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10 YEARS CELEBRATION

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SUBJECT TOPICS

1. **CUSTOM**
2. **PRECEDENT**
3. **LEGISLATION**
4. **POSSESSION**
5. **OWNERSHIP**
6. **RIGHTS AND DUTIES**
7. **HISTORICAL SCHOOL OF JURISPRUDENCE**

CHAPTER ONE: CUSTOM

DEFINITION OF CUSTOM

Salmond- Custom is the embodiment of those principles which have commended themselves to the national conscience as principles of justice and public utility.

Carter- The simplest definition of custom is that it is the conformity of the conduct of all persons under like circumstances.

Austin- Custom is a rule of conduct which the governed observe spontaneously and not in pursuance of law settled by a political superior.

Judicial Committee of Privy Council- A rule which in a particular family or a particular district has, from long usage, obtained the form of law.

Tanistry's Case- It is *jus non scriptum* and made by the people in respect of the place where the custom obtains, for where the people find any act to be good and beneficial and apt and agreeable to their nature and disposition, they use and practice it from time to time and it is by frequent alteration and multiplication of this act that the custom is made and being used from time to which memory runneth not to the contrary obtains the force of law.

ORIGIN OF CUSTOM

A study of ancient laws shows that in primitive society, the lives of the people were regulated by custom which developed spontaneously according to the circumstances. It was felt that a particular way of doing thing was more convenient than others.

Holland- Custom originated in the conscious choice by the people of the more convenient of the two acts. Imitation must have played an important part in the growth of customs.

Trade- Imitation is not mere curiosity of psychology, but it is one of the primary laws of nature. Nature perpetuates itself by repetition and the three fundamental forms of repetition are rhythm or undulation, generation and irritation.

Vinogradoff- Social customs themselves obviously did not take their form from assembly or tribunal. They grew up by gradual process. The magistrate came only at a later stage, when the custom was already in operation and added to the sanction of general recognition, the express formulation of judicial and expert authority.

BINDING FORCE OF CUSTOM

The very fact that any rule which has the sanction of custom raises a presumption that it deserves the sanction of law also. Judgments are inclined to accept those rules which have in their favor the prestige and authority of long acceptance.

Salmond- Custom is to society what law is to the state. Each is the expression and realization of

the measure of man‟s insight and ability of the principles of right and justice. Custom embodies them as acknowledged and approved, not by power of the state, but by the public opinion of the society at large. The binding force of custom is that the existence of an established wage is the basis of rational expectation of its continuance in the future. Justice demands that this expectation should be fulfilled and not frustrated. Sometimes, a custom is observed by a large number of persons in society and in course of time the same comes to have the force of law. Reference may be made in this connection to three grace days on bills of exchange. Customs rests on the popular conviction that it is in the interests of society. This conviction is so strong that it is not found desirable to go against it.

Paton- Custom is useful to the law giver and codifier in two ways. It provides the material out of which the law can be fashioned- it is too great an intellectual effort to create law *de novo*. There is inevitably a tendency to adopt the maxim „Whatever has been authority in the past is a safe guide for the future.

HISTORICAL THEORY REGARDING CUSTOM

The growth of law does not depend upon the arbitrary will of any individual. It grows as a result of the intelligence of the people. Custom is derived from the common consciousness of the people. Law has its existence in the general will of the people.

Savigny (Gives it the name of Volkegist)**-** Law, like language, stands in organic connection with nature or character of people and evolves with the people. Custom is the sign or badge of positive law and not its foundation or a ground of origin.

Puchta- Custom is not only self-sufficient and independent of state, *imprimatur* but it is a condition to all sound legislation.

James Carter- What has governed the conduct of men from the beginning of time will continue to govern it to the end of time. The human nature is not likely to undergo a radical change and therefore that to which we give the name of law always has been, still is, and will forever continue to be, custom.

CRITICISM

Paton- The growth of most of the customs is not the result of conscious thought but if tentative practice.

Jethrow Brown- That custom is often posterior to judicial decision is another fact about which no difference of opinion is possible. Under the preference of declaring custom, judges frequently give raise to it.

Nlen- All customs cannot be attributed to the common consciousness of the people. In many laws, customs have arisen on account of convenience of the ruling class.

Sir Henry Maine- Custom is a conception posterior to that of judgments.

The view of historical school is not balanced. Customs have not always arisen out of convenience or the needs of the people. Sometimes they have been imposed by the ruling class. The historical jurists did not pay proper attention to the fact that the state has power of abrogating custom.

ANALYTICAL THEORY REGARDING CUSTOM

The great advocates of analytical theory are Austin, Holland, Gray, Allen and Vinogradoff.

Austin- Custom is a source of law and not law itself. A customary law may take the quality of legal rules in two ways. It may be adopted by a sovereign or subordinate legislature and turned into a law in the direct mode or it may be taken as a ground of judicial decision which afterwards obtains as a precedent and in this case it is converted into a law after the judicial fashion. In whichever of these ways it becomes a legal rule, the law into which it is turned, emanates from the sovereign. Custom only has a persuasive value. Customary practices have to be recognized by the courts before they become law. Law styled customarily is not to be considered a distant kind of law. It is nothing but judiciary law founded upon anterior custom.

Holland- Customs are not laws when they arise but they are largely adopted into laws by state recognition. Binding authority has thus been conceded to custom, provided it fulfills certain requirements, the nature of which has also long since been settled, and provided it is not superseded by law of a higher authority. When therefore, a given set of circumstances is brought into court and the court decides upon them by bringing them within the operation of a custom, the court appeals to that custom, as it might to any other pre-existent law. It merely decides as a fact that there exists a legal custom about which there might, up to that moment, have been some question, as there might, about the interpretation of an Act of Parliament.

Gray- The true view, as I submit, is that law is what judges declare; that statutes, precedents, the opinions of the learned experts, customs and morality are the source of law; that custom is one of them, but to make it not only one source, but the sole source of law itself, requires a theory which is as little to be trusted as that of Austin.

CRITICISM

Allen- Custom grows by conduct and it is therefore a mistake to measure its validity solely by the element of express sanction awarded by courts of law or by other determinate authority. The characteristic feature of majority of custom is that they are essentially non-

litigious in origin. The starting point of all custom is convention rather than conflict, just as the starting point of all society is cooperation rather than dissension. The analytical theory contains some truth but that is only partial and not the whole truth. In most cases, customs are recognized not with the assumption that the recognition gives them the sanctity of law but with the assumption that they are the law and have to be treated as such.

Vinogradoff- Most of the branches of law did not start from legislation or from any other source. They started from customs. This applies to law of succession, property, possession and contract.

CLASSIFICATION OF CUSTOMS

The customs in their wider sense may be classified into two classes-

- Customs without sanction- They are those customs which are non-obligatory. They are observed due to pressure of the public opinion. The Austinian term for them is „positive morality".
- Customs with sanction- They are those customs which are enforced by the state. It is with these customs that we are concerned here.

LEGAL CUSTOM:-

A legal custom is one whose legal authority is absolute. It possesses the force of law *pro prio vigor*. The parties affected may agree to a legal custom or not but they are bound by the same. A legal custom is of two kinds. It is either a local custom or a general custom of the realm.

LOCAL CUSTOM

1. The term „custom" in its narrowest sense means local custom exclusively.
2. Local custom is that which prevails in some defined locality only such as borough or county and constitutes a source of law for that place only
3. In order that a local custom may be valid and operative as a source of law, it must conform to certain requirements. It must be reasonable. It must conform to statue law. It must have been observed as obligatory. It must be of immemorial antiquity.
4. It must be reasonable. The authority of usage is not absolute but conditional on a certain measure of conformity with justice and public utility.
5. The true rule is that in order to be deprived of legal efficacy, a custom must be so obviously and seriously repugnant to right and reason, that to enforce it as law would do more mischief than that which would result from the overturning of the expectations and agreements, based on its turning of the expectations and agreements, based on its presumed continuance and legal validity.

6. Another requirement is that a local custom must be in conformity with statute law. It must not be contrary to an Act of Parliament.
7. It must be observed as a matter of right. This does not mean that the custom must be acquiesced in as a matter of moral right. The custom must have been followed openly, without the necessity of recourse to force and without the permission of those adversely affected by the custom being regarded as necessary.
8. Legal custom is its immemorial antiquity. In order to have the force of law, the custom must be immemorial

GENERAL CUSTOM

1. A general custom prevails throughout the country and constitutes a source of the law of the land. The common law of the realm is the common custom of the realm.
2. There is no unanimity of opinion on the point whether the general custom must be immemorial or not.
3. A general custom must be immemorial. The general rule is that a general custom cannot have the force of law unless and until it is also immemorial.
4. When a general custom is adopted as a precedent, it is accepted as a form of conventional law. It is adopted because common law provides that an agreement should be enforced according to its terms.
5. A general custom, once recognized, cannot be set aside by a later general custom. A general trade custom cannot become law if it conflicts with law.

Keaton- A general custom must satisfy certain conditions. It is to be a source of law. It must be reasonable. It must be generally followed and accepted as binding. It must have existed from time immemorial. It must not conflict with statute law of the country. It should not conflict with the common law of the country.

