NATIONAL OPEN UNIVERSITY OF NIGERIA

FACULTY OF ARTS

DEPARTMENT OF PHILOSOPHY

COURSE CODE: PHL 462

COURSE TITLE: PHILOSOPHY OF LAW

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COURSE GUIDE

PHL 462: PHILOSOPHY OF LAW

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PHL 462: Philosophy of Law (2 Units)

The course shall examines basic issues in the philosophy of law, e.g. the concept of law, the nature of law, sources of law, theories of law (naturalist and positivists, etc), the idea of natural justice, the logic of legal reasoning, legal responsibility, legal rights and obligations of persons and judicial precedence. Philosophical investigation of the views of punishment and justice in law shall also be carried out.

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INTRODUCTION

Welcome to **PHL 462**: Philosophy of Law. PHL 462 is a two-credit unit course with a minimum duration of one semester. It is a compulsory course for Philosophy Major (degree) students in the university. The course is expected to provide instruction on the basic concepts of law and jurisprudence. It is also expected to espouse legal philosophy as the standard which determine the reciprocal relationships of men living in a society.

The course, which has evolved over time as distinguished from Civil law, domiciled in the Arts and Humanities; pay particular attention to the study of the major themes in Legal philosophy such as philosophy of law in perspective, theories of law, legal reasoning in judicial process, judicial precedent, punishment, and responsibility, Hohfeld's concept of right, right and justice and political obligation, theories of political obligation, relationship between law and morality etc.

The course is a compulsory pre-requisite for philosophy students. The course guide gives a brief description of the course content, expected knowledge, the course material, and the way to use them. Tutor-marked Assignment is found in a separate file, which will be sent to you later. There are also periodic tutorials that are linked to the course.

COURSE OBJECTIVES

By the end you will be able to:

a. Identify the nature and meaning of the Philosophy of law
b. Isolating and attempting to various issues in the philosophy of law.
c. Trace the historical and philosophical development of law
d. Enumerate the various theories/ school of thoughts in the philosophy of law.
e. Conceptualize the idea of legal reasoning and legal responsibility.

f. Identify the difference between legal naturalist's and the legal positivist's normative jurisprudence.
g. Compare and contrast the American and Scandinavian versions of legal realism.
h. Articulate the basic rationales that midwifed and justify the concept of punishment.
i. Itemise and discuss the various theories of right.
j. Analyse the idea of judicial precedents in law.
k. Articulate the theories of political obligation
l. Know the arguments for Affirmation and denial of obligation to obey the law

WORKING THROUGH THIS COURSE

To complete this course of study successfully, please read the study units, listen to the audios and videos, do all the assignments, read the recommended books and other materials provided, prepare your portfolios, and participate in the online facilitation.

Each study unit has an introduction, intended learning outcomes, the main content, conclusion, summary, and references/further readings. The introductory part will tell you the expectations in the study unit. You must read and understand the intended learning outcomes (ILOs). In the intended learning outcomes, you will come across what you should be able to do at the end of each study unit. So, you can evaluate your learning at the end of each unit to ensure you have achieved the intended learning outcomes. To achieve this goal and to meet the intended learning outcomes, there are suggested texts stipulated in the various modules and units in the study material. Do not ignore. You can also print or download the text and save in your computer, android or any other external drive.

The conclusion tells you the subject matter of the unit, which indicates the knowledge that you are taking away from the unit. Unit summaries are recaps of what you have studied in the unit. The references/further readings are other study materials like journals, encyclopedia, books etc. that were either used in the cause of preparing this study material, or not used but could be of help in enhancing further what you have studied in this material.

There are two main forms of assessment—the formative and the summative. The formative assessment will help you monitor your learning. This is presented as in-text questions, discussion fora and self- Assessment Exercises. The summative assessments would be used by the university to evaluate your academic performance. This will be given as a Computer Based Test (CBT) which serves as continuous assessment and final examinations. A minimum of two or a maximum of three computer-based tests will be given with only one final examination at the end of the semester. You are required to take all the computer- based tests and the final examination.

COURSE MATERIALS

Your course materials include: the study units in the course, the recommended textbooks and the exercises/assignments provided in each unit.

STUDY UNITS

There are seven (8) modules and thirty-two (32) study units in the course. These are:

MODULE ONE: PHILOSOPHY OF LAW IN PERSPECTIVE

Unit 1: Nature and Meaning of Law
Unit 2: Feature and Characteristics of Law
Unit 3: The importance of the Law
Unit 4: Understanding the Philosophy of Law

MODULE TWO: THEORIES OF LAW

Unit 1: Natural Law
Unit 2: Legal Positivism
Unit 3: Legal Realism
Unit 4: Sociological Jurisprudence

MODULE THREE: LEGAL REASONING AND LEGAL RESPONSIBILITY

Unit 1: Philosophical Perspectives of Reason in Human Affairs
Unit 2: Legal Reasoning in Judicial Process
Unit 3: Theories of Legal Reasoning
Unit 4: Between Scientific Reasoning and Legal Reasoning
Unit 5: Legal Responsibility and Legal Reasoning

MODULE FOUR: PUNISHMENT AND RESPONSIBILITY

Unit 1: What is Punishment?
Unit 2: Forms of Punishment
Unit 3: Theories of Punishment

MODULE FIVE: RIGHT AND JUSTICE

Unit 1: Understanding the meaning of Right
Unit 2: Philosophical Development of Right
Unit 3: Hohfeld's concept of Right
Unit 4: Modern Theories of Rights

MODULE SIX: JUDICIAL PRECEDENT

Unit 1: What is precedent?
Unit 2: Precedents and Operation of the Courts
Unit 3: Types of Precedents
Unit 4: Advantages and Disadvantages of Judicial Precedents

MODULE SEVEN: MUST WE ALWAYS OBEY THE LAW?

Unit 1: What is Political Obligation
Unit 2: Theories of Political Obligation
Unit 3: Laws as Generally Commanding Obedience
Unit 4: Reasons for Obligation to the Law

MODULE EIGHT: RELATIONSHIP BETWEEN LAW AND MORALITY?

Unit 1: What is Morality
Unit 2: What is Law
Unit 3: Relationship Between Law And Morality
Unit 4: Critique of the Arguments on the Relationship Between Law and Morality

SET TEXTBOOKS

The following books are recommended for the course:

a. Martin P. Golding & William A. Edmundson, (2005). ed, *The Blackwell Guide to the Philosophy of Law and Legal Theory,* London: Blackwell Publishers.
b. Wacks, R. (2006). *Philosophy Of Law: A Very Short Introduction*, Oxford University Press.
c. Simonton, J. W., (1902). "On the Origin and Nature of Law", *The Yale Law Journal ,* Vol. 11, No. 4.
d. Hart, H.L.A. (1961). *The Concept of Law*, Oxford: The Claredon Press.
e. Austin, J. (1995). *The Province of Jurisprudence Determined*, ed. Wilfrid E. Rumble, London: Cambridge University Press.
f. Wandell, O. H., (1996). *The Path of Law,* London: Cambridge University Press.
g. Njoku, F.O.C., (2007). *Studies in Jurisprudence: A Fundamental Approach to The Philosophy of Law*, 2nd, Edition Owerri: Claretian Institute of Philosophy, 2007
h. Uzomah, M. M. (2018). *The Concept of Law: An Ontological Conceptualization of Law.* Kafanchan: De-Young Printing Press
i. Haaga, P.T. (2020). "Law As A Normative System in Joseph Raz's Philosophy of Law", *Amahihe: Journal of Applied Philosophy,* Vol. 18, No. 6.
j. Finnis J. (1980). *Natural Law and Natural Rights,* Oxford: Oxford University Press.
k. Irving M. Copi and Carl Cohen, (1990). *Introduction to Logic* 8d., New York: Macmillan Publication Company, 1990.
l. T. Honore, *Responsibility and Fault* (Hart Publishing 1999). See also HLA Hart and T Honore´, Causation in the Law (2ndedn, Clarendon 1985) xlii, lxxvii
m. MacComick, N. (1978). *legal Reasoning and Legal Theory,* Oxford: Clarendon Press.

n. Uduigwomwn, F. A. (2010). *Studies in Philosophical Jurisprudence,* 3rd Ed, Calabar: Ultimate Index Book Ltd.
o. Rapheal D.D. (1976). Problems of Political Philosophy, London: MacMillian Press Ltd.

ASSIGNMENT FILE
The details of assignment that you are expected to submit to your tutor for marking will be communicated to you. These assignments will count towards your final mark in this course. Necessary information about the assignment is contained in the Assessment File and in the Course Guide.

PRESENTATION FILE
The presentation schedule included in your course materials gives you the important dates for the completion of tutor-marked assignments and the dates to attend tutorials. Remember, you are required to submit all your assignments by the due dates. You should guard again falling behind your work.

ASSESSMENT
There are two segments of assessment. They are: Tutor-Marked Assignment (TMA) and a written examination.

You are expected to submit your assignment to your tutor as at when due for 30% of your total course mark. While a final three hour examination accounts for 70% of your total course work.

SELF- ASSESSMENT EXERCISES

There are twenty one (21) tutor-marked assignments in this course that you are expected to submit to your tutor. The best four (i.e. the highest four among them) will be counted. The total mark for the best four assignments will be 30% of your total score.

The assignment questions for the course are contained in the assignment file. You should be able to complete your assignments from the information and material contained in your textbooks, reading and study units. However, you are advised to use other references to broaden your viewpoint and provide a deeper understanding of the subject.

When you have completed each assignment, send it along with tutor-marked assignment (TMA) to your tutor. Make sure that each assignment reaches your tutor on or before the deadline given in the assignment file. If you cannot complete your work on time, contact your tutor before the assignment is due to discuss the possibility of an extension.

FINAL EXAMINATION AND GRADING
The final examination for PHL 462 (Philosophy of Law) will be two-hour duration valued at 70% of the total grade. The exam will reflect the type of question for self-testing, practice questions and tutor marked assignments and will cover the entire course.

You are advised to revise the entire course after studying the last unit before you sit for the examination. You will find it useful to review your tutor marked assignments and the comments of your tutor on them before the final examination.

COURSE MARKING SCHEME

The table below shows how the actual course score is broken down.

Assessment	Marks
Assignments 1-28	Twenty eight assignments, best four of the assignments count as 30% of the course marks.
Final examination	70% of overall course marks
Total	100% of total course work

COURSE OVERVIEW

COURSE OVERVIEW

The table below brings the units together along with the number of weeks you should take to complete them, and the assignment that go with them.

S/N	Title of Work	Week's Activity	Assessment (end of unit)
	Course Guide	1	
1.	Nature And Meaning of Law	1	Assignment 1
2.	Characteristics And Features of The Law	2	Assignment 2
3.	The Importance of Law in the Society	3	Assignment 3
4.	Understanding the Philosophy of Law	4	Assignment 4
5.	Legal Naturalism	5	Assignment 5
6.	Legal Positivism	6	Assignment 6

7.	Legal Realism	7	Assignment 7
8.	Sociological Jurisprudence	8	Assignment 8
9.	Legal Reasoning and Legal Responsibility	9	Assignment 9
10.	Legal Reasoning in Judicial Process	10	Assignment 10
11.	Theories of Legal Reasoning	11	Assignment 11
12.	Scientific Reasoning and Legal Reasoning	12	Assignment 12
13.	Legal Responsibility and Legal Reasoning	13	Assignment 13
14.	What is Punishment?	14	Assignment 14
15.	Forms of Punishments	15	Assignment 15
16.	Theories of Punishment	16	Assignment 16
17.	Understanding the Meaning of Right	17	Assignment 17
18.	Philosophical Development of Right	18	Assignment 18
19.	Hohfeld's Concept of Right	19	Assignment 19
20.	Modern Theories of Rights	20	Assignment 20
21.	What Is Precedent?	21	Assignment 21
22.	Judicial Precedents and Operation of the courts	22	Assignment 22
23.	Types of Precedents	23	Assignment 23
24.	Advantages and Disadvantages of Judicial Precedents	24	Assignment 24
25.	What is Political obligation?	25	Assignment 25
26.	Theories of Political obligation	26	Assignment 26
27.	Laws as Generally Commanding Obedience	27	Assignment 27
28.	Reasons for obligation to the law	28	Assignment 28
29	What is Morality?	29	Assignment 29

30.	What is Law?	30	Assignment 30
31.	The Relationship between Law and Morality	31	Assignment 31
32.	Critique of arguments on the Relationship between Law and Morality	32	Assignment 32

HOW TO GET THE MOST FROM THIS COURSE

Study units replace the Lecturer in distance learning. This enables the students to read, study and work through the study materials with ease. This study is structures in such a way that learning is made easier for the student who studies and cross checks what he/she studies through assignments and suggested textbooks.

TUTOR AND TUTORIALS

There are eight hours of materials provided in support of this course. You will be notified of the dates, time and locations of these tutorials along with the names and necessary information about your tutor and the tutorial group.

Your tutor will read, mark and comment on your assignment and will be of assistance to you where necessary. All necessary information about your tutor will be made available to you.

SUMMARY

Philosophy of Law exposes students to the rudiments of thinking about law and all the issues raised by legal philosophers as well as how these issues have been dealt with.

MODULE ONE: PHILOSOPHY OF LAW IN PERSPECTIVE

INTRODUCTION

This module is made up of four (4) study units. The first addresses the meaning and nature of law, the second explains the idea of Philosophy of Law, Units three outlines the characteristics of Philosophy of law and four focuses on the importance of law.

UNIT ONE: NATURE AND MEANING OF LAW

Contents

1.1. Introduction

This unit covers the meaning, origin and development of the concept of law. It begins with an overview of the term law, continues with the explanation of what Philosophy of law is, and it further outlines the functions of law in a civil society.

1.2. Intended Learning Outcome (ILOs)

By the end of this course, you will be able to:

1. To attempt a conceptualisation of law.
2. Identify the features and characteristics of law
3. Explain the importance of law in the society.
4. Identify the different schools of thought in philosophy of law

1.3. Nature and Meaning of Law

The question regarding the nature of law has occupied a very core stage jurisprudence and philosophy of law in the modern era, and it has been the central occupation of contemporary analytic Jurisprudence. This entry in the legal theory aims to give an overview of the "what is law" debate. Historically, the answer to the question, "what is Law" is thought to have two competing answers (Wacks, 2006: 9-10). The classical answer is provided by natural law theory, which is frequently characterized as asserting that there is an essential relationship between law and morality and the modern answer is provided by legal positivism, which as developed by John

Austin, who asserted that law is the command of the sovereign backed by the threat of punishment (Wacks, 2006: 12).

The nature of law is classified in different categories: firstly, it is used to mean “legal order”. It represents the regime of adjusting relations and ordering conduct by the systematic application of the force of organized political society. Secondly, law means the whole body of legal precepts which exists in a politically organized society. Thirdly, law is used to mean all official control in a politically organized society **(**Definition of Law, its kinds and classification, 2022). The question, “what is law” is thought to have two competing answers. The classical answer is provided by natural law theory, which is frequently characterized as asserting that there is an essential relationship between law and morality and the modern answer is provided by legal positivism, which as developed by John Austin, who asserted that law is the command of the sovereign backed by the threat of punishment (Wacks, 2006: 11-12).

1.3.1. Exploring the origin of law

The word "law," with its plural "laws," is used in many different senses, some more or less closely related, and some almost totally opposite. Sometimes there is an ethical sense, as when we say the moral law, or the laws of morality, or the law of nature. In others there is rather the idea of uniformity of cause and effect, of like conditions producing like results, as when we say the laws of trade, the laws of political economy, the laws of history, the laws of health, and others of like nature (Simomton, 1902: 195). One theory of the nature and origin of municipal or civil law is that it is a series of commands addressed by a superior to inferiors. Thus, Blackstone tells us it is "a rule of civil conduct prescribed by the supreme power in the state, commanding what is right and prohibiting what is wrong." Of this it may be said in the first place that it is not at all a definition of "law," but only of "a law," an Act of Parliament, of Congress, of the Legislature; a definition of what was called by the Romans lex and not a definition of jus.

Another theory is that law originates in custom, or as expressed that, "Our unwritten law-which is the main body of our law-is not a command or body of- commands. but consist of rules springing from social standard of justice or from the habits or customs from which that standard has itself been derived; that law is custom and opinion" (Simomton, 1902: 195). Also, there can be no doubt that the law is often evidenced by custom and that the courts frequently decide cases in accordance with the custom found to exist among those engaged in the particular business with respect to which the question arises.

1.4. Summary

In this unit, students have been exposed to the basic elements of the meaning and nature of law. Also, the origin of the term law has been explored and this has been connected with the reality of law.

1.5. Conclusion

As a conclusion, the unit underscores the fact of the difference between law and religion and that the idea of law often differs from one religion to another. Also, the classical answer is provided by natural law theory, which is mostly characterized as asserting that there is an essential relationship between law and morality.

Self- Assessment Exercises

1. …….....asserted that law is the command of the sovereign backed by the threat of punishment (a) Joseph Raz (b) John Austin (c) Jeremy Bentham
2. The …….. frequently decide cases in accordance with the custom found to exist among those engaged in the particular- jurisdiction. (a) courts (b) judge (c) people

1.6. Reference and Further Reading

1. "Definition of Law, its kinds and classification", (2022). Retrieved at https://www.studocu.com/in/document/panjab-university/llb/definition-of-law-and-classification/6265563
2. Martin P. Golding & William A. Edmundson, (2005). ed, *The Blackwell Guide to the Philosophy of Law and Legal Theory,* London: Blackwell Publishers.
3. Simonton, J. W., (1902). "On the Origin and Nature of Law", *The Yale Law Journal* , Vol. 11, No. 4.
4. Wacks, R. (2006). *Philosophy Of Law: A Very Short Introduction*, Oxford University Press.

1.7. Possible Answers to Self-Assessment Exercises

1 Self-Assessment Exercise 1(b) John Austin
2. Self-Assessment Exercise 2 (a) Courts

UNIT TWO: CHARACTERISTICS AND FEATURES OF THE LAW

2.1. Introduction

This unit shall explore some of the basic features and characteristics that makes law enforceable and unique in the society.

2.2. Intended Learning Outcome (ILOs)

By the end of this course, you will be able to:

1. Articulate the position that law emanates from a sovereign.
2. Explain the idea that law is backed with constitutional coercive powers.
3. Explain how the law has territorial limitations.
4. Clarify the dynamic nature of law.

2.3. Features of Law

One amongst the features of law entails that it must continue to evolve in order to stay up with society. And since law is a social science, it advances and changes along with societal changes. New social developments bring about new issues. Law is a principle and set of rules that are established in a community by a certain authority and that apply to its citizens, whether it takes the form of legislation or of customs and policies that are acknowledged and upheld by state authority. It is any guideline for behavior and covers all norms that serve as confirmation for behavior. It refers to a collection of laws that the government has created and is enforcing. Law emanates from a sovereign; it is backed with the constitutional coercive powers, and it is dynamic in nature.

(Nkrumah Prempeh Anita), Concept and Features of law, https://www.slideshare.net/Lawkneu/concepts-features-of-law.

2.3.1. Law emanates from a Sovereign: Bentham was the first legal philosopher to analyse what is law. He divided his study into two parts: (a) Examination of Law as it is- *Expositorial Approach*– Command of Sovereign. And (b) Examination of Law as it ought to be- *Censorial Approach*– Morality of Law (Zhai, 2017: 525-526). Law is either seen as a command made by a superior; pronouncement made by a judge in court; or rule put in place to accord with natural justice. It comes from a higher authority which has the powers to make such law who is where a sovereign authority.

2.3.2. Laws are Backed with the Constitutional Coercive powers: The laws made by the state are backed by the state's coercive powers to enforce same and the state enforces laws by meting sanctions on defaulters and rewarding compliance to such laws made by it. The coercive powers of the state to mete out punishment is one of the features of laws that differentiates it from mere rules made for moral guidance. Any law that has been made is bound to be obeyed as disobedience to such laws will attract penal sanctions from the state. The state is not only seized with the powers to make laws but also has the power to ensure compliance to such laws. Any law that does not have such state backing is not a law per se but a mere rule of moral obligation as disobedience to such rules attracts no penalties. Hart (1961: 95). refers to this, as "secondary rule of adjudication". Besides identifying the individuals who are to adjudicate, such rules will also define the procedure to be followed.

2.3.3. Law is Dynamic in Nature: Change is constant, and it is a natural phenomenon which cannot be done away with. A law is not static, though it changes over time to attend to the present need, realities, and aspirations of the people it is meant for. Laws are made for purposes of social enhancement, well-being and wholistic development of a people (Haaga, 2010: 68-69). A law which does not meet these requirements of social engineering and development is as good as a bad law and should be discarded according to the naturalists. Similarly, a law that stifles growth and development of a people should be discarded. To further buttress this point, Hart (1961: 95) presents the case for the type of rules operational in law. First, Hart casts our minds back to primitive societies without legislature, courts, or officials of any kind. One of these defects is the static character of rules. He argues that "to remedy this defect in its simplistic form of social structure consists in supplementing it with the' rule of change'. The simplistic form of such a rule is that which empowers an individual or body of persons to introduce new

primary rules for the conduct of the life of the group or some class within it, and to eliminate old rules.

2.3.4. Law is Normative in Character: The purpose of law is to allow some actions to criminalise some other actions. This feature of law is best described as being normative; it prescribes the dos and donts of the society. An example of law prohibiting an action can be found in the provision of S. 319 of the Criminal Code which prescribes the death penalty for the act of murder. Another example of the law prescribing actions can be found in S.143 of the Constitution of the Federal Republic of Nigeria 1999(as amended) which provides for the procedure to be followed in the removal of the president from office by the legislature.

Self- Assessment Exercises

1. The three (3) features of law are ……. (a) laws are of Justice, laws have fairness and laws are equitable (b) law emanates from a sovereign, laws are backed with the constitutional coercive powers and law is normative in character.

2.3. Summary

The unit focused basically on the characteristics/features of law and four basic features are identified. These features are meant to highlight what the core elements of law are and to highlight the fact that law emanates from a sovereign; it is backed with the constitutional coercive powers, it is both normative and it is dynamic in nature.

2.4. Conclusion

While there could be other features of law, these four are very important because these are indispensable to articulating what law is. It is paramount to note that, it is a body of rules. It is man-made, it is normative in character and finally, it has an element of coercion.

2.5. Reference and Further Reading

1. Constitution of the Federal Republic of Nigeria 1999(as amended)
2. Hart, H.L.A. (1961). *The Concept of Law*, Oxford: The Claredon Press.
3. Kelson, H. (2002). *Introduction to the Problems of Legal Theory*, Oxford University Press.
4. Korkunov, N. M. (1992). *General Theory of Law*, New York: The Macmillan Company.
5. Ward, Ian, (1998). *An Introduction To Critical Legal Theory*, London: Cavendish Publishing.

6. Zhai, X. (2017). ‘Bentham's Exposition of Common Law’, *Law and Philosophy* Vol. 36, No. 5.

2.6. Possible Answers to Self-Assessment Exercises

1. Self- Assessment Exercises 1. (b) law emanates from a sovereign; laws are backed with the constitutional coercive powers and law is normative in character

UNIT THREE: THE ROLES OF LAW IN THE SOCIETY

Contents

3.1. Introduction

This unit shall outline the fundamental role law occupies in our society. It outlines the importance of because it acts as a guideline as to what is accepted in society, which without it there would be conflicts between social groups and communities.

3.2. Intended Learning Outcome (ILOs)

1. Explain the role of law as defending individuals from evil
2. Identify the purpose of law as a means for peaceful coexistence
3. Describe the central dimension of law to protect every citizen in the society

3.3. Significance of Law in the Society

The law is significant because it serves as a standard for what is permitted in society. There would be disputes between social groupings and communities in the absence of the law. It is crucial that we adhere to them. Changes in society can be easily adapted to thanks to the law. Through its direct influence on society, law has a significant indirect impact on social change. An illustration would be a law establishing a mandatory schooling system. On the other hand, legislation also frequently interacts indirectly with fundamental social institutions in a way that indicates a direct connection between law and social development. Law influences societal evolution and modernization. It also reveals the level of societal complexity. In addition, the upholding of our faith in the traditional panchayat system and the outlawing of the abominable customs of untouchability, child marriage, sati, and dowry are typical examples of how laws have influenced social transformation in the nation. Law is a powerful tool or agency that plays a

key role in enacting social change nationwide or in a specific area. Below are some of the roles law plays in the society.

3.3.1. Defending individual from evil: The first and most basic function of law is to defend us from evil – that is, those who would seek to harm us for no good reason. This function of law underlies 20th century developments in International Law such as the Nuremberg Trials and the creation of the International Criminal Court.

