Chapter Six

State and Sovereignty

Definition of State

MANY DEFINITIONS of State have been given by various writers. Holland defines State as "the numerous assemblage of human beings, generally occupying a certain territory amongst whom the will of the majority or of an ascertainable class of persons, is by the strength of such a majority or class, made to prevail against any of their number who oppose it".

Willoughby writes that the State exists "where there can be discovered in any community of persons a supreme authority exercising control over the social actions of individuals and groups of individuals and itself subject to no such regulation." According to Sidgwick, the State is a "political society or community, i.e., a body of human beings deriving its corporate unity from the fact that its members acknowledge permanent obedience to the same government which represents the society in any transactions that it may carry on as a body with other political bodies."

Phillimore defines the State as "a people permanently occupying a fixed territory, bound together by common laws, habits and customs into one body politic exercising through the medium of an organised government independent sovereignty and control over all persons or things within its boundary, capable of making war and peace and of entering into international relations with the communities of the globe."

According to Bluntschli: "The State is a combination or association of persons in the form of Government and governed on a definite territory, united together into a moral organisation, masculine personality or more shortly, the State is the politically organised national person of a definite country."

Garner writes: "The State is a community of persons more or less numerous, permanently occupying a definite portion of territory, independent or nearly so of external control and possessing organised government to which the great body of inhabitants render habitual obedience."

According to Gettell: "State is a community of persons permanently occupying a definite territory, legally independent of external control and possessing organised government which creates and administers law over all persons and groups within its jurisdiction. Abstractly considered, the State is juridical entity or person; concretely considered, it is the community, the territory which it occupies and the governmental organisation through which it wills and acts."

Bentham writes: "When a number of persons (whom we may style subjects) are supposed to be in the habit of paying obedience to a person or an assemblage of persons, of a known and certain description (whom we may call Governor or Governors), such persons altogether (subjects and Governors) are said to be in a state of political society."

According to Woodrow Wilson: "A State is a people organised for law within a definite territory." MacIver writes: "The State is an association which acting through law as promulgated by a government, endowed to this end with coercive power, maintains within a community territorially demarcated the universal external conditions of social order." Brierly observes: "The State is an institution, that is to say, it is a system of relations which men establish among themselves as a means of securing certain objects, of which the most fundamental is a system of order within which their activities can be carried on."

Salmond defines a State with reference to its essential functions as "a society of men established for the maintenance of order and justice within a determined territory, by way of force."

Elements of the State

(1) There are certain essential elements of the State. The first essential element is population. There can be no State without a people. The population of a State may be large or small.

(2) Another essential element of State is its territory. Wandering people cannot constitute a State. It is only when they settle down on some definite territory that they constitute a State. The size of the territory of a State is not very material. It may be large or small and there are both kinds of States. Salmond does not regard territory as an essential element of the State. To quote him: "The territory of a State is that portion of the earth's surface which is in its exclusive possession and control. It is that region throughout which the State makes its will permanently

supreme and from which it permanently excludes an alien interference. The exclusive possession of a defined territory is a characteristic feature of all civilised and normal States. It is found to be a necessary condition of the efficient exercise of governmental functions." However, it is not essential to the existence of a State. A State without a fixed territory—a nomadic tribe for example—is perfectly possible. A non-territorial society may be organised for the fulfilment of the essential functions of government and if so, it will be a true State. However, such a state of affairs is so rare that it is permissible to disregard it as abnormal. It is with the territorial State that we are concerned.

(3) Another essential element of the State is Government which is the machinery through which the administration of a country is carried on. The government is the outward manifestation of a State. It is an organ of the community. There can be no State without a permanent and definite organisation. A temporary and casual union of individuals does not constitute a State. Salmond writes: "Political or civil power is the power vested in any person or body of persons of exercising any function of the State by his or their decision to set in motion the forces of the State for a particular purpose. All the persons with such power considered together constitute the government of that State and are the persons through whom the State as a whole acts." The government is divisible into three great departments—the legislature, the executive and the judiciary.

(4) Another essential element of the State is sovereignty. According to Salmond: "Sovereignty or supreme power is that which is absolute and uncontrolled within its own sphere." It is this element of sovereignty which distinguishes the State from government. The sovereign is supreme both externally and internally. There is no power above it.

Functions of the State: Primary and Secondary

Salmond divides the functions of the State into two parts: primary or essential functions and secondary functions. As regards primary functions, those are war and the administration of justice. The fundamental purpose and end of political society is defence against external enemy and the maintenance of law and order within the country. A study of the various writers shows that these two functions are considered to be essential although there are other functions which are considered to be desirable, Herbert Spencer writes: "The primary function of the State or of that agency in which the powers of the State are centralised is the function of directing the combined actions of the incorporated individuals in war. The first duty of the ruling agency is national defence. What we may consider as measures to maintain intertribal justice are more imperative and come earlier than measures to maintain justice

among individuals. Once established, the secondary function of the State goes on developing and becomes a function next in importance to the function of protecting against external enemies. With the progress of civilization, the administration of justice continues to extend and becomes more efficient. Between these essential functions and all other functions, there is a division which, though it cannot in all cases be drawn with precision, is yet broadly marked."

The primary functions of war and administration of justice are essentially the same and they help individuals to maintain their rights in society. However, there are certain differences in the two functions. The administration of justice requires the interposition of a judicial decision but in the case of war, the State acts extra-judicially without awaiting any such decision. Judicial force is usually regulated by law but extra-judicial force recognizes no law. It is the will of those who exercise it. There is no law in war. Martial law is merely the will of the commanding officer. Another distinction is that judicial force is commonly exercised against private persons but extra-judicial force is exercised against States. However, it is possible that the State may wage war against its own subjects or against pirates or other persons who do not constitute a political society. Another difference is that the machinery of justice is usually employed against internal but force is used against external enemies. The administration of justice is usually against the persons completely in the power of the State and its force is usually latent. Extra-judicial justice is not armed with such obviously overwhelming force.

As regards secondary functions, there are two main functions in this class and those are legislation and taxation. These functions are necessary for the welfare of citizens. Every State is becoming a welfare State and the whole life and activities of the community have come to be regulated and governed by the State. The secondary functions of the State have increased State activity. In Communist countries, the whole of the economic structure is a branch of public administration.

Unitary and Composite States

A unitary State is one which is not made up of territorial divisions which are States themselves. The Central Government is all-powerful. A composite State is one which is itself an aggregate or group of constituent States. Salmond classifies composite States as imperial, federal or confederate according to whether in legal theory there exists a Central Government from which the authority of all others is derived.

According to Nathan, a federation is "an aggregate of small States which, while each retaining its separate identity, are united together for defined common purposes in a union which, theoretically at least,

is indissoluble." Prof. Dicey defines a federal State as "a political contrivance intended to reconcile national unity with the maintenance of State rights." Prof. MacIver writes that the distinctive feature of a federation "is the formal division of sovereign powers between the constituent or part States and the larger State which they together compose." According to Roscoe Pound: "A federal polity is necessarily a legal polity. Only a Constitution which has the supreme law of the land can hold the whole and parts in their appointed spheres. Also it is a polity requiring a separation or distribution of powers, since concentration of all government powers anywhere not merely threatens the regime of balance, it cuts off means of preventing the balance when it is disturbed. While a Constitution has a purely political side, as setting up a frame of government, it must be, especially in a federal polity, a legal document, a body of authoritative precepts, rules, principles and standards enforceable and enforced as the supreme law."

There is fundamental difference between a federation and confederation. Hall writes: "A confederation is a union strictly of independent States which consent to forego permanently a part of their liberty of action for certain specific objects, and they are not so combined under a common government that the latter appears to their exclusion as the international entity". In a federation, the units are merged into the federal government and a new State is created from the legal point of view. A federation is a permanent form of union and the units cannot leave the same. According to Garner, the component members of a confederation "are free to withdraw at will and thus dissolve the confederation, and the confederating authorities have no constitutional power to restrain a disaffected member and compel it to remain in the confederation against its will". A confederation is a temporary union for a temporary purpose and when that is achieved the confederation is dissolved. However, a federation is a permanent union for an indefinite period.

The State and Law

The relation between the State and law is very close and intimate. The State manifests or expresses itself through law and law has its importance or sanctity because it has the sanction of the State. There are *three theories* with regard to the relationship between State and law.

(1) The first theory is that the State is superior to law and creator of law. Salmond writes: "It is in and through the State alone that law exists". Austin defines law as a command of the sovereign. Only the sovereign has the power to make law and he himself is not bound by it. The subject cannot have any right against the sovereign. Rules which

have not been made by the State are not law. International law is not law. It is merely "positive morality".

There was a reaction against this theory. It was contended that law is anterior to the State and is not always made by the State. There was a further reaction when the Nazis and Fascists came to power in Germany and Italy. What they advocated was that law is the will of the leader of the nation. Law is merely an instrument for the prosecution and fulfilment of State policy and is not a check on it. Certain rights have been guaranteed to citizens in democratic countries and those are considered to be binding on the State. However, those rights can be amended, curtailed or modified by the State. The prevalent view is that the State is not only the maker of law but also superior to it.

(2) The second theory is that law is more important than the State and the State is bound by it. Law is anterior to the State. Laski writes: "The rule of law is, clearly, independent of the State and is, indeed anterior to it." Miller observes: "Law, like language, springs from the society itself and one of its first works is the creation of the State—the greatest of corporations—for the enforcement of rights and duties in accordance with law. The State makes laws but does not create chemical relations." According to Krabbe, the source of law is the subjective sense of the right in the community. The sovereign is not the source of law. It is the community that expresses itself through the organs of the government. Jellinek says that although the State creates law, it is bound by it. It submits to law voluntarily. Jellinek describes it as the theory of auto-limitation.

(3) The third theory is that the State and law are one and the same thing. They merely indicate legal order. Kelsen is one of the advocates of this view. According to him, the terms State and law are the same thing. These two terms are used because we look from two different angles. When we think in terms of rules, we call it State. When we think in terms of the institution created by those rules, we call it State. There is no difference between law and State. Kelsen's view has been criticised on a number of grounds. Miller observes: "The identification of law with the State is like the identification of church and State or religion and the State."

The different theories about the relationship of law and State have their own merits. The State bound by some fundamental law is not an impossibility. It is possible that in future, law may be considered more fundamental than the State.

Sovereignty

In its popular sense, the term sovereignty means supremacy or the right to demand obedience. A sovereign State is one which is subordinate to no other. It is supreme over the territory under its control. It issues orders which all men and all associations within its territory are bound to obey. Its independence in the face of other communities is the mark of external sovereignty. Its power to exact obedience from its members is the mark of internal sovereignty. Sovereignty is the chief attribute of statehood.

In ancient times, there was no concept of sovereignty as it is understood in modern times. The concept of State sovereignty came into being after the Middle Ages and developed during the Reformation and Renaissance. The view of Machiavelli was that politics is a secular science. The State is absolute and an end in itself. There are no restraints on its powers, whether of the church or of natural law. The power of the ruler over his subjects is absolute.

Bodin was the first writer who used the word sovereign by which he meant the absolute and perpetual power within a State. According to him, the ruler is the source of all laws. He has the absolute power of law-making although the law of nature makes him respect proprietary rights and keep faith with another ruler.

The theory of sovereignty was further developed by Hobbes. According to him, the sovereign is absolute and not bound by anything. Its power extends over all matters within the State, including religion.

The theory of sovereignty was given in a very elaborate and systematic form by Austin. According to him, the sovereign is not in the habit of obedience to any political superior and he commands habitual obedience from the bulk of his subjects. Sovereignty is indivisible, unlimited and illimitable.

Salmond

The view of Salmond is that every political society involves the presence of sovereign authority. It is not necessary that sovereignty in all cases be found in its entirety within the confines of the State itself and may, wholly or partly, be external to the State. In the case of a dependent or semi-sovereign State, sovereign power is vested wholly or in part in the superior State. Sovereignty need not mean unlimited supremacy as supposed by Austin. An authority may be sovereign within its sphere and in that sphere its power is uncontrolled. The ambit of this sphere need not be unlimited. Austin erroneously thought that if authority is restricted and confined to particular limits, it cannot be sovereign. According to Salmond, Austin's error lies in confusing the limitation

of power with its subordination. The authority confided to a particular organ should be regarded as sovereign if within its own sphere it acknowledges no higher power, though its authority may not extend to other spheres. A sovereign within its power is not a contradiction in terms. When Salmond says that sovereignty may be limited, it is not suggested that sovereign power may be legally controlled within its own sphere because that would be a self-contradictory proposition. What he maintains is that the province of sovereignty may have legally determined bounds. Within its own ambit, sovereign power must undoubtedly be unfettered, but the Austinian view that this ambit is infinite and has no assignable limits is rejected by Salmond. Legislative power itself may be divided between two coordinate legislatures, each dealing exclusively with certain topics of legislative power.

Dicey

The view of Dicey is that there are two kinds of sovereigns, legal sovereign and political sovereign. Parliament is the legal sovereign because it has the supreme power of law-making. Behind the legal sovereign, there is the political sovereign which is the electorate. The legal sovereign acts in accordance with the wishes of the political sovereign. During the time when the House of Commons is dissolved and elections have not taken place, sovereignty vests directly in the electorate. When the elections are held and the Parliament has been constituted, sovereignty directly vests in the legal sovereign and the political sovereign remains sovereign only indirectly. There must be harmony in the views of the legal sovereign and the political sovereign in the interests of political sovereignty.

Jethrow Brown

The view of Jethrow Brown is that the State, as a corporation, is sovereign. It acts through various organs and agents for the achievement of its corporate purpose. The sovereign is not a person or a group of persons, distinct and separate from the community. The community as such is the sovereign and it expresses its general will through the organs of government.

Kelsen

The view of Kelsen is that there can be no concept of sovereignty distinct and separate from and above the law. The State is simply a legal order. The only meaning that can be given to State sovereignty is that legal order is a unity distinct from and independent of other similar legal orders.

Duguit

Duguit rejects the idea of State sovereignty. According to him, social solidarity is the end of all human institutions, including the State. The State has no absolute and unlimited powers. It is bound by the rule of social solidarity. State sovereignty is a meaningless term as the State has no supreme and superior powers.

Pluralists

The Pluralists reject the idea of State sovereignty. According to them, the State is one of the many associations an individual joins for the satisfaction of his needs. The State is only one of the many associations. Associations compete among themselves for the allegiance of human beings. The State cannot demand exclusive allegiance from the people.

Marxist view

The Marxist view is that the State reflects the dominance of one class over the other classes of society. The powers of the State are exercised to protect the interests of the class which has instruments of production in its hands. Sovereignty or State power is only for the protection of that class. The State shall wither away when classes are abolished. In that case, there will be no question of State sovereignty.

For certain reasons, the authority of the State has increased tremendously in modern times. There is the perpetual danger of war. There is a race of armaments going on in the world. There is an atmosphere of cold war. All these factors have resulted in uncontrolled power of the State. However, there are certain limitations on the sovereignty of State. International law is an external check on the absolute power of the State. There is also a growing demand in the world for the decentralisation of the powers of the government. There is a demand for devolution of power, both regional and functional. There is a growing demand for individual freedom and freedom of association. "Whatever may have been the case in the past, the theory of sovereignty seems at the present day to be one of the greatest stumbling blocks in the path of international progress. It is hardly too much to say that ever since that Great War the world has been struggling to escape from the theory of sovereignty in international affairs—from its jealousies, its rivalries, its preposterous pretensions and its apprehensions and to build up out of the ruins left by the War, a more wholesome theory of international society."

Austin's Theory of Sovereignty

The nature of sovereignty is explained by John Austin in these words: "If a determinate human superior, not in the habit of obedience to a

like superior, receives habitual obedience from the bulk of a given society, that determinate superior is sovereign in that society and the society, including the superior, is a society political and independent. To that determinate superior, the other members of the society are dependent. The position of its other members towards the determinate superior is a state of subjection or a state of dependence. The mutual relation which subsists between that superior and them may be styled the relation of sovereign and subject, or the relation of sovereignty and subjection."

Prof. Laski says that there are three implications of the definition of sovereignty given by Austin. The State is a legal order in which there is a determinate authority acting as the ultimate source of power. Its authority is unlimited. It may act unwisely and dishonestly but there is no limit on the exercise of its power. From the legal point of view, the character of the action is immaterial. If the order comes from the sovereign, that order is lawful. Command is the essence of the law. Law is in the form of "You must do certain things" or "You must not do other things" and failure in either direction is punished.

According to Austin, in every independent political society, there is a sovereign power. The chief characteristic of sovereignty lies in the power to exact habitual obedience from the bulk of the members of the society. Sovereignty is the source of law. Every law is set, directly or circuitously, by a sovereign person or body to a member or members of the independent political society wherein that person or body is sovereign or supreme. Law is the will or command of the sovereign. Sovereign is that authority in the State which can make and unmake any and every law. The power of the sovereign is legally unlimited.

Austin admits that the sovereign power may have *de facto* limitations. The effective power of the sovereign is dependent on two factors. The first factor is the coercive force which the sovereign has at his command. The second factor is the docile disposition of the people. As these two things have practical limits, sovereignty is also limited *de facto*. What Austin denies is that the sovereign power can be limited *de jure*. By definition, the legal sovereign is that person or body to whose directions the law attributes legal force, the person in whom resides as of right the ultimate power of laying down general rules or isolated commands, whose authority is that of the law itself. As the sovereign is the source of law, the view of Austin is that there can be no legal limits to the power of the sovereign. The power of the sovereign is indivisible. It cannot be legally limited. It cannot be divided also. According to Austin, there can be only one sovereign in the State. The totality of sovereign power is vested in one person or a body of persons.

The legal omnipotence of the British Parliament is unique. According to De Lolme: "It is a fundamental principle with English lawyers that Parliament can do everything but make a woman a man and a man a woman." The only limits to the legislative power of Parliament are physical limits.

Lord Bryce writes: "The British Parliament can make and unmake any and every law, change the form of government or the succession to the Crown, interfere with the course of justice, extinguish the most sacred rights of the citizens...and it is, therefore, within the sphere of the law, irresponsible and omnipotent".

Prof. Dicey gives the following instances as illustrations of the exercise by Parliament of its supreme legislative authority: (1) The Union of Scotland Act, 1707 contained certain provisions which were expressed to have continuance for ever, but some of them were repealed later on. (2) The Union of Ireland Act, 1800 provided that the Churches of Ireland and England should be united into one Protestant Episcopal Church of England and Ireland and the united church should remain in force for ever. However, the Irish Church Act, 1869 disestablished the Church of England in Ireland. (3) Under an Act of 1694, the duration of British Parliament was limited to three years. This Act was in force in 1716 and a general election could not be deferred beyond 1717. However, the Septennial Act was passed which extended the duration of Parliament from three to seven years and the powers of the sitting House of Commons were prolonged for four years.

Dr. Jennings points out that all the instances given by Dicey relate to the subject-matter of legislation and not the method of legislation. Section 4 of the Statute of Westminster, 1931 provides that the British Parliament cannot legislate for a Dominion except with its consent.

The view of Salmond is that the existence of *de facto* limitations proves the possibility of legal limitations. To quote him: "A law is only the image and reflection of the outer world seen and accepted as authentic by the tribunals of the state...If the courts of justice habitually act upon the principle that certain functions or forms of activity lie outside the scope of legal sovereign power as recognised by the Constitution, then that principle is by virtue of judicial application a true principle of law and sovereignty."

In the British Constitution, the legislative authority alone resides in Parliament while executive authority resides in the Crown. In law, the executive power of the Crown is sovereign, being absolute and uncontrolled in its own sphere. Austin does not admit this and says: "The powers of the King detached from the body (Parliament) are not sovereign powers but are simply or purely subordinate; or if the King or

any part of its members considered as detached from that body, be invested with political power, that member as so detached is merely a minister of the body, or those powers are merely emanations of its sovereignty". Salmond does not accept the view of Austin and writes: "No law passed by the two Houses of Parliament is operative unless the Crown consents to it. How then can the legislature control the executive? A power over a person which cannot be exercised without that person's consent is no power over him at all. A person is sub-ordinate to a body of which he is a member only if that body has power to act notwithstanding his dissent." In legal theory, the Executive under the British Constitution cannot be regarded as subordinate to the legislature. The conclusion of Salmond is that the British Constitution recognises sovereign executive no less than a sovereign legislature.

Salmond points out that till 1911, a Supreme Judicature was recognised by the British Constitution. The House of Lords in its judicial capacity as a final court of appeal was sovereign. Without its consent, its judicial powers could not be impaired or controlled. Thus, the House of Lords was the supreme judicial power. However, the Parliament Act of 1911 made it possible for a bill passed by the House of Commons to become law even without the concurrence of the House of Lords. By that Act, the power of the House of Lords over general legislation was curtailed practically to a suspensive veto of two years. Thus, the House of Lords was reduced to a position of subordination and could not be regarded as a sovereign organ.

