JURISPRUDENCE
[Legal Theory]

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Class-room live lectures edited, enlarged and updated

Msrlawbooks

JURISPRUDENCE

[LEGAL THEORY]

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Textual and Reference Books :

Salmond's Jurisprudence	Fitzerald
Elementary Jurisprudence	Keeton
Jurisprudence Vols. 1 to 5	Roscoe Pound
Jurisprudence	Holland
Law in the making	Allen
A Textbook of Jurisprudence	Paton
Elements of Jurisprudence	Dias

INTRODUCTION

Jurisprudence means 'knowledge of law' (Prudence=knowledge Juris=law). Of all the subjects studied by the students, this presents itself tobe a formidable one, a difficult nut to crack.

The reason is that it deals with the basic, essential, theoretical, background to the various legal conceptions like Law, legal rights possession contracts, trusts, negligence, justice etc, For a general reading, the subject may look to be arid and abstract.

However, a systematic and analytical study would create more interest in the subject. An attempt is made here to present the subject with such an analysis and systematisation as would create confidence'to the student. Although each has his own method of study, it may be stated here, as a pointer that each reading must be simultaneously done with the writing of the 'point's. Then, these points should be read, re-read and digested.

The study and appreciation of this subject keeps the student at the threshold of a store-house of the "knowledge of law".

Understanding 'law is a life's ambition to jurists and experts, but yet, they acknowledge that it has become difficult to fathom the deep ocean of law. Salmond, Keeton, Hart, Roscoe Pound and others after specialising 'Jurisprudence' for over decades, have opined that they have only attempted to know the law.

A study of this subject is a sine quo non to the student of law. It is an additional feather to his cap!

"**Law is an ass",** so goes a saying, the meaning is not that law has the qualities of a donkey, but, I think, it means : to understand law, **one should work like an ass!**

'Knowledge of law' is a rich jewel to acquire, and, a priced virtue to possess. Serious attempt at the acquisition of such a treasure, is not an experience to be avoided but, a privilege to be sought. The path is presumably difficult, but, is richly rewarding.

SYLLABUS

1. Jurisprudence : Meaning, Nature and Purpose, analytical, Historical and Ethical Schools.

2. Nature of law : Law, Imperative law, and Natural law theories legal realism, Hart's theory, Constitutional law, International law, definition of law, function and purpose of law, Questions of law and

fact; law and equity.

3. Administrative : Origin-necessity-Theory of punishment; of justice kinds of punishment.

4. Sources of law : 1. Legislation-Nature, supreme legislation-Rules of Interpreation-Mischief Rule, Golden Rule etc.

2. Precedent: Theory authoritative and persuasive precedents, stare decicis, ratio decidendi.

3. Custom: Meaning, kind-scope-

5. Legal rights: Characteristics, kinds of legal rights.

6. Ownership and possession :

1. Corporeal and Incorporeal ownership-trust, vested and contingent interests.

2. Possession in fact and in law-Animus possidendi-Immediate & Mediate possession-Relation between possession and ownership possessor remedies.

7. Persons: Meaning of personality-legal person-legal stauts of dead persons, Unborn person, corporations-

8. T i t l e s : Meaning,vestitive facts, agreements.

9. Liability : Nature and kinds, penal liability, mens rea; remedial liability.

10. Negligence: Meaning, advertence and inadvertence, duty of care, Donoughue Vs. Stevenson, subjective and objective theories.

11. Intention : Meaning,! intention and motive, malice, Jus necessitatis.

12. Strict liability : Ryland Vs. Fletcher-Theory and extent of strict liability.

13. Mistake of law and fact.

14. Vicarious Liability.

15. Property : Meaning, Kinds, Movable and Immovable property, real and personal, rights in re propria-leases-servitudes Acquisition: Modes, occupation, prescription, inheritance.

16. Obligation: Nature and meaning, solidary obligations, sourc . es-Contractual'tortuous, quasi-contractual and innominate obligaions.

17. Procedure : Procedural and substantive law, law of Evidence.

QUESTIONS BANK

1. a) What is jurisprudence? Explain its function and purposes

   b) Explain the different schools of jurisprudence:

   Analytical, Historical and Ethical schools.

2. a) Discuss Austin's theory of law as the command of the Sover eign (Imperative law) and bring out the defects of his theory.

   b) Examine law as the dictate of reason (Natural law theory).

3. a) Examine Salmond's definition of law. State the merits and demerits of administrative of justice according to law.

   b) Discuss legal realism 'Examine: the life of law has not been logic, it has been experience.

4. a) What are. the various sources of law ? Assess the importance of legislation.

   b) Examine 'precedents' as a source of law. Distinguish between authoritative and persuasive precedents.

   c) State the advantages of legislation over precedents.

   d) Explain what circumstances, destroy or weaken the precedents.

   e) Discuss 'custom' as a source of law.

5. a) Explain the 'Theories' of punishment,

   b) Discuss 'cure the criminal, not kill him'.

6. a) What are the characteristics of legal right ?

   b) Explain the different kinds of legal rights.

7. Bring out the significance of legal personality. Examine the status of

   1. Dead men 2. Unborn person

   3. Lower animals and 4. Corporations.

8. What are solidary obligations?

   Explain the different kinds and sources of solidary obligations.

9. What are the various modes of acquiring property. Explain each mode with illustrations.

10. What is ownership ? "ownership is a bundle of rights". Discuss

    Distinguish (1) Ownership from possession.

    (2) Vested from contingent ownership.

    (3) Trust ownership from beneficial ownership.

    (4) Legal from equitable ownership

11. What is negligence ?

    Explain the concept of 'Standard of care'.

Explain the subjective and objective theories of negligence.

12. Write an essay on strict liability.

13. Discuss the conditions of penal liability.
(Actus non facit reum, nisi mens, sitrea)

14. Write Short Notes on:

1. Servitude.
2. Rebuttable and irrebuttable presumptions.
3. Animus possidendi.
4. Jus necessitates.
5. Possessory remedies.
6. Vestitive facts.
7. Quasi-contract obligations.
8. Acts and omission
9. Mischief rule.
10. Ratio decidendi and obiter dictum.
11. Mistake of fact.
12. Mistake of law.
13. Innominate obligations.
14. Jura in re aliena and in repropria.
15. Imperative law.
16. Substantive and procedural law.
17. Stare decisis.
18. Constitutional law.
19. Supreme legislation.
20. International law.
21. Hart's concept of law as a system of rules.
22. Questions of law and questions of fact.
23. Substantive and Procedural law.
24. Possession in law or in fact
25. Corporeal from incorporeal possession.
26 Prescription

15. (a) Discuss the necessity of Administration of Justice. Distinguish between the administration of Civil from Criminal Justice.

(b) Explain the various forms of Civil Justice.

16. Distinguish supreme from subordinate legislation. Discuss the

various types of subordinate legislation.

17. (a) Distinguish:

(1) Sole ownership from co-ownership

(2) Real from personal property

(b) What are the secondary functions of courts ?

CONTENTS

CHAPTER 1

JURISPRUDENCE : MEANING & VALUE

Ch. 1.1 Jurisprudence: Meaning:

Jurisprudence is derived from the Latin terms ‘Juris’ meaning legal and prudentia meaning "knowledge". It is that science which deals with the "**Knowledge of law**".

It is defined as a study of the fundamental legal principles including their philosophical, historical and sociological bases, and, an analysis of legal concepts.

It is a type of investigation into the essential principles of law and the legal systems (Salmond). It is the science of the first principles of civil law. The legal concepts like contracts, torts or criminal law consist of a set of rules. It has no such legal authority and further it has no practical application. The jurists have a free approach in their investigations. Further, the method of enquiry in jurisprudence is different from other legal subjects.

The questions answered are: What is law ?

What it is ,for a rule , to be legal rule ? What distinguishes law from morality, etiquette etc.,

The main fields of investigation are the following:

i) The nature of law, its sources: Administrative of Justice, statutory interpretation etc.,

ii) An analysis of:

a) The legal concepts of right and of its kinds and

b) Concepts like "intention", "negligence" "ownership" "possession" "persons" "liability", "obligations", Substantive and procedural laws" etc.

Ch. 1-2 Value of Jurisprudence:

Jurisprudence does not contain a sets of rules as in contracts or torts and also has no practical application. However, it has its own values, unique and distinctive.

i) The subject has its own intrinsic interest.

ii) Its researches have influenced other subjects in the field of political, medical, and social thinking.

iii) It is educative, as it sharpens the lawyers own techniques.

iv) Its method and explanations help resolve the complexities of law. Thus, theory helps law to solve problems and,

v) Professional lawyers may get a glean into the sociology of law i.e., the realities of time, and, make them look-forward with a orientation.

Ch. 1-3 Schools:

There are three main schools of jurisprudence: They are 1. Analytical 2. Historical 3. Ethical Schools.

1.Analytical School:

Also called English School. It aims at a systematic legal exposition of the various principles. The approach, is dogmatic. The founder of this school is Austin. The school aims at analyzing the contents of the

various legal notions past or present.

Main topics dealt with are:

i) Analysis of the concept of civil law.

ii) Analysis of the relationship between systems of law

iii) Analysis of sovereignty, administration of justice, theory of • legislation, precedents, customs

iv) An analysis of the concepts -of property, possession, ownership, contracts, trusts, obligations, etc.

2. Historical School:

The founder of this school is Savigny. It is also called continental school. It aims at examining the general or philosophical part of the legal theory. The approach is historical.

The purpose is to examine the historical evolution or the processes which ultimately lead to legal system. In other words, it examines 'what it is, from what is was'. It deals with the origin and development of those fundamental principles and conceptions so essential in the philosophy of law. These are the same as those dealt with in the analytical school, but the approach is Historical.

The influence of social conditions on legal conceptions is emphsised. It examines now these concepts evolved through generations.

3. Ethical School:

It deals with the general or philosophical part of the science of legislation.

The purpose is to set forth the law, not as it is or has been, but as it ought to be. It does not deal with the present but deals with the ideals for the future.

The theory of Justice in relation to law is the concept of this ethical school. Emphasising the ethical or moral significance of various topics is its main concern.

Grotius is called the father of this school. Kant and Hegel followed him, and developed further the ethical concepts.

In order to understand jurisprudence, as Salmond says, "A study of all the schools is essential because the three schools are closely related and interwoven."

