarily excluded from the community. Every lawful power of decision may exclude the

person affected by it from the community only to the extent that the person may remain a fellow creature. With the aid of these four principles, Stammler tried to solve the actual problems confronting law courts. He did not deny validity to the laws which fail to conform to the requirements of justice. His scheme is a framework for determining the relative justness of a rule or a law and for providing a means for bringing it nearer to justice.

The importance of Stammler's theory can be judged from the flood of controversy provoked by it. Before 1914, Stammler expressed the urge for scientific clarity and unity on one hand and a new idealism on the other. He put law scientifically on its own feet and revived legal idealism against the sterility of positivism. Both of these aspects have influenced modern legal theory. Until the rise of Fascism and National Socialism, the need for a true science of law was universally recognised. That does not mean that Stammler's particular concept of law as pure form applied to changing economic matters, was scientifically unchallengeable. Neo-Kantianism has produced a very different philosophical appreciation of law as a cultural phenomenon.

Max Weber has given a detailed criticism of Stammler's concept of legal science. According to him, the alleged formal categories are in fact categories of progressive generalisation, the more general ones being relatively more formal than less general ones. Even if a purely formal concept of law can be imagined, it is incomprehensible how Stammler can maintain throughout his work the illusion that a purely formal idea of law is capable of material guidance to the lawyer. Philosophically, his fallacy is that he adopts the different parts of Kant's philosophy but destroys the basis of Kant's system.

Dr. Friedmann writes that Stammler 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 is an "Idea of Justice" which is a hybrid between a formal proposition and a definite social ideal, kept abstract and rather vague by the desire to remain formal. Stammler produces solutions dependent on very specific social and ethical valuations which it was his chief endeavour to keep out of an idea meant to be universal.[7]

John Rawls.—The view of Prof. John Rawls (1921) of the Harvard University is that society is a more or less self-sufficient association of persons who in their mutual relations recognise as binding certain rules of conduct specifying a system of cooperation. Principles of social justice are necessary for making a rational choice between various available alternative systems.

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

Prof. Rawls arrives at his theory in this manner. Fairness results from reasoned prudence. Principles of justice, dictated by prudence, are those which hypothetical rational persons would choose in a hypothetical "original position" of equality. The insistence on prudence excludes gamblers from participating in the "original position", but will bring in, on the whole, these who are conservatively inclined. People in the "original position" are assumed to know certain things, e.g., general psychology and the social sciences. This is designed to exclude personal self-interest when choosing the "basic principles of justice" so as to ensure their generality and validity. What is needed is a form of justice which will benefit everyone, i.e., the disinterested individual's conception of the common good.

The Basic Principles of Justice are generalised means of securing generalised wants, "primary social goods" which include basic liberties, opportunity, power and a minimum of wealth.

The First Principle of Justice is: "Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all." The basic liberties include equal liberty of thought and conscience, equal participation in political decision-making and the rule of law which safeguards the person and his self-respect.

The Second Principle is: "Social and economic inequalities are to be arranged so that they are both: (*a*) to the greatest benefit of the least advantaged, consistent with the just savings principle and (*b*) attached to offices and positions open to all under conditions of fair equality of opportunity." The "just savings principle" is designed to secure justice between generations and is described as follows: "Each generation must not only preserve the gains of culture and civilisation, and maintain intact those just institutions that have been established, but it must also put aside in each period of time a suitable amount of real capital accumulation."

With the aid of these principles, Prof. Rawls tries to establish a just basic structure. There has to be a constitutional convention to settle a constitution and procedures that are most likely to lead to a just and effective order. After that comes legislation and its application to particular cases. Prof. Rawls claims that in this way the basic principles will yield a just arrangement of social and economic institutions.

The view of Prof. Rawls has been criticised on many grounds. One major attack launched by more than one critic is to question whether his conclusions follow from his "original position." It is maintained that the whole concept of "original position" and "veil of ignorance"

and what it covers and what it does not cover only provide a semblance of justification for reaching certain desired conclusions.

