Intermediate Year

Sri Lanka Law College

Jurisprudence

iGuide

Empowers Independent Learning

Independent Law Student Movement

Reviews, responses and criticism
iGuide,
Sri Lanka Law College,
244, Hulftsdorp Street, Colombo 12

Compiled by
iGuide Committee 2020

President
Nadeeshani Gunawardena

Co Secretaries
Arqam Muneer
Vivendra Ratnayake

Senior Committee
Nuwan Atukorala
Udani Ekanayake
Heshani Chandrasinghe
Rashad Ahmed
Nipuni Chandrarathne
Upeksha Perera
Ravindra Jayawardana
Nisansala Madhushani
Kavita Nissanka
Senandi Wijesinghe
Tehara Jayawardhana
Aranya Devanarayana
Poorni Mariyanayagam

Junior Committee
Osura Vindula
Dasuni Salwatura
Gayani Rathnasekara
Charith Samarakoon
Sharlan Kevin Benedict
Ashraf Mukthar
Marshadha Mackie
Amanda Chandrarathne
Vishwa Hewa
Uthpala Warusavithana
Githmi Ranathunga
Tameshiya Dahanayake
Chamalee Palihawadana

Special Thanks To:

Amali Charithma
Amanda Pabudunayake
Darshanie Miharanie Jayathilake
Deshan Peiris
Dilshi Wickramasinghe
Harindu Shehan
Hasthika Weerasinghe
Lahiru Weerasinghe
Lihini Dodangoda
Nimashi Pathirana
Pali Dewanarayana
Rozanne Chrisentia Irshad
Shani Fernando
Shenali Anthony
Thilini Jinendra

CONTENTS

1. NATURAL LAW

Natural law is a general term given to a school of thinkers whose ideas consist of various theories. As Many philosophers who lived over a period of about 2000 years belong to this school, it is obvious that there should be many various.

This theory seeks to explain law as a phenomenon which is based upon and which ought to approximate to some higher law contained in certain principles of morality. These principles find their source in either religion or reason.

Natural law includes thinking such as that there is a necessary connection between law and morals and that laws school be just and fair. There is one common theme that underlies this entire philosophy that is, there are certain principles of justice and fairness that are discoverable through human reason. "Natural" means in accordance with reason. That is why this school is known as the natural law school. These thinkers believe,

Superior - Knowledge gained through reason or innate knowledge
Inferior- Knowledge gained through sensory perception

Therefore, it is their view that man-made law should conform to these higher principles of right conduct that are discoverable through reason.

Although the ideas of justice or right and wrong are present in all human minds the contents of these notions vary from person to person, time to time and place to place. Though it is universally accepted that some kind of act is wrong, there can also exceptions to the rule. These exceptions will vary from society to society, from time to time, from place to place. E.g.:

- There are people who believe that judicial executions should not be done. They believe that a person should not be punished with death even though he has taken someone else's life.
- There are people who believe that abortion should be allowed. At the same time there are people who believe that if is wrong to take the life of an unborn child under whatever circumstances.

Though the idea of sanctity of human life-is universal, the circumstances under which deviations can be made vary. The principles of right and wrong are subjective and relative.

There are certain common features in this School namely;

1. That every human being has an idea of what is right or wrong or just and fair.
2. What is right or just is the higher law.
3. The higher law is discoverable by reason.

The approach of the natural law thinkers is very similar to the approach of Eastern philosophies and religions which believe that mind is superior to matter. Natural law is based on value judgments which emanate from some absolute source and which are in accordance with nature and reason. The principles of Natural Law are immutable, eternally valid and can be grasped by proper employment of human reason. These principles are universal and when grasped they must overrule all positive law, which will not be law unless it confirms to natural law.

The development of natural law philosophy can be studied in relation to four periods in history,

1. The Classical Period
2. The Middle Ages
3. The Renaissance Period
4. The Modern Period.

It is possible to trace natural law thinking from the most primitive stages of social development when for many simple societies, there was very little distinction made between the religious and secular, the spiritual and physical.

The Classical Period

The classical period was dominated by the ancient Greeks and Romans. Most well known philosophers of that time were **Socrates**, **Plato** and **Aristotle**.

Socrates (470 BC -399 BC)

He was an expert in asking questions and generating discussions. His method is known as the **Socratic Method**. He argued that there were principles of morality which it was possible to discover through the processes of reasoning and insight. Law based on thses principles would thus be the product of correct reasoning. However, very little is directly known about the ideas of Socrates because he did not write them down. It was his student Plato who wrote a series called **The Dialogues** based on the discussions Socrates had with others.

Plato

He was Socrates disciple. He founded an Academy for the training of statesman. He believed that the statesmen should be philosophers. Plato's famous work **The Republic** too was in the form of dialogue. The Republic starts with the question; *what is the meaning of justice?* He believed that ultimate justice is discoverable through reason. Therefore states should be ruled by philosophers or philosopher kings as only they will be able to engage in proper reasoning and discover the perfect rules of conduct and grasp the absolute idea of justice. In fact Plato said that states fail and become corrupt because their leaders are not wise.

Aristotle (1384 BC -322 BC)

He was Plato's disciple. Aristotle founded his own school named Lyceum where Alexander of Macedonia was one of his pupils. He recognized nature as the capacity for development inherent in particular things, aimed of a particular purpose in both physical and moral phenomena. Aristotle emphasized that humans are rational beings and as such all men and women by nature have a desire to know the truth. These powers of reason are a dependable guide for interpreting experience and revealing the truth about reality to us. Socrates Plato and Aristotle believed that there are certain universal and immutable standards discoverable through reason and manmade law should conform to these standards.

The Romans however were very practical people. Instead of theorizing like the Greeks they put into practice the natural law principles. Roman Civil law *(jus civile)* was full of technical formalities which at times resulted in unfair decisions. Therefore Roman magistrates relied largely on common sense and reason and developed a separate branch of law known as *jus gentium*, which later became the foundation for international commercial law. The laws pertaining to slavery too were later relaxed by them thus recognizing human values.

The Middle Ages - The period between 5th to 15th centuries

During this period Western Europe came under the rule of the Holly Roman Emperor and the spiritual affairs of this Empire came within the purview of the Pope. This period is marked by

a decline in the study of classics of the Greeks and Romans and emphasis was placed on religion and faith. The two prominent philosophers during this period were St. Augustine and St. Thomas Aquinas.

St Augustine's [354-430 A.D.] famous work **De Civitas Dei** (City of God) influenced the thinking of the Christian world for a loan time. In this book he asks "what are states without justice but robber hands enlarged?"

St. Thomas Aquinas's [1225 -1274 AD] **Contribution**
He attempted to harmonize the teaching of the Greek philosophers, especially those of Aristotle with the beliefs of the Catholic Church. His major work is **Summa Theologica**. According to him law consists of four types of rules.

1. Eternal law (*lex eternal*):
   Known only to God and unknowable to men in its perfect form

2. Divine law (*lex divina*):
   Part of the eternal law, revealed to men by God through Holy Scriptures

3. Natural law (*lex natura*):
   Part of the divine law that is understood by men through reason

4. Human law (*lex humana*): The man made law

Thomas Aquinas said that man can find out natural law by applying reason and studying scriptures which are revelations of God. It was his contention that *lex humana* should conform to *lex natura*. If manmade law conflicts with natural law in major areas, then manmade law need not be obeyed by the subject. In other words unjust laws deserve no obedience from the people to whom those laws apply. A government or a ruler who abuses its authority by enacting laws which are unjust loses the right to obedience from its subjects.

For Aquinas, human law would be unjust where it,
1. Farther the interest of the law giver only
2. Exceeds the poser of the law giver
3. Imposes burdens unequally on the governed

The practical importance of this analysis consists of the assessment which Aquinas made with regard to the incidence and strength of the moral obligation to obey positive laws. In general, Aquinas strongly espoused the position that in the event of any conflict between the postulates of Natural law and Positive Law, the former must undeniably pervert over the latter.

In other words it is in the conscience of every human being to give priority to his perception of Natural Law and to withhold allegiance from the provisions of positive law to the extent of incompatibility with the law of god or law of nature.

St. Thomas Aquinas' ideas have influenced modern constitutionalism, because Natural law inspired the formulation of democratic constitutions such as USA and France.

The Renaissance Period

During this time the Holy Roman Empire broke up in to nation states such as France, Spain, and Portugal. The influence of Catholicism diminished due to the teaching to reformers such as Martin Luther and Calvin and emergence of a number of Protestant churches.
There was a revival of learning as scholars started studying ancient classics of the Greeks and the Romans. With the decline of the influence of Catholic Church and the knowledge gained through the study of ancient works, these scholars took a fresh look at the concept of natural law as well. Instead of relying on scriptures, they looked at the purpose of human life itself to extract natural law principals.

Philosophers like **Rousseau, Hobbes and Locke** formulated theories of social contract which in turn led to the explanation of natural rights of human beings. Earring this period there was a shift from Natural law principles to Natural rights which is the forerunner of human rights of the modern day. According to them all men and women were born free and equal. As such all human beings were entitled to certain inalienable rights such as right to life freedom from arbitrary arrest, self determinations etc. This thinking let to incorporation of bill of rights in the American and French constitutions which were framed after revolutions.

The Modern Period

In the beginning of the 19th century the interest in natural law thinking declined. The reasons being;

1. The emergence of scientific knowledge. Scientists depend on observable data and not on vague subjective theories. Natural law did not fit into the scientific method of discovering knowledge. For example it was proved that social contract theory was not based on historical facts.
2. Natural law has been used by different people for various ends. The Christian thinkers used natural law to defend the teachings of the church. Hobbes used it to support absolutism, Rousseau to justify revolutions. Therefore as **Alf Ross** said, "*Like a harlot, natural law was at the disposal of everyone*".
3. During this period a school of thinkers called Positivists came to the lime light. They believed that the task of the jurist is to study and analyze law as it is, as opposed to law as it ought to be as professed by natural law thinkers.

However after the World War-II Natural Law gained acceptance again due to several reasons. The world community was shocked by the atrocities committed by the Nazis during The war. The massacre of Jews in millions was done under the laws passed by Nazi regime. In fact when war criminals were charged before Nuremberg Trials, the argument for the defendants was that they were carrying out superior orders and acting in accordance with the law.

The world community found that accepting positive law or law that is passed by the rulers or the governments without questioning the moral content of such laws is a dangerous phenomenon which will bring disaster to mankind. As a result there was revival in natural law thinking and a search for moral values which led to Universal Declaration of Human Rights by the United Nations [1948] and number of conventions and covenants on human rights and civil liberties.

John Finns and the restatement of Natural Law

He ragued that the objective knowledge of what is right is made possible by the existence of basis froms of human flourishing He lists 7 objective goods as being irreducibly basic,

Life	Friendship or sociability
Knowledge	Practical Reasonableness
Play	Religion
Aesthetic Experience	

These are generally things which for most people make life worthwhile he also presents 9 requirements of practical reasonableness. These 9 requirements and 7 basic forms of human flourishing together, according to Finns, constitute the universal and immutable principles of Natural Law.

Stage 1	God (Spiritual Revelation) and Nature (Human Reason)
Stage 2	Moral principles (External/Universal/Immutable Standards)
Stage 3	Just Law (Common Good)

Wijessuriya and Another v. State NLR 25J

The issue of acting under superior orders was considered. In this case the first accused was a lieutenant and the second accused a soldier in the volunteer force. They appealed against the decision of the trial court which found them guilty of the attempted murder of a young woman, a former beauty queen (Avurudu Kumari).

At the time of the incident due to an armed uprising against the state, a state of emergency was then declared and armed forces were called out to suppress the revolt and restore law and order. The two accused were among the troops that were sent to Kataragama for this purpose. The young woman was taken into custody as a suspected insurgent. The first accused started questioning her and then threatening persuaded her to remove clothes. She was then asked to put her hands up and march on the highway. The first accused and the other then followed her and later he kicked her and opened fire. After the girl fell down the two accused went. Then they were informed that the accused the girl was still alive. Whereupon the first accused ordered the second accused to go and shoot her. Accordingly the second accused went there and shot at her again. But as she was found to be still alive an unidentified soldier went up again and shot the girl through the head this time killing her.

One of the defense arguments was that they were carrying out superior orders. It was submitted that the first accuser's superior officer a Colonel had ordered him to "bump off' prisoners and that the second accused shot the girl on the orders of the first accused. The sec. 100 of the Army Act says that every person subject to military law who disobeys any lawful Command given by a superior officer commits an offence.

The accused also raised the defense under Sec. 69 of the Penal Code which states; "nothing is an offence.... who in good faith believes himself to be bound by law to do it". However it was held by the Court of Criminal Appeal that the Army Act required a person who is subject to military law to obey only lawful commands given by his superiors.

