KLE LAW ACADEMY BELAGAVI

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STUDY MATERIAL

for

JURISPRUDENCE

Prepared as per the syllabus prescribed by Karnataka State Law University (KSLU), Hubballi

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JURISPRUDENCE

SYLLABUS

UNIT – I

- Meaning and nature of 'Jurisprudence'
- Purpose and value of Jurisprudence
- Schools of Jurisprudence: Natural law, Imperative Theory, Legal Realism, Historical School, Sociological School.

UNIT – II

- Functions and purpose of law, questions of law, fact, and discretion
- Justice and its kinds
- Civil and Criminal Administration of Justice
- Theories of Punishment and Secondary functions of the Court.

UNIT – III: Sources of Law

- Legislation
- Precedent
- Custom

UNIT – IV: Legal Concepts

- Right and Duty, Kinds, Meaning of Right in its wider sense.
- Possession: Idea of Ownership, kinds of Ownership, Difference between Possession and Ownership
- Nature of Personality, Status of the Unborn, Minor, Lunatic, Drunken and Dead Persons.

UNIT – V

- Liability: Conditions for imposing liability
- Wrongful act: *Damnum Sine Injuria*, causation, *mens rea*, intention, malice, negligence and recklessness, strict liability, vicarious liability, obligation.
- Substantive Law and Procedural Law.

Prescribed Books:

1. Fitzgerald, *Salmond on Jurisprudence*, (Bombay: Tripathi, 1999).
2. Dias, R. W. M, *Jurisprudence*, (Delhi: Aditya Books, 1994)

Reference Books:

1. W. Friedman, Legal *Theory*, (New Delhi: Universal, 1999)
2. V. D. Mahajan, Jurisprudence *and Legal Theory*, (Lucknow; Eastern, 1996 Reprint)
3. Paton G. W., *Jurisprudence*, ELBS, (Oxford, 1972)
4. Bodenheimer, Edgar, *Jurisprudence*, (Harvard University Press, 1974) (Revised Edition)

UNIT – I

JURISPRUDENCE – CONCEPT AND SCHOOLS OF LAW

- Meaning and nature of 'Jurisprudence'
- Purpose and value of Jurisprudence
- Schools of Jurisprudence: Natural law, Imperative Theory, Legal Realism, Historical School, Sociological School.

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Definition and Meaning of Jurisprudence:

Jurisprudence is the study of the Theory and Philosophy of Law. This article focuses on information concerning the subject. There are several ideas with regards to the meaning of jurisprudence and its nature.

The term 'jurisprudence' has been derived from the Latin term '*jurisprudentia*' which literally translates to 'knowledge of law' or 'skill in law'. The Roman civilization, which is popularly known as the bedrock of all human civilizations in the world, started to question the meaning and nature of law. Ulpian defined law as the "knowledge of things divine and human". According to him, the law is the science of right and wrong. Several jurists in Europe began to deliberate upon the meaning of the law.

Jeremy Bentham, the Father of Jurisprudence, stated that the "science of jurisprudence" has nothing to do with ideas of good and bad. His disciple, Austin, defined jurisprudence in the following words, "Science of Jurisprudence is concerned with Positive Laws that is laws strictly

so-called. It has nothing to do with the goodness or badness of law." According to him, laws are commands made by the sovereign and their non-obedience leads to imposition of sanctions. He termed such laws as positive law and stated that the main subject matter of jurisprudence is the study of positive laws. According to Holland, "Jurisprudence means the formal science of positive laws. It is an analytical science rather than a material science." Keeton defined jurisprudence as, "the study and systematic arrangement of the general principles of law."

Jurisprudence is the study of the Theory and Philosophy of Law. The subject, in its entirety, differs from other social sciences. There are several ideas with regards to the meaning of jurisprudence and its nature. This makes it difficult to define. Each country has its own idea of jurisprudence shaped by the social and political conditions in which the development of law took place in that region. Modern jurisprudence is tied to sociology on one end and philosophy on the other. The ideas of jurisprudence that are popular in major legal systems throughout the world today have their origins in the West.

Jurisprudence versus Legal Theory:

One of the most interesting debates in jurisprudence has been with regards to the difference between jurisprudence and legal theory. It has been argued that while jurisprudence studies the legal concepts which may or may not be theoretical in nature, the legal theory deals with the philosophical aspects of the law.

According to Friedmann, "All systematic thinking about legal theory is linked at one end with philosophy and at the other end with political theory."

Salmond explains that the jurisprudence is concerned with investigating law while legal theory seeks to understand the law in a strictly academic manner. According to him, jurisprudence brings

some important principles of law and legal concepts to light and legal theory attempts to study legal concepts in an academic manner to answer questions pertaining to meaning of law. The subject matter of jurisprudence includes the study of concepts such as nature of law, legal systems, and legal institutions, etc. as well as the utility of concepts such as liberty, equality, neutrality, etc. Legal theory is concerned with the meaning of law and legal concepts and the philosophies which shape them such as- natural law and natural rights, legal positivism, legal realism, Marxism, feminist legal theory, postmodern legal theory, etc.

Evolution:

Jurisprudence originated in the Roman civilization with the Romans questioning the meaning and nature of law. It was quite limited since the concepts of law, morals and justice were confused with each other. References are also made to the works of ancient Greek philosophers such as Homer, Socrates, Plato, and Aristotle. With the fall of the Roman Empire, the ideas of Roman and Greek jurisprudence disappeared, and the Christian State emerged. Soon, the authority of the church over the state was challenged by the reformist and ideas of secularism emerged. Many theories were proposed with regards to the evolution and nature of 'state' by philosophers

th like Hugo Grotius, John Locke, Rousseau, and Blackstone. The Age of Reason in the 17 Century led to the formation of ideas of collectivism and social welfare. Slowly, the idea of positive law and positivistic approach gained popularity whereby the boundaries of the law were demarcated, and its scope was limited.

Nature of Jurisprudence:

Law regulates significant aspects of human life. In simple terms, law is a set of regulations which are formulated by the state and are binding upon its subjects. Jurisprudence is the science of law.

It has been described as the “grammar of law”. To effectively interpret the law, it is essential to understand its origin, nature and meaning. Not only interpretation, but even the legislative process requires legislators to keep several factors in mind to ensure that the law that is made is effectively enforced and followed by all. Jurisprudence studies the law to facilitate better legislation as well as interpretation. In doing so, it uses the wisdom provided by other social sciences.

According to Paton, modern jurisprudence is mostly based on social sciences and philosophy since it examines the historical aspects of law to address the chaos created by conflicting legal systems. Describing jurisprudence as a “lawyer’s extraversion”, Julius Stone is of the opinion that the objective of jurisprudence is to view and examine law from the eyes of disciplines other than law. Roscoe Pound states that the subjects of jurisprudence, ethics, economics, politics, and sociology might be quite distinct at the core, however, at a certain point they overlap with each other. He further adds on that it is impossible to understand their respective cores without studying this overlapping with other social sciences. According to him, all social sciences must especially co-work with jurisprudence. Let us evaluate the interrelation of jurisprudence with other social sciences.

Jurisprudence and Sociology

The objective of sociology is to study human actions in a social environment. Its studies humans as members of social groups. Law is an important element of society. Therefore, sociologists must understand law to understand society. However, a sociologist would not look at law in the same way as a lawyer. While a lawyer is concerned with the law itself, a sociologist is concerned with the impact of the law upon society. There is a separate branch of jurisprudence which comprises of sociological theories of law. Not only sociologists but lawyers too have to understand the society

to understand the law. For instance, crime is essentially an act of social deviance and to understand the law of crimes, a basic understanding of the society is required. Earlier, the judges used to decide punishments based on popular opinion. However, now the process has become more technical and professional in nature with the opinions and studies of criminologists being taken into consideration.

According to Paton, it is essential to understand the relationship between law and social interests since such a study would lead to a better understanding of the evolution of law. The human factor in law cannot be entirely neglected. The ideas of jurists like Keeton asserting the necessity of studying law as devoid of any social interests is, indeed, compelling but appears to be quite impractical.

Jurisprudence and Psychology

Psychology is the science of human mind and behavior. Its objective is to understand the reasons behind the way an individual responds to a stimulus. All the social sciences, including jurisprudence, study human actions. Psychology occupies a central position among the social sciences for it is imperative to understand the human mind before studying human actions. Law plays a regulatory role in a man's life. One cannot regulate without understanding the nature of that which is to be regulated. Therefore, it is important that a lawmaker understands basic psychological concepts. Such an understanding would enable the lawmaker in ensuring that the law is not only made but also effectively followed by the people.

It may be argued that jurisprudence is in no way concerned with the workings of a human mind. However, psychological researchers have greatly contributed to penology and criminology.

The analytical positivists stress upon the importance of sanctions that are imposed by law. Some jurists believe that the sanctions are mostly psychological ones.

Jurisprudence and Ethics

Ethics scientifically studies human conduct. It deals with the concept of ideal human conduct. Such an ideal state is determined by popular opinions of what is good and what is bad. It depends upon the moral values of the society. Crimes are acts against the society at large which are penalized by law. Generally, law does not concern itself with the science of ethics. Sometimes ethics may help in the determination of whether an act should be criminalized or not. However, it must be noted that something that is unethical may not be a crime and vice versa. Ethics deals with the values and beliefs about ideal human conduct. The law deals with the regulation of human conduct. Thus, a jurist must have a basic understanding of the science of ethics to examine a law.

Austin divorced ethics from jurisprudence. The same has been criticized by many, for, it is believed that complete separation of ethics from jurisprudence would completely cut out the science of law from all forms of social contact and reduce it to a "system of rather arid formalism".

Jurisprudence and Economics

Economics refers to the science of wealth. Both, jurisprudence, and economics aim for the betterment of the lives of the people. Economics aims for such betterment through the satisfaction of the needs and wants of the people, while jurisprudence, the science of law, aims for the betterment of the lives of the people through the enactment of welfare legislations. Wealth forms an important source of happiness, peace, and fulfilment in an individual's life. Therefore, to enact good welfare legislations, a legislator must be mindful of the fundamental concepts of the science of wealth, that is, economics. Moreover, economic factors also lead to crime. Therefore, an

understanding of economics is essential to address and prevent crime in society. Law also protects people from economic exploitation.

The intimate relation between law and economics was first emphasized by Karl Marx. After his theory, several jurists began to evaluate the relation between the science of wealth and the science of law.

Jurisprudence and History

History studies the events and happenings of the past. One of the important areas of jurisprudence is to understand the origin and evolution of law. Thus, the relation between jurisprudence and history is extremely close. In fact, there is an entire separate historical school of jurisprudence.

Jurisprudence and Political Science

According to Friedmann, jurisprudence is linked to philosophy at one end and to political theory on the other. The concept of law, as we know it today, originated with the concept of state. Political Science is the science of the state. The analytical school of jurisprudence considers law as the command of the sovereign. This 'sovereign' is what is known as the state. The various political theories regarding the origin of the state have been used by jurists to formulate theories regarding the origin, nature and functions of law.

The various social sciences are deeply inter-related. This makes it impossible to study a single social science in complete isolation. The primary objective of all social sciences is to study human actions and behavior in different forms. Thus, it is important for a legal professional to be mindful of the intimate relations that jurisprudence shares with other social sciences.

Purpose and Value of Jurisprudence:

The purpose of jurisprudence is to study the law and legal concepts and analyze the same to facilitate better understanding of legal complexities. Therefore, the theories of jurisprudence are quite useful in solving complex legal problems in the practical world. The various studies and analysis of the legal concepts help a legal professional in sharpening his legal acumen. The subject has immense academic value. One of the most important features of jurisprudence is its relationship with other social sciences such as sociology, political science, ethics, etc. Therefore, research in the field of jurisprudence yields great number of social benefits. Moreover, jurisprudential concepts make way for sociological perspectives in law, thereby preventing it from being reduced to rigid formalism. Jurisprudence is known as the "grammar of law". It helps in the effective expression and application of legal concepts to real-life legal problems. It greatly helps in the interpretation of law and determination of legislative intent. It stresses upon the importance of considering present social needs over the ideas of the past while dealing with legal problems.

Jurisprudence is also known as the "eye of law". The human eye senses the light reflected from objects to make them visible. Similarly, jurisprudence throws light on several fundamental legal concepts to facilitate their effective application in deliberation of legal problems.

Indian Perspective:

The Hindu legal system is one of the most ancient legal systems of the world. It is based on the concept and philosophy of "Dharma". The Hindu concept of dharma might appear to be like the natural school of jurisprudence. Dharma refers to the order set by nature and the adherence of human beings to such natural order. Dharma includes the concept of nyaya or justice. The term

natural order implies to the cosmic order- the law which sustains the entire universe. The Hindus believed that dharma ensures that humans exist in harmony with the entire cosmos or universe.

The philosophy of Dharma is found to be encoded in various ancient Hindu texts known as the "Dharmashastras" (Code of Law). Some of the most important ones are:

- Manu Smritis – it is the systematic collection of all rules of Dharma Shastras- covering all the branches of law then in force. The simple language and great clarity in its composition made the Manu Smriti the most authoritative source of ancient Hindu jurisprudence.
- Narada Smriti- It consists of both substantive as well as procedural laws.
- Yajnavalkya Smriti
- Arthashastra- The political treatise of Hindus

The modern Indian Legal System is based on the common law system. The ancient Hindu system is denounced greatly to ensure that the Indian state remains secular in nature. Thus, the ancient Hindu legal system has lost its relevance in the modern world.

Though several thinkers have questioned the utility of jurisprudence, it remains one of the most important subjects of law. The purpose of the law is to regulate society to maintain order. Jurisprudence ensures that law remains connected with society and its philosophies. Without jurisprudence, the law would be reduced to a formalistic science which may appear to facilitate its goal of regulation. However, in the long run, it would only lead to a situation of chaos and constant conflicts between law and society.

Schools of Jurisprudence:

Natural School of Law:

Natural law thinking is an important tool in political and legal ideology in modern times. The term 'natural law' essentially refers to the legal system laid down in nature since the dawn of life on the planet. Unlike positive law, natural law does not require a "politically superior" authority to formulate laws. Natural rights are conferred and protected by God himself.

Lord Llyod describes natural law as a mere law of self-preservation or an operative law of nature that constrains a man to behave in a certain way.

History

According to Friedmann, the history of natural law school is a "tale of the search of mankind for absolute justice and its failure". Natural law has always appeared, in some form or other, throughout the various ages, as an idea of law higher than positive law. With the changing socio-political conditions, the idea of natural law is also undergoing change. However, one aspect that appears to be permanent is the appearance of nature as an ideal higher than that of positive law.

Natural law has helped in the transformation of the old civil law of Romans. It has validated the idea of international law. It has been used as a weapon in the fight against absolutism. At different times, the natural law school has been put to different uses. The history of natural law school can be traced as follows:

Greece

The Greeks are said to have laid the foundations of the natural law school. Heraclitus observed a certain rhythm in events and termed it as "destiny, order, and reason of the world." With this, he

laid down the basis of natural law. Nature, according to the Greeks, refers to a certain order in things. They identified the relation between such an order and law. This thinking formed the basis for the Greek school of enlightenment in the 5th century B.C. It went on to dominate the philosophical thinking of those times.

Socrates

Socrates identified that particular element of natural law which calls for adherence to positive law. However, he argued that natural law does not demand blind adherence to positive law. It must be critically evaluated by men, using their insight. This element of natural law was a climacteric factor during his age.

Plato

Plato's ideas mainly revolved around the concept of natural justice. According to him, each individual is given a certain sense of justice by divine power. Such a sense of justice and ethical reverence has been given to him to facilitate his survival by forming unions with other individuals. An ideal State is one where a person is given a role that justifies the capabilities that he possesses. His Republic can be said to be a product of his pursuit for the basis of justice.

Aristotle

Aristotle views the world as a composition of nature. According to him, man is a part of the creation of God. Man is endowed with the gift of reason which distinguishes him from other creatures created by God. He argues that when a man lives in accordance with "reason", it can be said that he is living "naturally".

Rome

The Romans did not confine natural law to theoretical considerations. Instead, they explored its utility by applying its concepts practically. Romans used principles of natural law to transform their rigid legal system into a cosmopolitan one.

Roman Legal system can be said to have three divisions- jus civile, jus gentium and jus natural. Jus civile refers to Roman civil law which applied to Roman citizens only. Jus gentium refers to certain principles of natural law that were universally accepted and were, therefore, applicable to foreign citizens as well. The Roman jurists did not deliberate upon the conflict between natural law and positive law and did not decide as to which of them is higher.

India

The Hindu legal system is one of the most ancient legal systems of the world. It is based on the concept and philosophy of "Dharma". The Hindu concept of dharma might appear to be like the natural law school of jurisprudence. Dharma refers to the order set by nature and the adherence of human beings to such natural order. Dharma includes the concept of *nyaya* or justice.

The term natural order implies the cosmic order- the law which sustains the entire universe. The Hindus believed that dharma ensures that humans exist in harmony with the entire cosmos or universe.

Natural Law and Social Contract

The political, social, and economic developments in medieval Europe opened upon an entirely fresh perspective towards the principles of natural law. The idea of natural law was used to support

that of a social contract. The social contract theory argues that 'state' is nothing, but a product of an agreement entered into by individuals in order to protect their life, liberty, and property.

The interrelation between natural law and social contract theory can be found in the works of the following chief exponents of the social contract theory:

Hugo Grotius

Grotius believed the social contract theory is a historical fact. He argued that by entering a social contract, the people are forfeiting their right to punish the ruler howsoever bad his government may be. He further went on to state that the ruler was also bound by the basic principles of natural law by virtue of its existence even before the social contract was entered into by the people and the ruler.

Thomas Hobbes

Hobbes believed in the existence of natural law. However, his approach towards its study was completely different from those who regarded the idea of natural law as higher to that of positive law. He expounded upon the principles of natural law in the form of natural rights possessed by each individual. He recognized these rights as "inalienable". He recognized all the rights related to self-preservation of a human being as natural rights.

He further went on to say that individuals are always in the fear of their rights being violated or unlawfully taken away by another individual. Thus, to remove such insecurities, the rights were vested into an entity called the State which was tasked with protecting and preserving the natural rights of its citizens. This is how Hobbes beautifully synthesized the concepts of natural law and the social contract.

John Locke

Locke too recognized the existence of certain inalienable natural rights. He categorized them as "life, liberty, and estate". However, he is said to be an opponent of Hobbes for while Hobbes's social contract is based on absolutism, Locke's social contract is based on liberalism.

According to him, individuals came together to constitute an entity called State to protect the three inalienable natural rights, namely, the right to life, liberty, and property. Social justice, according to him, referred to the protection of life and the economic rights of an individual by the State. A society can be said to be fair and just only if it protects the economic interests of the people.

His idea of justice stemmed from the common belief of classical liberals that private property is the source of liberty and that it also ensures the effective protection of such liberty.

Rousseau

According to Rousseau, "Man by nature never thinks and he who thinks is a corrupt creature."

He believed that the state of nature was an idyllic state wherein man did not reason things out and lived-in absolute liberty with a free mind. Slowly, mischief crept into the human mind and crimes like theft and murder started taking place. Thus, to protect natural rights, the individuals came together to constitute a body.

Through the social contract, everyone surrendered their rights to a body known as the State whose primary function was to protect the rights that have been surrendered. According to him, an individual cannot be oppressed by a State since he himself is a member of it.

Kant

Kant made a sharp distinction between natural rights and acquired rights and recognized only one natural right i.e., the right to freedom. However, the same also had one limitation; that it must harmoniously coexist with the right to freedom of other individuals.

Decline

The decline of natural law theories took place in the 18th Century. With the advancement of empirical methods of study and scientific behavioralism, natural law theories were denounced primarily because its source was said to be a “divine entity”.

Montesquieu and Hume attacked some of the core beliefs of natural law such as the element of reason present inherently present in all human beings. Hume went on to establish that the element believed to be reason by natural law theorists is, in fact, confusion.

Bentham and Austin mercilessly criticized the natural law school as, “simple nonsense; natural and imprescriptible rights, rhetorical nonsense, nonsense upon stilts.”

Revival

The revival of natural law theories began towards the end of the 19th Century. It came up as a reaction to positivist legal theories of the 19th Century. The First World War shattered several ideals of western societies and it was realized that positive law alone is incapable of solving all problems in the new social order.

The emergence of ideologies such as Marxism and Fascism and their counter ideologies led to the revival of natural law theories. The revived natural law theories took analytical, historical as well

as sociological approaches into consideration. Instead of formulating abstract ideas, it took practical problems into consideration and concentrated upon relativism.

The concept of natural law has undergone several changes throughout the course of history. It has supported the emergence of several ideologies which have played a prominent role in world history.

In conclusion, it can be said that the natural law school has, with its various theories, greatly contributed to the overall development of law.

Imperative Theory

Analytical school is also known as the Austinian school since this approach is established by John Austin. It is also called as an imperative school because it treats law as the command of the sovereign. Dias terms this approach as "Positivism" as the subject-matter of the school is positive law.

The analytical school gained prominence in the nineteenth century. The distinctive feature of eighteenth-century juristic thought was Reason. Individualism became the manifestation of the cult of reason. Writers like Descartes, Locke, Rousseau, Kant advocated Reason as the last guide and judge in everything.

Bentham breaks away from the spirit of the eighteenth century, rejects natural law and subjective values and emphasizes utility and propounds the concept of expository jurisprudence which deals with the law as it is. Austin takes over tins concept of expository jurisprudence and subjects it to a far more detailed, thorough, and searching analysis.

