CHAPTER V

THE ADMINISTRATION OF JUSTICE

38. Necessity of administration of justice

It has been said by Jeremy Taylor[1], "A herd of wolves is quieter and more at one than so many men, unless they all had one reason in them, or have one power over them". Unfortunately they have not one reason in them, each being moved by his own interest and passions; therefore, the other alternative is the sole resource. According to Hobbes[2], without" a common power to keep them in awe, it is impossible for men to cohere in any but the most primitive forms of society; without it, civilisation is unattainable, injustice is unchecked and triumphant, and the life of men is 'solitary, poor, hasty, brutish and short". Man is by nature a fighting animal and force is the ultima ratio, not of Kings alone, but of all mankind. However orderly a society may be, and to whatever extent man may appear to obey the law of reason rather than that of force, and to be bound together by the bonds of sympathy rather than by those of physical constraints, the element of force is nonetheless present and operative. It has become partly or wholly latent, but it still exists. We may well believe, indeed, but with the progress of civilisation we shall see the gradual cessation of the actual exercise of force, whether by way of the administration of justice or by way of war. Ultimately there is no substitute of the rule of force administered through the law. Men being what they are, their conflicting interests, real or apparent, draw them in diverse ways; and their passions prompt them to the maintenance of these interests by all methods possible, notably by that method of private force of which the public force is the only adequate reply.

Public opinion is a valuable and indeed, indispensable supplement to that to law, but an entirely insufficient substitute for it. The relation between these two is one of mutual dependence. If the administration of justice requires for its efficiency the support of a healthy national conscience, that conscience is in its turn equally dependent on the protection of law and the public force. The influence of the public censure is least fell by those who need it most. The law of force is appointed not for the just but for the unjust; while the law of opinion is set rather for the former than for the latter and may be defied with a large measure of impunity by determined evil-doers.

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1. Jeremy Taylor, Works, XIII, 306. Haber's ed.
2. Hobbes, Leviathan, ch. 13; Salmond, Jurisprudence, (1975) P. 88.

It is also to be observed that the influence of the national conscience unsupported by that of the national force, would be counteracted by the internal growth of smaller societies or associations possessing separate interests and antagonistic conscience of their own. The social sanction, therefore, is an efficient instrument only so far as it is associated with, and supplemented by the concentrated and irresistible force of the incorporate community. Men being what they are each keen to see his own interests and passions to follow it— society can exist only under the shelter of the State; and the law and justice of the State is a permanent and necessary condition of peace, order and civilisation.

39. Origin of the Administration of Justice

The administration of justice has been defined as the maintenance of rights, suppressions of wrongs and thus upholding justice within a political community by means of physical force of the State. The law and justice of State is absolutely necessary for peace, order and civilisation.

The Administration of justice is the modern and civilised substitute for the primitive practices of private vengeance and violent self-help. In the beginning of the society a man redressed his wrongs and avenged himself upon his enemies by his own hand, aided, if need be, by the hands of his friends and kinsmen. The spirit of ancient law was a spirit of revenge, which is best expressed in the Jewish Canon of "an eye for an eye, a tooth for a tooth". In those days every man was the judge of his own cause and might was made the sole measure of right.

But at the present day, a man is defended by the sword of the State. In course of time the primitive practices of private vengeance and violent self-help have been replaced by the administration of justice. We may make use of the contrast, familiar to the philosophy of the 17th and 18th century, between the civil State and the State of nature. This State of nature is now commonly rejected as one of the fictions which flourished in the era of the social contract. As long as there have been men, there has probably been some form of human society. The State of nature, therefore, is not the absence of society, but the absence of a society politically organised to constitute a State.

One of the most important elements, then, in the transition from the natural to the civil State is the substitution of the force of the State for that of individuals, as the instrument of redress and punishment of injuries. Private vengeance is transmitted into the

administration of criminal justice while civil justice takes the place of violent self-help. Nevertheless, the substitution was effected only with difficulty and by slow degrees. In the beginning the administration of justice was an optional remedy and not a compulsory substitute for self-help and private vengeance. The parties could accept it or they could favour their crude methods. But later on, with the gradual growth of the power of the Government, the State ventured to suppress this ancient and barbarous system with strong hand and to lay down the peremptory principles and declare that all quarrels shall be brought for settlement to the courts of law.

40. Civil and Criminal Justice

Administration of justice has already been defined as the maintenance of right within a political community by means of physical force of the State. It involves two parties, namely, (1) a plaintiff or a set of plaintiffs claiming certain rights, and (2) a defendant or a set of defendants, alleged to have committed contain wrong.

Administration of justice is divisible into two parts which are distinguished as (i) the administration of Civil Justice and (ii) the administration of Criminal Justice.

Civil Justice—A wrong regarded as the subject-matter of civil proceeding is called a civil wrong. Civil justice is concerned with the enforcement of rights in civil proceeding; where plaintiff claims a right against the defendant, who is alleged to have committed a wrong.

The court secures this right for the plaintiff by compelling the defendant to perform a duty. Hence, administration of Civil Justice is primarily concerned with the plaintiff and remedy of his rights. So, it is remedial in nature.

Criminal Justice—Criminal justice is penal; A wrong regarded as the subject-matter of a criminal proceeding is called a crime. Criminal justice is concerned with the punishment of the wrong. In a criminal proceeding the complainant or the prosecutor on the complaint of the complainant, claims no right but makes an allegation against the accused that a wrong has been committed by the latter. Here the court does not require the accused to perform any duty but punishes him if it is satisfied that an offence has been committed by him. Hence, criminal justice is concerned with the accused and his offense

Both in civil and criminal justice, that is, in both the proceedings civil and criminal. there is a wrong complained of. In civil proceedings, the wrong complained of is called a civil wrong, while in criminal proceedings, the wrong complained of is called a crime. When a person has by actual or threatened wrong doing, exposed himself to legal proceedings. it is either Civil or Criminal according to the nature of the proceedings that may follow. So, the distinction between the two is one of procedure.

Some writers are not content with this procedural distinction between crimes and civil wrongs. They have suggested various other distinctions considering them to be more fundamental than the procedural one: (1) The distinction between a criminal and civil proceeding is very often identified with that between public and private wrong. According to Blackstone, crimes are public wrongs and affect the whole community at large and are regarded as offences against the society and as such the criminal proceedings are conducted in the name of the State while the civil injuries are private wrongs and concern individuals only and the action is brought by the private person injured.

Salmond regards the above view of Blackstone as insufficient for the following reasons :

(i) In the first place, all public wrongs are not crimes. For example, a refusal to pay taxes is an offence against the State and is dealt with at the suit of the State; but it is a civil wrong for all that—and not a crime. Secondly, the breach of a contract made with the State is an offence against the State, but it is no more a criminal offence than is the breach of a contract made with private individuals.

(ii) On the other hand, all crimes are not public wrongs. Many crimes may be prosecuted at the suit of a private person, yet the proceedings are criminal in their nature, as for example, criminal libel; offences relating to marriage can only be investigated upon a complaint made by some person aggrieved by such offence. Hence, the division between public and private wrongs and between crimes and civil injuries is not co-incident but cross-division.

(2) In an earlier edition, Salmond stated that the difference between the two is that civil justice consists of the enforcement of rights. whereas the criminal justice is concerned with the punishment of wrongs. This statement of Salmond presents an element of truth but it is not the whole truth. Because in the first place, punishment is not always present in criminal proceedings

nor always absent in civil proceedings. Criminal proceedings for instance, may end in a mere binding over to keep the peace, which is more in the nature of a warning than of a present punishment. On the other hand, in civil cases the protection of rights may sometimes be secured through the medium of punishment, as for example, where a defendant is imprisoned to obey an injunction granted against him in a civil action.

Kenny defines crimes as wrongs whose sanction is punitive, and is in no way remissible by any private person, but is remissible by the Crown alone, if remissible at all.

It may, therefore, be said that the distinction between civil wrong and crimes relates to the legal consequences of acts. Civil justice is administered according to one set of forms and criminal justice according to another set. The former is administered in one set of courts and the latter in a somewhat different set. Civil proceedings, if successful, result in a judgment in favour of the plaintiff which may be for damages, or payment of debt, or penalty (in a penal action), or in an injunction, or decree of specific performance or delivery of possession of land or decree of divorce or in a writ of any form or in other forms of relief known distinctively as civil. Criminal proceedings, if successful, result in the punishment of the accused ranging from hanging to a fine or in binding over to keep the peace or even a release with admonition.

41. Civil Justice (Primary and Sanctioning Rights)

Civil justice, as already stated, consists in the enforcement of rights. Rights are enforced through legal proceeding which is called civil or remedial proceeding, while criminal justice is done for punishment of wrong through legal proceedings which is criminal or penal in nature. So, legal proceedings may be divided into two classes-Civil and Criminal.

We now proceed to the consideration of civil justice and to an analysis of the various forms assumed by it. The rights enforced in civil proceeding may be either (1) a primary right or (2) a sanctioning right.

Primary Right—A primary right may be explained as the bundle of those rights which are, as a matter of fact, the privileges enjoyed by any person. Primary rights do not arise from any wrong. They exist independently of wrongs and do not come into existence on account of the violation of other rights, for example, person's right to liberty, safety and reputation. The enforcement of a primary right is called specific enforcement. A violation of primary rights produces a sanctioning right. Thus, the right of a

person not to be libelled or assaulted is primary, but his right to obtain pecuniary compensation from one who has already libelled or assaulted him, and thereby violated his primary right, is a sanctioning right.

Sanctioning Right—Sometimes it becomes impossible for the law to enforce a primary right, sometimes it is possible but not expedient. For example, if by negligence I destroy another man's property, his right to this property is necessarily extinct and no longer enforceable. The law, thereof, gives or sanctions, in place therefore, a new right (sanctioning right) to receive from me the pecuniary value of the property that he has lost. If, on the other hand, I break a promise of marriage, it is possible but not expedient that the law should specifically enforce the right and compel me to enter into the marriage and, instead therefore it enforces a sanctioning right or pecuniary satisfaction for breach of the promise of marriage.

Sanctioning rights come into existence on account of the violation of the other primary rights, and it consists of a claim to receive pecuniary satisfaction from the wrongdoer. They are the result of wrongs. Their object is to remedy injuries and to prevent wrongs. Example is the right of a person to recover damages for the breach of a contract. The enforcement of sanctioning right is called sanctional enforcement.

Sanctioning right is divided into two kinds, by reference to the purpose of the law creating them :

Penalty—It is a right to exact and receive pecuniary penalty from the defendant for the wrong he has committed by violating the plaintiff's right irrespective of any damages caused thereby. This is so where there is no payment of compensation to the person injured but a pecuniary penalty is payable to the State.

Compensation—It is a right to exact and receive pecuniary compensation from the defendant in respect of the damage which the plaintiff has suffered from the defendant's wrongdoing. Such compensation may be either restitution or penal redress.

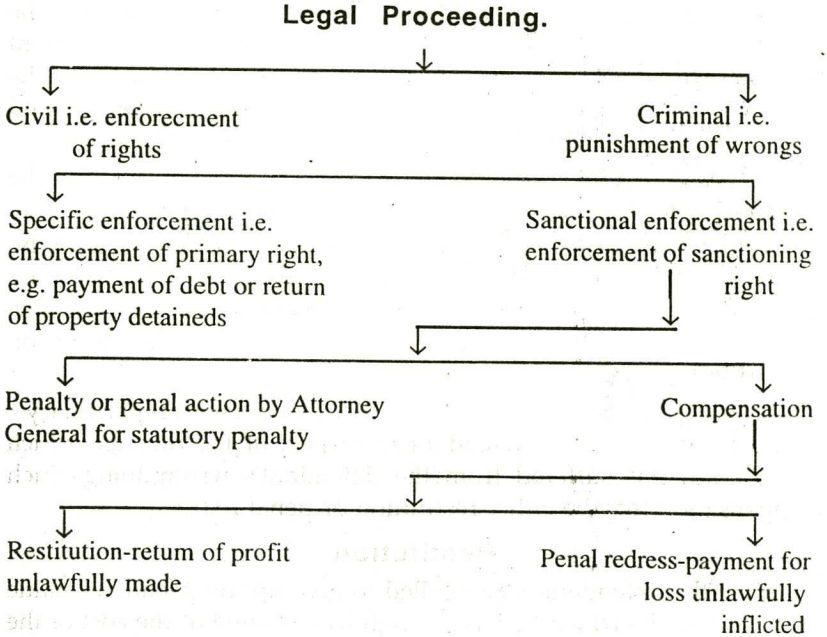
Restitution

Here the defendant is compelled to give up the pecuniary value of some benefits which he has wrongfully obtained at the cost of the plaintiff, as when he who has wrongfully taken or detained another's goods, is made to pay him the pecuniary value of them, or, when he who has wrongfully enriched himself of another's expense, is compelled to account to him for all money so obtained.