CONVENTIONAL CUSTOM OR USAGE

A conventional custom is one whose authority is conditional on its acceptance and incorporation in the agreement between the parties to be bound by it.

A conventional custom is an established practice which is legally binding because it has been expressly or impliedly incorporated in a contract between the parties concerned. There are certain implied terms which can be omitted.

The intention of the parties to the contract can be gathered from the customary law and other things which can reasonably be taken to be implied in the contract. The customs of the locality or trade or profession are taken to be included in the contract. The courts are bound to take notice of these customs.

There are some conditions:

- It must be showed that the convention is clearly established and it is well known. It implies that both the parties were aware of such a convention.

- Conventions cannot alter the general law of land. Therefore, they are valid only within the area of their observance.
- They must be reasonable. If certain conventions are expressly excluded by the parties, they will not be enforced.

ESSENTIALS OF A CUSTOM

The following are the essentials of a valid custom:-

1. **Antiquity**:-

- **Blackstone-** A custom, in order that it may be legal and binding, must have been used so long that the memory of man runneth not to the contrary. So that if anyone can show the beginning of it, it is no good custom.
- The idea of immemorial custom was derived by the law of England, from the Canon law and by the Canon law from the Civil law. An arbitrary time limit, that is, the year 1189, the first year of the reign of Richard I, has been fixed, at which the custom must be proved into existence.
- **Sir George Rankin** (In *Baba Narayan V. Saboosa*)**-** In India, while a custom need not be immemorial, the requirement of long usage is essential since it is from this that custom derives its force as governing the parties‟ right in place of the general law.

2. **Continuance**:-

- If a custom has been followed continuously and without any interruption for a long time, it gains recognition.
- If it has been interrupted, the presumption is that it never existed at all.

3. **Reasonableness**:-

- A custom must be reasonable. It gives a good deal of discretion to the court in the, matter of recognition of customs.
- It has been settled that the time to decide the reasonableness of a custom is the time of its origin.

Allen- The rule regarding reasonableness is not that a custom will be admitted, if reasonable, but that it will be admitted unless it is unreasonable. The courts are not at liberty to disregard a custom whenever they are not satisfied as to its absolute rectitude and wisdom or whenever

they think a better rule can be formulated in the exercise of their own judgment, otherwise, a custom will lose much of its force and sanctity.

4. The enjoyment of custom must be **peaceable enjoyment**. If that is not so, consent is presumed to want it.
5. **Certainty**:-

- A valid custom must be certain and definite.
- A custom which is vague or indefinite cannot be recognized.
- It is more a rule of evidence than anything else.
- The court must be satisfied by a clear proof that custom exists as a matter of fact or as a legal presumption of fact.

6. **Obligatory force**:-

- A custom is valid if its observance is compulsory. An optional observance is ineffective.
- **Blackstone-** A custom that all the inhabitants shall be rated, towards maintenance of a bridge, will be good but a custom that every man is to contribute thereto at his own pleasure, is idle and absurd and indeed no custom at all.

7. **General or universal**.-

- **Carter-** Custom is effectual only when it is universal or nearly so in the absence of unanimity of opinion, custom becomes powerless, or rather doesn‟t exist.

8. **Privy Council** in *Raja Varma V. Ravi Varma* held that **Public policy**, when against custom, will invalidate that the custom was bad in law.
9. **Conformity with statutory law**:-

- A state can abrogate custom but not vice-versa.
- But according to the historical school, a custom is superior to statute and it can supersede a statute, though this view has nowhere been recognized in practice. The English rule is that a custom will not be recognized if it is in conflict with some fundamental principle of the common law.
- **Coke-** No custom or prescription can take away the force of an Act of Parliament.

CHAPTER TWO: PRECEDENT

Every developed legal system possesses a judicial organ. The main function of the judicial organ is to adjudicate the rights and obligations of the citizens. In the beginning, in this adjudication the courts are guided by customs and their own sense of justice. As society progresses, legislation becomes the main source of law and the judges decide cases according to it. Even at this stage the judges perform some creative function. In the cases of first impression, in the matters of interpretation, or in filling up any lacuna in the law made by legislation the judges, to some extent, depend on their sense of right and wrong and in doing so, they adapt the law to the changed conditions.

DEFINITION OF PRECEDENT

In general English, the term precedent means, *„A previous instance or case which is, or may be taken as an example of rule for subsequent cases, or by which some similar act or circumstances may be supported or justified."*

According to Gray, „*A precedent covers everything said or done, which furnishes a rule for subsequent practice.*"

According to Keeton, „*A judicial precedent is judicial to which authority has in some measure been attached*."

According to Salmond, In loose sense it includes merely reported case law which may be cited & followed by courts. In strict sense, that case law which not only has a great binding authority but must also be followed.

According to Bentham precedents are „Judge made Law." According to Austin precedents are „Judiciary"s Law."

In general in the judicial field, it means the guidance or authority of past decisions for future cases. Only such decisions as lay down some new rule or principle are called judicial precedents. The application of such judicial decisions is governed by different principles in different legal systems. These principles are called „Doctrine of Precedent". For this case to be held, first such precedents must be reported, maybe cited and may probably be followed by courts. Secondly, the precedent under certain circumstances must be followed.

Thus it can be inferred that precedents are:

- Guidance or authority of past decisions for future cases.
- Precedents must be reported, maybe cited and may probably be followed by courts.
- Precedents must have *opinio-juris*.
- These must be followed widely for a long time and must not violate any existing statue law.

IMPORTANCE OF PRECEDENTS

In the Ancient Legal System:

The importance of the decisions as a source of law was recognized even in very early times. In the past, there have been numerous instances of this. Sir Edward Coke, in the preface of the sixth part of his report, has been written that Moses was the first law reporter. „In the case of the daughters of Zelophehad, narrated at the beginning of the twenty- seventh chapter of the book of numbers, the facts are stated with the great clearness and expressly as a precedent which ought to be followed.‟ Even in the Mahabharata, it has been stated that, „The path is the right one which has been followed by virtuous men.‟ This may be interpreted as giving a theory of precedent. In ancient legal systems of Babylonia and China, the judicial decisions were considered to be a great authority, and later on, they were embodied in code law.

In the Modern Legal System:

Among the modern legal systems, the Anglo – American law is judge made law. It is called „Common Law‟. It developed mainly through judicial decisions. Most of the branches of law, such as torts, have been created exclusively by judges. The Constitutional Law of England, especially the freedom of the citizens, developed through judicial decisions.

According to Tennyson, where freedom slowly broadness down, from precedent to precedent. Not only in the municipal law but in international law also, the precedents have their importance. The decisions of the International Court of Justice are an importance source of International law. These precedents have been recognised by the International Court of Justice by Article 38(2) (d) of the Statue of the International Court of Justice. Further, Article 59 of the same holds that the decisions of the court only have persuasive value for future cases and hence the International Court of Justice is not bound by its own decisions in

deciding similar cases in future. It holds that the decision is only binding the parties to the case.

Supreme Legislation is that which proceeds from the sovereign power in the State or which derives its power directly from the Constitution. It cannot be repealed, annulled or controlled by any other legislative authority. Subordinate Legislation is that which proceeds from any authority other than the sovereign power. It is dependent for its continued existence and validity on some superior authority. The Parliament of India possesses the power of supreme legislation. Legislative powers have been given to the judiciary, as the superior courts are allowed to make rules for the regulation of their own procedure. The executive, whose main function is to enforce law, is given in some cases the power to make rules. Such subordinate legislation is known as executive or delegated legislation. Municipal bodies enjoy by delegation from the legislature a limited power of making regulations or bye-laws for the area under their jurisdiction. Sometimes, the State allows autonomous bodies like universities to make bye-laws, which are recognized and enforced by the Courts of Law**.**
Courts may consider obiter dicta in opinions of higher courts. Dicta of a higher court, though not binding, will often be persuasive to lower courts. The obiter dicta is usually, as its translation "other things said", but due to the high number of judges and several personal decisions, it is often hard to distinguish from the ratio decidendi (reason for the decision). For this reason, the obiter dicta may usually be taken into consideration.

In law, a binding precedent (also mandatory precedent or binding authority) is a precedent which must be followed by all lower courts under common law legal systems. In English law it is usually created by the decision of a higher court, such as the Supreme Court of the United Kingdom, which took over the judicial functions of the House of Lords in 2009. In Civil law and pluralist systems, as under Scots law, precedent is not binding but case law is taken into account by the courts. Binding precedent relies on the legal principle of *stare decisis*. A stare decisis means to stand by things decided. It ensures certainty and consistency in the application of law. Existing binding precedents from past cases are applied in principle to new situations by analogy. There are three elements needed for a precedent to work. Firstly, the hierarchy of the courts needs to be accepted, and an efficient system of law reporting. „A balance must be struck between the need on one side for the legal certainty resulting from the binding effect of previous decisions, and on the other side the avoidance of undue restriction on the proper development of the law.

STARE DECISIS

Stare decisis is the legal principle by which judges are obliged to respect the precedents established by prior decisions. The words originate from the phrasing of the principle in the Latin maxim *Stare decisis et non quieta movere*: "to stand by decisions and not disturb the undisturbed." In a legal context, this is understood to mean that courts should generally abide by precedents and not disturb settled matters.

