Notes on Jurisprudence

Adnan Zaidi

(1) Definition, nature and scope of Jurisprudence

The term "jurisprudence" comes from the Latin word "juris-prudentia," which translates to "knowledge of law" in its broadest sense. Specifically, "juris" means law, and "prudentia" means skill or knowledge. It, as defined by various jurists, reflects the multifaceted nature and scope of the field. Here are some definitions provided by prominent legal scholars:

Definitions

1. **John Austin:** John Austin, a legal philosopher associated with legal positivism, defined jurisprudence as "the philosophy of positive law." He focused on analyzing the essential characteristics of law, such as its command nature, sovereign authority, and the relationship between law and coercion.
2. **H.L.A. Hart:** H.L.A. Hart, another influential legal philosopher, described jurisprudence as "the study of the concepts of law and the systems of law." He emphasized the importance of understanding legal concepts, such as legal obligation, authority, and the rule of recognition, in the analysis of legal systems.
3. **Roscoe Pound:** Roscoe Pound, a legal scholar known for his sociological approach to law, defined jurisprudence as "a science of law, or the philosophy of law, or a systematic knowledge of the nature, functions, and purposes of law." He highlighted the interdisciplinary nature of jurisprudence and its focus on understanding the social, political, and cultural aspects of law.

4. **Lon L. Fuller:** Lon L. Fuller, a legal theorist associated with legal naturalism, characterized jurisprudence as "the study of law in the concrete." He emphasized the importance of considering the moral and ethical dimensions of law, as well as its practical implications for society.
5. **Joseph Raz:** Joseph Raz, a contemporary legal philosopher, defined jurisprudence as "the conceptual and normative study of law." He emphasized the dual nature of jurisprudence, which involves both conceptual analysis of legal concepts and normative evaluation of legal principles and institutions.

Nature of Jurisprudence

Jurisprudence, as a field of study, delves into the theory and understanding of law, playing a pivotal role in shaping our comprehension of legal systems. By exploring fundamental legal principles like rights, duties, possessions, property, and remedies, jurisprudence offers valuable insights into the role and function of law within society.

A primary focus of jurisprudence lies in scrutinizing the sources of law, which encompass statutory law, common law, and constitutional law. Through this examination, scholars and practitioners aim to develop a deeper understanding of how these sources interact and influence the evolution of legal systems over time.

Another significant aspect of jurisprudence is its role in elucidating the complex concept of law itself. While law is often perceived merely as a set of rules and regulations, jurisprudence reveals its dynamic and multifaceted nature, shaped by a myriad of social, cultural, and political factors.

It's essential to recognize that jurisprudence isn't confined to a single viewpoint; rather, it encompasses diverse perspectives. Some scholars, view it as a science, while others regard it as a social science influenced

by historical, cultural, and political contexts. Despite these varied interpretations, jurisprudence undeniably serves as a cornerstone for understanding legal systems and guiding the development of legal theory and practice.

Jurisprudence is the study and theory of law and it plays a critical role in shaping our understanding of the legal system. This field provides insights into the fundamental principles and concepts of law, including the meaning of rights, duties, possessions, property and remedies. By examining these concepts, jurisprudence helps us to better understand the role and function of law in society.

One of the key aspects of **jurisprudence is its focus on the sources of law**. This field provides insights into the various sources of law, including statutory law, common law and constitutional law. Through the study of jurisprudence, scholars and practitioners seek to develop a deeper understanding of how these sources of law interact with each other and how they influence the development of legal systems over time.

Another important aspect of jurisprudence is its role in **clarifying the concept of law itself**. While the law is often thought of as a set of rules and regulations, jurisprudence helps us to understand that law is a complex and multifaceted concept that cannot be reduced to a simple definition. Instead, the law is a dynamic and evolving concept that is shaped by a range of social, cultural and political factors.

It is important to note that jurisprudence is not a substantive or procedural law. Rather, it is an **uncodified law that provides a framework for understanding the legal system as a whole.** Jurisprudence serves as the "eye of law," providing insights into how the law operates and how it can be used to achieve justice and fairness in society.

While some scholars view jurisprudence as a science, others view it as a social science. Scholars of the historical school of jurisprudence, for example, view jurisprudence as a social science that is shaped by

historical, cultural and political factors. Regardless of how one views jurisprudence, however, it is clear that this field plays a critical role in shaping our understanding of the legal system and in guiding the development of legal theory and practice over time.

