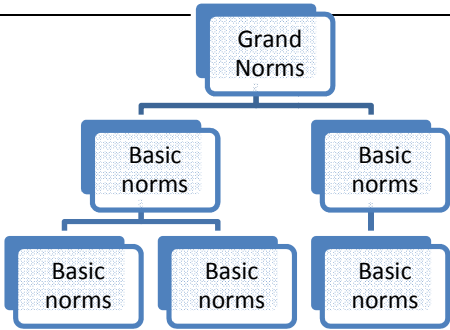


JURISPRUDENCE

School	Jurist	Philosophy	Main Points	Criticism	Similarity	Remark
Analytical	Banham	Utility	To measure the utility- How much pain and pleasure we procure. Man is the pleasure seeker. JP deals with law as they actually in a given legal system i.e. Positus. Most important aspect of law is its relation to the state. He distinguished –Expositoral Jurisprudence (what the law is) and Censorial Jurisprudence (what Law ought to be). Utilitarianism- Economic principle of Laissez-faire- minimum interference of State in the economic activity of Individual. Existing law is the real law as law as it is.			Evil Good ↓ ↓ Pain Pleasure Evil > Pleasure= Un civilized Society. Evil > Pain = Civilized Society
		Hedonism	Evil and good are the mater of human life.			
	Austin	Imperative	Law is the command of Sovereign. 1. Law is the command of sovereign which the subjects are duty bound to obey, the disobedience of which would lead to penal consequences. 2. Law as a coercive command issued by the sovereign devoid of moral or cultural values. Austin, rejected the historical growth of law and concentrated on law as it is. 3. Existing law and legal institution can be supported or opposed only when we know the sanction behind them and how they worked in the past and are actually working in the present.			<pre> graph TD A[Structure of Austin's Law] --> B[Law properly so called] A --> C[Law improperly so called] B --> D[Law of God] B --> E[Human Law] C --> F[Law by analogy, as laws of fashion] C --> G[laws of metaphor, i.e. law of gravity] E --> H["Positive laws (law strictly so-called) set by politically superior to politically inferior.."] E --> I["Laws not set by men as political superior."] </pre>

HLA Hart		Union of Primary and Secondary Rules. Primary Rules= Duty Imposing. Secondary Rules= Fulfillment of duty.	Law= Primary Rule + Secondary Rules.
kelson	Pure Theory	Law id the Collections of Norms, which is called the Grand Norms. Law is the normative character. Law has a Primitive Structure. Norms = The rules prescribing or forbearing certain behaviors. Norms are Basic and Grand Norms. Grand norms are at apex position which provides the validity of other or basic norms. for example Indian constitution is the grand norms.	 <pre> graph TD GN[Grand Norms] --> BN1[Basic norms] GN --> BN2[Basic norms] BN1 --> BN3[Basic norms] BN1 --> BN4[Basic norms] BN2 --> BN5[Basic norms] </pre>

Historical School			Evolution/ development of law. Darwin theory of living is the base. Changing needs of the society. Law is the dynamic nature, which change according the needs of the society. Law has the organic character. Every thing has a natural selection. 1. The positive law must conform were not principle s of morals but principles of customary action. They could be traced not by reasoning but by historical study. 2. They reject all the creative principle of judge and jurist or law –giver in making of law. Evolution of law from the primitive legal institutions of the ancient communities.			
	Sivigny	Volgesky	General will of the society.			
	Hanery Main	Progressive society	Progressive society. Status to contract and contract to status.			
Sociological			Conflict interest of Society. Social aspect.			
	Dean roscopond	Social Engineering				
	Duguit	Social solicitor	To serve and secure the social needs			
	Ehrlich	Living law				
Natural law			Reason basic			Q- what is law, and what is the development of natural law.
	Ancient Period		God made law			
	Medieval Period		Religious law- Church and POP			
	Renaissance	Hobbs and Lock Contract Theory-	Instrument of law			
	Modern		Strong Political base			

Ethical			Values and Ethics is the basis of making any law. Individual liberty, personal will must be free. People must be guided by his reasonableness.			
	Hegel		Making of law to reconcile the conflicting ego of the societies. Theses= Thinking. Antitheses= Opposition of thinking. Syntheses= compilation of both (thesis and antitheses.)			
	Kent	Categorical Imperative	Expect a man that he is guided by his own reasonableness. Law is the reconciliation of different people conditions or postulates. Conditions are there .e.i. > Personal wish. > Arbitrariness will. > Categorical imperative.			Reason > Postulate > Ethics
Realistic	Homes	Actual functions of Courts.	The professes of what the court do and nothing more precious what I mean by law.			
	Julius Stone		Jurisdiction is the lawyers extroversion.			

Discussed the Salmond's definition of law and examine how far it is applicable to Indian Legal system? (2008).

Q-1

Analytical School of Jurisprudence.

Critically examine the statement that " Law is the command of the sovereign" and state whether this concept applies to Indian Judicial system? (2004).

Discuss the analytical school of jurisprudence propounded by John Austin. What according to you are the weakness of his imperative theory of law?(2005).

Jurisprudence is the philosophy of positive law (Austin) (2006).

Discuss in brief the definition, nature scope and utility of jurisprudence. (2007).

What is the difference between Austin and Kelson as Jurist? (2009) short note (100W).

Bentham, Austin, Hart.