This doctrine is basically a requirement that a Court must follow the rules established by a Court above it. The doctrine that holdings have binding precedence value is not valid within most civil law jurisdictions as it is generally understood that this principle interferes with the right of judges to interpret law and the right of the legislature to make law. Most such systems, however, recognize the concept of *jurisprudence constante*, which argues that even though judges are independent, they should judge in a predictable and non-chaotic manner. Therefore, judges‟ right to interpret law does not preclude the adoption of a small number of selected binding case laws.

RATIO DECIDENDI AND OBITER DICTUM

There are cases which involve questions which admit of being answered on principles. Such principles are deduced by way of abstraction of the material facts of the case eliminating the immaterial elements. The principle that comes out as a result of such case is not applicable only to that case, but to cases also which are similar to the decided case in their essential features. This principle is called Ratio Decidendi. The issues which need determination of no general principles are answered on the circumstances of the particular case and lay down no principles of general application. These are called Obiter Dictum. It is the Ratio Decidendi of a case that is binding and not the Obiter Dictum that has a binding effect of a Precedent. But it is for the judge to determine the Ratio Decidendi of the decision and to apply it on the case which he is going to decide. This gives an opportunity to him to mould the law according to the changed conditions by laying emphasis on one or the other point.

Merits of the Doctrine of Precedents

It shows respect to one ancestors‟ opinion. Eminent jurists like Coke and Blackstone have supported the doctrine on this ground. The say that there are always some reasons behind these opinions, we may or may not understand them. Precedents are based on customs, and

therefore, they should be followed. Courts follow them because these judicial decisions are the principal and most authoritative evidence that can be given of the existence of such a custom as shall form a part of the common law.

As a matter of great convenience it is necessary that a question once decided should be settled and should not be subject to re-argument in every case in which it arises. It will save labour of the judges and the lawyers. Precedents bring certainty in law. If the courts do not follow precedents and the judges start deciding and determining issues every time afresh without having regard to the previous decisions on the point, the law would become the most uncertain.

Precedents bring flexibility to law. Judges in giving their decisions are influenced by social, economic and many other values of their age. They mould and shape the law according to the changed conditions and thus bring flexibility to law. Precedents are Judge made law. Therefore, they are more practical. They are based on cases. It is not like statue law which is based on a priori theory. The law develops through precedents according to actual cases.

Precedents bring scientific development to law. In a case Baron Parke observed „It appears to me to be great importance to keep the principle of decision steadily in view, not merely for the determination of the particular case, but for the interest of law as a science."

Precedents guide judges and consequently, they are prevented from committing errors which they would have committed in the absence of precedents. Following precedents judges are prevented from any prejudice and partially because precedents are binding on them. By deciding cases on established principles, the confidence of the people on the judiciary is strengthened. As a matter of policy, decisions, once made on principal should not be departed from in ordinary course.

Demerits of the Doctrine of Precedents

There is always a possibility of overlooking authorities. The vastly increasing number of the cases has an overwhelming effect on the judge and the lawyer. It is very difficult to trace out all the relevant authorities on the very point.

Sometimes, the conflicting decisions of superior tribunal throw the judge of a lower court on the horns of a dilemma. The courts faced with what an English judge called "complete fog of authorities."

A great demerit of the doctrine of precedent is that the development of the law depends on the incidents of litigation. Sometimes, most important points may remain unjudicated because nobody brought action upon them.

A very grave demerit or rather an anomaly of the doctrine of precedent is that, sometimes it is extremely erroneous decision is established as law due to not being brought before a superior court.

Factors undermining the authority of a precedent

1. Abrogated decisions – A decision ceases to be binding if a statute or statutory rule inconsistent with it is subsequently enacted, or if it is reversed or overruled by a higher court.
2. Same decision on appeal is reversed by the appellate court. – 24th amendment of Indian Constitution was passed to nullify the decision of the SC in the case of Golaknath.
3. Affirmation and Reversal on a Different Ground – A decision is affirmed or reversed on appeal on a different point.
4. Ignorance of Statute – A precedent is not binding if it was rendered in ignorance of a statute or a rule having the force of statute i.e. delegated legislation. A court may know of existence of the statute or rule and yet not appreciate in the matter in hand. Such a mistake also vitiates the decision. Even a lower court can refuse to follow a precedent on this ground.
5. Inconsistency with Earlier Decision of Higher Court – A precedent is not binding if the court that decided it overlooked an inconsistent decision of a high court. High courts cannot ignore decision of Supreme Court of India.
6. Inconsistency with Earlier Decision of Same Rank – A court is not bound by its own previous decisions that are in conflict with one another. The court of appeal and other courts are free to choose between conflicting decisions, even though this might amount to preferring an earlier decision to a later decision.

7. Precedent *sub silentio* or not fully argued – When a point is not involved in a decision is not taken notice of and is not argued by a counsel, the court may decide in favour of one party, whereas if all the points had been put forth, the decision in favour of one party. Hence, such a rule is not an authority on the point which had not been argued and this point is said to pass *sub silentio.* Binding force of a precedent does not depend on whether a particular argument was considered therein or not, provided the point with reference to which an argument was subsequently advanced was actually decided by the SC.

CONCLUSION

From the brief discussion above about the legal value of precedents we can clearly infer that these play a very important role in filling up the lacunas in law and the various statues. These also help in the upholding of customs that influence the region thereby making decisions morally acceptable for the people. This thereby increases their faith in the judiciary which helps in legal development. These moreover being a sort of respect for the earlier views of various renowned jurists, helps in upholding the principle of stare decisis. It is a matter of great convenience it is necessary that a question once decided should be settled and should not be subject to re-argument in every case in which it arises. It will save labour of the judges and the lawyers. This way it saves lots of time for the judiciary which is a real challenge in the present day legal system with so many cases still pending for many years now. Precedents bring certainty in law. If the courts do not follow precedents and the judges start deciding and determining issues every time afresh without having regard to the previous decisions on the point, the law would become the most uncertain. Precedents bring flexibility to law. Judges in giving their decisions are influenced by social, economic and many other values of their age. They mould and shape the law according to the changed conditions and thus bring flexibility to law.

CHAPTER THREE: LEGISLATION

In modern times, legislation is considered as the most important source of law. The term *'legislation'* is derived from the Latin word *legis* which means *'law'* and *latum* which means *"to make"* or *"set"*. Therefore, the word *'legislation'* means the *'making of law'*. The importance of legislation as a source of law can be measured from the fact that it is backed by the authority of the sovereign, and it is directly enacted and recognised by the State. The expression *'legislation'* has been used in various senses. It includes every method of law-making. In the strict sense it means *laws enacted by the sovereign or any other person or institution authorized by him.*

According to *Salmond* legislation is that „source of law which consists in the declaration of rules by a competent authority. For Gray, legislation is the formal utterances of the legislative organs of the society. Legislation is that source of law, which consists in the declaration, or promulgation of legal rules by an authority duly empowered by the Constitution in that behalf. It is sometimes called *Jus Scriptum* (written law) as contrasted with the customary law or *Jus non-scriptum* (unwritten law). *Salmond* prefers to call it „enacted law". Statue law or statutory law is what is created by legislation, for example, Acts of Parliament or of State Legislature. Legislation is either supreme or subordinate (delegated).

The kinds of legislation can be explained as follows:

(i) Supreme Legislation: When the laws are directly enacted by the sovereign, it is considered as supreme legislation. One of the features of Supreme legislation is that, no other authority except the sovereign itself can control or check it. The laws enacted by the British Parliament fall in this category, as the British Parliament is considered as sovereign. The law enacted by the Indian Parliament also falls in the same category. However in India, powers of the Parliament are regulated and controlled by the Constitution, through the laws enacted by it are not under the control of any other legislative body.

Subordinate Legislation: Subordinate legislation is a legislation which is made by any authority which is subordinate to the supreme or sovereign authority. It is enacted under the delegated authority of the sovereign. The origin, validity, existence and continuance of such legislation totally depends on the will of the sovereign authority. Subordinate legislation further can be classified into the following types:-

(a) Autonomous Law: When a group of individuals recognized or incorporated under the law as an autonomous body, is conferred with the power to make rules and regulation, the

laws made by such body fall under autonomous law. For instance, laws made by the bodies like Universities, incorporated companies etc. fall in this category of legislation.

(b) Judicial Rules: In some countries, judiciary is conferred with the power to make rules for their administrative procedures. For instance, under the Constitution of India, the Supreme Court and High Courts have been conferred with such kinds of power to regulate procedure and administration.

(c) Local laws: In some countries, local bodies are recognized and conferred with the law-making powers. They are entitled to make bye-laws in their respective jurisdictions. In India, local bodies like *Panchayats* and Municipal Corporations have been recognized by the Constitution through the 73rd and 74th Constitutional amendments. The rules and bye-laws enacted by them are examples of local laws.

(d) Colonial Law: Laws made by colonial countries for their colonies or the countries, controlled by them are known as colonial laws. For a long time, India was governed by the laws passed by the British Parliament. However, as most countries of the world have gained independence from the colonial powers, this legislation is losing its importance and may not be recognized as a kind of legislation.

