**JURISPRUDENCE MATERIAL**

**1. Introduction to Jurisprudence**

**1.1. Meaning, nature and scope of jurisprudence**

The study of the Theory and Philosophy of Law is called Jurisprudence. Jurisprudence is one of the fundamental subject while studying law. There are several ideas with regards to the meaning of jurisprudence and its nature.

The term ‘jurisprudence’ has been derived from a Latin term ‘*jurisprudentia*’ which literally means ‘knowledge of law’ or ‘skill in law’. The Roman civilization, which is popularly known as the base of all human civilizations in the world, started to question the meaning and nature of law.[[1]](#footnote-0)

* **Ulpian** defined law as the “*knowledge of things divine and human*”. According to him, the law is the science of right and wrong. Several jurists in Europe began to deliberate upon the meaning of the law.
* **Jeremy Bentham**, the Father of Jurisprudence, stated that the “**science of jurisprudence**” has nothing to do with ideas of good and bad.
* **Austin**, disciple of Jeremy Bentham defined jurisprudence in the following words, “*Science of Jurisprudence is concerned with Positive Laws that is laws strictly so-called. It has nothing to do with the goodness or badness of law*.” According to him, **laws are commands made by the sovereign** and **their disobedience leads to imposition of sanctions**. He termed such **laws as positive law** and stated that the main **subject matter of jurisprudence is the study of positive laws**.
* **Holland** defined jurisprudence as “*means the formal science of positive laws. It is an analytical science rather than a material science*.”
* **Keeton** defined jurisprudence as, “*the study and systematic arrangement of the general principles of law*.”[[2]](#footnote-1)

Jurisprudence is the study of the Theory and Philosophy of Law. It is difficult to define jurisprudence since its contents are entirely different from other social sciences and variations relating to meaning, nature and essence of jurisprudence. Each civilisation since the ancient time has different ideas relating ti jurisprudence shaped by various factors such as social, political, economical, religious ideas prvailing in that region. Modern idea relating to jurisprudence is connected to sociology and philosophy on either sides. Mojar legal systems throughout the world has been influenced by the idea of jurisprudence prevailing in the West.

**1.2. Need for study of jurisprudence**

The study of law and legal concepts helps in analysing and better understanding of legal complexities is the main purpose of jurisprudence. Different ideas and theories of jurisprudence helps in solving the practical world problems in the field of law. The study of jurisprudence has enormous academic value. Its helps in various studies and analysis of legal concepts anf help a professional to sharpen his legal knowledge and understanding.

The most distinct feature of jurisprudence is its relationship with other social science subjects such as history, sociology, ethics, political science, psychology ans so on. Paton backed this feature and stated that jurisprudence is based on social sciences and philosophy since it examines the historical aspect of law to address the chaos created by distincting legal systems. Even Roscoe Pound stated that Jurisprudence, ethics, economics, politics and sociology are distinct to core but at certain point overlap each other. This it can be concluded that progress in the field of jurisprudence yields greater number of social benefits,

Jurisprudence is known as the “grammar of law”. It yields effective expression which is later applied to real-life legal problems and helps in formation and progress of certain legal concepts. Jurisprudence helps in the interpretation of law and determination of legislative intent. Its helps the future of the legal systems while considering the present needs of society over the ideas of past in legal problem solving.

Jurisprudence is also known as the “eye of law”. Jurisprudence throws light upon various basic legal concepts to facilitate their effective application in deliberation of legal problems similar to how the human eye senses the light reflected from objects to make them visible.

**1.3. Relation between jurisprudence and other sciences**

Law regulates significant aspects of human life. In simple terms, law is a set of regulations which are formulated by the state and are binding upon its subjects. Jurisprudence is the science of law.[[3]](#footnote-2)

It has been described as the “grammar of law”. To effectively interpret the law, it is essential to understand its origin, nature and meaning. Not only interpretation, but even the legislative process requires legislators to keep several factors in mind to ensure that the law that is made is effectively enforced and followed by all. Jurisprudence studies the law to facilitate better legislation as well as interpretation. In doing so, it uses the wisdom provided by other social sciences.

* **Jurisprudence and Sociology**

The objective of sociology is to study human actions in a social environment. Its studies humans as members of social groups. Law is an important element of society. However the approach of a lawyer towards law is different than a sociologist. Sociologist understands the law to understand the society and is concerned with the impact of law upon society. A lawyer on the other hand is concerned with the law itself. The impact of sociology is so vast upon law, that sociology school of law is studied as a different branch. However both the lawyer and the sociologist needs to have certain understanding of law and society. For example, crime is essentially an act of social deviance and to study crime it is essential to have basic understanding od society.

According to Paton, it is essential to understand the relationship between law and social interests since such a study would lead to a better understanding of the evolution of law. The human factor in law cannot be entirely neglected. Various jurists such as Keeton stresses upon the necessity of studying law as a separate branch without involving social interests, however this view appears to be impractical.[[4]](#footnote-3)

* **Jurisprudence and Psychology**

Psychology is the scientific study of human mind and its function especially those affecting behavior. Its objective is to understand the reasons behind the way human’s reaction to a stimulus. All the social sciences, including jurisprudence, study human actions. Psychology has gained importance among other social sciences for its distinct understanding of human mind while studying human actions. Certain human actions are to be regulated using law to maintain a healthy lifestyle of the society. In order to regulate the human actions it is essential to study reasons for human behaviour. Thus it is essential for legislators as well as the jurists to study basic psychological concepts. Such understanding will ensure that the law is not only made but also effectively followed by the people.

It is often debated that jurisprudence is not concerned with human mind. However, psychological researchers have greatly contributed to penology and criminology.[[5]](#footnote-4) Analytical school of jurisprudence ponders upon the importance of sanctions imposed by the law. It is believed by various jurists that sanctions are psychological in nature and helps to regulate human behaviour.

* **Jurisprudence and Ethics**

Ethics scientifically studies human conduct. It deals with the concept of ideal human conduct. Such an ideal state is determined by the moral values prevailing in the society which is assessed by the popular opinion of what is good and what is bad. Certain acts are considered to be against the society at large and thus are penalized by law. Law in general is not concerned with the idea of what is good or bad. However these ideas may help in determination of nature of act and assess that the act should be criminalised or not. However not all unethical acts are penalised and visa versa. Ethics deals with the values and beliefs about ideal human conduct. The law plays a regulatory role upon the human conduct. Thus basic study of ethics is essential for a jurist to examine law.

Various jurists such as Austin disagrees upon the connection between ethics and jurisprudence and believe that complete separation of ethics from jurisprudence would completely cut out the science of law from all forms of social contact and reduce it to a “system of rather arid formalism”.[[6]](#footnote-5)

* **Jurisprudence and Economics**

Economics refers to the science of wealth. Both, jurisprudence, and economics aim for the betterment of the lives of the people. Economics and jurisprudence aims at betterment of society, the former through the satisfaction of needs and wants of the people while the latter through enactment of various legislations. Wealth is an important source of happiness, peace, and fulfilment in an individual’s life. Therefore, to enact welfare legislations, lawmakers should consider the science of wealth.