CHAPTER 2

SOURCES OF LAW

Ch.2-1 Sources:

The major sources of law are: i) Legislation, ii) Precedents, iii) Custom.

Ch. 2-2 **Legislation: as a superior source: over Precedent:**

Salmond opines that 'Case law is gold in the mine, a few grains of the precious metal to the ton of useless matter, while Statute law is the coin of the realm ready lor immediate use'.

Legislation is the main source of law. It consists of the declaration of legal rules by a competent authority like the Parliament or the other legislative bodies. It is an enunciation of principles having the force of law. The courts recognise these as law.

Legislation also called Statute Law has become the standard form of law. The earlier forms, that is precedent, custom based on religious faith or practice or revelations of men have lost much of their efficacy. The result is that legislation is the most powerful and the latest instrument in legal growth.

Advantages or virtues of Legislation: i) Abrogative and Reformative Powers:

The first virtue is its abrogative power. It can abolish an existing law or make a new law. But, a precedent has constitutive efficacy-it is capable of producing very good law. But its operation is irreversible. Once it is stated it stands But, legislation can bring about reforms. Hence, legislation has destructive and reformative power.

i) Efficiency:

The duty of the judiciary is to interpret the law and apply it . The legislature is superior as its duty is to make the law; administrators operate the law. Thus, there is a division in the labour and hence much efficiency.

iii) Prospective Operation:

Statute declares the law before the commission of any act to which it applies, thus it fulfills the principles of Natural Justice. Law will be known before it is enforced. A judicial precedent creates and declares in

the very act of applying and enforcing it (e.g .Ryland V. Fletcher).

iv) Law of future:

Legislation can make Acts to meet circumstances not yet arisen. Precedent requires definite circumstances before the court.

Legislation can fill up any vacancy i.e., settle any doubt that may come to the attention of the legislature. But, a bad precedent remains until another case comes up before the court for solving the doubt or for overruling it.

v) **Superiority in form:**

The legislature produces the law in the Statute form i.e. as Acts which are of standard form. Statute law is*brief, clear and easily know-able and accessible. But, case law is hidden deep and buried from sight in the huge records of litigation & Reports.

Hence, case law is like gold that is in the gold mine, hidden in the rocks. But, Statute law is like a coin ready for immediate use.

Salmond appreciates the perfection of the form of Statute Law. Statute Law is authoritative, and it is the duty of the Courts in interpret the words and their true meanings. But, in applying case law, the courts are dealing with the ideas and principles. Statute law is rigid, but case law has the merit that it appeals to reason and justice and hence flexible and adaptation is possible.

Only when the words in the Statute are not clear, that the courts will have to interpret with reference in social purpose.

Ch. 2-3 Precedent:

For the purpose of jurisprudence the sources may be divided into 'legal and historical source's. The legal sources are authoritative, have a right in the courts and have helped the course of legal developments. E.g. The statutes, precedents writings of eminent jurists like Bentham, Austin etc.

The historical sources are not authoritative, cannot have claim as a right in the courts. Precedent therefore is a legal source.

The distinguishing characteristic feature of English law is the judicial precedent. The unwritten law or the common law is purely a product of decided cases, from 13th Century. English judges have contributed considerably for the development of common law.

A judicial precedent speaks in England with authority. It is not merely evidence of the law but a source of it, and the courts are bound to follow the law that is so established.

Precedent means 'anything said or done furnishing a rule for subsequent conduct'. Judicial decisions speak of truth and hence are followed in later cases. If so followed, such a decision becomes a precedent.

The doctrine of precedent has two meanings. In the first place in a loose meaning, it means that precedents are reported, may be cited and will probably be followed by the courts. In the second i.e. in the strict sense it means that precedents not only have great authority but in certain circumstances they must be followed.

The two theories have many supporters. Sometimes a precedent may be unsatisfactory. The rule so laid down may be be reversed by the Parliament in making the law. Further, the judges have power to reverse their own decisions and correct the mistakes.

Broadly speaking precedents are:

1. Authoritative and 2. Persuasive.

This perhaps is the solution for the controversy between the two theories.

An authoritative precedent is one which judges must follow whether they approve of it or not.

A persuasive precedent is one which the judges are under no obligation to follow, but must take it into consideration and attach such weight as it deserves i.e. it must by itself merit consideration in the eyes of the judges.

Hence, it is true to say that authoritative precedents are legal sources of law but persuasive precedents are historical sources.

1. Authoritative precedent:

The decisions given by the superior courts are the authoritative precedents which must be followed. Hence the decisions of the House of Lords are authoritative in England. In India the decisions of the Supreme Court are binding on all the courts and authorities within the territory of India. (Art.141 Constitution of India). A High Court decision is binding on the lower courts under its jurisdiction in that State.

2. Persuasive precedent:

Persuasive precedents in England are the following:

Foreign decisions e.g. Decisions of U.S. Supreme Court. The decision of other superior courts in the commonwealth countries. Privy council decisions. Judicial dicta.(Means observation stated by the way).

In. India, so far as the Supreme Court is concerned, the decisions of the foreign courts, of the Privy Council and of the U.S. Supreme Courts etc. are persuasive in character. To the High Courts in India, decisions of the Privy Council, U.S. Supreme Court and decisions of other foreign courts are persuasive.

When a precedent is referred to in a court, it is accepted or disregarded. But if it is authoritative, it is binding and should be accepted.

If it is persuasive the court may accept or disregard it. Disregarding may be of two kinds:

1. It may over-rule it or
2. It may refuse to follow it.

Such a overruled precedent is null and void. The courts of equal authority have no power to over-rule each other's decisions. If two High Courts have given conflicting opinions a legal anomaly is created. This can be resolved only by the Supreme Court.

The meaning of over-ruling is that 'the supposed rule in that decision was not allowed at all. 'Hence the intermediate transactions will be governed by the new rule decided. Overruling is retrospective subject to certain exceptions.

Ch. 2-4 Circumstances which destroy or weaken the binding force of precedents.

1. Abrogation of decisions i.e. over-ruling of decisions.
2. Reversal of a precedent on a different ground.
3. A precedent given in ignorance of the relevant statue.
4. A precedent which his inconsistent with a decision of a High Court or Supreme Court.
5. Precedent sub silentia (not fully argued)
6. Erroneous decisions.

1. Abrogation:

This may happen when the legislature makes a statute to negative the precedent. There is abrogation when the higher judicial authority either over-rules or reverses a precedent. There is overruling when the Supreme Court declares that a 'precedent' (of a High Court or Supreme Court) is wrongly decided. E.g. The Supreme Court over-ruled Golaknath's case, in Bharati's case.

The position is that a case cannot be over-ruled by an obiter dictum (said by the way).

Over-ruling may be express or implied. Implied over-ruling is a doctrine of recent origin. In such a circumstances, the earlier case is deprived of its binding authority.

2. Reversal on a different ground.

It may happen that on appeal, a case may be affirmed or reversed on a different ground. This means, that if the appeal is on ground A, the decision of the appellate court may be on ground B. Nothing is said about ground A. This may create some difficulty. According to Salmond, in such cases, the decision is deprived of its absolute binding nature.

3. Ignorance of Statute.

A decision is not binding if it is given on ignorance of a statute or a subordinate legislation. This was decided by the House of Lords in Young V. Bristol. This is so even if the court knew the existence of a provision in a statute or rule.

Even a lower court may refuse to follow a precedent on such grounds.

4. Overlooking the decision of higher courts.

If a decision is given by a High Court, overlooking the Supreme Court precedent, then the High Court decision is a bad precedent

5. Inconsistency among earlier decisions of the same court.

The general rule is that a court is not bound by its own previous decisions if they are conflicting. This may happen when the counsels have not referred to relevant authorities, or it may be that the court has acted in ignorance or forgetfulness of the cases. The binding force of such precedents is weakened. The subsequent court may over-rule the decision.

6. Precedents sub silentio:

If the decision of the court does not perceive or look to the particular point of law involved, then there is sub silentio. If there are two points of law A & B and decision is given deciding on point A & not on point B(not argued) then there is sub silentio.

The leading case is Gerard V. Worth. If the previous court decides a case without argument, with reference to the point of law, without any citation or authority, such a decision is not binding.

7. Decisions of equally divided courts:

Where the court is equally divided, in the technical sense there is no decision at all. Hence, such a precedent, has no force at all.

Ch. 2-5 **Ratio decidendi :**

What the Court decides generally, is the ratio decidendi or rule of law in a case before it. What it decides between the parties to the case, is binding on the parties. The parties under Res Judicata are barred from reopening the case after the final Court of authority makes the decision between them. If A sues B for negligent driving, parties A and B are bound by the decision of the final court.

There are circumstances, when the judgment will be against all the world i.e, in rem. That is it is binding on all third parties. For example, a nullity declaration of a marriage by the Court, determines the status of the parties, but the decision is binding on all.

Development:

The Ratio decidendi or rule of law is produced by the Court in its process of application by the judges. It should have been applied to

the'parties in respect of live issues, argued on both sides. '

In the course of his judgment, the judge may refer to hypothetical situations, or may give his general reasoning. These are therefore not binding. They are called obiter dicta (observations made by the way) and hence, have no binding force. (Blackburn's dicta are exceptions)

The Court declares the ratio, and, applies that to the facts determined by it. Later Courts, may not follow the ratio. They may distinguish or state exceptions to the earlier rule.

For example, in Bridges V. Hawkesworth the plaintiff P found a bundle of currency notes on the floor of the shop of the defendant. The Court applied the principle of "finding is keeping" and held that P was entitled to the notes. However, in S.S. Water Company V.Sharman two golden rings were found by D in the mud pool owned by P. The court, distinguished the earlier case and said, in that case, the notes had been found on the floor of the shop (public place), whereas, in this case, the rings were in the mud owned by P (private place). The Court held that P was entitled/

Difficulty in finding ratio :

It is always not easy to find out what the ratio is in some cases. Cases are there where the Court may not have supplied the reasons. There are other extreme cases, where the decision is too lengthy, and very difficult to find the ratio.

Methods to determine ratio :

Prof. Wambaugh has suggested the "reversal test". This means, we must take the proposition of law (i.e.ratio) & reverse it (i.e., put the opposite of it) and, see whether that would change the decision. If it did, it is a ratio. This test is good but has its own limitations.