A- The major principle of analytical school of JP is **to deal with law as it exists in the present form. It seeks to analyze** the first principle of law as they **actually exist in a given legal system**. The exponents of the ASJP consider that the **most important aspect of law is its relation to the state**. They treat law as a command, or the command of sovereign. Therefore this school also called the imperative school. The exponents of this school neither concern with the past of the law nor the future of the law but they confine themselves to the study of law as it actually exists i.e. positus. That is the reason this school also called the Positive school of law.

Bentham, Austin, Holland, Salmond, Sheldon Amos, and Markby are the exponent of this school.

Bentham, started a new era in the history of legal thought in England. He is considered to be the father of positivism in modern sense of the term. And it is rightly said that Austin owes much to Bentham and on many points his propositions are merely the para-phrasing of Bentham.

Jeremy Bentham's view on Law.

The law in England in 18 century were not organized, but it was in a very haphazard way, as a result of customs or modes of thought and there were no guiding principle behind them. And during the Bentham's era it started getting grown, and it is often said in England law had in fact grown and rather than been made.

Justice is nothing but social happiness guaranteed by social order and protecting certain interests socially recognized by majority as worthy of being protected.

Criticism.

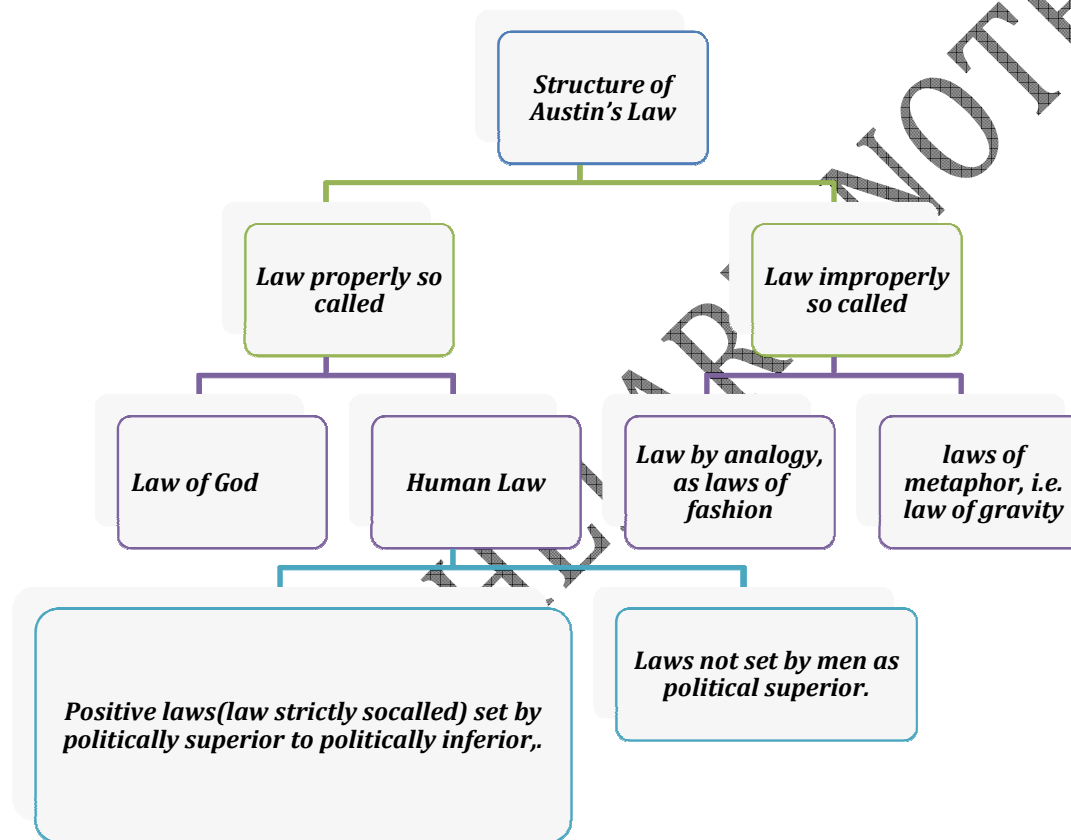
1. **Materialism with Idealism-** He blend materialism with idealism, he underestimates the need for individual discretion and flexibility in the application of law, and overestimated the power of legislature.
2. **Balance between the interest-** he failed to maintain the balance between the interests of the individual and the interest of community. He advocated that legislation which was supposed to remove inroad individual freedom, and provide him opportunity for development. But latterly it was found that legislature was used to restrict individual 's freedom in economic matters.

John Ausin- Imperative Theory of Law.

He is the founder of the Analytical School, he consider as the father of English Jurisprudence. The army life of strict discipline and command had its reflection in his theory. He was much impressed by the scientific treatment of Roman law and drew inspiration to introduced the same method to the legal exposition of law in England.

Analytical School of Jurisprudence-

This school also called as **imperative school**, due to its authoritative characteristic. He confined his study only to the positive law and applied analytical method for this purpose. By positive law , Austin meant" **law properly so-called**" as distinguished from moral and other laws which he described as laws improperly so called, which lack force or sanction of the State.



Austin's definition of Law: A rule laid down for the guidance of an intelligent human being by an intelligent being having power over him.

Kind of law-

A- Law properly so called.

1. **God law:-** law set by god for man.
2. **Human law:-** Laws set by men for men.
 - I. **Positive law- Set by** political superior to political inferior.
 - II. **Other laws-** those laws which **are not set** by political superior.