According to the Austinian theory, sovereignty in a federal State is to be sought in the ultimate power which can alter the Constitution. Article V of the American Constitution provides for constitutional amendment. That amendment is to be proposed by a two-thirds majority of the Congress and ratified either by the legislatures of three-fourths of the States or by conventions in three-fourths of the States. An amendment may also be proposed by a constitutional convention called on the application of the legislatures of two-thirds of the States and ratified by the legislatures of three-fourths of the States or by conventions in three-fourths of the States.

It is clear that the constitution-amending body is fettered in coming to decision by very restrictive rules as to majorities. These restrictions are provided to ensure that the Constitution does not become so readily alterable. However, a sovereign thus trammelled would be more or less a contradiction in terms. Moreover, the constitution-amending body comes into operation only on very exceptional occasions. Lord Bryce writes: "Is there not something unreal and artificial in ascribing sovereignty to a body which is almost always in abeyance?"

Even if it is assumed that the constitution-amending body is the sovereign, the question arises whether its powers are legally unlimited. Prof. Sidgwick observes: "It has legal limits of great importance because it (the constitution-amending body) can operate only when the legal rules determining its structure and procedure are satisfied." Moreover, no state can be deprived of its equal voting suffrage in the Senate without its consent. The result is that even the constitution-amending body has legal limitations upon its power.

Austin's theory of indivisible sovereignty breaks down in the case of federal States. Sovereignty is divided into legislative, executive and judicial sovereignty. This division is taken as axiomatic in a federal Constitution. These three branches are independent of one another in federal States.

The view of Lord Bryce is that Austin's theory of sovereignty is not applicable to federal Constitutions. In the United States, the Congress can legislate on federal matters only. The residuary legislative power is with the State legislatures. To quote Bryce: "Each legislature, therefore, has only a part of the sum total of supreme legislative power. The sovereignty of each of these authorities will then be to the lawyer's mind, a partial sovereignty. But it will nonetheless be a true sovereignty sufficient for the purpose of the lawyer." The conclusion of Lord Bryce is that "legislative sovereignty is divisible, that is, different branches of it may be concurrently vested in different persons (or bodies), coordinate altogether, or coordinate partially only, though acting in different spheres."

Under the Indian Constitution, Article 53 provides that the executive power of the Indian Union is vested in the President of India. Legislative power resides in Parliament which comprises the President, the Council of States and the House of the People. The Constitution can be amended only when the amending bill after being duly passed as required by Article 368, has received the assent of the President. The powers of the President as supreme executive cannot be impaired without his consent. In the executive sphere the President is supreme and may be regarded as the executive sovereign. As the powers of the Supreme Court can be impaired without its consent, there is no judicial sovereign in the Indian Constitution.

It is suggested that sovereignty may be located in the constitution-amending body. Austin tried to locate sovereignty in the United States in this way. However, that cannot be done in India whose Constitution does not prescribe only one procedure for amending the Constitution. Some amendments can be made by Parliament itself without the concurrence of the States. Some amendments mentioned in the Proviso

to Article 368 of the Indian Constitution require in addition ratification by the legislatures of one-half of the States. As there is not one constitution-amending body for all purposes, it is not the repository of sovereign power. Moreover, the constitution-amending body functions rarely and it is artificial to ascribe sovereignty to it.

While delivering the V. S. Srinivasa Sastri Endowment Lectures in 1955, K. M. Munshi observed: "What are the implications of the sovereignty with which our Republic is vested? Sovereignty has two aspects: one external, that is, in relation to other States enjoying sovereign powers, and the other internal, that is, in relation to its own citizens. The idea that sovereignty is unlimited or to use the words of Hobbes, indivisible, unlimited and illimitable is as untrue in theory as in practice. The idea was borrowed by nation-states from the Divine Right of Kings and has been leading the world to endless misery and confusion during the last three hundred years. In the past, the sovereignty of a State was always hedged in by treaties, conventions and international law. During recent years when the world has shrunk fast on account of science, external sovereignty as an illimitable power has no sense.

"India, in spite of being a sovereign Republic, is limited in its external relations by its membership of the Commonwealth, by its membership of the United Nations Organisation, by the express and implied alliances which it maintains with several nations, by the financial and military difficulties which preclude every nation in the world from doing what it likes, and above all, by the increasing pressure of international opinion. What is true of India is true of all nations. Today even the two most powerful nations of the world find it difficult to do what they want to do. The pressure of the world opinion is rising and would, in the near future, make external sovereignty anything but real. A leading school of jurists is of the opinion, and rightly, that only the universal State could be sovereign, but then its external relations could only be directed to the Moon or Mars. External sovereignty can therefore be defined as the power of a State to maintain its internal sovereignty as it likes, to develop and exploit its resources for its own advantage, to resist direct foreign interference in its own affairs, to frame its own foreign policies and choose its allies."

Sir Henry Maine was very critical of Austin's theory of sovereignty. His view was that sovereignty did not reside in a determinate human superior. To quote him: "A despot with a disturbed brain is the sole conceivable example of such sovereignty." Maine emphasised the existence of "vast mass of influences which we may call, for shortness, moral, that perpetually shapes, limits or forbids the actual direction of

the forces by its sovereign." Referring to Maharaja Ranjit Singh of the Punjab, Maine pointed out that the Maharaja "could have commanded anything; the smallest disobedience to his command would have been followed by death or mutilation." In spite of that, the Maharaja never "once in all his life issued a command which Austin could call a law. The rules which regulated the life of his subjects were derived from their immemorial usages and these rules were administered by domestic tribunals in families or village communities." The conclusion of Maine was that even a Maharaja like Ranjit Singh could not issue a command which was opposed to the customs, usages and religious beliefs of the people. That was so not only in the East but also in the West where also no sovereign could disregard "the entire history of the community, the mass of its historical antecedents which in each community determine how the sovereign shall exercise or forbear from exercising his irresistible coercive power."

According to Austin, the sovereign possesses unlimited powers, but experience shows that there is no power on earth which can wield unlimited powers. The reason is that the State or the sovereign acts through law which can regulate only the external actions of human beings and is helpless to regulate their internal actions. Whatever the Government might do, it cannot control the morality of the people, the beliefs of the people, their religion or the public opinion. The State cannot control the internal lives of the people. Hence the sovereign does not possess unlimited powers.

Bluntschli writes that "the State as a whole is not almighty, for it is limited externally by the rights of other States and internally by its own nature and by the rights of individual members."

According to Leslie Stephen, sovereignty is limited both from within and without: "from within because the legislature is the product of a certain social condition and determined by whatever determines society, and from without because the power of imposing law is dependent upon the instinct of subordination which is itself limited. If a legislature decided that all blue-eyed babies should be murdered, the preservation of blue-eyed babies would be illegal but legislatures must go mad before they could pass such a law and subjects be idiotic before they could submit to it." Again, "as there is in nature no such thing as a perfect circle or a completely rigid body, or a mechanical system in which there is no friction or a state of society in which men act simply with a view to gain, so there is in nature no such thing as an absolute sovereign."

Professor Laski has criticised the theory of unlimited sovereignty on many grounds. He points out that "no sovereign has anywhere pos-

sessed unlimited power and the attempt to exert it has always resulted in the establishment of safeguards." Even the British Parliament does not enjoy absolute powers in actual practice. Legally, the King-in-Parliament may outrage public opinion, but practically it can do so only on the implied condition that it ceases, as a consequence, to be the King-in-Parliament. The other associations within the State are no less sovereign than the State itself. The interests of humanity demand a limited sovereignty. To quote him: "Externally surely, the concept of absolute and independent sovereign State which demands an unqualified allegiance to government from its members and enforces that allegiance by the power at its command, is incompatible with the interests of humanity. Our problem is not to reconcile the interests of humanity with the interests of England; our problem is so to act that the policy of England naturally implies the well-being of humanity."

Critics point out that "legally, an autocratic Tsar may shoot down his subjects before the Winter Palace at Petrograd, but morally it is condemnation that we utter. There is, therefore, a vast difference between what Dean Pound has admirably called 'Law in Books' and 'Law in Action'."

It is not only impossible to exercise unlimited powers, but it is also undesirable to give unlimited powers to anybody. History tells us that whenever any King or Queen was given unlimited powers over the people, the people suffered. Both their lives and property were unsafe. They could not enjoy their liberty. The whims of one man prevailed and there was no certainty about anything. Moreover, unlimited sovereignty or the exercise of unlimited powers not only destroys those over whom that power is exercised but also destroys ultimately the wielders of unlimited power. As a result of persecution at the hands of the autocrat, the grievances of the people multiply and ultimately they revolt against him and pull him down.

The conclusion is that Austin's view of sovereignty is not applicable to the States in modern times. The definition served its purpose during the nineteenth century but now it does not serve its purpose.

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Chapter Seven

Administration of Justice

Importance of justice

IN THE WORDS of Prof. Sidgwick: "In determining a nation's rank in political civilisation, no test is more decisive than the degree in which justice as defined by the law is actually realised in its judicial administration." Lord Bryce writes: "There is no better test of the excellence of a government than the efficiency of its judicial system." George Washington said: "Administration of justice is the firmest pillar of government. Law exists to bind together the community. It is sovereign and cannot be violated with impunity." Salmond and Roscoe Pound have emphasized the importance of justice in their definitions of law. They have defined law in terms of justice. According to Salmond: "Law may be defined as the body of principles recognised and applied by the State in the administration of justice." Roscoe Pound observes: "Law is the body of principles recognised or enforced by public and regular tribunals in the administration of justice." Blackstone wrote: "Justice is not derived from the king as his free gift but he is the steward of the public to dispense it to whom it is due. He is not the spring but the reservoir from whence right and equity are conducted by a thousand channels to every individual."

Administration of justice

The most essential functions of a State are primarily two: war and administration of justice. If a State is not capable of performing either or both of these functions, it cannot be called a State. According to Salmond, the administration of justice implies the maintenance of right within a political community by means of the physical force of the State. It is a modern and civilised substitute for the primitive practice of private vengeance and violent self-help. The definition of Salmond has been criticised on the ground that it is not the force of the State

alone that secures the obedience of law. There are a number of other factors such as the social sanctions, habit and convenience which help in the obedience of law. In civilised societies, obedience to law becomes a matter of habit and in very rare cases the force of the State is used to secure it. The supporters of the definition of Salmond point out that if the force of the State is not used in all cases to secure obedience, it does not mean that the control of the State has disappeared. It merely indicates the final triumph and supremacy of the control of the State.

Necessity of Administration of Justice

In the words of Jeremy Taylor: "A herd of wolves is quieter and more at one than so many men, unless they all have one reason in them or have one power over them." Spinoza writes: "Those who persuade themselves that a multitude of men can be induced to live by the rule of reason are dreamers of dreams and of the golden age of poets." Hobbes says that without a common power to keep them all in awe, it is not possible for individuals to live in society. Without it, injustice is unchecked and triumphant and the life of the people is solitary, poor nasty, brutish and short.

Salmond points out that men do not have one reason in them and each is moved by his own interests and passions. The only alternative is one power over men. Man is by nature a fighting animal and force is the *ultima ratio* of all mankind. Without a common power to keep them all in awe, it is impossible for men to cohere in any but the most primitive form of society. Without it, civilisation is unattainable. However orderly a society may be, the element of force is always present and operative. It may become latent but still exists. A society in which the power of the State is never called into actual exercise does not mark the disappearance of the control of the government but its final triumph and supremacy. It is suggested that force as an instrument for the coercion of mankind is merely a temporary and provisional incident in the development of a perfect civilisation. To a large extent already, the element of force has become merely latent and for the most part it is sufficient for the State to declare the rights and duties of its subjects. This is clear from the increasing popularity of the cases for mere declaration which do not seek any other relief except the declaration of law or the rights of the parties. The force of public opinion is a valuable support and even indispensable for a system of law because without it there can be no stability and permanence. However, public opinion alone is no substitute for legal sanctions. The influence of public censure is a very weak one. The influence of the national conscience, unsupported by the force of the State, can be counteracted by small societies or associations possessing separate interests and separate antagonistic con-

sciences of their own. A man cares more for the opinion of his friends and immediate associates than for the opinion of all the world. The censure of ten thousand may be outweighed by the approval of ten. The honour of thieves finds its sanction and support from those belonging to their profession. Social sanction is an efficient instrument only if it is associated with and supplemented by the concentrated and irresistible force of the community. Force is necessary to coerce the recalcitrant minority and prevent them from gaining an unfair advantage over the law-abiding majority in a State. The conclusion is that the administration of justice with the sanction of the physical force of the State is unavoidable and admits of no substitute.

Origin and Growth of Administration of Justice

The origin and growth of administration of justice is identical with the origin and growth of man. The social nature of man demands that he must live in society. While living so, man must have experienced a conflict of interests and that created the necessity for providing for the administration of justice.

To begin with, every individual had to help himself to punish the wrongdoer. Personal vengeance was allowed. He avenged himself upon his enemies by his own hand, probably supported by the hands of his friends and kinsmen where necessary. At that stage, every man carried his life in his hands. He was liable to be attacked at any time and he could resist by overpowering his opponent. In those days, every man was a judge in his own cause and might was the sole measure of right. There was no guarantee that crime would certainly be punished and that also in proportion to the gravity of the crime. Very often one crime led to another. Not only an individual was involved, even the members of his family and tribe could be the victims of retaliation. There were group conflicts and tribal conflicts, Blood feuds were common. When blood feuds became disastrous, primitive societies provided for the payment of some money or its equivalent as a compensation to the victim of the crime or the relatives of the victim. The system of compensation was developed until a regular sliding scale was fixed. In the case of murder, the vengeance of the relatives of the deceased could be bought off by paying blood money according to the importance of the victim.

The second stage in the history of administration of justice started with the rise of political States. However, those States were not strong enough to regulate crime and inflict punishment on the criminals. The law of private vengeance and violent self-help continued to prevail. The State merely regulated private vengeance and violent self-help. The State also prescribed rules for the regulation of private vengeance.

The State enforced the concept of "a tooth for a tooth", "an eye for eye" and "a life for a life". The State provided that a life shall not be taken for a tooth or a life for an eye. Vengeance was not totally abolished in the Anglo-Saxon period of history of England but was merely restricted and regulated.

With the growth of the power of the State, the State began to act as a judge to assess liability and impose penalty. It was no longer a regulator of private vengeance. It substituted public enquiry and punishment for private vengeance. The civil law and administration of civil justice helped the wronged and became a substitute for the violent self-help of the primitive days. The modern administration of justice is a natural corollary to the growth in power of political State.

Advantages and Disadvantages of Legal Justice

As regards advantages, legal justice ensures uniformity and certainty in the administration of justice. Everybody knows what the law is and there is no scope for arbitrary action. Even the judges have to give decisions according to the declared law of the country. As law is certain, citizens can shape their conduct accordingly. Another advantage is that there is impartiality in the administration of justice. Judges are required to give their decisions according to the pre-determined legal principles and they cannot go beyond them. Law is not for the convenience of the judges or for any particular individual. Law is already laid down and judges have to act accordingly. It is in the way that impartiality is secured in the administration of justice. In the words of Chief Justice Coke: "The wisdom of law is wiser than any man's wisdom." Judges can avail of the wisdom accumulated during the last many generations. Legal justice represents the collective wisdom of the community and that is always to be preferred to the wisdom of any one individual.

There are certain disadvantages of legal justice. One disadvantage is that it is rigid. Law has already been laid down in precedents. It is not always possible to adjust it to the changing needs of society. Society may change more rapidly than legal justice and may result in hardship and injustice in certain cases. Judges act upon the principle that "hard cases should not make bad law". Another defect of legal justice is its formalism or technicalities. Judges attach more importance to legal technicalities than they deserve. They give importance to form than to substance. Another defect of legal justice is that it is complex. Modern society is becoming more and more complicated and if made from time to time to codify or simplify the legal system but very soon law becomes complicated. Sir John Salmond concludes: "The law is

without doubt a remedy for greater evils, yet it brings with it evils of its own."

Public Justice

Public justice is that which administered by the State through its own tribunals. Private justice is distinguished as being justice between individuals. Public justice is a relation between the courts on the one hand and individuals on the other. Private justice is a relation between individuals. *X* borrows money from *Y* and private justice demands that he should pay the same as promised. If he does not do so, *Y* has the right to go to a court of law to force *X* to pay the same. If *Y* does so, it is a case of public justice. Private justice is the end for which the courts exists and public justice is the instrument or means by which courts fulfil that end. Private persons are not allowed to take the law into their hands. Even if a wrong has been done to them, they must, refrain from helping themselves. There is no place for force in private justice. That can be used only in the case of public justice. To quote Salmond: "It is public justice that carries the sword and the scales and not private justice."

Justice according to Law

In modern times, what is given by the courts to the people is not what can really be called justice but merely justice according to law. Judges are not legislators and it is not their duty to correct the defective provisions of law. Their only function is to administer the law of the country. They are not expected to ignore the law of the country. It is rightly said that "in the modem Slate, the administration of justice according to law is commonly taken to imply recognition of fixed rules".

A few illustrations may be given to show what we understand by justice according to law. A creditor has to realise some money from a debtor. However, he files a suit after the lapse, of three years. Equity may be on his side, but his suit must fail on account of the law of limitation which demands that a suit must be filed within three years. Likewise, a person may have actually committed a murder. He may confess his guilt before a police officer who is an honest man. However, he does not make a confession before a magistrate. If he is convicted on the basis of his confession before the police officer, his conviction has to be set aside as it is opposed to the law of the country. Even if a guilty person escapes, judges are not bothered about it. They do not play and are not expected to play the role of legislators. If law is defective, it is the duty of the people to demand from their legislators to alter the same. However, so long as a particular law is on the statute book, the same has to be enforced unmindful of the consequences.

Law may be blind and therefore justice becomes blind, but there is no help for it. Judges are expected to give justice according to the law of the country and not according to what they consider to be just under the circumstances.

Civil and Criminal Justice

A rough distinction between crimes and civil wrongs is that crimes are public wrongs and civil wrongs are private wrongs. Blackstone writes: "Wrongs are divisible into two sorts or species, private wrongs and public wrongs. The former are an infringement or privation of the private or civil rights belonging to individuals, considered as individuals, and are thereupon frequently termed civil injuries; the latter are a breach and violation of public rights and duties which affect the whole community considered as a community and are distinguished by the harsher appellation of crimes and misdemeanours." A crime is an act deemed by law to be harmful to society in general. Murder injures primarily the particular victim but its disregard of human life does not allow the same to be a matter between the murderer and the family of the murdered. Those who commit such acts are proceeded against by the State and they are punished if convicted. Civil wrongs such as a breach of contract or trespass to land are deemed to infringe only the rights of the individual wronged and not the society in general. The law leaves it to the victim to sue for compensation in the courts.

English Law has certain features which prevent us from drawing a clear line between crimes and civil wrongs. There are some wrongs to the State and therefore public wrongs, but still they are regarded as civil wrongs by law. A refusal to pay taxes is an offence against the State and is dealt with in a suit of the State, but it is a civil wrong in the same way as a refusal to pay money lent by a private person is a civil wrong. The breach of a contract made with the State is not a criminal offence. An action by the State for the recovery of a debt, or for damages, or for the restoration of public property, or for the enforcement of a public trust is a civil wrong although in each case the person injured and suing is the State itself. Some civil wrongs can cause greater general harm than some criminal offences. The negligence of a contractor may cause greater damage and loss than a petty theft. The same act may be a civil injury or a crime.

However, Salmond points out that from a practical standpoint, the importance of distinction lies in the difference in the legal consequences of crime and civil wrongs. Civil justice is administered according to one set of farms and criminal justice according to another set of forms. Civil justice is administered in one set of courts and criminal justice is administered in a somewhat different set of courts. The outcome of

the proceedings is generally different. If successful, civil proceedings result in a judgment for damages or in a judgment for the payment of a debt or penalty or in an injunction or decree for specific restitution or specific performance, or in an order for the delivery of possession of land, or in a decree of divorce, or in an order of *mandamus*, prohibition or *certiorari*, or in a writ of *habeas corpus*, or in, other forms of relief known as civil. If successful, criminal proceedings result in one of a number of punishments, ranging from hanging to fine or in a binding over to keep the peace, release upon probation or similar other results belonging distinctly to criminal law. However, even here the distinction is not clear—cut. Criminal proceedings may result in an order against the accused to make restitution or compensation. Civil proceedings may result in an award of exemplary or punitive damages. However, the basic objective of criminal proceedings is punishment and the usual goal of civil proceedings is not punitive.

Some writers consider that the object of civil proceedings is to enforce rights, while the object of criminal proceedings is to punish wrongs. There is an element of truth in this view. Punishment is more a feature of criminal proceedings than of civil proceedings. However, punishment is not always present in criminal proceedings and not always absent in civil proceedings. A juvenile offender may be just warned and not punished in a criminal proceeding whereas in an action for torts, damages may be awarded by way of punishment. When a man disobeys an injunction of the court, he may even be punished with imprisonment in civil proceedings. Therefore, this distinction does not go to the root of the matter.