3.3.2. Promoting the common interest and good: Law is not just concerned with bringing evil people to account for their actions. A community made up of people who bear no ill-will to anyone else and are simply concerned to pursue their own self-interest needs law because there are situations where if everyone pursues their own self-interest, everyone will be worse off than they would have been if they acted differently.

3.3.3. Resolving disputes and conflict over limited resources: As it were, in most communities there are always disputes over who should have what of a limited number of resources. At this juncture, law is needed to resolve these disputes, as exemplified and evidenced by some realities in conflict management.

3.3.3. Encouraging individuals to always do the right thing: It was thought even from classical times that law performed a fourth function – that of encouraging and helping people to do the right thing. To state further, Aristotle argued that people needed the discipline of law to habituate them into doing the right thing, from which standpoint they could then appreciate why doing the right thing was the right thing to do.

Self-Assessment Exercises

1. The most basic function of law is to ……. (a) Promote the common interest (b) resolving disputes (c) defend us from evil
2. ……. argued that people needed the discipline of law to habituate them into doing the right thing (a)Aquinas (b) Aristotle (c) Hans Kelsen

3.4. Summary

As a summary, the importance of law as has been discussed include: Defending individual from evil, Promoting the common interest and good, Resolving disputes and conflict over limited resources, Encouraging individuals to do the right thing.

3.5. Conclusion

These points underscore what makes law indispensable to the very existence of a society. Basically, law ensures order in any society.

3.6. Reference and Further Reading

1. Ward, Ian, (1998). *An Introduction To Critical Legal Theory*, London: Cavendish Publishing.
2. . Korkunov, N. M. (1992). *General Theory of Law*, New York: The Macmillan Company.

3.7. Possible Answers to Self-Assessment Exercises

1. Self-Assessment Exercises 1:(c) defend us from evil
2. Self-Assessment Exercises 2:(b) Aristotle

UNIT FOUR: UNDERSTANDING THE PHILOSOPHY OF LAW

CONTENTS

4.1. Introduction

This unit shall focus on explaining the imperative of legal philosophy or philosophy of law with reference to the society. The perspective of some philosophers shall also be explored.

4.2. Intended Learning Outcome (ILOs)

1. Explain the concept of the Philosophy of law
2. Articulate the diverse view of philosophers on law

4.3. Conceptualizing the Philosophy of Law

The term "jurisprudence" comes from the Latin phrase *juris prudentia*, which translates to c" As the use of Latin indicates, the philosophy of law. The study of law in philosophy is situated in the area of philosophy called philosophy of law or Jurisprudence. the philosophy of law belongs to

the philosophy of practical reason. Practical reason, and thus the philosophy of practical reason (philosophical because considering the problems of practical reason in their full universality), seeks to make reasonable the deliberations and choices by which human persons shape their freely chosen actions and thus shape also themselves and their communities. Legal Philosophy or Philosophy of law is a branch of philosophy and jurisprudence that seeks to answer basic questions about law and legal systems, such as "What is law? What are the criteria for legal validity?", "What is the relationship between law and morality? and many other similar questions. According to Finnis (2014:133-142), Philosophy of law is part and parcel of ethics. Its foremost task is to comprehend "the existing laws in terms of their inner or rational correlation." As it were, the most prevalent form of philosophy of law is that it seeks to analyze, explain, classify, and criticize entire bodies of law, ranging from contract to tort to constitutional law (W/Gebriel & Mohamed, 2008: 38).

4.3.1. Philosophy and Philosophers Perspective of Law

There are differs perspective of by the various scholars. According to Kant the concept of law and right is something derived exclusively from pure reason. "The jurist has to discover the true sources of all that can be called law and right exclusively in pure reason. And in doing so he lays the foundation of a possible positive legal order**.**" (Capps. and Rivers, 2018: 267-268).). Law and right as such "are the sum total of those conditions by which the free moral will of one person can be reconciled with the free moral will of another person according to a universal law of moral freedom. Hegel conceived law as the objective form, as well as the product of the dialectical evolution and unfolding, of the Idea of right and just. It is, in the final analysis, the product of the "universal spirit" (Gesamtgeist). A truly philosophical science of law has the "Idea of law and right" for its foremost object (Hoffheimer, M. H. 1992: 30-31). Law is an attempt to "comprehend the State and the legal order as being something eminently rational." "Law signifies "the existence of being in general -- the existence of a free will." It is "freedom conceived as an idea," Law is founded on the Idea of the morally free and individual human personality and it signifies the unfolding and realization of the Idea of freedom within society.

Arendts defines law and right as “an aggregate of rules which determine the essential relations of man living in a community, law and right exist for the sake of liberty”. ((Torre, M. L., 2013:420).

According to Schopenhauer "injustice" is primary to "justice." Injustice is "the invasion of the boundaries of the affirmative will of another." "Therefore, law signifies "the negation of injustice or lawlessness." The purpose of law is "intimidation in order to prevent wrongful acts." (Baptista, et al., 2021:196-197). The jurist attempting to philosophize about the meaning of law and right must be aware that, in doing so he is rather a philosopher than a jurist. Legal philosophy does not necessarily concern itself with legal concepts, but rather with the Idea of law and right. From the perspective of the legal Positivist Command Theory, Austin states that, 'a law is a command which obliges a person or, persons, and obliges generally to acts or forbearances of a class" or a "course of conduct". (Austin, 1995: 89). For Oliver H. Wendell, Jnr, law is 'a prediction of what courts will do: "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law. Hence, a legal duty "is nothing but a prediction that if a man does or omits certain things, he will be made to suffer in this or that way by judgment of the court" (1996: 48-49). Quoting H.L.A. Hart, Haaga (2019: 68-69) affirms that, what is law is the most controversial question attended to in the history of legal theory. And these various shades of the responses given to this question are what make it more complex. While critiquing Austin's Command theory and Oliver Wendell's what officials do about disputes and prophesies of what the court will do, Hart asserts that law is the union of primary and secondary rules of obligation. Primary rules require human beings to do or abstain from certain actions, regardless of whether they wish to or not (hence they are content-independent reasons for action). They impose duties. Why secondary rules allow human brings to introduce new primary (Hart, 1961: p. v).

Self- Assessment Exercises

1. Philosophy of law is a branch of philosophy and jurisprudence that…….. (a) seeks to answer basic questions about law and legal systems (b) addresses issues on morality and conscience (c) interrogate the well-being of a people

4.4. Summary

As it is appropriate, this unit identified the meaning of the philosophy of law and how philosophy relates with the philosophy of law. The key point to note is that the philosophy of law is consideration of the basic element of the law from a philosophical standpoint.

4.5. Conclusion

In conclusion, the philosophy of law, which is also referred to as jurisprudence, is a very fundamental aspect of the study of law. That the philosophy of law, or legal philosophy,

examines and analyses the law in general, as well as legal institutions, systems, and principles. In particular, it examines the law's relationship with other systems and philosophical areas, such as politics and political philosophy, economics, and ethics.

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4.7. Possible Answers to Self-Assessment Exercises

1. Answers to Self-Assessment Exercises 1(a) seeks to answer basic questions about law and legal systems.

MODULE TWO: THEORIES OF LAW

INTRODUCTION

This module consists of four (4) units. The first unit explicates the doctrine of the natural law otherwise known as legal naturalism. The second unit exposes the legal positivist's theory of law. Unit three consists of discourses on the legal realist's scientific conceptualization of the meaning, nature and essence of law. And the last unit, unit four discusses the sociological school of jurisprudence.

UNIT ONE: LEGAL NATURALISM

CONTENTS

1.5. Conclusion
1.6. References and Further Reading
1.7. Possible Answers to Self-Assessment Exercises

1.1. Introduction

This unit explains Legal naturalism as the philosopher's account of the meaning, nature, validity and essence of law. It is an explanatory model that holds that there is an intrinsic relationship between law and morals; and this is referred to as *the inseparability thesis*. It holds that morality is the foundation and seat of legal validity and the justification for legal obligation.

1.2. Intended Learning Outcome (ILOs)

At the end of this unit, students should be able to:

1. Discuss the basic tenets of legal naturalism
2. Articulate the foundations of legal validity and obedience
3. Know the nature of the relationship between law and morals

1.3. Meaning of Natural Law

The idea of natural law originates from the belief that there is a "rational order" in nature, "which can provide intelligible value statements" that are "independently of human will, universal in application, unchangeable in their ultimate content and morally obligatory on mankind (Sigmund, 1971: viii). For Njoku, the concept "natural law" is frequently used as equivalent to the laws of nature, and laws of nature refers to the order which governs the entire physical universe. Natural law theory seeks to explain law as a phenomenon of social necessity based on the moral principles that derive from man's rational nature (2007: 39). There are basic principles of natural law, according to Messner (1965: 13) , namely: to preserve moderation, act in a way befitting human dignity; do not do to others what you do not wish them to do to you (golden rule); render to each their due (justice); do not repay good with evil (gratitude); keep your pledge word (fidelity); obey lawful authorities (obedience).

Among the Roman jurists, natural law referred to those instincts and emotions common to humans and the lower animals. These include the instinct of self-preservation and love of offspring. In its strictly ethical significance, the natural law is a rule of conduct which is essentially prescribed to us by the author of nature in the constitution of the nature of humanity (Uzomah, 2018: 9-10). It is important to note that natural law is otherwise known as moral law

and it is imperative here to explain that the moral laws of nature are called natural law for two reasons: (i) it is enshrined in our very nature; and (ii) it is manifested to us by the purely natural medium of reason (Uzomah, 2018: 49-55). Njoku (2007: 40-41) further identified, the five presuppositions of Natural Law theory which involves:

1. Natural law is based on value judgments which emanate from some absolute source, and which are in accordance with man's rational nature.
2. Value judgments express objectively ascertainable principles, which govern the essential nature of persons.
3. The principles of natural are immutable, eternally valid and can be grasped by the proper employment of human reason.
4. These principles are universal and when grasped they must overrule all positive law, which will not truly be law unless it conforms to natural law.
5. Law is a fundamental requirement of human life in society.

1.3.1. The Natural Law and the Human Law

The central thesis or tenet of the natural law doctrine is the view that law and morals are essentially or intrinsically interconnected. The moral laws of nature (morality) are the ultimate norms and inexorable and fundamental ingredient of the human law. And if law is grounded in morality and justice, then law, justice and morality enjoys internal relation that cannot be severed, therefore, law and morality are inseparable. This means that law and morality are inextricably linked (Uzomah, 2018: 64-69).

Consequently, law and morality is a unity, such that consideration of objective values is crucial in the definitions or conception of law. Law and morality have the same object in view: the making of good and virtuous citizens and creation of a free and fair community where justice and equity would prevail (Uzomah, 2018: 64-69). In fact, positive law mimics the objective of the moral laws which is to create order and harmony within created beings and to keep humans focused to their final end that is, happiness. Natural law theorists may say that if a law is not moral there is no obligation to obey it.

Self-Assessment Exercises

Attempt these exercises to test what you have assimilated thus far. This exercise should not take you more than five minutes.

1. There are basically two dimensions of the natural law. (a)True (b)false
2. The dual perspectives of the natural law confer what on humans? (a) Human Dignity (b) Naturality (c) Human conciseness

1.4. Summary

The natural law theory is the oldest and one of the main schools of jurisprudence. The theory is considered by most legal theorists as the philosopher's account of law, hence it is called philosophical jurisprudence. This school of jurisprudence holds that the task of the legal scholar must not stop at just describing or analysing the mean, nature and validity of law rather it must most importantly extend to the appraisal or critique of law.

1.5. Conclusion

The theory of natural law is quite contentious and controversial, yet it is one of the most formidable, persistent and sustainable legal theory. It upholds that humans are universally endowed with inherent moral codes that define the rightness and wrongness of human actions. These moral codes are precepts of reason ordained to be the foundation and validity of positive laws. So, any law that violates these moral codes should strictly not be considered as law.

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1.7 Possible Answers to Self-Assessment Exercises

1. Answers to Self-Assessment Exercises 1(a)True

2. Answers to Self-Assessment Exercises 1(a)Human dignity

UNIT TWO: LEGAL POSITIVISM

CONTENTS

2.1. Introduction

Legal positivism is a direct opposite and objection to legal naturalism. It rejected the belief in the inseparability of law and morals, instead it contended that law and morals are separate and separable. This theory defends what is known as the *separability thesis.*

2.3. Intended Learning Outcome (ILOs)

At the end of this unit, students should be able to:

1. Define legal positivism.
2. Explain the inseparability thesis.
3. Identify the difference between legal naturalist's and the legal positivist's normative jurisprudence.
4. Analyse J.L. Austin's theory of law and H.L.A Hart's analytic jurisprudence

2.3. What is Legal Positivism?

The term, "legal positivism" refers to essentially the attitude of mind and spirit which regard as valid laws, only such enforceable norms formerly enacted or established by appropriate official political organ (Okafor, 1992: 90). Although, the doctrine of legal positivism is not monolithic there are however, some central issues that gives its versions appreciable unity. Ndubuisi et al (2007: 114), highlights them to include:

> The argument that it is epistemologically vacuous and unintelligible to associate a positive law with a priori or metaphysically recognize ideals. That there exist no closeness or affinity between law and extraneous moral ideals. That law is posited by authority as autonomous should not be compared with any metaphysical "ought" or standard.

Based on the excerpt above, for the positivists, formal criteria of law's origin, law enforcement and legal effectiveness are all sufficient for social norms to be considered law. This movement therefore holds that law and morality are poles apart, even when a law is unjust it remains valid because morality and justice are separate and separable from law. So even if the said law contravenes the precepts of natural law and its inherent natural justices, even if it is morally repulsive or reprehensive, it remains a valid and binding law (Uzomah, 2018: 79).

All strands of positivist thinking have being categorized under legal positivism. These include legal formalism, the utilitarian theory of law, the command or imperative theory of law, and, normative theory of law. This module focuses only on the command or imperative school and the normative school.

i. Legal Positivism and the Separability Thesis

The separability thesis constitutes the core and general claim of legal positivism. According to Idowu, the jurisprudential dimension of the "is-ought controversy centres on whether law and morality are necessarily related? Does law consist of deductions from the moral laws of nature? (101). In reaction to this hot water, the nationalist holds that law, morality and justice are an inseparable unity. That is the connection between law and morality is logical, necessary and absolute. Contrary to the naturalist position, the legal positivist holds that law and morality are separate. The "is" appear differently from the "ought", the law that "is" exists whether it conforms to a standard of morals or ethics, that is a system of "ought" is another thing. The lawgiver is not in any way constrained by some perceived metaphysical moral standards or values. Although law and morals may mix yet they are poles apart.

Self-Assessment Exercise 1

Attempt this exercise to measure what you have learnt thus far. This exercise should not take you more than five minutes.

1. For legal positivists, laws and morals are conceptually and logically ---------- and -----
   (a) Distinct and valid (b) Sacred and separate (c) Separate and Separable.
2. According to legal positivists, only enforceable norms formerly enacted or established by appropriate official political organ are ---------- (a) valid laws (b) invalid laws (c) justified laws.

2.3.1. The Command School

The command school is otherwise known as the pedigree or imperative school. "The command or imperative theory of law is associated with the utilitarians, who did not only perceive law as

utility or social fact, but a command of those in authority. In this regard, law is an authoritative absolute rule. It cannot be questioned nor criticized. (Ndubuisi et al, 128). Law is authoritative and must be obeyed" (irrespective of its moral standing) (ibid). The central argument of the command theory is that the legitimacy of the authority from which proceeds is conclusive of the question of legal obligation and validity. There are two outstanding exponents of the Command/Imperative, they include, Jeremy Bentham and John Austin.

i. Jeremy Bentham's Utilitarian Jurisprudence

The command or imperative school was inaugurated by Jeremy Bentham (1948-1832). Bentham who was an early and staunch supporter of the utilitarian concept in the tradition of Hume is seen as the father of legal positivism. He views law essentially as a command issued by a sovereign to his subordinates, or by a superior to his inferiors who owes him a habitual obedience. Habitual obedience as used here may be understood as, a firm and ready and unalloyed obedience (Uzomah, 2018: 81). Command law then is a law that is issued from a superior intelligent being to inferior intelligent beings with a command of necessary obedience. In other words law is a dictate from a super-ordinate to subordinates. Bentham sees positive law as nothing but an absolute imperative that demands unconditional obedience.

It is important for you to note here that Bentham's command theory of law was targeted towards the defense of absolute authority, power or sovereignty and he was motivated by the works of Hobbes and Hume. In tandem with the mind-sets of these two great modern philosophers, Bentham posited that the sovereign or any legal person acting on delegated authority enjoys absolute sovereignty, and he is not limited by some perceived morality or laws of nature. In Bentham's (cited Ndubuisi et al, 2007: 114) opinion, law is not something imposed on the sovereign such as the natural law; rather, he enacts the law by his volition. He brings into law whatever he considers appropriate or expedient. He is not obliged to admit into his laws, ideals or values that are external to that which he himself thinks should be the object of law.

As to the contentious relations of law and morals, Bentham posited that law and morality do not have internal relation or connection, If they have any connection whatever, it must be contingent. He (1970: 1) says: "We must remove from the province of law, psychological and ethical factors which fix on one hand what they can do, and on the other hand, what it can widely try to do".

ii. John Austin's Jurisprudence

Austin modified Bentham's command theory by adding the concept of "sanction". He conceived law as a command backed up by sanction. In Austin's view sanction is an integral part of the command that gives it the envisaged attention. Like his mentor, Bentham, Austin asserted that law in the strict sense is what is set up by political superiors to political inferiors, he (1954: 158), writes: Positive laws or laws strictly so-called are established directly or indirectly by authors of three kinds: by monarchs, or sovereign bodies, as supreme political superiors; by men in a state of subjection, as private persons, in pursuance of legal rights. But every positive law, or every law strictly so-called is a direct or circuitous command of a monarch or sovereign member to a person or persons in a state of subjections to its authority. In this broad description, it is noticeable that Austin considered two sorts of command as positive law: general command and particular command. He also differentiated general command from particular commands. He asserted that general command properly so-called is law per se, because it is a rule backed up by sanction, that is, it is a coercive rule. So, direct and circuitous commands are general commands, and they stand for the entire law of the state (Uzomah, 2018: 84).

Postulating on the relation of law and morals, Austin's central contention is that law as it "is" and law as it "ought" to be are two different things. In other words, he holds that the existence of law is one thing, its moral dimension or consideration is another thing entirely. Hear him speak, "the existence of law is one thing, its merit or demerit is another. Whether it be or be not conformable to an assumed standard is a different inquiry. A law which actually exists, is a law, though we happen to dislike it, or though it varies from text by which we regulate our approbation and disapprobation" (1954: 24). This implies that an inquiry into law should focus on law as posited by the legislator, it should be an objective study devoid of any subjective consideration, and law as it 'is' should not be subjected to any form of evaluation.

Self-Assessment Exercise 2

Attempt this exercise to measure what you have learnt thus far. This exercise should not take you more than five minutes.

1. Do you think that for Austin, sanction is an essential validating element of law? (a)True (b)False
2. Bentham's theory of law was aimed to defend the ---------- of political figures of his time. (a) sovereignty (b) absolute authority or power (c) kingdom

2.3.2. The Normative School

It presents a normative approach to the study and concept of law and it is concerned with what ought to happen in an entirely different way to metaphysical propositions (Doherty, 32). It is not concerned with the ethical or metaphysical norms the naturalists opined to be the substantial element that confers legality on law; legal norms that regulate behaviour and conduct of all the society. Law as social fact principally has to do with systems of rules detailing the oughts of human conduct. Law is a normative concept because it prescribes how a society and its people are expected to conduct their affairs. The two outstanding exponents of the normative account of law in the tradition of legal positivism are Hans Kelsen and H. L. A. Hart.

i. Hans Kelsen's Pure Theory of Law

In the "Pure Theory" of law, Kelsen sort to establish that law is a pure or clean concept. In this sense, any inquiry or study of law should be devoid of any external interference-no metaphysical, moral, psychological or sociological element should be imported that may hinder a good and proper understanding of law (Uzomah, 2022: 151-180). This makes it imperative for the separation of legal science from political science because they differ substantially.

The focus of Kelsen's approach to the study of law was to establish how positive laws are validated, but in an entirely different way from metaphysical consideration. In this light, he perceived law as a normative proposition detailing or pronouncing what should happen within a legal system (Doherty, 1999: 3). Contrary to Austin's position, Kelsen negated the view that sanction is a necessary element of law, he rather argued that sanction is optional to law, because whether or not the judge or law enforcement agents applies sanction, the law remains the law.

In the spirit of legal positivism, Kelsen disparaged the "naturalist fallacy" which evaluates the validity of law with justice. He contended that coercion is a weapon of law which has forged, but is not the basis of law. Although law is a command, the aim of which is to do justice, such command is still good law, even if it fails to do justice" (Uzomah, 2022: 151-180). Since neither justice nor coercion is the ground of law, on what then is law grounded? Reacting to this issue, Kelsen argued that the validity of law is necessarily located in terms of other higher laws from which it is derived. Within a given legal system there are hierarchy of laws and at the apex of this hierarchy is a basic law that acts as the first and ultimate validating factor of the entire legal system. He referred to this basic norm as the *grundnorm*. The *grundnorm* performs the function of validating all other norms within a legal system. It is not itself validated by another; and each

legal system has a basic norm. And this basic norm is presupposed, assumed or it is a hypothetical assumption that does not owe its existence to any real legal or political authority.

ii. H. L. A. Hart's Descriptive Sociological and Analytic Jurisprudence

Hart's most famous work is the Concept of Law, first published in 1961, and with second edition (including a new postscript) published posthumously in 1994. The book emerged from a set of lectures that Hart began to deliver in 1952 and it is presaged by Holmes lecture, "Positivism and the Separation of Law of Morals" delivered in Harvard Law School (Hart, 1961, v). Hart in the preface to his *concept of Law* presents the case of that the work is "an essay in analytic jurisprudence". For it concerned itself wit the clarification of the general framework of legal thought rather than with the criticism of law and legal policy (Haaga, 2019, 64-65).

His analytic study of law sought to present an essay of descriptive sociology and analytic jurisprudence. He provided an explanation to a number of traditional jurisprudential questions such as what is law? Must laws be rules and what is the relationship between law and morality? In his unique way, and against the tradition of the "Pure Theory", in order to do justice to these philosophical problems, he situated law into a social context (Uzomah, 2018: 94-95). Haaga further states that, in Hart's opinion, what is law is the most controversial question attended to in the history of legal theory. And these various shades of the responses give to this question are what make it more complex. As such so many simplistic answers have been given to the above question. Some in his opinion say that the law is "what the officials do about disputes" (2019: 65). He (Hart) also considered law as a normative social phenomenon grounded in normative social facts. His legal thesis consists of the synthesis of the "Pedigree thesis which asserts that legal validity is a function of certain social facts, and the separability thesis which claims that law and morality are conceptually and logically distinct.

Hart expressed a profound believe that societies need systems of rules according to their level of development respectively. In this regard, he came up with the idea of primary and secondary rules. The primary rules are those of obligation, which state what must or must not be done. These are power conferring or duty imposing rules. For instance, these rules are to be found in criminal law. Hart indicated that the primary rules are needed concerning the free use of violence, theft and deception and other vices to which human beings are inclined to, but which they must, in general repress if they are to coexist in close proximity to each other.

The secondary rules are power conferring rules (rules of conduct). These rules are addressed to officials to administer primary rules. According to Hart, these rules operate in societies according to the level of sophistication of the legal system. He explained that what ultimately distinguishes societies with full blown systems of law from those with only rudimentary or primitive forms of law is that the former have, in addition to first, secondary meta rules that have as their subject matter the primary rules themselves.

In a nutshell, Hart opined that every legal system is composed of primary and secondary rules. He defined law simply as the amalgam of the primary and secondary rules. These legal rules remain valid laws irrespective of their moral nature. He asserted that it could not follow from the mere fact that a rule violated standards of morality that it was not a rule of law, and conversely, it could not follow from the mere fact that a rule was morally desirable that it was a rule of law (1957: 599). Hart concludes that although the validity of law and the obligation to obey law do not depend on the moral nature of law, yet every law ought to have at least a modicum or an iota of morality for it to command general acceptance. Collaborating with Hart, Raz substantially agrees with his search for an independent account of a legal system. However, he alleges that there are functions of law, which cannot be taken care of by Hart's explanation of law (Haaga, 2020: 116).

Self-Assessment Exercise 3

Attempt these exercises to measure what you have learnt thus far. This exercise should not take you more than five minutes.

1. The central argument of legal positivists regarding the relations of law and morals is known as ----------(a) inseparable thesis (b) autonomy thesis (c) separability thesis.
2. Hart defined law simply as the amalgam of the …….. and …… rules (a) simple and complex (b) primary and secondary (c) known and unknown

2.4. Summary

Summarily, legal positivism stands as the most formidable opposition to the natural law theory of law. It is a philosophy of law that lays emphasis on the analytic and conventional nature of law as socially constructed. It states that, law is something "posited", it is synonymous with positive norms that are made by legislators.