Penal Redress

In penal redress, however, the law not only compels the wrongdoer to restore back all the benefits which he has derived from his wrong; but also compels him to pay the amount of the plaintiff's loss which may far exceed the profit which he has himself received. In other words, in penal redress the compensation has a double aspect. From the point of view of the plaintiff it is compensation, and from the point of view of the defendant it is a penalty imposed upon him for his wrongdoing. Thus, if I burn down my neighbour's house by negligence I must pay him the value of it. As soon as he receives the compensation the wrong is redressed, because he has now the worth of his house. But without deriving any benefit by burning other's house I have become poorer by the value of the house paid by me and to this extent, I have been punished for my negligence.

The foregoing divisions and sub-divisions of the judicial remedies available through legal proceedings may be arranged in a tabular form thus :



In addition to the above, there are various forms of extra judicial remedies, sometimes known as self-help. In certain cases it is lawful to redress one's injuries by means of self-help, e. g. prevention of

trespass, re-entry on land, re-caption of goods, abatement of nuisance of distress damage feasant, which are the subject-matter of Torts.

42. Penal and Remedial Proceedings

Legal proceedings have been divided, in the foregoing table of legal proceedings, into five distinct classes :

(1) Actions for specific enforcement
(2) Action for restitution } Remedial Proceedings

(3) Criminal prosecutions
(4) Penalty or penal actions } Penal Proceedings
(5) Action for penal redress.

It must now be observed that the last three of these contain a common element which is absent from the others, namely, the idea of punishment. In all these three forms of procedure the ultimate purpose of the law is in whole or in part the punishment of the defendant. This is equally so whether one is imprisoned or compelled to pay a pecuniary penalty or is held liable in damages to the person injured by him. All these proceedings, therefore, are classed together as penal and as the sources of penal liability. The other forms, namely, specific enforcement and restitution, contain no such penal element; the idea of punishment is entirely foreign to them. They may be classed together as remedial.

It will be noted that all criminal proceedings are at the same time penal, but that the converse is not true. Some civil proceedings are penal while others are merely remedial.

A penal proceeding is not necessarily a criminal one. It is a criminal proceeding where there is a criminal prosecution. On the other hand, a penal proceeding is a civil proceeding. In all these proceedings the ultimate object of the law is the enforcement of plaintiff's rights, whether it is a proceeding for penal redress or for a penal action.

43. Purposes of Criminal Justice

The ends or purposes of Criminal Justice are four in number, and in respect of the purposes so served by it, punishment may be distinguished as (1) Deterrent, (2) Preventive, (3) Reformative and (4) Retributive.

Deterrent Punishment—Of the four ends of criminal justice, the first (deterrent) is the essential and all-important one, the other three being merely subsidiary. The chief end of the law of crime is to make the criminal an example and warning to other like minded with him to think about the consequences before making an

attempt to commit any crime. Punishment is deterrent in this that it prevents the commission of offences by making all the criminal activities not only injurious to others but also injurious to the doer of them, destroying the conflict of interest between the wrong doer and the society as large and thereby making every offence, in the words of Locke, "an ill bargain to the offender". The murderers are hanged, because those who are like minded may be put to the fear of like fate. Thus, deterrent type of punishment serves as a warning to those who are tempted to commit offences. Men do injustice because they have no sufficient motive to seek justice, which is the good of others rather than that of the doer of it. Punishment as a deterrent prevents the commission of like offences, by changing the motives of the other offenders so that they will fear to do what is wrong. It prevents others from committing like offences.

Preventive Punishment—Punishment is, in the second place, preventing or disabling. The secondary purpose of the criminal justice is to prevent a repetition of wrong by depriving the wrongdoer of the opportunity of repeating or committing any more crime. For example, murderers are hanged. because it is better that such persons should go out of the world, so that they may not commit sucl. crime again. Its primary and general purpose being to deter by fear, its secondary and special purpose is, if possible and expedient, to prevent a repetition of wrongdoing by the disablement of the offender. The most effective mode of disablement is the death penalty, which is confined to the crime of murder, and also to habitual offenders.

Reformative Punishment—Punishment is in third place, reformative. It consists in identifying crime with disease and consequently, it consists of applying such curative and remedial forms of punishment as will make the criminal cured of this disease. The strong supporters of the purely reformative theory condemn all the severe forms of punishment, such as bodily pain or penalty of death. They advocate imprisonment of a mild character and probation. Hence, punishment as reformative endeavours to reform the character of the offender so that he will desire to do what is right instead of fearing to do what is wrong. The reformative treatment of the criminals has been attempted in various ways. The juvenile offenders are sent to industrial school and reformatories and others are taught useful crafts to enable them, when out of jail, to earn an honest living.

Comparison between the deterrent and the reformative purposes of punishment—Offences are committed through the

influences of motives upon character, and may be prevented either by change of motive or by a change of character. Punishment as deterrent acts in the former method, that is, change of motives; punishment as reformative acts in the latter, that is, change of character. So, there is a necessary conflict between the deterrent and the reformative theories of punishment, and the system of criminal justices will vary in important respects according as the former or the latter principle prevails in it.

The purely reformative theory admits only such forms of punishment as are subservient to the education and discipline of the criminal, and rejects all those which are profitable only as deterrent or disabling, Death is, in this view, no fitting penalty; we must cure our criminals, not kill them. Flogging and other corporeal punishment are condemned as the relics of barbarism for the reason that they are degrading and brutalising both to those who suffer and to those who inflict them, and so fail in the central purpose of criminal justice.

Punishment as deterrent serves as a measure to prevent the commission of like offences by changing the motives of the offender, so that he will fear to do what is wrong, while punishment as reformative serves as a measure to prevent the commission of offences by changing or reforming the character of the offender, so that he will desire to do what is right instead of fearing to do what is wrong.

The strong supporters of the purely reformative methods regard crime as a disease and, therefore, to be remedied and not punished, According to them, the reformative treatment of the criminal is the only legitimate object of punishment. They say that we must respect the man even in the criminal and condemn all severe and deterrent forms of punishment such as bodily pain or the penalty of death. They advocate imprisonment of mild character and probation.

Now the question of all questions is whether the reformative theory of justice will be adequate in stamping out crimes.

Salmond's view—Salmond raises the following objections against the purely reformative theory:

(1) If the criminals are sent to prison in order to be there transformed into good citizens by physical, intellectual and moral training, prisons will be turned into comfortable dwelling houses and will no more serve as an effectual deterrent to those who are prepared to commit offences.

(ii) Secondly, crime will be a profitable business which will flourish greatly, because many persons will be tempted to commit offences in the hope of being sent to prison to be treated well there.

(iii) A further illustration of the divergence between the deterrent and the reformative theories is supplied by the case of incorrigible offenders. It must be admitted that there are men in the world who are incurably bad and are, by some vice of nature, beyond the reach of reformative influences. The deterrent and disabling theories, on the other hand, regard such offenders as being pre-eminently those with whom the criminal law is called upon to deal, so that they may be precluded from further mischief and at the same time serve as a warning to others. They are justly deprived of their liberty and, in extreme cases, of life itself.

It is true that the primary and most important end of criminal justice must be to deter by fear of punishment, and the general substitution of the reformative for the deterrent principle would lead to disaster. But it may be argued that substitution is possible and desirable in the special cases of the abnormal and the degenerate. The purely reformative treatment is now limited to the insane, the very young and the first offenders. The present tendency is to attribute exaggerated importance to the reformative element as a reaction against the former tendency to neglect it altogether. In view of the modern theories and tendencies, we should not insist on the primary importance of the deterrent element alone. The reformative element must not be overlooked, but it must not be allowed to assume undue prominence. In the case of juvenile offenders the chances of reformation is greater than in the case of habitual offender.

According to Salmond, the application of the purely reformative theory, therefore, would lead to astonishing result and it will be insufficient and inadequate in stamping out crimes. The perfect system of criminal justice is purely based on neither the reformative nor the deterrent principle exclusively, but it is the result of a compromise or perfect combination between the two.

Retributive Punishment—The primitive conception of justice was private vengeance. The Jewish principle of. "A tooth for a tooth, an eye for an eye" used to be considered as the most fitting form of punishment. Although the primitive method of vengeance has been replaced by the administration of criminal justice, the emotion and instinct that lay at the root of private vengeance are

still in existence in human nature. In all cases of punishment the main object is to gratify the desire of human beings for vengeance, both in their individual and their corporate capacity. Retributive punishment serves as a satisfaction of that emotion of retributive indignation which is stirred up by injustice. It gratifies the instinct of vengeance or retaliation which exists not merely in the individual wronged as well as in the society at large by way of sympathetic extension. Although the system of private vengeance has been suppressed, the emotion and instincts that lay at the bottom of it are still existent in human nature.

Sir James Stiphens says, "The criminal law stands to the passing of revenge in much the same relation as marriage to the sexual appetite".

Retributive punishment can only be justified on the ground that it serves to satisfy that sense of retribution which, in all healthy communities, is stirred up when any member acts in such a manner as to be condemned by them to some kind of punishment. Therefore, it should be the primary function of criminal justice to supply people their legitimate satisfaction.

Prof. Salmond mentions the following views of various jurists in support of the retributive punishment.

(1) The emotion of retributive indignation against injustice is one of the chief constituents of the moral sense of the community and positive morality is no less dependent on it than on the law itself. It is one of the essential factors for the moral upliftment of the community. It is good, therefore, such instincts and emotions should be encouraged and strengthened by their satisfaction.

(2) Retribution is in itself a right and reasonable thing, and the just reward of inequity or injustice—justice demands that wrong should meet its reward in equivalent suffering. It is right and proper, without regard to ulterior consequences, that evil should be returned for evil, and that as a man deals with others so should he himself be dealt with. So, retribution is an end in itself.

(3) A definite form of the idea of retributive punishment is that of expiation. In this view, crime is done away with, cancelled, blotted out, or expiated, by the suffering of its appointed penalty. The wrongdoer owes a debt to the wronged and to the law that has been violated. To suffer punishment is to pay that debt and thereby the liability of the wrongdoer is extinguished. It has been said by Lilley "The wrong whereby he has transgressed the law of right has incurred a debt. Justice requires that the debt be paid, that the wrong be expiated. This is the first object of punishment to make

satisfaction to outraged law". In this sense, crime is done away with or expiated by the suffering of its prescribed punishment, Guilt plus punishment is equal to innocence.

44. Function and Role of the Judiciary

The function played by the judiciary in the legal system is of great importance. Generally they follow the laws of the land in which they live. People go to them for enforcing their respective right as well as for punishment of the wrongdoer. The judges interprete the meaning of the rules of the existing law made by the legislature. But sometimes they modify or rationalize the customs that are followed by the people and thus, recognise the custom as binding law. The common law of England is mainly judge-made law.

To understand properly the role played by the judiciary in the legal system of the country, one has to closely scrutinise the functions performed by the judiciary. The courts normally performs the following functions :

(1) Investigation and determination of the facts in issue by preponderance of evidence adduced by the witnesses of the parties before the court;

(2) Application of the law i. e. application of the relevant law to the facts established before the court by the witnesses;

(3) Advisory function of the highest court of justice :

The Constitution of Bangladesh provides in Article 106 that the Appellate Division of the Supreme Court will extend such advice on any important point of law as and when called for by the executive authority before taking any executive action affecting the rights of the citizens.

(4) Non-legal functions : Apart from the functions listed above the courts also perform some other non-legal functions, such as administration of oath, granting licence and solemnising marriage, etc.

Do Judges make law ?

From the above discussion it appears that normally and apparently judges duty is to find out facts and the relevant law and to apply the relevant law to the facts already established before the court.

According to the declaratory theory of precedent, judges are merely law finder and not law-maker. They only declare the existing principle of law. English judge Blackstone was of this opinion. According to him, "They (judges) are depositories of the

laws, the living oracles who must decide in all cases of doubt—and are bound by an oath to decide according to the laws of the land". Thus, he is of the view that judges are sworn in to apply the law and not to make it. His view was also supported by Lord Esher. According to Dr. Allen, when a person cuts a tree into logs it seems that the logs are made by him. So is the task of the judges".

But this view is not fully correct. The common law of England is the best example which shows that judges not only modify, rationalise or interpret law but also create new law. This view is also supported by M. Smith, Austin and Bentham, the father of modern jurisprudence, who condemned the view of the declaratory theory of the precedent. Bentham termed the view held by Blackstone in respect of judicial incompetence to make law as willful disregard and said that this was the way to taking away the legislative functions of the judges. American jurists are of the view that the judiciary do make law in the absence of clear provision of law and that the English common law is nothing but judge made law.

The theories of legal realism, like positivism also condemn the declaratory theory. Like Austin the realists say that law is the command of the sovereign, but their sovereign is not the legislature but the judges or courts. Salmond upholds the view of the realist that all laws are not made by legislature and that judges also make law. According to him, laws are administered by judges and the rule which is not administered by judge is not a rule of law. Thus, Salmond defines law as made by the State for administration of justice. In U. S. A., the realist view has been upheld by Justice Holmes who is of the opinion that all laws are judge-made. Another American writer Gray supports the view that judges also make law. These views are much hostile or opposite to the declaratory theory of the precedent, once prevalent in England, that judges never make law.