Allen has pointed out that Austin does not revolt against 18th-century individualism but seems to be quite impervious to it. His approach was secular, positivistic, and empirical. In fact, it was Austin who propounded the theory of positive law, the foundation of which was laid by Bentham.

Background

The Natural law school predominated of the juristic thought up to the beginning of the eighteenth century. Principles of Natural law were considered supreme and according to some writers, could override the man-made law.

The term Natural law was differently defined and understood by different writers and no single general acceptable meaning of the term "Natural law" or the criterion for ascertaining the content of the principles of Natural Law was there.

Nature, reason, supernatural source, justice, utility were some of the bases from which Natural Law was supposed to be derived. The analytical school was a reaction against the airy assumptions of natural law.

Exponents of Analytical School

The prominent exponents of this school are Bentham, Austin, Holland, Salmond, Kelsen, Gray, Hoffield and Hart.

Bentham

Jeremy Bentham can be said to be the founder of the Analytical school. In one of his books, he rejected the clinches of natural law and expounded the principle of utility with scientific precision. He divided jurisprudence into expository and censorial.

The former deals with the law as it is while the latter deals with the law as it ought to be. Bentham's analysis of censorial jurisprudence is indicative of the fact that the impact of natural law had not completely disappeared that's why he talked of utility as the governing rule. Perhaps, because of this reason, Bentham is not styled as the father of analytical school. He, however, believes that law is a product of state and sovereign.

Bentham's concept of law is an imperative one for which he himself preferred the term "mandate". A law may be defined, said Bentham, as an assemblage of sin declarative of a violation conceived or adopted by the sovereign in a state concerning the conduct to be observed in a certain case by a certain person or class of persons who, in the case, in question are or supposed to be subject to his power.

Austin

In 1832, John Austin's lectures were published under the title of "the Province of Jurisprudence Determined". This was the first systematic and comprehensive treatment on the subject which expounded the analytical positivist approach and because of this work, Austin is known as the father of the Analytical School. He limited the scope of jurisprudence and prescribed its boundaries. His approach was analytical.

Austin built on the foundation of expository jurisprudence laid by Bentham and did not concern himself with extra-legal norms. He distinguished between the science of legislation and law from morals.

To Austin, jurisprudence meant the formal analysis of legal conceptions. He divides jurisprudence into general jurisprudence and particular jurisprudence. Austin took a legal system as it is that is positive law and resolved it into its fundamental conception.

Positive law is the outcome of state and sovereign and is different from positive morality. The great contrast between positive law and positive morality, according to Austin, is that the former is set by a political superior whereas the latter is not the offspring of state and sovereign, hence it is not law. Law cannot be defined by reference to any idea of justice.

The science of jurisprudence is only concerned with the positive laws. According to Austin, analysis of positive law is to be done by the operation of logic on the law without consideration of the history of ethical significance. Austin ignored social factors as well as in his analysis of law, he emphasized that by the operation of logic, it is impossible to find out the universal elements in law, for example, notions were common in all mature legal systems.

Austin's approach, analysis and deduction are, however, applicable to a unitary polity based on parliamentary sovereignty. It does not have that relevance to legal systems as in India and the United States of America.

Holland

Holland is another supporter of the analytical school. He is the follower of Austin. However, he differs from Austin as to the interpretation of the term positive law. For him, all laws are of not the command of sovereign, rather, he defines law as rules of external human action enforced by a sovereign political authority.

Salmond

Salmond also belongs to the analytical school but differs from his predecessors in several ways. These are:

1. He gives up the attempt to find the universal elements in law by defining jurisprudence as science of civil law. According to him, there is nothing like universal element in law because it is the science of law of the land and is thus conditioned by factors which prevail in a particular state.

2. He deals with low as it is but the law to him is to be defined not in terms of the sovereign but in terms of courts. Law is something which emanates from courts only.

3. He did not agree with Austin that analysis of law can be done with the help of logic alone. He points out that the study of jurisprudence which ignores ethical and historical aspects will become a barren study.

Tenets of analytical School

1. Difference between law as it is and law as ought to be – This is a trait of all positivism thinkers for example, Bentham's Law and Morals have same course but different circumference. Austin does not deny that moral factors work in the creation of law, however, he does not allow any place to morals in his theory. To him, positive law carries its own standard itself. This approach has been criticized by Dias, Hughes, Paton, Stone, Fuller, etc.

2. Concentration of positive law – Analytical jurists look exclusively at the positive law. They prefer to be concerned only with what is the pure fact of law. Representing to themselves the whole body of legal precepts that obtain in each system as made at one stroke on a logical plan to which they conform in every detail, the analytical jurists set out to discover the plan by analysis.

3. Law in terms of and a product of State – Analytical jurist regards law as something made consciously by lawmakers, whether legislative or judicial. They emphasize not the way in which the precepts originate with respect to their content but the fact that they get the conscious stamp of

the authority of the state. Thus, the most important fact is establishment or authoritative recognition by the state, of a rule of law. In this sense law is a product of conscious and increasingly determinate human will.

4. Logic – For studying law, analytical jurist have mainly taken resort of logic and rejected ethical elements. There is no value of historical or social factors for jurists of analytical school.

5. Statute – Law is that which is made consciously by the state. Statute law is the main concern of the school.

Kelson's pure theory of law

Kelson's theory of law which is known as the pure theory of law implies that law must remain free from Social Sciences like psychology, sociology, or social history. Kelson's aim was to establish a science of law which will be pure in the sense that it will strictly eschew all metaphysical, ethical, moral, psychological, and sociological elements.

His aim goes beyond establishing an autonomous legal science on positivistic empirical foundations, as he constantly criticized the ideas of justice and the principles of natural law. He altogether excludes all such factors from the study of law. Kelson defines law as an order of human behavior. The specific nature of this order consists –

1. in its being coercive and

2. the fact that this coercive power is derived solely from the sanction attracted to the law itself. His sole object was to determine what can be theoretically known about the law of any kind at any time under any conditions.

The essential foundations of Kelson's system may be summarized as under:

1. The aim of theory of law as of any science is to reduce chaos and multiplicity and to bring unity.

2. Legal theory is science not volition. It is knowledge of what law is, not of what the law ought to be.

3. Law is a normative not a natural science.

4. Legal theory is a theory of norms. It is not concerned with the effectiveness of legal order.

5. A theory of law is formal, of the way of ordering changing contents in a specific way.

6. The relations of legal theory to a particular system of positive law is that of possible to actual law.

The most distinguishing feature of Kelson's theory is the idea of norms. To Kelson, jurisprudence is a knowledge of a hierarchy of norms. A norm is simply a preposition in hypothetical form. Jurisprudence consists of the examination of the nature and Organization of such normative proportions.

It includes all norms created in the process of applying some general norm to a specific action. According to Kelson, a dynamic system is one in which fresh norms are constantly being created on the authority of an original or basic norm, while a static system is one which is at rest in that the basic norm determines the content of those derived from it in addition to imparting validity to them.

Criticism

Kelson's pure theory of law has been criticized by jurists. The main criticisms are as follows:

1. His conception of Grundnorm is vague. Friedman puts it, it is a fiction incapable of being traced in legal reality. Kelson seems to have given his thesis based on the written constitution but even in the written constitution Grundnorm is made up of many elements and any one of these elements alone cannot have the title of Grundnorm.

2. Every rule of law or norm derives its efficacy from some other rule or norm standing behind it but the grundnorm has no rule or norm behind it. A grundnorm derives its efficacy from the fact of its minimum effectiveness.

3. Another important objection of Kelson's theory is that he has not given any criterion by which the "minimum of effectiveness" is to be measured. Writers like Friedman, Stone, Stammer have pointed out that in whatever way the effectiveness is measured, Kelson's theory has ceased to be pure on this. The minimum of effectiveness cannot be proved except by an enquiry into political and social facts whereas Kelson has altogether rejected political and social facts.

Legal Realism

Unlike the sociological school, legal realism is mostly unconcerned with the ends of the law. The movement is known as the "realist" movement for it aims to study the actual workings of law and rejects the traditional definitions which regard enacted the law as the only true law.

One of the most important aftermaths of the Industrial Revolution was the increased tendency towards socialization amongst the people. It was recognized that to ensure justice, it is important to strike a balance between the overall welfare of the society and the protection of individual liberties. Thus, it was opined that the society is an important element in an individual's life and vice-versa. This can be said to be the basis of the various sociological approaches towards the study of law. One such sociological approach is legal realism. The realists study the judgments

given by the courts of law and even consider the human factor involved while delivering the said judgments.

It can be divided into two schools of thought- American Realism and the Scandinavian Realists.

American Realism

The aim of American realism is to reform the law. They recognize the fact that the same cannot be done without understanding it. They are interested in studying the law "as it is" and not "as it ought to be". This is something that they have in common with the positivists. Furthermore, they seek to understand the law by taking into consideration the sociological factors. They adopt an empirical approach to the study of law.

The American realists put too much emphasis upon the role of judges in law. According to them, the law is what the judges decide through their judgments. This tendency is due to the fact that judges have played an important role in the development of the American Constitution and subsequent laws. American realism studies the human factors involved in law. In fact, it strongly emphasizes the importance of studying such human factors. Some of the noted American Realists are as follows:

Gray (1839-1915)

John Chipman Gray is one of the "mental fathers of realist movement". Although known to be an analytical jurist, Gray considered the judiciary, and not the legislature, to be the most important source of law. He admitted the crucial role played by "non-logical" factors, such as personality and prejudice of the judge while delivering the judgments. Gray is complimented for laying down

a solid groundwork upon which many of the most important ideas of American Realism are currently resting.

Justice Holmes (1841-1935)

Oliver Wendell Holmes J. is famous for his "bad man's theory" which looked at law from a criminal's perspective. Law, according to him, is meant for the potential criminals or the "bad man". He took note of the various definitions of law based on principals of ethics, morality and natural law and rejected all of them stating that the bad man only cares about what the courts will do if he commits certain acts. Such predictions or "prophecies" regarding the actions of the courts is known as the law. He believed in the complete separation of law and morals. He was interested in studying law "as it is".

Legal history, according to him, should only be studied to analyze the relevance of certain historical laws in contemporary times. His definition of law as 'prediction' resulted in the increased importance of litigation and lawyers in the field of law. His approach towards law can be said to be empirical and pragmatic. Through his literary works and the writings as a judge of the Supreme Court of America, Holmes brought about a significant amount of change in the overall attitude towards the law.

Jerome Frank (1889-1957)

Frank insisted upon the existence of two groups of realists. While one group is skeptical about legal rules providing uniformity to law, the other group is skeptical about the establishment of facts before the trial court, in addition to the skepticism about legal rules. Frank identified himself as a member of the second group. According to him, law involves the application of certain rules of law to the facts of a case by the judge. He expresses his skepticism about the accuracy in the

finding of a fact by a judge and remarks that, in most judgments, it is difficult to distinguish between the facts found by the judge, the rule of law applied to them and the subsequent combination of both, the facts as well as the rules.

Frank emphasizes the uncertainty of the law. Precedents and codified law, according to him, are made under the false belief that law should be certain. He believed judges and lawyers should accept the fact that law is uncertain and should not strictly adhere to the precedents and codified laws. Such strict adherence to precedents and codifications to ascertain the law only provides a false sense of security to them and is actually quite harmful and dangerous.

Carl N. Llewellyn (1893-1962)

Llewellyn recognized law as an institution. According to him, law is an extremely complex institution in society. It owes its complexity to the use of several precedents and ideologies in the formulation of legal principles.

He further establishes the concept of "law-jobs" wherein law has two basic functions in society:

1. to facilitate group survival.
2. to engage in a quest for justice, efficiency, and richer life.

He further expounded upon the achievement of such "law-job ends" using "legal tools". He established the concept of "craft" as a minor institution. "Craft", according to him, refers to the skill and "knowhow" among a group of specialists who perform certain jobs within an institution. Such group or body of specialists continuously develops its skills from time to time and then passes them over to the next generation through education and practical example. He described the legal

profession as a profession involved in the practice of such crafts with the juristic method being the most important one amongst them.

Scandinavian Realists

Professor Dias is of the view that there is no "school" of Scandinavian Realism since the people belonging to such a group have certain differences amongst themselves. The approach of the Scandinavian realists towards law is more abstract and philosophical, unlike that of American Realism. It strongly criticizes the metaphysical ideas of law. Scandinavian realists have played an important role in rejecting the ideas of the school of natural law. Some of the noted Scandinavian Realists are as follows:

Hagerstorm (1868-1939)

Axel Hagerstorm is regarded as the spiritual father of the Scandinavian Realists. He was a philosopher who strongly criticized the metaphysical foundations of law. Much of his work is a critique of the errors in juristic thought and writing. His analysis is conceptual, historical, and psychological and not empirical, like that of American realists. He reviews the attempts made by various jurists to find empirical foundations of rights and rejects all of them. He stressed upon the psychological significance of right.

According to him, "One fights better if one believes that one has right on one's side." He extensively studied the Greek and Roman law in his quest for the historical basis of rights. He believed that just like classical law, modern law is also ritualistic in nature. According to him, the relation between law and ritual is just like that between liquor and its container (bottle). One cannot drink the container, but it is necessary to be able to drink the liquor. Hagerstorm rejected the ideas of good and bad. He denied the existence of such objective values.

Olivercrona (1897-1980)

Law, according to Prof. Olivercrona, does not require any specific definition. He sought to investigate the law and not the nature of law since such an examination of the nature of law would require an assumption to be made with regards to what it is. He insisted on examining facts rather than making assumptions. According to him, the law has a "binding force" so long as it is valid. The moment it loses its validity, it loses its binding force.

He rejected the ideas of "binding force behind the law" and "the" binding force of law. He further stated that such binding force is not vested in the "will of the State" or the unpleasant consequences if the law is broken. The binding force is present in its validity and the moment it is declared as invalid, it loses its binding force. He further believed that the term "right" is a hollow word and legal problems can be solved without using the concept of rights.

Ross (1899- 1979)

Alf Ross was a Danish jurist who deliberated upon the normative character of law. He distinguished between normative laws and descriptive laws which are found in the books. He did not believe in interpreting the law in the light of social facts and expressed concerns regarding the validity of the law. Like all legal realists, his ideas too are concerned with legal orders and the position of the courts.

A.V. Lundstedt

Lundstedt rejects the idea of justice and all the normative aspects of the law. The idea of justice, according to him, is purely metaphysical and regarded it as pure fantasy. He believed that only physical facts should be considered in the study of law. Thus, he dismissed the concepts of rights,

duties, legal rules, etc. as unrealistic. The idea of laws being made to achieve justice was rejected by him and he regarded such laws made on the idea of natural justice as ‘material law’.

Critics have argued that the overall approach of the realists, in general, undermines the importance of statutory principles and rules. They further argued that the realists have given undue amount of importance to litigation and the human factor in law and have been ignorant of that part of the law which does not even come before the courts for adjudication purposes. All in all, legal realism has greatly contributed to the evolution of jurisprudence. Julius Stone describes it as a gloss on the sociological approach and Allen goes on to describe it as an “avatar on the sociological jurisprudence.”

Historical School

Historical school of jurisprudence deals with the origin and development of the general principles of law as well as certain important legal principles which have been imbibed into legal philosophy. It primarily emerged as a reaction against the natural law school. In fact, Prof. Dias opines that its reaction against the natural law theories can be said to be the basis of several important principles of historical jurisprudence.

Some thinkers are also of the opinion that the Historical School has emerged as a reaction against Analytical legal positivism.

Montesquieu

Montesquieu is regarded as the first jurist to follow the “Historical Method”. He studied the laws of various societies and concluded that “laws are the creation of climate, local situations, accident or imposture”.

He did not go further to explain his observation. However, this idea of law answering the needs of time and place has been the basis of many notable ideas and theories.

F. K. Von Savigny (1779-1861)

Savigny is the founder of the Historical School in Europe. He was academically inclined towards historical studies. He believed reforms which go against the nation's continuity are doomed.

Therefore, he cautioned legislators to look before leaping into reforms.

He considered law to be "a product of times the germ of which like the germ of State, exists in the nature of men as being made for society and which develops from this germ various forms, according to the environing influences which play upon it."

Savigny believed that the nature of any legal system reflects the spirit of its people. This later came to be known as Volksgeist. Every law should follow the historical course. The "historical course" refers to the spirit of the people which manifests itself in the form of customary rules. Thus, customs are not only a formal source of law but also superior to it. Law is not universally applicable. It varies with time and place. He rejected the theories of natural law as well as positive law.

According to him, law is a part of the culture. It is not the product of an arbitrary act of the legislator but a response to the national spirit of the people. Thus, it is a product Volksgeist. of Savigny views a nation as an organism which grows and withers away with the passage of time. He regards law as an integral part of such an organism. According to him, law matures and withers away along with the national identity.

His idea of Volksgeist has been criticized for the lack of precision. According to Prof. Dias, there no doubt lies a certain amount of truth in the concept. However, Savigny has gone too far by developing major ideas and theories on the concept. The idea of Volksgeist is a product of the growing spirit of nationhood that existed throughout Europe in those times. Volksgeist is a concept with limited applicability which has been unreasonably stretched and made universal by Savigny.

Nevertheless, Savigny is one of the greatest jurists of the 19 Century. Ihering has stated that with the publication of Savigny's early works, modern jurisprudence was born. It is regarded as quite unfortunate that the Germans used the concept of Volksgeist to suit their own ends. They regarded the nation as a racial group and used the concept to enact laws against the Jews.

Sir Henry Maine (1822-1888)

Maine studied the development of primitive societies and identified three agents of legal development:

Legal Fiction- Using legal fiction, the law is changed according to the needs of time while casting an impression that it is remaining uniform and constant. He states, "I employ the expression 'legal fiction' to signify any assumption which conceals or affects to conceal, the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified."

Equity- Equity is used to modify the law "as a set of principles invested with higher sacredness than those of original law."

Legislation- Finally people came to realize that law can simply be reformed by explicit declarations of an intention to do so and enactment of legal codes. This process was termed as legislation.

Estimate of Historical School

Historical School has always maintained that law cannot be studied in complete isolation of its social aspect. It is a movement for facts against fancy. While it is recognized that the Historical School primarily studies the "evolution" of law, it is also noted by jurists that "evolution" does not mean "progress". It has been opined by some jurists that the Historical School owes its existence as a juristic school to the fact that it supplies the historical aspect of a particular law or legal concept as an aid for interpretation. The moment it fails to do so, it shall no longer be said to be a juristic school.

Comparison between Historical School and Analytical School

Both, the Historical School as well as the Analytical School, use the analytical method to study law. The most important point of distinction between the two is that the Analytical School studies the concepts as they are in the present time whereas the Historical School is concerned with the historical development of certain important legal concepts. Other points of distinction may be briefly summarized as follows:

1. The scope of the Analytical School is confined to mature legal systems whereas that of Historical School extends to primitive legal institutions of society.

2. Analytical School believes that law is a creation of man whereas the Historical School believes that law is self-existent.

3. The Analytical School believes that law has been created by the State whereas the Historical School believes that the concept of law existed even before that of State.

4. The Analytical School believes that the "hallmark of law is its enforcement by the sovereign" whereas the Historical School is of the opinion that law does not owe its existence to its enforcement by a sovereign.

5. Unlike Analytical School, the Historical School regards custom as a formal source of law.

6. While interpreting any law, the Historical School emphasizes upon historical aspect whereas the Analytical School is strictly concerned with its textual contents.

Distinction between Legal History and Historical School

There is a fine distinction between legal history and historical jurisprudence. While legal history studies the origin and development of an entire legal system, historical school is concerned with the history of legal principles existing within a legal system and not the entirely legal system. Both the disciplines are equally important in the study of law.

Sociological School

The sociological school of jurisprudence started dominating over the other schools in the initial years of the 20 Century. It aims to study the circumstances that led to the emergence of legal institutions and those which control their scope and applicability thereafter. It is completely unconcerned with the ethical constituents of law. Let us look at some of the notable sociological jurists and thinkers.

One of the most important aftermaths of the Industrial Revolution was the increased tendency towards socialization amongst the people. It was recognized that to ensure justice, it is important to strike a balance between the overall welfare of the society and the protection of individual

liberties. Thus, it was opined that the society is an important element in an individual's life and vice-versa. Approaches made from this perspective are known as sociological approaches.

Duguit (1859-1928)

Leon Duguit challenged the existing ideas on the concepts of State, sovereignty and law and viewed them from a social perspective. According to him, the most important social reality is the interdependence of the people. With the technological and scientific advancement of man, this interdependence has also increased. Specialization has increased to such an extent that an individual needs the help and support of other individuals to survive. It has become impossible for man to survive independently, without the membership of any community. Thus, social interdependence is not an idea or a theory but an important social fact. According to Duguit, all humans must strive to ensure that individuals work and exist in perfect harmony with each other. This is known as the principle of "social solidarity". He goes on to say that all human activity and organizations must be tested based on their contribution towards ensuring social solidarity and that the State must not enjoy any extra privileges. State is also a human organization which is necessary to protect the principle of social solidarity. The principle of social solidarity is the object as well as the limit and extent of the powers of the State. According to him, "Man must so act that he does nothing which may injure the social solidarity upon which he depends; and more positively, he must do all which naturally tends to promote social solidarity."

Rudolf von Ihering (1818-1898)

Ihering studied the genesis of Roman law and jurisprudence. He stressed on the importance of "purpose" in guiding the human will. According to him, just as a stone cannot be moved without any external force, the human will cannot operate without any specific purpose. According to him,

the purpose of law is to protect interests. Interest refers to the "pursuit of pleasure and avoidance of pain". Individual interest is partly affected by social factors wherein an individual takes the interest of other people into account. According to him, law strives to ensure individual good only to an end and not an end in itself. The end is the collective good or overall welfare of the society. He was also of the opinion that law is not the only method to regulate society. There are other means and methods as well. Within a society, while there may be several aspects which exclusively fall within the domain of law, there are certain aspects wherein no legal intervention is required. He recognized the coercive character of law which is why his approach is said to be a modern approach towards the study of law.

