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Translated Article*

Dr. Preedee's Three-Layer Theory of Law

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Translator's Introduction

The late Dr. Preedee Kasemsup ranks among the most distinguished Thai legal scholars of the 20th century. Although his work covers many fields of law, including legal philosophy and jurisprudence, legal methods and legal history, perhaps his greatest contribution to Thai legal thought is his "three-layer theory of law." Professor Preedee spent decades, roughly in the 1970s-80s, developing this theory which became a hallmark of the 'Thammasat School' of legal scholarship.

The three-layer theory of law represents a firmly socio-cultural approach to law and legal history, which recognises a multiplicity of sources of law and the dynamic and complex nature of legal development. Furthermore, it serves as a principled basis to challenge assumptions about superiority of 'modern law' and to expose fallacies concerning legal positivism and constructivism, while also drawing attention to the challenges for legal scholars in legal interpretation, given the law's plurality of sources.

Some discussion of the three-layer theory of law has already been published in English. Professor Preedee's book chapter "Reception of Law in Thailand—a Buddhist Society"[1]*is an application of this theory to the process of reception of legal ideas in Thailand in the 19th-20th centuries, and a frequently referenced source for English-language research into Thai legal history. However, this article, written by the eminent scholar Somyot Chuathai and published in 1988, represents a succinct*

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[1] Preedee Kasemsup, "Reception of Law in Thailand—a Buddhist Society" in Masaji Chiba (ed), *Asian Indigenous Law: In Interaction with Received Law* (KIP Limited, 1986) 267–300.

but detailed account of the conceptual underpinnings of the theory as well as an overview of some of its implications. It is hoped that this translation will be of interest to students and scholars as an important and widely influential work of Thai legal thought.

Professor Preedee Kasemsup developed the three-layer theory of law over the course of a decade from his teaching materials on courses on Philosophy of Law and Civil Law: General Principles. Therefore, the three-layer theory of law should be considered the foundation of Professor Preedee's legal thinking. The concept of the three-layer theory of law became widely known from the type of law that Professor Preedee called "Technical Law," and was eventually considered to belong to the 'Thammasat School' of legal scholarship. Professor Preedee used this theory to explain and address issues in the field of legal philosophy and to challenge concepts in various schools of legal thought, particularly Legal Positivism, which views the law as the command of the sovereign but at the same time uses this theory to explain matters concerning legislation and legal interpretation. Thus, in understanding the three-layer theory of law, these three areas must be separated: what law is; making law; and interpreting law.

I. WHAT IS LAW?

The question "what is law?" is a very important one in the field of legal philosophy. It may be considered from many angles and there are many different answers. The three-layer theory of law approaches this question by way of conducting a historical inquiry, or uses a 'historical approach'. It adopts the perspective that, to understand the law properly, in accordance with its true nature, it is necessary to see law as being dynamic, not static, since law has been continually changing throughout history. Viewing the law as static leads to the misunderstanding that special characteristics of law which appear in one era are characteristics of the law generally. To regard the law as having this static nature is therefore a distortion of the truth.

For this reason, in addressing the question of what the law is, the three-layer theory of law begins by discussing the origins, transitions, and evolution of the law. Since it is evident that law is linked with society—the Latin phrase for which is "*ubi societas, ibi ius*"—an explanation of the evolution of the law must come together with an explanation of the evolution of society. It may be surmised that the evolution of the law has three eras, and three types of law emerge: traditional law or law of the people (*Volksrecht*); law of lawyers (*Juristenrecht*); and law of a technical nature (*Technical Law*).

Regarding the origins of the law, there is the fundamental question of whether law arises through human legislation, or is engendered via the will of a human being, or arises through its own creation. On this issue, the three-layer theory of law views the law as arising through its own creation in human society and then gradually

evolving through to the present day, not formed or constructed through the will of any person.

In presenting this answer to the question above, the three-layer theory of law is based on supporting historic evidence and from the results of present-day academic research in the fields of the study of animal behaviour (ethology) and the study of cultures of primitive human tribes in anthropology.