2.5. Conclusion

Legal positivism is the scientist's descriptive and analytic account of law. It sees law as something posited or constructed; and as such a proper approach to the study of law is the

approach that isolates law from extra legal principles like morality, religion, politics, metaphysics, etc. therefore, whether or not a piece of law adheres to the dictates of morality or reason, it remains a valid law obliging the unconditional obedience of all within its jurisdiction.

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2.7. Possible Answers to Self-Assessment Exercises

1. Answers to Self-Assessment Exercises **1** (c) Separate and Separable. (a)valid laws.
2. Answers to Self-Assessment Exercises **2:** (a) True. (b) absolute authority or power.
3. Answers to Self-Assessment Exercises **3:** (c) separability thesis. (b) primary and secondary

UNIT THREE: LEGAL REALISM

CONTENTS

3.1. Introduction

In line with the basic tenet of realism, realists emphasize the independence and real existence of law. They postulate that the proper approach to the study of law should be to extricate all forms of extra-legal infiltrations or considerations that blur the concept of law.

3.2. Intended Learning Outcomes (ILOs)

At the end of this unit, students should be able to:

1. Define legal realism
2. Outline and explain the basic assumptions of legal realism
3. Compare and contrast the American and Scandinavian versions of legal realism.

3.3. What is Legal Realism?

As a movement, realism believes that law is what obtains in the courts and activities of the judges (Njoku, 2007: 141). And as the name indicates, this school takes a 'realist' view of law and insists on the de-mythologizing or demystifying of law. Legal realism is based on the basic tenet of the philosophical school of thought championed by the ancient philosopher Aristotle. Unlike idealism, legal realists see the physical universe and objects as have real and independent existence. Based on this understanding, legal realism takes a 'realist' view of law and it says in the study of law we should pay active attention on the law as it works in reality in human society rather than as it is in law books.

To achieve this, legal realists insist on the de-mythologizing or demystifying of law and a consideration of laws as independent rules. This school strong discourages the allowance of extra-legal sentiments and delusions into the province of law. Legal realism is simply states that, let us be realistic, there is actually nothing mystical or mysterious about law. If this is the fact, why do people present law as if it is a reality shrouded in mystery? Why do people import values external to law into the province and study of law? External infiltrations into the conceptualization of law distort a proper understanding of the real meaning, nature and functions of law. Therefore, we must see law for what it really is in terms of its practical function in the society.

Self-Assessment Exercise 1

Attempt these exercises to measure what you have learnt thus far. This exercise should not take you more than five minutes.

1. Legal realism strongly emphasises that law as a realistic entity must be ----------(a) unifying (b) univocal (c) demystify.
2. The assertion that extra-legal factors should be avoided in the study and analysis of law is what legal realists share with other members of legal naturalism? (a)True (b) False

3.3.1. American Legal Realism

The founder and typical representative of the American legal realism is Oliver Wendel Holmes (1849-1935) who was a judge of the supreme court of America. He deplores the confusion between law and morality in jurisprudence. He believed strongly that this confusion obscures our understating of law. Why should law be fused with morality? He insists on their separation if we are to understand law. Holmes believes that the best way to view law is from the standpoint of an immoral man who cares only for the consequences which such knowledge enables him to predict. This led Holmes to see law only in terms of sanction. For him, law is essentially a systematize prediction, that is, a prediction as to what will happen to a person if he performs certain actions or if he does certain things. He succinctly defines law thus:

> The prophecies of what the courts will do in fact, and nothing more pretentious, are what i mean by law.

Law enables us to predict the kind of punishment that would be inflicted on a person who does certain thing. Hence, "The object of our study of law is prediction of the public force through the instrumentality of the courts" (Uzomah: 2017: 17). According to him, to say that a person has a legal duty to do anything is to predict that if he fails to do it he will be forced to suffer this way or the other way as shall be pronounced and imposed by a court of competent jurisdiction. For Holmes, there is nothing like natural law, nor is there any room for the concept of natural justice in his theory. Law in his theory does not impose any obligation on man. People only obey law because of the fear of the evil consequence already (predicted by the law and subject to the interpretation of the court) they may suffer should they act contrarily to the provisions or dictates of the law (Holmes, 1881: 137).

Contributions of American Legal Realism

a. The realists have corrected the excess of conceptualism in proving that the decisions of judges in many cases are not pure exercises in logical deduction.
b. It creates an awareness of personal and intuitive factors such as reason, sentiments and passions on the part of judges in the course of performing their judicial functions.
c. It recognizes the avowed duty of the judiciary in the interpretation of law but equating the rules as interpreted to be the real laws.
d. It brings into focus sociological factors that play significant rules in shaping and redefining the nature and essence of law.
e. Realism also emphasis the need for the judges to be acquainted with all aspects of the law to be able to perform their functions adequately.
f. It rightly draws attention to the need to exercise juridical restraint in the interpretation of public policy that underlies the law.
g. It emphasis the importance of the application of the findings of the behaviorists to the study of law and for the greater benefit of the society.
h. It also put forward and analyzed the various techniques for predicting judicial behavioural especially in the appellate courts. This was the gravamen of Schubert realists theories (Akomolede, 68-69).

Self-Assessment Exercise 2

Attempt this exercise to measure what you have learnt thus far. This exercise should not take you more than five minutes.

1. In line with Holmes view, law is a prediction that envisages and instructs judges on what sanction to pronounce when articles of law are infracted? (a)True (b) False
2. One of the main contributions of legal realism is that it brings into focus --------- factors that play significant roles in shaping and redefining the nature and essence of law. (a) Sociological (b) Canonical (c) Economical

3.3.2. The Scandinavian Legal Realism

The Scandinavian version of legal realism was developed in the second half of the 19th century. It is best associated with Karl Olivercrona. The positivistic character of this theory of law is informed by its insistence that law consists of a system of fact-based imperatives. In this regard, it has no connection with moral norms outside itself since it is distinct from other forms of rules of behaviour. Olivercrona holds that, “in reality, the law of a country consists of immense mass

of ideals concerning human behaviour, accumulated during centuries through the contributions of innumerable collaborators. These ideas have been expressed in imperative forms by their originators, especially through formal legislation, and are being preserve in the same form in books of law. In this regard, Olivercrona takes law to be the accumulated experience of the people over a span of time, and this relates to social facts that are legislated into law.

The imperative nature of law enables the people to internalize law and obey it habitually. It is suggestive of the belief that the reality of law is informed by the imprint it makes in the minds of those who are obliged to obey it. As Omoregbe (1997:126) reintegrates, for the Scandinavian legal realists: "law as such has a powerful grip on the minds of people that it becomes a reality in their minds. It is this psychological effect it has on the minds of people that constitute the essence of law rather than the process by which it is passed or the authority from which it emanates".

Unlike Hart, for Olivercrona the official status of law or the process by which it is made is not what induces people to obey it. Unlike Austin, he does not believe that people obey law simply on the ground that it has being issued by an unlimited authority. For Olivercrona, the most important thing is that law is an imperative prohibition of certain behaviour which the people psychologically absorb and manifest in a cause-and-effect relation. In other words, law when internalized by the people, teaches them how to live a good life. By implication, law possesses an internal morality which men learn about the very moment it is classified as an imperative entity.

Self-Assessment Exercise 3

Attempt this exercise to measure what you have learnt thus far. This exercise should not take you more than five minutes.

1. Olivercrona takes law to be the ---------- of the people over a span of time. (a) entitlement (b) engagement ((c) accumulated
2. The view that the object of our study of law is prediction is associated to Olivercrona. True or False? (a) true (b) false

3.4. Summary

From the foregoing analysis, it is apt to say that legal realism attempted to demonstrate the concrete existence and independence of law from extra legal principles like ethical norms, metaphysical postulations, religious precepts, psychological fantasies, etc. For legal realists only this approach is capable of establishing the proper and clear meaning, nature and validity of law.

3.5. Conclusion

Legal realism is the realist and common sense account of law based on the functional essence of law. It is more or less an account of law that situates the social essence of law at the core of their conceptualization of law

3.6. References and Further Reading

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3.7. Possible Answers to Self-Assessment Exercises

1. Answers to Self-Assessment Exercises **1:** (c) Demystify (b) False
2. Answers to Self-Assessment Exercises **2:** (a) True. (a) Sociological.
3. Answers to Self-Assessment Exercises **3:** (c) accumulated (b) False.

UNIT FOUR: OTHER SCHOOLS OF JURISPRUDENCE

CONTENTS

4.1. Introduction

Sociological jurisprudence is simply a legal reasoning that takes sociological approach towards the study of law. It considers law from the perspective of its evolution from social facts and its social functions. It was a major aspect of twentieth century jurisprudence.

4.2. Intended Learning Outcome (ILOs)

At the end of this unit, students should be able to:

1. Analyse sociological jurisprudence.
2. Discuss the basic assumptions of sociological jurisprudence.
3. Articulate the main idea of sociological jurisprudence.

4.3. What is Sociological Jurisprudence?

Sociological jurisprudence is the legal reasoning that views law as the principal method of social control. This school employs sociological methods in the study of law. This school developed as a synthesis to the thesis and antithesis of legal positivism and natural law postulations (Adaramola, cited in Akomolede, 2008: 37-39). This school argues that while positive laws are a means of social control such laws must be constantly fine-tuned to meet the interests and evoke positive changes in the society. Thus, any law that fails to serve the interest of the society that it is meant to regulate cannot be law strictly so called.

To encapsulate the nature of sociological jurisprudence, Doherty (1999: 37-39), outlined Pounds's (a prominent legal sociologist) programme for sociological jurisprudence to include;

1. Study of the actual effect of legal rules, doctrines and institutions.
2. Sociological study as the basis for law-making
3. The approach aims to improve the effectiveness of laws.
4. The study of the jurisprudential method.
5. A sociological legal history; study of the social background and social effects of legal institutions, legal rules, doctrines and institutions.
6. Recognition of the importance of individualized solutions of individual cases.
7. In English-speaking countries, a ministry of justice.

One of the prominent exponents of this sociological account of law is Max Weber, one of the leading scholars in sociology.

i. Max Weber (1864-1920)

Weber was the first person to introduce systematic sociological studies to legal studies (Doherty, 1999: 37-39). He wanted to understand capitalism and other major features of western society, and to this end he stressed the development of bureaucracy and the role of legal professionals. In contrast to Marx, he does not see systems as driven by economic forces

(Doherty, 1999: 37-39). As a means to understanding legal institutions, he suggested that there were different forms of authority. These include:

i. Charismatic authority, where a leader is followed, as in a revolutionary situation.

ii. Traditional authority, as in a system based on autocracy.

iii. Rational legal authority, where power rests with the system or office or institution.

Besides distinguishing between various forms of authority, Weber also outlined what he described as the typology of law. These include:

i. Substantively rational

ii. Substantively irrational

iii. Formally rational

iv. Formally irrational.

This legal reasoning rejected the postulation of naturalism that an ultimate theory of values can be found. Rather, it projects and exposes relativism which it sees as socially constructed with no natural or divine guide or intervention. It does not subscribe to idea of the uniqueness of law as canvased by the positivists but insists that law is one of the methods of social control. It's most paramount concern is social justice and how best it can be achieved in society.

Self-Assessment Exercise 1

Attempt this exercise to measure what you have learnt thus far. This exercise should not take you more than five minutes.

1. What approach was adopted by sociological jurisprudence in the study of law? (a) Sociological (b) Historical (c) Divine
2. Law could be simply defined as a ----------. (a)A mechanism for social control (b) A class of engagement (c) a body of knowledge

4.3.1. Historical Jurisprudence

The historical school of jurisprudence is a reaction to the natural law thinking of the 18th century (Lloyds cited in Akomolade, 22008, 48). It is a theory that attempted to establish the historical development of law as necessarily linked to humans' historical evolution and struggle to survive in the society. Historical jurisprudence suggests that understanding the past will be a guide to the future. It is a reaction against natural law theory with an emphasis on roots, custom and stages of development (Doherty, 1999, 58). Historical jurisprudence relied upon a mystic sense of unity and organic growth in human affairs and drew a lot of impetus from the Romantic Movement which was part of the surge of the human mind against the classical and rationalistic standards of the 18th century in favour of feeling and imagination (Lloyds cited in Akomolade, 2008, 48). It

began as an artistic and interface movement in favour of feeling and imagination and speedily developed a mystic sense of the organic growth of human institutions and the mysterious invisible forces which propel or move the society (Lloyds, 1981, 251).

Regarding the basic thesis or postulations of historical and anthropological schools of jurisprudence, J. M Elegido asserted that, "the gravamen of the historical approach lies in her insistence on the existence of a link or relationship between law and the historical past especially in relation to the values and norms of such past (Akomolade, 2008, 49). According to Akomolede, "it seeks to answer the question as to how much norms of the present time have been influenced by the historical past. It emphasis the connection between law and other aspects of the culture of the people and further insisted that it is necessary to investigate the antecedents of the present law in the past to be able to fully understand it. It should be noted that the historical and anthropological schools of jurisprudence developed and were popularized in Germany (49). The basic factor that leveraged the growth and development of the historical school of jurisprudence in Germany was the total rejection of natural law and general discontentment with analytical positivism of the period.

4.3.2 Anthropological Jurisprudence

The anthropological school of jurisprudence is a legal theory that emerged in the late 19th and early 20th centuries, and it is based on the idea that the study of law should be approached from an anthropological perspective, that is, through the lens of cultural and social anthropology (Shabbir, 2017, 7). The anthropological school sought to understand the law as a product of culture, and to explore the ways in which legal systems vary across different cultures and societies.

Anthropological school of jurisprudence asserts the cultural and historical context in which law arises and functions. This perspective sees law as a dynamic and evolving system that is shaped by the beliefs, customs, and traditions of a particular community. The anthropological school of jurisprudence emphasized the importance of studying the customs, traditions, and social practices of different cultures, and how these influence the development and application of law. Anthropologists such as Franz Boas and Bronis law Malinowski argued that legal systems are deeply embedded in their cultural contexts, and that understanding the social and cultural factors that shape law is essential to understanding how legal systems function (2014, 156).

The anthropological school of jurisprudence also challenged the idea that Western legal systems were inherently superior to those of other cultures. Instead, it emphasized the need for a more comparative approach to legal studies, one that recognizes and values the diversity of legal systems across different cultures and societies.

Self-Assessment Exercise 2

Attempt the following study question to test your understanding of the foregoing discussion. This exercise should not take you more than five minutes.

1. ---------- Jurisprudence has also been criticized for its perceived relativism and for its tendency to downplay the role of law in promoting social justice and individual rights. (a)Feminist (b) Anthropological (c) Historical
2. The historical and anthropological schools of jurisprudence developed and were popularized in Africa. (a)True (b)False.

4.3.2. What is Feminist Jurisprudence?

Feminist jurisprudence is a philosophy of law based on the political, economic and equality of the sexes. As a field of legal scholarship, feminist jurisprudence began in 1960 (www.law.connell.edu/wex/feministjurisprudence). Feminist jurisprudence consists of the scientific or systematic study and appraisal of the concept, nature and essence of law from the feminist perspective or through the lens of feminism. It is a critical approach to the study of law aimed towards exposing and explicating the role or contribution of the law towards the perceived generational denigration, oppression and dominance of women.

According to Feminists legal jurists, "The logic, language nature and structure of law are male created and reinforces male values. They argue that by presenting male characteristics as the 'norm' and female characteristics as 'deviation'. From the norm, the prevailing notion of law reinforces and perpetuates patriarchal power" (Connell, 2017, Online). Based on this token, feminist jurisprudence could be significantly described as, a critique of gender stereotypes and hierarchies codified in positive laws in the legal system. Gender based stereotypes constitute the bane of the unjustifiable disparities and discriminations prevailing in workplaces, power relations, role differentiation etc.

Feminist jurisprudence generally is a theory that sought to dismantle the positive legal barriers that had denied women equal opportunity with men. The theory behind these goals stems from the belief that the rights of individuals as traditionally understood in liberal society should transcend gender differences. Owing to this belief, Michael posits that, for the feminist, "law is

seen as an 'instrument to change the distribution of power', whose regimes not equal treatment but 'an asymmetrical approach that adopts the perspective of the less powerful group with the specific goal of equitable power sharing among diverse groups (cited in Uzomah, 2017, 485). Going by this definition, feminist jurisprudence aims at power devolution or decentralization of power. In this spirit, feminist jurisprudence becomes a political activism and engagement aimed at wrestling power from those (men) who have unjustly arrogated the same to themselves.

Self-Assessment Exercise 3

Attempt this exercise to test what you have assimilated thus far. This exercise should not take you more than five minutes.

1. Feminist jurisprudence is the brainchild of --------- and ---------- (a) Lawyers and judges (b) law and morality (c) Feminism and Gender Studies.
2. Feminist jurisprudence seeks for the political, social, economic and cultural equality of the sexes through the instrumentality of ----------. (a) Society (b) Law (c) Public

4.4. Summary

This unit discussed other schools of jurisprudence that are the two major and opposing schools of jurisprudence. Moreover, these other school, especially sociological, historical and anthropological jurisprudence also opposed the natural law fussing of law and morality, though in a milder fashion. However, feminist jurisprudence apparently aligned with the natural theory that projects justice as an essential factor that validates law.

4.5. Conclusion

The most significance of sociological jurisprudence is that it emphasized the social function of law as a mechanism for social control. Moreover, the theory also highlighted the dynamic nature of law, thereby stressing the need for the continual reformation of law to reflect and accommodate social changes and needs.

4.6. References and Further Reading

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3. Douzinas C. et al. (1994). *Politics, Postmodernity and Critical Legal Studies,* London: Routledge.

4.7. Possible Answers to Self-Assessment Exercises

1. Answers to Self-Assessment Exercises **1:** (a) Sociological (a) A mechanism for social control (b) A class of engagement (c) a body of knowledge
2. Answers to Self-Assessment Exercises **2:** (b) Anthropological (b)False.
3. Answers to Self-Assessment Exercises **3:** (c) Feminism and Gender Studies. (b) Law.

MODULE THREE: LEGAL REASONING AND LEGAL RESPONSIBILITY

INTRODUCTION

This module is made up of four (4) study units. This unit will generally address the process of legal reasoning as the careful thinking by a judicial officer while resolving legal issues presented by a party to a legal action before his court for determination. It will also explain the specific duties imposed on persons as personal obligation known as legal responsibility.

UNIT ONE: PERSPECTIVES ON THE ROLE OF REASON IN HUMAN AFFAIRS CONTENTS

1.1. Introduction

This unit engages the discourse regarding the role of reason in human affairs. It will articulate the position of the proponents that reason plays a role in human affairs and those who berate the role of reason and extol that of sentiments.

1.2 . Intended Learning Outcome (ILOs)

By the end of this course, you will be able to:

1. Articulate the role of reason in human affairs.
2. Identify the position of the proponent that denial the role of reason in human affairs.

1.3 Reason and Human affairs

According to Herbert A. Simon, 'the ability to apply reason to the choice of actions is supposed to be one of the defining characteristics of our species'. The judge often makes judgement about human affairs, there are claims that s/he reasons about it whatsoever the outcome of the judgement is. Though, not so many schools of thought accept such claim; hence the interrogation: does reason play a role in human affairs? Opinions are divided between those who think that reason plays a role in human affairs and those who berate the role of reason and extol sentiments (Njoku, 2007: 249).

1.3.1. The Refusal of the role of Reason in Human Affairs

According to Njoku, there are those who think that the role of reason is not significant in human affairs. Thomas Hobbes holds that men are fundamentally selfish and ruled by emotions (Njoku, 2007: 249). Moral judgments are based on a person's feeling; according to him, right and wrong, good and bad are not in the nature of things but passions of the mind (Hobbes, 1651: 119). For Bernard Mandeville (1670-1733) does not think that men have always been social. According to him, morality is a deliberate intervention of the society, a product of "some victory great or small over untaught nature." He said, it is men's nature to cover (Mandeville, 1989: 109-110). Hume agrees with the view that morality is a societal invention, for its own use. He accepts, to a large extent, the influence of self-love in our acting. He argues that reason operates only upon given premises against which we ascertain the conclusion that follow from them. Passion and sentiment are what move people into action; "moral excite passions and produce or prevent actions (Hume, 1978: 469-470).

1.3.2. Affirmation of the role of Reason in Human Affairs

Contrary to the preceding discourse, some scholars argue that reason has always been regarded to have a hand in directing human affairs or the state. In Book 4 of the *Republic*, Plato gives the doctrine of the tripartite nature of the soul. The soul has three parts namely, the rational courageous/ spirited, and the appetitive parts. The rational part (the highest element) distinguishes humans from lower animals. Plato seem to give the rational part of the soul more fundamental and primary role in man (Plato, 325d-369a2). Collaborating with Plato, Aquinas affirms the role of reason in action. Human action is the combined effect of the intellect and the will; hence law is an ordinance of reason promulgated by one who has care for the community

(Aquinas, 1981: II,q. 91 a.1). Nicholas Malebranche holds that reason is the word or wisdom of God himself. He explains further that, man is a rational creature, and through reason we can discover relations of ideas as well as that of morality, which means that morality or human affairs can be demonstrated; this will mean that, there are rational law to which moral conduct must conform. Thomas Reid rejects Hume's reduction of source of action to mere impulse or animal reactions. One of the first principles of operation of the mind is reason. He believes that reason cannot be ignored in human conduct. Our rationality is manifested in our adherence to general principles; for example, no acts of violence ought to be perpetrated on human beings save in certain justifying or excusing circumstances (Reid, 1983:152). Also, John Finnis critiqued Hume's inability to realize that reason plays a great role in human affairs. He opines that people are motivated by what they know. That which the intellect considers as true, the will goes for it (1980: 47).

Self-Assessment Exercises

1. The proponents that argued that moral judgments are based on a person's feeling…. (a) affirm the role of reason in human affairs (b) refuse the role of reason in human affairs.
2. Scholars that argued that man is a rational creature, and through reason we can discover relations of ideas confirms the……. (a) the role of reason in human affairs (b) refuse the role of reason in human affairs

1.4. Summary

This unit has been focused on making a case for the role of reason or otherwise in human affairs generally. This is with a view to setting the tone for establishing the place of reason in legal processes as an aspect of human affairs. The devise proponent hold that reason cannot be ignored in human conduct and there are those who think that the role of reason is not significant in human affairs, as such moral judgments are based on a person's feeling, right and wrong or good and bad are not in the nature of things but passions of the mind.

1.5. Conclusion

The unit considered the argument for and against the role of reasoning in human affairs, but the general consensus is that reason plays a primary role in human affairs.

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6. Njoku, F.O.C., (2007). *Studies in Jurisprudence: A Fundamental Approach to The Philosophy of Law*, 2nd, Edition Owerri: Claretian Institute of philosophy, 2007.
7. See Plato, *Epistle Letter VII*, 325d-369a2.
8. See Reid, T. (1983). *Inquiry and Essays* eds. Ronald E. Beanblossom and Keith Lehrer, Indianapolis: Hackett Publishing Company.

1.7. Possible Answers to Self-Assessment Exercises

1. Answers to Self-Assessment Exercises: 1(b) refuse the role of reason in human affairs
2. Answers to Self-Assessment Exercises: 2(a) the role of reason in human affairs

UNIT TWO: LEGAL REASONING AND DISCRETION IN JUDICIAL PROCESS

CONTENTS

1.1.Introduction

This unit is an attempt to explain the fundamental components of legal reasoning in judicial process. It states that legal reasoning is part of the judicial process that revolves around what judges and courts do in deciding or adjudicating cases.

1.2. Intended Learning Outcome (ILOs)

By the end of this course, you will be able to:

1. To attempt a conceptualisation of legal reasoning.

1.3. What is Legal Reasoning?

The Concise Oxford English Dictionary, 5th edition, defines "reasoning" as "Thinking persuasively in a coordinated, orderly, sensible, and logical manner." The ninth edition of Black's Law Dictionary adds the following definition for "legal": "of or relating to law; falling within the jurisdiction of law." In a sense, the definition of legal reasoning that comes to mind is the skill of persuadingly thinking in a coordinated, ordered, rational, and logical manner in connection to law. Legal reasoning merely focuses on developing one's capacity for legal thought. Legal analysis involves many different elements and considerations.. Legal justification, judicial discretion, precedent, and legislative interpretation are the four main topics that the legal system typically accepts. The emphasis of this article is legal reasoning. A judge renders a decision about civil matters. Few people are willing to accept the notion that he uses reason to think about it, so the question arises: Does reason have any bearing on human affairs? There is disagreement between those who believe that reason has a place in human affairs and others who decry reason's place in society and praise sentiment's (Njoku, 2007: 248-249).

