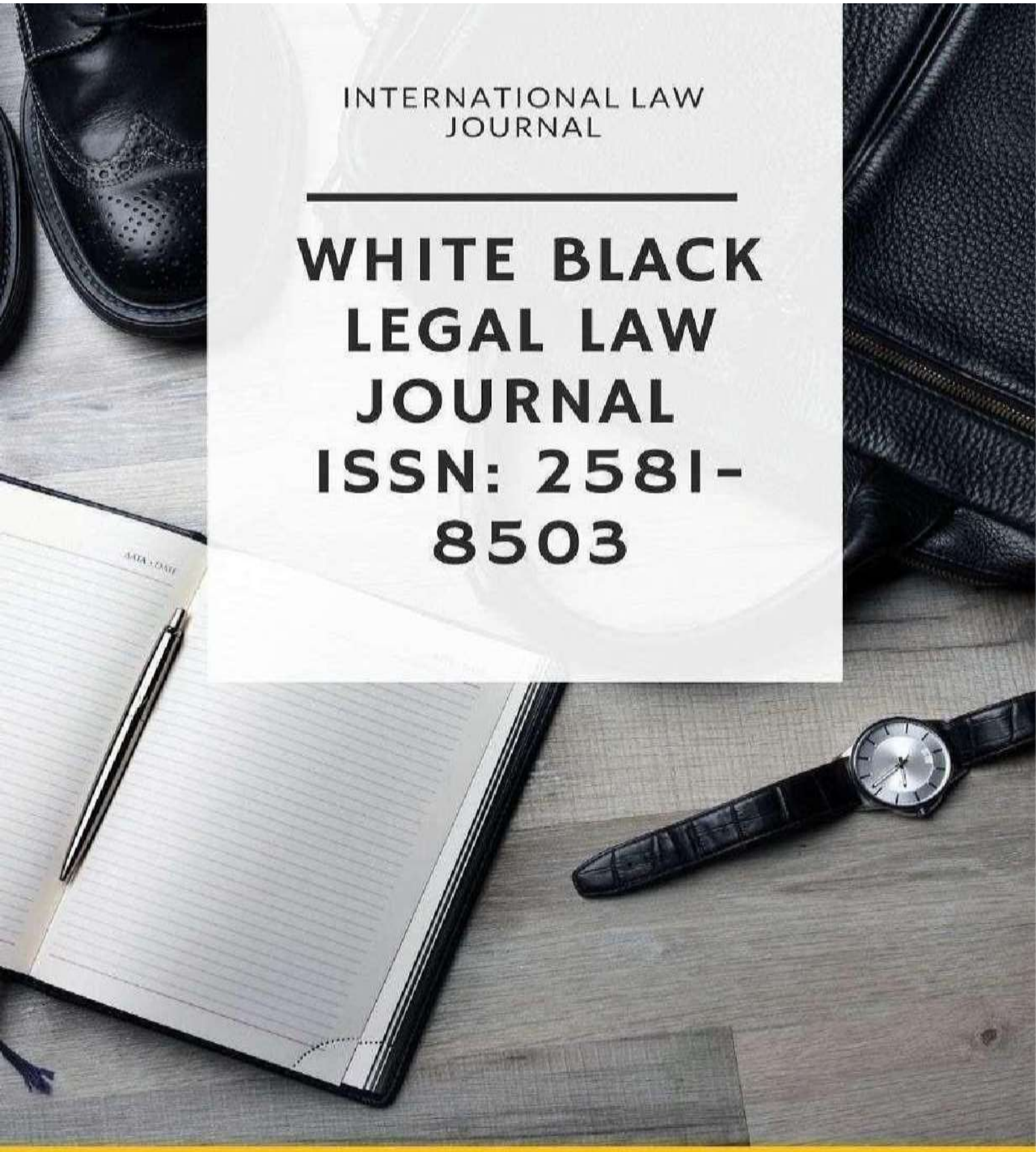

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The Law Journal strives to provide a platform for discussion of International as well as National Developments in the Field of Law.

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Dr. Rinu Saraswat

Associate Professor at School of Law, Apex University, Jaipur,
M.A, LL.M, Ph.D,

Dr. Rinu have 5 yrs of teaching experience in renowned institutions like Jagannath University and Apex University. Participated in more than 20 national and international seminars and conferences and 5 workshops and training programmes.

