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## Unit-I: State, sovereignty and law

### (a) Nature and functions of a State and its relationship with law

A state is an organized community living under one government. States may be sovereign. The term state is also applied to federated states that are members of a federal union, which is the sovereign state. Some states are subject to external sovereignty or hegemony where ultimate sovereignty lies in another state. The state can also be used to refer to the secular branches of government within a state, often as a manner of contrasting them with churches and civilian institutions.

Many human societies have been governed by states for millennia, However for most of pre-history people lived in stateless societies. The first states arose about 5,500 years ago in conjunction with rapid growth of cities, invention of writing, and codification of new forms of religion. Over time, a variety of different forms developed, employing a variety of justifications

for their existence (such as divine right, the theory of the social contract, etc.). Today, however, the modern nation-state is the predominant form of state to which people are subject.

A state can be distinguished from a government. The government is the particular group of people, the administrative bureaucracy that controls the state apparatus at a given time. That is, governments are the means through which state power is employed. States are served by a continuous succession of different governments. States as immaterial and nonphysical social objects, whereas governments are groups of people with certain coercive powers

Each successive government is composed of a specialized and privileged body of individuals, who monopolize political decision-making, and are separated by status and organization from the population as a whole. Their function is to enforce existing laws, legislate new ones, and arbitrate conflicts. In some societies, this group is often a self-perpetuating or hereditary class. In other societies, such as democracies, the political roles remain, but there is frequent turnover of the people actually filling the positions.

States can also be distinguished from the concept of a "nation", which refers to a large geographical area and the people therein who perceives themselves as having a common identity.

Political power is, of course, always coercive power backed by the state's machinery for enforcing its laws. But in a constitutional regime political power is also power of equal citizens as a collective body: it is regularly imposed on citizens as individuals, some of whom may not accept the reasons widely believed to justify the general structure of political authority (the constitution); or when they do accept that structure, they may not regard as well grounded many of the laws enacted by the legislature to which they are subject.

The nature of the state is a topic which divides criminologists. There are those who see it as a neutral instrument which upholds civic order or which supports citizens through a system of benefits and support and there are those who see the state as either having interests of its own or advancing the interests of a specific class of persons, in whose interests it governs. The idea of justice as fairness rests upon the idea that the state is a neutral entity and it is fair to say that the liberal tradition within Criminology has tended either to neglect the state or to rely, wholesale, upon liberal political theorists, such as John Rawls and his conception of 'social cooperation among equals for mutual advantage'. The Marxist and Feminist traditions within Criminology have a far richer body of writing about the state and more generally about state control and social regulation.

**The State**

The state is, arguably, the most contested term in political theory and it may refer to a great many different things, such as a philosophical or ideological category, an institution, a territorial power or a functional organizing principle. It is a topic covered extensively in the writings of political

philosophers since classical times, and certainly Plato, Aquinas, Machiavelli, Hobbes, Locke and Marx are only a few of the writers who have tackled the subject of the state. In Criminology different traditions have grown up which attribute varying attributes and motivations to the state. In order to make progress, let us outline four basic and interrelated features of a state.

First, the state must have a working political organizational structure.

In other words, it must have a set of institutions which allow it to operate, such as the courts, a civil service and a police force. Secondly, for a state to be a working entity it has to persist in time and space, i.e. it must control a set territory and survive changes in its basic organization, as would be the case if an election altered the government. Thirdly, it must be able to support a single political form of public order and therefore it must have agency. It must be sovereign and be able to claim a monopoly of political authority, law-making and power, and it must be autonomous. Fourthly, but closely linked to the idea of the state as a single political form of public order, it must have the allegiance of its members (citizens, subjects), who are subject to its laws and who have an obligation to obey it. The political theorist John Charvet has noted that: 'For Locke, as well as for Hobbes and Rousseau, entry into political society from the state of nature is possible only if individuals surrender their natural right of private judgment to the public judgment of the community or its agent.

The two most important features for criminologists are the first and third features. The first feature, that the state is a particular form of political organization, is the dominant notion at work in contemporary Criminology. It is the view of Karl Marx, who wrote in *The German Ideology*, that: 'Through the emancipation of private property from the community, the State has become a separate entity, beside and outside civil society; but it is nothing more than the form of organization which the bourgeois necessarily adopts both for internal and external purposes, for mutual guarantee of their property and interests.' In contemporary legal theory, Joseph Raz has also argued that the state is a form of political organization, but he has usefully delineated the state from law and government:

'The state … is the political organization of a society, its government, the agent through which it acts, and the law, the vehicle through which much of its power is exercised.' Raz has further argued that: 'A state is the political organization of a society, it is a subsystem of a more comprehensive social system.'