1.3.1. Legal Reasoning in Judicial Process

Legal reasoning is a method of thought and argument used by lawyers and judges when applying legal rules to specific interactions among legal persons in judicial process. Judicial process here simply entails the role of the court in interpreting the provisions of the law and it entails four major themes, namely, legal reasoning, judicial discretion, precedent and statutory interpretation (Njoku, 200:249). It is here that the court gives reason for its legal ruling, and it helps other courts, lawyers, and judges to use and follow the ruling in subsequent proceedings. The judge makes judgement about human affairs and there is a claim that s/he reasons about it. (Njoku, 200:249). Therefore, the ‘argument or analysis’ section of the Judge must be well critically reasoned and written. In fact, most Judges do apply the knowledge of reasoning in every process to arrive at logical conclusions of their judgements or verdict.

1.3.2. Judicial Discretion in Judicial Process

The question if there are really objectivity to questions involving controversial; issues in human affairs such as law and morality? Some persons have maintained that there are no right ways of deciding questions of law and morality because persons simply give their opinion regarding such

issues. The ethical argue that we have no way of justifying an argument as right if we there is no way of establishing or proving it to be right. But for Fuller, there is an inner morality of law that insists that there is a right way of doing things and judgements about human affairs are not purely built on emotion or opinion of individuals. though, not all accept the claim that all judicial judgements are subjective in all cases.

in a situation where there is no clear guide from the rule, the judge may come up with what ought to be the law. When s/he is doing this, s/he is making a new law. This is the claim posited by Hart and the Hartians. According to Hart, there are clear cases where a concept can be applied, and others where it cannot. Thus, there is always an obscurity of uncertainty surrounding any legal concept and this gives the possibility of there being a place for judicial discretion in borderline case (Hart, 1948, 124). Reacting on Hart's submission, Dworkin affirm that there are no gaps in the law, for it is only the theory that claims that law is simply made up of rules that runs into this problem. He insists that the law is made of principles and policies (Dworkin, 1986: 218).

Self-Assessment Exercises

1. Legal reasoning is a method of thought and argument used by…….and……
   (a) Philosophers and moralist (b) lawyers and judges (c) thinkers and critique
2. Legal reasoning merely focuses on developing one's capacity for……. (a) legal thought (b) individual thinking (c) Reason

1.4. Summary

As summary, tis section has defined what legal reasoning is and has also identified the four major themes of legal reasoning.

1.5. Conclusion

The key point to note in this unit is that legal reasoning is the thought pattern that makes up the legal process. It is the kind of thinking that makes legal procedures. Also, that judges decide cases within the context of operation of rules in which multiple considerations are taken on board before one adopts what is taken to be a good reason for a decision.

1.6. Reference and Further Reading

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6. Njoku, F.O.C., (2007). *Studies in Jurisprudence: A Fundamental Approach to The Philosophy of Law*, 2nd, Edition Owerri: Claretian Institute of philosophy, 2007.

1.7. Possible Answers to Self-Assessment Exercises

1. Answers to Self-Assessment Exercises 1(b) lawyers and judges
2. Self-Assessment Exercises 2(a) legal thought

UNIT THREE: THEORIES OF LEGAL REASONING

CONTENTS

3.1. Introduction

This unit advance the discourse on the basic theories and proponents in legal reasoning.

3.2. Intended Learning Outcome (ILOs)

By the end of this course, you will be able to:

1. Identify the core of legal formalism.
2. Explain the legal realism within judicial process.

3.2. Legal Formalism

Legal formalism is a theory that legal rules stand separate from other social and political institutions. According to this theory, once lawmakers produce rules, judges apply them to the facts of a case without regard to social interests and public policy. Christopher Columbus Langdell, he asserted that, the essence of legal formalism is the idea that "a few basic top-level

categories and principles formed a conceptually ordered system above a large number of bottom-level rules. The rules themselves were, ideally, the holdings of established precedents, which upon analysis could be seen to be discovered from the principles" (Grey, 1983: 4-5). In other words, there is a pyramid of rules with a very few fundamental "first principles" at the top, from which mid-level and finally many specific rules could be derived. The legal decision maker, faced with a case to be decided, would study the body of law and discover the rule that determined the correct result.

2.3.3. Legal Realism

Legal realism represents a break in the traditional definition of law. It moves from the emphasis of abstract principles to the idea of law as a body of rules and principles enforced by court; realism concentrate on how law works in practice (Njoku, 200:141). Legal realism arose in opposition to formalism and can be seen as an extension and elaboration of Holmes's early skepticism. Legal realists rejected the formalist ideas that the law was a self-contained logical system providing for the scientific, deductive derivation of the right answer in all new cases. They regarded this view as a vain daydream disconnected from the real-world influences on legal decision makers -hence the label "legal realism (Kalman, 1998: 469-470). ‘Legal Realism." In a strict formalist analysis, two different judges should always judge the same case in the same way unless one of them was mistaken in his understanding of the facts or the law. But the legal realists believed that it was an impossible ideal and that it was a waste of time to strive for it. According to the legal realists, instead of reflecting an abstract set of nearly immutable principles, the law reflects historical, social, cultural, political, economic, and psychological forces, and the behavior of individual legal decision makers is a product of these forces. (Leiter, 2010: 13-14).

The basic views of Holmes and Pound were quite similar - pragmatic and openminded. Pound, however, was a far stronger proponent of an interdisciplinary solution to the problems of formalism. The social sciences were very much on the rise at the beginning of the twentieth century and seemed "progressive" in a way that law was not. Their ideas stretched the imaginations of the more intellectually curious law professors and challenged some of the most fundamental assumptions of the law. (Leiter, 2010: 18).

2.4.Summary

This unit identified two theories of legal reasoning. These are: legal formalism and legal realism. It is these that unit has dealt with.

2.5.Conclusion

In conclusion, it is important to note that what has been termed theories of legal reasoning can also be referred to as stages of legal reasoning and analogy is identified alongside formalism and realism as part of the stages of legal reasoning.

Self-Assessment Exercises

1. …….. is a theory that legal rules stand separate from other social and political institutions. (a) Legal formalism (b) judicial precedence (c) legal realism
2. Legal realism arose in opposition to …….. (a) Jurisprudence (b) Philosophy (c) formalism

2.6. Reference and Further Reading

1. Brian Leiter (2010). "Legal Formalism and Legal Realism: What Is the Issue*?",* *University of Chicago Public Law & Legal Theory Working Paper*, No. 320.
2. Holmes O. W., (1881). *The Common Law in Pragmatism: A Reader ed.,* Louis Menand, New York: Vintage Books, xix
3. Laura Kalman, (1998). 'Legal Realism Now', *California Law Review*, Vol. 76, No. 2.
4. Njoku, F.O.C., (2007). *Studies in Jurisprudence: A Fundamental Approach to The Philosophy of Law*, 2nd, Edition Owerri: Claretian Institute of Philosophy.

3.7. Possible Answers to Self-Assessment Exercises

1. Answers to Self-Assessment Exercises: 1 (a) Legal formalism
2. Answers to Self-Assessment Exercises: 2 (c) formalism

UNIT FOUR: SCIENTIFIC REASONING AND LEGAL REASONING

CONTENTS

4.1. Introduction

This unit shall discuss the theories of legal reasoning. It shall also explain the nexus between scientific and legal reasoning.

4.2. Intended Learning Outcome (ILOs)

By the end of this course, you will be able to:

1. Identify the nexus between legal and scientific reasoning.

4.3. Forms of Legal Reasoning

Forms of legal reasoning are the methods that lawyers use to apply laws to facts in order to answer legal questions. The meaning of a legal rule and how it should be applied are often subject to multiple interpretations. When the meaning of a legal rule is ambiguous, lawyers use legal reasoning to argue for the interpretation that they find most convincing or that is most favorable to their client. The forms of legal reasoning are the tools of the lawyer's trade. The first step in effective legal reasoning is the ability to read a legal rule – such as an article in a code – and figure out how it works. Laws are often written in a way that makes them difficult to understand. Interpretation of the text of a law requires a systematic approach. Although laws take several different forms, all laws have the same fundamental "if/then" structure: if the facts of a case satisfy a set of criteria (the elements), then the law imposes consequences (the results).

4.3.1. Between Scientific Reasoning and Legal Reasoning

According to Llewellyn, legal reasoning is not scientific reasoning, although it shares some analytic strategies, most notably the "method of comparison and difference" (Llewellyn: 1930: 43). In fact, the legal decision maker in an adversarial system is forced to consider at least two competing hypotheses proposed by the parties. In this sense, the judge has some marginal protection against the thoughtless hypothesis confirmation to which scientists occasionally fall prey. This is not to say that judges are immune from hypothesis-confirming biases, only that at the beginning of the process they are forced to consider at least two rival hypotheses. Nonetheless, the judge and the scientist have different tools available to them, different constraints, and different goals" (Llewellyn: 1930: 21-22). Science demands no final decisions; it is an ongoing process. And they can figure out what further research needs to be done to answer the question and do it. Judges can neither reserve judgment nor go beyond the data presented in court. The judge must also decide for one side or the other; the scientist's decision that the truth lies somewhere between the extreme points of view is typically not available to the judge (Ellsworth, 2005: 969-967).

Self-Assessment Exercises

1. The first step in effective legal reasoning is the ability to….. (a) read a procedure (b) read a legal rule (c) investigate the procedure
2. Legal reasoning is not scientific reasoning, although it shares some…… (a) analytic strategies (b) legal mutuality (c) interconnectedness

4.4. Summary

The unit identifies the fact that legal reasoning is different from scientific reasoning and also establishes the nexus between both forms of reasoning.

4.5. Conclusion

Although the law may be said to be scientific, its processes can most times be at variance with scientific ones.

4.6. Reference and Further Reading

1. Ellsworth, P. H., (2005). 'Legal Reasoning' retrieved at: https://repository.law.umich.edu/book_chapters/51.
2. Llewellyn, K.N. (1930). "On what makes legal research worthwhile, *Journal of Legal Education,* Vol. 2. No. 2.
3. Llewellyn, K.N. (1962). *Jurisprudence,* Chicago: University of Chicago Press.

4.7. Possible Answers to Self-Assessment Exercises

1. Answers to Self-Assessment Exercises: 1 (b) read a legal rule
2. Answers to Self-Assessment Exercises: 2 (a) analytic strategies

UNIT FIVE: LEGAL RESPONSIBILITY AND LEGAL REASONING

5.1. Introduction

This unit shall discuss legal responsibility and legal reasoning. It shall advance a discourse on the logicality of legal reasoning.

5.2. Intended Learning Outcome (ILOs)

By the end of this course, you will be able to:

1. Conceptualize the idea of legal responsibility.

2. Identify the possibility of logicality of legal reasoning.

5.3. Legal Responsibility

The idea of legal responsibility, or outcome-responsibility, has become a basic concept of modern theories of tort law. As it were, legal responsibility may be regarded as the foundation of tort liability; yet it is not co-extensive with liability (Honore, 1999: lxxvii;) The right to have and to make decisions concerning the day-to-day care welfare and development of a child is classified as legal responsibility, here both parents are legally responsible for their child, except where: they agree that one parent should have greater or sole responsibility, or a court makes an order that changes their responsibility in a particular matter (Jansen, 2014: 221-252). Another example is, if A is responsible for some harm, s/he may nevertheless not be liable; be it because there was a specific reason justifying the imposition of harm without liability, or because A was excused. Authors like Tony Honore´ therefore describe responsibility as co-extensive with wide notions of causation (Honore, 1999: xiii). Indeed, responsibility does not necessarily presuppose the possibility of acting otherwise: people often accept blame and claim credit for events which are partly the result of bad or good (Williams, 1973: 50).

5.3.1. On the Logicality of Legal Reasoning

In the words of John Griffith in his *Politics of Judiciary*, 'legal reasoning is not logical, it is nothing more than a smoke screen for a political discussion (1997: 11)'. It is obvious that lawyers have a pattern of reasoning since logic deals with pattern of rational thought. Legal reasoning can either be taken to be deductive or inductive. Idealistically, every argument involves a claim that its premises provide *conclusive* grounds for its conclusion. A correct reasoning in a deductive argument is said to be valid; it is invalid when it is incorrect, meaning that the claim it makes about its conclusive ground provided by its premises is not the case (Njoku, 2007: 258). Deductive inferences move from general to particular: an example of a deductive argument is all humans are mortal, Paul is human; therefore, Paul is mortal. In this argument, there is logical necessary conclusion (Paul is mortal) that is drawn from the major premise (all humans are mortal) and the minor premise (Terngu is human).

On the other hand, an inductive argument claims that its premises provide *some* support for the conclusion drawn from its premises. For example: Hiltler was a dictator and was ruthless, Stalin was a dictator and ruthless; Castro is a dictator; therefor Castro is probably ruthless.' The major distinction between a deductive argument and an inductive argument is not so much that the former moves from general to particular and the later from particular to general because an inductive argument may have as well as universal propositions for its premises (Copi and Cohen, 1990: 3). Though, there are actually some degree of common "normative expectation held by the bench and bar of what constitutes relevant and acceptable argument in law upon a given point, that facts already mentioned would lead one to infer that there are shared norms among judges and as between judges and counsel which determine what types of arguments do and ought to carry weight in contested matters of litigation" (MacComick, 1978: 12).

5.4. Summary

The focus of this unit has been on the question of legal responsibility and the logic of legal reasoning. It addresses the relationship if there is any.

5.5. Conclusion

Basically, the logic of legal reasoning can be either inductive or deductive. From these logical forms, normative disposition can also be interpreted in the legal reasoning.

Self-Assessment Exercises

1. A correct…… in a deductive argument is said to be invalid when it is incorrect, meaning that the claim it makes about its conclusive ground provided by its premises is not the case. (a) reasoning (b) philosophy (c) understanding

5.6. Reference and Further Reading

1. John Griffith, (1997). *The Politics of the Judiciary,* London: HarperCollins Publishers; 5th ed.
2. Njoku, F.O.C., (2007). *Studies in Jurisprudence: A Fundamental Approach to The Philosophy of Law,* 2nd, Edition Owerri: Claretian Institute of philosophy, 2007.
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7. Williams, B., (1981). ‘Practical Necessity’ in Moral Luck: Philosophical Papers 1973–1980 (CUP 1981) 124, 130; cf. also his ‘Moral Luck’ in Moral Luck 20; and William ‘Recognising Responsibility’ in Shame and Necessity, University of California Press.

5.7. Possible Answers to Self-Assessment Exercises

1. Answers to Self-Assessment Exercises: 1(a) reasoning

MODULE FOUR: DELINEATING PUNISHMENT

INTRODUCTION

This module consists of four (4) units. Unit one discusses the meaning, nature and essence of punishment. The forms of punishment are explicated in unit two. Unit three examines theories of punishment. And unit four (4) attempts a critique and evaluation of theories of punishments

UNIT ONE: WHAT IS PUNISHMENT?

CONTENTS

1.1. Introduction

Human beings, wherever they are found are capable of erring, as such right from the primitive societies, there have been sanctioning measures put in place to checkmate erring members of the society. Sanctions are commonly known by the name “punishment”. This unit explicates the meaning of punishment and discusses the purposes or functions of punishment.

1.2. Intended Learning Outcomes (ILOs)

At the end of this unit, students should be able to:

1. Define punishment.
2. Articulate the basic rationales that midwifed and justify the concept of punishment.

3. Know the various functions of punishment.

1.3. WHAT IS PUNISHMENT?

The concept of punishment is one term that has attracted the attention of legal and political scientists and as well as philosophers. There is no generally accepted definition of punishment. But there are standing definitions of the term. As it were, *The Black Law Dictionary*, defined punishment as a sanction-such as fine penalty, confinement, loss of property, right, or privileged assessed against a person who has violated the law. Punishment is further defined by this dictionary as a loss of right or advantages as a result of breach of law. This implies that punishment is the reward for the breach of law. Hart also conceptualizes the concept of punishment in terms of the reward for contravening law. He (1968: 47), says, "The pains of punishment will for each individual represent the price of some satisfaction obtained from breach of law". It means that, punishment involves the deliberate infliction of suffering on a supposed or actual offender for an offense such as a moral or legal transgression.

Ferguson and Wright (cited in Uduigwomen, 2010: 266-267), conceived punishment as "the infliction of suffering upon an offender on the grounds of a particular offence and administer by a legitimate authority". There is an important fact asserted by this definition that requires emphatic stress. It must be emphasized that in a civilized society, only legitimate authorities are permitted to punish offenders in order to guide against jungle justice. Apart from seeing punishment in the sense of inflicting pain and suffering on offenders, it can also be seen in the light of deprivation. As a result, punishment could also be defined as "a form of deprivation extrinsically attached to human act of commission or omission perceived as anti-social or a violation of established norms or values of a given society" (Uduigwomen, 2010: 266-267). It is pertinent for you to understand that punishments are part of the law. As a matter of fact, they represent the coercive element of law that ensure or foster compliance with the dictates of law.

Thus, punishment implies paying back, that is, restoring that which one has taken or unjustly gained over others; hence Aquinas says "compensation is made by the distributor to the man to whom less was given that his due, by comparison of thing with thing, when the latter receives so much the more according as he received less than his due: and consequently it pertains to commutative justice" (1981: II-II, q.62,a4c). Traditionally, justification of punishment has largely been by one of the ways namely, utilitarian, deterrence and retributive theory.

1.3.1. Roles of Punishment

The primary and most fundamental essence of law to society is to ensure order through social control and cohesion. In view of this, punishment plays the following roles:

i. Deterrence:

Offenders are punished as escape goats to discourage them and others from committing same crime in the future. In other words, punishment serves the function of deterring people from engaging in wrongdoing in the future (Cesare, 1986: 110). From this, you can see that punishment serves both specific and general function-deters the individual (criminal) as well as all in the society that have criminal intent or tendencies to commit same crime.

ii. **Retribution**

Punishment serves as a tool for revenge. Men and women of goodwill hate crimes and wrongdoings. Whenever there is a crime, people naturally seek for justice in the form of making the criminal suffer some pain or deprivation for the damage caused. Hence, punishment avails individuals who are directly affected and society at large the opportunity to take their pound of flesh from the offender. Therefore, punishment as a retributive tool (an act of vengeance) serves as a mechanism for retribution.

iii. Incapacitation

Another vital function of punishment is that it helps to keep law breakers away from the society through imprisonment or incarnation. Depending on the nature and magnitude of crime committed, courts sentence people to short, long or even life imprisonment. This of course, helps to bring about some level of sanity in the society.

iv. Reformation

The Punishment serves as a tool for the rehabilitation of offenders. It enables criminals change their criminal disposition and refrain from committing the same offence again. It should be noted that if given the opportunity and the right attention, some prisoners are capable of turning a new leave. So, many prisons and remand homes are places of rehabilitation or reformation for offenders.

v. Reintegration

This is another vital function of punishment to human society. This function is otherwise known as restorative justice, and it avails victims the opportunity to be heard from their offenders. It is believed that when criminals feel the effect of their crimes on their victims, they might likely feel remorse and ask for forgiveness.

Self-Assessment Exercises 1
Attempt this exercise to test what you have assimilated thus far. This exercise should not take you more than five minutes.

1. The fear of evil consequences (punishment) induces people to act according to the --- (a) Act (b) Law (c)Judgement
2. When offenders are punished as escape goats to discourage them and others from committing same crime in the future is known as……....(a) Deterrence (b) Retributive (c) rehabilitative

1.3.2. Justification for Punishment

Under this segment, our thrust is to highlight the possible factors about human nature that makes the institution of punishment inevitable in human society.

i. The Law is a Toothless Bulldog without Punishment or Sanction

There is no society or state that can exist without law and there is no law that can be workable without any punishment attached to it. Thus, there is the necessity of punishment in every society. Ever since humans started living in the society, law and sanction which necessarily accompanies it have been ubiquitous. This is because with no prejudice to human rationality, humans have anti-social tendencies and instincts which they share with lower animals; and they sometimes act under the impulses of these instincts. Hence, the sanctions that accompanies law induces individuals to refrain from wrongdoing.

ii. Punishment is Expedient for Deterrence

Deterrence prevents future crime by frightening the defendant or the public. There two types of deterrence which is: Specific deterrence: applies to an individual defendant. General deterrence applies to the public at large. When the public learns of an individual defendant's punishment, the public is theoretically less likely to commit a crime because of fear of the punishment the defendant experienced.

Self-Assessment Exercises 2
Attempt this exercise to test what you have assimilated thus far. This exercise should not take you more than five minutes.

1. Sanction is an essential backup of law in order to make the law compelling. (a) True (b)False?
2. There is no society or state that can exist without…… (a) Court (b) Power (c) Law

1.4. Summary

The forgoing analysis in this unit underscores that punishment is usually imposed by the state on individual criminals or law breakers as some sort of remedy for their offences. The unit also discussed the various roles punishment plays in the society to ensure the rule of law.

1.5. Conclusion

The expository analysis of the concept of punishment in this unit has demonstrated that punishment is the reward of contravening the law. Without the threat of punishment and actual punishment of offenders, the law would have been a toothless bulldog. And when the law lacks coercive force, people might not be compelled to obey law; and when the latter becomes the case, society would be in for real trouble. So, the most fundamental role of punishment to society is that it deters and prevents crimes thereby ensuring the relative security, order and peaceful coexistence.

1.6. References and Further Reading

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1.7. Possible Answers to Self-Assessment Exercises

1. Answers to Self-Assessment Exercises: 1(b) Law (a) Deterrence
2. Answers to Self-Assessment Exercises: 2(a) True (c) Law

UNIT TWO: FORMS OF PUNISHMENTS

CONTENTS

2.1. Introduction

Human acts of wrongdoing vary in degree and form, so various degrees and forms of punishments are prescribed by law as sanctions to remedy them. Of course, a common sense of natural justice demands that since all offences or crimes are not the same in magnitude and degree, so there should be different types and varying degrees punishments. This unit explicates these forms of punishments.

2.2. Intended Learning Outcomes (ILOs)

At the end of this unit, students should be able to:

1. Identify and discuss the various forms of punishment.

2.3. Types of Punishment

In the history of society, there have been various forms of punishment. The most common ones include:

2.3.1. Corporal Punishment

Recall that one of the definitions of punishment above considers punishment as the act of inflicting pain upon offenders, and this actually refers to corporal punishment. The term "corporal" means body, corporal punishment simply refers to the pain inflicted upon the body as a sanction for an offence committed. Every form of bodily pain deliberately inflicted by any legitimate authority on anyone as a recompense for an act of commission or omission is considered a corporal punishment. Some classical corporal punishments include caning, blinding mutilation, stoning, hanging, burning, branding, etc.

2.3.2. Cruel and Unusual Punishment

Cruel punishment is usually gruesome or torturous and extremely demeaning and denigrating. And one of the basic characteristics of this debased form of punishment is that the amount of pain or suffering inflicted on the offender is usually not commensurate with the crime or offence committed. This uncommon and unpopular form of punishment has always been

morally inappropriate and reprehensible, so it is usually disparaged and detested by men and women of goodwill.

Self-Assessment Exercise 1
Attempt this exercise to test what you have assimilated thus far. This exercise should not take you more than five minutes.

1. The major characteristic of cruel punishment is that the amount of pain unleashed on the offender is equivalent to the crime committed. (a)True (b) False.
2. List at least three instances of corporal punishment (a) stoning, burning and branding (b) beating, shooting and killing (c) knifing, hanging and killing.

2.3.3. Cumulative and Deterrent Punishment

One who is familiar with the justice system of Nigeria would be conversant with the terms, "first offender", "second offender" and or "serial offender". First offenders are not usually punished severely, however, when an individual is convicted for the same offence, the court usually increases the severity of punishment. The more an individual gets convicted for same offence, the more the severity of punishment is increased cumulatively.

As it were, the concept "deterrent" means warning or preventive, hence deterrent punishment serves as a warning both to the offender and to others to prevent them from indulging in the act. It is making one an escape-goat for others having similar tendency to see and refrain from committing such act. This sort of punishment is said to have double effect-particularly it deters the offender from repeating same crime and at the same time it generally discourages individuals having similar tendencies against committing same crime to have a change of mind.

2.3.4. Reformative and Retributive Punishment

The teleology of reformative punishment is to make the offender turn a new leave. So, reformative punishment aims to cause a change of heart or character in the offenders. This is why Nigerian prisons are now known as correctional centres. So, reformative punishments are designed to rehabilitate those convicted of crimes and civil offences to offer them the chance to repent from crimes and wrong doings and become better citizens upon the expiration of their jail terms.

One may be correct if s/he considers retributive punishment the opposite of reformative punishment. This form of punishment is retaliatory in nature, and it is targeted towards making

the offer suffer for annoying the society or for insulting the society's collective sense of justice. This is why you can rightly refer to retributive punishment as society's revenge or vengeance.