Prof. Rawls gives certain "Principles of Priority". The First Priority Rule is the priority of liberty. "Liberty can be restricted only for the sake of liberty". A less extensive liberty must strengthen the total system of liberty shared by all. A less than equal liberty must be acceptable to those with the lesser liberty. The Second Priority Rule is the lexical priority of justice over efficiency and welfare. An inequality of opportunity must enhance the opportunity of those with the lesser opportunity. An excessive rate of savings must on balance mitigate the burden of those bearing this hardship. These principles ensure that as between liberty and need, liberty prevails. As between need and utility, need prevails. As between liberty and utility, liberty prevails. Liberty is to be given priority only after certain basic wants are satisfied.

As regards individuals, the view of Prof. Rawls is that reason yields principles of natural duties and fairness. The former include the duty to uphold just institutions, to help in establishing just arrangements, to render mutual aid and respect and not to injure or harm the innocent. The fairness principle gives rise to obligations, including promises. One should play one's part as specified by the rules of the institution as long as one accepts its benefits and provided the institution itself is just or at least nearly just. Civil disobedience is justified when "substantial injustice" occurs, all other methods of obtaining redress fail and disobedience inflicts no injury on the innocent. In these circumstances, disobedience is an appeal to the society's sense of justice which is evidenced by the reluctance of the community to deal with it.

Prof. Dias points out that Prof. Rawls has not succeeded in showing how his principles, desirable as they may be, derive from reason. The thrust of his theory is for stability. He puts emphasis on obedience grounded in fairplay. Law is only one institution of social justice.[8]

Morris.—According to Prof. Clarence Morris (1893): "Justice is realised only through good law." Laws without just quality are doomed in the long run. Prof. Morris uses law in a broad sense. To quote him: "I use the word law to mean more than statutes and ordinances; it includes both adjudicated decisions of cases and social recognition of those legal obligations that exist without governmental promptings." (*Customs and Practices).*

Justice is one of the three principal justifications of law and the other two are rationality and "acculturation". The theory of Morris is concerned with the method of realising justice and is not a theory of just content. Law makers should serve the public by advancing its genuine

[8] *Jurisprudence*, p. 674.

aspirations which are "deep-seated, reasonable and non-exploitative." Law-making contrary to them is doomed to failure. Without public support, legislators cannot succeed.

Rationality, the second justification of law, is concerned with the reasoning processes of law, both judicial and legislative. Reason is a major ingredient of justice, but it is of a special kind. By becoming a judge, a judge incurs a duty to implement public aspirations within the judicial process. Although legislation must reflect them, that does not mean that an unjust law is not a law. A court is bound to apply it.

The third justification of law is "acculturation" which is in conformity with culture. The purport of a statute is more easily gathered when one is in tune with the cultural environment of the legislator. Under the heading of acculturation is included a plea for an awareness in law-making of man's responsibility towards his environment.

The general thesis of Morris is that law has to be justified morally, socially and technically. Morris does not specifically say that just quality is a necessary condition of the continuity of law but that seems to be implicit. The view of Prof. Dias is that perhaps Prof. Morris is not to be classed as either naturalist or positivist as his thesis would not be rejected by either side.[9]

Del Vecchio.—*Del* Vecchio was a jurist of much greater elegance and universality than Stammler and his writings display a profusion of philosophical, historical and juristic learning. The larger part of his theory is grounded on Fichte and not on Kant. He conceives of natural law as nothing but merely a principle of legal evolution which guides mankind and law towards greater autonomy of man. It exists as a system of the highest truths, not sensible but rational. While psychological analysis reveals the foundation of an absolute law of justice or natural law in the human spirit, critical gnosiology endorses its validity.