The intimate relation between law and economics was first emphasized by Karl Marx. After his theory, several jurists began to evaluate the relation between the science of wealth and the science of law.

* **Jurisprudence and History**

History studies the events and happenings of the past. Jurisprudence studies the origin and evaluation of law. The present day problems are solved and analysed on the basis of the past. Thus the relationship between jurisprudence and history in detail.

* **Jurisprudence and Political Science**

According to Friedmann, jurisprudence is linked to philosophy at one end and to political theory on the other. Political Science is the science of the state. The analytical school of jurisprudence considers law as the command of the sovereign. This ‘sovereign’ is what is known as the state. The various political theories regarding the origin of the state have been used by jurists to formulate theories regarding the origin, nature and functions of law.

**2. Legal Theories in jurisprudence**

**2.1 Natural Law Theory**

Natural law thinking is an important tool in political and legal ideology in modern times. The term ‘natural law’ essentially refers to the legal system laid down in nature since the dawn of life on the planet. Natural law does not laid emphasis on the presence of a “politically superior” authority to formulate laws. Natural rights are conferred and protected by God himself.

**Lord Llyod** describes natural law as *a mere law of self-preservation or an operative law of nature that constrains a man to behave in a certain way*.[[7]](#footnote-6)

**History**

The history of natural law school is explaind by **Friedman** as a “*tale of the search of mankind for absolute justice and its failure*”. The essence of Natural Law in present times is higher compared to other schools. Natural law theory changes with change in time and change in various aspects of society such as social and political. However, one aspect that appears to be permanent is the appearance of nature as ideally higher than that of positive law.

Natural law has helped in the transformation of the old civil law of Romans. It has validated the idea of international law. It has been used as a weapon in the fight against absolutism. At different times, the natural law school has been put to different uses. The history of natural law school can be traced as follows:

**Greece**

The Greeks are said to have laid the foundations of the natural law school. **Heraclitus** observed a certain rhythm in events and termed it as “*destiny, order, and reason of the world*.” He laid down the fundamental principles of natural law. Nature, according to the Greeks, refers to a certain order in things. They identified the relation between such an order and law. This thinking formed the basis for the Greek school of enlightenment in the 5th century B.C. It went on to dominate the philosophical thinking of those times.

**Socrates**

Socrates identified that particular element of natural law which calls for adherence to positive law. However, he argued that natural law does not demand blind adherence to positive law. It must be critically evaluated by men, using their insight. This element of natural law was a climacteric factor during his age.

**Plato**

Plato’s ideas mainly revolved around the concept of natural justice. According to him, each individual is given a certain sense of justice by divine power. Such a sense of justice and ethical reverence has been given to him to facilitate his survival by forming unions with other individuals. An ideal State is one where a person is given a role that justifies the capabilities that he possesses. His Republic can be said to be a product of his pursuit for the basis of justice.

**Aristotle**

Aristotle views the world as a composition of nature. According to him, man is a part of the creation of God. Man is endowed with the gift of reason which distinguishes him from other creatures created by God. He argues that when a man lives in accordance with “reason”, it can be said that he is living “naturally”.

**Rome**

The Romans did not confine natural law to theoretical considerations. Instead, they explored its utility by applying its concepts practically. Romans used principles of natural law to transform their rigid legal system into a cosmopolitan one.

Roman Legal system can be said to have three divisions- jus civile, jus gentium and jus natural. Jus civile refers to Roman civil law which applied to Roman citizens only. Jus gentium refers to certain principles of natural law that were universally accepted and were, therefore, applicable to foreign citizens as well. The Roman jurists did not deliberate upon the conflict between natural law and positive law and did not decide as to which of them is higher.

**India**

The Hindu legal system is one of the most ancient legal systems of the world. It is based on the concept and philosophy of “Dharma”. The Hindu concept of dharma might appear to be like the natural law school of jurisprudence. Dharma refers to the order set by nature and the adherence of human beings to such natural order. Dharma includes the concept of *nyaya* or justice.

The term natural order implies the cosmic order- the law which sustains the entire universe. The Hindus believed that dharma ensures that humans exist in harmony with the entire cosmos or universe.

**Natural Law and Social Contract**

The political, social, and economic developments in medieval Europe opened upon an entirely fresh perspective towards the principles of natural law. The idea of natural law was used to support

that of a social contract. The social contract theory argues that ‘state’ is nothing, but a product of an agreement entered into by individuals in order to protect their life, liberty, and property.

The interrelation between natural law and social contract theory can be found in the works of the following chief exponents of the social contract theory:

**Hugo Grotius**

Grotius believed the social contract theory is a historical fact. He argued that by entering a social contract, the people are forfeiting their right to punish the ruler howsoever bad his government may be. He further went on to state that the ruler was also bound by the basic principles of natural law by virtue of its existence even before the social contract was entered into by the people and the ruler.

**Thomas Hobbes**

Hobbes believed in the existence of natural law. However, his approach towards its study was completely different from those who regarded the idea of natural law as higher to that of positive law. He expounded upon the principles of natural law in the form of natural rights possessed by each individual. He recognized these rights as “inalienable”. He recognized all the rights related to self-preservation of a human being as natural rights.

He further went on to say that individuals are always in the fear of their rights being violated or unlawfully taken away by another individual. Thus, to remove such insecurities, the rights were vested into an entity called the State which was tasked with protecting and preserving the natural rights of its citizens. This is how Hobbes beautifully synthesized the concepts of natural law and the social contract.

**John Locke**

Locke too recognized the existence of certain inalienable natural rights. He categorized them as “life, liberty, and estate”. However, he is said to be an opponent of Hobbes for while Hobbes’s social contract is based on absolutism, Locke’s social contract is based on liberalism.

According to him, individuals came together to constitute an entity called State to protect the three inalienable natural rights, namely, the right to life, liberty, and property. Social justice, according to him, referred to the protection of life and the economic rights of an individual by the State. A society can be said to be fair and just only if it protects the economic interests of the people.

His idea of justice stemmed from the common belief of classical liberals that private property is the source of liberty and that it also ensures the effective protection of such liberty.

**Rousseau**

According to Rousseau, “Man by nature never thinks and he who thinks is a corrupt creature.”

He believed that the state of nature was an idyllic state wherein man did not reason things out and lived-in absolute liberty with a free mind. Slowly, mischief crept into the human mind and crimes like theft and murder started taking place. Thus, to protect natural rights, the individuals came together to constitute a body.

Through the social contract, everyone surrendered their rights to a body known as the State whose primary function was to protect the rights that have been surrendered. According to him, an individual cannot be oppressed by a State since he himself is a member of it.

**Kant**

Kant made a sharp distinction between natural rights and acquired rights and recognized only one natural right i.e., the right to freedom. However, the same also had one limitation; that it must harmoniously coexist with the right to freedom of other individuals.

**Decline**

The decline of natural law theories took place in the 18th Century. With the advancement of empirical methods of study and scientific behavioralism, natural law theories were denounced primarily because its source was said to be a “divine entity”.