Scope of Jurisprudence

The scope of jurisprudence extends across various disciplines, including psychology, politics, economics, sociology, and ethics. This interdisciplinary approach reflects the interconnectedness between law and society, as the law is intricately intertwined with the social, cultural, and political fabric of its environment.

Moreover, jurisprudence doesn't solely focus on legal logic; it also delves into broader questions concerning the nature and origins of law. By studying the various legal systems and traditions and their evolution over time, jurisprudence provides invaluable insights into the complexities of law and its practical applications.

It's important to distinguish between jurisprudence and legal theory. While jurisprudence encompasses a wide array of topics related to the study of law, legal theory specifically examines the philosophical content of the law. Legal theory aims to clarify fundamental legal concepts and discern the essence of law, whereas jurisprudence encompasses a broader spectrum of legal studies.

Jurisprudence is a field of study that encompasses a wide range of topics and disciplines. It explores the relationship between law, culture and society and it seeks to understand the fundamental principles and concepts that underpin the legal system. One of the key aspects of jurisprudence is its focus on legal logic, which involves the study of legal frameworks, bodies of law and the reasoning behind legal decisions.

However, the scope of jurisprudence goes beyond just the study of legal logic. It also encompasses other fields, such as psychology, politics, economics, sociology and ethics. This is because the law is not created in a vacuum, but rather is shaped by the social, cultural and political context in which it operates. Therefore, jurisprudence seeks to understand how these various fields intersect with the law and how they influence the development and application of legal principles.

The study of jurisprudence is also important for understanding the nature of law itself. It explores questions such as the origin of law, the need for law and the utility of law and seeks to develop a deeper understanding of how the law operates in practice. This includes studying various legal systems and traditions and how they have evolved over time.

Justice P.B. Mukherjee noted that jurisprudence is both an intellectual and idealistic abstraction, as well as a study of human behaviour in society. It encompasses political, social, economic and cultural ideas and covers the study of individuals in relation to the state and society.

Overall, the scope of jurisprudence is vast and wide-ranging and includes a variety of disciplines and topics. It is an essential field of study for understanding the legal system and the role of law in society and it continues to play a critical role in shaping legal theory and practice today.

Difference Between Jurisprudence and Legal Theory

Jurisprudence and legal theory are two related but distinct fields of study. Jurisprudence is a broader field that encompasses the study of the nature of law and its principles, while legal theory is a subset of jurisprudence that specifically examines the philosophical content of the law.

As Fitzgerald has pointed out, jurisprudence covers a wider field of study compared to legal theory. It involves an investigation of abstract, general and theoretical aspects of the law. In contrast, legal theory seeks to clarify

the most fundamental legal concepts and answer the question, “what is law?”.

Legal theory is just one aspect of jurisprudence, which is concerned with the evaluative and philosophical study of law in terms of its ends, values and goods. It is focused on living law, which is based on social forces and felt needs and it rejects purely technical, analytical or conceptual perceptions of the law.

In summary, jurisprudence is a broader field that encompasses legal theory as well as other aspects of the study of law. Legal theory, on the other hand, is a subset of jurisprudence that specifically focuses on the philosophical content of the law.

Conclusion

Jurisprudence is indispensable for comprehending legal systems and their societal implications. It offers a theoretical framework for understanding the law and its underlying principles, guiding legal practitioners, policymakers, and scholars in their pursuit of justice and equity within society. Overall, these definitions underscore the diverse perspectives and approaches within jurisprudence, ranging from analytical and positivist views to more interpretive and critical approaches. Jurisprudence serves as a foundational discipline for understanding the nature, principles, and functions of law, and it provides insights into the complex interplay between law and society.

(2) Natural Law School

Introduction

Natural school of law is generally regarded as the law of nature, divine law or the law that is universal and eternal in nature. It has been given different meanings at different points of time and though it is created by man, it is found through the nature of an individual. It is mostly influenced by religion. The central idea of this theory is that there is a higher law based on morality against which the validity of human law can be measured. There is a belief that there are certain moral laws that cannot go against without losing its moral or legal character. If legislation is not moral it is not law. There is an essential connection between law and morality in this school of law.