Del Vecchio does not draw a line of demarcation between just and unjust and good and bad law. Law is neutral. Man has a double quality. He is, then and there, physical and metaphysical. Being a part of nature, he cannot distinguish between good and bad. Being an intelligent being, he possesses the possibility for free decision in himself. Man has in himself the "eternal seed of justice". This seed of justice is an idea and sentiment as well. As an idea, it emanates from the necessity of the individual to conceive himself as an ego. Individuality can only be conceived as a reciprocal notion in relation to another being. The essence of justice is in its inter-subjectivity. It is the simultaneous consideration of several subjects on an equal plane. Personality and law can only be conceived through the inter-relation of individuals.

[9] *Jurisprudence*, p. 676.

For del Vecchio, justice has not only a formal but also a substantial meaning and an implicit faculty of valuation. Human consciousness postulates not only reciprocity in a formal sense but instinctively it also emits a definite valuation, a conception of justice which discriminates between various forms of juridicity.

For del Vecchio, justice has an ideal content which, stripped of all technicality, 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. To del Vecchio, the evolution of mankind towards an increasing recognition of human autonomy appears to be the basis of natural law. Partial expression of this is given by the development from status to contract and from aggregation to association.

The view of del Vecchio is that positive law is a datum of experience and as such can be understood and explained as a phenomenon. It can be given a place coherently in the system of natural production.

There seems to be a definite break in the work of del Vecchio. The models for his earlier legal philosophy were Kant and the early Fichte, but in his later work it was definitely Hegel. This is clear from his theories on the relation between individual and State, between reality and idea and the unfolding of an implied purpose of history.

Del Vecchio considered natural law as the principle of legal evolution which guides mankind and law towards greater autonomy of man.

Geny.—Francois Geny asserts the idea of natural law against the positivist theory of law. Natural law comprises a number of principles of reason, interpreted in accordance with the ideals of Western liberalism.

Le Fur.—Le Fur considers the conception of natural law as necessary. It rests on human nature which, being that of a reasonable being, demonstrates to man that he is the creation of a superior will and intelligence.

Hall.—The view of Prof. Jerome Hall (1901) is that moral, social and formal considerations should be unified in a definition of positive law. According to him, time has come to reunite disciplines. Jurisprudence should be "adequate" in the sense that it will combine positivist, naturalist and sociological study. The result will be what he calls "integrative jurisprudence". The focal point of this is the action of officials and he calls the concept "law-as-action". Law-as-action from the point of view of officials relates to rules, values and social behaviour in the following way. Rules come in to explain official actions in prescribing, judging and ordering and applying sanctions. Values come into

the idea of validity. The way in which validity is understood depends upon whether law is viewed as law-as-rules or law-as-action. Social behaviour comes in through the idea of effectiveness of law which covers a large range of phenomena including sanctions, conscious obedience and compliance. Laws are effective when actual behaviour in accordance with them maximises the values of their goals.

When looked at from the point of view of law-as-action, moral value must be included in any definition of positive law. According to Prof. Hall, customary law represents experience in settling problems in just and rational ways.

According to Hall, law possesses six features and those are ethical validity reflected in certain attitudes, functions, regular character, range and character of public interest expressed in the laws of a State, effectiveness and supremacy.

According to Hall: "The objective validity of moral judgments is known intuitively or, as regards problematic situations, it is established by analysis, discussion and reflection, coherence with wider experience, the consensus of informed unbiased persons and the universality of solutions among diverse cultures". Hall does not believe that the correct answer to the most difficult ethical problems can be found by conscience, intuition or the law of God. Reason must aid in the choice between conflicting principles. Democracy is part of modern natural law because the values incorporated in democratic law "represent the most stable policy decisions which it is wise and feasible to implement by compulsion."

John Wild.—The theory of John Wild (1902) proceeds on the idea that "there are norms grounded on the inescapable pattern of existence itself." His method of arriving at these is not that of logical deduction, but a different process, namely, "justification". He asks: "How is moral justification to be explained? We cannot explain it without recognizing that certain moral premises must somehow be based upon facts." The core of his thesis is that "value" and "existence" are closely intertwined. Existence has a tendency towards fulfilment or completion. If completion of existence is good, existence itself must be valuable. The same act is good so far as it is realised, but it is evil so far as it is frustrated. Goodness is some kind or mode of existence and evil is some mode of non-existence or privation.