Dr. Nitesh Saraswat

E.MBA, LL.M, Ph.D, PGDSAPM
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More than 25 Publications in renowned National and International Journals and has authored a Text book on Cr.P.C and Juvenile Delinquency law.

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BBA. LL.B. (Hons.) (Amity University, Rajasthan); LL. M. (UPES, Dehradun) (Nottingham Trent University, UK); Ph.D. Candidate (G.D. Goenka University)

Subhrajit did his LL.M. in Sports Law, from Nottingham Trent University of United Kingdoms, with international scholarship provided by university; he has also completed another LL.M. in Energy Law from University of Petroleum and Energy Studies, India. He did his B.B.A.LL.B. (Hons.) focussing on International Trade Law.

ABOUT US

WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

LAW, JUSTICE, LAW AND RIGHTS – ISSUES OF JURISPRUDENCE

AUTHORED BY - KARAN SHARMA & SANSKRITI SINGH

Law is a formal mechanism of social control It is possible to describe law as the body of official rules and regulations, generally found in constitutions, legislation, judicial opinions, and the like, that is used to govern a society and to control the behaviours of its members.[1]

Objectives of the Study

1. To Define rights in the light of jurisprudence (Special- Indian Context)
2. Explanation of concept of justice by various theorist and jurists
3. Explanation of duties as per jurisprudence

Prolegomenon

We all are the part of society. Peace Law and order are maintained in the society by the state. Justices is the soul of every judicial system. Justices is established in the society by the law , So administration of justices is the essential subject matter of the law .The administration of justices is the process by which the legal system of a government is executed. Jeremy Taylor has well remarked –"A herd of wolves is quieter and more at one then so many man unless they all had one reason in them of have one power over them " the main function of state are to protect the rights of all person and to maintain the law and order in the society.[2]

Defining law

A lexical definition of the term 'law' simply reports the sense in which the term law is understood within a language community. Adding to the same , subject of jurisprudence sheds light upon this

- [1] WHAT LAW IS ? An Introduction to Law Law in the perspective of Jurisprudence: Part I Guidelines for Erasmus & International Students Plan para la internacionalización de la docencia universitaria UCM Docencia en inglés

[2] LL.M IInd Sem Jurisprudence II (L- 2002) Law and Justice

concern by –

One way that jurisprudence contributes to a deeper understanding of law is by reflecting on the ideas that define the nature of law and on the assumptions that underlie legal practices and institutions.

✓Jurisprudence asks questions about where law fits into our lives and our society.

✓Jurisprudence gives us a general understanding of the relation of law to other institutions making up our society.

✓Jurisprudence gives us a general understanding of the meaning of law and the major concepts of the law. ✓Jurisprudences gives us a general understanding of the structure of law.

Rights and duties in the light of Jurisprudence[3]

Generally, a duty is an obligation and a right is an entitlement. They may exist as a moral or a legal matter. For example, morally, a person may have a duty not to hurt another's feelings. However, case law and statutes provide the legal framework or parameters defining when harmful communications constitute defamation and the procedures governing obtaining redress.

Rights may also exist on a moral or legal matter. For example, an employee has a moral right to be treated with appreciation and respect by an employer. Employment and discrimination laws provide the legal framework defining an employee's rights to freedom from being disadvantaged by an employer's discriminatory intent based on certain grounds, such as age, sex, handicap, or religion. A moral right cannot be the basis for seeking relief through the legal system. There must be a law creating a right before that right can be enforced through the legal system.

Meaning of right:[4]

Right in the ordinary sense of the term means a number of things, but it is generally taken to mean the standard of permitted action within a certain sphere. As a legal term, it means the standard of permitted action by law. Such permitted action of a person is known as his legal right.

[3] Monika, What Are Rights And Duties. 13 April 2019, https://blog.ipleaders.in/the-concept-of-rights-and-duties/

[4] Rights and Duties,https://www.drishtiias.com/daily-updates/daily-news-editorials/rights-and-duties.

A legal right must be distinguished from a moral or natural right. A legal right is an interest recognized and protected by a rule of legal justice, an interest the violation of which would be a legal wrong, done to him whose interest it is, and respect for which is a legal duty. Moral or natural right means an interest recognized and protected by a rule of natural justice, an interest the violation of which would be a moral wrong, and respect for which is a moral duty'.