Professor Preedee Kasemsup used the following example from studies of fish behaviour. Some types of fish that live in rock crevices display territorial aggression. If another fish approaches its rock crevice, a fish will show aggressive behaviour to deter the intruder and, in the end, that fish usually displays greater physical strength so that the intruder must withdraw and admit defeat; it will not be so bold as to invade that territory again. This result is due to the fact that, in this situation, the fish felt that it was a native of that place. When the invader came into its native land, it felt like it was being assaulted. This shows that, in this situation, the native fish felt that it had a greater right than the other fish to occupy that area, demonstrating the power of having borders to mark out territory which is entirely one's own. This example illustrates the concept of being a native, or being defensive over an area, which is called the "territorial imperative." This principle is a fact; no-one created it through an order. It exists in and of itself.

Rules of conduct arise from this fact. According to the three-layer theory of law, there exists among all groups of animals, including human society, something which may be called "the principle of territorial enforcement," which has the same characteristics as defensively guarding property that is in a human's possession. Rules that impose limitations on the scope of this behaviour are used as a tool to prevent and avert quarrels, or so that disturbances to the pursuit of finding food do not occur too often. This principle promotes the preservation of a society. When this behaviour is exhibited continually, to the extent that it becomes accepted as ordinary, regular behaviour—and when it has been this way for a long time—it will create a rule, appearing in a clear form, that is generally accepted as correct (*opinio juris*) and as something that must necessarily be done (*opinio necessitatis*).

There is the issue of the period of time during which the rule has not yet emerged in a clear form. In other words, during the initial period, when each person acts as he or she thinks fit, what does each person use as a yardstick or means of deciding how to behave?

On this issue, the three-layer theory of law explains that knowing how a person should behave in any situation comes from two special innate human abilities: the ability to put facts into classifications ("Factual Reason"), which means the ability, in recall, to discern differences, identical aspects and similarities of different things; and the ability to know what is right and wrong, what should and should not be done, or what is called "Moral Reason."

When there is a conflict that humans must settle, humans use these abilities to examine different situations, along with the relationships between the facts which are tied together in a particular orderly manner. The system of order which exists in the relationship between the assembled facts in any matter is called the "Nature of

Things." When humans use the ability for Moral Reason within the human mind to analyse the relationship between external facts relating to a particular situation, we may be able to see the Nature of Things of that situation—drawn from external facts that indicate which party is right, and which is wrong. Thus, the decision comes automatically from the link between moral reasons and the Nature of Things.

How did the ability to discern right and wrong develop into rules of law? Professor Preedee Kasemsup explained that, when something has been settled as right or wrong, and this has been accepted into regular conduct for a long time, it becomes firmly fixed in the consciousness of persons in that community. Eventually, it becomes accepted as correct without any need for consideration. When it has been practiced for a long time, eventually it becomes traditional custom. There are important traditional customs relating to things which people value highly, such as property, wives and children. If someone encroaches, he must be warded off to the point of retaliation—permitting conduct on that matter more carefully than on other topics—and gradually the means of formal enforcement are developed in accordance with these traditional customs, until the principles become traditional law.

Lawyers' law evolves out of this traditional law, a process which Professor Preedee explains as follows. When human beings recognise that they are in a society, they will recognise, and act in accordance with, rules of traditional law. At first, the people will follow these rules, understanding them easily—which things are right, what ought to be done—without understanding the reasons for them or their hidden meanings in any detail or complexity. Later, people gradually come to know the meanings of the rules. When there are disputes, the people must use the rules to assist in adjudication, and at the same time they gradually elaborate these rules and the methods of their enforcement, adding detail and complexity until the rules cease to be accessible or understandable by ordinary common sense ("Simple Natural Reason") and require more complex reasoning to be accessed or understood. If a dispute on such a matter arises, knowledgeable persons must be relied upon to assist, to deliberate over and ruminate upon the various accumulated rules and their reasons in order to identify which most correctly apply.