Roscoe Pound (1870-1964)

The works of Dean Roscoe Pound have greatly contributed to the school of sociological jurisprudence. His ideas are a product of his constant confrontation with sociological and philosophical problems as well as the working of the American courts. Although some may describe him as completely pragmatic or a utilitarian, he never really denied the important part played by abstract legal philosophy in the development of legal institutions. However, he did approve of the various limitations that have been imposed upon it by time and place. Pound is credited for the growth of the functional attitude in jurisprudence. Functional attitude refers to the attitude of looking at the functional aspects and working of law rather than its abstract contents. According to him, the purpose of sociological jurisprudence is to ensure that social facts are taken into consideration while formulating, interpreting, and applying laws.

Theory of Social Engineering

Pound frequently stated that the task of a lawyer is analogous to that of an engineer. Pound defined interests as wants or desires which are asserted by individuals in a society. Law must attend to such assertions to create an organized society. According to him, the purpose of social engineering is to build a society in which maximum wants are satisfied with minimum friction and waste. Thus, it must balance competing interests. Pound classified various interests as follows:

1. Private Interests- These are an individual's "interests of personality" such as physical integrity, reputation, freedom of volition and freedom of conscience.

2. Public Interests- These are the interests asserted by individuals either involved in politics or as viewed from the standpoint of political life.

3. Social Interests- These are the interests pertaining to the social life of an individual and generalized as the interests of social groups. These may pertain to:

- General Security
- Security of social institutions
- General Morals
- Conservation of Social Resources
- General Progress
- Individual life

One of the most important outcomes of sociological jurisprudence is that it promoted field study to evaluate the interrelation between law and society. Another important outcome is that it evaluated abstracted ideas on an empirical basis. Critics have argued that the sociological school

of jurisprudence teaches “a little of everything except law.” They further state that a textbook of sociology cannot be converted into that of jurisprudence by simply changing the title. Nevertheless, it is difficult to deny the importance of sociological school in the study of law for; firstly, it helps us understand the evolution of law in a better manner, secondly, the element of human interest shall always play a prominent role in law and lastly, study of social interest leads to a better understanding of the legal system.

UNIT – II

CONCEPT OF LAW AND JUSTICE

- Functions and purpose of law, questions of law, fact and discretion
- Justice and its kinds
- Civil and Criminal Administration of Justice
- Theories of Punishment and Secondary functions of the Court.

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Meaning and Nature of Law

Law is the subject-matter of jurisprudence since the latter deals with the study of law. In its most general and comprehensive sense, it means any rule of action and includes any standards or pattern to which actions are or ought to be confirmed.

Blackstone defines law as "it signifies a rule of action and is applied indiscriminately to all kinds of action whether animate or inanimate or rational or irrational. Bentham said that law is a portion of discourse by which expression is given to an extensively applying and permanently in during act or state of the will of a person or person in relation to others and in relation to whom he is or they are in the state of superiority.

Salmond defines law as the body of principles recognized and applied by the sovereign in the administration of Justice. According to Austin law is a command of the sovereign backed by sanction.

All definitions have been founded on different bases which can mainly be categorized into the following three categories:

1. Law is a dictate of reason – given by supporters of the natural theory of law.

2. Law is a command of the sovereign – supported by followers of analytical School of Law.

3. Law is the practice of court – supported by followers of legal realism.

The word law is in two main forms that is one is concrete and the other is abstract. In its concrete form, the law includes statutes, ordinances, decrees, and the act of Legislature.

Law may be described as a normative science that is a science which Lays down norms and Standards for human behavior in a specified situation or situation enforceable through the sanction of the state.

What distinguishes law from other Social Sciences is its normative character. This fact along with the fact that at stability and certainty of law are desirable goals and social values to be pursued, make the law to be a primary concern for the legal fraternity.

Theoretically speaking judges do not make law they only interpret or declared it but the truth is that even during the period when analytical positivism held it's over the common law judges through their judicial creatively developed the common law to suit the needs of the social change.

The function of law is that of social engineering and this perception has been accepted by all the civilized countries of the world including India. The concern of law as an instrument of enhancing economic and Social Justice has widened to an extent that there has been a growth of a variety of laws touching various facets of human life.

Law is considered not as an end in itself but is a means to an end. The end is securing of social justice. Almost all theorists agree that law is an instrument of securing justice.

According to Holland, the function of law is to ensure the well-being of the society. Thus, it is for the protection of individuals' rights.

Roscoe Pound attributed four major functions of law, namely: (1) maintenance of law and order in society; (2) to maintain status quo in society; (3) to ensure maximum freedom of individuals; and (4) to satisfy the basic needs of the people. He treats law as a species of social engineering.

Though law functions to regulate the conduct of men in society, it's extent of operation has to be restricted to some extent for ensuring certainty and stability in the legal system. Having regard to history of development of law, it would be seen that different approaches through doctrinal theories propagated by jurists from time to time has been to project law as an instrument for balancing the rights and duties of the Subjects to exert social control.

Functions of Law

Salmond's opinion regarding the function of law appears to be sound and logical.

The term "Law' denotes different kinds of rules and Principles. Law is an instrument which regulates human conduct/behavior. Law means Justice, Morality, Reason, Order, and Righteous from the viewpoint of the society. Law means Statutes, Acts, Rules, Regulations, Orders, and Ordinances from point of view of the legislature. Law means Rules of court, Decrees, Judgment, Orders of courts, and Injunctions from the point of view of Judges. Therefore, Law is a broader term which includes Acts, Statutes, Rules, Regulations, Orders, Ordinances, Justice, Morality,

Reason, Righteous, Rules of court, Decrees, Judgment, Orders of courts, Injunctions, Tort, Jurisprudence, Legal theory, etc.

Ever since the down of Human civilization, mankind has had some sort of rule or that they used to Govern itself in society laws set the standard in which we should live in if we want to be part of society. Law set up rules and regulations for society so that we can freedom, gives Justice to those who were wronged, and it set up that it protects us from our own Government. Most importantly the law also provides a mechanism to resolve disputes arising from those duties and rights and allows parties to enforce promises in a court of law (Corley and Reed 1986 P.A) According to Corley and Reed (1986) law is a body of rules of action or conduct Prescribed by controlling authority and having legal binding forces. Laws are created because it helps prevent chaos from happening within the business environment and as well as society. In business, the law sets guidelines regarding employment regulatory, compliance, even inter office regulations.

The Modern History of Common Law

With the decline in the power of the monarchy and the ascendancy of parliament, the English court system stabilized; judicial independence was taken for granted and no longer considered a problem by the English rules. Even Oliver Cromwell and his puritan followers, who overthrew the Stuart kings and established a commonwealth in England between 1648 and 1660, feared the possible destabilizing effects of sweeping changes in the law. Cromwell thus made no major effort to supersede the common law (Prall, 1966). The English legal system remained a complex system of rules and precedents, interpreted with small shades of meaning and requiring a body of legal expects to deal with it. These legal experts had to save long apprenticeships to become familiar with the vast number of cases and precedents that would govern their decisions.

Devine and Human Laws

Divine Laws are the laws of God himself and are beyond the scope of jurisprudence, whereas human laws are framed by men.

Public and Private Law

The term public implies either State, or sovereign part of it. By private, it means an individual or a group of individuals. In private law, State exists but only as an arbiter of rights which exist between individuals. In public law, State itself is a party involved along with the public at large.

Salmond's classification of Law

He has referred to eight kind of laws:

1. Imperative law – the command of the sovereign must be general, and the observance of law must be enforced by some authority.

2. Physical or scientific law – these are laws of science which are the expression of the uniformities of nature.

3. Natural or moral law – Natural law is based on the principles of right and wrong whereas Moral laws are laws based on the principles of morality.

4. Conventional law – system of rules agreed upon by persons for the regulation of their conduct towards each other.

5. Customary law – any system of rules which are observed by men as a custom and has been in practice since time immemorial.

6. Practical or technical law – rules meant for a particular sphere by human activity.

7. International law – rules which regulate the relations between various nations of the world.

8. Civil law – the law enforced by the State.

Austin's Classification of Law:

John Austin has classified law as follows:

1. Divine law – the law of God, beyond the scope of jurisprudence.

2. Human Law – Law made by men.

3. Positive morality – rules set by the non-political superior.

4. Law metaphorically or figuratively so-called.

However, according to him, only divine law and human law are proper laws.

Purpose of Law

Salmond retains the emphasis on the judicial process but considers that a reference to the purpose of the law is essential. The law may be defined as the body of principles recognized and applied by the state in the administration of Justice. Justice is the end of law and it is only fitting that an instrument should be defined by a delineation of the purpose which is its raison d'être. This raises the question of the relationship of law and Justice in which one theory defines law in terms of justice but from this, it follows that, and unjust law cannot exist for if it could then on the promises there would be a fetal cells contradiction.

Many writers have fallen into the simple trap. Earlier theories of natural law put the emphasis on Justice and denied the validity of law if it was opposed to natural justice, but slavery condemned by natural law yet existed in the legal systems of the time and thought the Romans recognize this difficulty they never succeeded in solving it. A second means of solving the problem of the relationship of law and justice is to place all the emphasis on law and regard justice as near conformity to law by then we are depriving ourselves of a Criterion which may not be wholly subjective by which we made test the operation of a legal system. The purpose of law is essential to an understanding of its real nature but the pursuit of justice is not the only purpose of law the law of any period so many ants and doors and will vary as the decades roll by and to seek a for one term which may be placed in a definition as the only purpose of law leads to dogmatism the end That seems most nearly Universal is that of securing order but this alone is not an adequate description indeed, Kelson regards it as a pleonasm since law itself is the order of which we speak.

Questions before a court of law

Question which arises for determination before a court of law are either questions of fact or questions of law or an admixture of both, known as mixed question of law and fact.

Questions of law

A question of law is understood in three senses:

a. First sense

A question of law is one where answer is already prescribed by some rule of law. Thus, the question as to what the reasonable and proper punishment for murder is a question of law. In such cases the judicial opinion is excluded, and discretion of the Judge ruled out.

b. Second Sense

The question as to what law on point is such question arises where notwithstanding the existence of law on the point, it is dubbed with uncertainty. Such a situation is a matter of common occurrence because the language of the statute is always capable of various interpretations and it is in this sphere that the lawyers play the most important role. So, interpretation of a particular provision of law is a question of law in this second sense but once it has been interpreted either way a superior court it becomes a question of law in the first sense.

c. Third Sense

In jury, trails, such questions as are to be answered by the judge are named questions of law as distinguished from those which are to be answered by the jury and which are called questions of fact. This classification of the definition of question of law is however incorrect because the judge may often determine questions of fact also but for that mere reason such questions would not turn out to be questions of law.

Questions of fact

a. Broad sense

In its broad sense question of fact means a question other than a question of law. Thus,

i. Any question not answered by any fixed rule of law.

ii. Any question other than what the law on point is.

iii. Any question which is to be decided by the jury and not by the judge, are question of fact.

b. Restricted sense

In its restricted sense the terms mean a question of fact opposed to a question of judicial discretion. Thus, whether in a case of breach of contract the plaintiff should be allowed specific performance or merely left out with compensation is a question of discretion. Or where matters of opinion arise before the court, the court has discretion to adopt whichever view it deems best suited the circumstances of the case. In such cases, however, no rule of law is applicable, and it would, therefore, be appropriate to call them, questions of discretion.

Comparison of question of fact and question of discretion

i. Questions of fact are question of what is. Questions of discretion are questions of right or what ought to be.

ii. Questions of fact are to be proved by evidence and demonstration. Questions of discretion are subjects of reasoning and argument.

iii. In questions of fact, the court seeks to find out the truth. In questions of discretion, the court's aim is to determine what is just.

Conversion of questions of fact and discretion into those of law

As we have already seen, in the primitive stage of society, the basis of decision was the sole discretion of the judge, unfettered by any fixed rules or principles. With the advancement of society fixed principles or formulae came to be evolved and the judge had to follow them but these principles being general and vague left much room for the exercise of judicial discretion. Later, elaborate and all covering statues were framed but these again due to their being expressed in

language, which is an unruly horse and capable of being interpreted in various ways, still left sufficient room for the judge to exercise his discretionary powers.

The situation exists even to this day. But with the development of society and growth of law, the discretion of the courts is gradually being curtailed, firstly, by liberal enactment of statutes and secondly, by previous judicial decisions and authoritative opinion. The developed legal system aims at exclusion of the moral judgments of the courts and to compel them to decide cases, not according to their discretion, but according to fixed principles. To achieve this end, decisions of superior courts are permanently preserved in Law Reports and courts are bound to act according to the rules laid down therein. In this way, what were formerly mere questions of discretion are converted, at a later stage, into questions of law. Likewise, questions of fact may also at a later stage be converted into questions of law.

Discordance between law and fact

"The law is the theory of things as received and acted upon within the courts of justice and this theory may or may not conform to the reality of things outside. The eye of the law does not infallibly see things as they are partly by deliberate design and partly by errors and accidents of historical development, law and fact, legal theory and they may not be treated by law to be so or, in other words, law is discordant with facts in many instances.

Concept of Justice

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

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

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

Definition

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

In the words of jurists-

Blackstone- "Justice is a reservoir from where the concept of right, duty, and equity evolves."

Salmond- "Though every man wants to be righteous and just towards him, he himself being 'selfish' by nature may not be reciprocal in responding justly." According to him, some kind of external force is necessary for maintaining an orderly society, and without justice it is unthinkable.

Justice represents itself in kinds mainly:

Social Justice

In the words of Chief Justice, P. B. Gajendragadkar-social justice means ending all kinds of social inequalities and then provide equal opportunities to all.

Commenting on social justice Mr. M.C. Chagla, the former Chief Justice of the Bombay High court observed in the case of Prakash Cotton Mills v. State of Bombay, 1957 II LLJ 490 (Bom) that "we are no longer living in the laissez-faire…. it is true that social justice is imponderable, and we asked not to introduce the principles of social justice in constructing legislation that comes for interpretation before us. But in our opinion, no economic, social or labor legislation can be considered by the court without applying the principles of social justice in interpreting these related provisions of law."

While in the case of State of Mysore v. Workers of Gold Mines 1958 II LLJ 479 (SC) the Supreme Court observed that the concept of social justice is a living concept of revolutionary impact: it gives substance to rule of law and meaning and significance to the idea of welfare of the state.

Thus, the concept of social justice aims to uplift the underprivileged section without unduly and unreasonably affecting the interests of the upper section of the society. The concept of social justice finds its expression in Articles 14(equality before law), 15(prohibition of discrimination on the grounds of religion, race, caste, sex or place of birth), 16(equality of opportunity in matters of public employment) and 39 (b) and (c) [(b) ownership and control of the material resources and its equal distribution, (c) operation of the economic system not resulting to the concentration of wealth and means of production to the common detriment], of the constitution of India.

It also determines the concept of Processual Justice based on natural law which is the very basis of not only substantive law but also the remedial justice. Legal maxims like Nemo Judex

In Propria Cause (no one can be a judge in his own case); *Audi Altrem Partem* (here the other side or party) plays a vital role.

Economic Justice

It demands that all citizens should have adequate opportunities to earn their livelihood and get equal pay for equal work, which could substantially help them in fulfilling their basic needs. From financial inclusion to better health care the state government should create opportunities for them by generating employment opportunities, following MNREGA, RSBY and so on. No person or group of people should indulge themselves in exploitation and be exploited. There must be a fair and just equitable distribution of wealth and resources, and the gap between rich and poor should get abridged.

Political Justice

It means granting of equal political rights and opportunities to all citizens to take part in the administration of the country. The legality of the right to vote and contest election free and fairly.

Legal Justice

It has two dimensions as the formulation of just laws and then to do justice according to it. While making laws the will of the rulers must not be used on ruled. Laws should be based on public opinion and public needs considering the core of social values, morality, and the concept of just and unjust must be considered. It simply means rule of law and not the rule of person. Objective due dispensation of justice by the courts of law is an essential ingredient of legal justice.

Administration of Justice

Origin

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

1. Primitive stage- when society was primitive and private revenge and self-help were only the remedies available to the wrongdoer, one could easily get the wrong redressed with the help of his friends and relatives, ‘an eye for an eye, a tooth for a tooth and a limb for a limb.’

2. Elementary/Infant stage- it has been considered that law and state were at infantry level during this stage, and the feeling of security as a responsibility by the state towards its individual and his property was absent. It did not have the enforcing power through which it could punish the wrongdoer.

3. The growth of Administration of Justice- a change was about to witness where a sought of tariff schedules were fixed for different kinds of injury and offenses. And up to that time justice mold as private in nature without the compulsive force of the state.

4. The modernization- it was the developmental stage where the state geared its authority and took upon itself the responsibility of administrating justice and punishing the wrongdoer using its force whenever necessary. This stage owes its origin and growth to the gradual evolution of the state and its political power. And with its transformation, private revenge and self-help got substituted by the administration of criminal and civil justice through law courts.

Concept

"Men being what they are-each keen to see his own interest and passionate to follow it-society can exist only under the shelter of the State, and the law and justice of the state is a permanent and necessary condition of peace order and civilization." (Salmond)

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

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

Classification

Under the purview of administration of justice, it is classified into two kinds:

1. Civil justice

Blackstone called it as 'private wrong'. It has been defined as civil injuries where violation or infringement of civil or legal rights of an individual is taken into consideration. A civil case may result in an award of compensation or dismissal of the case. In jurisprudential term, the right of justice is enforced through the administration of civil justice which connotes enforcement and protection of rights as opposed to the punishment of wrongs.

The rights to be enforced under it may either be primary rights or secondary rights. Where the enforcement of Primary rights; is also called specific performance wherein the defendant is compelled to do the very act which is agreed upon to be done. For instance, payment of debt, or to perform a contract or restore land or property wrongfully taken or detained. It also connotes remedial rights under it, where the purpose may be either imposition of a pecuniary penalty upon the wrongdoer; or providing for pecuniary compensation to the plaintiff in respect of the damages which he has suffered from the defendant's wrongful act.

And on the other hand, is the Sanctioning rights; where the right to receive pecuniary compensation or damages from wrongdoer may be of two kinds:

(i) restitution- here the defendant is compelled to give up or restore the pecuniary value or some benefit which he has wrongfully obtained.

(ii) The penal redress, where it is not only restoration of all benefits which the wrongdoer has achieved through his wrongful acts, but also a full redress for the plaintiff loses.

Section 9 of the Civil Procedure Code, 1908 defines a civil suit. The civil courts in India have the power to try all suits of civil nature excepting those the cognizance of which is expressly or impliedly barred. These courts can grant declaratory, prohibitory, and momentary reliefs.

2. Criminal Justice

Blackstone stated it as 'public wrong'. The main purpose of administration of criminal justice has always been to punish the offender, while in certain general exceptional cases the accused may get acquitted. The nature of the violation of public rights and duties which affects the community is called a crime and a criminal proceeding results in applying on punishment varying from sentence

of death to a mere fine or binding over the lawbreaker to keep the peace or his release on probation after admonition.

Under this, the magistrate must decide the guilt of the accused based on the evidence before him.

Theories of Punishment

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

1. Deterrent theory

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

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

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

2. Retributive theory

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

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

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

3. Preventive theory

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

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

4. Expiatory theory

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

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

5. Reformative theory

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

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

Proceedings before a court of law are cither penal or remedial. In penal proceedings the law aims to secure the punishment of the defendant. In remedial proceedings, on the oilier hand, the idea of punishment is entirely absent.

It is enforced by specific performance of the contract and actions for res-titution. All criminal proceedings are penal; but the converse is not true, for there are civil proceedings which are merely penal and there are civil proceedings which are merely remedial.

Functions of the court

Primary Functions of Courts of Law

The primary functions of a court of law are the administration of justice, viz., the application by the Slate of the sanction of physical force to the rules of justice.

Justice is administered by a court by the enforcement of a right and the punishment of wrongs. It involves in every case two parties, namely, a plaintiff and a defendant, the prosecutor or complainant and the accused, and a judgment in favor of the one or the other.

Secondary Functions of Courts of Law:

The secondary func-tions of courts of law consist of activities which, though primarily exercisable by the State, have for the sake of convenience been dele-gated lo the courts of law.

The secondary functions of the courts are rapidly increasing with the growth of civilization. Under the English Law they have been classified by Salmond into four groups:

1. Petition of Right:

If a subject claims a debt or any other right against the State or raises an action for breach of a contract against the Slate, he can file a petition of right in a court of law. The court will investigate the claim and pronounce judgment in accordance with law. Bui as the courts form part of the State itself, no one can compel the Slate to act and the necessary sanction or the element of coercive force cannot be exercised against the defendant.

2. Declaration of Dight:

A litigant may require the assistance of a court of law not only for the enforcement of any right but also for a declaration that such a right exists. He seeks the assistance of the courts because his rights, though not violated, are uncertain. Examples of declaratory proceedings are declaration of legitimacy, declaration of nullity of marriage, etc.

3. Administration:

A third form of secondary judicial action includes those cases where the court undertakes the management and distribution of properly by means of the administration of trust, liqui-dation of a company by the court or realization and distribution of an insolvent casual.

4. Titles of Right:

Sometimes judicial decrees are employed as the means of creating, extinguishing or transferring rights, e.g., a divorce decoct, a decoct ordering judicial separation, or an adjudica-tion of insolvency. In such cases the judgment does not operate as the remedy of a wrong, but as the little of a right.