Definition of Right:

Austin: About the definition and the analysis of the legal rights there is a great deal of difference of opinion among the jurists. According to Austin, right is a faculty which resides in a determinate party or parties by virtue of a given law and which avails against a party or parties (or answers to a duty lying on a party or parties) other than the party or parties in whom it resides. According to him, a person can be said to have a right only when another or others are bound or obliged by law to do something or forbear in regard to him. It means that a right has always a corresponding duty. This definition, as it appears on is very face, is imperfect because in this definition there is no place for imperfect rights.

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

Salmond: Salmond defines right from a different angle. He says, A right is an interest recognized and protected by a rule of right'. It is an interest respect for which is a duty, and disregard of which is a wrong.

The main elements in this definition are two:

First, a rule of right means a rule of law, or, in other words, that which is judicially enforceable. Thus, according to Salmond, a right must be judicially enforceable.

Second, a right is an interest. The element of Interest is essential to constitute a right. So far as Salmond's first element is concerned, it is a corollary to his definition of law.

Supreme Court of India also interprets the definition of right in case of State of Rajasthan v. Union of India, AIR (1977) SC 1361 as:

In the strict sense, legal rights are correlatives of legal duties and are defined as interests whom the law protects by imposing corresponding duties on others. But in a generic sense, the word right' is

used to mean immunity from the legal power of another, immunity is an exemption from the power of another in the same way as liberty is an exemption from the right of another, Immunity, in short, is no subjection.

Rights guaranteed by the Indian Constitution

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

Following rights are guaranteed by the Court:
Right to Equality (Article 14
Right to freedom (Article 19)
Right against Exploitation (Article 23 and 24)
Right to Freedom of Religion (Article 25)
Right to Life (Article 21)
Right to Constitutional Remedies (Article 32)

Theories of Rights[5]

The Will Theory:

This theory says that the purpose of law is to grant the individual the means of self-expression or self-assertion. Therefore, right emerges from the human will. Holmes In his definition of right puts the same view more clearly. He defines legal right as nothing but a permission to exercise certain natural powers and upon certain conditions to obtain protection, restitution, or compensation by the aid of public force'. Hegel, Kant, Hume and others say that by right is meant the power of self-expression or will.

Will-Theory criticized: Duguit is vehemently opposed to the will theory. According to him, the basis of law is the objective fact of social solidarity and not the subjective will. The idea of will is anti-social. The will theory has been criticized on other grounds also. Those who greatly emphasis the

[5] Prof. Narender Kumar, Constitutional Law Of India, (Allahabad Law Agency, Haryana 8th Edn., 2011).

element of will confuse the fact with abstract ideas, that is, they do not make the distinction between what is and what ought to be.

The Interest Theory:

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

The Elements of a Legal Right:

There are four elements or characteristics of a legal right.

The subject: Subject means the person in whom the right is vested, or the holder of the right. There can be no right without a subject

The act of forbearance: Right relates to some act or forbearance. It obliges a person to act or forbear in favour of the person who is entitled to the right.

The object of right or the res concerned: it is the thing in respect of which the right exists or is exercised.

The person bound or the person of incidence: It means the person upon who falls the correlative duty.

In addition to these four elements, Salmond has given a fifth element also, that is title. He says that every legal right has a title, that is to say, certain facts or events by reason of which the right has become vested in its owner'.

In this way, according to him, every right involves a three-fold relation, in which its holder stands:

It is a right against some person or persons.

It is a right to some act or omission such person or persons.

It is a right over or to something to which that act or omission relates.

Wider sense of legal right: In its wider sense it includes other legally recognized interests without considering whether they have a corresponding legal duty or not. Salmond has pointed out that the term right-duty was often used to indicate relationships which were not in reality the same. It causes confusion in legal argument. He said that the term legal right in its generic sense means any advantage or benefit which is in any manner conferred upon a person by a rule of law. Right in this sense, there are four distinct kinds:

Right

Liberties
Power
Immunities

Each of these has its correlative, namely
Duties
No rights.
Subjections (or Liabilities).
Disabilities.
This analysis of Salmond was carried further by Hohfeld. He analyzed it with greater accuracy. This has been again developed by many other jurists.

