

JURISPRUDENCE REVISION NOTES

Dr. Shonal John



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Jurisprudence Notes - Dr. Shonal John



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Jurisprudence – its Meaning, Sources, and Importance

Introduction

The word “jurisprudence” is derived from a Latin word juris prudentia, which in its widest sense, means ‘knowledge of law or skill in law’. The Latin word 'juris' means law and "prudentia" means skill or knowledge. Thus jurisprudence signifies knowledge of law and its application. In this sense it covers the whole body of legal principles in the world. The history of the concept of law reveals that jurisprudence has assumed different meanings at different times. It is therefore difficult to attempt a singular definition of the term.

Jurisprudence - Meaning

Jurisprudence, in its limited sense, means elucidation of the general principles upon which actual rules of law are based. It is concerned with rules of external conduct which persons are constrained to obey. Therefore, etymologically jurisprudence is that science which imparts to us knowledge about “law”. In short, jurisprudence may be considered to be the study and systematic arrangement of the general principles of law.

Jurisprudence may also be regarded as the philosophy of law dealing with the nature and function of law.



Definition of Jurisprudence

The term 'jurisprudence' has meant different things at different times. The variation is due to different methods of inquiry and approach to the study of the subject. It is for this reason that Julius Stone has described jurisprudence as "the lawyer's extraversion" meaning thereby that jurisprudence involves examination of precepts, ideals and techniques of the law by lawyers in the light of disciplines other than the law.

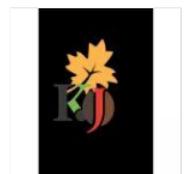
The definition of jurisprudence as given by some of the eminent Jurists may be stated as follows:

Ulpian- Jurisprudence, in its etymological sense means 'knowledge of law'. Ulpian, the celebrated Roman jurist defined jurisprudence as “the observation of things human and divine, the knowledge of the just and the unjust”. This definition is too broad and has a wider connotation.

Cicero defines jurisprudence as the philosophical aspect of knowledge of law.

Gray- Professor Gray opined that "jurisprudence is the science of law, the statement and systematic arrangement of the rules followed by the courts and the principles involved in those rules." Thus, jurisprudence deals with that kind of law which consists of rules enforced by courts while administering justice. In other words, the laws of the jurist deal with man and seek to regulate external human conduct in the society. It does not concern itself with the inner beliefs of man imbibed in religious laws.

Salmond- Salmond defines jurisprudence as the "science of the first principles of civil law". Thus, he points out that jurisprudence deals with a particular species of law, namely, civil law or the law of the State. The civil law consists of rules applied by courts in the administration of justice. He agrees with Gray in upholding that



jurisprudence is concerned with only jurist's law and is not concerned with the laws of theologian and moralist although they also govern the conduct of man in society.

John Austin- Austin calls jurisprudence as the "philosophy of positive law". He was the first jurist to make jurisprudence as a science. By the term "positive law" he meant 'jus positivum', that is law laid down by a political superior for commanding obedience from his subjects. Thus, it is identical with civil law of Salmond. Austin pointed out that science of law is concerned with law as it is and not as it ought to be, which he considers as the science of legislation.

Roscoe Pound- According to Pound, jurisprudence is "the science of law using the term 'law' in the juridical sense, as denoting the body of principles recognised or enforced by public and regular tribunals in the administration of justice". He emphasized that there is an inevitable co-relationship between jurisprudence and other social sciences. Thus, he opined that "jurisprudence, ethics, economics, politics and sociology are distinct enough as the core, but shade out into each other".

There are divergent views regarding the exact contents of jurisprudence. But it has been generally accepted that sources, legal concepts and legal theory constitute the main premises of the study of jurisprudence.

Contents of Jurisprudence

Sources - It is well known that the basic features of a legal system are mainly to be found in its authoritative sources and the nature and working of the legal authority behind these sources. Under this head matters such as custom, legislation, precedent as a source of law, pros and cons of codification of laws, methods of



judicial interpretation, and reasoning, an inquiry into the administration of justice etc., are included for study.

Legal concepts - Another area which concerns jurisprudence is the analysis of legal concepts, such rights, property, ownership, possession, obligations, acts, negligence, legal personality and the related issues. Although all these concepts are equally studied in the ordinary branches of law, since each of them functions in several different branches of law, jurisprudence tries to bring out a more comprehensive picture of each concept as a whole. The study of these abstract legal concepts furnishes a background for better understanding of law in its various forms.

Legal Theory - Besides the sources and the forces operating behind them and various legal concepts, legal theory also constitutes one of the main components of jurisprudence. Legal theory is concerned with law as it exists and functions in the society, and manner in which law is created and enforced as also the influence of social opinion and law on each other. Thus, legal theory seeks to co-relate law with other disciplines such as religion, philosophy, ethics, politics etc. and pursue its study in a wider socio-legal perspective.

Utility of Jurisprudence

There is a general confusion about the practical utility of jurisprudence as a subject. It is often alleged that jurisprudence being an abstract and theoretical subject, is devoid of any practical utility.

Jurisprudence seeks to rationalize the concepts of law which enable us to solve the different problems involving intricacies of law. In other words, it serves to render the complexities of law more manageable and in this way this can help to improve practice in the field of law.



That apart, jurisprudence also has great educational value. The logical analysis of legal concepts widens the outlook of lawyers and sharpens their logical technique.

It helps them in shedding aside their rigidity and formalism and trains them to concentrate on social realities and the functional aspects of law.

It is not the form of law but the social function of law which has relevance in modern jurisprudence.

Law has to take note of the needs of society and also of the advances in the related and relevant disciplines such as sociology, economics, philosophy, psychiatry etc.

Jurisprudence throws light on the basic ideas and the fundamental principles of law in a given society. This is why it has been characterised as "the eye of law" by some jurists.

Jurisprudence helps the judges and the lawyers in ascertaining the true meaning of the laws passed by the Legislature by providing the rules of interpretation.

It also furnishes them the opportunity to pinpoint the lacunae, shortcomings and defects in the laws framed by the legislature and improvise them through their judicial interpretation.

The study of jurisprudence helps in rationalising the thinking of the students and prepares them for an upright civil life. The knowledge of law and legal precepts also helps them to face exigencies of human life boldly and courageously.

Jurisprudence may also be helpful to legislators who play a crucial role in the process of law-making. The study of jurisprudence may familiarise them with technicalities of law and legal precepts thus making their job fairly easy was also interesting.



Concept of State

Introduction

The word state has been derived from the Latin word 'status', which implies standing. So, in the etymological sense, the word state denotes position or standing of a person or of a body of person. The state is the highest form of human association. It is necessary because it comes into existence out of the basic needs of life. The most important purpose of state is to make life possible and to protect the life.

Definition

Salmond- State or political society is an association, of human beings established for the attainment of certain ends by certain means.

Goodhart- The purpose of state is to maintain peace and order within a particular society. Therefore, the most essential purpose of state is to make life possible.

Aristotle – State is a union of families and villages having for its end, a perfect and self-sufficing life, by which we mean happy and honourable life.

Woodrow Wilson- State denotes a set of people organized for law within a definite territory.

Oppenheim- A state comes into existence when people are settled in a country under their own sovereign government.

According to Article 12 of the Constitution of India, the term 'State' can be used to denote the union and state governments, the Parliament and state legislatures and all local or other authorities within the territory of India or under the control of the Indian government.



Essential element of state

1. **Population**- It implies a significant number of human beings living together. there is no existence of the state without population. State is a community of person .it is a human political institution without a population there can be no state.
2. **Territory** - It is a very important element of state. according to Laski 'the territory of a state is the region over which it exercises sovereignty.'
3. **Government**- government is an organisation of machinery or agency or magistracy of the state which makes implements, enforces, and adjudicates the law of the state. Each government has three organs - legislature, executive, judiciary.
4. **Sovereignty**- It is the most exclusive element of a state. Without sovereignty no state can exist. Sovereignty is the basis on which the state regulates all aspects of the life of the people living in its territory.

Classification of state

1) Ancient classification –According to Aristotle: -

- a) Monarchy
- b) Aristocracy
- c) Democracy
- d) Polity

2) Modern Classification

- a) Independent and dependent state
- b) Unitary and federal state
- c) Confederation
- d) Imperial state



Theories of origin and evolution of state

- 1-The divine theory
- 2-The force theory
- 3-The social contract theory
- 4-The evolutionary theory
- 5-hereditary theory-
 - a) patriarchal theory
 - b) matriarchal theory

Functions of state

1. Primary function:
 - a. To defend the territory of the state from external aggression and armed rebellion
 - b. To maintain law and order within the society by administering justice
2. Secondary functions
 - a. They are required for the welfare of citizens.

Relationship between state and law

State is superior to law-this theory was propounded by John Austin, Thomas Hobbes, Hegel, and Jeremy Bentham. As per this theory, it is the state which makes law. Therefore, state is superior to law.

John Austin stated that 'law is the command of the sovereign. Therefore, the sovereign(state) has the power to enact, amend and repeal the law. However, he himself is not bound by law.



Law is superior to state-this theory was propounded by Harold, J Laski, Leon Duguit Ihering and Jennings. As per theory, law is superior to state. The state is bound by law.

Leon Duguit's view that the ultimate objective or end of law is to promote social solidarity. Any law made by the state in violation of the principle of social solidarity is invalid. Laski's view that rule of law exists independently of the state. for example, In India the parliament can amend the constitution, but it cannot destroy the basic structure of the constitution by an amendment. So, in India the constitution is supreme, and all the organs of the government are bound by it.

State and law are the same-according to Hans Kelson state and law are same. There is no fundamental difference between state and law.



Austin's Theory of Law

Introduction- Austin's Analytical Positivism

Austin is considered to be the 'father of English Jurisprudence'. He confined his study only to the positive law and applied analytical method for this purpose.

By positive law, Austin meant 'laws properly so called' as distinguished from morals and other laws which he described as 'laws improperly so called' which lack force or sanction of the State. Austin described positive law as the aggregate of rules set by man as politically superior to men as politically inferior subjects.

He attributes (1) command, (2) sanction, (3) duty, and (4) sovereignty as the four essential attributes of positive law.

It was Austin who for the first-time treated jurisprudence as a science of law concerned with analysis of legal concepts-their exposition, examination and comparison in a scientific manner in order to determine their scope and extent in a given politically organised society.

Austin distinguishes positive law from positive morality which is devoid of any legal sanction. He identifies law with command, duty and sanction.

Austin's analytical school as Imperative school

Austin defined law as "a rule laid for the guidance of intelligent beings by an intelligent being having power over him."

He divides law into two parts, namely, (1) Laws set by God for men; and (2) Human Law, that is laws made by men for men.