Then question to be considered is how did the court resolve what a lawful command is Hon Justice Thamotheran in his judgment says; "the discussion of law really centered on to what extent a person subject to military law is bound to obey the command of his superior officer" Three different positions emerged;

1. A soldier must obey the command of his superior whether it was lawful or not,

2. A soldier must obey the command of his superior only if it was lawful. This view came into conflict with the requirement that a solder must give his unquestioning obedience

to his superior's order. Very often he will not have time to consider its lawfulness. He does not give his mind to it- It is wrong in such cases to say that he has reason to believe it to be lawful. It is just that he does not think it to be unlawful.

3. From this there emerged the third view lat a soldier was bounded to obey only orders which were not manifestly and obviously illegal. That is where the illegality Strikes in the face. In such cases if he obeys such an order the law will presume that he has observed with knowledge of its illegality. It is this view the learned judge directed the jury to follow.

The same questions the learned judge posed in regard to the 2nd appellant at page 454 of his charge and said,
"If you come to the conclusion that the second accused honestly believed that he was bound by law to carry it out because it was not an obviously and manifestly illegal order then the 2nd accused is protected."

It will be seen that therefore what was considered as a lawful command was one which the accused honestly believed that he was bound to follow as it was not 'obviously and manifestly' illegal. It was therefore an appeal to own conscience rather than a reference to some legal provision or positive law. Although no mention was made of natural law principles, it is submitted that the learned judges reasoning shown that it was an instance where human values were involved.

Contribution of the Natural Law School

1. It played a very important role in the creation of international law International relations are guided by certain moral principles such as *pacta sunt servanda* that agreements should be honored, states and sovereigns are equal, that states should not interfere in the affairs of each other.

2. Natural law inspired the formulation of democratic constitutions such as those of United States of America and France, which incorporated chapters on fundamental rights.

3. Natural law led to the development of fundamental and human rights, culminating in the Universal Declaration of Human Rights. United Nations Covenants on Civic and Political Rights and Social and Economic Rights and international Conventions on Human Rights.

4. The principles of equity were developed on natural law thinking The Lord Chancellor in England intervened to reduce the harshness common law and developed a separate body of equitable principles. The branches of law such as Trust and Equity and quasi contracts are the results of natural law thinking.

5. The development of administrative law was also influenced by natural law thinking. Principals of natural justice such as *audi alteram partem*, that both parties should be heard no man should he the judge in his own cause, principle of reasonableness, *bona fide* or good faith are all results of natural law thinking,

6. Legal reforms *and* developments *in* the word are influenced by natural law thinking it is being used today as a yardstick for examining the existing law for its moral values and to effect law reforms where existing laws conflict with moral values and beliefs.

2. POSTIVISM

Positivism too is a general term, designating a number of shades of views. One of the best descriptions of Positivism has been given by Professor H.L.A. Hart in his book *Concept of Law*. He has explained the various brands of thinking.

1. Laws are commands of human beings.
2. There is no necessary connection between law and morals or law as it is and law as it ought to be.
3. The analysis or study or meanings of legal concepts is an important study to be distinguished from [though in no way hostile to] historical inquiries and the critical appraisal of law in terms of morals; social aims, functions etc.
4. That the legal system is a closed logical system in which correct decisions can be deduced from predetermined legal rules by logical means alone.
5. That moral judgments cannot be established as statements of fact, by rational argument, evidence or proof

Bentham and Austin held the views expressed in 1,2 and 3 but not those in 4 and 5 Kelson holds those expressed in 2, 3 and 5 but not those in 1 or 4.

Positivism is a reaction to Natural law thinking, as the latter was found to be vague and not supported by scientific knowledge. We have seen that scientists depend mainly on empirical knowledge; data obtained through observation and. experimentation. Natural Law could not be subjected to such observation and experiments as it existed only in the minds of human beings and they used this thinking to suit various and divergent ends from time to time. It was pointed out that natural law thinking was used to support religious influences totalitarianism, democracy and revolutions. Positivists therefore sought to approach the subject in a scientific manner so that their thinking will meet the tests of the scientific world, and it will be objective. Positivism means that which is posited or made by man as opposed to higher principles of natural law thinkers that existed in the realm of mind.

A pioneer in the positivist school is the Englishman Jerome Bentham who lived from 1782 to 1858. He was highly influenced by legal traditions in the European Continent where the law mainly consisted of enacted law or codified law. In England the law in his time mainly comprised common law or judge made law, which was based on immemorial custom and long standing practice that was supposed to contain natural reason. Consequently people did not know exactly what the law was till the judge pronounced the law.

Bentham therefore was highly critical of this practice and made fun of the common law saying it is ***dog's law***. He said; "*Whenever your dog does anything you want to break him of. You wait till he does it and then beat him for it. This is the way you make laws for your dog; and this is the way the judges make law for you and me*". He attacked natural law too saying that it was nothing but ***private opinions in disguise***. Bentham's famous books are "Of Laws in General (1940)" and "An introduction to the Principles of Morals and Legislation". However his writings were not published till recently and were gathering dust in the archives of the University of London.

As he was thoroughly dissatisfied with the common law he wanted to have the laws enacted in the form of a code. He defined law as wishes of the sovereign supported by sanctions or rewards. It will be seen that this definition is similar to that of John Austin who was Bentham's disciple. The world came to know how much Austin owed to Bentham only after latter's works were published very much after those of the former. He also believed that laws should attempt to achieve the greatest happiness of the greatest number. He is well known as a Utilitarian who believed that human actions are governed by the pleasure-pain principle.

People tend to avoid pain and seek pleasure. Accordingly, when laws are enacted they should follow this scientific principle. In fact he devised a method, though highly unscientific known as the *felific calculus* to calculate how much of pain or pleasure was there in each action. He was mainly concerned with exposing the weaknesses of the common law and reforming it by applying the pleasure pain principles. Therefore it is said that he was mainly devoted to censorial jurisprudence or how the law should be reformed.

Although John Austin [1790- 1859] drew widely from Bentham, it was Austin who came to be recognized as the **father of Jurisprudence**. Whereas Bentham was concerned with constructing an ideal code of law, Austin's interest was more in the systematic analysis of existing laws or expositorial jurisprudence. Austin's major work was "The Province of Jurisprudence Determined(1832)" consisting of lectures that he delivered as the Professor of Jurisprudence in the University of London.

Austin pointed out the there are various types of rules operating in any society and it is the task of jurists to separate laws proper from other rules. He classified laws as follows:

Law improperly so called
- Laws by analogy (laws of fashion) - positive morality
- Laws by metaphor (laws of science)

Law properly so called
- God's Law
- Manmade law
  1. By political sovereign/superiors to their subjects or by competent persons in accordance with the authority delegated to them by their political superiors (positive law or law strictly so called + real subject matter of jurisprudence)
     E.g.: Acts of Parliament and By-laws of local authority
  2. By others/not political superiors - positive morality

Austin defined positive law as a command of a political superior addressed to an inferior backed by sanctions. Command is an expression of a wish by the political superior that his subject should do or refrain from doing some act. If the latter disobeys the superior will inflict punishment on the other.

The command according to Austin will have the following elements:-

a. A wish or desire of the political superior that an inferior shall do or refrain from doing something.
b. A punishment that will proceed from the superior to the inferior if the latter does not obey the wish.
c. An expression of the wish by words or other means.

Having explained the qualities of a command, Austin describes the attributes of a political superior. His notions of a command and a political superior are closely linked. He defines the sovereign as, *if a determinate human superior not in the habit of obedience to a like superior receive habitual obedience from the bulk of a given society that determinate superior is sovereign in that society*. Accordingly the sovereign can be a particular person like a king or a president or a particular body of persons like the Parliament. Further the sovereign should have certain, specific features.

1. The sovereign should be habitually obeyed by the bulk of the society
2. He should not be habitually obeying another person or a body.

Consequently two conclusions are drawn from these attributes of the sovereign namely; that the sovereign is illimitable or incapable of being limited by law. In other words the sovereign's powers cannot be restricted and as such he has unlimited power. The second consequence that follows from the definition of sovereignty is that his power is undividable. If the powers of sovereignty are divided there will be several sovereign persons or bodies existing in the society and according to Austin it is logically impossible to have more than one political superior in an independent society.

To Austin laws are power based as they emanate from the sovereign. His notion of law will ideally fit the laws in a totalitarian state, where its population obeys its laws through fear of sanctions. The Black population under the Apartheid rule in South Africa obeyed those laws through coercion. His definition of law as a command backed by sanction has evoked much criticism.

One of the foremost critics of Austin is H.L.A. Hart, who in his work Concept of Law completely demolishes *orders backed by threats* model of law. He points out that there are duty imposing and power conferring rules in our society and Austin's command theory does not include power conferring rules. Power conferring rules are those that empower a person to do something. Examples would be laws empowering persons to write wills enter into contracts perform certain acts. These laws are not commands backed by sanctions. Therefore the command theory fails to encompass these rules. Austin's theory only matches duty imposing rules that oblige persons to conform to a certain code of conduct. The failure to it will render the violator open to punishment. When one looks at the time in which Austin lived it is not difficult to understand why he though in this manner. The predominant political philosophy at his time was the Laissez faire theory which allowed full freedom for individual actions. The state interference was minimal only to maintain law and order. Therefore most of the laws in his time were criminal laws.

This explains why he defined law as a command backed by threats of punishments. Secondly with regard to the range of application of laws it can be seen that today laws apply to the sovereign as well. For example laws on health education and social welfare impose obligations on the rulers as well mandating them to carry out certain duties in these areas. However according to Austin's definition of laws was a wish of the sovereign that others, and not he, should do or not do certain things. Thirdly a question arises as how one could explain judge made laws or customary laws. Austin explained away such criticism by stating that common law or judge made laws are "tacit commands" or indirect commands of the sovereign. Another criticism of Austin is his explanation of sovereignty, which was considered to be indivisible and illimitable, when one looks at Modem day constitutions one can see many countries having written constitutions, which restrict rulers' powers. An example is the chapter on fundamental rights, which restricts or limits the powers of the rulers. Similarly federal constitutions provide for power sharing between the centre and the provinces. Can we say that these countries are not sovereign?

It has also being pointed out that there is no sovereign as such, issuing commands to the subjects. These societies are regulated by customary laws. Sir Henry Maine in "Ancient Law" gives the example of Ranjeet Singh, the ruler of Punjab. Although he had all the powers to order anything he was not a lawgiver. His subjects were governed by customary laws which were enforced by domestic tribunals. However it could be argued that Austin referred only to sovereigns in developed societies and not primitive communities.

Another criticism is that Austin's theory does not match, with interpretation acts enabling enactments procedural laws as they are not commands in the manner, Austin envisaged "Austin's theory" also fails to recognize international and constitution law as laws. In international system there is no supreme body enacting commands, neither is there enforcement machinery. Similarly English Constitution contains a large bulk of non legal rules or conventions which are not commands of the sovereign and not enforceable in courts. Further constitutional law is not law according to him, because the sovereign cannot issue commands to himself. To Austin both these areas of law were positive morality and not law.

Austin's theory has many shortcomings and does not suit modem democratic societies. However it has to be admitted that Austin presented a simple, logical and precise theory of law. He showed that jurists should focus on positive law and not on vague and unascertainable natural law principles. He exercised a tremendous influence in the British Commonwealth and in the way lawyers think and decide in these countries. In fact Allen in his "Law in the Making" refers to Austin's theory as *the characteristic jurisprudence of England*. In these countries lawyers generally tend to follow the "black letter law" namely the enacted law as they are regarded as commands of the sovereign and restrictively interpreted. These lawyers are cautious in venturing out and making bold interpretations even where they may feel they should do so in the interests of justice. Lord Atkinson in Vacher and Sons Ltd v. London Society of Compositors [(1913) A.C.107 at 121] said "if the language of a statute be plain admitting only one meaning the Legislature must be taken to have meant and intended what it has plainly expressed and whatever it has in clear terms enacted must be enforced though it should lead to absurd or mischievous results."

Even in Sri Lanka today one can see the extent to which Austin has influenced (or blurred) the thinking of some people who maintain that the country will loosen its sovereignty if there is division of power between the central government and the provinces. A certain politician speaking on the devolution proposals recently said;"....in the event of the devolution package being implemented article 76 of the Sri Lankan Constitution will be deleted. As a result of this a chain reaction the supremacy of Parliament will be reduced to nothing, making the ruling powers and up in the hands of regional councils. The Island Sunday August 20 1995 Page 3 under the heading "Devolution will reduce Parliamentary Supremacy". Don't you see Austin's thinking persisting even today behind these words?

