

THE REVIVAL OF NATURAL LAW AND VALUE ORIENTED JURISPRUDENCE

SUBMITTED BY:

NAME: DEVANAND PRABHAKAR PRABHU

CLASS: F.Y. LL.M.

SUBJECT: LEGAL THEORY

COLLEGE: G.R. KARE COLLEGE OF LAW

CHAPTER I

I. INTRODUCTION

In legal theory and in ancient Hindu, Greek and Roman Law natural law has a primordial place. Indeed Natural Law theory has a history, reaching back centuries B. C and the vigour with which it flourishes notwithstanding periodic eclipse, especially in the nineteenth century, is a tribute to its vitality. There is no theory; many versions have evolved throughout this enormous span of time. No other firmament of legal and political theory is so bejeweled with stars as that of natural law, which scintillates with contributions from all ages.

Dr. Fried Mann has commented that the history of natural law is a tale of the search of mankind for absolute justice and its failure . therefore ,with the change in social and political condition ,the notion about natural law have also been changing . thus natural law has acted as a catalyst for bringing about transformation of the old prevailing legal system . it brought about a change in the old Roman law of Justinian period . the greatest contribution of natural law theory to the legal system is its ideology of a universal order governing all men and the inalienable rights of the individual.¹

Natural Law as conceived by its exponents is that law, which is inherent in the nature of man or society, and is independent of convention, legislation or other institutional devices. The phrase “natural law”, however, has a flexible meaning. Dias and Hughes describe that natural law meant different and often contradictory things in the course of its legal history. It has been utilized to justify social institutions and to condemn them and to encourage both social change and *status quo*. Natural law as such has been used as the ethical justification of law as a whole; as the ideal source of law and the standard positive law emanating from this ideal; as

¹ Blackstone : commentaries, introduction,p.39.

the invariant for testing the rules of law in contrast with the changing and uncertain; as autonomous law deriving its validity from its own inherent values as spontaneous law differentiated by its living and organic properties, from the law promulgated in advance by the State of its agents. The chief features of this school are:²

1. Its method is basically an *a priori* method different from empirical method, the former accepting things or conclusions in relation to a subject taken for granted without an enquiry or observation. The empirical or a *posteriori* approach try to find out all arguments or causes in relation to the subject matter.
2. Its meaning and nature has been varying, confusing and self-contradictory. In the natural sense it has been understood as synonym to physical universe, it has been used in the sense of natural reason, a law which conforms to the natural order of universe; it has also been correspondingly used with force or physical power or moral, ideal or law with varying content or social justice.
3. The principles of human conduct that are discoverable by “reason” from basic human nature are absolute, immutable and universal.
4. It has been used as weapon and a shield to change or maintain *status quo*. Dias and Hughes rightly remark the emotive content of the word “law” has been utilized to inducement to accept or change the existing state of affairs. For example, in England natural law in the hands of Hobbes became a shield to maintain *status quo* while in the hands of Locke it became an instrument of change. In the twentieth and twenty-first centuries the natural law philosophy is universally adopted both as shield and a weapon. In India the philosophy of natural law is enshrined in Chapter III relating to fundamental rights of the individuals and Chapter IV embodying the socio-economic goals of State policy for promotion of material welfare of the common man. The

² Dr. N. V. Paranjape : Jurisprudence, p. 96.

theory of natural philosophy has been advanced both ways to defend of or override individual liberty for common well being. This eternal dualism has been the chief characteristic of natural law philosophy.

5. The concept of Rule of law in England, the due process of law in the United States and the procedure established by law in India embody juristic traditions of natural law philosophy wherein the Sovereign body must act under law in the administration of justice. This is in essence a natural law thinking by which the positive law is subjected to the inhibition of a moral order.³

³ Dr. N. V. Paranjape : Jurisprudence, p. 96.

CHAPTER II

I.Natural Law---its meaning and Definition

There is no unanimity about the definition and exact meaning of natural law and the term 'natural law theory' has been interpreted differently at different times depending upon the needs of the developing legal thoughts. But the greatest attributes of the natural law theory is its adaptability to meet new challenges of the transient society.⁴

The exponents of natural law philosophy conceive that it is a law which is inherent in the nature of man and its independent of convention, legislation or any other institutional devices.

Dias and Hughes describe natural law as a law which derives its validity from its own inherent values, differentiated by its living and organic properties, from the law promulgated in advance by the State or its agencies.

According to Cohen, natural law is not a body of actual enacted or interpreted law enforced by courts, it is in fact a way of looking at things and a humanistic approach of judges and jurists. It embodies within it a host of ideals such as morality, justice, reason good conduct, freedom equality, liberty, ethics and so on.⁵

Main Characteristics of Natural Law:-

The phrase 'natural law' has a flexible meaning. It has been interpreted to mean different things in course of its evolutionary history. However, it has generally been considered as an

⁴ Dias R. W. M.: Jurisprudence, p. 65

⁵ Dr. N. V. Paranjape : Jurisprudence,p. 96.

ideal source of law with invariant contents. The chief characteristics features of natural law may be briefly stated as follows:-

1. It is basically apriori method different from empirical method, the forms, accepts things or conclusions in relation to a subject as they are without any need or enquiry or observation while empirical or a posteriori approach tries to find out the causes and reasons in relation to subject matter.
2. It symbolizes physical law of nature based on moral ideals which has universal applicability at all places and terms.
3. It has often been used either to defend a change or to maintain status quo according to needs and requirement of the time. For example, Locke used natural law as an instrument of change but Hobbes used it to maintain status quo in the society.
4. The concepts of 'Rule of Law' in England and India 'due process' in USA are essentially based on the natural law philosophy.⁶

⁶ Dr. N. V. Paranjape : Jurisprudence, p. 96.

CHAPTER III

I. THE REVIVAL OF NATURAL LAW AND VALUE-ORIENTED JURISPRUDENCE

1. Neo-Kantian Natural Law

From the middle of the nineteenth century to the beginning of the twentieth the theory of natural law was at a low ebb in most of the countries of Western civilization. It was largely displaced by historical evolutionary interpretations of law and by legal positivism. Historical and evolutionary views of the law sought to explain the law casually in terms of ethnological factors or by reference to certain evolutionary forces which pushed the law forward along a predetermined path. Legal positivists, especially the analytical jurists, sought to discourage philosophical speculation about the nature and purposes of the law and set out to limit the province of jurisprudence to a technical analysis of the positive law laid down and enforced by the state. Inquiries concerning the ends and ideals of legal regulation tended to vanish from jurisprudence and legal philosophy, and at the close of the nineteenth century the philosophical search for the ultimate values of legal ordering had practically come to a halt.⁷

⁸The twentieth century, however, witnessed a revival of natural law thinking and value-oriented jurisprudence. Certain elements of legal idealism can be noticed already in some versions of sociological jurisprudence.⁹ **Joseph Kohler** saw the end of legal regulation in the promotion of culture but held an entirely relativistic view with respect to the ethical values to be served by a law dedicated to culture. Roscoe Pound defined the aim of the law in terms of the maximum satisfaction of human wants through ordering of human conduct by politically organized society. Although he viewed the rise of a new philosophy of values with sympathy,

⁷ *ibid*

⁸ Edgar Bodenheimer: *Jurisprudence*, 2004 Edn, p.135

⁹ *ibid*

his own theory of law did not go much beyond a quantitative surveying of the multifarious interests demanding satisfaction or requiring adjustment through the art of legal “engineering”. Twentieth-century legal realism was well aware of the role which value judgments and considerations of social policy actually play in the legal process, but it refrained from building up a rational and objective theory of legal ends and social ideals.