Another distinction made by some writers is that crimes are more harmful in their consequences than civil wrongs. While crimes injure the public at large, civil wrongs injure the private individual. However, this distinction cannot always be maintained. Some acts may be considered both as crimes and civil wrongs. This is so in the case of defamation. It is also not always true that crimes are more harmful than civil wrongs. Negligence of a contractor is a civil wrong but it may result in more loss of life and property than a simple assault or a petty theft which are crimes.

According to some writers, the State constitutes itself as a party to the proceedings in a crime, but in civil proceedings private individuals are parties. This distinction is also not true in all cases. There are crimes in which private individuals can be parties.

The difference between criminal justice and civil justice cannot be considered in terms of natural acts or the physical consequences of the act. The distinction lies in the legal consequences. Civil proceedings re-

sult in judgment for damages etc. while criminal proceedings result in one or a number of punishments. Though, broadly speaking, criminal justice attempts at punishment and civil justice attempts at remedy, yet to be accurate, the distinction is more in the legal consequences of the proceedings than in the intrinsic nature of the acts.

Purpose of Criminal Justice

The purpose of criminal justice is to punish the wrongdoer. He is punished by the State. The question arises, what is the purpose of punishment or in other words, what is the end of criminal justice. From very ancient times, a number of theories have been given concerning the purpose of punishment. Those theories may be broadly divided into two classes. The view of one class of theories is that the end of criminal justice is to protect and add to the welfare of the State and society. The view of the other class of theories is that the purpose of punishment is retribution. The offender must be made to suffer for the wrong committed by him.

THEORIES OF PUNISHMENT

There are five theories of punishment: deterrent theory, preventive theory, reformative theory, retributive theory and theory of compensation.

(*a*) *Deterrent Theory (Deterrent Punishment)*:—Salmond considers the deterrent aspect of punishment to be the most important. To quote him: "Punishment is before all things deterrent and the chief end of the law of crime is to make the evildoer an example and a warning to all that are likeminded with him." A similar view was expressed by Locke when he stated that the commission of every offence should be made "a bad bargain for the offender". According to the deterrent theory of punishment, the object of punishment is not only to prevent the wrongdoer from doing a wrong a second time but also to make him an example to other persons who have criminal tendencies. A judge once said: "I don't punish you for stealing the sheep but so that sheep may not be stolen." The aim of punishment is not revenge but terror. An exemplary punishment should be given to the criminal so that the others may learn a lesson from him. The view of Manu was that "penalty keeps the people under control, penalty protects them, penalty remains awake when people are asleep, so the wise have regarded punishment (*danda*) as a source of righteousness". Again, "people are in check by punishment, for it is difficult to find a man who by nature sticks to the path of virtue and this world is unable to afford sources of enjoyment through fear of punishment". Paton writes: "The deterrent

theory emphasises the necessity of protecting society, by so treating the prisoners that others will be deterred from breaking the law."

The deterrent theory was the basis of punishment in England in medieval times and continued to be so till the beginning of the 19th century. The result was that severe and inhuman punishments were inflicted even for minor offences in England. In India also, the penalty of death or mutilation of limbs was imposed even for petty offences.

There is a lot of criticism of the deterrent theory of punishment in modern times. It is contended that the deterrent theory has proved ineffective in checking crime. Even when there is a provision for very severe punishments in the penal law of the country, people continue to commit crimes. In the time of Queen Elizabeth, the punishment for pickpocketing was death but in spite of that, pickpockets were seen busy in their work among the crowds which gathered to watch the execution of the condemned pickpockets. It is pointed out that with the increase in the severity of punishment, crimes have also increased. Excessive harshness of punishment tends to defeat its own purpose by arousing the sympathy of the public towards those who are given cruel punishments. Deterrent punishment is likely to harden the criminal instead of creating in him the fear of law. Hardened criminals are not afraid of punishment. Punishment loses its horror once the criminal is punished.

Beccaria writes: "The more cruel punishments become, the more human minds hardened, adjusting themselves, like fluids, to the level of objects around them; and the ever living force of the passions brings it about that, after a hundred years of cruel punishments, the wheel frightens men only just as much as at first did the punishment of prison." Hobhouse expresses himself in these words: "People are not deterred from murder by the sight of the murderers dangling from a gibbet. On the contrary, what there is in them of lust for blood is tickled and excited, their sensuality or ferocity is aroused and the counteracting impulses, the aversion to bloodshed, the compunction for suffering are arrested."

(b) Preventive Theory (Preventive Punishment):—Another object of punishment is preventive or disabling. The offenders are disabled from repeating the offences by such punishments as imprisonment, death, exile, forfeiture of office etc. By putting the criminal in jail, he is prevented from committing another crime. By dismissing a person from his office, he is deprived of an opportunity to commit a crime again. Paton writes: "The preventive theory concentrates on the prisoner but seeks to prevent him from offending again in the future. Death penalty and exile serve the same purpose of disabling the offender." Justice

Holmes writes: "There can be no case in which the law-maker makes certain conduct criminal without his thereby showing a wish and purpose to prevent that conduct. Prevention would accordingly seem to be the chief and only universal purpose of punishment. The law threatens certain pains if you do certain things, intending thereby to give you a new motive for not doing them. If you persist in doing them, it has to inflict the pains in order that its threats may continue to be believed."

An example of preventive punishments is the cancellation of the driving licence of a person. As he has no licence, he is prevented from driving.

Relation between Deterrent and Preventive Theories:—There is a difference between deterrent and preventive theories of punishment. The deterrent theory aims at giving a warning to the society at large that crime shall not pay. Preventive theory aims at disabling the actual criminal from doing harm. The purpose of the deterrent theory is to set a lesson unto others and show that crime does not pay. This theory points out to the offender and the rest of the world that ultimately punishment follows the crime and therefore crime should be avoided. In the case of preventive theory of punishment, the main object of punishment is to disable the wrongdoer from repeating the crime. This theory does not act so much on the motive of the wrongdoer but disables his physical power to commit the offence.

(c) Reformative Theory:—According to this theory, the object of punishment should be the reform of the criminal. Even if an offender commits a crime, he does not cease to be a human being. He may have committed a crime under circumstances which might never occur again. The object of punishment should be to bring about the moral reform of the offender. He must be educated and taught some art or industry during the period of his imprisonment so that he may be able to start his life again after his release from jail. While awarding punishment, the judge should study the character and age of the offender, his early breeding, his education and environment, the circumstances under which he committed the offence, the object with which he committed the offence and other factors. The object of doing so is to acquaint the judge with the exact nature of the circumstances so that he may give a punishment which suits the circumstances.

The advocates of the reformative theory contend that by a sympathetic, tactful and loving treatment of the offenders, a revolutionary change may be brought about in their characters. Even the cruel hardened prisoners can be reformed and converted into helpful friends by good words and mild suggestions. Severe punishment can merely debase them. Man always kicks against pricks. Whipping will make

him balk. Threat will result in resistance. Prison-hell may create the spirit of defiance of God and man. Hanging a criminal is merely an admission of the fact that human beings have failed to reform the erring citizen. Corporal punishments like whipping and pillory destroy all the finest sentiments and tenderness in man. Mild imprisonment with probation is the only mode of punishment approved by the advocates of reformative punishment.

The view of Salmond on the reformation theory is that if criminals are to be sent to prison to be transformed into good citizens by physical, intellectual and moral training, prisons must be turned into comfortable dwelling places. There are many incorrigible offenders who are beyond the reach of reformative influences and with whom crime is not a bad habit but an instinct and they must be left to their fate in despair. The theory of reformative punishment alone is not sufficient and there should be a compromise between the deterrent theory and the reformative theory and the deterrent theory must have the last word. The primary and essential end of criminal justice is deterrence and not reformation. In the past, the deterrent theory alone was considered and crime alone was taken into consideration and not other circumstances. In modern times, there is a tendency to ignore or minimise the deterrent aspect of punishment. What is required is that the value of the deterrent element must be given its proper place. In most cases, criminals are sub-normal persons and that is largely due to the fact that the fear of law has its effect on normal minds. Salmond writes: "The deterrent motive should not be abandoned in favour of the reformative altogether since the permanent influence of criminal law in this stern aspect contributes largely to the maintenance of the moral and social habits which shall prevent any but the abnormal from committing crime and also directly deter any but the sub-normal, apart from exceptional circumstances, from committing crimes."

Salmond further observes that although the acceptance of the reformative theory alone is bound to lead to disastrous consequences, it should be extended to the treatment of other than the very young and insane persons. He refers to two objections. In the first place, law is too rough an instrument to distinguish accurately between the normal and the sub-normal. Secondly, except in extreme cases of insanity it is not clear that even in the case of abnormal persons, the deterrent effects of punishment are not effective and necessary. If a person is deficient in any way, that is hardly any ground for treating him leniently than others. Even in the case of abnormal persons, it is easier to deter them from crime by discipline than to reform them by lenient punishment. Under the circumstances, the deterrent theory must not be ignored in criminal justice. Salmond writes: "The reformative element must not

be overlooked but neither must it be allowed to assume undue prominence. To what extent it may be permitted in particular instances to overrule the requirements of a strictly deterrent theory is a question of time, place and circumstances. In the case of youthful criminals, the chances of effective reformation are greater than in that of adults and the rightful importance of the reformative principle is therefore greater also. In orderly and law-abiding communities, concessions may be made in the interests of reformation which in more turbulent society would be fatal to the public welfare."

In spite of the view of Salmond, a lot of emphasis is being put on the reformative aspect of punishment in modern times. In progressive States, provision is made for the prevention of habitual offenders. Borstal schools have been set up. Provision is made for a system of probation for first offenders.

Reformation theory is being growingly adopted in the case of juvenile offenders. The oldest legislation on the subject in India is the Reformatory Schools Act, 1890 which aimed at preventing the depraved and delinquent children from becoming confirmed criminals in the coming years. It applied to children under the age of 15 years. Section 4 abolished all criminal proceedings for offences other than homicide against children. The entire responsibility of dealing with delinquent children was put on the local authority. Section 5 authorised the provincial government to establish and maintain reformatory schools. Section 6 provided that the reformatory schools must provide sufficient means of separating the inmates at night, proper sanitary arrangements, water supply, food, clothing and bedding for the youthful offenders detained therein, the means of giving industrial training to youthful offenders and proper places for the reception of youthful offenders when sick. Section 8 provided that if a youthful offender was sentenced to transportation or imprisonment, the court may direct that instead of undergoing sentence, he shall be sent to a reformatory school and detained there for a period not less than three years or more than seven years.

The Reformatory Schools Act has been extensively amended in its application to the various States by State legislatures, e.g., the Bombay Children Act, 1948, Madras Children Act, 1920, East Punjab Children Act, 1949, Uttar Pradesh Children Act, 1951, West Bengal Children Act, 1959, Assam Children Act, 1971, Bihar Children Act, 1970, Madhya Pradesh Baal Adhiniyam, 1970, Rajasthan Children Act, 1970 and Mysore Children Act, 1964.

The Government of India passed in 1960 the Children Act which applies to the Union Territories. This Act was amended in 1978. This amendment broadened the aim of the Children Act, 1960.

The Probation of Offenders Act, 1958 has been passed with a similar object in view. About this Act, the Supreme Court observed in *Rattan Lal* v. *State of Punjab* that the Act is a milestone in the progress of the modern liberal trend of reform in the field of penology. It is the result of the recognition of the doctrine that the object of criminal law is more to reform the individual offender than to punish him. The Act distinguishes offenders between 21 years of age and those above that age and offenders who are guilty of having committed an offence punishable with death or imprisonment for life and those who are guilty of a lesser offence. In the case of offenders who are above the age of 21, absolute discretion is given to the courts to release them after admonition or probation of good conduct. In the case of offenders below the age of 21, an injunction is issued to the courts not to sentence them to imprisonment unless they are satisfied that, having regard to the circumstances of the case, including the nature of the offence and the character of the offenders, it is not desirable to release them on probation.[1] In *Musa Khan* v. *State of Maharashtra,* the Supreme Court observed that this Act is a piece of social legislation which is meant to reform juvenile offenders with a view to prevent them from becoming hardened criminals by providing an educative and reformative treatment to them by the government.[2]

Section 27 of the Criminal Procedure Code, 1973 provides that any offence not punishable with death or imprisonment for life committed by any person who, at the date when he appears or is brought before the court, is under the age of 16 years, may be tried by the court of a Chief Judicial Magistrate or by any court especially empowered under the Children Act, 1960, or any other law for the time being in force providing for the treatment, training and rehabilitation of youthful offenders.

Section 360 of the Code of Criminal Procedure, 1973 empowers the court to order the release on probation of good conduct or after admonition.

Relation between Deterrent and Reformative Theories:—There is a lot of difference between the deterrent and reformative theories. The reformative theory stands for the reformation of the convicted person but the deterrent theory wants to give exemplary punishment so that the others are deterred from following that course. The deterrent the-

[1] AIR 1965 SC 444.

[2] AIR 1976 SC 2566.

ory would like to hang the murderer so that others may not commit murders but capital punishment does not allow an opportunity to the criminal to reform himself.

The reformative theory wants to punish the criminal as little as possible and improve him as much as possible. Punishments which brutalize the criminal are discarded. It is contended that if we inflict degrading punishments on criminals, there is no scope left for their reformation. The disgrace and loss of self-respect by the criminals are serious obstacles in the way of their reformation.

In the case of habitual criminals, the deterrent theory would like to inflict as severe a punishment as possible on the ground that the previous punishments must have been inadequate and that is why the criminal committed further offences. The reformative theory is going to fail in the case of habitual offenders.

The fundamental principle of deterrent theory is that punishment should be determined by the character of the crime and too much emphasis is put on the crime and not on the criminal. Ferri writes in Criminal Sociology: "To the classical criminologists, the person of the criminal is an entirely secondary element.... He is an animated manikin on the back of which the judge places the number of his section of the Penal Code." The reformative theory requires that the circumstances under which the offence was committed must be taken into consideration and every effort should be made to give a chance to the criminal to improve himself in the future.

The deterrent theory may impose the punishment of imprisonment, fine or even whipping and death penalty. According to the reformative theory, excepting imprisonment, the other modes of punishment are barbaric. Imprisonment and probation are the only important instruments available for the purpose of a purely reformative system.

The question arises whether a system of penal code is possible which has reformation as the sole standard of punishment. The view of Salmond is that there are in the world men who are incurably bad. With them, crime is not so much of a bad habit as an ineradicable instinct and the reformative theory would be helpless in the case of such persons. According to him, the perfect system of criminal justice is based on neither the reformative nor the deterrent principle. What is required is a compromise between the two and in that also the deterrent principle must have the predominant influence. The extreme inclination towards the reformative theory may be as dangerous as the complete acceptance of the deterrent theory. It is true that previously too much attention was paid to the crime and not to the criminal. It is also true that criminals generally are not ordinary human beings. They

are mentally diseased and abnormal human beings. However, if all the murderers are considered as innocent and given a lenient treatment, even ordinary sane people may be tempted to commit crimes in view of the lenient attitude of law towards crime. The reformative theory may be effective in the case of the very young and completely insane offenders, but the deterrent element in punishment must have the predominant influence.

Previously, criminal law was barbarous and death penalty was inflicted in a large number of cases regardless of the circumstances in which the crime was committed. In *R.* v. *Haynes*, the accused was charged with the murder of a woman with whom he was on very friendly terms up to the commission of the offence. Probably the offence was committed under some uncontrollable impulse or moral insanity, However, Bramwell, J. awarded death sentence to the accused. In justification of the sentence awarded by him, he wrote: "If an influence is so powerful as to be termed irresistible, so much more reason is there why we should not withdraw any one of the safeguards tending to counteract it." English Law has changed and more emphasis is now put on the circumstances which might be responsible for the crime. In a Memorandum appended to the Report of the Royal Commission, 1863, Cockburn, C. J. wrote: "It is on the assumption that punishment will have the effect of deterring the crime that its infliction can alone be justified; its proper and legitimate purpose being not to avenge crime but to prevent it. Wisdom and humanity no doubt alike suggest that if, consistently with this primary purpose, the reformation of the criminal can be brought about, no means should be omitted by which so desirable an end can be achieved. But this, the subsidiary purpose of penal discipline, should be kept in due subordination to its primary and principal one."

In his *Philosophy of Right*, Prof. D. Lioy writes: "Crimes are to be treated as infirmities and the culpable ones diseased subject: whose fury might be subdued in solitude, if they had been impelled to the evil deed by the violence of their passion; and it should aim at correcting their vicious habits by the aid of labour, if they had come to them through idleness and to enlighten their minds by means of instruction, if ignorance had led them astray. By this means law from being vindictive had become just and from being just had become charitable and it completed the act of punishing by the art of healing."

(*d*) *Retributive Theory*:—In primitive society, punishment was mainly retributive. The person wronged was allowed to have his revenge against the wrongdoer. The principle of "an eye for an eye", "a tooth for a tooth" was recognised and followed. Justice Holmes writes: "It

is commonly known that the early forms of legal procedure were grounded in vengeance."

The retributive aspect was recognised in ancient penology. Early criminal law was based on the principle that all evil should be requited. It was believed that the community could be regarded as purged of the evil only in that way. Among the ancient Jews, even animals which killed human beings were regarded as contaminated and were got rid of for the good of the community. Plato was a supporter of the retributive theory. He wrote: "If justice is the good and the health of the soul as injustice is its disease and shame, chastisement is their remedy. If a man is happy when he lives in order, than when he is out of it, it is of importance to him to enter it again and he enters it through chastisement. Every culpa demands an expiation; the culpa is ugly, it is contrary to justice and order; the expiation is beautiful because all that is just is beautiful and to suffer for justice is also beautiful."

Kant, the German philosopher, expressed himself in these words: "Judicial punishment can never serve merely as a means to further another good, whether for the offender himself or for society, but must always be inflicted on him for the sole reason that he has committed a crime. The law of punishment is a categorical imperative." Kant gave the following example: "Even if a community of citizens dissolves with the consent of every member (e.g., the inhabitants of an island decide to separate and spread all over the world), they must first execute the last murderer in the prison so that everyone gets what is his due according to his deeds."

The view of Sir James Stephen is that the purpose of punishment is to gratify the desire for vengeance by making the criminal pay with his body. To quote him: "The criminal law stands to passion of revenge in much the same relation as marriage to the sexual appetite." Punishment gratifies the feeling of pleasure experienced by individuals at the thought that the criminal has been brought to justice. That desire ought to be satisfied by inflicting punishment in order to avoid the danger of private vengeance.

The view of Sir John Salmond is that the retributive purpose of punishment consists in avenging the wrong done by the criminal to society. A crime is not aimed merely at the sufferer. It is an affront to community itself which should avenge the wrong and see that retribution overtakes the wrongdoer. The purpose of punishment is to gratify the desire for vengeance by making the criminal pay with his body. The retributive purpose of punishment is the elevation of the moral feelings of the community. The emotion of retributive indignation created by injustice is characteristic of all healthy communities. A noble emo-

tion like righteous indignation deserves to be fostered by the State. Through the criminal justice of the State, satisfaction is found for the moral sense of the community. Lilley writes: "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."

Another view is that retributive punishment is an end in itself. Apart from gain to society and the victim, the criminal should meet his reward in equivalent suffering. Expiation means the suffering or punishment for an offence. "*The murderer has expiated his crime on the gibbet.*"

Punishment is a form of expiation. To suffer punishment is to pay a debt due to the law that has been violated. Guilt plus punishment is equal to innocence. The penalty of wrongdoing is a debt which the offender owes to his victim. When punishment has been endured, the debt is paid and the legal bond forged by crime is dissolved. The object of true punishment must be to substitute justice for injustice. To compel the wrongdoer to restore to the injured person that which is his own by such restoration and repentance, the spirit of vengeance of the victim is to be satisfied.

Critics point out that punishment in itself is not a remedy for the mischief committed by the offender. It merely aggravates the mischief. Punishment in itself is an evil and can be justified only on the ground that it is going to yield better results. Revenge is wild justice. Justice Holmes writes: "This passion of vengeance is not one which we encourage, either as private individuals or as law-makers. Moreover, it does not cover the whole ground. There are crimes which do not excite it and we should naturally expect that the more important purpose of punishment would be coextensive with the whole field of its application." Retribution is only a subsidiary purpose served by punishment.

(*e*) *Theory of Compensation*:—According to this theory, the object of punishment must be not merely to prevent further crimes but also to compensate the victim of the crime. The contention is that the mainspring of criminality is greed and if the offender is made to return the ill-gotten benefits of the crime, the spring of criminality would dry up.

Critics of this theory point out that it tends to oversimplify the motives of the crime. The motive of a crime is not always economic. Offences against the State, against justice, against religion, against marriage and even against persons, may not always be actuated by economic motives. There may be other motives involved in the case. In those cases, the theory of compensation may be neither workable nor

effective. Even in the case of offences actuated by such motives, the economic position of the poor offender may be such that compensation may not be available. If the offender is a rich person, the payment of any amount may be no punishment for him.

