PART I

THE NATURE AND SOURCES OF LAW

CHAPTER I

KINDS OF LAW

LAW DEFINED

Much ink has been spilt in attempts to give an exact definition of the term "law". Indeed, so much time and energy has not been spent in answering an analogous question "What is geometry ?" The answer lies in the fact that *law* is *not* a legal concept, just as *geometry* is *not* a geometrical concept. Though the term *"law"* may *not* be a legal concept, it is nevertheless a *basic concept* in the study of jurisprudence, and some working definition of this term ought to be kept in mind.

Write a short note on : Nature of law.
P.U. Apr. 98

It is *not* easy task to give a precise definition of *law*, because of several difficulties. *Firstly*, the term is embeded in *philosophical perplexities. Secondly*, the traditional method of definition (*genus* plus *differentia*) is totally inadequate for our purpose. *Again*, the term possesses a high emotive content. Thus, should the term 'law' be applied also to an unjust law ? This is why no short and simple, yet accurate, definition of *law* is possible, in terms of which one can distinguish what is *law* from what is *not law* according to the definition.

Further, in its *widest* sense, *law* would include *any rule of action*. Thus, in accordance with the law of gravitation, if a stone is dropped from the roof of *X's* two-storeyed building, it *must* fall on the ground (unless it is caught on its way by *X's* neighbour on the first storey). Similarly, under the *law* of accoustics, if *X* claps his hands, he *must* hear the sound (unless, of course, he is totally deaf.) However, in jurisprudence, one is *not* concerned with the term *law* in such a wide sense.

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

HOLLAND says : "More briefly, *law* is a general rule of external human action enforced by a sovereign political authority. All other rules for the guidance of human action are laws merely by analogy; and propositions which are not rules for human action are laws by metaphor only."

Taking *law* as meaning any *rule of action*, the following *eight kinds of law* can be enumerated : 1. Imperative Law. 2. Physical or Scientific Law. 3. Natural or Moral Law. 4. Conventional Law. 5. Customary Law. 6. Practical or Technical Law. 7. International Law (or the Law of Nations). 8. Civil Law or the Law of the State. These are dealt with later in this Chapter.

The law may also be defined as the body of principles recognised and applied by the State in the administration of justice. *The law consists of the rules recognised and acted on in Courts of Justice. (Salmond)*

BENTHAM remarks "Law or the law, taken indefinitely, is an abstract or collective term, which, when it means anything, can mean neither more nor less than the sum total of a number of individual laws taken together."

Salmond, however, does *not* accept Bentham's interpretation. He is of the opinion that the constituent elements of which law is made up are *not law, but rules of law or legal principles.* That a will requires two witnesses is *not* rightly spoken of as the *law* of England; it is rather a *rule* of English law.

The Law and a Law

The term 'law' is used in *two* senses—in the *abstract sense* and in the *concrete*. The term *law* used in the *abstract sense* means the system of law, as for instance, the law of India, the law of defamation, or law and order, law and justice *etc.* In its *concrete sense,* it means a statute, enactment, ordinance or other exercise of legislative authority. In the abstract sense, one speaks of law, or of *the* law; in the concrete sense, one speaks of *a law,* or of laws. Law in the concrete sense may be the source of law in the abstract sense. Law in the concrete is *lex;* law in the abstract is *jus.* Therefore, the terms law and laws—the law and a law—are *not* identical in nature or scope. Indeed, the absence of separate words in the English language for these concepts has been responsible for considerable confusion.

Territorial Nature of Law

That portion of the earth's surface which is in the exclusive possession and control of a State is called the *territory* of that State. Throughout the region, the will of the State reigns supreme. All alien interference is excluded therefrom. The exclusive possession of a defined territory is a characteristic feature of all civilised States. Now, the law is conceived and spoken of as being *territorial.* Thus, the Indian Contract Act, the Indian Evidence Act, the Indian Sale of Goods Act, are all enforceable in, and apply to, India. They are essentially *territorial.* It is, therefore, correct to say that the enforcement of law is undoubtedly territorial in the same way as a State is territorial.

The territoriality of law, in this sense, necessarily flows from the political divisions of the world. As a general rule, no State allows other States to exercise governmental powers within its own boundaries. Thus, if a person commits a tort or a crime in country *A* and flees to country *B*, he *cannot,* so long as he is in country *B*, be reached by the authorities of country *A*. Of course, in the case of crimes, this situation is largely remedied by the practice of *extradition*, often crystalised in *extradition treaties*.

Likewise, the English law of torts knows comparatively little of any territorial limitation. If an action for damages for, say, negligence, committed outside England, is brought in an English Court, it will, generally speaking,

be determined in accordance with English law, and *not* otherwise. Then again, the English law of procedure is, in hardly any respect, territorial. As remarked by *Salmond,* the English law of procedure is the law of English Courts, rather than the law of England.

A law is said to have *extra-territorial operation,* when it is also operated outside the limits of the territory within which it is enacted. Thus, by virtue of the Indian Penal Code and the Criminal Procedure Code, Indian Courts are empowered to try offences committed outside India—

(a) on land, and

(b) on the high seas.

The latter is also known as *admiralty jurisdiction,* and is based on the principle that a ship on the high seas is a floating island belonging to the nation whose flag she flies.

Thus, in *Savarkar's Case* (13 BLR 296), the accused Savarkar was in the custody of police officers who had to bring him from London to Bombay. On the way, he escaped at Marseilles (France), but was re-arrested there, and finally brought to Bombay. He was then committed for trial by the Special Magistrate at Nasik. The High Court *held,* in the above circumstances, that the trial and the committal were *valid.*

Some countries, as for instance Turkey, go even beyond this, and apply their criminal law even to foreigners in respect of crimes committed abroad, if the victims are Turkish subjects and the foreigner concerned ventures within Turkish territory.

It may also be added that since territoriality is *not* a logically necessary part of the concept of law, a system of law is conceivable, which would be applied, *not* with reference to territorial considerations, *but* with reference to the personal qualification of the individual. Indeed, this can truly be said of the personal laws prevailing in India, *viz.,* Hindu law and Mahommedan Law.

Imperative law

Imperative law means any rule of action imposed upon men by some authority which enforces obedience to it. It is a *command* which *obliges* a person or persons to a course of conduct. In fact, it is the very essence of a law to be imperative; otherwise it is not *law,* but a *rule* which *may* or *may not* be obeyed.

Now, imperative laws are of various kinds. They are classified with reference to the *authority* from which they proceed. They are, in the first place, either *divine* or *human.* Divine laws consist of the commands imposed by God upon men and *enforced* by *threats* of punishment in this world (or in the next). Human law consists of imperative rules imposed upon men. They are of *three* kinds :

(a) Civil Law— which mainly consists of *commands issued by the State to its subjects,* and *enforced by its physical power.*

(b) The law of positive morality— which consists of the rules imposed by *society* upon its members and enforced by public censure or disapprobation.

(c) *The law of nations or International law*— which ordinarily consists of rules imposed upon States by the society of States, and enforced partly by *international opinion* and partly by the *threat of war.*

KINDS OF LAW

There are *ten* kinds of law. For this purpose, by *'law'* is understood *'any rule of action'*,—law in its most *general* sense, and not *civil* law, *i.e.*, the law of the land, although civil law is also a kind of law, as will be clear from the following discussion.

1. Physical or Scientific Law

Physical or scientific laws are expressions of the uniformities of nature, being general principles expressing the *regularity* and *harmony* in the operations of the Universe. Laws of gravity, light, heat, sound etc., are instances of *physical* or *scientific* laws.

2. Practical Law

Practical laws consist of the rules which guide people to the fulfilment of their purposes, *e.g.*, the laws of *health*, the laws of *architecture*, and so on.

3. Conventional Law

By conventional law is meant any rule or system of rules *agreed* upon by persons for the regulation of their conduct towards each other, as for instance, the rules of a club. Likewise, when two persons enter into an agreement, such an agreement is a *law* for the parties. Such rules of law are often enforced by the State, and so in many cases, conventional law is also civil law. (It may also be noted that conventional law is also a form of *special law*.)

4. Customary Law

Customary law refers to any rule of action which is *actually observed by men* : a law, or rule which they have set for themselves, and to which they *voluntarily* conform their actions. Prior to 1955, almost the whole of Hindu Law was based on custom. Then came the Hindu Marriage Act in 1955, and today the Hindu Law regarding marriage, succession, minority and guardianship, adoption and maintenance is codified, and therefore, governed by the appropriate statutes. Custom is one of the most important sources of law.

In this connection, the famous dictum of the Privy Council may be quoted here— "For," said their Lordships, "a clear proof of usage will outweigh the written text of the (Hindu) law." (*Collector of Madura* v. *Mootoo Ramalinga*,-12 M.I.A. 439). It must not, however, be forgotten that custom can *never* override *statute* law. The custom of *'suttee'* for example, *cannot* be pleaded to a charge of murder or its abetment.

(See also Chapter VIII, "Custom".)

5. Natural or Moral Law

By natural or moral law is meant the principles of *natural* right or wrong—the principles of *natural justice*.

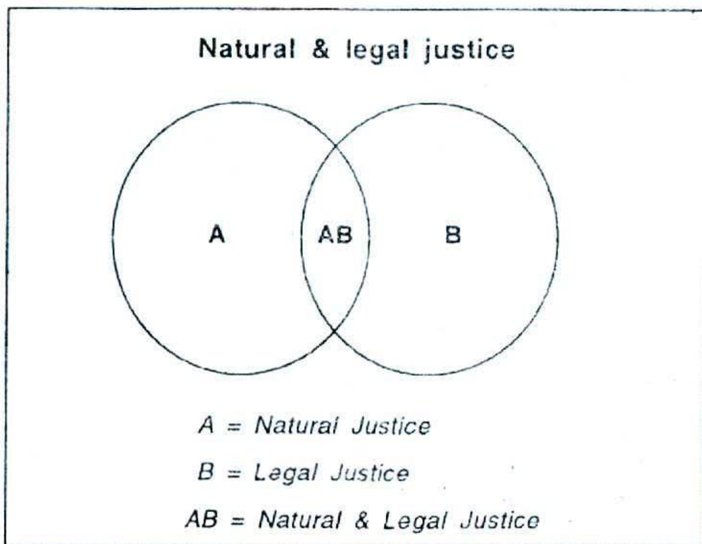
Right or justice is of *two* kinds : (a) *natural* or *moral* justice, and *(b) positive legal* justice. *Natural* justice is justice as it is in deed and truth—in its *perfect* idea. *Positive* justice is justice as it is conceived, recognised and expressed more or less *incompletely* and *inaccurately by the civil* or some other form of human positive law.

This concept may be classified by saying that natural justice is one meted out by *God* — by Nature. Positive or legal justice is one administered by *man*. The former, though often not administered (or *invisible*, if administered), is perfect; the latter is necessarily *imperfect*.

"Men have felt the need of an appeal from positive law to some higher standard. Just such a standard is provided by natural law, which has served to criticise and restrict positive law." Discuss.

B.U. Nov. 95

Natural justice is the ideal and the truth, of which legal justice is the more or less imperfect realisation and expression. Legal justice and natural justice represent two *intersecting circles*. (--see the figure below--) Justice may be *legal*, but not *natural or moral*, – or moral but *not* legal, or both legal *and* natural. Natural law has received several names, *e.g.*, it is called the Divine Law or the Law of Reason, or the unwritten law or the Universal or the Eternal Law, and in the modern sense, it is also called the Moral Law.



This can be illustrated as follows : *Z* is a notorious cheat. He borrows from *A*, a poor ignorant widow, Rs. 1,000 on a promissory note *over* which he affixes a *postage* stamp instead of a *revenue* stamp. Such a promissory note is *inadmissible in evidence*. When sued, *Z* is likely to succeed on a point of law (unless the widow proves fraud). Here, though *legal* justice is done, natural justice is *not* done to the poor widow. If, however, while coming out of the court after winning the case, *Z* is run over by a car and is disabled for life, one could say that God has punished him for his sins. That would be a case of *natural justice*, *– and not legal justice.*

Write a short note on : Advantages of natural law.

B.U. June 96

Justice may, however, be and ordinarily is, both legal *and* natural, as when a murderer is hanged, or a 'knifer' is sentenced to whipping (under certain systems of law). Here, Nature does justice through man.

The term 'natural law', in the sense in which it is referred to here, has fallen out of use in the present times, for which there are *two main reasons*, the *first* being that the term has become equivalent to physical law, *i.e.*, the uniformity of nature. The *second reason* is that it brings with it certain misleading associations, *viz.* the suggestion of common imposition, external authority, legislation *etc.*, which are *not* in harmony with moral philosophy.

It may not be out of place to dwell, for a moment, on the words of ancient writers which illustrate the meaning of the terms, *law and natural law,* as referred to in those days.

ARISTOTLE : "Law is either *universal or special. Special* law consists of the written enactments by which men are governed. The *universal law* consists of those unwritten rules which are recognised among all men. Right and wrong have been defined by reference to two kinds of law... Special law is that which is established by each society for itself... The universal law is that which is conformable merely to Nature."

JUSTINIAN : "Natural law *(jura naturalia),* which is observed equally in all nations, being established by divine providence, remains forever settled and immutable; but that law which each State has established for itself is often changed, either by legislation or by the tacit consent of the people."

GAIUS : "All people that are ruled by laws and customs observe partly law peculiar to themselves and partly law, common to all mankind. That which any people have established for themselves is called *jus civile,* as being law peculiar to that State *(Jus proprium civitatis).* But that law which natural reason establishes among all mankind is observed equally by all people, and is for that reason called *jùs gentium."*

The consequences of regarding *natural law* as law in the same sense as *civil law* are mainly *three* :

(1) Natural law and its product, natural right, are in a position to render void a human law which is repugnant to them.

(2) At a time when the orthodox theory was that the judges were mechanical interpreters of the law, natural law served as a good cloak for the judicial development of the law. However, it has *now* been recognised that since the law can never be complete and certain, the judges must have the power of making new laws in the course of deciding cases, and they naturally act in accordance with their moral ideas.

(3) Finally, the international lawyers regard this doctrine as seeming to give legal efficacy to international law, which is supposed to conform to natural law. But this difficulty, *viz.,* whether international law is reall a true law in the real sense of the term, is only a verbal one.

One may quote here the observations of *Bentham,* who regards *natural law* as only a *phrase* of the English language, and *natural rights* as "nonsense on stilts". According to him, the "natural law reasoning" (as he

called it) resulted from confusing scientific laws with moral or legal laws. As pointed out by him, scientific laws describe what generally *does* happen, whereas moral or legal laws prescribe how men *should* behave. To take a simple example, the law of gravity is a general description of how things behave, and if there is any discrepancy between such law and the observed phenomena, one *cannot* conclude that the law of gravity has been broken (on that occasion). Rather, it only shows that the man-made theory of gravity needs to be revised. Similarly, one *cannot* argue from natural laws of a scientific type to natural laws of a moral type. When one says that it is natural for man to have children, what is meant is that such is his general tendency, and *not* that he is under any moral or legal duty to follow this tendency.

Natural justice and positive morality are both based on right-doing or righteousness. Natural justice is justice in truth and deed. Positive morality means the rules of conduct approved by the public opinion of any community—the rules which are maintained and enforced in that community, *not* by civil law, but by the *sanction of public disapprobation and censure.*

6. 'General law' and 'Special law'

[Items 6 to 10 are different species of civil law, *i.e.*, the law of the land.]

The whole body of legal rules is divisible into *two* parts, which may be distinguished as *general* law and *special* law. The following are their definitions and the main points of difference between the two :

1. *General* law consists of the general or *ordinary law of the land. Special* law consists of certain *other* bodies of legal rules, which are so special and exceptional in their nature, sources, or application, that it is convenient to treat them as standing *outside* the general and ordinary law.

This distinction can best be illustrated by taking an example of one type of special law, *custom.* The Court *may not,* and ordinarily *does not,* know what a particular custom as to a particular fact is. The parties have to prove such custom if they are relying upon it. This is therefore a 'special' law. Ordinarily, special laws are the very opposite of *statute* laws which Courts are bound to know. *Ignoratia juris non excusat*—Ignorance of the law is no excuse. Thus, if a person neglects to take a licence for his dog (where such licence is compulsory), he is liable to be fined, even if *in fact* he did *not* know that such licence was required. Thus, every person is *deemed* to know the law, for had he taken care to know it, he would have known the law.