However, in this context, views of the political and economic writer are worth mention. Prof. Laski is of the opinion that the law of a given society is the result of the economic system. It is made by the class which dominates the economic power. And, therefore, judges merely declare what the law is according to the satisfaction of the dominating class. According to him, there is and must be element of justice in law but they are not interchangeable. Similarly the legal institution takes after the economic shape. If there is inequality in economic system, there is also inequality in the field of legal institutions and also in the judgment of the judge. In the

19th century, therefore, judges did not recognise the trade unions unless these were recognised by the State, certainly because they were not aware of these unions or because they represented the class which at that time was dominating the economic system and as such trade unions were unfavourable to them.

In the U. S. A., the court did not agree to decide the minimum wages on the ground that it was a violation of the liberty of contract.

Today, with the spread of reasoning and consciousness of the people task of judges has been elaborated. They have a great role to play for the development of legal system and at the same time for the development of the society with a view to eradicating wrongs and evils from the society. The task of the judges is now at the same time constitutive and declaratory. Though legislature or Parliament has taken the job of making laws, yet judges have the opportunity to make law by way of interpretation of the ambiguous statutory provisions of law. The binding nature of precedent shows the importance of their remarks and decisions regarding any point of law.

The role of judiciary in the legal system has assumed much importance of late. It is the judiciary which is, in fact, the real exponent and executor of legislation. The legislature confines itself to enacting statutes. Its task ends there and therefrom commences the role or task of judiciary which is infinite. For as long as the piece of legislation is in force the judiciary has to deal with it, interprete it and enforce it. Thus, the overwhelming influence and the role of judiciary in the modern legal system cannot be overruled.

Particularly in the U. K., the judiciary becomes most important as the guardian and interpreter of law enacted by the sovereign parliament. Judges now apply and interprete the law keeping in mind the Rules of Statutory Interpretation which include the (i) Golden Rule; (ii) The Mischief Rule; and (iii) The Ejescdum Generis Rule. Judges apply the law to a question before it and gives a decision which binds the parties to the dispute and by assuming the mantle of a precedent it binds all future similar questions before any court in the realm. Of course a decision or judgment is subject to appeal in a superior court having jurisdiction over it. But once the appeal is accepted or refused, that refusal or acceptance becomes a binding law again and the reason or premise for awarding a judgment or the principle enunciated therein is called the Ratio Decidendi. Sometimes, judges pass a passing opinion or remark not on point at issue but on an analogous though relevant point, which is known as Obiter Dicta, things said by the way. They have no

binding force but these judicial opinions (Obiter) may become the basics of a decision in a future case when they become Ratio Decidendi again.

The principle of State Decisis (Precedent) is followed as a source of law in England. It plays a great role in the modern legal system. The subordinate courts invoke the aid of the precedent established by the superior courts. In fact, in the absence of a codified law or a definite law, new principles of law enunciated by courts play a great role in developing law.

Keeping all these points in view one cannot agree with the statement that the judge never makes law and such a sweeping generalisation is really deplorable. We cannot agree with the observation of Blackstone that "judges only declare law and they can never make law". Practice in the U. K. belies this principle regarding the power and jurisdiction of the higher judiciary. But on the contrary one must again be cautious and must not contend that judges always make law. They make law, it must be remembered, only in the absence of the provision of law as well as prohibition of law.

A question, therefore, comes up as to the authenticity of the power of the judiciary to make law. The power of the judiciary to make law cannot be denied, but the power is not unlimited but limited. They make law, as aforesaid, only in the absence of any specific and definite provision of law as well as in the absence of any prohibition to make law. It is the function of the legislature to make law but when the statutory law is not sufficient to meet the need then and then only judges make law by way of interpretation of the ambiguous statutory provisions to make the otherwise uncertain law definite and certain, when it becomes a precedent.

The Supreme Court of Bangladesh, can make law called precedent, and the law thus made by its Appellate Division is binding on the High Court Division and that of either division is binding on all subordinate courts under Article 111 of the Constitution. From the above discussion, we can conclude by saying that the judges of the superior courts make law although the scope is very limited as stated above.

45. Secondary Functions of Courts of Law

The primary function of a court of law is administration of justice which means the maintenance and enforcement of rights and the punishment and prevention of wrong by means of physical force of the State. It is the forcible protection of rights and

suppression of wrongs. Administration of justice, therefore, involves in every case two parties, namely, a plaintiff claiming a right against a defendant committing a civil wrong, or the prosecutor against the accused committing crime, and a judgment in favour of one or the other. But the functions of a court of justice also include the fulfillment of other and more or less analogous functions. These secondary functions of courts of law chiefly fall into the following four groups.

Petition of Right or actions against the State—The courts of law entertain claims not only against private individuals, but also against the State itself. In England, if a subject is wrongfully dismissed from service, or if he claims a debt due to him from the Crown, or in case of breach of contract by the State, he is at liberty to take proceedings in a court of law, formerly by a petition of right but now by an ordinary action, for the determination of his rights in the matter. Although such action is tried in ordinary court like ordinary case between subjects (with some procedural variations) and although the result may be a judgment and decree for damages against the State, this is not the administration of justice properly so called, for the State as a Judge in its own cause cannot exercise restraint or coercive force against itself in execution of the decree in favour of the plaintiff (subjects). But in wider sense such action forms part of the administration of justice.

Under the Constitution of Bangladesh and India, a petition may be made to the High Court or Supreme Court for the infringement of the rights guaranteed by the Constitution in the form of Writ for *Hobeas Corpus. Mandamus. Quo warrant Certiorari, as the case may be.*

Declaration of Right—A proceeding for declaration of right takes place when a person requires the help of the court of law, not because his rights have been violated, but because they are uncertain. In such a case, the claimant seeks the assistance of the court for an authoritative declaration that certain right exists, as for example, declaratory proceedings for declaration of legitimacy and of nullity of a marriage.

Administration of Estates—The third form of secondary judicial function includes all those cases where the courts of law undertake the management and the distribution of property of deceased, and also of the minor whose property is vested in the Court of Wards, for example, administration of Trust, realisation and distribution of an insolvent estate.

Title of Right—This class includes all those cases in which judicial decrees are used as the means of creating, extinguishing and transferring rights, e. g. a decree of divorce or judicial separation, an adjudication of insolvency, an order appointing or removing trustees, etc. In such cases, the decree operates not as the remedy of a wrong, but as the title of a right.

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CHAPTER VI

THE SOURCE OF LAW

46. Classification of the Sources of Law

The expression 'sources of law' has several meanings and is a frequent cause of error unless we scrutinize carefully the particular meaning given to it in any particular text.

The determination of the source of law depends upon the particular definition of law, which the society adopts. If law is regarded as being created by the will of the State, then that is the formal source of Law. If law is the command of the sovereign, then the sovereign is the formal source. On the other hand, if law is valid because it is the embodiment of natural law or absolute justice, then the source of law is the ideal which we have laid down. If, according to the historical school, law is the product of the inner sense of right, then the sense of right is the source of law. If law is valid because it is the product of custom, then the habits of the people are the source of law. The philosophical school treats, under the heading of the source of law, some of the deepest problems of legal philosophy. Thus, Gurvitch says that the question of the sources of law in only one aspect of the general study of the validity of law.

Prof, Salmond classifies the sources of law firstly into formal and material.

Formal sources—A formal source of law is defined by Salmond in his 9th Edition as that from which a rule of law derives its force and validity. Somewhere within the State there must exist some authoritative person or persons whose commands receive obedience. The commands thus given are called laws. Therefore, the foremost source of authority to issue commands is possessed by this superior person or persons. This is called the formal source of law. The only formal source of the civil law is the will and the power of the State as manifested in statutes and decisions of the courts of justice.

Material sources—The material sources, on the other hand, are those from which is derived the matter and not the validity of the law. They are the agencies by which the legal rules are created or recognised. They supply the contents of the law. An example of a material source is custom. Customary law has its material source in the usages of those who are subject to it, but it has its formal source in the will of the State, in the same manner and to the same extent as any law passed by the legislature itself.

The material source may be divided into two classes—(a) Legal or authoritative and (b) Historical or unauthoritative.

Legal Source

Legal Source of law are those sources which are recognised as such by the law itself through the mouth of the court of law. New legal rules come into existence through these sources, which are authoritative in nature, e. g. The Penal Code or the law of Contracts. A legal source is any fact which determines the judicial recognition and acceptance of any new rule as having the force of law.

Historical Source

The historical sources of law are those sources which are such only in fact and not a source in law, and as such destitute of recognition. They influence legal history and not legal theory and do not speak with authority. Examples of historical sources are foreign judgment and writings and opinion of Jurists, e. g. D. F. Mulla's book on Hindu Law.

Following are the points of distinction between legal and historical sources of law :

(1) The important distinction which calls for careful consideration is that the former are capable of recognition; the latter are destitute of legal recognition. In respect of its origin, a legal rule is often of long descent. The immediate source of it may be decision of an English court of justice. But that court may have drawn the matter of its decision from the writings of some lawyer, say a French writer Pothier, who in his turn, may have taken from the compilations of the Emperor Justinian, who may have obtained it from the praetorian edict. In such a case all these things—the decision, the works of Pothier, *the corpus juris civil* and the *edictum perpituum*—are the successive material sources. Of them the decision (i. e. the precedent) is a legal source both in fact as well as in law and the others are merely its historical sources and as such are sources in fact only but obtain no legal recognition as such. The proposition that much of the law of Rome has become incorporated into the law of England is simply a statement of fact, which has in law no recognition by English jurisprudence.

(2) Secondly, legal sources are authoritative, the historical sources are unauthoritative. The former are accepted and

applied by law courts as of right for the application of which the courts are appointed; the latter have no such claim; they may influence the course of legal development, but they speak with no authority and are not binding upon the court of law. Both the statute book and the works of Bentham are material sources of law. But what the statute book says becomes law forthwith, but what Bentham says, may or may not become law, and if it does, it is by no claim of right, but solely through the good pleasure of the legislature. Similarly, decisions of English courts are legal source and authoritative but those of American courts are, in England, merely a historical source and unauthoritative.

(3) The legal sources are the only gates through which new principle can find entrance into the law. Historical sources operate only mediately or indirectly. They are merely the various precedent-links in that chain of which the ultimate link must be some legal source to which the rule of law is directly attached.

(4) Legal sources are authoritative and the laws coming into existence through these sources are binding upon court—it is a statute law or a case-law but the historical source has no such binding effect and the court may or may not accept it, and as such they are not authoritative until they are legalised through the good pleasure of the legislature or recognised and applied by the courts.

47. Legal Sources of English Law

Having regard to the general law of England in modern times, the legal sources of English law are really two namely, legislation and precedent. The first one (legislation) consists of enacted law, having its source in legislation, while the other one i. e. precedent consists of case-law having its source in judicial decision. The first one is to be found in the statute book such as Bankruptcy Act, Easements Act, etc. while the latter is to be found in the volumes of Law Reports.

Apart from these two sources, having regard not merely to the modern and general law of England, but also to the law in earlier times, and to the various forms of special law which exist side by side with the general law, courts of law recognise two other legal sources in addition to legislation and precedent. They are custom and convention based on agreement. Customary law is that which is constituted by those customs which fulfill the requirement as laid

down by law as a condition precedent to their recognition as obligatory rules of conduct. Conventional law is that which is constituted by agreement as having the force of special law in addition to the general law of the land. By reference to their legal sources. Salmond classifies law into four kinds :

(1) Enacted law, having its source in legislation.
(2) Case-law, having its source in precedent.
(3) Customary law, having its source in custom.
(4) Conventional law, having its source in agreement.

In addition to the historical and legal sources of the law, it is necessary to note and distinguish what may be termed as literary source, though this is a continental rather than an English use of the term source. The literary sources are the sources of our knowledge of the law, or rather the original and authoritative sources of such knowledge, as opposed to later commentary or literature. The sources of Roman law are in this sense the compilations of the Emperor Justinian, as contrasted with the works of commentators. So, the sources of English law are the statute book, the reports and the older and authoritative textbooks, such as Littleton. The literature, as opposed to the sources of our law, comprises all modern textbooks and commentaries.

The above legal sources will be considered in the following chapters.

48. Sources of Law and Sources of Right

The sources of law may also serve as a source of rights. By a source or title of rights is meant some fact which is legally constitutive of rights, that is, a fact by which such right obtains its legal validity. It is the de facto antecedent of a legal right just as a source of law is the de facto antecedent of a legal principle. An examination of any legal system will show that to a large extent the same classes of facts which operate as sources of law, operate also as sources of rights. The two kinds of sources form intersecting circles. *Some facts create law but not rights; some create rights but not law, some create both at once.* An Act of Parliament, for example, is a typical source of law, but there are numerous private Acts which are clearly title of legal rights. Such is an Act of divorce, or an Act granting pensions for public services, or an Act of incorporating a Company. So, in the case of precedent, the judicial decision is a source of rights as between the parties to it, though a source of law as regards the world at large. Regarded as creative of rights, it is called judgment, regarded as creative of law, it is called a

precedent. So, also immemorial custom occasionally gives rise to rights as well as to law. It creates a right called a prescriptive right to some particular individual, while as a source of law it operates as a customary law.