B. Law improperly so called.

Analogous law such as fashion or honor falls under this category; Austin places International Law under this class.

Austin describe positive law as “ The aggregate of rules set by man as politically superior to men as politically inferior subjects.”

Essential ingredients of Positive Law.

1. Command.
2. Sanction.
3. Duty.
4. Sovereignty.

Positive law and Positive Morality.

Austin said positive morality devoid of any legal sanction. **Justice Holmes**, said Austin's distinction between positive law and positive morality seeks to exclude the considerations of goodness or badness in the realm of law. In Austin's positive law there is no place for ideal or justness in law.

In his own word – the existence of law is one thing, its merit and demerit another. A law which actually exist is law, though we happen to dislike it or like it.

Austin law was therefore, on separation of law from morality.

Amos- Observed that positive law, as Austin has shown, must be legally binding though it may be unjust.

Austin's law was logical, coercive and enforceable as distinct from law as it ought to be. For him command was the key to the science of jurisprudence.

Law is command -

Law is the command of sovereign; command implies duty and sanctions. Laws properly so called are species of commands. The law is properly so called flows from a determinate source, or emanates from a determinate author. For

whenever a command is expressed or intimated, one party signifies a wish that another shall do or forbear. The sovereign has command on his subjects. The subjects are inferior to sovereign; a sovereign is any person or body of person.

Law stands in need of sanction, sovereign fulfils it. The source of the law is the will of the sovereign. The violation of law meets with punishment. Therefore Austin regards International law is not law properly so called, because it lacks the sanction and enforcing capacity.

All the command are not law, it is only the general command which obliges to a course of conduct is law. Though there are three kinds of laws which are not command but according to Austin still within the province of jurisprudence:

1. **Declaratory or Explanatory Laws**- these are commands because they are already in existence and are passed only to explain the law which is already in force.
2. **Laws of repeal**- Austin does not consider such laws as command because they are in fact the revocation of a command.
3. **Laws of imperfect obligations**- According to Austin commands to become law, must be accompanied by duty and sanction for its enforcement, and in this case there is no sanction attached to them.

Criticism of Austin Theory

1. **Customs ignored**- Austin regards only the command of sovereign, and ignored the historical fact. Not only in early times, but in present as well customs are also regarded as the source of law.
2. **No place for judge made law**- Judge made law is the significance important in modern time but Austin completely denies this factor.
3. **Command over emphasized**- Oliverona criticized this theory because it over emphasized command. The modern progressive law is nothing but general expression or will of the people.
4. **International law is mere morality**- he says international law is mere morality because it lacks the sanction and enforcing capacity.
5. **Triology of command**-
Hart criticized Austin's trilogy of Command, Duty and sanction as – it creates a situation where law only obligates subjects and threatens them with physical coercion. It compels the subject to obey the command even if it is most unjust or unfair.
Salmond- Austin's theory is completely divests law from morality and held that law to be effective must have in it elements of ethics, reasonableness and justice.
Fuller- The purpose of law is to subject human conduct to the governance of rule. The law therefore cannot be devoid of morality.

Gustav Radbruch- It lead to dictatorship as it was the case in Germany during the Nazi rule.

H.L.A Hart's contribution to Analytical Positivism

He **rejected Austin theory** of analytical positivism and expounded his legal theory based on the **relationship between law and society**. He favored analytical approach to law for a better understanding of it. Thus his notion of law was altogether different from his predecessor, because he believed that law, coercion and morality are related social phenomena having sociological implications

He divided Analytical Positivism in two categories, Primary and Secondary rules.

Primary rules- are duty-imposing and Secondary rules-confer power and the union of the two is the essence of law. The primary rules are binding in nature, because of the popular acceptance of kingship. The secondary rules enable the legislations to modify their policies according to the needs of the society.

Infact they seem to be the remedy of primary rules.

Critic-

He does not denounce the role of natural law in this positivism. Unlike Austin and kelson.

Q- 2

Historical School-

Contribution of Sir Henry Maine. (2005- SN)

Q- The movement of progressive societies has hitted to been movement from status to contract. Critically examine the statement.(2006)

This school gives the importance of the social institution in which the law develops itself. The task of historical school is to deal with the general principles governing the origin and development of law and with the influence that effect the law. Historical jurist reject all the creative principle of Judge and Jurist or law giver in the making of law. They propound that positive law were not principle of moral but principle of customary action. They could be tract not only by reasoning but by historical study.

When positivistic legal thinker failed to meet the needs of the people, they come up with a view – the law as a legacy of the past and product of customs, traditions and beliefs prevalent in different communities. They believe that Law has biological growth and it has not evolved in an arbitrary and erratic manner.

Sir Henry Main-

He was the first jurist who adopted historical method of pursuing the study of legal institutions.

He propounded that social and legal factor cannot always be reduced to water-tight compartments. Through his comparative researches came to a conclusion that the development of law and other social institutions has been more or less on an identical pattern in almost all the ancient societies were founded on patriarchal pattern wherein the eldest man call the pater familias dominated to entire family including all the male and female members including the children servant and slave also the property. There are examples of communities where the matriarchl pattern in which the eldest female of the family was the central authority to manage all the affairs of the family, and the word of them was the law, which they were supposed to follow. It is because of his or her kingship in the family, namely the blood relationship with the family that a person acquired a Status. In ancient societies, the slave, servant, ward, wife citizen etc. all symbols statuses which the law recognized in the interest of the community.