This position echoes John Rawls' idea, expressed in *Political Liberalism*, that: 'a society's main political, social, and economic institutions, and how they fit together into one unified system of social cooperation from one generation to the next'. It should be noted here that the political and social basis of the state are not very clearly delineated

The third feature, that the state is a political form of public order a with monopoly of political authority, law-making and power, was underscored by Thomas Hobbes and John Locke, who defined the state as that form of political power which has the sole right to make laws and to punish those who fail to follow them, and it has obvious connections to the study of crime.

Hobbes, in the *Leviathan*, wrote: 'I Authorize and give up my Right of Government myself, to this Man, or his Assembly of men, on this condition, that thou give up thy Right to him, and Authority all his Actions in like manner.' Hobbes saw the state as being that thing which preserves men from the state of nature. Hobbes' conception is set out in the Leviathan, where he writes: 'The state of nature is simply the condition of men without a sovereign power to compel order. Just as we may never have a perfect vacuum, perhaps we can never have a situation where there are no vestiges of the restraints that sovereignty provides, but inasmuch as sovereignty is absent, to that extent men will begin to exhibit behavior typical of the state of nature.' In Hobbes, we get the idea that it is not natural for men and women to subordinate themselves for the greater good. Rather, we are presented with a view that social community, and freedom from the state of nature, can only be established through the exercise of political power. Our human society is the outcome of agreements and conventions that men and women make themselves. John Locke, following Hobbes, saw the state as that political institution which maintains order. Locke details his notion of the main function of a state in his description of the Law of Nature: 'For the Law of Nature would, as other Laws that concern men in this world, be in vain, if there were no body that in the state of nature, had a power to execute the Law and thereby preserve the innocent and restrain offenders.' In this passage we note both his understanding that all law requires enforcement and concern for deterrence in punishment. In contemporary liberal political theory, both Charvet and Raz follow the tradition of understanding the state as that thing that maintains law and order and thereby allows persons to live their lives unhindered by the dangers inherent in a state of nature; indeed, it is the standard view. It is important to note that in liberal theory the state is the outcome of a voluntary agreement made by individuals who realize that only a social contract will save them from the dangers of the state of nature. The liberal state is always a protective neutral entity which represents all the people fairly for the common good of all. This conception of a neutral state that safeguards its citizens equally from the state of nature is what Marxism and Feminism takes issue with.

**Marxism and the State**

The classic statement within Marxist Criminology on the state, as that thing which frames laws which uphold sectional class interests, was given us by Bill Chambliss when he wrote: '... without doubt the single most important force behind criminal law creation is doubtless the economic interest and political power of those social classes which either (1) own or control the resources of the society, or (2) occupy positions of authority in state bureaucracies'. Marx himself gave two different accounts of the state. The account Marx gives in his Introduction to Critique of Hegel's Philosophy of Right is an unfinished work and is a critique of Hegel, rather than a systematic view of his own thinking. The first view Marx outlined for himself was given in the 1848 The Communist Manifesto, where he wrote: '...executive of the modern State is but a committee for managing the affairs of the whole bourgeoisie'. In The Communist Manifesto, the state simply coordinates the interests of dominant class. We are presented with a straightforward binary opposition between the bourgeoisie and the proletariat. However, Marx also advanced a

second view, notably in two other works, the Class Struggles in France, written in 1850, and The Eighteenth Brumaire of Louis Bonaparte, written in 1852. In these works, he outlines a plurality of classes and details how the state is far more than just a simple coordinator of the interests of the dominant class. Marx also argued, in this second view, that the state itself has some autonomy.

