CHAPTER VI

LEGISLATION AND INTERPRETATION

LEGISLATION DEFINED

Legislation consists in the declaration of *legal* rules by a competent authority, *conferring upon such rules the force of law*. Such 'competent authority' is styled as the 'Legislature' of a country, and its members are called 'legislators'. According to *Gray*, legislation represents the formal utterances of the legislative organs of the society.

Legislation, therefore, means making laws. But, judges also make laws when they give decisions which establish a *new principle*. However, this is *not legislation* in the strict sense of the term, but is known as 'indirect legislation' or *judge-made law*.

"In another sense, legislation includes every expression of the will of the legislature, whether directed to the making of rules of law or not. In this use, every Act of Parliament is an instance of legislation, irrespective of its purpose and effect. An Act of Parliament may do no more than ratify a treaty with a foreign State, *or* alter the calendar or coinage *or* declare war *or* make peace..... All this is *legislation in a wide sense*, but it is *not the declaration of legal principles* with which we are concerned". *(Salmond)*

What is legislation ? Distinguish between supreme and subordinate legislation.
B.U. June 96
Apr. 98

Law which emanates from legislation is described as enacted or codified law (*lex scriptum*), as opposed to unenacted or uncodified law (*lex non scriptum*).

KINDS OF LEGISLATION

Legislation may be classified as :

(A) Supreme and subordinate legislation

(B) Direct and indirect legislation.

Write a note on : Legislation.
P.U. Apr. 99

(A) SUPREME AND SUBORDINATE LEGISLATION

1. Supreme Legislation

Legislation is either *supreme or subordinate*. The former is that which proceeds directly from the sovereign power in the State, and is therefore free from any external control. It is also incapable of being annulled or repealed. The British Parliament is, in every sense, a sovereign law-making body, because there is no external restraint on its absolute authority. Its laws *cannot* be questioned in any Court of law. Though the Parliaments of the U.S.A. and India are also sovereign according to the literal meaning of the word, they are *not* really so, because the validity of their laws *can* be challenged in a Court of law, which may even declare them *ultra vires*. But according to the modern concept of sovereignty, *even legal restraints are not inconsistent with the idea of sovereignty*. So looking at it from the

modern concept, all federal legislatures also are sovereign and supreme bodies.

2. Subordinate Legislation

Subordinate legislation is that which proceeds from any authority *other than* the sovereign power, and is, therefore, dependent for its continued existence and validity on some supreme or superior authority.

Forms of subordinate legislation

Subordinate legislation may take any of the following *five* forms :

1. Executive

The executive is entrusted with the working of the administrative department of the State, but it also enjoys certain subordinate legislative powers which have been expressly delegated to it by Parliament or pertain to it by the common law. Thus, it is the prerogative of the Crown by the common law to make laws for the government of the territories acquired by conquest or by cession, and not yet possessed of representatives local legislation.

2. Judicial

The superior Courts have the power of making rules for the regulation of their *own* procedure. Thus, the High Courts of India are empowered to make *Rules* to regulate their own procedure. Thus, for instance, we have the *Bombay High Court Rules*, which are *Rules* governing the Bombay High Court and matters coming before that Court.

3. Colonial

Write a short note on : Subordinate legislation. P.U. Apr. 96 Oct. 97

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.

4. Municipal

Municipal authorities are entrusted with the power of establishing *special* law for the districts under their control. These are sometimes called *bye-laws*.

5. Autonomic (or Autonomous)

By autonomic legislation is meant that species of enacted law which has its source in various forms of *subordinate* and restricted *legislative* authority possessed by *private persons* and *bodies of persons*. A *railway company*, for example, may make rules for the regulation of its undertaking, *or* a *university* may make statutes for governing its members. Legislation thus effected is called '*autonomic*' or '*autonomous*'.

(B) DIRECT AND INDIRECT LEGISLATION

The word 'legislation' is used in different senses, and in its widest sense, includes judge-made rules of law, and even the particular rules of law or the rights created at law between parties to a contract. Looked at from this angle, legislation can be of *two* kinds, *viz.*, *direct* and *indirect*.

Direct legislation is legislation in the strict (or narrower) connotation of the term, in the sense that it connotes *enactment* and declaration of legal rules of behaviour which are enforceable in Courts of law. By *indirect legislation* is meant legislation in the widest sense, *i.e.*, legislation by judicial interpretation of statutes and the application of equitable principles by the judges. From this it follows that direct legislation means the making of rules and laws to be followed and enforced in the Courts of the State, and these rules can only be framed by a competent law-making body.

Write a short note on : Direct and indirect legislation.

Difference between Autonomic and Conventional Law. — There is a close resemblance between autonomic law and conventional law. Autonomic law is a function entrusted by the State to private persons. But conventional law is the product of *agreement,* and therefore, is law for none except those who have *consented* to its creation. Autonomic law, on the other hand, is the product of a true form of *legislation.*

Codification

Legislation as a source of law, has the advantage of *form* and *brevity.* The modern tendency is towards reduction of the whole body of law into the form of enacted law. This process is known as *codification.* According to *Salmond,* codification consists in the reduction of the whole *corpus juris* to the form of enacted law.

On the Continent, the bulk of the law, customary or otherwise, has been reduced to the form of a code. In England, however, there is no general attempt to codify the various branches of customary or case-laws. On the contrary, in the earlier days, legal temperament in England was averse to codification, and this pushed a great jurist like *Bentham* to publish his works in France (in the French language). However, English jurists of later days began to realise the immense value of codification, and now, several branches of Common law have been reduced to enactments.

Write a short note on : 'Codification'.
B.U. Oct. 97

Bentham was of the view that it is indeed possible to formulate a Code of Laws which is so ideal, that it takes care of all possible legal situations and avoids all possible scope for law-making *via* judicial decisions. However, this view *cannot* easily be subscribed to. Careful codification may *reduce* the volume of judge-made law; it *cannot,* however, totally do away with precedents.

Thus, codification does *not* altogether eliminate case-law. Even with codification, there will be room for case-law, as the code itself has to be interpreted. But the *bulk* of the case-law will be reduced. Thus, codification *cannot* connote the total abolition of precedents. Even when law is codified, the growth of precedents marks a parallel development.

In India, the most classical case is the Code of Manu, where law and religion are found to be inter-woven. However, codification, in its real sense, began in the country during the British reign. The first Law Commission was appointed in 1834 under the chairmanship of Lord Macaulay, to draft a Penal Code for India, and also to draft a Civil Procedure Code. The drafts prepared by the first Law Commission were submitted to the Second Law Commission, and the Civil Procedure Code was passed in 1859, whereas the Indian Penal Code was enacted in 1860.

Shortly thereafter, three more uncodified branches of law were embodied in statute in the shape of the Indian Contract Act, the Indian Evidence Act, and the Negotiable Instruments Act.

In India to-day, criminal Law is entirely codified. On the other hand, personal laws like Hindu Law and Mahommedan Law are partly codified and partly uncodified. Thus, in Hindu Law, whereas the law regarding marriage, succession, minority, guardianship, adoption and maintenance is codified, the law relating to joint families, coparcenary *etc.*, is uncodified. Similarly, in Mahommedan Law, which is mostly uncodified, one finds several enactments, as for instance, the Dissolution of Muslim Marriage Act, 1939, and the Wakf Act, 1954.

An interesting compromise between case-law and codification is the American Law Institute's *Restatement of American Law.* Although this Restatement is in the form of a Code, it is *not* statutory, and has no official sanction. Generally, it merely declares the existing law, without attempting to suggest or incorporate any improvements. Where there are conflicting decisions, the framers have adopted what they consider to be the preferable rule, which is *not necessarily* the one supported by most of the Courts.

One may conclude with the words of *Austin,* who observed as follows : "The vast difficulty of successful codification, no rational advocate of codification will deny or doubt. Its impossibility none of its opponents will venture to affirm."

THE MERITS OF LEGISLATION OVER OTHER SOURCES OF LAW

In the words of *Salmond, so great is the superiority of legislation over all other methods of legal evolution, that the modern tendency is to acknowledge its claim exclusively, and to discard the other instruments as relics of the infancy of law.* Of all the main sources of law, legislation is *the most recent and the most powerful.*

In primitive and ancient societies, as law and religion were blended together, immutable custom was the most important source of law, and legislation had a very small role to play. It was at times even non-existent. But immutable custom can hardly be an adequate source of law in the dynamic modern world. Therefore, custom can hardly be considered as a *rival* to legislation as a source of law, though it continues to be a *subsidiary* source of law, even in modern times.

The other source of law with which the merits of legislation are to be compared is precedents or case-law. The advantages of legislation can be best considered by contrasting it with precedent.

1. Abrogative power

Examine the advantages of legislation over precedent, as a source of law.
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Legislation is both *constitutive* and *abrogative,* while precedent merely possesses constitutive efficacy. In other words, whereas legislation can *both* make *and* unmake, precedent can *only make* new law. The first virtue of legislation lies in its abrogative power. It is *not only* a source of new law, *but is also* the most effective instrument of abolishing the existing law. The legislature can *amend, repeal* or *enact* new law. It can be progressive.

Precedent, on the other hand, does *not* possess that abrogative power which is so necessary for legal reform. It can produce new law, but it *cannot* reverse what is already law. Thus, if a precedent pronounced by a Full Bench of a High Court is unsound, in a new case, that High Court must first decide in conformity with such precedent. Only if the aggrieved party then appeals to the Supreme Court, can the precedent be reversed. Legislation, therefore, is an indispensable instrument, not only of *legal growth*, but also of *legal reform*.

Why is legislation superior to other sources of law ?
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This advantage, however, fizzles away when one considers the fact that precedent too is not always rigid and irreversible. In legal systems where the Courts can overrule their own previous decisions (as for example, the Privy Council in England and the Supreme Courts of India and the United States), precedent can also make and unmake the law.

What are the advantages of legislation as a source of law ?

2. Efficiency (Division of functions)

Point out drawbooks, if any, of legislation.
B.U. Oct. 96

Legislation allows an advantageous division of labour, which results in increased efficiency. It differentiates the legislature from the judiciary. The duty of the legislature is to *make* law, while the duty of the judiciary is to *interpret* and *apply* the law. Precedent, on the other hand, unites in the same body, the business of *making* the law and that of *enforcing* it, and this may *not* always be the best formula for efficiency.

3. Declaration

Legislation is also superior to precedent, because before a statute is applied by Courts of justice, it is formally declared. Justice requires that laws should be known before they are applied and enforced by the law Courts. Case-law, on the contrary, is created and declared in the very act of applying and enforcing it. The Courts of law apply it as soon as they make it, without making any formal declaration about it. Besides, it operates retrospectively, and applies to facts which are prior in date to that law itself. Would it be fair, it is rightly asked, to keep the citizens in the dark about their legal rights and duties, and then to suddenly subject them to a particular law ?

"Legislation is the chief source of law." Do you? Give reasons.
P.U. Apr. 98

The validity of the distinction is, however, watered down by the fact that sometimes even statutes are given a retrospective effect. Thus, for instance, a man who buys a house and hopes to rent it out at a good rent may find, to his disappointment, that a Rent Act is later passed by the Legislature, under which he can recover only the "standard rent" specified in such statute.

4. Provisions for future cases

Legislation makes rules for cases that have *not yet arisen*, whereas precedent must wait until the actual concrete instances come before the Courts for decisions. Thus, legislation makes room for *certainty*. But for it, the legal position in certain cases would have been uncertain and indefinite. It has, therefore, rightly been said that case-law is essentially *incomplete, uncertain and unsystematic*, while if statute law shows the same defects, it is only because of the incapacity or lethargy of the legislature.

5. Form

Examine the comparative advantages and disadvantages of legislation over precedent, as a source of law. P.U. Apr. 95

Statute law is also superior to case-law in point of *form*. It is *brief, clear, easily accessible* and understandable, while case-law is burried from sight and knowledge in the huge and daily growing mass of the records of litigation. "*Case-law is gold in the mine, while statute law is coin of the realm ready for immediate use.*"

This, however, is *not always so*. Instances are many where an Act is cumbersome and complicated in its reading, and judgments are lucid with crystal-clear simplicity.

6. Greater access and generality

Another advantage of legislation is that whereas precedents are scattered here and there, and therefore, inconvenient to refer to (even for a lawyer), enacted law is codified, easily available, and general in its application.

7. Reliability

Finally, codified law is *more reliable* than individual judgment. As rightly observed by *Dr. Sethna*, the human mind is *not infallible*, and the judge is no exception. The collective *wisdom of the legislature* can, therefore, be regarded as a more reliable means of protection than *the fancy of an individual judge*.

Defects of Legislation

1. No scope for judicial discretion

It has often been said that where there is an express provision of the law, the judge is tied down to it, and *has* to follow it, — *even if* it results in injustice. On the other hand, precedent allows a judge to give a decision on the merits of that particular case, without being rigidly tied down to water-tight rules of the enactment.

There is, indeed, considerable strength in this criticism. However, the *remedy* lies in enacting legislation which is *not absolutely binding* on the judge, and which provides scope for judicial discretion within the four corners of the statute.

2. Lack of clarity

It is also said that statute-law is often worded in cumbersome language, which makes little sense to a layman, whereas precedent is often to be found in clear and simple words.

There is *not* much strength in this criticism, and the *remedy* lies in employing competent draftsman to frame the statutes. At the same time, it is well-known that quite a few judgments are verbose and couched in high-sounding language, which make little sense to a lawyer, – much less to a layman.

3. Rigidity

Lastly, it is said that statutes are extremely rigid, — and leave little scope for selective application, thus resulting in injustice in extreme cases.

The *remedy* for this is once again to provide an in-built flexibility in the statute itself, so that there is a greater scope for judicial discretion.

PRINCIPLES RELATING TO INTERPRETATION OF STATUTES

'Interpretation' defined

Salmond defines interpretation as "*that process by which the Courts seek to ascertain the meaning of the legislature through the medium of the authoritative forms in which it is expressed.*" Thus, it involves giving effect to the *intention* of the legislature. Interpretation is always a point of law, and it is the function of the Court to interpret the laws.

Kinds of interpretation

What is interpretation of statutes? Distinguish between grammatical and functional interpretation.

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Interpretation can be *literal* or *functional*. The former is concerned *only with how* the law is expressed *as it stands*. It is concerned exclusively with the verbal expression of the law. This is called *litera legis*, *i.e.*, the literal construction of law. *Functional interpretation*, on the other hand, is that which *departs from the letter* of the law, and looks *elsewhere* for some other and more satisfactory evidence of the true *intention* of the legislature, namely, *sententia legis*.

Interpretation may be *literal* or *free*. In the former, law is interpreted exclusively in its verbal expression, and it does *not* look beyond the *litera legis*. But free interpretation departs from the letter of the law, and seeks more satisfactory evidence of the true intention of the legislature somewhere else. It is the duty of the judiciary to discover the intention of the legislature, because the essence of the law lies in its *spirit*, and *not* in its *letter*. Judges are *not* at liberty to add to or take away from or modify the letter of the law, simply because they have reason to believe that the true *sententia legis* (intention of the legislature) is *not* completely or correctly expressed by the law. As far as possible, law Courts are therefore required to follow the letter of the statute.

As *Mr. Justice Desai* remarked in a case before the Bombay High Court, "..... it is the paramount duty of the judicial interpreter to give full effect to the language used by the lawmaker". However, there are occasions on which law Courts have to depart from this rule, and one, therefore, finds different methods of interpretation of statutes, and one such method is the *historical interpretation.*

What is interpretation of statutes? When is a functional interpretation given to a statutory provision ?

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The Supreme Court has also *reiterated the role of beneficient construction in Addl. C.I.T* v. *Surat Art Silk Cloth Manufacturers Association* (1980 2 S.C.C. 31). It *held* that a construction that gives *meaning* and *effect* to the provisions of statute is definitely to be preferred to one which does *not* have this effect. In the course of its judgment, the Supreme Court observed as follows :

"If there is one rule of interpretation more well-settled than any others, 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."

Even in the United States of America, the trend today is towards a *purpose-oriented*, rather than a *plain-meaning* role in its rigid orthodoxy. The

U.S. Supreme Court has observed (*in United States* v. *American Trucking Association*-310 U.S. 534) :

"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."

Penal statutes must, however, be always *strictly construed.* If an Act creates an offence and prescribes a penalty for it, the words used in the Act must be strictly construed. In such cases, the Court ought *not* to be concerned so much with what might *possibly* have been intended; it is more concerned with what has *actually* been said and by the language used in the Act. If, in a penal statute, two possible and reasonable interpretations are possible, the Court must lean towards that construction which exempts the person from a penalty, rather than the one which imposes a penalty on him.

The Mischief Rule

When the *sententia legis* (intention of the legislature) *cannot* be determined by the language of the enacted statute, 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.