A/c to Main pater-familiar constituted the lowest unit of the primitive communities. A few families taken together formed the family group which consist of union of families. An aggregation of families constituted gens which in turn led to the formation of tribes. A collection of tribes formed the community which Main termed as commonwealth. It was in the manner that early primitive societies evolved, their relationship being regulated by the law of status which was also called as law of person.

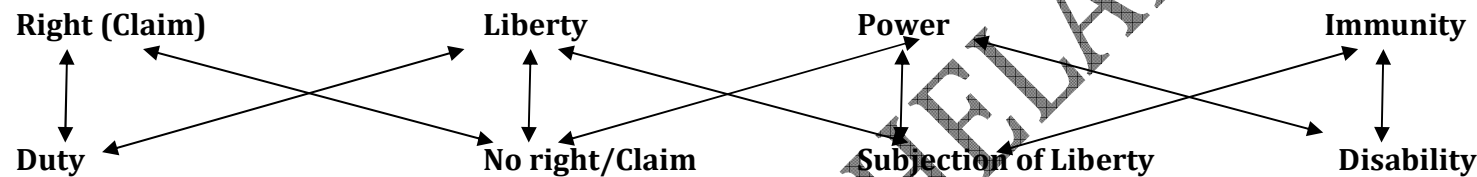
Movement of progressive society from status to contract

Gradually the institution of para families withered away and now rights and obligation were depends on individual contract and free negotiation between persons. This led to disintegration of family system and emergence of contractual relation between individuals. Now the individual could take the final decisions himself without depending on headman of the family. Here we can see accomplishment of the Bantham's Doctrine individual

freedom from the bondage of their master, and they could have the right like any other person. This regards the free society..

Q- 3

- Define Legal right. Why the legal rights are protected by the state. Also name various legal rights.(2007)
- "Rights and duties are co-relatives." Comment and discuss what is the position in Indian in this regard?(2008)
- Define the right in border sense.
- Define the jurial correlative and jurial opposite of- Right, power, immunity, and liberty, through hoffield table.



Ans- when people come into contact as a member of society, they have certain legal right and duties towards one another. These right and duties regulated by the prevailing law in the society. It is the establish fact the main purpose of law is the protection of the society. To establish this fact it is essential that Sovereign or Sate use its physical force for the enforcement of legal right and duties and punish those who violate these rights.

Law consist those rule which regulate the human society, and it is the state which enforce these right and duties created by the state.

Duties- It is an obligatory act, or it is an act opposite of it means would be wrong. It is an act which one ought to do, aan act the opposite of which would be a wrong.

Kind of Duties-

1. Moral duties
2. Legal duties

I. **Positive and Negative Duties-** When a law obliges a person to do and act it is called the positive duty. And when law obliges him/her to refrain from doing an act it is called the negative duty.

II. **Primary and Secondary Duties-** A primary duty which is exists per se and is *independent of any duty*, which the duty which has no independent existence, but *exist only for the enforcement of other duties*.

III. Absolute and Relative Duties- Absolute duties **owns only by the state**, which generally called the crime and remedy of it is punishment. Relative duties are **owns by any person other than the one who is imposing** them, the breach of it called the civil injuries. Which is repressible by compensation - **(Hibbert)**. **Austin says-** *Relative duties which have corresponding rights.*

Austin defined 4 kind of duties-

1. *Self duty- exp not commit suicide.*
2. *Public duty- not to commit nuisance.*
3. *Duty towards who are not human being duties towards God or animal.*
4. *Sovereign- Duty towards sovereign.*

Salmond- Reject the concept of Absolute duty he said there can be no duty without the right.

Rights-

A/c to Salmond- Right is a interest recognized and protected by a rule of justice.

A/c to Holums – Right is the power of enforcing legal limitation on conduct.

A/c Gray - Right is that power which a man has to make a person or persons to do or refrain from doing a act or certain acts

In **State of Rajasthan v/s Union of India**. SC has defined the Legal Right-

In **strict sense**, legal rights are correlative of legal duties and are defines as **interest which the law protected by imposing duties on others**. But in **generic sense** the word right is used to mean **immunity from the legal power of other**.

Theories of Legal Rights-

There are two theories on legal rights-

1. Will theory.
2. Interest theory.

Will theory-

Hume, Hegel and kent - A right is an inherent attribute of the human will. The subject matter of right is deriving from human will and through a right a man expresses his will over an object.

Puchta- says – legal right is an **power over an object**.

Vinogradoff- in a social order establish by law no man is absolutely free to act as he likes, but his **freedom of action is restricted due to rights of other**.

Austin- A right of a person means that **other are obligates to do or forbear from doing something** in relation to him.

Holland- legal right is nothing but a **permission to exercise certain natural powers** to obtain protection under certain conditions.

Interest Theory- this theory mainly propounded by **Ihring**.

According to Ihring- A legal right is a **legally protected interest**. He does not emphasis on the element of will. He said the basic function of law is to protect the human interest and to avoid a conflict between their individual interests.

But **Salmond criticize** his theory and said- it is incomplete because it is completely overlook the element of State recognition. A legal right should not only be protected by the sate but also be legally recognized.