Claim and duty:
Salmond has used the word right' at the place of claim. Therefore, the word claim' has been used here. Claim indicates what one can force another to do, or to refrain from doing. The person who can so force is said to have a claim and the person who can be made to act or forbear is said to have a duty.

Liberty and no claim: Liberty means that what one can do for himself without being prevented by the law, or, in other words, he is free of the possibility of legal interference by others'. It is that sphere of a person's activity within which the law leaves him alone.

Privilege, Absolute and Qualified:
Privilege has been mentioned in a brakcet along with liberty. In some respects it is akin to liberty, but in other respects it differs. Liberty includes those acts which are generally lawful for all. Privilege means those acts which are generally unlawful.

Power and liability:
Power is generally defined as an ability on the part of a person to produce a change in a given relation by doing or not doing a given act. The makings of will or alienating property are examples of such ability.

Power is of two kinds:

Public.

Private.

Public power is that which is vested in a person as an agent of the state, as the judicial or executive power of the officers.

Private power is that power which is vested in a person as citizen for his own interest. Liability gives the sense of being affected by an act of a person who has power' to do it. In other words, the person whose rights can be altered by the exercise of power is said to be under liability.

Immunity and disability:

Immunity is defined as a freedom on the part of one person against having a given legal relation altered by a given act or omission on the part of another person. It is opposite of liability. So it is also said that it is an exemption from having a given legal relation changed by another.
Claim= No Claim.

Duty= Liberty or privilege.

Power= Disability.

Liability= Immunity.

The correlative of immunity is disability. Disability means the absence of power.

Immunity is the Opposite of liability; disability is the opposite of power.

Rights and Duties:[6]

Rights and duties are the very important elements of law. The administration of justice, in most part, consists of the enforcement of rights and the fulfillment of duties. Rights and duties are correlated to each other in such a way that one cannot be conceived of without the other. In other words, the existence of the one depends on the existence of the other as there can be no child without a father and no father without a child. A right is always against someone upon whom the correlative duty is imposed. In the same way a duty is always towards someone in whom the correlative right vests.

Austin's View:

The duties which are always correlated with a right are called relative duties.

[6] Prof. Narender Kumar, Constitutional Law Of India, (Allahabad Law Agency, Haryana 8th Edn., 2011).

Austin, who supported, says that there are four kinds of absolute duties:

Duties not regarding persons

Duties owed to persons indefinitely.

Self-regarding duties.

Duties owed to the sovereign.

Classification of Duties

Positive duty: A positive duty implies some act on the part of the person on whom it is imposed. If a person owes money to another, the former is under a duty to pay the money to the latter. This is a positive duty.

Negative duty: A negative duty implies forbearance on the part of the person on whom it is imposed. For example, if a person owns lands, others are under a duty not to make any interference with that person's use of the land. This is a negative duty.

Primary and Secondary duties:

A primary duty is that duty which exists per se and independent of any other duty. The duty not to cause hurt to any person is a primary duty. A secondary duty is that duty whose purpose is only to enforce some other duty. If a person causes injury to another, the former is under a duty to pay damages to the latter. This is a secondary duty. The duty not to cause injury is the primary duty. When a breach of this duty has been committed, the secondary duty to pay damages arises.

Duties enriched under Indian Constitution

Article 51-A of the constitution of India guarantees certain duties to every citizen of India. Article 51-A of the Indian constitution states that it shall be the duty of every citizen of India

To respect the provisions of Constitution and respect the National Flag and National Anthem:

To safeguard the sovereignty and integrity of India

To follow the noble ideals of national struggle

To defend the country and contribute to national service when called

To preserve the national heritage of the country;

To promote and maintain the harmony of brotherhood amongst people of India.

To protect the dignity of women

To protect the natural habitat and including forests, lakes, rivers, and wildlife;

To protect public property and to avoid violence;

To contribute to the development of the nation in all spheres.