It is no doubt true that when judges are allowed to probe into questions of policy in interpreting statutes, there is bound to be some uncertainty in such interpretation. It is maintained that the 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 then to be construed in such a manner as *to suppress the mischief and advance the remedy.*

Write a short note on : The rule in Heydon's case.
B.U. Apr. 95

This rule of interpretation is also known as *the mischief rule,* and takes its origin from *Heydon's case* (1584-3 Co. Rep. 76). As was observed in *Heydon's case,* "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 *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 Act, *pro bono publico.*"

Write a short note on : The mischief rule.
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Thus, in *Gorris* v. *Scott,* (1874 L.R. 9. Exch. 125), 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".

Reiterating the application of the *mischief rule, the* Supreme Court has observed that always *that* construction must be adopted which would advance the legislature's object and suppress the mischief sought to the cured. (*Vishesh Kumar* v. *Shanti Prasad,* (1980) 2 S.C.C. 378)

But law Courts are rather cautious in utilising this method of interpretation of statutes, because the Courts are always restricted by the limitations of the interpretation that they may put on the law. Thus, *English Courts* do *not* permit themselves to consider the preliminary discussion that took place before the enactment became law. They will *not* look at debates in Parliament, or in general, at the reports of Commissions to which effect was given in framing the legislation. The *reason* is that the motives of different members vary considerably and those who have spoken represent the intention of the majority. Further, the intention of Parliament is *not* clearly seen through such debates; moreover, the intention of the Parliament may *not* give a precise effect to the reports of the Commission.

"The dominant purpose in construing a statute is to ascertain the intent of the legislature, and this may be done in any of the *three ways. Firstly,* by considering the cause and necessity of the Act; *secondly,* by comparing one part of the Act with another; and *thirdly,* (and this the most indefinite) sometimes by foreign (meaning extraneous) aids, so far as they can justly be considered to throw light on the subject." *(Lord Wrenbury)*

In India, the Courts have always looked into *all relevant material* when interpreting a statute. Thus, in *The Commissioner of Labour* v. *The Associated Cement Companies Ltd.* (57 Bom. L.R. 367), the Bombay High Court *held* that if it is relevant and material to consider the circumstances under which an Act was passed, the Court may consider the Debates in the Legislature.

Similarly, in *The State of West Bengal* v. *Subodh Gopal Bose* (1964 S.C.R. 587), it was observed by the Supreme Court that, in proper cases, the Statement of Objects and Reasons relating to the Act ought to be considered.

The Supreme Court has also referred to the Statement of Objects and Reasons of a statute in interpreting its provisions. (*Shyamcharan Sharma* v. *Dharamdas,* (1980) 2 S.C.C. 151)

The use of *external aids,* such as a *dictionary,* was once in question before the Supreme Court. Pointing out the differences between different dictionaries, the Court observed that the function of the Court is to gather the meaning of a particular word, *not* under the dictatorship of dictionaries, *but* guided by the statutory purpose, the mischief to be countered and the public interest to be advanced. (*Subhash Chandra* v. *State of U.P.,* (1980) S.C.C. 324)

The words used in the *heading* of a Chapter do *not* control the sections

which fall under that Chapter. They are to be regarded as a *Preamble* to the sections that follow. Although the Preamble to an Act *cannot* over-ride the plain meaning of its operative parts, it may assist in understanding the true meaning or implication of a particular section in an Act.

The Supreme Court has also observed that where the language of a statute is clear and explicit, restructuring the provision with the aid of the Preamble is *not permissible*. (*Bhim Singhji* v. *Union of India*, (1981) 1 S.C.C. 166)

The Supreme Court has also *held* that where a statute contains a definition clause, *i.e.*, a particular term is defined by the Act itself, the defined meaning generally prevails, unless the context otherwise requires. However, such a clause does *not necessarily* apply in *all* possible contexts in which the word defined may be found in that Act. (*K Balakrishna Rao* v. *Haji Abdulla Sait*, (1980) 1 S.C.C. 321)

Logical Interpretation

Ordinarily, the judge must accept the language in which a rule of law is framed, *i.e., litera legis*. Such interpretation becomes *literal*. By this method, the Court arrives at the correct conclusion with regard to the intention of the legislature. But if it is *not* possible to find out the intention of the legislature because of some logical defect, then it must be interpreted by some other means. It is then for the judge to supply an intelligent interpretation in order to furnish what is lacking in the law. This can be termed as the *logical interpretation of a statute*.

It is also to be remembered that words and phrases in an enactment are *not* to be taken in an isolated or detached manner—but as a whole, in the light of the *entire* enactment. Thus, under certain circumstances, the word 'may' is properly to be construed to mean 'shall'. Again, the word 'child' may *not* include an illegitimate child. Likewise the term *"void"* as used in several English statutes, has been interpreted as also covering *"voidable"*, as that was the meaning required to give effect to the requirement of the legislature.

However, there is no scope for a free or logical interpretation in a *penal statute*. Where an Act defines an offence and prescribes a penalty for its commitment, the words *must* be *strictly construed* in favour of the subject. Thus, if a man is charged with theft under the Indian Penal Code, the Court would insist on proof of a *dishonest* intent, and a mere *fraudulent* intent would *not* suffice.

Sometimes, a rule of law may be ambiguous, and in such cases, it is the duty of the Court to make a logical interpretation, and give the best and most equitable interpretation, so that the *litera legis* becomes clear.

As a rule, interpretation of law is *literal* or *strict*, and unless there is a very good ground for following a broader and equitable interpretation, the judge never departs from the grammatical, narrow, strict or restrictive interpretation of a statute. The difficulty sometimes arises because of two or more inconsistent interpretations which may be attributed to the same point of a statutory law. Such an inconsistency is a serious logical defect,

which can be remedied by correcting the language of the law and supplying a fair and reasonable interpretation. There are cases where the legislature may create a logical defect by accident, slip or oversight, or even by placing a comma at the wrong place, and therefore, it is for the judge to decide, for instance, that the comma ought to be at some other place, and the Court has the right to rectify such a mistake, so as to restore the true intent of the legislature, and thereby remove very great hardship on those who are likely to suffer on account of such an accident or oversight.

"There can, I think" says *Lord Mac-Naughten*, "be only *two cases* in which it is permissible to depart from the ordinary and natural sense of the words of an enactment. It must be shown either that the words taken in their natural sense *lead to some absrudity, or* that there is some other clause in the body of the Act *inconsistent with or repugnant to, the treatment in* question construed in the ordinary sense of the language in which it is construed."

Noscitur a Socis (Rule of ejusdem generis)

This maxim has been translated by *Lord Macmillan* as, "The meaning of a word is judged by the company it keeps." This means that the meaning of a word, the connotation whereof is *not* clear, may be ascertained by referring to the meaning of the other words associated with it. The rule of *ejusdem generis* involves a reference to the context and refers to a similar item. Thus, if a man asks his wife to go out and buy bread, butter, milk, eggs, and *anything else she needs*, he will *not* normally be understood to include in "anything else she needs" an item like a new dress or a piano,—but the words would obviously be taken to mean similar items, like cheese or jam.

Expressio unius est exclusio alterius

This maxim means that when one thing is specifically mentioned, it implies that other similar things are excluded by implication. Thus, where a man talks of "men" and "women", and then makes a statement regarding "women" it shows that he did *not* imply it to cover men also. Similarly, if an Act seeks to regulate land and buildings, and then makes a provision for 'land', it may be taken to exclude buildings.

However, this maxim is to be very carefully applied, and is indeed a *valuable servant* but a *dangerous master*. In certain circumstances, Courts *may* hold that a reference to only one of two items is merely by way of abundant caution, and that the provision applies to the other item also.

Principles of interpretation

The principles which guide the judiciary in the interpretation of enacted law may be summed up as under :

In all ordinary cases, *literal interpretation is the rule*. The Courts must be content to accept the *litera legis* as the exclusive and conclusive evidence of the *sententia legis*. They must generally take it for granted that the legislature has *said* what it *meant*, and *meant* what it has *said*. Judges are *not at liberty to add* to, or *take* away from, or *modify*, the letter of the

law, simply because they have reason to believe that the true *sententia legis* is not completely or correctly expressed.

As stated above, the Courts must be content to accept the *litera legis* as the exclusive and conclusive evidence of the *sentenita legis*. To this general principle of interpretation, there are *two exceptions* :

1. The first exception is where *the letter of the law is logically defective, i.e.*, when it fails to express some definite idea. Now, logical defects may be of *three kinds*, as under :

(a) *Ambiguity.*—In case of ambiguity, Courts may *go behind* the letter of the law *(litera legis)* to find its true import. This difficulty often arises from ambiguity of formal words like "or", "and" *etc.* Thus, for instance, if power is given to the Court to award "imprisonment or fine", would it mean that the Court can either fine *or* imprison, *but not both?* Or, would it imply that the Court can both fine *and* imprison? In other words, the question would be whether the word *"or"* was used by the Legislature in an *exclusive or an inclusive* sense.

(b) *Inconsistency.*— Similar is the case where the language used is inconsistent or contradictory.

(c) *Incompleteness.*—When the idea in an enactment is left *incomplete*, the Courts may supply the same.

2. The *second exception* in which logical interpretation is entitled to *supersede* the grammatical, is that in which there is an obvious clerical error in the text.

Disobedience to an unreasonable statute.—However *unreasonable, unjust* or *oppressive* a statute may be, it is the duty of the Courts to follow it and administer justice according to that statute. Judges are *not* to sit in judgment over statute. Their duty is to interpret it, apply it and act up to it for, "to seek to be wiser than the law is the very thing which is by good laws, forbidden." The judge *must* enforce the law *as it stands, unless* of course there are defects, clerical, logical, or otherwise,– in which case, he has to follow the above rules of interpretation.

The golden rule for avoiding absurdity

Write a short note on : Golden rule of interpretation of statutes.
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When a literal interpretation of a statute *cannot* be adhered to, either because there is some logical defect in it, or because the text of the statute leads to a result which is so *absurd or unreasonable,* that it is evident that the legislature could *not* have meant what it has said, the Courts adopt what is known as the *golden rule of interpretation.* According to this rule, the Courts imply into statutes *saving clauses* that have *not* been expressed, to avoid what they regard as absurdity. According to these implied saving clauses, it is considered that the *previous principles of common law* are preserved. As *Byles, J.* observed, "It is a sound rule to construe a statute in conformity with the common law rather than against it, except where or in so far as the statute is plainly intended to alter the course of the common law.

Although the golden rule was first evolved by *Lord Wensleydale*, the first recorded expression, "golden rule", is to be found in the judgment of *Cheif*

Justice Jervis in *Mattison v. Hart* (1884-14 C. B. 357). In India, the rule has been endorsed time and again, by various High Courts as also by Supreme Court Judges, the most notable amongst them being Justice Krishna Iyer.

Thus, in one case, where a statutory order was made transferring the rights and liabilities of a dissolved Company to another Company, it was *held* that this did *not* have the effect of transferring the *employees* for the dissolved Company, as though they were chattles, for it is the general principle of law that contracts of personal service are *not* capable of being assigned. *(Nokes* v. *Doncastor Amalgamated Collieries Ltd.*, 1940 AC. 1014)

The *justification* for this method of interpretation is *two-fold. Firstly*, this rule of interpretation is likely to effectuate the intention of the legislature; *secondly*, it avoids absurd, unjust or immoral results, and preserves the broad principles of the law.

However, when no principle of common law can be invoked to control a statute, the absurdity rule is less likely to be applied. It must also be noted that the absurdity rule is almost wholly confined to the *restriction* of statutes for the avoidance of absurdity; statutes *should not be extended*, on this ground, beyond their expressed language.

The commonest situations where the golden rule of interpretation has been applied are the following :

(a) Where there is an ambiguity in a statute regarding the exact connotation of a particular word. This is also known as *semantic ambiguity*.

(b) Where there is an ambiguity in the arrangement of a particular set of words in a statute, also known as *syntactic ambiguity*.

(c) Where there is ambiguity between two provisions in the same statute.

(d) When a provision of one statute is in conflict with the provision of another statute.

(e) Where the legislature has *not* made a provision for the particular situation which is before the court.

(f) Where there is a clerical error in the statute.

(g) Where the legislature has used certain words without *intentionally* defining the same, so as to give the court a measure of discretion to be exercised in the peculiar facts and circumstances of the case.

Summary of rules of interpretation as laid down by the Supreme Court

The following basic rules of interpretation of statutes have been reiterated by the *Supreme Court in decided cases* :

(i) The legislative intent is to be gathered by reading the statute *as a whole*. (*Iswhari Khetan Mills (P) Ltd.* v. *State of U.P.*, (1980) 4 S.C.C. 136)

(ii) *A benignant provision must receive a benignant construction*, and even if two interpretations are permissible, that which furthers the beneficial object should be preferred. *(Som Prakash Rekhi* v. *Union of India*, (1981) 1 S.C.C. 449)

(iii) Normally, the Court should stick to the *literal meaning* of an expression, in the absence of any alternative meaning. However, it *can* go beyond the strict grammatical construction when a new and ambiguous provision is to be construed. *(C.I.T.* v. *B.N. Bhattacharjee,* (1979) 4 S.C.C. 121)

(iv) *A liberal construction can be departed from when it* would lead to a manifestly *absurd result, not* intended by the legislature. *(C.I.T.* v. *National Taj Traders,* (1960) 1 S.C.C. 370)

(v) A construction which frustrates the objects of the legislation and leads to a manifest absurdity should *not* be preferred. *(Industrial Supplies Pvt. Ltd.* v. *Union of India,* (1980) 4 S.C.C. 341)

(vi) Courts must interpret words and their meanings so that *public good is promoted,* and misuse of power is interdicted. (*Bhim Singhji* v. *Union of India,* (1981) 1 S.C.C. 166)

(vii) A construction which leaves without effect, any part of the language of a statute, will normally be rejected. *(Life Insurance Corporation of India* v. *D.J. Bahadur* (1981) 1 S.C.C. 315)

(viii) There is a *presumption in favour of the constitutionality of a statute. (State of Karnataka* v. *Hansa Corporation,* (1980) 4 S.C.C. 697). Therefore, a construction which upholds the constitutionality of a provision is to be preferred. *(Mathurdas Mohanlal Kedia* v. *S.D. Munshaw,* (1980) 4 S.C.C. 653)

(ix) The Constitution should *not* be interpreted with a doctrinaire approach. *(Bhim Singhji* v. *Union of India,* (1981) 1 S.C.C. 166)

(x) Provisions of the *Fundamental Rights* of the Constitution must be *liberally and widely construed. (Francis Mullin* v. *Administrator, Union Territory of Delhi,* (1981) 1 S.C.C. 608)

(xi) A matter stated by the Minister piloting the Bill is *not relevant* to finding the object and purpose of the enactment. *(Sat Pal & Co.* v. *Lt. Governor of Delhi,* (1979) 4 S.C.C. 232)

(xii) *Legislative proceedings and speeches are relevant only if* the language of the statute is ambiguous, and the legislative intent is not clear. *(Life Insurance Corporation of India* v. *D.J. Bahadur,* (1981) 1 S.C.C. 315)

(xiii) *Punctuation marks* do *not,* by themselves, control the meaning of a statute, which is otherwise obvious. *(Dadaji* v. *Sukhdeobabu,* (1980) 1 S.C.C. 621)

(xiv) *Marginal notes of sections and titles of Chapters* do *not* take away the effect of the provisions of the Act, and render those provisions legislatively incompetent, if they are otherwise within legislative competence. *(Tara Prasad Singh* v. *Union of India,* (1980) 4 S.C.C. 179)

(xv) The *dictionary meaning* of a term may be resorted to when the definition clause has *not* conceptually defined the expression. *(Gestetner Duplicators Pvt. Ltd.* v. *C.I.T.,* (1979) 2 S.C.C. 354). However, a resort to the dictionary meaning is *not necessary* when

the meaning of a word can be gathered from the context and from the relevant regulations. *(M.C. Gupta* v. *Arun Kumar Gupta,* (1979) 2 S.C.C. 339)

(xvi) A provision designed to suppress smuggling activities should be *liberally construed,* so as *not* to undermine its scheme. *(State of Maharashtra* v. *Natwarlal Damodardas Soni,* (1980) 4 S.C.C. 669)

(xvii) A provision which provides *protection to tenants* should *not* be construed too technically and literally, so as to defeat the object of Act. *(Mangat Rai* v. *Kidar Nath,* (1980) 4 S.C.C. 276)

(xviii) Statutes affecting *substantive rights* are generally presumed to be prospective. But there is *no such presumption in favour of statutes relating to procedures;* alternations in procedure may operate retrospectively. *(Mahadeo Prasad Singh* v. *Ram Lochan,* (1980) 4 S.C.C. 354)

(xix) When two constructions are possible in a *criminal trial,* the one which is *beneficial to the accused* will have to be adopted. *(Pahalya Motya Valvi* v. *State of Maharashtra,* (1980) 1 S.C.C. 530)

CHAPTER VII

PRECEDENT

Meaning of "Precedent"

A *precedent* is a statement of law found in the decision of a superior court, which decision has to be followed by that Court and by Courts inferior to it. If each judge were left to himself in deciding cases without reference to similar cases decided in the past, the result would be *utter confusion and chaos,* the law would be uncertain, and the fate of litigants would hinge on the temperament of the judge or his mood of the day. Uniformity can only be achieved by the judges following, as far as possible, the law laid down by their fellow judges. It is through precedents that the judges herald the law to the world. Thus, *the theory of precedent plays a very important role in the jurisprudence of every country.*

Force (authority) of precedents in England

Precedents are of greatest importance in any system of law which is mostly unwritten, as in England. Whatever may be the position in theory, it must be admitted that, in practice, the Common law of England has been the work of English judges. In the words of *Salmond,* "the importance of judicial precedents has always been a distinguishing characteristic of English Law".