There is *another sense* in which, the term 'special law' is used as opposed to *'general'* law. Thus, the Indian Contract Act, the Partnership Act, the Indian Penal Code are *general laws,* meaning that they apply to the whole of India; whereas the Maharashtra Ownership Flats Act, the Tamil Nadu Gambling Act and the Calcutta Police Act are special laws applying respectively to Maharashtra, Tamil Nadu and Calcutta only.

Sometimes, the term 'special law' means the law relating to a particular subject, such as the Opium Act, Salt Act etc. Thus, it is common knowledge that the killing of a human being by another under certain circumstances amounts to murder. Everybody knows what a contract is,

and so on. These are instances of *general* law, embodied in the Indian Penal Code and the Indian Contract Act, respectively. But the question whether spirit is liquor, *or* whether particular facts amount to gambling or not, are to be determined with reference to Prohibition and Gambling Laws. These are *special laws,* and the party relying on them has to bring them to the notice of the Court.

2. *Secondly,* general law consists of those legal rules of which the Courts will take *judicial notice* whenever there is occasion for their application. Special law, on the other hand, consists of those legal rules which, although they are true rules of law, the Courts *will not recognise and apply them as a matter of course, but which must be proved and brought to the notice of the Courts* by the parties interested in their recognition. The test of the distinction, according to Salmond, is *judicial notice.*

Judicial notice

By the expression *judicial notice* is meant the knowledge, which any Court, *ex-officio,* possesses and acts on, as contrasted with the knowledge which a Court is *bound* to acquire on the strength of evidence produced for the purpose.

Thus, the fact that the sun rises in the East and sets in the West, *or* that England is a monarchy or France a Republic, need *not* be proved by evidence. The Court is *presumed* and *bound* to know them *suo motu.* Similarly, the Court is *bound* to take judicial notice of *all* the statute laws, *i.e.,* laws of the land.

Kinds of Special Law

The rules of *special law* fall, for the most part, into *seven distinct classes* :

(i) Local customs

Immemorial custom in a particular locality has the force of law. Most of Hindu Law, as it existed prior to 1955, was based on custom, and almost the whole of it was uncodified.

(The law relating to *custom* is discussed in Chapter VIII.)

(ii) Mercantile customs

The second kind of special law consists of the body of mercantile customs and usage, known as the *law-merchant.*

Thus, the whole of the Indian law relating to negotiable instruments in an Indian language *(hundies)* derives its origin from mercantile customs.

(iii) Private legislation

Statutes are of *two* kinds, *public* and *private.* The distinguishing characteristic of a public Act (as for instance, the Indian Penal Code or the Indian Contract Act), is that judicial notice is taken of its existence. A private Act, on the other hand, is one which does *not* fall within the ordinary cognizance of the Courts of justice, and will *not* be applied by them, *unless* specially called to their notice.

Thus, examples of private legislation are Acts incorporating individual companies or Electricity Boards, Acts regulating the navigation of a river, or

any other Act concerned with the interests of private individuals or particular localities.

(iv) Foreign law

It is essential in many cases to take account of a system of foreign law and to determine the rights and liabilities of litigants on its basis. This is the field of Private International Law, also known as Conflict of Laws.

Ignorance of law, *i.e.*, the law of *India*, is no excuse. One is supposed to know the law : *ignoratio legis neminem excusat*. But ignorance of *foreign* law is like ignorance of a *fact* and, if not known, is a good excuse : *Ignoratio facti excusat*.

(v) Conventional law

Another variety of special law has its source in the *agreement* of those who are subject to it. Agreement is law for those who make it. Rules of a club or a co-operative society are also instances of *conventional law*.

(vi) Autonomic law

Autonomic law is that species of enacted law which has its source in various forms of subordinate legislative authority possessed by *private* persons and bodies of persons. Thus, a Railway Company may make by-laws for regulating its undertaking, or a university may make statutes for governing its members, and so on.

(vii) Martial law

Martial law is the law applied by Courts-martial in the administration of *military justice*. The army also exercises the function of administering justice. The Courts established *within* the army for this purpose are called Courts-martial, and the law is of *three kinds*, being either (i) the law for discipline and government of the *army itself, or* (ii) the law by which the army, *in times of war,* governs *foreign territory* in its military occupation *outside* the realm, *or* (iii) the law by which *in times of war*, the army governs *the realm itself in derogation of the civil law.*

Martial Law and Military Law distinguished

Martial law is not to be confused with *military law*. The two are different concepts, as will be clear from the following *three points of difference* between them :

1. While Military law is a *State law*, Martial law is based on *Common law*.
2. Military law is applicable to *soldiers alone*. It is embodied in the *Army Act*. Offences under this Act are triable by the *Courts-martial*. This does *not* absolve a soldier from his liabilities under the ordinary law. He is liable in a dual capacity :
   (i) *As a soldier,* he is governed by the Military law; here, the Military law imposes upon him some liabilities from which an ordinary citizen is exempt.
   (ii) *As an ordinary citizen*, a soldier is governed by the ordinary law of the land. While Military law is applicable to *soldiers*

alone, Martial law is applicable to soldiers *as well as* to civilians in times of war.

3. Lastly, even when there is no war or rebellion, *soldiers are governed by the Military law.* Martial law, on the other hand, be tolerated only on the ground of *necessity.*

7. Public International Law (or Law of Nations)

Public International Law (or the Law of Nations) according to *Lord Birkenhead,* consists of rules, acknowledged by the general body or civilised independent States, to be binding upon them *in their mutual relations.* It consists of those rules which govern *Sovereign States in their relations and conduct towards each other.* According to *Salmond,* it is essentially a species of *conventional* law, and has its source in *international agreement.* It consists of those rules which Sovereign States have agreed to observe in their dealings with one another.

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

Write a short note on : International law.
B.U. Apr. 95
Nov. 95
Oct. 98
Oct. 99

International law is that body of rules which tries to regulate the relations between the different States, as also the relations between the individuals and the States. International law, as it has developed, is more or less customary and conventional, and these rules have developed as a result of international conferences, opinions, and writings of the jurists.

According to *Dr. Sethna,* "We should describe *international law* as all that body of customs, usages, conventions, and principles of international propriety and natural justice, as have been accepted or recognised by the nations of the world (in the case of general international law) or by some of the nations of the world (in the case of particular international law) with a view to their observance."

Whether or not international law is really *law,* is a celebrated, though sterile, controversy. *Austin* and his followers deny the existence of the law of nations, and do *not* consider it as law proper, because in their opinion, there is no *sanction* behind international law. According to them, it may, at best, be considered as *international positive morality,* and can be described as law only by courtesy. This is because of the fact that rights with which international law is concerned *cannot* be described as *legal* rights. Law necessarily requires some political arbiter or some authority which can enforce the law. Law, without such a force or such an arbiter, becomes a contradiction in terms. In international law, one finds that the only sanction is international opinion; international censure or international contempt operates behind international law. According to the Austinians, this is *not sufficient* for the purpose of enforcement of a law. The ultimate sanction behind international law is war, no doubt, but such a sanction would lead to nothing but destruction.

Modern jurists are, however, of the opinion that law *need not have sanction or force* for its enforcement. Even in civil law, the ultimate sanction lies in the physical power of the State to bring offenders to justice, but here also, *some of the civil law is only permissive, i.e., it is a law with rights but without remedies or without legal sanctions.* If this is true of civil law, then it can also hold good for international law. The fear of the atom bomb and devastating weapons would act as a sufficient deterrent to nations *not* to resort to war. Even in civil law, the fear of punishment does *not* necessarily deter a person from committing an offence, and similarly, it is possible that there might be some States which are *not* deterred by the fear of war or the atom bomb. From this it follows that restraint is *not necessarily* an important element in any law, though it is a powerful characteristic of civil law.

Therefore, it would *not* be right to say that international law is *not law* in the real sense of the term, because it has no legal sanction behind it. As a matter of fact, today international censure is a more powerful weapon than the sanction behind a civil law.

Its nature

Writers are not unanimous in their analysis of the essential nature of the law of nations (*i.e.*, international law). Various theories have been put forth from time to time by various legal experts :

(i) *According to one theory*, the law of nations includes a *branch of natural law*, namely, the rules of natural justice as applicable to the relationship between States *inter se*.

(ii) *According to the second theory*, the law of the nations is *a kind of customary law*, namely, the rules actually observed by States in their relations with one another.

(iii) *According to the third theory*, it is a *kind of Imperative law*, namely, the rules enforced upon States by international opinion, having the sanction of the threat or fear of war.

(iv) *According to the fourth theory*, the law of nations is *a* kind *of conventional law.*

According to *Salmond*, the prevalent opinion accepts the *fourth* theory, *viz.*, that the *law of nations is a species of conventional law.* Ordinarily, conventional law is purely based on agreement, which may be either between private *individuals* or *nations* and *States.*

[*Note: Public International Law* is to be carefully distinguished from what is known as *Private International Law.* Thus, if a dealer in India sells his goods to a dealer in France, the delivery to be effected in Germany, and there is breach of the contract, a question may arise as to whether the French or the German or the Indian courts would have jurisdiction in the matter, and whether French or German or Indian Law would be applicable. This would fall in the realm of *Private International Law,* also known as Conflict of Laws.]

8. Prize law

'*Prize law*' is that portion of the law of nations which regulates the practice of the *capture of ships and cargo* at sea *in times of war.* It is the

law as applied by courts called Prize Courts, in administering justice as *between the captors and all persons interested in the property seized.*

A Prize Court is *not* an international tribunal; it is a court established by, and belonging exclusively to, the individual State by which the ships and cargo have been taken. Nevertheless, the law which it is the duty and function of these courts to administer is the law of the nations. It has its source in the agreement of sovereign States among themselves.

Thus, Prize Courts were set up to decide the fate of ships and cargo captured during the 1971 Indo-Pak War.

9. Common law

The term "Common Law" is purely an English term. *There is nothing like common law in India.* The general law of England is divided into *three parts, viz.,* Statute Law, Equity and Common Law. Statute law is derived from legislation. It is the enacted or written law of England. Equity had its origin in the Court of the Chancery Division, and it has its source in the judicial precedent of that Court. All the residue is known as the Common Law, and it consists of the entire body of the Law of England with the exception of the above-named laws.

In its historical origin, common law was taken to mean the *whole law of England* including equity, for in those days, equity was *not* looked upon with great interest and was *not* frequently referred to. Statute law, of course, was referred to separately, because of its authority. In modern times, however, Statute law has been developed to a very great extent, and even certain portions of the common law are undergoing a slow transformation into Statute law by the process known as codification. Equity also has now gained status, and is as much a part of the ordinary or general law of the land as is the Common Law itself.

The term 'Common Law' is still used to mean the *whole law* of England, when it is contrasted with the foreign systems like Roman Law or French Law. In a phrase like "the principles of English Law" as it has been adopted in the other Common Law countries like Canada, Australia, New Zealand and the Irish Republic, the meaning is more extended and widened.

1. *'Common Law' and 'Statute Law'.*— By the 'Common Law' is sometimes meant the whole of the law, *except that which has its origin in statutes* or some other form of legislation. It is the *unenacted* law, with its source in custom or precedent, as opposed to the enacted law made by the Parliament or subordinate legislative authorities.
2. *'Common Law' and 'Equity'.*— In another sense, 'Common law' means the whole of the law (enacted or unenacted), *except* that portion which was developed and administered by the old Court of Chancery, and which is distinguished as 'Equity'.

Law and Equity

In England, during the thirteenth century, it was found that the Common Law of England had become very rigid, and it was thought necessary that this rigidity should be broken by supplementing the law by rules governed

by the conscience of the judge. During this period, there were certain rules of natural justice which were prevalent, and which to a very great extent supplemented the rigid principles of Common Law, so much so that an aggrieved party, not being in a position to obtain any remedy in the ordinary course, applied to the Sovereign, who was considered to be the fountain of justice. The Sovereign then referred such petitions to the Lord Chancellor who was "the keeper of the King's conscience", and who considered such applications and gave relief in fit cases, particularly in cases of frauds, errors, and unjust judgments.

Thus, for instance, the Lord Chancellor recognised the right to *'uses'*, which is the mother of the modern *trust*. Formerly, priests were not allowed to hold lands, and therefore, they purchased estates, and got them conveyed to some lay person, who held the lands for the benefit of the priests. If the legal owner (the lay person) refused to recognise the priests as the beneficiary, the priests could have no remedy at Common Law, and would, therefore, have to turn to a Court of Chancery. This gave rise to the system of 'use' in the Chancellor's Courts.

In other words, the need was felt to have some authority above the law, whom people could always approach when there was injustice. In course of time, the Lord Chancellor advised the judges of the Court of Chancery to supplement the law by the principles of *equity, justice* and *good conscience*. But this only resulted in a variety of decisions of a conflicting nature. It became necessary to preserve uniformity with regard to such judgments. So equitable decisions came to be uniform, and this led to formation of a body of equitable rules which were considered as supplementary to the rules of Common Law.

In the reign of Henry VI, the Lord Chancellor developed the *remedy of injunction,* which necessarily emanated from Chancery Courts. By this remedy, the Chancellor prohibited the execution of decrees passed by the Common Law Courts. It was in the matter of injunctions that a conflict arose between Lord Chancellor Ellesmere and Chief Justice Coke of the Common Law, because the former had issued an injunction prohibiting a holder of a decree obtained by fraud from executing it and which decree had been passed by Chief Justice Coke. The dispute was referred to Lord Bacon who was then Attorney-General of England, who decided the matter in favour of the Lord Chancellor. Thus, equitable principles came to be recognised as principles superior to the rules of Common Law. During the Chancellorship of Lord Eldon, equity became a body of principles decided on the basis of precedents laid down by the Judges in the equity Courts. Uniformity of principles and consistancy of application through the means of precedents were employed by equity Courts in deciding the cases before them.

Till 1875, England had *two* different systems of Judicial administration. In 1875, with the coming into existence of the *Judicature Act,* there was a fusion of the two systems into the High Court of Justice. In cases of conflict between the rules of law and the principles of equity, the latter became the modifying factor and was even allowed to prevail over the former, and thus correct the law. Today, equity has been merged into law.

"*The two streams flow side by side, but their waters do not mingle.*" Equitable principles are as effective as the principles of Common Law, and they have the same recognition as legal principles. For example, a trustee who is the legal owner of property *cannot* appropriate the property to the detriment of the beneficiaries, who have an equitable interest in that property. A subsequent legal charge can defeat even a prior equitable charge, but where the equities are equal, the law prevails.

Meaning of the term 'Equity'

According to *Salmond,* the term 'equity' possesses at least *three* distinct, though related, meanings.

In the first sense, it means morality, honesty and uprightness. This is the most general sense in which the term is used. As *Snell,* the learned author of *Principles of Equity,* points out, in modern legislation, provisions relating to what is *equitable* is usually construed as referring to what is *fair and just.*

In the second sense, it means the principles of natural justice which temper the fixed rules of law. Wherever law is inadequate, rigid or technical, it will be supplemented by *justice, equity and good conscience.* In this sense, equity consists of the rules of natural justice which augment the rules of law.

In the third sense, equity consists of, in itself, a set of fixed rules. It is not something which is left to the good sense of the judge, but it is a well-formulated set of rules. In this sense, it is a system of law parallel to the rules of common law and the statute law. When one speaks of equity under English law, one makes use of the term in this *narrow, restricted sense.*

Equity thus became the *source* of law. The principles emanating from the conscience of the judge were made uniform, and they were soon made into a body of rules which were called *rules of equity.* or equitable law. With the fusion of law and equity, equity became a part of the law, though the distinction between law and equity is still clearly maintained. Out of the equitable principles have emerged laws, such as the Law of Trusts, the Law of Mortgages, the Law of Quasi-contracts, the Doctrine of Subrogation, Assignments, and the recognition of several principles in the Partnership Act and the Companies Act. Transfers are also of *two* types, legal and equitable, and several principles of equity are embodied in the Specific Relief Act. All have become a part of the law of the land, thus correcting and supplementing the law considerably.