According to Austin, the study and analysis of positive law alone is the appropriate subject-matter of jurisprudence. To quote him, "the subject-matter of jurisprudence



is positive law-law simply and strictly so called; or law set by political superior to political inferiors."

The chief characteristics of positive law are command, duty, and sanctions, that is, every law is command, imposing a duty, enforced by sanction.

Thus, he strongly believed that law is the sovereign's command carrying with it threat of evil which is called sanction, and the party commanded and threatened is under an obligation (or duty) to obey it. Duty and command are co-relative and fear of sanction (punishment) is the motive for obedience of such command, i.e., law.

Austin, however, accepts that there are three kinds of laws which, though not commands, may be included within the purview of law by way of exception. They are:-

Declaratory or Explanatory laws - These are not commands because they are already in existence and are passed only to explain the law which is already in force.

Laws of repeal - Austin does not treat such laws as commands because they are in fact the revocation of a command.

Laws of imperfect obligation - They are not treated as command because there is no sanction attached to them.

Criticism of Austin's Imperative Theory of Law

Austinian theory of law and analytical positivism has been criticised by jurists like Bryce, Olivecrona and others. Bryce characterises Austin's work as full of errors which hardly has any significance in juristic thought.



Austin's theory has been criticised on the following grounds:

1. **Customs overlooked** - Austin's view that 'law is the command of sovereign' is not supported by historical evolution of law when customs played a significant role in regulating human conduct. Further, customs still continue to be a potent source of law even after the coming into existence of the State.
2. **Permissive character of law ignored** - Austin's theory does not take notice of laws which are of a permissive character and confer privileges eg. the Bonus Act, or the law of Wills etc.
3. **No place for Judge-made law** - Judge-made law has no place in Austinian conception of law although the creative function of judiciary as a law-making agency has been accepted in modern times all over the world.
4. **Austin's theory treats International law as mere morality** - Austin does not treat international law as 'law' because it lacks sanction. Instead, he regards international law as mere positive morality.
5. **Command over-emphasised** - The Swedish Jurist Olivecrona has denounced Austin's theory of law because of its over-emphasis on 'command' as an inevitable constituent of law. In modern progressive democracies law is nothing but an expression of the general will of the people. Therefore, the command aspect of law has lost its significance in the present democratic set-up where people's welfare is the ultimate goal of the state.
6. **Inter-relationship between Law and Morality completely ignored** - Perhaps the greatest shortcoming of Austin's theory is that it completely ignores the relationship between law and morality. Law can never be completely divorced



from ethics or morality which provide strength to it. The legal concepts such as 'right', 'wrong', 'duty', 'obligation' etc. themselves suggest that there is some ethical or moral element present in them.

7. **Sanction alone is not the means to induce obedience**- Austin's view that it is sanction alone which induces a person to obey law, is not correct. There are many other considerations such as fear, deterrence, sympathy, reason etc. which may induce a person to obey law. The power of the state is only the last force to secure obedience of law.

8. **Indivisibility of sovereignty criticized**- While bringing out distinction between positive law and positive morality, Austin opined that the former was set by a political superior called the sovereign. According to him, the sovereign could not be under a duty because his being under a duty would impliedly mean that there is another sovereign above him. But Jethro Brown has contended that the sovereign could well be bound by a duty towards his subjects.

The Austinian view regarding indivisibility of sovereignty has also been criticized by some writers particularly, Bentham who showed here sovereignty could be divided by conferring concurrent power of law-making between colonial legislature and British Crown during the colonial rule in India and elsewhere.



Historical Theory/School of Jurisprudence

Introduction

The exponents of the historical school of jurisprudence take social institutions in their sequence with primacy to primitive legal institutions of the society. While the analytical school pre-supposes the existence of a well-developed legal system, the historical school concentrates on evolution of law from the primitive legal institutions of the ancient communities.

The task of historical school is to deal with the general principles governing the origin and development of law and with the influences that affect the law. Such inquiries are distinguishable as an anthropological approach to the evolution and development of law.

The Austinian theory rejected historical growth of law and concentrated on law as it is, without bothering about its historic values and moral precepts. The positive school refused to recognise the impact of legal evolution which meant that existing law and legal institutions can be supported or opposed only when we know the sanction behind them and how they worked in the past and are actually working in the present.

The revolutionary ideas generated by positivistic legal thinking had a devastating effect as they failed to meet the needs of the people. Consequently, it led to the emergence of new approach to the study of jurisprudence based on history and historic conception of law. The historical jurists believe that law has biological growth, and it has not evolved in an arbitrary and erratic manner.

According to Sir Henry Maine, Montesquieu (1689-1755) was the first jurist who adopted the historical method of pursuing the study of legal institutions and came to the conclusion that laws are the creation of climate and local situations. He did not probe further into the relationship between law and society but pointed out that



law must keep pace with the changing needs of the society.

Hugo (1768-1844), pointed out that law, like language and habits of the people, forms itself and develops as suited to the circumstances. The essence of law is its acceptance, regulation and observance by the members of the society.

The English Legal historian Holdsworth attributes two major factors which are responsible for the emergence of historical school of jurisprudence, namely: (1) The French Revolution and the consequent upheavals, and (2) Darwinian theory of evolution which altered the character of scientific speculation during that period.

Case Law: Byram Pestonji Gariwala v. Union of India

In this case, the historical view of jurisprudence is supported by the Supreme Court of India, wherein the Court quoting Justice Thommen: “Indian legal system is the product of history. It is rooted in our soil, nurtured and nourished by our culture, languages and traditions, fostered and sharpened by our genius and quest for social justice, reinforced by history and culture”.

Montesquieu (1689-1755)

The credit of laying down the foundation of the historical school of jurisprudence in France goes to Montesquieu through his classic work Spirit of Laws published in 1748. He attributed evolution and development of law to the effect of cause and effect in a given social surrounding and biological environment. He held that laws should be adopted to suit the people for whom they are framed keeping in view the degree of liberty which the Constitution desires to grant to its people. According to him, there is nothing like good or bad in law, as it essentially depends on political and social conditions and environment prevailing in the society.



F.K. Von Savigny (1779-1861)

The forerunners of Savigny, notably, Schelling and Hugo had rejected natural law theory which believed that law is based on an abstract principle of human reason. They supported the view that law is a historical perception which evolves according to customs, traditions, culture and sentiments of the people. Savigny was the main exponent of this historical interpretation of law and is considered to be the propounder of historical jurisprudence.

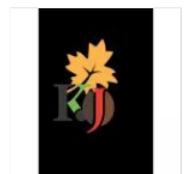
Volksgeist as a Source of Law

Savigny and his most popular pupil Georg Friedrich Puchta (1798-1846) firmly believed that law is a product of the general consciousness of the people and a manifestation of their spirit.

According to Savigny, a law made without taking into consideration the past historical culture and tradition of the community is likely to create more confusion rather than solving the problems because 'law' is not an 'artificial lifeless mechanical device'. The origin of law lies in the popular spirit of the people which Savigny termed as Volksgeist.

Savigny's contribution

Savigny pointed out that law has a national character and it develops like language and binds people into one whole because of their common faiths, beliefs and convictions. According to him, law grows with the growth of the society and gains its strength from the society itself and finally it withers away as the nation loses its nationality. Thus, he opined that law is not universal in nature like language, it varies with people and ages.



The main tenets of Savigny's theory can be summarised as follows: -

- (1) Law has an unconscious organic growth, it is neither found nor artificially made.
- (2) The basis of law is to be found in Volksgeist which means people's consciousness or will, and consists of traditions, customs, habits, practices and beliefs of the people.
- (3) Law is not universal in nature but like language, it varies with people, time and needs of the community.
- (4) Since law should always conform to popular consciousness i.e. Volksgeist, custom not only precedes legislation but is superior to it.
- (5) With the growing complexity of law, the popular consciousness is represented by lawyers who are nothing but the mouthpiece of the popular consciousness. It is for this reason that lawyers and jurists are more important than legislators in the process of development of a legal system.



Sir Henry Maine (1822-1888)

He is the Founder of Historical Jurisprudence

Maine's contribution to historical jurisprudence is so great that he is labeled as 'Social Darwinist' for he envisaged a social order wherein the individual is finally liberated from the feudalistic primitive bondage.

Maine's Contribution to Historical Jurisprudence

Historical jurisprudence would always remain indebted to Sir Henry Maine for his substantial contribution to the juristic thought. He improved upon Savigny's legal theory which explained inter-relationship between community and the law and also recognised the role of legal fictions, equity and legislation in the evolution of law. While Savigny had confined his study only to Roman law and its applicability in Germany, Maine looked at it from a broader perspective and studied the legal systems of different communities for his comparative research on evolution and development of law.

Four Stages of Development of Law

The supporters of the historical school of jurisprudence have traced the evolution and development of law through four major stages. They are as follows-

- (1) **Divine Law**- In the beginning law originated from Themes, which meant the Goddess of Justice. It was generally believed that while pronouncing judgments the King was acting under the divine inspiration of the Goddess of Justice. Themestes were the awards pronounced by Goddess of Justice



(themes) to be executed by the king as a custodian of justice under divine inspiration. Thus the king was merely the executor of judgment of God.

- (2) **Customary Law**- Next the recurring application of judgments led to uniform practice which crystallised into customary law to be followed in the primitive societies. The importance of customs as a source of law has been underlined by Sir Henry Maine when he observed that 'custom is to society what law is to State'.
- (3) **Priestly class as a sole repository of customary law**- In the next stage of development of law, the authority of the King to enforce and execute law was usurped by the priestly class who claimed themselves to be learned in law as well as religion. The priestly class memorised the rules of customary law because the art of writing had not developed till then. They applied and enforced the customary law.
- (4) **Codification** - The era of codification marks the fourth and perhaps the last stage of development of law. With the discovery of the art of writing, a class of learned men and jurists came forward to denounce the authority of priests as lawgivers. They advocated codification of law to make it accessible and easily knowable. This broke the monopoly of priestly class in matters of administration of law. The ancient Hindu Code of Manu, Hebrew Code, Solon's Attic Code, Twelve Tables in Rome, the Codes of Hammurabi etc. are some of the examples of such law Codes.



Natural Theory of Law

Introduction

The natural law philosophy occupies an important place in the realm of politics, law, religion, and ethics from the earliest times. It has played the role of harmonising, synthesising, and promoting peace and justice in different periods and protected the public against injustice, tyranny, and misrule.

Blackstone observed: “the natural law being co-existent with mankind and emanating from God Himself, is superior to all other laws. It is always binding over all the globe in all countries and no man-made law will be valid if it is contrary to the law of nature”.

Natural law was believed to have a divine origin.