Self-Assessment Exercises 2

Attempt this exercise to test what you have assimilated thus far. This exercise should not take you more than five minutes.

1. Retributive punishment a punishment that causes the offender pain for infracting society's sense of…….. (a)Pains (b) Justice (c) Law
2. The ultimate function of rehabilitative punishment is to enable wrong doers to become ……. (a) better citizens (b) smart offenders (c) good judges

2.4. Summary

The classical types of punishment are corporal, cruel or unusual, excessive, cumulative, deterrent, preventive, reformative, retributive and non-judicial punishments. Although these forms of punishments are sanctions against offences, yet they serve different purposes.

2.5. Conclusion

The various types of punishments discussed in this unit have always been part of the legal systems of nations. Notwithstanding their differences, their collective goal is to ensure law and order in the society.

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2.7. Possible Answers to Self-Assessment Exercises

1. Answers to Self-Assessment Exercises: 1(b) False (a) stoning, burning and branding.
2. Answers to Self-Assessment Exercises: 2(b) Justice (a) better citizens

UNIT THREE: THEORIES OF PUNISHMENT

CONTENT

3.1. Introduction

There are various theories of punishment which include retributive theory, reformative theory, preventive theory, deterrent theory and expiatory theory. You should note that the various types of punishments discussed in the preceding unit are respectively postulated by these theories of punishment that is the focus of this unit.

3.2. Intended Learning Outcomes (ILOs)

At the end of this unit, students should be able to:

1. Identify the various theories of punishment
2. Know the respective salient ideas that underpin the various theories of punishment
3. Meaningful review the theories of punishment studies in this module.

3.3. Retributive Theory of Punishment

One of the oldest and most basic justifications for punishment involves the principles of revenge and retribution. This equation of punishment with the gravity of the offense is embedded in the Judeo–Christian tradition in the Mosaic laws of the Old Testament that emphasize the idea of "an eye for an eye." The retributive theory of punishment is anchored on the unalloyed believe in human dignity and freedom. Defenders of this doctrine of justice hold that "every normal human being is a rational and moral being who know better those who deserve to be punished" (Geisler, 1989: 212). This theory is like saying, people in the society deserve a free and dignified social intercourse. Therefore, anyone who disrupts this free and dignified community deserves punishment to satiate society's resentment for injustice. The essence of this notion of punishment is to foster order and tranquillity in human community.

This theory of punishment advocates and proclaims the Golden Rule, which enjoins all 'to do to no one what you wish no one done to you'. The theory emphasizes the need for

vengeance. According to Cohingham (1979: 246), retributive theory of punishment is considered "a form of payback for crime one committed".

3.3.1. Reformative Theory of Punishment

Although it may seem contradictory or at least somewhat odd to assert that we punish for the treatment and reform of offenders, this basic principle underlies the rehabilitation purpose of punishment. Here, the ultimate goal of this theory is to restore a convicted offender to a constructive place in society through some combination of treatment, education, and training (Cesare, 1986: 118-119). The philosophy of reformative theory of justice is founded on the principle of humanitarianism and humanism. It prioritizes human life and dignity. Exponents of this theory strongly believe that individual wrong-doers are capable of change and as such deserve a second chance. In this sense, punishments ought to be correctional in nature and should aim to cause change of heart in the offender.

This optimistic philosophy maintains that environmental factors or one's background largely contribute in influencing one into committing a crime. Therefore, to achieve a genuine and sustainable reformation of an offender, factors like age, educational status, upbringing, environment and other germane factors must be taking into close consideration. These factors are necessary to determine the justifiable and appropriate punishment that fosters the needed reformation of the offender. Consequently, defenders of the reformative theory of punishment argued that for the prison system to foster the needed reformation of prisoners, it should be made a comfortable dwelling place.

3.3.2. Deterrence Theory of Punishment

The deterrent value of punishments is directly linked to the characteristics of those punishments. Specifically, punishments have the greatest potential for deterring misconduct when they are severe, certain, and swift in their application. The basic philosophy that undercuts the deterrence doctrine of punishment is the view that says punishment should be seen as a mechanism not necessarily meant to cause harm to the offender, rather to serve as warning to forestall the commission of the same crime in the future by others and even by the same offender. This theory of punishment specifically considers capital punishment as the best and most pragmatic deterrence of both the offenders and others who are inclined to the same offence. Understood in this sense, exponents of this theory see punishment as a proactive measure. For them, "punishment is not a retribution for the past, for what has been done cannot be undone.

Rather punishment is imposed for the sake of the future in order to ensure that both the punished and spectators of the punished may either learn to avoid the crime absolutely or attempt to desists from past wrongdoing (Iwe, 1991: 254).

Self-Assessment Exercises 1

1. The concept of vengeance is associated with what theory of punishment? (a) Rehabilitative (b) Retributive theory (c) Deterrence
2. The reformative theory is grounded the fundamental philosophy of ……. (a) humanitarianism (b) individualism (c) communalism

3.3.3. Restorative Theory of Punishment

One of the most recent goals of punishment derives from the principles of restoration. As an alternative to other punishment philosophies (e.g., retribution, incapacitation, rehabilitation), restorative justice fundamentally challenges our way of thinking about crime and justice. The global victims' rights movement is a relatively new phenomenon, but the general roots of restorative justice can be traced back to the early legal systems of Western Europe, ancient Hebrew justice, and precolonial African societies. Restorative justice literally involves the process of returning to their previous condition all parties involved in or affected by the original misconduct, including victims, offenders, the community, and even possibly the government. Under this punishment philosophy, the offender takes full responsibility for the wrongdoing and initiates restitution to the victim.

3.3.3. Preventive Theory of Punishment

The preventive theory of punishment is otherwise known as incapacitation theory of punishment. This theory proposes that punishment functions to discourage or dissuade others from committing similar offences. This theory sees imprisonment or exclusion as the best form of punishment because it keeps offenders away from the society and by so doing it reduces the probability of the repetition of same offence by others.

It is germane for you to note that the incapacitation theory could be divided into two, namely:

i. **Temporary Incapacitation:** This is limited punishment or short term imprisonment.
ii. **Permanent Incapacitation**: This has to do with punishments like life imprisonment, castration, death and limb amputation.

In a nutshell, this theory argues that to prevent the repetition of a crime and to drastically reduce the widespread of crimes and civil wrongs, the offender must be necessarily demobilized or incapacitated.

3.3.5. Expiatory Theory of Punishment

It is germane to observe that of all theories of punishment, the expiatory theory of punishment is more humanistic and optimistic in nature. This theory shares similar philosophy with the reformative theory of punishment. It holds that if the right corrective atmosphere (an environment that is supportive, sympathetic and fair) is created, even the most hardened criminal may experience a true conversion. Be that as it may, defenders of this theory posit that upon showing sufficient remorse for offence committed, an offender deserves pardon and a second chance.

Self-Assessment Exercises 2

1. Expiatory theory of punishment believes that individual criminals or wrongdoers are capable of change. (a)True (b) False
2. What makes the law an effective catalyst of social control and coercion? (a) Tolerance (b) Punishment (c) Vengeance

3.4. Summary

In the history of human sojourn on the planet earth, the ubiquity and persistence of crime in the human society has motivated scholars to postulate diverse ideas regarding the meaning, nature and goal of punishment. As such, we have retributive, reformative, preventive, deterrent and expiatory theories of punishment.

3.5. Conclusion

The theories of punishment discussed in this unit showed that scholars have diverse convictions regarding what should be the ideal meaning, nature and functions of punishment. These theories of punishment continue to influence the legal system and justice systems of nations. However, most civilized nations consider corporal and capital punishments archaic, inhuman and morally reprehensible.

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3.7. Possible Answers to Self-Assessment Exercises

1. Answers to Self-Assessment Exercises: 1(b) Retributive theory (a) humanitarianism
2. Answers to Self-Assessment Exercises: 2 (a) True (b) Punishment.

UNIT FOUR: CRITIQUING THEORIES OF PUNISHMENT

CONTENTS

4.1 Introduction

The core of Philosophical analysis consists of appraisal of the subject matter of burning issues. In this sense, this unit attempts to offer particular and general appraisal of the theories of punishment which has been the subject matter of the foregoing module.

4.1 Indented Learning Outcomes (ILOs)

At the end of this unit, you should be able to:

1. identify the weakness of each of each theory of punishment.
2. understand the expediency of punishment in human society.
3. critically appraise each theory of punishment.

4.3 Critique of Theories of Punishment: Deterrence and Retributive Theory

Each theory has its own merits and demerits. Therefore, if it depended on any one principle of punishment, criminal justice would not be safe. Thus, we have seen in depth the various theories of punishment. We knew what the guiding principles behind them are, how they vary from each other and some of the same very relevant case laws.

i. Weakness of Deterrence Theory

There is a lot of criticism of the deterrent theory of punishment in modern times. It has been criticized on the grounds that it has proved ineffective in checking crimes and also that excessive harshness of punishment tends to defeat its own purpose by arousing the sympathy of the public towards those who are given cruel and inhuman punishment. It has been alleged that hardened criminals are not afraid of punishment. Punishment losses its horror once the criminal is punished.

Another criticism is directed against the theory's unqualified utilitarianism. According to Uduigwomen, "If the aim of punishment is to deter people from committing more crimes and thus protect the society from harm, it will not matter whether the person receiving capital punishment is himself guilty or innocent. Thus, the death penalty can be applied to an innocent person provided the society believes that eliminating him will deter other people from committing similar offence" (266-267). In this light, understanding punishment as a function to deter crime is faulty in principle.

An attempt to make a strong case against deterrence theory of punishment, motivated Horwitz to postulate that "in order to prevent the perpetuation of sanguinary crimes, it seems in the first place necessary that the legislation should show abhorrence of the shedding of blood, and should inculcate the strongest manner a sacred regard for human life" (38). This goes to show the weakness of the deterrence module of punishment.

ii. Weakness of Retributive Theory

Despite the many positive dimensions of retributive theory of punishment, it has its loopholes. The advocacy for revenge is the undoing of this theory. As Bogart (426), rightly pointed out "the retrospective nature of the theory makes it vengeance in disguise. It focuses on desert that is it is backward looking. "The focus on desert means that retribution is solely for has been done". Apart from this, one of the major critical comments against is the view that

punishment per se is not a remedy for the mischief committed by the offender. It merely aggravates the mischief. Punishment evil and can be justified only on the ground that it yields better result. Revenge is wild justice. Retribution is only a subsidiary purpose served by punishment.

In addition, the theory does not contain elements of utilitarian value. Gainful consequences such as rehabilitating the offender and deterring potential offenders and thereby benefiting the society should be considered. According to Bentham (120), "the general purpose of law is to promote total happiness of the community… Punishment is mischief, and upon the principle of utility if it is to be admitted at all, it will be only on the ground of excluding some greater evil".

Our question remains, in the case of death penalty for someone who has taken another's life, can the killing of the offender bring back to life the already dead person? If not, it will be better rather to punish the offender he will rethink and come back to his senses.

Self-Assessment Exercise 1

Attempt this exercise to test what you have assimilated thus far. This exercise should not take you more than five minutes.

1. The exultation of vengeance has been considered as the greatest weakness of what ---------- theory of punishment. (a) Retributive (b) Deterrence (c) Reformative
2. The pursuit of deterrence may warrant the law to punish an innocent person. Is this a positive implication of deterrence theory? (a) Yes (b) No

iii. The Weakness of Preventive Theory

The main critical comment against this theory is that preventative punishment has the undesirable effect of hardening first offenders, or juvenile offenders, when imprisonment is the punishment, by putting them in the association of Harden Criminals.

It has also been alleged by some socio-political analysts that, no matter how preventive this theory might sound in deterring both the immediate offender and the potential criminals, looks like a *Shari'an* law which seems not have regard for human life dignity. The question that scholars have always asked is, does the amputation of an offender's limb or hand prevent others really from committing the same crime? If capital punishment actually prevents others from committing the same crime, why then are we still witnessing crime today.

iv. Weakness of Reformative Theory

This theory has been widely criticized on the basis that if criminals are sent to prison to be transformed into good citizens, a prison will no longer be a 'prison' but a dwelling house. This theory has been proved to be successful in case of young offenders.

Moreover, it has also been argued that reformative theory does not work smoothly in some cases because a hard-core criminal cannot be reformed. Even if criminals are treated as patients, some of the hardened criminals are incurably bad. If prisons are turned into comfortable place, the prison might turn into the dwelling place, at least for the poor. Hardened and professional criminals hardly respond favourably to reformative ideology because they are incorrigible offenders with whom crime is not so much a bad habit, but it is an ineradicable instinct in them. That is why, instead of trying for the reformation of his criminal mind, he should be punished.

Thus, it can be said that the reformative theory will be more effective if it is intended to supplement normal punishment, rather than replace it altogether. And if accept it then, criminals will repeat the same type of crime.

Self-Assessment Exercise 2

Attempt this exercise to test what you have assimilated thus far. This exercise should not take you more than five minutes.

1. The fact that some criminals are incorrigible makes reformative punishment unsustainable in all instances. (a)True (b)False
2. If prisoners are too comfortable some criminals may not be deterred from crimes and this is a negative implication of reformative punishment. (a)True (b) False

v. Weakness of Expiatory Theory

It has been alleged that showing of remorse should not be a good excuse for discontinuation of the punishment of an offender. This is because others may be encouraged to commit crimes after all once one shows remorse, he/she would be pardoned. Therefore, criminals will be shading crocodile tears once they are caught in a crime as a remorse which is witnessed constantly in our society today. Sanctions remain the coercive imperatives of law that fosters obedience to the law. Consequently, is the institution of sanction is watered down on the pretext and alter of remorse the sanctity of justice system would be fundamentally challenged.

4.3.1. General Evaluation

Punishment is a purposive activity, performed either for its own sake or for the sake of some effects which it produces. Purposive: it intends to inflict pain for wrongdoing, and deters

one from doing, in the future, the act for which pain was inflicted. It must be administered by someone who has the authority and the one to whom it is administered is judged guilty. All theories unanimously envisaged punishment as a necessary phenomenon provided the human elements are rightly found active, propitious and susceptible to wrongdoing in the society. They recognized wrongdoings in the society and how they appeal for punishment. In this sense, here is punishment simply because there are wrongdoings in the society. But the fundamental question here is that can there ever be a society without misconducts or tendencies to crime? And if no can punishment dissolute or eradicates all crimes and its tendencies in the society?

Self-Assessment Exercise 3

Attempt this exercise to test what you have assimilated thus far. This exercise should not take you more than five minutes.

1. Instead of deterring crime, expiatory punishment is capable of motivating crimes. (a) True (b)False
2. All theories of punishments are complete in themselves and capable of refraining crimes. (a)True (b)False

4.6. Summary

This unit attempted particular and general appraisal of the theories of punishment discussed in this module. Based on the strength of this critical analysis it behoves to observe that all theories of punishment based and reduce their interpretation and explanation of punishment within the empirical domain. Perhaps, it is more reason why they have been able to decipher the basic thrust of wrongdoing or what stimulates people to act against any convention.

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4.7. Possible Answers to Self-Assessment Exercises

1. Answers to Self-Assessment Exercises: 1(a) Retributive theory (b) No
2. Answers to Self-Assessment Exercises: 2 (a) True (a) True.
3. Answers to Self-Assessment Exercises: 3(a) True (b) False.

MODULE FIVE: THE CONCEPT OF RIGHT

UNIT ONE: UNDERSTANDING THE MEANING OF RIGHT

CONTENTS

1.1. Introduction

This unit covers the meaning, origin and development of the concept of Right. It begins with an overview of right, Hohfeld's idea of right, will and interest theorists of rights. Also, an insight of Rawls Justice as Fairness and Nozick's Entitlement theory of justice will be given.

1.2. Intended Learning Outcome (ILOs)

By the end of this course, you will be able to:

1. Identify the origin of right
2. Enumerate the meaning of right
3. Articulate the idea of Justice by Rawls and Nozick

1.3. Meaning of Right

The term right has seen may have many meanings, but we are concerned with right in the legal sphere- a right that is recognized and protected by the right in the legal system and exercised in the context of legal relations. The four elements in every legal right involves:

i. The holder of the right
ii. The act of forbearance to which the right relates.
iii. The *res* concerned (the object of the right) and
iv. The persons bound by duty.

It invariably means that every right involves a relationship between two or more persons, and only legal persons can be bound by duties, or be holders of legal rights (Njoku, 2007: 368). Rights and duties are correlatives. According to Harold J. Laski, "right is claim of an individual recognized by the society and the state. There are three essential elements in which right must be regarded. The interest of the individual, the interest of the various groups and the interest of the

community**" (**Laski, 1940: 20-21). Rights can be classified as entitlements (not) to perform certain actions, or (not) to be in certain states; or entitlements that others (not) perform certain actions or (not) be in certain states. It is also, a thing one may legally or morally claim; the state of being entitled to a privilege or immunity or authority to act. A broader discourse of rights is centred on human right which belongs to every person and do not depend on the specifics of the individual or the relationship between the right-holder and the right guarantor (Marc et al, 2003: 25).

It is a given that human rights are the rights that everyone has equally by virtue of their humanity. It is grounded in an appeal to our human nature. Christian Bay defined human rights as any claims that ought to have legal and moral protection to make sure that basic needs will be met (Vincent, 1986: 12-14). Human rights can be defined as those minimum rights which every individual must have against the state or other public authority by virtue of his being a member of the human family. Shree P. P. Rao said human rights are the inherent dignity and inalienable rights of all members of the human family recognizing them as the foundation of freedom, justice and peace in the world. For D. D. Raphael, human rights in a general sense denote the rights of humans. However, in a more specific sense, human rights constitute those rights which one has precisely because of being a human (Mamta, 2001:33-47).

1.3.1. The Origin of Right

It is common in political philosophy and among scholars to suggest that the antecedents of contemporary rights and liberties are of ancient origin (Richard, 1976:3). Many trace the historical origins of human rights to ancient Greece and Rome, where it is closely tied to the pre modem natural law doctrines of Greek Stoicism. The Roman jurist Ulpian declared that according to the law of nature, all men are equal and born free. The present concept of human rights can also be identified with early Christian philosophy or with the advent of medieval constitutionalism. For instance, Thomas Aquinas in the Thirteenth Century revived and expounded the classical doctrine that human dignity sets moral limits to political rule Richard, 1976:4).

Historically, rights involve religious, cultural, philosophical, and legal developments throughout recorded history. The modern human rights movement hugely expanded in Post-World War II Era can be traced through all major religions, cultures and philosophies. The issue of human

rights emerged in the history of ideas in its practical political form at the period of open conflict between a revolutionary bourgeoisie and state absolutism. The term "Human Right;" may comparatively be of a recent origin, nonetheless the idea of human rights is as old as the history of human civilization oppression (Bryne, 2003: 26). Human rights are deeply rooted in the historical past. The history of mankind has been firmly associated with the struggle of individuals against injustice, exploitation, and disdain. Only then did the contradiction between law and state become manifest. Law emerged as a guarantee of human freedom against the arbitrariness of state power. It was an expression of the citizen's resistance to oppression.

Self-Assessment Exercises

1. Right is ……. or……of an individual recognized by the society and the state. (a) duty or obligation (b) power or responsibility (c) claim or entitlement
2. …….. are the rights that everyone has equally by virtue of their humanity (a) human rights (b) legal rights (c) moral rights

1.4. Summary

This section has covered two basic items. Attention was given to the meaning of rights and the origin of rights was also considered.

1.5. Conclusion

The question of rights is integral to the law. In fact, the law is meant to protect rights. This is the reason why the discussion of rights is also integral to the philosophy of law.

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1.7. Possible Answers to Self-Assessment Exercises

1. Answers to Self-Assessment Exercises: 1(c) claim or entitlement
2. Answers to Self-Assessment Exercises: 2(a) human rights

UNIT TWO: PHILOSOPHICAL DEVELOPMENT OF RIGHT

CONTENTS

2.1. Introduction

This unit shall trace the philosophical development of right from ancient, medieval, modern to contemporary.

2.2. Intended Learning Outcome (ILOs)

By the end of this course, you will be able to:

1. Discuss the ancient origin of rights.
2. Analyze the medieval roots of rights.
3. Discuss rights in the modern period.
4. Articulate what rights are in the contemporary

2.3. Ancient

In the ancient era, Cicero defined natural law as right reason in agreement with nature (Lloyd, D. 1985: 108). Nature, for Cicero, has endowed mankind with the law it must obey, discernible by reason. Thus, the Romans saw in the Greek idea of natural law a vantage point from where they sought justification for the *jus gentium*, which was deemed to enshrine rational principles common to all civilised nations (Shaw, 1997: 79). Natural law according to Cicero was universal and unchanging. (The Stoics said that nature provided the best guidance for people's behaviour and that people should do their best to devise on ethical and moral system based on nature. The idea that all mankind has the same rights is the beginning of modem theories of human rights (Lloyd, D. 1985: 109).

Hugo Grotius, the Dutch Philosopher, wrote "De Jure Belli ac Pads" (On the Laws of War and Peace, 1625), in which he carried forward the Stoic idea of natural law based on reason. In the same vein, Plato (427-348 BC) was one of the earliest thinkers to advocate a universal standard

of ethical conduct. According to the Roman jurist, natural law was that "which nature and the State assures to all humans (James and Carl, 2001: 47). This meant that foreigners must be treated in the same way as one deals with one's compatriots. It also implied conducting of wars in a civilized manner. Plato believed in universal truth and virtue. This idea has continued to universalism: the belief that human rights are universal, and as such are above the laws of individual states. (James and Carl, 2001: 48-49). Aristotle (364-347 B.C) develops his theory of rights from a natural law point of view. But he does this from a teleological standpoint. Aristotle's view of the world included the existence of different social classes, accepting that there will always be an underclass, and even a slave class. Aquinas saw basic human needs such as self-preservation as requiring fundamental human rights.

2.3.1. Medieval

Aquinas (1225-1274) is the most important, medieval thinker who tried to incorporate many of Aristotle's ideas into Christian philosophy. For Aquinas the law is "nothing else than an ordinance of reason for the common good, promulgated by him who has care of the community" (Aquinas, 1981: I-II,q. 109, a3). He enumerates four kinds of laws. These are: eternal, divine, natural, and human laws. The natural law receives the greatest attention in Aquinas and for him human beings pursuing this law must apply their reason to the task of determining which means will direct them to their God given end. Now the human law is a product of the natural law and it governs the state. And he holds that government is legitimate only when it pursues the good (Aquinas, 1981: I-II,q. 110, a3). He states that the law directs man in his actions which are concerned with particular matters. He observes that divine law should motivate and direct every human action. Law is directed by its nature to the good, and especially to the universal or common good. It is addressed not primarily to private persons but to the whole people meeting in common or to persons who have charge of the community (Halsall, 2000: 8).

2.3.2. Modern Period

The social contract theorists championed this era. Thomas Hobbes states that, all men are equal, and each is dominated by the desire for self-preservation. (Martin, 1995: 573). In his work, *Leviathan*, Hobbes stated that all individuals possess simple freedoms and liberties which are correlated with duties and obligations on the part of others. Hobbes said that the right of nature (natural rights) is defined as the right to self-preservation which is immediately contrasted with

the law of nature (natural law) where the law forbids individuals from doing anything destructive of their lives or to omit the means of self-preservation (Eleanor, 2001:63-64).

In the same vein, John Locke (1632-1704) in his *Second Treatise on Government* develops this same natural law tradition but from a contractarian point. Locke presented the idea of state of equality wherein all power and jurisdiction are reciprocal, no one having more than another; the situation where people demonstrate high level of equality through distribution of resources and responsibilities (Haaga P. T. and Pilla J. G., 2021: 47). Without subordinate or subjection, the state of nature has a law of nature to govern it, which obliges everyone to reason, and which is that law that teaches all mankind who will but consult it, that being equal and independent, no one ought to harm another in his life health, liberty or possession (Locke, 2003: Nos. 243). According to Locke, the people have inalienable rights to freedom and equality, and that private property is necessary for this liberty. In this regard he writes that, “Everyman has a property in his person, the labour of his body, and the work of his hands are all his” (Locke, 2003: Nos. 246). And this is the sole reason why men unite into commonwealth.