A precedent is held in such high esteem in England that *Salmond* says that a judicial precedent speaks in England with authority; it is *not* merely *evidence* of the law, but a *source* of it; and the Courts are bound to follow the law that is so established. This is chiefly due to the peculiarly powerful and authoritative position which has been at all times occupied by the English judges. They are, in themselves, a compact body of legal experts, and the Common law of England is almost the entire product of decided cases. Neither Roman law nor the various legal systems based on it allot such a degree of authority to precedent. In England, the bench has always given the law to the bar, whereas in Rome, it was quite the opposite.

The principle that a Court is bound by the pronouncements of Courts superior to it is simple and understandable, but English law has gone much further, for even in modern times, Courts even on the higher level are bound by their own decisions. This rule applies to the Court of Appeal, Division Courts and Courts of Criminal Appeal. *Before 1966,* the House of Lords too was bound by its earlier decisions. However, in 1966, the House of Lords announced that too rigid an adherence to precedent might do injustice in a particular case; therefore they decided to depart from a previous decision when it was right to do so. This is so because there are certain decisions which, if seen in the light of experience of mature consideration, are bad decisions, although their number at present is small.

However, this trend is likely to increase with the passage of time and accompanying changes in moral ideas. This is particularly important in commercial matters where custom is still somewhat fluid.

Another ground for refusing to attach too much importance to the decisions of the earlier judges was that in those days, the same persons sat as judges, both in the Court of Chancery as well as in the House of Lords, and hence *there was poverty of legal learning.*

Further, when a decision of the House of Lords is on the construction or interpretation of legislation or of a document, it is easy for any Court to depart from its spirit, by showing that the decision was on the particular words before the House. Thus, if a Court can spuriously distinguish its own decisions, what harm is there in theory that it is bound ? The answer is that it complicates the law, and as pointed out by *Maitland,* it is perhaps the main fault of judge-made law that its destructive work can never be cleanly done. "Of all vitality and therefore of all parent harmfulness, the old rule can be deprived, but the moribund husk must remain in the system, doing latent mischief." This remark must be construed as applying only to the process of *restrictive distinguishing,* and not *overruling.* Where a Court is permitted to overrule a precedent, the operation is a clean one. In short, it is a mistake to suppose that predictability of legal decision is always best secured by a system which accords binding force to a precedent under which the judges are restive.

Thus, the argument for changing the rule of precedent is stronger for the highest Court of the land than any other Court, for if a lower Court goes wrong, there is always the possibility of the mistake being rectified by a higher Court. In settling the relative importance of legal certainty and flexibility, much depends on the particular part of the law to which one is referring. Certainty is important in the case of property and criminal law, but may not be so important in say, the law of contracts. The present doctrine of precedent makes no distinction between these different branches of the law. It is, therefore, refreshing to see that the House of Lords has finally decided to shake off the yoke of the binding nature of precedents, and is *not* bound by its earlier decisions, which is also true of the Supreme Court of India.

THE DECLARATORY THEORY OF PRECEDENTS

Juris dicere et non jus dare : Judges *administer* the law, and *not make* it. According to the *declaratory theory of precedents,* a Judge *never makes law.* He merely *declares* what the existing rule of law is. It is the *legislature* that lays down the law, and the function of the Judges is merely to *interpret* the law, and apply it to the facts of the case before them, *i.e, judges never play a creative role in the process of making laws.* Thus, it is said that in England, the Common Law is merely *customary* law, and *not* judge-made law, and that judges merely *declare* what has been law since times immemorial.

As *Blackstone* puts it, judges are "sworn to determine, *not* according to their own private judgment, *but* according to the known law and custom of

Explain the maxim. "Jus dicere et non jus dare". (Judges are to administer the law and not make it.) Is this maxim applicable in a modern State ? Substantiate your answer.

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...and, *not* delegated to pronounce a new law, *but* to maintain and explain the law and *not* make the law." Thus, according to *Blackstone*, judges *discover* the law; they *find* the law, – rather than *make* the law.

This theory oversimplifies the process of the development of Common Law. It is true, generally, that a judge applies an existing rule, but very often, he widens and extends a rule of law. He also develops rules *on analogy* and *by deduction*. Quite often, he is faced with a unique situation, which has never arisen in the past; in such cases, he creates an entirely new principle. *Therefore, a judge not only administers and interprets the law, but he also develops it.* To this extent, the Declaratory Theory does *not* provide a satisfactory solution.

Salmond and *Bentham* have also criticised the declaratory theory. They strongly maintain that judges *do* make new law also; they do make original precedents of a far-lasting value.

An interesting point is raised in this connection by *Paton*. Suppose the Court of Appeal lays down a particular doctrine, and two years later, the decision is overruled by the House of Lords; can it be said that such doctrine was the law between these two dates ? Under English law, the answer would be in the negative. Because according to the accepted legal fiction, the House of Lords merely lays down what is, and has always been the law. However, from the point of view of the persons to whom such law is applicable, the reasoning would be, to use the phrase of *Paton* himself, *pure nonsense*.

NATURE OF PRECEDENT

Precedent makes new law. It is the function of a judge to make precedent, which binds *not only* the parties before him, *but* future ones also.

The power of precedents to make law is *purely constitutive, and in no degree abrogative*. In other words, judicial decisions *may make law*, but they *cannot alter* it. Where there is a settled rule of law on any point, the judges have no authority to substitute for it a law of *their own making*. Their legislative power is strictly limited to supplying the vacancies of the legal system, to filling up with new law, the gaps which exist in the old, thus supplementing the imperfectly developed body of legal principles.

Doctrine of "Stare Decisis"

The origin of the doctrine of *Stare Decisis* (binding force of precedents) can be traced to the practice of law reporting, *i.e.*, reporting and publishing decisions of the Court. Until the *fifteenth century*, legal treatises seldom contained references to judicial decisions. *Thereafter*, appeared *Bracton's 'Notebook'* and *The Year Books*, the latter being regarded as the first Law Reports in England.

However, it was only in the *seventeenth century* that decisions of only the Exchequer Courts (and *not even* of the House of Lords) came to possess binding efficacy. It was *towards the end of the eighteenth century* that the necessity for recognising the binding force of precedents was realized. Then in 1833, the famous decision of *Chief Justice Park* in

Mirehouse v. *Rennel* (1833, ICl, & F, 527) reiterated the urgent need for recognising the binding force of precedents. Then came the Supreme Court of Judicature Acts of 1873 and 1875, and finally the theory of *stare decisis* was firmly established. Today, it is a characteristic feature of both the English and the Indian legal systems.

The doctrine of *stare decisis* has also been recognised by the Constitution of India. Article 141 gives it constitutional sanction, and provides that the law declared by the Supreme Court shall be binding on *all Courts* in India. Although the expression "all Courts" is wide enough to cover the Supreme Court itself also, it has been *held* that the expression does *not* include the Supreme Court. (*Bengal Immunity Co. Ltd.* v. *State of Bihar*, A.I.R. 1955 S.C. 661). Thus, the Supreme Court is free — like the House of Lords — to depart from its previous decisions, if valid reasons exist for doing so.

In India, the Supreme Court has *held*, in *Mahadeolal* v. *Administrator-General of West Bengal* (AIR 1960 SC 936), *that Judges of co-ordinate jurisdiction should not* set aside one another's judgments, for judicial decorum, no less than judicial propriety, forms the basis of judicial procedure, and *certainty* in law is *not only desirable, but also essential.* When a single Judge of a High Court is of the opinion that the previous decision of another single Judge of the same High Court on a point of law is erroneous, he should refer the matter to a larger Bench, and should *not* himself hold that the previous decision is wrong. The Supreme Court observed that this rule applies *not only* to Judges sitting singly, *but also* to Division Benches. In other words, one Division Bench should *not* set aside the decision of another Division Bench of the *same* High Court.

In this connection, the Supreme Court has observed that decisions of the Travancore High Court could, at best, have a pursuasive effect, and *not* the force of binding precedents on the Madras High Court. The doctrine of *stare decisis cannot* be invoked in such cases. (*Valliama Pillai* v. *Sivalthanu Pillai*, A.I.R. 1979 S.C. 1937)

Along the same lines, the Madras High Court has *held* that a Division Bench is the final Court of Appeal in a High Court in India, and if a Division Bench does *not* accept as correct the decision, on a question of law, of another Division Bench of that Court, the only proper course is to refer the matter to a *Full Bench.* (*Sheshamma* v. *Venkata Rao*, - 1940 Mad. L.J. 400)

This view was also reiterated by the Andhra Pradesh High Court, which *held* that if one Division Bench of a High Court has expressed a view and another Division Bench is not inclined to agree with it, the latter *cannot*, by itself, express a contrary view, but must refer the matter to a *Full Bench.* (*Yedlapat Venkataswarlu* v. *The State of Andhra Pradesh*, A.I.R. 1978 A.P. 333)

Commenting on the doctrine of *stare decisis*, the *Supreme Court* in *Minerva Mills Ltd.* v. *The Union of India*, [(1980) 3 S.C.C. 625], observed as follows :

"*Certainty* and *continuity* are essential ingredients of the rule of law.

Certainty in the applicability of law would be considerably eroded, and suffer a serious set-back, if the highest court in the land were readily to overrule the view expressed by it in the field for a number of years..... It would create *uncertainty, instability and confusion* if the law propounded by this Court on the faith of which numerous cases have been decided and many transactions have taken place, is held to be *not* the correct law after a number of years.

But, the doctrine of *stare decisis*, should *not* be regarded as a rigid and inevitable doctrine, which *must* be applied at the cost of justice. There may be cases where it may be necessary to rid the doctrine of its petrifying rigidity. The Court may, in an appropriate case, overrule a previous decision taken by it, but that should be done only for substantial and compelling reasons."

THE VALUE AND IMPORTANCE OF THE DOCTRINE OF PRECEDENT

The "doctrine of precedent" is generally *understood in two ways*. In the *first* sense (and this may be called its loose meaning), it means that precedents are reported, may be cited, and *will probably be followed by the Courts*. This was the meaning applied to precedents in England upto the end of the nineteenth century, and that which still prevails on the Continent. In the *second* and *stricter sense*, the phrase means that precedents not only have great authority, but *must be followed*. This was the rule which developed during the nineteenth century, and was fully evolved during the twentieth century.

Write a short note on : Advantages and disadvantages of Precedent.
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Do you agree that Judicial Precedent is one of the important sources of law ? Why ?
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The arguments advanced in favour of the doctrine of precedent will be found to support it in the loose sense, while those who attack the doctrine do so as regards its stricter meaning. The real issue is whether the doctrine should be adopted in its stricter sense *or* in the loose one. There is no harm in citing cases and attaching weight to them; the dissatisfaction is with the present practice of treating precedents *as absolutely binding*. The argument put forward in favour of the present practice is that it is necessary to secure the certainty of the law, predictability of decision being more important than approximation to an ideal; any unsatisfactory decision can be reversed by statute. This remedy is available, but is *not* taken advantage of to a great extent, because when Parliament has intervened to rectify the errors of the common law, it has almost always done so, *not by* a clean reversal, *but by* introducing exceptions to the common law rule, subject to further exceptions and qualifications. What is really needed is to give power to the judges to set right their own mistake. Such a remedy exists to a certain extent in the case of higher Courts. They can overrule a decision of a lower Court, but that puts the litigant into considerable expense. The power of restrictive distinguishing is also unsatisfactory, because it leaves the previous decisions standing, and this introduces refinements and illogicalities into the law. Hence, the present rule does *not* always promote certainty of legal administration.

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

The doctrine of precedent assumes all the more importance in a field of law which is mostly judge-made. For example, in the law of torts, leading cases like *Rylands* v. *Fletcher, Donoghue* v. *Stevenson, Ashby* v. *White, Bradford* v. *Pickles* and *Derry* v. *Peek* (to take just a few examples) have set the trend and laid down fundamental principles, which have since then been followed. However, as *Paton* points out, under the umbrella of a general principle, so to speak, one case plots a *point* on the graph of the law of torts, but to draw the *curve* of the law, one needs a *series of points* and a series of cases.

GROUNDS FOR RECOGNISING PRECEDENTS

The operation of precedents is based on the legal presumption of the *correctness of judicial decision*. A matter once decided is decided once for all. That which has been delivered in a judgment must be taken to be established truth. For in all probability, it is true in fact, and even if it is not, it is *expedient* that it should be held as true nonetheless. Unless and until reversed by a higher or superior Court, a precedent stands unchallenged and *cannot* be questioned otherwise than by an appeal to a higher Court.

CIRCUMSTANCES WHICH DESTROY THE BINDING FORCE OF PRECEDENT

What are the circumstances under which the binding force of precedents is either destroyed or weakened ?

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The rule of the binding force of precedent is, however, subject to a number of exceptions. The *seven* important exceptions are as follows :

(1) *Abrogated decision* : A decision ceases to be effective if a statute inconsistent with such a decision is enacted, *or* if it is reversed *or* overruled by a higher Court. *Reversal* occurs when the *same decision* is taken on appeal and is reversed by the appellate Court, whereas *overruling* takes place when the higher Court declares, *in another case*, that the precedent was wrongly decided, and will *not* be followed. Overruling need *not* be express; it may also be implied. The latter doctrine being of a recent origin, until the 1940's, the practice of the Court of Appeal was to follow its own previous decisions, even though they may be inconsistent with those of the House of Lords, until they were expressly overruled.

Recent examples in India where Parliament has passed enactments to supersede decisions of the Supreme Court are not far to seek. Thus, the 24th Amendment of the Constitution was passed to nullify the Supreme Court decision in the famous *Golak Nath case*. Similarly the 25th Amendment of the Constitution sought to remedy the situation resulting from the Supreme Court decision in the *Bank Nationalization case*.

(2) *Reversal on a different ground* : Suppose that a case has been decided in the Court of Appeal on one ground, and in the House of Lords

another plea is put forth, and no mention is made of the previous ground; in such a case, the decision of the lower Court is *not* overruled; in fact, it is as good a precedent as the decision of the House of Lords.

It is submitted that the true view is that a decision either affirmed or reversed on another point is deprived of any absolute binding force it may otherwise have had, but it remains an authority which may be followed by a Court that thinks the particular point to have been rightly decided.

Write a short note on : Precedent per incuriam.
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(3) *Precedent per incuriam* : A decision is *not* binding if it was rendered in ignorance of a statute or of a rule having the force of a statute, *i.e.*, delegated legislation. Similarly, a Court may know of the existence of the statute or rule and yet *not* appreciate its relevance to the matter in hand; such a mistake also vitiates the decision. Even a lower Court can refuse to follow a precedent on such grounds. In such a case, the decision is said to be given *per incuriam* (which literally means *through want of care*.)

Define precedent. When does a precedent lose its binding force? When is the binding force of a precedent lost?
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Thus, the Bombay High Court has *held* that a precedent has no binding force if rendered in ignorance of a statute. (*Yeshbai* v. *Ganpat*, A.I.R. Bom. 20)

Likewise, the Andhra Pradesh High Court has also ruled that a decision which overlooks a statutory provision is to be treated as *per incuriam*, and *cannot* be a binding precedent. (*Thuraka* v. *Tahsilder, Kadiri*, A.I.R. 1980 A.P., 267).

In order that a case may be said to have been decided *per incuriam*, it is *not enough* to show that it was *not adequately argued*. It must be shown that the decision was given in ignorance of a rule of law binding on the court, as for instance, an Act of Parliament, *or* a decision of the Supreme Court (in India) *or* the House of Lords in England.

(4) *Inconsistency with earlier decisions of higher Courts* : A precedent loses its binding force if the Court that decided it overlooked an inconsistent decision of a higher Court. Thus, if the Bombay High Court decides a case in ignorance of a decision of the Supreme Court, the decision of the Bombay High Court would *not* be a precedent, and hence would *not* be binding on any other lower Court. Such decision is also said to be given *per incuriam*.

(5) *Inconsistency between earlier decisions of Courts of the same rank* : A Court is *not* bound by its own previous decisions that are in conflict with one another. Hence, the Court of Appeal and other Courts are free to choose between conflicting decisions, – even though this might amount to preferring an earlier to a later decision, preferring an unreported decision to a reported one, and preferring a decision of a Court of co-ordinate jurisdiction to its own decision.

Write a short note on : Precedent sub silentio.
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(6) *Precedent sub silentio or not fully argued* : When a particular point involved in a decision is *not* taken notice of, and is *not* argued by counsel, the Court may decide in favour of one party, whereas *if* all the points had been put forth, the decision may have been in favour of the other party. Hence, such a case is *not* an authority on the point which had not been argued, and this point is said to pass *sub silentio*.