10. Constitutional law

The organisation of a modern State is of extra-ordinary complexity. Such organisation consists of *two* distinct parts. The *first* consists of its fundamental elements. The *second* consists of the details of State structure and State action. The essential part is known as the Constitution of the State. *Constitutional law is the body of those legal rules which determines the constitution of the State.* The distinction between Constitutional law and ordinary law, according to *Salmond,* is one of *degree* rather than one of *kind.* The more *important fundamental* and *far-reaching* any principle or

practice is, the more likely it is to be classed as constitutional. But in countries which have a written Constitution (like India), the distinction may *not* be as obscure as it is in countries without a written Constitution (like the United Kingdom).

The concept of Constitutional law presents some difficulty to a student of Jurisprudence. If Constitutional law is the body of those legal principles which determines the Constitution of a State, the problem is, how can the Constitution of a State be determined by law at all ? There can be no law unless there is already a State, and there can be no State without a Constitution; if the State and the Constitution are prior to the law, how is it that the law determines the Constitution ? Therefore, can it not be said that Constitutional law is *not* a law in reality at all ? *Salmond* maintains that the Constitution is both a matter of fact and of law. The Constitution consists *not only* of legal rules, *but also* of Constitutional practices. Constitutional practices are logically prior to Constitutional law. There may be a State and a Constitution without any law, but there can be no law without a State and a Constitution. Therefore, no Constitution can have its source and basis in the law. It has of necessity an extra-legal origin.

Write a short note on : Constitution law.

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The Constitutional facts which are extra-legal will be reflected with more or less accuracy in Courts of justice as Constitutional law. The law will develop for itself a theory of the constitution, as it develops a theory of many other things which may come in question in the administration of justice. For example, the Constitutions of the United States of America had their extra-legal origin in the independence it achieved by rebellion against the lawful authority of the English Crown. The constituent States of the United States of America established Constitutions for themselves by way of popular consent after such attainment of independence. Before these Constitutions were actually established, there was no law, save that of England. These Constitutions were established in defiance of the law of England. Therefore, the origin of these Constitutions was not merely extra-legal; it can even be said to be illegal. But as soon as these Constitutions succeeded in becoming *de facto* established, they were treated as legally valid by the Courts of these States. Constitutional law followed hard upon the heels of the constitutional fact. *Salmond* concludes by observing "Constitutional law, therefore, is the judicial theory reflection, or image of the Constitution *de facto*, that is to say, of constitutional practice."

Amendment of a Constitution

Essentially, a new constitution reflects the problems of the day and the ultimately accepted solutions. However, like any other statute, the Constitution needs to keep pace with changing times. Hence the necessity for provisions for its amendment. In the words of *Burke*, "A constitution without some means of change is without the means of its conservation."

The procedure for the amendment of the American Constitution is a highly *rigid* and even *complicated* one, contained in Art. V of the Constitution of the United States. In England, there being no written Constitution, the Constitution can be amended by Parliament like any other law, as the doctrine of Parliamentary Sovereignty prevails in that country. In India, the

provisions relating to the amendment of the Constitution are contained in Art. 368 of the Constitution, and have been the centre of lively controversies in several judicial decisions.

It is sometimes urged that the Constitution is a sacred law of the land, and therefore, frequent amendments are undesirable. The answer is that the Constitution is, no doubt a sacred document, but human life is even more sacred, and any amendment for maintaining the dignity of human life *cannot* be considered to be unnecessary. A constitution is, therefore, *not,* like the ark of the covenant, too sacred to be touched. *It can never be looked upon as a body of eternal principles operating in a vacuum.*

11. Administrative & Municipal Laws

Closely related to Constitutional Law are Administrative Law and Municipal Law. *Administrative Law* deals mainly with the administration of the executive departments of the State and delegated legislation. *Municipal Law* deals mainly with the promotion and preservation of public health, water supply, construction and maintenance of buildings, roads, gardens etc.

CHAPTER II

LEGAL THEORY

The primary purpose of legal theory is *to define law*. There have been *several theories of law*. These different theories often look at *law* from various points of view.

Why are laws obeyed according to different theories of law ? Which answer do you consider correct ? Why ?
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I. LAW AS THE DICTATE OF REASON : NATURAL LAW

According to the Natural Law Theory, there are objective principles, which depend on the essential nature of the universe, and which can be discovered by natural reason. From the point of view of the ordinary human being, law is only true law so far as it conforms to these fundamental rights. According to this theory, there are certain objective and absolute principles of *morality* and *justice* which are the basis of law. These principles can be ascertained by human reason and common sense. Positive law, *i.e.*, man-made law, has to conform to these fundamental principles. To the extent positive law is inconsistent with the principles of natural law, it does *not* claim obedience.

The roots of this theory are to be found in the philosophies of the ancient Greek philosophers. This theory is also responsible for much of the legal and political thinking of the middle ages. As *Bodenheimer* rightly remarks, "No other philosophy moulded and shaped American thinking and American institution to such an extent as did the philosophy of natural law in the form given to it in the seventeenth and eighteenth centuries".

The attractions of this theory are evident. Much too often, ordinary laws fall short of the ideal, and men have always felt the need of an appeal from positive law to some higher standard. And, it is precisely such a standard that is provided by natural law, which with its battle-cry "*lex injusta non est lex*" (unjust law is no law), has served to criticise and restrict positive law.

Another great use of this theory is that it rejects ethical relativism. Ethical relativism considers morality as a product of history and convenience, while natural law affirms the existence of certain objective and absolute values.

This theory promises to find common moral ground in different religions and different outlooks. The Greek Stoic Philosophers asserted that man should live according to nature. The essential characteristic of human nature was his *reason*. Therefore, he should live according to the dictates of reason. In the Medieval times, the function of natural law was primarily to prescribe man's functions and duties. But later philosophers, such as *Hobbes* and *Locke*, made use of the Doctrine of Natural Law for purposes of asserting man's rights and freedoms.

What principle do you find common in the various natural law theories ? What are the merits of natural law ?
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Criticism

The main criticism against the Doctrine of Natural Law is that it confuses the nature of law and morality with the scientific laws. In law and

What is the central theme of all natural law theories ? State the merits of the natural law concept.
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morality, the value is *not* a logical outcome of the fact, whereas the scientific laws are objective and *describe a phenomenon*. The natural laws or human laws do *not* prescribe a phenomenon, but *they prescribe a code of conduct*. This criticism is met by the natural lawyers, by showing that human laws also describe how men are ordained to behave. According to them, everything has its proper functions, and so to be good, it must fulfil this function, and natural law also fulfills such function.

Critically analyse the contribution and practical achievements of the Natural Law School.
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Further, the critics contend that a human being *cannot* be compared to an object like a motor-car. A motor-car is created for performing certain functions and for certain purposes. It is very difficult to maintain that a human being is created for such purpose and function. The natural law theory might involve the existence of God who created the human being with a purpose or for a function. This assumption in the existence of God results in several difficulties. Therefore, the natural law theory, based on the notion of opinion, *cannot* be compared to a scientific law.

What are the merits of the Natural Law Theory ? Do we accept the Natural Law Theory in our constitution ? How ?
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Another great difficulty which the natural law theory encounters is that it believes in universal principles of morality. But societies differ and times change. In such a context, it is difficult to maintain the existence of absolute and immutable universal principles. This difficulty is sought to be met by writers like *Stammler*, who formulate the idea of natural law with a varying content. According to this view, the basic principles remain the same, though their detailed application would depend on the special circumstances of each society.

Conclusion

The Theory of Natural Law underwent changes from the middle ages to the modern times. Give an account of the said changes.
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Though there has been quite a bit of criticism of the natural law doctrine, yet the doctrine has been revived to a large extent in the 20th century, when totalitarian doctrines rejecting all human moral values became a challenge. To meet them, humanity naturally had to revert to a certain kind of natural law. This could be seen in the trials of the war criminals at Nuremburg, and also formed the basis of the Charter of United Nations, and the Universal Declaration of Human Rights.

"Natural law is the result of the desire of wise and just men to seek ideal justice." Discuss.
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In the words of *Dr. Friedmann*, "The most important and lasting theories of natural law have undoubtedly been inspired by two ideals—of a universal order governing all men, and of the inalienable rights of the individuals". It can be said to-day that natural law has influenced the Church; it has modified and restricted the principles of positive law; it has imbibed its philosophy in the constitutions of several countries, and it has been a very potent source of international law. To-morrow, it may lead the countries of the world to accept the concept of *world law*.

II. IMPERATIVE THEORY OF CIVIL LAW *OR* THE AUSTINIAN THEORY

Almost diametrically opposed to the theory of natural law is the *imperative theory of law*, which found its most forceful expression in the works of *Austin*. This *important theory* is also called the *Positivist Theory of law*.

According to *Austin*, positive law has *three main features : (i) It is a kind of a command;* (ii) it is laid down by a *sovereign authority;* and (iii) it has a *sanction* behind it. A typical illustration would be the English Road Traffic Act. This Act lays down certain rules which *have* to be followed (*command*), it has been passed by the Queen in Parliament (*laid down by the sovereign authority of England*), and its violations are met with penalties (*sanction*).

"But every positive law, or every law strictly so called, is a direct or circuitous command of a monarch or sovereign in the character of a political superior, that is to say, a direct or circuitous command of a monarch or sovereign to a person or persons in a State of subjection to its author."

Analyse fully Austin's theory of Law.
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According to the imperative theory of civil law, civil law is, essentially and throughout its whole compass, nothing but imperative law. According to this theory, civil law consists of the general commands issued by the State to its subjects, and enforced through the agency of Courts of law by the sanction of physical force. The speciality of this theory is that it construes laws to be commands issued by the State and enforced by the sanction of its physical force.

In a *case* decided by the Supreme Court (*Raj Kapoor* v. *the State*, (1980) 1 S.C.C. 43), *Justice Krishna Iyer* examined the connotation of the term "law", and observed as follows :

> "Jurisprudentially speaking, *law,* in the sense of command to do or not to do, must be a reflection of the community's cultural norms, *not* the State's regimentation of aesthetic expression or artistic creation."

One might generally accept that there are certain rules of law which are in the nature of a command,-- but this theory maintains that *all laws* are in the nature of a command. This theory is *not* acceptable to many jurists. The following are the main criticisms levelled against it.

(a) Historical criticism

Critics belonging to the historical school concede that, in modern societies, where there are established States, laws may be in the nature of a command, but there existed laws even prior to the existence of the State. Such early law, which existed prior to the State, is *not* the command of the State. It has its source in custom, religion or public opinion,– and *not* in any authority vested in a political superior. Therefore, this school holds that law is prior to, and independent of, political authority and enforcement. A State enforces it because it is already law; and it is *not* that it becomes law *because* the State enforces it.

Criticism answered

Though *Salmond* is not a supporter of the imperative theory of civil law, yet he does *not* accept the criticism levelled by the historical school. *Salmond* points out that the rules which were in existence prior to the existence of a political State were *not laws* in the real sense of the term. They *resembled* law; they might have been primitive substitutes for law, but they were *not laws*. On the other hand, *Salmond* considers it to be a *virtue*

What are the characteristic features of positive law, according to Austin ? Do you agree with him ? Why?
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of the imperative theory that it excludes those rules which resemble law, but are not laws. *Salmond* supports his argument with an analogy. Apes might have resembled human beings; further, they might be in existence prior to man; but it is *not a defect* of a definition of man if it excludes apes from such definition. On the other hand, it is a *merit* of the definition.

(b) Moral criticism

Though *Salmond* rejects the historical criticism, yet he appreciates the inadequacy of the imperative theory of civil law. He observes : "It is one-sided and inadequate — the product of an incomplete analysis of historical conceptions." His *main criticism* against the imperative theory is that it disregards the *moral* or *ethical* elements in law. This theory ignores the intimate relation between law and justice. *Salmond* points out that the end of law is *justice.* Any definition of law without reference to justice is evidently inadequate. Law is *not* right alone, or might alone, *but* the perfect union of the two. It is justice speaking to men by the voice of the State. As the imperative theory excludes the ethical elements in law, it *cannot* be accepted as a complete definition of law.

Criticism answered

In all fairness to the Imperative Theory, it must be remembered that, as pointed out by *Austin,* his theory of civil law is only a *formal,* and not a *substantive,* treatment of the law. The questions of morality and public opinion are concerned with the law only in its *substantive* aspect.

"Natural law at different times has supported almost any indeology, but the most important and lasting theories of natural law have undoubtedly been inspired by two ideas, of a universal order governing all men, and of the inalienable rights of the individual." Discuss.

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(c) Permissive laws

Salmond further points out that the defect of the imperative theory of civil law *cannot* be cured even if an ethical element is added to the definition of the law as given by the imperative theory. *Salmond* points out that the imperative theory does *not* accommodate a number of rules of law which are *not* in the nature of commands. For example, there are permissive laws and procedural laws. These are, by no stretch of imagination, in the nature of commands. For example, a law which says that a certain act is not wrongful is *not* a command, *or* the law which says that hearsay is no evidence is *not* a command. Therefore, *Salmond* concludes that, though there is a large element of truth in the imperative theory of civil law, it is inadequate and incomplete.

Attempts to meet Salmond's criticism— Authority of Law

There are some writers who try to meet *Salmond's* criticism, that there are rules of law which are procedural and permissive and, therefore, not in the nature of a command. These writers maintain that these procedural rules may *not* be commands addressed to the citizens, but they are commands addressed to the Courts. The procedural law demands that the Court must act in a particular way under particular circumstances.

But this criticism is easily met by *Salmond.* It may be true to say that procedural laws are commands addressed to the inferior Courts, but so far

as the final Court of Appeal is concerned, the existence or procedural law depends on the interpretation given by such final Courts. For example, there is no way of correcting the Supreme Court of India, if the Supreme Court of India were *not* to follow a particular procedural rule. In the last analysis, the laws depend on the interpretation given by the Courts, and the judges obey the law, *not because* they are ordered to do so, *but because* they wish to obey it. Therefore, there is no force which compels a superior Court to obey procedural law. Consequently, procedural law *cannot* be considered as a command to the Courts.

(d) Other Criticisms

Austin's theory has also been criticised on the ground that if particular commands can qualify as law, how can one distinguish laws from commands which are not laws ? Everyday life is sprinkled with instances of people giving commands to others — masters give orders to servants, parents to their children, teachers to their pupils, and so on. Can all these be called "laws" ? Moreover, some such commands may be unlawful, as for instance, that of the bank-robber who points his gun at the cashier and orders him to hand over the cash. Indeed, some critics, like *Goodhart* have called this theory "the theory of gunman law", on the ground that it fails to distinguish between a law and the command of a bank-robber.

According to Austin, what are the characteristics of law ? Do you think that the definition of law given by him is proper in present times ? Give reasons.
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However, criticisms such as these overlook the second requirement of *Austin's* theory : To qualify as law, a command must come from a political sovereign. Thus, one difference between the order of the bank-robber and a decree of a dictator is that the latter enjoys some measure of general obedience, whereas the former secures a much more limited compliance.

Vinogradoff has also criticised *Austin's* theory on the ground that it is not only the sanctions behind the law that have to be considered, but also other factors like *general recognition, public opinion, the will of the governed etc.*

According to *Cicero* and *Kant,* law is based on *reason.* Laws flow from reason, and *not* from the Sovereign, as reasonableness is one of the primary ingredients of law.

It has also been said that if sanction and command are really necessary for law, *international law would be no law at all.* This criticism has been met by pointing out that *war* is the ultimate sanction behind International Law.

Conclusion

To conclude, it can be said that one cannot accept *Austin's* theory if it maintains that *all* law emanates from the command of the Sovereign. However, if the theory lays down that *most* law comes from, and requires the sanction of, the Sovereign, the theory may be accepted.

Again, *from a formal point* of view, *Austin's* theory is, on the whole, forceful, and the various criticisms considered above do *not* shake it off its foundation.

III. LAW AS THE PRACTICE OF THE COURT
(Legal Realism)

One version of legal realism was the one propounded by *Salmond*, who pointed out that *all* law is *not* made by the legislature. In fact, he argued that, in England, much of it is made by the law courts. However, all laws, however made, are recognised and administered by the Courts. Therefore, if a rule is not recognised by the Courts, it is *not* a rule of law. Thus, according to *Salmond*, it is to the Courts, and *not* to the legislature, that we must go if we wish to ascertain the true nature of the law. Accordingly, he defined law as *the body of principles recognised and applied by the State in the administration of justice*, as the rules recognised and acted upon by the Courts.