UNIT – III

SOURCES OF LAW

- Legislation
- Precedent
- Custom

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Sources of Law:

The common sources of law are codified laws, judicial precedents, customs, juristic writings, expert opinions, morality, and equity. With the growing popularity of the idea of constitutionalism, legislations and precedents occupy the center position amongst all the various sources of law. Let us analyze the sources of law in the article.

Meaning

The meaning of the term "sources of law" differs from writer to writer. The positivists use the term to denote the sovereign or the State who makes and enforces the laws. The historical school uses the term to refer to the origins of law. Others use it to indicate the causes or subject matter of law. Prof. Fuller, in his "Anatomy of the Law", states that a judge interprets and applies certain rules to decide upon a case. Such rules are obtained from various places which are known as "sources". He further goes on to give examples of the common sources of law such as codified laws, judicial precedents, customs, juristic writings, expert opinions, morality, and equity. Holland has defined the term to mean the sources of the knowledge regarding law.

Classification

There exists no definite classification of the sources of law. Different thinkers and jurists have given their own classifications according to their own understanding of the meaning of the term.

Salmond's Classification

According to Salmond, there are two main sources of law- formal and material. Formal sources are those from which law derives its validity and force, that is, the will of the State which is expressed through statutes and judicial decisions. He sub-divided the material sources into legal sources and historical sources. Legal sources comprise of legislations, precedent, custom, agreement and professional opinion. They are authoritative in nature and origin and are followed by the courts as a matter of right. On the other hand, historical sources are those which are originally found in an unauthoritative form and are subsequently admitted and converted into legal principles. For instance, precedents are a material source of law. However, domestic precedents are legal source whereas foreign precedents are historical source.

Salmond's classification of the sources into formal and material sources is found to be unsatisfactory by critics. The editor for the twelfth edition of Salmond's 'Jurisprudence' has classified the sources directly into legal and historical.

Keeton's Classification

Keeton's classification of the sources of law has emerged as a critique of Salmond's classification. He defines the term as those materials from which law is eventually fashioned through judicial activity. He classified the sources of law into- binding sources and persuasive sources. Binding sources are those which must be necessarily followed by the courts. Legislations, judicial

precedents, and customs are examples of such source. Persuasive sources are those which come into play when there is absence of any binding source on any subject.

Foreign precedents, professional opinions and principles of morality or equity are examples of persuasive sources of law.

Legislation as a source of law

Legislation means the process of lawmaking. *Legis* means law and *Latum* mean "making", and it means lawmaking. According to Austin, it means the making of law by a supreme or a sovereign authority which must be followed by people of every stratum of the society. Salmond defines Legislation as the process of lawmaking by a competent and able authority.

Legislation is the process of lawmaking where a competent authority is given the task of drafting and enacting the law in a state. It is also said to be a strict concept of lawmaking because there is only one body which is entrusted with the work of lawmaking and also there is no scope of any alteration as such because of codified and watertight laws which leave a very minuscule range of the amendment.

Definition of Legislation

According to Salmond: "Legislation is that source of law which comprises in the assertion of lawful standards by a competent specialist."

According to Austin: "Legislation is the command of the sovereign or the superior authority which must be followed by the common masses backed by sanctions".

According to Gray: "Legislation implies the formal expression of the administrative organs of the general public."

According to Positivist School: “A run of the mill law is a rule and legislation is the typical source and form of lawmaking.” Most examples of this school don’t affirm that the courts additionally can figure law. They don’t concede the case of custom as a wellspring of law. Consequently, they view just legislation as the form of law.

According to Historical School: “The legislation is the least innovative of the forms of law. The authoritative motivation behind the legislation is to give the better framework and increasingly viable the custom which is unexpectedly created by the general population.”

Historical School usually do not perceive the legislation as a form of law.

Types of Legislation

Legislation can have numerous reasons, for instance, to direct, to approve, to endorse, to give, to authorize, to allow, to proclaim, to confine and to annul. Therefore, in enacting any legislation and the rule of law, the welfare of the citizens must be kept in mind and therefore, it is must be adopted in the best interests of the citizens.

Some different types of legislation are as follows.

Supreme Legislation

The Supreme legislation is the legislation adopted by the sovereign intensity of the state. In this manner, some other authorities which are the organ of the state cannot control or check it. It is considered incomparable as well as lawfully powerful. An established piece of this rule can be found in Dicey’s book, ‘The Law of the Constitution ‘.

There is no legitimate restriction on its capacity. Indian parliament is likewise preeminent. Even though there are different constitutional amendments upon its capacity, it is not subject to any

other administrative authorities inside the state. Therefore, the sovereign jurisdiction of the state can't be revoked, cancelled or constrained by some other authoritative organ of the state.

Subordinate Legislation

Subordinate legislation will be legislation by some other authority than the Supreme specialist in the state. It is made under the powers designated by the Supreme authority. Such legislation owes its reality, legitimacy, and continuation to the Supreme expert. It can be cancelled and abrogated anytime by the power of the sovereign authority and therefore, it must offer an approach to sovereign legislation. Subordinate legislation is liable to parliamentary control. Five unique types of subordinate legislation can be distinguished. These are as follows.

Colonial Legislation

The nations which are not autonomous and are under the control of some other state have no Supreme capacity to make law. Such countries can be in different classes such as colonies, domains, secured or trust regions and so forth. The laws made by them are subject to the Supreme legislation of the state under whose control they are. Therefore, it is subordinate legislation.

England has had numerous colonies and territories. The laws made by them for the self-government are subject to modification, nullification, or supersession by the legislation of the British Parliament. As the colonies are free, accomplished freedom and practically all the British domains have an unlimited power for legislation, hence sooner rather than later, we might have this class of subordinate legislation no more in existence.

Executive Legislation

At the point when legislative powers are delegated by the designated official to an executive, it is called executive legislation. Even though the significant capacity of the official is to execute the laws and carry on the organization, he/she is continuously dependent on some subordinate enactment powers. Today, for all intents and purposes of each law sanctioned by the lawmaking body contains assignment statements giving law-making powers by the official to the executive to enhance the statutory arrangements.

Judicial Legislation

Powers delegated to the judicial system to make and implement their own laws to maintain transparency in the judicial system of the country. This will also ensure that there is no involvement of any other organ of the government in the governance of the judicial system of the state.

Municipal Legislation

Municipal bodies are offered powers to make byelaws concerning their neighborhood matters. Byelaw made by a neighborhood body works inside its individual area. In India, such municipal bodies are Municipal corporations, Municipal Boards, Zila Parishads, and so on. There is a move for allowing extensive powers to Panchayats. Along these lines, there is a plausibility of extension of this sort of subordinate enactment in our nation. Balwant Rai committee appointed by the Parliament gave some parliamentary reforms needed in the Panchayat system of the country. The recommendations were later incorporated in the Constitution by 73rd Amendment.

Autonomous Legislation

At the point when the Supreme authority gives powers upon a gathering of people to administer on the issues depended to them as a gathering, the law made by the last is known as the autonomous law and the body is known as a self-ruling body. A railway is an independent body. It makes byelaws for the guideline of its organization, and so on. A college is likewise a self-governing body. Even some universities in India have been granted the status of autonomous bodies.

Delegated Legislation

Delegated (subordinate or subsidiary) Legislation alludes to those laws made by people or bodies to whom parliament has delegated law-making powers.

Where Acts are made by Parliament, a Principal Act may cause arrangement for Subsidiary Legislation to be made and will indicate who can make laws as such under that Act. Delegated Legislation can just exist in connection to an empowering or parent Act.

Delegated Legislation contains the numerous regulatory subtleties essential to guarantee that the arrangements of the Act will work effectively. It might be directed by Government Departments, Local Councils or Courts.

Guidelines and Statutory Rules are the most widely recognized types of Delegated Legislation. They are made by the Executive or a Minister which apply to the overall public. By-laws, and occasionally Ordinances are made by a Local Government Authority which also applies to the general population who live around there. Principle and Parent Act regularly depict methodology to be followed in Courts if there is any flaw in a delegated law.

Advantages of Legislation as a Source of Law

Verifiably additionally the legislation has dependably been perceived as a significant wellspring of law as contrasted and different sources. There are two apparent explanations behind the legislation is viewed as a standout amongst the most significant sources of law. Right off the bat, it includes setting down of legitimate principles by the lawmaking bodies which the State perceives as law.

Besides, it has the power and authority of the State. It is hence said by Dias and Hughes that conscious law-production by a legitimate power, i.e., the State is called 'legislation' which gave that sovereign is correctly perceived as the supreme power by the courts. Relative Merit of Legislation over Precedent and customs have been discussed below.

Some main advantages of legislation are as follows:

i. Abrogative Power—It can change or annul old law; which control isn't controlled by different sources.

ii. Effectiveness—It separates the elements of making law and overseeing it between the Legislature and the legal executive.

iii. Declaration — it gives that principles of law will be known before they are authorized.

iv. Reliance on Accidental Legislation — Legislation is independent and emerges out of as the authoritative source of law it need not hold up until the original case of legislation.

v. Unrivalled in Form — It is predominant in structure, brief, clear, effectively available, and understandable as against case law, which is an increase of sense in a considerable amount of pointless issue.

Precedent and Legislation

The legislation has its source in the process of law which is basically enacted and enforced by the State while the precedent has its origin in ancient and historic judicial pronouncements.

Legislation has an authoritative force on courts by the assembly. However, precedents are made by the courts themselves.

Legislation signifies formal declaration of law by the governing body though precedents are acknowledgement and use of new standards of law by courts in the administration of equity, justice and good conscience.

Legislation is ordered before a case emerges. However, the precedent appears simply after the case has developed and taken for the choice of the court.

Legislation is basically of an exhaustive structure while the extent of legal precedent is restricted to comparable cases as it were.

Legislation is commonly and generally forthcoming while precedent is retrospective in nature.

Legislation is announced or distributed before it is brought into power, on the other hand, precedent comes into power on the double, i.e., when the choice is articulated.

Legislation is finished with the goal of the lawmaking process, yet it is not so on account of the precedent. The precedent which incorporates ratio decidendi and obiter dicta are expected to settle a particular contest on the purpose of law once for all.

It isn't hard for people, in general, to realize the law instituted by lawmaking body yet the precedent dependent on the case law isn't effectively known to the general population. Now and

again, the attorneys who manage law are themselves oblivious about the current case-law. Therefore, it makes a precedent of an ambiguous nature.

Legislation includes law-production by deductive strategy while case-law is made by resorting to an inductive technique.

Legislation and Custom

The presence of legislation is basically by law, while customary law is wholly accepted in a particular boundary.

Legislation is enacted out of hypothetical standards. However, customary law becomes is adopted because of its very well and long presence in history.

Legislation as a source is indeed a long-lasting nature of law, as contrasted to the custom which is the most established type of law and is followed by a particular sect.

The legislation is a fundamental characteristic for a present-day society while the customary law was created in a crude social order.

Legislation is finished, exact, written in the structure and effectively open. However, customary law is generally unwritten am non-scriptum and is hard to follow.

Legislation results out of the deliberations while custom develops inside the public in the ordinary course.

Demerits of Legislation

There is no source of law which is perfect and totally complete in its form and sense, some lacunas and loopholes could be easily found in every source of law which is as follows in the case of legislation.

Unbending nature—Law in the legislation is inflexible though the law in the precedents is versatile and adaptable.

In view of Hypothesis — Legislation, for the most part, continues speculative certainties, by considering the existing environment and surrounding in which the established law is frequently observed to be blemished in its application to the mind-boggling issues emerging in genuine life though piece-scratches develop out of the commonsense exigencies and convenience.

An excessive amount of Importance to the Wordings—Legislation appends a lot of significance to its wordings. Thus, if the articulation is faulty, the law gets effectively turned. In the precedents, the wording matters close to nothing as there is a genuine introduction which performs separate checks on the applicability of precedent as a source of law. Same goes with the customary law as well.

Legislation is therefore regarded as the most important source of law in the prevalent times. Hence it is the codified form of law which is commanded by the sovereign to the common masses, and it becomes a predicament situation to regard legislation as the authoritative source of law.

Legislation is one of the foremost and most important sources of law in today's world. Most countries in today's world regard legislation as an essential source of law and follow this system of lawmaking. Although some lacunae and loopholes are there which exists in the present form

but then too the difficulties such faced are relatively less than that faced from the other sources of law viz. custom and precedent as legislation as a source of law tries to bring uniformity by avoiding the ambiguity.

Precedent as a source of law

Every developed legal system possesses a judicial organ. The main function of the judicial organ is to adjudicate the rights and obligations of the citizens. In the beginning, in this adjudication, the courts are guided by customs and their own sense of justice. As society progresses, legislation becomes the main source of law and the judges decide cases according to it. Even at this stage, the judges perform some creative function. In the cases of the first impression, in the matters of interpretation, or in filling up any lacuna in the law made by legislation the judges, to some extent, depend on their sense of right and wrong and in doing so, they adopt the law to the changed conditions.

Inductive and Deductive Methods

In the inductive method, there is a great reliance placed upon the decisions of the judges. Before deciding a case, the judges investigate previously decided cases of a similar nature by their own court or by the superior court. From cases, they deduce general rules, and apply them on the cases before them and decide accordingly. This is known as Inductive method.

In the deductive method, there is a great reliance placed legislatures and enacted statues. In such a system, the cases are decided on the basis the enacted legislature and statue that are codified, and the judges decide cases based on these codes and not based on previously decided cases. This method is called the Deductive method.

Authority of Previously Decided Cases

In almost all legal systems, the judges take guidance from the previous decisions on the point and rely upon them. But the authority of such decisions is not the same in all the legal systems. In most of the countries including India, acquire their knowledge of the law through decisions of higher tribunals than from anything else. Such decisions are compiled and published in reports. These reports are valuable from the legal literature perspective. These decisions are very efficient in deciding cases of subsequent cases of similar nature. They are called judicial precedents or precedents.

Definition

In general English, the term precedent means, 'a previous instance or case which is, or may be taken as an example of rule for subsequent cases, or by which some similar act or circumstances may be supported or justified.'

According to Gray, 'precedent covers everything said or done, which furnishes a rule for subsequent practice.'

According to Keeton, 'a judicial precedent is judicial to which authority has in some measure been attached.'

According to Salmond, 'in a loose sense, it includes merely reported case law which may be cited & followed by courts.'

In a strict sense, that case law which not only has a great binding authority but must also be followed.

According to Bentham precedents are 'Judge made Law.'

According to Austin precedents are ‘Judiciary’s Law.’

In general, in the judicial field, it means the guidance or authority of past decisions for future cases. Only such decisions as lay down some new rule or principle are called judicial precedents. The application of such judicial decisions is governed by different principles in different legal systems. These principles are called ‘Doctrine of Precedent’. For this case to be held, first such precedents must be reported, maybe cited and may probably be followed by courts. Secondly, the precedent under certain circumstances must be followed.

Thus, it can be inferred that precedents are:

- Guidance or authority of past decisions for future cases.
- Precedents must be reported, maybe cited and may probably be followed by courts.
- Precedents must have opinio-juris.
- These must be followed widely for a long time and must not violate any existing statue law.

Nature of Precedents

They must be purely constitutive and not abrogative at all. This means that a judicial decision can make a law but cannot alter it. Where there is a settled rule of law, it is the duty of the judges to follow the same. They cannot substitute their opinions for the established rule of law. The function is limited to supplying the vacancies of the legal systems, filling up with new law the gaps that exist.

Importance of Precedents

In the Ancient Legal System, the importance of the decisions as a source of law was recognized even in very early times. In the past, there have been numerous instances of this. Sir Edward Coke, in the preface of the sixth part of his report, has been written that Moses was the first law reporter. 'In the case of the daughters of Zelophehad, narrated at the beginning of the twenty- seventh chapter of the book of numbers, the facts are stated with the great clearness and expressly as a precedent which ought to be followed.'

Even in the Mahabharata, it has been stated that 'The path is the right one which has been followed by virtuous men.' This may be interpreted as giving a theory of precedent. In ancient legal systems of Babylonia and China, the judicial decisions were a great authority, and later on, they were embodied in code law.

In the Modern Legal System, among the modern legal systems, the Anglo – American law is judge made law. It is called 'Common Law'. It developed mainly through judicial decisions. Most of the branches of law, such as torts, have been created exclusively by judges. The Constitutional Law of England, especially the freedom of the citizens, developed through judicial decisions.

According to Tennyson, "where freedom slowly broadness down, from precedent to precedent." Not only in the municipal law but in international law also, the precedents have their importance. The decisions of the International Court of Justice are an important source of International law. These precedents have been recognized by the International Court of Justice by Article 38(2)(d) of the Statue of the International Court of Justice. Further, Article 59 of the same holds that the decisions of the court only have persuasive value for future cases and hence the International Court

of Justice is not bound by its own decisions in deciding similar cases in future. It holds that the decision is only binding the parties to the case.

The above brief discussion indicates the role and importance of decisions on precedents in the development of law and their importance as a source of law at the municipal as well as the international level.

Types of Precedents

Persuasive precedents

Persuasive precedent (also persuasive authority) is precedent or other legal writing that is related to the case at hand but is not a binding precedent on the court under common law legal systems such as English law. However, a persuasive authority may guide the judge in making the decision in the instant case. Persuasive precedent may come from several sources such as lower courts, "horizontal" courts, foreign courts, statements made in dicta, treatises or law reviews. In Civil law and pluralist systems, as under Scots law, precedent is not binding but case law is considered by the courts.

Lower Courts

A lower court's opinion may be considered as persuasive authority if the judge believes they have applied the correct legal principle and reasoning.

Higher Courts in other Circuits

A court may consider the ruling of a higher court that is not binding. For example, a district court in the United States First Circuit could consider a ruling made by the United States Court of Appeals for the Ninth Circuit as persuasive authority.

Horizontal Courts

Courts may consider rulings made in other courts that are of equivalent authority in the legal system. For example, an appellate court for one district could consider a ruling issued by an appeals court in another district.

Statements made in *obiter dicta*

Courts may consider obiter dicta in opinions of higher courts. Dicta of a higher court, though not binding, will often be persuasive to lower courts.

The obiter dicta is usually, as its translation "other things said", but due to the high number of judges and several personal decisions, it is often hard to distinguish from the ratio decidendi (reason for the decision). For this reason, the obiter dicta may usually be taken into consideration.

A Dissenting judgment

A judgment heard by a tribunal, and one judge dissented from the decision. The judge in the next case can decide to follow the dissenting judge's obiter and rationale. The judge can only opt to overturn the holding of a court lower or equivalent in the hierarchy, however. A district court, for example, could not rely on a Supreme Court dissent as a rationale for ruling on the case at hand.

Treatises, Restatements, Law Review Articles

Courts may consider the writings of eminent legal scholars in treatises, restatements of the law, and law reviews. The extent to which judges find these types of writings will vary widely with elements such as the reputation of the author and the relevance of the argument.

Courts in other countries

An English court might cite judgments from countries that share the English common law tradition. These include other commonwealth states (for example Canada, Australia, or New Zealand) and, to some extent, the United States.

It is controversial whether it is appropriate for a U.S. court to consider foreign law or precedents. The Supreme Court splits on this issue. In Atkins v. Virginia, for example, the majority cited the fact that the European Union forbid death penalty as part of their reasoning, while Chief Justice Rehnquist denounced the "Court's decision to place weight on foreign laws." The House of Representatives passed a nonbinding resolution criticizing the citing of foreign law and "reaffirming American independence."

Binding precedents

In law, a binding precedent (also mandatory precedent or binding authority) is a precedent which must be followed by all lower courts under common law legal systems. In English law, it is usually created by the decision of a higher court, such as the Supreme Court of the United Kingdom, which took over the judicial functions of the House of Lords in 2009. In Civil law and pluralist systems, as under Scots law, precedent is not binding but case law is considered by the courts.

Binding precedent relies on the legal principle of stare decisis. A stare decisis means to stand by things decided. It ensures certainty and consistency in the application of the law. Existing binding precedents from past cases are applied in principle to new situations by analogy.

There are three elements needed for a precedent to work. Firstly, the hierarchy of the courts needs to be accepted, and an efficient system of law reporting. 'A balance must be struck between the

need on one side for the legal certainty resulting from the binding effect of previous decisions, and on the other side the avoidance of undue restriction on the proper development of the law.

Binding Precedent in England

Judges are bound by the law of binding precedents in England and Wales and other common law jurisdictions. This is a distinctive feature of the English legal system. In Scotland and many countries throughout the world, particularly in mainland Europe, civil law means that judges take case law into account in a similar way but are not obliged to do so and are required to consider the precedent in terms of principle. Their fellow judges' decisions may be persuasive but are not binding.

Under the English legal system, judges are not necessarily entitled to make their own decisions about the development or interpretations of the law. They may be bound by a decision reached in a previous case. Two facts are crucial to determining whether a precedent is binding:

The position in the court hierarchy of the court which decided the precedent, relative to the position in the court trying the current case.

Whether the facts of the current case come within in the scope the principle of law in previous decisions.

Stare Decisis

Stare decisis is the legal principle by which judges are obliged to respect the precedents established by prior decisions. The words originate from the phrasing of the principle in the Latin maxim Stare decisis et non quieta movere: "to stand by decisions and not disturb the undisturbed." In a legal

context, this is understood to mean that courts should generally abide by precedents and not disturb settled matters.