Gray was greatly impress by Salmond 's view and held that interest theory was partly true, he emphasized that a legal right is not an interest in itself but it **only a mean to extend protection to interest**. he said a legal right as the power by which a man makes other person do or refrain from doing a certain act by imposing a legal duty upon them through which the agency of law(State).

Allen- chooses the mid way he said both the element of Will and Interest are essential for legal right.

Essential element of legal Rights

There are five elements of legal rights-

1. The person of **Inherence-** This is also called the Subject, the **legal right always vested in a person**, without a person of inherence there cannot be a legal right.
2. The person of **Incedence-** The right avail against a person, he is a **person bound by the duty and so may be describe the Subject of duty**.
3. **Content of the Right- Act or omission** which is obligatory on the person bound in the favor of the person entitle.
4. **Subject matter of right-** it is **something which act or omission is relate**, it may be the **object**.
5. **Title of Right-** every legal right has a title that is **certain fact over event**.

Illustration-

A testator leaves a gold ring to a legatee. In this case

The **legatee** is the inherence or the **subject owner of the right**

The **gold ring** is the **object/ subject matter** of the right.

And the **delivery of the ring** is the **content** of the right

The **executer** is the person of **incidence**

The **bequeathing the ring** is the **title of the right**.

Enforcement of legal rights-

Through the agency of court of law established by State it can be enforced. The usual method of legal right is –

Award of damages in civil cases.

Grant of an injunction- where by a party is restrained from doing an act which is likely to affect the plaintiff adversely in enjoyment of his legal right.

Right in a wider sense-

Salmond suggested-

Right Other persons ought to do in my behalf.

Liberty- I may do without the interference of law.

Power- I can do effectively against other.

Immunity- Other cannot do effectively against me.

Classification of Legal Rights.

Perfect and Imperfect Rights. A/c Salmond – Perfect right is one which correspondent to legal duty, and not only recognized by law but also enforce by law.

Where as imperfect right though recognized by law but not enforceable by law, a time barred debt is the example of it.

Positive and Negative Rights. The nature of co relative duty defines the positive or negative rights, if a person is bound to do something then it is a positive right, if a person is refraining to do an act it is a negative right.

Proprietary and Personal Rights. Proprietary rights related to economic or monetary rights or right of wealth. For exp money in some one pocket or in bank, right to debt , land etc. Personal rights related to ones well being for example- right of reputation, freedom, liberty etc.

Right in re propria and rights in re aliena.

.re propria- Right over one's property.

.re aliena- Right over the property of someone else.

Principle and Accessory Right- Principle rights are independent rights, but accessory rights are ancillary rights of principle rights. For example – A piece of land has a right is the principle right but the right of way is the accessory right of adjoining land.

Public and Private rights- When the right is vested in the State is called the public right whereas the private rights concerned only with the private individuals.

Jus ad rem- a right which is originated from another right is called jus ad rem. A person of inherence has a right to have some other right transferred to him.

Q- What do you understand by possession? What are the elements of a possession? Explain various kinds of possession (2009).

Neither animus nor corpus is sufficient by itself. Possession beings with their union an lasts only until one or both of them disappears. Comment. (2008).

Discuss and define the concept of ownership in details. Also give its distinction with possession. (2007).

The essence of corporeal possession is essentially to be found in the physical power of exclusion. Comment. (2006).

There is 9 point out of 10 for possession. Comments.

A- Earlier legal system did not recognize the distinction between the possession and ownership. In Roman Law ownership and possession are relative terms-dominium, and possession, which denote **absolute right to a thing, while possession implied only physical control over it.**

Roman attached greater importance ownership rather than possession because in their view having absolute right over a thing was much more important than merely having physical control over it.

Ownership- The term ownership was used in English law for the first time in 1583, and when it was distinguished from possession.

Ownership is a supreme right that can be exercised on anytime.

Hibbert, define ownership which includes within its four kinds of right-

1. Right to use a thing.
2. Right to exclude others from using the thing.
3. Disposing of thing.
4. Rights to destroy.

Hibbert suggested that no one can have an absolute ownership in land as land not capable of being destroyed. One can merely have an estate in it.

Austin- right indefinite in point of user unrestricted in point of disposition and unlimited in point of duration. it is a right in rem which is available to the owner against the world at large.

Element of ownership a/c Austin-

1. Indefinite user -
2. Unrestricted Disposition-
3. Unlimited duration.

Criticism against Austin Definition-

It is being criticize that - it is fallacious to think that ownership is a single right, in fact it is a bundle of rights including right of user and enjoyment.

Second that the owner has an unrestricted right of disposition is not correct. The right of ownership can be curtail by the state subject to injurious to public health/ or for public use as per Constitution of India Art 31(2), any property can be taken by the state for public use.

Salmond- relation between a person and right that is vested in him. In simple sense ownership signifies the relation between the person of inherence and the object of ownership.

Salmond try to comprehends ownership in a wider sense to include both corporal and incorporeal rights. Thus a man can own a copyright or a right of way.

Duguit - criticized Salmon- a person really owns is a thing and not a right.

Pton- Define ownership in respect of four things-

1. Right of use.
2. Possession which also includes elimination of other.
3. Right of alienation.
4. Disposition

Characteristics of Ownership

1. It may be absolute or restricted.
2. Subject to public safety.
3. Law does not confer ownership on an unborn child or an insane person because both of them are incapable of conceiving the nature and consequences of their acts.