Discuss fully the version of realism presented by the American Realists and point out its merits and demerits.
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However, there has been *another version of legal realism*, particularly in the United States of America. According to this theory propounded by *American jurists*, law is in reality judge-made. The origin of this theory is traced to *Justice Holmes*, and the theory has a substantial following in the United States. *Holmes* highlights the situation, not of the judge or the lawyer, but of (what he calls) "the bad man", *i.e.*, the man who is anxious to secure his own selfish interests. Such a man is *not* interested in knowing what the Statutes or the text-books say, but what the Courts are likely to do in fact. This theory makes a distiction between law in books and law in action. According to this theory, what the Courts will do in fact *cannot* necessarily be deduced from the rules of law in text-books, *or* even from the words of statutes themselves, since it is for the Courts to say what these words mean. As *Gray* observed, "The Courts put life into the dead words of statute." This approach is a reaction to the traditional approach, that judges do *not* really *create* law, but only *declare* what the law already is.

Explain The Theory of Legal Realism.
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"The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." (Holmes). Discuss.
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This school fortifies *sociological jurisprudence*, and recognises law as the result of social influence and conditions, and regards it as based on judicial decisions. In the words of *Holmes*, "The life of the law has not been logic; it has been experience". Or, in the words of *Paton*, "Law is what the Courts *do*; it is not merely what the Courts *say*. The emphasis is on *action*."

However, the American realists point out that when Courts must choose between alternatives, much will depend on the *subjective element* of a judge. Judicial process, they argue, is *not* like that of a slot machine. Much will depend on the temperament, up-bringing, social background, realities, learning etc., of the judge. Therefore, they contend that law is nothing more than a prediction of what the Courts will decide.

Critically discuss the definition of law as framed by American realists.
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It is also argued that the language of several Statutes is uncertain, and the Courts are, therefore, called upon to decide what a particular word or phrase means. Thus, for instance, the English Road Traffic Act makes it an offence to *drive* a vehicle in a manner dangerous to the public. An interesting question before the Court was whether a person who steers a broken-down vehicle on tow can be said to be "*driving*" it. Since Parliament had *not* defined the term "driving", the word would have to be understood in its ordinary sense. However, the ordinary usage of the word is not wide

enough to cope up with such a marginal situation, as it does *not* draw a very clear or distinct line between what is driving and what is not driving. Faced with this question for the first time in 1946, the Court had to draw such an arbitrary line, and further define the term "*driving*" in *Wallace* v. *Major* (1946 K.B. 473).

A note may also be made of *Scandinavian Realism*, the founder whereof was *Axel Hagerstrom*. Whilst the American Realists preferred to revolve round what the courts did and what the judges said, the Scandinavian School sought to develop a formal philosophy of law, showing how law is an inextricable part of society as a whole. The Scandinavian Realist do *not* look at law as a divine command. According to them, law creates morality, and *not* the other way around.

Later jurists who adopted the "Scandinavian" line of Realism were *Vilhelm Lundstedt, Alf Ross* and *Karl Olivecrona.*

Criticism

This view that a statement of Law is nothing more than a prediction of what the Courts will decide is subject to the following criticisms :

(1) Legal situations which are *not* predictions

It should be noted that a statement of Law is seldom treated as a prediction which a Counsel submits before a Court. He is *not* forecasting what the judge will decide, but he is asking what the judge should decide. Further, a judicial decision is *not* a prediction of what a higher Court would do, but it is a judgment as to what the law now is. Similarly, a Legislature is *not* predicting what will be done, but it lays down what *shall* be done.

What do you understand by American Legal Realism ? Explain.

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(2) The theory represents a fraction of the situation

Though the realist view may be true to some extent in those situations when a new principle of law is evolved, yet it should be noted that most of our law is settled and stabilised. It should also be noted that several points of law never reach a Court, for the simple reason that the principle of law is so clear that the parties adhere to it.

Thus, it is argued that the creative days of the judge is now a thing of the past. It is argued that today the law is so complete, that the task of the judges is the more-or-less automatic task of applying settled laws to the cases before them.

American legal realism considered law as laid down by the courts. How did Scandinavian Realists depart from this ?

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However, this criticism is *not* without an answer. Legal rules are still *not* as certain as was once imagined, and the element of choice still faces a Court of law. To take just one example, in England, the unlawful and intentional killing of a human being is the common law crime of murder. But, what would be the position if *X* intentionally inflicts a mortal wound on *Y*, and then, mistakenly thinking him to be dead, throws his body into a lake, with the result that *Y* dies, *not* from the wound, *but* by drowning ? Would this amount to murder ? Until 1954, the English law had no answer to this problem, when these facts were before the Courts in *Thabo Meli* v. *R.* (1954 1 All E.R. 373), in which case the Court had to further develop the English law of murder.

(3) The theory of uncertainty of language *not* always correct

It may be noted that in some border-line cases, the language may be uncertain, as in the example of the word "*driving*" given above, but to generalise that *all* language is uncertain is to exaggerate the situation without any foundation. In marginal cases, the meaning of the word may be uncertain, but this proves that the meaning of the word is certain in other cases. Therefore, the realistic approach to law based on the uncertainty of language is a generalisation of an exceptional situation.

IV. LAW AS A SYSTEM OF RULES
(Hart's analysis of law; Kelsen's theory of legal system)

What are the characteristics of a legal role according to Prof. Hart.
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There is yet another way of looking at law. This is to analyse law in terms of *legal rules.* It should be noted that legal rules are imperative or prescriptive, rather than indicative or descriptive. In other words, legal rules are *not* concerned with what *happens*, but with what *should be done.* The legal rules again differ from commands, because commands order the doing of one particular act, while legal rules deal with general and repeated activity. In this sense, legal rules resemble technical rules or directives for achieving certain results. Thus, for instance, certain rules may provide the mode of preparing a good dish. Legal rules are more like the rules of a recipe than commands. But the fundamental difference between rules of recipe and legal rules is that the legal rules are *not* merely an instrument for producing certain kinds of society, but the legal rules and their observations are themselves part of such society.

What is law according to Prof. Hart ? Why are laws obeyed according to him ?
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It has also been pointed out that observing a rule is different from mere acting out of habit. What is done out of mere habit is done without any sense of obligation to do it, while observance of a legal rule is not merely external. Internally, it is coupled with an attitude that such external behaviour is obligatory. Therefore, a legal rule can be defined as one which prescribes a code of conduct, which is done with the feeling that such conduct is obligatory. This feeling is *not* a psychological illusion peculiar to the person observing the rule. A person who has to act according to a rule will also expect others to act according to the rule. This sense of obligation arises neither out of mistake nor out of illusion.

The above is, in short, *Professor Hart's theory of law*, as set out in his treatise, *The Concept of Law*.

Hart's definition of law can be stated as follows :

"Law consists of rules which are of broad application and non-optional character, but which are at the same time amenable to formalisation, legislation and adjudication."

Write a short note on : Law as a system of rules.
B.U. Apr. 95

Hart calls these rules of law *primary rules,* which would simply impose duties. But the unity among these rules is brought about by *secondary rules,* which are power-conferring rules. For example, the Indian Penal Code consists of primary rules, while the Constitution of India consists of secondary rules, as it consists of a number of power-conferring rules.

Legal rules, as defined above, must be distinguished from rules of games, clubs, and societies, and moral rules, which are also observed with

a sense of obligation. The first difference between moral rules and other rules (including legal rules) is that the latter can be amended and can be subject to adjudication, while morality can neither be amended by an authoritative body; nor is it susceptible to the process of adjudication.

Further, legal rules and moral rules can be distinguished from rules of games etc. Obedience to legal and moral rules is general in application, while the rules of games are applicable only to a limited number of persons who are playing the game. Again, one could withdraw from the game, the club or the society, while in the case of legal and moral rules, such withdrawal from a State or society is practically impossible.

Analyse Hart's definition of law. Why are laws obeyed ?
B.U. June 96

Hart's analysis and Austin's theory compared

Hart's analysis of legal rules is different from the *Austinian* concept of legal rules. *According to Austin,* the command of the State is imposed and one is obliged or compelled to obey it. *According to Hart,* a legal rule is observed because one has a sense of obligation to observe it. Law prescribes, not a command, but a standard of conduct. This standard is adhered to, not only because there is a sense of obligation to adhere to it, but also because there is an expectation that others have some obligation to adhere to it. Therefore, even a person who *cannot* be compelled to obey the law is still reckoned as having an obligation to obey. According to this view, law is concerned with *obligation rather than coercion.*

Prof. Hart had re-stated and re-defined positivism and put it in a most comprehensive manner. Discuss.
P.U. Oct. 99

Kelsen's theory of Legal System

Examine Kelsen's Theory of Law. Why is it called a Pure Law Theory.
P.U. Oct. 97

Another connected theory is that of the *Austrian jurist, Hans Kelsen,* the great jurist, who was responsible for the framing of the Austrian Constitution.

Kelsen advocated the *"pure" theory of law.* He called it *pure,* because the theory describes only the law, excluding everything that is strictly not law. It seeks to lay down what is the law,– and *not* what the law ought to be.

Kelsen was of the view that, to be acceptable, any theory of law must be "pure", that is, logically self-supporting,– and *not* dependent on any extraneous factors, *i.e. not* influenced by factors like natural law or sociological or political or historic influences.

Kelsen considered the systematic character of the legal system to consist in the fact that all its rules or norms are derived from the same basic rule or rules, which he has called *grundnorms.* Where there is a written constitution, as in India or the United States, the basic *grundnorm* will be that the constitution ought to be obeyed. However, where there is no written constitution, as in England, *Kelsen* postulates that we must look to social behaviour for the *grundnorm.* The English legal system, according to him, is based on several such basic rules, such as the theory of parliamentary supremacy, the binding force of precedents, and so on. Such basic rules are very important to any legal system; they are to a legal system what axioms are to geometry; they constitute the initial hypothesis from which all other legal propositions are derived.

Discuss fully Kelsen's Theory of Law.
B.U. Nov. 95

Examine Kelsen's Pure Theory of law.
P.U. Apr. 97

Hart's view differs from that of *Kelsen's,* inasmuch as *Hart* refuses to look upon such rules as hypothesis. According to *Hart,* the basic rules of a

legal system do *not* consist of something which one has to assume or postulate. Rather, it is itself a rule accepted and observed in a particular society. According to *Hart*, although the rule of parliamentary sovereignty in England *cannot* be derived from any other rule of English law, yet it is more than a merely hypothesis, — it is a customary rule of English law, followed in practice and looked upon as a standard which *has to be* complied with.

V. LAW AS A SYSTEM OF SYNTHESIS
(Sethna's Synthetic School)

The Synthetic School of Jurisprudence was founded on 21st July 1955, by *Dr. M. J. Sethna*, the learned author of "*Jurisprudence* ". Jurists are today now more and more attracted to *Dr. Sethna's* ingenious concept of Synthetic Jurisprudence.

According to *Dr. Sethna*, jurisprudence should be, at the same time, *analytical, **historical**, comparative and sociological*. In the words of the learned author, "There should be an *amalgam of principles* derived from the social studies; and jurisprudence should suggest changes for the better, with the march of time and the onward progress of society".

An interesting illustration of the product of the school is the Mind-Behaviour Theory of Negligence (also referred to as the Subjective-Objective Theory of Negligence), which is discussed in Chapter XV.

Similarly, the definition of the term *law* also can be synthetic. This school defines law, in its widest sense, as follows : "Law, in its widest sense, means and involves any uniformity of behaviour, a constancy of happening or a course of events, rules of action, whether in a phenomena of nature or in the ways of rational human beings."

Civil law, according to this school, is "all that body of principles, decisions and enactments approved or passed by the legally constituted authorities in a State, for regulating the rights, obligations and liabilities of the citizens in relation to the State, as also *inter se*, and enforced through the machinery of the judicial process securing obedience to the Sovereign authority in the State." In other words, an ideal civil law seeks to secure the greatest good of the largest number in the body politic.

Synthetic thinking also enables one to link up the various theories of punishment, which might otherwise appear chaotic and conflicting. "Not analysis alone, but rather synthesis, has enabled the outlook of an interdependence, so far as the theories of punishment are concerned." (See Chapter IV.)

THE FUNCTION AND PURPOSE OF LAW : JUSTICE, STABILITY AND PEACEFUL CHANGE

Discuss fully the function and purposes of law.
B.U. Nov. 95
Oct. 98
Apr. 99

Most Jurists agree that law is an instrument of society to establish justice. But there is not much agreement in defining justice. Generally, the term *justice* has *two meanings*. *In the wider sense*, justice is synonymous with morality; but *in the narrower sense*, it refers to one aspect of morality. In this sense, justice would mean that the like must be treated alike. In other words, it means fair and equal treatment of all.

Justice, in the sense of equality, has *two aspects* :

(a) Distributive justice, and (b) Corrective justice.

Distributive justice works to ensure a fair division of social benefits and burdens. The task of establishing distributive justice is primarily achieved through Constitution-making and by legislation. The function of the Courts is chiefly to apply these rules for the purpose of establishing corrective justice.

What is the function and purpose of law ?
B.U. Apr. 97

Distributive justice works to ensure a fair division of social benefits and burdens amongst the members of a community, as for instance, that every person has a right to the property legally acquired by him. Distributive justice thus serves to secure a balance or equilibrium amongst the members of a society. This balance can, however, be upset, as when *A* wrongfully seizes *B's* property. At this point, *corrective justice* will move in to correct the disequilibrium when the court compels *A* to make restitution to *B*.

Function & purpose of law.
B.U. Oct. 96
Oct. 99

What are the uses and purposes of law ?
B.U. Apr. 98

So far as distributive justice is concerned, there is one difficult problem. It is true that distributive justice aims at arriving at a balance in the society, by providing for equitable division of benefits and burdens and further by equal dispension of justice. But while achieving that balance, another factor is to be taken into consideration. In a society, there is conflict, *not only* between person and person, *but also* between interest and interest. For example, the right to employment and the right to property may conflict with each other. Then, society has to achieve a balance by reconciling such conflict of interest.

Roscoe Pound calls this *social engineering*. Here, the function of law is to satisfy, to the maximum extent, the desires, interests and claims of the various members of the community, and thus achieve a smooth running of the machinery of the society. According to this *theory of social engineering*, there are several interests which are of a great advantage to a person, *e.g.*, bodily security, freedom of speech etc. *Not all* such interests are, however, protected – or sometimes even recognised – by law. Thus, the right to privacy is *not fully recognised* by English law, even today. Now, which interests should be recognised by law is a question which is answered partly by sociology, partly by ethics,– and partly by law. Thus, the reconciliation of competing and conflicting interests is the ultimate aim of social engineering.

"The basic fact of social engineering is to construct an efficient and egalitarian social order, while adjusting conflicting claims, so that there will be least friction and waste." Discuss.
P.U. Oct. 96

When one speaks of equality and justice, one has to be very clear in one's mind on one question. Equality has been defined as the like treatment of the like. But the basis of grouping the people for this purpose is the crux of the problem. Equality and justice can be achieved only when people are grouped together for this purpose on a rational and reasonable basis. This has been termed as *reasonable classification* for the purpose of Article 14 of the Constitution of India (Right of Equality).

However, it *cannot* be said that justice is the only possible or even desirable, goal of law. Indeed, the very idea of law represents a basic conflict between two different needs — the need for *uniformity* and the need for *flexibility*. *Uniformity* is necessary to ensure that there is certainty

and predictability. If the rules of law are fixed and generalised, the citizen can plan his activities with an ample measure of certainty. Another advantage of uniformity is that the judge applies fixed rules, and *not* his whim of the moment. Yet another advantage is the stability and security which the social order derives from uniform and unchanging rules of law.

And yet, there is also a need for a certain degree of *flexibility*. The existing rules may *not* provide for a border-line case, and indeed, no rule can make provisions for *every* possible case. Some measure of discretion thus becomes valuable. Again, flexibility is necessary to enable the law to adapt itself to social change. If the law, as it exists, is unalterable, the necessary changes would have to come by revolution, violence and upheavals. On the other hand, law that is capable of adoption, whether by legislation or judicial development, allows for peaceful changes from time to time.