49. Ultimate Legal Principles

All legal rules have historical sources. As a matter of fact and history, they have their origin somewhere, though we may not know what it is. Only some of them have legal sources. But in every legal system there are certain ultimate legal principles from which all others are derived, but which are themselves self-existent. The legal principles, whose operation is ultimate and whose authority is underived, are called ultimate legal principles. The principles, which are derived from the ultimate legal principles. are called derivative (i. e. drawn from legal sources). A rule establishing a legal source is called by Kelsen a grundnorm or initial hypothesis.

There must be already in existence some law which establishes legal sources and gives them their authority. The rule that a man may not ride a bicycle on the foot-path may have its source in the bye-laws of a Municipal Council, the rule that these bye-laws have the force of law has its source in an Act of Parliament. But whence comes the rule that Acts of Parliament have the force of law? This is legally ultimate. The source of this ultimate legal principle, that is, the Act of Parliament, is historical and not legal. Similarly the Constitution of a country is legally ultimate, its source being historical. The historians of the Constitution know its origin, but lawyers must accept it as self-existent. It is the law because it is the law, and for no other reason that it is possible for the law itself to take notice of. No statute can confer this power upon Parliament, for this would be to assume an Act on the very power that is to be conferred. So, also the rule that *judicial decisions* (precedent) have the force of law is legally ultimate and underived. No statute lays it down. It is certainly recognised by many precedents, but no precedent can confer any authority upon precedent. If, for example, any statute gives statutory recognition to the operation of precedent, then the precedent may be reduced from an ultimate to a derivative source of law.

CHAPTER VII

LEGISLATION

50. Nature of Legislation

Legislation is that source of law which consists in the declaration of legal rules by a competent authority. It is a legal source of law. It creates statute law. Legislation makes its appearance at an advanced stage of civilisation and has the tendency to exclude the other sources of law. In modern times, legislation is the principal source of law in all civilised countries.

Besides this strict and most usual application of the term legislation, it is occasionally used in two other senses :

(1) It is sometimes used in a wide sense to include all methods of law-making. In this sense, legislation includes all the sources of law. Thus, when judges establish a new principle by means of a judicial decision, they may be said to exercise legislative power and not only judicial power. Salmond is of the opinion that this is not certainly legislation in the true sense of the term. Judges, no doubt, have in certain cases true legislative power—as where they issue rules of court. But in ordinary cases, the judicial declaration unaccompanied by judicial application of it has no legal authority whatever.

In this wide sense, legislation may be direct and indirect. The former is the legislation in narrow sense. i. e. making of law by means of the declaration of it. Legislation proper is direct legislation, and all other modes of law-making are indirect legislation. According to Salmond, direct legislation is the legislation in the strict sense of the term.

(2) Secondly, the term legislation includes every expression of the will of the legislature whether directed to the making of law or not. An Act of Parliament may alter the coinage or establish a uniform time throughout the whole realm, or ratify a treaty with a foreign State or declare war or make peace. All these are legislations in a wide sense but they are not certainly the declarations of legal rules or principles with which we are concerned.

Enacted and Unenacted Law—Law that has its source in legislation is called enacted law, law from all other sources being distinguished as unenacted law. Enacted law is often more familiarly known as statute law, but this term although sufficiently correct for most purposes, is defective inasmuch as the word statute

does not extend to all modes of legislation but is limited to Act of Parliament. In enacted law, the sovereign power gives not only the force, but also the contents of law. In unenacted law only the force is so given. Blackstone and other writers use the expressions written and unwritten law to indicate the distinction in question.

51. Supreme and Subordinate Legislation

Legislation is of two kinds—(1) Supreme and (2) Subordinate.

(1) Supreme legislation is that which proceeds from the supreme or sovereign power in the State, and is, therefore, incapable of being repealed, annulled or controlled by any other legislative authority. The legislation of the Imperial Parliament is supreme according to English law, for according to Blackstone, "What the Parliament doeth, no authority upon earth can undo".

In England, the parliament is not only supreme but legally omnipotent. In view of the doctrine of parliamentary supremacy, an Act of Parliament cannot be held void for unreasonableness or indeed upon any other ground.

(2) *Subordinate Legislation*—Subordinate legislation is that which proceeds from any other authority other than the sovereign power and is, therefore, dependent for its continued existence and validity on some superior or supreme authority. All other forms of legislation other than that of the Imperial Parliament recognised by a law of England are subordinate legislations, Subordinate authorities have delegated power to legislate. They may be regarded as having their origin in a delegation of the power of parliament to inferior authorities, which, in the exercise of their delegated functions, remains subject to the control of the sovereign legislation.

The chief forms of subordinate legislation are five in number :

1. Colonial

The power of self-Government entrusted to the colonies and other dependencies of the Crown is subject to the control of the Imperial legislation. The laws passed by these authorities are colonial, which are subject to the control of the Imperial Parliament.

2. Executive

The essential function of the executive is to conduct the administrative departments of the State; but it combines with this certain subordinate legislative powers, which have been expressly delegated by the Parliament. Statutes, for example, frequently entrust to some departments of the executive Government the duty of supplementing the statutory provisions by the issue of more detailed regulations bearing on the same matter.

3. Judicial

Certain delegated legislative powers are possessed by the judicature. The superior courts have the power of making rules for the regulation of their own procedure, e. g. rule of the Supreme Court and High Court of judicature. This is judicial legislation in the true sense of the term differing in this respect from the so-called legislative action of the courts in creating new law by law of precedent.

4. Municipal

Municipal authorities are entrusted by the law with limited and subordinate powers of making special law within their means and under their control. These enactments so authorised are termed bye-laws which may be distinguished as municipal.

5. Autonomous

Occasionally the State allows private persons, e. g. Railway Companies, Registered Companies, Universities and similar other bodies of persons limited legislative authority to make bye-laws for their regulations. These bye-laws are called autonomic, which are recognised and enforced by the law courts.

These subordinate authorities derive their power from the supreme legislature and the laws promulgated by them are valid, if they are not *ultra vires,* that is, made in excess of the powers delegated to them. Their validity is determined by the court of law. Hence, the supreme legislature can repeal or annul any law passed by these subordinate authorities.

52. Relation If Legislation to Precedent

The State has, in general, two articulate organs for law-making purposes —(1) Legislation and (2) Judicial Tribunal.

The first organ, Legislature, makes new law and the second, Court attests and confirms old law, though, under the cover of so doing, it introduces many new principles.

Legislation is the most important source of law. It has proved more efficient than other forms of developing law and is gradually taking their place. As it is most powerful, so it is the latest of the instruments of legal growth. Hence, it has been rightly remarked— "Legislation tends with advancing civilisation to become the newly exclusive source of new law".

The comparative advantages and disadvantages of legislation and case-law are discussed herein below :

(1) The first virtue of legislation lies in its abrogative power. It can not only create law but also can alter or abolish an existing law, that is, it can sweep away inconvenient and unjust rules.

Precedent, no doubt, possesses constitutive efficacy, i. e., it can enunciate new principles of law and make good or better law. But except in special circumstances, precedent cannot retrace a course once taken. If the Judge is, in one sense, a law-maker, it must be remembered that this power of creation is merely an ability to close such gaps as exist in the legal system. Legislation is, therefore, necessary for legal reforms.

Prof. Salmond, in this connection, makes a general statement, "Precedents are constitutive, not abrogative". But he makes this statement subject to two qualifications :

(i) The superior courts have the power to alter the existing law by expressly overruling it. The Supreme Court in Bangladesh can overrule its decisions.
But in legal theory there can be no overruling of precedent by a subsequent decision in view of the fact that prior erroneous decision was not law at the time it was made, the new decision operating retrospectively. Hence, Salmond remarks that the overruling of a precedent is not the abolition of an established rule of law, it is an authoritative denial that the supposed rule of law has ever existed.

(ii) Secondly, if through some error a decision is contrary to pre-existing law, it nevertheless constitutes a precedent. This is based on the doctrine of *factum valet*,—that is, a thing which ought not to have been done, may nevertheless be valid when it is actually done. The decision does not cease to have legal efficiency by virtue of the doctrine of *factum valet*.

(2) The second virtue of legislation is that it allows an advantageous division of labour. It improves efficiency by dividing the function of making the law and of administering it whereas the precedent unites these two functions in the same hand.

(3) Legislation satisfies the requirement of natural justice that law shall be known before they are enforced and thus the people are fore-prepared and fore-wanted.

Case-law, on the other hand, is created and declared at one and the same time. Thus a judicial decision very often gives the litigants unexpected surprises.. It operates ret

rospectively and is applied to facts which are prior in date to the law itself. But this is not so in case of enacted law, particularly in case of statutes creating criminal offensces.

(4) Legislation can by way of anticipation make rules for cases that have not as yet arisen, but the precedent must wait until the actual concrete instance comes before the court for decision. Thus, the precedent is dependent on, and the legislation is independent of, the accidental course of litigation. So far as precedent is concerned, a point of law must remain unsettled until by chance the very point arises for determination.

(5) The case-law has no universal application. The decisions of a subordinate court is not binding on the superior court, but this is not the case with statutory law. An Act of Parliament is equally binding on the superior as well as, the subordinate courts.

(6) Finally, the enacted law is superior in form, complete, certain, systematic, brief and easily accessible to all. On the other hand., case-law is incomplete and unsystematic, and buried from sight and knowledge in the huge and daily growing mass of records of bygone litigations valuable part of which is to be extracted from the judgment of a particular case which may run into hundreds of pages. Case-law is gold in mine—a few grains of the precious metal to the ton of useless matter—while statute law is coin of the realm ready for immediate use.

This very perfection of form, however, brings with it a defect of substance from which case-law is free. Statute law is embodied in an authoritative form of written words, and this literary expression is an essential part of the law itself. Court's duty is, in general, to apply the letter of the law. They are concerned with the spirit and reason i.e. the social purpose of it only so far as the spirit and reason have succeeded in finding expression through the letter. Case-law, on the other hand, has no authoritative verbal expression and there is no barrier between the court of justice and the very spirit and purpose of the law—which they are called upon to administer. Statute law, where the words are clear, is rigid and bound within the limits of authoritative formulae; case-law, with all its imperfections, has at least this merit that it remains in living contact with the reason and justice of the matter, and draws from this source a flexibility and a power of growth and adaptation which are too much wanting in the letter of the enacted law.

Where the words of the statute are not clear the court has to some extent a discretion to interpret the statute in accordance with its social purpose. But the initial question whether the words of the statute are clear, and the subsidiary question as to its social purpose, may be quite as difficult as ascertaining the ratio decidendi of a case. Thus, statute law is not always superior to case-law in point of clarity, nor yet always inferior to it in point of flexibility.

53. Codification

The whole tendency in modern times is towards the process which, since the days of Bentham, has been known as Codification, that is to say, the reduction of the whole corpus juris (civil law), so far as practicable, to the form of enacted law. A general movement towards codification marked the nineteenth century. Since the middle of the 18th century the process has been going on in European countries and is now all but complete. In this respect, England lags far behind the Continent.

As regards the advantages of codification, it is sometimes said that the predominant motive for codification was a desire to render the law certain. But only two types of countries can afford to adopt the code successfully; those with well-developed systems where the possibility of further development is remote for the moment and those with undeveloped systems which cannot grapple with new economic problems.

Nevertheless, many codifiers emphasise that one of their aims is to make the law simple and accessible, logically arranged and harmonious, certain and definite. In the first flush of enthusiasm, it was said in France that by codification all the problems of law would be solved and that every case would be decided by deduction from the provisions of the code. The advantages of codified law are so great that they outweigh all the defects that are to be found in statute law. Hence the modern tendency towards codification.

But codification must not be understood to involve the total abolition of precedent as a source of law. No code can be all-sufficient. Case-law will continue to grow, even when the codes are complete. The doctrine of the logical plenitude of law is a useful one but if jurists think that a limited number of sections in a code include all the law that there is, the problem becomes increasingly difficult as the decades roll by. No draftsman can altogether avoid such flaws as ambiguity, obscurity, or conflict of sections. Even if he could, new problems arise which could not possibly have been

foreseen and new social philosophies become popular which are out of keeping with the basis on which the code is built. In the long run, the real test of a code is the measure of flexibility which it has allowed the law. So, codification means not the total disappearance of case-law, but merely the reversal of this relation between case-law and statute-law i.e. it merely acts as a check whereby the determination of a particular law should not be left to the caprices of Judges. Hence, codification means that the substance and body of the law shall be enacted law, and that the case-law shall be incidental and supplementary only. We must understand that a code, however, skilfully drafted, cannot cover all cases and distinctions and is bound to give rise to the necessity of interpretation and case-law. Again, there is every likelihood that a particular enactment may not fully express the pure intention of the legislature. In such a case a necessity of recodification of the same enacted law will arise, and the same process will commence over again.