Classification of Rights:

Antecedent and remedial rights:

They are known by other names also, such as primary and secondary rights, principal and accessory rights. Pollock calls them as substantive and adjective rights. When a right exists independent of any other right and for its own sake it is an antecedent right. When another right is joined to it then so joined right is called a remedial right

Perfect and Imperfect rights:

A perfect right means a right which has a correlative duty that can be legally enforced. Generally, when law recognizes a right, it prescribes a remedy also and when the right is violated, it enforces it. An imperfect right' is that right which, although, recognized by law, is not enforceable, such as the claims barred by time.

Positive and negative rights:

A positive right is that right which has a correlative positive duty. In case of positive right the person having the right can compel the person upon whom the correlative duty is imposed to do some positive act. The scope of a negative right is only that the person having the right shall not be harmed.

Rights in rem and rights in Personam:

Generally most of the rights in personam, are positive right and rights in rem are mostly negative rights.

Proprietary and personal rights:

Proprietary right means a person's right in relation to his own property. Personal rights are rights-relating to status and that arising out of contract. Mainly two points of distinction between proprietary and personal rights are put forward.

First that proprietary right is valuable; personal rights are not valuable. Second, that proprietary rights are transferable, personal rights are not transferable.

Vested and contingent rights:

A right is a vested right when all the facts happening or not happening of which it is necessary to create or vest the right, have happened or not happened If only some of such facts have occurred then the right is a contingent right. It would become vested when all the facts have occurred. A vested right creates an immediate interest. It is transferable and heritable. A contingent right does not create an

immediate interest, and it can be defeated when the required facts have not occurred.

Legal and equitable rights:

The rights recognized and enforced by the common law courts were known as legal rights and the rights recognized and enforced by the chancery courts were known as equitable rights.

However in India there is no such division of rights as legal and equitable.

Concept of Justice and Law[7]

The concept of justice is as old as the origin and growth of human society. A man living in society desires peace and, while living in he tends to experience a conflict of interests and expects a rightful conduct on the others part. And this is why jurists like Salmond and Roscoe Pound have emphasized the importance of justice.

Through the instrumentality of law regulated by the state, the concept of justice became more clear. As the law grew and developed the concept of justice walked parallel and expanded its tentacles into different spheres of human activities. The essence of legal justice lies in ensuring uniformity and certainty of law and at the same time ensuring the rights and duties duly respected by all. The notion of justice is the impartiality imbibed in it. The violation of justice which is enforced by the law results in state sanction as 'punishment.

In the words of Chief Justice Coke it has been rightly said that 'wisdom of law and justice is wiser than man's wisdom, thereby legal justice represents the collective wisdom of the community which Rousseau called as 'General Will' of the people

Definition

The term justice has been derived from the Latin word Jungere' which means to bind or tie together, thus in this way it can be stated as justice is the key ailment which ties the individuals in the society together and harmonizes a balance between them and enhances human relation.

Concept

"Men being what they are-each keen to see his own interest and passionate to follow it society can

- [7] https://www.legalbites.in/concept-of-justice/

exist only under the shelter of the State, and the law and justice of the state is a permanent and necessary condition of peace order and civilization. "(Salmond)

Driving from the words of Salmond it is clear that administration of justice means justice according to law. Physical force of the state is the sole or exclusive Factor for a sound administration.

Administration of justice is the firmest pillar of government, and granting justice is said to be the ultimate end of law and the goal of society, which the judges of the courts have been pouring into law with new variants of justice in the form of contemporary values and need based rights like freedom, liberty, dignity, equality and social justice as ordained in the constitutional document. Access to justice for the people is the foundation of the constitution [State of Haryana v. Darshna Devi, AIR 1979 SC 855, per Justice Krishna Iyer]

Origin

The administration of justice in modern civilized societies has evolved through 4 stages:

1. Primitive stage when society was primitive and private revenge and self-help were only the remedies available to the wrongdoer, one could easily get the wrong redressed with the help of his friends and relatives, an eye for an eye, a tooth for a tooth and a limb for a limb."
2. Elementary/Infant stage- it has been considered that law and state were at infantry level during this stage, and the feeling of security as a responsibility by the state towards its individual and his property was absent. It didn't have the enforcing power through which it could punish the wrongdoer.
3. The growth of Administration of Justice a change was about to witness where a sought of tariff schedules were fixed for different kinds of injury and offenses. And up to that time justice mold as private in nature without the compulsive force of the state.
4. The modernization it was the developmental stage where the state geared its authority and took upon itself the responsibility of administrating justice and punishing the wrongdoer using its force whenever necessary. This stage owes its origin and growth to the gradual evolution of the state and its political power. And with its transformation, private revenge and self-help got substituted by the administration of criminal and civil justice through law courts.