H. L. A. Hart

In his book Concept of Law, he states that the legal system is a system of social rules. Rules are concerned with obligations as they make certain conduct obligatory. However rules are different from commands as explained by Austin. They are not conceiving orders like the orders of a gunman. Rules are accepted as standards of behavior by the members of the society. They believe that any deviation from such rules justify criticism. There is social pressure for conformity. He refers to this aspect as the "internal aspect" of the law.

External aspect of the law is what an outsider observes. In Gulliver's Travels, when Gulliver washed ashore after his ship wrecked on the island of Lilliput, the tiny people of that island examined his watch. They described it as round with two hands going round with a ticking sound etc. This was their observation from the external aspect from outside. But they did not know what it meant to Gulliver from his internal aspect. Similarly in rules too there is an internal aspect seen and applied by the people who use them. According to Hart people obey rules not through fear of punishment, but they on their own think rules are a standard of behavior and it is in the interest of the entire society to follow them.

Sometimes when I drive I begin to ponder as to which description of law; Austin's or Hart's is closer on the roads of Colombo? Some motorists follow traffic rules only when a policeman is around. They fear getting caught and the punishment that may follow. To them traffic rules are commands backed by sanctions and not standards to be followed for the safety of road users. I think Hart's views are more applicable in civic conscious societies. In societies, where this quality is lacking or in totalitarian regimes orders come from top to bottom. These social rules can be moral rules or legal rules. Ina primitive society he says, there is hardly any difference between these two sets of rules that regulate conduct of its members. He calls them primary rules. However when the society develops certain additional rules come into being to settle disputes facilitate changes and to determine the validity of the rules. He calls the first rules of adjudication the second rules of change and the third rules of recognition. All these categories of rules are termed secondary rules, which he says are found in any modern society. The Legal system in any modern society, according to Hart, is a "union of primary and secondary rules". In these societies legal rules are those rules that are valid according to the rule of recognition. To ascertain the ruin of recognition one has to observe how the courts and officials identify laws in that particular country. For example in a parliamentary democracy the courts will recognize as laws what has been passed by parliament or decisions of superior courts, Hart says. "What is crucial is that they should be a unified or shared official acceptance of the rule of recognition." The rules validated according to the rule of recognition must be generally obeyed by both the officials and the private citizens. He says "... so long as the laws which are valid by the system's test of validity are obeyed by the bulk of the population this surely is all the evidence we need in order to establish that a given legal system exists" Although Hart who is a Positivist says that there is no necessary connection between law and morals. He admits that there is a "minimum content" common to both law and morality. In the legal rules there are areas where the meanings are very clear and ceded and where no farther guidance is required to understand them. He calls them "core" areas. There are also areas, especially in the periphery where the meaning is not clear and Subject to interpretation. This open ended area is called the "penumbra' where judges exercise some discretion in interpreting laws. It will be seen that Harts concept of law is devoid of most of the shortcomings of Austin. The way Hart explains his rules can accommodate both duty imposing and power conferring rules. There is no reference to sovereignty as Austin envisaged it. Hart says restrictions on legislature are part of the rule that grants authority to legislate.

Ronald Dworkin - US

He became a Professor of Jurisprudence in Oxford & Starts his book "Taking Rights Seriously" with an attack on Hart's model of rules. Dworkin says that law consists not only of rules but also of principles, which are standards of justice of fairness or some other dimension of morality. They provide a reason for deciding a case in a particular way and describe rights. However these principles do not receive their law quality from the rule of recognition. It is Dworkin's contention that rights should be taken seriously.

Riggse v. Palmer [(1889) 115NY506]

The issue was whether a person named as an heir under a will could inherit even though he was the testator's murderer. The court started reaching by admitting that a literal interpretation of the relevant statutory provisions would entitle the murderer to inherit. But it pointed out that all laws may be controlled in their operation and effect by general fundamental principles of common law. Such a maxim is that no one should be permitted to prove by his own wrong. Accordingly, then murderer did not receive the inheritance.

Hennigsen v. Bloomfield Motors Inc [32 NJ 358]
The issue was whether a car manufacturer could limit his liability in case a sold vehicle was defective. The manufacturer had entered into sale agreement with the buyer which limited the former's liability. The plaintiff argued that the seller should not be protected by this limitation and should be liable for medical and other expenses of persons injured in the crash which occurred owing to the defects in the vehicle. He was not able to cite any statute or decision in support of his argument. However the court found for the plaintiff relying on principles such as that courts will not permit themselves to be used as instruments of inequity or injustice and courts will not enforce a bargain in which one party has unjustly taken advantage of the economic necessities of the other. The principles taken into account in the above decisions are not legal rules, which have gone through the rule of recognition

C. Suntheralingam v. AG [75NLR 126]
The petitioner applied to obtain an injunction to prevent and prohibit the minister for Constitutional Affairs from taking any steps to repeal the Ceylon Constitution and orders in Council 1946 and 1947 which provided certain minimum guarantees to the minorities and substituting it with a new constitution. It was held that the court cannot consider the validity or otherwise of a new constitution unless and until a new constitution is established.

However, the petitioner's argument was that when the new constitution is established it will not be possible to challenge it as the draft constitution had a provision ousting the jurisdiction of the courts with regard to judicial reviews. It is respectfully submitted that if the Supreme Court instead of looking at the issue from a purely technical angle or a positivist point of view had taken into account principles of equity and rights of individual [minorities in this instance] as pointed out in the previous paragraph the political history of Sri Lanka would have taken different Course.

3. THE PURE THEORY OF LAW

Hans Kelsen (1881-1973), German lawyer belongs to the Positivist school. He not only believed that laws should be divorced from morals but also that laws should be separated from all other non-legal factors or disciplines such as history, economics, sociology and other considerations and analyzed as it is. Hence his theory is known as the pure theory of law. His teachings are accepted today in many parts of the world. (E.g.: Mexico) He also drafted the Austrian constitution in 1921 and wrote and authoritative guide to the United Nations Charter.

He sought to provide **a pure theory of law,** one that would be scientific and accurate in answering the question "what is law?" - Pure in this context means analysis of the law is limited to the law itself and it is purely conceptual.

To Kelsen law is a norm. By norm he meant a legal cause and a legal effect. *E.g.: If I steal and get caught I ought to be arrested if arrested I ought to be produced in court if produced in court I ought to be tried. If I found guilty, I ought to be sent to jail.* Therefore norms are a series of "ought" propositions. If X happens, Y ought to follow. Ultimately these norms end up as directives, addressed to officials to take certain action and apply sanctions.

However legal causation is different from a scientific sense.
Scientific sense: ----under certain circumstances certain results will invariably follow.
Legal cause: ----and effect situations certain things *ought* to happen but may not happen.
A norm is therefore an "ought statement" stating that under certain circumstances certain results ought to happen. The important feature of study of law to Kelsen was not analysis of the facts of human behavior but an explanation of norms which are rules and regulations that set out the expected standards of behavior.

Kelsen distinguished moral norms, legal norms and legal rules.

Moral:	It is required standard of behavior
Legal norm:	Describes what law ought to be under certain situations
	Merely describes what the law essentially requires
Legal rule:	Law as contained in the publications of legislators

Kelsen states that there is a hierarchy of norms in a legal system where one norm leading to another in this manner one norm depends on another higher norm for its validity. Norms can be traced to one basic norm beyond which one cannot go any further. The ultimate norm beyond which there is no other norm is the basic norm or the "Grundnorm" as Kelsen calls it. This basic norm gives validity to the entire legal system as all norms ultimately receive their validity from this basic norm. The grundnorm in a legal system is not the constitution but the norm that what is passed according to the constitution out to be obeyed. And also it could be the historically first constitution of that society.

"*The norm the validity of which cannot be derived from a higher norm, the last presupposition the final postulate*".
-Kelson-

Where does the grundnorm get its validity?

It does not get it validity from any other source. Kelsen says that it is simply assumed to be valid by the people in that particular country. A grundnorm can be found in every type of legal order. Legal system is like a pyramid with lesser norms at the base and going up in ascending order of importance and culminating at the apex with the grundnorm.

↓	Basic Norm	-General -Higher Norm
	Secondary Norm	-prescribes certain conducts
	Primary Norm	-Particular -Lower Norm
		-stipulates sanctions applied under certain conditions
		-directs officials to apply sanctions

He also says that the grundnorm should be effective or efficacious in the legal system that is it should be accepted by and large within the community. It should be generally obeyed, but universal total obedience is no required. When the grundnorm ceases to get the minimum support it ends being the basis of the legal order and it can be replaced with a new constitution which has by and large the backing of the population.

Sri Lankan System

This theory of grundnorm is a significant theory in understanding the evolution of legal system in a society. In Sri Lankan situation, one finds Pradeshiya Sabhas, Municipal Councils and Urban Councils at the bottom level of the administration. They are authorized to make rules to regulate affairs within their purview. These rules are norms directed to their officials to take action or not to take action if the members of the public act in a particular manner. These rules or norms get their validity from the respective enactments that created them. These enactments in turn get their validity from the Second Republican Constitution of Sri Lanka [1978] which authorizes the local bodies to pass by laws in accordance with a particular procedure set out.

From where does the 1978 constitution get its validity? It's from the 1972 or the First Republican Constitution. There is no further norm. It is the grundnorm. It has no link or connection with the previous constitution that is the Ceylon Constitution of 1947. That is the reason the members of parliament who drafted the 1972 constitution met as a Constituent Assembly away from the Parliament building in a different place, Navarangahala to show that the new constitution did not derive its validity from the one (Soulbury Constitution) granted by the British in 1947.

It was because there was a strong opinion that the sec. 29 of the Soulbury Constitution which provided certain minimum guarantees to the minorities in the country was an entrenched clause which the Parliament of Ceylon was not authorized to amend or repeal. It appears that the architects of the 1972 constitution were guided by Kelsen's theory to have a complete break with the old system and introduce a new basic norm.

"The inauguration of the Republican Constitution resulted in a legal revolution that the devise of the Constituent Assembly to draft and adopt the new constitution was deliberately intended to breach any implied continuity with the British heritage"
- Zafrullah-

Kelsen explains that the effectiveness of the grundnorm is not a sufficient condition but a, necessary condition. By effectiveness he means that the existing legal system should be generally obeyed. Although effectiveness is a must for the grundnorm, it is not the reason for its validity since it does not depend on any other source for its legality. In fact it is simply assumed to be valid by anyone in the community. In Sri Lanka the Soulbury Constitution

ceased to be effective in 1972 as the country extended its allegiance to a new constitution. It will be remembered that the Tamil parties boycotted the Constituent Assembly that drafted the 1972 Constitution even the major opposition party at the time was against the new constitution.

"When the Republican Constitution was put to the vote on the morning of 22nd May 1972 the UNP voted against it, In the Constituent Assembly. Mr. Dudley Senanayake explained the reasons for his party's decision to oppose the new Constitution. He stated while the UNP accepted the principle of a ***free sovereign and independent republic*** *yet the constitution drafted, by the United Front contained many defects and omissions and a constitution, far from protecting the sovereignty of the people could result in an erosion of it."*
-Zafrullah-

However after the Republican Constitution was passed the people generally accepted it without any major opposition the Courts assumed it valid and acted accordingly. The members of judiciary, the armed forces, police and the public service swore their allegiance to the new constitution and even the Tamil parties and the UNP took their seats in the National State Assembly [House of Representatives] after taking the oath of allegiance to the new Republic.

This is a fitting example of Kelsen's theory where one grundnorm give way to another on receiving the support of the population on a strictly legalistic basis one can argue that the 1972 constitution is not valid because it was not passed according to the provisions of the Soulbury Constitution. But Kelsen provides the counter argument that one grundnonn has ceased to be effective and another has received the support of the people. It does not require any other norm for its validity except the assumption by the people that it is valid. It could be assumed that edicts of Sri Wickrama Rajasinghe the last King of Kandy are still valid or some descendant of this has a claim to the throne as the King was illegally deposed by the British But the problem is the old legal order is not efficacious anymore. In other words one can have efficacy without validity but one cannot have validity without efficacy.

The grundnorm ensures that all the norms that it validates do not contradict each other. The validity of each norm depends on the effectiveness of the legal order. By validity it means that norms are binding on the people.

<u>Political regimes as grundnorm</u>
The grundnorm may not last forever. When it loses its efficacy, it will give way to another gnundnorm. This will generally happen after a revolution when the old order is over thrown and a new system has taken its place. There are also many examples in the world where the existing legal order was changed by military revolts and violent means. E.g.: Pakistan, Uganda, Ghana and Nigeria.