This doctrine is basically a requirement that a Court must follow the rules established by a Court above it. The doctrine that holdings have binding precedence value is not valid within most civil law jurisdictions as it is generally understood that this principle interferes with the right of judges to interpret law and the right of the legislature to make law. Most such systems, however, recognize the concept of jurisprudence constante, which argues that even though judges are independent, they should judge in a predictable and non-chaotic manner. Therefore, judges' right to interpret law does not preclude the adoption of a small number of selected binding case laws.

Authority of Precedents

The authority of a decision as a precedent lies in its Ratio Decidendi.

Ratio Decidendi and Obiter Dictum

There are cases which involve questions which admit of being answered on principles. Such principles are deduced by way of abstraction of the material facts of the case eliminating the immaterial elements. The principle that comes out because of such case is not applicable only to that case, but to cases also which are like the decided case in their essential features. This principle is called Ratio Decidendi. The issues which need the determination of no general principles are answered on the circumstances of the case and lay down no principles of general application. These are called Obiter Dictum.

It is the Ratio Decidendi of a case that is binding and not the Obiter Dictum that has a binding effect of a Precedent. But it is for the judge to determine the Ratio Decidendi of the decision and

to apply it on the case which he is going to decide. This gives an opportunity to him to mold the law according to the changed conditions by laying emphasis on one or the other point.

Merits of The Doctrine of Precedents

It shows respect to one ancestors' opinion. Eminent jurists like Coke and Blackstone have supported the doctrine on this ground. The say that there are always some reasons behind these opinions, we may or may not understand them.

Precedents are based on customs, and therefore, they should be followed. Courts follow them because these judicial decisions are the principal and most authoritative evidence that can be given of the existence of such a custom as shall form a part of the common law.

As a matter of great convenience, it is necessary that a question once decided should be settled and should not be subject to re-argument in every case in which it arises. It will save the labor of the judges and the lawyers.

Precedents bring certainty in the law. If the courts do not follow precedents and the judges start deciding and determining issues every time afresh without having regard to the previous decisions on the point, the law would become the most uncertain.

Precedents bring flexibility to law. Judges in giving their decisions are influenced by social, economic and many other values of their age. They mold and shape the law according to the changed conditions and thus bring flexibility to law.

Precedents are Judge made law. Therefore, they are more practical. They are based on cases. It is not like statue law which is based on a priori theory. The law develops through precedents according to actual cases.

Precedents bring scientific development to law. In a case, Baron Parke observed 'It appears to me to be great importance to keep the principle of decision steadily in view, not merely for the determination of the particular case, but for the interest of law as a science.'

Precedents guide judges and consequently, they are prevented from committing errors which they would have committed in the absence of precedents. Following precedents, judges are prevented from any prejudice and partially because precedents are binding on them. By deciding cases on established principles, the confidence of the people on the judiciary is strengthened.

As a matter of policy, decisions, once made on principal should not be departed from in ordinary course.

Demerits of The Doctrine of Precedents

There is always a possibility of overlooking authorities. The vastly increasing number of cases has an overwhelming effect on the judge and the lawyer. It is difficult to trace out all the relevant authorities on the very point.

Sometimes, the conflicting decisions of superior tribunal throw the judge of a lower court on the horns of a dilemma. The courts faced with what an English judge called "complete fog of authorities."

A great demerit of the doctrine of precedent is that the development of the law depends on the incidents of litigation. Sometimes, the most important points may remain unadjudicated because nobody brought an action upon them.

A very grave demerit or rather an anomaly of the doctrine of precedent is that sometimes it is the extremely erroneous decision is established as law due to not being brought before a superior court.

Factors Undermining the Authority Of A Precedent

i. Abrogated decisions – A decision ceases to be binding if a statute or statutory rule inconsistent with it is subsequently enacted, or if it is reversed or overruled by a higher court.

ii. Same decision on appeal is reversed by the appellate court. – 24th amendment of Indian Constitution was passed to nullify the decision of the SC in the case of Golaknath.

iii. Affirmation and Reversal on a Different Ground – A decision is affirmed or reversed on appeal on a different point.

iv. Ignorance of Statute – A precedent is not binding if it was rendered in ignorance of a statute or a rule having the force of statute i.e., delegated legislation. A court may know of existence of the statute or rule and yet not appreciate in the matter in hand. Such a mistake also vitiates the decision. Even a lower court can refuse to follow a precedent on this ground.

v. Inconsistency with Earlier Decision of Higher Court – A precedent is not binding if the court that decided it overlooked an inconsistent decision of a high court. High courts cannot ignore decision of Supreme Court of India.

vi. Inconsistency with Earlier Decision of Same Rank – A court is not bound by its own previous decisions that conflict with one another. The court of appeal and other courts are free to choose between conflicting decisions, even though this might amount to preferring an earlier decision to a later decision.

vii. Precedent sub silentio or not fully argued – When a point is not involved in a decision is not taken notice of and is not argued by a counsel, the court may decide in favor of one party, whereas if all the points had been put forth, the decision in favor of one party. Hence, such a rule is not an authority on the point which had not been argued and this point is said to pass sub silentio. Binding force of a precedent does not depend on whether a particular argument was considered therein or not, provided the point with reference to which an argument was subsequently advanced was decided by the SC.

Circumstances Which Increase The Authority Of A Precedent

i. The number of judges constituting the bench and their eminence is an important factor in increasing the authority of precedent.

ii. A unanimous decision carries more weight.

iii. Affirmation, approval or following by other courts, especially by a higher tribunal, adds to the strength of a precedent.

iv. If an Act is passed embodying the law in a precedent, the gains an added authority.

Comparison Between Different Legal Systems

U.S. legal system

In the United States, which uses a common law system in its state courts and to a lesser extent in its federal courts, the Ninth Circuit Court of Appeals has stated:

Stare decisis is the policy of the court to stand by precedent; the term is but an abbreviation of stare decisis et quieta non movere — "to stand by and adhere to decisions and not disturb what is

settled." Consider the word "decisis." The word means, literally and legally, the decision. Nor is the doctrine stare dictis; it is not "to stand by or keep to what was said." Nor is the doctrine stare rationibus decidendi — "to keep to the rationes decidendi of past cases." Rather, under the doctrine of stare decisis a case is important only for what it decides — for the "what," not for the "why," and not for the "how." Insofar as precedent is concerned, stare decisis is important only for the decision, for the detailed legal consequence following a detailed set of facts.

In other words, stare decisis applies to the holding of a case, rather than to obiter dicta ("things said by the way"). As the United States Supreme Court has put it: "dicta may be followed if sufficiently persuasive but are not binding."

In the United States Supreme Court, the principle of stare decisis is most flexible in constitutional cases:

Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions. This is strikingly true of cases under the due process clause.

For example, in the years 1946–1992, the U.S. Supreme Court reversed itself in about 130 cases. The U.S. Supreme Court has further explained as follows:

When convinced of former error, this Court has never felt constrained to follow precedent. In constitutional questions, where correction depends upon amendment, and not upon legislative action, this Court throughout its history has freely exercised its power to re-examine the basis of its constitutional decisions.

English legal system

The doctrine of binding precedent or stare decisis is basic to the English legal system, and to the legal systems that derived from it such as those of Australia, Canada, Hong Kong, New Zealand, Pakistan, Singapore, Malaysia, and South Africa. A precedent is a statement made of the law by a Judge in deciding a case. The doctrine states that within the hierarchy of the English courts a decision by a superior court will be binding on inferior courts. This means that when judges try cases they must check to see if similar cases have been tried by a court previously. If there was a precedent set by an equal or superior court, then a judge should obey that precedent. If there is a precedent set by an inferior court, a judge does not have to follow it, but may consider it. The House of Lords (now the Supreme Court) however does not have to obey its own precedents.

Only the statements of law are binding. This is known as the reason for the decision or ratio decidendi. All other reasons are "by the way" or obiter dictum. See Rondel v. Worsley. A precedent does not bind a court if it finds there was a lack of care in the original "Per Incuriam". For example, if a statutory provision or precedent had not been brought to the previous court's attention before its decision, the precedent would not be binding. Also, if a court finds a material difference between cases then it can choose not to be bound by the precedent. Persuasive precedents are those that have been set by courts lower in the hierarchy. They may be persuasive but are not binding. Most importantly, precedents can be overruled by a subsequent decision by a superior court or by an Act of Parliament.

Civil Law System

Stare decisis is not usually a doctrine used in civil law court system, because it violates the principle that only the legislature may make law. In theory therefore, lower courts are generally

not bound to precedents established by higher courts. In practice, the need to have predictability means that lower courts generally defer to precedents by higher courts and in a sense, the highest courts in civil law jurisdictions, such as the Cour de cassation and the Conseil d'État in France are recognized as being bodies of a quasi-legislative nature.

The doctrine of stare decisis also influences how court decisions are structured. In general, court decisions in common law jurisdictions are extremely wordy and go into detail as to the how the decision was reached. This occurs to justify a court decision based on previous case law as well as to make it easier to use the decision as a precedent in future cases.

By contrast, court decisions in some civil law jurisdictions (most prominently France) tend to be extremely brief, mentioning only the relevant legislation and not going into detail about how a decision was reached. This is the result of the theoretical view that the court is only interpreting the view of the legislature and that detailed exposition is unnecessary. Because of this, much more of the exposition of the law is done by academic jurists which provide the explanations that in common law nations would be provided by the judges themselves.

In other civil law jurisdictions, such as the German-speaking countries, court opinions tend to be much longer than in France, and courts will frequently cite previous cases and academic writing. However, e.g., German courts put less emphasis of the particular facts of the case than common law courts, but on the discussion of various doctrinal arguments and on finding what the correct interpretation of the law is.

Indian Legal System

Indian Law is largely based on English common law because of the long period of British colonial influence during the period of the British Raj.

After the failed rebellion against the British in 1857, the British Parliament took over the reign of India from the British East India Company, and British India came under the direct rule of the Crown. The British Parliament passed the Government of India Act of 1858 to this effect, which set up the structure of British government in India. It established in England the office of the Secretary of State for India through whom the Parliament would exercise its rule, along with a Council of India to aid him. It also established the office of the Governor-General of India along with an Executive Council in India, which consisted of high officials of the British Government.

Much of contemporary Indian law shows substantial European and American influence. Various legislations first introduced by the British are still in effect in their modified forms today. During the drafting of the Indian Constitution, laws from Ireland, the United States, Britain, and France were all synthesized to get a refined set of Indian laws, as it currently stands. Indian laws also adhere to the United Nations guidelines on human rights law and the environmental law. Certain international trade laws, such as those on intellectual property, are also enforced in India.

Indian family law is complex, with each religion adhering to its own specific laws. In most states, registering marriages and divorces is not compulsory. There are separate laws governing Hindus, Muslims, Christians, Sikhs, and followers of other religions. The exception to this rule is in the state of Goa, where a Portuguese uniform civil code is in place, in which all religions have a common law regarding marriages, divorces and adoption.

Ancient India represented a distinct tradition of law and had an historically independent school of legal theory and practice. The Arthashastra, dating from 400 BC and the Manusmriti, from 100 AD, were influential treatises in India, texts that were considered authoritative legal guidance. Manu’s central philosophy was tolerance and pluralism and was cited across Southeast Asia. Early

in this period, which finally culminated in the creation of the Gupta Empire, relations with ancient Greece and Rome were not infrequent. The appearance of similar fundamental institutions of international law in various parts of the world show that they are inherent in international society, irrespective of culture and tradition. Inter-State relations in the pre-Islamic period resulted in clear-cut rules of warfare of a high humanitarian standard, in rules of neutrality, of treaty law, of customary law embodied in religious charters, in exchange of embassies of a temporary or semi-permanent character. When India became part of the British Empire, there was a break in tradition, and Hindu and Islamic law were supplanted by the common law. As a result, the present judicial system of the country derives largely from the British system and has little correlation to the institutions of the pre-British era.

From the brief discussion above about the legal value of precedents we can clearly infer that these play an important role in filling up the lacunas in law and the various statues. These also help in the upholding of customs that influence the region thereby making decisions morally acceptable for the people. This thereby increases their faith in the judiciary which helps in legal development.

These moreover being a sort of respect for the earlier views of various renowned jurists, helps in upholding the principle of stare decisis. It is a matter of great convenience it is necessary that a question once decided should be settled and should not be subject to re-argument in every case in which it arises. It will save labor of the judges and the lawyers. This way it saves lots of time for the judiciary which is a real challenge in the present-day legal system with so many cases still pending for many years now. Precedents bring certainty in law.

If the courts do not follow precedents and the judges start deciding and determining issues every time afresh without having regard to the previous decisions on the point, the law would become

the most uncertain. Precedents bring flexibility to law. Judges in giving their decisions are influenced by social, economic and many other values of their age. They mold and shape the law according to the changed conditions and thus bring flexibility to law.

Custom as a source of law

Customs are the earliest sources of law and form the basis of the English Common Law system as we see it today. They can be described as cultural practices which have become definite and backed by obligation or sanction just by virtue of widespread practice and continue presence.

Definitions

John Salmond

"Custom is the embodiment of those principles which have commended themselves to the national conscience as principles of justice and public utility."

For Salmond, a valid custom has absolute legal authority which as the force of law. He divides Customs into two:

General Custom – A general custom has the force of law throughout the territory of a state. For example, the Common Law in England.

Local Custom – The local custom are those which operate have the force of law in a particular locality. The authority of a local custom is higher than that of general custom.

C.K. Allen

C.K. Allen defines custom as "legal and social phenomenon growing up by forces inherent in society—forces partly of reason and necessity, and partly of suggestion and imitation."

J.L. Austin

"Custom is a rule of conduct which the governed observe spontaneous and not in pursuance of law settled by a political superior."

Austin's ideas were often seen in contravention to customary law because for him, the political superior was the only source of law and customs were not 'real law'. They needed the assent and command of the Sovereign to be considered law.

Robert Keeton

"Customary law may be defined as those rules of human action established by usage and regarded as legally binding by those to whom the rules are applicable, which are adopted by the courts and applied as source of law, because they are generally followed by the political society as a whole, or by some part of it."

Origin of Customs

In primitive societies, there was no external authority over people, yet people organized themselves in cohesive groups with a mechanism for fairness and liberty.

People developed rules and regulations through spontaneous reaction to their circumstances as well as a coordinated conscious decision to arrive at them.

Eventually, people started recognizing traditions, practices, rituals which were prevalent in a certain territory or group and saw how they formed a systematized approach to social regulation.

In Britain, Jurists and legislators started studying these patterns, recording their prevalence, usage and applicability. These came to be known as customs, which were then formalized and put into legislation in the Common Law of England.

There are two philosophers with alternate views as to how customs originate.

Sir Henry Maine

According to Sir Henry Maine, "Custom is conception posterior to that of Themistes or judgments." Themistes were judicial awards which were dictated to the King by the Greek goddess of justice. He explained, "Themistes, Themises, the plural of Themis, are the awards themselves, divinely dictated to the judges.

He described the development in distinct steps. These are:

i. Law by rulers under divine inspiration

At the first stage, law was given by rulers who sought divine sanction for their commands. They were believed to be messengers of God, laying out the law for the people.

ii. Developing of Customs

Gradually, as people get into the habit of following the dictates of their rulers, they develop into customary law, and becomes a part of people's daily living.

iii. Knowledge of law in the hands of priests

The knowledge of customs and practises is then studied by a minority, primarily religious people. This is possible due to the weakening of the power of the rulers over people. Priests study customs, recognize patterns, understand their relevance, and formalize customs.

iv. 4. Codification

The last and final stage is that of codifying these laws. Priests study customs meticulously and put it on paper. This code is then promoted and spread to newer areas and territories.

T. Holland

According to Holland, "custom is a generally observed course of conduct".

Holland says that custom originated in the conscious choice by the people of the more convenient of the two acts.

For Holland, customs grow through imitation. In early political societies the king or the head of the society did not make laws but administered justice according to the popular notions of right and wrong, whichever were enshrined in the course of conduct pursued by people- in general. What was accepted by the generality of the people and embodied in their customs was deemed to be right and which was disapproved by them or not embodied in their customs was deemed to be wrong.

Types of Customs

There are two broad categories into which customs can be divided. These are customs without binding obligation and customs with legally binding obligations.

Customs without binding obligation

These customs are not enforceable by law but are still prevalent in society and have societal sanctions attached to them.

For example, every society has some customs about how to dress, how to address elders or how to conduct marriages etc. These are not legally binding but can still have powerful sanctions attached to them. For example, if a person comes to a funeral wearing colorful clothes, he will be ostracized and alienated by others around him.

These customs, although not binding, hold tremendous importance in society and must be followed uniformly for efficient functioning of society.

Every one of these customs are pursued because of the fear that non-recognition of such customs may lead them to be socially outcasted. Such customs are non-authoritative as in they are not mandatory to pursue. Individuals follow them due to the social pressure of society. At the point when a custom of this sort is abused, society typically responds by demonstrating social dismay or ostracization; however, it has no sanction in the true sense of the term. Such customs can be called as ‘Social Customs’.

Customs with binding obligations

In this classification those customs are discussed which in an objective and stringent sense are viewed as the obligations and commitments of men. Such customs may direct the commitment of marriage and the upbringing of children, the transmission of property etc.

Such customs do not relate to the circle of social conventions, outward propriety, or style; rather, they are worried about the genuine business of society, the work that must be practiced in request to verify and ensure necessary conditions for community living.

Customs under this category have sanctions which are more stringent than the previous category. If these customs gain widespread acceptance, they acquire legal character. On violation of these customs, adequate penalty is incurred by the violator as per the statute that governs the custom.

These can be further divided into Legal Customs and Conventional customs.

Legal Customs

The sanction of a legal custom is certain and absolute. It is negative in its operation, in the sense that, if the custom is not followed, certain desired consequences would not take place. For example, if you do not follow the custom of marriage properly, that marriage will be considered void and any children born out of that marriage will be considered illegitimate.

Legal custom is operative per se regardless of any agreement of participant parties contrary to the custom. They are unconditional and absolute in their function and take up the form of law.

They are obligatory rules of conduct on not based on faith or convention.

According to Salmond, Legal Customs have legal obligation or proprio vigor. He divides legal customs further into General and Local Customs which have been discussed earlier.

Conventional Customs

According to Salmond, 'A conventional custom is one whose authority is conditional on its acceptance and incorporation in agreement between the parties to be bound by it.'

A conventional custom or usage is a practice which comes into practice due to it being followed for a long period of time and arising out of a contract between the parties; it does not have any legal character. Thus, a usage or conventional custom is an established norm which is legally

enforceable, not because of any legal authority independently possessed by it, but because it has been expressly or impliedly incorporated in a contract between the parties concerned.

Conventional custom may, again, be divided into two types—General Conventional.

Customs and Local Conventional Customs. General Conventional Customs are extensively practiced throughout a particular territory, whereas Local Conventional Customs are limited to a particular place or to a particular trade or transaction.

Requisites of a Valid Custom

i. **Reasonability**

A custom must be in conformity with basic morality, the prevailing understanding of justice, health and public policy. If it is not reasonable in its origin or practice, it cannot be considered a valid custom. For example, Sati was an accepted custom once, but with the modern moral understanding, it is reprehensible, and therefore it cannot be considered a custom today.

This, however, does not mean that every custom must be perfect in its morality or ethical concerns, or contain eternal wisdom, it just needs to be relevant to contemporary times, useful and capable of being legislated on.

ii. **Conformity with Statute Law**

No custom can be in contravention to the existing law of the land. Any practice, however widespread and accepted, if found in violation of any statute of a said territory cannot be considered a custom.

iii. Certainty

It must be clear and unambiguous as to what the custom is and how it is practiced. A custom can only hold up in a court of law when it is not indefinite or uncertain. It needs to be absolute and objective in theory and in action.

iv. Consistency

A custom must be consistent with the general principles of Law which form the basis of every law or statue which exists. These principles form the basis of ideas like Justice, fairness and liberty, and every custom must be in consonance with these.

v. Antiquity

It is necessary for the custom to have been followed for time immemorial. The practice must be so ingrained in society, that legislating it seems like the only natural step. Recent or modern practices cannot be custom until they become firmly established in society.

vi. Continuity

A custom must not be interrupted, or its practice must not be sparse. It needs to be continuing for time immemorial without any interruption.

vii. Must be peaceful in its practice.

Any custom advocating or calling for violence, implicitly or explicitly, `cannot be considered a custom.

viii. Must not be opposed to Public Policy.

Whatever the public policy may be of the state the custom is operating in, must be conformed to.

ix. Must be General or Universal.

According to Carter, "Custom is effectual only when it is universal or nearly so. In the absence of unanimity of opinion, custom becomes powerless, or rather does not exist."

Theories of Customs

Historical Theory

As indicated by this school, custom contains its own legitimacy, since it would not exist at all except if some profound needs of the general population or some local nature of societal needs offer validity to it.

The development of law does not depend upon the subjective will of any person. It because of the knowledge of the communities and civilizations that have existed throughout history.

Custom is achieved from the common conscience of the general population. It springs from an innate feeling of right. Law has its reality in the general will of the people. Savigny calls it "Volksgeist".

Analytical Theory

Austin was the main proponent of the Analytical theory. For him, Customs did not have any legally binding force in themselves. Their legal character is always subject to the assent of the Sovereign. For him, customs were merely reflection of law, and were not 'real law'. Customs need the

modification and the approval of judges, jurists, or rulers for them to have any binding force on people. This is in consonance with his idea that all law is the ‘Will of the Sovereign”.

Therefore, Customs are an important source of law, which have their historical roots in the earliest and most primitive of societies, and still hold relevance. Society is constantly in the process of establishing newer practices which might in due time turn into usages or customs.

We depend on customs and are governed by them, knowingly or not. The English Common law can be interpreted as a formalization of existing customs, and therein lies the importance of having the right customs in society.