According to Wild, the world is an order of divergent tendencies which, on the whole, support one another. Each individual entity is marked by an essential structure which it shares in common with other members of the species. This structure determines certain basic tendencies that are common to the species. If these tendencies are to be

realised without distortion or frustration, they must follow a general dynamic pattern. This pattern is what is meant by natural law. It is grounded on real structure and is enforced by inexorable natural sanctions. Good and evil are existential categories. It is good for an entity to exist in a condition of active realisation. When all these principles are applied to human nature, three ethical theses may be derived viz., the universality of moral or natural law, the existence of norms founded on nature and the good for man as the realisation of human nature. Natural law may be defined as "a universal pattern of action applied to all men everywhere, required by human nature itself for its completion."

Fuller.—Prof. Lon L. Fuller (1902) is regarded as the leading contemporary natural law lawyer. He does not contend that the rules of a legal system must conform to any substantive requirements of morality or any other external standard. He maintains the need for rules of law to comply with "internal morality." Initially, he draws a distinction between morality of duty and morality of aspiration. The former corresponds to an external morality of law. It consists in those fundamental rules without which society cannot exist. He sees law as a "purposive activity." The morality of aspiration exhorts mankind to strive for ideals and fulfil their potentialities in a Platonic way. He gives eight typical ideals or formal virtues to which a legal system should strive viz., generality, promulgation, absence of retroactive legislation and certainly no abuse of retrospective legislation, no contradictory rules, congruence between rules as announced and their actual administration, clarity, avoidance of frequent changes and the absence of laws requiring the impossible. These principles of legality are not basic conditions which every system necessarily fulfils, but constant pole stars guiding his progress. The greater its success, the more fully legal such a system is.

Fuller is critical of the assertion of Dworkin that while baldness is a matter of degree, a line can be drawn between law and non-law. To quote Fuller: "Law does not just fade away, but goes out with a bang."

Fuller does not develop the relationship between the form in which legal rules are expressed and their content. The Nazi legal system was faithful, with one possible exception, to the canons of Fuller and yet it was able to promulgate the Nuremberg racial laws which were utterly offensive to all human values. Fuller must surely believe that form has a direct bearing on content as otherwise his principles would be nothing more than the tools of an efficient craftsman.

The view of the critics of Fuller is that Fuller betrays confusion between efficacy and morality. Hart objects "to the designation of these principles of good legal craftsmanship as morality, in spite of the qualification 'inner', as perpetrating a confusion between two notions that it is vital to hold apart the notions of purposive activity and morality".

Hart points out that the eight desidarata of Fuller are "unfortunately compatible with very great iniquity", e.g., Herod's order for the massacre of the innocents satisfied all the conditions. The reply of Fuller is to doubt whether an evil ruler could pursue iniquitous ends and also continue to respect "inner morality". He calls for "examples about which some meaningful discussion might turn" and which would show that "history does in fact afford significant examples of regimes that have combined a faithful adherence to the internal morality of law with a brutal indifference to justice and human welfare." The contention of Fuller is that iniquitous regimes have not continued to exist, nor could they continue to combine evil policies with fidelity to "internal morality".

Castberg, a Norwegian jurist, refers to natural law in the sense of rules of ideal laws which are adapted to the oft changing conditions of life.

D'Entreves states that natural law contains the elementary principles which man must respect as long as they are what they are and propose to set up a viable society. He puts certain queries and asks: Are we to conclude that natural law is central and privileged sphere of morality distinguished by its sacred and inviolable character? Does it mean that outside the sphere of the minimum content, laws of any iniquity may stand? And even within it, what is the status of laws which flagrantly violate the minimum protection for which Hart's natural law stands? Are such laws and, if so, what, if any, is the right of resistance? To what extent can 'evil law' permeate a system before that setup becomes no more than a suicide club?