<u>State v Dosso [1958] 2 Pakistan SCR 80</u>
The Supreme Court of Pakistan held that the military regime that usurped power from the lawful government was effectively in power and therefore valid. The Chief Justice Muhammad Munn said in his judgment;
"It sometimes happens however that the Constitution and the national legal order under it are disrupted by an abrupt political change not within the contemplation of the Constitution. Any such change is called a revolution and its legal effect is not only the destruction of the existing constitution but also the validity of the national legal order".

Uganda v Commissioner of Prisons

In 1966 the Prime Minister of Uganda issued a statement declaring that he has taken over all the powers of the country. The High Court in considering the legal effect of the takeover stated;

"*..our deliberate and considered view is that the 1966 Constitution [i.e. revolutionary constitution] is a legally valid constitution and the supreme law of Uganda and that 1962 constitution having being abolished as result of a victorious revolution in law does no longer exist nor does it now form part of the laws of Uganda it having been deprived of its de facto and de jure validity*".

Madzimbamuto v. Lamer Burke and Another [1968] 3 All IR 561

In 1961 there came a convention of the British Parliament not to legislate for Southern Rhodesia except with the agreement of the Legislative Assembly of that country. In that year Britain granted a new constitution to South Rhodesia which provided *inter alia* that no person shall be derived of his personal liberty except in accordance with the law. However derogation from this provision was permitted in the event of a public emergency. It had to be declared by the governor under the Emergency Power Act and the period was limited to 3 months only. Under the regulations of Emergency Powers Act, appellant's husband was arrested.

A few days later Ian Smith, the Prime Minister issued a unilateral declaration of independence. On the same day the governor issued a statement that PM and his ministers ceased to hold office and called on all citizens to refrain from supporting the illegal authorities. The British Parliament declared that all laws made by the Legislative Assembly of the colony were void. PM and ministers however ignored the dismissal. They cached on regardless and adopted a new constitution in 1965. When the state of emergency proclaimed under the old constitution came to an end February 1966. Ian Smith took steps under his new constitution to prolong it.

The Emergency Powers Regulations 1966 were thus made and under these the first respondent made an order continuing the detention of the appellant's husband. The appellant then questioned in courts the legality of her husbands' detention. The Appellate Division of the High Court affirmed the decision of the lower Court that the detention order was valid. Although the High Court did not officially regard the Ian Smith's constitution as valid, it observed that judges appointed under the British Constitution continued to function and their judgments were enforced by the officers of the rebel government. The new government had also appointed and promoted junior judicial officers. Their decisions had come up for review and on appeal before the High Court and it had recognized these appointments and had never quarried their jurisdiction. It had also taken cognizance of the laws passed by the rebel government and acted upon them.

"*The present govt. having effectively usurped the govt. powers granted Rhodesia under the 1961. Constitution can now lawfully do anything which its precession could lawfully have done but until its new constitution has firmly established and thus becomes the de jure constitution of the territory its administrative and legislative acts must confirm to the 1961 Constitution. The various Proclamations of states of Emergency were lawfully made.*"

-CJ of Rhodesia-

However when this came up in appeal before the Privy Council held the emergency powers regulations made in South Rhodesia after 1965 November had no legal validity force or effect because *inter alia* concepts of *de facto* and *de jure* government were inappropriate in dealing with the legal position of a usurper within the territory of which he had taken control and whilst the legitimate government was trying to regain control it was impossible to hold the

usurping government was for any reason lawful government. Whereas in the above two cases from Pakistan and Uganda the rebel regimes were in full control.

However more recent cases show that courts are not prepared to accept now regimes purely on the basis that there had been a change of grundnorm and the new master are in firm control.

Mitchell v DPP [1986] AC 73
In an appeal from Grenada the Court of Appeal said that in addition to efficacy of a legal system there must be popular support not submission to coercion and the regime must not be Oppressive or Undemocratic.

Asma Jilani v. Government of Punjab PI I 1972 SC 670
The Supreme Court headed by Hamoodur Rahman held the takeover by General Yahya Khan was illegal. They totally rejected Kelsen's theory and overruled the decision in the State v. Dosso stating that "*a perfectly good country was made into a laughing stock.*" However it has to be mentioned that these decisions were made after the illegal regimes had been ousted and not when they were in control.

In assessing Kelson it is apparent that his theory is highly logical, one that appeals to the intellect.

1. It does not have the deficiencies of Austin's command theory as norms can accommodate both duty imposing and power conferring rules. The norms can apply to the rulers as well therefore the difficulty Austin found with regard to written and federal constitutions are not present in Kelsen's theory.
2. According to it, International Law is in primitive form as it lacks effective enforcement machinery. It has also assisted judges in interpreting situations than emerge after revolutions though it has been rejected by some courts in recent times.

Criticisms

1. Kelsen's theory is not as pure as he claims it to be. It is obvious that when it comes to the effectiveness of the grundnorm one has to go into the political realities of the situation.
2. Kelsen didn't bring a solid method to measure the effectiveness of the grundnorm. He only says that it should be *by and large* effective.
3. The theory has no connection with real life since law is intricately linked to sociology, economics, politics, history and a variety of other disciplines as Harold Laski stated it is "an exercise in logic and not in life".
4. Kelsen saw the state as the personification of all law, and his view thus disregards the perspective of ordinary citizens and their interests in the development of the law.
5. Kelsens theory has also been criticized for providing legitimacy to political regimes which do not have a mandate from citizens to rule and make law.

4. HISTORICAL AND ANTHROPOLOGICAL SCHOOL

The Historical and Anthropological school adopted a different methodology from the Positivists. This school attempted to study the origin and development of law and legal systems and thereby formulate theories and concepts. The Historical School denied that law was result of deliberate law making. To them law was the result of gradual development through various practices of people. Therefore they studied the past rather than the present. They attributed social pressure rather than politically power to law making. To them law is something to be found and not made. Therefore custom was the most important element in law.

Friedrich Karl von Savigny [1779-1861/Germany]
He said that law should mirror the spirit of the nation which was later called in German **"Volksgeist".** Nation to him was a group of people linked together by historical geographical and cultural ties. This spirit of the people was reflected in the customary rules. Custom came before legislation and it was in fact superior, to legislation and the most important element in the legal system. The legislature in enacting laws should take into account the volksgeist. The judges too in their decisions give expression to the national consciousness, as they too are part of the society. As each nation has its own priorities and aspirations laws will vary from country to country and time to time.

Savigny spoke of a National Ethos. Since the law reflects people's spirit, it could be understood only by studying their history. Savigny wrote at a time when German speaking people were trying to unify and if helped to bring these people together. However it should be also mentioned that this sort of thinking can lead a society to tendencies such as racial superiority and fascism.

Although Savigny's thinking is partially true, especially in regard to personal laws which ever their foundation in customs in reality legislation does not at times reflect the people's spirit. The passing of laws to make Sinhala and Tamil the official languages of Sri Lanka can be considered as acts giving effect to the Volksgeist of the Sinhalese and Tamils. But there are many laws which reflect the thinking of politicians, judges, officials and bureaucracy more than the people.
E.g.:
Apartheid laws of South Africa
Roman Dutch Law as common law in Sri Lanka
Use of English legal principles with respect to criminal law, mercantile law in Sri Lanka
Use of statutes drafted for use in India and the New York Civil Procedure Code in Sri Lanka

Sameed v Segutamby [25 NLR 181 496].
"The Proclamation of 1799 established the Roman Dutch Law as it subsisted under the ancient government of the United Provinces as our common law and the promulgation is that every one of those laws if not repealed by local legislature, is still in force."
-Jayewardene, CJ

Kershaw v. Nicholl
It was held that a European wife of a European domiciled in the Kandyan provinces was governed by Kandyan law the operation of which was not limited to Kandyan natives. In William v Robertson a Full Bench overruling *Kershaw v Nicholl* held the Kandyan law was a personal law. Therefore the Kandyan law which was a territorial law was made a personal law by the judicial decisions.

It may be that Savigny's ideas will hold well in countries that were not under foreign domination. However, even in a country like Japan, which was never under colonial rule, the German Civil Code has taken root. May be it was the decision of the officials and not the spirit of its people. Sometimes legislation is the result of the decisions of policy makers to bring about social change and ensure social justice and not an expression of the spirit of the majority.

E.g.: Laws against slavery
Prohibition of Sati Pooja in India
Segregation Laws in the USA

The following is a summary of the evaluation of Savigny's thoughts:-

1. He overemphasized the importance of Volksgeist which concept suited the aspirations of the German people at that time.
2. The receipt of foreign legal systems in other countries is inconsistent with the concept of Volksgeist.
3. Generally new ideas are introduced by a few enlightened thinkers
   E.g.: Women's rights/Fundamental freedoms.
4. The national character is ordinarily reflected in certain branches of laws such as personal laws.
5. Law is at times used to change existing beliefs and ideas.
   E.g.: In certain African countries the husband's relatives remove all his property on his death leaving the widow and children without any assets as per the customary law of certain tribes. But legislation is used to prevent these practices and ensure that the widow and the children are not left destitute.
6. Many laws have been initiated for the benefit of the ruling class.
7. The researchers found that customs too are at times not a reflection of people's spirit but the result of imitation of others, especially the ruling classes.
   E.g.: During the last days of the Kandyan Kingdom a lot of South Indian customs were adopted by the people as the royalty had its origin in that country.
8. Certain Laws come into existence as a result of conflict between various groups.
   E.g. Labor laws

Sir Henry Maine [1832 -1888/England]

He studied the early legal systems of Greece, Tome, Israel and India. In fact Maine considered India as *the great repository of ancient juridical thought*. He built upon Savigny's ideas and gave a more balanced view of history. His famous work was "Ancient Law (1861)". It was a systematic study of the early history of laws. In this book he explains that legal notions and institutions have a certain pattern of evolution namely.

1. Orders of rulers or kings
2. Aristocracies as custodians of custom
3. Codes

However this conclusion of Maine's is not accepted today by modern social scientists. Regarding Positivist conception of law Maine comments;

"Bentham and Austin resolve every law into a command of the lawgiver and obligation imposed thereby on the citizen and a sanction threatened fit the event of disobedience. It is curious that, the farther we penetrate in to the primitive history of thought, the farther we find ourselves from a conception of law which at all resembles a compound of the elements which Bentham determined."

Maine also rejects Austin's nation of sovereignty altogether. His study of ancient legal systems proved that in reality there is no necessity fed all the powers to be concentrated in one person or a body. He says;
"There is not nor has there ever being in international laws anything to prevent some of these rights being lodged with one person and some with the other."
Sir William Lee upon a study of pre colonial India confirms Maine's conclusion.

Branislaw Malinowski
A pole, by birth he traveled to Trobriand Islands (Now belongs to Papua New Guinea). He lived among the local people from 1915 to 1918. Malinowski concluded about these islanders that it was wrong to define forces of law in terms of central authority codes and courts. That islanders' society was orderly even though these were lacking.

He accounted for this in terms of reciprocity, systematic incidence, publicity and ambition. The affairs of the community were regulated by custom. There was no Lawgiver. Customs were seen as parties for the benefit of the community to arrange its affairs in a systematic manner. Any deviation from these practices was punished with sanctions but they took the form of withdrawal of the production of the community.

5. SOCIOLOGICAL SCHOOL

It was seen that the Positivists thought that law is something to be consciously made whereas the historical school believed that law is something to be found. The Sociological School accepts that law is made and found both. But their focus is on the social purposes, which the law serves, rather than on the analysis of abstract legal concepts. Therefore they look at legal institutions and systems from a functional point of view that is what the law does how it does it how can it be made to do it better. They also study law in relation to and as part of the process of social control.

Like other schools sociological thinkers are also diverse in their views. The variety of views reflects the differences that exist among this group of thinkers. Sociology is a new social science. Auguste Comte [1798-1857] is considered to be the founder of Sociology. Like the Historical thinkers the early sociological jurists looked at how the law evolved and sought to relate those changes to the changes that had taken place in the society itself. They showed the importance of groups and associations and inter group relations.

The next phase of the development of the Sociology came about with the work of Charles Darwin [1809 -1882] on evolution. Darwin's theory of evolution had a tremendous impact on the social scientists of that period. His theory was that humans descended from animals and therefore human nature could not be distinguished fundamentally from the nature of animals. Therefore, if animals cannot be held morally responsible for their actions how can humans by nature be moral or otherwise, as both had the same origin? Darwin's teachings were so novel that it directly conflicted with the beliefs of the time. Natural Law jurists said, humans have inborn ideas of good and bad just and unjust. It is Darwin's theory the complete opposite of what the Naturalists said. He also said the evolution comes about by natural selection, the survival of the fittest. These ideas were adopted by social scientists as well.