In certain cases, the Supreme Court has awarded compensation to persons who have suffered at the hands of government servants. In *Bhim Singh* v. *State of Jammu and Kashmir,* Bhim Singh was a member of the Legislative Assembly. He was arrested while on his way to attend a meeting of the Assembly. The result was that he was deprived of his constitutional right to attend the Assembly session. The Supreme Court awarded a sum of Rs. 50,000 as compensation and ordered the same to be paid within two months.[3]

A perfect system of criminal justice cannot be based on any one theory of punishment. Every theory has its own merits and every effort must be made to take the good points of all. The deterrent aspect of punishment must not be ignored. Likewise, the reformative aspect must be given its due place. The personality of the offender is as important as his actions and we must not divorce his action from his personality. The offender is not merely a criminal to be punished. He is also a patient to be treated. Punishment must be in proportion to the gravity of the crime. It must be small for minor crimes and heavy for major crimes. The first offender should be leniently treated. Special treatment should be given to the juvenile offenders. It must not be forgotten that motive for the crime is generally lacking in the case of children. They commit petty offences on account of bad company and bad neighbours. Their cases must be handled with imagination and sympathy. Children must be tried in special courts set up for them. Those in charge of them must try to find out ways and means of reforming them and not punishing them. A criminal should be able to secure his release by showing improvement in his conduct in jail. He who behaves better should be given good diet, clothes and leisure and a part of his sentence should also be remitted. The object of this concession is to convince the offender that normal and free life is better than life in jail. The government should set up mental hospitals and reformatories in place of jails and living conditions in jails should be improved.

Kinds of Punishment

(*a*) *Capital Punishment*:—In the history of punishment, capital punishment has always occupied a very important place. In ancient times and even in the Middle Ages, sentencing of offenders to death was a very common kind of punishment. Even for what might be considered as

[3] 1986 Cri LJ 192.

minor offences in modern times, death penalty was imposed. In the reign of George III, there were as many as 220 capital offences. Death penalty was awardable even for offences like shoplifting, cattle-stealing and cutting down of trees. When Samuel Romilly brought proposals for abolition of death penalty for such offences, there was a lot of hue and cry from lawyers, judges, parliamentarians and the so-called protectors of social order. They opposed the proposal on the ground that death penalty acted as a deterrent against the commission of such offences and if that deterrent was removed; the consequences would be disastrous. The opinion of the Chief Justice was that shops would be attacked and bankruptcy and ruin would become the lot of honest and laborious tradesmen. The prevention of crime should be the chief object of law and terror alone could prevent the commission of those crimes.

On a similar bill, the Lord Chancellor remarked: "So long as human nature remained what it was, the apprehension of death would have the most powerful cooperation in deterring from the commission of crimes; and he thought it unwise to withdraw the salutary influence of that terror."

The bill for abolition of death penalty for cutting down a tree was opposed by the Lord Chancellor in these words: "It did undoubtedly seem a hardship that so heavy a punishment as that of death should be affixed to the cutting down of a single tree, or the killing or the wounding of a cow. But if the bill is passed in its present state, a person might root up or cut down whole acres of plantations or destroy the whole of the stock of cattle of a farmer without being subject to capital punishment."

In 1810, a bill was brought forward to abolish death penalty for the offence of stealing in a shop to the value of 5 shillings. Lord Ellenborough opposed the bill in these words: "Your Lordships will pause before you assent to a measure so pregnant with danger for the security of property. The learned judges are unanimously agreed that the expediency of justice and public security required that there should not be a remission of capital punishment in this part of criminal law. My Lords, if we suffer this bill to pass, we shall not know where we stand, we shall not know whether we are on our heads or on our feet. "Six times the House of Commons passed the bill and six times the House of Lords rejected the same. The majority on one occasion included all the judicial members, one Archbishop and six Bishops. However, in spite of opposition, the bill was passed and the number of cases in which capital punishment was awarded was reduced year after year and death penalty was reserved for offences like murder and treason.

In his *Essay on Capital Punishment*, Sir James Fitzjames Stephen, the draftsman of the Indian Penal Code, maintained that "no other punishment deters man so effectually from committing crimes as the punishment of death... The threat of instant death is the one to which resort has always been made when there was an absolute necessity of producing some results."

In his statement before the Royal Commission on Capital Punishment, Lord Denning stated: "The punishment inflicted for grave crimes should adequately reflect the revulsion felt by the majority of citizens for them. It is a mistake to consider the object of punishment as being deterrent or reformative or preventive and nothing else. The ultimate justification of any punishment is not that it is a deterrent but it is the emphatic denunciation by the community of a crime, and from this point of view there are some murders which in the present state of opinion demand the most emphatic denunciation of all, namely, the death penalty. The truth is that some crimes are so outrageous that it (death penalty) is imposed irrespective of whether it is a deterrent or not."

The Royal Commission on Capital Punishment seemed to agree with Lord Denning's view about the justification of death penalty and observed: "The law cannot ignore the public demand for retribution which heinous crimes undoubtedly provoke; it would be generally agreed that, though reform of the criminal law ought sometimes to give a lead to public opinion, it is dangerous to move too far in advance of it."

In spite of these views, death penalty was abolished in the United Kingdom in 1965 except for offences of treason and certain forms of piracy and offences committed by members of the Armed forces during wartime. An attempt was made in the United kingdom in December 1975 to reintroduce death penalty for terrorist offences involving murder but it was defeated in the House of Commons. A similar motion was moved by a Conservative member of Parliament that "the sentence of capital punishment should again be available to the courts" but the motion was rejected by the House of Commons on 19 July, 1979.

The framers of the Indian Penal Code provided for capital punishment but the same was to be resorted to sparingly. The position of capital punishment did not change for more than 100 years but the trend in the direction of the abolition of capital punishment in many countries affected legislative as well as judicial thinking in India. The legislative thinking is reflected in some subtle changes in the Code of Criminal Procedure during the last two decades or so. Before the amendment of the Code of Criminal Procedure in 1955, it was obligatory for a court to

give reasons for not awarding death sentence in a case of murder. The amendment of 1955 did away with the requirement of assigning reasons for not giving death sentence in an appropriate case. Under the new Code of Criminal Procedure, 1973, the court has to record reasons for awarding death sentence. It is clear that the provisions regarding death sentence have gradually been liberalised in favour of guilty persons.

The recent trend in India is clearly towards the abolition of death sentence. In *Ediga Anamma* v. *State of Andhra Pradesh,* the Supreme Court of India observed: "While murder in its aggravated form in the extenuating factors connected with crime, criminal or legal process, still is condignly visited with death penalty, a compassionate alternative of life imprisonment in all other circumstances is gaining judicial ground."[4]

In *Raghubir Singh* v. *State of Haryana,* although the Supreme Court accepted the contention that the murder was treacherous, death sentence was reduced to life imprisonment.[5]

In *Rajendra Prasad* v. *State of Uttar Pradesh,* the appellant was sentenced to life imprisonment in a previous case but released on Gandhi Jayanti day. He again committed murder and was sentenced to death by the Sessions Judge and his death sentence was confirmed by the High Court. However, the same was converted into life imprisonment by the Supreme Court.[6] Earlier, in *Raghubir Singh* v. *State of Haryana,* the Supreme Court commuted the death sentence to life imprisonment.

In *Bachan Singh* v. *State of Punjab,* the Supreme Court held by a majority of four to one that the provision of death sentence as an alternative punishment for murder in Section 302 of the Indian Penal Code is not unreasonable and is in the public interest. Section 302 violates neither the letter nor the ethos of Article 19 of the Constitution. The provision of death sentence as an alternative punishment for murder does not violate Article 21 of the Constitution. By no stretch of imagination it can be said that death penalty constitutes an unreasonable, cruel or unusual punishment. The framers of the Constitution did not consider death sentence for murder as a degrading punishment which would defile "the dignity of the individual". Death sentence for the offence of murder also does not violate the basic structure of the Constitution. To commit a crime is not an activity guaranteed by Article 19(1) of the Constitution. A very large segment of people the world over, including sociologists, legislators, jurists, judges and administrators still fairly

[4] (1974) 4 SCC 443.
[5] (1975) 3 SCC 37.
[6] (1979) 3 SCC 646.

believe in the necessity of capital punishment for protection of society. The penalty has still a recognised legal sanction in most of the civilised countries in the world and the framers of the Indian Constitution were fully aware of the existence of death penalty as punishment for murder under Section 302 of the Indian Penal Code. It is not possible to hold that the provision of death penalty as an alternative punishment for murder is not in the public interest.[7]

The dissenting view of Justice Bhagwati was that instead of death sentence, the sentence of life imprisonment should be imposed. He pointed out that the international trend was towards the abolition of death penalty and a large number of countries has abolished death penalty *de jure* or *de facto*. As on 30th May, 1979, the following countries had abolished death penalty for all offences: Australia, Brazil, Colombia, Denmark, Federal Republic of Germany, Finland, Norway, Sweden, Portugal etc. Canada, Italy, Spain, Switzerland, the Netherlands, Peru and Malta had abolished death penalty in time of peace but retained it for specific offences committed in time of war. Many other States had retained death penalty on their statute books but they did not conduct any execution for many years. Many States in the United States of America had abolished death penalty. The United Kingdom abolished death penalty in 1965. The United Nations had gradually shifted from the position of neutral observer concerned about but not committed on the question of death penalty to a position favouring the eventual abolition of death penalty. The objective of the United Nations is that capital punishment should ultimately be abolished in all countries.

Justice Bhagwati referred to the Indian Penal Code (Amendment) Bill, 1972 which sought to narrow drastically the judicial discretion to impose death penalty and tried to formulate the guidelines which should control the exercise of judicial discretion. The Bill was passed by the Rajya Sabha in 1978 but it lapsed on account of the dissolution of the Lok Sabha. That indicated the direction in which the change was taking place.

Justice Bhagwati also referred to the views of Jayaprakash Narayan, Andrei Sakharov, Victor Hugo and Mahatma Gandhi in support of his contention. The view of Jayaprakash Narayan was that a humane treatment even of a murderer will enhance the dignity of man and make society more human. Sakharov regards "death penalty as a savage and immoral institution which undermines the moral and legal foundation of society... I reject the motion that death penalty has any essential deterrent effect on potential offenders. I am convinced that the contrary

[7] (1980) 2 SCC 634.

is true—that savagery begets only savagery... I believe that death penalty has no moral or practical justification and represents a survival of barbaric customs of revenge, bloodthirsty and calculated revenge with no temporary insanity on the part of the judges and therefore shameful and disgusting". Tolstoy, Victor Hugo and Mahatma Gandhi have expressed themselves against capital punishment.

Justice Bhagwati has put emphasis on barbarity and cruelty involved in death sentence. Death penalty is irrevocable. It cannot be recalled. It extinguishes the flame of life for ever. It is destructive of the right to life which is the most precious right of all, a right without which enjoyment of no other right is possible. It silences for ever a living being and despatches him to a country from which there is no return. By reason of its cold and cruel finality, death penalty is qualitatively different from all other forms of punishment. If a person is sentenced to imprisonment, even if it be for life, and subsequently it is found that he was innocent and was wrongly convicted, he can be set free. However, that is not possible where a person has been wrongly convicted and sentenced to death and put out of existence in pursuance of the sentence of death. In his case, even if any mistake is subsequently discovered, it will be too late because he cannot be brought back to life. The execution of death sentence makes miscarriage of justice irrevocable. Through its judicial instrumentality, the State would have killed an innocent man. However careful may be the procedural safeguards erected by law before penalty can be imposed, it is impossible to eliminate the chance of judicial error. No possible judicial safeguard can prevent the conviction of the innocent.

Justice Bhagwati further points out that death penalty is barbaric and inhuman in its effect, mental and physical, upon the condemned man and is positively cruel. Its psychological effect on the prisoner in the Death Row is disastrous. Intense mental suffering is inevitably associated with confinement under sentence of death. Anticipation of approaching death can and does produce stark terror. There is also the excruciating mental anguish and severe psychological strain which the condemned prisoner has to undergo on account of the long wait from the date when the sentence of death is initially passed by the Sessions Court until it is confirmed by the High Court and then the appeal against death sentence is disposed of by the Supreme Court and if the appeal is dismissed, then until the clemency petition is considered by the President and if it is turned down, then until the time appointed for the actual execution of the sentence of death arrives. The worst time for most of the condemned prisoners is the last few hours when all certainty is gone and the moment of death is known.

Death penalty cannot be said to be appropriate to the offence merely because it may be or is believed to be an effective deterrent against the commission of the offence. Death penalty cannot be regarded as appropriate to the offence of murder merely because the murder is brutal, heinous or shocking. The nature and magnitude of the offence or the motive and purposes underlying it or the manner and extent of its commission cannot have any relevance to the proportionality of death penalty to the offence.

The view of Justice Bhagwati is that death penalty for the offence of murder does not serve any legitimate social purpose, whether it is reformation, denunciation by the community or retribution and deterrence. The civilised goal of criminal justice is the reformation of the criminal and death penalty means the abandonment of this goal for those who suffer it. Death penalty cannot serve the reformatory goal because it extinguishes life and puts an end to any possibility of reformation. It defeats the reformatory end of punishment. There is no way of accurately predicting or knowing with any degree of moral certainty that a murderer will not be reformed or is incapable of reformation. There are examples of cases where the most vicious have been reformed.

Justice Bhagwati does not accept the argument advanced in support of death penalty that every punishment is to some extent intended to express the revulsion felt by the society against the wrongdoer and therefore punishment must be commensurate with the crime and as murder is one of the gravest crimes against society, death penalty is the only punishment which fits such crimes and hence it must be held to be reasonable. According to Justice Bhagwati, the denunciatory theory is a remnant of a primitive society which had no respect for the dignity of man and worth of the human person and seeks to assuage its injured conscience by taking revenge on the wrongdoer. Revenge is an elementary passion of a brute and betrays lack of culture and refinement. The manner in which a society treats crime and criminals gives the surest index of its cultural growth and development. A society which is truly cultured can never harbour a feeling of revenge against a wrongdoer. The wrongdoer is as much a part of the society as anyone else and by exterminating him, society will injure itself.

Retaliation can have no place in a civilised society and particularly in the land of Buddha and Gandhi.

To take human life even with the sanction of law and under the cover of judicial authority, is retributive barbarity and violent futility, travesty of dignity and violation of the divinity of man. So long as the offender can be reformed through the rehabilitatory therapy and can

be reclaimed as a useful citizen and made conscious of the divinity within him, there can be no moral justification for liquidating him out of existence.

The only ground on which death penalty may be sought to be justified is reprobation which is nothing but a different name for revenge and retaliation. It is difficult to appreciate how retaliatory motivation can ever be countenanced as a justificatory reason. The reason is wholly inadequate as it does not justify punishment by its results. It merely satisfies the passion for revenge masquerading as righteousness.

Justice Bhagwati rejects the view that death penalty acts as a deterrent against potential murderers. According to him, this view is a myth which has been carefully nurtured by a society which is actuated not so much by logic or reason as by a sense of retribution. Justice Frankfurter of the Supreme Court of the United States expressed the same view in the course of his examination before the Royal Commission on Capital Punishment: "I think scientifically the claim of deterrence is not worth much." A similar view was expressed by the Royal Commission on Capital Punishment: "Whether the death penalty is used or not and whether executions are frequent or not, both death penalty States and abolition States have rates which suggest that these rates are conditioned by other factors than the death penalty". Again, "the general conclusion which we have reached is that there is no clear evidence in any of the figures we have examined that the abolition of capital punishment has led to an increasing homicide rate or that its reintroduction has led to a fall".

The view of Prof. Sellin is that "there is no evidence that the abolition of capital punishment generally causes an increase in criminal homicides, or that its reintroduction is followed by a decline. The explanation of changes in homicide rates must be sought elsewhere".

Justice Bhagwati points out that the knowledge that death penalty is rarely imposed and almost certainly it will not be imposed takes away whatever deterrent value death penalty might otherwise have. The expectation, bordering almost on certainty, that death sentence is extremely unlikely to be imposed is a factor which would condition the behaviour of the offender and death penalty cannot in such a situation have any deterrent effect. The risk of death penalty being remote and improbable, it cannot operate as a greater deterrent than the threat of life imprisonment.

In order to remove the vice of arbitrariness in the imposition of death penalty, Justice Bhagwati recommends that there should be an automatic review of the death sentence by the Supreme Court sitting as a whole and death sentence shall not be affirmed or imposed by

the Supreme Court unless it is approved unanimously by the entire court sitting together. Death sentence should be imposed only if the Supreme Court comes to the conclusion that the offender is a serious menace to society and it is in the interests of society that he should be eliminated.[8]

There is going on a debate between those who stand for the abolition of capital punishment and those who want to retain it. Those who stand for its abolition maintain that capital punishment has not served its deterrent object at all. In certain States of the United States where death penalty has been abolished, there are fewer serious crimes than in those States where capital punishment is retained. If capital punishment had the deterrent effect, crimes in the former States ought to have increased and those in the latter States ought to have decreased. The conclusion is that statistics do not prove the deterrent effect of capital punishment.

It is also contended that crimes are committed very often not by normal human beings under normal circumstances. It is not even certain that a murderer would repeat murder again. He might have committed the heinous crime of murder under extraordinary circumstances. If law were to kill that man, it can have the superficial satisfaction of having prevented a crime which probably would not have been committed. In its anxiety to prevent a crime, the State itself commits the greatest crime of taking away the life of man.

Prof. Hentig points out that no right-thinking person can claim that our law of evidence and the law of procedure are foolproof and always lead inevitably to truth. It is possible that there are judicial errors and in such cases if capital punishment is once carried out, the same cannot be revoked. Thus, capital punishment is neither effective nor just. It is better to save nine murderers from capital punishment than to execute one who may in fact be innocent.

Those who want to retain the sentence of capital punishment argue that there are some offenders who are not only incorrigible but also immensely dangerous to society. There is no reason why society should be burdened with maintaining such people. If an offender cannot be cured and the incorrigible element is harmful to human society, the best thing is to carry out the death sentence.

Another argument in favour of capital punishment is that punishment by the State is a substitute for private revenge. If a murderer is not punished with death, it is quite possible that other relatives of the victim might murder the murderer and thus a chain of murders may start. So long as human emotions are powerful and the powers of

[8] (1982) 3 SCC 24.

vengeance prevail, capital punishment is a necessary kind of punishment.

The view of Lord Denning is that capital punishment is the way in which society expresses its denunciation of the wrongdoer. It is necessary to maintain respect for law. Some crimes are so outrageous that society insists on adequate punishment for the wrongdoer.

Justice Stewart observes: "I cannot agree that retribution is a constitutionally impermissible ingredient in the imposition of punishment. The instinct for retribution is part of the nature of man, and channelling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organised society is unwilling or unable to impose upon criminal offenders the punishment they deserve, then there are sown the seeds of anarchy—of self-help, vigilance, justice, and lynch law."

A similar view was expressed by the British Royal Commission in its Report: "We think it is reasonable to suppose that the deterrent force of capital punishment operates not only by affecting the conscious thoughts of individuals tempted to commit murder, but also by building up in the community, over a long period of time, a deep feeling of peculiar abhorrence for the crime of murder. The fact that men are hung for murder is one great reason why murder is considered so dreadful a crime. This widely diffused effect on the moral-consciousness of society is impossible to assess, but it must be at least as important as any direct part which the death penalty may play as a deterrent in the calculations of potential murders... ."

Former Prime Minister Lloyd George expressed his view on capital punishment in these words: "The first function of capital punishment is to give emphatic expression to society's peculiar abhorrence of murder... . It is important that murder should be regarded with peculiar horror... . I believe that capital punishment does, in the present state of society, both express and sustain the sense of moral revulsion for murder."

According to Dr. Ernest Van Den Haaq, a very strong symbolic value attaches to execution. The motives for death penalty may include vengeance, but legal vengeance solidifies social solidarity against lawbreakers and probably is the only alternative to the disruptive private revenge of those who feel harmed.

The view of a judge of the Ontario Appeal Court is that with the advent of armed criminals and substantial increase in armed robberies, criminals of long standing, if arrested, must expect long sentences. If they run no risk of hanging when found guilty of murder, they will

kill policemen and witnesses with the prospect of a future no more unhappy than being fed, lodged and clothed for the rest of their lives. Moreover, once in prison, such people who are capable of anything, could kill their guards and fellow inmates with relative impunity.

J.J. Maclean of Canada defends the right of the State to award capital punishment for murder. According to him, if the State has the right and duty to defend the community against outside aggression such as in time of war and within the country, for instance, in case of treason etc., and that to the extent of taking the life of the aggressors and guilty parties, if the citizen wants to protect his own life by killing whoever attacks without any reason, the State can do the same when a criminal attacks and endangers the life of the community by deciding to eliminate summarily another human being. Capital punishment must be retained to prove the sanctity of that most precious thing which is the gift of life. It embodies the revulsion and horror that we feel for the greatest of crimes. As a deterrent, death penalty is playing its part for which there is no substitute.