For Thomas Hobbes and John Locke there are many natural rights, but all of them are inferences from one original right, the right of an individual to preserve his life. What is intrinsically right is no longer what is required by, or what partakes of, the good life; it is what is subjectively regarded by the individual as necessary to his security (Locke, 2003: Nos. 2). Contrary to all the above, David Hume in his *Treatise On Human Nature*, develop a legal dimension to the theory of human rights. This stems from his dissatisfaction with natural law and its underlining metaphysics. The reason cannot arrive at any moral judgment about good and evil. Due to this basic inability in man, any attempt at making such a judgment is tantamount to what he calls the *logical jump* which culminates in the *is-ought* question in his philosophy (1739: 101-102). In the light of the above, this position rejects the principal ground upon which the concept of moral rights rests Jeremy Bentham in his work *Anarchical fallacies* develops a criticism which is rooted on his understanding of the nature of law. Rights are created by law, and law is simply the command of the sovereign. According to him, the term "natural right" is a "perversion of language." It is "ambiguous," "sentimental" and "figurative" and it has anarchical consequences. He was the most notable among those who criticized natural rights (Bentham, 1938: 126-127). Jeremy Bentham, the founder of the philosophy of utilitarianism, said that the doctrine of natural

rights was speculative in nature and therefore, it was nonsense upon stilts for him. For him, rights were determined from law and the people. To him it was the people who made laws which later became rights. On the contrary, natural law compels a man on the dictates of his conscience, to take up arms against any law which he may dislike (Bentham, 1938: 129).

2.3.2. Contemporary

In reaction to the utilitarianism of Bentham, John Rawls (1921) in the *Laws of peoples*, following his theory of justice as fairness, presents the case for how the rights of men are derived and protected. Thus, he opines that this work is an attempt to show "how the content of a Law of Peoples might be developed out of a liberal idea of justice similar to, but more general than, the idea I call "justice as fairness". This law has eight principles. These are "Peoples (as organized by their government) are free and independent, and their freedom and independence are to be respected by other peoples (2000:78). Rawls's list of human rights include: '…the right to life (to means of subsistence and security); to liberty (freedom from slavery, serfdom, and forced occupation, and to a sufficient measure of liberty of conscience to ensure freedom of religion and thought); to property (to personal property); and to formal equality as expressed by the rules of natural justice (that is, similar cases be treated similarly)'(2000:79-80). Ronald Dworkin (1931) in his work *Taking Rights Seriously* rejects the rule theory of law as developed by the positivists, claiming that it does not show the importance of legal principles. Principles here are presuppositions that describe individual rights. On this note, he develops a new theory of adjudication, and applies it to the central and politically important issue of cases in which the Supreme Court interprets and applies the Constitution (Dworkin, 1977: 28). Furthermore, John Finnis in his *Natural Law and Natural Rights*, rather than limiting the source of rights to an egalitarian politics as Dworkin does, goes back to natural law as the root of rights. He begins by rejecting Hume's basic thesis on natural law. For him Natural law does not derive it normative orientations from any form of observable data, but from a reflexive grasp of the self-evidently good (Finnis, 1980:33). Joseph Raz grounds rights in interests that are themselves grounded in values. Richard Rorty argues that human rights activists should rely not on reason and theory but on passion and the courage of their convictions.

Self-Assessment Exercises

1. In the……., Cicero defined natural law as right reason in agreement with nature. (a) ancient era (b) medieval era (c) modern era
2. In the medieval period …….. states that, law is "nothing else than an ordinance of reason for the common good, promulgated by him who has care of the community". (a) Plato (b) Kant (c) Aquinas

1.4. Summary

In this section, the focus has been on the historical development of right from a philosophical perspective. This has been done along the lines of the traditional historical divisions of philosophy. In line with this, the unit has for sections: Ancient, medieval, modern and contemporary period.

1.5. Conclusion

From the discussions, we can conclude that the idea of rights is ancient and it has developed over time into what it is now.

Discuss the ancient origin of rights?

1. Analyze the medieval roots of rights?
2. Discuss rights in the modern period?
3. Articulate what rights are in the contemporary?

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1.7. Possible Answers to Self-Assessment Exercises

1. Answers to Self-Assessment Exercises: 1(a) ancient era
2. Answers to Self-Assessment Exercises: 2(c) Aquinas

UNIT THREE: HOHFELD'S CONCEPT OF RIGHT

CONTENTS

3.1. Introduction

This unit shall address the various categories of rights, namely, claim, privilege, power and immunity classified by Hohfeld.

3.2. Intended Learning Outcome (ILOs)

By the end of this course, you will be able to:

1. Enumerate the various classifications of rights by Hohfeld
2. Identify the privilege and claim right
3. Analyse the power immunity right

3.3. Hohfeld's Concept and Analysis of Rights

An analysis of rights has two parts: a description of the internal structure of rights (their form), and a description of what rights do for those who hold them (their function). W. N. Hohfeld argues that "one of the greatest hindrances to the clear understanding, the incisive statement, and

the true solution of legal problems frequently arise from the express or tacit assumption that all regal relations may be reduced to 'rights' and 'duties' and these later categories are therefore adequate for the purpose of analyzing even the most complex legal interest such as trust, options etc". The term 'right' is used to cover what in a given case may be a privilege, a power, or immunity (Hohfeld, 1984: 6). The four basic components of rights are known as "the Hohfeldian incidents" which are the privilege, the claim, the power, and the immunity. Each of these Hohfeldian incidents has a distinctive logical form, and the incidents fit together in characteristic ways to create complex "molecular" rights.

3.3.1. Privileges (or Liberties)

A privilege is the opposite of duty, and its correlate is a no –right. You have a right to pick up a shell that you find on the beach. This right is a privilege: *A* has a privilege to B *if and only if A* has no duty not to B. To say that you have a right to pick up the shell is to say that you have *no duty not* to pick it up. You will not be violating any duty not to pick up the shell should you decide to do so. Similarly, your right to sit in an empty seat in the cinema, and your right to paint your bedroom red, are also privileges. Privilege-rights mark out what their bearer has no duty not to do (Hohfeld, 1984: 8-10). The privilege of entering is a negation of a duty to stay off. The closest synonym of legal privileges is legal liberty or legal freedom ass emphasized by some scholars. A privilege confers a special position and accurately captures some privileges. All privileges, however, do not mean the absent of duties. A privilege denotes freedom to do an act which would have been a breach of duty; it does not itself include a right to non-interference (Kamba, 1974: 256).

3.3.2. Claims

A contract between employer and employee confers on the employee a right to be paid her wages. This right is a claim. *A* has a claim that *B* φ *if and only if B* has a duty to *A* to φ. The employee has a claim that the employer pays her her wages, which means that the employer has a duty to the employee to pay those wages. As seen in the definition and the example, every claim-right correlates to a duty in (at least) one duty-bearer (Goldberg and Zipursky, 2022: 370). What is distinctive about the claim-right is that a duty-bearer's duty is "directed at" or "owed to"

the right-holder. Some claim-rights exist independently of voluntary actions like signing a contract; and some claim-rights correspond to duties in more than one agent. For example, a child's claim-right against abuse exists independently of anyone's actions, and the child's claim-right correlates to a duty in every other person not to abuse him (i.e., the claim right is *in rem*). This example of the child's right also illustrates how a claim-right can require duty-bearers to *refrain* from performing some action (Hohfeld, 1984: 10-12).

3.3.3. Powers

One who has power may effect or cause a new legal relation. If A's voluntary act will cause new legal relation either between 'B' and 'A' or 'B' and a third party, then 'A' has a legal power. A power is an ability on the part of a person to produce a change in each legal relation by doing or not doing an act (Hohfeld, 1984: 24). In this light, privileges and claims define what Hart (1961: 90) called "primary rules" (uncertainty, static and efficiency): rules requiring that people perform or refrain from performing actions. Indeed, the primary rules for all physical actions are properly analyzed as privileges and claims. Were we to know all privileges and claims concerning physical actions, we would know for every possible physical action whether that action was permitted, required or forbidden. Two further Hohfeldian incidents define what Hart called "secondary rules (rule of recognition, change and adjudication)": rules that specify how agents can introduce and change primary rules. The Hohfeldian power is the incident that enables agents to alter primary rules: *A* has a power *if and only if A* has the ability to alter her own or another's Hohfeldian incidents. Powers can alter not only "first-order" privileges and claims, but "second-order" incidents as well (Hart, 1982: 77).

3.3.4. Immunities

The fourth Hohfeldian incident is the immunity. When *A* has the ability to alter *B*'s Hohfeldian incidents, then *A* has a power. When *A lacks* the ability to alter *B*'s Hohfeldian incidents, then B has an immunity: *B* has an immunity *if and only if A* lacks the ability to alter *B*'s Hohfeldian incidents. Immunity is a correlative of disability (no power), and its opposite negation is liability, (and its correlative is exempt). Hohfeld writes "a power bears the same general contrast to an immunity that a right does to a privilege (Hohfeld, 1984: 30). One's freedom from legal power or control of another as regards some legal relation is known as immunity. It describes the legal

relation of A to B when B has no legal power to effect a change in one or more legal relations of A. For instance, A, the landowner, has a right (that is immunity) not to be expropriated without compensation (Hohfeld, 1984: 31-32).

Self-Assessment Exercises

1. According to W. N. Hohfeld , the term 'right' is used to cover what in a given case may be a claim, privilege, a power, or…… (a) capability (b) immunity (c) authority
2. A……. is a contract between employer and employee confers on the employee a right to be paid her wages. (a) claim right (b) privilege right (c) power right
3. The ability on the part of a person to produce a change in each legal relation by doing or not doing an act is known as…….. (a) integrity (b) power (c) immunity

3.4. Summary

This section focuses on Hohfeld's theory of rights. In doing this, attention was given to the components of privileges, powers, claims and immunities within his theory of rights.

3.5. Conclusion

As conclusion, it is important to note that Hohfeld's theory has been highlighted because of the central role of his theory in the conceptualisation of rights are.

3.6. Reference and Further Reading

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2. Kamba, J. W. (1974). ''Legal Theory and Hohfeld's Analysis of a Legal Right' in *Judicial Review*.
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4. Hart, H.L.A (1961). *The Concept of Law*, Oxford: The Claredon Press.
5. Hart, H.L.A. (1982). 'Legal Rights' in *H.L.A. Hart Essays on Bentham: Jurisprudence and Political Theory,* (Oxford: Oxford University Press.

3.7. Possible Answers to Self-Assessment Exercises

1. Answers to Self-Assessment Exercises: 1 (b) immunity
2. Answers to Self-Assessment Exercises: 2 (a) claim right
3. Answers to Self-Assessment Exercises: 3 (b) power

UNIT FOUR: MODERN THEORIES OF RIGHTS

CONTENTS

1.1. Introduction

This unit shall discuss the basic modern theories of rights.

1.2. Intended Learning Outcome (ILOs)

By the end of this course, you will be able to:

1. Itemise and discuss the various theories of right.
2. Analyse the Will and Benefit theories of right.
3. Articulate rights based on natural right and justice.

1.3. The Will or Benefit Theory of Right

For this theory, the purpose of the right is to grant the widest possible means of self-expression. It conceives rights as the inherent attributes of the human will. Its basic idea is that "law attempts to give effect to human will (Wenar, 2005: 223-235). The will theory recognizes that an individual's having a right of some kind-depends upon the legal recognition of his will, his choice, as being pre-eminent over that of others in relation to a given subject matter or within a given relationship (Graham, 1996: 259-260).The also claim that all legal rights in the strict sense (privileges, power and immunities) can exercised at the discretion or choice of the person who holds them. Will theorists maintain that a right makes the right holder "a small scale sovereign" (Njoku, 2007:373). More specifically, a will theorist asserts that the function of a right is to give its holder control over another's duty (Graham, 1996: 257). Not all rights involve a corresponding duty. Even where such a rights suggests corresponding duty, the duty need not always be enforced. Again, elements of control, liberty and choice are not denied any importance. You are the "sovereign" of your book, in that you may permit others to touch it or not at your discretion. Similarly, a promisee is "sovereign" over the action of the promisor: she has a right because she has the power to waive (or annul) the promisor's duty to keep the promise. (Paton and Derham, 1972: 278).

1.3.1. The Interest or Benefit theory of Right

The interest theory holds that the purpose of the law is to protect certain interests. It claims that certain persons have rights that are not based on their having wills. The baby and the lunatic, for instance, could not be said to have will in the legal sense (though their will is operative through whom their interest is realized) yet they have rights (Paton and Derham, 1972: 278). The interest theory accuses its rival theory of treating rights 'too indiscriminately as if they were no more than the 'reflex' of rules which impose duties or relieve from duties. Interest theorists maintain that the function of a right is to further the right-holder's interests. An owner has a right, according to the interest theorist, not because owners have choices, but because the ownership makes owners better off. A promisee has a right because promisees have some interest in the performance of the promise, or (alternatively) some interest in being able to form voluntary bonds with others (Paton and Derham, 1972: 300). To have a right is to have the ability to determine what others may and may not do, and so to exercise authority over a certain domain of affairs (Heikkinen, 1999: 69).

1.3.2. Natural Rights: Core Rights

The aftermath of World War II brought about a revival of natural rights theory. The doctrines of natural law and natural rights suggested that men were entitled to make claims for the protection of their life, liberty and property by virtue of their common humanity (Peter, 1975: 35). Natural rights are the rights that all men possess, because of which they may be obligated to act, or to refrain from acting in certain ways. Natural rights theory was the philosophic motivation for the wave of revolt against absolutism during the late 18th century and it makes an important contribution to human rights (Shestactf, 2002: 16). It affords an appeal from the realities of naked power to a higher authority which is asserted for the protection of human rights. It identifies with and provides security for human freedom and equality from which other human rights easily flow. And it provides properties of security and support for a human rights system, both domestically and internationally.

1.3.3. Rights Based on Justice

The monumental thesis of modern philosophy is John Rawls' *A Theory of Justice.* "Justice is the first virtue of social institutions," says Rawls. Human rights, of course, are an end of justice; hence, the role of justice is crucial to understanding human rights. No theory of human rights for a domestic or international order in modern society can be advanced today without considering Rawls' thesis. Principles of justice, according to him, provides a way of assigning rights and duties in the basic institutions of society. These principles define the appropriate distribution of the benefits and burdens of social (Rawls, 1972: 22-23) cooperation. Rawls' thesis is that each person possesses an inviolability founded on justice that even the welfare of society cannot override. Therefore, in a just society the liberties of equal citizenship are taken as settled; the rights secured by justice are not subject to political bargaining or to the calculus of social interests (Rawls, 1972: 24).

Self-Assessment Exercises

1. For……. the purpose of the right is to grant the widest possible means of self-expression. It conceives rights as the inherent attributes of the human will. Its basic idea is that "law attempts. (a) Interest theory (b) will theory (c) command theory

2. The …….. holds that the purpose of the law is to protect certain interests. (a) Interest theory (b) will theory (c) command theory
3. The doctrines of ……. and……. asserts that men were entitled to make claims for the protection of their life, liberty and property (a) natural law and natural rights (b) command and will theory rights (c) interest and moral rights.

3.3. Summary

This unit focused on the modern theories of rights. These include: natural rights theory, will theory, interest theory and rights based on justice. While there are other theories, only these have been the focus here.

3.4. Conclusion

These theories have also become very fundamental to what rights are in modern times. The represent the final refinement of the essence of rights.

1.6. Reference and Further Reading

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5. Heikkinen, K. (1999). 'The Interest Theory of Rights and rights Attached Roles", retrieved from https://ojs.st-andrews.ac.uk.
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1.7. Possible Answers to Self-Assessment Exercises

1. Answers to Self-Assessment Exercises: 1(b) will theory
2. Answers to Self-Assessment Exercises: 2(a) Interest theory
3. Answers to Self-Assessment Exercises: 3(a) natural law and natural rights

MODULE SIX: JUDICIAL PRECEDENTMODULE SEVEN: JUDICIAL PRECEDENT

INTRODUCTION

This module is divided into four (4) units. The first Unit examines the definitions, meaning and nature of judicial precedent. The second unit looks at judicial precedence in connection with the operations of the Courts. The third unit explicates the various types of judicial precedent. Unit four outlined the advantages and disadvantages of judicial precedent.

UNIT ONE: WHAT IS PRECEDENT?

Content

1.1 Introduction

This unit examines the definitions, meaning and nature of judicial precedent. In this unit you will get to understand that judicial precedent otherwise known as case law or judge-made law has the same force with statutes.

1.2 Intended Learning Outcomes (ILOs)

At the end of this unit, you should be able to:

1. define judicial precedent.
2. establish the basic rationale behind judicial precedent.
3. understand the workings of judicial precedent.

1. 3 Judicial Precedent

The doctrine of judicial precedent is one important principle that makes meaning within the hierarchical organisation and operation of the Nigerian courts system. Patterned after the British legal system, the Nigerian legal system practices the common law system.

It is very important for you to know the etymological root of this important legal term to deepen your understanding of the term. The etymology of this term is the Latin term *Stare Decisis* and the Latin legal maxim "*stare decisis et non quietamovare"* which simply means, to stand by a decision and not to disturb that which is settled. So, this legal maxim enjoins legal practitioners to consider judgements of superior courts of competent authority as essential guides

in deciding cases in the future that have the same facts and contexts. This legal concept is an important general principle as far as the Common Law is concerned as it enables courts to decide cases in the future that share same characteristics in terms of facts, situations, issues, etc.

i. What is Precedent *or Stare Decisis?*

Judicial precedence otherwise known as case law or judge-made law consists of law found in judicial decisions. Case law has to do with that body of principles and rules of law which over the years have been formulated or pronounced upon by the courts as governing specific legal contexts (Ohireime, 1998: no p.). There are persuasive precedents and binding precedents. Precedent that has only a merely persuasive authority will be dicta, and precedents with binding with binding authority will be *ratio decidendi* in the strict sense (Njoku, 2007: 281). To explain further, Judicial precedent is regarded as the *ratio decidendi* which means the reason for the decision (Obilade, 1990: 111)". This requires subordinate courts to apply this principle and cite same as the basis for their pronouncement or decisions. The *Oxford Dictionary of Law* conceptualizes judicial precedent as a "judgement or decision of a court used as authority for reaching the same decision in subsequent cases.

The term is derived from the Latin term *Stare Decisis* and the Latin legal maxim "*stare decisis et non quieta movare",* which simply means to stand by a decision and not to disturb that which is settled. So, this legal maxim enjoins legal practitioners to consider judgements of superior courts of competent authority as essential guides in deciding cases in the future that have the same facts and contexts. This legal concept is an important general principle as far as the Common Law is concerned.

In terms of material source, judicial precedent is embedded in cases decided by courts; and in terms of composition, at least in the Nigerian legal sense, it consists of the principles of common law and the doctrine of equity (Tobi, 1996: 77). Judicial precedent is a law developed or evolved by courts and this accounts for why it is called judge-made law or case law. An outstanding legal realist, Holmes graphically conceptualizes the centrality of judicial precedents as far as adjudication of cases in the court of law is concern when he said, "The life of the law has not been logic; it has been experience". This implies that experience of past case influences the adjudication of present and future cases that shares similar attributes and context. Differently put, the wisdom of the past is expedient for deciding current and future cases.

Self-Assessment Exercises 1

Attempt these exercises to test what you have assimilated thus far. This exercise should not take you more than five minutes.

1. Judicial precedent is regarded as the negation of previous decisions. (a) True (b) False
2. *Stare Decisis* is the ---------- etymological root of judicial precedent. (a) Latin (b) Greek (c) French

1.3.1. Operation of Stare Decisis and Material Sources of Judicial Precedent

This segment examines the supporting grounds for the doctrine of judicial precedence and the possible material sources from which this very important legal doctrine and legal framework.

It is germane to assert that there are two fundamental frameworks that leverage and foster effective and accurate functioning of judicial precedents. These include:

a. A settled hierarchy of courts
b. An effective system of law reporting.

These two conditions are essential for the proper functioning of the doctrine of judicial system because when there is dispute regarding jurisdictional powers and hierarchy of courts, no court(s) may be compelled to obey the pronouncements or necessarily adhere to the ruling of other courts. Moreover, when laws are not sufficiently promulgated, appellate courts may not be aware of extant judgments or pronouncements that have striking sameness in terms of fact and law with undecided cases.

i. Material Source of Judicial Precedent

In terms of material source, judicial precedent is embedded in matters decided by courts; and in terms of composition, at least in the Nigerian legal sense, it consists of the principles of common law and the doctrine of equity (Tobi, 1996: 77). The whole essence of judicial precedent is that it is a law developed or evolved by courts and this accounts for why it is called judge-made law or case law. An outstanding legal realist, Holmes graphically conceptualizes the centrality of judicial precedents as far as adjudication of cases in the court of law is concern when he said, “The life of the law has not been logic; it has been experience”. This implies that experience of past case influences the adjudication of present and future cases that shares similar attributes and context. Differently put, the wisdom of the past is expedient for deciding current and future cases. In effect, this is another way of saying that yesterday’s trick (experience) is very vital for deciding similar cases today and tomorrow and today’s trick (experience) is essential for deciding similar cases tomorrow and beyond.

Self-Assessment Exercise 2

1. Judicial precedent is a law developed or evolved by courts and this accounts for why it is called ----------. (a) judge-made law or case law (b) law made in the society (c) power of the sovereign.
2. Judicial precedent could be aptly seen as ---------- (a) power of the judge (b)wisdom of the past (c) people's voice

1.3.2. Ratio Decidendi and Obiter Dictum

Ratio decidendi and obiter dictum are very pertinent to understand the position of the law regarding case that determined the judgement of the court and important comments of the judge. These two constitute what is known as ratio decidendi and obiter dictum. Let take a look at them respectively.

i. Ratio Decidendi

Judgements or pronouncements of courts are not arbitrarily arrived at, rather they are necessarily based on the point of the law. Judges as interpreters of the law are expected by the law to rely on relevant law in deciding cases before them. This is why in delivery judgements, judges explicitly state their reason (based on the provisions of the law) for their decision. This provision of the law otherwise known as the point of the law is what is regarded as the *ratio decidendi.* Ratio decidendi has to do with the provision of the law which decide a case in line with the material facts of the case in question.

Consequently, the concept of ratio decidendi provides that a lower case electing to base its judgement on a given precedent must ensure that the point of the law and material facts of the matter under consideration shares same with the precedent. It is very plausible to state here that the student of philosophical jurisprudence must know that judicial precedent is the point that determined a judgement or decision that now serves as a case law and a necessary guide. It is equally germane to establish that ration decided is a vital judicial precedent because it constitutes the precedent itself which judges are mandated to rely on.

i. Obiter Dictum

In considering previous wisdom as a guide to decide a case, judges are expected to pay attention to the core or essential element of a previous ruling as constituting a binding precedent. They are discouraged from paying attention to things said in passing. Hence, the concept "obiter" literarily means "in passing" or "by the way". The statement made in passing by the judge is

what is known as the obiter dictum of the precedent. For example, illustrations, opinion, observation, explanation, analysis, etc. are considered as not part of the reason for the ruling, hence they are not binding precedents. Obiter dictum is not part of the binding precedent and as such judges are expected to base their judgment only on ratio decidendi which is the reason (the point of law) for the decision.

However, obiter dictum is persuasive in nature and most judges do not totally discard them and it may inform their analogy. The following facts are responsible for the persuasive nature of obiter dictum rather than been binding:

a. The judge did not express a conclusive opinion
b. The statement was made in complete consideration of the case law on the proposition of the law
c. May not have considered all the situations that may result from it
d. The circumstances of its ruling.

Self-Assessment Exercises 3

Attempt this exercise to test what you have assimilated thus far. This exercise should not take you more than five minutes.

1. Is it correct to say that ratio decidendi is the opposite of obiter dictum? (a) Yes (b) No
2. What essentially differentiates ratio decidendi from obiter dictum is that the former is ---------- in nature. (a) Sanction (b) Autonomy (c) Binding.

1.4. Summary

In the final third, the idea is to enable you learn that judicial precedent is otherwise known as case law or judge-made law. It consists mostly of previous decisions of higher courts that lower courts must necessarily adopt to decide present or future cases that shares same attributes or similar characteristics. While applying a precedent to a case, the judge must pay attention to the ratio decidendi instead of the obiter dictum as the bases for judgment.

1.5. Conclusion

This unit explicated the doctrine of judicial precedent. It has established that this principle is otherwise known as case law or judge-made law that is necessarily binding on lower courts. Most importantly, the foregoing unit established that far as the Common Law is concerned, judicial precedent enables courts to decide cases in the future that share same characteristics in terms of facts, situations, issues, etc.

1.6. References and Further Reading

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Oxford. (2006), *Oxford Dictionary of Law*,(6th ed), OUP Oxford.

Tobi N. (1996), *Sources of Nigerian Law*, Lagos: MIJ Professional Publishers Ltd.

1.7. Possible Answers to Self-Assessment Questions

1. Answers to Self-Assessment Exercises:1(b) False (a)Latin
2. Answers to Self-Assessment Exercises:2 (a) judge-made law or case law (b) wisdom of the past

UNIT TWO: JUDICIAL PRECEDENTS AND OPERATION OF THE COURTS

CONTENTS

2.1. Introduction

Having understood the principle of judicial precedent, this unit shall explain workings of judicial principles and the hierarchy of courts (Nigerian Courts), because judicial precedent only makes sense within the relationships existing between the courts and operations of courts. The concept of judicial precedent and hierarchy of courts are intimately intertwined. More specifically, this unit considers the hierarchy of the Nigerian Courts.