A pioneering attempt to create a modernized natural law philosophy based on a priori reasoning was made in Germany by **Rudolf Stammler** (1856-1938). As a philosophical disciple of Kant, he was convinced that human beings bring to the cognitive perception of phenomena certain a priori categories and forms of understanding which they have not obtained through the observation of reality. Stammler taught that there exist in the human mind pure forms of thinking enabling men to understand the notion of law apart from, and independently of, the concrete and variable manifestations in which law has made its appearance in history.¹⁰

Stammler, however, departed from his master Kant by breaking the notion of law down into two components: the *concept of law* and the *idea* of law. Kant had defined law as the aggregate of the conditions under which the freedom on one could be harmonized with the freedom of all. Stammler pointed out that this formula was faulty because it confused the concept of law with the idea of “right” or just law. The concept of law, he said, must be defined in such a manner as to cover all possible realizations and forms of law in the history of mankind. Stammler believed that he had found such an all-embracing definition of law in the following formula” “Law is the inviolable and autocratic collective will”. A number of different elements are contained in this formula. Law is the collective will, that is, a

¹⁰ Edgar Bodenheimer: Jurisprudence, 2004 Edn,p.136

manifestation of social life. It is an instrument of social co-operation, not a tool for the satisfaction of purely subjective desires of individuals devoid of community value. Furthermore, law is an expression of a collective will which is autocratic and sovereign. The rules of law, once they have been established, claim a compulsory force. They are binding irrespective of the individual citizen's inclination to follow them. This fact, said Stammler, distinguishes law from customs and social conventions, which constitute mere invitations to the citizens to comply with them and do not purport to be absolutely compulsive. Finally, the rules of law contain an element of inviolability. This means that, as long as they are in effect, they are strictly binding not only upon those who are subject to them but also upon those who are entrusted with their creation and enactment. Herein, according to Stammler, lies the difference between law and arbitrary power. We are confronted with the latter when a command is issued which the holder of power does not regard as an objectively binding regulation of human affairs, but merely as a subjective gratification of a present desire or impulse without normative force.¹¹

From the concept of law Stammler distinguished the *idea of law*. The idea of law is the realization of justice. Justice postulates that all legal efforts be directed toward the goal of attaining the most perfect harmony of social life that is possible under the conditions of the time and place. Such a harmony can be brought about only by adjusting individual desires to the aims of the community. According to Stammler, the content of a rule of law is just if it is conducive to harmonizing the purposes of the individual with those of society. The social ideal, as Stammler sees it, is a "community of free-willing men". The term "free" as used in this formula, does not denote an act of volition which is directed by the subjective and selfish

¹¹ Dr. N. V. Paranjape : Jurisprudence, p. 96.

desire of an individual; in accordance with Kantian terminology, a free act is one that is objectively and rationally justified from the point of view of the common interest.

Stammler pointedly emphasized that his social ideal could serve merely as a formal method for determining whether the content of a specific law was just, it could not be used as a universal substantive standard for passing judgment on the “rightness” of concrete enactments.¹² Stammler’s formula has in fact been decried as essentially empty in content. It cannot be denied, however, that Stammler, in contradiction to his own methodological premises, did derive some absolute postulates of “right law” from his social ideal. In any attempt to realize it, he wrote, the legislator must keep four fundamental principles in mind:

1. The content of a person’s volition must not be made subject to the arbitrary power of another.
2. Every legal demand must be made in such a manner that the person obligated may remain his own nearest neighbor (retain his self respecting personality).
3. A member of the legal community cannot be excluded from it arbitrarily.
4. A power of control conferred by law can be justified only to the extent that the person affected thereby may remain his own nearest neighbor (retain his self-respecting personality).¹³

What do these “principles of respect and participation”, as Stammler called them, mean in substance? They mean that each member of the community is to be treated as an end in himself and must not become the object of the merely subjective and arbitrary will of another. No one must use another merely as a means for the advancement of his own purposes. “To curb one’s own desires through respect of another, and to do so with absolute reciprocity,

¹² Edgar Bodenheimer: Jurisprudence, 2004 Edn,p.137

¹³ Dr. N. V. Paranjape : Jurisprudence,p. 96.

must be taken as a principle in the realization of the social ideal". This notion of a community of free men treating each other as ends in themselves is close to the Kantian idea of law, but differs from it in two respects. First, the *community* of individuals takes the place of the free individual as such; this means that Stammler's formula is somewhat less individualistic than Kant's.¹⁴ Second, Stammler's formula in its abstractness leaves more room for variety and diversity in positive law than Kant's natural law definition. "There is not a single rule of law", said Stammler. "the positive content of which can be fixed a priori". In his view, two legal systems with widely varying rules and principles of law may both be in conformity with his social ideal.¹⁵ This ideal does not embody a concrete system of natural law but represents merely a broad yardstick by which the justice or injustice of positive rules of law may be tested. It is, at the most, a "natural law with a changing content". With the eternal and immutable law of nature of the classical period it has very little in common.

Like Stammler, the Italian legal philosopher **Giorgio Del Vecchio** (1878 – 1970) distinguishes sharply between the concept of law and the ideal of law. The concept of law, he maintains, is logically anterior to juridical experience, that is, constitute an a priori datum. The essential characteristics of law, according to him, are first, objective co-ordination of the actions of several individuals pursuant to an ethical principle, and second, bilateralness imperativeness, and coercibility.

The legal ideal is identified by Del Vecchio with the notion of natural law. "Natural Law is the criterion which permits us to evaluate Positive Law and to measure its intrinsic justice". Accepting the fundamental tenets of Kantian ethics, he derives natural law from the nature of man as a rational being. Respect for the autonomy of the human personality is to

¹⁴ Carl J. Friedrich, *The Philosophy of Law in Historical Perspectives*, p.163

¹⁵ Edgar Bodenheimer: *Jurisprudence*, 2004 Edn.

him the basis of justice. Every human being may demand from his fellowmen that he should not be treated as a mere instrument or object. Del Vecchino is convinced that the evolution of mankind leads to a constantly increasing recognition of human autonomy and thus to a gradual realization and ultimate triumph of natural law.