During the medieval period it had a religious and supernatural basis but in modern times it has a strong political and legal mooring. It has been rightly pointed out by Lord Lloyd that natural law has been devised as a mere law of self-preservation or a law restraining people to a certain behaviour.

It has found expression in modern legal systems in the form of socio-economic justice. The entire human rights philosophy is an outcome of the growing importance of the principles of natural justice.

The natural law theory acts as a catalyst to boost social transformation thus saving the society from stagnation.

Natural Law- Its Meaning and Definition

It is stated there is no unanimity about the definition and exact meaning of natural law and the term natural law theory has been interpreted differently at different



times depending on the needs of the developing legal thought. But the greatest attribute of the natural law theory is its adaptability to meet new challenges of the transient society. The exponents of natural law philosophy conceive that it is a law which is inherent in the nature of man and is independent of convention, legislation or any other institutional devices.

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

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

From the jurisprudential point of view, natural law means those rules and principles which are supposed to have originated from some supreme source other than any political or worldly authority.

Some thinkers believe that these rules have a divine origin, some find their source in nature while others hold that they are the product of reason. Even the modern sociological jurists and realists have sought recourse to natural law to support their sociological ideology and the concept of law as a means to reconcile the conflicting interests of individuals in the society.

Commenting on the nature of natural law, Blackstone observed that "The natural law being co-existent with mankind and emanating from God himself, is superior to all other laws. It is binding over all the countries at all times and no man-made law will be valid if it is contrary to the law of nature."

Main Characteristics of Natural Law

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



been considered as an ideal source of law with invariant contents. The chief characteristic features of natural law may be briefly stated as follows:

It is basically a priori method different from empirical method, the former accepts things or conclusions in relation to a subject as they are without any need or enquiry or observation while empirical or a posteriori approach tries to find out the causes and reasons in relation to the subject-matter.

It symbolises the physical law of nature based on moral ideals which has universal applicability at all places and times.

It has often been used either to defend a change or to maintain status quo according to needs and requirements of the time. For example, Locke used natural law as an instrument of change but Hobbes used it to maintain the status quo in the society.

The development of human rights jurisprudence and basic rights of men essentially owes its origin to the natural law philosophy of the post- nineteenth century.

It embodies within it the values of reason, justice, morality and ethics, which provide a common base of legal philosophy and philosophical or ethical jurisprudence.

Natural Law Theory in different periods

1. Ancient Period

Heraclitus (530-470 B.C.)- The concept of natural law was developed by Greek philosophers around the 4th century BC. Heraclitus was the first Greek philosopher



who pointed at the three main characteristic features of the law of nature, namely, (i) destiny, (ii) order, and (iii) reason.

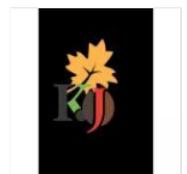
He stated that nature is not a scattered heap of things but there is a definite relation between the things and a definite order and rhythm of events. According to him, 'reason' is one of the essential elements of natural law.

Socrates (470-399 B.C.)- The name of Socrates occupies a prominent place among the Stoic philosophers of the ancient time. He was a great admirer of truth and moral values. He argued that like natural physical law, there is a natural moral law. It is because of the 'human insight' that a man has the capacity to distinguish between good and bad and is able to appreciate moral values.

Thus according to Socrates, 'virtue is knowledge' and 'whatever is not virtuous is sin'. To him, justice may be of two kinds, namely, (i) natural justice; and (ii) legal justice. The rules of natural justice are uniformly applicable to all the places but the notion of legal justice may differ from place to place depending on the existing statutory law and social conditions of the place.

His pupil Plato supported the same theory. But it is in Aristotle that we find a proper and logical elaboration of the theory.

Aristotle (384-322 B.C.)- Aristotle came out with a more logical interpretation of the natural law theory. According to him, a man is a part of nature in two ways. Firstly, he is a creation of God, and secondly, he possesses insight and reason which enable him to articulate his actions. He defined natural law as 'reason unaffected by desires'. It embodies the basic principles of justice and morality which have universal validity independent of time and place.



2. Medieval Period

According to Gierke, the medieval period Christian theology centred around two fundamental principles, namely:-

Unity derived from God, involving one faith, one church and one empire.

The supremacy of law both, divine and man-made, as a part of the unity of the universe.

Until the rise of humanism, natural law, divine law and human law were bound together, all being imposed from above by God.

The main tenets of the natural law theory of the medieval period may briefly be stated as follows:-

The supporters of the theory believed that the institutions of slavery, property, state etc. represented the evil desires because they are not the creation of nature, nevertheless, they are necessary for preventing or limiting the vicious tendencies of men. The existence of State and society is essential for the development of morals and ethical values in man.

‘Law’ is the greatest binding force both for those who govern and the governed. Thus the natural law theory accepted the supremacy of law.

The greatest problem before the medieval legal thinkers and philosophers was the correct interpretation of law. They believed in two facets of the human activities, namely, (i) Worldly and (ii) Godly. They are radically different from one another and there arises no question of conflict or clash between the two. State i.e. ruler is supreme in the field of worldly activities whereas the Pope held supreme authority in the realm of Godly activities.



As to the question about the exact source of legal authority in a developed society, the majority view was that State and law were the gift of the people who agreed to subdue themselves to their authority.

Critical Appraisal of Natural Law Theory

A brief survey of the natural law theories would reveal that the concept has been used to support different ideologies from time to time. It has been used to support absolutism, individualism and has even been used by revolutionists to overthrow the government. The contribution of natural law philosophy to the development of law and legal system is by no means less important.

The natural law principles of justice, morality and conscience have been embodied in various legal systems. Natural law being regulated by law of nature is inevitable and obligatory whereas man-made positive laws are arbitrary and contingent. Natural law is not variable since it emanates from human reasoning, which is known for its uniformity and general acceptance.

- (1) The moral proposition, i.e., 'ought to be' may not always necessarily conform to the needs of the society. For instance, it is natural for men to beget children, as it is for trees to bear fruit. But the factual position may be different since many countries including India, may like to restrict the growth of their population by resorting to family planning devices.
- (2) The concept of morality is a varying content changing from place to place; therefore, it would be futile to think of universal applicability of law. For example, one society may adhere to monogamy while another may permit plurality of marriages.



- (3) The rules of morality embodied in natural law are not amenable to changes but the legal rules do need a change with the changing needs of the society.
- (4) Legal disputes may be settled by law courts but the disputes relating to morality and law of nature cannot be subjected to judicial scrutiny, and even if they are challenged in a court of law, the correctness of the verdict may always be questioned since it is based on subjective discretion of the Judge.
- (5) Though apparently law and morality may appear to be in conflict with each other, the fact remains that in order to decide whether a particular law is 'just' or 'unjust', it has to be tested on the basis of the principles of morality.

Despite the above shortcomings, it cannot be denied that natural law has played a crucial role in shaping the law.



Custom as a Source of Law

Sources of Law- Meaning

In the Indian context, the expression "sources of law" is generally used in two senses. In the first, according to Hindu scriptures- duty is the foundation head of all law; while according to modern jurisprudence, it is the sovereign from where the law emanates. In the second sense, the expression 'sources of law' means where one must resort to get at law.

In other words, the evidence of records of land or books or reports etc. have to be looked into for the purpose of learning or knowing law. In the latter sense, the sources of Hindu law are the Sruti, the Smriti and the immemorial customs by which the divine will or the 'reasoning'- which is law, is evidenced.

Custom as a Source of Law

Custom occupies an important place in regulation of human conduct in almost all societies. In fact, it is one of the oldest sources of law-making. A custom may be defined as a continuing course of conduct which by the acquiescence or express approval of the community observing it, has come to be regarded as fixing the norm of conduct for members of society.

However, the importance of custom as a source of law continuously diminishes as the legal system grows. Custom is largely superseded by legislation as a source of law.



According to Manu Smriti, the roots of custom as a source of law in ancient India may be enumerated under four distinct stages, namely

- (i) Revelation, or the utterances and thoughts of inspired seers (Rishi- Munis);
- (ii) The utterances of revered sages, handed down by words of mouth from generation to generation (shruti);
- (iii) The approved and immemorial usages of the people; and
- (iv) That which satisfies a sense of equity and good conscience and is acceptable to reason.

As rightly observed by Salmond “custom is to society what law is to the State”. Each one of them is the expression and realisation, to the measure of men's insight and ability, of the principles of rights and justice. The influence of custom on society is similar to that of law on the State.

Definition and Nature of Custom

A custom may broadly be defined as a usage observed by the people and recognised by the courts on the fulfilment of certain conditions. Salmond opines that custom embodies those principles acknowledged and approved, not by the power of the State, but by public opinion of the society at large. When people find any act to be beneficial and agreeable to their nature and disposition, they start practising it from time to time and when it is continued for immemorial time, it obtains force of law.



Reasons for Recognition of Custom

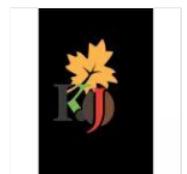
Custom exists as law in every country, though it tends to lose its importance relatively to other sources of law with the changes in society. The law that originated in England on the basis of prevailing customs is known as the 'common law', which is adopted in the form of Acts of Parliament ever since the sixteenth century.

Customs are not laws when they arise, but that they are largely adopted into the law by the State recognition. Customary law assumes a binding authority provided it fulfils certain requirements and provided it is not suspended by law by a higher authority.

It is not always necessary that the Court should recognise all the practices which are prevalent in a community as custom. For example, the mourners in a funeral procession are supposed to wear black clothes in England, but if a person does not follow this practice, he cannot be punished by court for committing this breach of custom. Thus, these are conventional customs established by usage and long practice and the courts shall not take judicial notice of such customs. In other words, such customs are not obligatory.

On the other hand, there are certain customs which are binding and are enforceable by a court of law since they are backed by the sanction of the State. For instance, a Hindu marriage solemnised without the performance of Saptapadi is not legally valid and can be set aside by the court.

In earlier stages of the development of society before the State came into existence, people were being governed by the customary laws.



Kinds of Custom

Broadly speaking, there are two kinds of custom, namely,

- (1) Conventional custom
- (2) Legal custom.

1) Conventional Custom

A conventional custom is also called "usage". It is an established practice whose authority is conditional on its acceptance and incorporation in the agreement between the parties bound by it.

A conventional custom is legally binding 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.

When two parties enter into a contract, generally whole terms of the agreement are not set out expressly and a large part of most contracts is implied.

A conventional custom shall be recognised as law so long as it is not contrary to the general law of the country. It should be consistent with statute law. It cannot alter the general law of the land.

2) Legal Custom

Legal customs are those which are operative per se as binding rules of law independent of any agreement between the parties. Legal customs are of two kinds, namely, (i) Local custom, (ii) General custom.