Montesquieu and Hume attacked some of the core beliefs of natural law such as the element of reason present inherently present in all human beings. Hume went on to establish that the element believed to be reason by natural law theorists is, in fact, confusion.

Bentham and Austin mercilessly criticized the natural law school as, “simple nonsense; natural and imprescriptible rights, rhetorical nonsense, nonsense upon stilts.”

**Revival**

The revival of natural law theories began towards the end of the 19th Century. It came up as a reaction to positivist legal theories of the 19th Century. The First World War shattered several ideals of western societies and it was realized that positive law alone is incapable of solving all problems in the new social order.

The emergence of ideologies such as Marxism and Fascism and their counter ideologies led to the revival of natural law theories. The revived natural law theories took analytical, historical as well

as sociological approaches into consideration. Instead of formulating abstract ideas, it took practical problems into consideration and concentrated upon relativism.

The concept of natural law has undergone several changes throughout the course of history. It has supported the emergence of several ideologies which have played a prominent role in world history.

In conclusion, it can be said that the natural law school has, with its various theories, greatly contributed to the overall development of law.

**2.2 Legal Positivism**

Analytical school is also known as the Austinian school since this approach is established by John Austin. It is also called as an imperative school because it treats law as the command of the sovereign. Dias terms this approach as “Positivism” as the subject-matter of the school is positive law.

The analytical school gained prominence in the nineteenth century. The distinctive feature of eighteenth-century juristic thought was Reason. Individualism became the manifestation of the cult of reason. Writers like Descartes, Locke, Rousseau, Kant advocated Reason as the last guide and judge in everything.

Bentham breaks away from the spirit of the eighteenth century, rejects natural law and subjective values and emphasizes utility and propounds the concept of expository jurisprudence which deals with the law as it is. Austin takes over tins concept of expository jurisprudence and subjects it to a far more detailed, thorough, and searching analysis.

Allen has pointed out that Austin does not revolt against 18th-century individualism but seems to be quite impervious to it. His approach was secular, positivistic, and empirical. In fact, it was Austin who propounded the theory of positive law, the foundation of which was laid by Bentham.

**Background**

The Natural law school predominated of the juristic thought up to the beginning of the eighteenth century. Principles of Natural law were considered supreme and according to some writers, could override the man-made law.

The term Natural law was differently defined and understood by different writers and no single general acceptable meaning of the term “Natural law” or the criterion for ascertaining the content of the principles of Natural Law was there.

Nature, reason, supernatural source, justice, utility were some of the bases from which Natural Law was supposed to be derived. The analytical school was a reaction against the airy assumptions of natural law.

**Exponents of Analytical School**

The prominent exponents of this school are Bentham, Austin, Holland, Salmond, Kelsen, Gray, Hoffield and Hart.

**Bentham**

Jeremy Bentham can be said to be the founder of the Analytical school. In one of his books, he rejected the clinches of natural law and expounded the principle of utility with scientific precision. He divided jurisprudence into expository and censorial.

The former deals with the law as it is while 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 natural law had not completely disappeared that’s why he talked of utility as the governing rule. Perhaps, because of this reason, Bentham is not styled as the father of analytical school. He, however, believes that law is a product of state and sovereign.

Bentham’s concept of law is an imperative one for which he himself preferred the term “mandate”. A law may be defined, said Bentham, as an assemblage of sin declarative of a violation 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 supposed to be subject to his power.

**Austin**

In 1832, John Austin’s lectures were published under the title of “the Province of Jurisprudence Determined”. This was the first systematic and comprehensive treatment on the subject which expounded the analytical positivist approach and because of this work, Austin is known as the father of the Analytical School. He limited the scope of jurisprudence and prescribed its boundaries. His approach was analytical.

Austin built on the foundation of expository jurisprudence laid by Bentham and did not concern himself with extra-legal norms. He distinguished between the science of legislation and law from morals.

To Austin, jurisprudence meant the formal analysis of legal conceptions. He divides jurisprudence into general jurisprudence and particular jurisprudence. Austin took a legal system as it is that is positive law and resolved it into its fundamental conception.

Positive law is the outcome of state and sovereign and is different from positive morality. The great contrast between positive law and positive morality, according to Austin, is that the former is set by a political superior whereas the latter is not the offspring of state and sovereign, hence it is not law. Law cannot be defined by reference to any idea of justice.

The science of jurisprudence is only concerned with the positive laws. According to Austin, analysis of positive law is to be done by the operation of logic on the law without consideration of the history of ethical significance. Austin ignored social factors as well as in his analysis of law, he emphasized that by the operation of logic, it is impossible to find out the universal elements in law, for example, notions were common in all mature legal systems.

Austin’s approach, analysis and deduction are, however, applicable to a unitary polity based on parliamentary sovereignty. It does not have that relevance to legal systems as in India and the United States of America.

**Holland**

Holland is another supporter of the analytical school. He is the follower of Austin. However, he differs from Austin as to the interpretation of the term positive law. For him, all laws are of not the command of sovereign, rather, he defines law as rules of external human action enforced by a sovereign political authority.

**Salmond**

Salmond also belongs to the analytical school but differs from his predecessors in several ways. These are:

1. He gives up the attempt to find the universal elements in law by defining jurisprudence as science of civil law. According to him, there is nothing like universal element in law because it is the science of law of the land and is thus conditioned by factors which prevail in a particular state.

2. He deals with low as it is but the law to him is to be defined not in terms of the sovereign but in terms of courts. Law is something which emanates from courts only.

3. He did not agree with Austin that analysis of law can be done with the help of logic alone. He points out that the study of jurisprudence which ignores ethical and historical aspects will become a barren study.

**Tenets of analytical School**

1. Difference between law as it is and law as ought to be – This is a trait of all positivism thinkers for example, Bentham’s Law and Morals have same course but different circumference. Austin does not deny that moral factors work in the creation of law, however, he does not allow any place to morals in his theory. To him, positive law carries its own standard itself. This approach has been criticized by Dias, Hughes, Paton, Stone, Fuller, etc.

2. Concentration of positive law – Analytical jurists look exclusively at the positive law. They prefer to be concerned only with what is the pure fact of law. Representing to themselves the whole body of legal precepts that obtain in each system as made at one stroke on a logical plan to which they conform in every detail, the analytical jurists set out to discover the plan by analysis.

3. Law in terms of and a product of State – Analytical jurist regards law as something made consciously by lawmakers, whether legislative or judicial. They emphasize not the way in which the precepts originate with respect to their content but the fact that they get the conscious stamp of

the authority of the state. Thus, the most important fact is establishment or authoritative recognition by the state, of a rule of law. In this sense law is a product of conscious and increasingly determinate human will.

4. Logic – For studying law, analytical jurist have mainly taken resort of logic and rejected ethical elements. There is no value of historical or social factors for jurists of analytical school.

5. Statute – Law is that which is made consciously by the state. Statute law is the main concern of the school.

**2.3 Pure Theory of law**

Kelson’s theory of law which is known as the pure theory of law implies that law must remain free from Social Sciences like psychology, sociology, or social history. Kelson’s aim was to establish a science of law which will be pure in the sense that it will strictly eschew all metaphysical, ethical, moral, psychological, and sociological elements.