2.2. Intended Learning Outcomes (ILOs)

At the end of this unity, students should be able to:

1. Identify the types and hierarchical order of Nigerian courts
2. Recognise the supremacy of the constitution (and Acts of parliament) establishing the jurisdictions of the court
3. Explain the application of judicial precedent in the courts.

2.3. The Hierarchical Organization of the Nigerian Courts

The Nigerian courts are hierarchically organized in the following order of precedence:

i. The Supreme Court
ii. Court of Appeal

iii. Federal High Court (National Industrial Court)
iv. State High Court
v. Sharia Court of Appeal
vi. Customary Court of Appeal
vii. Magistrate Court

2.3.1. Establishment and Classification of Courts

At this point it is germane for you to learn that no court arrogates any power to itself, rather each and every court operates within the confines of the law that established it. The idea of judicial precedent is embedded in the constitution and laws that established them. Having said that, it should be observed that the judicial powers of courts to adjudicate on civil and criminal rights and liabilities of persons and other litigants are generally sanctioned by section 6 of the 1999 Constitution of the Federal Republic of Nigeria (as amended). In furtherance of the provision of section 4 which divides legislative powers between the National Assembly for the Federal and State house of Assembly, establishes courts for states. It should be observe that the courts established for the Federation and those established for the States are all referred to as superior courts of record under section 6(3) of the Constitution.

Apart from the Constitution, the next source of authority for the establishment and functioning of courts in Nigeria is the respective statutes establishing them. That is, each of the superior courts of record or Tribunals is also established either by an Act of the National Assembly in respect of the courts of the Federation or a Law of the House of Assembly in respect of the courts established for the States.

2.3.2. Judicial Precedents and Operation of the Courts

a. The Supreme Court

The Supreme Court, by the virtue of its finality and supremacy exclusively has the right to overrule its previous decisions in pursuance of justice, where the decisions are proven to be:

i. Evidently erroneous in law
ii. Vehicles of injustice
iii. Given per *incuriam* (wrongly)
iv. Inconsistent with the provisions of the constitution
v. Embodying outcomes which are undesirable, unjust and contrary to public good
vi. Tools for injustices
vii. And other germane reasons.

b. Court of Appeal

The Court of Appeal ranks second only to the Supreme Court. Since the appeal court is under the Supreme Court in the order of hierarchy, it is bound by the decisions of the Supreme Court. Whether or not such decisions are rightly or wrongly decided is immaterial. It should be observed that as far as the doctrine of *stare decisis* is concerned, the court of appeal is bound by its own previous decisions, except in the following contexts:

i. The court is at liberty to decide which of the two conflicting decisions of its own it will follow.
ii. It is not bound to follow a decision of its own if it is satisfied that the decision was wrongly given.
iii. It will refuse to follow its own decision which though not expressively overruled, cannot in its opinion stand with a decision of the Supreme Court.

c. Other Courts

The doctrine of judicial precedent demands that all courts below the appeal court and the Supreme Court show unreserved allegiance to the above-mentioned courts. They are bound by the decisions of these higher courts, irrespective of the nature of such decisions.

Self-Assessment Exercises

1. Election tribunals are classified under ---------- (a) Court of appeal (b) Special courts (c) High court.
2. Superior courts of records are those created by the Nigerian …… (a)1999 Constitution (as amended) (b) National Assembly (c) States Assemblies
3. Inferior courts are those established by the Act of the National Assembly and the ……. respectively. (a) Executives (b) National Assembly (c) States Assemblies

2.4. Summary

The Nigerian courts are organized into a hierarchical order that ensures the flow of authority. All courts are established by relevant laws (Constitution and Acts of Parliament). Courts must operate within their respective jurisdiction as determined by the law establishing them.

2.5. Conclusion

Form the foregoing expository analysis in this unit we have learnt that the doctrine of judicial precedent confers the final authority on the Supreme Court. However, it is useful to note that, the Supreme Court, as well as other courts below it is capable of erring irrespective of its finality.

Despite its fallibility it remains the ultimate court whose opinion and decision is ultimately binding on all courts.

2.6. References and Further Reading

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2.7. Possible Answers to Self-Assessment Exercises

1. Answers to Self-Assessment Exercises:1(b) Special courts
2. Answers to Self-Assessment Exercises:2(a)1999 Constitution (as amended)
3. Answers to Self-Assessment Exercises:3(c) States Assemblies

UNIT THREE: TYPES OF PRECEDENTS

CONTENT

3.1. Introduction

This unit shall engage in the discourse of the three basic types of precedents which include, original precedent, binding precedent and persuasive precedent. Let's briefly discuss them.

3.2. Intended Learning Outcomes (ILOs)

At the end of this unit, students will be able to:

1. Identify the various types of judicial precedent.
2. Explain the types of judicial precedent.
3. Establish the striking difference between the various types of judicial precedent.

3.3. Original Precedent

Original precedent is the first in the line of similar precedents. Original precedents are created when a point of law in a case that has never been decided in the past. In this instance whatever becomes the judgment of the court becomes a rules or norm or a new precedent that judges in the future may leverage on to decide cases of similar attributes and context. In this instance, original precedent becomes original case law that judges would rely on in the future to resolve similar cases brought to courts for adjudication or consideration.

3.3.1. Binding Precedent

Binding precedent consists of precedents that must be applied or followed. The general rules regarding the relationship existing in the hierarchical structure of the courts is such that the decisions of a higher court (whether right or wrong) must be binding on lower courts. The hierarchical order of the courts made it imperative that every court in the hierarchy must apply the prior decisions of courts higher than itself irrespective of the rightness or wrongness of the prior decision in question.

3.3.2. Persuasive Precedents

Unlike binding precedent, a persuasive precedent is not automatically binding on a court however, such precedent may be applied when it considers it necessary or instrumentally valuable. In other words, judges are allowed to exercise discretion regarding whether or not to apply precedents that are persuasive in nature. It suffices to give a few practical examples of persuasive authorities that are not binding but may be considered useful, to buttress this point:

a. Decisions of courts lower in hierarchy
b. Decisions of foreign courts
c. Legal Texts: Texts Books and Periodicals
d. Speculation of a judge of regarding what his judgment would have been if the facts the case had been different.

Having understood what judicial precedents means, it is useful we ask the question, in the operation of the courts hierarchy, does the idea and practice of judicial precedent have advantages or disadvantages or both? Yes of course! A few advantages as well as disadvantages have been identified and would be discussed in the next unit.

Self-Assessment Exercise

Attempt this exercise to test what you have assimilated thus far. This exercise should not take you more than five minutes.

1. Decisions of foreign courts serve as ---------- authority to Nigerian courts. (a)Binding (b) Persuasive (c) Judicial
2. Decisions of courts lower in hierarchy are binding precedents on courts higher in hierarchy. (a)True (b)False

3.4. Summary

Thus far, from the analysis in this unit, you have come to understand that three types of judicial precedents are distinguishable, and they include original precedent, binding precedent and persuasive precedent. Apart from the first type of precedent where emphasis is placed on the order of origin, judicial precedent is strictly classified just into two forms-binding and persuasive precedents.

3.5. Conclusion

In the operation of the courts what necessarily matters to the courts is not the order of origins of precedents, rather what determines whether or not a court should compulsorily apply a given precedent in the determination of a case before it is, first, whether or not the precedent in question is binding or persuasive (if it is binding it must necessarily be applied; if it is otherwise its application is optional). Second, the significance of the precedent; however, the question of precedent only arises when we are talking about persuasive precedent (if the persuasive precedent is significantly relevant for the case at hand, then its application becomes expedient).

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3.7. Possible Answers to Self-Assessment Exercises

1. Answers to Self-Assessment Exercises:1(a) Persuasive
2. Answers to Self-Assessment Exercises:2(b) False

UNIT FOUR: ADVANTAGES AND DISADVANTAGES OF JUDICIAL PRECEDENT

CONTENTS

4.1. Introduction

The discourses on the doctrine of judicial precedent may be incomplete if no mention of the strengths and limitations of this doctrine are made. In view of this, students of philosophical jurisprudence should be eager to appraise the effect of judicial precedents on the hierarchical operation of courts. In what follows, this unit highlights some advantages and disadvantages of this important legal doctrine.

4.2. Intended Learning Outcomes (ILOs)

At the end of this unit, student should be able to:

1. Outline the advantages of judicial precedent.
2. Identify the disadvantages of judicial precedent.

4.3. Advantages of Judicial Precedence

The discourses on the doctrine of judicial precedent might not be complete if no mention of the strengths and limitations of this doctrine are made. Hence, students of philosophical jurisprudence should be eager to appraise the effect of judicial precedents on the hierarchical operation of courts. In what follows, this unit outlines some advantages and disadvantages of this important legal doctrine.

One who understands the operations of the hierarchical nature of Nigerian courts would agree with me that the doctrine of judicial precedent has been instrumentally valuable in maintaining stability and order. Against this backdrop, the following has been outlined as the advantages of judicial precedent:

i. It saves time and energy of judges since it prevents them from tracing every point of law.

ii. It enables and enhances the work of legal practitioners to discover law and to advise their clients properly on the probable outcome of a given court's decision on a given case.

iii. It assists in the maintenance of the ethics of the legal profession through the fostering of due respect for the decisions of superior courts in the hierarchy.

iv. It fosters the maintenance of consistency, stability and a high degree of certainty in the operations of the court.

v. It enhances justice and fairness because it ensures that citizens are treated lie equals before the law.

4.3.1. Disadvantages of Judicial Precedent

It is often said that whatever has an advantage must surely has at least one disadvantage. The following has been identified as the setbacks of the doctrine of judicial precedent:

i. There are too many case law and it is too complex.

ii. Cases can be easily separated based on their facts to avoid following an inconvenient precedent.

iii. There may arises difficulties in deciding the reason for a case, especially if there are a number of reasons.

4.3.2. The Double Effects

From the study in this unit, you are now educated on the fact that the Nigerian judicial system has witness tremendous development owing to the adaptation and practice of the principle of judicial precedent. However, the Nigerian courts have also witness different pushback arising from the practice of this principle.

In the operation of the courts what necessarily matters to the courts is not the order of origins of precedents, rather what determines whether or not a court should compulsorily apply a given precedent in the determination of a case before it is, first, whether or not the precedent in question is binding or persuasive (if it is binding it must necessarily be applied; if it is otherwise its application is optional). Second, the significance of the precedent; however, the question of precedent only arises when we are talking about persuasive precedent (if the persuasive precedent is significantly relevant for the case at hand, then its application becomes expedient).

Self-Assessment Exercise

Attempt this exercise to test what you have assimilated thus far. This exercise should not take you more than five minutes.

1. The existence of too many and too complex case laws constitutes a setback to judicial precedent in Nigeria. (a)True (b)False
2. Judicial precedent has been instrumentally valuable in maintaining ---------- in the Nigerian Courts. (a) agreement and consent (b) stability and order (c) mutuality and contract

4.4. Summary

Thus far, from the analysis in this unit, you will understand that the Nigerian judicial system has revealed that the doctrine of judicial precedent has some advantages as well as disadvantages, some of which have been highlighted in this unit.

4.5. Conclusion

From the study in this unit, you are now educated on the fact that the Nigerian judicial system has witnessed tremendous development owing to the adaptation and practice of the principle of judicial precedent. However, the Nigerian courts have also witnessed different pushbacks arising from the practice of this principle.

4.6. References and Further Reading

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1.7. Possible Answers to Self-Assessment Exercises

1. Answers to Self-Assessment Exercises:1 (a) True
2. Answers to Self-Assessment Exercises:1 (c) mutuality and order

MODULE SEVEN: MUST WE ALWAYS OBEY THE LAW?

Introduction

This module consists of four (4) units. The first unit explicates the conceptualization of pollical obligation otherwise known as 'must we always obey the law'. The second unit identifies the

various theories of obligation. Unit three and four consist of the discourses on the affirmation and denial of obligation to obey the law of the state.

UNIT ONE : WHAT IS POLITICAL OBLIGATION?

CONTENTS

1.1. Introduction

This unit shall engage in the discourse on political obligation. It will also undertake in the argument and meaning of 'being obliged and obligated.

1.2. Intended Learning Outcome (ILOs)

1. Explain the concept of political obligation
2. Articulate the difference between being obliged and obligated.

1.3. What is Political Obligation

The term 'obligation' originated from a Latin word '*obligare'* which means something that binds men together to an engagement or performing what is enjoined (Johari, 1987: 23-24). Political obligation has various connotations, in the realm of ethics it informs a man to fulfill or discharge a duty enjoined in him and acceptable to his rational understanding. According to Haaga, In the field of jurisprudence, (legal) it requires a man to obey the law by which he is tied to some performance and in the world of politics, it takes the form of a bond between man as a citizen and the authority under which he lives to perform his act (Haaga, 2012:111), D.D Raphael thus defines political obligation as the moral and legal duty of a citizen to obey the laws of the state. Political obligation exists only within political contexts; we must know whom, before why to obey. To be a citizen means belonging to a state, it means living and acting according to its rules. The question still remains why does the citizen have a duty to obey the laws of the state? The citizen is obliged to obey the laws of the state because the state has sovereign authority, the state

has the right to issue orders to its citizens and the right to receive obedience from them and the citizens are obliged to obey the orders (Rapheal, 1976: 79-80).

1.3.1. Being 'Obliged and being 'Obligated'.

In the preceding discourse, I have explained the concept of political obligation, here to acknowledge the claim of an authority dislike of the consequences of not doing so, is to admit a prudential obligation. It is to say that I ought in my own interest to obey, I had better do so, or else it will be the worse for me. The term 'obliged' and 'compelled' are often used of actions performed under duress, because the choice offered cannot be regarded as a genuine or effective choice when one of the alternatives is too unpleasant to be seriously entertained (Rapheal, 1976: 79-80). For example, we certainly have a choice whether to follow a doctor's advice on diet even though we believe his prediction of the consequences of neglect. But if you are threatened by a robber in a gunpoint to handover your valuables or risk your life to death will be being obliged because you do not have any choice than to obey for the fear of being killed (Hart, 1961: 80–88). As it were, the armed robber does not necessarily say 'You really ought to handover the money' but rather, 'you had better….'

However, to acknowledge the claim from the thought that it is right to do so, is to admit a moral ground for obligation. It is to say that I am obligated, or I have a moral duty to obey. To collaborate further, Political obligation in Hart is a combination of both moral and legal obligations and pertains to duties to the political community. Hart in this regard has also tried to distinguish between when I have an obligation and when I am obliged (Hart, 1974: 458). For Hart, to say one is obliged has to do with the beliefs and motives with which an action is carried out. It is also referred to as duty for the sake of purpose. When we say a person was obliged to hand over his money (as in the case of a gunman demanding for money) it becomes the case that such a person believes that some harm or other unpleasant consequences would befall him if he did not comply (Haaga, 2012: 1114). But to have an obligation provokes a different scenario altogether, it is done out conviction and fulfilment. Obligation here is referred to as duty for duty sake. For the fact about the beliefs and motives for the action are not necessary for the truth of a statement that a person had an obligation to do something (Hart, 1961: 81).

Self-Assessment Exercise

1. Political obligation as the …… and …. duty of a citizen to obey the laws of the state. (a) moral and legal (b) moral and natural (c) civil and religious

2. To acknowledge the claim from the thought that it is right to do so, is to admit a moral ground for obligation, which means being……. (a) obliged (b) obligated (c) responsible
3. If you are threatened by a robber in a gunpoint to handover your valuables or risk your life to death will be being ……. (a) obligated (b) mandated (c) obliged

1.4. Summary

The focus in this unit has been on the idea of obligation. The unit has defined it and the unit has also attempted to draw the lines between being obliged and being obligated. This is to help put the concept in proper perspective.

1.5. Conclusion

By way of conclusion, it should be noted that the idea of obligation is quite central to what the law is. This is because, if there were no laws, the question of obligation will not arise in the first instance. It is because there are laws that scholars are investing so much interest on the concept of obligation.

1.6. Reference and Further Reading

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1.7. Possible Answers to Self-Assessment Exercise

1. Answers to Self-Assessment Exercises: 1(a) moral and legal
2. Answers to Self-Assessment Exercises: 2(b) obligated
3. Answers to Self-Assessment Exercises: 3(c) obliged

UNIT TWO: THEORIES OF POLITICAL OBLIGATION

2.1. Introduction

This unit shall state that, the reasons for accepting legal obligation at all must be drawn from outside the system of legal obligation.

2.2. Intended Learning Outcome (ILOs)

1. Identify the components of the social contract theory
2. Mention and discuss the other theories of obligation

2.3. Theory of Social Contract

The theory of social contract tries to justify political obligations as being based on an implicit promise, like the obligation to obey the rules of a voluntary association. There are three kinds of theory of contract:

i. Contract citizenship: an implicit contract of this kind is described as the ground for political obligation in Plato's dialogue, *Crito.* It states that if a man remains in a particular society and enjoys its privileges, he is bound for his part to accept obligations too. (Plato, 2000: no. 54c).

ii. Contract of community: a second form of contract theory is discussed by Plato in the *Republic* (Book II), but not a view that he himself accepts. This theory depicts me as being by nature egoistic, everyone out for himself. Everyone is therefore liable to suffer harm as well as to cause it and make agreement with each other to set up laws for the regulations of their conduct.

iii. Contract of government: some social contract theorists have in fact distinguished between community (or 'society) and the State and have spoken of a double contract which we may call contract of community and contract of government. According to this form of the theory, men first contract with each other to join together in community (or 'society'), and then make a second contract in which they agree to set up a state and promise to obey its laws (Rapheal, 1976: 100).

2.3.3. Theory of Consent

The idea of consent is a key element in the works of John Locke and Jean-Jacques Rousseau. In the *Second Treatise of Government*, Locke puts forth his conception of the ideal form of government based on a social contract. He powerfully details the benefits of consent as a principal element of government, guaranteed by a social contract. Locke believes in the establishment of a social contract among people of a society that is unique in its ability to eliminate the state of nature. He feels the contract must end the state of nature agreeably because in the state of nature "everyone has executive power of the law of nature" (Locke, 2003: 309). Locke incorporates his views on money into his consent theory, for he feels that men have agreed tacitly, with the invention of money, to put a value on property and establish rights to it. The consent of men to place a value on money has allowed men to support themselves with property and labour and "increase[s] the common stock of mankind". Consent makes industry and the accumulation of the wealth of society possible, and Locke considers this a positive achievement (Haaga and Pilla, 2021: 447). Jean-Jacques Rousseau develops his political theory in response to the contention of Locke that his idea of government is the ideal. He believes in a much higher level of political participation and obligation, but for the most part concurs with Locke regarding the role of consent in establishing government. Rousseau feels that the social contract, as it secures the consent of all, will benefit every man equally and protect his property, as such the 'general will' of the people "can direct the forces of the state" to ensure "the common good" is served (Rousseau, 1938: 634). To say that no man can be subjected to political power

without his own consent is a way of drawing the distinction between being compelled by coercive power and accepting authority. It is a way of saying that acceptance of authority is voluntary, while being coerced is not (Haaga and Pilla, 2021: 449).

2.3.4. Theory of the General Will

The idea of the 'general will' first appeared in the work of Jean-Jacques Rousseau in the eighteenth century. The imperative feature of the theory of the general or 'real' will is the view that morality, including rights, depends on the existence of organized society; in the hands of some of its advocates (Rousseau, 1938: 634). The view is that we ought to obey the laws of the state because they represent the general will. The theory of the general will is not referring to the wishes of the majority. For J.J Rousseau, the general will is always right. The object of the general will is the common good, not what any particular people happen to make for themselves. The common good is taken to be the aim of moral volition- decision, and general will is the will that each man has as a non-moral individual thinking of his own interests in isolation from the interests of others. This theory assumes that the government knows better than the individual what he really wants. Secondly, the theory holds that everyone really wants the same things; it makes no allowance for differences of taste. It assumes that fundamentally human nature is always the same. Thirdly, the theory identifies moral obligation with interest. It says that what I ought to do is what I really want to do. It assumes that there can be no obligation other than prudential obligation, and this is why it has to make the absurd assumption that everyone wants the same things (Rousseau, 1938: 636-637).

2.3.5. Theory of Justice

The various theories considered try to make out that political obligation is voluntarily undertaken and is grounded on this voluntary acceptance itself, independent of aims or consequences. According to the theory of justice, our obligation to obey the laws of the state depends on the fact that these laws are intended to secure justice or moral rights. The version of the theory speaks of 'natural rights', a conception that plays an important part in the political philosophy of Locke, who speaks of the doctrine of social contract or consent (Rapheal, 1976: 102). The theory of natural rights maintains that men have certain absolute moral rights, such as the right to life, liberty, and to the opportunity to pursue happiness. (Locke in fact made life, liberty, and property his three cardinal rights; but he was clearly uneasy about joining a natural right to property).

Locke's view was that the state is designed to guarantee and protect natural rights. If we think that the notion of justice includes more than what Locke had in mind as natural rights, we may expand his doctrine and say that the state is designed to guarantee justice, i.e. established rights and fairness. We may say that if the state effectively carries out this function, we are thereby under an obligation to support it and obey its rules. On this view, political obligation depends on our moral obligation to pursue justice (Rapheal, 1976: 103).

2.3.6. Theory of General Interest or Common Good

This theory is held by Utilitarians, who hold the view that all moral obligations depend on their utility for promoting the general happiness or interest. The state is a necessary means to securing a substantial part of this moral end, and therefore we are obliged to obey the law as an essential condition of fulfilling our general moral obligations (Rapheal, 1976: 106-107). The state carries out its purpose by laying down laws, backed by force, requiring everyone to refrain from actions (crimes and torts) that arm the common good and to contribute to taxes and other imposts to the up keep of services (such as defence, public utility, and social service) that promote the common good. As suggested by the theory of justice, utilitarian theory states that if a particular government is harming instead of helping the promotion of the common good, it loses its right to obedience. Both theory of justice and the theory of common good ground political obligation on the functions of the state. Theory of justice would say that this function is the protection of established rights, one aspect of justice. And the common good theory would say that the negative function is to prevent harm to the common good. The common good theory, however, would say that it already provides for all functions, since the concept of justice is comprehended under utility. (Rapheal, 1976: 108).

Self-Assessment Exercise

1. The three kinds of theory of contract are namely, citizenship, community and ……. (a) government (b) individual (c) people
2. The theory of consent is a key element in the works of John Locke and …… Rousseau (a) James (b) Michael (c) Jean-Jacques

2.4. Summary

In summary, this unit has considered four theories of obligation. These include: the social contract theory, the consent theory, the justice theory, the general will theory and common good theory.

2.5. Conclusion

These theories have developed as avenues to give force and justification ot the idea of obligation. They serve as rational grounds upon which to further entrench the idea of obligation.

2.6. Reference and Further Reading

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Rousseau, J.J. (1938). *Social Contract*, in *Readings in Political Philosophy*, by Francis William Coker, London: Macmillan Company Press.

2.7. Possible Answers to Self-Assessment Exercise

1. Answers to Self-Assessment Exercise 1(a) government
2. Answers to Self-Assessment Exercise 2 (c) Jean-Jacques

UNIT THREE: LAWS AS GENERALLY COMMANDING OBEDIENCE

3.1. Introduction

This unit shall advance a brief discourse on the different perspectives of law according to the legal positivists and also explain the intervention of H.L.A. Hart in this regard on law.

3.2. Intended Learning Outcome (ILOs)

At the end of this unit, students should be able to:

1. Explain the concept of law as command that foster obedience

3.3. Laws as Generally Commanding obedience

The champions of legal positivism- Jeremy Bentham and John Austin adhere to the view that the understanding of law should be sought in the posited social facts of a group. Whereas Bentham defined law as a command of the sovereign, who is in the habit of being obeyed but he has no such a habit to obey others. He further divided his study of law into two parts, namely, Examination of Law as it is- *Expositorial Approach*– Command of Sovereign and Examination of Law as it ought to be- *Censorial Approach*– Morality of Law (Bentham, 1988: 48). Hans Kelsen, argues that law is 'an order of human behaviour, which a system of rules and legal norm, is a conditional directive addressed to officials to apply sanctions (Kelsen, 1961: 1). For Raz, law provides the general framework within which social life takes place as a system for guiding behaviour and for settling disputes which claim supreme authority to interfere with any kind of activity (Haaga, 2020: 111).