The second method is stated by Dr.Goodhart. This is the material facts theory. This means we must ascertain all the relevant facts of the case, as determined by the judge and also look to the decision in respect of them. That is the ratio. This test is more theoretical than practical according to Salmond.

When several separate judgments are given by the judges in a case, the difficulty in finding the ratio is all the more difficult for the Court. In such a case Lord Dunedin says, it is not the Courts duty to find out with great difficulty, the ratio, to be bound by it.

Ch. 2-6 Obiter Dicta :

Means "what is said by the way". This is opposed to ration decidendi.

A ratio decidendi, is a proposition of law or a rule, enunciated by the Court. It should have been applied to the parties, in respect of live

issues, and also argued upon in the case. Such a ratio is binding on the later Court. In suitable cases, that court may distinguish the earlier decision. The importance of the "ratio" is that it is binding on the later Court.

However, "obiter" is different. It refers to hypothetical situations or reasoning or circumstances referred to by the judge in his decision. These are generally the observations, made by the judge. The significance is that they are not binding. The Courts will not follow these observations.

It goes to the credit of Blackburn J, for his dicta, in some leading cases, are followed with respect, by the Courts. But, the universal rule is that the obiter dicta are not binding on the later Courts.

Ch. 2-7 **Requirements of valid custom:**

'CUSTOM' observes Salmond 'is to society what law is to the State'. 'Each is the expression and realisation and the measure of the society's insight. The principles commend themselves to the community Custom embodies them, as acknowledged and approved not by the power of the state but by the public opinion of the society at large'.

A custom may be legal or conventional. Legal Custom has the force of the law is conventional in usage.

The following are the requirements of a valid custom, i)

Immemorial Antiquity :

The local custom should be long standing or of a fixed period which can be determined. Immemorial means beyond the memory of any living person. Hence, the custom must have been observed over a

period, beyond the memory of any living person, i.e., for over 100 years.

ii) Continuity :

The custom must have been enjoyed continuously. If no living man can contradict the custom set up, it must be presumed to be valid.

iii) Enjoyment as of right:

The custom must have been enjoyed as of right. If the custom has only been mentioned or followed by force or by stealth or with license it can have no claim to stand as a right. It must have been followed openly.

iv) Certainty :

The custom must be certain, clear and definite. That which is vague or not impressive will fail.

v) Reasonability :

The custom must be reasonable. This is the most complex and difficult of the requirements of a valid custom. What is reasonable or not is to be decided by the court in accordance with the prevailing notions

of natural justice and public morality. Custom must not be either immoral or contrary to public utility.

vi) Conformity with the general law :

A local custom will not be admitted if it conflicts with the fundamental principles of the law of the land.

vii) Conformity with statute law :

The local custom must not conflict with any statute or any rule thereunder. '

viii) Compatibility with other customs :

It must not be incompatible with other customs within the same locality. The court cannot sanction two hostile rules or customs.

14 ix) **Opinio juris sive necessitates :**

"Jurists opinion as necessary". The necessary mental element that the custom is obligatory and not merely optional. Such a conviction of mind is obligatory.

Reasons for reception of customary law as law :

1) Custom frequently contains principles of justice and public utility.

2) Backing custom, there is an established usage which is the basis of its continuance for the future.

CHAPTER 3

LEGAL RIGHTS

Ch. 3-1 Legal Rights and Duties :

Rights are concerned with 'interests'. Rights are defined as interests protected by moral or legal rules. But yet rights are different from interests. Interests are things which are to a man's advantage. Eg. He has interest in his freedom or his reputation. If we say that a person has an interest in his reputation, what we mean is, that he stands to advantage of good name in the society, But, if we say that the person has a right to his reputation what we mean is, that others should not take this from him.

Duties:

A duty is an act which one ought to do. Not doing of, amounts to a 'wrong'. A duty may be moral or legal.

It is a legal duty not to sell adulterated milk. If a person is curious, about his neighbours, there is no legal duty not to be so curious, this is a moral duty and therefore cannot be enforced through the courts.

Legal Rights : Characteristics ;

According to Salmond every legal right has the following basic characteristics:

1. It is vested in a person, that person may be called the owner of it, or the subject of it. i.e, the person entitled. E.g. A buys a house from B. A is the owner of the house acquired.

2. It avails against a person. It is on that other person that a corresponding duty is imposed. That person may be called the person bound, or as the person of incidence. E.g. A is the owner of the house. All others are bound by duty not to interfere etc.

3. Right obliges the person bound, to an act or omission in favour of the person entitled. This is the content of the right E.g. others not to interfere with the enjoyment of the house property, by A.

4. The act or omission relates to a thing. It is called as the object or subject matter of the right. E.g. land, house, goods etc.

5. Every legal right has a title. This means certain facts or events by reason of which the right has become vested in the owner E.g. The sale deed executed by vendor B, in favour of A (the vendee). Title vests in A.

A buys goods from B. A becomes the subject or the owner of the

goods so acquired. The person, bound by the duty are the persons in general (against the world i.e., right in Rem).

The content of the right is non-interference with the enjoyment of goods. The object or the subject matter is the house. The title of the right is the conveyance or sale deed by which A has acquired from B.

An ownerless right does not exist and is not recoginsed by law.

Legal rights in a wider sense:

In a wider sense the legal rights do not necessarily correspond with duties. Here a rule of law confers a benefit or advantage over a person. There are four classes of rights.

1. Rights in a strict sense.
2. Liberties.
3. Powers.
4. Immunities.

Each of the above has corresponding :

1. Duties.
2. No rights.
3. abilities.
4. Disabilities.

1. Rights and duties:

Legal right in the 'strict sense' has all the 5 characteristics, and bears a corresponding legal duty. Right to reputation, right to landed property, right to service under a contract etc. These form the bulk of the rights in the legal world, there are corresponding duties on others.

2. Liberties and no rights:

Legal liberty is a benefit which a person derives without legal duty on others. A is at liberty to express his opinions on public affairs. But A has 'no liberty' to publish a defamatory matter. A may defend himself against violence but he has 'no right' to take revenge upon B who has injured him.

3. Powers and liabilities:

The power to make a 'Will, or the power of appointment of an executor. The powers vested in the judges to discharge their functions. These powers have no corresponding duties on others.

But, it may be noted that liability may be correlative of power. e.g. i) An unfaithful spouse may be divorced, ii) Right or power to marry.

iii) Tenant under liability, as tenancy may be terminated by reentry

of owner.

4. Immunities and disabilities:

It is an exemption, i.e., non-subjection e.g. immunity from ordinary criminal courts given to ambassadors. Therefore an immunity creates no disabilities. Disability is the absence of power. He who has no title cannot pass a title. This is a disability of the transferor. A Minor is under a legal disability to be a party to a contract.

Kinds of Legal Rights:

Ch. 3-2 **Perfect and Imperfect rights:**

A perfect right is one which corresponds to a perfect duty (The duty is recoginsed by law and is enforceable) Eg. Breach of contract. The right is protected and can be enforced by suing for compensation or for specific performance.

Imperfect right is one which is recoginsed by law but is not enforceable. E.g. Time barred debts. Such a right to recover exists but not through the courts.

It may be noted that an imperfect right is a good defense: e.g. when time barred debt is paid by debtor, the creditor may defend his position. An imperfect right may be a sufficient security, E.g. Pledge or mortgage, though the debt is barred still the property remains a security. Further an imperfect right may have the capacity to become perfect eg. acknowledgment of a debt barred by limitation.

Rights against State, are considered imperfect though they are legal rights. In one sense, they are not enforceable against the State, as the State is the strength of it. From lawyer's view, they are enforceable against the State.

Ch. 3-3 Positive and Negative rights:

A positive right corresponds to the positive duty under which the person should do some positive act. A has a right not to be pushed into water, if pushed into water there is a negative duty on others to pull A out of water.

A negative right corresponds to a negative duty; The right gives a benefit; Acts & Omissions belong to this group.

Ch. 3-4 Rights in Rem and right in personam:

Right in rem is a real right available against the world at large. A has

a right in rem to the peaceful enjoyment of his property i.e., no-body should interfere.

Right in personam is a personal right available against a particular person or persons. If A leases out his house his right to receive the rent, is the right against the tenant only. The right of C, a creditor to receive the loan amount from the debtor B, is a right in personam.

Ch. 3-5 Rights in Re-propria and rights in Re-aliena:

Right in re-propria means right over one's own property; title, ownership etc. Right in re-aliena means right of a person over the property of another. Eg. tenants rights encumbrance right etc.

A right in re-aliena is an encumbrance on the property imposing restrictions on the owner. Eg. Mortgage or charlge.

In respect of a right in re-aliena, there is an encumbrance, but the ownership and other rights are vested in the owner.

The right of a tenant or a mortgagee in possession of the property etc. are rights in-aliena. However, the ownership remains with the owner who has the rights in re-propria.

Hence, all encumbrances, are rights in re-aliena:

Leases, servitudes, securities and trusts.

In respect of bailor and bailee, the right of the bailee is right in re-aliena but the bailor has rights in re-propria.

CHAPTER 4

LEGAL PERSONALITY

Ch. 4 Personality:

i) The personality of a human being means the possession of certain characteristics particularly belonging to mankind. E.g.; Power of thought, of speech etc.

Hence, there are certain attributes which make a human being a person having the personality recgnised by law. If these attributes are absent then that human being is not a person at all. E.g. Slaves are like chattels (things) and therefore not persons at all. Conversely, in law there are persons who are not men; e.g., a municipal corporation, A joint stock company etc. are 'persons' though they are not human beings. Similarly an idol is a person.

According to jurisprudential theory a person is any being who is capable of rights and duties. Hence any being who is capable of rights and duties is a person. Persons are the substances. The rights and duties are attributes. This is the juridical significance of personality

which has gained legal recognition capable of rights and duties is a person.

ii) Persons are of two kinds:

1. Natural persons.
2. Legal persons.

A human being is a natural person. Legal persons are beings who are treated for purposes of law as human beings.