Division of Natural Law

Natural law can be broadly divided into four classes:

1. Ancient theories
2. Medieval theories
3. Renaissance theories
4. Modern theories

Ancient Theories

Greece

The Greek thinkers developed the idea of natural law and laid down its essential features. At that time in Greece, there was great political instability and it was thought by many that law is made only to serve the interest of the strong, but the same situation made some other jurists think

in other ways, they saw this as an opportunity to develop new universal principles that would tackle and control tyranny and arbitrariness of government.

Socrates view on Natural Law

Socrates believed that as there is natural physical law there is also natural law. In his concept of natural law man has his own insight which makes him know of the things whether they are good or bad, it is this insight according to him by which a man is able to inculcate the moral values in him, the only way to judge the basis of law according to Socrates is man's insight. Through his theory, Socrates wanted to ensure peace and stability in the region which was one of the principle demands of that time.

Aristotle's view on Natural Law

Aristotle's concept of natural law is different from that of Socrates, he divides the life of man in 2 parts, first, he says that man is the creature which is created by God and second he posses the quality of reason by which he can develop his own will. It is this reason through which one can discover the principle of natural justice. Aristotle is considered to be the founding father of natural law school and gave this theory a very solid ground so that it could develop naturally.

Rome

Stoics view on Natural Law

Stoics was inspired by Aristotle's theory and based on Aristotle's theory developed his own theory of natural law but made some key changes and made it more ethical. According to him, the world is governed by reason. Man's reason is also a part of this world, therefore when he lives according to reason he lives according to nature or lives naturally. One of the duties of man is to obey the law of nature as according to Stoics law

of nature is binding on everyone and positive law must conform to the natural law.

Influence of Stoics theory

The theory of Stoics had a great influence upon the jurists during the republican period, as many of the jurists started paying more attention to natural law. Natural law helped Roman people to transform their rigid lives into a cosmopolitan one. Sometimes the roman courts also applied the principle of natural law in order to deal with cases that involved foreign people, in this way natural law helped in the development of Roman law.

Medieval Theories

Aquinas

Catholic philosophers and theologians moved away from the orthodox interpretation of natural law and gave a more logical and systematic theory of natural law. Thomas Aquinas defined law as the obedience of reason for the common good made by him who has the care of the community and promulgated. He divided the law into four stages.

1. Law of God
2. Natural law
3. Divine law
4. Human laws

Natural law is that part which reveals itself in natural reason. This is applied by human beings to govern their affairs and relations. According to Aquinas positive law must conform to natural law, positive law is valid only to the extent to which it is compatible with natural law.

Merits of Aquinas theory

Thomas Aquinas perfectly blended Aristotle's theory with that of Christian faith and built a very elastic and logical theory of natural law. He pleaded for establishing the authority of the church over the state, according to him, even the sovereign has limited powers. He identified natural law with reason, gave sanctity to the social and political organization and pleaded hard for preserving social stability. Catholic modern jurist have built upon the theory of Aquinas but have modified his theory according to the changing needs and circumstances.

Renaissance Theories

Introduction

This period saw major changes in all aspects of knowledge, this period was marked by the emergence of new ideas, new branches of knowledge and discoveries of science shattered the foundation of established values. Secondly, the developments in the field of commerce led to the emergence of new classes that wanted more protection from the states. It gave birth to the concept of nationalism. All these factors together overthrew the dominance of the church. New theories supporting the sovereignty of the state started coming up. The reason was the foundation stone of all these theories. The natural law theories of this age also have some characteristics. This theory proceeds with a belief that a social contract is the basis of society.

Theories of Social Contract

Social contract theory presupposes a state of nature, various philosophers have described their own state of nature. In simple terms state of nature is the condition before a contract has been entered into, whatever may be the situation people entered into a contract either with themselves or with a

single person under where philosophers are very important to understand the development of natural law during the Renaissance period. These philosophers are:

1. Thomas Hobbes
2. John Locke
3. Rousseau

Thomas Hobbes

Hobbes State of nature

Under his state of nature, man lived in a chaotic state, according to him, man's life in a state of nature was that of fear and selfishness. It was solitary, nasty, brutish and short.

Hobbes Contract

Under the prevailing circumstances, people, in order to get rid of their miseries, entered into a contract under which they surrendered all their rights to a single person. The law of nature can be discovered by reason which says what a man should do or not do. Man has a natural desire for security and order, this can be achieved only by establishing a superior authority that must command authority. Therefore he advises the sovereign that he must command with the natural law.