(i) **Local Custom**- A local custom is that which prevails in some defined locality whereas a general custom is operative throughout the realm. Local custom is a particular rule which has existed actually or presumptively from time immemorial, and has obtained the force of law in a particular locality,

(ii) **General Custom**- As stated earlier, a general custom prevails throughout the realm. A general custom is usually practised by all the people living in the country and it is prevalent throughout the land.

Essentials of a Valid Custom

In order to be a valid custom, it must conform to certain requirements laid down by the law. The essential requisites of a valid custom are-

- (1) **Reasonableness**- A custom must be reasonable. It must be remembered that the authority of a prevailing custom is never absolute, but it is authoritative provided it conforms to the norms of justice and public utility. A custom shall not be valid if it is apparently repugnant to right and reason and it is likely to do more mischief than good if enforced. A general observance of a custom leads to the presumption that it has a rational basis and that it is useful and convenient.
- (2) **Consistency**- A custom to be valid, must be in conformity with statute law. In other words, it should not be contrary to an Act of Parliament.
- (3) **Compulsory Observance**- A custom to be legally recognised as a valid custom, must be observed as of right. It means that custom must have



been followed by all concerned without recourse to force and without the necessity of permission of those who are adversely affected by it. It must be regarded by those affected by it not merely as an optional rule but as an obligatory or binding rule of conduct. If a practice is left to individual choice; it cannot be treated as a customary law. If the observance of a custom is suspended for a long time, it would be assumed that such a custom was never in existence.

- (4) **Continuity and Immemorial Antiquity**- A custom to be valid should have been continuously in existence from the time immemorial. Customs must have been in existence from ancient times. In other words, there is no definite year laid down in India to determine the antiquity of a custom. Even it need not be beyond human memory.
- (5) **Certainty** - In order to prove the existence of a custom since time immemorial, it must be shown that it is being observed continuously and uninterruptedly with certainty. The element of certainty evinces the existence of a custom therefore, a custom cannot be said to be in existence from the time immemorial unless its certainty and continuity is proved beyond doubt.



Legislation as a Source of Law

Introduction

There are two obvious reasons for legislation being regarded as one of the most effective sources of law. Firstly, it involves laying down legal rules by the legislature which the State recognises as law. Secondly, it has the force and authority of the State.

It is for this reason that it is rightly said that deliberate law-making by an authoritative power, i.e., the State, is called legislation, provided that authority is duly recognised as the supreme power by the courts. Undoubtedly, deliberate law-making is indispensable for the efficient regulation of the modern State.

Definition of Legislation

The term legislation is derived from latin words, legis meaning law and latum which means "to make" or "set". Thus the word 'legislation' means 'making of law'. Legislation is that source of law which consists in the declaration of legal rules by a competent authority.

The term 'legislation' has been used in different senses. In its broadest sense, it includes all methods of law-making. However, in its technical sense, legislation includes every expression of the will of the legislature, whether making law or not. Thus ratification of a treaty with a foreign State by an Act of Parliament shall be considered law in this sense. But in the strict sense of the term legislation means enacted law or statute law passed by the supreme or subordinate legislature.



Legislation includes activities which result into law- making or amending, transforming or inserting new provisions in the existing law.

Types of legislation

(1) Supreme and Subordinate Legislation

Legislation may either be supreme or subordinate. Legislation is supreme when it proceeds from the sovereign power in the State and is incapable of being repealed, annulled or controlled by any other legislative authority.

On the other hand, subordinate legislation proceeds from any authority other than the sovereign power. It is dependent for its continued existence and validity on some supreme authority.

Thus in England the doctrine of parliamentary sovereignty implies supremacy and omnipotence of the British Parliament.

Therefore, it possesses the power of supreme legislation. In India, however, the Parliament is sovereign but not supreme although it possesses the power of supreme legislation. Legislation by bodies inferior to the sovereign constitutes subordinate legislation.

Kinds of Subordinate Legislation

The chief forms of subordinate legislation are as follows:

1. **Colonial Legislation** - The British colonies and other dependencies were conferred limited power of self-government in varying degrees by the Imperial legislature. The colonies in exercise of this power, enjoyed limited



power of law-making. But the laws so made by colonial governments could be repealed, altered or superseded by the Imperial legislature, namely, the British Parliament.

2. **Executive Legislation** - The legislature, i.e., the Parliament quite often delegates its rule-making power to certain departments of the executive organ of Government. The rules made in pursuance of this delegated power have the force of law.

They may, however, be-repealed or superseded by the legislature as and when deemed necessary to do so. Keeton suggests that this species of subordinate legislation has given rise to a vast body of rules known as administrative law which is commonly called 'public law' because it describes the nature of the activity of the executive department of the government in action.

Executive legislation in India includes power to make rules, regulations and bye-laws for administrative matters such as fixing of price, or deciding suitable place for market, 3 taxation, setting up incorporated bodies etc.

3. **Judicial Legislation**- In certain cases, legislative power of rule-making is delegated to the judiciary and the superior courts are authorised to make rules for regulation of their own procedure in exercise of this power. This is also known as judicial legislation which should not be confused with judicial precedents where the Court formulates a new principle of law through its judicial decision.

The Constitution of India has conferred the power of rule-making to the Supreme Court under Article 145. Similar power is conferred on the High Courts under Article 227 of the Constitution.



4. **Municipal Legislation** - The municipal authorities are allowed within their areas to make bye-laws for limited purposes such as water-tax, land urban cess, property-tax, town planning, public health, sanitation etc.
5. **Autonomous Legislation** - The State may occasionally allow private entities or bodies, such as universities, companies, corporations etc. to make bye- laws for regulating the conduct of their business. These bye-laws are framed in exercise of the rule-making power conferred on these bodies by the State.

Delegated Legislation

Delegated legislation is a legislation made by any authority other than the legislature. It denotes the rules, orders, notifications, bye-laws or directions made by the executive authorities under the law passed by the Parliament.

The term 'delegated legislation' is generally used in two senses. In one sense, it means the exercise of power of rule-making by the Executive under the authority delegated to it by the Legislature.

In the other sense, it means the output of the exercise of that power. In other words, when the function of legislation is entrusted to organs other than the legislature itself, the legislation made by such organs is called delegated legislation, which may be in the form of rules, regulations, bye-laws, orders, schemes, directions, circulars or notifications, etc.



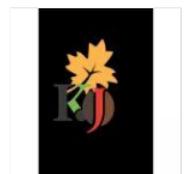
Legislation and Custom

Pointing out the importance of enacted law over customary law, Keeton observed that in earlier times legislation was supplemental to customary law but in modern time the position has reversed, and customary law is treated supplementary to the enacted law. Laws enacted by Legislature being definite, written and comprehensive, they are easy to understand.

That apart, enacted law is created by Legislature therefore, it is an expression of the general will of the people. A custom can be accepted as a customary law only after it is practiced for a long time.

Legislation as a source of law differs from custom in the following aspects :-

1. The existence of legislation is essentially de jure whereas customary law exists de facto.
2. Legislation grows out of the theoretical principles, but customary law grows out of practice and long existence.
3. Legislation as a source is historically much latter as compared with custom which is the oldest form of law.
4. Legislation is an essential characteristic of modern society whereas customary law has developed through primitive societies.
5. Legislation is complete, precise, written in form and easily accessible, whereas customary law is mostly unwritten (jus non scriptum) and is difficult to trace.
6. Legislation results out of deliberations but custom grows within the society in natural course.
7. Legislation expresses the relationship between men and the State but customary law is based on relationship between men inter se.



Judicial Precedent as a Source of Law

Introduction

Judicial precedent is one of the important sources of law. It is a distinguishing feature of the English legal system because most of the common law is unwritten and owes its origin to judicial precedents.

Precedents have a binding force on judicial tribunals for deciding similar cases in future. According to Salmond, the doctrine of precedent has two meanings, namely (1) in a loose sense precedent includes merely reported case-law which may be cited and followed by the courts, (2) in its strict sense, precedent means that case-law which not only has a great binding authority but must also be followed.

A statement of law made by a Judge in a case can become binding on later Judges and other subordinate Courts and in this way may become the law for everyone to follow. Whether or not a particular decision i.e., precedent become binding depends on two main factors namely:

- (i) it must have been pronounced by a Court which is sufficiently senior; and
- (ii) it is only the ratio decidendi, i.e., reasoning behind the decision which is binding

Precedent as a Source of Law

Precedent has a binding force and therefore it is an important source of English law. A judicial precedent is purely constitutive in nature and never abrogative. This in other words means that it can create law but cannot abolish it. The Judges are not at liberty to substitute their own views where there is a settled principle of law. They can only fill in the gaps in the legal system and remove imperfections in the existing law.



Kinds of precedents

Broadly speaking, precedent may either be authoritative or persuasive. An authoritative precedent is one which has a binding force and the Judge must follow it whether he approves it or not. Authoritative precedents are the decisions of superior courts of justice which are binding on subordinate courts.

Persuasive precedent, on the other hand, is one which the Judges are under no obligation to follow but which they may take into consideration. Thus authoritative precedents are the legal sources of law while persuasive precedents are merely historical sources.

Persuasive precedents may be of various kinds, namely:

- Foreign judgments
- Decision of superior courts to other parts of British Empire
- Judgments of the Privy Council when sitting as the final Court of appeal from the colonies
- Judicial dicta (obiter dicta)
- Authoritative text books and commentaries

Position in India

In the Indian context, the decisions of the House of Lords, Privy Council and Supreme Court of USA or Canada have only persuasive value.

The decisions of the Supreme Court of India are binding on all the courts in India and they constitute authoritative precedents. Article 141 of the Constitution of India



gives a constitutional status to the doctrine of precedent in respect of law declared by the Supreme Court of India.

Precedents which enunciate rules of law form the basis of administration of justice in India. The decisions of the various High Courts are binding on the courts below them within their respective State limits.

Case Law: Bengal Immunity Ltd. v. State of Bihar

In this case, the Supreme Court held that it is not bound by its own decision.

Case Law: Somwanti v. State of Punjab

In this case, the Supreme Court clarified that what is binding is the ratio decidendi, that is, the principles of law applicable to the legal problems disclosed by the facts of the case before the Court.

Circumstances which destroy the Binding Force of Judicial Precedents

Once a decision is overruled by any subsequent ruling, it loses all its binding authority. But there are certain other circumstances which also destroy or weaken the binding force of judicial precedents either partially or totally.



They are as follows:

1. Ignorance of Statute

A precedent is not binding if it be rendered in ignorance of any statute or any other rule having the force of statute. It is also not binding if the court had the knowledge of the existence of the statute but it failed to appreciate its relevance to the matter in hand due to negligence or ignorance.