In olden days if an ox gored a person to death, the ox was guilty of homicide and it was stoned to death and its flesh not eaten. This is no longer the law to-day. A beast is incapable of legal rights and legal duties. Its interests have no recognition in law. Today if an animal causes hurt to a person, there is no wrong. But the responsibility is no

the owner of the animal. However, cruelty to animals is a criminal offence and to that extent the animal has a legal right. A 'Trust' may be created to benefit a particular class of animals. Eg. Race horses, tigers etc. as beneficiaries. They are entitled to treatment according to the trust dead. However, if the interests of the animal conflict with the interest of human beings, the interest of the human being will prevail.

iii) Dead Man:

In so far as dead human beings are concerned, the principle is that personality commences on birth and ceases to exist at death. Therefore dead men are not persons in the eye of law. Actually they have laid down their legal personality with their lives. They are destitute of rights and liabilities. They have no rights because they have no interests. A dead man will not continue to be the owner of his property after death. In fact, he is not a owner in the interval between his death and the entry of an executor or an administrator or a successor. But this does not mean that law will ignore the desires and interest of the dead man.

There are three spheres where a man has anxieties after his death. These are the dead **man's body, his reputation and his estate.**

Hence law wants to protect such interests.

In respect of the dead body the corpse is the property of nobody. It cannot be disposed of by will; and, wrongful dealing with it will not amount to theft or hurt. But criminal law, secures a dead man, a decent burial and the violation of the dead body or the grave amounts to a criminal offence. Hence the dead man is protected in respect of his body.

A trust for maintenance of a tomb is void. The property is for the use of the living, not of the dead.

Similarly the reputation of the dead is protected under the criminal law of defamation. Libel or slander of the dead is punishable.

In respect of the estate of a dead man, he is allowed to regulate

the action of the successors under a will.

iv) **En vetre as mere:**

In respect of unborn persons law does not prevent a man from owning property before he is born. Of course his ownership is contingent because he may not be born at all! Hence, a man may settle property on his wife and unborn persons. Of course, restrictions have been imposed on such powers so as not to arrest property for generations (Transfer of Property Act , Refer Unborn person, perpetuities etc).

A child in the mother's womb is already born for purposes of law. As Justice Coke pointed out, law has conferred certain consideration on the apparent expectation of birth. Thus in respect of property, an unborn child is considered as a child born for the purposes of:

a) Acquisition of property.

b) Acquisitions, subject to the law against perpetuities

The problem is not solved whether an unborn person can have a personal and proprietary right. It has been held that a posthumous child is entitled to damages for the-death caused by the defendant. Wilful or negligent injury inflicted on the child which dies after being born alive amounts to murder.

A pregnant woman cannot be condemned and executed to death until the mother is delivered of the child. There is a conflicting decision of the English Court.

Due to the negligence of a Railway company there was a collision. There was a child in a mother's womb which received certain injuries. The court held: That the company was not liable. •

The unborn child has a contingent right and it must be born as a living human being. If the child is born dead the legal personality falls away **ab initio**. If the child dies in the womb or is still-born, his inheritance fails but he gets all the rights even if he is alive for an hour after birth. Law wants to protect the interests of unborn person.

CHAPTER 5

THEORIES OF PUNISHMENT

Ch. 5-1 Theories of punishment and their relative Merits & Demerits:

There is a complexity of social phenomena which is the main cause for commission of crimes. There are certain important social and personal facts which are mainly responsible for crimes.

These are :-

Physical Causes, mental forces, economic causes, political reasons, personal causes etc.

There are many theories concerning the justification of the punishment. As Salmond observes the ends of criminal justice are four in number: Deterrent, Preventive, Reformative and Retribution.

The preventive theory concentrates on the prisoner, but seeks to prevent him, from offending again in the future. The reformative theory sees, in the readjustment of the prisoner to the demand of society as the greatest need of the criminal law. The deterrent theory emphasises the necessity for protecting society, for so punishing the prisoner that he will be barred from breaking the law.

i) Deterrent theory :

The chief end of the law of crime is to make the evil-doer an example & a warning to all persons who are like minded with him. According to this theory offences are the result of conflicts of interests, between that of the wrong-doer and the society. Punishment makes the commission of an offence .an ill bargain for the offender, and debars the potential offender from the commission of crimes. Creation of "fear" in the mind of persons is the essence of this theory.

This theory is criticized as ineffective. During Queen Elizabeth's time, when severe punishment was publicly given to pick pockets, it

was found that other pick pockets were busy in. the crowd which had come to see the punishment!

ii) Preventive theory :

The object of punishment is to prevent repetition of the crime by rendering the offender incapable of again committing the offence. Preventive theory of punishment aims at physical restraint. Prison became an institution because of this theory. In modern times, the disability aspect has been emphasised by statutes conferring power to sentence habitual offenders to preventive terms of imprisonment, penalties, forfeiture or suspension of driving license etc.

Hi) Retributive theory :

This theory is based on "evil for evil". An offence creates an imbalance in the society, and punishment or suffering is the medium through which the balance is restored. It is simply the theory of private vengeance. Revenge is the right of the injured person according to Salmond. It means that a man should be so dealt with as he has done with

others. The basis of this theory is, that evil should be returned for evil. To suffer punishment is to pay a debt due to the law that had been violated. The rule is "**A head for a head, a tooth for a tooth and a nail for a nail".**

iv) Reformative theory:

The object of this theory is to reclaim the offender, to make him a useful member of the society by bringing about a change in his character and to give a chance to him to lead a free life in Society. According to this theory criminals are generally abnormal persons and the interest of the society is subserved by leaving these persons to the normal law abiding individuals. The stress, here is shifted from crime to the criminal. We must **cure our criminals and not kill them.** E.g. Educational discipline of the criminal.

Corporeal (physical) punishment is deemed to be brutal and degrading both to the offender and to those who inflict it. Preventive punishment turns the offender into a hard headed criminal. The treatment of the criminal should be humane, his case history should be studied and appropriate measures taken to keep him away from the wrong-doing. Eg. The cases of juvenile offenders First offender's and sex offenders, should be dealt with carefully. Nothing is gained by sending them to the prison to the company of hardened criminals.

Rather they must not be sent to reformative schools which are houses of corrections.

The theory is against all types of corporeal punishment; it commends education, training & proper social moral instructions when in prison. Modern techniques should be used to reform him, to change his attitude and approach to life.

Punishment is not an end itself. It is a means to reform and to rehabilitate the prisoner. Hence, the prisoner should be cured, and not killed.

Conclusion :

Salmond is of the opinion that primary importance is to be given to the deterrent elements is criminal justice. The reformative element should not be over-looked. But neither must be allowed to assume prominence. It is a question of time, place, circumstance and nature of the offence, that should be applied on each case.

CHAPTER 6

PENAL LIABILITY

Ch.6 Liability:

Liability or responsibility is the word or tie that comes into existence as a result of the wrongful act of an individual. This is called Vinculum juris by which a man who is under it, must do certain things. A man's liability consists in these things which he must suffer. It is the ultimatum of the law. It has its sources in the Supreme will of the State. According to Salmond, liability or responsibility is the bond of necessity that exists between the wrong doer, and the remedy. "He who commits a wrong is said to be liable or responsible for it".

Liability may be divided either as civil or criminal or as remedial or penal. In the case of civil or remedial liability, the object of the law is the enforcement of right, whereas in case of criminal or penal liability the purpose is the punishment of the wrong-doer. All criminal liability is penal. Civil liability on the other hand may be either penal or remedial.

Measure of Penal liability : Mens rea:

The basic principle of a liability is embodied in the legal maxim. "**Actus non facit reum nisi mens sit rea".** [The act alone does not amount to guilt, it must be accompanied by a guilty mind, "mens rea"]. Hence, there are **two conditions** to be fulfilled before penal liability can be imposed on a person. It is not enough that a man has done some act. Before the law can justify punishment, an enquiry must be made into the mental attitude of the doer. It is the combination of physical and mental elements that constitutes penal liability. It is not enough to •convict an accused charged of the offence of murder to prove that he has killed another. It should further be proved that he did it intentionally, wilfully and deliberately. According to Salmond, generally a man is penalty responsible for those wrongful acts which he does either wilfully or negligently.

There are three aspects of penal liability viz., conditions, incidence and measure of penal liability. According to Salmond these three elements should be taken into consideration in determining the measure of criminal liability, namely, motive of the offender, the magnitude of the offence, character of the offender. Where there is no inadvertence or negligence, punishment is generally unjustifiable. Hence in inevitable accidents or mistake it is in general a sufficient ground of exemption from penal responsibility.

Ex. A driver knowing fully well, that the bus is not having the breaks, insists to drive the bus; In consequence the bus has gone out of control and has resulted in an accident injuring B.

This is an act committed intentionally and hence the driver is liable for punishment. Here the "Mens Rea" (blame worthy mind) is there. But if the bus has been in good condition as regards breaks system, then while driving, if the accident happens, it could have been said that the accident is inevitable. It has taken place accidentally. Here the driver has no idea of accident but it is due to failure of the breaks the accident has inevitably occurred.

Father was sleeping in a room which was dark and there was a gun kept loaded in that room. His son entered the room, in darkness; the son pressed the trigger of the gun thinking it to be a switch which resulted in firing of the gun resulting in the death of the father. Father was the victim of the bullet but the son had no intention to kill his father. This is inevitable accident not murder.

CHAPTER 7
STANDARD OF CARE

Ch. 7 Negligence:

Negligence is culpable carelessness. That means the absence of such care as it was the duty of the defendant to use. It does not necessarily consist in thoughtlessness or inadvertence. A is guilty of negligence, if he drives furiously into a crowd. A may know that he is exposing others to risk.

Negligence is failure to use sufficient care.

Carelessness may exist to any degree. The degree depends on the risk to which others are exposed. The risk depends on:

1. The magnitude of the threatened evil and

2. The probability of it.

What is the yard stick of care required by Law ?

The answer is mat the "Standard of care" of which nature is capable. 'A' is not liable for the harm ignorantly done by him. This harm he could have avoided with fore-thought. A is liable if he knowingly fails to take steps to stop the harm.

The facts which help to find out the standard required are:

1. The magnitude of the risk.

2. The dangerous form of the activity.

By driving the train at 50 miles per hour, a railway company may cause a fatal accident. But, if the speed is 10 miles per hour perhaps no accident happens. But his saving is done by causing great inconvenience. Hence, the company is not liable.