This second view of the state has become the dominant view in contemporary Marxist scholarship and Carnoy has written that: 'The State is not regarded simply as an instrument of the ruling class. ... Who rules the State is an important issue, but few, if any, current writers claim that the ruling class controls the State directly.' However, we must not lose sight of the fact that Marx did not furnish a systematic theory of the state and his ideas are often inconsistent or not fully formed, though this is in part due to the fact that he was far more concerned with Political Economy, rather than Political Theory. Marx also tends to underplay the ability of individuals to either act or calculate independently of their economic situation. Because Marx failed to provide a thoroughgoing or clear conception of the state, his followers have had to interpret his writings and this has spawned a variety of latter-day Marxist theories. Nevertheless, the Marxist state is always essentially economic in its character. As Pashukanis said of legal forms, they 'form a united whole with the material relations of which they are the expression'. This position is found in Marx's Preface to a Critique of Political Economy Marxist criminologists Dario Melossi has, perhaps, done most to uncover the original intention of Marx's writing on the state and punishment, though Marx's writings resist a definitive definition. Nonetheless, it is possible to argue that there are two main schools within Marxist writing on law, punishment and the state. On the one hand,Melossi and Rusche and Kirchheimer, who stress the first view given in The Communist Manifesto and play up the economic elements in Marx's analysis and the role of state coordination. On the other hand, Hall, Hay, Ignatieff and Sumner, who tend to favour the second view given in The Eighteenth Brumaire of Louis Bonaparte and understand the state as having a deal of autonomy. Hall, Hay, Ignatieff and Sumner all stress the importance of ideology and broader issues of legitimacy. Hay, for example, reasoned that the criminal justice system in eighteenth-century England was essentially ideological in nature, rather than straightforwardly judicial. The proliferation of offences for which people could be executed was, he argued, part of an elaborate system of execution and mercy. The deeper point Hay makes is that state punishment was secondary to its ideological function, which was the preservation of the property rights of a tiny minority of the population. State punishment was actually more concerned with ensuring a compliant citizenry than giving criminals their deserved sentences. Hay wrote: 'Loyalties do not grow simply in complex societies – they are twisted, invoked and often consciously created.'

## Functions of the State

The end of the State, we have seen, is to promote the welfare of its citizens as a whole, as members of families, and as members social classes. Anyone who is inclined to doubt the propriety of including the second and third of these clauses, will dismiss the inclination as soon as he looks beneath formulas and fixes his attention upon realities.

State exists and functions for the sake of human beings. It attains this end primarily by safeguarding those interests that are common to all the persons under its jurisdiction; for example, by resisting foreign invasion and protecting life and property. If it stops at this point it will leave unprotected not only many individual interests, but many elements of the common good, many aspects of the general welfare. To neglect the integrity of the family or the prosperity of any considerable social class, will sooner or later injure society as a whole. To take care of these interests is, indirectly at least, to promote the common good. Nor is this all. Since individual welfare is the ultimate, though not strictly the formal, object of the State, that object ought to be deliberately promoted by the State, whenever it cannot be adequately furthered by any other agency. To deny this proposition is to assume that men have been unable to achieve a political organization that is adequate to safeguard their temporal welfare. However, it is neither desirable nor practicable for the State to provide for every individual as such. It can promote individual welfare best by dealing with men as groups, through their most important group relationships; therefore, as members of families, and as members of social classes. When it provides for the needs that are common to members of these two fundamental forms of association, it benefits most effectively the whole number of its component individuals.

What are the specific policies and measures by which the State can best attain the objects described in the foregoing paragraphs? To answer this question will be to describe the proper functions of the State.

Among political writer a fairly frequent classification of State functions is into necessary and optional or essential and non-essential. The former are "such as all governments must perform in order to justify their existence. They include the maintenance of industrial peace, order, and safety, the protection of persons and property, and the preservation of external security. They are the original primary functions of the State, and all States, however rudimentary and undeveloped, attempt to perform them." They may be enumerated somewhat more specifically as military, financial, and civil. In the exercise of its military function, the State defends itself and its people by force against foreign aggression, and prevents and represses domestic disorder. The financial function of the State comprises the collection and expenditure of funds for the maintenance and operation of government. Regulations concerning individual rights, contracts, property, disputes, crime, and punishment, constitute the State's civil function.

The optional or unessential functions are calculated to increase the general welfare, but they could conceivably be performed in some fashion by private agencies. They comprise public works; public education; public charity; industrial regulations, and health and safety regulations. Under the head of public works are comprised: Control of coinage and currency in the conduct of banks; the postal service, telegraphs, telephone and railroads; the maintenance of lighthouses, harbors, rivers, and roads; the conservation of natural resources, such as forests and water power, and the ownership and operation of supply plants and municipal utilities. Public education may include not only a system of schools, but museums, libraries, art galleries, and scientific bureaus, such as those concerned with the weather and agriculture. In the exercise of the function of public charity, the State establishes asylums, hospitals, almshouses, corrective institutions, provides insurance against accidents, sickness, old age and unemployment, and makes various provisions of material relief for persons in distress. In the field of regulation, as distinguished from that of ownership, operation, or maintenance, the State supervises public safety and industry. Regulations of the former kind relate to quarantine, vaccination, and medical inspection of school children and of certain businesses and professions, and protection of public morals in the matter of pictures, publications, theatres and dance halls. Industrial regulation extends to banks, commerce, business combinations, and the relations between employer and employee.