2. Inconsistency between earlier decisions of the Higher Court

A precedent loses its binding force completely if it is inconsistent with the decision of a higher court.

Case Law: Young v. Bristol Aeroplane Co. Ltd

Thus, the Court of Appeal in this case observed that it is bound to follow its own previous decisions as well as those of courts of co-ordinate jurisdiction.

However, the Court is bound to refuse to follow a decision of its own which, though not expressly overruled, cannot, in its opinion, stand with a decision of the House of Lords or if it finds that there is inconsistency between its earlier decision.

3. Inconsistency between earlier decisions of the court of the same rank

A Court is not bound by its own earlier decisions which are conflicting with each other. The conflict may arise due to inadvertence, ignorance or



forgetfulness in not citing earlier decisions before the Court. In such a case the earlier decisions are not binding on the Court.

4. Precedent sub silentio

A decision is said to be sub silentio when the point of law involved in it is not fully argued or not perceived by the court.

Case Law: Gerard v. Worth of Paris Ltd

The decision in this case is a good illustration to explain a precedent sub silentio. In this case an employee who was discharged by the defendant company obtained damages for his wrongful dismissal against the company.

He applied for a garnishee order on a bank account of the company which was in the name of the liquidator. The only point argued was priority of claimant's debt and the Court of Appeal granted the order.

The question whether a garnishee order could be properly made on an account standing in the name of liquidator was never argued or considered by the court. Therefore, when this very point was argued in a subsequent case before the Court of Appeal, the Court held itself not bound by the previous decision as the point was sub silentio in the previous case.

5. Decision of equally divided court

There may be cases where the Judges of the Appellate Court are equally divided. In such a case practice is to dismiss the appeal and hold that the decision appealed against is correctly decided.



But this problem does not arise now-a-days because Benches are always constituted with uneven number of Judges. In India, however, where the Judges in a Division Bench of a High Court are equally divided, the practice is to refer the case to a third Judge whose decision shall be treated as final unless it is set aside by the Supreme Court.

6. Dissenting judgments

Most judicial decisions are unanimous. But at times few Judges may write or even note a dissent in the case in which they disagree with the majority. However, while Judges are free to differ on judicial matters and interpretation of law in a case in hand, there is always an effort on the part of the majority to minimise or even eliminate dissent.

The dissenting judgment do not in any way undermine the authority or authenticity of law because they provide scope to correct errors of law due to blindly following the doctrine of precedent.

For instance, just take the question whether and to what extent freedom under the Constitution should be interpreted to allow 'live-in-relationship' which has cropped up as a crucial social problem in India in recent decades. The society copes up, manages and outgrows with such problems but rarely solves it.

There is always a scope for dissent when such questions come up for adjudication before the higher Courts. Judges decide such issues on the basis of their own life experiences and there is always a scope or possibility that a dissenting note of a particular judge may become a ratio in a case in future due to overruling of the case wherein such dissent was recorded.



7. Erroneous decisions

The decisions which are founded on misconceived principles or in conflict with the fundamental principles of law lose their binding force completely.

8. Abrogated decisions

A decision ceases to be binding if statute inconsistent with it is subsequently enacted. So also it ceases to be binding if it is reversed, overruled or abrogated. If a decision is wrong or irrational, it may be abrogated by a subsequent enactment or decision of a higher court.

9. Affirmation or reversal on a different ground

When a higher court either affirms or reverses the judgement of the lower court on a ground different from that on which the judgement rests, the original judgement is not deprived of all the authority but the subsequent court may take a view that a particular point which the higher court did not touch, is rightly decided.



Legal Rights and its kinds/types

Introduction

When people come in contact as members of society, they have certain legal rights and duties towards one another.

These rights and duties are regulated by the law prevalent in the society. It is well known that the main purpose of law is to protect human interests by regulating the conduct of individuals in the society.

For the attainment of this objective, it is necessary that the State should make use of its physical force for the enforcement of legal rights and punish those who violate these rights.

In general parlance, right means claims or titles, liberties, powers and immunities summed together. In other sense, it is a permissible action within a certain sphere. The Latin term for right is *rectus* which means 'correct'.

Salmond has defined a 'right' as a man's capacity of influencing the acts of another, not by his own strength, but of the opinion on the force of society.

Legal Rights

John Salmond defines right as an interest recognised and protected by a rule or justice. It is an interest in respect of which there is a duty and the disregard of which is wrong. A man has varied interests but all of them are not recognised by law.

Many interests exist *de facto* and not *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. Interests are things which are to man's advantage.



Rights are either moral or legal.

A moral or natural right is an interest recognised and protected by a rule of morality- violation of which would be a moral wrong. For example, a parent's interest to command respect from their children is their moral right but if children violate it, it is a moral wrong.

A legal right, on the other hand, is an interest recognised and protected by a rule of law, violation of which would be a legal wrong. Thus every one has the right to privacy and if any person interferes with this right, it would be a legal wrong.

Classification of Legal Rights

Legal rights have been classified by various jurists in different ways. Rights may generally be classified under the following heads :-

1. Perfect and Imperfect Rights

According to Salmond, a perfect right is one which corresponds to a perfect duty. It is not only recognised by law but also enforced by it. An imperfect right, on the other hand, is one which though recognised, is not enforceable by law. In other words, a perfect right is one in respect of which an action can be successfully brought in a court of law, and the decree of the court, if necessary, enforced against the defaulting judgement- debtor. But an imperfect right is incapable of legal enforcement.

However, sometimes, an imperfect right can be converted to a perfect right. For example, where a bond is unstamped, it creates an imperfect right which is not enforceable by law. But on payment of prescribed penalty, it becomes a perfect right enforceable by law.



2. Positive and Negative Rights

A right is distinguished as positive or negative according to the nature of the co-relative duty it carries with it. In case of a positive right, the person subject to the duty is bound to do something whereas in case of negative right, others are restrained from doing something.

The positive right is a right to be positively benefited but a negative right is merely a right, not to be harmed. A right to receive compensation or damages, or a creditor's right to recover money from the debtor are examples of positive rights. As against this, right of ownership is a negative right.

3. Antecedent and Remedial Rights

The rights dealt with by substantive law may either be antecedent or remedial. An antecedent right is one which exists irrespective of any wrong having been committed. It is an exceptional advantage granted to the person who is clothed with this right.

For instance, purchaser of certain goods has an antecedent right over the goods so purchased. On the other hand a right which accrues when an antecedent right is violated is called a remedial right. Generally, it involves compensation by way of relief for the violation of an antecedent right. Antecedent right may either be a right in rem or a right in personam.

4. Rights in rem or in personam

These are also called real right and personal right. The distinction between real and personal rights is closely connected but not identical with that between negative and positive duties. It is based on the difference in the incidence of co-relative duties.



A real right (right in rem) corresponds to a duty imposed upon persons in general whereas a personal right (right in personam) corresponds to a duty imposed upon determinate individuals. In other words, a real right is available against the world at large while a personal right is available against a particular person or persons.

A person's right to the peaceable occupation and use of his land is a right in rem because all the world is under a duty towards him not to interfere with it. But if a person grants a lease of the land to a tenant, his right to receive rent from the tenant is a right in personam, for it is available exclusively against the tenant and none else.

5. Proprietary and Personal Rights

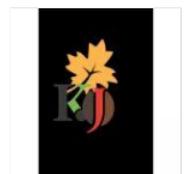
The aggregate of a man's proprietary rights constitutes his estate, his assets and his property. They have some economic or monetary significance and are elements of wealth.

For instance, money in one's pocket or in bank, right to debt, land, houses etc., are proprietary rights. The personal rights, on the other hand, are elements in one's well-being. They have no monetary value whatsoever.

Examples of personal rights are the right of reputation, personal liberty, freedom from bodily harm, etc.

6. Rights in re propria and rights in re aliena

Right in re propria means right over one's own property and right in re aliena means right over the property of someone else. The latter may also be called as encumbrances using the term in its widest sense.



7. Principal and Accessory Rights

The existence of principal rights is independent of any other rights but accessory rights are ancillary to principal rights and have a beneficial effect on the principal right.

For example, if a debt is secured by a mortgage, the recovery of debt is the principal right while security is the accessory right.

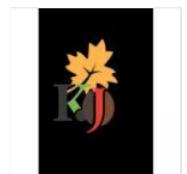
Likewise, if an owner of a piece of land has a right of way on the adjoining land, the ownership of the land is his principal right and right of way in the adjoining land is accessory right. The rent and covenants of a lease are accessory to the landlord's ownership of the property.

8. Primary and Sanctioning Rights (Antecedent & Remedial Rights)

Primary rights are also called the antecedent or substantive rights. Similarly, sanctioning rights are also called the remedial or adjectival rights. It may be reiterated that sanctioning rights originate from some wrong, i.e., from violation of another's right whereas primary rights have some source other than wrongs.

9. Legal and Equitable Right

The distinction between legal and equitable right originates from the distinction between law and equity. Prior to the passing of Judicature Act, 1873, there were two distinct co-ordinate systems of law in England which were called the common law and the equity law. At that time, legal rights were recognised by the common law Courts whereas the equitable rights were recognised by the Court of Chancery which was a Court of Equity. This distinction was, however, abolished.



10. Vested and Contingent Rights

A vested right accrues when all the facts have occurred which must by law occur in order that a person in question would have the right. In case of contingent right, only some of the events necessary to vest the right in the contingent owner have happened.

A vested right creates an immediate interest. It is transferable and heritable. A contingent right does not create an immediate interest and it can be defeated when the required facts have not occurred.

11. Public and Private Rights

A very radical division of Rights is based upon the broad distinction between the public or private character of the person or persons with whom the Right is connected. By 'public person', it means either the 'State', or the sovereign part of it, or a body or individual holding delegated authority under it.

The term 'private person' denotes an individual, or collection of individuals however large, who or each one of whom, is of course, a unit of the State, but in no sense, represents it, even for a special purpose.

From the aforesaid definition, it follows that a right vested in the State is called a 'public right'. This distinction is further illustrated by a simple example- an assault is a breach of the private right of the person assaulted but avoiding military service (where it is mandatory) is an injury to the State.



12. Servient and Dominant Right

A servient right is one which is subject to an encumbrance while the encumbrance which derogates from it, may be called dominant.

The land or immovable property for the beneficial enjoyment of which the right exists is called the dominant heritage and the owner or occupier thereof, is called the dominant owner.

The land or immovable property on which the liability is imposed is called the servient heritage and the owner or occupier thereof, is the servient owner.

RESPAIR ACADEMY



Possession and its kinds

Introduction

Possession is prima facie evidence of ownership.