In professions, want of skill or competence amounts to negligence. The person is expected to use such skill & knowledge, as is necessary for reasonable efficiency. If he is below this, he is negligent and hence liable. An ignorant physician who kills his patient is liable not because he is ignorant, but because being unskillful he ventures to do an act which calls for qualities which he does not possess.

CHAPTER 8

SOLIDITY OBLIGATION

Ch. 8 Obligation:

Obligation is a synonym for duty.

Obligations may mean one class of duties corresponding to rights in personam. E.g.: To collect rent.

Obligation may be vinculum-juris (bond of legal necessity). It binds together two or more individuals. Duty to pay a debt, to perform a contract, to pay damages for torts etc.

Obligation is not merely a duty but it is also a right. Further, an obligation belongs to the group of proprietary rights i.e., the right forms part of the estate of the owner. Therefore, an obligation is defined as a proprietary right in personam or a duty which corresponds to such a right.

"Person entitled" is called a creditor and the person who is bound, is the debtor in a narrow sense. The technical equivalent of an obligation is **choses in action** or thing in action.

E.g.: Debt, a share in a company, claim for damages for tort etc.

The normal type of obligation is between a creditor and a debtor. There may be two or more creditors or debtors, but in such a case, there

may be co-owners or persons jointly bound.

Eg.: 1) Debts by a partnership firm.

2) Debts by principle debtor, guaranteed by one or more sureties.

3) Liability of two or more tort-feasors.-

Hence, the creditor is not obliged to divide his claim into as many different parts as there are debtors. He may recover the entire amount from one debtor and leave that debtor to recover from the co-debtors. If A and B partners of a firm owe Rs.1000 to creditor C, it does not mean that A and B are under an obligation to pay Rs.500/- each. The debt is single and therefore can be recovered from any person A or B. If the debt is one or single, it is called solidary obligation. That is, each debtor is bound is solidum instead of proparte. (Proportionate

part).

Hence a solidary obligation may be defined as an obligation in which two or more debtors owe the same things to the same creditor. There are three distinct types: 1. Several 2. Joint and 3. Joint and several.

1. Several: It is several where the thing owed is the same but there are many obligations as there are debtors. Each debtor is bound to the creditor by a distinct and independent Vinculum juris. But the obligation is the same. Hence, performance by one debtor discharges all debtors.

2. Joint: Here, there are two or more debtors but there is only one debt. If one is discharged, all others get discharged.

3. Joint and several: Law treats this for some purposes joint and for other purposes several.

In order to find out the class to which an obligation belongs, it is necessary to find out the origin.

Examples:

1) **Several:**

Principal debtor and surety-where the suretyship is in a separate agreement. But, if it is in the same agreement it becomes a joint obligation.

2) **Joint:**

Debts of partners.

3) **Joint and several :**

(i) Joint tort feasors (ii) Contracts where the obligation is joint and several, i.e., all together & each is individually liable.

The various sources of obligation may be :

1. Contractual.

2. Delictual E.g. Joint tort feasors.

3. Quasi Contractual.

4. In-nominate:

Eg. Obligation of trustee towards beneficiary.

CHAPTER 9

PROPERTY

Ch. 9-1 Property:

In its widest sense "property includes all the legal rights of a person of whatever description including thereunder personal as well as proprietary rights. In a narrow sense, property includes the rights of a person and not his personal rights.

Eg.: Land, Chattels, Stocks, Patent rights, Trade marks, Copy rights etc. are property.

Broadly there are two kinds of properties. Corporeal and incorporeal (moveable and immoveable.)

Real and personal come under corporeal. Right in-propria and right in re-aliena come under incoporeal property.

Ch. 9-2 Modes of Acquisition:

1. Occupation or possession:

In case of 'Res nullius' (a thing without an owner) anyone is at liberty to take and keep it and he makes it his own by the very act of taking possession. The possession of the material object is the title to the ownership of it. Possession is the objective realisation of ownership. If a possessory owner is wrongfully deprived of the thing, he can recover it.

A person in possession is deemed to be the owner until and unless proved otherwise. A person in lawful possession cannot be ousted out, even by the owner, without observing the due course of law.

2. Prescription:

It is a mode of acquiring property. May be defined as the effect of lapse of time in creating or destroying rights. It is the operation of time as a vestitive fact. It is of 2 kinds. Positive or aquisitive and negative or extinctive. In the positive prescription it is a title or right; but in negative prescription it is a destructive fact. The rational basis of prescription is the coincidence of possession and ownership of fact and right.

3. Agreement: Includes not merely contracts but all other bilateral acts in the law. Agreement is of 2 kinds namely.

1) Assignment and 2) Grants.

By the former existing rights are transferred from one person to another, By the latter new rights are created by way of encumbrance upon

the existing rights of the grantor.

E.g.: Leases:

Agreement is either formal or informal.

4. Inheritance: On the death of the owner heritable rights of deceased survive to the heirs. Personal rights are generally not heritable. Proprietary rights are usually heritable.

The representative bears the personality of the deceased and has vested in him all the inheritable rights. That is, rights are **vested** in the heir.

Ch. 9-3 Ownership-a bundle of rights:

l. Definition: ownership denotes the relation between a person and an object, forming the subject-matter of ownership(Salmond).

It consist of a bundle of rights, and, all of them are rights in rem-against all the would.

2. The incidence of ownership are :-

(i) Right of Possession: The owner has the right to possession of his property. Hence, when this property is hired, pawned, leased, etc the owner has interest in the thing & his right continues, even though he may not be physically in possession.

(ii) R**ight of Use :**

The owner has the right to use & to enjoy the property. **(iii)**

Right to alienate or destroy :-

The owner has a right to alienate, transfer or to destroy the thing or property as he wishes.

(iv) **Duration:**

There is no duration for ownership. It is indeterminate.

In cases of lease, bailment, pledge, mortgage etc of property, the duration is for a fixed period.

• But ownership has no such condition. By death of owner, the property conies to his heirs.

v) **Residuary :-**

This means, even if all the lesser right like lease, easement etc are given away, the residuary will remain with the owner. When these are terminated, they come back to the owner.

Salmond says that it is a fallacy to say the owner's right is "absolute. The reason is the right is subject to the law of the land. The title of the owner is no doubt undisputable, but law may restrict the use of the property.

Ch: 9-4 Kinds of property :-

1. Property is mainly of two kinds: corporeal and incorporeal.

(i) corporeal property is the right of ownership in material things, (visible). It may be movable or immovable. Eg. Land,House, ornaments, gold etc

ii) Incorporeal property : It a proprietary right. It has two divisions.

a) Encumbrances (Jura in re aliena) like lease, mortgage, servitude, Trust etc.

b) Jura in re propria- a right over immaterial things: e.g. patent right, trade mark, copy right, Goodwill, etc. Salmond says that the distinction is only theoretical.

2. Movable & immovable property :

Immovable property (land) (Real property according to English law): has the following elements:

i) It is a portion on earth's surface.

ii) The ground beneath the surface down to the centre of the earth, and the space above it upto infinity.

iii) All objects under the surface in its natural state i.e. minerals, stones etc.

iv) Building permanent fixtures etc.

Movable property is any corporeal property which is not immovable, e.g. goods, chattels, furniture, etc.

Ch. 9-5 Possession

Possession in law & fact :

1. POSSESSION :- It is very difficult to define the concept of "Possession". "Possession is the most basic relation between man & things. (Salmond) It is prima facie evidence of ownership. In fact possession is considered as "nine-points" (out of ten) of law. The meaning is that it is an evidence of ownership, and he who interferes, must prove his better right or title, over the person in possession.

Legal possession should have two elements corpus (physical) & animus (or mental element) to the exclusive use of the thing.

POSSESSION in fact :-

'It is a relationship between a person and a thing" (Salmond)

To possess means to have physical control. Such a control is relative i.e., (1) it may be absolute e.g. a ring a person wears; (2) it may be to exclude other persons from interfering i.e., to keep a thing is a safe.

Two conditions are essential: (i) corpus i.e., to use the thing possessed and (ii) Animus (intention) to use it to oneself exclusively.

Hence, what is required is that the person should have a general control over the thing & should be capable of using it, excluding others. Then there is "possession in fact".

Possession in Law :-

Law given protection to possession. The person in possession has a right in rem. When he is wrongfully dispossessed, the court first determines whether the plaintiff was in possession, and, if so he is protected. If A takes away B's watch, law gives possessory remedy to B.

Legal possession is different from physical possession. A's guests at dinner are provided with spoons, forks etc, Guest has physical possession, he is not entitled to take away the spoons.

Court generally decides in case of dispute, who had the better title. In **Bridges V Hawksworth,** a bundle of currency notes, was found by a customer C, on the floor shop of A. The owner could not not be traced. Held, Q.the finder was entitled...

In **Armory V Delamorie,** the Chimney sweeper C found a golden ring when he was sweeping. He gave it to B Goldsmith's servant for valuation. B refused to return. Held C had a better title.

Possession in law or legal possession should have corpus and animus. Corpus means effective control over the thing & to exclude others. Animus is intention to have it as owner. However a child with a coin in its hand, may not have power to exclude others, but still it has legal possession.

Possession is law is possible without knowledge. A may have a golden ring in his well; he may not know it. If 'C' finds it, 'A' is entitled as he has legal possession (Sharman's case).

Ch. 9-6 Possession and ownership distinguished:

Possession	**Ownership**
1. Possession is the most basic relation between man and things.	1. ownership denotes the relation between a person and an object forming the subject matter of ownership.

2The concept is complex possession may not be legal, but still it is his possession	2. The incidents of ownership, are definite. Right to possession, to use, to enjoy, to alienate, or to destroy the thing, are exclusive to the owner. The owner has title vested in him.
3. The duration of possession is generally temporary.	3 The duration is permanent
4. Deals with a factual relationship only.	4. Deals with legal relationship in a system of law.
5. Possession may be legal, non-legal & even a pre-legal concept.	5. It is a legal concept in its strict sense.

Ch. 9-7 Vested & Contingent Ownership:

Ownership may be Vested or contingent. T executes his will giving his property to his wife W for life and on her death to A, (if A is alive on her death) or to B.

Here A & B have a contingent ownership ie., A should be alive on the death of W, B gets ownership if A is not alive on W's death. Hence, vested ownership is absolute, but contingent ownership is conditional.