(e) Laws made by the Executive: Laws are supposed to be enacted by the sovereign and the sovereignty may be vested in one authority or it may be distributed among the various organs of the State. In most of the modern States, sovereignty is generally divided among the three organs of the State. The three organs of the State namely legislature, executive and judiciary are vested with three different functions. The prime responsibility of law-making vests with the legislature, while the executive is vested with the responsibility to implement the laws enacted by the legislature. However, the legislature delegates some of its law-making powers to executive organs which are also termed delegated legislation. Delegated legislation is also a class of subordinate legislation. In welfare and modern states, the amount of legislation has increased manifold and it is not possible for legislative bodies to go through all the details of law. Therefore, it deals with only a fundamental part of the legislation and wide discretion has been given to the executive to fill the gaps. This increasing tendency of delegated legislation has been criticized. However, delegated legislation is resorted to, on account of reasons like paucity of time, technicalities of law and emergency. Therefore, delegated legislation is sometimes considered as a necessary evil.

IMPORTANCE OF LEGISLATION IN INDIA

Today, in India the place of legislation as a source of law is very high. Among the sources of law, the most important, today as so recognized, is that of legislation. Custom, which played a significant role in ancient times, lost much of its importance. At present customary laws have been incorporated in statutes. Legislation is considered as superior even to precedents. Sometimes, Precedents produce sound law, but at times, bad or fallacious judgments are responsible for bad law by production of unsound precedent. If a precedent is unsound, it is very difficult to remedy the defect and the procedure is a lengthy one. At first the trying judge in the same High Court must decide the case at hand according to the precedent. The aggrieved party may then go in appeal and the Appellate Court may give the right judgment. The defects of legislation can more readily be got over by a proper judicial interpretation of statute or by amendment of the Act. It is this abrogative power and amending facility that gives legislation superiority over precedents. Besides this, legislation voices the views of the people; bills are circulated for public opinion and it is the voice of public opinion echoed in the voice of statute.

Another great advantage of legislation is that it is direct and unambiguous. Whereas precedent provides rule which only a lawyer can unravel from the mass of decisions in support and even among lawyers often there is considerable divergence of opinion as to the rule that is laid down. Again, legislation is definite and precise as comparison to case law which is mostly bulky and voluminous. Further, legislation is the predeclaration of law to the citizens of the State before the law can be applied to their disputes or actions. A precedent for the first time declares what the law on a point is, till then the parties to the litigation were in doubt about law. A precedent may come as an unpleasant and unexpected surprise to a party and cause him serious damage. Enacted law, the product of legislation, on the other hand declares beforehand what the rights and liabilities of the panics will be and thus leads to greater justice to the parties.

CHAPTER FOUR: POSSESSION

"Possession" is polymorphous term which may have different meaning in different contexts. It is impossible to work out a completely logical and precise definition of *"possession"* uniformly applicable to all situations in the context of all statues. Possession is an evidence of ownership . It transfer is one of the chief methods of transferring ownership. The possession of a thing *"even if it is wrongful"* is a good title against the whole world except the real owner. That is why it is said that *"possession is nine points of the law".*

Possession of material things is essential to life because the existence of human life and human society would be rather impossible without the consumption and sue of material things. Many important legal consequences flow from the acquisition and loss of possession. Besides being a *"primci-facie"* evidence of ownership, it is also one of the modes of transferring ownership. Possession is said to be nine out often points of law meaning thereby that it is an evidence of ownership and he who interferes with the possession of another, must show either title or better possessory right.

DEFINITION OF POSSESSION

Jurists have defined possession according to their own notions. POLLOCK says that having physical control over a thing constitutes possession. According to SALMOND, *"the possession of a material object is the continuing exercise of a claim to the exclusive use of it".* Thus, possession involves two things:-

i) Claim of exclusive user; and

ii) Conscious or actual exercise of this claim i.e. physical control over it.

The former is mental element called *"animus possessions"* and the latter is physical element as the *"corpus possidendi".*

Professor ZACHAIAE observes that possession is a relation between a person and a thing which indicates that the person has an intention to possess that thing and has the capacity of disposing it off. SAVIGNY, in his theory of possession says that the essence of corporeal possession is to be found in the physical power of exclusion. The first is *"corpus"* i.e. physical power to possess a thing for the first time. The second is having initially acquired the thing, there must be physical power to retain it.

SALMOND, however, does not agree with SAVIGNY"s view that possessor must have physical power to exclude alien interference. The true test according to him is not the physical power of exclusion but the *"improbability of interference by other".* WINDSCHEID IHRING is of the opinion that the element of *"animus possidendi"* is altogether immaterial

and cannot serve as a test of legal possession. The legal possession, therefore, does not depend on the nature of the intention but the manner or character in which the claim to possession is made.

It is submitted that if IHRING‟s theory of possession is accepted, it would provide on solution to the question as to why a thief can claim possession of the thing which he has stolen but not the servant who is1 in possession of his master‟s goods. HOLMES writes, *"to gain possession a man must stand in certain physical relation to the object and to the rest of the world, and must have a certain intent".* POLLOCK pointed out that in common speech a man is said to possess or to be in possession of anything of which he has the apparent control, or from the use of which he has the apparent power of excluding others.

According to MARKBY possession is the determination to exercise physical control over a thing on one's own behalf coupled with the capacity to do so, MAINE defines possession as *"physical detention coupled with the intention to hold the thing detained as one's own* KANT defines possession and says, that, "*there must be empirical fact of taking possession conjoined with the will to have external object as one"s own".*

Hence from the definition the conclusion which can be made is that there are two elements which are essential to constitute the concept of possession as complete and valid. These are:-

i) Physical element which consists in physical control over the thing,

ii) A mental element which consists in the determination to exercise that control.

The physical element is called the *"corpus possession"* is and the mental element is called‟ as the "*animus possidendi"*. It is said that to constitute a valid and complete possession both these elements must be present i.e. there must be *"animus possidendi"* which means the intention to possess as well as "*corpus possessionis"* i.e. the thing must be actually possessed by the person who has intention to possess it. Both these elements but must be present in the case of possession and neither of them alone is sufficient to constitute possession.

Possession is divided into two categories:-

i) POSESSION IN FACT

ii) POSESSION IN LAW

Possession in law means possession in the eye of law. It means a possession which is recognized and protected by law. There is sometimes a discrepancy between possession in fact „and possession in law, although usually possession exists both in fact and in law in the same person. A person who is in *"de facto"* possession of a thing also comes to have *"de jure"* possession. Of possession in fact and in law there may be three situations viz:-

1) Possession in fact as well as hi law

2) Possession in fact not in law

3) Possession in law and not in fact

The first type of possession is the perfect possession while the second type of possession is not called as the possession actually simply a custody as the possession of servant over. the thing of his master, and the third types of possession is property called as construction possession as 1 have a railway receipt for the goods which are with the railway. A tenant may be occupying a particular building but the landlord has the constructive possession of the same. The same is the case with the things in the possession of servants, agents and bailees. The relation between a person and a thing which he possesses is called possession in fact or *"de facto possession"*.

It indicates physical control of a person and a thing. For instance, if a person has caged a parrot, he would be deemed to have possession of it so long as the parrot is in the cage but as soon as the part escapes fro the cage of set free, he would have possession over it. Certain points regarding possession in fact must be carefully rated. They are.

1) There are certain things over which a person cannot have physical control e.g. sun, moon, stars, etc.

2) The physical control over the object need not be continuous. For instance, I possess my coat when I am wearing it, I still have possession of it when I take it off and hang it on a pag when I go to sleep. The basic idea is that I should be in a position to resume control over it in normal course whenever I so desire. In other words physical control may continue even if a person relinquishes actual control temporarily.

3) In order to constitute possession in fact, merely having physical control of a thing is not enough but it must be accompanied by capacity to exclude others from the possession of it. However, some jurists do not consider the element necessary for possession.

4) In order to determine the question of acquisition, abandonment or termination of possession, the distinctive feature is the desire of the person whether he desires to retain possession or not.

POSSESSION IN LAW

Possession in law is also termed as *"de jure "* possession. It has already been stated that the law protects possession for two obvious reasons, namely,

i) By conferring certain legal rights on the possessor;

ii) By penalizing the persons who interfere with the possession of a person or by making him pay damages to the possessor.

Whenever a person brings a suit for possession the first thing that the court ascertains is whether the plaintiff was formerly in real possession of the thing in dispute. It is true that in most of the actual or factual possession testifies legal possession yet there are many situations when a person does not have possession in law although he is in actual possession of the object. In the legal sense, possession is used as a relative term. The law is generally not concerned with the question as to who has the best title, but it is concerned as to which of the parties before it has a better title. A few cases may be cited in support of this contention.

ELEMENTS OF POSSESSION

Legal possession has two essential elements, namely:-

CORPUS POSSESSIONS-

"corpus" is the effective realization in fact of the claim of the possessor. Effective realization means that the fact must amount to the actual present exclusion of all alien interference with the thing possessed together with a reasonably sufficient security of the exclusive use of it in the future. The possessor has physical power or physical contact over the thing possessed. The possessor has the absolute power of dealing with the thing in any way he pleases. He has also the absolute power of excluding others form the possession, private use or enjoyment of the thing concerned.