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

Judicial Process and Reasoning

Normally, it is considered that the judicial process is one of *deductive reasoning*. There is a principle of law that certain facts lead to certain legal consequences. Then there is the ascertainment of the fact. Thirdly, the legal rule is applied to the facts. Thus, it might appear that the judicial process is a mechanical process. But it is *not* really so. It is possible that there may be some ambiguity in the legal rule itself or the pattern of the facts may be slightly different. In such cases, some kind of innovation or improvisation is necessary. In those circumstances, a judge may have to take recourse to deduction or analogy, and it is also possible that the judge is confronted with a new situation altogether. In such circumstances, the judge can never take a formalistic approach. He has to improvise the law to meet the needs of the changing society. In such circumstances, it is *not* the law that determines, but it is what the judge considers as justice that tempers the law. Thus, judicial process and reasoning is a complicated phenomenon.

CHAPTER III

CIVIL LAW

SALMOND'S DEFINITION OF CIVIL LAW

Salmond observes, "Law is a growth from small beginnings. The development of a legal system consists in the progressive substitution of rigid, pre-established principles for individual judgment, and to a large extent, these principles grow up spontaneously within the tribunals themselves. That great aggregate of rules which constitutes a developed legal system is *not a condition precedent* of the administration of justice, *but a product of it*. Gradually, from various sources — precedent, custom, statute, — there is collected a body of fixed principles which the Courts apply, to the exclusion of their private judgment."

"That it is on the whole expedient that Courts of Justice should thus become Courts of law, no one can seriously doubt. Yet the elements of evil involved in the transformation are too obvious and serious ever to have escaped recognition. Laws are in theory, as *Hooker* says, *the voice of right reason : they are in theory the utterances of Justice speaking to men by the mouth of State, but too often in reality, they fall short of this ideal. Too often they turn judgment to wormwood* and make the administration of justice a reproach. Nor is this true merely of the earlier and ruder stages of legal development. At the present day, our law has learnt, in a measure never before attained, to speak the language of sound reason and good sense, but it still retains in no slight degree the vices of its youth; nor is it to be expected that at any time we shall altogether escape from the perennial conflict between law and justice. It is needful, therefore, that the law should prove the ground and justification of its existence" - *Salmond.*

Civil law is a portion of the law of the land which is enforced by the law Courts. As a matter of fact, it is law in the strictest sense of the term. It is sometimes called the *Municipal law,* as opposed to international law. According to *Salmond*, "*Law may be defined as the body of principles recognised and applied by the State in the administration of justice.*" This definition, therefore, does *not* include the aspect of international law. But law, as commonly understood, is something that comes before the law Courts; it does *not* originate from the Courts. Law is something that is found in customs, conventions and habits of the people, which have been accepted by the Legislature as good as law, which the law Courts have to accept, adopt, confirm, explain and interpret. It would be a great hardship on the people if they were to wait for the judges to create law. It is on the very sound principle that ignorance of the law is no excuse, that one considers something newly created by the legislature and interpreted by the judges.

Law reflects, to a very great extent, the hopes and aspirations of the people, and hence, there cannot be either uncertainty or ignorance of law. Every law has some predeclared principles, which are very well-known to

the citizens at large. It is because of this knowledge that laws find favour with the society. The only difference is that law is something *certain;* it is *more concrete* than the abstract customs and habits of the people.

From the above, it becomes clear that it is difficult to give a precise definition of the word 'law'. Law, as the term is understood today, is civil law exclusively. Such a definition has its obvious advantage, because it separates law from conventions which are *not* regarded as law, though they have the same force as law.

Some writers have suggested that the word 'law' should include the principles acted upon by the administrators. These principles are no doubt important to the lawyer, but they are not entirely unknown to the people. There are rules and regulations which are not always enforced in the law Courts. In the case of the *Sheriff of Middlesex,* the Sheriff was imprisoned by order of the House of Commons, because he attempted to enforce the judgment of a Court of law. The act of the Sheriff was in accordance with the law enforced by the law Courts. How could it be said that this action of the Sheriff was in any way against the principles governing the procedure in the House of Commons ? Can such principles be called *law,* and how far are they binding ? Such questions are important in the interpretation of word '*law*' in a specific context.

Criticism of the Definition

Salmond's definition of law, as given above, is often criticised on the ground that the definition is appropriate to case-law, but *not* to statute law. It is contended that a statute becomes law as soon as it is passed, and it need *not* wait for recognition by the Courts for becoming law. The Courts recognise a statute *because* it is law; it is *not* law *because* the Courts recognise it. *Vinogradoff,* for instance, criticises *Salmond's* definition, and says that it is very much like defining *medicine* as 'a drug prescribed by a doctor', because this ignores its real function (that of curing) and because medicine does *not* cease to be so just because it is prescribed by a lay person.

This criticism is met by *Salmond* by pointing out that the Courts and the legislature are the two organs of the community for creating the two kinds of law. He also points out that so long as the Courts and legislature work harmoniously, it does *not* matter whether a statute is law because the Courts recognise it, *or* the Courts recognise it because it is a statute.

Salmond's definition is also open to another criticism, in as much as he uses the term "the body of *principles*" in his definition. The term implies more of *abstract,* basic principles, and fails to pay due importance to concrete law, the law made up of statutes. In reality, *civil law deals more with the concrete than the abstract,* and one cannot help feeling that *Salmond's* definition fails to bring out this aspect.

Yet another criticism is that since *Salmond* defined *law* in terms of justice, it follows from this that an *unjust law* cannot exist, because it would amount to a fatal self-contradiction, just like the term "square circle". In the Roman days, slavery, for example, existed in the legal systems of the time, and yet it is something which is condemned by natural law. Therefore, it is pointed out that law does *not* cease to be law merely because it is unjust.

Lastly, it is also pointed out that the legal goal of justice is *not* the only purpose of law. The law serves many ends, and ends vary from time to time and from place to place. Today, the ends that seems to be most universally accepted are those of securing order in society, the greatest happiness of the largest number, and the recociliation of the will of one with the liberty of another.

The Indian Constitution [under Art. 13(3)(a)] defines *law* as including any Ordinance, Order, By-law, Rule, Regulation, Notification, Custom or Usage, having in the territory of India the force of law. From this, it follows that, today, it is widely realised that law should be given as wide a meaning as possible. From this point of view, *Dr. Sethna's definition* of 'civil law' covers all possible requirements of civil law, which he defines as follows : "Civil law may be defined as all that body of statutes, ordinances, rules made by the Government by virtue of powers given to it by the legislature, and judicial decisions based on positive morality, public opinion, customs and conventions, enforced through the machinery of the judicial process, and meant for regulating the rights and duties of citizens *inter se*, and the State and the citizens, so as to secure the greatest good of the greatest number."

THE CHARACTERISTICS OF CIVIL LAW

As seen above, by civil law is meant *the positive law of the land or law as it exists.*

Secondly, like any other law, *civil law is uniform, and this uniformity is established by judicial precedents.*

Thirdly, *law is noted for its constancy,* because without this, law would be nothing but the law of the jungle.

Fourthly, *law is in the nature of the enjoinments by the people who inhabit a particular State,* with the capacity to assert themselves and command obedience through the judicial processes.

Fifthly, *law is backed by the force and might of the* State for the purposes of enforcement. In other words, *civil law has an imperative character and has legal sanction behind it.*

Sixthly, *law is essentially of a territorial nature* and it only applies within the territory of the State. It is the law of the territory, as opposed to the law of the locality, *or* as opposed to the law of the Nations *or* the law of the Nature. It is *not* universal, but general.

Seventhly, *law creates legal rights,* — fundamental or primary, as also secondary rights.

Lastly, as law is enforced by the sanction of the State, *an infringment of the law is always attendant with attachments, fines or imprisonment, or some other form of punishment, which the society inflicts on the wrongdoer in order to show its displeasure against the person who commits an anti-social act.*

In considering the nature of civil law, one must consider both law in the *abstract* sense and law in the *concrete* sense. Law in its abstract sense means and is known as *jus* or *droit;* in its concrete sense, it is known as

lex or *loi*. In other words, law in its concrete sense implies a particular law, *e.g.*, the law of the Income-tax, Industrial law, Company law, etc., while in its abstract or general sense, it means laws generally.

Usually, all laws are *general* in nature, *i.e*, laws are applicable to all those persons who reside in that particular territory. Thus, there are laws which are applicable to certain acts or to particular individual families or to a group of individuals. But the law passed by a legislature is always a general law, *e.g.*, a law regulating succession in a particular community applies to *all* the members in that community. A *particular law* applicable to a limited number of persons does not create law in the abstract sense. But all these laws, general as well as special, constitute a *corpus juris civils*. Thus, there are local laws, Martial law, conventional law, autonomic law and law for the Prize Courts. There is also the common law or the unwritten law of England (*lex non scriptum*) which is based on customs and usages.

It can, therefore, be concluded that civil law, which is enforced by the law Courts and the physical power of the State, can include many types of laws depending upon the conditions or the circumstances. The modern world has travelled far too ahead from the definition given by *Austin*, who considers all laws as the product of a general command coming from the supreme authority in the State. *Austin* has been criticised by many, but the truth remains even today as *Austin* had stated in his times. *Austin's* definition of 'law' does *not* take into consideration the theory of moral right, and is based upon the physical force of the State. But *law*, as the term is understood today, is a matter of public opinion and a matter of discriminating the right from the wrong.

Sanction

The term 'sanction' has a peculiar meaning in Jurisprudence. It means and involves the idea of *compulsion* or *threat*. It may be defined as the *instrument of coercion* employed by any regulative system, and any rule of right supported by such means is said to be 'sanctioned'. The instrument of coercion need *not* necessarily be physical. It may be moral, divine, or even political. Thus :

Write a short note on : Sanction as one of the essentials of law.
B.U. Oct. 96

1. Physical force is the sanction applied by the State in the administration of justice. (Thus, the watchful eyes of the policeman and ultimately the prison bars serve as an effective deterrent to prospective offenders.)
2. Censure, ridicule and contempt are the sanctions by which society enforces the rules of positive morality.
3. War is the last and most formidable of the sanctions which, in the society of nations, maintains the law of nations.
4. The threat of divine displeasure or divine anger are the sanctions of religion.

Its Forms

So far as *administration of justice* is concerned, sanction assumes *two different forms*, according to the *kind of justice*, *i.e.*, whether *civil* or *criminal*. The administration of justice is the application by the State of the sanction

of force to the rule of right, and it is divisible into *two* parts, which are distinguished as the administration of *civil* and that of *criminal* justice. Both in civil and criminal proceedings, there is a wrong complained of, yet the complaint is of an essentially *different* character in civil and criminal cases. In *civil* justice, it amounts to a *claim of right;* in criminal justice, it amounts merely to an *accusation of wrong.* The former consists in the *enforcement of a right,* the latter in the *punishment of a wrong.* Thus, sanction assumes different forms in these two cases.

PLACE OF LAW IN THE ADMINISTRATION OF JUSTICE

Secondary position of law

As seen earlier, the administration of justice may be defined as the *maintenance of right or justice within a political community by means of the physical force of the State.* Now, in primitive times, justice was, more or less, natural justice, in the sense that it was administered in accordance with the dictates of *conscience, equity* and *good sense.* There were no legal rules then. With the advancement of learning, justice came to be administered in accordance with fixed legal rules. Therefore, the *primary* aim of the administration of justice is to do *right* by *means* of law. What is then the place of *Law* in the administration of justice ? The place of law in the administration of justice is only *secondary.* The primary purpose of the administration of justice is the *maintenance of right or justice within a political community by means of the physical force of the State* and through the instrumentality of the State's judicial tribunals. Law is only *secondary.*

Meaning of 'Justice according to law'

Modern justice is justice according to law. It is *legal justice.* The same meaning is conveyed by saying that modern Courts of *Justice* are Courts of *Law.* What is then the meaning of these expressions ? Modern justice is administered in accordance with rules of Law, and *not* independently of them.

The meaning of the phrase 'justice according to law' may be illustrated by the following examples. *A* is charged with *B's* murder. He voluntarily makes a clean breast of the whole affair to a police officer, who is an extremely honest man. There is no *other* evidence in the case except this *honest* confession. Now the law (contained in the Indian Evidence Act) is that a confession (however voluntary and sincere) made to police officer (however honest and trustworthy) *cannot* be used in evidence. The result will be that *B* will be discharged, unless he pleads guilty. Here, however, willing the judge may be to do real justice, his hands are tied by law. He must release the prisoner. This is justice according to *law.* Many such cases may be cited from civil laws, where honest litigants are defeated owing to the *law* being against them. Such, for instance, are cases where parties sue after the period of Limitation. Here also, the Court *cannot* decree the plaintiff's legitimate claim, as it is time-barred. *Legal* justice is done in such cases.

It may be noted that one cannot term the cases mentioned above as cases of *injustice.* The real principles of justice underlying them are that it

is *dangerous* and *unsafe* to convict on the strength of a confession to the police, and that the law should *not* help litigants who sleep over their rights, and then seek the Court's assistance to redress them *after* the period of Limitation have run out : law is for the vigilant and not the indolent. These are *not* cases of injustice, but are cases of legal justice—justice according to law, though not, perhaps, according to honest conscience and belief of the judge trying the cases. It is, therefore, quite correct to say that "In the modern State, the administration of justice according to law is commonly taken to imply recognition of fixed rules."

USES OR ADVANTAGES OF LAW

Though in the modern State, the administration of justice according to law is generally according to fixed rules, yet it is possible for the Courts to function without fixed rules at all. For example, there could be a tribunal which administers justice according to conscience and natural justice, and *not* according to previously fixed or accepted general principles (as for instance, the Chancellor's Court in England in the earlier days).

Even in the modern State, it *cannot* be said that the administration of justice is strictly by recognised or fixed rules. An element of *free discretion* of a judge is *not totally excluded*. The question is the *extent* to which the administration of justice should be decided by fixed rules, and the *extent* to which free judicial discretion should be allowed to play a role in the administration of justice. This question can be answered only after an estimate of the advantages and disadvantages of the administration of justice according to law.

The *chief uses or advantages of law* are the following :

(1) Uniformity and certainty

Fixed rules of law impart, to a considerable extent, uniformity and certainty to the administration of justice. It is very important, *not only* that judicial decisions should be just, *but also* that people should be able to know beforehand the decision to which the Courts of Justice will come. It is often more important that rule should be *definite, certain, known* and *permanent,* than that it should be *ideally just.*

(2) Protection against improper motives of judges

The necessity of conforming to publicly declared principles protects the administration of justice from the disturbing influence of improper motives on the part of those entrusted with judicial functions. The law is necessarily impartial, and as already observed, it is certain and known. Therefore, a departure from a rule of law by the judicial authority is visible to all men. Thus, it is not enough that *justice should be done;* it is also necessary that *it should be seen to be done.* On the other hand, if administration of justice was left completely to the individual discretion of the judge, improper motives and dishonest opinions could affect the administration of justice.

As *Salmond* observes, "It is to its impartiality, far more than its wisdom (for this latter virtue it too often lacks) that are due to the influence and reputation which the law has possessed at all times; wise or foolish, it is the same for all." Therefore, law acts necessarily impartially, which is

considered as one of the first principles of political liberty. That is why the words of *Cicero,* "we are the slaves of the law so that we may be free".

(3) Freedom from the errors of individual judgment

Law serves to protect the administration of justice from the errors of individual judgment. The problems offered for judicial decisions are often difficult and complicated. Therefore, there is a great need of guidance from the experience and wisdom of the world at large, of which the law is the record. As *Salmond* observes, "The establishment of the law is the substitution of the opinion and conscience of the community at large for those of the individuals to whom the judicial functions are entrusted... The law is not always wise, but on the whole, and in the long run, it is wiser than those who administer it." *Aristotle* also observes : "To seek to be wiser than the laws is the very thing which is by good laws forbidden."

(4) Reliability

It is also said that law is more reliable than individual judgment. The human mind is certainly not infallable, and the judge is no exception. It is, therefore, believed that the wisdom of the legisluatre, *i.e.*, the collective wisdom of the representatives of the people, is a *safer* and *more reliable* means of protection, than the momentary fancy of an individual judge.

DEFECTS OR DISADVANTAGES OF THE LAW

Though the advantages of law are many, there is a heavy price to be paid for these benefits. In the words of *Salmond,* "The law is without doubt a remedy for greater evils, yet it brings with it evils of its own."