Herbert Spencer [1820 - 1903]
He said that humans should be also left to progress through natural selection and survival of the fittest. In the economic field this is the thinking that came to be known as laissez faire theory that the state should refrain from interference in economic matters and allow private enterprise to function freely. The same thinking is revived today as free market economies with minimum stat intervention.

Ihering [7818 - 1892]
He was in the early part of his career a follower of the Historical school. Dias says;
".. during which time he intensively studied Roman Law and published four volumes of a work *The Spirit of Roman Law*. This he left unfinished for its execution has convinced him that the origin of laws laid in sociological factors a thesis which he proceeded to urge for the rest of his life".
He placed greater emphasis on the functioning of law as an instrument for serving the needs of the human society. He stated that there was a conflict between social interest and individual self interests. To reconcile the two interests the state should employ both rewards and sanctions. According to him the success of the legal system depended do the degree to which it achieved a proper balance between the competing social and individual interests. An example would be man's interest in accumulating wealth. He will want to mine for precious stones wherever he thinks they are found. But the social interests demand that his activities be kept in check to prevent damaging the environment. So the state has to reconcile the two conflicting interests.

Eugen Ehrlich [1862 -1922]

He was mainly concerned with explaining the social foundation of law for him law is derived from sociological facts and depends on Social pressures and compulsions for its efficacy. The real source of law is not statutes or judicial decisions but the activities of the society itself. He believed that there is a "living law" behind formal laws and it is the task of the judge and Jurists to combine these two types of law. He showed that in the commercial world that there are innumerable practices among merchants. These are not formal rules, but the merchants strictly adhered to by the merchants. For example in the Sri Lankan informal sector there are many moneylenders, who have certain practices as to interest, recoveries, sureties etc. The formal sector consisting of banks also resort to lending. However, when these banks give loans the rural sector for agricultural purposes they find it extremely difficult to recover the leans. Banks depend on formal laws for debt recovery but the village moneylender on local practices such as social pressures. What Ehrlich says is that these informal practices should he studied and given legislative recognition in order that laws would be effective. Instead of deliberate law making law should be developed out of the interplay of social factors.

Roscoe Pound [1870 - 1964]

He was a professor of law at the Harvard University. He can be introduced as the leading exponent of sociological jurisprudence. He was mainly concerned with the dispute settlement process. He adopted Ihering's view that law should be a reconciler of conflicting interests. Like an engineer buildings structure law alto should take into account and balance the various strengths and weakness of the materials used in constructing which in the case of law the conflicting interests if there are balancing is incorrect the whole structure will collapse. He borrowed this term from engineering and said that the function of law is social engineering. The aim of social engineering is to build an efficient structure of society which will satisfy maximum of wants and minimize friction and waste. An interest is defined as a "demand or desire which human beings either individually or through groups or associations seek to satisfy" He classified interests as

Individual interests
Public interests
Social interests

In balancing interests he said that they should be *balanced on the same place.* Accordingly one cannot balance individual interests against public interests and so on. Hence interests should be transferred to the same plane. For example personal freedom is an individual interest but it can be transferred to the social interest group that its Members should be for as an illustration takes the case of demand for timber f by the carpenters. If they do not get it in sufficient quantities they will be without work. But if trees are felled indiscriminately it will cause irreparable damage to the environment. There is now a conflict between these two interests. The function of law is to strike a balance between these two conflicting interests. There is a creative role for judiciary as well and they will have to adopt a new legal technique directed to social needs. In India their Supreme Court headed by the Chief Justice Sri Bhagwati demonstrated such an approach. They attempted to strike a balance between conflicting interests of parties in public interest litigation. This technique is different from the Positivist approach. Suppose the case of tree felling came before positivists they will first look for the relevant law a statutory provision or a judicial decision and then will apply the law to the facts. That is the training you too get as a law student. You are not taught to look at the conflicting interests in the issue involved and how those conflicting can be reconciled. But the **Poundian Theory** of dispute settlement calls; firstly for restatement of the dispute in terms of social claims as "interests" Secondly to select one of the competing interests into which plaintiffs and defendant's claims are translated and lastly to look for the correct balance between the two conflicting interests. If you will recall the decision in Suntheralingam v AG [75 NW 126] referred to in the Chapter on Positivism you will note how the court viewed the

issue purely from a positivist standpoint. If they looked at it from Poundian angle they would have taken into account the conflicting interests of the majority and the minority ethnic groups in the country and attempted to strike a balance.

How does one identify the various interests? Pound says that looking at the legal pleadings and the claims can do it. The next question is how one evaluates the interests to ascertain the correct balance. There is however no fixed formula for this. It depends on the importance that is attached to various social aims at the relevant time. For example at a time of acute unemployment the emphasis will be on repaid industrialization to create jobs. Environmental issues will take a secondary place. But once the industrialization has taken place then the attention will shift to environmental problems. Sri Lanka is a good example in this regard. Environmental issues were given a low priority to facilitate industrialization and as a result many areas faced with environmental pollution today.

An assessment of pound's ideas will highlight the following criticisms:-

1. A Pound in detailing the various interests has included *inter alia*, items such as freedom of contract, freedom of association, continuity of employment under individual freedoms, general health, peace and order, security, religious freedom, economic, institutions, conservation of natural resources, freedom of use and sale of property, free science, free letters opportunity etc under social interests. These items read like a political manifesto of a liberal and capitalist party.

2. Although he says it a simple matter to know the real interests of people it is in reality, not so easy. People can be persuaded by others and the media.

3. He does not show us the real distinction between public and social interests. Dias says that an engineer always has a plan before be starts construction. Therefore he knows exactly what value to be given to each strength and weakness of the materials used. But in regard to laws there is no such plan worked out in detail. The society is constantly developing and changing. Therefore the value to be givers to each interest cannot be predetermined

4. The choice of an ideal or between competing interests is a matter of decision and not balance.

5. Pound's theory will work only in a matter society where there are common values and room for consensus. For example in a society that is divided on diehard sectarian ethnic lines it is difficult or even, impossible to achieve balancing of conflicting interests.

6. MARXIST THEORY

Generally the term Marxism refers to the thoughts of Karl Marx (1818-83) and Friedrich Engels (1820-95). In Soviet Union and other third world countries, there were many popular revolutions led by Marxists such as Fidel Castro of Cuba and left of the Centre politicians such as Allende of Chile, Father Aristede of Haite who were all inspired by the Marxist doctrine.

Like any doctrine that gains popularity Marxism also has many versions as followers attempt to interpret the tenets in the light of their backgrounds and experience. In fact Marshal Tito of former Yugoslavia maintained that each country should be left to interpret the Marxist theory in its own way. Lenin and Stalin adopted these ideas and put them into practice in the former Soviet Union. There is also the Chinese version initiated by Mao Tse Tung and the Yugoslavian interpretation.

The Marxist approach to society is basically materialist, meaning from the Marxist point of view. That the material, physical, economic and environmental etc. Conditions under which humans live are regarded as the most important factors influencing social development. Marx believed that only the material world is the reality.

Das Kapital

Marx's famous work is 'Das Kapital (Capital: Critique of Political Economy)'. He believed that the function of philosophy was not to interpret reality but to change the world. He was a materialist that is he believed only the material world is the reality. His ideas were greatly influenced by another German philosopher namely, Hagel. From him Marx adopted dialectical logic. This scheme of logic is that;

Thesis – A particular state of officers
Antithesis – Call of its own opposite
Synthesis – The conflict between the two states of affairs provide for the next phase

Marx's thoughts are also referred to as dialectical materialism because of the combination of dialectics and materialism.

Stages of Class Struggle

Marx identified history as social history and not as a collection of separate and unrelated events pertaining to individuals. He also thought that the social history is the history of class struggle, conflict between the thesis and antithesis. In this process the society will go through the phases namely

a. Pre – capitalist
   - Primitive Communalism 1
   - Save mode of production 2
   - Feudal mode of production 3
b. Capitalist mode of production 4
c. Socialist mode of production 5
   - Socialist production
   - Communist production 6*

* Stages of production

Pre – Capitalist Mode of Production:

People shared commodities equally. There was communal effort in the production of the means of sustenance social control is through communal morality and social pressure. However as time went by some members did upset this balance by grabbing the means of production paving the way for capitalism due to the increase in technology, division of labor

aroused. Society is then divided into classes along the lines of capital and labor. Primitive society was taken over by the state which came to be controlled by the capital owning class.

Capitalist Mode of Production:
Capitalist class will attempt to dominate the working class, who are in majority and tension will break out. A revolt will take place against the capitalist class and the working class which gain control of the economic resources.

Socialist Mode of Production:
Workers who will eventually emerge victoriously will set up a socialist state of their own which will be a proletarian (class of labor force) dictatorship. The class conflict will not end with the establishment of the socialist state. It will continue in new forms, as there will be resistance to the new regime. The dictatorship of the proletariat will be the 'highest form of democracy possible in a class society'. The commodities will be distributed according to the maxim "*from each according to his ability to each according to his need*". Domination of one class will cease and inequalities will disappear. Eventually the dictatorship of the proletariat will be replaced by a classless society in which law will also "wither away". There is the theory expounded by Marx.

The analysis of law in Marx's Theory
It should be noted that neither Marx nor Engels presented a theory of law. Whatever ideas they expressed about law was incidental to their philosophy which was political and economic in nature. For them law was only an instrument of domination by the ruling class which will disappear eventually with the birth of the classless society, the ideal state of affairs according to this thinking.

According to Marxism, societies move from capitalism to socialism by changes in the mode of ownership in the means of production from individual capitalist to collective ownership. Here the nature of law will then be fashioned by the mode of ownership of the means of production.

In the capitalist society law will be used by the ruling class an instrument to keep the working class in control and for the exploitation of labor. This is more or less the same in slave and feudal modes of production. Under such modes the state and law reflect the existing economic relations of production and are geared towards protecting the interests of the ruling class. In a socialist state, law will be mean to an end, namely to prepare the way for the classless society. Once classless society is achieved there will be no need for law.

When the law is in existence whether capitalist or socialist, the society will have two levels of structures;
The base:

> This consists of the economic structure or the infrastructure and made up of forces of production or technology and relations of production namely ownership and control over people and property.

The superstructure:

> This consists of law, politics and religion shaped on the infrastructure and will determine the shape of the superstructure and thus law being part of this, will be fashioned according to the needs of the economic base.

That is how law will become an instrument of domination in the capitalist society and under socialism a means to achieve the classless society.

Marxism rejects the idea that the law can be a neutral body of rules, which guarantees liberty and legality. In other words Marxists reject the idea of rule of law because law is an instrument of class domination. They claim that capitalism is destructive of human liberty and private property represents the dominance of the material world over human values. They also consider rights as an expression of capitalist values. They provide Protection only to self-interested individuals and as such rights will not be necessary in a classless socialist society.

Thus Marxist philosophy was based on 4 doctrines.

1. Doctrine of the economic determination of law – law is a superstructure on an economic sytem
2. Doctrine of the class character of the law – law is used by rulers to keep subjects under control
3. Doctrine of identity of law and state – The state comes in to existence as soon as there is an unequal distribution of commodities. The property owners will try to protect their wealth from those who do not own them.
4. Doctrine of withering away of the law and state – When a classless society came into being there will not be any necessity for the state and law which is an instrument of domination

Subsequent soviet jurists developed a theory of law to fit the Marxist philosophy and the requirements of the socialist state and its relations with other countries. One of the forerunners in this field is **E.Pashukanis** who wrote in the 1920. He developed what came to be known as the *commodity exchange theory* and stated that all law was based on relations between individuals and exchange of commodities among individuals (commodity exchange theory). He reflected on the post revolutionary state foreseen by Marx. Marx foresaw that in such a communist state post revolution, law and state will wither away. But Pashukanis stated that a concept called 'law' cannot exist in a communist society i.e. he believed that the law is a capitalist criterion which is a direct result of the commodity exchange theory. A commodity exchange theory can only exist in a capitalist society. Therefore law can only exist in a capitalist society. He is therefore of the view if Marx foresaw the existence of law in a communist state he must appreciate that it is a capitalistic law that exist.

However he stuck to the Marxist belief that law was fashioned by the economic infrastructure. Later this theory was replaced by the ideas of **Vyshiski** which explained the Soviet law as;
In soviet law such a single and general principle is that of socialism the principle of a socialist economic and socialist system resting on socialist property annihilation of exploitation and social inequality, distribution in proportion of labor a guarantee to each member of society of the complete and manifold development of all his [spiritual and physical] creative force and true human freedom and personal independence.
[As quoted in Dias]

Criticisms

1. Marx Failed to understand the true nature of human beings.
2. Marx also failed to recognize that the proletariat upon coming into power will become just as corrupt as the Bourgeoisie they overthrew.
3. Marx's analysis of the society as consisting of capitalists and workers is an overemphasis. The idea of violent conflict by these two classes is also not true. A study of modern day societies shows that in between these two classes there is a middle class who are mainly professionals and they exercise a substantial influence over economic affairs. Revolutions also have not taken player in must societies as predicted by Marxists.