The absolute value of the person, equal liberty of all men, the right of each of the associates to be an active, not just a passive, participant in legislation, liberty of conscience, and in general the principles in which is summed up, even amid accidental fallacies, the true substance of the classical philosophy of law, *juris naturalis scientia*, have already received important confirmations in the positive juridical orders, and will receive others soon or in the course of time, whatever may be the resistances and the oppositions which they still encounter.¹⁶

Del Vecchio, though in general he may be classified as a neo-Kantian, differs from Kant in his conception of the purposes of the state. For Kant, the purpose of state power exhausted itself in the promulgation and enforcement of laws designed to protect the equal liberty of all. Del Vecchio holds that the state need not be indifferent to the problems of the economic, cultural and moral life. It may extend its regulatory power over all aspects of human social life, and it is its highest function to promote the well-being of society generally. But in doing so, the state must always operate in the forms of the law, so that every act of the state has for its basis a law manifesting the general will. With this conviction, Del Vecchio leaves the soil of Kantian individualism and moves into the orbit of the Hegelian philosophy of the state. However, he is willing to recognize a right of resistance against the commands of state power

¹⁶ Edgar Bodenheimer: Jurisprudence, 2004 Edn,p.139

in extreme cases in which these commands come into irreconcilable conflict with the most primordial and elementary requirements of natural law and justice.¹⁷

The German legal philosopher **Gustav Radbruch** (1878-1949) started out from a new-Kantian philosophy of values, which erects a strong barrier between the “is” and the “ought” and denies that any judgment as to what is “right” can be gained from the observation and apperception of reality. In giving an account of Radbruch’s legal philosophy it is necessary, however, to distinguish two phases in the evolution of his thought.

Prior to the Second World War, **Radbruch** adhered to an essentially relativistic view of law and justice. The chief trend of his thought ran as follows: Law is the sum of the general rules for the common life of man. The ultimate goal of the law is the realization of justice. But justice is a rather vague and indeterminate concept. It demands that those who are equal be treated in an equal manner, while those who are different be treated differently according to their differences. This general maxim leaves open two questions: first, the test by which equality or inequality is to be measured and second, the particular mode of treatment to which equals as well as unequal are to be subjected.¹⁸ In order to obtain the substantive and specific contents of the law, the idea of justice must be supplemented by a second idea, the idea of *expediency*. The question as to the expediency of a legal regulation cannot be answered unequivocally and generally in one way or another. The answer is colored by political and social convictions and party views. One man or group of men may see the highest goal of the law in the development of the individual human personality (individualism); another may see it in the attainment of national power and glory (supraindividualism); a third one may regard the promotion of civilization and the works of culture as the worthiest aim of the law

¹⁷ Edgar Bodenheimer: Jurisprudence, 2004 Edn

¹⁸ Dr. N. V. Paranjape : Jurisprudence, p. 96.

(transpersonalism). Even though Radbruch expressed preference for the transpersonalist conception, he denied that a choice between the three views could be justified by any scientific arguments; the choice was to him a matter of personal preference. But it is obvious, said Radbruch, that the legal order cannot be made the plaything of conflicting political and social opinions. In the interest of security and order, what is right and what is wrong must in some way be authoritatively settled. The ideas of justice and expediency must be supplemented by a third idea, the idea of *legal certainty*, which demands the promulgation and maintenance of a positive and binding legal order by the state.¹⁹

Thus, we have three elements or principles, all of which contribute in some degree to the building up of the legal order: the idea of justice, the idea of expediency, and the idea of legal certainty. These three elements according to Radbruch, “require one another – yet at the same time they contradict one another”. Justice, for example, demands generally in the formulation of a legal rule, while expediency may require an individualized treatment adapted to the specific situation of the case. To take another example, the idea of legal certainty postulates fixed and stable laws, while justice and expediency demand a quick adaptation of the legal system to new social and economic conditions. The full realization of one of these ideas will make a certain sacrifice or neglect of the two others indispensable, and there is no absolute standard by which the proportionate relation of these three elements within the legal order can be satisfactorily determined. Different ages will lay decisive stress upon the one or the other of these principles. Radbruch himself, before World War II, was committed to the view that in case of an irreconcilable conflict between them, legal certainty ought to prevail. “It is more important that the strife of legal views be ended than that it be determined *justly* and *expediently*.”

¹⁹ Edgar Bodenheimer: Jurisprudence, 2004 Edn, p.140

After the cataclysmic events of the Nazi period and the collapse of Germany in the Second World War, Radbruch undertook a revision of his former theories.²⁰ He expressed the view that there exist certain *absolute* postulates which the law must fulfill in order to deserve its name. Law, he declared, requires some recognition of individual freedom, and a complete denial of individual rights by the state is “absolutely false law”.

Furthermore, Radbruch abandoned his former view that in case of an irreconcilable conflict between justice and legal certainty, the positive law must prevail. He argued that legal positivism had left Germany defenseless against the abuses of the Nazi regime and that it was necessary to recognize situations where a totally unjust law must give way to justice. His revised formula regarding the relation between positive law and justice reads as follows: “Preference should be given to the rule of positive law, supported as it is by due enactment and state power, even when the rule of unjust and contrary to the general welfare, unless the violation of justice reaches so intolerable a degree that the rule becomes in effect “lawless law” and must therefore yield to justice. By this formula Radbruch in his old age, made himself a convert to natural law in a moderate form.²¹

2.Neo-scholastic Natural Law

Neo-Scholasticism is a modern philosophical movement of Catholic origin which will be considered in this section only with regard to the impact on the philosophy of law. In this field, neo-Scholastic thought has in the last few decades been particularly active in France, Germany and the United States.

²⁰ *ibid*

²¹ Edgar Bodenheimer: Jurisprudence, 2004 Edn,p.142

Although neo-Scholastic jurists have developed legal theories with differing emphases and implications, certain basic convictions are held in common by them. The most important of these convictions is the belief in a natural law which exists prior in positive law and is superior to it. The natural law is no longer the law of nature of the classical period of Western legal philosophy. It draws its inspiration from a different source, namely, from medieval Catholic Scholastic thought and particularly from the legal philosophy of St. Thomas Aquinas.

The chief difference between the classical and the Thomist natural law may be sought in the fact that the Thomist consists of very broad and general principles, while many of the classical thinkers developed very specific and detailed systems of natural law. Neo-Scholasticism in this respect definitely follows the Thomist tradition. It rejects the idea that natural law is an unchangeable order of specific and concrete legal norms and contents itself with laying down some broad and abstract principles. Victor Cathrein, for example, a Swiss neo-Thomist, defined the supreme principle obligatory for human action as follows: “You should observe the order which is fitting for you as a rational being in your relations to God, your fellowmen, and yourself”. This maxim, as applied to legal ordering, demands above all the recognition of the *summum euique* principle (to give everybody that which is due him). Natural law, according to Cathrein, embraces only some very fundamental principles and must be made concrete and implemented by the positive law of the state. Heinrich Rommen states that only two self-evident principles belong to the content of natural law in the strict sense. These are:” What is just is to be done, and injustice is to be avoided,” and the old axiom, “Give to everyone his own”.²² He assumes that, in the light of these maxima, the legal institutions of private property and inheritance must be deemed to be of natural law, but that

²² Edgar Bodenheimer: Jurisprudence, 2004 Edn

the natural law “does not demand the property and inheritance institutions of feudalism, or of liberate capitalism, or of a system in which private, corporate and public forms of ownership exist side by side”. The supreme maxims of natural law would, of course, prohibits such obviously unjust acts as the killing of innocent persons, and they also require that human beings be granted a certain amount of liberty and the right to found a family. Louis Le Fur, a French author, declares that there exist three principles of natural law; to keep freely concluded agreements, to repair damage unjustly inflicted on another person, and to respect authority. Jacques Maritain states that “there is, by very virtue of human nature, an order or a disposition which human reason can discover and according to which the human will must act in order to attune itself to the necessary ends of the human being. The unwritten law, or natural law, is nothing more than that”.²³ Maritain’s catalogue of rights to be derived from natural law is more comprehensive than Rommen’s. Maritain holds, however, that these rights are not necessarily absolute and unlimited; they are, as a rule, subject to regulation by the positive law for the purpose of promoting the public interest.