Vernon Rich writes: "The isolation theory of crime and punishment is that the criminal law is a device for identifying persons dangerous to society who are then punished by being isolated from society as a whole, so that they cannot commit other anti-social acts. The isolation theory is used to justify the death penalty and long term imprisonment. Obviously, this theory is effective in preventing criminal acts by those executed or permanently incarcerated."

George A. Floris expresses himself in favour of death penalty in these words: "It is feared that the most devastating effects of the abolition will, however, show themselves in the realm of political murder. An adherent of political extremism is usually convinced that the victory of his cause is just round the corner. So, for him long term imprisonment holds no fear. He is confident that the coming ascendency of his friends will soon liberate him." To prove this proposition, Floris gives the example of Von Papen's government which in September 1932 reprieved the death sentence passed on two of Hitler's stormtroopers for brutal killing of one of their political opponents. The Retentionists believe that the dismantling of gallows will almost everywhere enhance the hit and run attacks on political opponents. Capital punishment is the most formidable safeguard against terrorism.

Even in England, death penalty has been retained for high treason. In the aftermath of assassination of Prime Minister Bandaranaike in 1959, Ceylon reintroduced capital punishment for murder. Likewise, Israel sanctioned death penalty for crimes committed against the Jewish people and executed Eichmann in 1962 on the ground that he was

responsible for the deaths of many Jews. In 1979, Israel sanctioned the use of death penalty "for acts of inhuman cruelty".

The Law Commission of India in its 35th Report has given reasons for the view that capital punishment has a deterrent effect. Basically, every human being dreads death. Death, as a penalty, stands on a totally different level from imprisonment for life or any other punishment. The difference is one of quality and not merely of degree. The view of the majority of the State Governments, Judges, Members of Parliament and Legislatures and members of the Bar and Police Officers is that the deterrent object of capital punishment is achieved in a fair measure in India.

(*b*) *Deportation*: Another way of punishment is the deportation of incorrigible or dangerous offenders. This method used to be called transportation in India. However, this is not a solution to the problem. If a person is dangerous in one society and if he is let loose in another society, he is likely to be equally dangerous there also. Even if a separate colony or settlement is created for the deportation of such offenders, the problem of maintaining such a settlement would be a very difficult one. Moreover, such a colony would have a degrading influence on the character of the offenders. Punishment in the form of deportation was abolished long ago in Britain and it has now been abolished in India also.

(*c*) *Corporal punishment*: Another form of punishment is corporal punishment. This punishment includes modulation, flogging (or whipping) and torture. Previously, this was a very common form of punishment. Right up to the Middle Ages, whipping was one of the commonest forms of punishment. It was also a very severe form of punishment. Many persons died as a result of the wounds received by them on account of flogging or whipping. Whipping in public used to be common during the ancient and Medieval times in India.

The main object of this kind of punishment is deterrence. However, critics point out that this kind of punishment is not only inhuman but also ineffective. The person who undergoes this kind of punishment may become more anti-social than he was before. Criminal tendencies in him may become hardened and it may be an impossible task to reform him. Whipping was one of the forms of punishment originally provided for in the Indian Penal Code but the same was abolished in 1955. Pakistan has recently introduced flogging as a form of punishment.

A few criminologists have suggested that whipping should be reintroduced in India as a kind of punishment. Their contention is that simple imprisonment itself does not have the same deterrent effect as

whipping. This is particularly so in the case of a rich offender. There is opposition to the suggestion on the ground that whipping is a barbaric form of punishment and it should not be introduced in the civilised society of today. Whipping produces only the rougher kind of criminal. Dr. Barnes writes: "I never knew a convict benefited by flagellation. The beaten may become a more desperate character."

(*d*) *Imprisonment*: Another form of punishment is imprisonment. If properly administered, imprisonment can serve all the three objects of punishment. It may be deterrent because it makes an example of the offender to others. It may be preventive because it disables the offender, at least for some time, from repeating the offence. If properly used, it might give opportunities for reforming the character of the accused. However, there is the problem of fixing the period of imprisonment. Both short term and long term imprisonments have their inherent disadvantages. Short term imprisonments are regarded not only useless but also dangerous. They are useless because no institutional training or treatment is possible in short terms like one month or six months. They are dangerous because jails provide ideal surroundings to the novices and the minor offender for further training in a criminal career.

The Supreme Court of India has pointed out the dangers of long term imprisonment in a number of cases and has reduced the period of incarceration in appropriate cases e.g.,[9]

Sometimes, the accused are sentenced to both imprisonment and fine and sometimes fine only. The view of Lord Goddard is that fine should not be used to give an opportunity to persons of means to avoid the punishment of imprisonment.

In judging the adequacy of sentence, the nature of the offence, circumstances of its commission, the age and character of the offender, injury to individuals or to society, effect of punishment on the offender, eye to correction and reformation of the offender, are some amongst many other factors which would ordinarily be taken into consideration by the court.

(*e*) *Solitary confinement*: Another kind of punishment is solitary confinement which is an aggravated kind of punishment. Solitary confinement exploits fully the sociable nature of man. By denying him the society of his fellow beings, it seeks to inflict pain on him.

Critics point out that this kind of punishment is inhuman and perverse. There is every possibility of a man of sound mental health being turned into a lunatic. If used in excess, it may inflict permanent harm

[9] *Ashok Kumar* v. *State (Delhi Administration)*, (1980) 2 SCC 282 and *Nadella Venkatakrishna Rao* v. *State of Andhra Pradesh*, (1978) 1 SCC 208.

on the offender. However, if used in proportion, this kind of punishment may be useful. If those limits are surpassed, it becomes cruel.

Sections 73 and 74 of the Indian Penal Code lay down the limits beyond which solitary confinement cannot be imposed in India. The total period of solitary confinement cannot exceed three months in any case. It cannot exceed 14 days at a time with intervals of 14 days in between or 7 days at a time with 7 days interval in between.

(*f*) *Indeterminate sentence*: Another kind of imprisonment is indeterminate sentence. In this case, the accused is not sentenced to imprisonment for any fixed period. The period is left indeterminate at the time of the award. When the accused shows improvement, the sentence may be terminated.

It is the view of some criminologists that punishment of fine, in addition to serving its deterrent object, also serves three more purposes. It may help to support the dependents of the prisoner. It might provide expenses for the prosecution of the prisoner. It may be used for compensating the aggrieved party. This kind of punishment may be very useful if the criminals are not hardened. Care must be taken that heavy and excessive fines which result in the forfeiture of the property of the offender, should not be inflicted. Facilities for collecting fines must be created in such a way that levying of fine does not inevitably drive the offender to the prison on account of his inability to pay the fine.

Civil Justice

Primary and Sanctioning Rights

The rights enforced by civil proceedings are of two kinds viz., primary rights and sanctioning rights. Primary rights are those rights which exist as such. They do not have their source in some wrong. Sanctioning or remedial rights are those rights which come into being after the violation of a primary right. A primary right is a right arising out of conduct or as a *jus in rem*. A sanctioning right is one which arises out of the violation of another right. If *A* enters into a valid contract, his right to have the contract performed is a primary right. If the contract is broken, his right to damages for the loss caused to him for the breach of contract is sanctioning right. A primary right may be enforced by specific enforcement. A sanctioning right is enforced by sanctioning enforcement. Specific enforcement lies in either specific performance or specific restitution (restoring a person to his *status quo*). Where primary rights can be enforced, there is no question of any sanctioning right for that purpose. The cases of the enforcement of a primary right are where a defendant is compelled to perform a contract or to pay a

debt. The enforcement of the primary right is called specific enforcement.

Sanctioning rights are (*i*) the right to be compensated by damages by the wrongdoer, or (*ii*) the right to exact the imposition of pecuniary penalty on the wrongdoer by penal action. The first is divided into two types: restitution and penal redress. Restitution lies in restoring the plaintiff to his original position. Penal redress involves restitution of all benefits the offender derives from his wrongful act, plus a full redress for the plaintiff's loss.

Penal and Remedial Proceedings

All legal proceedings can be divided into five categories viz., action for specific enforcement, action for restitution, action for penal redress, penal action and criminal prosecution. Actions for penal redress, penal action and criminal prosecution are called penal proceedings because their ultimate purpose is punishment. Actions for specific enforcement and restitution are called remedial proceedings as their object is to remedy a wrong. In the case of penal proceedings, the ultimate purpose of law is on the whole or in part the punishment of the defendant. That is so where a person is imprisoned or held liable in damages to the person injured by him. In the case of remedial proceedings, the idea of punishment is entirely absent. From the point of view of legal theory, the distinction between penal and remedial proceedings is very important. All criminal proceedings are penal although the converse is not true. Some civil proceedings are also penal while others are of a remedial nature.

Secondary Functions of Courts of Law

The primary function of a court of law is the administration of justice. It has to enforce rights and punish wrongs. In every case, there are two parties, viz., the plaintiff and the defendant or the prosecutor and the accused. However, in addition to this other functions are also performed by courts of law.

(1) Courts adjudicate on the claims of citizens against the State. It seems logically impossible to conceive of the forces of the State being used against itself. However, the laws of all modern States provide remedies for individual citizens against the State to be pursued in its own courts. In the case of India, a suit can be brought against the Union of India or the Government of a State. In England, no action could be brought against the Crown up to the passing of the Crown Proceedings Act, 1947. However, even then, in the case of contractual liabilities, a British subject could put in a petition of right which was governed by the Petition of Rights Act, 1860. A petition of right could also be made

for the recovery of real property, chattel or damages for a breach of contract. If a petition of right was refused, there was no appeal against that. However, the petition was always granted unless the same was frivolous and did not disclose any cause of action at all. A judgment in favour of a petitioner in a petition of right was in the form of a declaration of the rights of the petitioner and was as effective as a judgment in ordinary action in an ordinary court. The Crown Proceedings Act, 1947 provides that where a person has a claim against the Crown, that claim can be enforced.

(2) Another function of the courts is the declaration of the rights of individuals. This is done where the rights of the parties are uncertain. What a court does is that it gives an authoritative declaration of the rights of the person concerned. Examples of declaratory proceedings are the declaration of legitimacy, declaration of nullity of marriage, advice to trustees or executors regarding their legal powers and duties, authoritative interpretation of wills etc.

(3) In certain cases courts of justice undertake the management and distribution of the property of a deceased person and also of minors whose property is put under the Court of Wards.

Other examples of administrative functions are the administration of the trust, the realisation and distribution of an insolvent estate, liquidation of a company by the court etc.

In certain cases, judicial decrees are employed as the means of *creating, extinguishing and transferring rights.* Examples of such functions are a decree of divorce or judicial separation, adjudication of bankruptcy, a decree of foreclosure against a mortgagor, appointment or removal of trustees, grant of letters of administration etc. In such cases, the judgments of the courts operate not as the remedy of a wrong but as a title of right.

Superior courts are often armed with the power of supervising the courts below them. Such a power is given to the High Courts in India by Article 227 of the Constitution of India.

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CHAPTER EIGHT

SOURCES OF LAW

Meaning of Source of Law

THE TERM "sources of law" has been used in different senses by different writers and different views have been expressed from time to time. Sometimes, the term is used in the sense of the sovereign or the State from which law derives its force or validity. Sometimes it is used to denote the causes of law or the matter of which law is composed. It is also used to point out the origin or the beginning which gave rise to the stream of law. C.K. Allen uses it in the sense of agencies through which the rules of conduct acquire the character of law by becoming definite, uniform and compulsory. Vinogradoff uses it as the process by which the rule of law may be evolved. Oppenheim uses it as the name for a historical fact out of which the rules of conduct come into existence and acquire legal force. According to Prof. Fuller, the problem of "sources 35 in the literature of jurisprudence relates to the question: "Where does the judge obtain the rules by which to decide cases? In this sense, among the sources of law will commonly be listed statutes, judicial precedents, custom, the opinion of experts, morality and equity." (*Anatomy of the Law*, p. 69).

Holland: According to Holland, the expression "sources of law" is sometimes employed to denote the quarter whence we obtain our knowledge of the law, e.g., whether from the statute book, the reports or esteemed treatises. Sometimes it is used to denote the ultimate authority which gives them the force of law, i.e., the State. Sometimes it is used to indicate the causes which, as it were, automatically brought into existence rules which have subsequently acquired that force viz., custom, religion and scientific discussion. Sometimes it is used to indicate the organs through which the State either grants legal recognition to rules previously unauthoritative or itself creates new law, viz., adjudication, equity and legislation.

Rupert Cross writes that the phrase "source of law" is used in several different senses. First, there is the literary source, the original documentary source of our information concerning the existence of a rule of law. In this sense, the law reports are a source of law, whereas a textbook on tort or contract, or a digest of cases falls into the category of legal literature. Next, there are the historical sources of law, the sources—original, mediate or immediate—from which rules of law derive their content as a matter of legal history. In this sense, the writings of Bracton and Coke and the works of other great exponents of English Law are sources of law, for they enunciate rules which are now embodied in judicial decisions and Acts of Parliament. In this sense too, Roman law and medieval customs are sources of English Law, for parts of our law which are now immediately attributable to decisions in particular cases or specific statutory provisions can be traced to a rule of Roman law, and a great deal of the English land law originated in feudal custom. This sense of the phrase "source of law" can be extended to anything which accounts for the existence of a legal rule from the causal point of view. On the one hand, it may be applied to the Queen-in-Parliament and Her Majesty's judges as the immediate authors of rules of law; on the other hand, it may be used to cover public opinion, moral principles and even those judicial idiosyncrasies which some American realists insist should be the true subject-matter of a mature study of law. *(Precedent in English Law,* p. 146).

Natural Law: According to the school of natural law, law has a divine origin. Every law is the gift of God and the decision of sages. The Quran is the word of God. The Hadis contain the precepts of the Prophet as inspired and suggested by God. According to the Hindus, the Vedas were inspired by God. The law of Lycurgus in Greece had a divine origin. Moses got the Commandments from Jehovah and Hammuradi got his code from the Sun God.

Austin: John Austin refers to three different meanings of the term "sources of law". In the first place, the term refers to the immediate or direct author of the law which means the sovereign in the country. Secondly, the term refers to the historical document from which the body of law can be known, e.g., the Digest and Code of Justinian. In the third place, the term refers to the causes which have brought into existence the rules which later on acquire the force of law. Examples are customs, judicial decisions, equity, legislation etc.

The analytical school of jurisprudence represented by Austin is attacked by the exponents of the historical school as represented by persons like Savigny, Sir Henry Maine, Puchta etc. Their contention is that law is not made but is formed. The foundation of law lies in

the common consciousness of the people which manifests itself in the practices, usages and customs of the people. Customs and usages are the sources of law.

Sociological view: The sociological school of law protests against the orthodox conception of law according to which law emanates from a single authority in the State. According to this school, law is taken from many sources and not from one. Ehrlich writes: "At the present as well as any other time, the centre of gravity of legal development lies not in legislation, not in juristic science nor judicial decisions, but in society itself." Duguit writes that law is not derived from any single source and the basis of law is public service. There need not be any specific authority in a society which has the power of making laws.

Salmond: The view of Salmond was that the two main sources of law were formal and material. Material sources could be subdivided into legal sources and historical sources. Legal sources were legislation, precedent, custom, agreement and professional opinion.

A formal source of law was defined by Salmond as that from which a rule of law derives its force and validity. The formal source of law was the will of the State as manifested in statutes or decisions of the courts. The authority of law proceeds from that. However, this approach depends upon the particular definition of law adopted by Salmond.

Material Sources: Legal and Historical

The material sources of law are those from which is derived the *matter*, though not the *validity* of the law. The matter of law may be drawn from all kinds of material sources.

According to Salmond, material sources of law are of two kinds, legal and historical. *Legal sources* are those sources which are the instruments or organs of the State by which legal rules are created, e.g., legislation and custom. They are authoritative and are followed by law courts as of right. They are the gates through which new principles find admittance into the realm of law. *Historical sources* are sources where rules, subsequently turned into legal principles, were first to be found in an unauthoritative form. They are not allowed by the law courts as of right. They operate only *mediately* and *indirectly*. Both the Acts of Parliament and the works of Bentham are material sources of English Law, but Acts of Parliament become law forthwith and automatically but what Bentham says may or may not become law. That depends upon its acceptance by the legislature or the judiciary. Likewise, the decisions of the Supreme Court of India are binding precedents for all courts in India, but the decisions of the Supreme Court of the United States are not binding in India. They may or may not be recognised

and followed in Indian courts. In India, much of the early law is based on the precepts of religion. The Codes of Manu and Brihaspati were almost entirely based on religious precepts. During the reign of Aurangzeb, most of the law had its origin in the Holy Koran.

In respect of its material origin, a rule of law has often a long history. Its immediate source may be a decision by a court of law, but that court may have based its decision on the writing of some lawyer, e.g., Pothier. Pothier himself may have taken the material from the edict of an urban praetor. In such a case, the decision, the works of Pothier, the Code of Justinian and the edict of the urban praetor are the material sources of the rule of law. However, there is a difference between them as a precedent is a legal source of law and others are merely historical sources. Precedent has its source not merely in fact but also in law. The others are its sources in fact and not in law.

Critics find fault with Salmond's classification of sources of law into formal and material sources of law. Allen criticises Salmond for his attaching little importance to historical sources. Keeton also criticises Salmond's classification of formal sources. According to him, in modern times, the only formal source of law is the State, but the State is an organisation which enforces law. Therefore, it cannot be considered as a source of law in the technical sense.

While criticising Salmond, Keeton writes that the meaning of the term "source of law" is the material out of which law is eventually fashioned through the activity of judges. He gives his own classification of the sources of law: the binding sources of law and persuasive sources of law. The binding sources of law are those which are binding on the judge and he is not independent in their application. Those sources of law are legislation, judicial precedents and customary law. The persuasive sources of law are useful only when there are no binding sources of law on a particular point. Some of such sources are professional opinions and principles of morality or equity.

Salmond's classification of sources of law into formal and material sources simply indicates the binding or persuasive nature of the source and therefore its criticism by Allen is not well-founded. However, taken as a whole, the classification of Salmond into formal and material sources of law is not satisfactory and perhaps that is the reason why the editor of the twelfth edition of *Salmond on Jurisprudence* has omitted the classification into formal and material. The only classification now given in Salmond's book is legal and historical sources. The editor starts by saying that sources of law can be classified as either legal or historical. The former are those sources which are recognised as such by the law itself. The latter are those sources which lack formal recog-

nition by the law. The legal sources of law are authoritative, the historical are unauthoritative. The former are allowed by law courts as of right, the latter have no such right. They influence more or less extensively the course of legal development but they speak with no authority. Legal sources are the only gates through which new principles can find entrance into the law. Historical sources operate only mediately and indirectly. Every legal system contains rules of recognition determining the establishment of new law and the disappearance of old. It is a principle of English Law that any principle involved in a judicial decision has the force of law. Similar legal recognition is in extended to the law-producing effect of statute and immemorial customs. These rules establish the sources of the law. A source of law is any fact which in accordance with such basic rules determines the recognition and acceptance of any new rule as having the force of law.

Salmond points out that the line between legal and historical sources in English Law is not crystal clear. There are sources lying well to each side of the line. A statute is clearly a legal source which must be recognised and the writings of Bentham are without legal authority. No English court is bound to follow the decisions of the Privy Council which are at best of high persuasive value only. No decision of the High Court of Justice is binding on other High Court judges, on the Court of Appeal or on the House of Lords. The view of Salmond is that according to the basic rules of English Law, certain statements of law are absolutely binding in some but not all contexts, others are not binding in any context but are of persuasive value and others yet lack even persuasive force. The distinction between legal and historical sources is useful as a starting point and must not be pressed too far.

All rules of law have historical sources. They have their origin somewhere although it may not be known to us. However, all of them do not have legal sources. The rule that a man may not ride a bicycle on the footpath may have its source in the by-laws of a Municipal Council and the rule that these by-laws have the force of law has its source in an Act of Parliament. The question arises from where comes the rule that Acts of Parliament have the force of law. The answer is that the source is historical only and not legal. The historians of constitutional law 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. Likewise, the rule that judicial decisions have the force of law is legally ultimate and underived. No statute lays it down. The doctrine of parliamentary sovereignty in England involves more than merely the usage and practice. It involves the acceptance of the view that Parliament's word ought to be observed. It is not a mere hypoth-

esis In be assumed for the sake of argument. Parliament is in fact supreme. These ultimate principles are the rules of law.

Legal Sources of English Law

In general, law may be found to proceed from one or more of the following legal sources: from a written constitution, from legislation, from judicial precedent, from customs and from the writings of experts. English Law proceeds chiefly from legislation and precedent.

The *corpus juris* is divisible into two parts by reference to the source from which it proceeds. One part consists of enacted law, having its source in legislation. The other part consists of case law, having its source in judicial precedents. The first part consists of the statute law to be found in the book and the other volumes of enacted law. The second part consists of the common law which is to be found in the volumes of law reports. Legislation is the making of law by the formal and express declaration of new rules by some authority in the body politic which is recognised as adequate for that purpose. A precedent is the making of law by the recognition and application of new rules by the courts themselves in the administration of justice. Enacted law comes into the courts *ab extra.* Case law is developed within the courts themselves.