UNIT – IV

LEGAL CONCEPTS

- Concept of Wrongs, Duties and Rights
- The concept of Rights
- Elements and Types of Legal Rights
- Hohfeldian Analysis of Rights
- The concept of Possession
- Kinds of possession
- Possessory Remedies
- The concept and incidences of ownership
- Types of ownership
- The concept of Personality
- Status of lower animals, Dead persons and unborn child under the law
- Concept of corporate personality
- Theories of corporate personality
- Personality of the state

Wrongs:

A wrong is simply a wrong act—an act contrary to the rule of right and justice. A synonym of it is injury, in its true and primary sense of injuria (that which is contrary to jus). Wrongs or injuries are divisible for our present purpose into two kinds, being either moral or legal. A moral or natural

wrong is an act which is morally or naturally wrong, being contrary to the rule of natural justice. A legal wrong is an act which is legally wrong, being contrary to the rule of legal justice and a violation of the law. It is an act which is authoritatively determined to be wrong by a rule of law and is therefore treated as a wrong in and for the purposes of the administration of justice by the state. It may or may not be a wrong indeed and in truth, and conversely a moral wrong may or may not be a wrong in law.

In all ordinary cases the legal recognition of an act as a wrong involves the suppression or punishment of it by the physical force of the state, this being the essential purpose for which the judicial action of the state is ordained.

Duties:

A duty is an obligatory act it is an act the opposite of which would be a wrong. Duties and wrongs are correlatives. The commission of a wrong is the breach of a duty, and the performance of a duty is the avoidance of a wrong, A synonym of duty is obligation, in its widest sense. Duties, like wrongs, are of two kinds, being either moral or legal. A moral or natural duty is an act the opposite of which would be a moral or natural wrong. A legal duty is an act the opposite of which would be a legal wrong. It is an act recognised as a duty by the law and treated as such in and for the purposes of the administration of justice by the state.

Rights:

A right is an interest recognised and protected by a rule of right. It is any interest, respect for which is a duty, and the disregard of which is a wrong. All that is right or wrong, just or unjust, is so by reason of its effects upon the interests of mankind, that is to say upon the various elements of human well-being, such as life, liberty, health, reputation, and the uses of material objects. If any

act is right or just, it is so because and in so far as it promotes some form of human interest. If any act is wrong or unjust, it is because the interests of men are prejudicially affected by it. Conduct which has no influence upon the interests of anyone has no significance either in law or morals. Every wrong, therefore, involves some interest attacked by it, and every duty involves some interest to which it relates, and for whose protection it exists. The converse, however, is not true. Every attack upon an interest is not a wrong, either in fact or in law, nor is respect for every interest a duty, either legal or natural. Many interests exist de facto and not also de jure; they receive no recognition or protection from any rule of right. The violation of them is no wrong, and respect for them is no duty. For the interests of men conflict with each other, and it is impossible for all to receive rightful recognition. The rule of justice selects some for protection, and the others are rejected. The interests which thus receive recognition and protection from the rules of right are called rights. Every man who has a right to any thing has an interest in it also, but he may have an interest without having a right. Whether his interest amounts to a right depends on whether there exists with respect to it a duty imposed upon any other person. In other words, a right is an interest the violation of which is a wrong.

Correlation between Rights and Duties:

Rights and duties are necessarily correlative. There can be no right without a corresponding duty, or duty without a corresponding right. For every duty must be a duty towards some person or persons, in whom, therefore, a correlative right is vested. And conversely every right must be a right against some person or persons, upon whom, therefore, a correlative duty is imposed. Every right or duty involves a vinculum juris or bond of legal obligation, by which two or more persons are bound together. There can be no duty unless there is someone to whom it is due ; there can be

no right unless there is someone from whom it is claimed; and there can be no wrong unless there is someone who is wronged, that is to say, whose right has been violated.

Theories of Rights:

Interest Theory:

Jeremy Bentham (1748-1832) initiated the interest theory. As a utilitarian, he was critical of the idea of moral rights, but conceded that the rights could be useful in legal systems. Someone would have a right to something (x), against a second person, if that person had a legal duty to provide the first person with x. For example, on Bentham's interest theory, you have a right to vote if someone is legally required to provide you with the opportunity to vote, and count your ballot, and so on.

Further, Rudolf Von Ihering stated that legal right is the legally protected interest. He gave importance to the interest of the people rather than the will of the people. The main objective is to protect the interests of the people and to avoid the conflict between the individual interest.

Will Theory:

Herbert L.A. Hart (1907-92), a British legal scholar, is credited with developing the will theory of rights. He cited Kant as inspiring his thinking about the importance of human freedom, or liberty. Freedom is the most basic right, according to will theory. It is a moral (or natural) right. All other rights, moral or legal, are specific protected freedoms. Limiting anyone's freedom always requires the authorization of others' rights; and the subjects of rights remain free to "claim" them or not. So as per the will theory of rights, *rights are an inherent attribute of the human will"*. The purpose

of the law is to permit the expression of free will. The subject matter is derived from the human will.

Rights are defined in the terms of will by Austin, Pollock, and Holland. According to John Locke, "*the basis of the right is the will of the individual"*. According to Puchta the legal rights gives power to the person over the object which by means of right can be subjected to the will of the person who is enjoying the right.

Elements of Legal Rights:

In every legal right the five following elements are involved: —

(1) A person in whom it is vested, and who may be distinguished as the owner of the right, the subject of it, or the person entitled.

(2) A person against whom the right avails, and upon whom the correlative duty lies. He may be distinguished as the person bound, or as the subject of the duty.

(3) An act or omission which is obligatory on the person bound in favour of the person entitled. This may be termed the content of the right.

(4) Something to which the act or omission relates, and which may be termed the object or subject matter of the right.

(5) A title is to say, certain facts or events by reason of which the right has become vested in its owner.

Thus, if A buys a piece of land from B., A. is the subject or owner of the right so acquired. The persons bound by the correlative duty are persons in general, for a right of this kind avails against

all the world. The content of the right consists in non-interference with the purchaser's exclusive use of the land. The object or subject matter of the right is the land. And finally, the title of the right is the conveyance by which it was acquired from its former owner.

Types of Legal Rights:

1. **Perfect and imperfect rights:** Perfect right corresponds with perfect duty. Perfect rights are recognized and enforced by law and an action can be taken against the wrongdoer by filing a suit in Court of Law for the breach of it. While Imperfect right corresponds with Imperfect duty, which though recognized by law, but still cannot be enforced by the law. For example, 'A' advanced loan to 'B'. 'B' is bound to repay that Loan. 'A' has perfect right to recover loan from 'B' and 'B' has perfect duty to pay the amount of loan to 'A'. If 'B' failed, then 'A' can file Suit against him in court of law for recovery of loan. But if it is time-barred loan, for example no suit filed within the limitation period and 'A' was sleeping over his right for a long time. 'A' can claim for the same but becomes imperfect right which cannot be enforced by law.
2. **Positive and Negative rights**: Positive rights have corresponding Positive duty. Positive rights are therefore realised when some positive act is required to be done by the person who has the corresponding duty. Thus, the person on whom such duty lies must do some positive duty. While on the other hand negative rights are those rights when some negative act by way of omission is required. Negative rights correspond to negative duty, and the person on whom such negative duty lies shall omit (not to do) such act.
3. **Rights in rem and rights in personam:** Rights in rem or jus in rem means a right against or in respect of a person. Rights in rem are available against the whole world. Examples:

possession and ownership. An individual's right to possession and ownership is protected against the whole world.

A right in personam corresponds to a duty which is imposed on determinate persons. Rights under a contract are rights in personam as the parties to the contract are alone bound by it.

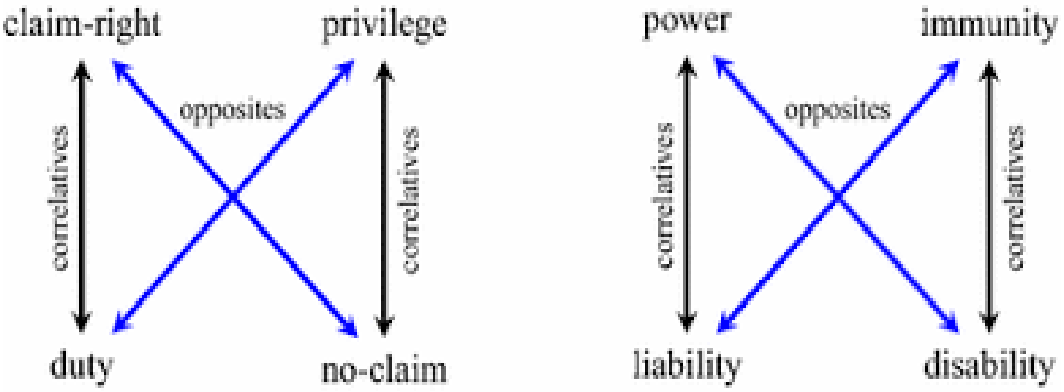
4. **Proprietary and personal rights**: Personal right is in respect of person of owner of right whereas Proprietary right is in respect of property of which the person is an owner. Proprietary Rights are those, which constitute a man's property or wealth. These are the rights, which possess some economic or monetary value and constitute the estate of the Person. Right to land, debts and Goodwill or patent rights are all Proprietary right. Personal right includes right to safety, to repetition Personal rights are also important like Proprietary right. For example - right to reputation. Personal rights do not have economic value. They relate to person's well-being or status.
5. **Rights in re propria and rights in re aliena:** Right over one's own property is known as rights in re- propria whereas rights over the property of another person is known as rights in re-aliena. For example: A person has rights in re propria on their own land. The rights in re- aliena will arise if the rights of the owner over their property becomes subject to someone else's right over their property. Rights in re-aliena are also known as encumbrances.
6. **Principal and accessory rights:** The principal right is a basic or main right vested in Persona under law. They are Vital and important Rights. While accessory right is incidental or consequential right. They are not essential but are apparent to the more basic general right.

7. **Primary and sanctioning rights:** Primary right is basic right. It is an independent right. For example - right to reputation, if right of reputation is violated then there is legal remedy in the civil and criminal law. Sanctioning rights are the consequential rights. They originate for the redressal of some wrong. They come into picture when some primary right has been violated.
8. **Vested and Contingent rights:** Vested rights come in existence when an interest in a property is transferred in favour of a person without specifying the time or a specific condition. Such interest must vest in the person on happening of an event which is bound to happen. The interest in the property remains vested in the transferee even though the right to enjoyment of the property is postponed. Vested interest does not depend on an uncertain event. It depends on a certain event which must happen. It creates a present or immediate right though the right to enjoyment is postponed. Contingent rights come into existence when interest is created in a property in favour of a person to whom such property is transferred, such interest is dependent on the happening of a specified uncertain event which may or may not take place. Hence the transfer of an interest in a property is dependent on a contingent event. This interest in the property can become vested interest in favour of the person to whom it is transferred on the happening of the event or when the happening of the specified event fails or becomes impossible. The creation of interest of the person's right to enjoyment, possession or ownership in the property is dependent on happening of a condition which may or may not take place.
9. **Legal and Equitable rights:** Legal rights are the rights given by common law Courts of England. Common law was based on statute by way of custom, usage. Equitable rights are

the outcome of law of equity given by the court of chancellor, or equity Court based on principle of natural justice and conscience of Lord Chancellor.

Hoffield Analysis of Rights:

Hoffield was a professor of law and tried to simplify the complicated concept of rights. He did so by classifying rights into eight distinct concepts. He further grouped them into jural correlatives and jural opposites. A jural correlative is a pair where the existence of one implies the existence of another i.e., they are mutually inclusive. Jural opposite is a pair where existence of one implies absence of another i.e., they are opposite to each other and mutually exclusive.



Right (Claim)-No Right (no Claim):

My legal rights (in the strict sense) are the benefits which I derive from legal duties imposed upon other persons. These are the interests which is recognised and protected by the law. Rights of this class are concerned with those things which other persons ought to do for me.

Liberties/Privilege- Duty:

Legal liberties are the benefits which I derive from the absence of legal duties imposed upon myself. They are the various forms assumed by the interest which I have in doing as I please. They

are the things which I may do without being prevented by the law. The sphere of my legal liberty is that sphere of activity within which the law is content to leave me alone. The term right is often used in a wide sense to include such liberty. I have a right (that is to say, I am at liberty) to do as I please with my own; but I have no right and am not at liberty to interfere with what is another's. I have a right to express my opinions on public affairs, but I have no right to publish a defamatory or seditious libel. I have a right to defend myself against violence, but I have no right to take revenge upon him who has injured me.

The jural opposite of liberty is duty which means that the other person is under an obligation not to infringe or interference with my sphere of liberty. According to Hoffield, Liberty is form of a weaker right, it only signifies what a person can do in their space, without being interfered with.

Power-Disability:

A power may be defined as ability conferred upon a person by the law to determine, by his own will directed to that end, the rights, duties, liabilities, or other legal relations, either of himself or of other persons. Powers are either public or private. The former is those which are vested in a person as an agent or instrument of the functions of the state; they comprise the various forms of legislative, judicial, and executive authority. Private powers, on the other hand, are those which are vested in persons to be exercised for their own purposes, and not as agents of the state. Power is either ability to determine the legal relations of other persons, or ability to determine one's own. The first of these power over other persons is commonly called authority; the second power over oneself is usually termed capacity.

Jural opposite of power is liability. This means that giving power to one person disables the other from exercising such power and altering the legal equation between the two.

Immunity-Liability:

When immunity i.e., protection is granted to one person, they are shielded from any liability which might be imposed on them because of the immunity being granted by the law. For example: Wearing of helmets while driving is mandatory. However, Sikhs wearing a turban are not required to wear a helmet. This is an immunity granted to them because of which they will not be subjected to any liability under the law.

Possession

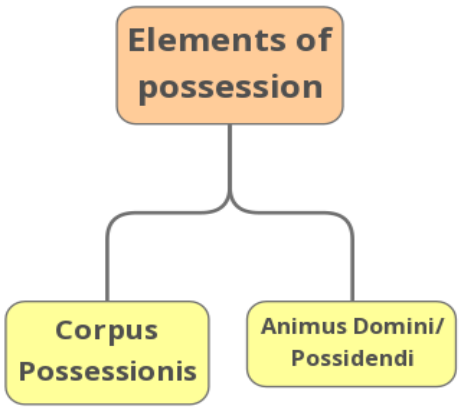
Possession, simply put, can be defined as the relationship of an individual with an object/property. The concept of possession is one of the most complicated concepts in law. One of the questions which frequently arises is to why is the possession of an individual protected even though they are not the owners? The answer to this question can be found in the writings of German philosophers. Kant and Hegel start from freedom. The freedom of the will, Kant said, is the essence of man. It is an end in itself; it is that which needs no further explanation, which is absolutely to be respected, and which it is the very end and object of all government to realize and affirm. Possession is to be protected because a man by taking possession of an object has brought it within the sphere of his will. He has extended his personality into or over that object. As Hegel would have said, possession is the objective realization of free will. And by Kant's postulate, the will of any individual thus manifested is entitled to absolute respect from every other individual and can only be overcome or set aside by the universal will, that is, by the state, acting through its organs, the courts.

Another question that arises with regards to possession is whether ‘Possession a fact or a right’? This question must be taken to mean, by possession and right, what the law means by those words, and not something else which philosophers or moralists may mean by them. A legal right is

nothing but a permission to exercise certain natural powers, and upon certain conditions to obtain protection, restitution, or compensation by the aid of the public force. The word "possession" also denotes a group of facts. Hence, when we say of a person that they have possession, we affirm directly that all the facts of a certain group are true of them i.e., we speak of possession as it exists or the state of being. This is how possession is understood in the factual sense. The law tends to preserve or protect certain existing set or group of facts. Therefore, the protection which the law attaches by way of consequence to possession, is truly a right in a legal sense.

Elements of Possession:

To gain possession, then, a man must stand in a certain physical relation to the object and to the rest of the world, and must have a certain intent i.e. to say that possession has two elements.



1. *Animus Possidendi/ Domini*: Refers to the intention of the individual to hold on to the object. The intent necessary to constitute possession is the intent to appropriate to oneself the exclusive use of the thing possessed. It is an exclusive claim to a material object. It is a purpose of using the thing oneself and of

excluding the interference of other persons. As to this necessary mental attitude of the possessor there are the following observations to be made:

(i) The *animus sibi habendi* is not necessarily a claim of right. It may be consciously wrongful. The thief has a possession no less real than that of a true owner. The possessor of a thing is not he who has, or believes that he has, a right to it, but he who intends to act as if he had such a right. To possession in good faith the law may and does allow special benefits which are cut off by fraud, but to possession as such—the fulfilment of the self-assertive will of the individual good faith is irrelevant.

(ii) The claim of the possessor must be exclusive. Possession involves an intent to exclude other persons from the uses of the thing possessed. A mere intent or claim of unexclusive use cannot amount to possession of the material thing itself.

(iii) The exclusion, however, need not be absolute. I may possess my land notwithstanding the fact that some other person, or even the public at large, possesses a right of way over it. For, subject to this right of way, my animus possidendi is still a claim of exclusive use. I intend to exclude all alien interference except such as is justified by the limited and special right of use vested in others.

(iv) The animus possidendi need not be specific but may be merely general. It does not necessarily in- volve any continuous or present knowledge of the thing possessed or of the possessor's relation to it. A general intent

with respect to a class of things is sufficient (if coupled with the necessary physical relation) to confer possession of the individual objects belonging to that class, even though their individual existence is unknown. Thus, I possess all the books in my library, even though I may have forgotten the existence of many of them.

Corpus Possessionis: To constitute possession the animus domini is not in itself sufficient but must be embodied in a corpus. The claim of the possessor must be effectively realised in the facts; that is to say, it must be actually and continuously exercised. The will is sufficient only when manifested in an appropriate environment of fact. Corpus Possessionis can be understood in two ways- (1) on the relation of the possessor to other persons, (2) on the relation of the possessor to the thing possessed.

(i) Relation of the possessor to other persons: So far as other persons are concerned, I am in possession of a thing when the facts of the case are such as to create a reasonable expectation that I will not be interfered with in the use of it.

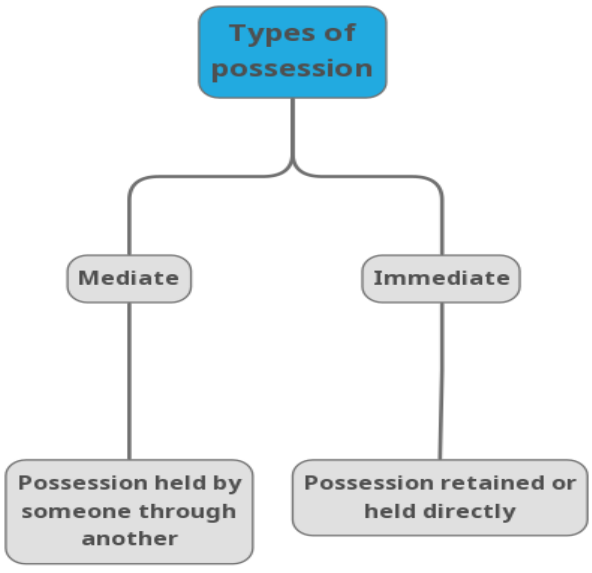
A thing is possessed, when it stands with respect to other persons in such a position that the possessor, having a reasonable confidence that his claim to it will be respected, is content to leave it where it is.

(ii) Relation of the possessor to the thing possessed: The necessary relation between the possessor and the thing possessed is such as to admit of his making such use of it as accords with the nature of the thing and of his claim to it. There must be no barrier between him and it, inconsistent with the nature of the claim he makes to it. For example: I have the possession of the house I live in the house because of my physical power/ control of the house and the fact that I can use my property in a manner that I

choose, excluding others from any kind of interference. This also means that when I am not present in my house, I still have it in my possession because I can return to my house as per my will. My dog is away from home, but he will probably return. I have mislaid a book, but it is some- where within my house and can be found with a little trouble. These things, therefore, I still possess, though I cannot lay my hands on them at will.

Types of possession:

(i) Mediate and immediate: The possession thus held by one man through another may be termed 7nediate, while that which is acquired or retained directly or personally may be distinguished as immediate or direct. If I go myself to purchase a book, I acquire direct possession of it; but if I send another person to buy it for me, I acquire mediate possession of it through them, until they have brought it to me, when my possession becomes immediate.

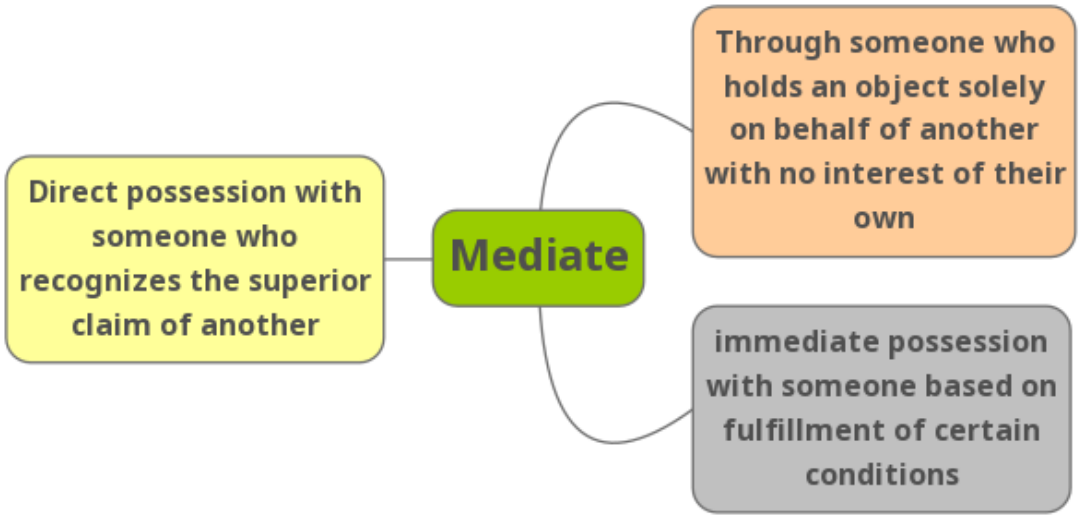


Types of mediate possession:

Of mediate possession there are three kinds. The first is that which I acquire through an agent or servant; through someone who holds solely on my account and claims no interest of his own. For example: I send my boots to a shoemaker to be repaired or when I allow my servant to use my tools in his work. In all such cases, though the immediate possession is in the servant or artisan, the mediate possession is in me; for the immediate possession is held on my account, and my animus domini is therefore sufficiently realised in the facts.