A Significant contribution to neo-Thomistic legal thought has been made by **Jean Dabin** (b. 1889), a Belgian jurist. Dabin conceives of the legal order as “the sum total of the rules of conduct laid down, or at least consecrated, by civil society, under the sanction of public compulsion, with a view to realizing in the relationships between men a certain order – the order postulated by the end of civil society and by the maintenance of the civil society as an instrument devoted to that end”.²⁴ Dabin places a great deal of emphasis on the rule element in law and on compulsion as an essential ingredient of the positive legal order, approaching in this respect the positivistic position. On the other hand, he also undertakes an elaborate analysis of the ends of legal regulation portrayed in terms of justice and the public good. The

²³ Edgar Bodenheimer: Jurisprudence, 2004 Edn

²⁴ *ibid*

latter, in Dabin's view, embraces the totality of human values. It requires the protection of the legitimate activities of individuals and groups as well as the institution of public services in aid or supplementation of private initiative. The state, by means of the law, should coordinate and adjust conflicting economic efforts and counteract undue dispersion and waste engendered by unregulated competition.

Nothing which is contrary to morality can, in Dabin's view, be considered as included in the public good. This maxim forms the link between Dabin's conception of the public good and his theory of natural law. He deduces natural law from the nature of man as it reveals itself in man's basic inclinations under the control of reason. More concretely, Dabin appears to identify natural law with certain minimal requirements of ethics postulated by reason.

What happens when the positive law comes at odds with the ethical minimum? Dabin says: "Everybody admits that civil laws contrary to natural law are bad laws and even that they do not answer to the concept of law". This statement should probably be construed to reflect the general Thomistic and neo-Scholastic position, according to which a flagrantly and outrageously unmoral law, as distinguished from a merely unjust law, must be deemed invalid.

Dabin's theory of justice contemplates three different forms of justice: commutative, distributive, and legal justice. The first kind of justice is aimed at the proper adjustment of the relations of private individuals, particularly by means of the legal remedies designed to award adequate damages in contract and tort cases, restore stolen or lost property, grant restitution in cases of unjust enrichment, and the like. Distributive justice determines what is due from the collectivity to its members: it governs the legislative distribution of rights, powers, honors

and rewards. Legal justice, on the other hand, is concerned with what is owed to the collectivity by its members. Its object is “ordinance for the common good”, that is, determination of the duties and obligations which the members of society owe to the social whole, such as revenue, military service, participation in public functions, obedience to laws and legitimate orders. “Legal justice”, says Dabin, “is the virtue most necessary to the public good precisely because its object is the public good (of the state or of the public). It is in legal justice that law and morals meet so closely as almost to merge”. Although legal justice will come into play only after a demonstration of the insufficiency of the two other forms of justice for the solution of a problem, it will prevail in the case of an irreconcilable conflict with the latter”.

Closely linked with the neo-Thomist natural law is the *institutional theory*, which was devised by Maurice Hauriou (1856 – 1929) and, after his death, developed in detail by Georges Renard (1876 – 1943).

Hauriou defines the concept of “institution” as follows: “An institution is an idea of a work or enterprise that is realized and endured juridically in a social milieu”. For the realization of this idea an authority is constituted which provides itself with organs; in addition, among the members of the social group interested in the realization of the idea, manifestations of communion arise which are directed by the organs of authority and regulated by procedural rules. Expressing the same general thought, Richard defines an institution as “the communion of men in an idea”.²⁵

²⁵ Dr. N. V. Paranjape : Jurisprudence, p. 96.

The institution is supposed to symbolize the “idea of duration” in law. An individual is certain to die, and contracts concluded between individuals are of a transitory character. An institution like the state, the Catholic Church, Harvard University, or the British Board of Trade will be likely to endure for a long time to come. The idea to whose realization the institution is consecrated will live and prevail long after the original founders of the institution have died, and this idea is wholly detached from the casual individuals who belong to the institution at some particular time. It may be noted that Renard finds the most perfect definition of the institution in the first article of the former Italian Fascist Charter of Labor, which reads as follows: “The Italian nation is an organization endowed with a purpose, a life, and means of action transcending those of the individuals or groups of individuals composing it”.

Institution and contract are sharply contrasted by Renard. The touchstone of a contract is the notion of equality; a contract serves the merely subjective purposes of two or more individuals. The criterion of the institution, on the other hand, is the idea of authority; the organization of an institution implies differentiation inequality, direction and hierarchy. It demands subordination of individual purposes to the collective aims of the institution. Subjective rights, typical in law of contracts, are restricted in institutional law. Status, not contract, is the chief organizational principle of the institution. The relations and qualifications of the members are objectively and authoritatively determined. This does not mean, Renard states, that the members of the institution lose their human personality; it merely means that the common good of the institution must prevail over the private and subjective interests of the individual members. Renard admits that the members of an

institution lose their liberty to some degree; but in his opinion they gain in security what they lose in liberty.²⁶

The State, according to the theory of institution, is the most eminent manifestation of the institutional phenomenon. But the advocates of the theory do not consider the state as an omnipotent and totalitarian entity. There are other institutions, they say, which enjoy a considerable autonomy and independence from state interference and which should represent an effective counterweight against state power. First, there is the family, which is the oldest of institutions. Second, there is the religious congregation, the Church. Third, there are professional association, corporations, labor unions, employers associations. Every individual belongs to some institution other than the state, and the autonomy of the various institutions guarantees him a certain amount of liberty, because no institution has an entirely unlimited power over him. The institutional theory is opposed to statism and to that form of socialism which would make the individual a mere cog in the apparatus of an all-powerful state. It believes in corporate or syndicalist pluralism and in the self-government of institutions, subject of course to the state's police power.

3.Duguit's Legal Philosophy.

