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JURISPRUDENCE AND LEGAL THEORY

CHAPTER ONE

DEFINATION OF JURISPRUDENCE

It is extremely difficult to compose and forward a universal definition of Jurisprudence. Every jurist has his own notion of the subject-matter and proper limits of jurisprudence depend upon his ideology and the nature and character of the society.

Jurisprudence involves the study of general theoretical questions about the nature of law and legal systems, about the relationship of law to justice, morality and about the social nature of law. Jurisprudence as a science of law is primarily concerned with the regulation of human conduct in accordance with the set values, needs and goals of each society. As the values, needs and goals are of a changing character, the nature of jurisprudence also keeps on changing to cater to the need of a particular society.

The study of jurisprudence started with the Romans. The Latin equivalent of "jurisprudence" is jurisprudentia which means either "Knowledge of law" or "skill in law". Ulpian defines Jurisprudence as "the knowledge of things divine and human, the science of the just and unjust". Another roman jurist Paulus mentions that "the Jurisprudence is the Law and the Law is not to be deduced from the rule, but the rule from the law". The definitions provided by the Roman jurists are ambiguous and not sufficient but they put forward the idea of a legal science independent of the actual institutions of a particular society.

In England, the word jurisprudence was in use throughout the early formative period of the common law, but as a meaning it conveyed little more than the study of or skill in law. The word Jurisprudence began to acquire technical significance in the legal field in the early part of the 19th Century from the work of two prominent scholars namely Bentham and his disciple Austin. Bentham later on distinguished between examinations of the law as it is and as it ought to be (expositorial and censorial jurisprudence). Austin occupied himself with "expository" jurisprudence and he did the formal analysis of the structure of English Law. The concept of jurisprudence propagated by these two above named jurists has dominated legal thought up to the modern times.

However in the last few decades there has been a shift in the understanding and approach towards jurisprudence and jurisprudence today convey a much larger meaning than that is given by Austin. Even some Jurists like Buckland have stated that "The Analysis of legal concepts is what jurisprudence meant for the student in the days of my youth. In fact it meant Austin. He was a religion, today he seems to be regarded rather as a disease.

AUSTIN'S DEFINITION

Austin defines "jurisprudence as "Science of law which deals with analysis of the concepts or its underlying principles". To him, the appropriate subject of jurisprudence is positive law i.e. law as it is (existing law). It has nothing to do with the goodness or badness of law. Austin divided the subject into general and particular Jurisprudence.

To him general jurisprudence is the philosophy of positive law. It is related directly with those principles and distinctions which are common to all systems whereas particular jurisprudence is confined only to the study of any actual system of law or any portion of it. Hence for Austin, 'general jurisprudence' means "the science concerned with the expositions of the principles, notions and distinctions which are common to all systems of law". The concept of rights, ownership, duties, possession, property etc. comes under the province of general jurisprudence. 'Particular jurisprudence' according to Austin "is the science of any such system of positive law as now

actually obtains or once actually obtained in a specifically determined nation or specifically deter - mined nations". Austin stated that "Particular Jurisprudence is the Science of any actual system of law or any portion of it. The only practical Jurisprudence is particular jurisprudence".

Austin's classification of jurisprudence into general and particular has been criticised by many scholars like Salmond, Holland and other Jurists. Salmond shows the error in the idea of Austin as according to his idea he assumes that unless a legal principle is common to many legal systems, it cannot be dealt with in general jurisprudence. Salmond states that there may be different schools of jurisprudence but there are not different kinds of Jurisprudence. Jurisprudence is one integral social science. Salmond said that in reality the jurists are dealing with not different kinds of jurisprudence but different systems of law. Holland objects the idea of particular jurisprudence put forward by Austin as to him if jurisprudence is a science then all sciences it must be general and it is meaningless to call it "particular". Dias and Hughes point out serious vagueness in Austin's definition of general jurisprudence. They pointed out that Austin gives no explanation whether the common principles are those which are in fact found to be common or those which for some reason are treated as being necessarily common.

HOLLAND'S DEFINITION

Holland defines jurisprudence as "the formal science of positive law". According to Holland, jurisprudence is a formal or analytical science rather than a material science. Positive law is being defined by Holland as "the general rule of external human action enforced by a sovereign political authority". Hence jurisprudence according to Holland is not concerned with the actual material contents of law but with its fundamental conceptions as it is concerned only with the form and not with its essence. According to him jurisprudence is therefore, not the material science of these portions of law which various nations have in common but the formal science of those relations of mankind which are generally recognised as having legal consequences. Gray has criticised Holland and says that material rules of law are like clay and relations governed by these rules are like bricks. As bricks cannot be made without clay, therefore there cannot be any relationship if there is no material rule. Eminent jurists like Dias and Hughes and Buckland has also criticised Holland over his analogy of jurisprudence with 'geology'. They say that law is a not a mechanical structure like geological deposits.

SALMOND'S DEFINITION

Salmond defines jurisprudence as "the science of law" and by law he denotes the law of the land or civil law and this civil law is different from general law. He actually explains jurisprudence in two senses, the first being the 'generic sense' which is described as the 'science of Civil Law' and in the 'specific sense' which is described as 'the first principle of Civil Law'. According to Salmond civil law is the law which is administered by courts in the administration of justice.

According to Salmond jurisprudence in the specific sense includes theoretical jurisprudence as it deals not with the details but with the fundamental principles and conceptions. Salmond divides generic jurisprudence into :—

❖ **Legal Exposition** — the purpose of which is to set forth the contents of an actual legal system as existing at any time, whether past or present.

❖ **Legal History** — the purpose of which is to set forth the historical process whereby any legal system came to be what it is or what it was.

❖ **The science of legislation** — purpose of which is to set forth the law, not as it is or has been, but as it ought to be. It deals not with the past or present of any legal system but with its ideal future.

Salmond further divides jurisprudence in the specific sense into —

❖ Analytical jurisprudence — the purpose of which is to analyse without reference either to their historical origin or development.

❖ Historical Jurisprudence — the purpose of which is to deal with the general principles governing the origin and development of law. It is history of the first principles and conceptions of the legal system.

❖ Ethical jurisprudence — the purpose of which is to deal with the law from the point of view of its ethical significance and adequacy.

Salmond's definition has been criticised on the ground that he has narrowed down the field of jurisprudence by saying that it is science of civil law, and hence covers only particular legal system. But with the emergence of time the scope of jurisprudence has enlarged and hence this theory finds little acceptance in present times.