The second kind of mediate possession is that in which the direct possession is in one who holds both on my account and on his own, but who recognises my superior right to obtain from him the direct possession whenever I choose to demand it. It is the case of a borrower, hirer, or tenant at will. I do not lose possession of a thing because I have lent it to someone who acknowledges my title to it and is prepared to return it to me on demand, and who in the meantime holds it and looks after it on my behalf.

The third kind of immediate possession is in a person who claims it for himself until sometime has elapsed or some condition has been fulfilled, but who acknowledges the title of another for whom he holds the thing, and to whom he is prepared to deliver it when his own temporary claim has come to an end : as for example when I lend a chattel to another for a fixed time, or deliver it as a pledge to be returned on the payment of a debt. Even in such a case I retain possession of the thing, so far as third persons are concerned.



(ii) Concurrent possession: It was a maxim of the civil law that two persons could not be in possession of the same thing at the same time i.e., *Plures eandem rem in solidum possidere non jaossunt*. As a general proposition this is true; for exclusiveness is of the essence of possession. Two adverse claims of exclusive use cannot both be effectually realised at the same time. Claims, however, which are not adverse, and which are not, therefore, mutually destructive, admit of concurrent realisation. Hence there are several possible cases of duplicate possession.

1. Mediate and immediate possession coexist in respect of the same thing as already explained.

2. Two or more persons may possess the same thing in common, just as they may own it in common. This is called *compossessio* by the civilians.

3. Corporeal and incorporeal possession may coexist in respect of the same material object, just as corporeal and incorporeal ownership may.

Modes of acquisition of possession:

The modes of acquisition are two in number, namely Taking and Delivery. Taking is the acquisition of possession without the consent of the previous possessor. The thing taken may or may not have been already in the possession of someone else, and in either case the taking of it may be either rightful or wrongful.

Delivery, on the other hand, is the acquisition of possession with the consent and co-operation of the previous possessor. It is of two kinds: actual and constructive. Actual delivery is the transfer of immediate possession; it is a physical dealing with the thing as it transfers from the hands of one person to those of another.

Constructive delivery, on the other hand, is all which is not actual. There are three types of constructive delivery:

(i) The first is that which the Roman lawyers termed *traditio brevi manu*. It consists in the surrender of the mediate possession of a thing to him who is already in immediate possession of it. If, for example, I lend a book to someone, and afterwards, while he still retains it, I agree with him to sell it to him, or to make him a present of it, I can effectively deliver it to him in fulfilment of this sale or gift, by telling him that he may keep it. It is not necessary for him to go through the form of handing it back to me and receiving it a second time from my hands. For he has already the immediate possession of it, and all that is needed for delivery under the sale or gift is the destruction of the animus through which mediate possession is still retained by me.

(ii) The second form of constructive delivery is termed as *constitutum possessorium* that is to say, an agreement touching possession. This is the converse of traditio brevi manu.

It is the transfer of mediate possession, while the immediate possession re- mains in the transferor. Anything may be effectually delivered by means of an agreement that the possessor of it shall for the future hold it no longer on his own account but on account of someone else. No physical dealing with the thing is requisite, because by the mere agreement mediate possession is acquired by the transferee, through the immediate possession retained by the transferor and held on the other's behalf.

(iii) The third form of constructive delivery of possession is known as attornment. This is the transfer of mediate possession, while the immediate possession remains outstanding in some third person. For example: I have goods in the warehouse of A., and sell them to B., I have effectually delivered them to B., so soon as A. has agreed with B. to hold them for him, and no longer for me. Neither in this nor in any other case of constructive delivery is any physical dealing with the thing required, the change in the animus of the persons concerned being adequate.

Possessory Remedies:

The legal remedies provided for the protection of possession even against ownership are called possessorium or possessory remedies. A wrongful possessor, who is deprived of his possession even by the owner otherwise than in due process of law, can recover it from him, simply on the ground of his possession. The true owner, who retakes possession, must first restore it to the wrong doer and then proceed to recover it based on his ownership in due course of law. There has been much discussion as to the reasons on which this provisional protection of possession is based. It would seem probable that the considerations of greatest weight are the three following:

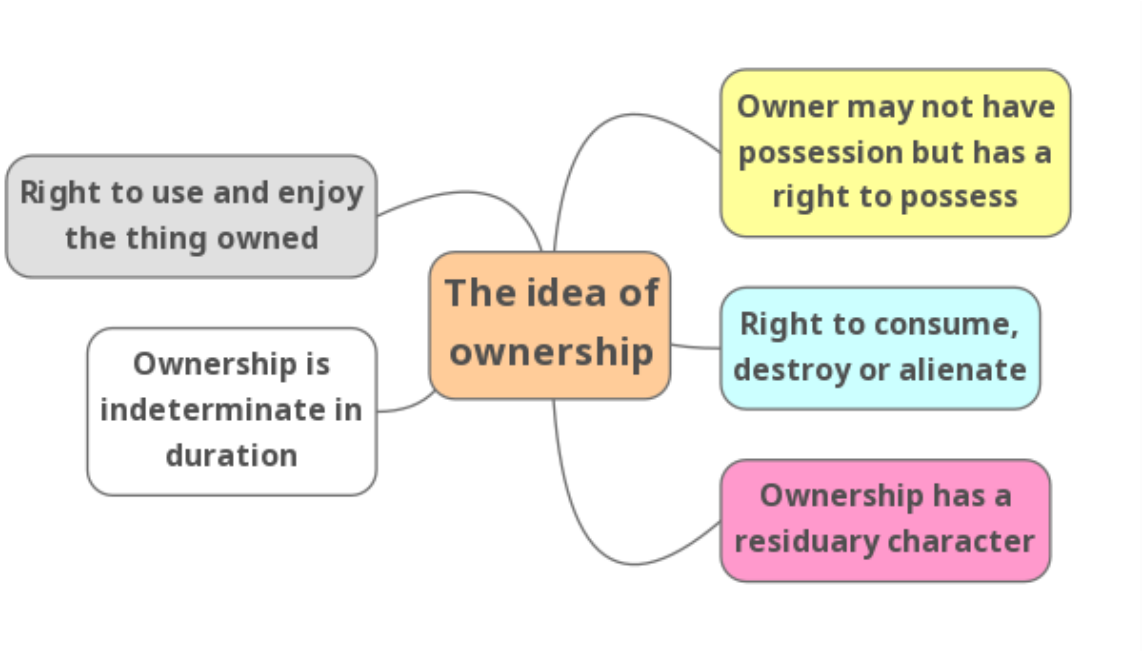
1. The evils of violent self-help are deemed so serious that it must be discouraged by taking away all advantages which anyone derives from it. He who helps himself by force even to

that which is his own must restore it even to a thief. The law gives him a remedy, and with it he must be content. This reason, however, can be allowed as valid only in a condition of society in which the evils and dangers of forcible self-redress are much more formidable than they are at the present day.

2. A second reason for the institution of possessory remedies is to be found in the serious imperfections of the early proprietary remedies. The procedure by which an owner recovered his property was cumbrous, dilatory, and inefficient. No man, therefore, could be suffered to procure for himself by violence the advantageous position of defendant, and to force his adversary by such means to assume the dangerous. and difficult post of plaintiff. The original position of affairs must first be restored; possession must first be given to him who had it first; then, and not till then, would the law consent to discuss the titles of the disputants to the property in question.
3. A third reason for possessory remedies, intricately connected with the second, is the difficulty of the proof of ownership. It is easy to prove that one has been in possession of a thing, but difficult (in the absence of any system of registration of title) to prove that one is the owner of it. Therefore, it was considered unjust that a man should be allowed by violence to transfer the heavy burden of proof from his own shoulders to those of his opponent. Every man should bear his own burden. He who takes a thing by force must restore it to him from whom he has taken it; let him then prove, if he can, that he is the owner of it; and the law will then give to him what it will not suffer him to take for himself.

Ownership:

Ownership, in its most comprehensive signification, denotes the relation between a person and any right that is vested in him. Ownership is often termed as the bundle of rights. Different incidents of ownership are as follows:



Ownership is of various kinds, and the following distinctions are of sufficient importance:

1**. Corporeal and Incorporeal Ownership**: The ownership of material objects is called corporeal ownership whereas the ownership of right is called incorporeal ownership. Thus, the ownership of a house, table, land, machinery, etc., is corporeal ownership and the copyright, patent, trademark, right of way, etc. is incorporeal ownership. Corporeal things are those which are tangible that is, which can be felt by the senses while incorporeal things are intangible and cannot be felt by senses. Salmond thinks that the distinction between corporeal and incorporeal has merely a theoretical significance because in either case, the ownership is the right vested in the owner and not the material object.

2**. Sole Ownership and Co-ownership**: When the ownership is vested in one person only, it is called the sole ownership and when it is vested in more than one it is called co-ownership, ex-partnership. 'Tenants in common' and 'joint tenants' (in English law) are co-owners of the tenancy. In India, the coparcenary of Hindu is also a co-ownership. Co-ownership is possible only so far as the law makes provisions for harmonizing in some way the conflicting claims of the different owner inner se. There is an existence of reciprocal obligation of restricted use and enjoyment between co-owners.

3. **Trust Ownership and Beneficial Ownership**: The institution of trust and beneficial ownership was not the same as now, the institution of trust and the rights of the trustee and the beneficiary are the special creation of English 'equity'. The relation in trust is that there are two or more sets of owners- one set is under an obligation to use its ownership for the benefit of another, the former is called the 'trustee' and the letter is called the 'beneficiary', and this is 'beneficial ownership'. Professor Campbell suggests the term 'bare ownership' in place of trust ownership. A trustee in legal theory is owner, though, he has no right to use the property for himself. The purpose of trusteeship is to protect the rights and interests of persons, who for any reason, are unable to protect them for themselves.

4. **Legal and Equitable Ownership**: Certain rights which were not recognized by the courts of common law in England were afterwards recognized by the courts of equity; and the distinction between legal and equitable ownership is like the distinction between legal and equitable rights. Ownership recognized by the Courts of common law is called legal ownership, whereas ownership recognized by courts of equity is called equitable ownership. One person may be the legal and another, the equitable owner of the same thing or right at the same time. Legal ownership is that

which has its origin in the rules of common law, while equitable ownership is that which proceeds from the rules of equity.

5. **Vested and Contingent Ownership**: Ownership is said to be vested when the owner's title is already perfect. It is called contingent when the owner's title is as yet imperfect but is capable of becoming perfect in the future on the fulfilment of some condition. It is vested ownership; the property is owned absolutely. In contingent ownership, the property is owned conditionally. It means that the investitive facts are incomplete, but it may be completed in the future. Till then the ownership is contingent and when the required condition is fulfilled, it becomes complete or vested.

Personality:

The concept of personality can be traced to attributes of human behaviour/characteristics which is unique to the mankind. This also involves power to reason and to make a choice. The capacity to reason and make a choice is unique to the human beings and animals do not possess such attributes. Various corporations and entities are also a part of the society and therefore they too need to be subjected to laws and regulations. It is for this reason that law vests them with personality and such corporations and entities are persons in the eyes of law.

A person, then, may be defined, for the purposes of the law, as any being to whom the law attributes a capability of interests and therefore of rights, of acts and therefore of duties. Persons are of two types:

Natural persons: Is an individual/ human being who has a personality of its own.

Legal persons: A legal person is any subject matter to which the law attributes a merely legal or fictitious personality. This extension, for good and sufficient reasons, of the conception of personality beyond the limits of fact—this recognition of persons who are not men—is one of the most noteworthy feats of the legal imagination.

Legal Status of Lower Animals:

The only natural persons are human beings. Beasts are not persons. They are merely things—often the objects of legal rights and duties, but never the subjects of them. Beasts, like men, are capable of acts and possess interests. Yet their acts are neither lawful nor unlawful; they are not recognised by the law as the appropriate subject-matter either of permission or of prohibition. A beast is as incapable of legal rights as of legal duties, for its interests receive no recognition from the law. The law is made for men and allows no fellowship or bonds of obligation between them and the lower animals.

There are, however, two cases in which beasts may be thought to possess legal rights. In the first place, cruelty to animals is a criminal offence, and in the second place, a trust for the benefit of classes of animals, as opposed to one for individual animals, is valid and enforceable as a public and charitable trust; for example, a provision for the establishment and maintenance of a home for stray dogs or sick animals.

Legal Status of Dead Persons:

Dead men are no longer persons in the eye of the law. They have laid down their legal personality with their lives and are now as destitute of rights as of liabilities. They have no rights because they have no interests. There is nothing that concerns them any longer. However, there are exceptions to this. The law These are a man's body, his reputation, and his estate. It is an offence to defame a

dead person or to violate their graves. The estates of a dead man have to be disposed in accordance with their will.

Juristic personality:

A corporation is an artificial being created by a group of individuals with the aim to do business. Being an artificial person, it has been given life through the legal clauses and thus it has been deemed to have a corporate personality through law. This concept has been recognised both in English and Indian law. Thus, a corporation is an artificial person enjoying in law, having the capacity with rights and duties, and holding property. The individuals forming the corpus of the corporation are called is Corporate Personality. Juristic personality of corporations must contain three essential conditions:

Firstly, there must be a group or body of human beings associated for a certain purpose; Secondly, there must be organs through which the corporation functions, and thirdly, the corporation is attributed will/animus by legal fiction.

Creation and extinction of Corporations:

The birth and death of legal persons are determined not by nature, but by the law. They come into existence at the will of the law, and they endure during its good pleasure. Corporations may be established by royal charter, by statute, by immemorial custom, and in recent years by agreement of their members expressed in statutory forms and subject to statutory provisions and limitations. They are in their own nature capable of indefinite duration, this being indeed one of their chief virtues as compared with humanity, but they are not incapable of destruction. The extinction of a body corporate is called its dissolution—the severing of that legal bond by which its members are knit together into a fictitious unity. We have already noticed that a legal person does not of

necessity lose its life with the destruction or disappearance of its corpus or bodily substance. There is no reason why a corporation should not continue to live, although the last of its members is dead; and a corporation sole is merely dormant, not extinct, during the interval between two successive occupants of the office. The essence of a body corporate consists in the animus of fictitious and legal personality, not in the corpus of its members.

Theories of juristic personality:

Fiction Theory:

The fiction theory was pronounced by Savigny and further expounded by Salmond, Coke, Blackstone, and Holland. According to the fiction theory, a personality is attached to corporations, institutions, and funds by a pure legal fiction. The personality attributed to the corporation is different from that of its members. Infact there exists a double fiction in the case of a corporation. By the first fiction, the corporation is given a legal entity and through the second fiction, the corporation is bestowed with the will of an individual person. Through this double fiction, the personality of the corporation arises which is different from its members. Savigny regarded corporation as an exclusive creation of law having no existence apart from its individual members who form the corporate group and whose acts by fiction, are attributed to the corporate entity.

The word fictitious implies something which is not real, which is exactly what the theory implies an imaginary creation of law. It presupposes that incorporation is a made-up extension of personality resorted to for ensuring smooth functioning of government and facilitating dealings with property. Salmond also supports the view that a corporation has a fictitious existence. Sir John Salmond is of the view that a corporation is distinct from its members that it is capable of

surviving even the last member of them as company. It being incorporated by an Act of Parliament can only be dissolved only as provided therein or by another Act of Parliament.

Realist Theory:

This theory was propounded by Gierke, the great German jurist. Further, this theory has been substantiated by Maitland, Beseler, Lasson, Bluntschli, Zitelmann, Miraglia, Sir Frederick Pollock etc.

According to Gierke, every group has real mind, a real will and a real power of action. The existence of a group goes beyond the aggregate of the individualities of persons forming the group. According to this theory, every group has a personality of its own despite being a social one or a political one. This group has a will of its own which is different and distinct from the individual wills of the members.

Concession Theory:

The theory is linked with the philosophy of sovereign state According to this theory, the only realities are the sovereign and the individual. They are treated as persons merely by a concession on the part of the sovereign. Legal personality is conferred only by law. It pre-supposes that corporation as a legal person has great importance because it is recognised by the State or the law. According to this theory, juristic personality is a concession granted to corporations by the State. It is entirely at the discretion and disposal of the State to recognise or not to recognise a corporation as a juristic person. The theory closely resembles the fiction theory as it also believes that there is no juristic personality of its members. Thus, the advocates of fiction theory also accept the view of concession theorists. Thus, Savigny, Salmond and Dicey have also advocated this theory. This

theory differs from the fiction theory since emphasises on the discretionary power of the State in the matter of recognising the personality of the corporation.

Purpose Theory:

The main exponent of this theory is a German jurist called Brinz. In England, this theory was, supported by E.I. Bekker, Aloys and Demilius. The theory is based on the fundamental principle that corporations can be treated as persons for certain specific purposes. It runs on the assumption that only living persons can be the subject-matter of rights and duties, and since corporations are non-living entities, they do not have any rights and duties. To tackle this, the theory believes that it became necessary to attribute personality to corporation for the purpose of being capable of having rights and duties.

The origin of purpose theory is to be traced back to Stiftung of German Law i.e., the foundations or the edifice upon which the structure of the juristic person can be built. Another noted jurist called Duguit interpreted purpose theory in a different way. In his opinion, the endeavour of law in its widest sense is to achieve social solidarity. If a given group is pursuing a purpose which conforms to social solidarity, then all its activities falling within the purpose need to the protected by law by conferring it legal personality.

Bracket Theory:

The Bracket theory, also called as Symbolist theory, is associated with the well-known German jurist Ihering. According to this theory legal personality is a symbol to facilitate the working of the corporate bodies. According to this theory, the members of a corporation have certain rights and duties which are given to the corporation for the sake of carrying business transaction in a smooth manner. It is not always practicable or convenient to refer to all the innumerable members

of a corporation. A bracket is placed around them to which a name is given. That bracket is the corporation. Only the members of the corporation i.e., human beings are persons in real sense and thus a bracket is put around them to indicate that they are to be treated as one single unit when they form themselves into a corporation.

For example, like a synonymous word is put within brackets to give an equivalent meaning, a collective form of a group of different individuals is expressed through a corporation and their separate identities are given a unified form. Thus, incorporation is done merely for the sake of convenience.

Hoffield' s Theory:

According to Hoffield, corporate personality is the creation of arbitrary legal rules designed to facilitate proceedings by and against an incorporated body in law court. Hoffield has supported this theory on the ground that only human beings are persons and juristic personality is mere creation of arbitrary rules of procedure. The corporate person is only a procedural form of many individuals which is recognised to determine legal relations among them. According to Hoffield, corporate personality is only a means of taking account of mass individual relationships. He implied that unity of a corporation is a convenient way of deciding cases by the courts of law.

Personality of the State:

Of all forms of human society, the greatest is the state. It owns immense wealth and performs functions which in number and importance are beyond those of all other associations. Is it, then, recognised by the law as a person? Is the commonwealth a body politic and corporate, endowed with legal personality, and having as its members all those who owe allegiance to it and are entitled to its protection?

The answer to the question can be figured out by assessing the personality of the king under the English Law. The real personality of the King, who is the head of the state, has rendered superfluous any attribution of fictitious personality to the state itself. Public property is in the eye of the law the property of the King. Public liabilities are those of the King; it is he, and he alone, who owes the principal and interest of the national debt. Whatsoever is done by the state is in law done by the King. The public justice administered in the law courts is royal justice administered by the King through his servants the judges. The laws are the King's laws, which he enacts with the advice and consent of his Parliament.

The state has no army save the King's army, no navy save the King's navy, no revenues save the royal revenues, no territory save the dominions of the King. Treason and other offences against the state and the public interest are in law offences against the King, and the public peace is the King's peace. The citizens of the state are not fellow-members of one body politic and corporate, but fellow-subjects of one sovereign lord. Insomuch, therefore, as everything which is public in fact is conceived as royal by the law, there is no need or place for any incorporate commonwealth, *republica, or universita regni*. The King holds in his own hands all the rights, powers and activities of the state. By his agency the state acts, and through his trusteeship it possesses property and exercises rights. For the legal personality of the state itself there is no call or occasion. The King himself, however, is in law no mere mortal man. He has a double capacity, being not only a natural person, but a body politic a corporation sole. The visible wearer of the crown is merely the having representative and agent for the time being of this invisible and undying personification, in whom by our law the powers and prerogatives of the government of this realm are vested. When the King in his natural person dies, the property real and personal which he owns in right of his crown and as trustee for the state, and the debts and liabilities which in such right and capacity have been

incurred by him, pass to his successors in office, and not to his heirs, executors, or administrators. For those rights and liabilities pertain to the King who is a corporation sole, and not to the King who is a mortal man.