Regarding the adjudication of these disputes, Professor Preedee Kasemsup is of the view that those who have the responsibility to adjudicate—the judges—do not come up with the principles for deciding on their own. Rather, they seek out the principles which are correct for the dispute. The judge, known to be an upright individual, usually decides in accordance with existing rules, regardless of whether the matter has been considered in previous judgments or has never arisen before. In the latter case, a judge would carry out the duty of finding the rules which should apply to a new situation by comparing with rules that are similar, adapting from pre-existing rules, or reasoning based on beliefs about right and wrong in relation to that matter as a tool for making the decision. In this sense, the judge merely demonstrates what the rule is on the matter, and does not lay down the rule arbitrarily, or according to his or her own predilection. Thus, Professor Preedee Kasemsup is of the view that the terms "case law" or "judge-made law" do not reflect the true nature of the matter, because justice was there already. The jurists only perform the duty of finding or adapting the legal

principles, to make them more detailed or clearer. The reasoning that lawyers use to decide on the merits of a case is called "Artificial Juristic Reason," which is reasoning adapted from Simple Natural Reason.

Take the example of a person appropriating someone else's property. When we consider this situation using Simple Natural Reason, we know that the person taking the property is in the wrong. For example, suppose that there is a hunter carrying a deer which he has caught, and another hunter snatches the deer from him: we know that the hunter who snatched the property is in the wrong. However, suppose that the first hunter shoots a deer, wounding it. It escapes, and the hunter tracks it. Eventually, it dies in the territory of the second hunter. An intermediary might decide that the first hunter should still be allowed to claim the deer, feeling that it is fairer to give it to him than to the hunter that was merely present, and who did nothing beyond this. The animal is not considered to be an ownerless animal because it was brought down in the jurisdiction of the first hunter. When this is taken into consideration, it will be concluded that the animal must be given to the first hunter.

However, suppose that the first hunter's shot only grazes the deer, merely slicing off some of its fur, and the hunter tracks it but finds that the second hunter has caught it. Through the application of the same principle (the "First Taker Principle"), Professor Preedee Kasemsup explained the position as follows:

This situation differs from the second situation, because the injury did not cause the animal to be incapacitated as it was fleeing, as was the case in the second situation, so that when it escaped there was still an opportunity for it to be captured. That is, the injury did not cause the animal to be within the scope of control of the hunter. Although the deer was injured, its injury was only minor; therefore, the animal was still free and had not fallen under the power of the person who injured it, as in the second situation. In reasoning in this way, the 'right of first taker' will take on additional content and detail. The reasoning of an ordinary person who has not thought deeply about the matter would not result in the development of reasoning such as this. This type of reasoning uses subtle and profound consideration; reasoning in the style of lawyers, also called "legal reasoning" or Artificial Juristic Reason. Therefore, it is necessary to study and understand how legal principles give rise to the art of interpreting and applying the law, which in turn creates laws or principles of academic jurisprudence. This can be seen clearly from the example of the Romans who used detailed and profound legal-style reasoning in relation to their traditional ancient laws, to gradually develop them into a large number of detailed and complex laws which have become the principles of academic jurisprudence that we study today, the type of law that Professor Preedee Kasemsup calls "Lawyers' Law" ("*Juristenrecht*").

On the issue of how technical law comes about, Professor Preedee saw that society never stands still but is constantly changing; just as from when carts were used, technology was developed to create high-speed vehicles such as cars. When there are cars, it is necessary to develop new regulations for them in place of the traditional rules that were in operation when carts were used. Now, society cannot wait for the formation of such rules through custom or tradition because the dangers are

increasing all the time and the damage that can be caused by cars is much greater than before. Thus, there is a need to have new provisions of law immediately.

The legislative process is gradually developed. The laws written by this legislative process are rules created by the will of humans in the furtherance of some particular objectives, for example, traffic law for convenience and safety in travel, or forestry law for the conservation of natural resources and headwaters. The three-layer theory of law calls legislatively created law such as this "Technical Law"; that is, law that is created for technical reasons. This is the name which Professor Preedee Kasemsup gave to this type of specific law. Law in the modern age is mostly this type of law.

The three-layer theory of law sees the evolution of the three eras of law as a historical process which continues in a single unbroken line, like an uninterrupted stream. In the first era, the protagonist is 'the people', who use law which is traditional law (*Volksrecht*), also called people's law. In this first era, the people are the upholders of the law; law of this kind does not need to be learned to be understood, because it comes from traditions or customs that are in continual use. In the second era, it is lawyers who decide cases in place of the people, who are under the decisions of the lawyers. The lawyers adapt the legal principles which the people have been using, until they become something which must be learned to be understood. In the third era, the protagonist is the legislator, who creates legislation for technical reasons and with a particular purpose. To understand law of this type, it is necessary to study the objective of that law.