The most significant revival of natural law thinking in our time is to be found in contemporary German legal philosophy. This revival springs directly from the reaction against the excessive and, in the later phases of the Nazi regime, Nihilistic manifestations of legal positivism. German legal philosophers and law courts have sought to rethink and reformulate the relation of "higher law" principle and positive law. Deeply moved by the excesses of absolute State sovereignty perpetrated by the Nazi regime, Gustav Radbruch states that since law is, in its very nature, destined to serve justice, certain types of positive law cannot be defined as law and this applies to the whole portions of National Socialist Law. Radbruch was conscious of the extreme diffi-

culty of separating "non-law" from merely "bad" or "unjust" law and the need to reserve the decision on those matters to institutions like the supreme constitutional court.

H. Krabbe, a Dutch jurist, strongly adheres to the "social conscience" or the "recognition" of law by those whom it applies. He admits no other authority as a true source of law. According to him, law is to the individual or groups of individuals in the same way as the theory of auto-limitation is to the State. This collective conscience becomes the corporate aspect of natural law. As for the individual judge or legislator who has to explore and expound the collective conscience, much stress is laid on his instinct or intuition, that is, his own moral sense and his own intelligence.

The view of Prof. C. K. Allen in *Law in the Making* is that reduced to its simplest language, the revived natural law appears to "mean little more than that the magistrate must judge as justly as he can, and the legislator must make laws as wisely as he can, in accordance with the prevailing ideas of justice and utility with which, it is to be hoped, (and, after all, it cannot be more than a hope), law-makers and law-dispensers of a particular community are imbued by training and experience." Again, "the new natural law does not seem to contain any very novel truth, or to be very fictitiously named; and it probably would not have been so much canvassed on the continent had it not been associated with a movement for a moral, liberal and elastic judicial technique, *la libre recherche scientifique*, than has been orthodox in most European countries and also with controversies concerning the nature and limits of the powers of the State. Apart from these special problems, its chief value has been to counteract the tendency to exaggerate the purely historical and fortuitous circumstances of legal growth, at the expense of the moral principles from which law may sometimes be judicially separated, but can never be divorced *a vinculo matrimonii* '.

Hart.—Prof. H. L. A. Hart (1907) is in many ways the leader of contemporary positivism. In his book entitled *The Concept of Law*, Hart has attempted to restate the position of natural law from a semi-sociological point of view. He points out that there are certain substantive rules which are essential if human beings are to live continuously together in close proximity. To quote him: "These simple facts constitute a core of indisputable truth in the doctrines of natural law." Hart puts emphasis on an assumption of survival as a principal human goal. According to him, we are concerned with social arrangements for continued existence and not with those of a suicide club. There are certain rules which any social organisation must contain and it is these facts of human

nature which afford a reason for postulating a "minimum content" of natural law.

Hart does not state the actual minimum universal rules but certain facts of "human condition" which must lead to the existence of some such rules but not necessarily rules with any specific content. According to Hart, those facts of human condition consist of human vulnerability, approximate equality, limited altruism, limited resources and limited understanding and strength of will. In the light of these inevitable features of human condition, there follows a "natural necessity" for certain minimum forms of protection for persons, property and promises. "It is in this form that we should reply to the positivist thesis 'law may have any content'."

Hart does not suggest that, even if this analysis of human society is accepted, this must inevitably lead to a system of even minimal justice within a given community. He accepts the fact that human societies at different periods of history have displayed a melancholy record of oppression and discrimination in the name of security and legal order as in the case of systems based on slavery, or systems based on positive religious or racial discrimination.