This rule can be traced, in English law, to as far back as 1661, when in a famous English case, the Counsel said, "A hundred precedents *sub silentio* are not material",— and the judge agreed.

A good illustration of a precedent *sub silentio* given by *Salmond* is that of a case where an employee was discharged by a company, and he obtained damages against the company for wrongful dismissal. The employee applied for a Garnishee Order in respect of a Bank Account standing in the name of Liquidator of the company. The only point argued in the Court of Appeal was on the question of the priority of the employee's claim and the Order was granted. No consideration was given to the question whether a Garnishee Order could properly be made in such a case. The latter point came up for argument in a subsequent case before the same Court, and the Court *held* that it was *not* bound by its previous decision.

"The importance of judicial precedents has always been a distinguishing characteristics of English law. Examine this statement, and state what circumstances lead towards weakening of the binding force of precedents.

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It is interesting to note that where a judgment is given in a case where the losing party had *not* been represented, such a decision (an *ex parte* decision, as it is called) ought *not* to be regarded as possessing an absolute authority, even if it does *not* strictly fall within the *sub silentio* rule, for there is no assurance in such a case that all relevant considerations had been brought before the Court.

However, a precedent is not destroyed *merely because it was badly argued by the losing party*. It will thus be seen that an arbitrary line is sought to be drawn between a complete absence of argument, which robs the precedent of its binding force, and insufficient argument, which would *not* be a ground for not following the precedent.

The Supreme Court has observed that the binding effect of a precedent does *not* depend on whether a particular argument was considered therein or not, provided that the point with reference to which an argument was subsequently advanced was actually decided by the Court. (*K. Balakrishna Rao* v. *Haji Abdulla Sait*, (1980) 1 S.C.C. 321)

(7) *Decisions of Courts equally divided* : When the decision of the appellate Court is equally divided (for example, where in the Bench of two judges, one sides with the appellant and the other with the respondent), the usual practice is to dismiss the appeal, and the view adopted by most Courts is that the decision only has the authority of the Court appealed from. This problem is *not* a serious one today, as it is the usual practice of most appellate Courts to sit with an *uneven* number of judges, like *three* or *five*.

Should precedents be diverted from ?

In the interests of *certainty*, it is fair that a precedent once established, should always be followed. However, it is equally in the interest of *justice*, that a particular precedent be disregarded in particular circumstances.

"It is better," said *Lord Eldon*, "that the law should be certain, than that every judge should speculate upon improvements in it." *Salmond* also thinks that it is "more important that the law should be certain than that it should

be ideally perfect." These requirements are of the opposite nature and one must choose between them. Whenever a decision is *not* followed, the certainty of law is sacrificed to its rational development, and the evils of the uncertainty so produced may far outweigh the trifling benefit to be derived from the correction of the erroneous doctrine. Precedent may easily have established the law, valuable properties having been dealt with in reliance on it. Justice may, therefore, imperatively require that the decision, though founded on error, should stand inviolate nonetheless.

Further, a precedent acquires added authority from the *lapse of time*. A precedent of long standing will require greater force to be overruled than a comparatively new one, for it is likely to cause more than harm in the way of uncertainty and disappointment of reasonable expectations. The rule is, however, subject to modification, for after a certain period, the precedent becomes absolute and inoperative. A moderate lapse of time will give added vigour to a precedent, but after a still longer time, the opposite effect may be produced, not directly, but in an indirect manner, *i.e.*, through the accidental conflict of the ancient, and perhaps partially forgotten principle, with later decisions. Overruling, however, is more difficult in the case of proprietary rights than where merely personal rights are affected.

In conclusion, one can say that there are various special circumstances that determine the weight to be attached to a precedent. *Circumstances which add weight* to the authority of a precedent are unanimity of the Court, affirmation or approval by the Courts, eminence of the judge, approval by the profession, learned argument, consultation by the judges or other great deliberation. *Circumstances which tend to lessen the authority* of precedents are lack of unanimity, failure to notice a contrary decision, or being misled by reliance upon a case of no authority, absence of final judgment or where the matter is compromised or not opposed.

Justice Krishna Iyer of the Supreme Court of India has cautioned that although blind adherence to precedents is *not* justified, in the sensitive area of labour relations — under a Constitution with a slant towards social justice — a Court should hesitate to disregard them. (*Life Insurance Corporation of India* v. *D. J. Bahadur*, (1981) 1 S.C.S. 315)

Ex facto oritur jus

From the above observation, it will be seen what exactly the effect of a precedent is. A judge *cannot* make or 'enact' a new law. This is the function of the Legislature. At the most, he can put his own interpretation on an existing law, thereby creating precedents from the peculiar *facts* of a case. In future, on similar facts, the cases will be decided accordingly. In other words law, *i.e.*, case-law arises from facts — *ex facto oritur jus.*

WAYS OF DISREGARDING A PRECEDENT AND THE EFFECT THEREOF

A precedent may be disregarded in *two ways* :

1. It may be overruled by the Court in which it is relied upon; *or*

2. The Court may refuse to follow it.

In the first case, the precedent becomes *null* and *void*. It is an act of superior jurisdiction, and such a precedent is definitely and absolutely deprived of all authority. Thus, for example, a precedent established by the High Court of Calcutta may be overruled in a case before the Supreme Court of India. Such an overruling can only be done by a Court of *higher authority*. Moreover, this overruling of an earlier precedent takes effect retrospectively, except regarding matters which are *res judicata*. This is a departure followed in the case of a new enactment; when a statute is repealed, all the transactions entered into before the Act came into force would be governed by the repealed Act. What is newly constituted ought to be *prospective*, and *not retrospective*, in its operation.

The refusal to follow a previous decision is an act of co-ordinate, and *not* of a superior, jurisdiction. Two courts of equal authority have no power to overrule each other's decisions. Where a precedent is merely *not* followed, it does *not* mean that the latter authority substitutes the earlier one; on the contrary, the two stand side by side, conflicting with each other. Thus, the Bombay High Court may refuse to follow the precedent laid down by the Madras High Court. It *cannot*, however, overrule such a precedent. The legal ambiguity thus produced can only be solved by the act of a higher authority (in this case, the Supreme Court) which will, in due time, decide between the two, formally overruling one of them, and sanctioning the other as good law. In the meantime, the matter remains doubtful, and the law stays uncertain.

KINDS OF PRECEDENT

Precedents may be *authoritative* or *persuasive; declaratory* or *original*.

1. Authoritative and persuasive precedents

An *authoritative* (also known as '*absolute*') *precedent* is one which the judges *must* follow, whether they approve of it or not. It is *binding* upon them and *excludes their judicial discretion* for the future. The authoritative precedents recognised by English law are the decisions of the superior Courts of Justice in England.

Following are the rules regarding authoritative precedents in India :

1. The decisions of the Supreme Court are of the highest authority.
2. The decisions of *one* High Court are *not* authoritative with regard to *another* High Court.
3. In the same High Court, the decision of a *single* judge is binding on *another* single judge, but *not* on a Court of *Appeal*.
4. A judge of the lower Court is bound to follow the ruling of the High Court of his own State when there is a conflict amongst various High Courts.
5. Unreported judgments have as much binding authority as reported ones.

Authoritative precedents may be either *unconditional* or *conditional*. A precedent that is authoritative *unconditionally* is binding on the Courts. The judges have no power to reject such a precedent, however unreasonable it may be, but a precedent which is authoritative *conditionally* can be rejected under certain circumstances, *e.g.*, where there is such an extreme or serious degree of error or unreasonableness that to follow it would really be a mockery or absolute denial of justice.

It should be remembered that if a *conditionally authoritative precedent* is so unreasonable as to lead to nothing but injustice, it can be disregarded by the Courts. *Cessante ratione legis cessat lex ipsa* : if the reason of the law ceases, the law itself ceases.

There are *four main exceptions* to this rule of the authoritative nature of precedent. They are as follows :

(1) Where there is another equally authoritative precedent conflicting with the rule sought to be overruled, the latter need *not* be followed.

(2) Where the Court deciding the case erred by not being aware of a statutory provision or rule, the precedent need *not* be followed.

(3) Likewise, a precedent will *not* be followed, when it is inconsistent with a later precedent of a high Court, though the first precedent may *not* have been expressly rejected.

(4) A precedent *must* be rejected after the law has been changed by an enactment so as to nullify or modify the effect of the precedent.

Thus, the main difference between the two is that the *absolutely* authoritative precedent is one which is absolutely binding and *cannot* be set aside, *unless* it has been overruled by statute, *or* there is a conflicting precedent of equal authority or of a higher Court. A *conditionally* authoritative precedent is one which is binding on the Courts, *unless* it is too erroneous or too unreasonable to follow.

A *persuasive* precedent is one which the judges are under *no obligation to follow*, but which they will *take into consideration* and to which they will attach such weight as they deem fit. Thus, judgments of American Courts are merely persuasive in their nature, as far as Indian Courts are concerned.

2. Declaratory and original precedents

A *declaratory* precedent is one which is merely the *application of an already existing rule of law; an original* precedent is one which creates and applies a new rule. A declaratory precedent *is not* a source of *new* law; an original precedent *is*.

Ordinarily, declaratory precedents are far more *numerous* than original precedents; for, on most points, the law is already settled and judicial decisions are, therefore, usually mere declarations of pre-existing principles. Original precedents though *fewer* in number, are greater in *importance*, for they alone *develop* the law.

RATIO DECIDENDI

A judicial decision contains *two aspects* — one, *a concrete decision* binding on the parties to the litigation, and therefore having practical consequences, and the other, a *judicial principle* which is the basis of the concrete and practical decision. This judicial principle, which is general in nature, operates as a precedent, and has the force of law. This general principle applied in a particular decision is known as the *ratio decidendi* of the case.

"The ratio decidendi of a case is in fact what later cases consider it to be". Explain fully the concept of ratio decidendi.
B.U. Oct. 96
Apr. 97
Oct. 98

One must thus distinguish between what a case decides generally and as against the whole world, from what it decides between the parties *inter se*. What it decides generally is the *ratio decidendi* or the rule of law for which it is the authority; what it decides between the parties to the suit includes more than this. As against the persons who are *not* parties to the suit, the only part of the judgment which would be conclusive is the general rule of law for which it is the authority.

As *Salmond* points out, the concrete decision is binding between the parties, but it is the *abstract ratio decidendi* which alone has the force of law as regards the world at large. This rule or proposition, or the *ratio*, can thus be described as the rule of law applied by and acted upon by the Court, *i.e.*, the rule which the Court regarded as governing the case in question.

To describe *ratio decidendi* is comparatively simple; to lay down rules for determining it is rather difficult. In the course of a judgment, a judge would have discussed several legal principles, and the problem is to determine which of these is the *ratio decidendi* of the case.

According to *one test* (propounded by *Prof. Wambaugh*), one should take the proposition of law put forward by the judge, reverse or negate it, and then see if its reversal would have altered the actual decision. If the reversal *changes* the actual decision, then the proposition is indeed the *ratio* of the case. But, if such reversal has no effect on the decision, the proposition *cannot* be the *ratio*. This is called the *Reversal Test*.

This test is, however, *not* helpful when the report contains only a statement of the facts together with the order that was made. It is also *not* helpful where several reasons are given by the Court for its decision.

Another test, suggested by *Dr. Goodhart*, is to determine the *ratio* by ascertaining the facts treated as *material* by the judge together with the decisions on those facts. According to this test, what one should do is to ascertain what the judge did, and *not* what the judge said he *would do*. This is sometimes referred to as the *Material Facts Test*.

The observations of the Supreme Court on this point are to be found in *State of Orissa* v. *Misra* (A.I.R. 1968 S. C. 647), where it observed as follows :

"A decision is only an authority for what is actually decided. What is of the essence in a decision is its *ratio*, and not every observation

found therein, nor what logically follows from the various observations made in it."

Further, it is to be remembered that when a Court first states a new rule, it *cannot* have before it all possible situations which such rule might cover, and there may be situations to which it would be quite undesirable that such rule should apply. When stating such a rule, the Court is neither concerned nor obliged to formulate all possible exceptions to the rule. Such exceptions must be dealt with by the later Courts, as and when such exceptions arise.

Thus, in 1851, the Queen's Bench decided in, *Bridges* v. *Hawkesworth*, that if a customer finds money on the floor of a shop, he can keep the same on the basis of the rule "finders-keepers", and that he is *not* bound to hand it over to the shop-keeper. However, in 1896, in *South Staffordshire Water Co.* v. *Sharman*, the Queen's Bench refused to apply this rule in a case where the defendant had found two gold rings in a mud pool owned and occupied by the plaintiffs. The ground of this refusal was that in the earlier case, the money had been found in a public part of the shop, whereas in the latter case, the pool was *not* a public place. It will be seen that the later case carved out an exception to the *ratio decidendi* of the earlier case with regard to property found on some one else's land.

OBITER DICTA

Write a short note on : Ratio decidendi and Obiter dicta.
B.U. June 96
P.U. Oct. 96

Whereas the *ratio decidendi* is the general principle of a case and the very heart of a precedent, *obiter dicta* is what the Judge said *unwantedly*, just *by the way*. Judges often express legal opinion on issues they are *not* asked to decide. These statements of law were *not necessary* for the decision, and go beyond the requirements of the particular case. Such *dicta* are, therefore, called *obiter dicta*.

In *Keeton's jurisprudence, obiter dicta* are described as "statements of law made by a judge in the course of a decision, arising out of the circumstances of the case, but *not necessary* for the decision". Thus, in one English case, a favourable Report given by a Bank about the financial condition of a company was found to be false. However, the Bank had, in the Report, disclaimed any liability in the matter. In view of this disclaimer, it was *held* that the Bank was *not liable*. However, the Judgment went on to discuss what the liability of the Bank *would have been if* the disclaimer clause was *not* there. This entire discussion (not at all necessary for the purpose of the final judgment) would be *obiter*.

Generally, as *obiter dicta* are merely things said *by the way*, they merely possess *persuasive efficacy* — and *not* any *binding authority*. *In England*, an *obiter dicta* has no binding efficacy over a subordinate or a co-ordinate Court. In India, however, the *obiter dicta* of the Supreme

Court are binding on the various other Courts in India, *provided* that such *obiter dictum* is on a question that arose for determination by the Supreme Court. As Chief Justice Chagla once remarked in a case decided by the Bombay High Court, "The Supreme Court has now taken the place of the Privy Council, and one must show the same respect for the *obiter dicta* of the Supreme Court as we did for those of Privy Council..... All the High Courts must accept as binding the *obiter dicta* of the Supreme Court in the same spirit as the High Courts accepted the *obiter dicta* of the Privy Council." (*Mohandas* v. *Satanathan*, 56 B.L.R. 1156)

Write a short note on : Obiter dicta.
B.U. Apr. 95

Many a time it happens that in the course of a judgment, a judge lets fall from his mouth, various observations which are *neither* strictly necessary, *nor* exactly relevant for the issue in question. These are *casual expressions of opinion* on a point not really raised in that case. Some judges, for instance, have the habit of illustrating their reasoning by reference to hypothetical situations, and then passing remarks about such situations. In other cases, after having decided the point in question, the judge may feel that it would be unnecessary to pronounce on the other points raised by the parties; nevertheless he may indicate how he would have decided these points, *if* it were necessary. Both these kinds of observations would be by the way, *obiter dicta*, and without any binding authority. Such observations may nonetheless assume importance, because on one hand, they help to rationalise the law, and on the other, they suggest solutions to problems not yet decided by the Courts. As rightly observed by *Salmond*, the *obiter dicta* of the great masters like *Lord Blackburn* often enjoy a greater prestige than the *ratio decidendi* of lesser judges.

The Supreme Court has *held* that a mere *discussion* by a Court after "pondering over the issue in depth" would *not* be a precedent binding on the Court. (*Rajput Ruda Meha* v. *State of Gujarat*, (1980) 1 S.C.C. 677)

Difference between "Ratio Decidendi" and "Obiter Dictum"

In a given case, several questions may arise before the Court. The Court may answer *all* of them, although only *some* of them may be necessary for the determination of the case. The questions which were necessary for such determination would form the *ratio*, and the opinion of the Court on the other question would be *obiter dicta*.

Thus, *ratio decidendi* constitute a *legal source* of law, whereas obiter dicta can, at best, constitute only a *historical source* of law.

What is ratio decidendi ? Distinguish it from obiter dicta.
B.U. Apr. 99

This difference between *ratio decidendi* and *obiter dictum* may best be described in the words of *Chagla, C.J.* who distinguished between the two thus in *Mohandas* v. *Satanathan* (referred to above) thus : "Now, an *obiter dictum* is an expression of an opinion on a point which is *not necessary* for

the ultimate decision of the case. The question which was necessary for determination of the case would be the *ratio decidendi;* the opinion of the tribunal on the question which was not necessary to decide the case would be only an *obiter dictum."*

However, as *Allen* points out, such a distinction sounds admirably clear-cut in the abstract, but in practice, it is *not* always easy to distinguish between deliberate expressions of opinion given after due considerations *(ratio decidendi)* and statements made by the way *(obiter dicta)*. Very often, the dividing line between the two is quite thin, and in a given case, it may become extremely difficult to say what is a mere 'aside' and what is 'one of the links in the chain of judicial reasoning'. This is so because a judgment is a fabric woven out of all different kinds of materials, and frequently, it is difficult to determine exactly what is essential to its warp and woof.