His aim goes beyond establishing an autonomous legal science on positivistic empirical foundations, as he constantly criticized the ideas of justice and the principles of natural law. He altogether excludes all such factors from the study of law. Kelson defines law as an order of human behavior. The specific nature of this order consists –

1. in its being coercive and

2. the fact that this coercive power is derived solely from the sanction attracted to the law itself. His sole object was to determine what can be theoretically known about the law of any kind at any time under any conditions.

The essential foundations of Kelson’s system may be summarized as under:

1. The aim of theory of law as of any science is to reduce chaos and multiplicity and to bring unity.

2. Legal theory is science not volition. It is knowledge of what law is, not of what the law ought to be.

3. Law is a normative not a natural science.

4. Legal theory is a theory of norms. It is not concerned with the effectiveness of legal order. 5. A theory of law is formal, of the way of ordering changing contents in a specific way.

6. The relations of legal theory to a particular system of positive law is that of possible to actual law.

The most distinguishing feature of Kelson’s theory is the idea of norms. To Kelson, jurisprudence is a knowledge of a hierarchy of norms. A norm is simply a preposition in hypothetical form. Jurisprudence consists of the examination of the nature and Organization of such normative proportions.

It includes all norms created in the process of applying some general norm to a specific action. According to Kelson, a dynamic system is one in which fresh norms are constantly being created on the authority of an original or basic norm, while a static system is one which is at rest in that the basic norm determines the content of those derived from it in addition to imparting validity to them.

**Criticism**

Kelson’s pure theory of law has been criticized by jurists. The main criticisms are as follows:

1. His conception of Grundnorm is vague. Friedman puts it, it is a fiction incapable of being traced in legal reality. Kelson seems to have given his thesis based on the written constitution but even in the written constitution Grundnorm is made up of many elements and any one of these elements alone cannot have the title of Grundnorm.

2. Every rule of law or norm derives its efficacy from some other rule or norm standing behind it but the grundnorm has no rule or norm behind it. A grundnorm derives its efficacy from the fact of its minimum effectiveness.

3. Another important objection of Kelson’s theory is that he has not given any criterion by which the “minimum of effectiveness” is to be measured. Writers like Friedman, Stone, Stammer have pointed out that in whatever way the effectiveness is measured, Kelson’s theory has ceased to be pure on this. The minimum of effectiveness cannot be proved except by an enquiry into political and social facts whereas Kelson has altogether rejected political and social facts.

**2.4 Historical School of law**

Historical school of jurisprudence deals with the origin and development of the general principles of law as well as certain important legal principles which have been imbibed into legal philosophy. It primarily emerged as a reaction against the natural law school. In fact, Prof. Dias opines that its reaction against the natural law theories can be said to be the basis of several important principles of historical jurisprudence.

Some thinkers are also of the opinion that the Historical School has emerged as a reaction against Analytical legal positivism.

**Montesquieu**

Montesquieu is regarded as the first jurist to follow the “Historical Method”. He studied the laws of various societies and concluded that “laws are the creation of climate, local situations, accident or imposture”.

He did not go further to explain his observation. However, this idea of law answering the needs of time and place has been the basis of many notable ideas and theories.

**F. K. Von Savigny (1779-1861)**

Savigny is the founder of the Historical School in Europe. He was academically inclined towards historical studies. He believed reforms which go against the nation’s continuity are doomed.

Therefore, he cautioned legislators to look before leaping into reforms.

He considered law to be “a product of times the germ of which like the germ of State, exists in the nature of men as being made for society and which develops from this germ various forms, according to the environing influences which play upon it.”

Savigny believed that the nature of any legal system reflects the spirit of its people. This later came to be known as Volksgeist. Every law should follow the historical course. The “historical course” refers to the spirit of the people which manifests itself in the form of customary rules. Thus, customs are not only a formal source of law but also superior to it. Law is not universally applicable. It varies with time and place. He rejected the theories of natural law as well as positive law.

According to him, law is a part of the culture. It is not the product of an arbitrary act of the legislator but a response to the national spirit of the people. Thus, it is a product Volksgeist. of Savigny views a nation as an organism which grows and withers away with the passage of time. He regards law as an integral part of such an organism. According to him, law matures and withers away along with the national identity.

His idea of Volksgeist has been criticized for the lack of precision. According to Prof. Dias, there no doubt lies a certain amount of truth in the concept. However, Savigny has gone too far by developing major ideas and theories on the concept. The idea of Volksgeist is a product of the growing spirit of nationhood that existed throughout Europe in those times. Volksgeist is a concept with limited applicability which has been unreasonably stretched and made universal by Savigny.

Nevertheless, Savigny is one of the greatest jurists of the 19 Century. Ihering has stated that with the publication of Savigny’s early works, modern jurisprudence was born. It is regarded as quite unfortunate that the Germans used the concept of Volksgeist to suit their own ends. They regarded the nation as a racial group and used the concept to enact laws against the Jews.

**Sir Henry Maine (1822-1888)**

Maine studied the development of primitive societies and identified three agents of legal development:

Legal Fiction- Using legal fiction, the law is changed according to the needs of time while casting an impression that it is remaining uniform and constant. He states, “I employ the expression ‘legal fiction’ to signify any assumption which conceals or affects to conceal, the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified.”

Equity- Equity is used to modify the law “as a set of principles invested with higher sacredness than those of original law.”

Legislation- Finally people came to realize that law can simply be reformed by explicit declarations of an intention to do so and enactment of legal codes. This process was termed as legislation.

**Estimate of Historical School**

Historical School has always maintained that law cannot be studied in complete isolation of its social aspect. It is a movement for facts against fancy. While it is recognized that the Historical School primarily studies the “evolution” of law, it is also noted by jurists that “evolution” does not mean “progress”. It has been opined by some jurists that the Historical School owes its existence as a juristic school to the fact that it supplies the historical aspect of a particular law or legal concept as an aid for interpretation. The moment it fails to do so, it shall no longer be said to be a juristic school.

**2.5 Sociological School of law**

The sociological school of jurisprudence started dominating over the other schools in the initial years of the 20 Century. It aims to study the circumstances that led to the emergence of legal institutions and those which control their scope and applicability thereafter. It is completely unconcerned with the ethical constituents of law. Let us look at some of the notable sociological jurists and thinkers.

One of the most important aftermaths of the Industrial Revolution was the increased tendency towards socialization amongst the people. It was recognized that to ensure justice, it is important to strike a balance between the overall welfare of the society and the protection of individual

liberties. Thus, it was opined that the society is an important element in an individual’s life and vice-versa. Approaches made from this perspective are known as sociological approaches.