Vested	**Contingent.**
1. Owner's title is perfect.	1. On fulfilment of some condition the ownership becomes perfect.
2. Owns property absolutely.	2.Owns property conditionally
3. Investitive fact is complete	3.It is incomplete.
4. Title is complete by itself	4.It is something more than mere chance or possibility; There is incomplete title.

Ch. 9-8 : Real and Personal Property:

These are English concepts and "Real refers to immovable property; "personal property" refers to movables (Refer Ch.9.4)

Ch. 9-9 Legal & equitable Ownership :

Legal ownership originated from English common law; but equitable ownership is traceable to Equity and chancery, courts. Though law & equity courts were fused together, the distinction between legal and equitable ownership, still continues.

If A orally assigns a debt to B. A remains a legal owner, but B becomes an equitable owner. The debt is one, but has two owners.

This is so in case of equitable mortgage. Legal ownership is different from this, though the property is the same. In fact, there will be legal ownership (of owner) in all equitable mortgages made by him.

Ch. 9-10 Corporeal & Incorporeal Ownership :

Corporeal refers to Land, house, machinery etc material objects (tangible) But incorporeal refers to copyright, patent, trade mark, goodwill of business, right of way etc (Intangibles).

If A has Rs.10,000/- with him, it is corporeal ownership

If A owes Rs.10,000/- to B, the right of B to recover , is incorporeal. ,

Add Ch. 9.4

Ch.9-11 Trust & Beneficial Ownership :

In case of a trust, the trustee is vested with ownership of the trust property; But, the beneficiary has the beneficial ownership. Trustee's ownership is one of form, than of substance; it is nominal. He should use his ownership for the benefit of the beneficiary.

It was to protect the interests of the beneficiary (called **cestui que trust)** that the Chancery court recognised the trust under equity law. Trustee should use the property for the benefit of the beneficiary only., and, not for his own use. If he misuses, he becomes liable to the beneficiary.

Ch. 9-12. Sole & Co-ownerships :

The general rule is that there could be one owner only ie., sole owner for a property. Two or more persons may have vested ownership in the same property, e.g. partners are co-owners of the partnership property. Co-ownership may be either ownership-in-common and joint-ownership. On the death of a co-owner, in ownership-in-common,

his right vests in his heirs according to the Law of inheritance. On the death of a Joint-owner, the right vests by survivorship.

CHAPTER 10

MISCELLANEOUS

Ch.10-1 Jus Necessitatis:

Necessity knows no law. (Necessitatis non habet legem). In the theory of wilful wrong doing, motive of "necessity" operates as an excuse, in some circumstances and it is called Jus necesitatis.

i) Necessity is not the inevitable thing where there is no choice at all. In necessity there are choices and the person selects under compelling reasons, the one for the other. Hence there is choice of values. In order to save life, one may damage the property of another: one may pull down a thatchet in order to save the others from the spreading of fire.

ii) Further, necessity creates a motive in him and in fulfilling it, the person will not be afraid of punishment. Two drowning persons A and B cling to a plank which is not in a position to support more than one. A may be under a moral duty to sacrifice to save B. But if A pulls • away and saves his own life, he is protected under self preservation.

Similarly two shipwrecked sailors were forced to starve for several days and then to kill a boy and eat him to save themselves. The act of killing may be murder, but it is done under extreme necessity. Necessity is a legal defence. The sailors of course are guilty of murder. But, the court reduced the punishment taking into consideration the circumstances of necessity. (R. Vs. Dudley)

Ch.10-2 Possessory remedies:

Possessions is a good title of right against any one who cannot show a better title. If a wrong doer is in possession, he is having a good title against all except the real owner. The real owner must proceed according to law, to recover, the same. The intention of law is that every person in possession is entitled, until he is deprived of itaccording to the decision of the court. Hence, for the protection of the possessor, certain remedies are provided which are called 'possessory remedies'.

Armory Vs. Delamarie is the leading case.

The reasons for providing such remedies are three:

i) Imperfection of early remedies: The procedure by which the owner recovered was cumbersome, dilatory and inefficient. There were many pit-falls also. Hence, it was considered that "Possession was nine points of law". Hence the original state of affairs must first be restored. Hence, possession must be given to him who had it first. Then, the question of title was to be dealt with by the court.

ii) The difficulty of the proof of ownership is the second reason a) Prior possession is prima facie proof of title, b) The defendant is always at liberty to show that he has a better title, c) The defendant who has violated the possession is not allowed to set up the plea of jus terti (third party's right of ownership).

iii) The third reason is the evil of violent self-help. Under this a person may take advantage over another. A may, by force seize the property from B. B is to be protected and the possessory remedies are necessary for him.

Ch. 10-3 Vestitive facts: (Title):

Every right is a source of that from which it flows. This source is a fact, By birth a child gets certain rights. Birth is a fact. By purchase, a vendee gets a right. Here, purchaser is a fact. Hence the fact is the root from which the right proceeds. Such a source or title may be original or derivative. In catching a fish by fisherman A, the original title is acquired by A. If A sells the fish to B, B gets the derivative title. A's title is lost. That is, it is extinctive.

Hence vestitive Facts =

(1) Investitive Fact = Original or derivative = Create Rights

(2) Divestitive Fact = Extinctive facts = Destroy Rights

(3) Derivative or alienative facts = Transfer of Rights

Hence, A's title to fish is a investitive fact. His transfer of it to B, makes it a divestitive fact. Hence, these investitive and divestive facts are called vestitive facts. The right of the creditor to receive his debt-amount becomes extinct when payment is received by him. This extintive fact is also a vestitive fact.

Hence, vestitive facts include the creation, transfer and extinction of a right. These may operate voluntarily or may be involuntary.

Ch. 10-4 Quasi-Contract Obligations:

Obligations are of four kinds:

1) Contractual.

2) Delictual or tortious.

3) Quasi-Contractual and

4) Innominate.

Obligation arising from quasi contract:

These are obligations which are not in the true sense contractual, but which the law treates as if there were such obligations. Roman Law called them quasi res extra contracts & English Law called them Implied or Quasi-contracts. A quasi contract arises from a contract implied in law. If A entres a bus, he has impliedly agreed to pay the fare. This is implied contract, but not a quasi contract. Quasi contract obligation is of two kinds:

i) A debt is a contractual obligation. But a judgement-debtor is under a quasi contract.

If A obtains money from B by fraudulent misrepresentation B may sue in tort for deceit or on a ficitious contract for the return of the money.

Reasons for recognising quasi-contracts:

i) The traditional classification of the various actions into contract or tort

ii) There is a desire to supply a theoretical base for new forms of obligations.

iii) There is a desire of plaintiff to obtain superior efficiency of contractual remedies.

Quasi-contracts are dealt with in Sns.68 to 72 of the Contract Act.

Ch.10-5 Servitude: (Easementary right)

It is an encumbrance which conditions the right of the claimant-owner to the limited use of the servient tenement without the possession of it, or ownership.

Eg. A right of way, right to air and light etc.

Servitudes are of two kinds.

i) Private ii) Public.

A Private servitude is one which is vested in a determinate individual e.g. right of way, right to fishing public servitude is vested in the public at large, as in customary easement i.e., to bury the dead at a particular place.

According to Salmond a servitude is a right to a limited use of land, unaccompained by ownership. It is a right in rem.

Servitude exists as a right over immovable property only.

Ch. 10-6 Rebuttable presumptions:

Presumptions are inferences drawn from the experience of mankind. That is, from a set of known circumstances, the unknown is presumed. The main function of presumption, is to allow the court to draw inference from proved or known facts, about unknown facts. The court presumes at the first instance the existence of certain facts. Sn.118 of Negotiable Instruments-Act provides certain presumptions. Similarly the evidence Act.

The date and signature, consideration, endorsements etc., of a N/I are presumed to be correct until the contrary is proved. When proved the presumption becomes rebutted. (Add Evidence Act: Presumption).

Ch. 10-7 Animus possidendi:

The essential element to constitute possession is "Animus possidendi". That is , an intention and this is essential. If there is corpus (physical detention of property), in addition to animus, it becomes juristic possession. The special feature is, the possession must be an exclusive claim. The claim need not be absolute. A bailee or mortgagee is entitled to juristic possession though he cannot exclude the real owner.

Animus possidendi need not be a claim on his own behalf. A person may possess a thing on his own account or on account of another.

Eg. Agent, Servant, a trustee etc

Ch.10-8 Mediate and immediate possession:

A person may possess a thing for and on account of some one else. This is called "mediate possession". If a person acquires directly or personally it is immediate possession. A sends B to buy goods for A. The moment B buys the goods, A gets the mediate possession of the goods, B gets immediate possession.

Mediate possession is of 3 kinds, i) Acquired through agent or servant, ii) Acquired through a borrower or tenant, iii) Acquired through a pawnee. Leading cases: 1. Hague Vs. West.

2. Marvin Vs. Mallace.

A bought a horse from B. He lent it to B, for a month. Held: The horse had been delivered. Hence, B holds as bailee.

In mediate possession the persons are in possession of the same thing at the same time. One is having the immediate possession whereas the other mediate possession.

Eg. Land-Lord and tenant, Principal and agent.

Ch. 10-9 Mischief Rule:

The primary duty of the courts is to "interpret" the Law.

The principle of Interpretation of Statutes styled "Mischief Rule" was enuciated in Heydon's case. In 1584 the Barons of exchequer said, that, for a true interpretation of a statute, four items should be considered:

1. What was the common law before the making of the Act?
2. What was the mischief and defect for which the common law did not provide ?
3. What remedy the Parliament has provided ?
4. The true reason of the remedy.

Since then this rule of contruction is followed by the courts as it is a safe guide to the problems of Interpretation.

Smith Vs. Hughes : The prostitutes were attracting the attention of the passers-by. The street Offences Act was made which provided for punishment for soliciting "In the street". The prostitutes attracted the people from their balconies and windows, and not in the streets.

Held as the mischief was the solicitation of people, by the prostitutes, the Act had made a remedy for it, i.e., to clean the roads. The court held that solicitation from the balcony was "In the Street" and hence the prostitutes, were punishable.

The judges have interpreted in such a manner as to supress the mischief "In the Street", and, to advance the remedy, that is, to clean the streets.

Under this concept the judges may prevent any evasions and any continuance of the mischief. It is, within their province to add force and life to cure and to provide a remedy according to the true intentions of the Parliament. This intention is to be inferred from the natural and plain meaning of statute itself.