Usually the presumption is that the possessor of a thing is the owner of it and the other claimants to have it must prove their title. Further, the finder of a thing has a good title to it if he is in possession of that thing. Even a person who wrongfully possesses a property, has a good title against the world at large except the true owner.

It may, however, be stated that if the person, who obtains a bank-note knowing that it is a stolen one, in that case, he commits an offence of receiving stolen property under Section 410 of the Indian Penal Code which is punishable under Section 411 of the said Code.

Possession is an important condition in the acquisition of ownership. Law relating to pledge provides that the possession of thing pledged constitutes creditor's security without any presumption of ownership.

Nature of Possession

Possession is the most basic relation between man and things. Possession of material things is essential to life because the existence of human life and human society would be rather impossible without the consumption and use of material things.

Many important legal consequences flow from the acquisition and loss of possession. Besides being a prima-facie evidence of ownership, it is also one of the modes of transferring ownership.



Possession is said to be nine out of ten points of law meaning thereby that it is evidence of ownership and he who interferes with the possession of another, must show either title or better possessory right.

For example, a thief who steals my watch has a possession which the law will protect against everyone except myself or some person acting on my behalf.

As stated by Federick Pollock, a man is said to be in possession of a thing of which he has the apparent control or from the use of which he has the apparent power of excluding others. Possession without title would not confer ownership. Thus, possession is an important element of ownership and in fact it is a means of acquiring ownership.

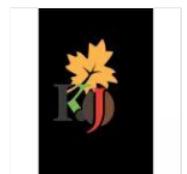
Meaning of the term Possession

Jurists have defined possession according to their own notions. Pollock says that having physical control over a thing constitutes possession.

According to Salmond, “the possession of a material object is the continuing exercise of a claim to the exclusive use of it”.

Thus, possession involves two things: (1) claim of exclusive user; and (2) conscious or actual exercise of this claim i.e., physical control over it. The former is mental element called as **animus possessionis** and the latter is physical element known as the **corpus possidendi**.

Zachariae observes that possession is a relation between a person and a thing which indicates that the person has an intention to possess that thing and has the capacity of disposing of it.



Kinds of Possession

Corporeal and Incorporeal Possession

Corporeal possession is the possession of material things like land, house, buildings and movables like books, chattels etc.

In the case of corporeal possession, the corpus consists firstly in confirming exclusion of others' interference and secondly in the enjoyment of the thing at will without external interference.

Actual use of the thing is, however, not necessary. Thus a person may keep his watch locked in a safe for several years without using it, he would nevertheless be deemed to be in possession of it.

The corporeal possession therefore, consists not in dealing with the thing but only in the powers of dealing with it at will.

Incorporeal possession, on the other hand, means possession of immaterial or intangible things which we cannot touch, see or perceive. The examples are possession of a copy-right or a trade mark or a right of reputation, goodwill.

Unlike corporeal possession, in case of incorporeal possession, actual / continuous use and enjoyment is deemed as an essential condition.

The reason being that in this case, power of exercising the possession at will is not visible as an objective fact because of its incorporeal nature.

Therefore, exercising it at will can be known only when it is actually being used. In brief, continuous non-user may give rise to the extinction of the right of incorporeal possession.



Mediate and Immediate Possession

Mediate possession is the possession of a thing through another person. It is also known as indirect possession. For instance, if I purchase a book through any agent or servant, I have mediate possession so long as the book remains in my agent's or servant's possession. Salmond points out three categories of mediate possession as follows:-

- (1) Possession acquired through an agent or servant;
- (2) Possession held through a borrower or hirer to tenant where the object can be demanded at will; and
- (3) Where the property is lent for a fixed period of time or delivered as security for the repayment of a debt.

It is significant to note that in case of a mediate possession two persons have the possession of the same thing at the same time. The existence of a mediate possession can be used against third persons only and not against the person who has immediate and real possession of the thing.

Therefore, mediate possession obtained by the master, landlord, pawnee from the servant, tenant, pawner respectively can be used against the whole world except those persons through whom mediate possession has come into existence. Immediate possession is also known as 'direct possession'.

If the relation between the possessor and the thing possessed is a direct one, it is called immediate possession. For example, if I purchase a book myself. I have immediate possession of it without any intervening agency.



Quasi-Possession

The doctrine of quasi-possession also known as *possessio juris* extends to control which the person exercises over certain advantages, short of ownership, which may be derived from objects. A right of way or passage over another's land is an illustration of quasi-possession.

Concurrent Possession or Duplicate Possession

The English civil law explicitly holds that two persons cannot be in possession of the same thing at one and the same time. Thus exclusiveness is the essence of possession because two adverse claims of exclusive use are not capable of effectual realisation. It is, however, realised that there may be certain claims which are not adverse and are not therefore mutually destructive. Such claims could be concurrently realised. The concurrent possession is also called duplicate possession and Salmond has summarised it as follows:-

- (1) Mediate and immediate possession may co-exist as in case of possession of servant over his master's things where the servant has an immediate possession and the master has mediate possession
- (2) Two or more persons may possess a thing in common just as in case of co-owners.
- (3) Corporeal and incorporeal possession may co-exist in respect of the same material object. For example, a person may possess corporeal possession of a piece of land while another may have the right of way on the same land which is incorporeal possession of it.



Constructive Possession

Constructive possession means having power and intention of retaining control over property but without actual control or actual presence over it.

According to Pollock constructive possession is possession in law and not actual possession. It is a right to recover possession. For instance, the delivery of keys of a building.

Adverse Possession

Adverse possession implies the possession by a person initially holding the land on behalf of some other person and subsequently setting up his own claim as a true owner of that land. If adverse possession continues peacefully undisturbed for a prescribed period, the title of the true owner is extinguished and the person in possession becomes the true owner of that land.

Three elements are deemed necessary for establishing adverse possession, namely, (1) continuity, (2) adequate publicity, and (3) peaceful and undisturbed possession for prescribed period.

In short, to be adverse, possession must be actual, exclusive, and adequate in continuity and publicity and the exercise of possession should be without violence and without permission.



Ownership & its Kinds

Introduction

Ownership is a complex juristic concept which has its origin in ancient Roman law. Perhaps of all of the rights, right to ownership is the most important right.

The earlier legal systems did not recognise the distinction between ownership and possession. It was with the advancement of civilization that the two were considered as separate and distinct concepts.

In Roman law ownership and possession were respectively termed as 'dominium' and 'possessio'. The term dominium denotes absolute right to a thing while possessio implies only physical control over it.

Romans attached greater importance to ownership rather than possession because in their view having absolute right over a thing was much more important than merely having physical control over it.

Definition of Ownership

Jurists have defined ownership in different ways. All of them, however, accept that the right of ownership is the most complete or supreme right that can be exercised over anything. According to Hibbert ownership includes within it four kinds of rights:

1. Right to use of a thing.
2. Right to exclude others from using the thing.
3. Disposing of the thing.
4. Right to destroy it.



In Black's Law Dictionary (7th Ed.), ownership has been defined as "collection of rights to use and enjoy property, including right to transmit it to others." Therefore, ownership is de jure recognition of a claim to certain property.

Salmond's Definition of Ownership

According to Salmond, "ownership, in its most comprehensive signification, denotes the relation between a person and right that is vested in him, that which a man owns in this sense is in all cases a right."

Thus in its generic sense, 'ownership' signifies the relation between the person of inherence and the object of ownership. It consists in a complex of rights, all of which are rights in rem.

In Salmond's view, ownership exhibits the following incidents:-

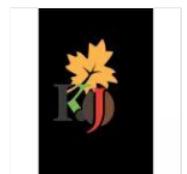
- (i) An owner shall have a right to possess the thing which he owns. He may, however, not be necessarily in actual possession of it;
- (ii) He has normally the right to use and enjoy the thing owned;
- (iii) The owner has a right to consume, destroy or alienate the thing;
- (iv) Ownership has the characteristic of being indeterminate in duration;
- (v) Owner has a residuary character.



Characteristics of Ownership

An analysis of the concept of ownership would show that it has the following characteristics:-

1. Ownership may either be absolute or restricted, that is, it may be exclusive or limited. Ownership can be limited by agreements or by operation of law. When a land or a thing is owned by more than one owner, they are called co-owners and the right of each co-owner is limited to the right of other co-owners.
2. The right of ownership can be restricted in times of emergency. For instance, buildings or land owned by private individuals can be requisitioned and used for lodging army personnel during the period of war. Allotment of accommodation to tenants by the Rent Controlling Authorities is yet another illustration to show that ownership can be restricted.
3. An owner is not allowed to use his land or property in a manner that is injurious to others. In this sense, his right of ownership is not unrestricted.
4. Restrictions may also be imposed by law on the owner's right of disposal of the thing owned. Thus any alienation of property made with intent to defeat or delay the claims of creditors can be set aside. The power of disposition can also be limited by the existence of the rights of encumbrancers such as a mortgagee etc. The owners in India and in most of the countries are not free to sell their land or property to aliens.
5. The owner has a right to possess the thing which he owns. It is immaterial whether he has actual possession of it or not. The most common example is



an owner leasing his house to a tenant, where the tenant is in actual possession but the ownership still remains with the landlord. Again, when a car is hired or stolen, the possession remains with the person who has hired it or stolen it, but the ownership still remains with the owner of it.

6. Law does not confer ownership on an unborn child or an insane person because they are incapable of conceiving the nature and consequences of their acts.
7. Ownership is residuary in character.
8. The right to ownership does not end with the death of the owner, instead it is transferred to his heirs.

Kinds of Ownership

Ordinarily, the subject-matter of ownership consists of material objects like land, chattels etc. The wealth and assets of a person such as interests in the land, debts due to him, shares in a company, patents, copyrights etc. may also be subject-matter of ownership. Thus intangible rights may also constitute subject-matter of ownership.



The different kinds of ownership can be explained under the following heads:

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 ownership of a copyright, patent, trade- mark, right of way etc. is incorporeal ownership.

Pollock points out that the ownership is a right to the entirety of the lawful uses of a corporeal thing. Corporeal things are those which are tangible, that is, which can be perceived and felt by the senses while incorporeal things are intangible and cannot be perceived and felt by senses.

2. Sole Ownership and Co-ownership

When the ownership is vested in a single person, it is called sole ownership; when it is vested in two or more persons at the same time, it is called co-ownership of which co-ownership is a specie.

For example, the members of a partnership firm are co-owners of the partnership property. The usual consequence of a co-ownership is the existence of reciprocal obligations and restricted use and enjoyment.

Co-ownership may be of two kinds- i.e., ownership in common and joint ownership. According to Salmond, the main difference between these relates to the effect of death of one of the co-owners.

In case of ownership in common, the right of the deceased passes on to his successors like other inheritable right; but in case of a joint ownership, if one of the two joint-owners dies, his right of ownership also dies with him (i.e.,



extinguished) and the survivor becomes the sole owner by virtue of his right of survivorship.