SCOPE AND UTILITY OF JURISPRUDENCE

When it comes to the scope of Jurisprudence there is no consensus or unanimity of opinion. Different authorities have provided different meanings and scopes of law and that has led to difference of opinions with regard to the exact limits of the field covered by jurisprudence. Austin deserves credit for the fact that he distinguished law from morality and theology and restricted the term to the body of rules set and enforced by the sovereign or supreme law-making authority within the limits permissible to them. Hence the study of jurisprudence was limited to the study of the concepts of positive law and ethics and theology fall outside the province of jurisprudence.

However with the passing of times there is a tendency to widen the scope the scope of jurisprudence and at present we include what was previously considered to be beyond the province of jurisprudence. The present view is that jurisprudence includes all concepts of human order and human conduct in state and society. Anything that is related with the order in the state and society falls under the domain of jurisprudence. It now includes political, social, economic and cultural ideas as well. It covers the study of man in relation to state and society. According to Lord Radcliffe jurisprudence is a part of history, a part of economics, a part of sociology, a part of ethics and a philosophy of life.

The significance of jurisprudence cannot be ignored in any manner whatsoever. It is contended sometimes that jurisprudence has got no practical utility as it is an abstract and theoretical subject. Salmond however does not agree with this view and according to him jurisprudence has its own intrinsic interest like other subjects of serious scholarship. It is as natural to venture on the nature of law as on the nature of light. Researches in jurisprudence may have long lasting effects on the whole of legal, political and social thought.

Jurisprudence also has practical value. In science with the advancement in technology generalisation has occurred in the various branches and they are more unified now than ever. Generality can also mean improvement in law. One of the primary objectives of jurisprudence is to construct and explain concepts serving to render the complexities of law in a more manageable and more rational manner. This help in solving the ambiguities of law clarifies the legal concepts correctly and vastly helps in practice.

Jurisprudence has got educational value as well. The logical analysis of legal concepts sharpens the logical technique of the persons who deals with law like the lawyers. Because of jurisprudence the lawyers not only concentrates on the legal rules and principles bit also on the social function of law. A proper understanding of the law of contract may require some understanding of economics etc. jurisprudence helps in understanding the law by valuing the need of other social sciences which are closely associated with law.

Jurisprudence is often said to be "the eye of law", it is the grammar of law. It throws light on the basic ideas and fundamental principles of law. By understanding the basic concepts and distinctions that exist in the field of law, a lawyer can find out the actual rules of law existing in a particular society at a given time. The study of jurisprudence also helps in achieving some logical training which is very necessary for the lawyers.

Jurisprudence helps the legislators by providing them a precise and unambiguous terminology. It relieves them of defining terms again and again in each legislation like terms like right, duty, possession, ownership etc. Jurisprudence also helps the judges and the lawyers in ascertaining the true meanings of the laws passed by the legislatures by providing the rules of interpretation.

CHAPTER TWO

ANALYTICAL POSITIVISM

At various times and places, jurists have made their approaches to the study of law from different angles. They have defined law, determined its sources and nature and discussed its purpose and ends. For understanding their points of view, the jurists are divided into different schools on the basis of their approaches to law. There may be occasions when any certain jurists may not fall within the strict boundaries of any school. However inspite of this the schools are helpful in understanding jurisprudence and legal philosophy.

The persons belonging to the profession of law gave great attention to the study of law and they were also concerned with the positive law which is not bothered with the vague and abstract notions of the natural law. They laid more and emphasis on the analysis of positive law and they came to be called "positivists" or "analysts". The positivist movement started at the beginning of the 19th century. Prof. H.L.A Hart states that the term "positivism" has many meanings which are as follows :—

i) The laws are commands and this is the first meaning of the term "positivism". This meaning is associated with Bentham and Austin who are the pillars and founders of British Positivism.

ii) The second meaning is that the analysis of legal concepts is worth pursuing, distinct from sociological and historical inquiries and critical evaluation.

iii) The third meaning is that decisions can be deduced logically from pre-determined rules without recourse to social aims, policy and morality.

iv) The fourth meaning is that moral judgements cannot be established or defended by rational arguments or evidences.

v) The fifth meaning is that the law as it is actually laid down has to be kept separate from the law ought to be. This meaning is the one which is currently attributed with positivism.

A total separation of the law as it is and the law as it ought to be cannot be done uniformly, however there must be some degree of separation for practical purposes.

The Analytical school is known by different names. It is sometimes called the Positivist school because the persons who have developed this school concern themselves with the law as it is i.e. positum. The positive school was very much predominant in England and is also popularly known as the English School. It is also known as the Austinian School since this approach was developed by John Austin. It is also called imperative school because it treats law as the command of the Sovereign. The term positivism was invented by Auguste Comte. The main task of the analytical school is the systematic exposition of the legal ideas present in the maturer system of law. It begins with the actual facts of law as it sees them today. It endeavours to define those terms, explain their meaning and show the relations to one another. The analytical school takes law as a command of the sovereign. It puts emphasis on legislation as a source of law. This school regards law as a closed system of pure facts from which all the norms and values are excluded. The main importance of the analytical school lies in the fact that it brings about precision in legal thinking. It has knowingly excluded all external considerations which fall outside the scope of law.

EXPONENTS OF THIS POSTIVIST / ANALYTICAL SCHOOL

JEREMY BENTHAM

The first exponent of this School is Jeremy Bentham. In his work named "limits of jurisprudence Defined" written in 1872 he rejected the clichés of natural law and expounded the prin-

ciples of utility with scientific precision. He divided jurisprudence in to expository and censorial jurisprudence. The former deals with the law as it is and the latter deals with the law as it ought to be. Bentham's analysis of censorial jurisprudence is indicative of the fact that the impact of natu - ral law had not completely disappeared and that's the reason of why he talked about utility as the governing rule. Perhaps because of this reason he is not called the father of analytical school. He however believes that law is the product of the sovereign and the state. Thus with Bentham came in England the advent of positivism, sovereignty, command duty and sanction-the basic elements of Analytical Jurisprudence which were subsequently borrowed by John Austin. As a great social and legal reformer he wanted to clarify the then existing English law which was shrouded by common law, natural law, equity and' fiction, judge-made law and moral law.

According to Bentham "law may be defined as an assemblage of signs, declarative of a volition, conceived or adopted by the sovereign in a state, concerning the conduct to be observed in a certain case by a certain person or class of persons, who in the case in question are or are supposed to be subject to his power". Some of Bentham's ideas were carried forward and elaborated by the other exponents of this school.