Theories of Punishment

Various theories are advanced in justification for punishing the offender. The view regarding punishment also kept changing with the changes in the societal norms. They are of following kinds

1. Deterrent theory

The term " Deter" means to abstain from doing an act. While the main purpose of this theory is to deter the criminals from doing the crime or repeating the same in the future. Under this theory, severe punishments get impose upon the offender so that he abstains from committing a crime while it would constitute as a lesson to the other member of the society.

In the words of Salmond punishment is before all things deterrent and the chief aim of the law of crime is to make the evil-doer an example and warning to all who are like minded as him. He further stated that offenses are committed by reason of conflict of interest of the offender and the society.

While this theory concept could be determined in the words of Manu from ancient India. According to him punishment or "dandh" are the sources of righteousness because people abstain from committing wrongful acts through the fear of punishment.

Retributive theory

This theory is based on the principle-An eye for an eye, a tooth for a tooth..." here, retributive means to give in return. The object of the theory is to make the criminal realize the sufferings of the pain by subjecting him to the same kind of pain, as he had imposed on the victim. The theory has been regarded as an end in itself as it only aims at revenge taking rather than sound welfare and transformation.

Salmond puts his words stating that to suffer punishment is to pay a debt c to the law that has been violated. Revenge is the right of the injured person and the penalty for wrongdoing is a debt which the offender owes to the v and when the punishment is given the debt is paid.

While this theory was never recognized as a just theory because it plays a role in self motivation for committing a crime on the ground of justice for injustice. Overall it could be stated as it was a kind of abatement prompted by society to victims.

3. Preventive theory

The preventive theory is founded on the idea of preventing the repetition of crime by disabling the offender through measures such as imprisonment, forfeiture, death punishment, etc. In the words of Paton, this theory seeks to prevent the prisoners from committing the crime by disabling him. It pre-supposes that need of punishment for crimes simply arises out of social necessities, as by doing so the community protecting itself against anti-social acts which are endangering social order.

However, this theory was also not a just method as stated by jurist Kant and others that merely by awarding a term of imprisonment is not going to reduce the crime unless. reformative efforts are made to integrate emainstream of society through the process of rehabilitation

4. Expiatory theory

This theory is solely based on the concept of morality, rather being much more concerned with legal concepts. It emphasizes more on ancient religious perceptions regarding crime and punishment when prisoners were placed in isolated cells to repent or expiate for their crime of guilty from their core of the heart and the one who succeeded in doing so were let off.

This theory is based on ethical considerations due to which it lost its relevance in the modern system of punishment.

5. Reformative theory

This theory emphasizes the reformation of offenders through the method of individualization. It is based on the principle of humanistic principle that even if an offender commits a crime, he does not cease out to be a human being And an effort should be made to reforms him during the period of incarceration. This theory is based on the principle of hate the sin, not the sinner The focal point of the reformist view is that an effort should be made to restore the offender

to society as a good and Lew abiding citizen The Supreme Court in the case of T.K.Gopal State of Karnataka AIR 2000 SC 1669(1674) stated that the law requires that a criminal should be punished and the punishment prescribed must be meted out to him, but at the same time, reform of the criminal through various processes, despite he has committed a crime, should entitle him all the basic rights, human dignity, and human sympathy,

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ABOUT THE AUTHOR

Karan Sharma, an accomplished individual known for his multifaceted talents, is recognized as an author, podcaster, article writer, and the owner of an E-commerce website. With a passion for diverse fields, Karan has garnered acclaim and earned certifications of appreciation from esteemed organizations such as UNICEF, WHO, Amnesty University, Google, and more.

Currently in his third year, Karan is pursuing a 5-year Integrated BA LLB program at Guru Gobind Singh Indraprastha University. His academic pursuits are complemented by notable contributions to the field of law, with his paper titled "The Unseen Suffering: Women's Experiences Of Brutal Violence In The 1947 Partition - Suffering, Trauma And Catastrophe Of Partition" recently published in the Indian Journal of Law and Legal Research.