CHAPTER VIII

CUSTOM

ITS EFFICACY

Custom is one of the most fruitful sources of law. "*Custom is to society what law is to the State. Each is the expression and realization, to the measure of men's insight and ability, of the principles of right and justice.*" When the State takes up its function of administering justice, it accepts as true and valid the rules of *right already* accepted by the society of which it is itself a product, and it finds these principles already realised in the customs of the realm.

Another ground of the law-creative efficacy of custom is to be found in the fact that *the existence of an established custom is the basis of a rational expectation of its continuance in the future.* Justice demands that, unless there is good reason to the contrary, man's rational expectations shall be fulfilled rather than frustrated, *even if* the customs are *not* ideally just and reasonable.

Why has custom been accorded the force of law? Explain and illustrate.
B.U. Apr. 95
Oct. 97

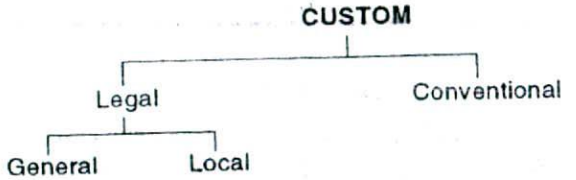
According to *Paton*, custom is useful to the law-giver and codifier in *two ways. First of all,* it provides the material out of which the law can be fashioned, because it usually takes a great deal of intellectual effort to create law *de novo. Secondly,* psychologically also, it is easier to secure reverence for a law, if the same is based on a custom which has immemorially been observed. There is always a tendency to feel that what has been followed in the past would be a safe guide for the future.

Recently, custom has lost much of its efficacy as a source of law, owing to the growth of *legislation* and *precedents.* Yet, the role played by custom even today is not totally insignificant. Much of statute law itself is subject to well-recognised customs to the contrary. Thus, the law relating to *hundies* (negotiable instruments in an Indian language) is *not* governed by the Indian Negotiable Instruments Act, *but* by local custom, *unless* such custom is expressly excluded by any provision of that Act.

Today, custom plays a more important role in the Indian system than in England or America. One instance is the Mohammedan Law rule of *pre-emption,* which prescribes that a person's neighbour has the first option of buying a plot of land about to be sold. Another example is the Hindu Law rule of *damdupat,* (which applies throughout Maharashtra and Gujarat) under which a debtor *cannot* be made to pay a sum of interest which exceeds the principal amount. So also, there is a custom in the *fur trade* in India that whoever orders any fur article does so at his own risk, and has to pay the price even if the goods are lost in transit. All these are illustration of the maxim, *modus et conventio vincunt legem* : Modes and conventions override the law.

KINDS OF CUSTOM

Customs, which have the force of law, are of *two* kinds, *viz., legal and conventional.* Legal custom, in turn, may be *general or local.* Thus.—



1. Legal custom

A *legal custom* is one which has the force of law *irrespective of any agreement on the part of those who are bound by it;* its legal authority is absolute. Legal custom is itself of *two kinds;* it is either *general or local.*

(a) General

Where a custom is observed by *all* the members of a society, it is *general* custom.

(b) Local

Where a custom is observed only by *residents of particular locality,* it is a *local* custom. Local custom is one which prevails in *some defined locality,* and constitutes a source of a law *for that place only.* General custom is that which prevails *throughout the country,* and constitutes one of the sources of the common law of the land. The term 'custom' in the narrowest sense means *local custom* only.

2. Conventional custom (Usage)

A *conventional* custom (or usage) is one whose authority depends on its being incorporated, expressly or impliedly, into *an agreement* between two or more parties to regulate their mutual relations.

A legal custom exists in a country apart from any agreement between the parties. It has its own independent status, and is *not* a creature of agreement. On the other hand, a conventional custom or usage does *not* exist or arise out of any legal authority independently possessed by it, but arises out of an agreement between the parties. From this it follows that there are *three important points of difference* between legal custom and usage.

What is usage ? When is a conventional custom accepted as valid by courts ?
B.U. June 96

Distinction between legal custom and conventional custom

1. A legal custom, in order to be valid, must have been supported by *immemorial antiquity.* A usage does *not* require such an antiquity, because it is sufficient if the usage has been well-established for a *considerably long time,* for it is then automatically regarded as a custom. It does *not* matter even if a usage has been in existence for a year or so.

2. Conventional customs or usage are implied when they are *not* in contradiction to the general law of the land. But if they contradict or negative the general law, they may be made applicable by an express agreement between the parties. Thus, in the Indian Contract Act and in the Indian Partnership Act, one finds such clauses such as 'subject to an

agreement to the contrary'. To take a simple example, death or insolvency dissolves a partnership under the Indian Partnership Act. But if there is an agreement to the contrary, then death or insolvency will *not* dissolve the firm. Much of the law of Marine Insurance and the Sale of Goods Act, is also subject to contract or usage to the contrary. Conventional customs, as far as possible, should never conflict with the statute, though the statute itself may allow the usages by express agreement.

3. There is a legal maxim which says that modes and conventions override the law : *Modus et conventio vincunt legem.* Mercantile Law has its origin in custom. Thus, there are certain usages existing in certain traders which allow certain practices which are contrary to the statute law. But such practices are enforced by the Courts. For example, as stated earlier, *in the fur trade,* the person who orders fur goods on approval, does so at his risk and peril, and will be held liable for the price if the goods are destroyed in any way. But what is required is that such mercantile practices must have consistency, so that judges may *not* have any difficulty in enforcing them.

Write a short note on : Conventional custom.
B.U. Oct. 96
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Judicial recognition of custom

Before a custom is recognised by a law Court, it has to be *proved.* This may be done on the evidence of trustworthy persons *or* of residents of a locality *or* of professionals of the trade. Once the Court accepts the custom by recognising it as such in its judgment, it becomes law and need *not* be proved afresh in the future. In such cases, *judicial note* (or *judicial notice*) is said to be taken of such custom.

REQUISITES OF A VALID LOCAL CUSTOM

What are the essentials of a valid custom according to Salmond ? Explain the importance of custom as a source of law.
P.U. Oct. 97

A *local custom* becomes valid and operates as a source of a law *only if* it is reasonable and is of immemorial antiquity having a continuity, is capable of peaceful enjoyment and is *not* inconsistent with statute, and is observed as of right.

In other words, to be fully operative as a source of law, a local custom *must* satisfy the following *seven requirements :*

1. Reasonableness

A local custom must be *reasonable,* because no Court will enforce or accept an unreasonable custom. The reasonableness of the custom is to be judged from the date of its inception, and the Court must be satisfied that, apart from being acceptable, it is *not* opposed to rules of natural justice, equity and good conscience. Thus, in India, a custom allowing *sale of a religious office* was *held unreasonable,* and therefore unenforceable.

Explain the essentials of a valid local custom.
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Similarly, a so-called "custom" whereby *Kamins* were required to deliver their manure to the *Biswedars* without any consideration (although the *Kamins* needed the same themselves), merely because the *Kamins* were residing in the village of the *Biswedars,* was *held* to be *unreasonable* and one-sided. (*Mahadeva* v. *Ganesh,* A.I.R. 1953 Pepsu 126)

Another example of a case where a custom was held to be *unreasonable* is an English case, where the House of Lords held as unreasonable, an alleged custom whereby a Lord could take minerals underneath the

surface of copyhold or freehold lands, without making compensation for subsidence and damage to such buildings. It was observed, in that case, that such a custom was of an oppressive character and probably founded more in wrong and usurpation, than in the voluntary consent of the holders of such land.

2. Immemorial antiquity

It is necessary to distinguish between *two* kinds of customs, namely, those which are *general*, the customs of the *realm*, which prevail throughout the whole territory, and those which are *local* and are limited to some special *part of the realm*. A custom which is merely *local* must have existed from *time immemorial*. In the case of *other* customs, however, there is no such requirement. It is sufficient that the usage is *definitely established*, its duration being *immaterial*.

Write a short note on : Local customs.
B.U. Oct. 95
Oct. 97

In order that a custom may have immemorial antiquity, *it must stand the test of time*. It must be custom which has run on *since time out of mind*. Originally, by *immemorial antiquity* was meant that the custom should be so old that no living man could say when exactly it has first started. However, as time went on, *legal memory* took the place of human memory; and in *England*, legal memory stretches back to the year 1189. Therefore, a local legal custom under the English law becomes *valid* if it satisfies this requirement of immemorial antiquity, *i.e.*, it should be as old as 1189, *if not older*. If it is shown that the custom has been in existence since the accession of Richard I, the custom will be regarded as being one of immemorial antiquity.

In India, also, a custom which is observed in a particular district for a *very long time*, has the necessary force of law. It must be ancient, but it is *not necessary* that, in every case, the antiquity must date as far back as the memory of man. All will depend upon the circumstances of each case, and antiquity is to be decided from that point of view. What is important is that the usage must have been accepted and acted upon by the people in actual practice for such a long period and with such invariability as to show that it has, by common consent, been submitted to as the established governing practice of that particular district.

In case a party submits that a particular custom was in existence and that it is *not* in derogation of the ordinary rights of the other people, then the burden of proof falls upon that party to give a clear and positive proof of the user relied upon to substantiate the custom. It follows from this that, *in India, the custom need not be immemorial*, but it should have been in existence for a *long period*, so that the custom can easily derive the force of law thereby regulating rights of the parties.

From the point of view of a Court of law, it is also necessary that a custom, in order to be acceptable, must have some antiquity. *Modern customs* are *not*, therefore, enforced by the law Courts, because they change so often, and they do *not* enjoy the same confidence of the people as an established custom. "A mere habit, practice, or fashion which has existed for a number of years nobody supposes to be *ipso facto* an

obligatory custom; antiquity is the only reliable proof resistance to the changing conditions of different ages"- (*C. K. Allen*). Hence, to facilitate a uniform and healthy system of law, and to prevent confusion and injustice, the requirements of the test of time and reasonableness are *both* essential in order to establish the validity of a custom.

No hard and fast rule can be laid down to define as to what is *an old custom*. In this connection, one is reminded of *Azo*, who remarked that a custom is *long* if it is 10 years old, *very long* if it is 30 years old, and *ancient* if 40 years old.

3. Opinio necessitatis

By *opinio necessitatis* is meant an *ethical conviction* on the part of those who follow a custom that it is *obligatory*, and *not merely optional*. Thus, if in a mercantile community, sending a cheque by ordinary post was optional, *i.e.*, followed by some merchants and *not* by others, such transmission *cannot* be said to have become a *custom*. What distinguishes custom in the legal sense from mere convention is what is known as *opinio necessitatis, viz.*, the recognition that there is an authority behind it.

4. Conformity with statute law

A custom must *not* be contrary to an Act of Parliament. "The common law yields to immemorial usage, but the enacted law stands for ever."

However, an enactment may expressly provide that it is subject to any usage or custom to the contrary. Thus, the Indian Act opens with the words "Nothing herein contained affect....any usage or custom of trade."

5. Conformity with the Common Law

Unless immemorial, a custom must be *consistent with the common law*. That it must be consistent with *statute-law* is applicable to *all customs, whether immemorial or not*. That it must be consistent with the common law is a rule applicable only to recent customs, and *not* to those which have the prestige and authority of immemorial antiquity.

6. Continuity

A local custom must have *continuity, i.e.*, it must have been in existence, and must have been recognised by the community without any interruption or break, for such a period as may be considered by the Court as being *reasonably long* to be recognised as a local custom.

If a custom is *not* actively exercised for a brief period, that does *not necessarily* defeat its efficiency. In England, what is essential is that it should *not* have been *abandoned* at any time after 1189, and then re-continued. Thus, where certain fishermen had a customary right to spread their nets on a certain portion of the shore, and they did *not* do so, as that part was submerged under water, it was *held* that the custom had *not* been abandoned, as there was merely a *temporary cessation*.

7. Peaceable enjoyment

Local custom must be capable of *peaceable enjoyment* without any disturbance or contest. Unless this undisturbed existence is proved to the

satisfaction of the Court, it *cannot* be said that the custom was based on the general consent of the people.

Discontinuance of custom.—In the case of a *family custom,* it is competent to a family to discontinue it. But in the case of *a local custom,* the custom of individuals *not* to follow it *cannot* have the effect of *destroying* it.

Burden of proof.—In the case of persons governed by any special law, the burden of proving a custom *derogatory* to such special law is upon the person who *asserts* it.

When the existence of a custom has been proved, the burden of proving its discontinuance is upon the party who alleges its discontinuance.

What the law requires, before an alleged custom can receive the recognition of the Court and thus acquire legal force, is satisfactory proof of usage, so long and invariably acted upon in practice as to show that it has, by common consent, been submitted to as the established governing rule of the particular family, class, or district; and the course of the practice upon which the custom rests must *not* be left in doubt, *but* must be proved with certainty.

Custom is one of the sources of Hindu law. 'Immemorial custom is transcendent law' says *Manu.* Custom is a rule which in a particular family or district has, from long usage, obtained the force of law.

As a branch of Hindu law, custom plays an important part, and within the limits in which its operation is now confined, it modifies or supplements the written law. Custom is an independent source of law, and when it is universally adopted, it should supersede the provisions of the written law for, "under the Hindu system of law, clear proof of usage will outweigh the written text of the Hindu law" : *Collector of Madura* v. *Mootoo Ramalinga,* 2 M.I.A. 439.

On this point, the Privy Council observes—"Their Lordships are fully sensible of the importance and justice of giving effect to long established usages existing in particular districts and families in India, but it is of the essence of special usages, modifying the ordinary law of succession that they should be *ancient and invariable,* and it is further essential that they should be *established to be so by clear unambiguous evidence.*"

THEORIES OF CUSTOMARY LAW

There are two theories of customary law. —The *first* of these is a characteristic feature of *foreign,* and more especially of German, jurispurdence, being chiefly due to influence of *Savigny.* It is based on the proposition that custom is rightly *to be considered as a formal, and not merely as a material, source of law.*

Salmond's view is that this theory is almost unanimously rejected by English jurists. *Custom,* he says, is a *material, not a formal,* source of law. Its only function is to supply the principles to which the will of the State gives legal force. Law exists only because it is applied and enforced by the State, and where there is no *State,* there can be no law. From custom, the

State may draw the material contents of the rules to which it gives the form and nature of law.

The *second theory* of customary law is that which may be called the *Austinian* theory. *Austin* considers that the true legal source of customary law is to be found in the precedents in which custom receives *judicial recognition and enforcement* for the first time. Customary law is, according to *Austin*, a variety of case-law. It follows from this that a custom does *not* acquire the force of law until it has *actually come to the notice of the Courts* and has received judicial *approval and application*.

The correct theory according to Salmond, is that custom, although *not* a *formal* source of law, *is* a *legal* source of law, that is to say, its authority as a law-creative source depends upon an *antecedent rule of the law*, which recognises the force of all sorts of customs. Custom is a source of law *irrespective* of, and even *prior* to, the existence of *judicial decision upon it*.

(For the distinction between *Custom* and *Prescription*, see Chapter XVIII.)

CHAPTER IX

THE STATE

'STATE' DEFINED

A State is a *society of men established for the maintenance of peace and justice (within a determined territory) by way of force.* In one American case, the U.S. Supreme Court has defined "State" as a body of free persons, united for the common benefit to enjoy peaceably what is their own and to do justice to others. *Salmond* says that a *State* is "an association of human beings established for the attainment of certain ends by certain means".

PRIMARY AND ESSENTIAL FUNCTIONS OF THE STATE

The end of every organised political association is to provide *defence against external enemies* and *to maintain peaceful and orderly relations within the association itself.* The Sovereign, according to *Hobbes,* carries *two swords,*—the sword of *war* and that of *justice. The essential functions, therefore, of a modern political State are war and administration of justice.*

Every organised political society which performs these two functions is a State, and none is such which does *not* perform them. These are the two methods by which a State fulfills its appointed purpose of *establishing right and justice by physical force. It is thus a combination of right as well as might.*

The organisation of the modern State

The organisation of the modern State is of extraordinary complexity. The *three* most important departments of the modern State are the *legislature, the executive* and the *judiciary.* The enactment of the law is done by the *legislature,* though it is *not* the only body which makes the law; it is helped to a great extent by the *judges* who, though they do *not* enact laws, yet *interpret* the laws in such a way that it conforms to the public morality, public opinion, custom and conventions. The common law of England is judge-made. The *executive* carries out the orders and decrees of the Courts, and preserves peace and order, through its administrative and welfare departments.