JOHN AUSTIN

Austin's work called "the province of jurisprudence determined" was the first systematic and comprehensive treatment of the subject which expounded the analytical positivist approach and as a result of his work Austin is known as the father of the Analytical School of Jurisprudence. Austin built on the foundation of expository jurisprudence laid by Bentham and did not concern himself with extra-legal norms.

According to Austin, positive law has three main features. The first says it is a type of command. The second says that it is laid down by a political sovereign. The third says it is enforceable to sanction.The relationship of superior to inferior consist for Austin in the power which the former enjoy over the other i.e…., his ability to punish him for disobedience .the idea of sanction is built in Austin in notion of command. There are commands which are laws and commands which are not law. Austin distinguishes law from other commands by their generality. Laws are general commands. However there can be exceptions. There can exist laws such as acts of attainder which lack the character of generality. According to Austin, law is law only if it is effective and it must be generally obeyed. Perfect obedience is not necessary without general obedience. What is sufficient for a legal theorist is that obedience exists. Certain laws are set up by political superiors and are positive law and there is other which are not set up political superiors. The second category covers voluntary association and clubs. According to Austin ,laws strictly so called are one particular species of set rules and consists of only those which are set by a sovereign power to a member of an independent political society wherein that person or body is sovereign or supreme A command is wish/desire to another so that he shall do a particular thing or refrain from doing a particular thing .in case of non-compliance with command ,he has to for evil consequences .the sanction behind law is the evil which is to be influenced in case of disobedience.

Austin most important contribution to Legal theory was substitution of the command of the sovereign for any ideal of justice in the definition of law. He, defined law as "a rule laid down for the guidance of intelligent being by an intelligent being having power over him" law is strictly diverged from justice. It is based on the power of a superior. According to Austin laws are two kinds, laws of god and Human laws. Human laws are divisible into Laws properly so called (positive law) and Law improperly so called. The former are law set by political superiors to political subordinate or laws set by subjects as private person in prudence of legal rights granted to them. Laws improperly so called are those laws which are not set directly or indirectly by a political superior .In this category are diverse type of rules, such a rules of clubs , law of fashion, laws of

natural science ,the rules of so called international law .Austin gave these the name of positive morality. Laws improperly so called also included a final category called "laws by metaphor which covered expression of uniformities of nature.

CRITICISM OF AUSTIN THEORY OF LAW

Austin's theory has been criticized on the following grounds :—

LAW BEFORE STATE :—

a. The definition of law in terms of state has been utilized by jurists belonging to the historical and sociological schools. According to the school law is prior to and independent of political authority and enforcement. A state enforces it because it is already law. It is not correct that it become law before the state enforces it.

b. Although Salmon is not a supporter of the imperative theory .he does not accept the criticism of historical school. He point out that the rule which were in existence prior to the existence of a political state were not law in the real sense of the terms. They resembled laws. They were primitive substitutes for law but not laws.

c. Pollock observes "not only law,but law with a good deal of compelling its observance and induced before there was and regular process of enforcement at all".

d. Lord Bryce writes, "law cannot be always and everywhere the creation of state because instances can be ad descends where law existed in a community before there was any state".

GENERALITY OF LAW :—

a. According to Austin, law is a general rule of conduct, but that is got practical in every sphere of law .law is the sense of legal system can be particular .the requirement that law should be general is extremely difficult to maintain.

b. There are degrees of generality .some particular precepts may concern especially important person as king. (e.g.) abdication act .it has to be considered as a part of law.

LAW AS COMMAND :—

a. According to Austin, all laws cannot be expressed in terms of command. The greater part of legal system, consists of laws empower people by certain means to achieve certain results. To regard a law conferring a power on one person as in fact an indirect to another is to distort in nature.

b. The term "command" suggests the existence of a personal commander. In modern legal system, it is impossible to identify any commander in this person sense.

c. Laws differ as they can and do continue in existence long after the extrinsic of the actual law giver. The notion of an implied or facet command is suspect. An implied command is no command.

d. The bulk of English law has been created neither by ordinary legislation nor by delegation legislation, but by the decision of the courts.

SANCTION :—

a. Austin's definition cannot be applied to a modern democratic country whose machinery is employed for the result of the people.

b. The sanction behind law is not the force of the state but the willingness of the people to obey the same.

c. Force can be used only against a few rebels and not against the whole society. If law is opposed by all the people, no force on earth can enforce the same.

d. Sanction is not essential of law. If we accept Austin's definition, the whole of law will have to be excluded from the scope of positive law.

e. The writers of historical, sociological and philosophical school of law criticize the idea of sanction as international law and conventions are not backed by only authority, yet they are obeyed like any other law of state Pollock observes "Law is enforced on account its validity. It does not become valid merely because it is enforced by the state".

NOT APPLICABLE TO INTERNATIONAL AND CONSTITUTIONAL LAW :—

a. International law is not the command of any sovereign, yet it is considered to be lawby all conserved. It does not apply to constitutional law also. As a matter of fact, constitutional law of country defines the power of various organs of the state. Nobody can be said ton command himself.

b. Austin's definition cannot be applied for Hindu, Mohammed and the Canon law. These laws came into existence long before the state began to perform legislative functions.

DISREGARD OF ETHICAL ELEMENTS :—

a. The main criticism of Salmond is that the theory disregards the moral or ethical elements of law. The end of law is justice. Any definition of law without reference to justice is inadequate.

b. The view of Salmond is that Austin's definition of law refers to "a law" and not "the law". The term "a law" is used in a concrete sense to denote a statute while the term "the law" is used in an abstract sense to denote legal principles. A good definition of law must deal with both aspects of law.

PURPOSE OF LAW IGNORED :—

Austin's theory of sovereignty ignores the purpose of law. Burkland writes "This at first right, looks like circular reasoning. Law is law since it is made by the sovereign. The sovereign is sovereign because he makes the law. But this is not circular meaning. It is not reasoning at all. It is definition. Sovereign and law have much the same relation as centre and circumference.

SALMOND'S CRITICISM ON AUSTIN'S THEORY OF LAW :—

a. Austin's theory of law is one sided and inadequate; it does not contain the whole truth. It eliminates all elements except that of force. Austin has missed the ethical element in law or the idea of right or justice.

b. Law is the declaration of a principle of justice. As Austin's theory of law does not take into consideration the purpose of law, it is not an adequate definition of law.

c. Austin's theory not only misses the ethical aspect of law but over emphasizes on in imperative aspect.

d. According to Salmond, "All legal principles are not commands of the state and those which are at the same thing and in their essential nature, something more, of which the imperative theory takes no account".

e. Law in abstract sense is more comprehensive in its signification than law in the concrete sense. To quote Salmond "The central idea of juridical theory is not lex but Jus, in gestez and recht".