Hobbes support for Absolutism

Hobbes theory of natural law is a plea to support the absolute authority of the sovereign. He advocated for the established order, he stood for stable and secure governments.

John Locke

Locke's State of Nature

Locke's view on the state of nature was completely different from that of Hobbes. He also interpreted the natural law in a different way. Locke was

in favor of individualism and therefore for him, natural law meant giving individuals more power than the sovereign. Locke's state of nature was a golden age for man, but as the society grew and people started establishing the concept of property, people become insecure about their property.

Locke's Contract

It was for the purpose of protection of property that man entered into a social contract. Under this contract, he did not surrender all his rights, but only a part of them. All these rights were surrendered in order to maintain order and to enforce the law of nature. The natural rights like the right to liberty, property, and life were to be retained by man.

Locke's support to Individual Liberty

Locke stood for individual liberty and advocated that the powers of the sovereign is not unlimited. According to Locke individual has a right to protest against the sovereign if he is unable to protect the rights of the individual, individuals also have a right to overthrow the existing government. According to him an individual's right to liberty, property, and life are the basic natural rights and the sovereign must realize these rights and take a decision, taking into consideration the above-mentioned rights.

Rousseau

Rousseau's state of nature

Under Rousseau, natural law and social contract received a new interpretation. For him, a social contract is the hypothetical construction of reason. Before the social contract man lived a happy life, there was equality amongst men.

Rousseau's Contract

According to Rousseau man entered into a contract in order to preserve the rights of equality and freedom, they surrendered their rights not to a

single individual but to the community as a whole which Rousseau calls it as the general will.

Theory of General Will

According to Rousseau, it is the duty of an individual to obey the general will because in that way he is obeying his own will. The government and laws made must conform itself with the general will and if they are not able to so that they could be overthrown, in brief Rousseau stood for the interest of the community rather than the interest of the individual, his natural law theory stood for equality and freedom of men.

Modern theories

Nineteenth Century

The decline of Natural Law theories

The 19th century saw the decline of natural law, the natural law theories reflected more or less the great economic and political changes which had taken place in Europe. Reason or rationalism was the spirit of the eighteenth-century thought. The problems created by the new changes and developments demanded political and concrete solutions. Individualism gave way to collectivistic outlook, modern sciences and political theories started preaching that there are no absolute and unchangeable principles. Many historians rejected the social contract theory by saying that it was a myth. All these factors gave a strong blow to natural law.

Twentieth Century

The revival of Natural law theories

During the end of the 19th century, we saw the revival of natural law theories mainly due to the following reasons:

1. It emerged as a reaction against the legal theories which had exaggerated the importance of positive law.

2. It was realized that abstract thinking was not completely futile.
3. Positivist theories failed to solve the problems created by the changed social conditions.
4. The ideologies of Fascism and also led to the revival of natural law theories, as at that time during the two world wars, the world witnessed great destruction of human lives and property and principles of natural law were approached in order to attain peace.

Conclusion

An exclusive study of the theories of Natural Law reveals one thing that the concept of Natural Law has changed from time to time. It has been used to support almost every ideology whether it is absolutism or individualism. It has also inspired various revolutions, natural law has also influenced greatly the development of positive law. A study of law would be incomplete if it fails to meet the ends of it, Natural Law theories focused on to achieve the ends of the law. Therefore it could said that Natural law principles have been embodied in the legal system of almost every country.

In India the constitution gives certain fundamental rights like right to life, right to equality etc, all these rights are also based on the principles of natural law, not only this the principle of natural justice is also based on the principles of natural law. In the end it could be said that natural school of law has made a great contribution to the legal jurisprudence of the world including India.

(3) Law and morality

Ever since law has been recognized as an effective instrument of social ordering there has been an ongoing debate on its relationship with morality.
According to **Paton**, morals or ethics is a study of the supreme good. In general, morality has been defined to include:
all manner of rules, standards, principles or norms by which men regulate, guide and control their relationships with themselves and with others.

Both, law and morality, have a common origin. In fact, morals gave rise to laws. The State put its own sanction behind moral rules and enforced them. These rules were given the name law.