The test of possession is sometimes the appearance of power to exclude others. The exclusion of others may be by means of physical strength, physical barriers, concealment, and vigilance, the personal presence of the possessor, custom or the manifestation of the will to hold or *"animus domini".* The possessor may use physical force to exclude others. He may lock up his thing to maintain his possession. He may conceal his things from others so that they may not run away with them. He may keep a dog or a chowkidar to protect his possession. The moral sentiment, religion or law may protect the possession of the possessor. The same may be done by the custom of the country or the personal presence of the possessor. It is pointed out that it is not necessary that the possessor must have physical contact with the thing possessed.

All that is necessary is that he must have the physical power of dealing with the thing exclusively as his own. 1 put some money in a box and lock up the same with the key. Although I have no physical contact with the box, the box is in my possession s the key of the box is in my possession. A person has some money in a pocket and some of it is dropped on the road. He continues to be the possessor of the money fallen on the road till the same is

picked up by somebody else. When a person gives a dinner, his silver forke while in hands of his guests, are still in his possession. It is to be observed that the corpus of possession is not the same as the physical power to exclude others. A weak person may not have the power to exclude others, but he still has the *"corpus"* of possession. As a matter of fact, „*corpus*' depends more on the general exception that others will not interfere with the control of an individual over a thing than upon the physical capacity of an individual to exclude others. Corpus implies two things, namely:-

i) Possessor‟s physical relation to the res i.e the object; and

ii) The relation of the possessor to the rest of the world

The first point emphasizes that there must exist some physical contact of a person with a thing which he possesses so as to give rise to a reasonable assumption that others will not interfere with it. The physical control of the possessor over a thing implies that others would not interfere with the possessor‟s right to use or enjoyment of that thing.

One notable feature of *"corpus"* is that possession is not lost by temporary absence of the possessor from the object If a person throws a net in the tank to catch fishes, he does not acquire possession over the fishes until they are caught in the net. Likewise, the possession of a person over his pet dog which is let-loose to move about freely is not lost during the time it is moving freely, because he still has the "*corpus "* and *"animus* " over it.

ANIMUS POSSIDENDI-

"Animus possidendi" or the subjective element in possession is the intent to appropriate to oneself the exclusive use of the thing possessed. It is an exclusive claim to a material subject. The *"animus possidendi"* is in the conscious intention of an individual to exclude others from the control of an object.

It is to be observed that the "*animus sibi habendi"* is not necessary a claim of right. It may be a wrongful claim. A thief has as much real possession of a thing as the true owner. The possessor of a tiling is one who intends to act as if he has a right to that tiling. The claim of the possessor must intend to exclude others from the use and enjoyment of the thing possessed by him. A mere claim to the use of a thing does not amount to the possession of the material thing itself although it may amount to some form of incorporeal possession. A person who has a right of way over a piece of land does not possess the land but has his right to the use of land for a particular purpose. He is not in possession of the land because he has not the "*animus"* of exclusion. However, exclusion of others may not be absolute. I have the

possession of the land although person may have the right way of way over the same land. The right of way merely puts a restriction on the sue of the land by me.

The "*animus possidendi* " need not amount to a claim or intent to use the thing as owner. A tenant or a borrower or a pledge is as much in possession of a thing as the true owner himself. The extent and duration of exclusive use may be a short one but that constitutes possession. Moreover, the "*animus possidendi"* need not be a claim on one‟s own behalf. Servants, agents and trustees have possession of things although they possess those things on behalf of others.

The "*animus possidendi"* need not be specific and may be in general terms. A general intention to possess exclusively a class of things is sufficient to confer things in the general category. I have a general possession of all the books in my library even if I do now know the existence of all the books in the library. Likewise, a shopkeeper has the general possession of all the things in his shop. A person who receives a letter comes to have general possession of all that is in the letter. However, if a person buys a certain thing which is believed to be empty and later on something is found in a secret drawer, he purchaser does not acquire possession of the thing found in the drawer.

KINDS OF POSSESSION

The following are the kinds of possession:-

a) **Corporeal possession**- Corporeal possession is the possession of material things like land, house, buildings and movables like books, chattels, etc. In this case of corporeal possession, the *"corpus"* consists firstly in confirming exclusion of other‟s interference and secondly in the enjoyment of the thing at will without external interference. Actual use of thing is, however, not necessary. Thus a person may keep his watch locked in a safe for several years without using.it, he would nevertheless be deemed to be in possession of it. The corporeal possession, therefore, consists not in dealing with the thing but only in the powers of dealing with it at will.

b) **Incorporeal possession**- Incorporeal possession, means possession of immaterial or intangible things which we cannot touch, see or perceive. The examples are possession of a copyright or a trade-mark or a right of reputation, goodwill, etc. Unlike corporeal possession, in case of incorporeal possession, actual continuous use and enjoyment is deemed as an essential condition. The reason being that in this case power of exercising the possession at will is not visible as an objective facts because of its incorporeal nature.

c) **Mediate possession** is when our possession is one with someone else on our behalf. Moderate possession is known as indirect possession. When that relation is through the intervention or agency of some other person, it is called mediate possession. If I send an agent to the bazaar to buy something and he does make the purchase, his possession is mediate, and the possession of the agent is mediate. For instance, if I purchase a book through my agent or servant, I have mediate possession so long as the book remains in my agents or servant‟s possession.

d) **Immediate possession** is also called direct possession. If the relation between the possessor and the thing possessed is a direct one, it is called immediate possession. For example, if I purchase a book myself, I have immediate possession of it without any intervening agency. The things in possession of a master, principal and owner are said to be in their immediate possession. Immediate or direct or primary possession is the possession that a person acquires or gets directly or personally. Such possession implies a direct and actual hold over the thing. It implies that there is no intermediary to hold the thing.

e) **Concurrent Possession or Duplicate Possession**- When two or more persons possess the same thing at the same time, but their clams are not adverse to each other. In the case of concurrent possession, the possession of a thing may be in the hands of two or more persons at the same time. Claims which are not adverse and which are not mutually destructive, admit of concurrent realization. In this case of concurrent possession, mediate and immediate possession may exist in respect of the same thing. Constructive possession is not actual possession. It is a possession in law and not possession in fact. Tire goods sold by me are lying in a warehouse and if I hand over the lays of the warehouse to the purchaser, the latter comes to have the constructive possession of the thing. If I hand over the key of a building to a tenant, I give the constructive possession of the building to the tenant. The handing over of the key shows that possession has changed in law although not in fact.

f) ***Adverse "*possession**- means the possession of one person against that of another person; the first mentioned person claims an exclusive right to the land of another. If the claimant who is actually in possession carries on with ***"unbroken"*** possession for a period e.g. of ***"twelve years"*** or ***"more"*** and ***"openly"*** he gets a title or a right of ownership to that land. The true owner‟s title gets defeated by the possessor who exercised the ***"adverse*** " possession for the required length of time. For established adverse possession, three elements are deemed necessary :-

- Continuity
- Adequate publicity,
- Peaceful and undisturbed possession for prescribed period.

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

CHAPTER FIVE: OWNERSHIP

The idea and concept of ownership is developed by slow degrees with the growth of civilization. In primitive societies the only concept known to human mind was that of possession. It was much later that the concept of ownership adopted. So long as the people were wandering from place to place and had no settled place of residence, they had no sense of ownership. The idea began to grow when they started planting trees, cultivating lands and building their homes. The transition from a pastoral to an agricultural economy helped the development of the idea and concept of the ownership.

Thus, ownership denotes the relation between a person and an objective forming the subject matter of his/her ownership. The normal case of ownership can be expected to exhibit the incidents as follows: First, the owner will have a right to possess the thing which s/he owns. Secondly, the owner normally has the right to use and enjoy the thing owned. Thirdly, the owner has the right to consume, destroy or alienate the thing. Fourthly, ownership has the characteristics of being indeterminate in duration. Fifthly, ownership has a residuary character

The literal meaning of the term „own" is to have or hold a thing. The one who holds a thing as his own is said to be the owner and has right of ownership ever it. Thus in the non-legal sense ownership may be defined as the right of exclusive control over and disposal of a thing at will.

In the legal sense the term ownership carries the meaning of right over a thing to the exclusion of all other persons. This implies non-interference by others in the exercise of this right and must be distinguished from mere holding of a thing in one"s possession

DEFINITION

The concept of the ownership is one of the fundamental juristic concept common to all system of law. Different writers have defined ownership in different ways.

Austin defined ownership as „a right indefinite in point of user, unrestricted in point of disposition and unlimited in point of duration."

Austin"s definition thus implies thee attributes viz.,

a) indefinite user,
b) unrestricted disposition and
c) unlimited duration.

***Holland*‟s** definition: Austin‟s definition of ownership has been followed by Holland. He defines ownership as plenary control over an object. According to him an owner has thee rights on the subject owned:-

a) Possession
b) Enjoyment
c) Disposition

According to ***Salmond***, „Ownership in most comprehensive significance denotes the relation between a person and any right that is vested in him.‟ That, which a man owns, according to him, is in all cases a right. Ownership in this wider sense extends to all classes of rights, whether proprietary or personal, in rem or in personam, in re-propria or in re-aliena. He adds that it applies not only to rights in the strict sense but also to liberties, powers and immunities.