Hart's view of minimum content for natural law has been criticised. It is contended that this approach should not be confused with an attempt to establish some kind of "higher law" in the sense of overriding or eternally just moral or legal principles, but is merely an attempt to establish a kind of sociological foundation for a minimum content for natural law. The justification for the use of the term natural law is that regard is paid to what is suggested to be the fundamental nature of man as indicated in the five facts of human condition by Hart. However, these "facts" are extremely vague and uncertain in most respects. They do not depend upon sociological investigation, but are really an intuitive appraisal of the character of the human condition. Lord Lloyd points out that it is difficult to see how any real minimum content whatever can be based upon such principles. The factor of human vulnerability restricts the use of violence but the need for human survival has not prevented the acceptance in many societies of the exposure of infants or the killing of slaves or children by those exerting power over them. A society may actually base its survival upon the need for human slaughter. The ancient civilisation of Mexico possessed a religious and a State system which required the perpetual propitiation of the gods by continuous human sacrifice on a massive scale. In relation to such a society, it seems difficult to talk in terms of individual human vulnerability as it might be conceived in a developed modern State

which acknowledges as a fundamental principle the value of individual life and security.

Although Hart refers to the implications of approximate equality between human beings, he himself recognises that no universal system of natural law or justice can be based upon the principle of impartiality, or that of treating like cases alike. The rule of equality cannot be derived from any formal principle of impartiality. The idea of equality or non-discrimination is essentially a value judgment which cannot be derived from any assertions or speculations regarding the nature of man. No insistence on the idea of impartiality or the rules of natural justice, or the "inner morality" of the law in the sense used by Prof. Fuller, can afford a basis of arriving at such a principle as that of non-discrimination. This is fully recognised by Hart himself when he writes that the idea of impartiality is "unfortunately compatible with very great iniquity."

D'Entreves points out another gap in his treatment of natural law by Hart. While Hart accepts the positivist view that the validity of a legal norm "does not depend in any way on its equity or iniquity", he maintains that natural law contains "the elementary principles which man must respect as long as men are what they are and propose to set up a viable society." D'Entreves asks: "Are we to conclude that natural law is a central and privileged sphere of morality distinguished by its sacred and inviolable character?" Does this mean that outside the area of the minimum content laws of any iniquity may stand? and even within it, what is the status of laws which flagrantly violate the minimum protection for which Hart's natural law stands? Are such laws law, and, if so, what, if any, is the right of resistance? To what extent can "evil laws" permeate a system before that set-up becomes no more than a suicide club?

Prof. Dias observes that it may seem ironic that this account of natural law should end with a leading positivist expounding on the "core of indisputable truth in the doctrines of natural law", but this may at least indicate that the gulf between the two groups is not as wide as it used to be. Positions are less clearcut now. It further underlines the point that classification into "naturalist" and "positivist" applies to views and not individuals. Certain doctrines may be labelled "naturalist" and others "positivist", but people may subscribe more or less strongly to one type or the other depending on the issue.[10]

It is clear from what has been stated above that the concept of natural law has changed from time to time. It has been used to support almost any ideology—theocracy, absolutism and individualism. It has

[10] *Jurisprudence*, p. 684.

inspired revolutions and bloodshed. It has provided a firm ground for theorizing and expressing the ideas and thoughts of a particular age. It has influenced positive law and modified it. The theories of natural law have helped the development of law. A large number of principles of natural law have been embodied in the legal systems of various countries. Examples can be given from the legal systems of England, the United States and India. So far as England and the United States are concerned, a reference to them has already been made. As regards India, a number of legal principles and concepts have been borrowed from England and many of them are based on the principles of natural law. The examples of some of them are "justice, equity and the good conscience", quasi-contract reasonableness in tort. The Constitution of India also embodies a number of principles of natural law. It guarantees certain fundamental rights to the people of India and gives the Supreme Court of India and the High Courts the power to exercise control over administrative and quasi-judicial tribunals and one of the grounds on which the orders are set aside, is the violation of the principles of natural justice. The principles of natural justice are incorporated in Article 311 of the Constitution which provides that no civil servant can be dismissed, removed or reduced in rank without giving him reasonable opportunity of showing cause against the action proposed to be taken against him.