In the words of Hart The law of every modern State shows at a thousand points the influence of both the accepted social morality and wider moral ideal. Both, law and morality have a common object or end in so far as both of them direct the actions of men in such a way as to produce maximum social and individual good. Both, law and morality are backed by social or external sanction.

Bentham said that legislation has the same center with morals, but it has not the same circumference. Morality is generally the basis of law, i.e. illegal (murder, theft, etc.) is also immoral. But there are many immoral acts such as sexual relationship between two unmarried adults, hard-heartedness, ingratitude, etc. which are immoral but are not illegal. Similarly, there may be laws which are not based upon morals and some of them may be even opposed to morals, e.g. laws on technical matters, traffic laws, etc.

Morals as test of law: several jurists have observed that law must conform

to morals, and the law which does not conform to morals must be disobeyed and the government which makes such law should be overthrown.

Paton said that if the law lags behind popular standard, it falls into dispute, if the legal standards are too high; there are great difficulties of enforcement.
Morals as end of law: According to some jurists, the purpose of the law is do justice.

Paton said that justice is the end of law. In its popular sense, t he word 'justice' is based on morals. Thus, such morals being part of justice become end of justice. The end which the preamble of our constitution tries to achieve is the morals.

Prologue
No distinction in ancient times: in the early stages of the society there was any distinction between law and morals. In Hindu law, the prime sources of which are the Vedas and the Smritis, we do not find such distinction in the beginning.

However, later on, Mimansa laid down certain principles to distinguish obligatory from recommendatory injunctions. In the West also the position was similar. The Greeks in the name of the doctrine of **natural rights** formulated a theoretical moral foundation of law.

The Roman jurists in the name of 'natural law recognised certain moral principles as the basis of law. In the middle Ages, the Church became dominant in Europe. The **natural law** was given a theological basis and Christian morals were considered as the basis of law.

A distinction drawn in post-Reformation Europe

Modern trends: In the post-Reformation Europe (when the yoke of the Church was thrown off) it was asserted that law and morals are distinct and separate, and law derives its authority from the state and not from the morals. Morals have their source in the religion or conscience. However, in the 17th and 18th centuries **natural law** theories became very popular and, more or less, they had a moral foundation. Law again came to be linked with morals.

Again there came a reaction. In the 19th century, Austin propounded his theory that the law has nothing to do with the morals. He defined law as the **command of the sovereign**. He further said that it was law (command) alone which is subject-matter of jurisprudence. Morals are not a subject-matter of study for jurisprudence.

Many later jurists supported the view of Austin. In the 20th century, Kelsen said that only the **legal norms** are the subject-matter of jurisprudence. He excluded all other extraneous things including the morals from the study of law. There is a change in trend of thought in modern times.

The sociological approach to law indirectly studies morals also. Though they always make a distinction between law and morals and consider the former as the proper subject-matter of study, in tracing the origin, development, function and ends of law, they make a study of the forces which influence it. Thus their field of study extends to the various social sciences including morals.

India: As observed earlier, the ancient Hindu jurists did not make any distinction between law and morals. Later on, in actual practice some distinction started to be observed. The Mimansa made a distinction between obligatory and recommendatory rules. By the time the commentaries were written the distinction was clearly established in

theory also.

The Commentators pointed out the distinction and in many cases dropped those rules which were based purely on morals. The doctrine of ‘factum valet’ was recognised which means that an act which is in contravention of some moral injunction, if accomplished in fact, should be considered valid.

However, this rule does not apply to legal injunctions. In modern times, the Privy Council in its decision always made a distinction between legal and moral injunctions. Now there is no longer any confusion between law and morals and when the law is gradually being codified, there are little chances of such confusion.

Distinction Between Law and Morals

It has been repeatedly observed in the preceding paragraphs that in modern times there is a clear distinction between law and morals in every developed and civilized society.

Now the points of distinction between the two shall be discussed as:

a. The morals are concerned with the individual and lay down rule for the moulding of his character. Law concentrates mainly on the society and lays down rules concerning the relationships of individuals with each other and with the state.

b. Morals look to the instrinsic value of conduct or in other words, they look into motive. Law is concerned with the conduct of the individual for which it lays down standards.

c. The morals are an end in themselves. They should be followed because they are good in themselves. Law is for the purpose of convenience and expediency, and its chief aim is to help a smooth running of the society.

d. The observance of morals is a matter of individual conscience. Law brings into picture the complete machinery of the state where the individual submits himself to the will of the organised society and is bound to follow its rules.

e. The morals are considered to be of universal value. Law is relative-related to the time and place, and, therefore, it varies from society to society.

f. Law and morals, again, differ in their application. The morals are applied taking into consideration the individual cases whereas the application of law is uniform.