Thus, according to *Salmond* ownership vests in the owner a complex of rights which s/he exercises to the exclusion of all others. For *Salmond* what constitutes ownership a bundle of rights which in here in an individual. *Salmond"s* definition thus points out two attributes of ownership:-

a) Ownership is a relation between a person and rights that is vested in him;
b) Ownership is incorporeal (immaterial, having no material body or form).

For Salmon a man may own a copyright or a right of way in the same way as s/he owns a piece of land because in all the cases s/he owns only a right and not a thing.

Hohfield expresses a similar view (like that of *Salmond*) when he says ownership is not a right but a bundle of rights, privileges, powers etc.

Duguit has defined, „Ownership is a relation between a person and a thing. On account of this relation the person has the power of disposal, use and enjoyment of the thing.‟

We may conclusion say that-

a) Ownership is a right which comprises of powers, claims, privileges, etc.
b) Ownership is in respect of a thing which may be corporeal or incorporeal.
c) The rights relating to or in connection with ownership are subject to state regulation i.e., can be limited or restricted by law.
d) Owner is he who is entitled to the residue of rights with respect to an object left after the limitation resulting from the voluntary acts of the owner (mortgage, lease or hire) or those imposed by law are exhausted,
e) Ownership does not imply or indicate absolute or unlimited rights either regarding use, disposal or duration.

ESSENTIALS OF OWNERSHIP

i. The first essential of ownership is that it is indefinite in point of user. It is impossible to define or sum up exhaustively the wide variety of ways in which the thing owned may be used by the person entitled to its ownership.

ii. Another essential of ownership is that it is unrestricted in point of disposition. An owner can effectively dispose of his property by a conveyance during his lifetime or by will after his death.

iii. The owner has a right to possess the thing which s/he owns.

iv. The owner has the right to exhaust the thing while using it, if the nature of the thing owned is such.

v. Another essential of ownership is that it has a residuary character. An owner may part with several rights in respect of the thing owned by him/her.

vi. Generally, the owner has the right to destroy or alienate the thing s/he owns.

CHARACTERISTICS OF OWNERSHIP:

i. Ownership is absolute or restricted. It may be limited to a lesser or greater extent, either voluntarily or under compulsion of law.

ii. Right of ownership may also be restricted national emergency.

iii. An owner has to pay taxes to the state and exercise of his right of ownership.

iv. An owner must not exercise his right of ownership in such a way as to infringe the right of other owners.

v. An owner has not the freedom to dispose of his property in any way he likes. he cannot transfer the property to defraud his creditor.

vi. Infants and lunatics are under a disability in the eye of law because they can neither understand the true nature of their acts nor the consequences.

vii. Ownership does not generally terminate with the death of the owner. It passes to legal heirs in case of intestacy.

THE SUBJECT MATTER OF OWNERSHIP:

The prime subject matter of ownership consists of material objects such as land and chattels. But ownership is by no means limited to things of this category. A human being‟s wealth may consist of such things as interests in the land of others, debts due to him, shares in

companies, patents, designs, trademarks, copyrights and so on. *Salmond* indeed took the view that the true subject matter of ownership has to be a right in all cases.

METHODS OF ACQUIRING OWNERSHIP:

A thing is capable of being owned, the methods of acquiring ownership over it will vary from legal system to legal system. There are two modes of acquisition of ownership and those are original and derivative. Original acquisition can be absolute: res nullius and by occupation. Basically, one can acquire ownership in two ways:

i. by operation of law or

ii. by reason of some act or event.

As to the first, a statute might provide that all A‟s property should after a certain period of time vest in B. As to the second this may consist in the first taking or madding a thing, both being cases of original acquisition. Thirdly, the thing may fall into man‟s ownership without any human act, as would be the case if a piece of land were to break off from an island in a river and attach itself to my land on the opposite bank.

8. CLASSIFICATION OF OWNERSHIP:

Ownership may be of various kinds. Broadly, it may be classified under the following heads-

I. Vested and Contingent ownership

II. Sole and Co-ownership

III. Corporeal and Incorporeal ownership

IV. Legal and Equitable ownership

V. Trust and Beneficial ownership

VI. Absolute and Limited ownership

I. Vested and Contingent ownership

Ownership is either vested or contingent. It is vested when the owner‟s title already perfect, it is contingent when his title is as yet imperfect, but is capable of becoming perfect on the fulfillment of some condition. In the former case the ownership is absolute; in the latter it is merely conditional. Once it is matured it automatically converts into vested type of ownership.

II. Sole and Co-ownership

Sole ownership indicates the singular control over the property. In this concept an individual only entertains all sorts of rights of ownership over his owned property. Co-ownership is a concept of plural or multiple owners holding right over the particular property. A single person cannot entertain the rights of ownership in group.

III. Corporeal and Incorporeal ownership

Ownership over any material object which can be movable or immovable but tangible objects is called corporeal ownership. Incorporeal Ownership means ownership over the immaterial things such as right over patent, design, trademark, copyright etc.

IV. Legal and Equitable ownership

The distinct between legal and equitable ownership is limited in English common law only. Legal ownership is a legally defined and protected property. Generally, ownership is understood as a legal ownership. In other words, legal ownership is that which has its origin in the rules of the common law.

Equitable ownership is basically carried out from the Chancery courts of UK. Equity courts protect the rights of property. Equity law granted rights were the concept of equitable ownership. Equity law is a concept of natural law philosophy. It does have no practicability to rest of the world.

V. Trust and Beneficial ownership

Trust ownership is also known as duplicate or dual types of ownership. It is well defined right that one should use the right to favor other. This kind of ownerships looks like ceremonial having no powers.

Beneficial ownership is relating to rights over the trust to use the authority in favor of the trust itself. This type of ownership is taken as a real ownership because it is powerful and using right to favor the trust is to benefit all trustees. Moreover user is none other than a trustee.

VI. Absolute and Limited ownership

Absolute ownership is a concept of right having no any conditions. Particular property is totally under the control of owner. Limited ownership is a conditional approach of the rights over the property. It is basically based on contract law or dependency and various defined limitations towards the entertainment of right relating to owners.

On the basis of above discussion, we can compare ownership and possession in this way in brief:

Ownership	Possession
i. Ownership is an absolute authority over the property. ii. Ownership is perfectly legal right. It shows legal situation. iii. Ownership is a de jure concept. iv. Ownership right is wider concept. v. Ownership holds unlimited and uncontrolled rights. vi. Transfer of ownership is not easy and it needs to legal or formal procedures, prerequisites of registration. vii. Ownership has no technical obstructions to transfer. viii. Ownership is a union of ownership and possession. ix. Ownership only does not carry practical use in the absence of possession. x. Ownership does not get priority if there is an equal right over the same property.	i. Possession is relative authority holding physical control over the property. ii. Possession is possessory right only. It shows real situation. iii. Possession is a de facto concept. iv. Possession is a right of consumption only. v. Possession right is limited concept of right. vi. Possession is comparatively easy and practically no need to register and such formalities. vii. Possession faces the technical obstacles for transfer. viii. Possession is a single concept giving no right of ownership. ix. Possession may create ground for the ownership as well. x. Possession is the real and basis of priority for the situation of equal rights.

CHAPTER SIX: RIGHTS AND DUTIES

DUTIES

According to Salmond, "A duty is an obligatory act". This is to say, it is an act opposite of which would be a wrong. The duties and the wrongs are not strictly identical. Duties and wrongs are correlatives. The commission of wrong is the breach of duty and performance of a duty is the avoidance of wrong. Yet not all the acts which a man ought to do constitute duties. When the law recognizes an act as a duty, it commonly enforces the performance of it, or punishes the disregard of it, or punishes the disregard of it. But this sanction of legal force is in exceptional cases absent. A duty is legal because it is legally recognized, not necessarily because is legally enforced or sanctioned. There are legal duties of imperfect obligation, as they are called, which will be considered by us at a later stage of inquiry.

Duty in the strict sense means an act which one ought to be done in respect of the other person and correspondingly other person has a right against former one.

Duty can be divided into four classes:-

(i) Legal and moral duty.

(ii) Positive and negative duty.

(iii) Primary and secondary duty

(iv) Absolute and relative duty.

(I) Legal Duty:- It is an act recognized as a duty by law and treated as such for the administration of justice. A legal duty is an act and the opposite of which is a legal wrong.

(II) Moral Duty:- An act which ought to be done according to the dictates of morality. It can also be defined as an act the opposite of which is a moral or natural wrong. Example:- If a person is in problem at the time of swimming then the person stands nearby, has a moral duty to rescue him if he knows swimming.

(III) Positive Duty:- When the law obliges us to do an act, the duty is called positive duty.

(IV) Negative duty:- When the law obliges us to forbear from doing an act, the duty is negative

LEGAL RIGHTS

Legal rights are those rights which are recognized and protected by law. Rights are concerned with interest. Interests are something to the advantage of a person. Interest has been defined as interests protected by rules of rules of right, which is by moral and legal rule. Yet rights and interest are not identical.

For Example:-A man has an interest in his freedom or his reputation. His rights to these, if he has such rights, protect the interest, which accordingly form the subject of his rights but are different from them. To say he has an interest in his reputation means that it is to his advantage to enjoy a good name, to say he has a right to this imply that others ought to take from him.

Every right has two elements i.e.