A natural-law theory with strongly sociological overtones was propounded by the French jurist Leon Duguit (1859 – 1928). This doctrine was diametrically opposed to the natural law doctrines of the age of enlightenment in that Duguit repudiated any natural or inalienable system of legal rights by a system which would recognize only legal duties. Every individual has a certain task to perform in society, Duguit said, and his obligation to perform this function may be enforced by the law. The only right which any man might be said to possess

²⁶ Edgar Bodenheimer: Jurisprudence, 2004 Edn,p.146

under this theory is the right always to do his own duty. As Corwin has aptly said, this theory is “that of Locke stood on its head”.²⁷

Notwithstanding his emphasis on social duties, Duguit rejected any absolutist conception of state power. He proposed to strip the state and its organs of all sovereign rights and other attributes of sovereignty with which the traditional doctrine of public law had endowed it. Duguit taught that the governing authorities, like the citizens, have only duties and no rights. Their activity is to be confined to the performance of certain social functions, and the most important of these functions is the organization and maintenance of public services. It is the duty of governmental officials to guarantee a continuous and uninterrupted operation of the public services. This aim, Duguit believed, would be most efficiently realized by a far-reaching decentralization and technical autonomy of the public utilities under a syndicalist structure of the state.²⁸

The social function of law, according to Duguit, is the realization of *social solidarity*. This is the central concept in Duguit’s theory of law, “The fact of social solidarity is not disputed and in truth cannot be disputed, it is a fact of observation which cannot be the object of controversy..... Solidarity is a permanent fact, always identical in itself, the irreducible constitutive element of every social group.”²⁹ Thus Duguit regarded social solidarity not as a rule of conduct or imperative, but as a fundamental fact of human coexistence.

The fact of social solidarity becomes, however, converted into a normative principle under Duguit’s “rule of law” (*regle de droit*). The rule of law demands of everyone that he contribute to the full realization of social solidarity. It imposes upon the governors as well as

²⁷ Edgar Bodenheimer: Jurisprudence, 2004 Edn

²⁸ *ibid*

²⁹ *ibid*

the governed the duty to abstain from any act which is motivated by a purpose incompatible with the realization of social solidarity. The rule of law is so conceived by Duguit as to constitute a definite limitation upon the power of all governing authorities. No statute or administrative order is valid which is not in conformity with the principles of social solidarity and social interdependence. Duguit suggests that a tribunal composed of representatives of all social classes should be set up which would be entrusted with the task of interpreting the concept of social solidarity authoritatively, and with determining whether a certain legal enactment is or is not in accord with this supreme requirement.

It was Duguit's professed intention to create an entirely positivistic, realistic, and empirical theory of law, free from any ingredients of metaphysics and natural law. In truth, as Geny has pointed out, Duguit's rule of law based on social solidarity is far removed from legal positivism and empiricism. The theory is essentially metaphysical and must be classified as a peculiar version of natural-law doctrine in a socialized form.³⁰

4.The Policy – Science of Lasswell and McDougal

Harold Lasswell (b. 1902) and **Myres McDougal** (b. 1906), two American writers who have joined in an effort to develop a policy-science of the law, have in common with Leon Duguit the objective of building an empirical legal theory free from metaphysical speculation. Unlike Duguit, however, they admit openly that their approach to the law represents a theory of values rather than a mere description of social facts.

The Lasswell-McDougal value system proceeds from the assumption that a value is a "desired event". Thus, inasmuch as men want power (defined as participation in the making

³⁰ Edgar Bodenheimer: Jurisprudence, 2004 Edn,p.148

of important decisions), power is “unmistakably a value, in the sense that it is desired (or likely to be desired). Other value categories or “preferred events” gratifying the desires of men are wealth, that is, control over economic goods and services; well-being or bodily and psychic integrity; enlightenment, or the finding and dissemination of knowledge; skill or the acquiring of dexterities and development of talents; affection, or the cultivation of friendship and intimate relations; rectitude or moral responsibility and integrity; and respect, or recognition of merit without discrimination on grounds irrelevant to capacity.³¹ This list is regarded as representative, but not necessarily exhaustive. A ranking of the values in question in the order of their importance is held impossible by the authors since “the relative position of values varies from group to groups, from person to person, and from time to time in the history of any culture or personality”. Nor is it regarded as feasible to assign a universally dominant role to any particular value. What the values controlling a group or individual are in a given situation must in principle be determined separately in each case.

Law is conceived by Lasswell and McDougal as a form of the power value and described as “the sum of the power decisions in a community”.³² It is essential to the legal process, McDougal says that a formally sanctioned authority to make decisions be conjoined with an effective control ensuring the execution of these decisions. This combination of formal authority and effective control produces a flow of decisions whose purpose it is to promote community values in conformity with the expectations of the community. It is one of the basic postulates of the authors that the members of the community should participate in the distribution and enjoyment of values, or differently expressed, that it must be the aim of legal regulation and adjudication to foster the widest possible sharing of values among men. The ultimate goal of legal control as envisaged by Lasswell and McDougal is a world community

³¹ Edgar Bodenheimer: Jurisprudence, 2004 Edn

³² Edgar Bodenheimer: Jurisprudence, 2004 Edn

in which a democratic distribution of values is encouraged and promoted, all available resources are utilized to the maximum degree, and the protection of human dignity is regarded as a paramount objective of social policy.

These authors believe that legal science, in approaching its task of fostering the democratization of values on a global scale and contributing to the creation of a free and abundant society, should minimize and deflate the role of technical legal doctrine, which is referred to as the “authoritative myth”. Legal doctrines, McDougal says, have the unfortunate habit of “travelling in pairs of opposites”. Conceptual and doctrinal antinomies are endemic to the law, and legal terms take their meaning from the context in which they are employed. Thus, reliance on doctrine does not ensure legal certainty and often defeats the attainment of socially desirable ends.

Laswell and McDougal propose, therefore, that the technical-doctrinal approach to law, although it should not be entirely discarded, ought largely to be supplanted by a “policy” approach. Key legal terms should be interpreted in relation to the goals and vital problems of democratic living. Legal decisions should be viewed as “responses to precipitating events best described as value changes in social processes”. Emphasis on definition and orientation upon rules should be replaced by “goal thinking” and functional consideration of the effect of alternative solutions upon over-all community patterns. Legal doctrines should be relegated to the role of “symbols whose function is to serve the total policies of their users”. Sharp distinctions between law and policy, between formulations *de lege lata* and propositions *de lege ferenda* should be shunned. “Every application of legal rules”, says McDougal, “customary or conventional or however derived, to specific cases in fact requires the making of policy choices”. While the adjudicating organs may seek guidance from past judicial

experience, they should always focus their vision strongly upon the probable impact of the decision upon the future of their community. Such a future-oriented approach to the decision-making process is regarded by McDougal and Lasswell as far superior to the mechanical manipulation of traditional doctrines.³³

Although both of these authors hold that their legal “policy-science” should not be classified as natural-law doctrine, such a characterization would not appear to be wholly inappropriate. While the eight values recognized by them correspond largely to the actual desires held by people and are therefore empirical in character, the insistence of the authors that these values be democratically shared in a world-wide order, resting on respect for human dignity as a super value, would appear to bear certain earmarks of natural-law thinking.