Roscoe Pound therefore, says that:

as to application of moral principles and legal precepts respectively, it is said that moral principles are of individual and relative application; they must be applied with reference to circumstances and individuals, whereas legal rules are of general and absolute application.

Relation Between Law and Morals

In the preceding paragraph the points of distinction between law and moral have been discussed, but due to these points of distinction between the two, it should not be gathered that they are opposed to each other and there is no relationship between the two. Really speaking, they are very closely related to each other. In considering the relationship between law

and morals much will depend on how one defines law. Analytical, Historical, Philosophical and Sociological jurists all have defined law in their own way and these definitions materially differ from each other.

A study of the relationship between law and morals can be made from three angles:

1. Morals as the basis of law.
2. Morals as the test of (positive) law.
3. Morals as the end of law.

(1) Morals as the basis of law:

As observed earlier, in the early stages of the society no distinction was made between law and morals. All the rules originated from the common source, and the sanction behind them was of the same nature (mostly supernatural fear).

When state came into being, it picked up those rules which were important from the society's point of view and the observance of which could be secured by it. The state put its own sanction behind these rules and enforced them. These rules were called **law**. The rules which were meant for some supreme good of the individual (in the metaphysical sense) and the state could not ensure their observance continued in their original condition. These rules are known as **morals**.

Thus, law and morals have the common origin but in the course of development they came to differ. Therefore, it could be said that law and morals have a common origin but diverge in their development. As the law and morals have come from the common stock, many rules are common to both. For example, to kill a man or to steal, are acts against law and morals both. It is on this ground that, sometimes, law is said to be

minimum ethics.

Queen v. Dudley and Stephen's case:

Though law and morality are not the same, and many things may be immoral which are not necessarily illegal, yet the absolute divorce of law from morality would be a fatal consequence. The principles laid down in **Queen v. Dudley and Stephen's** (14 Q.B.D. 273) are worth mentioning in this connection. In that case three seamen and a boy, the crew of an English yacht, were cast away in a storm on the high seas and were compelled to put into an open boat belonging to the said yacht.

They had no food and no water in the boat and in order to save themselves from certain death, they put the boy to death and fed on the boy's body, when they were picked up by a passing vessel. They were tried for the killing of the boy and jury returned a special verdict.

The case came before a bench of five judges of Queen's Bench Division. Coleridge C.J. (the other four judges concurring) observed:

To preserve one's life is generally speaking a duty, but it may be the plainest and highest duty to sacrifice it. War is full of instances in which it is man's duty not to live but to die. The duty in case of ship wreck, of a captain to his crew, of the crew to the passengers, of soldiers to women and children.....

These duties impose on men the moral necessity, not of the preservation, but of the sacrifice of their lives for others, from which in no country, least of all it is to be hoped in England will men ever shrink, as indeed, they have not shrunk. It is not correct, therefore, to say that there is any absolute or unqualified necessity for preserving one's life. It is not needful to point out the lawful danger of admitting the principle which has been contended for.

- Who is to be the judge of this sort of necessity?
- By what measure is the comparative value of lives to be measured?
- Is it to be strength, or intellect or what?

It is plain that the principle leaves to him who is to profit by it to determine the necessity which will justify him in deliberately taking another's life to save his own. In this case the weakest, the youngest, the most unresisting, was chosen.

- Was it more necessary to kill him than one of the grown-up men?

The answer must be, No..

So spoke the Fiend, and with necessity. The tyrant's plea excused his devilish deeds.

It is not suggested that in this particular case the deeds were 'devilish', but it is quite plain that such a principle, once admitted might be made the legal cloak for unbridled passion and atrocious crime. There is no safe path for judges to tread but to ascertain the law to the best of their ability and to declare it according to their judgment and if in any case the law appears to be too severe to individuals, to leave it to the sovereign to exercise that prerogative of mercy which the Constitution has entrusted to the hands fitted to dispense it.