(i) The material element‟ of interest like reputation, property, money, etc. and

(ii) The formal elements‟ like capacity, power to realize the interest, etc. The definitions of right given by different jurists are mostly based on either one or the other elements of right.

CHARACTERISTICS (OR ELEMENTS OR INGREDIENTS) OF LEGAL RIGHTS

According to John Salmond, Legal rights involve five essential elements:-

(1) Right is vested in a person who may be the owner of the right, the subject of it, the person entitled, or the person of inheritance.

(2) Object: A legal right operates against some person who is under a duty or obligation to obey or respect that right. He may be distinguished as the person bound, or as the subject of the duty, or as the person of incidence.

(3) Content: There is some content or substance of a legal right i.e. the act or forbearance by which the person in obligation is bound. (4)

(4) Acts: There is the act or omission relates to something, which may be termed as the object or subject matter of the right. (5)

(5) Title: Every legal right has a title, that is to say, certain facts or events by reason of which the right has become vested in its owner.

Illustration:- If „X‟ sells a piece of land to Y by sale deed than Y becomes the owner of the property. Y has all the rights over that property. Y is the person of inheritance. Thus, Y is the subject of the right. Now, X and all other persons have a duty not to interfere with the possession or ownership or any other rights of „Y‟. Thus, the object of right or subject of duty is in rem. „X‟ is obliged to give possession and ownership of the property to „Y‟ after the sale and „X‟ is obliged not to interfere with Y‟s possession. Thus, possession, ownership, non-interference are the contents of the right. Piece of land is the subject-matter of the rights. Every right is created by certain acts or omission. In this case, it is done by deed of conveyance, so, it is the title of the right.

HOHFELDIAN ANALYSIS OF LEGAL RIGHTS

Historical Background:

The concept of legal right has undergone change in last century. Thomas Hobbes discussed two terms right in strict sense and liberty. After several jurist, Bentham, Austin and Salmond further explained various terms for the word „right‟ i.e. right in strict sense, liberty and power. In 1913, Professor Hohfeld, an American jurist, rearranged and completed Salmond‟s scheme by adding a fourth term immunity and worked out a table of jural relations. According to modern jurist, term right is like a homo name which includes within its sweep.

Legal Right in strict sense means that there is a corresponding duty and are defined as interests which the law protects by imposing corresponding duties on others. Legal rights in wider sense not necessarily include the corresponding duty. The right‟ in wider sense has been identified with powers, privilege and immunities. Salmond says, In generic sense, a legal right may be defined as any advantage or benefit conferred upon a person by a rule of law.

CLASSIFICATION/ KINDS OF LEGAL RIGHT

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

A. PERFECT AND IMPERFECT RIGHT;

According to Salmond, a perfect right is one which corresponds to a perfect duty. It is not only recognised by law but also enforced by it.

An imperfect right, on the other hand, is one which though recognised, is not enforceable by law. In other words, a perfect right is one in respect of which an action can be successfully brought in a court of law, and the decree of the court, if necessary, enforced against the defaulting judgment-debtor. But an imperfect right is incapable of legal enforcement.

A time-barred debt is a typical example of imperfect right. In India, the, creditor or the holder of a promissory note can sue upon it within three years from the date of debt becoming payable. After the expiry of this time, the debt is barred by time. The limitation, however, does not extinguish the debt. That is, for certain purposes creditor's rights are still recognised though the time-barred debt cannot be recovered through a court of law. Firstly, if the debtor pays the money after it has become time- barred, he cannot later sue to recover it saying that it being barred by time, was without consideration. Secondly, a fresh promise to pay the debt in writing, can be enforced and the time-barred debt is treated as a valid consideration for such fresh promise. Thirdly, if the debtor has given some security, he cannot take back the things given as security, without paying the debt to the creditor. Thus in case of an imperfect right, though remedy in a court of law is denied but the right itself does not come to an end. Likewise, part payment of a time-barred debt converts the imperfect right into a perfect right.

The rights of the subjects against the State are also sometimes classified as imperfect rights because of their unenforceability. It is, however, submitted that this view seems to be against the accepted legal notions, the reason being that an ordinary imperfect right is unenforceable because some rule of law declares it to be so whereas rights against the State are unenforceable not in this legal sense, but in the sense that the strength of the law is none other than the strength of the State itself.

B. POSITIVE AND NEGATIVE RIGHT

A right is distinguished as positive or negative according to the nature of the co-relative duty it carries with it. In case of a positive right, the person subject to the duty is bound to do something whereas in case of negative right, others are restrained from doing something. The positive right is a right to be positively benefited but a negative right is merely a right, not to be harmed. A right to receive compensation or damages, or a creditor's right to recover money from the debtors are examples of positive right. As against this, right of ownership is a negative right for it imposes on others a negative duty of non-interference with one's right ownership. A right to reputation is again a negative right in the sense that it imposes a negative duty upon others not to interfere with it.

The distinction between positive and negative right can be summarised as follows ;

(1) A positive right corresponds to a positive duty whereas a negative right corresponds to a negative duty.

(2) A positive right involves a positive act while a negative right involves some kind of for

(3) A positive right entitles the owner of it to an alteration of the present position to his advantage whereas a negative right seeks to maintain the present position of things.

(4) A positive right aims at some positive benefit but a negative right aims at not to be harmed.

(5) A positive right requires an active involvement of others but a negative right requires only passive acquiescence of other persons.

(6) A positive right receives something more than what one already has whereas a negative right seeks to retain what one already has.

(7) A positive right has a mediate and indirect relation to the object while a negative right is immediately related to the object.

(8) Right to the money in one's debtor's pocket is an illustration of a positive right while the money in one's own pocket is an example of a negative right bearance or not doing.

C. REAL AND PERSONAL RIGHT.-

These are also called rights in rem and rights in personam. The distinction between real and personal rights is closely connected but not identical with that between negative and positive duties. It is based on the difference in the incidence of co-relative duties. A real right (right in rem) corresponds to a duty imposed upon persons in general whereas a personal right (right in personam) corresponds to a duty imposed upon determinate individuals. In

other word s, a real right is available against the world at large while a personal right is available a against a particular person or persons. The distinction between real and personal right is well illustrated by an example. My right to the peaceable occupation and use of my land is a right in rem because all the world is under a duty towards me not to interfere with it. But if I grant a lease of the land to a tenant, my right to receive rent from him is a right in personam for it is available exclusively against the tenant and none else.

D. PROPRIETARY AND PERSONAL RIGHT.-

The aggregate of a man's proprietary rights constitutes his estate, his assets and his property. They have some economic or monetary significance and are elements of wealth. For instance, money in one's pocket or in bank, right to debt, land, houses etc., are proprietary rights. The personal rights, on the other hand, are elements in one's well-being. They have no monetary value whatsoever. Examples of personal right are right of reputation, personal liberty, freedom from bodily harm, right of a husband in respect of his wife or parent in respect of their children.

The distinction between proprietary and personal rights can be summarised as follows:-

(1) Proprietary rights relate to estate of a person which includes all his assets and property in any form. The personal rights, on the other hand, pertain to the status of a person.

(2) Proprietary rights are elements of a person's wealth whereas personal rights are elements of his well-being.

(3) Proprietary rights are alienable while the personal rights are not alienable. The former are inheritable whereas the latter are not heritable.

(4) Proprietary rights are more static as compared with the personal rights.

E. RIGHT IN RE PROPRIA AND RIGHT IN RE ALINEA;

Literally speaking, right in re propria means right over one's own property and right in re aliena means right over the property of someone else. The latter may also be called as encumbrances using1he term in its widest sense. The most absolute power which the law gives over a thing is called the right of dominium. This is a real right in a thing which is one's own, and is called right in re propria. But a man may have rights in property less than full ownership, the dominium being, in fact, vested in another. Such rights are called rights in aliena.

F. PRINCIPAL AND ACCESSORY RIGHT

The existence of principal rights is independent of any other rights but accessory rights are ancillary to principal rights and have a beneficial effect on the principal right. For example, if a debt is secured by a mortgage, the recovery of debt is the principal right while security is the accessory right. Likewise, if an owner of a piece of land has a right of way on the adjoining land, the ownership of the land is his principal right and right of way in the adjoining land is accessory right.

G. PRIMARY AND SECONDARY RIGHT;

Primary rights are also called the antecedent or substantive rights. Similarly, sanctioning rights are also called the remedial or adjectival rights. It may be reiterated that sanctioning rights originate from some wrong i.e., from violation of another's, right whereas primary rights have some source other than wrongs. Salmond has pointed out that a primary right can either be a right in rem e. g. one's right not to be assaulted or it may be a right in personam i.e., right of a promisee that the promiser should perform his part of the contract. If the promiser commits a breach of the contract, promisee shall have sanctioning right to claim damages

H. LEGAL AND EQUITABLE RIGHT;

The distinction between legal and equitable right originates form the distinction between law and equity. Prior to the passing of Judicature Act, 1873, there were two distinct co-ordinate systems of law in England which were called the Common Law and the Equity Law. At that time, legal rights were recognised by the Common Law Courts whereas the equitable rights were recognised by the Court of Chancery which was a Court of Equity. This distinction was, however, abolished by the fusion of the two courts by the Judicature Act, 1873 but the existence of Common Law and equity as two distinct branches of law still persists in England.