A/c to salmond there are two ways of acquiring the ownership-

1. **By operation of law.** Such as the law of intestacy(Dying without a legal will) or bankruptcy.
2. **By reason of some event or act.** such as taking or making a thing for the first time.

There are three generally known mode of acquisition of ownership-

1. **Absolute.-** when there was no previous owner of that thing. i.e. res nullius (ownerless thing).
2. **Extinctive-** when ownership of a previous owner has been terminated by reason of adverse possession by the acquirer.
3. **Accessory.** Acquired as a result of accession. E.g. owner of a animal has right to its off springs or the owner of a tree has the right of the fruits of the tree.

Salmond think that the concept of ownership is changing with social changes pointed out that in ancient times the right of ownership regarded as absolute, but in modern time it is subject to reasonable restriction.

Kind of Ownership-

1. Corporeal and Incorporeal-

- Material/ tangible object= corporeal i.e. pen, table, vehicle etc. it is chose in possession
- Immaterial/ intangible = incorporeal- i.e. copy right etc it is chose in action.

2. Sole and Co- ownership-

- **Sole**= single person ownership.
- **Co-ownership**= when it vested in two person.
 - I. **Common**= Right of the deceased passes on to his successor like other inheritable right. For example. When a property belongs to A, and B in equal shares and if A dies the right of half of the thing will pass on to the legal heirs of the property. And the other half will remain with B. Hindu law recognized the right of common ownership.
 - II. **Joint**= if one of the two joint owners dies, his right of ownership also dies with him and the survivor becomes the sole owner by virtue of his right. It is also called the right of survival ship.

3. Trust and Beneficial- The property is own by two owner, in which one is under an obligation to use his ownership for the benefit of other. The former is called the trustee and the later is called the beneficiary. The ownership is nominal for trustee rather than real because he is deprived of any right to the beneficial enjoyment of the trust property.

4. vested and Contingent-

Vested= perfect ownership

Contingent= fulfillment of some future condition.

Possession-

It is de facto= exercise of a claim

Possession is in fact while ownership is in the form of the right. Possession is the prima facie example of ownership.

Henry Main- possession means that contact with an object which provides the rights of exclusion of other form the enjoyment of it.

Pollock- having physical control over a thing is possession.

Salmond- the possession of a material object is the continuing exercise of a claim to the exclusive use of it.

Sivigny- **physical power of exclusion.**

Nature of Possession - possession is the most basic relation between man and things. Possession of material thing is essential to life because the existence of human life and human society. It is also one of the modes of transferring ownership. **Possession is said to be nine out of ten points of law meaning thereby that it is an evidence of ownership.** For example a thief who steals my watch has a possession which the law protect against everyone except myself or some person thing on my behalf.

Possession under Roman Law - under Roman Law it has been defined in two categories-

1. Corpus possessionis- Simply a physical control over a thing.
2. Civilis possessionis- legal possession. The property disputes mostly decided on the basis of this possession.

Animus- A person was deemed to be in legal possession of a thing when not only thing was in his physical control or he had custody over it. But he also had the power to exclude other from interference in his possession. This is the mental element.

Holems- to gain a possession a man must stand in certain physical relation to the object and to the rest of the world, and must have a certain intent.

The Roman law distinguished detention from the custody. *In detention a person was to have real possession and control over a thing though he may not have ownership of it. The custody on the other hand involved possession and control with out ownership.*

Element of Possession

Holland- possession has two essential elements-

- Corpus- Physical control over a thing.
- Animus- Power of exclusion other of it use.

Salmond- It is not necessary that animus should always be present in legal possession.

Ihring- takes a sociological view of the concept of possession, he doest not give much stress animus, he says it is quit immaterial as to how a person intended to possess a thing but what is important is how he got it.

Case ref-

Nn Majumdar v/s Sate- the question of animus came up for determination before the High court of Calcutta.

Brief Fact- Police made a search of the accused house in the hope that the pistol would be recovered from there but no such recovery could be made. In the meantime, the accused had a quick word with his wife who went out and returned within there or four minutes with a pistol and some cartridges. The police took the plea that as per S.27 of the Evidence Act, it should be presumed that the pistol was recovered from the possession of the accused. The court however, rejected the contention of the prosecution and held that the Arms Act being a special enactment, **the fact of corpus must be specifically proved and mere existence of corpus without animus is ineffective to constitute possession.**

Savigny-

1. **Corpus-** physical control of the thing, that is, immediate physical power to exclude any foreign agency's interference by the possessor.
2. **Animus-** mental element or conscious intention to hold the object as owner against all other.

Criticism- he assumed that without the combination of these two element possession is not possible, and possession will be lost when either of these element are lost and in some instance without the element of both of this.

Second Law does not protect a possession which is acquired unlawfully, although both the element are present.

Ihring- consider animus only as a supplemental element for possession.

Criticism Ihring purely analyzed the concept of possession in the background of Roman Law refused possessory rights to persons who were in effective physical control of the thing possessed.

Kind of Possession-

1. **Corporeal and Incorporeal- Possession for material thing. Incorporeal- Possession for intangible thing**
2. **Mediate and Immediate Possession-** Mediate means possession through third person- for example I purchase a book through any agent or servant. I have mediate possession so long as the book remains in my agent's possession.
Immediate- Direct possession.
3. **Adverse Possession-** it implies a possession by a person initially holding the land on behalf of some other person and subsequently setting up his own claim as a true owner of that land. If adverse possession

continues peacefully undisturbed for a prescribed period (12 years in India) the title of the true owner is extinguished and the person in possession becomes the true owner of that land.