An interesting compromise between case-law and codification is the American Law Institute's Restatement of American law. Restatement is the form of a code but it is not statutory and has no official sanction. Its authority in the courts of the United States, rests entirely on the eminence of the jurists, who have framed it. Generally speaking, the Restatement, as its name implies, merely declares the existing law, without attempting to suggest or incorporate improvements in it.

54. Interpretation of Enacted Law

The characteristic of a statute passed by the Legislature is that it is in the form of a definite and authoritative formula that is to be applied, whenever any case requiring its application arises. The very words in which a particular enactment is expressed, the litera scripta, constitute a part of the law itself. Hence, every enacted law requires a judicial interpretation or construction, the object of which is to make definite the meaning of that particular enactment. Such judicial interpretation is nor necessary in the other forms of law (except in the case of conventional law, which in this respect, stands on the side of statutory law), because in such case there are no fixed and authoritative expressions. By judicial construction or interpretation is meant the process by which the courts seek to ascertain the intention of the legislature.

Interpretation is of two kinds : (1) Grammatical and (2) Logical.

(i) Grammatical Interpretation (Litera Legis)

The general rule for the interpretation of statute law is that the words of the law should be taken in their ordinary meaning. The court must accept the letter of the law presuming that the legislature has said what it meant and meant what it said. This kind of interpretation, according to Salmond, is called grammatical interpretation. It is that kind of interpretation which exclusively determines the letter of the law. It does not look beyond the words that are to be found in the particular enactment. Grammatical interpretation is the sole guide when the language of the statute is clear.

Exceptions—There are two exceptions to the above general rule when the litera legis (letter of the law) may be affected. These are :

(i) When the litera legis is logically defective.

(ii) When it is unreasonable

Logically Defective Law

When the letter of the law is logically defective i. e. when the language is not clear and complete idea is not expressed, the letter of the law should not be taken as the sole guide but due consideration and weight should be given to the spirit of the law.

These logical defects may be due to the following three reasons:

Ambiguity

When a statute instead of meaning one thing means two or more different things, the courts can in such a case disregard the meaning of the letter of the law and can ascertain the true intention of the legislature.

Inconsistency

When the different parts of a statute are so repugnant to each other as to destroy each other's effect and significance, the courts can in such a case correct the letter of the law and can ascertain the intention of the legislature. Again, when a statute is inconsistent with another statute, the latter statute will be deemed to overrule the earlier one.

Incompleteness

Lastly, the letter of the law may be defective by reason of its incompleteness. It may not be ambiguous or inconsistent, but it may contain some lacuna (omission) which prevents it from expressing any logically complete idea. For example, where there are two alternative cases, the law may make provision for one of them, and remain silent as to the other. The court may lawfully supply such omission by way of logical interpretation. It must be

noted, however, that the omission must be such as to make the statute logically incomplete. If what the legislature has said is logically complete giving expression to some definite idea,— the courts have no lawful concern to express anything else in addition to what the legislature has actually said. It is the duty of the court, in such cases, to apply the letter of the law and they can add to it or alter it only in so far as to make its application possible and nothing more.

Unreasonableness

When the meaning of the law (litera legis) seems to be unreasonable and it appears that the legislature could not have meant what it has said, the letter of the law should not be taken as the sole guide but due consideration and weight should be given to the spirit of the law. In case of a clerical error, the court must interpret the sentence so as to make sense of it.

2. Logical Interpretation (Sententia Legis)

Logical interpretation (sententia legis) on the other hand, is that which departs from litera legis (letter of the law) and seeks elsewhere for some satisfactory evidence of the true intention of the legislature in the enactment of a particular statute.

The duty of the judicature is to try to discover the true intention of the legislature (sententia legis) or to act upon the grammatical construction of the enactment only (litera legis). In all ordinary cases, the courts must be content to accept the litera legis as the exclusive and conclusive evidence of the sententia legis, Judges are not at liberty to add to or modify the letter of the law simply because they have reason to believe that the true intention of the legislature has not been expressed in that particular letter. In other words, in all ordinary cases grammatical interpretation is the sole form allowable.

But the courts should adopt the logical interpretation (sententia legis) of the statute by ascertaining the true intention of the legislature when the grammatical interpretation is not possible, the letter of the law being either (i) logically defective due to ambiguity, inconsistency and incompleteness, or (ii) unreasonable.

CHAPTER VIII
PRECEDENT

155. 'Stare Decisis' or the Principles of Judicial Precedent

In order to secure certainty of law, decisions of High Courts and of superior Courts are reported and cited as authority in future cases where an identical question of law comes up for determination. A Court may be bound by the decision of a superior Court in the same way as it is bound by statute. In England, the Courts are imperatively bound by decisions of higher Courts in the same hierarchy, and the House of Lords[1], the Court of Appeal and the Divisional Court are each bound by their own decisions. Decisions of the judicial committee of the Privy Council are absolutely binding on many Courts in the Empire though not in England, but the Judicial Committee and many Dominion Courts reserve liberty to overrule their own decisions. Thus the decisions of Courts are as good as statutory law in countries like England and America. This is known as Precedent or Case-law. According to this theory. a judge does not make law. he merely declares law .The system of jurisprudence that we follow and which is based on the principles of law followed in England, is 'stare decisis' which means to abide by authorities and cases already adjudicated upon. Thus, the growth of case-law involves the gradual elimination of judicial liberty. In any system in which precedents are authoritative, the Courts are figuratively said to be engaged in forging fetters for their own feet and that every fresh decision is an additional link, in the chain of the judge's slavery.

156. The Authority of Precedent

The importance of judicial precedents has always been a distinguishing characteristic of English law. The great body of unwritten law is entirely the Product of decided cases which have been preserved and accumulated in the voluminous Law Reports. In England ever since the reign of Edward the First, at the close of the thirteenth century it has been the custom to follow the decision of a Judge once it has been authoritatively declared previously by the superior Courts. A judicial precedent in England speaks with authority, it is not mere evidence of the law, as in the continental countries, but a source of it, and the Courts are bound to follow when it is once so established. Thatis what is meant by the

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1. From July, 1966, House of lords is not absolutely bound by its own decisions.

expression, "In England the Bench has always given law to the Bar". Salmond says, "In practice if not in theory the Common Law of England has been created by the decision of English Judges."

But the case is otherwise with the Continental Law. In the continental countries of Europe, decisions of Courts have no binding force on a Tribunal. They are not binding even on inferior Courts. The continental system is founded on the Roman system, which did not attribute any authority to precedent. A book of law reports and a textbook were on the same level. There precedents were not sources of law but were merely evidence of it. The reason is that unlike in England the Roman Bar always gave law to the Bench, for there are no permanent bodies of expert professional Judges as in England.

The grounds on which precedents are so authoritatively followed are that it is presumed that a judicial decision is always correct. It is an application of the maxim. 'Res judicata pro vertitite accipitur' (a judgment must be taken for accepted truth). A matter once formally decided in decided once for all. Even if the decision is not true in fact, it is expedient that it should be held as true nonetheless. Therefore, when a question has once and been judicially considered and answered, it must be answered in the same way in all subsequent cases in which the same principle arises again.

57. Original and Declaratory Precedent

Precedent or case-law is a judicial decision. But all judicial decision is not precedent. A judicial decision which contains in itself a principle of law is called precedent. Precedent may be (1) Original and (2) Declaratory.

An original precedent is one which contains a new principle of law i.e which creates a new rule for the first time.

A declaratory precedent is one which is merely the application of an already existing rule of law. When a particular rule of law has already been authoritatively determined by the Court and it is to be applied in a subsequent and similar case, it is merely the application of a declaratory precedent, that is, the application of an already existing rule of law.

In the former case it is law of the future because it is now created and applied for the first time, in the latter case, the rule is applied because it is already a rule of law. Though a declaratory precedent is a source of law, it is not a source of new rule of law, whereas an original precedent is a source of a new rule of law.

However few they are in number, the original precedents are of greater importance. For, they alone develop the law, the declaratory precedents leave the law as it is.

58. Authoritative and Persuasive Precedent

Precedents may be further divided into two classes, which may be distinguished as (1) Authoritative and (2) Persuasive. These two differ in respect of the kind of influence which they exercise upon the future course of the administration of justice.

Authoritative Precedents—An authoritative precedent is one which is binding upon Judges and which they must follow whether they approve of it or not. It is binding upon them and it excludes their judicial discretion for the future. Authoritative precedents recognised by English law are the decisions of the superior Courts of justice in England. These precedents are legal sources of law. Authoritative precedents may be divided into two classes.

(i) Absolute authoritative.

(ii) Conditional authoritative.

(i) Absolute authoritative—An absolute authoritative precedent is one which is absolutely binding upon Judges and which must be followed by them however unreasonable or erroneous it may be considered to be. In England, absolute authority exists in the following cases :

(a) Every Court is absolutely bound by the decisions of all Courts superior to itself.

(b) The House of Lords was previously absolutely bound by its own decision. In July 1966, the House of Lords announced that it would not longer consider itself absolutely bound by its own decision.

(c) The Court of Appeal is absolutely bound by its own decisions. Similarly, the older Courts of Co-ordinate Authority e. g. the Court of Exchequer was bound by its own decision.

(d) A Divisional Court of the High Court is also bound by its own decision.

Conditional Authoritative Precedent—A conditional authoritative precedent is one which possesses merely conditional authority and it may be disregarded by the Judges under certain circumstances, that is, the Courts possess a certain limited power of disregarding it. In all ordinary cases it is binding, but there is one special case in which its authority may be lawfully denied or disregarded (i.e. it may be overruled or dissented from). A precedent may be disregarded when it is not merely wrong but it is

so clearly and seriously wrong that its reversal is demanded in the interest of justice, Otherwise it must be followed, however, erroneous the original decision may be. Except in the above four cases of absolute authority of precedent, the authority of precedent in merely conditional.

It must be noticed, however, that the force of a decision depends not merely on the Court by which it was given but also on the Court in which it was cited. Its authority may be absolute in one Court but merely conditional in another. A decision of the Court of Appeal in England is absolutely binding on a Court of first instance, but it is only conditionally binding upon the House of Lords. Here the decision of Dhaka High Court (now the Appellate Division of the Supreme Court of Bangladesh) is absolutely binding on any subordinate Court in Bangladesh but before the independence of Bangladesh it was conditionally binding on any Munsif in West Pakistan.

Absolute and Conditional Authority of Precedent in our Courts—

(i) Decision of the Supreme Court and of the former Federal Court were authoritative and binding on all the High Courts of Pakistan and is now binding on the Supreme Court of Bangladesh.

(ii) Decisions of the Privy Council, which used to operate as absolutely authoritative formerly, will henceforth operate as conditional from the time of the jurisdiction of the Privy Council as the final appellate authority was discontinued, and as such it is not binding on our Courts.

(iii) Decisions of High Courts are of three kinds; namely,

(a) Full Bench decision i. e. decisions of Divisional Court composed of three or more Judges, (b) Division Bench decision i.e. decision of Divisional Court of two Judges, and (c) Decision of a single Judge.

Now, a Full Bench decision is binding on a Division Bench as well as on a single Judge of the same High Court even if unreported. Similarly a Division Bench's decision is binding on other Division Benches of the same High Court till it is overruled either by a Full Bench decision or by the Supreme Court. A High Court, however, is not bound by any decision of another High Court, be it a Full Bench decision or a Division Bench Decision.

(iv) With respect to subordinate Courts, only decisions of High Court to whom they are subordinate and of the Supreme Court are authoritative and binding while the decisions of the other High Courts possess only a persuasive authority.

Following are the circumstances which tend to increase the authority of a precedent :

(i) Unanimity of the Court ; (ii) affirmation or approval by other Courts, particularly by a superior Court ; (iii) eminence of the Judge; (iv) approval or even absence of criticism by the profession; (v) learned argument; and finally (vi) the fact that an Act has since been passed on the same subject-matter without reversing the decision.

59. Circumstances justifying disregard of Precedent

In order that a Court may be justified in disregarding a conditionally authoritative precedent, the following conditions must be fulfilled, namely, that the decision must, in the opinion of the Court in which it is cited, be a wrong decision. A decision becomes wrong in two cases, namely, (a) when it is contrary to law, or (b) when it is contrary to reason. It is wrong as contrary to law when there is already in existence an established rule of law on that point but the decision fails to conform to it. When the law is already settled, the sole right and duty of the Judge is to apple it. It is wrong as contrary to reason, when there is no settled law to declare and follow and the Courts make law for the occasion. In such circumstances, it is the duty of the Courts to follow reason. If they fail to do so, their decisions are wrong and the principles involved in them are defective. In the above circumstances, disregard of a precedent is justified.