The classification of State functions as necessary and optional has the merit of presenting a comprehensive view of political experience. It enables us to see how States have interpreted their scope, and distinguished between functions that are essential and functions that are non-essential. While all fully developed States have regarded as essential the functions which are so designated in the foregoing paragraphs, not all have agreed in conceiving the so-called optional functions as of that character. Some of the optional functions have been regarded by some States as primary and essential. And the number of optional functions that have been undertaken varies greatly among the various States. The factor determining the course of the States in this matter has been mainly, if not exclusively, expediency.

A somewhat analogous classification is used by many Catholic writers. While conforming fully to political experience, it also based upon fundamental principles of ethics, and it illustrates the principles of logic. It is thus stated in summary form by CathreinThe functions of the State are First, to safeguard the juridical order, that is, to protect all rights, of individuals, families, private associations, and the Church; second, to promote the general welfare by positive means, with respect to all those goods that contribute to that end. Substantially the same classification and principle is laid down by Meyer, Castelein, Croninand Lilly In a general way the primary functions in this classification correspond to the necessary or essential functions in the grouping made by the political writers. While the second group of functions denoted by the Catholic writers resembles the second category of the political science manuals in a general way as regards content, there is a considerable difference of principle. The secondary functions described by the political writers are said to be optional, and their optional character is

determined mainly by the varying experience and practice of particular States; but the positive promotion of general welfare is regarded by the Catholic writers as normal and necessary, because required by the fundamental needs of human beings. According to the Catholic writers, the difference between the primary and secondary functions of the State is not a difference of kind but only of degree. As noted by Meyer, the primary functions are not sufficient. The State must not only safeguard rights, but promote the general good by positive measures of helpfulness.{10} This is the general principle. In carrying it out, the State may properly undertake some particular activities which are not obligatory, but only more or less expedient.

PRIMARY FUNCTIONS

The concrete activities which fall under the primary functions of the State may be summarized as follows. All natural rights must receive adequate protection. The State is obliged to safeguard the individual's rights to life, liberty, property, livelihood, good name, and spiritual and moral security. Whence it follows that laws must be enacted and enforced against all forms of physical assault and arbitrary restraint; against theft, robbery, and every species of fraud and extortion; against all apparently free contracts which deny the opportunity of pursuing a livelihood on reasonable terms; against calumny and detraction; and against the spiritual and moral scandal produced by false and immoral preaching, teaching, and publication.

In the individualistic theory, the first two classes of enactments are held to exhaust the functions of the State, apparently on the assumption that they cover all the individual's rights. This is a grossly inadequate conception. Reasonable opportunities of livelihood, reputation, spiritual and moral security, are all among man's primary needs. Without them he cannot develop his personality to a reasonable degree, nor live an adequate life. Therefore, they fall within the scope of his natural rights. For natural rights include all these moral powers, opportunities and immunities which the individual requires in order to attain the end of his nature, to live a reasonable life. Any arbitrary or unreasonable interference with these is a violation of the rights of the individual. Hence the unfair competition carried on by a monopoly, unreasonable boycotts, wage contracts for less than the equivalent of a decent livelihood, untrue or otherwise unjustifiable statements derogatory to a man's reputation, utterances and publications calculated to corrupt his religion or morals, -- are all injurious to the individual, and are unreasonable interferences with the security and development of his personality. All the foregoing rights should be safeguarded by the State, not only as exercised by the individual, but also as involved in the reasonable scope of associations. Hence the family, the Church and all legitimate private societies have a just claim to protection by the State in the pursuit of all their proper ends. Men have a right to pursue their welfare not only by individual effort but through mutual association. A corollary of State protection of rights is State determination of rights. To a very great extent the reciprocal limits of individual rights cannot be satisfactorily adjusted by the individuals

themselves. This fact is most conspicuously illustrated in connection with property rights, but it receives frequent exemplification in other sections of the juridical province.

While all the rights above described have a general claim upon the State for protection, not all of them have an actual claim to adequate protection at any given time. This is a question of prudence and expediency. What the State may normally be expected to do, is one thing; what it is here and now able to do, is quite another thing; for example, with regard to false religious teaching and scandalous moral teaching. Perhaps the most comprehensive and practical principle that can be laid down is this: The State should not attempt to protect any right beyond the point at which further efforts threaten to do more harm than good.

SECONDARY FUNCTIONS

These can be conveniently described by following the order outlined in the paragraph which enumerated the so-called optional functions. In general, the secondary functions cover all activities that cannot be adequately carried on by private effort, whether individual or corporate.