A joint ownership occurs when two or more persons are entitled to the same right or bound by the same obligation in respect of a thing. For example, partnership property is owned by the persons constituting the firm jointly and trustees are the joint owners of the trust property.

The essence of the conception is that there is only one right and one obligation, so that anything which extinguishes such right or obligation, releases all parties. But in case of a co- ownership, extinction of such a right does not release the remainders.

3. Trust Ownership and Beneficial Ownership

Another peculiar species of duplicate ownership is trust ownership in which property is owned by two persons at the same time. The relation between them is such that one of them is under an obligation to use his ownership for the benefit of the other.

The former is called the trustee and his ownership is trust ownership, while the latter is called the beneficiary and his ownership is beneficial ownership. The ownership of the trustee is a matter of form rather than of substance, it is nominal rather than real because he is deprived of any right to the beneficial enjoyment of the trust property.

According to Salmond the purpose of trust ownership is to protect the rights and interests of persons who for any reason are unable to protect them effectively for themselves.



4. Legal and Equitable Ownership

Sometimes one person may be the legal owner 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 whereas equitable ownership proceeds from the rules of equity. In many cases, equity recognises ownership where law does not so recognise it owing to some legal flaw or defect.

For example, when a debt is verbally assigned by A to B. A remains the legal owner of it but B becomes the equitable owner of it. Thus, the debt is only one although now it has two owners. In this case the right of both A and B are legal rights but the ownership of A is legal while that of B is equitable.

Keeton has observed that equitable ownership always presupposes the existence of a legal ownership, the legal owner being restrained by the rules of equity from using his legal ownership to the detriment of the equitable owner. Conversely, a legal ownership does not necessarily imply the existence of an equitable owner.

5. Vested and Contingent Ownership

Ownership may either be vested or contingent. In vested ownership the title of the owner is already perfect while in contingent ownership his title is as yet imperfect but it is capable of becoming perfect on the fulfilment of some conditions. In the former, the ownership is absolute, in the latter, it is conditional.

For instance, a testator may leave property to his wife for her life, and on her death to A, if he is then alive, but if A is dead, to B. Here A and B are both owners of the property in question, but their ownership is merely contingent.

The ownership of A is conditional on his surviving the testator's widow; and that of B is conditional on the death of A during the widow's life-time.



6. Absolute and Limited Ownership

When all the rights of ownership, ie, possession, enjoyment and disposal are vested in a person without any restriction, the ownership is absolute. But when there are restrictions as to user, duration or disposal, the ownership will be called a limited ownership.

Ownership and Possession

"Possession is the external realisation of Ownership".

Possession is de facto exercise of a claim; ownership is the de jure recognition of it. This means, possession is in fact while ownership is in the form of a right.

Possession is the external evidence of ownership. The possessor of a thing is presumed to be the owner of it and may put all other claimants to prove their title. Long possession is a source of ownership.

When possession is held adversely to the true owner for a period prescribed by the law (generally 12 years), the true owner's right is extinguished and a title is created in the adverse possessor as he acquires it by right of prescription due to lapse of the specified time.

Bringing out distinction between possession and ownership Salmond pointed out that a person is said to be the owner of a thing when his claim receives the recognition and protection from the law of the State, but possession may be exercised and realised even without such recognition or protection from the law.



Thus ownership has the guarantee of law but possession has some measure of security and value from the facts, without any possibility of support from law.

There may be ownership without possession as in case of a debt which is capable of being owned but not possessed. Conversely, there may be possession without ownership such as patent, copyright, trademark etc.

RESPAIR ACADEMY



Property and its kinds

Introduction

The concept of property occupies an important place in human life because it is virtually impossible to live without the use of material objects which constitute the subject-matter of property.

In its widest sense, all animate or inanimate things belonging to a person are included within the meaning of the term property, for instance, a person's life, liberty and estate may also be considered as his property. However, it has now become redundant to interpret the term 'property' in this comprehensive sense.

The importance of property in the modern materialistic world hardly needs to be emphasised. Property is absolutely necessary for the subsistence and well being of human beings. Everyone has a right to enjoy the fruits of labour and industry. Property is the foremost requisite for a happy and contented life.

Meaning of Property

The term property in a looser sense, may be described as the sum-total of a man's fortune, including not only the objects of which he is the owner, but also the value of any claims which he may have against other persons, after deducting the amount of any claims which might be made good against him.

In a limited sense, property conveys only a person's proprietary rights as opposed to his personal rights. Thus land, chattels, shares and debts due to him constitute his property. This is the most usual sense in which the term is used in modern times. In



yet another sense, property includes only those rights which are proprietary rights in rem, e.g., patent, copyright.

Salmond observes that the term 'property may have a variety of applications but in legal terms it refers to the following:

All legal rights- It includes a person's legal rights of whatever description. A man's property is all that is his in law. This ordinarily implies complete ownership of all things- material as well as incorporeal.

Proprietary rights- It includes not all rights. but only a man's proprietary rights as opposed to his personal rights. Thus if I sell my land to you, the property in it shall pass to you on your paying me the purchase money.

Corporeal Property- In this sense, property includes nothing more than corporeal things, that is, right of ownership in a material object such as a watch, land, horse, etc.

According to Salmond, ownership of corporeal property is a general permanent and inheritable right of the user of a thing.

Case Law: Guru Datt Sharma v. State of Bihar

In this case, defining property as a legal concept, the Supreme Court observed that it is a bundle of rights, and in the case of tangible property, it would include the right of possession, the right to enjoy, the right to retain, the right to alienate and the right to destroy. The term 'property' also includes within it, goodwill of a business, which is an intangible asset. It includes not only immovable and movable objects, but also patents, copyrights, shares, claims etc.



Kinds of Property

Broadly speaking, the objects which are capable of becoming property are those over which a person exercises a right and with reference to which another person owes a duty. These objects may be-

(i) Material objects i.e., physical things (res corporales) such as house, tree, field, horse, table etc.

(ii) Intellectual objects which are artificial things called res incorporales such as trademark, copyright, patent, easement rights. These are intangible things, which are treated by law as if they were material objects for the purpose of determination their holder's right and duty of others against him.

Thus, it would be seen that property is mainly of two kinds, namely, (1) corporeal, and (2) incorporeal.

Corporeal property is the right of ownership in material things whereas incorporeal property is any other proprietary right in rem, eg., patent right, right of way.

Corporeal property is always visible and tangible while incorporeal property is not. Both are, however, valuable rights inasmuch as they are legal rights recognised and enforced by law. Corporeal property is of two kinds, movable and immovable.

Incorporeal property is further divisible into two kinds, namely, (i) jura in re aliena or encumbrances, whether over material or immaterial things, e.g., lease, mortgages and servitude; and (ii) jura in re propria over immaterial things, such as patents, trade marks, copyright etc.

Corporeal and Incorporeal Property- As stated earlier corporeal property is also called tangible property because it has a tangible existence in the world. It relates to material things, eg, land, house, money, ornaments, gold, silver etc. are corporeal



property the existence of which can be felt by the sense-organs. Incorporeal property is also called intangible property because its existence is neither visible nor tangible, eg, right of easement, copyright, patent, trademark etc.

Movable and Immovable Property- All corporeal property is either movable or immovable. In English law these are termed as chattels and land respectively. According to Salmond, immovable property (ie, land) has the following elements-

- (1) A determinate portion of the earth's surface;
- (2) The ground beneath the surface down to the centre of the earth;
- (3) The column of space above the surface ad infinitum;
- (4) All objects which are on or under the surface in its natural state, e.g., minerals, natural vegetation, or stones lying loose upon the surface;
- (5) All objects placed by human agency on or under the surface of the land with the intention of permanent annexation, e.g., houses, walls, fences, doors, etc.

These become part of the land and lose their identity as separate movable chattels. It must, however, be noted that physical attachment without the intent of permanent annexation does not make change in the nature of movable property.

For example, carpets or ornaments nailed to the floor or wall of a house or money buried in the ground are as much a chattel (movable property) as money in the owner's pockets.

Immovable property has been defined in the General Clauses Act, 1897 to include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth.



Movable property, on the other hand, may be defined as any corporeal property which is not immovable property.

Real and Personal Property- The distinction between real and personal property is closely connected with but not identical with the distinction between movable and immovable property. Real property means all rights over land recognised by law. Personal property, on the other hand, means all other proprietary rights whether they are rights in rem or rights in personam.

Salmond observed that the law of real property is almost equivalent to the law of land while the law of personal property is almost identical with the law of movable.

Rights in re propria in Immaterial Things –

Proprietary rights are both in relation to material and immaterial things. Material things are physical objects and all other things which may be subject-matter of a right are immaterial things. They are various immaterial products of human skill and labour. These immaterial forms of property are as follows-

- **Patents**- The subject-matter of a patent right is an invention such as the idea of a new process, instrument or manufacture. The person by whose skill or labour the invention or a new process or manufacture is introduced has the exclusive right of patent in it. This is granted to the inventor by the State.
- **Copyright**- The subject-matter of the right is the literary expression of facts or thought. This right may be available to writers, painters, engravers, sculptures, photographers, musical and dramatic personnel for their outstanding work. When such a person does some creative



work by utilising his intellect, skill and labour, he is entitled to exclusive copyright which is an immaterial form of property.

- **Commercial Goodwill**- Yet another form of immaterial property is commercial goodwill, trademarks and trade-names. The goodwill of commercial business is a valuable right acquired by the owner by his labour and skill. He has exclusive right of use and profit from the business and anyone who seeks to make use of it by falsely representing to the public that he is himself carrying on the business in question, shall be violating this right.

Rights in re aliena (Encumbrances)

Rights in re aliena are also known as encumbrances. Encumbrances are the rights of specific or particular user as distinguished from ownership which is the right of general user. Encumbrances prevent the owner from exercising some definite rights with regard to his property. The main categories of rights in re aliena or encumbrances are-(1) Leases, (2) Servitudes, (3) Securities, and (4) Trusts.

- **Lease**- A lease is that form of encumbrance of property vested in one person by a right to the possession and use of it vested in another. Thus it is the transfer of right to the possession and use of property owned by some other person. A lease may either be for a certain specified period or in perpetuity. It is an encumbrance in which the lessor, i.e., the owner of the property transfers his right of possession to the lessee.
- **Servitude**- A servitude is that form of encumbrance which consists in a right to the limited use of the place of land without ownership or possession of it; for example, a right of way, a right to passage of light or



water across the adjoining land, right of fishing etc. There is no transfer of possession in case of a servitude, and this distinguishes it from a lease.