From the evolution of the law through these three eras, the three-layer theory of law views the law as having many complexities. It is created from reason and from convenience for usage in situations (expediency). It means traditional law, legal principles adapted by lawyers, and also rules specified by the sovereign to address a problem technically. Thus, the law is produced in many ways and in many forms. The three-layer theory of law does not agree with followers of the school of Legal Positivism which sees law as the order of the sovereign.

II. INTERPRETATION OF THE LAW

On the topic of the interpretation of written law, in the field of legal scholarship from the 19th century until the present day, the focus has been on the question of whether to identify the purpose of the legislator or the purpose of the provision itself. This controversial issue is not yet settled. The three-layer theory of law is of the view that the two sides to this dispute suffer from the same flaw, that is the notion that the law is a matter of the intention or will entirely, so that the question becomes only whether to identify the intention or the objective of the law or that of the legislator. However, all written law that exists at the present time, all the various provisions, has content that flows from many streams; it does not only come from one person's will. According to the three-layer theory of law, the content of a provision of law is not of homogenous composition; the law is made up of component parts coming from the three sources

overlapping one another. A comparison can be made with pork belly which, though it is one cut of pork, is made up of different types of meat in three layers. A good chef must use his or her knowledge and expertise to use each cut of meat, which has different qualities, to prepare the right dish, and to employ the right technique for each. As for the law, analysis shows that all written law at the present time has content from the three sources. It is composed of:

(1) Provisions which come from traditional customs, also called "traditional law." Most provisions on the topic of the family come from customs and morals in society. In interpreting these provisions, it is not necessary to waste time identifying the intention of the legislator; instead, one must consider the traditional customs of the Thai people as an important aid for interpreting the law correctly. For example, the legal provisions relating to dowries, living together as husband and wife, bonds of good behaviour the breaking of which is grounds for divorce: such provisions are laws of this type. Additionally, in interpreting other similar provisions regarding, for instance, the principle of *pacta sunt servanda* in contract law, or the principle of respecting another's property, it is necessary to consider traditions and the history of these provisions in order to form a correct interpretation. In relation to the academic study of such legal provisions, if one only researches into legislative history to shine a light upon the intention of the legislator, one can be said to be heading into a dead end.

(2) Provisions which come from principles of law or principles of jurisprudence, such as matters concerning the period for adverse possession, the acquisition of rights in good faith (Section 1303 of the CCC), the denial of repayment of debt due to the expiry of a prescription period. The assertion of a right to adverse possession does not rely on reasons of morality, because the person asserting his or her right cannot fully claim that this act is correct on the basis of morality—indeed, it may even be looked upon with contempt by virtuous people—but it is acknowledged that the law recognises it. We therefore should imitate the Roman lawyers who stated that prescription periods and adverse possession are not institutions of morality, but legal institutions. Legal institutions arise by way of some aspect of legal reasoning, and once begun they continually develop until they become intricate institutions of law. If we consider only their interpretation from the standpoint of morality and custom, we cannot form an understanding of these legal institutions. Rather, it is necessary to study and research into the legal principles (*Rechtsdogmatik*—Doctrine) and the history of the legal principles (*Dogmengeschichte*—Doctrinal history) to do so. When we understand the background of this type of legal provision, we will be able to use and interpret it well. Legal history and comparative law are important for this.

(3) Provisions created for technical reasons. Some legal provisions are of this type, which we call technical law. For example, traffic law: driving on the left- or right-hand side of the road is not right or wrong in and of itself; the right or wrong comes from the establishment of the rules. Legal provisions of this type may be termed "justice by convention," and not "justice by nature," in the way that criminal law treats

offences which are wrong because they are prohibited (*mala prohibita*) differently from offences which are wrong in and of themselves (*mala in se*). All legislation which is made today is created for some particular, specific reason. Therefore, it is in the category of technical law. In interpreting legal provisions of this type, it is necessary to conduct research into the particular reason ("technical reason"), the reason for that law. Identifying this reason means identifying the intention of the person who made that law. Hence, we may say that, specifically for technical law such as this, a person applying or interpreting the law must seek out the intention or purpose of the law. For the other types of law, it is necessary to look for reasons in morality, reasons regarding the subject matter itself (the Nature of Things), and reasons of the legal institution relating to each matter.