Public Works. Under this head are included all those industries and institutions which the State not merely regulates, but owns and manages. The control of coinage and currency are undoubtedly among the necessary functions of government. Almost equally necessary is the government postal service. Telegraphs, telephones, railways, water supply and lighting may in a sense are called optional functions, since the general welfare does not always require them to be operated by the State. When public operation is clearly superior to private operation, all things considered, the State undoubtedly neglects its duty of promoting the common welfare if it fails to manage these utilities. It is a necessary part of the State's functions to provide such public safeguards as fire departments, lighthouses, buoys, and beacons; to maintain such instrumentalities of communication as roads, canals, bridges, and wharves; and to conserve such natural resources as forests, water powers, and watersheds. None of these activities can be satisfactorily performed by private enterprise.

Public Education. As the child belongs primarily to the parents, so the function of education is primarily theirs. Both these propositions are demonstrated by the facts and requirements of human welfare. In very exceptional cases only can the education and upbringing of the child be controlled and carried on as well by the State as by the parents. Nevertheless, the common welfare does require the State to take a rather important part in the work of education. It is summarized in the following excerpts from the Pastoral Letter of the American Hierarchy, issued in 1920.

As the public welfare is largely dependent upon the intelligence of the citizen, the State has a vital concern in education. This is implied in the original purpose of our government which, as

set forth in the preamble to the Constitution, is "to form a more perfect union, establish justice, ensure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity."

In accordance with these purposes, the State has a right to insist that its citizens shall he educated. It should encourage among the people such a love of learning that they will take the initiative and, without constraint, provide for the education of their children. Should they, through negligence or lack of means fail to do so, the State has the right to establish schools and take every other legitimate means to safeguard its vital interests against the dangers that result from ignorance. In particular, it has both the right and the duty to exclude the teaching of doctrines which aim at the subversion of law and order and therefore at the destruction of the State itself.

The State is competent to do these things because its essential function is to promote the general welfare. But on the same principle it is bound to respect and protect the rights of the citizen, and especially of the parent. So long as these rights are properly exercised, to encroach upon them is not to further the general welfare, but to put it in peril. If the function of government is to protect the liberty of the citizen, and if the aim of education is to prepare the individual for the rational use of his liberty, the State cannot rightfully or consistently make education a pretext for interfering with rights and liberties which the Creator, not the State, has conferred. Any advantage that might accrue even from a perfect system of State education would be more than offset by the wrong which the violation of parental rights would involve. In our country, government thus far has wisely refrained from placing any other than absolutely necessary restrictions upon private initiative. The result is seen in the development of our resources, the products of inventive genius and the magnitude of our enterprises. But our most valuable resources are the minds of our children, and for their development at least the same scope should be allowed to individual effort as is secured to our undertakings in the material order.

The spirit of our people in general is adverse to State monopoly and this for the obvious reason that such absorption of control would mean the end of freedom and initiative. The same consequence is sure to follow when the State attempts to monopolize education; and the disaster will be greater inasmuch as it will affect, not simply the worldly interests of the citizen, but also his spiritual growth and salvation.

There are other public educational institutions which can scarcely be called absolutely necessary, and yet which are so useful that they may very properly be conducted by the State. Such are museums, art galleries, libraries, zoological gardens, scientific bureaus, laboratories, and experiment stations. The services rendered by these agencies contribute much to the common welfare and they could not, as a rule, be adequately carried on by private effort.

Public Charity The principle that the State should do only those things which cannot be done as well by private action, applies with especial force to the field of charity. In general, this principle rests upon the fundamental truth that the individual reaches a higher degree of self-development when he does things for himself than when the State does things for him. In the province of charity this fact is illustrated with regard both to the receiver and the giver. The former is more likely to seek unnecessary assistance from the State than from an individual; the latter is more likely to infuse his charity with human sympathy than is the State; and his incentives to charitable action are diminished if the State does too much. In both cases harm is done to individual development.

Nevertheless, the charitable functions of the State are numerous and important, In the field of prevention, it can and should use all proper and possible methods to provide that kind of social environment which renders charitable relief unnecessary. Under this head comes a large list of industrial, educational, sanitary and moral provisions, to assure people a reasonable minimum of the material conditions of living. Some of these are stated in detail in later paragraphs of this chapter. In the field of relief, the State is frequently required to maintain hospitals, asylums, almshouses and corrective institutions; to grant subsidies to private institutions and agencies engaged in these works, and even to provide for needy persons outside of institutions. Whether and to what extent the State should undertake any of these tasks is always to be determined by the answer which the actual situation gives to the question: can the State do the work better, all things considered, than private agencies? "All things considered," refers to remote as well as immediate results. For example, it is conceivable that the State might take care of all dependent children more cheaply than could private associations, but this action ought not to be taken if it would lead to a notable decline in charitable feeling, responsibility, and initiative among individuals.