Salmond refers to two other legal sources in addition to legislation and precedent. Those are custom and agreement which are the sources of *customary law* and *agreement.*

Customary law is that which is constituted by those customs which fulfil the requirements laid down by law as the condition of their recognition as obligatory rules of conduct. Conventional law is that which is constituted by agreement as having the force of special law *inter paries,* in derogation of or in addition to the general law of the land.

By reference to their legal sources, there are four kinds of law:

(i) Enacted law having its source in legislation, *(ii)* Case law having its source in precedent. *(iii)* Customary law having its source in custom. *(iv)* Conventional law having its source in agreement.

In addition to the above sources of law, *professional opinions* of eminent jurists may be called juristic law. Juristic writings and professional opinions have played a very important role in the evolution of law. In England, the trend was set by Bracton and continued by such legal luminaries as Glanville, Chief Justice Coke and Blackstone. The works of Dicey and Cheshire are sources of private international law.

Lord Wright once paid a tribute to Pollock's *Law of Torts* in *Nicholls v. Ely Beet Sugar Factory Ltd.,* (1936) 1 Ch 343.

In *Bradford v. Symondson,* the judgment turned almost entirely on the discussion of the books of leading text writers on insurance. In *Haynes v. Harwood,* the court followed a conclusion reached by Prof. Goodhart in an article written by him in the *Cambridge Law Journal.* Prof. Roscoe Pound explains the part played by textbooks in the development of American law in his book *The Formative Era of American Law.* His view is that doctrinal writings has had more influence in the United States than in England and even today that influence is continuing. *The* American *Restatement of the Law* is an example of cooperation between the bench, the profession and law teacher.

Sources of Law and Sources of Rights

The sources of law may also serve as sources of rights. By a source of law is meant some fact which is legally constitutive of right, it is the de facto antecedent of a legal right in the same way as source of law is de factor antecedent of a legal principle. Experience shows that to a large extent, the same class of facts which operate as sources of law also operate as sources of right. Some facts create law but not rights. Some facts create rights and not law. Some facts create both law and rights at the same time. The decisions of inferior courts are not sources of law but they are nevertheless sources of right. Immemorial custom gives rise to rights and law at the same time in certain cases. An agreement operates as a source of right. It is not exclusively a title of rights but also operates as a source of law.

Ultimate Legal Principles

Ultimate legal principles are those self-existing principles of which *no* legal origin is known though it may be possible to trace them to some historical source. All rules of law have historical sources but all of them do not have legal sources. If that were so, the search for (tracing the origin of legal principles will continue *ad infinitum.* It is necessary that in every legal system there should be found certain ultimate principles from which all others are derived but which are self-existent.

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CHAPTER NINE

LEGISLATION

THE TERM "legislation" is derived from two Latin words, *legis* meaning law and *latum* meaning to make, put or set. *Etymologically, legislation means the making or the setting of law.*

According to Salmond: "Legislation is that source of law which consists in the declaration of legal rules by a competent authority." According to Gray, legislation means "the formal utterances of the legislative organs of the society". According to Holland: "The making of general orders by our judges is as true legislation as is carried on by the Crown." Again, "in legislation, both the contents of the rule are devised, and legal force is given to it by acts of the sovereign power which produce written law. All the other law sources produce what is called unwritten law to which the sovereign authority gives its whole legal force, but not its contents, which are derived from popular tendency, professional discussion, judicial ingenuity or otherwise, as the case may be." According to Austin: "There can be no law without a legislative act." According to another writer, legislation consists in "the declaration of legal rules by a competent authority, conferring upon such rules the force of law". The term legislation is sometimes used in a wider sense to include all methods of law-making. When a judge establishes a new principle by means of a judicial decision, he may be said to exercise legislative powers and not judicial powers. However, this is not legislation in the strict sense of the term. The term legislation includes every expression of the legislature whether the same is directed to the making of law or not. An Act of Parliament may amount to nothing more than establishing a uniform time throughout the realm or altering the coinage.

Legislation as Source of Law

The view of the analytical school is that typical law is a statute and legislation is the normal process of law-making. The exponents of this

school do not approve of the usurpation of the legislative functions by the judiciary. They also do not admit the claim of custom to be considered as a source of law. The view of the historical school is that legislation is the least creative of the sources of law. To quote James Carter: "It is not possible to make law by legislative action. Its utmost power is to offer a reward or threaten a punishment as a consequence of particular conduct and thus furnish an additional motive to influence conduct. When such power is exerted to reinforce custom and prevent violations of it, it may be effectual and rules or commands thus enacted are properly called law; but if aimed against established custom they will be ineffectual. Law not only cannot be directly made by human action, but cannot be abrogated or changed by such action." According to this view, legislation has no independent creative role at all. Its only legitimate purpose is to give better form and make more effective the custom spontaneously developed by the people. Both the analytical school and the historical school go to extremes. The mistake made by the analytical school is that it regards legislation as the sole source of law and does not attach any importance to custom and precedent. The mistake of the historical school is that it does not regard legislation as a source of new law. Dean Pound points out that there are two types of legislation. Those are the organizing type and the creative type. The existence of the latter cannot be doubted in modern times when there is abnormal legislative activity.

Supreme and Subordinate Legislation

According to Salmond, legislation is either supreme or subordinate. Supreme legislation is that which proceeds from the sovereign power in the State. It cannot be repealed, annulled or controlled by any other legislative authority. On the other hand, subordinate legislation is that which proceeds from any authority other than the sovereign power. It is dependent for its continued existence and validity on some superior authority. The Parliament of India possesses the power of supreme legislation. However, there are other organs which have powers of subordinate legislation.

Subordinate Legislation

(i) Salmond refers to five kinds of subordinate legislation. As regards subordinate legislation in the colonial field, the powers of self-government entrusted to the colonies and other dependencies of the Crown are subject to the control of the imperial legislature which may repeal, alter or supersede any colonial enactment. However, it is to be noted that after the passing of the Statute of Westminster of 1931, the Dominion Legislatures have been given the power to make any law they please. No law passed by them after the Act of 1931 can be declared

inoperative or void on the ground that it is repugnant to the law of England or any Act of Parliament. Every Dominion legislature has the power to repeal or amend any law.

(*ii*) In certain cases, legislative power has also been given to the judiciary. The superior courts are allowed to make rules for the regulation of their own procedure. It is a true form of legislation although it cannot create new laws by way of precedents.

(*iii*) Municipal authorities are also allowed to make bye-laws for limited purposes within their areas. According to Allen: "By a series of enactments, notably the Public Health Acts, 1875-1976, the Municipal Corporations Act, 1882 and the Local Government Acts, 1888-1933, local authorities—county, borough, rural and urban district councils—have powers to enact bye-laws binding upon the public generally, for public health and for 'good order and government'. Offences against these bye-laws are punishable on conviction by summary process by fines usually not exceeding £5. The range of subjects dealt with is immense: to take the commonest, we may note building, advertisements, care of the sick (hospitals, vaccination, infectious diseases), cleanliness of dwelling-houses, housing of the working classes, town-planning schemes, nuisances, scavenging and cleansing, police, rating, education, traffic, highways, burials, and the conduct generally of persons in public places. All these matters, and their many analogs in local government, count for no less in the daily lives of ordinary citizens than the enactments of Parliament. The far-off dignity of the House of Commons, though to the instructed it may symbolize the majesty of the Constitution, to the plain law-abiding man is but a name compared with the immediate discipline of magistrates, policemen, and inspectors."

(iv) Sometimes the State allows private persons like universities, railway companies, *etc.*, to make bye-laws which are recognized and enforced by law courts. Such legislation is usually called *autonomic.* The railway company may make bye-laws for the regulation of its undertaking. Likewise a university may make statutes for the government of its members.

Delegated Legislation: Another kind of subordinate legislation is executive legislation or *delegated legislation.* It is true that the main function of the executive is to enforce laws but in certain cases, the power of making rules is delegated to the various departments of the government. This is technically called subordinate or delegated legislation. Delegated legislation is becoming more and more important in modern times. To quote Baldwin: "In the three years from 1925-1928, the average number of Acts was 506, the average number of pages oc-

cupied by them 539; while the average number of Statutory Rules and orders was 1408.6 and the average number of pages covered by them was 1, 849."

Many factors have been responsible for the growth of delegated legislation. The concept of the State has changed and instead of talking of a police State, we think in terms of a welfare State. This change in outlook has multiplied the functions of the government. This involves the passing of more laws to achieve the ideal of a welfare State. Formerly, every bill used to be a small one but civilization has become so complicated that every piece of legislation has to be detailed. The rise in the number and size of the bills to be passed by Parliament has created a problem of time. It is realized that all this legislation cannot be enacted even if the members of Parliament are prepared to work day and night. The result is that Parliament resorts to the device of passing skeleton bills and leaving the work of filling in the details to the departments concerned.

Modern legislation is becoming highly technical and it is too much to expect that the ordinary members of Parliament will appreciate all the implications of modern legislation. Except a few experts in certain lines, the other members of Parliament are bound to bungle if they attempt to do the impossible. Under the circumstances, it is considered safe to approve of general principles of legislation and leave the details to the ministries concerned.

The time available for drafting bills to be passed into law by Parliament is not adequate. If an attempt is made to draft detailed bills within a short period, the drafting is bound to be defective. No wonder power is delegated to the departments concerned to issue orders-in-council which can be made at leisure and which can be expected to be logical and intelligible.

It is impossible for any statesman or civil servant to foresee all contingencies that might arise in the future and provide for them in the bill when it is being passed by Parliament. It is convenient if some power is given to the department concerned to add to the details to meet any contingency in future. Moreover, full knowledge of the local conditions may not be available to the government at the time of the passing of the law and it is desirable to adjust the law by means of orders-in-council to meet the requirements of the various localities. Delegated legislation gives flexibility to law and there is ample scope for adjustment in the light of experience gained during the working of any particular legislation.

Delegated legislation is controlled in the following ways:

(*a*) *Parliamentary Control*: Parliament has always general control. When a bill is before it, it can modify, amend or refuse altogether the powers which the bill proposes to confer on a minister or some other subordinate authority.

(*b*) *Parliamentary Supervision*: A second way of controlling delegated legislation is that laws made under delegated legislation should be laid before the legislature for approvai and the legislature may amend or repeal those laws if necessary.

(*c*) *Judicial Control*: While parliamentary control is direct, the control of courts is indirect. Courts cannot annul subordinate enactments, but they can declare them inapplicable in particular circumstances. The rule or order frowned on by the courts, though not actually abrogated, becomes a dead letter because in future no responsible authority will attempt to apply it. If it is applied, nobody will submit to it. Judicial control operates through the doctrine of *ultra vires*. All delegated legislation is subject to the test whether or not it falls within the periphery of the power thus conferred. If they do not, they are of no effect. Courts also possess certain direct power over the acts and procedures of public authorities. The most important of them are called writs. The other methods are injunctions and declarations.

(*d*) *Trustworthy Body*: An internal control of delegated legislation can be ensured if the power is delegated only to a trustworthy person or body of persons.

(*e*) *Publicity*: Public opinion can be a good check on the arbitrary exercise of delegated statutory powers. Public opinion can be enlightened by antecedent publicity of the delegated laws.

(*f*) *Expert's Opinions*: In matters of technical nature, opinions of experts should be taken. That will minimise the danger of vague legislation and "blanket" delegation.

C.T. Carr has suggested certain safeguards to avoid the evils of delegated legislation which is otherwise inevitable. Delegation of legislative powers should be made to a trustworthy authority. The limits within which the delegated powers are to be exercised should be defined clearly and the courts should be given the power to declare any piece of delegated legislation as *ultra vires*, which is beyond the power given to the authority concerned. The particular interests involved should be consulted by the authority concerned at the time of issuing orders-in-council. There should be antecedent publicity for delegated legislation and also for amending or revoking delegated legislation. The rules and regulations made under delegated legislation should be put before the legislature before they come to have the force of law. If they are not approved by the legislature they must lapse. Expert ad-

vice should also be taken at the time of making rules and regulations. All delegated legislation must be subject to judicial control and review. It must not be repugnant to the statute under which it is made. It must not be vague or uncertain. It must not be unreasonable. It must be allowed to be controlled by the courts by means of appropriate writs.

Legislation and Precedents

It may be desirable to compare legislation with precedents and customary law. As regards legislation and precedents, the former has its source in the law-making will of the State. On the other hand, precedent has its source in the *ratio decidendi* and *obiter dicta* of the judicial decision. Legislation is imposed on courts by the legislature but precedents are created by the courts themselves. Legislation is the formal and express declaration of new rules by the legislature, but precedents are the creation of law by the recognition and application of new rules by courts in the administration of justice. It is a judicial decision which provides a rule of law for subsequent decisions. Legislation creates statute law and precedents create judge-made law. Legislation comes before a case arises requiring its application. Precedent comes after the cause has arisen. Legislation is expressed in a general and comprehensive form but precedent is in a particular and limited form. Legislation is abstract but precedent is definite. However, a precedent primarily settles a particular dispute between definite parties. It is easy to interpret a statute than to interpret a precedent. While legislation is ordinarily prospective, precedent is retrospective only.

Legislation and Custom

As regards legislation and customary law, legislation grows out of theory but customary law grows out of practice. While the existence of legislation is essentially *de jure,* the existence of customary law is essentially *de facto.* Legislation is the latest development of law-making tendency, customary law is the oldest form of law. Legislation is the mark of advanced society and a mature legal system. Customary law is the mark of primitive society and an undeveloped legal system. Legislation expresses a relationship between men and the State but customary law expresses the relationship between man and man. Legislation is complete, precise and easily accessible, but the same cannot be said about customary law. Legislation is *jus scriptum* but customary law is *jus non scriptum.* Legislation is the result of a deliberate positive process but customary law is the outcome of necessity, utility and imitation. According to Keeton: "In early times, legislation either defined or supplemented custom, today the relative positions of custom and legislation have been reversed. Statute law is the principal source

of modern law; custom only persists where legislation has as yet not penetrated . . . Legislation, stripped of all divine associations, is really a very convenient method of making law. It is quickly made, definite, easy of access, and easy to prove. However, since the development of representative institutions, it may be regarded as the closest approximation to the general will that can be secured. Custom, on the other hand, requires many years to form, is rarely absolutely clear, and is in consequence more difficult to prove. To repeal a statute, it is merely necessary to pass another one, avoiding it. To repeal a custom by desuetude is a long and extremely uncertain business. It is always much more convenient to repeal a custom by statute."

According to Allen: "The difference between custom and legislation as sources of law is manifest. The existence of the one is essentially *de facto*, of the other essentially *de jure*. Legislation is therefore the characteristic mark of mature legal systems, the final stage in the development of law-making expedients. In short, while custom expresses a relationship between man and man, legislation expresses a relationship between man and State. It cannot exist until the notion of a central State, whether or not it be 'sovereign' in the conventional sense, has crystallized. It may be objected that we have been taught for many years past that legislation, in the form of codes, is one of the earliest sources of law. But this is legislation in a very different sense. It does not proceed from anything which modern theory has taught us to regard as 'sovereign', but usually from a source deemed to be either divinely inspired or itself divine."

Advantages of Legislation over Precedent

Legislation as a source of law has many advantages over precedent.

(*i*) Legislation is both constitutive and abrogative, but precedent is merely constitutive. Legislation is not only a source of new law but also the most effective instrument of abolishing the existing law. Abrogative power is necessary for legal reform and this virtue is not possessed by precedent which can produce new law but cannot reverse that which is already law. Legislation is a necessary instrument not only for the growth of law but also for its reform.

(*ii*) Legislation is based on the principle of division of labour and consequently enjoys the advantage of efficiency. The legislative and judicial functions are separated and consequently both of them are done better by different organs. Legislature attends to the work of legislation and judiciary attends to the work of interpreting and applying the law. In the case of precedent, the functions of legislation and interpretation are combined and that is hardly desirable.

(*iii*) Legislation satisfies the requirement of natural justice that laws shall be known before they are enforced. Law is declared in the form of legislation and the same is later on enforced by the courts. Law is formally declared to the people and if after that they dare to violate the same, they are punished. However, that is not the case with precedent. It is created and declared in the very act of applying and enforcing it. There is not any formal declaration of precedent. It is applied as soon as it is made. It operates retrospectively and applies to facts which are prior in date to law itself. However, it is pointed out that modern statutes are so numerous and so complicated that it is doubtful whether their promulgation secures wider knowledge of the new principles than any important decision. In any case, until they have been construed by actual decisions, their effect is doubtful. Moreover, there is nothing in the nature of legislation to prevent it from having a retroactive effect so as to alter the legal consequences of acts already done. Any considerable alteration of principles must have some retroactive effect as long-term arrangements will have been entered into on the assumption that law will remain unchanged.

(*iv*) Legislation makes rules for cases that have not yet risen but precedent must wait until the actual concrete incident comes before the courts for decision. Precedent is dependent on the accidental course of litigation but legislation is independent of it. A precedent must wait till such time as a case is brought for decision before a court of law. Legislation can move at once to fill up the vacancy or settle a doubt in the legal system.

(*v*) Legislation is superior in form to precedent. It is brief, clear, easily accessible and knowable. Case-law is buried from sight and knowledge in the huge and daily growing mass of the records of litigation. "Case-law is gold in the mine, a few grains in the precious metal to the tons of useless metal, while statute law is coin of the realm ready for immediate use." However, it is pointed out that it is not true in the case of English statute law. Sometimes, the statutes are so drafted as to simplify the law, but usually important statutes require elaborate editing with copious references to cases as soon as they are enacted. Reference may be made in this connection to the Local Government Act, 1833. It is true that continental codes have facilitated the scientific arrangement of legal topics, but even they have proved unworkable without much comment and the guidance of successive decisions. The constantly increasing bulk of reported cases on the existing law is proving to be a burden everywhere.

According to Prof. Friedmann: "It will be difficult to deny that in modern circumstances development of law through precedent is slow,

costly, cumbrous and often reactionary. It is therefore less suitable for a time of fast changes and restlessness such as ours. It is also dependent upon a continuity and steadiness of social conditions which may not last. Perhaps none but British judges could have worked it in such a way as to make it withstand, at least partially, the onslaught of centuries. Many present-day judges find that the only way of preserving the system is to take a bold attitude towards antiquated precedents, and to form the law in terms of broad principles. But others take the view that law reform should be left to the legislator. As a result the judicial approach to law reform, under a precedent system, is increasingly uncertain, and more influenced by changes in the judicial personnel than a code law system. Consequently the sphere left to judicial law-making diminishes steadily, even if it tries to engraft itself upon statutory interpretation."[1]

Advantages of Precedent over Legislation

(*i*) Precedent also has certain advantages over legislation. According to Dicey: "The morality of the courts is higher than the morality of the politicians." Politicians are always swayed by popular passions and are liable to make bad laws. On the other hand, judges decide cases in a calm atmosphere and can afford to hold the scales even between the contending parties. They perform their functions impartially and fearlessly.

(*ii*) According to Salmond, case law enjoys greater flexibility than statute law. Statute law suffers from the defect of rigidity. Courts are bound by the letter of law and are not allowed to ignore the same. In the case of precedent, analogical extension is allowed. It is true that legislation as an instrument of reform is necessary but it cannot be denied that precedent has its own importance as a constitutive element in the making of law although it cannot abrogate law. In the case of England, the courts of equity played an important part in mitigating the rigours of common law by means of precedents.

(*iii*) According to Amos, law does not become more uncertain when it is based on precedents than when it is founded on enacted law. Although French law is codified, it is still far from being uncertain. The uncertainty of English Law is nothing when compared to that of France. A French advocate has to wade through a set of French codes, interpretations and commentaries as an English lawyer has to do. The enactment of a law is no cure for uncertainty in a legal system. Neither legislation nor precedent alone can completely meet all eventualities. The gaps have to be filled by legislation and precedents.

[1] p. 492, *Legal Theory.*

According to Gray, case law is not only superior to statute law but all law is judge-made law. To quote him: "In truth, all the law is judge-made law. The shape in which a statute is imposed on the community as a guide for conduct is that statute as interpreted by the courts. The courts put life into the dead words of the statute."[2]

It is submitted that in the present age, both legislation and precedent are equally important and one cannot attain its end without the other. The aim of the law is the protection and progress of society and individual. For a planned progress, legislation is necessary. To interpret it and to apply and to adapt it to a particular case, case law is equally necessary. Both legislation and precedents contribute equally to the development of law.

Codification

According to the *Oxford Dictionary*: "Code is a systematic collection of statutes, body of laws, so arranged as to avoid inconsistency and overlapping." This definition of codification is not exhaustive because it does not include common law and case law. In fact, codification is the systematic process and reduction of the whole body of law into a code in the form of enacted law. Codification implies collection, compilation, methodical arrangement, systematization and reduction to coherent form the whole body of law on any particular branch of it so as to present it in the form of a systematic, clear and precise statement of general principles and rules.