It may, however, be noted that before disregarding a conditionally authoritative precedent a Court should take into consideration the following aspect of the matter.

It is often more important that the law should be certain than that it should be ideally perfect. These two requirements (i. e. certainty and perfectness) are to a great extent inconsistent with each other; we must often choose between them. A precedent acquires added force by lapse of time. The longer a precedent has stood the test of time, the greater chance it has to be remembered and followed in future. The precedent, while it stood unreversed, may have been counted upon in numerous cases as definitely establishing the law and many transactions may have been adjusted and rights determined on the strength of the precedent so established. Justice may, therefore, imperatively require that the decision, though found in error, shall nevertheless be followed. Lord Eldon said, "It is better the law should be certain, than that every Judge should speculate upon improvements in it". But the defective decision must not, by the lapse of time or otherwise, have

acquired such added authority as to give it a permanent recognition notwithstanding the vices of its origin. When the decision is plainly wrong and practical injustice in consequence must flow from it, it bcomes necessary to have it corrected either by a statute or by having it overruled.

60. Effect of disregarding a Precedent

The disregard of a precedent assumes two distinct forms, namely (i) the Court to which it is cited may overrule it, or (ii) the Court may merely refuse to follow it. Overruling is an act of a Court of superior jurisdiction. A precedent overruled is definitely and formally deprived of all authority. It becomes null and void, like a repealed statute, and a new principle is authoritatively substituted for the old.

A refusal to follow a precedent, on the other hand, is an act of co-ordinate or concurrent jurisdiction. Two Courts of equal authority have no power to overrule each other's decision. Where a precedent is merely not followed, the result is not that the later authority is substituted for the earlier, but that the two stand side by side as conflicting decisions. The conflict thus produced can only be solved by the act of a higher authority, which will in due time decide between the competing precedents, formally overruling one of them, and sanctioning the other as good law. In the meantime, the matter remains at large and the law uncertain.

When a case is overruled by the superior Court on appeal not on the point on which the decision has been given in the Court bellow, but on some other point, the decision, not concerned on appeal, is not perhaps altogether deprived of authority, but it is reduced to the status of a merely persuasive authority.

61. Circumstances destroying the binding force of Precedent

The rules of precedent that have there to been stated are subject to a number of general exceptions. These exceptions (that is, the circumstances destroying the binding force of precedent), are as follows:

(1) *Abrogated decision*—A decision ceases to be binding if a statute or statutory rule inconsistent with it is subsequently enacted, or if it is reversed or overruled by a higher Court. Reversal occurs when the same decision is taken on appeal and is reversed by the appellate Court. Overruling occurs when the higher Court declares in another case that the precedent case was wrongly decided and so is not to be followed.

Affirmation or reversal on a different ground—It sometime happens that a decision is affirmed or reversed on appeal on a different point. As for example, suppose a case is decided in the High Court on ground A, and then goes on appeal to the Supreme Court, which decides it on ground B, nothing said on ground A. Jessel M. R. in one case said that where the judgment of the lower Court is affirmed on different grounds, it is deprived of all authority, as the conduct of the appellate Court showed that it did not agree with the grounds given below. It is the same with cases reversed on another point. It is submitted that the true view is that a decision either affirmed or reversed on another point, is deprived of any absolute binding force it might otherwise have had, but it remains an authority which may be followed by any Court that thinks the particular point to have been rightly decided.

Ignorance of Statute—A precedent is not binding if it was rendered in ignorance of a statute or a rule having the force of a statute, i. e. delegated legislation. This rule was laid down for the House of Lords by Lord Halsbury in a leading case of England. Even a lower Court can impugn a precedent on such grounds. It is an example of a decision per incuriam i. e. not binding upon Court.

Inconsistency with earlier decision of Higher Court—A precedent loses its binding force if the Court that decided it, overlooked an inconsistent decision of a higher Court. If, for example, a Division Bench of Dhaka High Court decides a case in ignorance of a decision of the Full Bench, which went the other way, the decision of the Division Bench is per incuriam and is not binding either on itself or on lower Courts. It is the decisions of the Full Bench that is binding.

Inconsistency between earlier decisions of the same rank—A Court is not bound by its own previous decisions that are in conflict with one another. The conflict may arise through inadvertence, because the earlier case were not cited in the later.

Although the later Court is not bound by the decision so given per incuriam this does not mean that it is bound by the first case. Because the rule is that where there are previous inconsistent decisions of its own, the Court is free to follow either.

Precedent sub silentio or not fully argued—A decision passes sub silentio when the particular point of law involved in the decision is not perceived by the Court nor present to its mind. The Court may consciously decide in favour of one party because of point A, which it considers and pronounces upon, which the Court should not have done without deciding point B in his favour. But

point B was not argued or considered by the Court. In such circumstances, although point B was logically involved in the case and although had a special outcome, the decision is not an authority on point B, which is said to pass sub silentio as the Court remained silent on the point which is logically involved in the facts and circumstances of the case.

Decisions of equally divided Courts—Where an appellate Court is equally divided, the practice is to dismiss the appeal. In such circumstances, the rule adopted in all Courts of England except the House of Lords (where the invariable practice has since been to sit with an uneven number of peers usually five) is that the decision has only the authority of the Court appealed from, the obvious reason being that there is no majority against the appeal. If the Court is equally divided, the appeal is dismissed, but it is not a decision in favour of the respondent. Because a drawn battle cannot be described a victory.

In our country, if a Division Bench is equally divided, the case is referred to a third Judge for decision and the case is finally decided according to the majority view of the two Judges.

62. The Grounds of the Authority of Precedent

The grounds on which precedents are so authoritatively followed are the following :

The Doctrine of Res judicata—It is presumed that a judicial decision is always correct. It is an application of the maxim, res judicata pro vertitate accipitur (i. e. a judgment must be taken for accepted truth). This doctrine of res judicata formulates the legal principle that a matter once formally decided is decided once and for all. Even if the decision is not true in fact, it is expedient that it should be held as true nonetheless. Therefore, when a question has been judicially considered, heard and finally decided, it must be answered in the same way in all subsequent cases in which the same question arises again. Strict application of this rule checks unnecessary litigation and puts an end to the arbitrary decision on the part of the Judges.

Ratio Decidendi of a case—A precedent is a judicial decision which contains in itself a principle of law : all judicial decisions are not called precedents. Of the questions that come up for judicial decision in a particular case, some are capable of being answered in the form of a principle—which is of general importance, while the answer to some of them can only be specific and concrete which is of importance only to the parties to the case and to which strangers are not at all interested. The concrete decision binds only the parties to

it, but it is the abstract principle alone that has the force of law. The underlying principle of a decision which thus forms its authoritative element is often termed the ratio decidendi of a case. What is important in a precedent is not the actual and concrete decision but the underlying principle on which it is grounded.

It is often said by Judges that inasmuch as the matter before them is not covered by authority, they must decide it on principle. The statement implies two things : first that where there is any authority on the point, i. e. if the question is already one of law, the duty of the Judge is simple to follow the decision, and secondly, that if there is no authority, it is the duty, if possible, to decide it upon principle, i.e. to formulate some general rule and to act upon it, thereby creating law for the future. Sometimes the Courts have to decide questions which do not admit of being answered either on authority or on principle, and in such cases a specific or individual answer alone is possible, no rule of law being either applied or created.

Obiter or judicial dicta—Although it is the duty of Courts of Justice to decide questions on principle if they can, they must take care in the formulation of principles to limit themselves to the requirements of the case in hand. They must not lay down principles which are not required for the due decision of the particular case or which are wider than what is necessary for this purpose. The authoritative judicial principles are those which are relevant in their subject-matter and limited in their scope. All other principles, which are not necessary for disposal of the case, are of merely persuasive efficacy and not authoritative. Such unwarranted and unnecessary observations and principles laid down by the Judge, which go beyond the scope and subject-matter of the case, is known as obiter dicta or judicial dicta, which means—things said by the way. They are simply passing remarks made by the Judge and as such are not authoritative but possesses only persuasive efficacy.

Distinguishing Precedents—The question, as to whether a principle laid down by a Court is unduly wide for the decision of the case i. e. obiter or not, is to be answered by the Court before whom the decision is cited as precedent. In practice, Courts do not concede to their predecessors the power of laying down very wide rules. So, when any decision is cited as an authority in a particular case and the Judge is of opinion that the case cited before him contains irrelevant matter, he reserves to himself the power to narrow down the rules created by the former decision by introducing into them particular facts of the precedent case that

were treated by the earlier Court as irrelevant. This process is known as distinguishing the former case.

63. The Sources of Judicial Principle

The judicial principles or ratio decidendi by which the Courts supplement the existing law, are, in truth, nothing else than the principles of natural justice, practical expediency and common sense, Judges are appointed to administer justice according to law so far as the law extends,, but so far as there is no law according to the principles of natural justice. Where the civil law is deficient, the law of nature takes its place, and in so doing puts on its character also. But the rules of natural justice are not always such that any man may know them and the light of nature is often an uncertain guide. So, men differ as to "natural justice", and instead of trusting to their own unguided instincts in formulating the rules of right and reason they seek guidance and assistance from elsewhere i. e. the historical sources. In establishing new principles they willingly submit themselves to various persuasive influences. Thus, the persuasive precedents, judicial dicta, opinions of distinguished writers and other forms of ethical or juridical doctrine, which seem good to them, form the source of judicial principles. None of these are binding upon the Judges but these sources are thought to be just and satisfactory, because they find it already embodied in some system of foreign law. Thus, new rules are very often the analogical extension of the old.

This is called the analogy of pre-existing law. The Courts seek as far as possible to make the new law the embodiment and expression of the spirit of the old ratio juri, as the Romans called it. At the same time it must be remembered that analogy is lawfully followed as a guide to the rules of natural justice. It has no independent claim to recognition. Wherever justice so requires, it is the duty of the Courts, in making new law, to depart from the ratio juris, rather than to servilely follow it.

64. Value of the Doctrine of Precedent

The phrase "the doctrine of precedent" has two meanings. In the first, i. e. in its loose meaning, the phrase means merely that the precedents are reported, cited and will probably be followed. This was the doctrine that prevailed in England until the nineteenth century, and it is still the only sense in which the doctrine prevails in the continental countries like France and Italy. In the second, i. e. in the strict meaning, it means that precedents not only have great authority but must be maintained and followed in certain

circumstances. This rule developed in the nineteenth century and completed in some respects during the twentieth, which prevails under our system of legal jurisprudence.

The real issue is whether the doctrine of precedent should be maintained in its strict sense or whether we should revert to the loose sense. There is no dissatisfaction with the practice of citing cases and of attaching weight to them; the dissatisfaction is with the present practice of treating precedents as absolutely binding. In favour of the present practice it may be said that the practice is necessary to secure certainty of law, the predictability of decisions being more important than approximation to an ideal. Against it, it must be stated that the Judges sometimes find it impossible to undo the mischief done by a decision which under the circumstances, must be followed even though the judge feels that it causes great injustice. This is the defect and vice of our system. Against such defects two arguments may be advanced :

(1) A very unsatisfactory decision may be reversed for the future by statute. To this, it must be pointed out that the pressure of parliamentary time is so great that they find it impossible to devote their attention to such matter. Moreover, experience has shown that when Parliament attempted to rectify errors of the Common Law, it has almost always done so, not by clean reversal, but by introducing exceptions to the Common Law rule. What is needed is a power in the Judge to set aside their own mistakes.

(2) It may also be pointed out that the Judges do possess the power of setting aside a decision which is wrong. Such a power does exist at the moment in some degree, for a High Court Judge may refuse to follow another High Court Judge, a higher Court may overrule a decision of an inferior Court, and any Court may restrictively distinguish an unjust decision. But the power of restrictive distinguishing is unsatisfactory, because it leaves the distinguished decision standing and although the old rule is not observed, it nevertheless continues to remain. Moreover, the present rules do not always promote certainty of legal administration that is claimed for them, for it depends very much upon the strength of the particular Judge whether he will restrictively distinguish a decision that is technically binding upon him.

As a compromise between the two opposing views, it is submitted that the strict doctrine should be remained in so far as it binds a Court to follow the decisions of the superior Court, but that Court should cease to be bound by the decisions of the Courts of co-ordinate jurisdiction.

CHAPTER IX

CUSTOM

65. Importance of Customary Law

Custom, is a long and generally observed course of conduct of a number of persons. It is the spontaneous evolution of rules by the popular mind, the existence and general acceptance of which is proved by their customary observance. Prof. Salmond observes—"Custom is the embodiment of those principles which have commanded themselves to natural conscience as the principle of truth, justice and public utility". Customs are, therefore, rules of conduct or practices of the people which are generally followed, because they are true, just and beneficial to the society.

A custom is formed when a man does a thing in a particular way and his method of doing the thing is imitated by others. But why the first man did that thing in that way nobody can say. When others repeat the same course of action similarly, a habit is formed. This habit of acting in a particular way is a custom. The older a custom grows, the stronger does its force become.