The organisation of a State necessitates the existence of *a population, a territory and the government.* Without a sufficiently reasonable number of persons to organise, there is no question of an organisation. A State exists within a certain defined territory, outside of which a State or its organs can have no authority or function. The State has its own sovereignty and independence; it is *not* dependent upon any other State or unit.

Salmond however has pointed out that, in a modern State, independence and sovereignty are *not* the essentials of a State. A State may be

independent, *i.e.*, sovereign, *or* it may be dependent, *i.e.*, non-sovereign. Constitution and constitutional practice have preceded constitutional law, *i.e.*, there must have been some sort of a State or organisation for the existence of the political or civil life of the people. It was later when the constitution became a matter of law that it developed, and in course of time, became highly complex, with its several types of State powers and State functions.

The complexity of the State has increased to a very great extent due to the fact that the State provides to its citizens greater amenities in the form of good health, safety, economic and social welfare, education and other requirements of good living. It strives towards the idea of family and social and welfare State.

Functions of the modern State

The complexity of the modern State lies in the fact that no longer does one consider a State as an organisation meant merely to be the police force, to collect taxes and to maintain law and order. There are *secondary* and *ministerial* functions also. It engages in all sorts of welfare activities. The organisation of the modern State is not only complex in its essential parts *i.e.*, regarding its constitution, but it is complex also in its secondary part, which comprises of the details of State structure and State functions.

As seen earlier, the primary function of the State is to maintain law and order and to administer justice. Further, it also protects its members against foreign aggression by the use of extra-judicial force. Under the secondary function fall legislation, taxation, and the maintenance of welfare activities and discharge of welfare duties for benevolent purposes. Legislation is an important work of a modern State, for without good laws, a State *cannot* function efficiently, nor can its subjects and citizens thrive. Good laws are the essence of a good government, and are absolutely necessary for the maintenance of the social balance of justice and well-being. For this, the State must have finances to maintain the government and engage in works of public utility and social welfare, and hence the necessity of taxation as a secondary function of the State.

Thus, the complexity of the modern State arises from the fact that it is no longer responsible only for the maintenance of law and order. For a government to be considered a good government, it is necessary that it should be in a position to discharge its social obligations in the form of looking after the welfare of its citizens and promoting their well-being, by procuring full employment, social security, and freedom from want. In the strength and welfare of its citizens lies the strength and welfare of the State. Hence the great necessity for the secondary aspects of the purpose and function of the modern State.

WAR AND ADMINISTRATION OF JUSTICE DISTINGUISHED

The *two primary functions* of a State, namely, war and administration of justice, can be distinguished in the following *five* respects :

1. Judicial and extra-judicial use of force

(1) Force is *judicial*, when it is applied by or through a *tribunal*, whose business it is to *judge* or to *arbitrate* between the parties. It is *extra-judicial* when it is applied by the State *directly, without* the aid or intervention of any such judge or arbitrator.

(2) Judicial force involves *trial* and *adjudication*, as a condition precedent to its application; extra-judicial force does *not*.

(3) The primary purpose of judicial force is to *execute judgment* against those who will *not* voluntarily yield obedience to it. Only indirectly, and through such judgment, does it enforce rights and punish wrongs. But extra-judicial force strikes *directly* at the offender. It recognises *no trial or adjudication* as a condition of its exercise. When a rebellion or a riot is suppressed by troops, this is the *extra-judicial* use of force, but when, after its suppression, the rebels or rioters are *tried, sentenced and punished* by criminal *Courts*, the force so used is *judicial*.

2. Law

Judicial force is regulated by *law*, while the force of arms is usually *exempt* from such control. Justice is according to law; war is according to the pleasure of those by whom it is carried on. As between the State and its *external* enemies, *the civil law is wholly silent*.

3. Persons, States

Judicial force is commonly, though not always, exercised against persons; extra-judicial force is exercised against other *States*.

4. Internal, external

The administration of justice is generally the *internal*, while war is generally the *external*, exercise of the power of the State. In other words, the State commonly proceeds against *internal* enemies by way of *judicial*, and against *external* enemies, by way of *extra-judicial*, force.

5. Latent, patent

In the administration of justice, the element of force is commonly *latent* or *dormant*, whereas in war, it is seen in *actual exercise*.

Thus, when a prisoner is sentenced to death, one does *not see* the Judge using any force. He merely passes the sentence. Real force is used later on when the person is hanged. So, here, the element of force is latent. It is there, but one does *not* see it when the Court pronounces the judgment. The same remarks apply when a person is sentenced to imprisonment or fine.

SECONDARY FUNCTIONS OF THE STATE

The primary and essential functions of the State are, as mentioned above, *war* and the *administration of justice*. Its *secondary* functions are many and may be divided into the following *three* classes :

1. Legislation

Legislation is the formulation of the principles in accordance with which the State intends to fulfil its functions of administration of justice.

[See Chapter VI : Legislation and Interpretation.]

2. Taxation

Taxation is the instrument by which the State obtains the revenue which is the essential condition of all its activities.

3. Other activities

Then there are all the *other* activities undertaken by the State. Examples of this class are very numerous in modern times, *e.g.*, Post Offices, Railways, Education, maintenance of welfare activities *etc.*

Titles to State membership

In all modern States, membership may arise either by the personal tie of *citizenship* or by *subjectivity*. A citizen is or becomes a member of a State by virtue of his *birth*, but he can also become a citizen by virtue of *residence*. Citizenship and residence are, therefore, types of title to a membership of a modern State.

Membership of a State entitles a person to many rights and privileges, which are *not* enjoyed by those who are *not* citizens of that State. Rights also include obligations. The citizens have a right to enjoy their rights, immunities and protection afforded by the civil law or the law of the State, and the citizens in turn owe allegiance to the State. In all modern States, protection of the law is given *not only* to citizens, *but also* to non-citizens who are residents of that State.

The terms *citizen* and *subject* both suggest that there is a permanent and personal relationship between the State on the one hand and the individuals residing in that State on the other. One normally talks of *citizens* in republics, and of *subjects* in monarchies. The Britishers are the *subjects* of Her Majesty, the Queen, to whom all pay their homage and acknowledge their allegiance. But in a Republican State like India, the individuals are *citizens*, and they have all the rights, duties and liabilities of citizens.

According to *Salmond*, citizenship has its source in nationality. Fellow-citizens are those who belong not merely to the same State, but also to the same Nation. There is thus a difference between *citizenship* and *nationality*. By nationality is meant membership of a particular nation, as opposed to citizenship, which is membership of a State. A nation means a group of persons having common interests, though not necessarily a common religion or a common language, but necessarily common sentiments and traditions, without which there can be no nation. A State is a political society meant for the purpose of protecting the life and liberty of subjects, and granting them certain facilities for the development of their personalities. In one State, there may be several nations, cultures and languages and in the same nation, there may be several States. It is only to the State that a nation or nations look in order to secure oneness.

Ordinarily, a person may acquire citizenship by *birth, by residence*, or by *naturalisation*. From this, it follows that it is absolutely necessary that an individual should be a member of some State. A person *cannot* be considered as a full individual without the membership of a State. It is necessary that in order to acquire such rights, he would have to be faithful, obedient, and of service to the State.

RIGHTS AND LIABILITIES OF A CITIZEN

Concept of 'Citizenship'.—Citizenship is a legal concept; nationality is *membership of a nation*. Citizenship is *one kind of membership of a State*. A nation is a society of men united by common blood and descent. A State, on the other hand, is a society of men united under one *government*.

"The historical origin of the conception of citizenship is to be found in the fact that the State has grown out of the nation. The State in its origin is the nation politically organised for the purposes of government and self-defence. The citizens are the members of a nation which has thus developed into a State."—*Holland*.

Men become united as fellow-citizens, because they are, or are deemed to be, already united by the bond of common kinship.

The relationship between a State and its members is one of *reciprocal obligation*. The State owes *protection* to its members, while they in turn owe *obedience* and *fidelity* to it.

Every State is known by a system of rights that it maintains. A subject, therefore, has many rights in a State, and one such right is *the right against the State*. He can claim this right in the same way as he claims it against any other citizen in the State, *i.e.*, by instituting proceedings against the State for the determination and recognition of his rights. He can also claim a judgment in his favour if he finds that his rights have been infringed by the State. The State recognises certain duties which it owes to the subjects, and it tries to fulfil these duties by respecting these rights. As a matter of fact, the strength of the law is the strength of the State; and law, therefore, *cannot* be used or turned against the State whose very strength it is. According to *Salmond*, these rights of the subject against the State are therefore *imperfect*. They obtain legal recognition, but *not* legal enforcement.

This had led many writers to deny that subjects have any legal rights at all against the State. But this is too narrow a definition of the term 'legal rights', and would include only those rights which are enforced by the law Courts. It would be better if one includes within the term 'legal rights', all those claims that are legally recognised in the administration of justice. From this, it follows that all rights against the State are *not* legal in the same way as all rights against the private persons are also *not* legal. The fact is that some rights are legal and can easily be enforced in a Court of law. All these limitations to the power of the State are determined by the rules of law courts, and they are determined in accordance with the fixed principles of law. It, therefore, follows that the State has a legal duty to

defend the legal rights of the subjects. To a lawyer, a contract entered into by a layman with the State is as much a source of legal rights and obligations as is a contract entered into by two private persons. The party to the contract, can, therefore, successfully sue the State for a breach of the contract.

It is needless to say that rights against the State are held at the State's pleasure, and are therefore *not* legal rights at all, for all other legal rights are in the same position. They are legal, *not* because the State is bound to recognise them, *but because* the State voluntarily recognises them.

Allegiance

The duty of assistance, fidelity and obedience is called *allegiance*. Subjects owe *permanent* allegiance to the State. Resident aliens owe *temporary* allegiance to the State during the period of their residence.

CONSTITUTION OF THE STATE

Every State *must* have a permanent and definite organisation, a determinate and systematic form, structure and operation. The organisation of a modern State is divisible into *two parts. The first* part consists of its *fundamental or essential* elements; the *second* consists of the *details of State-structure*. The first essential and basic portion is known as the *constitution* of the State.

The form and structure of the government adopted by a country is called its constitution. The English constitutional law is *not* to be found in any one document. It does *not* mean any *particular* law or collection of laws. It means the *whole* structure of a political society, its legislative and executive organs and their functions, and the rights and duties of subjects in relation to the supreme power in the State. *In England,* there is (i) no *written* fundamental law, and (ii) no distinction between the fundamental laws and the ordinary laws. In India, on the other hand, there is an elaborately *written Constitution,* which defines the fundamental rights of citizens, and even of non-citizens.

Constitutional Law defined. — Constitutional law is that branch of civil law which deals with rules directly or indirectly affecting either the *exercise* or the *distribution* of the *sovereign power* in the State. It embodies rules which prescribe the structure and the main *functions* of the different organs of any government. Constitutional laws mean in England *laws which affect the fundamental institutions of the State,* and *not* laws which are *legally* more sacred and more difficult to change.

KINDS OF STATES

1. Unitary and composite

A *unitary or simple* State is one which is *not* made up of territorial divisions *which are States themselves. A composite State,* on the other hand, is one which is itself an aggregate or group of constituent States.

Composite States are of two kinds —

(a) *Imperial* and (b) *Federal.* In an *Imperial State,* the government of *one of the parts* is the common government of all. In a *Federal State,* the common government is *not* that of one of its parts, but a *central government* in which all the constituent States participate.

2. Independent and dependent

An *independent* or *sovereign State* is one which possesses a *separate existence,* being *complete* in itself, *and* merely a part of a large whole to whose government it is subject.

Independent States are of two kinds :

(a) *Fully sovereign* and (b) *Semi-sovereign. A fully sovereign* State is one whose sovereignty is in no way derogated from by any control exercised over it by *another* State. A *semi-sovereign State* is one which is *subordinate* to some other State.

A *dependent or non-sovereign State* is one which is *not* complete and self-existent, but is merely a constituent portion of a greater State which includes both it and others and, to whose government it is subject.

PART II

LEGAL CONCEPTS

CHAPTER X

LEGAL RIGHTS

'LEGAL RIGHT' DEFINED

Gone are the days when food, clothing and shelter provided for *all* the needs of man. Today, one can clearly see the emergence of what is called the *welfare state,* where man needs many other things. Amongst others, what he needs are *rights*, — rights which are recognised and enforced by the Courts of law.

"A legal right is an interest recognised and protected by the rule of law". Discuss.

B.U. Apr. 95
Oct. 96

In all civilised societies, law consists of those principles in accordance with which justice is administered by the State, and that administration of justice has behind it the physical power of the State, for the purpose of enforcing rights and punishing the wrong-doers for violations. It follows, therefore, that every right involves a *'title'* or a *source* from which that right is derived. The word *'title'* may be understood as the *de facto* antecedent of which the *right* is the *de jure* consequence. (This is discussed at length in Chapter XIII, "Titles".)

The conception of a *right* is of fundamental significance in modern legal theory, because one *cannot* live without rights which are recognised and enforced at law. Different authors have defined rights in different ways. According to *Salmond,* right is an interest, recognised and protected by a rule of Law. It is any interest respect for which is a duty, and the disregard of which is a wrong. Thus, a right is recognised and protected by a rule of legal justice.

According to *Austin,* a party has a right when another or others are bound or obliged by law to do or forbear something towards or in regard to him.

According to *Holland,* a right is the ability possessed by a person to control other's actions and self-protection with the help and assistance of the State.

According to *Dr. Sethna,* a right is any interest either vested or created under a law or under a contract.

One often says that an act is *right* or *just* because it promotes some form of human interest; therefore, if any act is wrong or unjust, it means that human interests are prejudicially affected by it. It means a form of human conduct which the law takes into account and it has an influence upon the interests of others. Those interests which thus receive recognition and protection from the rules of rights are called *rights.* Every man who has right to anything has an interest in it also, but he may have an interest without having a right. *Therefore, a right is an interest, the violation of which is a wrong.* Thus, according to *Salmond,* every right corresponds to a *rule of right* from which it proceeds, and it is from this source that it derives its name.

According to *Austin*, every right implies a corresponding duty, but every duty *does not necessarily* imply a corresponding right. To take an example, one can say that it is the *duty* of a Magistrate to punish a wrong-doer whose guilt has been proved. However, can it be said, by any stretch of the imagination, that the offender has a corresponding *right* to be punished ?

Explain the concept of "rights". How are rights and privileges different ?
P.U. Apr. 98

Rights may be *private, i.e.*, vested in individuals, or they may be *public*, that is vested in, acquired or possessed by the public or a section of the public at large. Again, rights may be divided into those which are *perfect or enforceable* and rights which are *imperfect or unenforceable*. A *perfect legal right* is always enforceable at law and its infringement, however insignificant it may be, is necessarily an infringement of a legal right. "There must be a means to vindicate and maintain the right, and a remedy if there is an injury in the exercise and employment of it; and indeed *it is a vain thing to imagine a right without a remedy, for want of right and want of remedy are reciprocal.*" — (*Holt C.J.* in *Ashby* v. *White*)

Define the concept of "right". What are its kinds ?

The right to a debt created by a contract is a *personal right* of the creditor to receive the amount on the appointed date, and if the debtor fails to pay the amount, the creditor can enforce this primary right by bringing an action for the recovery of the amount. Similarly, every citizen has a right to reputation, and if any person defames any other person, the defamed person can enforce his right to reputation by a suit for damages for the loss of reputation he has suffered.

How are rights and duties co-related ?
P.U. Oct. 98

Imperfect rights are unenforceable because, as *Salmond* says, "a legal enforcement does *not* pertain to essence of the conception of right." Therefore, according to *Salmond*, a legal right is one that is protected and recognised by the law, *but not necessarily* one that is enforceable. A legal right, therefore, need *not* be enforceable at law. But such a right *cannot* be called perfect or complete. There are certain rights which are incomplete and unenforceable, *e.g.*, under the Indian Partnership Act, a minor who is entitled to share the benefits of partnership can ask the partners of the firm to show him the books of accounts, but in case of their failure or refusal to do so, the minor cannot successfully sue them, *unless* the firm is dissolved at the option of the sued partners. So also, a finder of goods has a right to be reimbursed for the expenses he has incurred in finding out the true owner of the goods and in preserving the goods in proper condition. But if the owner refuses to reimburse the finder, the finder *cannot* sue for compensation; he can only have a lien against the goods. A right barred by the Limitation Act is also an imperfect right because it is unenforceable at law.

Are rights and duties necessarily co-relative?

"A duty is an obligatory act, it is an act the opposite of which would be a wrong. Duties and wrongs are co-relative. The commission of a wrong is the breach of a duty, and the performance of a duty is the avoidance of a wrong". *(Salmond)*

It is a debatable question whether rights and duties are necessarily co-relative. *According to one view*, every right has a corresponding duty. There

can, therefore, be no duty unless there is some one to whom it is due. According to this view, there can be no right without a corresponding duty, or a duty without a corresponding right, just as there cannot be a husband without a wife, or a father without a child.