H.L.A. HART

There is a gap in the thinking between the thinking of John Austin and prof. H.L.A. Hart. John Austin's model of positivism conditioned by anti-natural law scientific theories and Jeremy Bentham's legal thinking emanated in his Lectures on Jurisprudence in the Universal of London

finally concretized in Province of Jurisprudence Determined. Hart in his work called the "the concept of Law" highlighted the various difficulties and inadequacies besetting Austin's theory of Jurisprudence. The concept of law is thus a critical evaluation of the development of positivism in law from John Austin to Hart. Indeed Professor Hart has been careful to exclude all the defects from which John Austin's jurisprudence has been suffering and thereby has enunciated a much reformed and socially oriented positivistic theory of law.

Hart has been anti-Austinian who has rejected the Austinian model as it is exclusively based on the trilogy of command, sanction and sovereign which Austin described as 'key to the science of Jurisprudence'. Such pattern, says Hart, is exclusively applicable to criminal pattern of law and is inapplicable to modern legal systems. Hart's analysis of legal system is quite elaborate and sociological and not merely a kind of command or orders of gunman or gangster.

In place of Austin's monolithic legal structure Hart provides a dual system of law consisting of two types of rules which he describes as primary and secondary rules. Primary rules are those which lay down standards of behaviour and are rules of obligation-that is the rules which impose duties. The Secondary rules, on the other hand, are such rules which specify the rules in which primary rules may be ascertained, amended, rescinded and enforced. The addition of secondary rules to a set of primary rules is, says Hart, 'a step forward as important to society as the invention of the wheel'. The combination of primary rules of obligations and the secondary rules of recognition, says Hart, is the 'Key to the science of Jurisprudence'. Thus it is the union of primary and secondary rules which constitute the core of the legal system and can be justly regarded as the 'essence' of law.

Hart's theory has been criticized by various jurists including Lloyd who states that this demar - cation into primary and secondary rules provides a tool of analysis that has confused both jurists and political theorists. Dworkin has criticized the theory of Hart by stating that the theory has failed to take into account of "principles".

KELSON

Kelsen introduces his theory as being a theory of positive law. This theory of positive law is then presented by Kelsen as forming a hierarchy of laws which start from a Basic Norm or grundnorm where all other norms are related to each other by either being inferior norms, when the one is compared to the other or superior norms. The interaction of these norms is then further subject to representation as a static theory of law or as a dynamic theory of law.

Kelsen's strict separation of law and morals was an integral part of his presentation of the pure theory of law. The application of the law, in order to be protected from moral influence or political influence, needed to be safeguarded by its separation from the sphere of conventional moral influence or political influence. Kelsen did not deny that moral discussion was still possible and even to be encouraged in the sociological domain of inter subjective activity. However, the static operation of the pure theory of law (see section below) was not to be subject to such influences.

Kelson's gives his point of view of the interaction of state law and international law as these are especially guided by the understanding of political sovereignty. For Kelsen, the assessment of inter - national law is that it represents a very primitive from of law in distinct contract to the highly developed forms of law as may be found in individual nations and states. As a result, Kelsen emphasizes that international law is often prone to the conduct of was and severe diplomatic measures (blockade, seizure, internment, etc.) as offering the only corrective measures available to it in regulating the conduct between nations. For Kelsen, this is largely inevitable due to the relative primitiveness of international law in contemporary society.

His theory has been criticized on the following grounds :—

a. His conception of "grundnorm" is vague. It is a fiction incapable of being traced in legal reality.

b. Every rule of law or norm derives its efficacy from some other rule or norm standing behind it. But the grundnorm has no such rule or norm behind it.

c. He has not given any criterion by which the "minimum of effectiveness" is to be measured.

CHAPTER THREE

HISTORICAL SCHOOL OF JURISPRUDENCE

In Germany also the historic conception of law was taken up and developed in the latter part of the eighteenth century by Herder in his work 'Ideas on the Philosophy of the History of Human Race'. This heralded the advent in 19th century of German Historical School represented by forerunners of Savigny, Schelling (1775-1854), and Hugo (1768-1844) both of whom rejected a natural theory of law and advocated law in fact, independently of legislation which develops itself as suited to the need and circumstances of each community. The essence of law, according to Hugo, is its observance, acceptance by the people because its harmony with the paramount sentiments and practices of the people. Law is not a declaratory of moral principles of reason or of human nature. It is declaratory of principle of progress and growth discovered by human experience of administering of justice. As Sir Frederick Pollock puts it, 'the historical method is nothing else than the doctrine of evolution applied to human societies and institutions'. However, of the greatest German jurists of Historical School the name of Friedrich Karl Von Savigny (1770 -1861) is remembered conspicuously as the unrivalled and unchallenged founder of Historical Jurispru - dence. He was the 'Darwin' of Historical School of Jurisprudence. His last published work appeared only six years before The Origin of Species (1860) and was still alive when Darwin's work appeared.

The theory of evolution was thus not new which Savigny had already propounded. Savigny, therefore, ushered the beginning of Historical School-his doctrines regarding law were represented in his famous pamphlet 'On the Vocation of Our Age for Legislation and Jurisprudence 1814'. Factors which led to its growth in Germany and elsewhere may be summarized below:-

a. It was a reaction against the a priori notions of natural law philosophy. The philosophers hitherto measured all situations and problems by referring them to an idealized picture of social order without studying law in relation to social growth and legal development.

b. The natural law thinkers had thought of law which was always the same static and unchangeable. They failed to see the law which had grown and developed from the past.

c. The natural law philosophers believed in ideal principles of law as revealed by reason. It did not look to history, traditions, customs, habits and religion as true basis of law.

d. The Historical School was a reaction against the French Revolution which itself was a product ofnatural law philosophy with its gospel of liberty, equality and fraternity of men and nations. In Germany a movement grew up which was romantic, irrational and strongly nationalistic in character and which found its expression in art, literature, history, political theory and law. Nations now started revolting against Nature.

The basic characteristics of the Historical School of Jurisprudence are as follows :—

1. Law is found. It cannot be made. It does not consist of an abstract set of rules imposed on society by any political or other agency.

2. Law, like language, grows and evolves and has deep roots in social, economic and other factors. The growth of law is thus a silent organic process and bears a clear and distinct imprint of the society where it develops.

3. Laws cannot be of universal validity nor can they be constructed on the basis of certain rational promises or eternal principles.

4. Legislation, therefore, has subordinate role. Custom is the typical form of law, the sanction behind custom being the habit of obedience, social standards of justice. etc.