**Duguit (1859-1928)**

Leon Duguit challenged the existing ideas on the concepts of State, sovereignty and law and viewed them from a social perspective. According to him, the most important social reality is the interdependence of the people. With the technological and scientific advancement of man, this interdependence has also increased. Specialization has increased to such an extent that an individual needs the help and support of other individuals to survive. It has become impossible for man to survive independently, without the membership of any community. Thus, social interdependence is not an idea or a theory but an important social fact. According to Duguit, all humans must strive to ensure that individuals work and exist in perfect harmony with each other. This is known as the principle of “social solidarity”. He goes on to say that all human activity and organizations must be tested based on their contribution towards ensuring social solidarity and that the State must not enjoy any extra privileges. State is also a human organization which is necessary to protect the principle of social solidarity. The principle of social solidarity is the object as well as the limit and extent of the powers of the State. According to him, “Man must so act that he does nothing which may injure the social solidarity upon which he depends; and more positively, he must do all which naturally tends to promote social solidarity.”

**Rudolf von Ihering (1818-1898)**

Ihering studied the genesis of Roman law and jurisprudence. He stressed on the importance of “purpose” in guiding the human will. According to him, just as a stone cannot be moved without any external force, the human will cannot operate without any specific purpose. According to him,

the purpose of law is to protect interests. Interest refers to the “pursuit of pleasure and avoidance of pain”. Individual interest is partly affected by social factors wherein an individual takes the interest of other people into account. According to him, law strives to ensure individual good only to an end and not an end in itself. The end is the collective good or overall welfare of the society. He was also of the opinion that law is not the only method to regulate society. There are other means and methods as well. Within a society, while there may be several aspects which exclusively fall within the domain of law, there are certain aspects wherein no legal intervention is required. He recognized the coercive character of law which is why his approach is said to be a modern approach towards the study of law.

**Roscoe Pound (1870-1964)**

The works of Dean Roscoe Pound have greatly contributed to the school of sociological jurisprudence. His ideas are a product of his constant confrontation with sociological and philosophical problems as well as the working of the American courts. Although some may describe him as completely pragmatic or a utilitarian, he never really denied the important part played by abstract legal philosophy in the development of legal institutions. However, he did approve of the various limitations that have been imposed upon it by time and place. Pound is credited for the growth of the functional attitude in jurisprudence. Functional attitude refers to the attitude of looking at the functional aspects and working of law rather than its abstract contents. According to him, the purpose of sociological jurisprudence is to ensure that social facts are taken into consideration while formulating, interpreting, and applying laws.

**Theory of Social Engineering**

Pound frequently stated that the task of a lawyer is analogous to that of an engineer. Pound defined interests as wants or desires which are asserted by individuals in a society. Law must attend to such assertions to create an organized society. According to him, the purpose of social engineering is to build a society in which maximum wants are satisfied with minimum friction and waste. Thus, it must balance competing interests. Pound classified various interests as follows:

1. Private Interests- These are an individual’s “interests of personality” such as physical integrity, reputation, freedom of volition and freedom of conscience.

2. Public Interests- These are the interests asserted by individuals either involved in politics or as viewed from the standpoint of political life.

3. Social Interests- These are the interests pertaining to the social life of an individual and generalized as the interests of social groups. These may pertain to:

• General Security

• Security of social institutions

• General Morals

• Conservation of Social Resources

• General Progress

• Individual life

One of the most important outcomes of sociological jurisprudence is that it promoted field study to evaluate the interrelation between law and society. Another important outcome is that it evaluated abstracted ideas on an empirical basis. Critics have argued that the sociological school

of jurisprudence teaches “a little of everything except law.” They further state that a textbook of sociology cannot be converted into that of jurisprudence by simply changing the title. Nevertheless, it is difficult to deny the importance of sociological school in the study of law for; firstly, it helps us understand the evolution of law in a better manner, secondly, the element of human interest shall always play a prominent role in law and lastly, study of social interest leads to a better understanding of the legal system.

**2.6 American Realism**

The aim of American realism is to reform the law. They recognize the fact that the same cannot be done without understanding it. They are interested in studying the law “as it is” and not “as it ought to be”. This is something that they have in common with the positivists. Furthermore, they seek to understand the law by taking into consideration the sociological factors. They adopt an empirical approach to the study of law.

The American realists put too much emphasis upon the role of judges in law. According to them, the law is what the judges decide through their judgments. This tendency is due to the fact that judges have played an important role in the development of the American Constitution and subsequent laws. American realism studies the human factors involved in law. In fact, it strongly emphasizes the importance of studying such human factors. Some of the noted American Realists are as follows:

**Gray (1839-1915)**

John Chipman Gray is one of the “mental fathers of realist movement”. Although known to be an analytical jurist, Gray considered the judiciary, and not the legislature, to be the most important source of law. He admitted the crucial role played by “non-logical” factors, such as personality and prejudice of the judge while delivering the judgments. Gray is complimented for laying down

a solid groundwork upon which many of the most important ideas of American Realism are currently resting.

**Justice Holmes (1841-1935)**

Oliver Wendell Holmes J. is famous for his “bad man’s theory” which looked at law from a criminal’s perspective. Law, according to him, is meant for the potential criminals or the “bad man”. He took note of the various definitions of law based on principals of ethics, morality and natural law and rejected all of them stating that the bad man only cares about what the courts will do if he commits certain acts. Such predictions or “prophecies” regarding the actions of the courts is known as the law. He believed in the complete separation of law and morals. He was interested in studying law “as it is”.

Legal history, according to him, should only be studied to analyze the relevance of certain historical laws in contemporary times. His definition of law as ‘prediction’ resulted in the increased importance of litigation and lawyers in the field of law. His approach towards law can be said to be empirical and pragmatic. Through his literary works and the writings as a judge of the Supreme Court of America, Holmes brought about a significant amount of change in the overall attitude towards the law.

**Jerome Frank (1889-1957)**

Frank insisted upon the existence of two groups of realists. While one group is skeptical about legal rules providing uniformity to law, the other group is skeptical about the establishment of facts before the trial court, in addition to the skepticism about legal rules. Frank identified himself as a member of the second group. According to him, law involves the application of certain rules of law to the facts of a case by the judge. He expresses his skepticism about the accuracy in the

finding of a fact by a judge and remarks that, in most judgments, it is difficult to distinguish between the facts found by the judge, the rule of law applied to them and the subsequent combination of both, the facts as well as the rules.

Frank emphasizes the uncertainty of the law. Precedents and codified law, according to him, are made under the false belief that law should be certain. He believed judges and lawyers should accept the fact that law is uncertain and should not strictly adhere to the precedents and codified laws. Such strict adherence to precedents and codifications to ascertain the law only provides a false sense of security to them and is actually quite harmful and dangerous.

**Carl N. Llewellyn (1893-1962)**

Llewellyn recognized law as an institution. According to him, law is an extremely complex institution in society. It owes its complexity to the use of several precedents and ideologies in the formulation of legal principles.

He further establishes the concept of “law-jobs” wherein law has two basic functions in society:

1. to facilitate group survival.

2. to engage in a quest for justice, efficiency, and richer life.

He further expounded upon the achievement of such “law-job ends” using “legal tools”. He established the concept of “craft” as a minor institution. “Craft”, according to him, refers to the skill and “knowhow” among a group of specialists who perform certain jobs within an institution. Such group or body of specialists continuously develops its skills from time to time and then passes them over to the next generation through education and practical example. He described the legal

profession as a profession involved in the practice of such crafts with the juristic method being the most important one amongst them.