4. Marx views on laws are too an over simplified. Most laws are not instruments of domination. Personal laws and laws on social welfare are in fact protecting rights and interests of all individuals. There are laws, which bind and restrict the ruling class as well. An example is Human Rights law.
5. No classless society has arisen. Instead of the disappearance of the state and the birth of a classless society the communist state has "withered away". Marxism has no place in most of the new states that have emerged after the collapse of the Soviet Union. They have now embraced the market economy, free enterprise and private property.
6. Marx has failed to predict the development of the 20th century.
   E.g.: divisions between employed and unemployed, shareholders and managerial classes, income distribution by taxation and the birth of social welfare states.

7. DUTIES AND RIGHTS (Hohfield's Analysis of Rights)

Duties

Human behavior is governed by duties. Courts use different conceptions of duty so as to do justice in different situations.

1. Since duties do not described, but only prescribe behavior it follows that they express notional patterns of conduct to which people might to conform. Thus duties are notional patterns of conduct that are phrased in an imperative form (Using words such as 'must" and "shall")
2. Not all legal rules create duties but even when they do not, they always address an additional duty or officials to treat them as 'law'.
3. The conduct envisaged in duties need not necessarily refer to the future, although this is in fact the case with the majority of them. A duty can be created with reference to past conduct in which case it represents a notional pattern of conduct as to how people ought to have behaved.
   If the behavior of any person is found to have been contrary to what it ought to have been, he is regarded as having committed a breach of that duty.
4. A duty prescribes a person's behavior primarily for some purpose other than his own interest. Such duties should be performed in the interests of social stability,
   E.g.: duty on the driver of a vehicle to observe road signs.

Legal Duty

1. A duty could be both legal and moral. E.g.: Committing theft
2. A duty could be moral although it may not be legal E.g.: Respecting parents
3. A duty could be legal although it may not be moral. E.g.: Hangman's duty

It could be held that every legal duty may arise from moral duties
-Lord Atkein

Donghue v. Stevenson

Under English law most legal duties have come in to being through the recognition of moral duties. Jurisprudence only concerns legal duties. Features of these legal duties are as follows.

1. The acceptance of 'ought' and 'ought not' phrases goes hand in hand with the idea of legal duty most jurists such as Austin associates duty with command due to this reason a moral duty differs from a legal duty. Professor Olivercrona has pointed out that everyone has a store of experiences of actual commands addressed in the imperative from, so that whenever one encounters that four of expression there is a tendency to suppose that it must have emanated.
2. Enforceability may mean one of two things,
   Compelling observance of the pattern of conduct enjoined by the duty or
   The indirect method of inflicting a penalty or section in the event of failure to observe it

E.g.: order a person, who fats to pay maintenance to pay the same with an additional fine.

Idea of sanction

A number of authorities contend that a duty can be distinguished as 'legal' whenever a sanction attaches to its breach.
Austin defined sanction as the eventual or conditional evil and to him, sanction and duty were co-relative terms the sanction being that which ought to be done to a person who breaks a duty.
Dias holds that although sanctions attend most duties, the ideal of duty and sanction should be kept separate for sanction is not the test of a legal duty.

The breach of certain duties does not entry any sanctions.
E.g.: the non-enforcement of fundamental duties under chapter 27 of the constitution do not entail sanctions.

Creation of a legal duty
Legal duties may arise from:

1. The constitution
2. Judicial Precedents - The duty of the Inferior courts to follow judicial precedents of superior court
3. Custom - When a custom is given legal authority a legal duty comes into being.
4. Equity
5. Agreements and contract

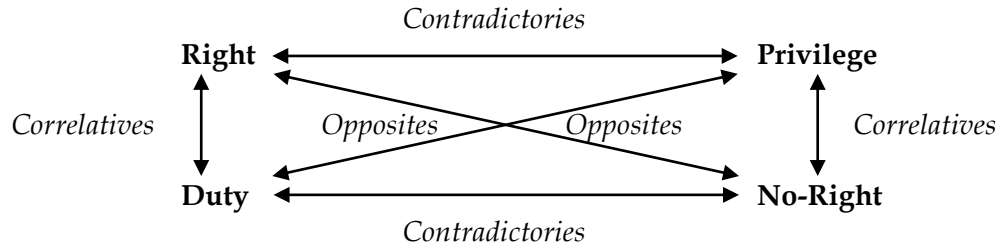
Hohfield's Analysis of Rights

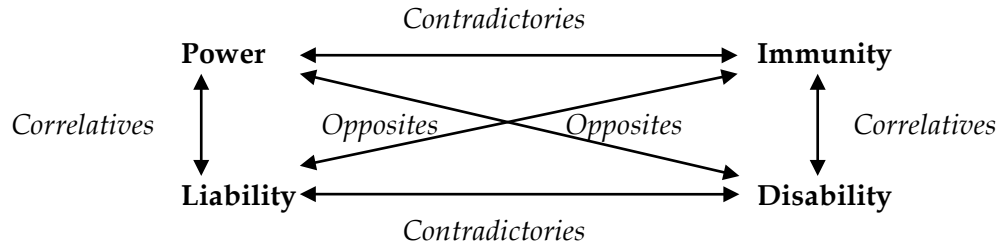
Salmond:	Any advantage or any benefit which is in any manner conferred upon a person by a rule of law is a right.
Austin:	Interests protected by law and imposing duties on others are rights. Therefore, rights are regarded as correlatives of duties.
Dias:	In a wider sense rights may be regarded as a legally recognized interest irrespective of whether there is a corresponding duty or not.

Final Relations
Claims, liberties, powers and immunities are subsumed under the term 'rights' in ordinary speech. But that use of the term 'right' to denote separate ideas of claims, liberties, powers and immunities obscures the distinction and leads to confusion. Therefore, to make the distinction as obvious as possible each idea is allotted a term of its own. These distinctions were arrived at gradually.

- Bentham distinguished between claim and duty
- Windscheid distinguished between claim and power.
- Thon and Bierling distinguished between claim, liberty and power.
- Salmond distinguished between claim, liberty power and corresponding ideas of duty, disability and liability

Wesley Newcomb Hohfeld, an American jurist rearranged and completed Salmond's scheme by adding a fourth term 'immunity' and worked out a table of jural relations. This resulted in what is up to date probably the most rigorous analysis of jural relations ever attempted.





Conceptions identified in this theory are 8 fold.

Right	The relation of a person, which is an enforceable claim for performance, action or forbearance by another
Duty	The relation of a person, who is commanded by the society to act or forebear for the benefit of another person, either immediate or in the future and who will be penalized by the society for disobedience
Privilege	The relation of a person, when he is free or at liberty to conduct him in a certain manner as he pleases. His conduct is not regulated for the benefit of another by the command of society. He is not threatened with any penalty for disobedience.
No-Right	The relation of a person in whose behalf society is not commanding some particular conduct or another
Power	When A's voluntarily act will cause new legal relations between either A-B or A-a 3rd party.
Liability	When one maybe brought into new legal relations by the voluntary act of another
Immunity	When one has no legal power to affect one or more of the existing legal relations of another
Disability	When by no voluntary act of one's own can extinguish one or more of the existing relations of another

An important preliminary point is that a jural relation between two parties should be considered only between them, even though the conduct of one may create another jural relation between him and someone else.

Hohfield's analysis is based on a number of assumptions about legal concepts. There are 4 basic rights, namely;

1. Rights in the strict sense – rights (claims)
2. Rights which are in fact liberties - privileges
3. Rights describe ability of one person to create/change legal relations with others - power
4. Rights which protect a person from interference with another - immunities

These basic rights are the lowest common denominator in all legal relationships and any other right which a person may claim to have can ultimately be reduced to a category of one of these 4.

Those relationships between the basic rights and their counterparts can be explained in 3 different ways.

1. Jural Correlatives (connected by vertical arrows)

A *quality* in one person implies the presence of its correlative in another person.
Therefore,

- Right in X implies the presence of duty in Y. (converse proposition is not always true)
- Power in X implies the presence of liability in Y and vice versa.

2. Jural Opposites (connected by diagonal arrows) - *Jural Negations*

A *quality* in one person implies the absence of its opposite in himself.

- Right in X implies the absence of no-right in him and vice versa.
- Power in X implies the absence of disability in him and vice versa.

3. Jural Contradictories (connected by horizontal arrows)

A *quality* in one person implies the absence of its contradictory in another person.

- Right in X implies the absence of privilege in Y and vice versa.
- Power in X implies the absence of immunity in Y and vice versa

This analysis while applies to legal rights can be applied effectively to the investigation of moral rights.
Above 3 instances can be explained by an example of govt. taxation.

Correlative - Since govt. has right to charge tax, people have duty to pay tax

Opposite - If people have a duty to pay tax, then they don't have the privilege of not paying tax

Contradictory- If govt. has a right to charge tax, then people have no privilege of not paying tax.

<u>Criticisms</u>

1. Even though the above mentioned relationships are different in nature they are not mutually exclusive.

E.g.: "A" and "B" make a contract. Each of them has a right against the other for the fulfillment of the contract and consequently each owes a duty to the ether. In case of breach of the contact the aggrieved party has a power to sue the other for damages. Therefore a single action may give rise to a bundle of relationships.

2. The diagram cannot cover all situations.

E.g.: Where does discretion fall? The entire scenario can be changed by a powerful discretion.

Where does retrospectivity Fall? (A claim enjoyed earlier because a no-claim later).

8. **FEMINISM**

This is an off shooting of the critical Legal studies movement. It has of its beginnings in women's movement in the 1960's and 1970's with the writings of Simone De Bauvoir and others.

This is an area of theory teaching and practice of how law affects women. If discusses woman-law, discrimination- law and gender- law. In other words this deals with the feminist approach to the law. The firm feminist legal theory is associated with inquiry about the practice of law and how it affects gender and what social change is made by such practice. Although feminists have various opinions about law and unification seen is the feminist struggle for social changes.

There are three types of feminist legal theories

1. Traditional Liberal Feminists
2. Radical Feminists
3. Socialist Feminists

Traditional Liberal Feminists

They believed that political, economic Institutions of a society should only interfere in the public sphere and equality for women could be achieved from the existing frame work of the law.

E.g.: They seek pregnancy benefits for women on the same basis as benefits for illness or disablement.

Liberal Feminists argue for reformation of the Pales allocating benefits and burdens.

Radical Feminists

1. They believe that women's oppression in a patriarchal system is a true expression of male domination and control over women which leads to all social political and economic limitation.
2. The desire for supremacy for men and his psychological pleasure of power and the identification by man of the female sexuality and reproductive capacity have been analyzed by the radical feminists as the motivating forces to establish patriarchy.
3. The radical feminist view is that laws governing reproduction sexual assault pornography are expressions of patriarchal control over the female, and they believe that man uses violence against women to reinforce his control or supremacy.

Socialist Feminists

They regard gender and close relation has been linked. Therefore the improvement of the status of women is entirely based on the class cupboard.

Feminist Legal Theory is concerned with addressing as to,

1. How does the law affect women and contribute towards their oppression?
2. How can law be used to improve social position of women?

In answering the first question one may analyze the legal rules and practices that are discriminatory on the face and differentiate on the basis of gender and those which disadvantage women,

Examples of male stream law

Rape law with men's definition of 'sex'
Labour law with its gendered meaning of 'work'
Prohibiting women from vesting
Prohibiting women from entering a profession
Treating adultery committed by women more serious than the same by men.

Many feminists believe that laws or legal rules which differentiate is often defended on the ground that it protect women where as it actually results in. causing disadvantage to women.

The second level of discussion is where legal methodology adopted in legal reasoning is 'Patriarch' many feminists believe that women approach moral issues much differently from that of men, they find that women are more sensitive in the discussion of moral reasoning.

Further concept such as 'precedent' has allowed male bias in the interpretation of the law to continue so much so that the experience of women is totally excluded from the legal interpretation.

Third analysis is that the law must be neutral however neutral does not mean a mere compromise. It should truly proceed for right to reality. The male domination is described as feminists as the most pervasive and tenuous systems of power. Therefore the feminists agree that there must be a total de construction of the myrrh of neutrality.

In answering the second question it is observed that law should be a tool of social change that the feminist straggle should be brought into the law in order to make this change. In ardor to do this inure research should be done encompassing women of all walks of life. The chain that law is patriarchal does not mean that women have been ignored by law but law's cognition of women is taken from and male eye rather than women's experience and definitions.