There have been codes since very ancient times. In India, we had not only the Code of Manu but also the Codes of Yajnavalkya, Brihaspati, Narada and Parashar. The Code Justinian is a very important ancient code of Roman law. In many respects, it is like a modern code. Justinian compiled the mass of laws which existed in various forms such as the Praetor's edicts, the writings of classical jurists etc. The other important ancient codes were the Jewish Code, the Chinese Code, the Code of Hammurabi etc. In the beginning of the 19th century, Napoleon gave what is called the Code Napoleon. Bentham pleaded for codification in England. He was supported by Thibaut but opposed by Savigny. Sir Henry Maine also advocated codification in England. More work has been done in this direction in the present century. The law of property, in most parts, has been codified. Many archaic, outdated and artificial rules have been eliminated and law has been put in a very clear, simple and systematic form.

As regards India, the first Indian Law Commission was appointed with Lord Macaulay as its Chairman under the provisions of the

[2] *The Nature and Source of the Law.*

Charter Act of 1833. The result was the drafting of a number of codes such as the Indian Penal Code, the Civil Procedure Code and the Indian Limitation Act. A Second Law Commission was set up under the Charter Act of 1853. The Indian Penal Code was passed in 1860. Later on, the Criminal Procedure Code and some other Acts were drafted and passed. Law Commissions were set up again in 1861 and 1879 which drafted and revised many Acts. The result was that the criminal law, civil law in most parts, and procedural laws were codified by the beginning of the present century. After the independence of India in 1947, the Indian Law Commission was appointed to make recommendations about laws and their administration. The Indian Law Commission has made comprehensive and voluminous recommendations on various aspects of law in India.

Certain conditions are necessary for the codification of law. According to Roscoe Pound, the following important conditions lead to codification:

(*i*) The exhaustion for the time being of the possibilities of juristic development of existing legal materials, or where the legal institutions have become completely mature, or where the country has no juristic past, the non-existence of such material.

(*ii*) The unwieldiness, uncertainty and archaic character of the existing law.

(*iii*) The development of an efficient organ of legislation. The need for one uniform law in a political community whose several sub-divisions had developed or received divergent local laws.

Kinds of Codification

Codes may be of the following kinds:

(*i*) A creative code is that which makes a law for the first time without any reference to any other law. It is law-making by legislation. The Indian Penal Code belongs to this category.

(*ii*) A consolidating code is that code which consolidates the whole law—statutory, customary and precedent—on a particular subject and declares it. This is done for systematising and simplifying the law. The Code of Justinian belongs to this category. The same is the case with the Indian Transfer of Property Act, 1882.

(*iii*) A code may be both creative and consolidating. It may make new law as well as consolidate the existing law on a particular subject. The recent legislation in India on Hindu law is an example of this kind.

Merits

(*i*) The one great merit of codification is that law can be known with certainty. The law of contract in India can be found by a reference to the Indian Contract Act. Likewise, the rules of evidence in the country can be known by a study of the Indian Evidence Act. The certainty of law avoids confusion in the public mind.

(*ii*) Another advantage of codification is that the evils of judicial legislation can be avoided. According to Macaulay Judge-made law in a country where there is an absolute government and lax morality—where there is no Bar and no public—is a curse and scandal not to be endured." According to Sir James Stephen: "Well—designed legislation is the only possible remedy against quibbles and chicanery. All the evils which are created from legal practitioners can be averted in this way and in no other. To try to avert them by leaving the law undefined and by entrusting judges with a wide discretion, is to try to put out the fire by pouring oil upon it. Leave a judge with no rule or with one of those leaden rules which can be twisted in any direction, and you at once open to the advocate every sort of topic by which the discretion of the judge can be guided. Shut the lawyer's mouth and you fall into the evils of arbitrary government."

(*iii*) Codification is necessary to preserve the customs which are suited to the people of a country. According to Rattigan: "To codify, on the other hand, the existing customs would perpetuate that system or retard its break-up. We should, therefore, not be hampering a healthy development but avoiding a disastrous tendency to disruption. We should not be asphyxiating progress to ensure the prosperity of agricultural classes by preserving for them the position of their lands and the constitution of their communities. We should not be introducing any novel or distasteful legislation but doing our best to maintain all that was healthy and good in a system which was suited to the people."

(*iv*) The codification of law is necessary to bring about a sense of unity in the country. To quote a Despatch of the Government of India to the Secretary of State for India: "We feel that the reduction to a clear, compact and scientific form of the different branches of our substantive laws which are still uncodified, would be a work of the utmost utility; not only to the judges and the legal profession but also to the people and the government. It would save labour and thus facilitate the despatch of business and cheapen the cause of litigation; it would tend to keep our untrained judges from errors; it would settle disputed questions on which our superior courts are unable to agree; it would preclude the introduction of technicalities and doctrines unsuited

to this country; it would perhaps enable us to make some urgently needed reforms without the risk of existing popular opposition and it would assuredly diffuse among the people of India the more accurate knowledge of rights and duties than they will ever attain if their law is left to its present stage."

Demerits

(*i*) Codification is not an unmixed blessing. It has its demerits also. Codification brings rigidity into the legal system. It cramps and impedes the free and natural growth of law. The law becomes petrified at the stage at which it is codified. According to Cardozo: "The inn that shelters the traveller for the night is not the journey's end. The law, like the traveller, must be ready for tomorrow. It must have a principle of growth." According to Roscoe Pound: "Law must be stable and yet it cannot stand still. Hence all thinking about law has struggled to reconcile the conflicting demands of the need of change. The social interest in the general security has led men to seek some fixed basis for an absolute ordering of human action whereby a firm and stable social order might be assured. But continual changes in the circumstances of social life demand continual new adjustments to the pressure of other social interests as well as to new modes of endangering security. Thus the legal order must be flexible as well as stable. It must be overhauled continually and refitted continually to the changes in the actual life which it is to govern. If we seek principles, we must seek principles of changes no less than principles of stability. Accordingly, the chief problem to which legal thinkers have addressed themselves has been how to reconcile the idea of a fixed body of law affording no scope for individual wilfulness, with the idea of change and growth and making of new law; how to unify the theory of law with the theory of law-making and to unify the system of legal justice with the facts of administration of justice by magistrates." According to Cockburn: "Whatever disadvantages attach to any unwritten law, and of these we are fully sensible, it has at least this advantage that its elasticity enables those who administer it to adapt it to the varying conditions of society, and to the requirements and habits of the age in which we live, so as to avoid the inconsistencies and injustice which arise when the law is no longer in harmony with the wants and usages and interests of the generation to which it is immediately applied." According to Sir James Stephen: "Those who consider that codification will deprive the common law of its elasticity appear to think that it will hamper the judges in the exercise of a discretion, which they are at present supposed to possess, in the decision of new cases as they arise."

(*ii*) Codification results in the regimentation of the life of the people. A code gives a uniform law to the whole country. It does not bother about the differences in the sentiments, convictions, aspirations, customs and traditions of the people living in different parts of the country. Unfortunately, the various classes in society do not run on the same road at the same speed. The result is that liberty and individuality are sacrificed at the altar of uniformity.

(*iii*) A code is the work of many persons and no wonder the provisions of a code are found to be incoherent. However, if the work is done by competent persons, this defect can be avoided to a great extent.

(*iv*) Codification makes the law simple and thereby enables the knaves to flourish. They know the law and before committing a crime, they can provide against the same. According to Savigny, a code makes the defects of law obvious and thereby encourages the knaves to take advantage of them. However, it is pointed out that there are greater chances for knaves when the law is not clear. Uncertainty of law is more to their advantage.

(*v*) A code is likely to disturb the existing rights and duties of the people by creating new rights and duties in place of the old ones. It disturbs the fabric of legal order and creates confusion and uncertainty.

(*vi*) Critics point out that the codes of France and Germany have failed and consequently it is useless to have them. However, it is not correct to say that all codes have failed. It is rightly pointed out by Sir James Stephen that Indian Codes have been "triumphantly successful". According to Chalmers: "All the continental nations have codified their laws and none of them show any sign of repenting it. On the contrary, most of them are now engaged in remodelling and amplifying their existing Codes. In India, a good deal of codification has been carried on, and public and professional opinion seems almost unanimous in its favour."

(*vii*) No code can be complete and self-sufficing. In course of time, every code is overlaid with an accumulating mass of comment and decisions. However, this defect can be avoided by revising the code from time to time. To quote Lord Macaulay: "The publication of this collection of cases decided by the legislating authority will, we hope, greatly limit the power which the courts of justice possess of putting their own sense on the laws. But we are sensible that neither this collection nor any other can be sufficiently extensive to settle every question which may be raised as to the construction of the code. Such questions will certainly arise, and unless proper precautions be taken, the decisions on such questions will accumulate till they form a body of law of far greater bulk than that which has been adopted by the legislature... it

is most desirable that measures should be taken to prevent the written law from being overlaid by immense weight of comments and decisions."

According to Savigny, if an age is capable of producing a good code, no code is necessary in that case. The work of a code can be done by the jurists, lawyers and private expositors. However, it cannot be denied that such expositions lack authority and certainty and the judges are not bound to follow them.

According to Salmond: "The advantages of enacted law so greatly outweigh its defects that there can be no doubt as to the ultimate issue of its rivalry with the other forms of legal development and expression. The whole tendency in modern times is towards the process known since Bentham as codification."

According to Portalis: "Whatever is done, positive laws can never entirely replace the use of natural reason in the affairs of life. The needs of society are so varied, social intercourse is so active, men's interest are so multifarious, and their relations so extensive, that it is impossible for the legislator to provide for everything.

"It is then, to the course of decision (la jurisprudence) that we leave (1) rare and extraordinary cases which cannot enter into a reasonable legislative plan, (2) details too variable and contentious to occupy the legislator and (3) all those objects which it would be a useless effort to anticipate, or of which premature anticipation would be dangerous.

"It is for experience to fill progressively the gaps we leave. The code of a people makes itself with time; properly speaking it is not made."

It is contended that most of the demerits of codification have been magnified and exaggerated. It is true that there are some demerits of codification but those are insignificant as compared with its merits. Codification enables the planned development of law. It enables the law to fulfil its purpose. Most of the demerits of codification are due to a mistaken view that codification means the complete abolition of case law and customary law. It cannot be denied that case law will always work as a supplement to the code. However carefully a code may be drafted, some defects are bound to remain. If case law functions side by side with the code, most of its demerits would disappear. If the code does not go hand in hand with case law, it would become difficult to use it in a short time. The Codes of Justinian and Napoleon were materially changed in their practical application. The *Restatement of American Law* prepared by the American Law Institute is a beautiful compromise between codification and case law. It declares the existing law and on points where there is any conflict, it adopts the view it

prefers. It commands great respect in the courts of America although it has no sanction from the State.

Codification has become very necessary in modern times. It is the most potent means of legal development. That is why the method of codification is being adopted in all parts of the world.

Rules of Interpretation

Grammatical Interpretation

According to Salmond: "By interpreting or construction is meant the process by which the courts seek to ascertain the meaning of legislation through the medium of the authoritative forms in which it is expressed." Salmond refers to two kinds of interpretations, *grammatical and logical.* In the case *of grammatical interpretation,* only the verbal expression of law is taken into consideration and the courts do not go beyond the *litera legis.* In the case of *logical interpretation,* the courts are allowed to depart from the letter of the law and try to find out the true intention of the legislature. It is the duty of the courts to discover and act upon the *true intention* of the legislature. In all ordinary cases, it is the duty of the courts to content themselves by accepting the grammatical interpretation as the true intention of the legislature. It should be taken for granted that the legislature has said what it meant and meant what it has said. The judges are not at liberty to add to or take away from or modify the letter of the law simply because they feel that the true intention of the legislature has not been correctly expressed in the law itself. In all ordinary cases, grammatical interpretation is the only interpretation allowable.

In the *Sussex Peerage* case, it was rightly observed that "if the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound words in their natural and ordinary sense. The words themselves alone do, in such cases, best declare the intention of the law-giver." According to Lord Brougham: "The construction of an Act must be taken from the bare words of the Act. We cannot fish out what possibly may have been the intention of the legislature. We cannot aid the legislature's defective phrasing of the statute. We cannot add and mend and by construction make up deficiencies which are left there. And, therefore, if any other meaning was intended than that which the words purport plainly to import, then let another Act supply the meaning and supply the defect in the previous Act." According to Lord Wensleydale: "In construing statutes, as in considering all other written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity or some repugnance or inconsistency with the rest of

the instrument in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, but no further." According to Paulus, the Roman jurist: "Where there is no ambiguity in the words, the question of intention ought not to be admitted."

Salmond refers to three logical *defects* by which grammatical interpretation may be affected: (*i*) The first defect is that of *ambiguity*. The language of a statute may be such that instead of having one meaning, it may be possible to put two or more meanings on the same word. In such cases, it is the right and duty of the courts to go behind the letter of the law and try to find out the true intention of the legislature. When two meanings are possible, that which is more natural, obvious and consonant with the ordinary use of language should be put. (*ii*) Another defect is that of *inconsistency*. The different parts of the law may be inconsistent with one another and thereby destroy and nullify their meaning. In such a case, it is the duty of the courts to find out the true intention of the legislature and correct the letter of the law. (*iii*) Another logical defect may be that law in itself is *incomplete*. There may be some lacuna in the law itself and that may not allow the whole meaning to be expressed. In such cases, the defect can be remedied by logical interpretation and not grammatical interpretation. However, the omission in the law must be such as to make the same incomplete logically. If law is logically complete, the courts have no business to interfere with the same. Their duty is merely to apply the letter of the law and not to alter the same to suit their reasoning. They are not entitled to assume legislative powers.

Golden Rule:—Though the literal interpretation must be accepted, it must be applied very cautiously. It should not be followed if the statute is apparently defective. The literal interpretation is a means to ascertain the general purport of the statute or *ratio legis*. In the difficult cases, the court may go beyond the words of the statute and take help from other sources. This rule is called the Golden Rule. Austin and Korkunov have approved of this rule. It has been followed by eminent judges in their decisions. It has been summarised by Parke in these words: "It is a very useful rule in the construction of a statute to adhere to the ordinary meaning of the words used, and to the grammatical construction, unless that is at variance with the intention of the legislature, to be collected from the statute itself, or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified so as to avoid such inconvenience, but no further."

In *Additional Commissioner of Income Tax* v. *Surat Art Silk Cloth Manufacturers' Association*, the Supreme Court of India emphasized the role

of beneficent construction of statutes. It was held that a construction that gives meaning and effect to the provisions of a statute is definitely to be preferred. In the course of its judgment, the Supreme Court observed: "If there is one rule of interpretation more well settled than any other, it is that if the language of a statutory provision is ambiguous and capable of two constructions, that construction must be adopted which will give meaning and effect to the other provisions of the enactment, rather than that which will give none."[3]

In the United States also, there is a trend towards a purpose-oriented interpretation rather than a plain-meaning interpretation. In the *United States* v. *American Trucking Association*, the Supreme Court of America observed: "When the plain meaning has led to absurd or futile results, this court has looked beyond the words to the purpose of the Act. Frequently, however, even when the plain meaning did not produce absurd results, but merely an unreasonable one, plainly at variance with the policy of legislation as a whole, this court has followed that *purpose* rather than the literal words."

However, penal statutes must always be construed strictly. If an Act creates an offence and also prescribes a penalty for its violation, the words used in the Act must be strictly construed. In such cases, the court is not so much concerned with what might possibly have been intended, but with what has actually been said and the language used in the Act. If in a penal statute, two possible and reasonable interpretations can be given, the court must lean towards that construction which exempts the person from a penalty rather than that which imposes penalty.

The Mischief Rule:—When the true intention of the legislature cannot be determined by the language of the statute in question, it is open to the court to consider the historical background underlying the statute. The court may consider the circumstances that led to the introduction of the bill and also to the circumstances in which it became law. When judges are allowed to probe into questions of policy in interpreting statutes, there is bound to be some uncertainty. It is maintained that judges may look at the law before the Act and the mischief in the law which the statute was intended to remedy. The Act is to be construed in such a manner as to suppress the mischief and advance the remedy. This rule of interpretation is known as the mischief rule. It takes its origin from *Heydon's* case. In that case, it was observed that for the sure and true interpretation of all statutes, "four things are to be discussed and considered; first, what was the common law before the making of the Act; second, what was the mischief and defect for which the

[3] (1980) 2 SCC 31.

common law did not provide; third, what remedy the Parliament hath resolved and appointed to cure the disease; fourth, the true reason of the remedy, and then the office of all judges is always to make such construction as shall suppress the mischief and advance the remedy, and to suppress subtle invasions and evasions for continuance of the mischief...and to add force and life to cure and remedy, according to the true intent of the makers of the Act, *pro bono publico.*".

In *Gorris* v. *Scott*, a newly enacted statute provided that animals carried on board a ship should be kept in pens. The defendant shipping company had failed to enclose the plaintiff's sheep in pens, and sheep had been washed overboard during a storm. If only the sheep had been penned as required, this mishap would not have occurred. However, the English court rejected the plaintiff's suit for breach of statutory duty on the ground that this Act had been passed to prevent infection from spreading from one owner's animals to those of another and should not therefore be used to provide a remedy for a totally different 'mischief'."

In *Vishesh Kumar* v. *Shanti Prasad*, the Supreme Court observed that that construction should be adopted which would advance the object of the legislature and suppress the mischief sought to be cured.[4]

Though the mischief rule sounds very reasonable, it has not received much favour in English courts which lean more towards literal interpretation. Generally, the rule has not been followed in England and in some cases it has been criticised even.

Logical Interpretation

Logical interpretation is to be put on a statute only when grammatical or literal interpretation is not possible. In such cases, the true intention of the legislature has to be found out by referring to other facts. If the words are ambiguous, that interpretation is to be preferred which prevents the law from becoming absurd and dead letter. In the case of two or more alternative interpretations, that interpretation is to be preferred which is required to fulfil the object of law itself. According to Gray: "Logical interpretation calls for the comparison of the statute with other statutes and with the whole system of law and for the consideration of the term and circumstances in which the statute was passed." According to Allen: "Nowhere it is more apparent than in the construction of enactments that words 'half reveal and half conceal the thought within'. Unfortunately, a statute must be of revelation and in nowise concealment, if it is to avoid a darkening counsel. In the task of liberal or grammatical interpretation, judges are constantly reminded

[4] (1980) 2 SCC 378.

to their unfeigned chagrin of the imperfection of the human language. The style of statute has differed greatly from age to age."

The logical method takes into consideration the historical facts and the needs of society. It is the duty of the court to consider the circumstances under which the law was passed and the mischief which it was intended to remedy. Only that interpretation should be put which is liable to suppress the mischief and help the cause of remedy. However, courts are not allowed to refer to the debates on the bill, the fate of amendments proposed and dealt with by the legislature.

In the case of logical interpretation, it is the duty of the courts to take into consideration the object of the Act and the needs of society. That interpretation is to be put which advances the cause of justice. According to Kohler: "Rules of law are not to be interpreted according to the thought and will of the law-maker, but they are to be interpreted sociologically; they are to be interpreted as products of the whole people whose organ the law-maker has become." According to Cardozo: "Formerly men looked upon law as the conscious will of the legislator. Today, they see in it a natural force. It is no longer in text or in systems derived from reason that we must look for the source of law; it is in social utility, in the necessity that certain consequences shall be attached to give hypotheses. The legislator had a fragmentary consciousness of this law, he translated it by the rules which he describes. When the question is one of fixing the meaning of those rules, where ought we to search? Manifestly at their source, that is to say, in the exigencies of social life. There resides the strongest probability of discovering the sense of the law. In the same way, without the question of supplying the gaps in the law, it is not of logical deduction, it is rather of social needs, that we are to ask the solution."

It cannot be denied that both the grammatical and logical interpretations are equally important. They have been compared to two footsteps required for walking on the road. The help of both of them is essential for interpreting statutes. To quote Salmond: "The maintenance of a just balance between the competing claims of these two forms of interpretations is one of the most important elements in the administration of statute law. On each side there are dangers to be avoided. Undue laxity on one hand sacrifices the certainty and uniformity of the law to the arbitrary discretion of the judges which administer it, while undue strictness on the other hand sacrifices the intent of the legislature and the rational development of the law to the tyranny of words."

Strict and Equitable Interpretation

When the *litera lagis* suffers from ambiguity, it usually happens that one of the meanings is more obvious and consonant with the popular use

of the language. If this meaning is adopted, the interpretation is called strict or literal. Sometimes, courts reject the natural and most known interpretation in favour of another which conforms better to the intention of the legislature though it may not fit in with the ordinary use of language. When that is done, there is equitable interpretation.