5. As society progresses, Volkegistalone cannot discharge the function which it did hitherto.

Judges and lawyers also have a part to play in law making.

6. Legislation appears at the final stageand hence preparation of a code presupposes generations of jurists who cleared the ground for it.

SAVIGNY'S THEORY (VOLKEGIST THEORY)

The main points of the Volkegist theory of Savigny are as follows :—

1. According to Savigny law was not something which can be made or altered arbitrarily by law makers. The contents of law are essentially determined by the whole past of a people so it cannot be produced ab extra by an action of a wise law giver or by some inventive or master spirited people.

2. Law of a nation, therefore according to Savigny, is not the product of reason or command or will of the Sovereign but the instinctive sense of right possessed by every race or community. In other words, law is a product of 'internal silently operating forces'.

3. Law is found and not made. It is to be found in popular faith, common convictions, customs, traits, habits, traditions which in course of time grow into legal rules.

4. Like the language, the manners and constitution of anation, all law is exclusively determined by the nation's peculiar character which is otherwise called the Volkegist or spirit of the people.

5. Law cannot be universal or general in character. It is always peculiar, particular, limited-its nature and character depending upon the peculiar, traditions of each people. Law of a nation likes its language, manner and Constitution is peculiar to a people. Law grows with the growth and strengthens with the strength of the people and finally dies as the nation loses its individuality.

6. Savigny, therefore, favored customary law over legislations. As such he gives more importance to jurist than legislator the former representing the national spirit, i.e., Volkegist.

7. Savigny believed in the unbreakable continuity of law from the past to the present and future also. A law of a nation cannot be different from its past customs and traditions on which the existing and even future law can be based.

8. Savigny considered law an inextricable part of society. He viewed law as a part of social process and development which arises from silent forces which are not directed by arbitrary and conscious intention but operates in the way of customary law.

CRITICISM OF SAVIGNY

Savigny while advocating the role of evolution and growth in the development of law his approach towards law was vitiated in the following manner :—

1. He laid excessive emphasis upon the unconscious forces which determine the law of a nation and ignored the efficacy of legislation as an instrument of deliberate, conscious and planned social change. In modern developing societies like India legislation is being created, enacted and used as an important instrument of social change and social reform. As he underestimated the importance of legislation and took a pessimistic view of human power for creation of law to bring about social change so he is criticized for his 'juristic pessimism'.

2. Savigny emphasized the national character of law. While advocating national character of law he entirely rejected the study of German Law and took inspiration from Roman Law.

3. Volkegist itself is an abstract idea as indeterminable and vague as the natural law itself.

SIR HENRY MAINE

Maine began his work with a mass of material already published by the German historical already published by the German historical school. He inaugurated the comparative approach to

the study of law and history which was history which was destined to play an important role in the years to come. According to him, law develops in 4 stages:-

a. Commands of ruler believed to be in divine inspiration.

b. Commands crystalize into customary law.

c. Knowledge and administration of customs goes into hands of minority usually of a religious nature, due to weakening of original law makers.

d. Times of codes (solan's artic code or twelve tables in Rome).

Societies which do not progress beyond the 4th stage which closes the era of spontaneous legal development are called static societies by Maine. Their legal condition remains characterized by what Maine states are status. Maine refers to a few progressive societies of history, for instance, the romans and nations of nation of modern Europe which progressed beyond the phase of codes and status relationships because they're steered by conscious desire to develop and improve.

The 3 agents of legal development that are brought to bear upon the primitive codes are in the historical sequence legal fiction, equity and legislation. Maine has defined legal fiction as "any assumption which conceals the fact that a rule of law has undergone alteration, its letter remaining unchanged,and its operation being modified".

By the use of legal fictions, law is altered in accordance with changing needs while it is pretended that it remains what it was.The legal fiction of Maine has been considered as sort of clumsy self-deluding kind of legislation. There are overtones of this view in Maine himself. However this view of fiction is unjust and distorts the role it has played in the development of law. Modern legislature with broad competence in law making is in the position to correct oversight with curative legislation. No such recourse was available in primitive societies. According to rim, the asso - ciation of law and religion is a comparatively later development. However, Maine is defended on this point by hovel. Another limitation of Maine theory was that it was not meant "to apply to personal conditions imposed otherwise than by natural incapacity".

Maine presented a balanced view of the history of law. His conclusions were based upon a comparatives study of different system of law. His greatness lies in the fact that he had preached a belief in progress and that contained the germs of sociological approach. Many like Maitland, Vinogradoff and Lord Bryce were immensely influenced by his writings.

CHAPTER FOUR

SOCIOLOGICAL SCHOOL OF JURISPRUDENCE

Sociological approach to the study of law towards the end of the nineteenth century did not emerge in isolation. It was a reaction against the formal and barren approach of the analytical jurists and the pessimistic approach of the historical jurists: There was a dire need to study law not in mere abstraction, but in its functional and practical aspects. Further, on account of economic and social conflicts towards the beginning of twentieth century led to growing disbelief in the eternal principles of natural law which had hitherto placed an ideal of harmony before the individual. These various approaches appeared as a clog in the way of legal reform, social change and economic justice. The theory of inalienable natural rights was now being considered as an expression of outmoded laissez-faire philosophy. This led the States to expand the dimension of their activities to such matters as health, insurance, education, old age security and other forms of social and economic aspects of welfare. Hence a new approach towards the study of law in relation to its ends, purposes and functions for, ordering and regulating relationship between individuals and groups of individuals emerged which is described as the sociological jurisprudence.

Among the foremost writers who made an attempt to apply scientific methods to social phenomena was Auguste Comte (17981851). He is known as the founder of sociology as a science. He laid stress upon empirical methods such as observation and experiment for the study of society. It is the task of sociology to provide methods, tools and a basis for a purposeful and realistic appraisal of social phenomena which interact in society. Darwin, Herbert Spencer and Bentham in a way directly or indirectly applied law to man in society.

EXPONENTS OF THE SOCIOLOGICAL SCHOOL OF JURISPRUDENCE

IHERING

Rudolf Von Ihering is one of the greatest German jurists who has been described as 'the father of modern sociological jurisprudence'. He rejected the analytical and historical jurisprudence as 'jurisprudence of concepts'. He considers law as an instrument of serving the needs of individuals in society. Therefore, the theory of causal relationship applicable in natural world cannot be applicable to human nature. According to him 'human conduct is determined not by a 'because' but by a 'for' by a purpose to be effected. In substance, therefore, he says, law has to be studied in terms of purposes or interests which law serves.