This approach has already made an impact as follows:-

Amendments made to the Penal Code in 1995 and 1997
Prevention of Domestic Violence Act

(Thus sexual harassment and marital rape has been recognized as offences) R v. R/State v. Smith

9. LAW AND MORALITY

Must laws be moral?
What are the main factors which serve to distinguish between moral rules from legal rules?

Distinction
They are two separate concepts
Morals are concerned with individuals and lay down rules for mauling of their character.
Law concentrates mainly on society and lays down rules concerning the relationship of the individual with each other and the state.

Morals 100K in to motive
Law is only concerned with conduct of individuals for which it lays down standards.

Morals are an end in themselves and it a matter of conscience.
The chief aim law is the smooth functioning of society it operates for the purposes of convenience and expediency.

Morals vary from person to person, period of time to period of time Society to society and country to country.
Law in a state is static in that country. Law brings in to the picture the complete machinery of the state where the individual brings himself to organized will of the society. Law has relative value which is related in time and place.

Moral cannot be enforced and non-conformity does not result in punishment.
Laws are capable of being implemented and non-compliance would result in punishment.
But the distinction between law and morals should not be understood as they are opposed to each other. They are in fact very closely related.
One definition that can be given to law is that
"At the rules and principles which govern or influence human conduct this allows morals to play a very important role in the field of law."

This study can be, make in 3 angles

a. Morals as the basis of law
b. Morals as the test of law
c. Morals as the end of law

Morals as the basis of law
In early societies all rules originated from the same source and the sanctions behind thorn as of the same nature.
When state come into being all (Moral) rules which were important for the society and observance of which could be secured by society was prixed up by the state.
Once the state took them it imposed sanctions and enforced them as laws.
Thereafter the laws were both moral and legal because what was earlier having a moral sanction was now transformed into law enforced by the state.
Though they have common origin they diverged in their development,

Queen v Dudley & Stevents
There Seomen and a boy were cast way in a storm on the high seas. They had no food and water.
In order to save themselves from death by starvation the 3 seamen killed the boy and fed o his flesh.

The court based its judgment on the moral and legal ground that no man has a right to take another's life to save his own.

Abortion, Mercy Killing
Offences against persons and property (Kill or steal) are covered both by laws and morals/ sexual offences incest, rape)
Some acts such as traffic offences are moral. For even though the breach of traffic laws and involves sanctions it does not involve a moral aspect
E.g.: Wearing a helmet/ not wearing a seat belt

DPP v Shaw (Ladies Directory case)
It was held that courts have inherent powers to superintend those Offences prejudicial to public welfare (Public morals).
The relationship between law and morality was well discussed in this case where a person and charged with conspiracy to corrupt public morals by publishing an obscene article in a Magazine entitled the "Ladies Directory' which listed names address and other information about prostitutes.

Certain aspects although considered to be immoral are not illegal
E.g.: Adultery Divorce laws a person who abstains from saving the life of a drowning man when he is capable of doing so.

Morals as the test of Law
In the 11th and 18th centenary when the natural law theory was at its peak it was contended that law [positive law] must conform to natural law.
According to them any law which does, not conform to natural law is to be disobeyed and the govt. which makes such law should be overthrown.
Even in Modern banes this vies that, law mast conform with morals and if it is not in confirm with morals it is not law is regarded as holding a good position.
Dorothy Silva v IP Pettah
Nuremberg Trials
Alfred WIijesooriya v Republic

Generally the law cannot depart from the morals because it does not enforce itself.
Patton observes that,
"If the law lags behind popular standards if falls into disrepute, if the legal standards are too high, them there's a great difficulty in the enforcement".
(In incerprdoation of law and exercising judicial discretion morals play a Major)

Morals as the end of law
Law has been defined in terms of justice and accordingly the aim of law is to secure justice which is very much based on Morals.
Analytical jurists any study of the end of the law is beyond the domain of Jurisprudence.

Sociological point of view
The law always has a purpose and it is a welfare society.
Utilitarian point of view
The immediate point of laws is to secure social interest.

The Need to obey law and regard a cause of action as a right could be answered by showing that the requirement of duty of law and rights tends in each case to promise human welfare and to field to what men do to find to be of value.

Duty law and right each logically demand the idea of value as the foundation upon which it finally rests.

Conclusion

Law and morals act and react upon and mould each other when courts are required to exercise judicial discretion moral considerations play a very important role.

All human conduct and social relations cannot be regulated and governed by law along considerable number of them are regulated by morals. Statutes may be mere legal shells if they are expressed in terms are not filled with moral principles.

However all laws are not morals and all morals are not laws.

10. **PUBLIC INTEREST LITIGATION** -INDIAN EXPERIENCE

Around the mid 1970's there emerged a new kind of litigation in some Indian counts I became possible for any person even if he/she was not directly affected to initiate litigation by merely addressing a letter to a judge of that court. In this manner a number of public interest issues affecting groups such as prisoners, workers those who are unable to approach the court for relief due to their social and economic disadvantaged position women and children were brought to the notice of the court.

In common law jurisprudence the system of litigation is adversarial where the judge is regarded as an umpire before whom each party is required to prove his case and only those who have *locus standi* have the right to appear before court. This deprived the poor and the under privileged because they are not aware of their rights and cannot afford legal serves. The supreme court of India was innovative in regard to this issue and introduced four features which come to characterize the above mentioned type of litigation.

1. An expansion in the doctrine of standing (*locus standi*) permitted any bona fide petitioner to bring matters of public interest before the court. The petitioner was not required to show that he or she was personally affected. This development recognizes the validity of what is called representative standing to the effect that any member of the public, may seek judicial redress for a wrong caused to a person or a class of persons who would otherwise have no access to a court of at all.

A.B.B.K. Sangh Railway v. Union of India
The above principle was introduced in this case where it was held that an unregistered association could maintain a writ petition under Article 32 for the redressal of a common grievance.

Akkatoon v. State of Bihar
A certain Kapila Hingorani filed a habeas corpus' application on behalf of 18 remand prisoners awaiting trial for long periods which led to the discovery of more than 80,000 of such prisoners.

2. Formal court procedures were dispensed with. Thus actions could be initiated by writing a letter to the court that would be then converted in to a formal petition and notice issued on the respondent. Thus the supreme court extended its services to the needy who cannot afford the luxury of a property instituted legal action in the manner of "epistolary jurisdiction"

Baxi v. State of Bihar
In this case, the Supreme Court accepted a letter written to it by two university professors as a vent petition and proceeded to grant relief to inmates of a protective home.

Sheela Bares v. State of Maharashtra
This is a case where the Supreme Court treated a letter written by a journalist complaining of custodial violence to women prisoners as sufficient to bear a writ petition.

S. P. Gupta and others v. President of India and others
Bhagawati CJ, observed that court will unhesitatingly cost aside the technical rides of procedure in the exercise of dispending its power and treat the letter of the public minded individual petition and act upon it

3. The use of novel methods to gather facts often the court appointed a sociological commission of inquiry to investigative the disputed facts and submit a report to the court (fact finding commissions)

When complaints were lodged in court researchers and social activists sometimes judicial officers were commissioned to make inquires and to expeditiously submit report, recommending appropriate remedial measures to be taken.

Bandua Mukti Morcha v. Union of India
M.C. Mehta v. Union of India
It was held in these cases that the power of the supreme court of India under Article 32 includes the power to appoint commissions for making inquiry in to the facts relating to the violation of FRS.
A distinctive feature of social action litigation is that the court monitions the implementation of its directions sometimes these commission are given authority to actually decide factual issues which are binding on parties.

Bombay Pavement Dwellers Case

4. A creative interpretation of some of the Fundamental Rights provisions in the Indian Supreme Court.

E.g.: The right to life clause in the Indian constitution was broadly interpreted to include a right to livelihood a right to speedy access to justice and the right to a clean and healthy environment.

Mehta v. Union of India
Subash Kumar v. State of Bihar
In interpreting the constitution, the courts have made frequent use of the non enforceable directive principles of state policy (Article 36-52) and International Human Right norms.
In India areas such as injuries done to children injuries Bihar blinding case protecting of pavement and stern dwellers in Bombay protection of environment and ecology abolition of bonded labor and provision of drinking water and basic sanitation facilities to quarry workers have been addressed under Public Interest Litigation The courts have thus attempted balance conflicting interest and such as industrialization unemployment and safe environment.

This type of litigation has been referred to as Public interest litigation or social action litigation in India its emergence was due mainly to a sympathetic supreme court an expansive interpretation of constitutional provisions the key roles played by Justice Kirshna Iyer and Former Chief Justice Bhagwati the India academies the press and its non-governmental groups.

11. REALISM

We have seen in the earlier chapters that various schools looked all law as commands rules norms, reflections of the spirit of people and as a product of social forces. They did so by looking at laws as it appeared in books statutes or law reports. The Realist school looks at law from a different angle. For them law is not what appears in books or what is passed by the legislature. According to Realists one should look at how laws actually operate in the society or law in action to find out what law is. As one thinker of this school said if you want to know the law you must look at it as a bad man because he is not concerned about the law in books but is certainly worried about what the court or Judge in a particular place will do. Law is what the officials do and not what is found in books or paper rules.

Although there are many theorists of this persuasion, some think they do not form a unified school of though. However there are certain features that are common to the thinkers who are grouped as Realists. These characteristics are,

a. They consider law as something always changing, it is not static.
b. It is a creation of judges.
c. Law is only a means to achieve certain social ends and not an end in itself.
d. The society is also changing but faster than law
e. Laws should be evaluated in terms of its effects
f. They adopted a pragmatic approach towards law

There are two main schools of Realism namely American and Scandinavian.
American Realists; Some of the members of this movement are,

a. Oliver Wendel Holmes
b. John Chipman Gray
c. Karl Llewellyn
d. Jerome Frank

He can be considered the father of American Realism. He was famous scholar and also judge of the Supreme Court of the U.S.A. for about thirty years.

1. He believed that law is what the courts actually said it was therefore the focus should be on decisions of courts.
2. Holmes saw law as a set of consequences. We can understand them if we can predict with some certainty the outcome of the decisions of courts.

3. The actual decisions will depend on the courts assessment of the relevant legal policy. The American case McBoyle v. United States involved the theft of an airplane where the relevant statute prohibited transportation across state boundaries of a stolen "automobile, automobile truck, automobile wagon, motorcycle or any other self-propelled vehicle not designed for running on rails. The question was is an airplane such a vehicle?" Justice Holmes wrote for the Supreme Court "it is reasonable that a fair warning should be given to the world in language that the common world will understand of what the law intends to do if a certain line is passed. To make the warning fair so far as possible the line should be clear". In other words he meant that unless judges interpret criminal statutes narrowly they will send to jail persons who had no dear notice that they had committed a crime. Accordingly the U.S. Supreme Court overturned McBoyle's conviction on this ground. You will note that Holmes assessment of the legal policy that is without a fair notice no one should be found guilty decided the case.

JOHN CHIPMAN CRAY
Gray developed on the views of Holmes that judicial attitudes are more important than statutes. For him statutes were only barebones the flesh came from judicial decisions and statutes were not laws until courts interpreted them. He said "the laws of great nations mean

the opinions of a half a dozen men some of them conceivably of limited intelligence "Therefore his view was that one must study the factors that determine judicial attitudes.

KARL LLEWELLYN
He started his career as a commercial lawyer then switched onto the academic field. His contribution to American Realism was tremendous. The most important aspect of his contribution was "functionalism" which is brought out in his works; The Bramble Bush. The Common Law Tradition and The Cheyenne Way [co-authored with E. A. Hoebel], Llewellyn perceives law as serving certain fundamental functions. He says that we should regard law as an "engine having purposes not values in itself" Law according to him was a major institution and an institution is an organized activity built around a job or a cluster of jobs. These are known as 'law jobs' in the case of a major institution. Its job cluster is important to the survival of that society.

The law job -theory was first formulated to solve a certain problem in legal anthropology. The researchers who went to study the legal system of a certain Red Indian tribe, Brown-as the Cheyennes, who lived in the Great Plains' of America, reported that it was impossible to study their laws.

The reasons they gave were;
a. The Cheyenne Indians had no sovereign no courts and not lawyers. Therefore they had no law
b. They did not speak or think M terms of rules of any kind When these Indians were asked the question: "what would happen if someone does something?" their reply was "it all depends" Llewellyn therefore asked them the question what ac actual disputes had arisen among them in the past who settled them using what techniques and what were the results. The result of this enquiry was the classic work The Cheyenne Way [by Llewellyn & Hoebel 1941 and the law job theory which he developed to cover all societies. There features of the origin of the law job theory are;

b. It was developed from research done in a society that had no state or on "non state law"
c. It was based on actual dispute settlement by the Red-Indians
d. It was a study of the "law ways of the Cheyennes" i.e. the institutions rules traditions and of the methods these people used as a means of dispute settlement prevention and adaptation to change.