Mode of Acquisition of Possession-

1. By taking- Without Consent of owner.
2. By delivery- with consent of owner.
3. By operation of Law.

Relationship between possession and ownership-

Possession has been treated as an external evidence of ownership. a person in possession of a thing may be presumed to be the owner of it. The person in possession may not need to prove the ownership.

Administration Justice – Theory of Punishments-

Q- The main objective of criminal justice is the prevention of crime. Critically examine with the help of various theories of punishments. (2009).

Q- Deterrent and prevention. (2008) short note.

Q- Civil and criminal administration of justice(2008) S.N.

Q- Reformatory punishment in India. (2007).

Q- Various theories of punishment which theory is good according to you. (2007).

Q-Prevention theory of punishment(2006).

A- The two most essential functions of a state are- War and Administration of Justice. If the state fails to fulfill these two objectives it cannot be called the rightly the State. Administration of justice implies the peace and order within a political community by means of physical force of the State.

Lord Bryce rightly said that- there can be no better test of the excellence of a Government than the efficiency of its judicial administration.

Concept of Justice-

The concept of justice become more conspicuous with the growth of State which ensures justice to it people through the instrumentality of law. The essence of legal justice lies in ensuring uniformity and certainty of law and at the same time ensuring that rights and duties are duly respected by the people.

Importance of Administrative Justice-

By nature man is the dominate nature and wants to enjoy his liberty , liberty which consist in the power to do everything that does not injure another. Thus liberty implies freedom of action so far permitted by law. It therefore, follows that legal liberty depends on the existence of the authority of the sate.

Origin of Administrative Justice. The administration of justice evolve in civilized society in the stages-

First State- Primitive Society- when the society was primitive and private vengeance (revenge) and self help.

Second State- Emergence of State, and its function were only persuasive (influential) in nature, and do not have the power to punish the wrong doer.

Third State- State exerted its authority and capable to punish the wrong doer.

Advantage and Disadvantage of Administrative Justice-

-Merit- Uniformity, certainty, impartiality and equal.

-Demerit- Rigidity, formality, and complexity of law.

Kind of Administrative Justice-

There are two kind of Administrative justice.

1. Civil – it is also called the private wrong. It is violations of civil or legal rights of individuals called civil injuries. The object of it is enforcement of rights.
2. Criminal- it is also called the public wrong. It is the violations of public rights and duties which affect community as a whole and are called crime or misdemeanours, and punishable by State. The object of it is to punish the offender.

Theories of Punishments- The theories of punishments are changing according to the social norms.

Deterrent Theory-

The main object of punishment is to deter other from committing crimes. As salmond rightly stated- the chief aim of law of crime is to make the evil doer an example and warning to all that are like minded with him. This point clearly shows that punishment is a means of attaining social security as it seeks to protect the society by deterring potential offenders.

Salmond says- offences are committed by reason of a conflict of interest of the offender and the society. Punishment prevents such offences by destroying the conflict of interest by making acts which are injurious to other as injurious to dower himself.

This theory therefor justifies exemplary punishment because it not only dissuades the offender from repeating the crime but also deter other from indulging into such criminal activities.

Manu the greater law commentator of Ancient time, also supported this theory. He treated punishment as **dharmā**, as the source of righteousness because people are refrained form committing wrongful act through the fear of punishment. Most penal system made use of deterrent theory because of their sentencing mechanism till early nineteenth century.

The advocates of deterrent punishment hold that **fear** in the mind of preparation of crime and the consequences that could befall on him dissuade him from committing the crime.

Critics-

Holmes against this theory- he says that it was immoral in as much as it lays down no definite measure of punishment except the subjective opinion of the judge.

It has proved to be ineffective in restricting crimes. Even during the reign of Queen Elizabeth who was a staunch supporter of deterrent theory and awarded severest punishment to smallest offences.

Second hardliner criminal use to it, and after the completion of their prisoner life.

It may be justifiable when the offence is deliberate, pre planned and barbaric and a menace to the safety and security of the society. Particularly anti notational violence.

Retributive Theory

In primitive societies punishment was mainly retributive. It was regarded as an end in itself. This theory consider that – **evil should be returned for evil without any regard to consequences.** This theory is appraise by the rule of natural justice which is expressed by the maxim- **eye for an eye and tooth for thooth.**

Philosophy- *the theory therefor emphasizes that the pain to be inflicted on the offender by way of punishment must outweigh the pleasure derived by him from his criminal act. Punishment is an expression of society's disapprobation for the offender's criminal act.*

Criticism. It is also questionable that –Whether retribution can be justified on the ground of social policy? This theory owes its origin in the crude animal instinct of individual or group to retaliate when hurt and therefore, its approach to offender is vindictive (cruel) and out of tune with the modern reformatory punishments.

Supportive View Those who are supportive of this theory proclaimed that –*it is the appropriate moral response to criminal acts because the perpetrators of crime deserve to be punished.*

In this view they share the same view of deterrent theory which also defends punishment as morally just and that the severity of the punishment inflicted upon the offender should be in proportion to the gravity of the crime for which he has been found guilty. It supports bodily pain and suffering, imprisonment, deportation and even the death sentence.