The importance of custom as a source of law has been recognised in almost all systems of law. According to English law, a valid custom binds every one who comes within its domain, whether he knows of it or not. In earlier times, it was the long received theory of English law that whatever was not the product of legislation has its source in custom. Although it has now almost ceased to operate as an instrument of development of English law in particular, partly because it has to a large extent been superseded by legislation and precedent and partly because of the limitations imposed by law upon its law-creating efficacy, the identification of the common law with customary law remained the accepted doctrine long after it had ceased to retain the semblance of truth. It is true that with the advance of civilisation custom has been relegated to a secondary position as a source of law, the legislation being now the primary source, but still custom is regarded to be one of the legal sources of law.

66. Reasons for acceptance of Customary law

There is more than one reason for attributing to custom the force of law. The reasons are :

(1) In the first place, custom is frequently the embodiment of those principles which have commanded themselves to the national conscience as principles of justice and public utility. The fact that any rule has already received the

sanction of custom, raises a presumption that it deserves to obtain the sanction of law also.

(2) Secondly, both law and custom are the expressions of the principle of right and justice. Custom is to society what law is to the State. Law embodies the rules of conduct by the power of the State, but custom embodies them as acknowledged and approved not by power of the State, but by the public opinion of the society at large. Hence, it is natural, that when the State first comes into existence and takes its function of administering justice according to law, it should accept as true and valid those principles of right and justice that have already been recognised by public opinion i. e. the custom.

(3) In the third place, the law creating efficacy of custom is to be found in the fact that the existence of an established usage is the basis of a rational expectation of its continuance in the future. So, when a custom is once established, the general public expect that it should continue to exist in future and many transactions are based thereon. Justice demands that unless there is good reason to the contrary, men's rational expectation shall, so far as possible, be fulfilled rather than frustrated. Even in modern times the Legislature gives express statutory recognition to bodies of local customs.

67. Difference between Law and Custom

A question is often asked as to when does custom become law and, for that matter, as to the distinction between Law and Custom. There is a difference of opinion as to the moment when a custom becomes law.

(1) Austin's opinion is that a custom becomes a law from the moment of its recognition by the State.

(2) Prof. Holland observes that a custom becomes law not from the moment when it is recognised by the State, but retrospectively. It was law as soon as it satisfied certain tests.

(3) Prof. Salmond says that a custom is law not because it has been recognised by the Courts, but because it will be recognised, in accordance with the fixed rules of law, if occasion arises. Hence, the Courts enforce a custom because they find it a law already in existence.

In this connection, it may be urged that thought the Courts consider a custom as 'Law' before they enforce it, yet before enforcement the custom might have been a particular kind of law

but not 'Civil Law' at least. The enforcement by the Court stamps the custom (which might have been a particular kind of law) with the character of 'Civil Law'.

The mark which distinguishes custom in the legal sense from mere convention is the recognition that there is authority behind it. In the modern State, the custom, if legally recognised, has behind it the Court and an apparatus of coercion. In the primitive communities there was no authority necessarily organised in the institutional sense. Custom in the early stages is somewhat vague—it can be made into an effective rule of law only if the practices is hardened and made definite. This can occur only by the slow work of the Courts, as technical rules are fashioned out of the raw material afforded, or by legislation, since writing inevitably sharpens the vague outlines of custom.

68. Kinds of Custom

All custom which has the force of law is of two kinds, which are essentially distinct in their mode of operation. These two kinds of Customs may be conveniently distinguished as legal and conventional.

Legal Custom—A legal custom is one whose legal authority is absolute—one which in itself possesses the force of law. It is operative per se as a binding rule of law, independently of any agreement on the part of those subject to it. Legal custom is itself of two kinds— (a) Local and (b) General.

Local Custom—When a legal custom having the force of law prevails in a particular locality only, it is called local custom. In its narrowest sense, the term custom means local custom exclusively. Thus, local custom is in force as a law in some defined locality only, such as borough or county in England, and constitutes a source of law for that place only. Thus, the former custom observed in a particular part of Madras province, where the daughter's son was declared entitled to succeed to the property of his uncle on his death excluding in that part the right of the son to succeed the father, is a local customary law.

General Custom—The general custom is that which is in force and prevails throughout the country. In order to have the force of law, a general custom must be an ancient, immemorial custom of the country. According to earlier theory, the general law of England with the exception of statute law, was customary law. All the general and immemorial customs of England have been accepted by the Courts of justice and have, therefore, been transformed into case-law. But according to the modern theory, the general law of

England consists of enacted law and case-law. Nevertheless custom did at one time form the sources of general law of the realm. Thus, in the law reports of Henry IV, it is said, "The Common Law of the realm is the common custom of the realm". But this theory did not express the whole truth. The King's Courts even in earlier days must have imposed upon the realm much that was not customary but what was Civil or Canon Law.

Conventional Custom—A conventional custom, on the other hand, is conditional on its incorporation in agreement between the parties to be bound by it. In the language of English law, the term custom is more commonly confined to legal custom only while conventional custom is distinguished as usage. The distinction so drawn between custom and usage is not universally observed, not even by lawyers.

A conventional custom is legally binding not because of any legal authority possessed by it but because it is necessarily implied. Where two persons enter into an agreement, they do not commonly express in words, whether written or verbal, the whole terms of that agreement; some of the terms remain implied. The larger part of most contracts is implied rather than expressed. The law, therefore, endeavours to find out the true intentions of the parties with respect to those terms which have not been put on paper. This presumed intention is gathered from two sources—first, from that which is reasonable, and second, from that which is customary. The latter part of the agreement is called conventional custom. It operates only indirectly through the medium of agreements and is legally binding on those persons who come under the contract. Hence, its authority depends conditionally on its acceptance between the parties. Where persons enter into a contract in any matter in respect of which there exists some established usage they will be presumed to have intended to contract with reference to that usage in the absence of any express indication to the contrary.

Conventional custom may be of two kinds :

(i) General—In is in force as law throughout the realm, e. g. mercantile custom regarding negotiable instruments.

(ii) Local—It is in force as law in a particular locality only, e. g. local customs of agriculture and tenancy.

69. Requirement of a valid Custom

In order that a legal or local custom may be valid and operative as a source of law it must conform to the following requirements :

Reasonableness—A custom must be a reasonable one. It must, to a certain extent, conform to the rules of justice and public utility.

Conformity with Statute Law—A custom must not be contrary to the statutory law of the country. It cannot take away the force of a Parliament. Any custom, which is contrary to the statute law, is void.

Observance as of right—A custom must refer to legal relations. A mere casual or voluntary practice is not enough. It must be observed as of right. Hence, the custom must be accompanied by the conviction, on the part of those who use a custom, that it is obligatory and not merely optional. A merely voluntary practice not conceived of as based on any right or obligation does not amount to a legal custom and cannot operate as a source of law.

Immemorial antiquity—The fourth and the last requirement of a legal custom relates to the length of time during which it has been established. A custom to have the force of law must be immemorial. It must have existed from the time beyond the memory of man. Recent or modern custom is of no value. Custom is immemorial when its origin was so ancient that the beginning of it was beyond human memory.

Sir C. K. Allen seems to make light of the requirements of antiquity, saying "A mere habit, practice or fashion which has existed for a number of years nobody supposes to be ipso facto an obligatory custom; antiquity is the only reliable proof of resistance to the changing conditions of different ages".

The limit of human memory has been arbitrarily fixed by the English law. By a statute of West Minster passed in 1925, it became settled that the time of human memory reached as far back as the reign of Richard I, and no further. This curious rule of English law is still in force. Hence, if any person disputes the antiquity of a custom he will have to prove its non-existence at any time between the present day and the time of Richard I, i. e. the twelfth century.

70. Custom and Prescription

The distinction between custom and prescription is, in short, this :

(1) Custom is a long usage or practice operating as a source of law but prescription is a long usage or practice operating as a source of right. That on the death of A, an owner, intestate (i.e. without executing any will), all his lands in a certain borough descended on his youngest son, is a custom and is a source of special customary law excluding in that locality the common law of primogeniture. But that B, the owner of a certain farm and his predecessors in title have used from time immemorial a way over the adjoining farm, is a

prescription and is the source of prescriptive right of way vested in B, an individual person.

(2) Custom concerns a number of persons of a society, but prescription concerns a single individual. Regarded historically, the law of prescription is merely the branch of the law of Custom. Prescription was originally concerned as a personal custom, i. e. a custom limited to a particular person and his predecessors or ancestors in title which was distinguished from local custom which is limited to a number of persons of an individual place. Coke distinguished between custom and prescription thus : "In the common law, a prescription, which is personal, is, for the most part, applied to persons, being made in the name of a certain person and of his ancestors, or those whose estate he hath; ..... And a custom, which is local, is alleged in no person, but laid within some locality or place.".

(3) The requisites of a valid prescription were is essence the same as those of a valid custom. Both must be reasonable, immemorial, and consistent with statute law and so on. It was only by the process of gradual differentiation and the later recognition of the other forms of prescription that the difference between the creation of customary law and that of the prescriptive rights, has been brought clearly into view. In the case of custom, for example, the old rule as to time immemorial still subsists, but in the case of prescription it has been superseded to some extent by the fiction of the lost modern grant and to a much greater extent by the statutory rules, the Prescription Act.

Thus, custom in order to be valid, must be of immemorial antiquity, but a prescriptive right, for instance, right to light, is now finally acquired by enjoyment of twenty years.

PART III

LEGAL CONCEPTS

CHAPTER X

LEGAL RIGHTS

71. Right, Wrong, Duty

Administration of justice means maintenance of rights, suppression or redress of wrongs and thereby upholding justice by means of the coercive power of the State and the primary duty of the State is to administer justice. Therefore, in dealing with the term 'right', it is absolutely necessary to define the terms 'Wrong and Duty'.

Wrong

A wrong means simply a wrongful act which is contrary to the rule of right and justice. A synonym of it is injury in its primary sense of injuria (that which is contrary to jus) though in its modern secondary sense it also means harm or damage. Wrongs are divisible into two classes : (1) Legal Wrong and (e) Moral Wrong.

Legal Wrong—A legal wrong means an act which is contrary to the rule of legal justice and a violation of the law, i.e. an act which is legally wrong. It is an act which is authoritatively determined to be wrong by a rule of law, and is, therefore, treated as a wrong in and for the purpose of administration of justice by the State. For example, non-payment of debts by the debtor legally due to the creditor is a legal wrong.

Moral Wrong—Moral wrong means an act which is contrary to or in violation of the rules of natural justice. For example, disobeying one's superior is a moral wrong.

Duty

A Duty is an obligatory act, i. e. an act the opposite of which would be wrong. The commission of a wrong is a breach of duty, and performance of duty is the avoidance of wrong. It is obligation in its widest sense. So, duties and wrongs are correlatives. When the law recognises an act as a duty it commonly enforces the performance of it or punishes the disregard of it. Duties are of two kinds : (1) Legal duty and (2) Moral duty.

Legal Duty—It is an act required by the rule of legal justice—an act the opposite of which would be a legal wrong. e. g. the debtor is under a legal duty to pay his debt, which may be legally enforced by the creditor.

Moral Duty—It is an act required by the rule of moral justice—an act the opposite of which would be moral wrong, which cannot be enforced by law, e. g. the child is under a moral duty to respect his parents.

These two classes of duties are partly coincident and partly distinct. For example, in England, there is a legal duty not to sell or have for sale adulterated milk whether knowingly or otherwise, and without any question of negligence. In so far as the duty is irrespective of knowledge and negligence, it is exclusively a legal duty. On the other hand, there is no legal duty in England to refrain from offensive curiosity about one's neighbours, even if the satisfaction of it does them harm. Here the duty is clearly a moral though not a legal duty. Finally, there is both a moral as well as a legal duty not to steal.

When the law recognises an act as a duty, it commonly enforces the performance of it, or punishes the disregard of it. But this sanction of legal force is in exceptional cases absent. A duty is legal because it is legally recognised, not necessarily because it is legally enforced or sanctioned.

Right

Salmond defines right as "an interest recognised and protected by a rule of right". It is an interest, respect for which is a duty, and the violation or disregard of which is a wrong. A more elaborate definition is given by Austin as "a faculty which resides in a determinate party or parties by virtue of a given law and which avails against a party or parties other than the party or parties in whom it resides'. Rights are either legal or moral.

Legal Right—It is an interest recognised and protected by the rule of legal justice—an interest the violation of which would be a legal wrong. e. g. the creditor has got a legal right to realise his debt from his debtor within the time limited by law. It is a capacity residing in one man of controlling the actions of others with the assent and the assistance of the State. "Rights" says Ihering, "are legally protected interests".

Natural or Moral Rights—It is an interest recognised and protected by a rule of natural or moral justice—an interest the violation of which would be a moral wrong. For example, a teacher has a moral right to command obedience from his pupil, but it cannot be legally enforced. A moral right is one man's capacity to influence the acts of another by means not of his own strength but of the opinion of the society. On the other hand, if he has the capacity of influencing the acts of another by means of his own

strength, he is said to have a right. Thus, a right is moral if it depends upon the force of the public opinion and it is legal if it is supported by the State.