5. Other Recent Value Oriented Philosophies of Law

In addition to Laswell and McDougal, a number of other thinkers in the United States have turned their attention in recent decades to the fundamental values which the institution of law should be made to promote. Although the revival of natural law or justice-oriented approaches to the law has not in this country reached the degree and intensity of Western European developments, the trend is at the present still gaining in momentum and strength.³⁴

Edmond Cahn (1906 – 1964) is in many important aspects of his thought connected with the realist movement in American jurisprudence. Although Cahn realizes the importance of the rational element in the administration of justice, he views legal processes to a far-reaching extent as intuitive ethical responses to concrete and particular fact situations.

³³ Edgar Bodenheimer: Jurisprudence, 2004 Edn, p.150

³⁴ Edgar Bodenheimer: Jurisprudence, 2004 Edn, p.151

Cahn has expressed the conviction that the problem of justice should be approached from its negative rather than its affirmative side. Suggesting that the postulation of affirmative ideals of justice has been “so beclouded by natural law writings that is almost inevitably brings to mind some ideal relation or static condition or set of perceptual standards, “Cahn prefers to place the emphasis on the “sense of injustice”.³⁵ The sense of injustice is a blend of “reason and empathy” which forms part of the human biological endowment. Justice is essentially a process of remedying or preventing whatever would arouse the sense of injustice.

How does the sense of injustice manifest itself? First and perhaps most important of all, feelings of injustice are precipitated in a group of human beings by the creation of inequalities which the members of the group regard as arbitrary and devoid of justification. “The sense of injustice revolts against whatever is unequal by caprice”. The inequalities resulting from the law must make sense; the law becomes unjust when it discriminates between indistinguishable.

The sense of injustice also makes certain other demands, such as the demand for recognition of merit and human dignity, for impartial and conscientious adjudication, for maintenance of a proper balance between freedom and order, and for fulfillment of common expectations. The last mentioned demand, Cahn points out, may manifest itself in two different ways. It may assert itself, first, where normal expectations of human beings regarding the consistency and continuity of legal operations have been disappointed by lawmakers or judges. Any retroactive changes of substantive law which reaches transactions and acts undertaken in justified reliance on the earlier law presents, therefore, a challenge to the sense of injustice. Second, a similarly unfavorable reaction may be produced by the opposite was of proceeding,

³⁵ *ibid*

namely, by a failure of the law to respond to new moral convictions and new social needs. Thus, the positive law may become unjust not only by breaking its promise of regularity and consistency, but also by violating its commitment to be sensitive to new demands of the social and economic life. Law, in order to be just, must maintain a precarious and hazardous balance between regularity that is uncompromising and change that is inconsiderate. The sense of injustice “warns against either standing still or leaping forward; it calls for movement in an intelligible design”.

Lon fuller (b. 1902) has turned a critical searchlight on both juridical positivism and legal realism. The positivistic attitude, he points out, is as a general rule associated with ethical skepticism. “Its unavowed basis will usually be found to rest in a conviction that while one may significantly describe the law that is, nothing that transcends personal predilection can be said about the law *that ought to be*”. In his opinion, it is impossible to study and analyze the law apart from its ethical context. The legal realists, he charges, have made the same mistake as the positivists, the mistake of assuming that a rigid separation of the *is* and *ought*, of positive law and morality, is possible and desirable.³⁶

Law, to Fuller, is a collaborative effort to satisfy, or to aid in satisfying the common needs of men. Each rule of law has a purpose which is directed at the realization of some value of the legal order. Because of the close connection which exists between purpose and values, a purpose must be regarded as “at once a fact and a standard for judging facts.” Since the interpretation and application of the law is permeated with purposive and axiological

³⁶ Edgar Bodenheimer: Jurisprudence, 2004 Edn

considerations, the dualism of “is” and “ought,” in his opinion, also cannot be maintained in the context of the judicial process.”³⁷

Fuller maintains that the search for the principles of successful human living must always remain open and unshackled. He rejects the notion of natural law as a body of authoritative “higher-law” axioms against which human enactments must be measured. No natural law theory can be accepted, he insists, that attempts to lay down in advance an eternal, unchanging code of nature.

Because of widespread association of the term “natural law” with doctrinaire and absolutist philosophies of law and ethics. Fuller recommends that a new name be used for an old phenomenon. He suggests the term “economics”, which he defines as “the theory or study of good order and workable arrangements”. He warns that economics must not attempt to teach any orthodoxy or doctrine of binding ultimate ends, but must see its task primarily in furnishing a doctrine of the means which the legal order must employ to attain the aims of a certain form of social organization. However, it may go beyond such concern for the means aspects of social ends and attempts to demonstrate scientifically that there exist unattainable social goals for which no practicable and manageable legal forms can be devised. Fuller believes that there are some constancies and regularities in man’s nature which impose limitations upon the desire of legal utopians and social engineers to create radically novel forms of society.³⁸

³⁷ *ibid*

³⁸ Edgar Bodenheimer: *Jurisprudence*, 2004 Edn,p.154

According to Fuller, the integrity of the law is determined primarily by the process which it uses in order to accomplish its goals. The “morality that makes law possible” requires the satisfaction of eight conditions which may be summarized as follows:

1. There must be general rules formed to guide particular actions;
2. These rules must be made known to the public, or at least to all those to whom they are addressed;
3. The rules should, in most instances, be prospective rather than retroactive;
4. They should be clear and comprehensible;
5. They should not be inconsistent with one another;
6. They should not require the impossible;
7. They should be reasonably stable, i.e., they should not be changed too frequently;
8. There should be congruence between the rules as announced and their actual administration.

Fuller views these eight canons as “a procedural version of natural law”. A total failure to satisfy any one of these conditions of legal morality, does not, in Fuller’s view, simply produce a bad system of law; it results, he declares, “in something that is not properly called a legal system at all, except perhaps in the Pickwickian sense in which a void contracts can still be said to be one kind of contract”. Thus the intrinsic legitimacy of a legal system seems for Fuller to rest on requirements of a somewhat structural and technical character. He is convinced, however, that a legal order which lives up to these requirements will usually be essentially sound and just in its substantive contents.³⁹

³⁹ H.L.A.Hart, Law Review, 78; Harvard Law Review at 1287-1288

Jerome Hall (b.1901) is deeply concerned with the question of whether rationality and morality are “of the essence” in law, and his answer to the question is affirmative. He advocates the adoption of a restrictive definition of positive law which would limit the term to “actual ethical power norms” and exclude “sheer power norms”. He is convinced that there may be norms enacted by the state which lack the quality of law because they are entirely devoid of ethical content. In an attempt to lay the foundations for a democratic natural law, Hall proposes that the democratic ideal should be included in the essence of the positive law. “Especially, we include therein the “consent of the governed” and all that implies in the context of the democratic process. That is the fundamental correction which must be made in the traditional Natural Law theories of positive law”.