The *four* main evils or disadvantages of the law are the following :

(1) Rigidity

The first defect of law is its *rigidity.* A legal principle is the product of a process of generalisation and abstraction. Therefore, it has to disregard particular, individual or exceptional circumstances. But one *cannot* be sure, while administering justice, that those individual or exceptional circumstances will be irrelevant in a particular case. But the law is to be applied without any allowance for special circumstances. The result is *inflexibility,* which often results in *hardship* and *injustice.*

(2) Conservation

Another defect of law, which is analogous to that of rigidity, is that of *conservatism.* Conservatism is the failure on the part of law to conform itself to the changes in circumstances and in men's views of truth and justice, which are brought about by the lapse of time. *Rigidity* is a defect arising out of the failure of law to meet the requirements of special or exceptional cases, while *conservatism* is the defect arising out of the failure of law to conform itself to the changing needs and notions of justice. Though this defect can be remedied by legislation, yet it is impossible to completely counteract the evil of legal conservatism.

(3) Formalism

The third defect of law is *formalism.* The law has often a tendency to

attribute more importance to *technical* requirements than to *substantial* rights and wrongs. Though the ancient legal systems were more formal and technical, yet it *cannot* be said that modern legal systems are completely free from such bonds.

(4) Complexity

The last defect of the law is its undue and endless *complexity*. Law, being the reflection within Courts of Justice of the complex facts of civilised existence, it is to a considerable extent complex. Though everyone is presumed to know the law, it is *not possible* for everyone to know it on account of its elaboration, excessive subtlety and complexity. Though this defect can be cured by codification, by reducing its size and by increasing its intelligibility, yet a complex law for a complex social existence is unavoidable.

In conclusion, *Salmond* observes that if the benefits of law are great, the evils of too much law are also not small.

LAW AND FACT

"Questions which arise for consideration and determination in a court of justice are of two kinds, being either questions of law or questions of fact." Discuss.
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"Question of Law" and "Question of Fact"

Generally, all questions which come up before a Court of Justice can be classified *either* as questions of *law or* as questions of *fact*. But these terms—questions of law and questions of fact—have *three* distinct meanigs, as under :

The different meanings of the term—Questions of law and Questions of fact

(a) The term 'questions of law' means *firstly,* that a question is to be answered *in accordance with the already established rule of law,* and *not* in accordance with the evidence that is laid before the Court. All other questions which are *not* questions of *law* in this sense are questions of *fact.*

Thus, in a suit for damages, the question as to *whether* damages are at all recoverable, in the circumstances of the case, is a *question of law.* But the question as to the *quantum of damages* (*i.e.*, how much damages should be awarded in that particular case) would be a *question of fact.*

Write a short note on : Question of Law and Question of Fact.
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Similarly, whether a contractor has been guilty of unreasonable delay in building a house is a question of fact, because the law does *not* prescribe fixed rules on this point. But, whether the holder of a bill of exchange has been guilty of unreasonable delay in giving a notice of dishonour is a question of law, to be determined with the rules laid down in the Bills of Exchange Act in England and the Negotiable Instruments Act in India.

(b) In the *second* sense, a 'question of law' means a *question as to what the law is.* It would be a question of ascertaining the existence or the non-existence of a particular rule of law. This question arises out of the uncertainty of statute *or* the absence of a clear-cut judicial decision. A question of fact corresponding to the term 'question of law' in the second sense, would mean that it is a question of ascertaining the facts. This is to be done by appreciation of evidence laid before the Court.

(c) A question of law in the *third* sense is a question to be *answered* by the *judge*, as distinguished from one which is to be *answered* by the *jury*. A question of fact in this sense will be answered by the *jury*. This distinction between question of law and question of fact is the outcome of the peculiarity of the English procedure, and with the abolition of the jury system, is irrelevant in India.

Paton has distinguished *law* from *fact* thus: "*Law* consists of the abstract rules which attempt to reduce to order the teeming facts of life. *Facts* are the raw material on the basis of which the law creates certain rights and duties."

Mixed Questions of Law and Fact

Generally, the matters that come before Courts are either matters of law or matters of fact, but very often, one comes across matters which involve *both* a question of *law* and a question of *fact*. For example, when the existence of a partnership is to be determined, enquiry must be made at two levels : firstly, whether there has been an agreement between persons participating in a particular commercial adventure; secondly, whether such an agreement amounts to a partnership. The first question is a *question of fact*, while the second is a *question of law;* but on the whole, whether the partnership exists or not is a *mixed question of law and fact*.

Similarly, if a person is charged with criminal misappropriation of property, whether the alleged acts amount to that offence is a question of law, which will be answered by applying the appropriate provisions of the Indian Penal Code. But, the question whether that person has actually committed the alleged acts is a question of fact, which will largely depend on the evidence before the Court. Thus, the question whether that person has committed criminal misappropriation is a *mixed question of law and fact*.

Questions and Opinion

A *question of fact* is also to be distinguished from a *question of opinion*. Unlike a question of fact, an *opinion* is only the expression of a person's judgment, based on what *he* believes or thinks. Although such a person may be an expert in his field, such expert opinion also may be based entirely on *his* reason and belief, and *not* on facts. A person may be guilty in the eyes of the law if he misrepresents facts, but *not* if he has given his opinion, although it may turn out that it was an erroneous opinion on the point.

Questions of Judicial Discretion

To say that all questions which arise before a Court are either questions of fact or questions of law would be an *oversimplification*. Very often, questions which are *neither* questions of law *nor* questions of fact might arise. For example, if a person is convicted of a particular offence, the statute might provide that the maximum punishment to be given to him is imprisonment for a particular period (say, imprisonment upto 3 years), but the actual sentence to be given in a particular case (*i.e.* whether to convict that offender for 1 year, *or* 2 years, *or* for the maximum period of 3 years),

is *not a question of law, nor is it a question* of fact. Such a question is a *question of judicial discretion*. This question of judicial discretion includes all questions as to what is *right, just, equitable or reasonable* so far as *not predetermined by authoritative rules of law.*

A question of judicial discretion pertains to the sphere of right, as opposed to that of fact in its stricter sense. It is a question as to what *ought to be*, as opposed to a question as to what *is*.

TRANSFORMATION OF QUESTIONS OF FACT INTO QUESTIONS OF LAW

As a legal system develops, questions of fact in the first sense of the term have a tendency of being determined by law, and thus they get converted or transformed into questions of law. Likewise, there is also a transformation of judicial discretion into questions of law, although this is so to a smaller extent than that within the sphere of pure fact. But in this process of transformation, *discordance between law and fact may arise*. In the words of *Salmond, "The law is the theory of things, as received and acted upon within the Courts of justice, and this theory may or may not conform to the reality of things outside. The eyes of law do not infallibly see things as they are."* This discordance between law and fact generally arises in *two ways : firstly*, by establishment of legal *presumptions*, and *secondly*, by the device of a *legal fiction* or a *fictio juris*.

Legal presumptions (Presumptio Juris)

In the case of a legal presumption, one fact is recognised by the law as sufficient proof of another fact, whether it is in truth sufficient for the purpose or not. For example, a notification in an *official gazette* will be presumed by the law to have been duly signed by the person by whom it is purported to have been signed. *In fact*, the person concerned *might have signed or might not have signed;* yet, the fact of notification is considered by law to be sufficient proof of the fact of the signature.

Presumptions are of *two kinds*, being either *conclusive* or *rebuttable*. A *conclusive* (or *irrebuttable*) presumption is one which constrains the Courts to infer the existence of one fact from the existence of another, even though this inference could be proved to be false. In the case of conclusive presumptions (also known as *presumptions juris et de jure*), the law prohibits leading evidence to the contrary. For example, the birth of a child during coverture will be considered to be conclusive proof of its legitimacy. Law does *not* allow any evidence to the contrary.

Similarly, under our penal system, a child under seven years of age is *conclusively presumed* to be incapable to committing a crime *(doli incapax)*, and the Court will refuse to hear evidence seeking to prove that the child realised the malicious or criminal nature or quality of the act.

Again, the Companies Act lays down that a certificate issued by the Registrar of Companies that the requirements of the Act regarding registration have been fulfilled will be conclusive evidence that such requirements have been duly discharged. Even if it later turns out that the signatures of some of the applicants were forged, the certificate is final.

A *rebuttable* presumption, on the other hand, is one where the law requires the Courts to draw an inference, even though there is no sufficient evidence to support it *(provided there is no sufficient evidence to establish the contrary inference)*. In other words, the Courts will presume something, but at the same time, allow the opposite party to rebut or contradict such presumption. For example, a negotiable instrument is presumed to be given for value, *unless the contrary is proved*. So, if no proof is adduced by either side (either of consideration or the absence thereof), the Court will presume that there was consideration supporting that negotiable instrument. However, if one of the parties proves that there was, in fact, no consideration supporting the instrument, the presumption *cannot* be made.

So also, a person who has not been heard of for seven years (or more) by those who would naturally have heard of him had he been alive, is presumed to be dead. However, any party to the proceedings is allowed to show that such a person is, in fact, *not* dead.

Similarly, any person accused of any offence is presumed to be innocent, and it is for the prosecution to prove that he has committed a particular crime.

Legal fiction *(Fictio Juris)*

By the device of legal fiction, law attempts to believe in the existence of a situation which is contrary to reality. For example, in the case of the *adoption* of a child, the fiction of law imputes that the child is the child of the parent who has adopted it, though in fact it is the child of its natural parents.

Legal fiction was a device familiar to primitive legal systems, but modern legal systems are not completely free from them. In modern law, besides the fiction of adoption, there are other fictions. For example, a child in the womb of the mother, though not born, will be treated *as if* it is born for certain purposes as for example, inheritance.

In England, legal fiction was used by way of a false averment in the plaint, with a view to giving jurisdiction to the Court. The defendant was not allowed to traverse that averment. Thus, the Exchequer Court, dealing with revenue matters, obtained jurisdiction even over civil cases, by virtue of a *legal fiction*.

Henry Maine uses the term *legal fiction* in a broader sense, inasmuch as he describes it as "any assumption which conceals the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified." An example of a *legal fiction* used in this broader sense is the dictum that judges *never make* new law; they merely expound and interpret what has always been the law.

CHAPTER IV

THE ADMINISTRATION OF JUSTICE

The most essential functions of a State are *primarily two : war* and *administration of justice*. If a State is incapable of performing *either* or *both* these functions, *it cannot be called a 'State'*. Now, the term 'Administration of Justice' at once brings to our minds Civil Law, which is defined as *the body of rules recognised and applied by the State in the administration of justice*.

But for the function of the State, *might* would always be *right*. It is administration of justice whereby right is protected by might. The administration of justice is the *maintenance of right* within a political community by means of the *physical force of the State*. It is the *modern* and *civilised substitute for the primitive practice of private vengeance and violent self-help*.

ITS NECESSITY.—*"A herd of wolves is quieter and more at one than so many men, unless they all had one reason in them or have one power over them."—(Taylor)*. Unfortunately, it appears that human beings, who act in the welter of conflicting interests, *do not have one reason*. Therefore, one power over them becomes necessary. As *Hobbes* pointed out, unless man is under *"a common power to keep them all in awe"*, it is impossible for men to live together, except in the most primitive forms of society, where life would be *"solitary, poor, nasty, brutish and short"*.

The element of force is always present in every society. A society in which the power of the State is never called in actual exercise might prevail in some places and for some time; but the force of the State is always latent, and experience shows that ultimately the force of the State has become triumphant. A society wherein the might of the State never comes to the surface signifies, *not* the absence of State control, *but* its final triumph and supremacy.

There are some optimistic thinkers who believe that the force of the State is just a temporary phase in the development of human society and that *public opinion* might keep people in restraint and the *force of the State* might become superfluous. As *Salmond* points out, *"The constraint of public opinion is valuable and indeed an indispensable supplement of that of law, but an entirely insufficient substitute for it."* Public opinion may be effective in the case of people who have a civilised conscience, but in the case of determined evil-doers, the effect of public opinion would be most inoperative; public opinion can hardly influence the unjust and the turbulent members of the society. *Indeed the influence of the public censure is least felt by those who need it most.*

Besides, the evil-doer might be influenced by *another kind of public opinion*. Instead of being amenable to *the influence* of the society at large, the wrong-doer may be influenced more by the opinion of his brethren, and he might have more regard for his opinion within, say, his professional

circle of thieves. In such circumstances, public opinion, instead of becoming a restraint on anti-social activity, might even encourage and promote it. *Therefore, Administration of Justice with the sanction of the physical force of the State is unavoidable, and admits of no substitute.*

THE ORIGIN OF THE ADMINISTRATION OF JUSTICE (WITH PARTICULAR REFERENCE TO ORIGIN AND DEVELOPMENT OF *CRIMINAL* JUSTICE)

As it has already been pointed out, the administration of justice is the modern and civilised substitute for the primitive practice of private vengeance and violent self-help. The progress from the primitive times to modern days has been through various stages, mainly the following *three* :

(a) First Stage.— In the early days, a person redressed his wrongs and *avenged* himself upon his enemies by his own hand, probably supported by the hands of his friends and kinsmen, where necessary. At this stage, every man carried his life in his hands. He was liable at any moment to be attacked, and could only resist by overpowering his opponent. *In those days, every man was a judge in his own case, and might was the sole measure of right*. There was no guarantee, at this stage, that crime would certainly be punished, and if it met with punishment, that such punishment would be in proportion to the crime.

Very often, one crime led to another, and the consequent crime might *not* have confined itself to the criminal, but along with him his family, and even his tribe, would be the victim of the retaliation. Thus, it led to group conflicts and tribal conflicts. *Blood feuds became very common*. At some stages, when the *blood feuds proved to be disastrous*, primitive society provided for payment of some money or its equivalent as a *compensation* to the victim of the crime or the relatives of the victim, as the case may be. The advantage of this system of compensation was readily seen, and it developed until a regular sliding scale was fixed. Even in the case of murder, the vengeance of the relatives could be bought off by paying blood money, which varied according to the importance of the victim.

(b) Second Stage.— The *second stage* in the history of administration of justice began with the rise of political States; but these infant States were hardly powerful to regulate crime and to inflict punishment on the criminal. *The law of private vengeance and violent self-help continued to prevail*. The function of the State was just to *regulate* private vengeance and violent self-help. At this stage, the State prescribed certain rules for regulation of private vengeance. All that the State could ensure was that the act of revenge or retaliation would *not* be disproportionately severe. The State enforced the concept of *"a tooth for a tooth, eye for eye and life for a life". All that the State enjoined was that a life shall not be taken for a tooth or a life for an eye*. It will be seen that this was definitely a step in the advancement of criminal justice.

In the days of the Saxons, for instance, vengeance was *not* totally absent, — it was merely restricted and regulated. It was thought proper that every man has a right to do with his own hands what today is done by the machinery of the State.

(c) Third Stage.— In the first and second stages, there was hardly any difference between criminal justice and civil justice. With growth of the power of the State, the State began to act as a judge to assess liability and to impose penalty. *It was no longer a regulator of private vengeance; it substituted public enquiry and punishment for private vengeance.* Thus, for instance, the punishment of a murderer would be taken over by the State,–and *not* by the family members of the victim. The civil law and administration of civil justice helped the wronged, and became a substitute for the violent self-help of the primitive days.

Thus, it can be seen that the modern administration of justice is a natural corollary to the growth of the political State.

Difference between *Civil* and *Criminal* Justice

There has been considerable difference of opinion amongst jurists regarding the difference between *civil* justice and *criminal* justice.

(1) Some writers consider that the *object of civil proceedings is to enforce rights, while the object of criminal proceedings is to punish wrongs.*

There is an element of truth in this view. Certainly, punishment is more a feature of criminal proceedings than of civil proceedings, but punishment is *not always* present in criminal proceedings, *nor always absent* in civil proceedings. For example, a juvenile offender may be just warned, and *not* punished, in a criminal proceeding; whereas in an action for torts, damages may be awarded by way of punishment; or, when a man disobeys an injunction of the Court, he may even be punished with imprisonment in civil proceedings. Therefore, this definition does *not* go to the root of matter.