In his work Law as a Means to an End, Ihering came to the conclusion that the dominant motivation in the exercise of human will is notion of purpose. This he calls the law of purpose. According to Ihering human will is primarily directed towards furtherance of individuals purposes. In realization of individual purposes there is bound to be a conflict between social interest and each individual's selfish interests. He, therefore, tries to reconcile the individual interest with that of society. So law is only an instrument for serving the needs of society-its purposes and interests. The State, therefore, must apply methods which promote such social interests which are inherent in every individual. To reconcile the conflicting interests of society vis-a vis individual, state employs the methods of reward by enabling economic wants to be satisfied and also the methods of coercion. For instance, economic wants of man must be satisfied.Therefore, society in larger interest puts such social controls which may reduce the quantum of profits. This can be done both by means of reward and by coercion which is called law. Law is a coercion organized in a set form by the State. The success of legal process is to achieve a proper balance between social and individual interests. It is thus through the two impulses Coercion and Reward that society compels individuals to sub- ordinate selfish individual interests to social purposes and general interests. The natural impulse of Duty and Love, i.e., the egoistical instincts of sacrifice and service also makes man to subserve social ends. Therefore, law according to Ihering is nothing but a means to

an end-an instrument of social control-balancing of individual interests with that of society. Regulation through law of human activities the service of general community is its chief raison d'etre.

LEON DUGUIT

The French jurist Leon Duguit carried forward the belief that scientific progress can be accelerated by individual behaviour in order to satisfy common social needs and interests.

Like Ihering, Duguit also rejected the prevailing notion of State, Sovereignty, law as a command or as an exercise of free human will and the theory of natural right of man as subjective and unreal concepts based on fictions or hypotheses. According to him the basis of law is the fact of social and natural interdependence of individuals and groups upon each other. As such law is based and dependent on certain social facts or reality which impels men who have common needs, who have different capacities and talents to subserve each other by common exchange of services.

This is the fact and not an assumption that the individuals think and act on the full realization of the idea that individual good can be furthered only on the furtherance of community good or collective interest. Individual interest without public good is no interest but an abstraction of subjective satisfaction. In other words, according to Duguit, there is not and cannot be opposition between individual and those of collective interests, that of interest of one with the interests of all. Generally speaking interests of all and each one are complimentary and completely coincide with individual purposes, that making use of the expression of Karl Marx 'The free development of each one is the condition of free development of all'. Therefore, law is independent of State or sover - eign, etc. and is based on coincidence of individual and social interests.

ROSCOE POUND'S THEORY OF SOCIAL ENGINEERING

Dean Roscoe Pound is styled as the father of modern American Sociological Jurisprudence. His Readings on the History and System of the Common law, the Spirits of Common law, law and Morals, Interpretation of Legal History etc., are the most original outstanding works in the field of legal philosophy yet produced in the United States. Pound' took some part of Ehrlich's sociology of law, and some part of Ihering's theory of interest and made law more than a set of abstract norms but a social process of controlling, adjusting and compromising the various conflicting interests of individuals along with social good. Law, therefore, according to Pound was not for its own sake but for the avowed object to satisfying human needs, wants, interests and purposes.

Pound has used the term 'social engineering' repeatedly. He likes the task of lawyer to engineering. According to him "the aim of social engineering is to build as efficient a structure of society as possible which requires the satisfaction of maximum of wants minimum of friction and waste. It involves the balancing of competing interests. For this purpose, interests were defined as "claims or wants or desire" which men assert de facto about which the law must do something if organized societies are to endure. According to Pound law is not concerned with abstract concepts like rights and duties. It is neither an assertion of individual rights nor fulfillment of individual duties. It is rather concerned with satisfaction of individual or social needs, wants, claims and interests. It is the task of sociological jurists to find out what claims or wants or demands need social recognition and acceptance at a particular place and time. This is to be found out on the basis of social surveys and concrete factual information of just social needs and claims.

Law, therefore, has to recognize just interests-individual, public and social and has to evolve a practical line of action within which each type of interests should be allowed to function and satisfied by law. In this respect law has to prescribe limits, determine the scope as well as subject matter of interests, catalogue all the interests according to their primacy and urgency, find out the means for securing interests and to take in view the wider values of society, etc. Thus all the

interests are to be so adjusted as it may result in maximum satisfaction. Pound classifies the various interests as:-

1. Individual interests :— These are claims, demands and desires from the point of view of each individual as such. These are concerned with :—

a. Personality : This Includes interests in (i) the physical persons, (ii) freedom of will, (iii) honour and reputation,(iv) privacy, and (v) belief and opinion.

b. Domestic Relations : The relations of husband-wife, father-son etc. comes into this class.

c. Interest of Substance : All kinds of properties, contracts, freedom of associations, trade unions, continuity of employment etc. come under this category of interests.

2. Public Interests :— These are claims, demands and desires asserted by individuals from the point of view of political life. These are two in number:-

a. Interests of State as a juristic person. They include (i) the integrity, freedom action and honour of State's personality, (ii) claims of politically organized society as cooperation to property acquired and held for corporate purposes.

b. Interests of State as guardian of socialinterests.

3. Social Interests :— Social interests are claims or demands or desires involved in social life in civilized society and asserted its title of that life. It is not uncommon to treat them as the claims of the whole social group as such. Pound classified the social interests into six groups:-

i. Social interest in general security: These include safety from aggression both internally and externally; general health, peace and order; security of transactions and security of acquisitions protection of property.

ii. Social interest in the security of social institutions: These include domestic relations, religious institutions, political institutions and economic institutions.

iii. Social interest in general morals: It is concerned with protection of the moral sentiments of thecommunity. It covers such laws concerning prostitution, drunkenness, gambling, begging, obscene literature, etc.

iv. Social interest in conservation of social resources: For instance, these may include physical resources like utilization and conservation of forests, oil, water and other resources. It also includes protection of human resources such as protection of infants, lunatics, idiots, juvenile delinquents and also of poor and weaker sections of society.

v. Social interest in general progress: It may be of three types: (a) Economic: free trade, free competition, freedom and use of property without restriction, (b) Political: It includes free speech, free press, freedom of association and cultural freedom etc.

vi. Social interest in individual life: Individual self-assertion, physical, mental, economic; individual opportunity, physical, cultural, social and economic; individual conditions of life-a minimum wages, etc.