H.L.A. Hart, recognising the legal insights of both Bentham and Austin, thinks that their reduction of law to command and sanctions obscure rather than explains law or the salient feature of legal system (Hart, 1961: v.) hart criticises that Bentham, Austin and Kelsen's models are not necessarily theoretically solid in founding obligation in law. Neither habit of obedience nor threat of punishment is sufficient to explain obligation to the law. There are many reasons for obeying the law (Njoku, 2007:298). Hart thinks that normativity of law from which obligation to obey the law is derives stems from an accepted and valid legal relationship established in the system. Certainly, laws identified by the rule of recognition claim obedience.

Self-Assessment Exercises

1. Bentham divided his study of law into two parts, namely, Expositorial Approach– and…… (a) Censorial Approach (b) Adjudicative approach (c) legalistic approach.

1.4. Summary

This unit has considered the idea of law as generally commanding obedience. The ideas of Bentham and Hart were alluded in establishing the main point in this unit.

1.5. Conclusion

The point to underscore here is that the law commands obedience. If the law cannot be obeyed, then it is no law. Also, there are many (justifiable) reasons for obeying the law.

1.6. Reference and Further Reading

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1.7. Possible Answers to Self-Assessment Exercises

1. (a) Answers to Self-Assessment Exercises 1(a) Censorial Approach

UNIT FOUR: REASONS FOR OBLIGATION TO THE LAW

4.1. Introduction

This unit shall engage in the discourse for a justification to obey the law and also advance the discourse on those who affirm that, there is obligation to obey the law and those who denied obligation to obey the law.

4.2. Intended Learning Outcome (ILOs)

At the end of the unit, student should be able to:

1. highlight the argument affirming obligation to obey the law
2. Identify the denial of obligation to obey the law

4.3. Affirmation of Obligation to Obey the Law

The question, 'why ought I to (or should I) obey the law? This may be understood and answered in Plato's dialogue known as *Crito.* This work is the first philosophical exploration of political obligation and also as the last to appear for centuries. These arguments fall into categories. Firstly, Socrates felt that he had a moral duty and religious obligation to comply with the judgement of the state. He maintains that his long residence in Athens shows that he has entered into an agreement with its laws and committed himself to obey them — an argument that anticipates the social contract or consent theory of political obligation (Plato, 2000: no. 54c). Second, he acknowledges that he owes his birth, nurture, and education, among other goods, to the laws of Athens, and he hints at the gratitude theory of obligation when he concludes that it would be wrong of him to disobey its laws now. Third, he appeals to what is now known as the argument from fairness or fair play when he suggests that disobedience would be a kind of mistreatment of his fellow citizens. (Plato, 2000: no. 54c) The question: must we always obey the concerns moral obligation to obey the law. Bentham and Austin separated law from morality, but they endorsed utilitarian morality that should guide the legislator in the enactment of the law. For Hart, also, law is fundamentally separated from morality but he thinks that the utilitarian morality does not go far enough, for the converse of the happiness of the greatest number can cause social harm to some persons; therefore he rejects the utilitarian morality on grounds of its theoretical and practical inconsistencies.

4.3.1 Denial of Prima Facie and Particular Obligation

Joseph Raz opts that there is no obligation to obey the law, whether absolute or prima facie, not even a good society whose legal system is just. Accordingly, quoting Raz, Haaga, states that "an obligation to obey the law entails a reason to do that which the law requires". However, he indicates "many reasons to that which the law requires have nothing to do with an obligation to obey the law (Haaga, 2020: 216-217). The law can be obeyed on the grounds of several reasons not because we presume an obligation to obey the law. A law can exist without demanding an obligation, which means that a rule may demand something without equally letting us infer that

there is an obligation for to comply. The contention according to Raz is that, there are are no general and true premises or conditions that are sufficient to establish that everyone ought to do what the law requires in all circumstances. (Raz, 1979: 233-234)". Raz explains that, the question of the proper attitude to the law is a central preoccupation of legal and political philosophy. One aspect of it is the inquiry whether there is an obligation to comply with the claims of the law for obedience, whether one has duty to obey the law as it demands to be obeyed (Haaga, 2020: 217). It is important to that, the law's claims for obedience are very different from the current philosophical conception of the obligation to obey the law as a *prima facie* reason to obey.

Self-Assessment Exercises

1. The arguments for affirmation of obligation to the law states that, there is a moral duty and religious obligation to comply with the judgement of the……. (a) court (b)state (c) people
2. The strongest proponents of denial of obligation to obey the law is…… (a)Joseph Raz (b) John Austin (c) John Rawls

4.4. Summary

This unit has considered some of the reason that have been advance for obligation to the law and the reasons advance to the contrary. These were captured as affirmation of obligation and denial of prima facie obligation, respectively.

4.5. Conclusion

Even when obligation is integral to what the law is, arguments are still rife for and against it. This what this unit has considered.

4.6. Reference and Further Reading

1. Haaga, P.T. (2020). "The Relationship Between Authority-Reason and the Question of Obligation in the Legal Philosophy of Joseph Raz" *Sapientia Journal of Philosophy*, Vol.12.
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4. Raz, J. (1979). *Authority of Law*, Oxford: Oxford University Press.

4.7. Possible Answers to Self-Assessment Exercises

1. Answers to Self-Assessment Exercises 1(b)state

2 Answers to Self-Assessment Exercises 2 (a)Joseph Raz

MODULE EIGHT: THE RELATIONSHIP BETWEEN LAW AND MORALITY

INTRODUCTION

This module is divided into four units: the first unit examines the meaning of the concept of morality; the second units unit concerns itself with the meaning of law while the third unit looks at the relationship between law and morality. The final unit concerns itself with an evaluation of the discourses.

UNIT ONE: WHAT IS MORALITY?

CONTENTS

1.1. Introduction

In legal philosophy, both law and morality are normative disciplines; as normative disciplines, they attempt to prescribe and control behavior in a certain direction. These are two concepts that have been variously discussed in philosophy and also in the field of law. Within the context of the philosophy of law and jurisprudence, the question of what whether they relate to each other or not and what kind of relations they have amongst themselves have been debated and have also elicited responses from philosophers and jurist alike. This unit concerns itself with the concept of morality. Here you will get to understand what morality means.

1.2. Intended Learning Outcome (ILOs)

At the end of this unit, students are expected to be able to:

1. Account for the etymological definition of morality
2. Define morality within the context of ethics and moral philosophy

1,3. What is Morality?

The concept of morality is derived from the Latin *mos* which means custom or usage. Nyasani (2010) argues that morality as derived from the Latin *mos* (plural: *mores*) means custom, conventions, pejoratively value or standard. Here, the Latin *mores* means the totality of norms, customs and conventions embodying the fundamental values of a group of people in the society.

In this sense, morality may not necessarily denote or relate to propriety or probity of conduct as such but to the whole spectrum of those intrinsic values and norms whose observance makes life livable, tolerable and reasonably self-regulated.

Morality, for Bernard Gert (1999:586) is "an informal public system applying to all rational persons, governing behavior that affects others, having the lessening of evil or harm as its goal, and including what are commonly known as the moral rules, moral ideals, and moral virtues. To say that it is a public system means that all those to whom it applies must understand it and that it must not be irrational for them to use it in deciding what to do and in judging others to whom the system applies". Morality as Hare (1992) intimated can be a body a of standards or principles derived from the code of conduct from a particular philosophy, religion, culture or it can be driven from a standard that a person believes should be universal. Put differently, Morality is the principles concerning right and wrong, or good and bad behaviours, it is the degree to which something is right or wrong, good or bad.

Self-Assessment Exercises

1. …….. is the principles concerning right and wrong, or good and bad behaviours, it is the degree to which something is right or wrong. (a) Obligation (b) morality (c) authority

1.4. Summary

It explained that morality is derived from the latin *mos* (*mores*) which means custom or standards. Morality consists of a body of standards or principles derived from the code of conduct from a particular philosophy, religion, culture or it can be driven from a standard that a person believes should be universal.

1.5. Conclusion

This unit explicated the concept of morality and has established that the concept of morality is of Latin derivation and that away from the etymological definition, morality can be a body a of standards or principles derived from the code of conduct from a particular philosophy, religion, culture or it can be driven from a standard that a person believes should be universal.

1.6. References and Further Reading

Gert, B. (1999). "Morality" Robert Audi (Ed.) *The Cambridge Dictionary of Philosophy* (3rd Edition), New York: Cambridge University Press.

Hare, R. M. (1992) *The language of Morals*. New York: Oxford University Press.

Nyasani, J. M (2010). *Legal Philosophy: Jurisprudence.* Nairobi: Consolata Institute of Philosophy Press.

1.7 Possible Answers to Self-Assessment Exercises

1. Answers to Self-Assessment Exercises 1(b) morality

UNIT TWO: WHAT IS LAW?

Content

2.1. Introduction

Having accounted for the concept of morality in the preceding unit, it behooves on this unit to concern itself with a discourse on the concept of law with the intent of getting the students acquainted with what law means as a concept. To this end, the discourse that follows will be on the concept of law.

2.2. Intended Learning Outcome (ILOs)

At the end of this unit, students should be able to:

1. Define the concept of law
2. Account for Cicero's definition of law
3. Account for Aquinas' definition of law.

2.3. What is Law?

The concept of law has been defined in variously in the previous unit. Hence, the beginning of the discourse on the concept of law will proceed from its etymology. The concept of law originates from the Latin *Jus* which when used in connection with the Latin *jungere* implies a bond or tie. Quoting Wilson, Agundu (2019: 228) sees law as "that portion of established thought and habit which has gained a distinct and formal recognition in the shape of uniform rules backed by the authority and power of government". The concept of law has generality, normativity, and sanction as what characterizes it nature. Put differently, law is a general rule of action taking cognizance only of the external acts, enforced by a determinate authority, which is

paramount in a political society; or briefly, a law is a general rule of external action enforced by a sovereign (Asirvatham and Misra (2009); Agundu (2019).

Any discourse on the clarification of the concept of law, especially from the point of view of philosophy must account for the definition of law by the roman jurist, Cicero and the encyclopedic Thomas Aquinas. For Cicero as cited in Wack (2006: 3), "true law is right reason in agreement with Nature; it is of universal application, unchanging and everlasting. . . . It is a sin to try to alter this law, nor is it allowable to attempt to repeal any part of it, and it is impossible to abolish it entirely. . . . [God] is the author of this law, its promulgator, and its enforcing judge". For Aquinas, (in Brian Leiter and Michael Sevel (2015)), law an 'ordinance of reason', that is, a prescription which is both produced (by a lawmaker), as well as responded to (by its subjects), by an exercise of the distinctive human capacity of reason. What Aquinas' definition translates into is that law, by nature a distinctive point or purpose. In the most abstract sense, the purpose of law is to serve the common good of a political community; more concretely, law is a promulgated plan of coordination whereby a society can realize goods (both tangible and intangible) which cannot be achieved by other means.

From the above definitions of law, certain essentials of law can be deciphered. They include (a) law implies the presence of a civic community (b) the reflect the social conditions of that community; (c) they are a set of rules; (d) they regulate the external or the outer conduct of man and they imply coercion, more physical the moral.

Self-Assessment Exercises

1. The concept of law originates from the Latin word……. (a) *Jus* (b) *nous* (c) *dasein*
2. The essential components of law include implies the presence of a civic community; the reflect the social conditions of that community; they are a set of rules; they regulate the external and……. (a) they imply coercion, more physical the moral (b) they grant full autonomy (c) they empower the supreme

2.4. Summary

The concept of law ramifies that portion of established thoughts and habits which has come to be recognized in the shape of uniform rules backed by the authority and power of government. The concept of law has generality, normativity, and sanction as what characterizes it nature.

2.5. Conclusion

In the foregoing, attempts have been made to account for the concept of law and show its nature. what is to be noted is that laws are established and recognized rules that have been promulgated

and codified by constituted authorities and as part of its nature, generality, normativity and sanctions are what characterizes law.

2.6. References and Further Reading

1. Agundu, O. (2019). *Social And Political Philosophy in the Age of Globalisation.* Abuja: DonAfrique Publishers.

2. Asirvatham, E and Misra, K. (2009) *Political Theory*. New Delhi: S. Chand and company.

3. Brian Leiter and Michael Sevel (2015) "Philosophy of Law" Sydney Law School Legal Studies Research Paper No. 15/18

4. Wacks, R. (2006). *Philosophy of Law: A Very Short Introduction*. Oxford: Oxford University Press.

2.7. Possible Answers to Self-Assessment Exercises

1. Answers to Self-Assessment Exercises: 1(a) *Jus*
2. Answers to Self-Assessment Exercises: 2 (a) they imply coercion, more physical the moral

UNIT THREE: ON THE RELATIONSHIP BETWEEN LAW AND MORALITY

CONTENTS

3.1. Introduction

Answers to the question of whether law and morality are related or not and should they be related, what kind of relations exist between them have been sought by philosophers and researcher in the field of law and the philosophy of law. This unit will attempt an answer to the above question and will show the various schools of thought that have been used to argue for their relatedness or otherwise.

3.2. Intended Learning Outcome (ILOs)

At the end of this unit, students should be able to:

1. Account for the relationship between law and morality.
2. Analyse the arguments of the separatists school against any connection between law and morality.
3. Outline the arguments of the inseparatists school for a necessary connection between law and morality.

3.3. The Relationship between Law and Morality?

Discourses on the relationship between law and morality are based on two theses which is represented by two schools of thought; the first is the separatist thesis that is championed by the separability school and the inseperatist thesis of the inseperability school of thought.

3.3.1. The Separatibility Thesis

The Separability School according Uduigwomen (2010) argues that law and morality are separate from each other. To argue their position, members of the school advanced the following reasons. The first reason is that law is relative while morality is universal. To quote Uduigwomen (2010:54), "while law differs from society to society, the fundamental moral principles cuts across all nations of the world". The second argument is that morality can strive exist and thrive without law; the reason being that, a society with a very high level or standard of morality may not need law. Again, there are many offences according to Uduigwomen which law permits but are condemned by morality (54). To this end, Uduigwomen (2010) argued that while law may not frown at, and perhaps punish such immoral acts as prostitution, voluntary fornication between adult of opposite sex, morality may frown seriously at them. Yet another argument that have been advanced by the separability school is that law can be traced to a definite that it was promulgated or that it came into existence while it is in fact, not possible to trace and pin the existence of moral norms to a particular date. It has also been argued that law and morality are at par with regards to the end or telos. While the aim of morality is to make men more virtuous, the aim of law is different as it aims at ensuring peaceful co-existence in the society.

Jeremy Bentham (1748-1832) and John Austin (1790-1859) who according to Uduigwomen (2010) are members of the command school of law are both sympathetic and supportive of the separation of law from morality thesis and maintain that a value free account of law is possible. Han Kelsen (1881-1973) also supports the separation thesis and in agreement with Bentham and Austin stressed that a value free account of law is not only possible but necessary and that

although law and morality are both social orders, they differ in differ in the way they try to achieve their purpose in the social order.

Joseph Raz is one of the leading exponents of Legal positivism (a 19th century movement which is often defined as a doctrine that is in radical and polemical contradiction to natural law theories). He is not just a legal positivist but one of the leading exponents of exclusive legal positivism (one of the two strands of legal positivism, a division that is occasioned by the question of what the relationship between law and morality) is. The exclusive legal positivists hold as its major thesis, the fact that morality and law are not related. According to Wacks who corroborated the above, "as a leading 'hard' or 'exclusivist' legal positivist, Raz maintains that the identity and existence of a legal system may be tested by reference to three elements: efficacy, institutional character, and sources. Law is thus drained of its moral content, based on the idea that legality does not depend on its moral merit'. (37). Raz further argues that law is autonomous: we can identify its content without recourse to morality. Legal reasoning, on the other hand, is not autonomous; it is an inevitable, and desirable, feature of judicial reasoning. For Raz, the existence and content of every law may be determined by a factual enquiry about conventions, institutions, and the intentions of participants in the legal system (37). Answering the question of what law is; Raz asserted that is a fact (a social). It is never a moral judgement.

3.3.2. The Inseparability Thesis

The second school of thought regarding the relationship between law and morality is the inseparability school whose highest common factor is the fact that there is a close relationship between law and morality and hence, both cannot be technically separated. Uduigwomen (2010) advanced the three main reasons with which members of this school have argued their position. The first is hinged on the fact that both law and morality employs and uses the same normative language and are both concerned with laydown norms of human conduct that are expressed in both legal and moral language in terms of what is right or wrong. Both of them demands that it is our duty to do this or that, or that we should refrain from this or that. The second argument is based on the fact that although morality has a wider scope than law, law is a subject matter of morality and hence, morality and law cannot be separated. To buttress the above position is the fact that agreeing or the refusal to obey the law or the question of whether a particular law should be obeyed is in itself a moral question and it is in this sense that Aquinas argued that any positive

or human law that is not in conformity with morality or moral law is a pervasion of the law and hence, should be refuted. Thirdly, quoting Dennis Lloyd, Uduigwomen (2010) argued that both morality and law are concerned with imposing certain standards of conducts without which the survival of human society is at stack and in many of these fundamental standards, morality and law reinforces, supplement and complement one another as part of the fabrics of social life.

In the thoughts of philosophers like Plato and Aristotle, one finds traces of the fusion of law and morality, Thomas Aquinas also argued for the inseparability of law from morality when he argued that since the aim of law is to make citizens good, any law that is at par with morality is no law. The American Jurist, Lon Fuller (1902-1978) regarded law as having an inner morality in his 'necessary connection thesis' with respect to morality and law.

3.3.3 The Middle course Thesis: Hart's Minimum Content

Hart is the champion of this idea. The judge while exercising his judicial discretion in borderline cases, let his own moral conviction bear on the judgment he gives. He endorses morality at the fringe of law that is in hard cases **(**Hart, 1994: 102**)**. There will be particular and novel cases where rules will run out in the face of application and interpretation. In deciding hard cases, a judge's moral intuition can prevail. Nevertheless, Hart insists that where a judge decides a hard case on the basis of his moral conviction, he does not equally certify the validity of the law he enforces on moral ground, that is, on the condition of its moral content **(**Hart, 1994: 103-104**)**. His decision, ordinarily about judgments of the law, do not have to be sustained on some moral principles. He argued that the relationship between law and morality should not be conceived as if moral and legal imperatives mean the same. We use words such as: must, should and ought both in law and morality. Normative statements in both law and morality do not necessarily coincide nor are they logically equivalent.

Self-Assessment Exercises

1. The…… School according argues that law and morality are separate from each other. (a) Inseparability (b) Accountability (c) Separability
2. The school of thought which argues for the relationship between law and morality is known as……. (a) Inseparability (b) Accountability (c) Separability

3.4. Summary

In this unit, we have presented the arguments of the separatist and the inseparatist school on the relationship between law and morality. While the proponents of the separatists school have argued for the fact that there is no necessary connection between law and morality, the proponents of the inseparatist school have argued that there exist a necessary connection between morality and law and that any attempt to separate them will amount to an exercise in futility.

3.5. Conclusion

In this unit, attempts have been made to explicate on the relationship between law and morality. This attempt takes cognizance of the argument of the separatist school as well as the inseparatist school. While the separatist school argues for the fact that law and morality are parallel and hence, there is no necessary connection between them, the inseparatist school argues that law and morality are inseparably linked to each other.

3.6. References and Further Reading

1. Uduigwomen, A. F. (2010) *Studies in Philosophical Jurisprudence* 3rd Edition, Calabar: Ultimate Index Books Publishers.
2. Wacks, R. (2006) *Philosophy of Law: A Very Short Introduction*. Oxford: Oxford University Press.
3. Njoku, F.O.C., (2007). *Studies in Jurisprudence: A Fundamental Approach to The Philosophy of Law*, 2nd, Edition Owerri: Claretian Institute of Philosophy.
4. Hart, H.L.A. (1994). *The Concept of Law*, Second Edition Oxford Clarendon Press.

3.7. Possible Answers to Self-Assessment Exercises

1. Answers to Self-Assessment Exercises 1(c) Separability
2. Answers to Self-Assessment Exercises 2(a) Inseparability

UNIT FOUR: CRITIQUE OF THE ARGUMENTS ON THE RELATIONSHIP BETWEEN LAW AND MORALITY

CONTENTS

4.1. Introduction

Having accounted for the concepts of morality and law as well as a discourse on the relationship between law and morality within the context of the separatist and the inseparatists schools, it remains to evaluate the discourse and to perhaps, take a stand from amongst the two contending schools. Consequently, this unit concerns itself with an evaluation of what has been argued in the foregoing.

4.2. Intended Learning Outcome (ILOs)

At the end of this unit, students should be able to:

1. Identify the two schools you consider more plausible.

4.3. Argument For and Against the Relationship Between Law and Morality

Away from the separatist and the non-separatist thesis, the arguments, and contributions of Roscoe Pound (1945) and Arthur Scheller (1953) to the discourse on the relationship between law and morality is here considered necessary and instructive. Roscoe Pound (1945:187) in "Law and Morals - Jurisprudence and Ethics" identified four stages in the development of law with respect to morality and morals are generally recognized. First, is the stage of undifferentiated ethical customs, customs of popular action, religion, and law, what analytical jurists would call the pre-legal stage. Law is undifferentiated from morality. Second, is the stage of strict law, codified or crystallized custom, which in time is outstripped by morality and does not possess sufficient power of growth to keep abreast. Third, there is a stage of infusion of morality into the law and of reshaping it by morals. Fourth, there is the stage of conscious law-making, the maturity of law, in which it is said that morals and morality are for the lawmaker and that law alone is for the judge.

Closely related to the above, Arthur Scheller (1953: 322-323) in his paper entitled "Law and Morality" also contributed to the discourse on the relationship between law and morality. He argued that a complete dichotomy between law and morality is unsound. He further argued that the precise areas of relationship between law and morality can be stated in the following manner:

i. Law is related to morality in the setting forth of those virtues that are related to the common good. This does not mean that positive human law should prohibit all vices nor command all virtues: rather it prohibits only the grosser failings of mankind which threaten the very survival of society and commands those virtues which can be ordained by human means to the common good.

ii. Law is related to morality by the moral obligation imposed, that is, by the necessity of an act in relation to a necessary end-since law as the command of practical reason necessarily implies an obligation. Thus, obligation flows from the essential notion of law as an effective dictate of practical reason, that is, a connection of some necessity between the act commanded and the end for which that act is commanded. However, positive human laws' obligation is not in that same manner as morality's obligation.

iii. Law is related to morality because law is subject to and cannot contradict moral principles, that is, natural moral law.

iv. Law is related to morality since both stem and are directed by the same source: practical reason or prudence. A keener insight into this relationship can be ascertained by determining the nature of politics; politics is a human work of art, that is, a work of experience and prudence-and as prudence, politics is intrinsically related to ethics.

v. Law is related to morality because justice is a moral concept which is meaningless outside the area of morality. Essentially, justice consists in the creation of an equality.

In the preceding paragraphs, attempts have been made to argue account for the discourse on the relationship between law and morality. This attempt proceeded from a preliminary discourse on the meaning of law and morality to the question of their relation to each other. What should be noted is that two schools of thoughts: the separability school and the inseparability school serve to explain the relationship between morality and law. While the seperability school argues that there is no necessary connection between law and morality, the inseparability school argues for the fact that law and morality are intrinsically and necessarily connected and cannot be separated. Following from the discourse here presented, this attempt tilts towards, and is sympathetic to the inseparability school of thought and opines that law and morality are necessarily connected.

Self-Assessment Exercises

1. In the critique in Law and Morals, there are four stages in the development of law with respect to morality, namely, i) stage of undifferentiated ethical customs, ii) the stage of strict law, codified or crystallized custom iv) there is a stage of infusion of morality into the law and …… (a) the stage of conscious law-making (b) the stage of order (c) the stage of obligation and arbitrariness

4.4. Summary

This unit has evaluated the preceding discourse and hence, the present author, drawing from the ensuring argument is sympathetic to/with the inseparatist school which argues that there is a necessary connection between morality and law

4.5. Conclusion

The conclusion that is reached in this unit is that there are three schools of thought upon which the arguments for or against the connection between morality and law have been advanced. Be that as it may, the argument of the inseparatist school who stresses the necessary connection between morality and law is here considered more plausible.

4.6. References and Further Reading

1. Arthur Scheller Jr., *Law and Morality*, 36 Marq. L. Rev. 319 (1953). http://scholarship.law.marquette.edu/mulr/vol36/iss3/12
2. Bernard Gert (1999) "Morality" Robert Audi (Ed.) *The Cambridge Dictionary of Philosophy* (3rd Edition), New York: Cambridge University Press.
3. Roscoe Pound, *Law and Morals -- Jurisprudence and Ethics*, 23 N.C. L. Rev. 185 (1945). http://scholarship.law.unc.edu/nclr/vol23/iss3/1

4.7. Possible Answers to Self-Assessment Exercises

1. Answers to Self-Assessment Exercises 1 (a) the stage of conscious law-making