(2) The *second* distinction made by some writers is that *crimes are more harmful* in their consequences than civil wrongs; it is said that crimes *injure the public* at large, whereas civil wrongs *injure the private individual.*

Thus, according to *Salmond,* the distinction between *crimes* and *civil wrongs* is that crimes are *public* wrongs, whereas civil wrongs are *private* wrongs. Thus, he maintains that a crime is an act deemed by law to be harmful to *society* in general, even though its immediate victim is an individual. He gives the example of murder, which injures primarily the victim, but falls in the category of a public wrong (crime) as it shows a blatant disregard for human life.

This distinction also *cannot* always be maintained, because some acts may be considered both as crimes and also as civil wrongs (as for instance, defamation). Further, it is *not always true* that crimes are more harmful than civil wrongs. For example, the negligence of a contractor (which would be a *civil wrong),* which results in widespread loss of life and property may entail more harmful consequences than say, a simple assault or a petty theft (which are *crimes).*

(3) The third distinction is that in a *crime*, the *State constitutes itself as a party* to the proceedings, whereas in *civil* proceedings, *private individuals are parties.*

This distinction is also *not always maintainable,* as there are some crimes where private individuals also can be parties.

What is meant by administration of justice ? What are the theories of crimal administration of justice ?
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Conclusion

Therefore, the difference between criminal justice and civil justice *cannot* e considered in terms of the *natural acts or the physical consequence of the ct.* The distinction lies in the differences in the legal consequences. *Civil* roceedings, if successful, result in a judgment for damages, or a judgment or payment of a debt *or* a penalty, *or* in an injunction, *or* a decree for specific estitution, *or* in an order for the delivery of possession of land, *or* any other orm of relief known distinctively as civil; while *criminal* proceedings, if uccessful, result in one or a number of punishments ranging from hanging to ine, *or* in binding over to keep the peace, *or* release upon probation, *or* other utcome known to belong distinctively to criminal law.

What is meant by administration of justice ? What is its necessity ? Explain.
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Though broadly speaking, criminal justice attempts at punishment and ivil justice attempts at remedy, yet to be accurate, the distinction is more n the legal consequences of the proceedings rather than in the intrinsic nature of the acts. Thus, civil justice is administered according to one set of orms, in one set of courts and criminal justice according to another set of orms, in a different set of courts.

What is meant by administration of justice ? Discuss the purpose of criminal justice.
Analyse the different theories of punishment.
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The purpose of Criminal Justice

What is punishment

Punishment, according to the dictionary, involves the infliction of pain or forfeiture; it is the infliction of a penalty, chastisement or castigation by the judicial arm of the State. *If* the *sole purpose* behind punishment is to cause physical pain to the wrong-doer, it serves little purpose. *However, if* punishment is such as leads him to realise the gravity of the offence committed by him, and to repent and atone for it (thus neutralizing the effect of his wrongful act), *it may be said to have achieved its desired effect.*

A person is said to be *punished* when some pain or detriment is inflicted on him. This may range from the death penalty to a token fine.

The needs of criminal justice are mainly *five*, namely, —

(1) Deterrent
(2) Preventive
(3) Reformative
(4) Retributive
(5) Compensation.

What are the ends of criminal justice ? Substantiate your answer with reference to the Theories of Criminal Justice. What, in your opinion, should be the modern approach to the problem of criminality ?
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(1) *Deterrent Punishment.* — Punishment is said to be *deterrent* when its object is to show the futility of crime, and thereby *teach a lesson to other persons*. Others with similar designs may have second thoughts in the matter, and may actually abstain from putting their evil designs into practice.

According to this theory, offences are the result of a conflict between the interests of the wrong-doer and those of society. The *aim* of punishment is to dissolve the conflict of interests by making every offence, to use the famous words of *Locke*, "an ill-bargain to the offender".

(2) *Preventive Theory of Punishment.* — If the deterrent theory tries to put an end to crime by *causing fear of the punishment* in the mind of the possible crime–doer, the preventive theory aims at preventing a crime by

disabling the criminal himself, as for example, by exposing the criminal to the death penalty, *or* by confining him in the prison, *or* by suspension of his driving licence. Thus, the extreme penalty, the death sentence, ensures that once and for all, the offender will be *prevented* from repeating his heinous acts. In the past, maiming was considered an effective method of preventing the wrong-doer from committing the same crime in the future, by dismembering the offending limb. Thus, a thief's hand would be cut off, a sexual offender would be castrated, and so on.

The Relation between the Deterrent and the Preventive Theories of Punishment

The *difference* between the deterrent and the preventive theories of punishment must be carefully noted. The deterrent theory aims at *giving a warning to the society* at large that crime does *not* pay, whereas the preventive theory aims at *disabling the actual criminal* from doing harm.

As mentioned above, the *purpose* of the *deterrent* theory is to *set a lesson unto others, and show that crime does not pay.* This theory of punishment points out to the offender *and* to the rest of the world, that ultimately, punishment follows the crime, and therefore crimes are to be avoided. In the case of the *preventive* theory of punishment, *the main object of the punishment is to disable the wrong-doer from repeating the crime.* This theory does *not* act so much on the motive of the wrong-doer, but it disables his physical power to commit the offence.

(3) *The Reformative Theory.* — A crime is committed as a result of the conflict between the *character* and the *motive* of the criminal. One may commit a crime *either* because the temptation of the motive is stronger *or* because the restraint imposed by character is weaker. The deterrent theory, by showing that the crime never pays, operates on the motive, while the reformative theory seeks to strengthen the character of the person, so that he may not become an easy victim to his own temptation. This theory would consider punishment to be curative or as performing the function of a medicine. According to this theory, crime is like a disease. This theory maintains that "*you cannot cure by killing*".

Exponents of this theory believe that a wrong-doer's stay in prison should serve to re-educate him and to re-shape his personality in a new mould. They believe that though punishment may be *severe*, it should *never be degrading.* To them, execution, solitary confinement and maiming are relics of the past and enemies of reformation. *Thus, the ultimate aim of the reformists is to try to bring about a change in the personality and character of the offender, so as to make him a useful member of society.*

True, it is that this reformative element had long been neglected in the past. However, the present tendency to lay much stress on it seems to be only a reaction against the earlier tendency to neglect it altogether, and has therefore, the danger of going to the other extreme. Whereas reformation is an important element of punishment, it *cannot* be made the sole end in itself. In the case of young offenders and first offenders, the chances of long-lasting reformation are greater than in that of habitual offenders.

Again, some crimes, such as sexual offences, are more amenable to reformative treatment than others. Also, reformative treatment is more likely to succeed in educated and orderly societies than in turbulent or underdeveloped communities.

The Relation between the Deterrent Theory and the Reformative Theory

Though the deterrent and the reformative theories might coincide to some extent, there is also some conflict between them. The deterrent theory might impose the punishment of imprisonment, fine, or even whipping and death penalty, but according to the reformative theory, except imprisonment, the other modes of punishment are barbaric. *Imprisonment* and *probation* are the only important instruments available for the purpose of a purely reformative system.

The next question to be answered is, in view of this conflict between the deterrent and reformative theories of punishment, whether a system of penal code is possible, having reformation as the sole standard of punishment. *Salmond* points out that there are, in the world, men who are incurably bad. With them, crime is not so much of a bad habit as an ineradicable instinct. A reformative theory might be quite helpless in the case of such persons. Therefore, according to him, *"The perfect system of criminal justice is based on neither the reformative nor the deterrent principle exclusively, but is the result of a compromise between them."* In this compromise, it is the deterrent principle which possesses the *predominant influence.*

Salmond further adds that the present day acceptance of the reformative theory is, in a large measure, a reaction to the conservative approach to the question of punishment. The extreme inclination towards the reformative theory may be as dangerous as the complete acceptance of the old code of punishment. It is true that, in the olden days, too much attention was paid to the *crime*, and *not* to the *criminal*. It is also true that the criminals are *not* generally ordinary human beings. They are mentally diseased abnormal human beings; but if all murderers are considered as innocent and given a lenient treatment, is it not possible that even ordinary sane people might be tempted to commit crime, in view of the lenient attitude of law towards the crime ? *This theory may be effective in the case of the very young and the completely insane offenders, but the deterrent element in punishment must be present.*

(4) *The Retributive Theory of Punishment.* — While discussing the history of Administration of Justice, it was noted that punishment by the State is a substitute for private vengeance. In all healthy communities, any crime or injustice stirs up the *retributive indignation* of the people at large, and according to this theory, a rational system of Administration of Justice must attempt to satisfy this *emotion of retributive indignation.* This kind of punishment will *not only* satisfy the primitive spirit of private vengeance in the wronged, *but also* quench a similar feeling in the society at large.

Though the system of private revenge has been suppressed, the instincts and emotions that lay at the root of these feelings, are yet present

in human nature. Therefore, according to this theory, this *moral satisfaction* that the society obtains from punishment *cannot* be ignored. On the other hand, if the criminal is treated very leniently or even in the midst of luxury, as the reformative theory would have it, the spirit of vengeance would *not* be satisfied, and it might find its way through private vengeance. Therefore, punishment, instead of preventing a crime, might indirectly promote it. According to this theory, *an eye for an eye and tooth for a tooth* is a complete and self-sufficient rule of natural justice.

Unfortunately, this theory ignores the *causes* of the crime, and it hardly attempts to remove the causes. A mere moral indignation can hardly prevent crimes. It is quite possible that the criminal is as much a victim of circumstances as the victim himself might have been.

Further, whereas other theories regard punishment as a *means* to some other end, this theory looks on it as an *end* in itself. It regards it as prefectly legitimate that evil should be returned for evil, and that as a man deals with others, so should he himself be dealt with. It is unfortunate that *this theory overlooks the fact that two wrongs do not make a right.*

Retribution as expiation

There is another interpretation of the retributive theory, which considers punishment as a form of expiation. To suffer punishment is to pay a debt due to the law that has been violated. *Guilt plus punishment is equal to innocence.* According to this view of the retributive theory, the penalty of wrong-doing is a debt which the offender owes to his victim, and when punishment has been endured, the debt is paid, and the legal bond forged by the crime is dissolved. Therefore, the *object of true punishment* must be to substitute justice for injustice. To compel the wrong-doer to restore to the injured person that which is his own by such *restoration and repentance,* the spirit of vengeance of the victims is to be satisfied.

The Theory of Compensation. — According to this theory, the object of punishment must be *not merely* to prevent further crimes, but also to compensate the victim of the crime. This theory further believes that *"the main spring of criminality is greed, and if the offender is made to return the ill-gotten benefits of the crime, the spring of the criminality would be dried up." (Dr. Sethna)*

Though there is considerable truth in this theory, it must be pointed out that *this theory over-simplifies the motives of the crime,* and the motive of crime is *not* always economic. Offences against the State, against justice, against religion, against marriage, and even against the person, may *not* always be actuated by the economic motives. There may be other complicated motives. In such cases, the theory of compensation may be neither *workable nor effective.* Quite often, even in the case of offences actuated by economic motives, the economic condition of the offender may be such that compensation may *not* be available. Therefore, this theory can at best play a subordinate role in the framing of a penal code.

Critically examine the various theories of punishment, and state which theory will be able to meet the ends of justice more in the present context.
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Conclusion regarding the Theories of Punishment

By way of conclusion, it may be said that the administration of criminal justice *cannot* have any *one* of the above purpose as the single standard of

punishment. *A perfect penal code must be a judicious combination of all these various purposes of punishment.*

No theory of punishment is a complete answer by itself. As has been said, all theories of punishment are not mutually exclusive.

If by the retributive theory is meant pure vengeance, it *cannot* be accepted. However, it does *not* mean that. In its true sense, it involves the working of *Nemesis*. The real idea behind retribution is to make the offender realise — by a process of reformative detention — the heinousness of his crime, thus *preventing him and deterring others* at the same time.

In the words of *Dr. Sethna,* the theories of retribution, reformation, determent and prevention go hand-in-hand, and exist for the preservation of the moral order, the protection of society and the rehabilitation of the offender himself. In fact, this forms the essence of the Synthetic School of Jurisprudence advocated by *Dr. Sethna.*

KINDS OF PUNISHMENT

(1) Capital Punishment

In the history of punishment, capital punishment has always occupied a very important place. In ancient times, and even in the middle ages, sentencing offenders to death was a very common kind of punishment. Even what might be considered as minor offences in modern criminal law attracted the death penalty in those days. In England, there was a time when there were as many as 200 felonies for which the punishment was the death penalty. Even the offence of theft of property worth more than two shillings could attract the death penalty. And even as late as the middle of the seventeenth century, the penalty for the offence of forgery was death.

Then there began a movement in the eighteenth century, which raised a voice of protest against the inhuman nature of punishment. *Bentham* may be considered to be the spearhead of this movement. He analysed the causes of crime and showed how punishment was inadequate. According to him, punishment itself was an evil, but a necessary evil. No punishment was to be inflicted unless it brought greater good.

The *object* of capital punishment can be said to be *twofold.* By putting the offender to death, it may *instil fear in the minds of others and make a lesson out of it.* Secondly, if the offender is *an incorrigible one*, by putting him to death, it *prevents the repetition of the crime.* But it is evident that it is *not* based on the reformative object of punishment; in a sense, it is a step of despair.

There are many arguments for and against capital punishment.

Arguments against Capital Punishment

(i) Those who denounce this kind of punishment argue that capital punishment has *not* served its *deterrent object* at all. For example, in certain States of the United States of America, where the death penalty

has been abolished, there are fewer serious crimes than in those States where capital punishment is retained. If capital punishment had the deterrent effect, it is supposed to have, crimes in the former States ought to have increased, and crimes in the latter States ought to have decreased. Therefore, it is argued that *the statistics do not prove the deterrent effect of capital punishment.*

Abolition of capital punishment has been a *recent experiment in England* and the immediate results are indeed encouraging. The experiment is worth a trial in India also.

(ii) The punishment may be preventive, but at what cost, and with what justification ? Crimes are *committed very often, not by normal human beings, and not under normal circumstances. It is not even certain that a murderer would repeat the murder again.* He might have committed this heinous crime under the most extra-ordinary circumstances. If law were to kill that man, it can have the *superficial satisfaction* of having prevented a crime which probably would never have been committed. But, in its anxiety to prevent a crime, the State itself has committed the greatest crime of taking away the life of a man. As *Professor Henting* puts it, "........ I see in capital punishment, a means of punishment whose advantages can be obtained by other means, and whose disadvantages *cannot* be prevented in any other way than by abolishing it."

(iii) *Professor Henting* draws attention to another salient defect of capital punishment. According to him, no *thinking person can claim that our law of evidence and the law of procedure are foolproof, and always lead us inevitably to the truth.* It is possible that there are judicial errors, and in such cases, capital punishment once awarded *cannot be revoked.* Therefore, it is argued that this punishment is *neither effective nor just.*

Thus, there have been cases where after execution of an alleged murderer, the true murderer is caught. But can the mischief be remedied ? It is, therefore, better to save *nine* murderers from capital punishment than inflict it on *one* man who may be, in fact, innocent.

Arguments in Favour of Capital Punishment

(i) On the other hand, others argue that there may be some offenders who are not only *incorrigible*, but who are immensely dangerous to the society, and there is no reason why society should be burdened with maintaining such people. *If you cannot cure, and if this incorrigible element is harmful to human society, why not quietly remove it ?*

(ii) Another argument in favour of capital punishment is that punishment by the State *is a substitute for private revenge.* If a murderer is *not* punished with death, it is quite possible that other relatives of the victim might murder the murderer, and thus a chain of murders might set in. So long as human emotions are powerful, and so long the powers of vengeance prevail, capital punishment, it is argued, is a necessary kind of punishment.

Conclusion

In conclusion, it may be said that though capital punishment serves

some purposes, in the present context, out of respect of human dignity and possibility of reforming the character of the offenders, an experiment of abolishing capital punishment might be worth a trial.

(2) Deportation

Next to capital punishment, a method of elimination of incorrigible or dangerous offenders is the punishment of deportation. In India, It used to be called *transportation*. This could hardly be a solution to the problem. *If a man is dangerous in one society, and if he is let loose in another society, he is likely to be equally dangerous there*. Even if a separate colony or settlement were to be created for deportation of such offenders, the problem of maintaining such settlement might create a number of difficulties, in addition to such colony having a *degrading influence on the character of the offenders*. Therefore, this kind of punishment was abolished in England long ago, and now, it has been abolished in India also.