2.7 Modern Trends and Theories

**3. Concepts in jurisprudence**

**3.1 Rights and Duties**

Rights in general sense means the standard of permitted action within a certain sphere. The nature of right can be moral or legal. Moral rights are not enforceable by law and thus one cannot seek relief through the legal system whereas legal rights are enforceable by law and thus one can seek relief through the legal system. For instance, if an individual is drowning in river, it is an moral right of that person to be saved by a passerby. However this right is not enforceable by law since there is no legal obligation upon the passerby to save the drowning individual. On the other hand, if an individual is discriminated on the basis on sex, caste, religion, place of birth that is a violation of his fundamental right of Right to Equality and the same is enforceable by law and an individual can seek legal remedy regarding the same.

**Meaning of Rights**

Right as a legal term, means the standard of permitted action by law. Such permitted action of a person is known as his legal right.

A legal right must be distinguished from a moral or natural right. A legal right is an interest recognized and protected by laws and violation of legal right is legal wrong committed against him and omission of legal wrong is a legal duty of every individual. Moral or natural right means an interest recognized and protected by a rule of natural justice, an interest the violation of which would be a moral wrong, and respect for which is a moral duty'.[[8]](#footnote-7)

**Definition of Rights**

The definition and analysis of the legal rights differs on the basis of opinion of various jurists.

* **Austin**- Right is a faculty which resides in a determinate party or parties by virtue of a given law and which avails against a party or parties (or answers to a duty lying on a party or parties) other than the party or parties in whom it resides. According to him, *a person can be said to have a right only when another or others are bound or obliged by law to do something or forbear in regard to him*. It means that a right has always a corresponding duty. This definition, as it appears on is very face, is imperfect because in this definition there is no place for **imperfect rights**.[[9]](#footnote-8)

**Holland**- Holland defines legal right “*as the capacity residing in one man of controlling, with the assent and assistance of the state the actions of others”*. It is clear that Holland follows the work given by Austin.

**Salmond-** defines right from a different angle. He says, *‘right is an interest recognized and protected by a rule of right*'. It is an interest respect for which is a duty, and disregard of which is a wrong.[[10]](#footnote-9)

The main elements in this definition are two:

1. **Rule of right** means a rule of law, or, in other words, that which is legally enforceable.
2. **Right is an interest** means right as an element of Interest which essential to constitute a right.

Supreme Court of India also interprets the definition of right in case of **State of Rajasthan v. Union of India** as:

*‘In the strict sense, legal rights are correlatives of legal duties and are defined as interests whom the law protects by imposing corresponding duties on others. But in a generic sense, the word right' is used to mean immunity from the legal power of another, immunity is an exemption from the power of another in the same way as liberty is an exemption from the right of another, Immunity, in short, is no subjection.’*[[11]](#footnote-10)

**Rights guaranteed by the Indian Constitution**

The Constitution of India has guaranteed certain rights to the citizens of India which are known as Fundamental Right which is considered to be the most important rights. If these rights get violated then the person has the right to move to the Supreme Court of India or the High Court for the enforcement of such rights. Fundamental Rights are mentioned under Part III of the Constitution of India.

Following rights are guaranteed by the Constitution of India:

* Right to Equality (Article 14 to Article 18)
* Right to freedom (Article 19 to Article 22)
* Right against Exploitation (Article 23 and 24)
* Right to Freedom of Religion (Article 25 to Article 28)
* Educational and Cultural Rights (Article 29 and Article 30)
* Right to Constitutional Remedies (Article 32)

**Theories of Rights**

* The Will Theory:

The purpose of law is provide means of self-expression and self-assertion to every individual. Thus Will theory advocates that right emerged from the will of humans. Holmes have put forth the same view very clearly in his definition. He defines legal right *‘as nothing but a permission to exercise certain natural powers and upon certain conditions to obtain protection, restitution, or compensation by the aid of public force*'. Hegel, Kant, Hume and others say that by right is meant the power of self-expression or will.

Criticism of the theory:

Dughit has widely criticised this theory. According to him, the basis of law is the objective fact of **social solidarity** and not the subjective will. The idea of will is anti-social. The will theory has been criticized on other grounds also. Those who greatly emphasis the element of will confuse the fact with abstract ideas, that is, they do not make the distinction between **what is** and **what ought to be.[[12]](#footnote-11)**

* **The Interest Theory:**

The profounder of this theory is Ihering-a great German jurist. He defined legal right as *‘a legally protected interest*'. According to him, the basis of right is interest' and not will'. His definition of law is in terms of purpose'. Law always has a purpose. In case of rights the purpose of law is to protect certain interests and not the wills or the assertions of individuals.

**The Elements of a Legal Right:**

The four elements or ingredients of legal right are as follows:

1. **The Holder of Right**: the holder of right or person in whom right is vested is called subject. There can be no right without the holder of right.
2. **The act of forbearance**: Right relates to some act or forbearance. It obliges a person to act or forbear in favour of the person who is entitled to the right.
3. **The object of right**: the main object is respect for which the right is exercised or the mere existence of right.
4. **The person bound**: right cannot exist with out. Where there is right, there is a correlative duty.

Along with the four elements, Title of recoginsed as the fifth element. The fifth element is given by Salmond. According to him every legal right has a title, that is subjected tp certain facts or events by reason of which the right is vested to the owner.

Thus according to him, the relation between the right amd holder is three-fold, explained as follows:

1. Right against some person or persons.
2. Right is an act or omission
3. Rights is over something which that act or omission relates.

**3.2 Ownership and Possession**

Ownership

According to Austin ‘*ownership means a right, which avails against everyone who is subject to the law conferring the right to put thing to user of indefinite nature*’. Ownership is Right in Rem i.e., right available against the world at large. Ownership is over both corporeal and incorporeal things. The former refers to physical objects and the latter refers to all claims. According to Hebert ‘*ownership is a comprehensive right in rem. It is a bundle of four rights*:

1. *Right to use a thing.*
2. *Right to exclude others from using the thing.*
3. *Right to dispose of the thing.*
4. *Right to destroy the thing.[[13]](#footnote-12)*

Holland refers ownership as plenary control over objects, whereas Salmond refers ownership as relation between a person and object, the former is the one in which right is vested which the latter is the subject matter of ownership. Owning a right is called ownership. Some key features of ownership are as follows:

1. Owner can use the property in many ways and end number of times
2. Owner has a right to transfer the subject matter permanently or temporarily
3. Ownership is permanent and beyond time duration constraints.

**Modes of acquisition of ownership: The ownership is acquired in two ways:**

1. **Original mode**: the orignal mode of ownership refers to the ownership over ownerless objects. This is called res nullis. The subject matter in this case belonged to noone. The wpnership can be acquired by accession, occupation and specification.
2. **Derivative mode**: the derivative mode of ownership refers to the ownership transferred as a result of purchase from original or previous owner. It is merely transfer of existing ownership but the ownership is derived from seller and the purchaser becomes the new owner.