- **Security**- A security is an encumbrance vested in a creditor over the property of his debtor for the purpose of securing the recovery of the debt. In other words, it may be said to be a right to retain possession of a chattel until the debt is paid. Security on immovable property is called a 'mortgage' and on movable property it is called a 'pledge'.
- **Trust**- A trust is an encumbrance in which the ownership of property is limited to deal with it for the benefit of some third person. In other words, a trust is an obligation annexed to the ownership of property. It arises out of a confidence reposed in and accepted by the owner. Trust is ordinarily created for the benefit of unborn persons, infants, minors, lunatics and persons who suffer from some legal disability.



Liability & its kinds

Introduction

In modern civil societies, the rights and duties of individuals are regulated by the law of the land. A breach of these rights and duties is called a wrong. One who commits a wrong is said to be liable for it.

Thus, liability may be for a wrongful act or omission. Salmond defines liability as Vinculum juris, ie, a bond of necessity that exists between the wrongdoer and the remedy of the wrong. The remedy of the wrong is enforced by the supreme will of the State through its organised force.

According to Austin, liability consists in those things which a wrongdoer must do or suffer. It is the ultimum of law and has its source in the supreme will of the State. Liability arises from a breach of duty which may be in the form of an act or omission. Austin prefers to call liability as 'imputability'.

It is thus evident that liability arises from a wrong or the breach of a duty in law.

Kinds of Liability

Liability may either be civil or criminal; it may also be remedial or penal; and vicarious and absolute. Absolute liability is also called strict liability.



Distinction between Civil and Criminal Liability

Civil liability consists in enforcement of the right of the plaintiff against the defendant in civil proceedings whereas in the case of penal or criminal liability, the purpose of law is to punish the offender or wrongdoer.

Civil liability may either be remedial or penal but criminal liability is necessarily penal. For example, a libel to pay damages to the person injured is civil but if criminal proceedings are initiated against him under Sections 499/500, IPC, then it shall be penal as he may be punished with the sentence of imprisonment.

Besides defamation, the liability may be civil or penal in case of assault, malicious prosecution, defamation nuisance etc. In case of civil proceedings, the remedy is in the form of damages whereas redress for criminal liability is in the form of punishment.

The main points of distinction between civil and criminal liability are as follows:

- (1) Civil liability arises when a wrong is against a private individual but criminal liability arises in case of an offence which is wrong against the society.
- (2) Civil liability entails damages but criminal liability results in punishment.
- (3) The procedure for determining civil and criminal liability is different. The civil liability in case of a civil wrong is determined by civil proceedings in a Civil Court but criminal liability is imposed by criminal proceedings instituted by the State against the offender.
- (4) In case of civil liability, it is the act and not the intention which is taken into consideration but in case of criminal liability it is the mens rea which is the determining factor.



Penal and Remedial Liability

Liability may also be penal or remedial, the former involving the idea of punishment while the latter consisting in the specific enforcement of the plaintiff's right without any element of punishment in it.

For example, liability to pay a fine is penal while liability to repay a debt is remedial. Criminal liability is generally penal while civil liability is mostly remedial, though in some cases it may carry penal consequences.

Theory of Remedial Liability

The basis of remedial liability is to be found in the maxim *ubi jus ibi remedium* which means where there is a right there must be a remedy. When law creates a duty, it ensures its fulfilment also. Where there is a breach of duty, there must be some remedy prescribed by law and enforced by law.

Thus, the purpose of remedial liability is to ensure the specific enforcement of the plaintiff's right. It aims at protecting the right of the plaintiff rather than punishing the wrongdoer.

There are, however, three exceptions to this rule when law might accept the right of the plaintiff and yet it may not enforce it. These exceptions are:-

- (i) **Duties of imperfect obligation**- In such case law recognises the right but does not enforce it.

For example, the liability of a debtor in case of a time-barred debt is recognised by law but it is not enforceable by the courts. Therefore, the



claim of the creditor to recover the debt lapses on expiry of the prescribed period of limitation.

However, even though the time barred debt is not enforceable by the Court, it does not mean that the court denies the fact that the debtor owes the debt to the creditor. In other words, the payment of time-barred debt by the debtor to the creditor will be perfectly valid in law.

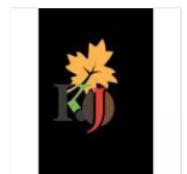
Thus, the effect of the debt being time barred only renders it unenforceable but does not extinguish the right of the creditor to receive the debt amount even if it is time-barred.

- (ii) **Duties which by nature are incapable of specific performance**- In certain cases, the nature of the duty or the corresponding right is such that it cannot be specifically enforced.

For example, everyone has a right to reputation and therefore, there is a corresponding duty imposed on others not to violate such a right. But if a libel is committed, the specific enforcement of corresponding duty of the defendant (ie., person who has committed libel) is not possible.

In other words, once a mischief has been done, it cannot be undone. In such cases, damages are perhaps the only adequate remedy. However, this principle does not apply to cases of continuing wrongs, e.g., nuisance. In such cases, the Court may order the wrongdoer to desist from continuing with the nuisance.

- (iii) **Where specific performance is inexpedient or inadvisable**- There are certain categories of cases in which though specific performance is possible, law may not resort to it where other remedies would satisfy the requirements of law.



For example, law does not enforce the specific performance of a promise of marriage or painting of a picture but normally awards damages in such cases.

Theory of Penal Liability

As stated earlier, the main purpose of penal liability is either directly or indirectly, to punish a wrongdoer. The basic principle underlying penal liability is contained in the maxim *actus non facit reum, nisi mens sit rea* which means that 'act alone does not amount to crime, unless it is accompanied by a guilty mind'. Therefore, two elements, i.e., act and a guilty mind are essential requirements to constitute a crime.

No person can be punished merely because his act resulted in some crime unless it was accompanied by *mens rea* or guilty mind.

Conversely, mere presence of *mens rea* shall not constitute a crime or an offence unless it is accompanied by some act. Thus 'act' is the physical element of the crime and *mens rea* is its mental element.



Law of Obligation

Introduction

Obligation in its popular sense is merely a synonym for duty. In legal sense, it is merely one class of duties, namely, those which are correlatives of rights in personam. Salmond defines obligation as the vinculum juris, or bond of legal necessity which binds together two or more determinate individuals. In its juristic sense, obligation includes the following:-

(i) A duty in personam such as a duty to pay a debt, to perform a contract or to pay damages for torts but not the duties in rem such as duty to refrain from interference with the person, property or reputation of others.

(ii) Obligation also denotes the bond of legal necessity which the Roman law called vinculum juris, that is, not only a duty but also a correlative right of another person in the same transaction. Thus in a contract for sale of property the purchaser has a right to receive the property which is sold on payment of price and the seller is under an obligation to part with the property and hand it over to the purchaser on receipt of the price.

(iii) In the third sense, obligation is considered as a proprietary right in personam, which means a duty which corresponds to such a right. But the rights which pertain to a person's status such as those created by marriage etc. are not obligations even though they are rights in personam.



Definition of Obligation

Holland has defined obligation as a tie whereby one person is bound to perform some act for the benefit of another. In some cases, the two parties agree with their mutual consent to be bound together, in other cases they are bound without their consent.

In every case, it is the law that ties the knot, and its untying (solution) is competent only to the same authority. There may, however, be cases in which a merely moral duty as opposed to a civil obligation receives legal recognition. For instance, if a person who owes a debt, pays it in ignorance that it is time-barred by statute of limitation, he will not be allowed to recover it back from the creditor.

Kinds of Obligations by law

Considered from the point of view of their sources, obligations are divisible into the following four classes :-

1. Contractual (Obligationes ex contractu)
2. Delictal (Obligationes ex delicto)
3. Quasi-contractual (Obligationes quasi-ex-contractu)
4. Innominate.

Contractual Obligations

A contract is a kind of agreement which creates right in personam between the parties to it, e.g., contract of sale and purchase, leases and guarantee etc. The rights so created are proprietary in nature, but sometimes they may not be in personam such as the promise of marriage, which falls within the law of status.

Similarly in case of a contract of pledge, reciprocal obligation of the debtor and creditor are involved. The debtor is entitled not only to have the thing pledged re-



delivered to him, on payment of his debt, but also to have it preserved with care and attention by the creditor.

A warranty also creates obligation as a result of contract between the parties. It is usually with reference to title or quality of the goods/things, though mostly accessory to a contract of sale. It may also extend to hire and purchase agreements.

These obligations resulting from particular contracts are dissolved and terminate the right in personam when there is performance or release from performance or certain events make their performance impossible.

Delictal Obligations

These are obligations arising out of torts. It means a duty of making pecuniary satisfaction for the wrong, i.e., tort committed by the defendant.

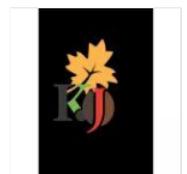
Thus, a tortious obligation is a liability to pay pecuniary damages for civil wrong which in English and Indian law is confined to those specific torts for which remedy is an action for damages and does not include a mere breach of contract or of a trust or other equitable obligations.

A tort may be defined as a civil injury the remedy for which is an action for damages. But only those civil remedies are torts where the appropriate remedy for them is an action for damages. Thus a civil injury resulting from a breach of a contract or a trust is not a tort.

Quasi-Contractual Obligation

These obligations are regarded by law as contractual though they are not so in fact.

In certain cases, the law departs from the actual facts and implies a contract by fiction. For example, a money decree of the court creates an obligation which is not contractual as there is no prior agreement to pay. The law, however, presumes that there is a duty to pay and also a promise to pay. Therefore, it is quasi-contractual obligation.



The following may be treated as illustrative cases of quasi-contract:

(i) Claim for necessaries supplied to a person incapable of contracting on his own account. Thus, A supplies B, a lunatic, with necessaries suitable to his condition in life. A is entitled to be reimbursed from B's property. A supplies to the wife and children of B, a lunatic, with necessaries suitable to their condition in life. A is entitled to be reimbursed from B's property.

(ii) Reimbursement of a person paying money due by another in payment of which he is interested. Where 'B' holds a land on a lease granted by 'A', the Zamindar. The revenue payable by A to the State Government being in arrears, his land is advertised for sale by the Government. Under the revenue law, the consequences of such sale will be annulment of B's lease. B in order to prevent the sale and consequent annulment of his own lease, pays to the Government the sum due from A. In such a case, A is bound to make good to B the amount so paid.

(iii) Obligation of a person enjoying the benefit of a non-gratuitous act. Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.

Innominate Obligations

Salmond calls it a residuary class of obligations. Those obligations which are not covered under any of the aforesaid three categories are called innominate obligations. For instance, the obligations of trustees towards their beneficiaries and other equitable obligations are the species of innominate obligations though they form a part of the law of property in modern legal systems.