Public Health, Safety, Morals, and Religion. The State should protect its citizens against disease, by sanitary regulations, such as those relating to quarantine, inoculation, medical inspection of school children, impure drugs, adulterated food, and the disposal of garbage. It should safeguard their physical integrity, by such measures as traffic rules, safety requirements for public conveyances, and building regulations. It should, as far as possible, provide them with a good moral environment through the regulation or repression of the liquor traffic, through the suppression of divorce, prostitution, public gambling, and indecent pictures, printed matter, theatrical productions, and places of amusement. Finally, the State is under obligation to protect and promote religion in all ways that are lawful and effective. Here we may appropriately quote the words of Pope Benedict XV:

Let princes and rulers of the people bear this in mind and bethink themselves whether it be wise and salutary, either for public authority or for the nations themselves, to set aside the holy

religion of Jesus Christ, in which that very authority may find such powerful support and defense. Let them seriously consider whether it be the part of political wisdom to exclude from the ordinance of the State and from public instruction, the teaching of the Gospel and of the Church. Only too well does experience show that when religion is banished, human authority totters to its fall. That which happened to the first of our race when he failed in his duty to God, usually happens to nations as well. Scarcely had the will in him rebelled against God when the passions arose in rebellion against the will; and likewise, when the rulers of the people disdain the authority of God, the people in turn despise the authority of men. There remains, it is true, the usual expedient of suppressing rebellion by force; but to what effect? Force subdues the bodies of men, not their souls.
All these matters are of vital importance for public welfare, and some of them are even included within the primary functions of the State, inasmuch as they involve the protection of natural rights. None of them can be adequately dealt with by private effort.

Industrial Regulation, Owing to the complexity of modern industrial conditions, this function of the State is more important than in any preceding age. Owing to its effect upon the pecuniary interests of individuals, it has been more strongly criticized than any other activity of the State. Not much opposition has been offered to State regulation of banks. All reasonable men recognize that the public must be protected through requirements concerning incorporation, minimum of capital and surplus, liability of stockholders, nature of investments, amount and kind of reserves, the issuing of notes, and public inspection and supervision.

The regulation of commerce, public utilities and manufactures, has a varied scope and may be exercised i n various ways. Foreign commerce may be regulated through taxes and embargoes on imports and exports, and by other methods of restriction. The regulation of domestic commerce takes many forms: intoxicating liquors, tobacco, explosives, drugs and other commodities are subjected to a system of licensing, or special taxation, or other kinds of legal supervision; railroads are forbidden to exact more than certain maximum charges for carrying goods and passengers, and are compelled to maintain certain standards of service; and such municipal utilities as street railways and lighting concerns must submit to similar requirements. Commercial contracts which are clearly extortionate, such as loans of money at usurious rates, are generally prohibited by law. In this matter the policy of governments is not in accord with the individualistic theory that all technically "free" contracts ought to be legally enforced. As a matter of fact, such contracts are not free in any fair sense. All the foregoing regulations promote the public welfare and are evidently among the proper functions of the State.

The most important public regulation of manufactures is that which strives to prevent unfair dealing and extortion by monopolistic corporations. In some form this is a very ancient practice of the State. Many centuries ago, legislators became aware that human beings cannot be trusted to exercise monopoly power with fairness to either competitors or consumers. Today the most

enlightened governments have numerous and complex statutes to prevent and punish both these forms of injustice. Such measures are clearly justified, not only to promote the public good, but also as an exercise of the primary function of the State, namely, the protection of natural rights. They are intended to prevent and punish unjust dealing and extortion. Nevertheless, they have not adequately attained that end. Additional measures are required, to limit still further the "individual freedom" of the monopolist to treat his fellows unjustly. Legal determination of maximum prices, government regulation of supply and distribution, and State competition in the manufacturing or other business carried on by a monopolistic concern, -- are the principal new methods that have been suggested. In so far as they are necessary and would prove adequate to protect the general welfare, they can undoubtedly be classed among the proper functions of the State. Since the main object is to prevent the imposition of extortionate prices upon the consumer and the receipt of excessive profits and interest by the monopoly, these and all other regulatory measures are directed against that "rapacious usury, which, although more than once condemned by the Church, is nevertheless, under a different guise but with the like injustice, still practiced by covetous and grasping men.