**Kinds of ownership:**

1. **Corporeal and incorporeal ownership**: The ownership over a tangible or material object is called corporeal ownership
2. **Trust and Beneficial ownership**: The ownership of a trustee is called trust ownership
3. **Legal and Equitable ownership**: The ownership which originated from the rules of common law is called legal ownership. A assigned a debt to B. A is the legal owner and B becomes an equitable owner.
4. **Vested and Contingent ownership**: The ownership which comes into existence immediately is called vested ownership. A transfer his property to B an unmarried daughter for life and to C, an unborn make child. C's ownership is contingent because C's birth is uncertain.
5. **Sole and Co-ownership**: An exclusive ownership of an individual as against the whole world is called sole ownership single owner. The ownership of two or more persons having interest in the same property or thing is called co ownership.
6. **Absolute and limited ownership**: The ownership which vests all the rights over a thing to the exclusion of all is called absolute ownership. Ownership which imposes limitations on user duration or disposal of rights of ownership is called limited ownership.[[14]](#footnote-13)

**Possession**

Possession means custody or control. According to **Salmond** *‘possession establishes the relationship between men and the material things*’. According to **Pollock** ‘*possession is a physical control over a thing*’. According to **Savigny** ‘*possession is the physical power of exclusion*’.

According to **Ihering** *‘possession is de facto exercise of a claim over a thing*’. According to **Roman law** ‘**possession is a prima facie evidence of ownership. It supports the title of ownership**’. The possessor of a thing is presumed to be the owner. Long enjoyment of a property creates ownership. This is known as prescription hence possession in nine points in law.

**Kinds of Possession**

1. **Possession in fact**: Possession in fact refers to the physical or actual possession of a thing. Basically, refers to the physical control over a thing. It refers to the physical relation between the person and object.
2. **Possession in law**: Possession in law refers to the possession recognised and protected by the law. It is also called as de jure possession i.e., possession in the eye of law.

**Elements of possession**

1. **Animus possidendi**: The intention to possess a thing is called animus possidendi. It refers to the subjective and mental intention of possession. The possessor must have a strong desire to possess a thing he must have exclusive claim.
2. **Corpus possessionis**: The physical possession of a thing is called corpus possessionis. It deals with the objective element. According to **Savigny** ‘*the actual physical control over a thing is called corpus possessionis*’. The physical control gives to an assumption that others will not interfere with it. Possessor must present personally and physically possess.

**Acquisition of possession**

1. By taking.
2. By delivery.
3. By operation of law.

**Types of Possession**

1. **Corporal and incorporeal possession**: Corporeal Possession refers to the possession of a material object. Actual use or control over such object is not necessary. Eg. possession of a bike. Incorporeal Possession refers to the possession other than of a material object. Actual use and control is necessary.
2. **Immediate and Mediate Possession**: Immediate possession refers to the primary or direct possession of a material object. The possesser hold things personally. Eg possession of a bile owner. Mediate Possession refers to the indirect or secondary possession of a material object. The possesser holds the thing on behalf of another. Eg. possession of a tenant.
3. **Representative Possession**: Representative Possession refers ro possession of a thing through an agent. This representative holds on behalf of the real possessor. Eg. car in possession of the driver.

1. **Concurrent Possession**: Concurrent Possession refers to the joint possession of two or more persons at the same time on a thing.
2. **Derivative Possession**: Derivative Possession refers to the possession of the holder of a thing. The title is derived from the person who entrusts the thing. Eg. Phone repairer.
3. **Constructive possession**: Constructive possession refers ro the possession in law. The possession is not actual. Eg. possession of keys of bike implies possession of bike.
4. **Adverse possession**: Adverse Possession refers to the possession against every other claiming to have a right to the possession of the property. It is the possession of the thing without the permission of the real owner.
5. **Duplicate possession**: Duplicate Possession refers when two persons claims the possession of a thing. However, the two claims must not be mutually adverse.

**Distinction between Ownership and Possession**

| **Ownership** | **Possession** |
| --- | --- |
| It is an absolute right | It is an evidence of ownership |
| It is de factp exercise of fact | It is de jure recognition of claim |
| It is the guarantee of the law | It is the guarantee of the fact |
| It is related to a right | It is related to fact |
| It includes possession | It does not include ownership |
| It excludes interference | It exclude other except owner |
| It developed on possession | It is developed with civilization |
| It provides proprietary remedies | It provides possessory remedies |
| The transfer is technical | The transfer is less technical |

**3.3 Title and property**

The term property is wide in scope and is used in various sense. Everything in surrounding can be categorised as property. Every object, whether tangible or intangible having some value to human beings, may be termed as Property. The essential characteristic of Property is the value attached to it.

Thus property is considered as a source of wealth. The value of property can be personal or in monetary terms. Some example of property are land, building, debts and shares. Property rights also include the right to enjoy and dispose certain things in an absolute manner.

**Evolution Of Term Property**

The word property is derived from the **Latin word** **proprietary** and the **French equivalent properties, which means a thing owned**. The concept of property is very similar to the concept of ownership. In simple terms ot refers to the right to possess the property one owns. The term property has been widely interpreted by various jurists such as Salmond, Bentham and Austin. Close observation of the definitions given by them will help us understand the concept in a better manner.

**Property And Its Definition**

Eminent jurist **Salmond** while defining the term property observed that the term might be understood in one of the three senses mentioned below:

1. The term property includes all the legal rights of a person. That is to say that it includes complete ownership of a man on material as well as incorporeal things.
2. The term includes not a man’s personal rights, but only his proprietary rights.
3. The term includes the rights of ownership in material things such as building etc.

According to another jurist, **Bentham**, the term property *‘includes ownership of material objects alone*’. He has, in a way, interpreted the term in a narrow sense. According to **Austin**, Property denotes ‘*the greatest right of enjoyment known to the law, including servitudes. The Property includes both proprietaries as well as the personal rights of a man*’.[[15]](#footnote-14)

**Interpretation of the word Property by the Apex Court of India**

The honourable Supreme Court of India in the case of **R.C. Cooper vs. Union of India[[16]](#footnote-15)**, interpreted the concept of Property in the legal regime. The court, in this case, observed that the term property includes both corporeal things such as land, furniture and incorporeal things such as copyrights and patents. The recent trend of the Apex court, however, has changed. Court has started viewing Property in the light of Article 21 of the Indian constitution as liberties exist even reference to the Property owned and possessed.[[17]](#footnote-16)

**Kinds of properties**

Corporeal and Incorporeal are the two main categories of property. The former refers to visible and tangible property such as land, house, ornaments, silver, etc whereas the latter means the property that is not visible and is intangible such as rights of easements and copyrights.. Corporeal Property refers to right of ownership in material things and incorporeal property means right in rem. Corporeal Property is further categorized into Movable and Immovable Property. Incorporeal Property is classified into two categories: in re propria and rights in re aliena or encumbrances.

**Movable and Immovable Property**

All corporeal Property may either be movable or immovable in nature. The basis of this kind of classification is the portability of the object.