The equation of this theory supporter = *Guilty + Punishment = Innocence*

Salmond also said- revenge is the right of the injured person.

Preventive Theory

Preventive theory enriches the idea of –*preventive repetition of crime by disabling the offender through measures such as imprisonment, forfeiture, death punishment, suspension of licenses. Etc.*

Paton- this theory seeks to prevent the prisoner from committing crime by disabling him. This theory does not lay much emphasis on the motive of the wrongdoer but seeks to take away his physical power to commit the offence. It presupposes that the need for punishment for crime arises simply out of social necessities. In punishing criminals, the society protects itself against the anti-social acts which are dangerous to the social order.

For example, when a person sticks a notice – “trespasser will be prosecuted” he does not want any actual trespasser and to have the trouble and expense of setting the law in motion against him. He hopes that the threat will render any such action unnecessary, his aim is not to punish for trespass but to prevent it. .

Thus the real object of the penal law is to make the threat generally known rather than putting it occasionally into execution. This makes the prevention theory realistic and humane.

According to this murderers are hanged not merely to deter others from meeting similar end but to eliminate such dreadful offenders from the society.

Reformative Theory.

This theory emphasizes on reformation of offenders through the method of individualization. It is based on the humanistic principle that even if an offender commits a crime, he does not cease to be a human being. Therefore an effort should be made to reform him during the period of his incarceration (imprisonment).

While awarding the punishment the judge should consider his age, fact and circumstances under which he committed the crime.

As compare to deterrent theory this theory take a sociological view against the offender. It aim of this theory is to socialization of the offender so that the factors which motivated him to commit the crime are eliminated and he gets a chance of leading a normal life in the society.

It must be noted that this theory shows a radical (fundamental) departure from the earlier theories and seeks to bring about a positive change in the attitude of the offender so as to rehabilitate him as a law-abiding member of society.

In this theory punishment use as a measure to reclaim (get back) the offender and not to torture him. It condemns all kinds of corporal punishments the major thrust of the reformist theory is rehabilitation of inmates in penal institution so that they are transformed into law abiding citizen.

It suggested that instead of prisoner being allowed to idle in jail, they should be properly taught, educates and trained so as to adjust themselves to normal life in the community after the imprisonment. This purpose may be achieved through the agencies of parole and probation which have been accepted as modern techniques of reforming the offender all around the world.

Punishment is only justifiable if it looks to the future and not the past. It should not be regarded as setting an old account but rather opening a new account.

Prisonment is not meant for the isolation of offender from eliminating the society, but to bring about a change in their mental attitude through effective measure of reformative during the term of their sentence.

The modern trend in favor of reformatory justice but there is strong feeling that the method should not be stretched too far. This method has proved useful in case of juvenile delinquents (*one who fails to do that which is required by law or by duty when such failure is minor in nature*). First offender and women seen to be response favorable. But hardened and professional offenders hardly response favorably in the method of punishment, the reason is the crime is not a bad habit for them but the inherent nature of their. Deterrent punishment is the only alternative for such type of criminal.

The philosophy behind this theory is- punishment should not be regarded as an end in itself but only as a means, the end being the social security. at rehabilitation of offender in the society.

The focal point of reformists view is that an effort should be made to restore the offender to society as a good and law abiding citizen. The theory believes that it perception of doubt characters are given proper education and training in such a manner as enable them to earn their livelihood by honest means, they would shun adopting for methods for their subsistence.

Conclusion- The deterrent, retributive, preventive and reformatory theories of punishment has there own merits and demerits but unfortunately non of them take notice of compensation which should be paid to the victim of the crime. The modern view is that punishment must not be merely to prevent further occurrence of crime but it must seek to compensate the victim of crime.

It is also be noted that no single theory would serve the interest of criminal justice administration. Undoubtedly, reformatory theory must be given due importance but at the same time the deterrent and preventive aspect of punishment must also not be completely ignored. Thus reformatory can be use as a general method of treatment offenders but those who do not respond favorably to the corrective method of treating they must be treated severely punishment. The institutional method of punishment should be given regard rather than conventional methods.

Q- what is – Ratio decidendi, and obiter dicta- Short note.

Ratio decidendi= what principle it lays down on the rule of law for which it becomes an authority

it is the general rule all the court are bound by the decisions of all court higher them itself. Having consider the extent to which courts are bound by previous decisions, it become necessary to consider what actually constitutes the decision in a case and what is that which is actually binding on the lower case.

A decision generally has two aspects namely-

1. **What principle it lays down on the rule of law for which it becomes an authority. This is generally calling the ratio decidendi of a case.**

2. What the case decides between the parties. Such matter become the **res judicata** between the parties and cannot be the subject of further dispute.

The term ratio decidendi literally means –**reason of the decision** . it is the general principle which is deduced in a case. In other words, ratio decidendi is the rule of law upon which the decisions is founded.

It is different from res judicata which means decision given in a particular case and which is conclusive between the parties to the case.

Obiter Dicta= The literally means something said by the judge by the way , which does not have any binding authority.

In the course of judgment the judge may make various observations which are not relevant to the concern case. Whatever said by the court by way of statement of law which lay down a rule but which is unnecessary for the purpose in hand (concern case) are called obiter dictate.

These dicta have the force of persuasive (influential) authority and are not binding upon the courts. The courts may seek help but they are not binding upon the courts.

The literally means something said by the judge by the way, which does not have any binding authority.