The followers of this view point out that every duty is a duty *towards* some person or persons, in whom, therefore, a corresponding right is vested. Conversely, every right is a right *against* some person or persons, upon whom, therefore, a co-relative duty is imposed. Every right or duty thus involves a *vinculum juris* or a bond of legal obligation, by which two or more persons are bound together. Thus, there can be no duty unless there is someone *to whom* it is due. Likewise, there can be no right unless there is someone *from whom it* is claimed.

The other school of thought distinguishes between *relative* and *absolute* duties. *Relative duties* are those which have rights corresponding to them, *while absolute* duties have no such rights.

This school believes that the essence of a right is that it should be vested in some determinate person, and that it should be enforceable by some form of *legal process* to be instituted by him. Thus, duties towards the public at large or towards indetermined portions of the public have no co-relative rights. So, also, the duty to refrain from committing a public nuisance has no co-relative rights. Similarly, where trustees hold property on trust for 'religious purposes', even though there is no ascertained beneficiary, the trustees are under a duty *not* to use the property for any other than religious purpose. The question is, to whom is the duty owed ? If owed to anybody, it must be owed to the public at large *or* to the State *or* to the Crown. But it makes no difference whether one says that the duty is owed to one or the other or it is not owed to any one. In any event, the law on this point is clear, *viz.*, that it is the duty of the trustees to use the property only for those purposes for which it is ear-marked.

Write a short note on : Rights and duties. "To describe a right of one person is to imply that some other person is under a corresponding duty." Elucidate. Comment upon Hohfeld's scheme of legal rights and its corelative jural concepts with the help of suitable illustrations.

P.U. Oct. 95

As stated earlier, according to *Austin*, every right implies a corresponding duty, but every duty does *not* imply a corresponding right. Thus, a right to a debt implies a corresponding duty to pay the amount of the debt to the creditor. However, as stated above, every duty does *not* imply to a corresponding right. Thus, it is the *duty* of the Magistrate to punish an offender if his guilt is proved in the Court. However, it would be going too far to say that, in such a case, the offender too has a corresponding *right* to be punished.

In conclusion, it may be said that duties in the *strict sense* of the term have corresponding rights, but duties in the *wider sense* do *not*.

It is relevant to note the observations of the Supreme Court in this connection. In *Minerva Mills Ltd.* v. *The Union of India*, (1980) 3 S.C.C. 625, it observed as under :

> "There may be a rule which imposes an obligation on an individual or authority, and yet it may *not* be enforceable in a court of law, and therefore, *not* give rise to a corresponding enforceable right in another person. But it would still be a legal rule, because it prescribes a norm of conduct to be followed by such individual or authority. The law may

provide a mechanism for enforcement of this obligation, but the existence of the obligation does *not* depend upon the creation of such mechanism. The obligation exists prior to, and independent of, the mechanism of enforcement. A rule imposing an obligation would *not* therefore cease to be a rule of law because there is no regular judicial or quasi-judicial machinery to enforce its command. Such a rule would exist despite of any problem relating to its enforcement."

THE CHARACTERISTICS OF LEGAL RIGHT

What are the essential characteristics of a legal right ?
P.U. Apr. 97

Every legal right possesses the following *five* characteristics :

1. There is a person who is the *owner* of the right. He is the *subject* of the legal right, sometimes also described as the *person of inherence.*

   The owner of a right need *not* be a determinate or fixed person. When an individual owes a duty towards society at large, it can be said that *an indeterminate body, i.e.,* the society at large is the subject of inherence. Similarly, in the case of a bequest to an unborn person, the owner of the right is an unborn child, *i.e.,* an unascertained person.

Define a legal right. What are the characteristics of a legal right ?
B.U. Apr. 98

2. A legal right accrues against another person or persons, who are under a corresponding duty to respect that right. Such a person is called the *person of incidence* or *the subject of the duty.*

   Thus, if *A* has particular right against *B, A* would be the person of *inherence,* and *B* the subject of *incidence.*

State and explain fully the characteristics of a legal right.
B.U. June 96

3. Next is the *content* or *substance* of the legal right. It may be an act which the subject of incidence is bound to do, *or* it may be a forbearance on his part.

4. Then, there is the *object* of the right. This is the thing over which the right is exercised. This may also be called the *subject-matter* of the right.

Analyse fully the concepts of legal right, duty and wrong.
B.U. Oct. 99

5. Lastly, there is the *title* to the right, *i.e.,* the facts showing how the right vested in the owner of the right. This may be by purchase, gift, inheritance, assignment, prescription etc.

To take an example that illustrates all these five characteristics of a legal right, suppose a man buys a house from another. This buyer will be the person of inherence and the seller and other persons generally the persons of incidence. The subject-matter of the right will be the house, and the contents of the right would lie in the fact that the seller and every other person should *not* disturb the buyer's peaceful possession and enjoyment of the house. In this case, the title to the right is to be found in the fact of the sale of the house, reflected in the conveyance (sale-deed) under which the house was acquired by the purchaser from the vendor.

When a person purchases anything by paying the price for it, he is entitled to the undisputed right of use in the thing which he has purchased. Other persons are bound by the co-relative duty, and the owner has a right against the whole world. The object or subject-matter of the right in the thing purchased is his legal right. He acquires the title of the right because

the property in the object has been conveyed to him in the same manner as it was acquired by the former owner.

Write a short note on : Characteristics of a legal right.
B.U. Apr. 97

Thus, every right involves a *three-fold relation* in which the owner of it stands :

1. It is a right *against* some *person* or persons.
2. It is a right to *some act* or *omission* of such person or persons.
3. It is a right *over* or *to something* to which that act or omission relates.

It may be noted that every right involves a relation with its owner. An ownerless right is *not* recognised by law, although it is *not* a legal impossibility. But it must not be forgotten that although ownerless rights are not recognised, the ownership of a right may be uncertain or contingent. Such owner may be an indeterminate person. Or, he may be an unborn person, and may perhaps never be born. It is, therefore, clear that although every right has an owner, it need not have any *certain* or *vested* owner.

From this it follows that an *object* is as essential an element in the idea of right as the subject to whom the right belongs. A right being a legally protected interest, the object of the right is the thing in which the owner has his interest — whether material or immaterial, — which he desires to keep or to obtain, and which he is able to keep or to obtain by means of the duty which the law imposes on other persons. In respect of rights over material things, all civilised societies have a great mass of legal rules which are by far the most important of legal rights.

Then, there are also rights in respect of one's own person. Every person has a right *not* to be killed, and the object of this right is one's life. Similarly, one has a right *not* to be physically injured or assaulted. One has also a right *not* to be coerced or deceived into acting contrary to one's desires or interests. Similarly, one has a right of reputation, rights in respect of domestic relations, rights over immovable property, rights to services, and many such rights, over which a man has a full right of enjoyment.

As regards the right of personal service, the law which recognises slavery make it perfectly legal for another to buy and sell a human being, in the same manner as a horse or a car. But where slavery is *not* recognised, the only right that one can acquire over a human being is the temporary and limited right to the use of that person, created by a voluntary agreement with that person; and in no way does such an agreement create a permanent and general right of ownership over the person who is a party to the agreement.

Moral and legal rights

Rights, like wrongs and duties, are either *moral* or *legal*. A moral or *natural* right is an interest recognised and protected by a rule of natural justice. Thus, the mutual right of a husband and wife to be loved by each other is a moral right, the breach of which *cannot* (unfortunately) be remedied by a law Court.

A legal right, on the other hand is an interest *recognised* and *protected*

by a rule of legal justice. *Rights*, says *Ihering*, *'are legally protected interests'*.

"In order that an interest should become a *legal right*", observes *Salmond*, "it must obtain *not merely legal protection, but also legal recognition*. The interests of beasts are, to some extent, protected by the law, in as much as cruelty to animals is a criminal offence. The duty of humanity so enforced is *not* conceived by the law as a duty *towards* beasts, but merely as a duty *in respect* of them."

Similarly, a *man's interests may obtain legal protection as against himself*, as when *drunkenness* or *suicide is* made a crime. But he has *not*, for this reason, a legal right against himself. The duty to refrain from drunkenness is *not* conceived by the law as a duty owing by a man to himself, but as one owing by him for the *community*. The only interest which receives legal recognition is that of the *society* in the sobreity of its members.

'Legal Wrong' defined

A *wrong* is an act contrary to the rule of right and justice. Its synonym is *injury* in its true and primary sense of *injuria*. This term has acquired a *secondary sense of* harm or damage, whether *rightful or wrongful*. Wrongs or injuries are either *moral* or *legal*. The former *are not*, whereas the latter *are*, cognisable by Courts of Law.

Wrongful act.— A wrongful act is an act *contrary* to the rule of *right* and *justice*. It may be of *two kinds* : (i) a *moral* or *natural* wrong, *i.e.*, an act which is *morally* or *naturally* wrong, being contrary to the rule of *natural justice* : and (ii) *legal* wrong, *i.e.*, an act which is legally wrong, being contrary to the rules of *legal* justice and a violation of the law. A legal wrong is an act which is authoritatively determined to be wrong, *by a rule of law*, and is therefore treated as a wrong for the *purposes* of the administration of justice by the State. The essence of a legal wrong consists in its recognition as a wrong *by the law*. It is synonymous with *injuria*, that is, the violation of a legal right. A mere loss (*damnum*) without the violation of a legal right (*injuria*), does *not* give rise to a cause of action, though in some cases, *injuria* without *damnum* suffices to constitute a tort.

Legal damage. — Damage, in common language, means the *physical effect* of the defendant's act. But *legal damage* or damage that constitutes *liability in tort* is neither identical with *actual* damage, nor does it necessarily mean any *pecuniary* loss. *Every invasion of a person's legal right or unauthorised interference with his property imports legal damage;* that is, although the injured person may *not* suffer *any pecuniary loss* by the wrongful act of the defendant, yet, *if* it is shown that there was a violation of some *legal* right, the law will *presume* damage. This is known as 'legal damage'.

The Gloucester Grammar School Case. — The defendant, a schoolmaster, set up a rival school next door to the plaintiff's school, with the result that the boys from the plaintiff's school flocked to defendant's. The plaintiff sued the defendant for the loss. It was *held* that no suit could lie on

the ground that *bona fide competition can afford no ground of action, whatever damage it may cause. Free and fair competition is not illegal.*

But a competition in which the legal rights of rival are infringed is a ground of action. Thus, an action lies against a person for causing injury to another by *illegally interfering* with the latter's trade, business or employment. Thus, in the *Gloucester Grammar School case* (above) if, besides setting up a rival school, the defendant had interfered with the plaintiff's school by *illegal* means, as for example, by procuring another to waylay the children going to the plaintiff's school or by intimidating them so that they cease to go there, the defendant would be liable. In such a case, the plaintiff would be entitled to damages or injunction or both.

Another case on the same point is *Chasemore* v. *Richards* (1869) 7 H.L.C. 349. — In this case, the plaintiff was the owner of an ancient watermill near Croydon. For more than 60 years, the occupiers of the mill had been using and enjoying the flow of the river Wandle for the purpose of working the mill. The Local Board of Health of Croydon (whom the defendant in the suit represented) sank a well in their own land and pumped up large quantities of water, with the result that the percolating underground water, which would naturally have found its way to the river, and helped to work the plaintiff's mill was obstructed. With the diminution of water in the river, the plaintiff found it impossible to work his mill. The plaintiff sought to make the defendant liable, but the Court *held* that the doing of an act which is otherwise lawful *cannot* give rise to an action in tort, however much it may be attended with loss to the party complaining. As the Judicial Committee pointed out, in *Rogers* v. *Rajendra Dutt,* (1860) 1 M.I.A. 103, "it is essential to an action in tort that the act complained of should, under the circumstances, be legally wrongful as regards the party complaining. That is, it must prejudicially affect him in some *legal right.*

OBJECTS OF RIGHTS

The following are the *six* chief kinds of legal rights *with reference to their objects* :

1. Rights over material *things.* — Thus, one has rights over one's house, books, car, furniture *etc.*
2. Rights in respect of one's own *person.* — Thus, one's rights *not* to be assaulted or falsely imprisoned by anybody are rights in respect of one's *person.*
3. The right of *reputation.* — No person has the right to defame another, either by libel or slander.
4. Rights in respect of *domestic relations.* — These include *marital* rights, *parental rights and a master's* rights over his servant.

Violation of *marital rights* can take place in *three ways* :

(i) Abduction, or taking away a man's wife.

(ii) Adultery, or criminal conversation.

(iii) Causing physical injuries to the wife.

Violation of *parental rights* consists in the seduction of a person's daughter or child.

Lastly, a master's rights over his servant are violated by anyone who deprives him of the services of his servant by—

(i) *injuring or imprisoning* him so as to prevent performance of his services; *or*

(ii) *inducing* the servant to *leave* the master's service wrongfully; *or*

(iii) *harbouring* a servant who has left his service wrongfully, *i.e.*, before the expiration of the period stipulated.

In addition to the above, a master may sue for loss of service caused by the *seduction of a female servant.* The relationship of master and servant must exist *both* at the time of seduction *and* at the time of the illness causing the loss of service.

5. Rights in respect of other rights.— In many cases, a right has another right as its subject-matter. Thus, by a contract for sale, the buyer acquires a right to the right of ownership over the object of sale.

6. Rights over *immaterial property.*— Examples of rights over immaterial property are patent rights, copy-rights, trade marks and commercial goodwill.

LEGAL RIGHTS IN A WIDER SENSE OF THE TERM

What is "right" in the wider sense? Critically examine the concept of liberty and power.

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A legal right, in the *strict sense* of the term, means an interest, *recognised by law,* which *imposes a corresponding duty* on others; but a legal right *in the general sense of the term* may be defined *as any advantage or benefit which is in any manner* conferred upon a person by a rule of law. In this sense, there are *three more kinds* of rights :

(1) Liberties

A person has *liberty* when there is an absence of the legal duty imposed upon him. The sphere of his legal liberty is that sphere of activity within which the law is content to leave him alone. In this sense, one has a right to publish his opinion on public affairs, but he has no right to express a defamatory or seditious libel. In brief, one's *liberty is his ability to do a thing without being liable for it in law.*

Just as the co-relative of *right* is *duty,* the co-relative of *liberty* is what is called "*no-right*". The term "*no-right*" means an absence of a right against another in a particular respect. Thus, the owner of a land has a *liberty* to eject a trespasser (even forcibly if need be), and correspondingly, a trespasser has "*no-right*" *not* to be ejected from his owner's land.

"No-right"

This is a term coined by *Hohfeld.* If *X* has a right to do a particular thing, it implies that other persons, *A, B, C, D* etc., shall have '*no-right*' to prevent *X* from doing that thing. Thus, *no-right* means the absence of any right in other persons to prevent or hinder a man from exercising his right.

"*No-right*" thus means absence of a right against another person in a particular respect. Therefore, it can be said that a trespasser has a "no-right" *not* to be ejected forcibly from the trespassed premises, — and this

corresponds to the owner's *liberty* to eject him. Again, *X* may do whatever he likes with his house. It is his *liberty* or *privilege*. The correlative *no-right* is that other persons have *no right* to interfere with *X* while he does as he pleases with his house.

What are the defects of Hohfeld's analysis of fundamental legal conceptions ?
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For the above, it is clear that a *liberty* or a *privilege* is the correlative of a no-right. *Hohfeld* explains it by saying that if it is *A*'s right that *B* should stay off his land, the correlative of this right is *B*'s duty *not* to enter *A*'s land.

The maxim "damnum sine injuria" (detriment without legal injury) illustrates a *no-right*. Thus, *X* has been running the only shop in his vicinity since several years. Then, one fine morning, *Y* opens a similar shop just across the street, and because of cut-throat competition, *X* suffers a severe loss. Here, *X* cannot prevent *Y* from continuing the business; his is a case of *no-right*.

2. Powers

Discuss Hohfedian analysis of rights.
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A *power* may be defined as an ability conferred upon a person by the law to alter, by his own will directed to that end, the rights, duties, liabilities or other legal relations, either of himself or of other persons. For example, one's right to make a will is his power, and one's right to alienate his property during his own life-time is also his power.

Tawney defines *power* as the capacity of an individual to modify the conduct of other individuals in the manner in which he desires.

Powers are either *public* or *private*. — *Public powers* are those which are vested in a person as an agent of the State. This power is sometimes called *authority*. On the other hand, *private powers* are those which are vested in a person, and are to be exercised by him for his own purpose. Private power is called *capacity*. *Subjection is the correlative of power just as a duty is the correlative of a right in the strict sense of the term.*

3. Immunities

How is a legal right defined ? What are rights in the wider sense and what are their jural correlatives ? Illustrate your answer suitable.
P.U. Apr. 96

An *immunity* is an exemption one enjoys from having a given legal relation changed by another. For example, a Lord is said to be immune from trial by jury when he has been exempted from such trial. *One's immunity arises on account of the absence of power or the disability of others to interfere with one's legal position*. Therefore, *disability* is the *correlative of immunity*.

According to *Paton*, immunity is a freedom on the part of one person against having a legal relation altered by a *given* act or omission on the part of another person. Thus, immunity is the advantage conferred by the absence of legal powers in other persons.