Law, in Hall’s view, is a “distinctive coalescence of form, value, and fact”. The value component of law, he points out, is not merely an expression of subjective desires and personal interest, but lends itself to rational analysis. “People sometimes act against their desires and sacrifice their interests because they decide to do the right thing. The naturalistic dogma must condemn Socrates as an idiot”. Under the skeptical theory of value judgments, “expressions of delight when witnessing a murder would be just as rational as expressions of intense anger directed at someone who had just risked his life to rescue a drowning child”. The fact that it is sometimes very difficult to solve a moral problem does not justify the conclusion that objectivity in valuation is impossible or that justice is, in the words of Kelsen, an “irrational ideal”.⁴⁰

Hall has been a vigorous critic of legal positivism, insofar as it claims to provide a complete explanation of the phenomenon of law exclusive of the valid elements in natural-law

⁴⁰ Edgar Bodenheimer: Jurisprudence, 2004 Edn,p.155

reasoning and sociological jurisprudence. He has advocated as “integrative” jurisprudence which would combine analytical studies of the law with sociological descriptions and an understanding of the value-components of legal ordering. Hall sees the bond lending unity to the various aspects of jurisprudence in the term “action”. “Law-as-action” relies extensively on legal rules and concepts, but the law as a social institution cannot be comprehended unless the day-to-day practice of judges, administrators, and law enforcement officials is studied. This practice will to some extent conform, to some extent diverge from the conceptual structure of the law. The conceptions of law as action also brings within the province of jurisprudence the subject of compliance with, and obedience to, legal prescriptions by the general population, and the interactions between laymen and law-related officials.⁴¹

Filmer Northrop (b. 1893) agrees with Hall that an evaluative science of the law is possible. According to him, a scientifically meaningful evaluation of legal norms ought to be undertaken on two different levels. First of all, the positive law enacted by the state should be tested with respect to its conformity with the living law of a people or culture. Only a positive law which meets the social and legal needs of the people and is, in general, accepted and acted upon by them can function as an effective legal system. The living laws of nations or groupings of nations in this world, Northrop points out, are not uniform, but pluralistic and widely divergent. This does not mean that the sociological “is” of a culture constitutes the ultimate test for the goodness or badness of its legal system. “The normative ideal for judging today’s human behavior and cultural institutions cannot be the de facto “is” of that human behavior and those cultural institutions; other wise the status quo would be perfect and reform and reconstruction would be unnecessary”. The criterion of virtue and sin for culture and cultural man, according to him, is the truth or falsity of the philosophy of nature and natural

⁴¹ Hall, Foundation Of Jurisprudence, pp.142-147s

man underlying a culture. This philosophy of nature and natural man is identified by Northrop with natural law, which in his view includes “the introspected or sensed raw data, antecedent to all theory and all cultures, given in anyone’s experience in any culture”. Ethics, he argues, is nothing but empirically verified natural philosophy applied to human conduct and relations. The ethical principles on the basis of which the Hitler government operated must be adjudged to be bad because Hitler’s conduct was the consequence, in part at least, of philosophical beliefs about natural man which scientific method can demonstrate to be false.⁴²

Northrop is of the opinion that the natural law of the modern world cannot be based either on the Aristotelian-Thomist conception of this law or on the natural rights philosophy of Locke and Jefferson. It must be grounded on the conception of nature and natural man supplied by modern physics, biology, and other natural sciences (including psychology). Northrop insists that the building of an effective international law to secure the survival of mankind must of necessity be predicated on the scientific foundations with which this theory of natural law may provide us. Only a truly universal natural law can, in the long run, mitigate and alleviate the hostility and tensions engendered by the living law pluralism of the present world and bring about that modicum of mutual understanding between peoples which is indispensable to world peace. The “dying legal science” of positivism, in his opinion, to furnish us with the tools and the inspiration needed to cope with the momentous problems which the atomic age has thrust upon mankind.

A recent attempt to revive the social contract theory and the Kantian philosophy of law in a modernized garb and to oppose them to the utilitarianism of Bentham and Mill is represented by the *Theory of Justice* of John Rawls (b. 1921). In the opinion of a reviewer, the book

⁴² Introduction to Jurisprudence; by Dr. Avtar Singh

“shows how the values of individual liberty and dignity can be assigned an independent status that does not derive from the maximization of the social good”. Like Kant, Rawls defines liberty as absence of constraints,⁴³ and the first of his two fundamental principles of justice requires that “each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all”. Going beyond Kant, Rawls then incorporates the notion of equality into his theory of justice by means of the following axiom. “social and economic inequalities are to be arranged so that they are both

- a) to the greatest benefit of the least advantaged, consistent with the just savings principle, and
- b) attached to offices and positions open to all under conditions of fair equality of opportunity”.

The question of determining what kinds of social and economic inequality will work out for everyone’s advantages is to be resolved according to the hypothetical concept of the “original position” (which is Rawl’s new version of the social contract theory). If it can be assumed that rational human beings, concerned in general with advancing their own interests but ignorant of the particular manner in which a decision as to equality or inequality would affect them personally in a concrete situation, would accept certain principles for the distribution of goods, rights, positions and offices as fair and just, a particular determination concerning distributive justice is thereby legitimated. There remains the possibility, however, that a step towards greater egalitarianism might result in a curtailment of liberty. In that event, the value of liberty is to be given preference.⁴⁴

⁴³ Edgar Bodenheimer: Jurisprudence, 2004 Edn

⁴⁴ Edgar Bodenheimer: Jurisprudence, 2004 Edn,p.158

An increased emphasis on the value components of legal ordering is also noticeable in certain modern varieties of sociological and psychological jurisprudence. Philip Selznick (b. 1919) has proposed that the sociology of law should pay as much attention to the axiological goals pursued by a legal system as to the genetic origins of legal norms and legal institutions. Sociology, therefore, “should have a ready affinity for the philosophy of natural law”. It should not view law simply for the philosophy of natural law”. It should not view law simply as a system of culture conditioned rules but also as an instrumentality for moral development and the satisfaction of morally relevant needs. In short, law should be examined for its potential contribution to human welfare. The philosophy of values has entered from a different point of departure into the psychoanalytic jurisprudence of Albert Ehrenzweig (1906-74). While Selznick places considerable emphasis on the psychic unity of mankind and the universal characteristics of human nature. Ehrenzweig views the legal order chiefly as an enterprise designed to moderate conflicting individual views of justice. He is consigned to moderate conflicting individual views of justice. He is convinced that a sense of justice is inborn in all men and women, but regards its competing and often inconsistent manifestations (“justness’s”), in reliance on the general psychological theories of *Sigmund Freud*, largely as a product of unconscious factors in early personality development. Ehrenzweig does not, however, deny the possibility of reaching some measure of group consensus as to the basic values to be served by a legal order.⁴⁵

In Germany and Austria, a strong revival of value – oriented legal philosophy took place after the fall of Hitler’s Third Reich. The conversion of the distinguished German jurist Gustav Radbruch from a position of value-relativism to the acceptance of an indubitable, though moderate, form of natural law thinking gave a strong impetus to a development which

⁴⁵ Introduction to Jurisprudence; by Dr. Avtar Singh

emphasized the role of law in protecting human dignity, freedom and other substantive values of individual and social life. The legal philosophy of Helmut Coing (b. 1912) is in its methodological approach decisively influenced by the phenomenology of Edmund Husserl, Max Scheler, and Nicolai Hartmann, a philosophical movement which recognizes an objectively subsisting realm of values amenable to intuitive perception. In its contents, Coing's jurisprudence represents a restatement, with some modifications, of the classical philosophy of individual and economic liberalism.⁴⁶

According to Coing, it is the duty of the state to safeguard basic individual rights and freedom, which include bodily integrity, privacy, preservation of one's reputation, private property, protection against fraud and overreaching, freedom of speech and assembly. Coing concedes that these rights cannot be hypostatized into illimitable absolutes. They are subject to some restrictions necessary to promote the general welfare, but their core and essential substance may not be touched. Coing takes the position that a law which violates a supreme principle of liberty and justice is not void but justifies, in extreme cases, active or passive resistance on the part of the people or law – enforcing authorities.