Restrictive and Extensive Interpretation

Equitable interpretation is either restrictive or extensive, according as it is narrower or wider than the literal interpretation. The rule of restrictive interpretation is applied to penal and fiscal statutes. These laws impose restraints on the liberty of an individual or on the enjoyment of property by him. In such cases, courts are against a construction which imposes a greater burden on the subject than is warranted by the literal meaning of the language employed in the statute. *Nisbet* v. *Rayne and Burn* is an example of extensive interpretation. In that case, Nisbet was a cashier of the defendants, a firm of coalmine owners. It was a part of his duty to take every week from his office to the colliery the cash out of which the wages of the employees at the colliery were paid. While doing so, Nisbet was robbed and murdered. His widow claimed damages under the Workmen Compensation Act, 1906. Section I of that Act provides that when a workman meets his death by an accident arising out of the course of his employment, his widow may claim damages from the employers. It was contended in that case that murder was not an accident within the meaning of the Act and hence the claim was groundless. Lord Justice Kennedy agreed with the view that "the description of death by murderous violence as an accident cannot honestly be said to accord with the common understanding of the word." However, he observed: "I conceive it to be my duty rather to stretch the meaning of the word from the narrower to the wider sense of which it is inherently and etymologically capable, that is, 'any unforeseen and untoward event producing personal harm', than to exclude from the operation of the section a class of injury, which it is quite unreasonable to suppose that the legislature did not intend to include within it." This is a case of extensive interpretation.

Historical Interpretation

The method of historical interpretation is employed while interpreting a statute when its language gives no clue to the intention of the legislature. What is done is that courts consider the circumstances attending the original enactment and give effect to the intention which the legislature would presumably have expressed if its attention had been drawn to the particular question. In *Heydon's* case, it was laid down that "for the sure and true interpretation of all statutes in general, be they penal or beneficial, restricting or enlarging the Common Law, four things

are to be discussed and considered: first, what was the Common Law before the making of the Act; second, what was the mischief and defect for which the Common Law did not provide; third, what remedy the Parliament hath resolved and appointed to cure the disease of the Commonwealth; fourth, the true reason of the remedy; and the office of all the judges is always to make such construction as shall suppress the mischief and advance the remedy and suppress subtle inventions and evasions for continuance of the mischief." However, it is worthy of notice that historical interpretation cannot be adopted in every case. Even while ascertaining the supposed intention of the legislature, the courts cannot travel out of the language used in the statute. The result is that the proceedings in the legislature or the history of the introduction of a particular clause in the statute in the legislature cannot be considered. In *Rhonda's* case, Lord Birkenhead observed: "The words of the statute are to be construed so as to ascertain the mind of the legislature from the natural and grammatical meaning of the words which it has used, and in so construing them the existing state of the law, the mischiefs to be remedied and the defects to be amended, may legitimately be looked at together with the general scheme of the Act." In the same case, Lord Wrenbury observed: "The debate upon the bill, the fate of amendments proposed and dealt in Committee of either House cannot be referred to, to assist in construing the language of the Act as ultimately passed into law with the Royal assent."

Sociological Interpretation

The jurists of the sociological school are prepared to give a lot of freedom to the judges while interpreting a statute. The view of Kohler is that for the determination of the correct interpretation, courts can properly refer to the history of social movements and enquire into the social needs, objects and purposes which were agitating the society at the time of the legislation and which the statute had in view. To quote him: "The opinion that the will of the law-maker is controlling in construing legislation is only an instance of the unhistorical treatment of the facts of the world's history and should disappear entirely from Jurisprudence. Hence the principal rules of law are not to be interpreted according to the thought and will of the law-maker, but they are to be interpreted sociologically, they are to be interpreted as products of the white people whose organ the law-maker have become." Benjamin Cardozo writes: "Formerly men looked upon law as the conscious will of the legislator. Today they see in it natural force.... It is no longer in texts or in systems derived from reason that we must look for the source of law; it is in social utility, in the necessity by that certain consequences shall be attached to given hypothesis. The legislator had

a fragmentary consciousness of this law: he translates it by the rules which he prescribes. When the question is one of fixing the meaning of those rules, where ought we to search? Manifestly at their source; that is to say, in the exigencies of social life. There resides the strongest probability of discovering the sense of the law. In the same way when the question is one of supplying the gaps in the law, it is not of logical deductions, it is rather of social needs that we are to ask the solution." It is worthy of notice that the method of sociological interpretation has so far not been recognized by the courts. However, in course of time it is bound to have its own place in the rules of interpretation.

Equity of a Statute

The principle of "equity of a statute" is defined by Coke in these words: "Equity is a construction made by the judges that cases out of the letter of a statute yet being within the same mischief or cause of making the same, shall be within the same remedy that the statute provideth; and the reason thereof is for that the law-makers could not possibly set down all cases in express terms." In the case of *Riggs* v. *Palmer*, it was held that a murderer could not be permitted to take under the will of his victim and transmit rights to his own heirs, although the statutes regulating the devolution of property by will, if literally construed, did not stand in the way of the murderer benefiting by the testamentary disposition of his victim. To quote: "If the lawmakers could, as to this case, be consulted, would they say that they intended by the general language that the property of a testator or of an ancestor should pass to one who had taken his life for the express purpose of getting his property." The principle of equity of statute is not favoured by the courts. They are not prepared to fill in lacunae left by the legislature.

Rule of Casus Omissus

The rule of *casus omissus* provides that omissions in a statute cannot, as a general rule, be supplied by construction. In the case *of Parkinson* v. *Plumpton*, the Catering Wages Act, 1943 prescribed minimum wages payable to workers in catering establishments. The schedules to the Act provided for minimum wages when the employer supplied the worker with full board and lodging and when the employer supplied the worker with neither full board nor lodging. In that case, the plaintiff was a worker in a catering establishment. She was provided with full board but not lodging. She claimed that she was paid less than the minimum wage payable under the Act. While dismissing the claim, Lord Goddard observed: "I think there is a *casus omissus*, and that the draftsman has forgotten to provide for the case where, as here, board is provided, but not lodging within the meaning of the schedule. I suppose it was thought that full board would only be supplied when lodg-

ings were provided, and, as I have said, lodging seems to be put out of account here. These people were there full time, and so, therefore, you have got this unfortunate hiatus. One always tries to construe words so as to give them a sensible construction and prevent their failure, but I do not know of any canon of construction which enables me to construe 'where the employer supplies the worker with neither board nor lodging' to include a case where the employer supplies full board but no lodging. I can't rewrite the legislation. I must enter judgment for the defendant."[5]

Rules of Interpretation of Statutes

There are certain well-known rules of interpretation of statutes.

(1) According to Lord Simon: "The golden rule is that the words of a statute must *prima facie* be given their ordinary meaning. We must not shirk from an interpretation which will reverse the previous law, for the purpose of a large part of our statute is to make lawful that which would not be lawful without the statute, or conversely, to prohibit results which would otherwise follow. Judges are not called upon to apply their opinion of sound policy so as to modify the plain meaning of statutory words, but where, in constrained general words, the meaning of which is not entirely plain, there are adequate reasons for doubting whether the legislature could have been intending so wide an interpretation, the narrower of which would fail to achieve the manifest purpose of the legislation, we should avoid a construction which would reduce the legislation to futility and should rather accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result."

(2) The statute must be read as a whole and construction should be put on all parts of the statute. According to Lord Halsbury: "You must look at the whole instrument inasmuch as there may be inaccuracy and inconsistency; you must, if you can, ascertain what is the meaning of the instrument taken as a whole in order to give effect, if it be possible to do so, to the intention of the framer of it." According to Lord Davey: "Every clause of a statute should be construed with reference to the context and other clauses of the Act, so as, as far as possible, to make a consistent enactment of the whole statute or series of statutes relating to the subject-matter."

(3) The statute should be construed in a manner to carry out the intention of the legislature. According to Lord Blackburn: "I quite agree that in construing an Act of Parliament, we are to see what is the intention which the legislature has expressed by the words, but then

[5] (1954) 1 All ER 201.

the words again are to be understood by looking at the subject-matter they are speaking of and the object of the legislature, and the words used with reference to that may convey an intention quite different from what the self-same set of words used in reference to another set of circumstances and another object would or might have produced." According to Lord Radcliffe: "There are many so-called rules of construction that courts of law have resorted to in their interpretation of statutes, but the paramount rule remains that every statute is to be expounded according to its manifest and expressed intention." The fundamental rule of interpretation to which all others are subordinate is that a statute is to be expounded "according to the intent of them that made it". According to Lord Simond: "The duty of the court is to interpret the words the legislature has used; those words may be ambiguous. But even if they are, the powers and duty of the court to travel outside them on a voyage of discovery are strictly limited, see for instance, *Assam Railways and Trading Co.* v. *I.R.C.* and particularly the observations of Lord Wright." It is not the duty of courts to fill up the gaps in a statute. To do so is to usurp the legislative function under the thin disguise of interpretation. If a gap is discovered, it is for the legislature to fill up the same.

(4) The interpretation of a statute should be in accordance with the policy and object of the statute in question. According to Lord Halsbury: "It is impossible to contend that the mere fact of a general word being used in a statute precludes all enquiry into the object of the statute or the mischief which it was intended to remedy." According to Lord Goddard: "A certain amount of commonsense must be applied in construing a statute. The object of the Act has to be considered." According to Channell, J.: "It is always necessary in construing a statute and in dealing with the words you find in it to consider the object with which the statute was passed; it enables one to understand the meaning of the words introduced into the enactment." According to Lord Cave: "I base my decision on the whole scope and purpose of the statute and upon the language of the sections to which I have specifically referred."

(5) The words used in a statute should be construed in the popular sense. If those are used in connection with some particular business or trade, they will be presumed to be used in a sense appropriate to or usual in such business or trade. According to Lord Hewart: "It ought to be the rule and we are glad to think that it is the rule that words are used in an Act of Parliament correctly and exactly and not loosely and inexactly. Upon those who assert that the rule has been broken, the burden of establishing their proposition lies heavily, and they

can discharge it only by pointing to something in the context which goes to show that the loose and inexact meaning must be preferred."

(6) The words in a statute should be taken to have been used in the sense that bore at the time the statute was passed. According to Lord Esher: "The first point to be borne in mind is that the Act must be construed as if one were interpreting it the day after it was passed."

(7) There is a presumption in the construction of statutes that the same words are used in the same meaning in the same statute and a change of language is an indication of change of intention on the part of the legislature. According to Lord Shaw: "In the absence of any context indicating a contrary intention, it may be presumed that the legislature intended to attach the same meaning to the same words when used in a subsequent statute in a similar connection." According to Lord Macmillan: "When an amending Act alters the language of the principal statute, the alteration must be taken to have been made deliberately. In tax legislation, it is far from uncommon to find amendments introduced at the instance of the Revenue Department to obviate judicial decisions which the department considers to be attended with undesirable results."

(8) If the language of a statute is clear, it must be enforced although the result may seem harsh or unfair or inconvenient. It is only when there are alternative methods of construction that notions of injustice and inconvenience may be allowed scope. According to Tindal, C.J.: "Where the language of an Act is clear and explicit, we must give effect to it whatever may be the consequences, for in that case the words of the statute speak the intention of the legislature." According to Lord Birkenhead: "The consequences of this view will no doubt be extremely inconvenient to many persons. But this is not a matter proper to influence the House unless in a doubtful case affording foothold for balanced speculation as to the probable intention of the legislature."

(9) As far as possible, statutes should be interpreted in such a way as to avoid absurdity. According to Jervis, C.J.: "If the precise words used are plain and unambiguous, we are bound to construe them in their ordinary sense, even though it does lead to absurdity or manifest injustice. Words may be modified or varied where their import is doubtful or obscure, but we assume the functions of legislators when we depart from the ordinary meaning of the precise words used, merely because we see, or fancy we see an absurdity or manifest injustice from an adherence to their literal meaning."

(10) The doctrines of *expressio unius exclusio alterius* and *ejusdem generis* apply in the interpretation of statutes. The first doctrine means that the expression of one person or thing implies the exclusion of

other persons or things of the same class which are not mentioned. The term "*ejusdem generis*" means "of the same kind". According to Collick: "It is the general rule of construction that where a broad class is spoken of and general words follow, the class first mentioned is to be taken as the most comprehensive and the general words treated as referring to matters *ejusdem generis* with such class." According to Lord Halsbury: "There are two rules of construction now firmly established as part of our law. One is that words, however general, may be limited in respect to the subject-matter in relation to which they are used. The other is that the general words may be restricted to the same *generis* as the specific words that precede them."

In Byren's *Law Dictionary* the rule of *ejusdem generis* has been explained as follows: "It is a rule of legal construction that general words following enumeration of particulars are to have their generality limited by reference to the preceding particular enumeration and to be construed as including only all other articles of the like nature and quality."

(11) It is not the business of a court to fill up the gaps in a statute. That is the function of a legislature. According to Lord Wright: "It may be that there is a *casus omissus*, but if so, that omission can only be supplied by a statutory action. The court cannot put into the Act words which are not expressed and which cannot reasonably be implied on any recognised principles of construction. That would be the work of legislation, not of construction, and outside the province of the court." However, courts have occasionally tried to fill up the gaps, although this tendency is not approved of.

(12) The general rule of interpretation is that no law is to have retrospective effect unless a specific intention to that effect is given in the statute itself. Ordinarily, all laws are to be interpreted to have prospective effect only. According to Scrutton, L.J.: "*Prima facie*, an Act deals with future and not with the past events. If this were not so, the Act might annul rights already acquired, while the presumption is against the intention." According to Wright, J.: "Perhaps no rule of construction is more firmly established than this, that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards a matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language that is fairly capable of either interpretation, it ought to be construed as prospective only." According to Lindley, L.J.: "It is a fundamental rule of English Law that no statute shall be construed so as to have a retrospective operation, unless its language is such as plainly to require such a construction

and the same rule involves another and subordinate rule to the effect that a statute is not to be construed so as to have a greater retrospective effect than its language renders necessary."

(13) Nobody has a vested right in procedure. There is no presumption that a change in procedure is *prima facie* intended to be prospective only and not retrospective. According to Black burn: "Alterations in the form of procedure are always retrospective, unless there is some good reason or other why they should not be."

(14) While interpreting a statute, certain presumptions have to be taken into consideration by the courts. It is always to be presumed that the legislature does not make mistakes, and if it actually does make a mistake, it is not for a court to correct the same. According to Lord Halsbury: "But I do not think it competent for any court to proceed upon the assumption that the legislature has made a mistake. Whatever the real fact may be, I think a court of law is bound to proceed on the assumption that the legislature is an ideal person that does not make mistakes." According to Lord Loreburn: "It is quite true that in construing private Acts, the rule is to interpret them strictly against the promoters and liberally in favour of the public, but a court is not at liberty to make laws however strongly it may feel that Parliament has overlooked some necessary provision or even has been over-reached by the promoters of a private bill."

(15) Another presumption is that the legislature knows the practice. According to Hamilton, L.J.: "I think it is a sound inference to be drawn as a matter of construction that the legislature, aware as I take it to have been, of the practice of these inquiries and its incidents, intended that the local inquiry which it prescribed should be the usual local inquiry and that the usual incidents should attach in default of any special enactment, including the incident that the Board would treat the report as confidential."

(16) Another presumption is that the legislature does not intend what is inconvenient or unreasonable. According to Lindley: "Unless Parliament has conferred on the court that power in language which is unmistakable, the court is not to assume that Parliament intended to do that which might seriously affect foreigners who are not resident here and give offence to foreign governments." According to Brett, M.R.: "With regard to inconvenience, I think it is a most dangerous doctrine. I agree that if the inconvenience is not only great, but what I may call an absurd inconvenience in reading an enactment in its ordinary sense, whereas if you read it in a manner of which it is capable, though not in its ordinary sense, there would not be any inconvenience at all, there would be reason why you should not read it according to its ordinary

grammatical meaning. If an enactment is such that by reading it in its ordinary sense, you produce a palpable injustice, whereas by reading it in a sense it can bear, though not inexactly its ordinary sense, it will produce no injustice, then I admit one must assume that the legislature intended that it should be so read as to produce no injustice."

(17) Another presumption is that the legislature does not intend any alteration in the existing law except what it expressly declares. According to Lord Wright: "The general rule in exposition of all Acts of Parliament is somewhat this, that in all doubtful matters, and where the expression is in general terms, they are to receive such a consideration as may be agreeable to the rules of common law, in cases of that nature; for statutes are not presumed to make any alteration in the common law, further or otherwise than the Act does expressly declare." According to Devlin, J.: "A statute is not to be taken as affecting a fundamental alteration in the general law unless it uses words which point unmistakably to that conclusion."

(18) Another presumption is that public or private vested rights are not taken away by the legislature without compensation. According to Bowen, L.J.: "In the consideration of statutes, you must not construe the words so as to take away rights which already exist before the statute was passed, unless you have plain words which indicate that such was not the intention of the legislature." According to Brett, M.R.: "It is a proper rule of construction not to construe an Act of Parliament as interfering with or injuring persons' rights without compensation unless one is obliged to so construe it."

(19) Another presumption is that statutes do not violate the principles of International Law. According to Craies: "The judges may not pronounce an Act *ultra vires* as contravening international law, but may recoil in case of ambiguity, from a consideration which would involve a breach of the ascertained and accepted rules of international law."

(20) It is a rule of interpretation well-settled that in construing the scope of a legal fiction it will be proper and even necessary to assume all those facts on which the fiction can operate. A consideration which would defeat the object of the legislation must, if that is possible, be avoided.

(21) The test of pith and substance is generally and more appropriately applied when a dispute arises as to the legislative competence of the legislature, and it has to be resolved by a reference to the entries to which the impugned legislation is relatable. When there is a conflict between two entries in the legislative lists and legislation by reference to one entry would be competent but not by reference to the other, the

doctrine of pith and substance is involved for the purpose of determining the true nature and character of the legislation in question.[6]

(22) While interpreting a taxing statute, equitable considerations are entirely out of place. Likewise, taxing statutes cannot be interpreted on any presumptions or assumptions. The court must look squarely at the words of the statute and interpret them. It must interpret a taxing statute in the light of what is clearly expressed. It cannot imply anything which is not expressed. It cannot import provisions in the statutes so as to supply assumed deficiency.[7]

(23) The tendency of the courts towards technicality is to be deprecated. It is the substance that counts and must take precedence over mere form. Some rules are vital and go to the root of the matter. They cannot be broken. Others are only directory and a breach of them can be overlooked provided there is a substantial compliance with the rules read as a whole and provided no prejudice ensues. When the legislature does not itself state which is which, judges must determine the matter and exercising a nice discrimination sort out one class from the other along broadbased commonsense lines.[8]

(24) In determining the constitutionality of a statute, the court is not concerned with the motives of the legislature, and whatever justification some people may feel in their criticisms of the political wisdom of a particular legislative or executive action, the Supreme Court cannot be called upon to embark upon an enquiry into public policy or investigate into questions of political wisdom or even to pronounce upon motives of the legislature in enacting a law which it is otherwise competent to make.[9]

(25) The legal pursuit of a remedy, suit, appeal and second appeal are really but steps in a series of proceedings all connected by an intrinsic unity and are to be regarded as one legal proceeding. The right of appeal is not a mere matter of procedure but is a substantive right. The institution of the suit carries with it the implication that all rights of appeal then in force are preserved to the parties thereto till the rest of the career of the suit. The right of appeal is a vested right and such a right to enter the superior court accrues to the litigant and exists as on and from the date the *lis* commences and although it may be actually exercised when the adverse judgment is pronounced, such right is to be governed by the law prevailing at the date of the institution of the suit or proceedings and not by the law that prevails at the date

[6] AIR 1961 SC 232.
[7] AIR 1961 SC 1047.
[8] AIR 1956 SC 140.
[9] AIR 1959 SC 860.

of its decision or at the date of the filing of the appeal. This vested right of appeal can be taken away only by a subsequent enactment if it so provides expressly or by necessary intendment and not otherwise.[10]

(26) In the case of a penal statute, no proceedings under it are generally maintainable in respect of acts done before the commencement of the statute, unless the statute includes such acts by express provision or necessary intendment. The act which was not an offence at the time it was done under the law then prevailing, cannot become so by reason of the operation of some statute which itself came into existence at a subsequent date. All penal statutes have to be construed strictly in favour of the accused.

(27) In *Ex parte Campbell,* James L.J. observed: "Where once certain words in an Act of Parliament have received a judicial construction in one of the superior courts, and the legislature has repeated them without alteration in a subsequent statute, I conceive that the legislature must be taken to have used them according to the meaning which a court of competent jurisdiction has given to them." The view of Lord Denning is that he does not believe that whenever Parliament re-enacts a statute, it thereby gives statutory authority to every erroneous interpretation which has been put upon it. In *Royal Court Derby Porcelain Ltd.* v. *Raymond Russell,* Lord Denning observed: "The true view is that that court will be slow to overrule a previous decision on the interpretation of a statute when it has long been acted on, and it will be more than usually slow to do so when Parliament has, since the decision, re-enacted the statute in the same terms."[11]

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[10] AIR 1957 SC 540.

[11] (1949) 2 KB 417, 429.

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