He thus identified six law jobs:-

1. Adjustment of trouble cases.
2. Preventive channeling of conduct and expectations
3. Expectations to adjust to change
4. Allocation of authority and determination of procedures for authoritative decision making.
5. provision of direction and incentive within the group
6. The job of the juristic method.

The main thrust of this theory is that law is an 'institution' that performs various jobs and the important job the law performs is the resolution of disputes. He says in The Bramble Bush [1930] 'this doing of something about disputes the doing of it reasonably is the business of the law. And the people who have the doing in charge whether they be judges or sheriffs or clerks or jailors or lawyers are officials of the law. What these officials do about disputes is to my mind the law itself however in the later writings he amended this position and said that this view was no more than a partial statement of the truth.

With regard to juristic method law jobs, he made a distinction between the errand style and the formal style of judgments in his book. The Common Law Tradition [1961] The Grand style is a style of judicial decision making based on reason and supported by policy considerations. The formal style keeps away from policy matters and. strictly follows rules and precedents. This is the method of Austinian Positivism, which stringently restricts judicial initiative. Understandably Llewellyn prefers the Grand Style. However it must be mentioned that the above views were based on this observation of the operation. of appellate courts and not trial courts.

JEROME FRANK

I rank too was a follower of Holmes thinking and believed that law could not be separated from the decisions of the courts. However he did not like the name Realist and wanted to group the thinkers of this persuasion as "Rule Sceptics" and Fact Sceptics". The former doubted the certainty of law's formal rules. They looked for certainty in judicial decisions by looking in to the psychology politics sociology etc of judges. They mainly concentrated on the appellate courts as we have seen in the case of Llewellyn. The second group namely the Fact Sceptics doubted the certainty of facts placed before courts such as evidence because of a wide range of factual situations,. This group concentrated on the trial courts. Frank belonged to this latter group.

He did not like the name Realist grouped the thinkers of this persuasion as:

Rule Sceptics
Fact Sceptics

Rule Sceptics

1. They doubted the certainty of laws formal rules. They looked for certainty in judicial decisions by looking in to the psychology politics sociology etc of judges.
2. This aspect of Realism is where there is Scepticism as to whether rules are they exist in practice play the part traditionally ascribed to thorn.
3. The multiplicity of rules can lead to conflicting results. It means that in reaching his decision read the entire corpus of the relevant law.
4. Most often they (judges) pretend to have regard to the statutes earlier case decisions that would guide him to the correct decision. But what actually happens is that he think about the matters is question and decided who has the best case. There after they would go to the law books to work out a chain of reasons that would lead to the predetermination of the final judgment.
5. Here the will not be the rules of law that would settle the issue in question, But the instinct of the judge as to which side -to win for which he would later find the support of the law determines the outcome of the case.
6. On the other hand certainty of the rules is also an illusion for rules are general propositions and general propositions do not decide concrete cases. (Mainly concentrated on the appellate courts)
7. According to rule 'sceptics' certainty is unattainable primarily because. rules by their very nature cannot envelope every conceivable situation and it is therefore unavoidable that some element of discretion would remain with regard to the application of the rule in marginal contexts.

Facts skepticism

1) They doubted the certainty of facts placed before courts such as evidence because of a wide range of factual situations.
(They concentrated on trial courts)
2) They look at how facts would hardly be taken in to consideration in making judicial decisions.

3) He holds that there are certain illusive factors that would effect on outcome of case decision. These are prejudices of a judge or jurors. (Racial, religious, Political or economic prejudices) These illusive factors operate unconsciously.

Other factors that would influence the judges and jurors are;
The convincing theatrical of a judge giving false evidence
The sensitivity of the subject matter (mercy killing abortion homosexuality)
The social background, culture, intellectual interests, religion, relationship with parents, children and spouse
Hunger, anger, need for rest with regard to a research on trial courts Frank and peaks of

- Perjured witnesses
- Coached witnesses
- Biased witness
- Missing or dead witness
- Missing or destroyed documents
- Inattentive jurors and trial judges

He further states that trial judges and jurors have a wide discretion in deciding which witnesses story is be accepted as correct.

This decision of the Court is a product of Rules & Facts. If the rules and facts are known the decision would be clear. In a stable society most rules are moderately well known.
Most often the problems of uncertainly arises from Facts.

Much of this difficulty comes from:
1 The difficulty the witnesses have in remembering and accurately describing what they saw
2 The tactless and strategies adopted by lawyers in their day to day work which rather than finding the truth more often rend to hide it.
(The selective calling of witnesses, misleading questions, cross examination)
Frank mourns that since the facts are distorted as mentioned above the judges conscientiously attempts to regally resolve a dispute that never happened.
This might result in innocent people being punished.

Conclusions
1) Frank concludes that in resorting to psychoanalysis demonstrates that judges are swayed, by very subjective consideration is making their decision.
2) He argued that the quest for certainty is basic instinct in legal reasoning.

Judges are under the nation that,
The law is a definite set of rules invested with objective content
And capable of interpretation in a way which can practically be proved to be correct,

However Frank opposes to this notion regarding it as a hypothesis. For rather than being compelled by the ascertainable rules of law to arrive at a conclusion_

The truth was that he had a wide discretion open to him and the choice which he made in a particular case was very much a product of his own ideas varies and preferences.

THE REASONS FOR AMERICAN REALISM

a. The rule of the Supreme Court in the U.S.A. which has a Federal and a written constitution. The Supreme Court is entrusted with the task of ascertaining the constitutionality of laws passed by the Congress. They can strike down any legislation, which is repugnant to the provisions of the constitution. The ruling on such issues depends on preferences, values and attitude on the part of judges.
b. American judges in the lower courts are elected and this leaves room for political influence.
c. American legal system is young when compared to that of Great Britain. The Judges are therefore still making law.
d. The divergent and separate common law systems that obtain in the different states are evidence of the creative function of the judges. How could these systems have developed along different lines from a common starting point if it were not for the active faculties of judges? (Dias.p.51 6)

The American Method

1. American Realism focuses on behavioralism view of law. Behavioralism explains outwanl manifestations of mental processes and other phenomena that are not directly observable and measurable. Therefore these jurists use behavioral psychology to assess judicial behavior.
2. Adoption of modem technology especially computers, for legal research. Studies of the types envisaged by the Realists involve collation and analysis of large volumes of data. The work will be simplified and done quicker if modem technological devices such as computers are used. This is known as jurimetrics.

The Assessment

The Realists of over emphasized the aspect, of judicial law making. The judges do not always make law. There are settled areas where the meanings of statutes are very clear. The area U. J. A. Hart refers to as the 'Core'. They have the discretion on where the laws are open to various interpretations which Hart calls penumbra. Hart says that Realists in their quest for a 'legal science habited a narrow empiricism a vast amount of energy was burnt up in the collection of date"

However there is merit in their argument that judges make law and their attitudes background and beliefs influence their decisions.
For example in Sri Lanka Sharvananda, CJ was liberal on labor matters but was strict in matrimonial cause. See Tennakoon v Tennakoon [1986 SIR 90] which overruled Muthuranee v Thuraisingham [1984 SLR 351]

12. CRITICAL LEGAL STUDIES

The emergence of Critical Legal Studies

In the US Classical Jurisprudence, informed by a belief in, and devotion to the grandeur of the law - dominated law schools until the 1970s, with the liberal influence of the Warren Supreme Court acting as a punctual corrector of the conservatism of legal academics. In a narrow sense the term Critical Legal Studies (CLS) refers to a movement which originated in the US in the 1970s as a response to an increasing political and legal conservatism. Though it is, for all intents and purpose, now defunct, CLS encompass a plurality of different critical perspectives on law which have been flourishing for the past 3 decades.

This movement was officially born in 1977 at a conference in the University of Wisconsin, but its founding members were rooted in 1960's activism, particularly the civil rights movement and general distrust of authority fuelled by the Vietnam War militarism, and so of the law..

In 1970 **Duncan Kennedy**, a student at Yale Law School started expressing strong dissatisfaction with the smugness of legal academics, safely sheltered behind the 'objectivity' of the formal rule of law. Kennedy questioned the apparent absence of politics from the legal discourse.

It is difficult to define CLS movement in a definitive manner as CLS perspectives are ever expanding. They range from analyzing legal symbolism and representations of law in literature to deconstructing the concepts of legal discourse and questioning the symptomatology of the law. That is, whether the law is neutral as it claims to be or is it patriarchal, discriminatory, colonial, exclusionary etc.

The Central claim of the early American Crits was the grand legal edifice, despite its self – representation as neutral, objective and abstract, was in fact deeply political, structurally contingent, fundamentally contradictory and intermediate (idea that law does not determine the outcome of legal disputes but politics do) and that the law's main function was to entrench the social status quo further conferring legitimacy upon it. (legitimation)

The law can be shown, for example to manipulate legal concepts in order retroactively to legitimate the expropriation of indigenous people or to entrench radical or sexual stereotypes. What however distinguishes CLS from more straight forwardly critical takes on law is that its many approaches import insights. Concepts and methods devised by other disciplines such as aesthetics, literary criticism and philosophy into the critical study of the law.

It is this sense that the early Crit Movement as influenced by Marx's view of the world in terms of domination, exploitation and oppression. The initial object of American CLS, particularly which of Duncan Kennedy, was twofold.

- To counteract the conservatizing effect of legal training in legal education
- To turn the law into am overt political terrain

Prominent participants in the American CLS movement include Duncan Kennedy, **Mark Tushnet** and **Roberto Unger**.

Yet all CLS perspectives share a wish to critique the traditional notions of legal objectivity and supposed neutrality of the law in order reveal law as a murkier, much more morally ambivalent area than is usually acknowledged in classic legal discourse.

The shared idea is that there is another truth to law than that of its apparent content through the status of thus other truth hidden, repressed absent impossible ambivalent depends on the views of the author.

CLS proponents imported the ideas, theories and hail dominantly European thinkers (initially Marx and the Frankfort School) into the field of law, thereby giving birth to the idea of a critical inquiry into that had hither to been constructed as an objective, quasi-scientific field of study.

The central object of CLS is if one is to be named to challenge the apparent objectivity of the law and legal practice in order to expose the political choices embedded in legal discourse. CLS range from the straight forward, neo-Marxist denunciation of the function of the law in the reproduction and legitimating of the social status quo to the deconstruction of a legal concept or the exposure of the repressed content of the law.

CLS movement includes movements such as following:

Feminist Legal Theory
Queer Theory
Critical Race Theory
Post Colonial Theory

It retains critical inquiry into the nature and functioning of the *legal system*.

The Decline of first – generation American CLS

The early American CLS movement came to a premature halt, partly due to the opposition of mainstream legal academics who feared to their own position (effectively, Critics were not hired by law schools and so the movement stopped developing) and partly due to the movement's own conceptual shortcomings. The concepts of legitimation, contradiction and indeterminacy proposed by the early Crits became the site of theoretical debates with mainstream legal academy, which was unfortunate as these concepts referred to oppositional strategies and so were not theoretical building blocks for the creation of an alternative legal discourse. These debates resulted in the explosive potential of the concepts of early CLS being defused through appropriation by mainstream legal thoughts.

Thus for example:

- The concepts of contradiction and indeterminacy led to neo-pragmatism. Since the law is indeterminate and contradictory to be practical about it and abandon grand theories.
- Legitimation means if everything is political then to be aware of it and make the politics explicit. This led to the 'reason-giving', 'civic-republican' and 'dialogic' strand of mainstream legal thought.

American CLS today

Though the American CLS movement in its original form more or ended in the 1980s as a radical challenge to mainstream legal thought, its legacy in the US is alive as well as feminist legal theory (Fem-Crit) and race critical theory (Race-Crit). There is also a more general movement, heir to 1st generation American CLS and represented in the Association for the study of law, culture and the Humanities. The association for the study of law, culture and the Humanities, which holds annual conferences in the US, is an association committed to interdisciplinary legal scholarships: legal history, legal theory and jurisprudence, law and cultural studies, law and literature, law and performing arts and legal hermeneutics are all represented.

The association's remit is to contextualize and so problematize law by exploring its relation with culture, politics and society. For example, in *Law in the Liberal Arts (2004)* Austin Sarat argues that the traditional location of legal education in law schools offering vocational training produces an impoverishment of students and so lawyers grasp of the law's place in culture and society.