In recent years, the ideas of natural justice have become more and more important and have been relied upon by the Supreme Court of India and High Courts in their decisions. In *A. K. Kraipak* v. *Union of India*, the Supreme Court observed that the aim of the rules of natural justice is to secure justice or to put it negatively, to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. They do not supplant the law of the land but supplement it. The concept of natural justice has undergone a great deal of change in recent years. In the past it was thought that it included just two rules, namely, (*i*) no one shall be a judge in his own cause (*nemo debet esse judex propria causa*) and (*ii*) no decision shall be given against a party without affording him a reasonable hearing (*audi alteram partem*). Very soon thereafter, a third rule was added which provides that quasi-judicial inquiries must be held in good faith, without bias and not arbitrarily or unreasonably. In the course of years, many more subsidiary rules have been added to the rules of natural justice. Till recently, it was the opinion of the courts that unless the authority concerned was required by the law under which it functioned to act judicially, there was no room for the application of the rules of natural justice. The validity of that limitation is now questioned. If the purpose of the rules of natural justice is to prevent miscarriage of justice, one fails to see why

those rules should be made inapplicable to administrative inquiries. It is not easy to draw the line that demarcates administrative inquiries from quasi-judicial inquiries. Inquiries which were considered administrative at one time are now being considered as quasi-judicial in character. Arriving at a just decision is the aim of both quasi-judicial inquiries as well as administrative inquiries. An unjust decision in an administrative inquiry may have more far-reaching effect than a decision in a quasi-judicial inquiry. The rules of natural justice are not embodied rules. What particular rule of natural justice should apply to a given case must depend to a great extent on the facts and circumstances of that case, the framework of the law under which the inquiry is held and the constitution of the tribunal or body of persons appointed for that purpose. Whenever a complaint is made before a court that some principle of natural justice had been contravened, the court has to decide whether the observance of that rule was necessary for a just decision of the facts of that case. In the case pending before the Supreme Court, the selections were set aside on the ground that they violated the principles of natural justice as one of the members of the Selection Board was himself interested in that selection.[11]

In *Maneka Gandhi* v. *Union of India,* the Supreme Court observed that natural justice is a great humanising principle intended to invest law with fairness and to secure justice. Over the years, it has grown into a widely pervasive rule affecting large areas of administrative action. The soul of natural justice is "fairplay in action" and it has received widest recognition throughout the democratic world. The Supreme Court held that even the procedure laid down by law must be right, just and fair. It is liable to be set aside on the ground that it is not reasonable.[12]

SUGGESTED READINGS

Allen, C. K.	:	*Law in the Making,* 7th edn., Oxford, 1964.
Bentham,J.	:	*The Theory of Legislation,* trans. R. Hildreth, eds. K. Ogden, Routledge & Kegan Paul Ltd., 1950.
Brunner, E.	:	*Justice and the Social Order,* trans. M. Hottinger, Lutterworth Press, 1945.
Buckland, W. W.	:	*Some Reflections on Jurisprudence,* Cambridge University Press, 1945.
Cohen, M. R.	:	*Reason and Nature,* Kegan Paul, Trench and Trubner &. Co. Ltd., 1931.
Cowen, D. V.	:	*The Foundations of Freedom,* Cape Town, QUP, 1961.

[11] AIR 1970 SC 150.

[12] AIR 1978 SC 597.