Probably the most necessary and beneficent group of industrial regulations are those which apply to the labor contract and the conditions of labor. The principal subjects covered are wages, hours of labor, child labor, woman labor, safety and sanitation in work places, accidents, sickness, old age and unemployment. As regards wages, legislation has been enacted regulating the manner and frequency of payment, and fixing minimum rates of remuneration. Underlying most of the latter measures is the theory that no wage earner should be required to accept less than the equivalent of a decent livelihood. So long as millions of workers are unable to obtain this decent minimum through their own efforts or through the benevolence of the employer, they have clearly the right to call upon the intervention of the State. In other words, the enactment of minimum wage legislation is among the State's primary as well as secondary functions. Laws prohibiting an excessively long working day, the employment of young children, the employment of women in occupations unsuited to their sex, the existence of unsafe and unsanitary work places, -- are all likewise included among both the primary and the secondary functions of government. Legal provisions for the prevention and adjustment of industrial disputes, and to insure the workers against accidents, sickness, unemployment, invalidity and old age, have been made by various countries. They evidently represent a normal exercise of, at least, the secondary functions of the State.

To the foregoing legal measures for the protection of labor may pertinently be applied the principle laid down by Pope Leo XIII: "Whenever the general interest, or any particular class suffers or is threatened with injury which can in no other way be met or prevented, it is the duty of the public authority to intervene." Indeed, the great Pontiff himself applied the principle quite specifically to the conditions and needs of the working class. He said: "When there is question of

defending the rights of individuals, the poor and helpless have a claim to especial consideration. The richer class has many ways of shielding themselves, and stands less in need of help from the State; whereas, those who are badly off have no resources of their own to fall back upon, and must chiefly depend upon the assistance of the State. And it is for this reason that wage-earners, who are undoubtedly among the weak and necessitous, should be specially cared for and protected by the government."

Our discussion of the end and functions of the State may fittingly close with the following declaration of the great Catholic authority on law, Francisco Suarez:

"The object of civil legislation is the natural welfare of the community of its individual members, in order that they may live in peace and justice, with a sufficiency of those goods that are necessary for physical conservation, and comfort, and with those moral conditions which are required for private well-being and public prosperity."

**ELEMENTS OF STATE**

1. Population
2. Sovereignty
3. Definite territory
4. Government

**THE RELATIONSHIP OF STATE AND LAW**

One of the first courses (often the first) studied in law schools throughout the Soviet Union, and still studied by entering students in post-Soviet law schools, is the famous — no, the infamous — Theory of State and Law (TSL).

The classical TSL focused (and still focuses) on "interior" and "exterior" functions of governance. The interior functions include the state budget, focused on enhancing the economic development of the country; the reduction of unemployment; the social protection of citizens; the improvement of public health and public infrastructures (transportation, water, sewage, electricity, gas, etc.); and law enforcement, especially the "struggle against infringement of laws" (but without discussion of whether the government is itself governed by laws). The exterior functions include "maintaining mutually beneficial relations with foreign countries" and "defending the country against aggression."

Students are assured that "every country" understands and adopts the fundamental goals and institutions of law and government set forth in the TSL. Not surprisingly, during Soviet times the TSL did not give a whiff of attention to liberty, equality under law, and the need for an independent judicial branch to determine facts and apply law without fear or favor; the TSL did

not mention the necessity for free and fair elections; and it was bereft of the history of constitutional democracy and the fundamentals of the Rule of Law. And what of today? What is taught as the ruling paradigm governing "state and law" more than two decades after the Soviet Union collapsed?

It is generally assumed that man is a socio-political animal, that man and society are mutually inextricable, and that no one can lead the life of the island (like the lonely Robinson Crusoe the ship-wrecked man trapped on an island). Such a world would simply be boring and meaningless. From the moment necessity endeared man to live beyond subsistence and evolve society, the questions have ever re-echoed: What is law? What is the role of law in the state? What are the rights and obligations of the citizens in the state? These rights and obligations vary from the intellectual, political, economic, judicial, to the freedom of expression, property ownership, equity and justice. However, the obligations and rights of the citizenry are actualized or negated according to the nature of law within a particular state.

The state is a personified abstraction. It often signifies the laws of the federation or a republic. It is in this sense that the state is said to have a geographical expression. A nation nonetheless refers to a people and the way they live (i.e. by their norms and customs). A nation state therefore, will include the people and the laws of the land.

Law is the fountain head that nurtures, or is nurtured by other elements of social organization such as politics, economics, sociology, psychology and religion…. Kings and Princes, Chiefs and Priests, Bishops and Mullahs, Proletariat and Soldier and, indeed, any person or group of persons who hold(s) the reigns of power or governance over a group of people does so on the basis of law. A lawfully authorized government rules by law in the same way as usurpers to power must resort to some form of law to gain legitimacy and control.

**(b) : Nature and development of Sovereignty**

**Sovereignty**, in layman's terms, means a state or a governing body has the full right and power to govern itself without any interference from outside sources or bodies. In political theory, sovereignty is a substantive term designating supreme authority over some polity. It is a basic principle underlying the dominant Westphalian model of state foundation.