Ch. 10-10 Constitutional Law :

The fundamental or the essential elements containing the details of States structure and State action, constitute constitutional law. In fact, Constitutional law is a body of those legal rules which determine the Constitution of the State. It is the Organic law of the State. The more fundamental and far reaching principles come under the constitution.

It contains the structure of the legislature, the methods of its actions, the structure and operation of subordinate legislatures like the local States. But structure of Municipality etc. is not part of the constitution.

The Organisation, powers and jurisdiction of the Supreme Court come within the Constitution. Other courts may not find a place there.

The organisation, power and functions of the Executive Head come within the Constitution.

A Constitution is rigid when it is written as in the U.S., India etc. It is flexible when unwritten as in England.

The Constitutional Practices customs and conventions are as a matter of fact prior to Constitutional law.

Salmond says that Constitutional law is a judicial theory. Here law and fact may be different. De facto and de jure powers may be in different persons or authorities (e.g. Crown's or Indian Presidents powers). It contains a charter of rights called fundamental.

These discrepancies in fact and in law are there in every constitution. The will of the body politic as expressed through the legislature and the courts may express itself and determine the Constitutional fact or theory

Ch. 10-11 International Law :

It consists of those rules which govern Sovereign States in their relations and conduct towards each other. To some, international law is a branch of Natural Law or rules of Natural Justice; to others it is a kind of Customary law or of a kind of imperative law enforced by international opinion. It may be a kind of Conventional law having its source in International custom.

There is nothing wrong to think that International law belongs to each of the 4 different laws: Natural law, Customary law, Imperative law and Conventional law. Though consent is the basis, it is not fully so. In respect of a new State, the rules become applicable to it. On the other hand, even in respect of big States, it may be correct to say that these have agreed through their representatives to all the rules of the law of the Nations.

There is a broad division of International Law into Common Law of Nations and particular principles of law of Nations. Universally acknowledged fundamental principles of International Law belong to the first but those between two or more States to the second.

Whether International law, is law, is a controversy. Positivists say it cannot be called law proper, as it has no law making body & also has no sanction. Some refer to natural law to show its binding force. Others say consent of states is the basis. The truth is between these two.

It may not have all features of standard legal system of law-making, courts with compulsory jurisdiction, and law enforcement system, but it **is more than** a species of morality. It falls short of a rigid definition of law.

CHAPTER 11

NATURE OF LAW

Ch. 11-1 The function & purpose of Law :

Law is a means to an end and not an end in itself. The aim of law is to secure *justice.* Law is a body of principles recognised and applied by the State in the administration of Justice. Jurisprudence deals with the concept of justice.

i) Justice means 'equal treatment to all, placed alike'. Racial segregation law is against this concept, and, hence according to naturalists, it is no law at all. Of course there may be classifications which are legally valid.

ii) Justice may be (a) distributive and (b) corrective.

It is "distributive" when it brings about social equilibrium. It demands equal treatment when persons are similarly placed. Barring blue-eyed persons from voting, is a clear violation of equality clause. Parliament or Legislature may make law guaranteeing and defining equality.

A person's right to enjoy his property may be upset by constant trespass by his neighbour. In such a case "corrective justice" helps to get compensation from such a trespasser. Courts and tribunals administer this corrective justice. In so doing, they apply a large number of rules: giving opportunity to both sides a fair hearing, barring interested judge from presiding etc. The objective is to provide equal protection to all who are placed in equal position.

One happy result of 'corrective justice' of the court is that it has brought about continuity. This means, on the experience of the past, the public may ascertain what the result would be.

Social Engineering:

The above analysis has referred to individual rights, but, when

we look to the interests of the individuals in society as a whole, their rights and their conflicting social interests, we find law playing the role of "social engineering". This aims at maximum fulfilment of the interests of the community and of its members and also to promote the smooth running of the machinery or the society. The architect of this is **Roscoe Pound.**

Law should be just, but more than that it should be uniform definite certain, known and permanent. This enables a person, to predict what he may get from the courts.

Impartiality is the objective of law; publicly declared principles protect the administration of justice.

People in Society need not be at the mercy of others. Hence the saying "rule of law is always preferable to rule of men".

Law assures stability and security of social order.

Demerits:

i) Law suffers from rigidity.

ii) It may not change to social needs by changing itself. Thus, it lags behind social changes.

iii) Law is becoming more complex. To meet competing interests more laws are continuously passed often changed and the citizens may not know where they stand.

Ch. 11-2 Questions of law & Questions of Fact.

Questions which come up for determination before the courts are "questions of fact" and "questions of law".

a) Question of law: •

It is used in three different senses.

i) Where the court is bound to answer a question in accordance with a rule of law,-(not in its own estimation)- it is deciding a question of law. A child below 7 years of age cannot be criminally liable. This is determined according to I.P.C. Sn.82.

ii) It means, a question as to what is the law to be applied in a particular case. The rule may be unsettled or ambiguous or not yet determined so far. Once it is determined it becomes authoritative. This is

followed in later cases.

iii) Questions of law are decided by judges and questions of facts by the jury, (in England) But, there are many circumstances, where the courts decide questions of fact.

b) Questions of fact bears three meanings:

i) A question not predetermined by any rule of law.

ii) It covers all question excepts what the law is.

iii) Those questions which are to be answered by the jury.

c) Judicial discreation and judicial opinion:

Besides these two, i.e., questions of law and of fact there is the judicial determination based on judicial discretion. Further there is the smaller field where judicial opinion will have its role to play.

eg. i) Whether 'A' has committed an offence, is a question of fact, decided on proved facts.

ii) What particular offence is committed, is determined in relation to the ingredients of the offences. This is a question of law.

iii) What punishment is to be awarded, is a "judicial discretion".

iv) In a civil case, for example, whether the defendant was driving with 'due care and caution', is determined by judicial opinion.

d) Presumption and legal fiction:

v) Questions of facts into questions of law: This transformation is possible in case of presumptions, (rebuttable or irrebuttable)Based on facts, a presumption of law is made.

vi) In the case of legal fictions, there is a departure from facts to a fiction of law: An adopted son, is by fiction, the son of the adoptive father, and has all the rights according to law.

Thus, all questions are either questions of law or questions fact is, only a general rule. In the above analysis, it is clear that judicial discretion, judicial opinions, presumptions and legal fictions have their own role to play in the administration of justice.

Ch. 11-3 Substantive law and Procedural law: 1.

Definition and Differences:

Substantive law defines the rights, while procedural determines the remedies. This suggestion is true in theory, but has limited scope in practice.

Many legal rights eg. to. go in appeal to higher courts, to

cross-examine a witness, are rights in the procedural laws. Many remedies e.g. levy of fines, imposition of punishment are substantive law i.e., The Indian Penal Code. Hence, it is not correct to say that procedural law deals with remedies only.

Substantive Law	Procedural Law
1. This refers to the purpose and the subject matter but does not concern itself with the process.	This governs the process of litigation i.e., actions. These include all the legal proceeding Civil & Criminal i.e.Summons, Pleading, Proof, Judgment, Execution.
2. This concerns itself with the ends of Justice.	This deals with the means of reaching the ends.
3. It deals with the matters litigated.	3.It regulates the conduct of the courts, the litigants and their relations.(eg. Cr.P.C.,C.P.C.)
4. What facts constitute a wrong is substantive.	4.What constitutes' proof of wrong is procedural.
5. Substantive law defines the legal rights.	5. Procedures define the modes & conditions of the application of remedy.

Ch.11-5: Civil & Criminal Justice :

Lex Civil includes both civil and criminal law. But they are different. Blackstone divided wrongs into private wrongs & public wrongs.

1. Infringement of a person's civil right was a civil injury. Violations of public rights & duties (affecting the community) were crimes.

2. Remedy :- Individuals seek damages etc in Civil matters, But, State punishes in criminal matter.

3. Initiation :- Individual brings action in Civil matters in his name. But State is the injured party in Crimes and it procures in its name through officials.

4. Courts:- Civil wrongs are tried in civil courts but offences are tried in criminal courts.

Evidence to be produced is different in these courts; Even in appeal the nature of evidence is different.

5. Civil courts award damages, injunction, specific performances, money decree etc.

Criminal courts visit punishment, death penalty, Imprisonment, fine, release on probation etc.

Though these differences are maintained still there are overlappings Wrongs against state are offenses but violation of contract with Govt non-payment of tax etc are civil matters.

There are acts like trespass, defamation which are both civil & criminal There are instancee wherein compensation is awarded to the aggrieved party for criminal matters.

Conclusion :- Even though these overlappings are there, no one can doubt that the objects, methods of enforcement, evidence, & proceedings & impact in civil & Criminal matters are distinctly different.

Ch.11-6 Secondary Functions of Courts :

The primary function of courts, in the administration of justice, is upholding the rights, providing remedies (Civil courts) and, punishment (criminal courts)

However, administration of Justice in its wider sense also includes various secondary functions of courts

These functions are :

a) Action against the state :

Citizen may sue the State to recover dues from it & for restitution of property detained by it. There are the proceedings and there is no coercion or constraint by the State in which the Judiciary itself is a part.

b) Declaration of Right:

A party may claim for a declaration if his rights are under "cloud", e.g. Declaration of Legitimacy, Status as adopted son, executor, elected member etc (sn.34. Specific Relief Act)

c) Administration :

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Courts undertake the responsibility like administration of estate, or, distribution of property, liquidation of a company, trust administration etc.

d) Titles or Rights :

Judicial decrees may create certain rights or extinguish certain rights. Decree of divorce, judicial separation, removal of trustee, appointing administrator etc.

Thus the scope of civil" courts is extensive to include these secondary functions.

MAJOR THEORIES OF LAW

Ch. 12-1 Major Theories:

The major theories of law, which are prominent in legal theory (jurisprudence) are the following:

i) Law as the dictate of Reason. This is the natural law theory.

ii) Law as the command of the Sovereign of the State. This is the imperative theory. (Austin's theory)

iii) Law as the practice of courts. This is the theory of "Legal Realism". (Salmond's theory)

iv) Law as a system of Rules. This is called as Hart's theory. **Ch.**

12-1 Natural Law theory:

Natural law theory defines "law as the dictate of reason". The theorists are called the Naturalists.