(3) Corporal Punishment

The punishments of flogging, caning, whipping and torture fall under this head. This was a very common kind of punishment in the ancient and the mediaeval times. The *main object* of this kind of punishment is *deterrence*. It has been long ago realised that this kind of punishment is not only *inhuman*, but also *ineffective*. The person who undergoes this kind of punishment may become *more anti-social than he was before*. The criminal tendencies in him might be hardened — reforming him might become impossible.

Though whipping was one of the kinds of punishment provided in the Penal Code, it has now been abolished. It is indeed a matter of surprise, that some countries still have this kind of punishment in their legal systems. Thus even to-day, caning is a mandatory punishment (in addition to a jail sentence) *in Singapore*, and *some Arabian states*, for offences like robbery, rape, attempted murder, drug trafficking etc.

(4) Imprisonment

Imprisonment is a kind of punishment which, if properly used, can serve all the three objects of punishment. It can be *deterrent*, because it makes an example of the offender to others. It can be *preventive*, because it disables the offender, at least for some time, from repeating the offence; and it might, if properly used, give opportunities for *reforming* the character of the offender.

Solitary Confinement

Solitary confinement is an aggravated kind of imprisonment. This kind of punishment seeks to fully exploit the sociable nature of the man, and by denying him the society of his fellow beings, it tries to inflict pain on him.

It has been felt by many criminologists that this kind of punishment is *inhuman* and *perverse*. It is possible that this might convert a man with sound mental-health into a lunatic. If used in excess, it may inflict permanent harm on the offender. Though in limited cases, if used in a proper proportion, this kind of punishment may be useful, yet if those limits

are surpassed, it is likely to be unnecessarily cruel. The Indian Penal Code, therefore, provides stringent limits to the extent and maximum duration of this type of punishment.

Indeterminate Sentence

Another kind of punishment, which may serve the reformative purpose to a greater extent, is the method of awarding an indeterminate sentence. In this case, the accused is *not* sentenced to imprisonment for any fixed period. The period is left indeterminate at the time of the award, and when the accused shows improvement in his character, the sentence may be brought to an end. This kind of sentence serves the reformative purpose to a considerable extent, as even in prison, the offender has a *very strong motive to reform himself.* This type of imprisonment has been successfully tried in the United States of America, and its results are very encouraging.

(5) Fine

Some criminologists are of the opinion that the punishment of fine, addition to serving its *deterrent* object, also serves *three* more purposes. *Firstly*, it helps to support the prisoners; *secondly*, it can provide expenses for the prosecution of the prisoners; and *thirdly*, it may be used for compensating the aggrieved party. This kind of punishment may be very useful in cases of hardened criminals. But care must be taken to see that heavy and excessive fines, which would almost result in forfeiture of the property of the offenders, *should not* be inflicted. Moreover, the facilities for collecting fines must be created in such a way that levying of fine may not inevitably drive the offender to the prison on account of his inability to pay the fine.

In Indian Courts, it is a very common practice to award both imprisonment and fine, with a further period of imprisonment *in case the fine is not paid.*

CIVIL JUSTICE

Primary and sanctioning rights

Civil proceedings are instituted with the object of enforcing a person's rights. These rights may be classified into *primary* and *sanctioning rights.*

Write a short note on : Primary and sanctioning rights.
P.U. Oct. 97

A *primary right* is a right *arising out of conduct,* or as a *jus in rem,* while a *sanctioning right* is one which *arises out of the violation of another right.* If *X* enters into a valid contract, then, *X's* right to have the contract performed is *primary right,* and if the contract is broken, his right to damages for the loss caused to him for the breach of contract is a *sanctioning right.*

A *primary right* may be enforced by *specific enforcement,* and a *sanctioning right* is enforced by sanctioning *enforcement.* Specific enforcement lies in either (a) specific performance, *e.g.*, delivery of a rare antique, or (b) specific restitution, *e.g.*, restoring a person to his *status quo.*

Sanctioning rights are : (1) the rights to be compensated by damages by the wrong-doer; *or* (2) the right to exact the imposition of pecuniary penalty on the wrong-doer by *penal action.* The first is divided into *two*

types : (a) Restitution and (b) Penal redress. *Restitution lies in restoring the plaintiff to his original position,* while *penal redress* involves restitution of all benefits which the offender derives from his wrongful act, *plus* a full redress for the plaintiff's loss.

Penal and remedial proceedings

Legal proceedings can be divided into *five kinds*, namely, (1) action for penal redress; (2) penal actions; (3) criminal prosecutions; (4) actions for specific enforcement; and (5) actions for restitution.

The *first three* proceedings are commonly known as penal, because the ultimate purpose of the law is, in whole or in part, the punishment of the wrong-doer. For, whether he is imprisoned *or* made to pay a pecuniary penalty, the person is undergoing some form of punishment. Whereas in the other two, there is no penal element, the idea of punishment is entirely foreign to them, and hence they may be termed as *remedial*. This distinction is of a greater importance in the case of penal and remedial proceedings than in the case of civil and criminal liabilities. The fact is that *all* criminal proceedings are penal, whereas the converse is *not true* in *all* cases, for, as seen above, there are instances where a civil proceeding may also be penal.

However, a controversy has arisen in so far as penal and remedial liability is concerned, for it has been *held* that even criminal proceedings may only result in threats, *e.g.*, release on probation; similarly an action for specific enforcement may also result in a threat of punishment, *i.e.*, if it is not obeyed. It must, therefore, be admitted that this somewhat blurs the distinction between the two kinds of remedies, and puts to naught the contention that the distinction between penal and remedial proceedings is of great importance.

SECONDARY FUNCTIONS OF COURTS OF LAW

Write a short note on : Secondary functions of a court of law.
P.U. Apr. 97

The *primary* function of a Court of law is the *administration of justice*, *viz.*, the application by the State of the *sanction of the physical force* to the rules of justice. It is to administer *justice* that the tribunals of the State are established. But there are *five secondary functions* which the Courts also perform. They are :

1. Petition of right

In England, proceedings against the Crown can be taken only by a petition of right in a Court of law which determines the rights of the parties. This is *not* administration of justice, strictly and properly so called, for the *essential elements of coercive force is lacking*. The State is to judge its own cause, and *cannot* exercise constraint against itself.

2. Declaration of right

A person may seek the assistance of a Court of justice, *not* by way of *obtaining redress, but* by way of having it *declared* that he has or has not a certain right. The Court of justice, after hearing the parties, either makes or refuses to make the necessary *declaratory order*.

3. Administration

Courts of justice sometimes undertake the *management* and *distribution* of property. Examples are the administration of a trust, the liquidation of a company etc.

4. Titles to right

These are all those cases in which judicial decrees are employed as the means of *creating, transferring* or *extinguishing rights, e.g.*, an adjudication of bankruptcy, a grant of a probate or letters of administration *etc.*

5. Supervision of lower courts

Superior Courts are often armed with the power of supervising the Courts below them. Such a power is given to the High Courts in India by Art. 227 of the Constitution.

CHAPTER V

THE SOURCES OF LAW

The term "sources of law" is a frequent victim of confusion, because the term is capable of having more than one meaning. Thus, the followers of the philosophical school treat under this topic even some of the deepest problems of legal philosophy. Thus, *Gurvitch* has pointed that the question of the *source* of law is *only one aspect* of the general study of the *validity* of law.

The *two main sources* of law are :

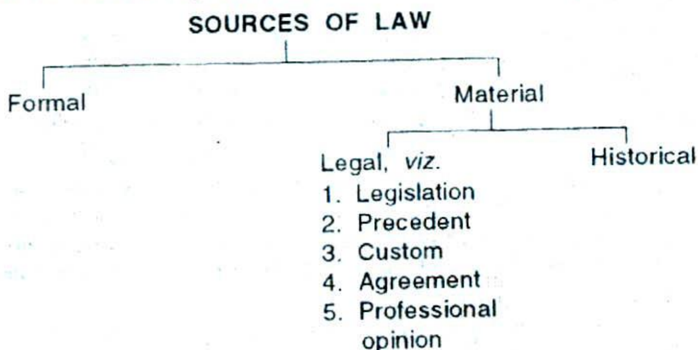
1. Formal, and
2. Material.

Material sources can further be sub-divided into :

(a) Legal sources, and

(b) Historical sources.

This can be summed up as under :



What are the sources of law ? Which source, according to you, is important ? Give reasons.
P.U. Oct. 98

1. FORMAL SOURCE

What are the major and minor sources of law ? Which sources, according to you, are important ?
P.U. Oct. 99

A formal source of law is defined by *Salmond* as that from which a rule of law derives its *force* and *validity*. The formal source of the law is *the will of the State*, as manifested in statutes or decisions of the Courts. It is that from which the *authority* of the law proceeds.

However, this approach depends upon the particular definition of law adopted by *Salmond*. If law is regarded as being created by the will of the State, then *that* is the formal source of law. If law is the command of the sovereign, then such sovereign is the formal source.

However, looked at from another angle, one could reach the conclusion that the formal source of law is to be found elsewhere. If law is valid because it is the embodiment of natural law or absolute justice, then the source of law is the ideal laid down by us. If law is valid because it is the product of an inner sense of right, then such sense of right is the source

of law. This is the view adopted by the historical school. Thus, *Del Vecchio* regards the source of law as being the *nature of man.* If law is valid because it is the product of custom, then the *habits of the people are the source of law.* The followers of this view thus do *not* regard the State as the source of law.

2. MATERIAL SOURCES

The material sources of law are those from which is derived the *matter,* though *not* the *validity,* of the law. The *matter* of the law, as stated above, may be drawn from all kinds of *material* sources.

Kinds of material sources

Material sources of law are of *two* kinds, — *legal and historical.*

"The legal sources are the only gates through which new principles can find entrance into the law."—Comment.
B.U. Apr. 95

(a) Legal

Legal sources are those sources which are the instruments or organs of the State by which legal rules are created, *e.g.,* legislation and custom. They are authoritative. They are allowed by the law Courts *as* of *right.* They are the gates through which new principles find their way into the realm of law.

(b) Historical

Historical sources are sources where rules, subsequently turned into legal principles, were first to be found in an unauthoritative form. They are *not* allowed by the law Courts as of *right.* Some examples are religion, morality and opinion of text writers. They operate only *mediately* and *indirectly.*

To take a concrete illustration, one can say that both Acts of Parliament and the works of *Bentham* are material sources of English law. Yet, whereas the Acts of Parliament become law forthwith and automatically, what *Bentham* says *may or may not* become law, and even if it does, it does so, *not* as matter of right, *but* because of its acceptance by the legislature or the judiciary.

In the same way, decisions of the Supreme Court of India are binding precedents for all other Courts in our country, but the decisions of the U.S. Supreme Court are *not* binding in India, and they *may or may not* be recognised and followed in Indian courts.

Write a short note on : Legal and historical sources of law.
B.U. June 96
Oct. 97
Oct. 98

In India, much of the early law is based on the precepts of religion. The Codes of Manu and Brehaspati were almost entirely based on religious precepts. Likewise, in Aurangzeb's reign, most of the law had its origin in the holy *Koran.* Similarly, *in ancient Iran,* most of the law was of a religious nature, embodied in the holy *Vandidad.*

Legal and historical sources distinguished

1. Legal sources are those sources which are recognised as *such by law itself.* Historical sources are those which lack formal recognition by the law. They are thus *destitute of legal recognition.*
2. The legal sources are *authoritative,* (*e.g.,* the decisions of English Courts are a legal and authoritative source of English law, but those of American Courts are, in England, merely a historical or unauthoritative source), whereas *historical sources are unauthoritative.*

3. The legal sources are allowed by the law Courts as of *right; historical* sources can stake no such claim.

Kinds of legal sources

Distinguish between legal and historical sources of law. What are the legal sources of the Indian legal system ?
B.U. Oct. 99

There are *five kinds* of legal sources. They are :

1. Legislation

Legislation is the making of law by the formal and expressed declaration of rules by some authority in the body politic, which is recognised by the Courts of law as competent for that purpose. Law which has its origin in legislation is called *enacted law*. It is also called *statute law* (See the next Chapter.)

2. Precedent

Precedents establish the law by the recognition and application of new rules *by the Courts themselves* in the administration of justice. Precedents produce *case-law*. (This is dealt with at length in Chapter VII.)

Judicial decisions form an important source of law. It was on the raw materials of custom that the judges fashioned up rules of law. Like sculptors working on marble, the judges worked on the raw material of custom supplied mostly by the merchants, and thus made a valuable contribution to the law of the land.

3. Custom

Law based on custom is known as *customary law*. In fact, *custom is one of the most fruitful sources of law*. Custom is to society what law is to the State. Each is the expression and realisation, to the measure of men's insight and ability, of the principles of right and justice. (See Chapter VIII.)

4. Agreement

An *agreement* may be defined as the expression by two or more persons, communicated each to the other (or others), of a common intention to affect the legal relations between them. The terms of an agreement constitute *conventional law* for the parties. Conventional law is that which is constituted by agreement as having the force of special law *inter partes*, in derogation of, or in addition to, the general law of the land.

Treaties and conventions between nations also fall under this head. Thus, a rule of civil law may be over-ridden by a treaty between two nations.

5. Professional opinion

Professional opinion of eminent jurists may be called *juristic law.*

In fact, juristic writing and professional opinion have played a very important role in legal evolution. In England, the trend was set by *Bracton*, and continued by such legal luminaries as *Glanvil, Coke* and *Blackstone*. Coming to recent times, in the field of private international law, the works of *Dicey* and *Cheshire* have become classics.

Lord Eldon once remarked that a writer who had held no judicial position could *not* properly be cited as an authority. However, this view has been gradually modified, and it has now become the convention that the works of dead authors could be cited, *not,* of course, as binding authorities, *but* as expert evidence as to the state of the law. Thus, *Lord Wright* once

paid a graceful tribute to *Pollock's Law of Torts* (in *Nicholls* v. *Ely Beet Sugar Factory Ltd.,* 1936, 1 Ch. 343).

In Bradford v. *Symondson* (1881 7 Q.B.D. 462), the judgment turned almost entirely on the discussion of the books of leading text writers on insurance. Similarly, in *Haynes* v. *Harwood* (1935 1 K.B. 146), the Court followed a conclusion reached by *Prof. Goodhart* in an article written by him in the Cambridge Law Journal.

In an interesting account of the part played by the text-book in the development of *American law* is given by *Roscose Pound in The Formative Era of American Law*. His view is that doctrinal writing has had more influence in America than in England, especially in the earlier times. Even to-day, that influence is *not* wanting, because the lists of courts are congested, the authorities are many, and there is thus a strong natural temptation to turn to any text-book which states the law in clear and definite terms. The *American Restatement of the law* is an interesting modern example of co-operation between the Bench, the Profession and the Law Teacher.

Sources of *law* and sources of *rights* distinguished

The sources of law may also serve as sources of *rights*. By a source of title of rights is meant some fact which is legally constitutive of rights. It is the *de facto* antecedent of legal *right,* just as a source of law is the *de facto* antecedent of a legal principle.

An examination of any legal system will show that, to a large extent, the same classes of fact which operate as sources of *law,* operate as sources of rights also. These two kinds of sources form intersecting circles. Some facts create law, but *not* rights; some create rights, but *not* law; some create both at once. An Act of Parliament is a typical source of law, while numerous private Acts, *e.g.,* an Act of Divorce, an Act granting a pension for public service, are clearly titles of legal *rights*. Judicial decision is a source of *rights* as between the parties, while it is a source of law for the *world at large*. Regarded as creative of *rights,* it is called a *judgment;* regarded as creative of *law,* it is called a *precedent.*

LITERARY SOURCES OF LAW

By literary sources of law is meant the original sources of law which emanate from the authorities on law. Thus, the *Institutes of Justinian* are considered as literary sources of *Roman law*. A literary source, being an original source, any commentary written on the original works *cannot* constitute the literary source of civil law. In England, the writing of some of the great jurists constitute the literary sources of English law, while the *Codes of Manu, Yajnavalkya* and *Narada* would constitute the literary sources of *Hindu law.* Similarly, the writings of such great jurists like *Abu Hanifa, Abu Yusuf and Imam Muhammad* would constitute the literary sources of *Mohammedan law.*

The term "literary sources", according to *Salmond,* is more used on the Continent than it is used in England. He considers the literary sources as pre-authoritative sources of the knowledge of law. Under English Law; the original sources would be the statute book, the reports, and the older and authoritative text-books.