Although a legal right is usually accompanied by the power of instituting legal proceedings for the enforcement of it, this is not invariably the case. For example, there are certain rights which are not enforceable by any legal process, e.g. debts barred by limitation. They are nevertheless legal rights although unenforceable at law. They are called rights of imperfect obligation. Just as there are imperfect and unenforceable legal duties, so there are imperfect and unenforceable legal rights.

72. Correlation of Rights and Duties

There are two different views with regard to the proposition that rights and duties are correlative.

According to Salmond, rights and duties are correlative. There can be no right without a corresponding duty or duty without a corresponding right, any more than there can be a husband without a wife or a father without a child. When A has a right against B, B is under a duty towards A. B's duty, therefore, implies a corresponding right. In other words, according to this view, every duty must be a duty towards some person or persons, in whom, therefore, a corresponding right is vested. And conversely, every right must be a right against some person or persons upon whom, therefore, a corresponding duty is imposed. So, there can be only one idea of duty i.e. a duty corresponding to a right. Every right or duty involves a vinculum juris or bond of legal obligation, by which two or more persons are bound together. There can, therefore, be no duty unless there is someone to whom it is due, there can be no right unless there is someone from whom it is claimed; and there can be no wrong unless there is someone who is wronged, that is to say, whose right has been violated.

According to the second and different view held by Austin, some duties do not correspond to rights. He divides duties into relative and absolute, the former being those which have rights corresponding to them, and the latter being those which have none. On this view, duties towards the public at large or towards indeterminate portions of the public have no correlative right; the duty, for example, to refrain from committing a public nuisance. Austin says, absolute duties are sanctioned criminally, that is, there being no corresponding rights, the violation of such duties results only in criminal prosecution. He classifies absolute duties as being (1) Duties to one-self i. e. self-regarding duties not to commit

suicide, (2) duties to the community, (3) duties to God or duties not to be cruel to lower animals, and (4) duties to the sovereign, i. e. the State.

Prof. Salmond rejects the above view of Austin for the following reasons, that the so-called duties mentioned above are reducible to duties to sovereign, for when a duty towards the public is infringed it is usually redressed by the sovereign. There appears to be not much substances in the two opposite views. Because, in all the cases where there is a duty, it is immaterial whether it is owed to someone or none. The law in any event is clear and enforces the duty, either at the instance of the person whose right is infringed or at the instance of the Advocate– General if the duty owned is to the public. Therefore, the question as to whether there is any absolute duty comes to this—"Can there be relative duties to the sovereign" or "can the sovereign have legal rights"?

Austin says that as no man can confer a right on himself, in order that a sovereign should have a legal right, there should exist another sovereign to confer it. But there can be no two sovereigns in a State. Therefore, a sovereign cannot have legal rights.

But Salmond, Holland and Pollock hold the contrary view that it is not impossible that a sovereign should confer a right upon himself. When the sovereign declares that he will protect some interest of an individual, he creates a legal right in favour of that individual. So, when he declares that he will protect an interest of his own, he creates a legal right in his own favour. Thus, the sovereign has a right to impose tax and to receive payment of taxes already imposed. Hence the conclusion is that there are no absolute duties and that a sovereign can have legal rights, and as such the duties to the sovereign are not absolute but relative i.e. corresponding rights are possessed by the State.

Next question that arises for consideration is "Can the sovereign have legal duties"? Here also Austin holds the same view that if the sovereign can be bound by a legal duty, some other sovereign must impose it, which is absurd and concludes that the sovereign cannot be bound by legal duties. But Pullock and Holland hold the contrary view that if the sovereign allows himself to be sued by his subjects and gets judgment against him and compensates the plaintiff, he cannot be said to be not bound by a duty.

But, according to Salmond, the right of the subjects to sue the sovereign is an imperfect right because though judgment can be obtained against the sovereign it cannot be enforced as the sovereign cannot apply physical force against himself.

73. The Characteristics of a Legal Right

According to Salmond, every right has the following five elements or characteristics :

Subject of Right—A person in whom the right is vested may be distinguished as the subject of right, the owner of right, the person entitled or the person of inherence.

The Subject of the Duty—A person against whom the right avails i.e. upon whom lies the correlative duty may be distinguished as the subject of duty, the person bound or as the person of incidence

An Act or Omission—The person bound is under an obligation either to do an act or to omit to do an act i. e. to refrain from doing an act in favour of the person entitled. This act or forbearance may be termed the content of right'.

Thing—The act or omission relates to some thing—(in the widest sense of the term), which may be termed the object or subject matter of the right' There must be something over which the right is exercised i. e. the thing to which the act or omission relates.

Title—Every legal right has a title, that is to say, certain facts or events by reason of which the right becomes vested on its owner. Rights are created, transferred or extinguished by facts or events. Hence, there must be certain facts or events, by the operation of which the right has become vested in its owner. So, facts or events give rise to title.

Thus, suppose, A buys a piece of land from B, (1) A is the subject or owner or the right so acquired ; (2) The persons bound by the correlative duty not to interfere with A's right are persons in general and not B alone, for a right of this kind is a right in rem and avails against the whole world, (3) The content of the right (i. e. act or omission) consists in non-interference with the purchaser's exclusive use of the land; (4) The thing or the object or subject-matter of the right is the land purchased; and (5) finally the title of the right is the conveyance (documents of transfer) by which it was acquired from the former owner.

Every right, therefore, involves a three-fold relation in which the owner of it stands—

(1) It is a right against some person or persons;
(2) It is a right to some act or omission of the person or persons bound;
(3) It is a right over or to something to which that act or omission relates.

74. Rights by reference to their objects

A right is a legally protected interest and the object of the right is the thing in which the owner has interest. It is the thing material or immaterial, which the owner desires to keep or to obtain by means of the duty which the law imposes on the other persons. Following are the chief kinds of rights by reference to their objects, as classified by Salmond :

Rights over material thing—It means rights over tangible or physical objects perceptible by the external organs of sense, such as land, house, book, etc.

Rights over immaterial property—Immaterial property is intangible object not perceptible by the organs of sense. It has got only a notional existence. Examples of these are patent rights, copy rights, trade marks and commercial goodwill. The object of a patent-right is an invention, that is to say, the idea of a new process, instrument or manufacture, and the patentee has right to the exclusive use of this idea. Similarly, the object of literary copy- right is the form of literary expression produced by the author of a book. In this he has a valuable interest by reason of the disposition of the public to purchase copies of the books and by the Copyright Act this interest has been given the status of a legal right.

Rights in respect of one's own person—A person has a right not to be killed. The object of this right is his own life. Similarly, I have a right not to be injured or assaulted, the object of this right being bodily health and integrity. I have a right not to be imprisoned save in due course of law, the object of this right being my personal liberty— that is to say, my power of going where I will.

The right of reputation—A man has an interest in his reputation i. e. in the good opinion that other persons have of him, just as he has an interest in the money in his pocket. Here the object is to have his moral worth in the society respected by every other man.

Rights in respect of domestic relation—Every man has an interest and a right in the society and consequently a right for the security of his family and dependants. Any person who, without just cause, interferes with his interests, as by seduction of his wife or daughter or by taking away his child, is guilty of a violation of his rights.

Right to services—These are rights vested in one person to the services of another. Every person has a right, acquired by contract, to receive the services of servant, physician, teacher, workman, artist, etc. In all such cases, the object to the right is the skill, knowledge, strength, time and so forth of the person bound by

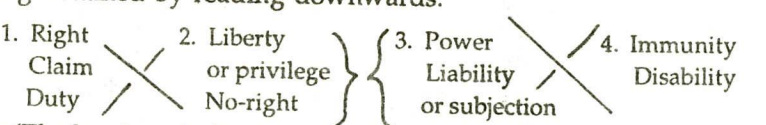
contract. If I hire a physician I obtain thereby a right to the use and benefit of his skill and knowledge, just as, when I hire a horse I acquire a right to the use and benefit of his strength and speed.

Right in respect of others' rights or right to a right—In many cases a right has another right as its subject-matter. These are cases of agreement to enter into sale, lease, mortgage etc. By the sale itself a person acquires the right of ownership ; but by an agreement of sale, he does not acquire the ownership itself, but he gets a right to acquire the right of ownership, that is, a right to compel another to transfer the ownership to him.

75. Legal rights in a wider or generic sense of the term

Hitherto we have discussed legal rights in the strictest and proper sense of the term. It is in this narrowest and specific sense only that we have regarded them as the correlatives of legal duties, and have defined them as interests which the law protects by imposing duties with respect to them upon other persons.

In its wider and generic sense a legal right may be defined as any advantage or benefit which is in any manner conferred upon a person by a rule of law, whether it corresponds to legal duty or not. Legal rights in this sense are of four kinds i.e. the right-duty relationship in its broad sense may be analysed into its four component parts, namely, (1) Claim or Right (in its strict sense), (2) Liberties, (3) Powers and (4) Immunities. Each of these has its correlative, namely, (1) Duties, (2) No-rights (or absence of right), (3) Subjections (or liabilities) and (4) Disabilities. The four pairs of correlatives may be arranged in the following table, the correlatives being obtained by reading downwards.



(The brackets indicate correlatives and the lines opposites)

Legal rights and duties and correlation between the two have already been discussed in sections 71 and 72.

76. Liberties and No-rights

The term liberty appears to be synonymous with the term 'right'. Thus we say, I have a right (i.e. I am at liberty) to do as I please with my own but that I have no right and I am not at liberty to interfere with what is another's. Similarly, I have a right (i. e. I am at liberty to express my opinion on public affairs, but I have not right to publish a defamatory or seditious libel). I have a right or I

am at liberty to defend myself against violence, but I have no right to take revenge upon him who has injured me.

But really speaking, there is a subtle difference between the two expressions. Both are no doubt legally recognised interests, but they are distinct species of one genus. My legal rights are the benefits which I derive from legal duties imposed upon others. Legal liberties are the benefits (sometimes called licences or privileges) which I derive from the absence of legal duties imposed upon other. Thus, legal liberties are advantages or benefits conferred upon a person by law without the imposition of any corresponding duty on others. The law helps the owner to exercise such rights in whatever way he likes provided he does not encroach upon the rights of others. Such liberties may, therefore, be stated to be "Liberties and no-Rights".

77. Powers and Subjection's or Liabilities

Legal powers are the abilities conferred by law upon a person to determine by his own will the rights and duties of himself or of other persons. A power is not the same thing as a right in the strict sense, nor is it identical with the right of the second class, namely, a liberty. But it is also legally recognised interest or advantage conferred by the law. It resembles liberties and differs from right in the strict sense, inasmuch as it has no duty corresponding to it. Examples of such powers are the following : the right to make a will or to alienate property or to gift or to lease; a landlord's right of re-entry; the power to sue and to prosecute, the various powers vested in Judges and other officials for the due fulfillment of their functions. There are no corresponding duties attached to such rights (i. e. powers). Thus my right to make a will corresponds to no duty in any one else. But a power is not strictly identical with the term liberty. Liberty is that which I may do innocently, but my right to make a will does not mean that in doing so I do not wrong. It does not mean that I may make a will innocently, but that I can make a will effectively which will be legally valid. I use my liberties with the permission or without being prevented by law; I use my power with the help of the law. The Wills Act gives us the power or enables me to make a will

The correlative of power is a subjection which means that the power is vested in someone else as against the person in subjection or liability. The examples are, the subjection of a tenant to cause the lease determined by re-entry for breach of an express covenant and that of a judgment-debtor to have the execution issued against him. Powers may be of two kinds—public or Private.

Public

When the rights are vested in a person as an agent or instrument of the function of the State, it is called public. They comprise the various forms of legislative, judicial and executive authority, such as right to vote, the power to prosecute, the power to make law, etc.

Private

Power is private when the rights are vested in persons to be exercised for their own purposes, and not a agents of the State, e. g. the capacity to make wills, landlords' right of re-entry and so on.

Public legal power is called authority and the private one is called capacity.

Thus, according to Salmond, legal liberties and legal powers have no corresponding duties attached to them. For duty, he says, is an obligatory act. Hence no positive acts are due by anybody to persons possessing legal liberties or legal powers.

78. Immunities and Disabilities

The term 'right' is also used in another sense to mean immunity from the legal power of some other person. An immunity is an exemption from having a legal relation changed by another. The right of a peer to be tried by his peers, for example, is neither a right in the strict sense, nor a liberty, nor a power. It is an exemption from trial by jury— an immunity from the power of the ordinary Criminal Courts. In other words, legal immunity is an exemption from the power of another in the same way as liberty is exemption from the right of another.

The correlative of immunity is disability otherwise called inability (or no-power). Disability is the absence of power. Thus, the rule that no one can sell things which do not belong to him can be expressed as a disability on the part of persons in general to transfer property that they do not themselves own.