It must not be supposed that in refusing to admit temptation to be an excuse for crime it is forgotten how terrible the temptation was; how lawful the suffering; how hard in such trials to keep the judgment straight and the conduct pure.

We are often compelled to set up standards we cannot reach ourselves, and to lay down rules which we could not ourselves satisfy. But a man has no right to declare temptation to be an excuse, though he might himself

have yielded to it, or allow compassion for the criminal to change or weaken in any manner the legal definition of crime.

Grove J. while concurring added

If the two accused men were justified in killing Parker, then if not rescued in time two of the three survivors would be justified in killing the third, and, of the two who remained, the stronger would be justified in killing the weaker, so that three men might be justifiably killed to give the fourth a chance of surviving.

Thus, the principle is that no man has a right to take another's life to save his own (**Common wealth v. Holmes**).

Recently Supreme Court of India held that in case of conflict of fundamental rights of two individuals the decision is to be made on the basis of morals.

In this case, the appellant's blood sample was found to be HIV (+). On account of this disclosure the appellant's proposed marriage to one **A** which had been accepted, was called off. The appellant sued the hospital for damages on the ground that the doctors violated their duty to maintain confidentiality as well as his right to privacy. This was contested on the ground that the disclosure of the health conditions of the appellant to ,the girl to whom he was proposed to be married was protected under the **right to life** of the girl which includes the right to a healthy life.

The court held:
As a human being A must also enjoy, as she obviously is entitled to, all the human rights available to any other human being. This is apart from, and in addition to, the fundamental right available to her under Article 21. This right would positively include the right to be told that a person, with

whom she was proposed to be married, was the victim of a deadly disease, which was sexually communicable.

Since **right to life** includes right to lead a healthy life so as to enjoy all the faculties of the human body in their prime condition, the respondents, by their disclosure that the appellant was HIV(+), cannot be said to have, in any way, either violated the rule of confidentiality or the right of privacy.

Moreover, where there is a clash of two Fundamental Rights, as in the instant case, namely, the appellant's right to privacy as part of right to life and **A'**s right to lead a healthy life which is her Fundamental Right under Article 21 the right which would advance the public morality or public interest, would alone be enforced through the process of court, for the reason that moral considerations cannot be kept at bay and the Judges are not expected to sit as mute structures of clay in the hall known as the courtroom, but have to be sensitive, in the sense that they must keep their fingers firmly upon the pulse of the accepted morality of the day. (**Mr. X v. Hospital Z,** (1998) 8 SCC 296)

However, it does not mean that morals are the basis of all the legal rules. There are a number of legal rules which are not based upon morals and some of them are even opposed to morals. Morals will not hold a man vicariously liable, one liable for the act of another, where the person made liable is in no way blame able. In the same way, in cases where both the parties are blameless and they have suffered by the fraud of a third, law may impose the loss upon the party who is capable of bearing it but such a course will not be approved by morals.

(2) Morals as the test of law:

It has been contended by a number of jurists, since very early times, that law must conform to morals. This view was supported by the Greeks and the Romans. In Rome, law to some extent, was made to conform to 'natural law' which was based on certain moral principles and as a result 'jus civil' was transformed into **'jus gentium'**.

Most of the ancient jurists expressed their views in a spirit of compromise and attached sanctity to legal rules and institutions. They said that law, even if it is not in conformity with morals, is valid and binding. During the Dark Ages, Christian Fathers preached forcefully that law conform to Christian morals and said that any law against it is invalid. In the 17th and the 18th centuries, when the 'natural law' theory (which was based on certain morals) was at its highest, it was contended that law (positive law) must conform to **natural law**.

They said that any law which does not conform to **natural law** is to be disobeyed and the government which makes such law should be overthrown. It was this theory which inspired the French Revolution.

In modern times, such views that law must conform to morals and if it is not in conformity with morals, it is not valid and binding are no longer heard. However, in practice to a great extent law conforms to morals.

Generally, law cannot depart far from the morals due to many reasons. The law does not enforce itself. There are a number of factors which secure the obedience of law. The conformity of law with morals is a very important factor. There is always a very close relation between the law and the life of a community, and in the life of the community morals have got an important place.

Paton rightly observes that:
if the law lags behind popular standard it falls into disrepute, if the legal

standards are too high; there are great difficulties of enforcement.