Law consists of principles of Justice and morality which are deduced from the objective moral principles of nature. These are rules of conduct for human beings, and, may be discovered by natural reason and commonsense. These are true law and are not obligatory but are followed naturally by the people. This is the essence of this theory of law.

Naturalists oppose the positive law founded in Codes, Statutes, Constitutions etc., These are obligatory and are enforced by force All these, which are opposed to natural law, are riot really true law, but are only a violation or abuse of law.

Merits:

The merits of this theory of law are as follows:

i) **Superior standard:**

When the ordinary positive law falls short of some ideal, the people appeal to some higher standard based on natural law. The cry of the people in such cases would be "an unjust law is no law at all". Thus natural law has some leading role to play.

ii) Obedience:

The phenomena of nature like the movement of the moon, the earth and the heavenly bodies are governed by the law of nature obligatory and are being followed. However, people have made their own customs, manners, fashions etc., and these are arbitrary and conventional. They do not command obedience as natural law.

iii) Stoic's Philosophy:

The Stoic philosophers developed this concept further. According to them, "man should live, according to nature" since, man by nature is endowed with reason. True law is equal to right reasoning.

iv) Natural Rights:

On the ground of "reasoning", the fundamental human rights have their base in natural law. For example, equality, has its base in natural law Naturalists say

"**A dwarf is as much a man, as a giant is".**

Criticism:

Natural law has its own formidable difficulties, i)

Not followed in Practice:

Natural law holds that the people 'ought' to follow its rules. But, in reality this may not be so. For example, man out to beget children, just like a tree bearing fruits. This may not be followed. Even States may impose restrictions on begetting children.

ii) Fulfilling functions:

The principle of nature is that everything has its proper function and so, it must fulfill this function. The function of a watch is to show correct-time, as per its maker. This is its definite purpose. This

analogy is not fully applicable to man. His purposes and functions are varied. The question about his maker god creates many other problems.

iii) Functions:

According to nature, it is the function of smoke to rise, fire to burn, of tree to bear fruits, and of wind to blow. Likewise there are many functions of man founded on "reason".

iv) There is no acceptance of natural law, universally. Slavery was recognised in Rome and Greece. Inequality prevails on the basis of religion, colour etc.

v) **Contents:**

The contents of natural law are also changing. Monogamy is recoginsed in many States ; Polygamy is some others etc.

vi) Natural law has not provided for the security and protection of property and of the person of the individuals.

vii) Disputes are solved or decided by the Courts and tribunals. Applying moral or natural law, it may become difficult for them to solve.

Ch. 12-2 Imperative Theory : Austin

Imperative theory of law defines **"law as the command of the**

sovereign"

This theory states what a legal rule is, and, distinguishes it from a 'just rule' or 'a moral rule'. It takes into consideration the formal criteria of a legal rule, and distinguishes it from morals, etiquette etc.

Trieste is founder of this theory is. Austin. According to him positive law has three characteristic features : .

i) It is a type of command;

ii) It is laid down by the political sovereign &

iii) It is enforced by a sanction.

i) **Commands:**

According to Austin, every positive law is a direct or circuitous command of the monarch or the sovereign, to his subjects.

Austin explains the nature of these commands. In a State, where there is an absolute Ruler, by name R, are all the orders made by him commands? His order to his servants to close the door, or to arrange for a banquet; (if not followed the servant may be punished). There are not commands but only desires according to Austin. To be law, the command must be a general command. Of course, generality alone is not sufficient to be a law.

ii) Political Sovereign:

Law emanates from the political Sovereign or Superior. A sovereign may be a person or a group of persons, but not obedient to any other person. He enjoys the obedience of his subjects; Of course, perfect obedience may not be available. Laws may be obeyed out of respect, fear, habit or wisdom. The reason is not important for Austin, but, obedience to the sovereign exists as a fact, in general.

iii) Sanction:

Human nature being what it is, a sovereign without a means to enforce his commands would have no scope. Law stands in need of sanctions. To Austin law is something for the citizen to obey, not as he pleases but whether he likes it or not. This can be achieved by using some coercion (force), that is, by inflicting punishment, by the sovereign. Thus, sanction is part of law.

Criticism:

Austin's theory has been attacked by many.

i) The Naturalists, opposed the positive law, stating that Codes, Statutes, Constitutions etc. are enforced by force and, hence, are not true law, but a violation of law.

Moral and ethical base is essential for a good law and there cannot

be good positive law, without this base.

ii) Austin's definition of law as a command of the sovereign, is silent about customary law. Viewed from this angle, international law is no, law all according to Austin. In reality this is not so.

iii) There are some laws which are not commands, but are rules which confer only powers. Right to vote, right to contest for election etc. examples.

iv) Laws continue even after the extinction of the actual law giver. Some provisions of the Constitutions provide for restrictions on the law giver and some provisions cannot be changed, in some States, e.g. basic structure in India.

v) English law is full of judge-made law. **Austinians** argue that judges are the delegates of the Parliament. But, this is not so in reality. Under judicial review in many States judges declare law as null and void. Hence Austin's Theory is inadequate to explain this.

vi) Rules defining sovereignty are varied. Modern States have written Constitutions. These provisions are hardly the commands of the sovereign.

Conclusions:

Though critics have an edge against the imperative theory, the fact remains, that this theory contains a lot of truth.

The law emanates from and is visited with penalty by an authority. This is best explained by imperative theory than by any other theory.

Ch. 12-3 Law as the practice of Courts. Salmond

Salmond's definition of law (legal realism).

Law. is the expression of the will of the State, through the Legislature (sovereign) (Positivists' theory). Legal realism takes the position that the will of the State, is one that is expressed through the medium of the courts. The shift is from the sovereign to the Court. To the realist, the sovereign is the court.

Salmond as a legal realist, stated that all law is not made by the legislature, but courts do make law. But, in reality all law, however made, (Legislation, custom, judicial precedent) is recognised and administered by the Courts. Further, those which are not rules are not followed. Hence, he emphasises that in order to know the true law, we must look to the Courts, and not to the legislature.

On the above analysis, Salmond defined law. "It is the body of principles recognised and applied by the State in the administration of

Justice, as the rules recognised and acted on by the Courts of Justice.

Criticism :

i) Agencies other than Courts :

There are in the modern State, many other agencies, other than law courts to recognise and to apply the law. The Tribunals and the quasi-judicial bodies belong to this category. The House of Commands has exclusive powers to recognise and to punish for violation of its privileges.

ii) Exclusion of statute law :

Critics hold the view, that Salmond's definition applies to case-law and not to statute law. The reason is, a statute becomes operative, as soon as it is made and, need not wait for recognition by the Courts. To this Salmond answers : when the Courts and the Legislature are working in harmony, it does not matter whether the statute law is law because Courts recognise it, or, Courts apply because it is a statute made by Legislature. The truth is the same. (Of course problems arise when a law is struck down by the courts as.null and void).

iii) Holmes's theory :

A strong supporter of legal realism is Holmes. To him "all law is in reality judge-made." Taking the case of a "bad man", who is interested in securing his selfish interest, he says such a person looks to the Courts to know what they would do. In reality the Courts guided

by judicial discretion interpret the law and decide. Hence, it is for the courts to say what the statute means. From this angle : **the courts put life into the dead words of the statute.** Further questions of law are decided by reference and deductions of the Statute. Hence, Holmes says **"the life of the law has not been logic, it has been experience ".** Hence, the position is that a statement of law is a prediction of what the courts will decide.

Criticism :

1) **Affects definitions:**

According to this theory, no one could ever say. what the law is; but he could only predict what the judges might do. However, this affects the "definiteness" of law, and, in reality this is not he position.

2) **Legislature makes law :**

A statute is operative as soon as it is made, it need not wait for the recognition by the Courts. Courts apply them because they are law.

3) **Certainty of law :**

Statute law is so certain that parties apply them in their day -today

transactions, and, hence a great number of disputes do not go to courts.

3) **Wider perspective:**

According to the Realist, we may know the law by referring to case-law. But this is not enough. We must consult the Statues, Rules, Regulations etc. to know the law.

These criticisms apart, this-theory has its own advantages; It shows the reality behind the Statues, Rules and Regulations etc. through the medium of the Courts. This theory has gained a major victory in the United States.

Ch. 12-4 Law as a system of Rules - HART'S theory .

Hart's theory concerns itself with the analysis of the term "rule" or with a system of rules.

i) These rules deal with what "ought to be done". They are imperative and prescriptive. They have some characters of "commands". They demand repeated activity. Sometimes they are constitutive, e.g. rules of grammar. In others, regulative, as in rules of games like tennis, football etc.

These rules are followed as part of the game. Hence, observance of law by the people is part of an ordered tolerable society.

ii) The rules have two aspects:

a) external behavior and

b) Internal attitude that a behavior is obligatory.

Hart explains that when a person conducts himself to a certain pattern, he requires the same in others; if others do not confirm, he criticises them. To a rule or a set of rules, this is the reaction in the society.

iii) People comply or follow the rules not under coercion, but out of a sense of obligation. Even those who are opposed, consider the rule as an obligation to obey. Hence, law is followed under obligation and, not under coercion or force.

iv) There are the moral and legal rules in the society; moral rules apply to every human act, but, legal rule (law) applies to a number of such actions. These moral or legal rules apply to individuals whether they like them or not. They are non-optional.

v) Out of these legal rules has grown a system called the "legal system". Hart's view is that this system has arisen from the combination of the primary and secondary rules.

Primary rules are those which impose duties. Secondary rules

are those which confer the power of rule-making in the legal system and vests it in an authority eg. Parliament or any other authority. This makes uniform, dynamic rules adapting the social changes..

Criticism:

Though Hart's theory of law is convincing and has its own merits, still it has many draw-backs.

i) The division of rules into primary and secondary is not satisfactory. Change in the legislative sovereign may create problems.

ii) It is not correct to say that the entire legal system is based on rules. There are many fundamental principles which are exclusive and separate, and are found in every developed legal system.

iii) Observance of rules on the basis of internal or external attitudes expecting others to follow them, is not true in reality.

iv) Hart's analysis of Rule is incomplete in respect of his explanation of "**What ought to be done".** The truth is, that people have found the necessity of a social life. In that a legal system is a must, and, basic rules are essential in such a system.

THE END