Pound stated that in a democratic state-it is the task of the lawyers, judges and law-, administrators to weigh each interest in accordance with the needs and values of society and realise each of them through law. Lawyers and judges, therefore, adjust social interests through law to avoid social tension and economic conflict, changes in society should be brought about through law. For the values of a society are not static so the law must recognize new values which press for recognition. For Pound law is not so much a social science as technology and the analogy of engineer - ing is applied to social problems. For a practical and functional working of law in society, it must be based on actual information, statistics and briefs like the mechanical engineering which also

depends upon a number of scientific factors for the production of goods needed by the community. So the law must be concerned with its purposes and techniques to achieve the set purposes paying no or little attention to conceptual notions of law, legal rights, sovereignty, etc.

CHAPTER FIVE

REALIST SCHOOL OF JURISPRUDENCE

The Realist approach to law is a part of the sociological approach. That is why it is sometimes called as the left wing of sociological or functional school. It differs from sociological school in that this school neither studies the social effect of law nor it starts with any a priori like balance of interests or social engineering, rather it concentrates on a scientific observation of law in its making and working. There are mainly three reasons for the establishment of the realist· school of law. Firstly, it was established as a reaction against sociological jurists who were emphasizing the social effect of law. Secondly, it was established to ignore the theory of interest as given by Ihering and the theory of Social Engineering as advocated by Pound. Thirdly, this school was established to point out the importance of Courts and importance of the Judges-the human factor in the judges and the lawyers.

There are two trends of the realist school. One is the American Realist School, another the Scandinavian Realist School. American realism is the product of a pragmatist and behaviorist approach to social institutions; practicing lawyers or law teachers have developed it with a characteristic Anglo-American emphasis on the work of courts and judicial behaviour, as a corrective to the philosophy of analytical positivism which dominated Anglo-American jurisprudence in the nineteenth century. They have stressed law in action, law as experience, as against legal conceptionalism. Holmes, Gray and Jereme Frank are the main supporters of the American Realist School. Scandinavian realism is a philosophical critique of the metaphysical foundations of law. They have put forth a philosophical justification. Olivercrona, Lundstedt, Ross and Hagerstrom are the main exponents of the Scandinavian Realist School.

EXPONENTS OF THE AMERICAN REALIST SCHOOL

HOLMES'S VIEW

Both in his writings and in his long tenure as Judge of the Supreme Courts, Holmes played a fundamental part in bringing about a changed attitude to law. His emphasis on the fact that the life of the law was experience, as well as logic, and his view of law as predictions of what the court will decide stressed the empirical and pragmatic aspect of law. Holmes published a paper in 1897 in which this great judge put forward a novel way of looking at law. If one wishes to know what law is, he said, one should view it through the eyes of a bad man, who is only concerned with what will happen to him if he does certain things. The traditional description of law is that it consists of rules from which deductions are made. He says, "But if we take the view of our friend, the bad man, we shall find that he does not care straws for the action or deduction, but that he does want to know what Massachusetts of English Courts are likely to do in fact. I am much of his mind. The prophecies of what the courts will do in fact and nothing more pretentions are what I mean by the Law".

GRAY'S VIEW

Another important pioneer of American Realist School was Gray, who made a distinction between law and sources of law. The former is what the judges decide. Everything else, including statute, are only sources of law until interpreted by a court. He defined 'the law' as follows : "The law of the state or of any organized body of men is composed of the rules which the courts, that is, judicial organs of that body lay down for the determination of legal rights and duties". He said of statutes that, "the courts put life into the dead words of the statute. Other sources include expert opinion, customs and public 'policy'.

FRANK'S VIEW

In his book titled "law and the modern mind" Frank explained his theory of law and jurispru-

dence. His entire thesis is centered on one point viz. Law is uncertain, certainty of law is a legal myth. To say in other words his main attack was originally directed at the myth of achieving certainty through legal rules. Frank insists that there are two groups of realists, "rule-skeptics" as he calls them, who regard legal uncertainty as residing principally in the "paper" rules of law and who seek to discover uniformities in actual judicial behaviour and "fact skeptics" who think that the unpredictability of court decisions resides primarily in the elusiveness of facts. The former he suggests, make the mistake of concentrating on appellate courts, whereas it is to the activities of trial courts that attention needs most to be directed. To this statement Lloyd remarks, "No doubt there is force in this contention, for it is familiar enough to find that nice points of law often dissolve away before decisions "on the facts", quite apart from the fact that the majority of cases involve no disputed law at all. Also, the facts may affect the actual decision as to the law, since courts often "wrench" the law in order to make it fit what they conceive to be the merits of a case, not always with adequate regard to the wider implications of their decision. But at the same time it is difficult not to feel that Frank makes an overelaborated case about what in essence has never been far from the thoughts of the legal profession, viz., that you can never anticipate with certainty which way a court or jury will jump on issues of facts, and that innumerable factors combine to promote such uncertainty and to render it ineradicable".

EXPONENTS OF SCANDINAVIAN REALISM

Despite the unfortunate ignorance in the common law world both of the working of the legal systems in the Scandinavian countries, and of their legal literature, common lawyers have slowly become aware of a significant movement in legal thought in the Nordic countries. Understanding of this movement increased as works by Scandinavian jurists were published in English. As our knowledge of the methods and concepts of Scandinavian law increased, the writings of these jurists became more meaningful. The relative insularity of the Scandinavian countries, with early national formulations of law, meant that Roman law had little impact on their civilization. In their substantive law and, though less so, in their legal science, they remained outside the main legal families of the world. Their law is less codified than the rest of the Europe and, as a result, more judges oriented.

AXEL HAGERSTORM

Axel Hagerstorm was born in Vireda, Jönköping County, Sweden. He was not a lawyer. He was a professor of Philosophy in Uppsala University, whose attention was directed to law and ethics as particularly fertile sources of metaphysics. He wanted to establish a real legal science which could be applied to the reorganization of society in just the same way as the natural sciences had been used to transform the natural environment. To do this, legal science had to be emancipated from mythology, theology and metaphysics. Hagerstorm contented that it is the aim of philosophy to liberate the human minds from the phantoms of its own creation. Legal philosophy for Hagerstorm as, indeed, it became for his followers, is sociology of law without empirical investigation, but built instead upon conceptual, historical and psychological analysis.

He first reviews the attempts that have been made to discover the empirical basis of a right. He dismisses each such attempt as unsuccessful: "the factual basis which we are seeking cannot be found, either in protection guaranteed or command issued by an external authority." He concludes that there are no such facts. The "idea" has nothing to do with reality: its content is some kind of supernatural power with regard to things and persons. Hagerstorm next sought a psychological explanation and found it in the felling of strength and power associated with the conviction possessing a right. "One fights better if one believes that one has right on one's side." It is clear from his writing that, though rights may not exist, they are useful tools of thought.7 He rejected the notions of right-duty relationship and the theory of legal obligations because they do not have any

objective basis. For him these are merely psychological notions.