d'Entreves, A. P.	:	*Natural Law,* Hutchinson's University Library, 1951.
del Vecchio, G.	:	*Philosophy of Law,* trans. T. O. Martin, Catholic University of America Press, 1953.
Dewey, J.	:	*Philosophy and Civilisation,* G. P. Putnam's Sons, 1931.
Dias, R. W. M.	:	*Jurisprudence,* Butterworths, London, 1976.
Ellul, J.		*The Theological Foundation of Law,* trans. M. Wiescr, S. C. M. Press Ltd., 1946, Ist British edn., 1961.
Fitzgerald, P. J.	:	*Salmond on Jurisprudence,* Sweet and Maxwell, London, 1966.
Friedmann, W.	:	*Legal Theory,* Stevens and Sons Ltd., London, 1960.
Fuller, L. L.	:	*Law in Quest of Itself,* The Foundation Press Inc., 1940.
Fuller, L. L.	:	*The Morality of Law,* revised edn., Yale University Press, 1969.
Goodhart, A. L.	:	*English Law and the Moral Law,* Stevens & Sons Ltd., 1955.
Haines, C. G.	:	*The Revival of Natural Law Concepts,* Harvard University, 1930.
Hall, J.	:	*Foundations of Jurisprudence,* The Bobbs-Merrill Co. Inc., 1973.
Hall, J.	:	*Studies in Jurisprudence and Criminal Theory,* Oceana Publications Inc., 1958.
Hart, H. L. A.	:	*The Concept of Law,* Oxford, Clarendon Press, 1961, reprinted, 1975.
Holland, T. E.	:	*The Elements of Jurisprudence,* 13th edn., Oxford, 1924.
Jolowich, H. G.	:	*Lectures on Jurisprudence,* ed. J. A. Jolowicz, The Athlone Press, 1963.
Jorgensen, S.	:	*Law and Society,* Akademisk Boghandel, 1972.
Kelsen, H.	:	*What is Justice?* University of California Press, 1957.
Laslett, P. (Edn.)	:	*Philosophy, Politics and Society.*
Llewellyn, K. N.	:	*Jurisprudence: Realism in Theory and Practice,* The University of Chicago Press, 1962.
Lloyd, D.	:	*The Idea of Law,* Penguin Books Ltd., A 688, 1964.
Lord Lloyd	:	*Introduction to Jurisprudence,* Stevens & Sons, London, 1979.
Maine, H.J. S.	:	*Ancient Law,* edn. F. Pollock, John Murray, 1906.
Maritain, J.	:	*The Rights of Man and Natural Law,* Geoffrey Bles, The Centenary Press, 1944.
Morris, C.	:	*The Justification of Law.*
Paton, G. W.	:	*A Text Book of Jurisprudence,* 4th edn., G. W. Paton and D. P. Derham, Clarendon Press, Oxford, 1972.

Patterson, E. W.	:	*Jurisprudence*, The Foundation Press Inc., 1953.
Pound, R.	:	*Interpretations of Legal History*, Cambride University Press, 1923.
Pound, R.	:	*The Ideal Element in Law*, University of Calcutta, 1958.
Pound, R.	:	*Jurisprudence*, West Publishing Co., 1959.
Rawls, J.	:	*Theory of Justice.*
Reuschlein, H. G.	:	*Jurisprudence—Its American Prophets*, The Bobbs-Merrill Co. Inc., 1951
Ritchie, D. G.	:	*Natural Rights*, Allen & Unwin Ltd., 1894.
Rommen, H. A.	:	*The Natural Law*, trans. T. R. Hanley, B. Herder Book Co., 1947.
Ross, A.	:	*On Law and Justice*, Stevens & Sons Ltd., 1958.
Salmond, J. W.	:	*Jurisprudence.*
Samek, R. S.	:	*The Legal Point of View*, Philosophical Library, New York, 1974.
Seagle, W.	:	*The Quest for Law*, Alfred A. Knopf, 1941.
Shklar, J. N.	:	*Legalism*, Harvard University Press, 1964.
Silving, H.	:	*Sources of Law*, New York, 1968.
Stammler, R.	:	*Theory of Justice.*
Stone, J.	:	*Human Law and Human Justice*, Stevens & Sons Ltd., 1965.
Strauss, L.	:	*Natural Right and History*, University of Chicago Press, 1953.
Wild, J. D.	:	*Plato's Modern Enemies and The Theory of Natural Justice.*
Windolph, F. G.	:	*Leviathan and Natural Law*, Princeton University Press, 1951.
Wright, B. F.	:	*American Interpretations of Natural Law*, Harvard University Press, 1931.
Wu, J. C. H.	:	*Fountain of Justice, A Study in Natural Law*, Sheed & Ward, 1955.

SUBJECT INDEX