The two categories are discussed as follows:

1. Section 3 of the general clauses act, 1897; Section 2(6) of the Indian Registration Act, 1908 defines the term immovable Property. It includes land, things attached and embedded in the land.
2. On the other, movable Property includes any corporeal property which is not immovable property. It may include furniture, stationery items, etc. The concept of immovable Property holds greater importance and has elaborately been dealt with under Indian statutes. The following mentioned are judicially recognized as immovable Property:  
   1. Right of way
   2. Right to collect the rent of immovable Property
   3. Right of ferry
   4. Mortgagor’s right to redeem the mortgage
   5. The interest of the mortgagee in immovable Property
   6. Right of fishery
   7. Right to collect lac from trees

On the other hand, the following are not judicially recognized as immovable Property:

1. Standing timber
2. Growing crops
3. Grass
4. Royalty
5. A decree of sale or sale of immovable property on a mortgage
6. Right of the purchaser to have land registered in the name
7. Right to recover maintenance allowance even though it is charged through immovable Property

The above-mentioned lists are not exhaustive and are subject to judicial interpretations from time to time.

**Public Property and Private Property**

With reference to the concept of ownership, Property may be classified into public and private property.

The two kinds are discussed below:

1. Public Property is owned by the public as such in some governmental capacity. In other words, it is owned by the government and used for the beneficial use of the public in general. A park or a government hospital is a public property.
2. Private Property is that Property which is owned by a particular individual or some other private person. A residential house of a citizen may be his private property.

**Real and Personal Property**

This distinction between real and personal Property basically originated from Roman law, and it still exists in England.

The two categories of Property are discussed below:

1. Real Property means all rights over land recognized by law.
2. Personal Property means all other proprietary rights, whether they are right in rem or in personam.

**Right in re aliena and Right in re propria**

Right in re aliena are also sometimes referred to as encumbrances. These are the rights of a specific user. These prevent the owner from exercising some definite right in reference to his Property. Lease, security and trust may be included under this category. Right in re propria are immaterial forms of Property. These are a product of human skill and labour. Patents, copyrights and commercial goodwill may be included under this category.

**Intellectual Property**

Intellectual Property is, in simpler terms, creation of intellect or wisdom or of the human mind. It is related to intellectual innovation and innovation in the literary, scientific and artistic fields. Nations around the world are making efforts toward protecting intellectual property. One major reason is to recognize by way of statute, the economic rights of creators of these intellectual properties.

Another reason is the urge to promote creativity amongst the masses which will, in the long run, contribute towards an environment comprising of only fair trade practices. The law related to intellectual Property aims at protecting the people who create and own the intellectual goods and services by granting them certain time-limited rights to control the use made of those productions. Those rights do not apply to the physical object in which the creation may be embodied but instead to the intellectual creation as such.

**3.4 Person**

According to **Austin** the term ‘person’ refers to ‘*a physical or natural person including every being who can be deemed as human*’. In jurisprudence sense, every individual who has a legal personality is considered as person. In layman’s term, a living human being is considered a natural person. In the ancient times, slaves were not considered as person and thus were denied the rights and privileges of a legal person and were only considered as natural person since they were born. Most of the rights and duties conferred by law and conferred to natural person and thus they have right to sue and be sued as per law. Various rights classified as human rights and fundamental rights are laid for the benefit of natural persons.

A person has certain rights in society. One of such category of right is civil rights and include rights such as right to life, right to privacy, right to practice profession, right to cote, right to marry, right to religion, right to travel and so on. These rights are meaningful and useful to human beings. However some rights are conferred to certain conditions such as right to vote is conferred only after an individual is of certain age.

Thus as per jurisprudence, a natural person is a reasonable and prudent human being and are empowered with these rights. A person is considered to be natural person since the time he is norn till death. A person ceases to be a natural person after his death. However, even after death the body os the person is honoured and later his property and reputation are considered. A dead person’s property must not be dishonoured. He must not be defamed to harm the reputation of the family or to hurt the feelings of his family members. Natural persons have the most privileges and duties under the law.

**Legal or artificial person in the eyes of the law**

The concept of person as per jurisprudence widened as per time. Natural persons started developing entities for their businesses, for this purpose, certain natural persons were required to act on behalf of such entities. However, a complex situation arose when the entities were to be sued. In order to avoid this problem, the concept of a ‘legal/artificial’ person was introduced.[[18]](#footnote-17)

A person or an entity is attributed as a legal person only when he is capable of suing and being sued in court of law. For example, a legal person can be a company, a State, an idol, a trade union, etc. law has provisions and power to transform an entity into an artificial person who has legal status and value. This clarifies the identity of the one suing and one being sued. Thus, legal persons are conferred with rights and duties by the law for the purpose of the law.

The main provision of law is that all natural persons are legal person however all legal persons are not natural persons. This can be understood with the help of an example – A person living in Mumbai will be considered as a legal person and a natural person. However, a business established in Bangalore will only be considered as a legal person and not a natural person as it only entails legal existence. Legal personality is not just limited to businesses, it also extends to the position of a person. A president or a deputy officer are legal positions given to people. This means that irrespective of who holds such a position, the duties to be carried out will be the same. Hence, a person holding a position may be sued for the actions done by them while being in the course of such a position. Further, the concept of corporate personality is also created by the law. A corporate personality has more rights and duties when compared to other legal persons.[[19]](#footnote-18)

**3.5 Liability**

Rules made or recogonised by state is called as law and law governs the relation between the individuals and individual and the state is a civilised society. Laws lays down the rules and liabilities of the individual. In simple terms laws prescribe what one can do, what one cannot do and what one is entitle to do. A breach of these laws of the state is called wrong. When an individual commits a wrong, he is held liable for the same.

Liability is a condition that arises when an individual commits a wring. **Salmond** defines liability as, ‘*the bond of necessity that exists between the wrongdoer and the remedy of the wrong'*. Law lays down the rights and duties of an individual along with that it ensures protection, enforcement and redressal of the said rights and duties.

**Kinds of Liability**

Liability is of two kinds:

1. Civil.
2. Criminal.

**Distinction between civil and criminal liability**

About the distinction between the two, different jurists have given different views.

**Austin** says:

An offence which is pursued at the discretion of injured party or his representatives is a civil injury. Offences which are pursued by the sovereign or by the subordinates of the sovereign are a crime. All absolute obligations are enforced criminally.

**Salmond's** view is that the distinction between criminal and civil wrong is based not on any difference in the nature of the right infringed, but on a difference in the nature of the remedy applied.[[20]](#footnote-19)

One view is that the main difference between the two lies in the procedure. In other words, their procedures are different.

The difference between criminal and civil liability is put forth in four points as follows:

1. Crime is a arong against the whole society whereas civil wrong is against private individual.
2. Crimes are punishable in nature whereas civil wrongs are remedial in nature i.e., damages.
3. There are different set of proceedings for the crimnal and civil wrongs and the proceedings takes place in two different set of courts.

1. The liability in a crime is measured by the intention of the wrongdoer, but in a civil wrong the liability is measured by the wrongful act and the liability depends upon the act and not upon the intention.[[21]](#footnote-20)

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