III. LEGISLATION

We can count the present time as being in the age of legislation. However, since we have only been in this epoch for roughly 200–300 years, we do not yet have enough knowledge and experience to have fully developed an academic field of the study of legislation. We still do not know what its scope is, what are the things that may be legislated upon and what are not, and there is still no-one who can explain the principles on these matters. If we are taught only that law is the command of the sovereign, this will cause many issues. Thus, it has been said that the invention of legislation is more terrifying than the invention of fire or gunpowder; in the same way, it is a case of human beings putting their fate into others' hands.

On this issue, the three-layer theory of law is of the view that legislation has a limited scope. A person who has the power to legislate is not able to create whatever laws they want. This is because the three-layer theory of law sees law as having three layers of content: that is, traditions, legal principles, and legislated law. The foundation is law which comes from traditional customs, as can be seen clearly from the Civil and Commercial Code and the Criminal Code.

Regarding the principles of criminal law on theft, robbery and murder, according to the three-layer theory of law, the basis comes entirely from morality. Before we had a legal code, we had the basic concept of theft together with punishment for it. The Criminal Code was merely recognition of that which was there already. Law of this type we call law that comes from tradition, which is closely related to morality.

The principles of civil law are similar. The principle which concerns parents being required to take care of their children, a major principle on the topic of the family, is not present simply because the Civil and Commercial Code contains this duty. Rather, this principle was present already. The legislative provisions merely gave clear recognition to something that was already in existence; they did not create something new. The principle of respecting others' property gives rise to legal or jurisprudential principles which come to be explained as movable and immovable property, fixtures and fittings: concepts which make the law based on tradition (*Volksrecht*) clearer, more precise and detailed. Thus, the law concerning property is

comprised of parts which come from traditional customs and parts which are legal principles of lawyers, or principles of jurisprudence, developed through adaptation. In addition, issues concerning prescription periods and adverse possession, for instance, are already present in the principles of jurisprudence.

The draftsmen's decision to specify the number of years for a prescription period is a matter of the preferences of the draftsmen or the legislature—this may be considered technical law. Therefore, the law on property is composed of all three elements together.

On the matters of obligations, juristic acts, and contracts, they have as a fundamental principle that a person must keep his or her promises. This part was already there and was not provided by legislation. However, the part which specifies when a contract is made, characteristics of offer and acceptance, whether or not they match each other, when an offer is effective: these are details of the law, matters of legal principle. However, on the part which states that contracts must be according to a particular form, or must be evidenced in writing, these are matters which have been given a specification—technical law—which is a matter for the legislator. For this part, there is no basis to cite any underlying reason other than to recount that the law specifies that it is so. However, the legislature may not create a legal provision which conflicts with principles of law that are based on custom. For example, it may not legislate that a debt may not be repaid.

When legislation is created that includes provisions of technical law, the three-layer theory of law is of the view that this type of law is law which a person created; it does not come with moral force or the strength of long-lasting traditions and customs. If it is law which comes from custom—such as theft of another's property, breach of contract, or destruction of another's property—these are wrongs in custom and morality; people in society will censure them. Therefore, they have the force of morality to ensure that people conduct themselves in accordance with the law, so that even if there are no police, and no courts, there will nevertheless be enforcement in society. However, this is not the case for law which is truly created by legislation, such as in the case of traffic law—whether driving is decreed to be on the left- or right-hand side of the road is not a matter of right and wrong; or tax law—if you evade taxes, people will not censure you, because originally taxes were not collected by traditional customs. Laws on these matters do not have the force of morality or tradition. They have force by virtue of the power of the state alone.

Thus, to be effective, such laws require action on the part of the state to make the law have sanctity, such as traditional customs have, by some process to make the people feel that they must conduct themselves in accordance with the law. Otherwise, the law will not be enforced. Thus, for technical law to be effective, the three-layer theory of law offers the following recommendations:

(1) A law which is created by legislation must be sufficiently clear and certain. For example, to write that a violation of the peace, good order and good morals of the people will result in a 10-year prison sentence: this should not be done.

(2) The law must not run contrary to nature, nor clash excessively with the sentiments of the people upon whom it will be enforced. For example, if a law provides

that every child must report to an official if their parents commit an offence, this will threaten the peaceful harmony of the family, creating a state of continual paranoia.