The philosophy of values underlying the phenomenological movement also forms the foundation of the work of Henrick Henkel, Karl Engisch and Reinhold Zippelius. These three authors, however, differ from Coing in that they take a more relativistic, culture-oriented position towards the problem of legal values, without accepting an extreme form of axiological subjectivism.

⁴⁶ Edgar Bodenheimer: Jurisprudence, 2004 Edn, p.159

While legal thought in Austria prior to the World War II was dominated by Kelsen's Pure Theory of Law and the logical positivism of the Vienna Circle, a revival of natural – law thinking took place in that country, too, in the period following the war. Modernized versions of Aristotelian and Thomist legal philosophy were produced in highly subtle and differentiated forms, by Alfred Verdross and Rene Marcic. Their reflections on law and justice cannot easily be summarized, and it is to be regretted that no translations of their major works are available in the English language.

The philosophical movement known as existentialism also has had an impact on legal philosophy, although its bearing on the problems of legal ordering are a matter of doubt and controversy. The German jurists Werner Maihofer and Erich Fechner have developed legal philosophies proceeding from existentialist premises, while the Danish scholar Georg Cohn has presented a view of the judicial process based on what he considers to be the implications of the movement for adjudications and legal reasoning. Like phenomenological philosophy, existentialism pays a great deal of attention to axiological (as distinguished from purely empirical or logical) factors in the law, but it takes a skeptical attitude toward endeavors designed to build a system of natural law based on absolute and immutable norms.

The influence of phenomenology and existentialism is also manifest in the work of the influential Mexican legal philosopher Luis Recasens Siches (b. 1903). He believes, with the German philosophers Max Scheler and Nicolai Hartmann, that values are ideal objects which do not exist in space and time but which can nonetheless claim an objective and a priori validity. Values such as truth, goodness, beauty, justice and security belong to this realm of ideal things; they are not given to us through experience or sense perception, but contact with

them is made through intuitive processes. Man is a citizen of two worlds, the world of nature and the world of values, and he endeavors to build a bridge between these two worlds.⁴⁷

The law, according to Recasens Siches, is not in itself a pure value but is a system of norms designed to realize certain values. Its primary purpose is to achieve security in the collective life; men created law because they wanted to have certainty and protection for their personal and property relationships. But while Recasens Siches regards security as the primary aim of the law and the chief reason for its existence, it is not to him its supreme end. The highest and ultimate goal of the law is the realization of justice. However, while security and inviolable regularity are part of the very concept of law, this is not true of justice. If the legal order does not represent an order of security, then it is not law of any sort, but an unjust law is nevertheless a law.

It is the task of juridical valuation, according to Recasens Siches, to find the criteria of value which should be taken into account in molding the content of the positive law. He believes that the supreme value which ought to inspire all lawmaking is the protection of the individual person. He emphatically rejects the philosophies of transpersonalism and collectivism, which see in man an instrument to produce works of culture or to serve the ends of the state. To him, the function of law is to guarantee liberty, personal inviolability, and a minimum of material comfort to the individual, so that he can develop his own personality and fulfill his "authentic mission".

⁴⁷ Edgar Bodenheimer: Jurisprudence, 2004 Edn, p.161

CHAPTER IV

IV. CONCLUDING OBSERVATIONS

1. It may be noted that the large majority of these legal theories were normative in character in the sense that they were concerned with the paramount objectives to be pursued by social control through law. In other words, they dealt with the “ought” rather than with the “is” of the legal life. This characterization would be applicable to most theories of natural law, to the philosophy of transcendental idealism, to utilitarianism, and to certain versions of sociological jurisprudence.
2. The law is a large mansion with many halls, rooms, nooks, and corners. It is extremely hard to illuminate with a searchlight every room, nook and corner at the same time, and this is especially true when the system of illumination, because of limitations of technological knowledge and experience, is inadequate, or at least imperfect.
3. Proceeding from similar methodological and epistemological premises, Jerome Hall has made a strong plea for present day scholastic effort to create an “integrative jurisprudence”. He has castigated the ‘particularistic fallacy’ in jurisprudence, especially the attempt to separate from another value elements, factual elements, and form element in legal theory. What is needed today, in opinion of Hall, is an integration of analytical jurisprudence, realistic interpretations of social and cultural facts, and the valuable ingredients of natural-law doctrine. All of these divisions of jurisprudence are intimately related to, and dependent on, one another.

4. Such ideas and efforts should be deemed sound and constructive. Our historical experience has taught us that it is impossible to explain the institution of law in terms of one single, absolute factor or cause.⁴⁸
5. The historical school of law has made a significant contribution to legal knowledge by teaching that the national genius of a people may have its share in the creation of a great legal system. Further, the historical school cannot adequately explain why Roman law, several centuries after its decline in the world of antiquity, was revived in a new and different civilization. Nor can historical school account the fact that the legal systems of Germany and Switzerland were transplanted to countries like turkey and Japan and were made to work satisfactorily in those countries.
6. In reality, the problem of achieving justice in human relations is the most challenging and vital problem of social control through law, and it is one that is by no means impervious to the method pf rational argument. The use of theses method does not demand unanimity or universality in the reaching of conclusions concerning the justice of a legal measure.
7. The search for justice is unending and beset with many difficulties. It is, on the other hand, aided by certain objectively verifiable factors, such as the existence of cultural uniformities of valuation which draw their roots chiefly from the fact that affirmation of life strongly preponderates over life-negation in the history of the human race.
8. If the search for justice and reasonableness in law is abandoned by the best minds on the grounds that justice is a meaningless, chimerical, and irrational notion, then there is a danger that the human race will fall back into a condition of barbarism and ignorance where unreason will prevail over rationality, and where the dark forces of

⁴⁸ Edgar Bodenheimer: Jurisprudence, 2004 Edn,p.162-168

prejudice may win the battle over humanitarian ideals and the forces of good will and benevolence.⁴⁹

⁴⁹ Edgar Bodenheimer: Jurisprudence, 2004 Edn,p.162-168

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