Hagerstorm also investigated the historical basis of the idea of a right. To achieve this he made comprehensive studies of Greek and more particularly Roman law and history. His studies were devised to demonstrate that the framework of the jus civile9 was a system of rules for the acquisition and exercise of super natural powers. Hagerstorm's ideas were based on Greek and Roman sources, but modern research, in attackingthe assumptions embedded in the anthropology of Tyler and Frezer's Golden Boug, has cast doubt on Hagerstorm's understanding of the role of magic in less complex societies. The influence of Hagerstorm's thesis is nonetheless apparent in Olivecrona's analysis of legal language, in his discussion of what he calls "performatives," legal words which are used to produce certain desired results, usually a change in legal relationship.

KARL OLIVECRONA

One of the internationally best-known Swedish legal theorists, Olivercrona was a professor of procedural law and legal philosophy at Lund University. His writings emphasize the psychological significance of legal ideas. His most striking work on legal theory, the first edition of his book Law as Fact (of 1939, almost entirely different in content from the similarly titled 1971 work), stressed the importance of a monopoly of force as the fundamental basis of law. Olivecrona's politics during World war II showed a related stress on a need for overwhelming coercive power to guarantee order in international relations.

Professor Olivecrona's views about Scandinavian realism have been appreciated for their practical implications. He emphasized the study of law as a social fact. According to him, law is nothing but a 'set of social facts'. He rejected the view that laws are a command or an expression of the will of the State and argued that they are 'independent imperatives' issued by constitutional agencies of the State from time to time and they 'operate in the minds of the judge' while reaching a particular decision. For him, there is no such thing as the binding force of law; it is a myth. For instance, a person may break the law and go undetected yet no one would say that the law is not binding on him. In his opinion, the notion of binding force of law only exists in the mind of a person because of the psychological pressures which exert an influence on his conduct and motivates him for regularity of behavior which is an attribute of a legal system.

CHAPTER SIX

ADMINISTRATION OF JUSTICE

Administration of justice is the firmest pillar of Government. Administration of justice means justice according to law. According to Salmond it means maintenance of right within a political community by means of the physical force of the state. Physical force of the state is the sole or exclusive factor for a sound administration which also helps obedience to law. These factors are social sanctions, habits, convenience etc.

The concept of administration of justice developed gradually. In the first stage of the primitive society self-help was the option and the only remedy left before the people. Thus the only rule that prevailed was "tooth for a tooth and eye for an eye". In the second stage of the development of the concept, society too developed a bit and state came into existence but its function was persuasive only. State at this stage of development, could not enforce the sanction or punish the wrong-doer. In the third stage of the development, custom as well as the state encouraged the idea of the notion of monetary compensation for a wrong. A sort of tariff schedule was fixed for different kinds of offences and injuries. To begin with the only idea of liability for wrongs was in terms of money. It was known as wergild i.e. pecuniary compensation for crimes. Certain wrongs like treason were termed as botless for which money compensation was no remedy. Such wrongs could be purged only by punishment like death or mutilation. Gradually as the state became more powerful and organized, private justice was substituted by public justice. Crime which was considered wrong done to the individual began to be treated as a wrong done to the society and was considered as an offence against the state. Administration of justice in the modern sense thus evolved in this phase.

Administration of justice is of two kinds namely, civil and criminal. Difference between civil and criminal justice is the one of procedure and not of substance as in both the cases the idea is to impose liability upon the individual who commits such wrongs. Civil justice is administered in civil courts and criminal justice is administered in criminal courts. In fact in criminal matters the question of debate is the presence of guilt on the part of the accused and in the civil matters the question of debate is the violation of some civil rights.

The purpose of criminal justice is to punish the criminal. Punishment is necessary for the security of the members of the society. One of the prime functions of the state is to maintain peace, order and security in the society and thus it becomes inevitable to punish the evil-doer. It is the duty of the State to impose suffering in order to reform, regenerate the criminal.

VARIOUS THEORIES OF PUNISHMENT

The various theories of Punishment are as follows :—

i. **Deterrent theory :—** Deterrence is virtually regarded as the main function of punishment. According to this theory, the object of punishment is not only to prevent the wrong-doer from doing a wrong a second time, but also to make him an example to others who have criminal tendencies. Salmond considers deterrent aspects of criminal justice to be the most important for control of crime. The deterrent theory was the basis of punishment in England in the Medieval Period. Severe and inhuman punishment was the order of the day. This theory has been criticised a lot on the grounds that it has proved ineffective in checking crimes and also that inflicting excessive punishment tends to defeat its own purpose by arousing sympathy towards the criminal by the public.

ii. **Preventive theory :—** Another object of punishment is prevention or disablement. Offenders are prevented from repeating the crime by warding punishments such as, death, exile or forfeiture of an office. By putting the criminal in jail, he is thereby prevented from committing

another crime. The criticism of this theory is that it has an undesirable effect of hardening first offenders or juvenile offenders, when imprisonment is the punishment by putting them in the mix of hardened criminals.

iii. **Retributive theory :—** In earlier times and in primitive society punishment was mainly retributive. The person wronged was allowed to have revenge against the wrong-doer. The principle is of "an eye for an eye", "a tooth for a tooth" was the basis of criminal administration. The person who favours this theory says that the criminal deserves to be punished and the point put forward by them is that unless the criminal receives the punishment he deserves then either the victim will seek individual revenge or the victim will refuse to make a complaint or offer testimony and the state will therefore be handicapped in dealing with criminals. In modern times the idea of private revenge has been forsaken and the state has come forward to effect revenge in place of the private individual.

iv. **Reformative theory :—** According to this theory the object of punishment is the reformation of criminals. The notion is that even if an offender commits a crime under certain circumstances, he does not cease to be a human being. The object of the punishment should be to reform the offender. The criminal must be educated, and taught some art or craft during his time in imprisonment so that he may be able to lead a good life and become a responsible citizen after release from jail. Critics of this theory state that if criminals are sent to prison to be transformed into good citizens then the deterrent motive would be defeated altogether in favour of reformative theory. Criminals will no longer have the fear of punishment in their mind if the jail transforms into a dwelling house in place of prison.

v. **Expiatory theory :—** This theory is also known as the theory of penance. According to this theory, punishment is necessary for the purification of the offender. It is a kind of penance for the misdeeds of a person. Men undergo punishment so that the wrong done by them may be expiated. In view of Hindu jurists expiation washes away the sin. In modern times expiation theory is accepted in a modified form and is considered by some to be part of the retributive theory.

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