(3) The law must not cause an excessive loss of benefit to the persons upon whom it will be enforced. If a law is written that results in a person being disadvantaged to an extreme degree, that person will evade it, causing the law to lose its effectiveness. Therefore, an offence and its punishment must be proportional to the strictness of the prohibition. If a prohibition causes a person who follows it to lose a benefit in a certain amount, the penalty for infringement must also increase proportionally to that amount.

(4) It is necessary to consider the process and organ involved in the enforcement of the law. When any law is issued, if it is pure technical law, the state or legislator must write the procedure clearly. For example, on the matter of patents and copyrights—property that, although it is invisible, the law has created or conjured so that it can be controlled as though it is property—it is necessary to give a definition specifying procedures for registration, together with clear rights and duties, and it is necessary to have an organ to enforce these rights and duties accordingly, for example a department of registration and officials who perform duties related to enforcement.

(5) It is necessary to consider whether the atmosphere in society is favourable to respect for, and conduct in accordance with, the law. This atmosphere is very important. If there is an atmosphere of conformity with law, issuing a new law will be easy.

Therefore, in building a nation in the modern era, Professor Preedee Kasemsup is of the view that a leader who understands the importance of the atmosphere in society and has a strategy for persuading the people to gradually adopt respect for the law, such a person in power for a time must be wise enough to force him or herself not to intervene in legislation. If in any country the concept of rule according to the law or the principle that the law is sovereign (the "Rule of Law") is firmly rooted, a person in power who commits an offence must be penalised just the same.

In a country which has a robust concept of the Rule of Law, a person in power need not be an intelligent person, because the law is there to support him or her. But in a country which does not have a tradition of respecting the law, or where the Rule of Law is not robust, the person in power must be wise enough to force him or herself not to intervene in legislation. Without an intelligent person with a good strategy, it is difficult for a country which does not have a tradition of the Rule of Law to build an atmosphere that gives rise to a tradition of following the Rule of Law. But if there is found to be a group of people in power who are brutish in what they construct from the outset and use their power selfishly, they will destroy any atmosphere of respect for the law and ruin any tradition of adhering to the Rule of Law. Thus, in building a nation, or 'modernisation', that is, creating a 'Modern State', we find that prosperous countries happen to have had people in power who were intelligent enough to use this strategy in building a modern nation.

CONCLUSION

The three-layer theory of law sees law as having dynamic, not static, characteristics. This allows us to see the complete picture of the law as it really is. From its beginnings, its accidental birth from morality and traditional customs which have simple, uncomplicated qualities called "Spontaneous Order," it gradually evolved through the adaptation of humans and the stipulations of those in power, according to Professor Preedee Kasemsup, to develop complex rules with "Artificial Order." To analyse the characteristics of the evolution of the law in this way is to consider the derivation of the law from evidence from anthropology and history broadly, and to form an understanding of the creation of rules of behaviour of people in society, and of the growth and expansion of those rules into their manifestation in a legal system comprised of detailed and complex rules, as at the present day.

Analysis using the above categorisation is an oversimplification of a complex account, performed to reveal the three key characteristics described above—that is, of the people's law, the lawyers' law, and legislated law. Each stage or era is not clearly separated from the others, since they occur within the unbroken, continuous stream of history. From the beginning, in ancient times, humans may have been able to understand legislation; at the same time, today, although we have passed beyond the era of traditional law, this does not mean that traditional law does not at all reveal itself in present law. And we may not yet be able to find a clear answer to the question of what the elements of traditional law are.

However, the three-layer theory of law may act as a general warning to lawyers not to think of the law simplistically or to refer to the law as having the static characteristics which are displayed in only one era. Moreover, interpreting the law is not a matter of merely considering the letter of the law; and legislating must not be an arbitrary act, because the law is a system of rules of behaviour of humans which is detailed and complex.

From studying the three-layer of law theory of Professor Preedee Kasemsup over a long period of time, it should be stated without exaggeration that the Professor's academic contribution on this topic is a great contribution to the field of jurisprudence in Thailand. At the same time, it demonstrates that the academic standards of Thai jurists are at the same level as those of lawyers in other countries which are advanced in the field of jurisprudence.