(3) Morals as the end of law:

Morals have often been considered to be the end of law. A number of eminent jurists have defined law in terms of, 'justice'. They say that the aim of 'law' is to secure justice. Justice in its popular sense is very much based upon morals.

In most of the languages of the world, the words used for law convey an idea of justice and morals also. According to analytical jurists, any study of the ends of law falls beyond the domain of jurisprudence. But sociological approach considers this study as very important. It says that law has always a purpose; it is a means to an end, and this end is the welfare of the society.

According to this utilitarian point of view, the immediate end of law is to secure social interests, that is, to secure harmony of claims or demands. It means that the conflicting interests (in the society) should be weighed and evaluated and the interests who can bring greater benefit with the least sacrifice should be recognized and protected.

Thus, this all becomes a question of choice. In making this choice and in weighing or evaluating interest, whether in legislation or judicial decision, or juristic writing, whether we do it by law making or in the application of law, we must turn to ethics for principles. Morals are an evaluation of interests; law is or at least seeks to be delimitation in accordance therewith.

Korkunov's view:

he also says that:
the idea of value is, therefore, the basal conception ethics. No other terms,

such as duty, law, or rights, is final for thought; each logically demands the idea of value as the foundation upon which it finally rests. One may ask, when facing some apparent claim or morality, why is this my duty, I must obey this law, or why regard this course of action as right? The answer to any of these questions consists in showing that the requirements of duty, law and right tend in each case to promote human welfare to yield what men do actually find to be of value.

Many of the modern definitions of law say that the evaluation of interests is a very important test of law. This can be done properly in the context of socially recognised values which in their turn are closely related to morals. Thus, ultimately morals become the end of law.

This end has been expressed in the constitutions of many countries. If we look at the preamble of our own Constitution, we shall find that the ends which it endeavours to achieve are the morals; of course, they are the morals of the modern age.

Influence of morals on law:

Law and morals act and react upon and mould each other. In the name of ‘justice', ‘equity’, ‘good faith’, and ‘conscience' morals have in filtered into the fabrics of law. In judicial law making, in the interpretation of legal precepts, in exercising judicial discretion (as in awarding punishment) moral considerations play a very important role. Morals work as a restraint upon the power of the legislature because the legislature cannot venture to make a law which is completely against the morals of the society. Secondly, all human conduct and social relations cannot be regulated and governed by law alone.

A considerable number of them are regulated by morals. A number of

actions and relations in the life of the community go on very smoothly without any intervention by law. Their observance is secured by morals. So far as the legal rules are concerned, it is not the legal sanction alone that ensures their obedience but morals also help in it. Thus, morals perfect the law. In marriage, so long as love persists, there is little need of law to rule the relations of the husband and wife, but the solicitor comes in through the door, as love flies out of the window.

Hart's view:

The law of every modern state shows as at a thousand points the influence of both the accepted social morality and wider moral ideals. These influences enter into law either abruptly and avowedly through legislation, or silently and piecemeal through the judicial process. In some systems, as in the United States, the ultimate criteria of legal validity explicitly incorporate principles of justice or substantive moral values; in other systems, as in England where there are no formal restrictions on the competency of the supreme legislature, its legislation may yet no less scrupulously conform to justice or morality.

The further ways in which law mirrors morality which are myriad, and still insufficiently studied: statutes may be a mere legal shell and demand by their express terms to be filled out with the aid of moral principles; the range of enforceable contracts may be limited by reference to conceptions of morality and fairness; liability for both civil and criminal wrongs may be adjusted to prevailing views of moral responsibility.

No positivist could deny that these are facts or that the stability of legal systems depends in part upon such types of correspondence with morals. If this is what is meant by the necessary connation of law and morals, its existence should be conceded.

Growing importance of morals:

Now, sociological approach has got its impact upon the modern age. This approach is more concerned with the ends that law has to pursue. Thus, recognised, or, in other words, morals (of course the morals of the modern age) have become a very important subject of study for good law making. On international law also morals are exercising a great influence.

The brutalities and inhuman acts in World Wars made the people to turn back to morals and efforts are being made to establish standards and values which the nations must follow. Perhaps there is no other so forceful ground to justify the Nuremberg Trials as morals. If the law is to remain closer to the life of the people and effective, it must not ignore morals.