In modern times it has become usual to speak of the Crown rather than of the King when we refer to the King in his public capacity as a body politic. We speak of the property of the Crown when we mean the property which the King holds in right of his crown. So, we speak of the debts due by the Crown, of legal proceedings by and against the Crown, and so on. The Crown is not itself a person in the law. The only legal person is the body corporate constituted by the series of persons by whom the crown is worn.

UNIT – V

LEGAL CONCEPTS

- The concept of Liability
- Theories of Liability: Remedial and Penal Liability
- Other forms of Liability: Strict, Absolute and Vicarious
- The concept of Obligation
- Sources of Obligation
- Law of Procedure

The concept of Liability:

He who commits a wrong is said to be liable or responsible for it. Liability or responsibility is the bond of necessity that exists between the wrongdoer and the remedy of the wrong. This vinculum juris is not one of mere duty or obligation; it pertains not to the sphere of ought but to that of must. It has it source in the supreme will of the state, vindicating its supremacy by physical force in the last resort against the unconforming will of the individual. A man's liability consists in those things which he must do or suffer, because he has already failed in doing what he ought. It is the ultimatum of the law. Liability is in the first place either civil or criminal, and in the second place either remedial or penal.

Remedial Liability:

The theory of remedial liability presents little difficulty. It may be laid down as a general principle, that, whenever the law creates a duty, it should enforce the specific fulfilment of it. The sole

condition of the existence of remedial liability is the existence of a legal duty binding upon the defendant and unfulfilled by him. What a man ought to do by a rule of law, he ought to be made to do by the force of law.

To this general principle, however, there are the following exceptions: — In the first place, there are duties of imperfect obligation—duties the breach of which gives no cause of action, and creates no liability at all, either civil or criminal, penal, or remedial. A debt barred by the statute of limitations, or due by the Crown, is a legal debt, but the payment of it cannot be compelled by any legal proceedings.

Secondly, there are many duties which from their nature cannot be specifically enforced after having once been broken. When a libel has already been published, or an assault has already been committed, it is too late to compel the wrongdoer to perform his duty of refraining from such acts. Wrongs of this description may be termed transitory; once committed, they belong to the irrevocable past. Others, however, are continuing; for example, the non-payment of a debt, the commission of a nuisance, or the detention of another's property. In such cases the duty violated is in its nature capable of specific enforcement, notwithstanding the violation of it.

In the third place, even when the specific enforcement of a duty is possible, it may be, or be deemed to be, more expedient to deal with it solely through the criminal law, or through the creation and enforcement of a substituted sanctioning duty of pecuniary compensation.

Theory of Penal Liability:

The general conditions of penal liability are indicated with sufficient accuracy in the legal maxim. Actus non facit reum, nisi mens sit rea—The act alone does not amount to guilt; it must be accompanied by a guilty mind. There are two conditions to be fulfilled before penal responsibility

can rightly be imposed, and we may conveniently distinguish these as the material and the formal conditions of liability. The material condition is the doing of some act by the person to be held liable. A man is to be accounted responsible only for what he himself does, not for what other persons do, or for events independent of human activity altogether. The for- mal condition, on the other hand, is the mens rea or guilty mind with which the act is done. It is not enough that a man has done some act which on account of its mischievous results the law prohibits; before the law can justly punish the act, an inquiry must be made into the mental attitude of the doer. For although the act may have been materially or objectively wrongful, the mind and will of the doer may have been innocent.

Broadly speaking, only two, distinct mental attitudes of the doer towards the deed. These are intention and negligence.

Intention: Intention is the purpose or design with which an act is done. It is the foreknowledge of the act, coupled with the desire of it, such foreknowledge and desire being the cause of the act, since they fulfil themselves through the operation of the will. An act is intentional if, and in so far as, it exists in idea before it exists in fact, the idea realising itself in the fact because of the desire by which it is accompanied.

Intention does not necessarily involve expectation. I may intend a result which I well known to be extremely improbable. So, an act may be intentional with respect to a particular circumstance, although the chance of the existence of that circumstance is known to be exceedingly small. Intention is the foresight of a desired issue, however improbable — not the foresight of an undesired issue, however probable. If I fire a rifle in the direction of a man half a mile away, I may know perfectly well that the chance of hitting him is not one in a thousand; I may fully expect to

miss him; nevertheless, I intend to hit him if I desire to do so. Conversely, expectation does not in itself amount to intention. An operating surgeon may know very well that his patient will probably die of the operation; yet he does not intend the fatal consequence which he expects.

Negligence:

Negligence is culpable carelessness. " It is- " the absence of such care as it was the duty of the defendant to use."

What then is meant by carelessness? It is clear, in the first place, that it excludes wrongful intention. These are two contrasted and mutually inconsistent mental attitudes of a person towards his acts and their consequences. No result which is due to carelessness can have been also intended. Nothing which was intended can have been due to carelessness. The essence of negligence is not inadvertence but indifference. Indifference is exceedingly apt to produce thoughtlessness or inadvertence; but it is not the same thing. If I am careless, indifferent, as to the results of my conduct, I shall very probably fail to acquire adequate foresight and consciousness of them; but I may, on the contrary, make a perfectly accurate estimate of them, and yet remain equally indifferent with respect to them, and therefore equally negligent. Negligence, therefore, essentially consists in the mental attitude of undue indifference both respect to one's conduct and its consequences.

Carelessness or negligence does not necessarily consist in thoughtlessness. Being thoughtless is one of the forms of negligence. But it is not the only form. When I consciously expose another to the risk of wrongful harm, but without any wish to harm him, and harm ensues, it is inflicted not wilfully, since it was not desired, nor inadvertently, since it was foreseen as possible or even probable, but nevertheless negligently.

The term negligence has two uses, for it signifies sometimes a particular state of mind, and at other times conduct resulting therefrom. In the former or subjective sense, negligence is opposed to wrongful intention, these being the two forms assumed by that mens rea which is a condition of penal responsibility. In the latter or objective sense, it is opposed not to wrongful intention, but to intentional wrongdoing. A similar double signification is observable in other words. Cruelty, for example, means subjectively a certain disposition and objectively conduct resulting from it. The ambiguity can scarcely lead to any confusion, for the two forms of negligence are necessarily coincident. Objective negligence is merely subjective negligence realised in conduct; and subjective negligence is of no account in the law, until and unless it is manifested in act.

In conclusion, negligence, as so defined, is rightly treated as a form of mens rea, standing side by side with wrongful intention as a formal ground of responsibility. For these are the two mental attitudes which alone justify the discipline of penal justice. The law may rightly punish wilful wrongdoing, because, since the wrongdoer desired the outcome of his act, punishment will supply him for the future with a good reason for desiring the opposite. Also, the law may justly punish negligent wrongdoing, for since the wrongdoer is careless as to the interests of others, punishment will cure this defect by making those interests for the future coincident with his own.

The standard of care:

Carelessness is not culpable, or a ground of legal liability, save in those cases in which the law has imposed a duty of carefulness. In all other cases complete indifference as to the interests of others is allowable. No general principle can be laid down, however, about the existence of this duty, for this is a matter pertaining to the details of the concrete legal system, and not to abstract theory.

Carelessness is lawful or unlawful, as the law sees fit to provide. In the criminal law liability for negligence is quite exceptional.

Therefore, negligence per se was not treated as a ground of penal liability. It is considered as a degree of mens rea only in cases where the law prescribes for the same.

Strict Liability:

Strict liability is a legal concept that holds a party responsible for their actions or products, without the plaintiff having to prove negligence or fault. When someone is involved in ultrahazardous activities such as keeping wild animals, using explosives or making defective products, then they may be held liable if someone else is injured.

The principle of Strict liability was first laid down in the case of *Rylands v. Fletcher* (1868) where the defendants employed independent contractors to construct a reservoir on their land. The contractors found disused mines when digging but they failed to seal them properly. They filled the reservoir with water. As a result, water flooded through the mineshafts into the plaintiff's mines on the adjoining property. Here, the House of Lords held that any person who allows a dangerous element on their land, which escapes and damages a neighbour, will be liable. Here, the claimant only needs to prove that the tort occurred, and that the defendant was responsible. It is not necessary to prove negligence on the part of the landowner from which the dangerous substance escaped.

Essential Conditions of Strict Liability:

1. **Dangerous/ Hazardous Substance** – The defendant will be held strictly liable only if a "dangerous" substance escape from his premises. The things which the defendant is

holding in his land should be dangerous to others, tending to cause harm to the public at large.

2. **Escapes from land** – Another essential condition to make the defendant strictly liable is that the harmful substance so kept should escape from the premises of the defendant. Such substance which is in possession of a person should escape and enter someone else's premise to cause harm to the other person. It is necessary that the dangerous object so kept should also escape from the premises of the defendant which leads to a loss or damage to the property of the plaintiff. The substance, which is in possession of a person, escapes from the property of such person and enters into another's property, harming that person, would make that person liable as per strict liability.

3. **Non-natural use of land** – It should be kept in mind that there must be some special use or purpose which increases the danger to others. The use of such land should be different from the ordinary use of it.

Exceptions to the rule of Strict Liability:

There are several circumstances where the concept of Strict liability does not apply, so what are those conditions?

1. **Plaintiff's Fault** – If the plaintiff suffers damage by his own intrusion into the defendant's property then all his rights to complain about the damage so caused are nullified.

2. **Act of God** – An event which is beyond the control of any human agency. Such acts happen exclusively due to natural reasons and cannot be prevented even while exercising

caution and foresight. Such acts which occur due to an unforeseeable event do not give any right to the plaintiff to complain about the damage suffered.

3. **Act of the Third Party** – This rule also does not apply when the damage is caused due to the act of a third party. The third party means that the person is neither the servant of the defendant nor the defendant has any contract with them or control over their work. If an act was done by such party, the plaintiff cannot claim his rights.

4. **Consent of the Plaintiff** – This exception follows the principle of *volenti non fit injuria*. This means in situations where the plaintiff has voluntarily consented to suffer the harm for the common benefit of both, then the defendant would not be held liable.

Absolute Liability:

Absolute Liability, in its basic sense, means a liability which is imposed upon certain conduct, regardless of whether such conduct is negligent or liability without fault – for which there is no excuse. If any person is engaged in any hazardous activity and if any harm occurs while carrying out such activity, then the person will be held liable for the harm or the damage so occurred under absolute liability.

The rule of Absolute liability in some sense like the rule of strict liability where there are no exceptions which are available in the case of strict liability. The exceptions present under the concept of strict liability which does not hold the tortfeasor responsible are when the act is done by the victim which led to such situations, any act done with the consent of the victim, any act of God, an act of any third party or any act done under the statutory authority.

Difference between Strict and Absolute Liability:

The Supreme Court, in the case of *MC Mehta v. Union of India*, distinguished between Strict and Absolute liability as following-

- Absolute liability will be applied in cases where the industries or companies are involved in inherently dangerous activities. Thus, the industries other than these would be covered under Strict liability.
- Another point that distinguished absolute liability from strict liability is that there is no need for the dangerous substance to escape one's property, it would be applied to all those harmed/ injured inside or outside the premises.
- The exceptions given for strict liability would not be applied for absolute liability.
- The rule that strict liability would only be applied to the non-natural use of the land would not be applied for absolute liability. It would be applied even if the use is natural.

Vicarious Liability:

Normally and naturally the person who is liable for a wrong is he who does it. Yet both ancient and modern law admit instances of vicarious liability in which one man is made answerable 'for the acts of another. Criminal responsibility, indeed, is never vicarious at the present day, except in incredibly special circumstances and in certain of its less serious forms. Modern civil law recognises vicarious liability in two chief classes of cases:

Master-Servant Relationship: In the first place, masters are responsible for the acts of their servants done in the course of their employment: It has been sometimes said that the responsibility of a master for his servant has its historical source in the responsibility of an owner for his slave.

This, however, is certainly not the case. The English doctrine of employer's liability is of comparatively recent growth. It has its origin in the legal presumption and gradually become conclusive, that all acts done by a servant in and about his master's business are done by his master's express or implied authority and are therefore in truth the acts of the master for which he may be justly held responsible. No employer will be allowed to say that he did not authorise the act complained of, or even that it was done against his express injunctions, for he is liable none the less. Historically, as we have said, this is a fictitious extension of the principle. Qui facit per alium facit per se. Formally, it has been reduced to the laconic maxim. Respondeat superior. The rational basis of this form of vicarious liability is in the first place evidential. There are such immense difficulties in the way of proving actual authority, that it is necessary to establish a conclusive presumption of it. A word, a gesture, or a tone may be a sufficient indication from a master to his servant that some lapse from the legal standard of care or honesty will be deemed acceptable service.

A further reason for the vicarious responsibility of employers is that employers usually are, while their servants usually are not, financially capable of the burden of civil liability. It is felt, probably with justice, that a man who can make compensation for the hurtful results of his activities should not be enabled to escape from the duty of doing so by delegating the exercise of these activities to servants or agents from whom no redress can be obtained.

Representatives of a dead man: A second form of vicarious responsibility is that of living representatives for the acts of dead men. There is no doubt that criminal responsibility must die with the wrongdoer himself.

It is to be observed that it is not strictly true that a man cannot be punished after his death. Punishment is effective not at the time it is inflicted, but at the time it is threatened. A threat of evil to be inflicted upon a man's descendants at the expense of his estate will undoubtedly exercise a certain deter- rent influence upon him; and the apparent injustice of so punishing his descendants for the offences of their predecessor is in most cases no more than apparent. The right of succession is merely the right to acquire the dead man's estate, subject to all charges which, on any grounds, and apart altogether from the interests of the successors themselves, may justly be imposed upon it.

The Law of Obligations:

Obligation in its popular sense is merely a synonym for duty. Its legal sense, derived from Roman law, differs from this in several respects. In the first place, obligations are merely one class of duties, namely those which are the correlatives of rights in personam. An obligation is the vinculum juris, or bond of legal necessity, which binds together two or more determinate individuals. It includes, for example, the duty to pay a debt, to perform a contract, or to pay damages for a tort, but not the duty to refrain from interference with the person, property, or reputation of others. Secondly, the term obligation is in law the name not merely of the duty, but also of the correlative right. It denotes the legal relation or *vinculum juris* in its entirety, including the right of the one party, no less than the liability of the other. Looked at from the point of view of the person entitled, an obligation is a right; looked at from the point of view of the person bound, it is a duty.

An obligation, therefore, may be defined as a proprietary right in personam or a duty which corresponds to such a right.

Sources of Obligation:

Classed in respect of their sources or modes of origin, the obligations recognised by English law are divisible into the following four classes:

(1) Contractual

(2) Delietal

(3) Quasi-contractual

(4) Innominate.

Obligations arising out of a contract: The first and most important class of obligations consists of those which are created by contract. that it is that kind of agreement which creates rights in perso7iam between the parties to it. Rights in 'personal obligations are the most numerous and important kind, and of those which are not obligations comparatively few have their source in the agreement of the parties. The law of contract, therefore, is almost wholly comprised within the law of obligations, and for the practical purposes of legal classification it may be placed there with sufficient accuracy. The coincidence, indeed, is not logically complete: a promise of marriage, for example, being a contract, which falls within the law of status, and not within that of obligations. Neglecting, however, this small class oi personal contracts, the general theory of contract is simply a combination of the general theory of agreement with that of obligation.

Obligations arising from torts: The second class of obligations consists of those which may be termed delictal, or in the language of Roman law *obligationes ex delicto*. By an obligation of this kind is meant the duty of making pecuniary satisfaction for that species of wrong which is known in English law as a tort. Etymologically this term is merely the French equivalent of the English wrong tort (tortum), being that which is twisted, crooked, or wrong; just as right (rectum) is that

which is straight. As a technical term of English law, however, tort has become specialised in meaning, and now includes merely one class of civil wrongs. A tort may be defined as a civil wrong, for which the remedy is an action for damages, and which is not solely the breach of a contract or the breach of a trust or other merely equitable obligation. This definition contains four essential elements, there being four kinds of wrongs excluded by it from the sphere of tort:

1. A tort is a civil wrong; crimes are wrongs, but are not in themselves torts, though there is nothing to prevent the same act from belonging to both these classes at once.

2. Even a civil wrong is not a tort unless the appropriate remedy for it is an action for damages. There are several other forms of civil remedy besides this; for example, in- junctions, specific restitution of property, and the payment of liquidated sums of money by way of penalty or otherwise. Any civil injury which gives rise exclusively to one of these other forms of remedy stands outside the class of torts.

3.No civil wrong is a tort if it is exclusively the breach of a contract. The law of contracts stands by itself, as a separate department of our legal system, over against the law of torts.

4. The fourth and hist class of wrongs which are not torts consists of breaches of trusts or other equitable obligations. The original reason for their exclusion and separate classification is the historical fact, that the law of trusts and equitable obligations originated and developed in the Court of Chancery and was wholly unknown to those courts of com- mon law in which the law of torts grew up.

Obligations arising from Quasi- Contract: Both in Roman and in English law there are certain obligations which are not in truth contractual, but which the law treats as if they were. They are contractual in law, but not in fact, being the subject-matter of a fictitious extension of the sphere

of contract to cover obligations which do not in reality fall within it. The Romans called them obligationes *quasi ex contractu*. English lawyers call them quasi-contracts or implied contracts, or often enough contracts simply and without qualification. " Implied contracts" says Blackstone, " are such as reason and justice dictate, and which, therefore, the law presumes that every man undertakes to perform."

From a quasi-contract, or contract implied in law, we must carefully distinguish a contract implied in fact. The latter is a true contract, though its existence is only inferred from the conduct of the parties, instead of being expressed. Thus, when I enter an omnibus, I impliedly, yet agree to pay the usual fare. A contract implied in law, on the contrary, is merely fictitious, for the parties to it have not agreed at all, either expressly or tacitly**.**

In what cases, then, does the law recognise this fiction of quasi-contract? What classes of obligations are regarded as contractual in law, though they are not so in fact? To this question it is not possible to give any complete answer.

In the first place we may say in general, that in the theory of the common law all debts are deemed to be contractual in origin. A debt is an obligation to pay a liquidated sum of money, as opposed to an obligation to pay an unliquidated amount, and as opposed also to all non-pecuniary obligations. Most debts are *obligatiaies ex contractu* in truth and in fact, but there are many which have a different source, A judgment creates a debt which is non-contractual; so also does the receipt of money paid by mistake or obtained by fraud. Nevertheless, in the eye of the common law they all fall within the sphere of contract; for the law conclusively presumes that every person who owes a debt has promised to pay it.

Secondly, the second class of quasi-contracts includes all those cases in which a person injured by a tort is allowed by the law to waive the tort and sue in contract instead. There are certain obligations which are in truth delictal, and not contractual, but which may at the option of the plaintiff be treated as contractual, if he so pleases. Thus, if one wrongfully takes away my goods and sells them, he is guilty of the tort known as trespass, and his obligation to pay damages for the loss suffered by me is in reality delictal. Nevertheless, I may, if I think it to my interest, waive the tort, and sue him on a fictitious contract, demanding from him the payment of the money so received by him as having rightly sold the goods as my agent, and therefore as being indebted to me in respect of the price received by him; and he will not be permitted to plead his own wrongdoing in bar of any such claim. So, if a man obtains money from me by fraudulent misrepresentation, I may sue him either in tort for damages for the deceit, or on a fictitious contract for the return of the money.

Innominate: Contractual, delictal, or quasi-contractual, is not exhaustive, for it is based on no logical scheme of division but proceeds by simple enumeration only. Consequently, it is necessary to recognise a final and residuary class which we may term innominate, as having no comprehensive and distinctive title. ^ Included in this class are the obligations of trustees towards their beneficiaries, a species, indeed, which would be sufficiently important and distinct to be classed separately as co-ordinate with the others which have been named, were it not for the fact that trusts are more appropriately treated in another branch of the law, namely in that of property.

The law of Procedure

Although the distinction between substantive law and procedure is sharply drawn in theory, there are many rules of procedure which in their practical operation are wholly or substantially

equivalent to rules of substantive law. In such cases the difference between these two branches of the law is one of form rather than of substance. A rule belonging to one department may by a change of form pass over into the other without materially affecting the practical issue. In legal history such transitions are frequent, and in legal theory they are not without interest and importance. Of these equivalent procedural and substantive principles there are at least three classes sufficiently important to understand:

(i) An exclusive evidential fact is practically equivalent to a constituent element in the title of the right to be proved. The rule of evidence that a contract can be proved only by a writing corresponds to a rule of substantive law that a contract is void unless reduced to writing. In the former case the writing is the exclusive evidence of title; in the latter case it is part of the title itself. In the former case the right exists but is imperfect, failing in its remedy through defect of proof. In the latter case it fails to come into existence at all. But for most purposes this distinction is one of form rather than of substance.

(ii) A conclusive evidential fact is equivalent to, and tends to take the place of, the fact proved by it. All conclusive presumptions pertain in form to procedure, but in effect to the substantive law. That a child under the age of seven years is incapable of criminal intention is a rule of evidence but differs only in form from the substantive rule that no child under that age is punishable for a crime. That the acts of a servant done about his master's business are done with his master's authority is a conclusive presumption of law and pertains to procedure; but it is the forerunner and equivalent of our modern substantive law of employer's liability. A bond (that is to say, an admission of indebtedness under

seal) was originally operative as being conclusive proof of the existence of the debt so acknowledged; but it is now itself creative of a debt; for it has passed from the domain of procedure into that of substantive law.

(iii) The limitation of actions is the procedural equivalent of the prescription of rights. The former is the operation of time in severing the bond between right and remedy; the latter is the operation of time in destroying the right. The former leaves an imperfect right subsisting; the latter leaves no right at all. But save in this respect their practical effect is the same, although their form is different.