The concepts of rights, liberties, powers and immunities may be stated as under :

(a) Rights : What others *must* do for *X*.
(b) Liberties : What *X may* do for himself.
(c) Power : What *X can* do against other persons.
(d) Immunities : What others *cannot* do against *X*.

The analysis of *rights in the wider sense* into *four pairs of correlatives* can be expressed as under :

Right	Liberty
↓	↓
Duty	No-right

Power	Immunity
↓	↓
Liability	Disability

In the above rectangles, the correlatives can be obtained by following the arrow downwards. Thus "duty" is the correlative of "right", and so on. Also, the concepts within each rectangle are closely related to one another, but the concepts contained in one rectangle are *not* so related to those contained in the other rectangle.

KINDS OF CIVIL RIGHTS

Primary and sanctioning rights

Civil rights are of *two kinds — primary* and *sanctioning*. The object of a *civil* (not 'criminal') proceeding is the enforcement of the plaintiff's right. The right so enforced is either *primary* or *sanctioning*. A sanctioning right is one *which arises out of the violation of another right; all others* are primary. If *X* enters into a valid contract with *Y*, *X's* right to *have the contract fulfilled is primary* right; if this contract is *broken*, his right to *damages* for this breach is a *sanctioning right*.

Kinds of sanctioning rights

The purpose of sanctioning right can be (1) *penal action, i.e.*, the imposition of a pecuniary *penalty* upon the defendant for the wrong which he has *committed, or* (2) *restitution and penal redress, i.e.*, grant of pecuniary *compensation* to the plaintiff in respect of the damage which he has suffered from the defendant's wrong-doing.

1. *Penal action*

Penal action does *not* mean 'criminal prosecution'. It means a civil action in which the defendant is made to *pay a penalty*. The law often creates and enforces a sanctioning right which has in it *no element of compensation* to the person injured, but is intended solely as a *punishment* for the *wrong-doer*. Such an action is called a *penal action* as being brought for the recovery of a *penalty*. But it is nonetheless a purely *civil* proceeding, and *not* a *criminal* proceeding.

2. *Restitution and penal redress*

The *second* form of sanctioning right is the right to *pecuniary compensation or damages*. Such compensation is divided into two kinds, *restitution* and *penal redress*.

The distinction between restitution and penal redress is the following : In *restitution*, the defendant is compelled to give up the pecuniary *value* of some benefit which he has wrongfully obtained at the expense of the plaintiff; he has to restore the plaintiff to his original position (*status quo*). Thus, if a defendant has made profits by infringing the plaintiff's trade

mark, he must compensate the plaintiff by handing over all the profits made by him as a result of such infringement.

In penal redress, the defendant has to restore all the benefits derived from his wrongful conduct *in addition to a* full redress for the loss of the plaintiff. In such cases, the defendant may have to pay much more than what he gained by his wrongful conduct.

TEN KINDS OF LEGAL RIGHTS

The following are the *ten* kinds of *legal* rights, *i.e.*, rights *recognised* and *enforced* by law.

1. Perfect and imperfect

Explain and classify the various kinds of rights. Illustrate your answer suitably. P.U. Apr. 95 Oct. 96

A *perfect right* is one which corresponds to a *perfect duty;* and a perfect duty is one which is *not merely recognised,* but *also enforced* on account of by the law. A duty is enforceable when an action (*i.e.* a suit) or other legal proceeding will lie for its breach. In other words, a perfect right is enforceable in law. An imperfect right is never *enforceable.*

Write a short note on – Perfect and imperfect rights. B.U. Nov. 95

What then is an imperfect right ? An imperfect right is one which, though it is otherwise a legal right, *cannot* be enforced on account of some *legal defect.* Thus, claims *barred* by lapse of time and claims unenforceable by action owing to the absence of some special *form* (such as a written document, when one is required by law) are instances of imperfect rights. In all these cases, the duties and correlative rights are *imperfect. No action will lie for their maintenance;* yet they receive *recognition* from law. *They remain valid for all purposes, save that of enforcement.*

All these cases of imperfect rights are exceptions to the maxim *ubi jus ibi remedium.* Thus, in the case of a debt barred by the Laws of Limitation, the debt is *not rendered extinct,* but merely the *right of action* is barred, so that lapse of time does *not destroy* the right, but merely reduces it from the rank of one which is *perfect* to an *imperfect* one. To take an example, if *A* has given a loan to *B,* but cannot file a suit against *B* as it would be time-barred, and if despite this fact, *B* pays the amount to *A, B cannot* sue *A* and ask him to return the money on the ground that *A* could not have filed a suit against him.

Give an account of classification, creation and extinction of rights. P.U. Apr. 99

Salmond gives a few examples by which imperfect rights may also be recognised : (1) An imperfect right serves as a *good ground of defence,* though *not* for any legal action. (2) An imperfect right is sufficient to support any security given for it, *e.g.,* a mortgage or a pledge remains perfectly valid, though the debt for which it was given as security has become barred by the Limitation Act, and thus unenforceable. (3) An imperfect right may become perfect, *e.g.,* a debt which has become irrecoverable by reason of limitation may become recoverable by reason of either acknowledgment or part-payment under the Limitation Act.

The legal nature of rights against the State

In connection with the classification of rights into perfect and imperfect rights, another problem needs to be discussed, that is, the problem of the nature of the rights of a subject against the State. In this connection, there

are *two views. One view,* as advocated by *Salmond,* is that "A subject may claim rights against the State, no less than against another subject. He can institute proceedings against the State for the determination and recognition of those rights..... and claim judgment in his favour..... But there can be no enforcement of that judgment." But this absence of enforceability does *not* amount to the absence of right. This is a case where a right is recognised but *cannot* be enforced. Such a right is, therefore, an *imperfect right.*

The *other view,* advocated by *Austin,* is that a subject or a citizen *cannot* have any rights against the State of which he is a member. According to *Austin,* a sovereign State claims obedience from all, and owes it to none. The State would have no duties to its subjects. If the State could have no duty, the subjects could have no rights. But as pointed out both by *Pollock* and *Salmond,* in modern times, rights against States are recognised, and they should be considered as imperfect rights, as the element of enforcement may *not* be present in them.

2. Proprietary and personal

Proprietary rights are rights concerning property, corporeal or incorporeal. One often speaks of a man's proprietary rights as his "estate" or "assets" or "property". Thus, a man has proprietary rights in his house, car, furniture etc.

Personal rights, on the other hand, are rights in regard to a person's *status* or person. Thus, the right to reputation, the right of freedom of speech and expression, the free choice of a profession or vocation are all personal rights.

Corresponding to personal and proprietary rights, are personal and proprietary *duties* and *obligations.* Thus, the obligation to pay a debt or to deliver goods under a contract are *proprietary obligations,* whereas the obligation to take care when driving a car on a crowded street is a *personal obligation.* Likewise, the obligation *not* to infringe another's copy-right is a *proprietary obligation,* whereas the obligation *not* to harm another's reputation is a *personal obligation.*

Difference between proprietary and personal rights

There are *four points of distinction* between proprietary and personal rights :

(i) Proprietary rights are *valuable* (*i.e.* they can generally be valued in terms of money); personal rights are *not.*

(ii) The former are the elements of a man's *wealth,* the latter are elements of his *well-being.*

(iii) The former are *inheritable,* the latter are *not.*

(iv) Proprietary rights are more *permanent* than personal rights.

3. Inheritable and uninheritable

A right is *inheritable if* it survives its owner; *it is uninheritable* if it dies with him. Proprietary rights are *inheritable,* while personal rights are *uninheritable.* In other words, the heirs of a proprietary owner become

owners after his death, which *cannot* be the case with personal rights, which die with the owner.

'Estate' and 'status'. —*'Estate'* ordinarily means one's belongings, one's property, — whereas *'status'* means one's position in life. It is possible for a person to be of status without owning property. The popular notion of status is wealth or property. The word 'status' also means 'legal condition' as when one speaks of the *'status'* of a trustee, minor, bankrupt etc.

4. Principal and accessory

A *principal* right is the *main or primary right* vested in a person under the law. An *accessory* right is secondary right which is connected to, or arises out of, the principal right. Thus, the right of a person who has bought a tree is a *principal right*, but the right to enjoy the fruits of the tree is an *accessory right* which flows from the principal right. The legal maxim *accessorium sequitur principale* means that the accessory right follows the principal. If a person purchases land, he has a right *not only* to the land (principal right), *but also* to its title deeds (accessory right).

5. Positive and negative

According to their *context*, rights may also be classified as *positive* or *negative*. When a person has a *positive* right, he is entitled to something to be done by the person who has the corresponding duty. Thus, if *A* has bought goods from *B*, the latter has a positive right to claim the purchase money from *A*. On the other hand, a *negative* right entitles its owner to some forbearance on the part of the person who has the corresponding duty. Thus, if *A* is taken as an apprentice in *B's* business, and *A* covenants not to serve in a rival business for five years, *B* has a negative right to see that for five years, *A* forbears from serving in a rival business.

Write a short note on : Positive and negative rights.
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Distinction between

Positive right	Negative right
1. Corresponds to a positive duty.	1. Corresponds to a negative duty.
2. *Content* : positive act.	2. *Content* : forbearance or non-doing.
3. Entitles the owner to an alteration of the present position to his advantage.	3. It maintains the present position of things.
4. *Aim* is positive benefit.	4. *Aim* is *not* to be harmed.
5. Is a right to receive something *more* than one already has.	5. Is a right to retain what one already *has*.
6. Requires the *active assistance* of other persons.	6. Requires only *passive acquiescence* of other persons.
7. *Mediate* and *indirect* relation to the object.	7. *Immediate* relation to the other.

6. Legal and equitable

Legal rights are those which were *recognised* by the *Courts of Common Law. Equitable rights* (also called equities) are those which were recognised solely in the *Court of Chancery.*

The Judicature Act of 1873 did *not* abolish either law or equity, but made them consistent with each other, by abolishing those rules of Common Law which *conflicted* with the rules of equity.

Difference between legal and equitable rights

Legal rights differ from equitable rights in *two* respects :

1. *In the methods of their creation and disposition.* — The methods of their *creation* and *disposition are* different. A legal mortgage of land *must* be created by deed, but an equitable mortgage may be created by a *written agreement or* by mere *deposit of title deeds.*

2. *In their efficacy.* — Legal rights are more *efficacious* than equitable rights. *Equitable rights have a more precarious existence than legal rights.* Where there are two inconsistent *legal* rights claimed *adversely* by different persons over the *same* thing, the *first in time prevails. A similar rule* applies to the competition of two inconsistent *equitable rights.* But when a *legal* and an *equitable* right *conflict*, the *legal* will *prevail over the equitable,* even though *subsequent* to it in origin, *provided that* the owner of the *legal* right acquired it for *value* and *without notice* of the prior equity.

Thus, legal rights are in all respects *superior* to, and *more efficacious* than, equitable rights.

Equity in India. — In India, both Common Law and Equity jurisdictions are combined in *one* Court, which acts according to justice, equity and good conscience *in the absence of specific rule of law.* The expression "justice, equity and good conscience" has generally been interpreted to mean the rules of English Equity, so far as they are applicable to Indian society and circumstances. In the absence of specific rules of law, the practice of the English Equity Courts would be followed in India with the necessary modifications.

Besides, Regulation 4 of 1827 required the East India Company's Courts to act according to justice, equity and good conscience *in the absence of a specific law and usage.* Under clause 36 of the Supreme Court Charter of 1823, the Supreme Court of Bombay was expressly made a Court of Equity and given an equitable jurisdiction corresponding to that of the Court of Chancery.

Whether Legal and Equitable Estates are recognised in India. — In England, estates are either *legal or equitable.* Thus, in England, the mortgagor's right to redeem is regarded as a creation of the Courts of Equity, and is an *equitable* right known as the equity of redemption. Such is *not* the case in India. No distinction is recognised in India between legal and equitable estates ; *Tagore* v. *Tagore*, (1872) I.A. Sup. Vol. 47, 71; *Webb* v. *Macpherson,* (1904) 30 I.A. 238.

In England, however, these estates are recognised. A contract to sell

property in England creates an interest in favour of the purchaser, and the vendor holds the property in trust for him. But in India, Ss. 40 and 54 of the Transfer of Property Act clearly show that merely by virtue of a contract of sale of an immoveable property, no interest is created in favour of the purchaser, but only an obligation is *annexed* to the ownership of the property.

Similarly, in England, a mortgage passes the legal estate to the mortgagee, and the mortgagor has only the equitable estate, namely, the equity of redemption. But in India, what passes to a mortgage is a few rights of ownership of the mortgagor, who is nevertheless the owner of the mortgaged property.

In the case of *Chhatra Kumari Debi* v. *Mohan Bikram,* (1931) 58 I.A. 279, the Privy Council endorsed the view taken in the two previous cases of *Tagore* v. *Tagore* and *Webb* v. *Macpherson,* (above), and observed as follows : "The Indian law does *not* recognise legal and equitable estates. By that law, therefore, *there can be but one 'owner'* and where the property is vested in a trustee, the 'owner' must, their Lordships think, be the trustee. This is the view embodied in the Indian Trusts Act, 1882, see Ss. 55, 56 etc..... the right of the beneficiary being in a proper case to call upon to convey to him."

7. Real and personal

A *real right* corresponds to a duty imposed upon *persons in general;* a *personal right* corresponds to a duty imposed upon *determinate individuals.* A real right is available against the world at large; a personal right is available only against particular persons. Thus *X*'s right *not* to be assaulted or defamed is available against the whole world, but *X's* right to proceed against his assailant or defamer is personal — being against a person individually.

Real rights, moreover, are more valuable and advantageous than personal rights. Real rights are mostly *negative;* personal rights are mostly *positive.*

8. Rights *in rem* and rights *in personam*

A right in *rem* is one which is available against the *whole* world. A right in *personam* is one which is available against a *particular individual* only. In personal rights, it is the *personal relation* that is the predominant factor, and therefore, such rights are called *jus* in *personam.*

A right *in rem* is a right vested *in some determinate person* (either *personally* or as a *member of the community) and available against the world at large.* Thus *X's* rights not to be defamed or assaulted are rights available against the *whole* world. Such rights are rights *in rem.* Their number is countless. Thus, the right to freedom of person, ownership and possession of property, the right to reputation, the right to copyright and trade-marks are all instances of *rights in rem.*

Write a short note on : Rights in rem and rights in personam.
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The very opposite of a right *in rem* is a right *in personam.* A right *in personam* is a right available *only against some determinate person* or

body, and in which the community at large has *no concern*. Thus, *X* agrees to sell his house to *Y* for a certain sum. *X* does not carry out the contract. *Y* will thereupon have a right to sue *X* for damages for breach of contract. Here, the *mutual* right of *X* and *Y* are created by their *private mutual agreement*. These rights are *personal* to both. Third parties are *not* concerned with them. Such rights are, therefore, called rights *in personam, i.e., personal rights*, as opposed to *general rights*.

Distinguish between rights in rem and rights in personam.
P.U. Apr. 97

Generally speaking, *rights in rem* are *negative rights*, whereas *rights in personam* are *positive rights*. Thus, a right to a debt or a right to a delivery of goods are rights which are *positive* as well as *in personam*. On the other hand, a right to reputation or the right to freedom of person are rights which are *negative* as well *in rem*. However, this is only the general rule, and some *negative rights* are also rights *in personam*. Thus, the right of an employer to ensure that an employee does *not* work with a rival employer is a *right in personam*, which is, at the same time, a *negative right*.

9. Rights (jus) *in re propria* and rights *in re aliena*

Write a short note on : Rights in re propria and rights in re aliena.
B.U. Oct. 96
Apr. 98
Apr. 99

The most absolute power which the law gives over a thing is called the right of property — *dominium*. This is the real right in a thing which is one's own — *jus in re propria*. But a man may have right in property *less* than full ownership, the *dominium* being, in fact, vested in *another*. Such rights are called *jura* (rights) *in re aliena*.

Both can be created in respect of the same property. "A right *in re aliena* is one which *limits or derogates from some* more general right belonging to some other person in respect of the same subject-matter. All other rights which are not thus limited are *jura in re propria*." — *Salmond*.

Define property. Explain "rights in re propria" and "rights in realiena".
B.U. Apr. 95

Thus, *X* mortgages his house to *Y* and gives him possession thereof. *X* thereby creates an *encumbrance*, by dividing his proprietary right in the house, of which *Y* becomes the temporary occupier. However, *X* still has the right to redeem the mortgage. This right, which is for the time being detached from *X's* complete ownership of the house, is a right *in re aliena*.

10. Servient and dominant

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

The land for the beneficial enjoyment of which the right exists is called the *dominant heritage*, and the owner or occupier thereof, the dominant owner; the land on which the liability is imposed is called the *servient heritage* and the owner or the occupier thereof, the servient owner. Thus, *A*, as the owner of a house has a right of way over the neighbour *B's* land, or has the right of maintaining eaves for the discharge of water from his roof on to *B's* grounds. *A's* house is the *dominant heritage*, and *A* is the *dominant owner* and *B's* house is the *servient heritage* and B is the *servient owner*.