The general principle regarding equitable rights is that when there are two inconsistent equitable rights claimed by different persons over the same thing, the first in time shall prevail. But where there is a conflict between a legal right and an equitable right, the legal right shall take precedence over equitable right even if it is subsequent to the equitable right

in origin,. but the owner of the legal right must have acquired it for value and without notice of the prior equity. This principle finds expression in the maxim, 'where there are equal equities, the law shall prevail.'

The Indian law, however, does not recognise the distinction between law and equity since there is neither separate equity law nor separate equity courts in India. But the principles of equity have found expression in various statutory enactments in India. In other words, where there is no specific law or usage on a subject, the case shall be decided by applying the principle of 'justice, equity and good conscience' which implies application of English law, so far as it is applicable to Indian conditions and circumstances. The Privy Council, in Chatra Kumari Devi v/s Mohan Bikram observed that the Indian law does not recognise legal and equitable estates. Therefore, there can be only one owner and where the property is vested in a trustee, the owner must be trusteegland. The methods of their creation and disposition are, however, different.

I. VESTED AND CONTINGENT:

A vested right accrues when all the facts have occurred which must by law occur in order that a person in question would have the right. In case of contingent right, only some of the events necessary to vest the right in the contingent owner have happened. A vested right creates an immediate interest. It is transferable and heritable. A contingent right does not create an immediate interest and it can be defeated when the required facts have not occurred.

J. PUBLIC AND PRIVATE RIGHT:

A right vested in the State is called a public right. The State enforces such right as a representative of the subjects in public interest. A public right is possessed by every member of the public. A private right, on the other hand, is concerned with only private individuals, that is, both the parties connected with it are private persons. As a corollary of public and private rights, there are public and private wrongs. The former are a breach and violation of public rights and duties which affect the community as a whole, namely, the State. They are called 'crimes'. The private wrongs are an infringement of private of civil rights belonging to individuals. They are called civil injuries or torts.

HISTORICAL SCHOOL OF RISPRUDENCE

In Germany also the historic conception of law was taken up and developed in the latter part of the eighteenth century by Herder in his work 'Ideas on the Philosophy of the History of Human Race'. This heralded the advent in 19th century of German Historical School represented by forerunners of Savigny, Schelling (1775-1854), and Hugo (1768-1844) both of whom rejected a natural theory of law and advocated law in fact, independently of legislation which develops itself as suited to the need and circumstances of each community. The essence of law, according to Hugo, is its observance, acceptance by the people because its harmony with the paramount sen- timents and practices of the people. Law is not a declaratory of moral principles of reason or of human nature. It is declaratory of principle of progress and growth discovered by human experi- ence of administering of justice. As Sir Frederick Pollock puts it, 'the historical method is nothing else than the doctrine of evolution applied to human societies and institutions'. However, of the greatest German jurists of Historical School the name of Friedrich Karl Von Savigny (1770 -1861) is remembered conspicuously as the unrivalled and unchallenged founder of Historical Jurispru - dence. He was the 'Darwin' of Historical School of Jurisprudence. His last published work ap- peared only six years before The Origin of Species (1860) and was still alive when Darwin's work appeared.

The theory of evolution was thus not new which Savigny had already propounded. Savigny, therefore, ushered the beginning of Historical School-his doctrines regarding law were repre- sented in his famous pamphlet 'On the Vocation of Our Age for Legislation and Jurisprudence 1814'. Factors which led to its growth in Germany and elsewhere may be summarized below:-

a. It was a reaction against the a priori notions of natural law philosophy. The philosophers hitherto measured all situations and problems by referring them to an idealized picture of social order without studying law in relation to social growth and legal development.

b. The natural law thinkers had thought of law which was always the same static and un- changeable. They failed to see the law which had grown and developed from the past.

c. The natural law philosophers believed in ideal principles of law as revealed by reason. It did not look to history, traditions, customs, habits and religion as true basis of law.

d. The Historical School was a reaction against the French Revolution which itself was a prod- uct ofnatural law philosophy with its gospel of liberty, equality and fraternity of men and nations. In Germany a movement grew up which was romantic, irrational and strongly nationalistic in character and which found its expression in art, literature, history, political theory and law. Na- tions now started revolting against Nature.

The basic characteristics of the Historical School of Jurisprudence are as follows :—

1. Law is found. It cannot be made. It does not consist of an abstract set of rules imposed on society by any political or other agency.

2. Law, like language, grows and evolves and has deep roots in social, economic and other factors. The growth of law is thus a silent organic process and bears a clear and distinct imprint of the society where it develops.

3. Laws cannot be of universal validity nor can they be constructed on the basis of certain rational promises or eternal principles.

4. Legislation, therefore, has subordinate role. Custom is the typical form of law, the sanction behind custom being the habit of obedience, social standards of justice. etc.

5. As society progresses, Volkegistalone cannot discharge the function which it did hitherto. Judges and lawyers also have a part to play in law making.

6. Legislation appears at the final stageand hence preparation of a code presupposes genera- tions of jurists who cleared the ground for it.

SAVIGNY'S THEORY (VOLKEGIST THEORY)

The main points of the Volkegist theory of Savigny are as follows :—

1. According to Savigny law was not something which can be made or altered arbitrarily by law makers. The contents of law are essentially determined by the whole past of a people so it cannot be produced ab extra by an action of a wise law giver or by some inventive or master spirited people.

2. Law of a nation, therefore according to Savigny, is not the product of reason or command or will of the Sovereign but the instinctive sense of right possessed by every race or community. In other words, law is a product of 'internal silently operating forces'.

3. Law is found and not made. It is to be found in popular faith, common convictions, cus- toms, traits, habits, traditions which in course of time grow into legal rules.

4. Like the language, the manners and constitution of anation, all law is exclusively determined by the nation's peculiar character which is otherwise called the Volkegist or spirit of the people.

5. Law cannot be universal or general in character. It is always peculiar, particular, limited-its nature and character depending upon the peculiar, traditions of each people. Law of a nation likes its language, manner and Constitution is peculiar to a people. Law grows with the growth and strengthens with the strength of the people and finally dies as the nation loses its individuality.

6. Savigny, therefore, favored customary law over legislations. As such he gives more impor- tance to jurist than legislator the former representing the national spirit, i.e., Volkegist.

7. Savigny believed in the unbreakable continuity of law from the past to the present and future also. A law of a nation cannot be different from its past customs and traditions on which the existing and even future law can be based.

8. Savigny considered law an inextricable part of society. He viewed law as a part of social process and development which arises from silent forces which are not directed by arbitrary and conscious intention but operates in the way of customary law.

CRITICISM OF SAVIGNY

Savigny while advocating the role of evolution and growth in the development of law his ap- proach towards law was vitiated in the following manner :—

1. He laid excessive emphasis upon the unconscious forces which determine the law of a nation and ignored the efficacy of legislation as an instrument of deliberate, conscious and planned social change. In modern developing societies like India legislation is being created, enacted and used as an important instrument of social change and social reform. As he underestimated the importance of legislation and took a pessimistic view of human power for creation of law to bring about social change so he is criticized for his 'juristic pessimism'.

2. Savigny emphasized the national character of law. While advocating national character of law he entirely rejected the study of German Law and took inspiration from Roman Law.

3. Volkegist itself is an abstract idea as indeterminable and vague as the natural law itself.

SIR HENRY MAINE

Maine began his work with a mass of material already published by the German historical already published by the German historical school. He inaugurated the comparative approach to

the study of law and history which was history which was destined to play an important role in the years to come. According to him, law develops in 4 stages:-

a. Commands of ruler believed to be in divine inspiration.

b. Commands crystalize into customary law.

c. Knowledge and administration of customs goes into hands of minority usually of a religious nature, due to weakening of original law makers.

d. Times of codes (solan's artic code or twelve tables in Rome).

Societies which do not progress beyond the 4th stage which closes the era of spontaneous legal development are called static societies by Maine. Their legal condition remains characterized by what Maine states are status. Maine refers to a few progressive societies of history, for instance, the romans and nations of nation of modern Europe which progressed beyond the phase of codes and status relationships because they're steered by conscious desire to develop and improve.

The 3 agents of legal development that are brought to bear upon the primitive codes are in the historical sequence legal fiction, equity and legislation. Maine has defined legal fiction as "any assumption which conceals the fact that a rule of law has undergone alteration, its letter remain- ing unchanged,and its operation being modified".

By the use of legal fictions, law is altered in accordance with changing needs while it is pre- tended that it remains what it was.The legal fiction of Maine has been considered as sort of clumsy self-deluding kind of legislation. There are overtones of this view in Maine himself. However this view of fiction is unjust and distorts the role it has played in the development of law. Modern legislature with broad competence in law making is in the position to correct oversight with cura- tive legislation. No such recourse was available in primitive societies. According to rim, the asso - ciation of law and religion is a comparatively later development. However, Maine is defended on this point by hovel. Another limitation of Maine theory was that it was not meant "to apply to personal conditions imposed otherwise than by natural incapacity".

Maine presented a balanced view of the history of law. His conclusions were based upon a comparatives study of different system of law. His greatness lies in the fact that he had preached a belief in progress and that contained the germs of sociological approach. Many like Maitland, Vinogradoff and Lord Bryce were immensely influenced by his writings.