Derived from Latin through French *souveraineté*, its attainment and retention, in both Chinese and Western culture, has traditionally been associated with certain moral imperatives upon any claimant.

Sovereignty reemerged as a concept in the late 16th century, a time when civil wars had created a craving for stronger central authority, when monarchs had begun to gather power onto their own hands at the expense of the nobility, and the modern nation state was emerging. Jean Bodin, partly in reaction to the chaos of the French wars of religion, presented theories of sovereignty calling for strong central authority in the form of absolute monarchy. In his 1576 treatise *Les Six Livres de la République* ("Six Books of the Republic") Bodin argued that it is inherent in the nature of the state that sovereignty must be:

1. Absolute: On this point he said that the sovereign must be hedged in with obligations and conditions, must be able to legislate without his (or its) subjects' consent, must not be bound by the laws of his predecessors, and could not, because it is illogical, be bound by his own laws.
2. Perpetual: Not temporarily delegated as to a strong leader in an emergency or to a state employee such as a magistrate. He held that sovereignty must be perpetual because anyone with the power to enforce a time limit on the governing power must be above the governing power, which would be impossible if the governing power is absolute.

Bodin rejected the notion of transference of sovereignty from people to sovereign; natural law and divine law confer upon the sovereign the right to rule. And the sovereign is not above divine law or natural law. He is above. not bound by) only positive law, that is, laws made by humans. The fact that the sovereign must obey divine and natural law imposes ethical constraints on him. Bodin also held that the ***lois royales***, the fundamental laws of the French monarchy which regulated matters such as succession, are natural laws and are binding on the French sovereign. How divine and natural law could in practice be enforced on the sovereign is a problematic feature of Bodin's philosophy: any person capable of enforcing them on him would be above him

During the Age of Enlightenment, the idea of sovereignty gained both legal and moral force as the main Western description of the meaning and power of a State. In particular, the "Social Contract" as a mechanism for establishing sovereignty was suggested and, by 1800, widely accepted, especially in the new United States and France, though also in Great Britain to a lesser extent.

Thomas Hobbes, in *Leviathan* (1651) borrowed Bodin's definition of sovereignty, which had just achieved legal status in the "Peace of Westphalia", and explained its origin. He created the first modern version of the social contract (or contractarian) theory, arguing that to overcome the "nasty, brutish and short" quality of life without the cooperation of other human beings, people must join in a "commonwealth" and submit to a "Soveraigne] Power" that is able to compel them to act in the common good. This expediency argument attracted many of the early proponents of sovereignty. Hobbes strengthened the definition of sovereignty beyond either Westphalian or Bodin's, by saying that it must be[]

1. Absolute: because conditions could only be imposed on a sovereign if there were some outside arbitrator to determine when he had violated them, in which case the sovereign would not be the final authority.
2. Indivisible: The sovereign is the only final authority in his territory; he does not share final authority with any other entity. Hobbes held this to be true because otherwise there would be no way of resolving a disagreement between the multiple authorities.

Hobbes' hypothesis that the ruler's sovereignty is contracted to him by the people in return for his maintaining their physical safety, led him to conclude that if and when the ruler fails, the people recover their ability to protect themselves, including by forming a new contract.

Hobbes's theories decisively shape the concept of sovereignty through the medium of social contract theories. Jean-Jacques Rousseau's (1712–1778) definition of popular sovereignty (with early antecedents in Francisco Suárez's theory of the origin of power), which only differs in that he considers the people to be the legitimate sovereign. Likewise, it is inalienable – Rousseau condemned the distinction between the origin and the exercise of sovereignty, a distinction upon which constitutional monarchy or representative democracy is founded. John Locke, and Montesquieu are also key figures in the unfolding of the concept of sovereignty, and differ with Rousseau and with Hobbes on this issue of alienability.

The second book of Jean-Jacques Rousseau's *Du Contrat Social, ou Principles du droit politique* (1762) deals with sovereignty and its rights. Sovereignty, or the general will, is inalienable, for the will cannot be transmitted; it is indivisible, since it is essentially general; it is infallible and always right, determined and limited in its power by the common interest; it acts through laws. Law is the decision of the general will in regard to some object of common interest, but though the general will is always right and desires only good, its judgment is not always enlightened, and consequently does not always see wherein the common good lies; hence the necessity of the legislator. But the legislator has, of himself, no authority; he is only a guide who drafts and proposes laws, but the people alone (that is, the sovereign or general will) has authority to make and impose them. Rousseau, in his 1763 treatise *Of the Social Contract*rgued, "the growth of the State giving the trustees of public authority more and means to abuse their power, the more the Government has to have force to contain the people, the more force the Sovereign should have in turn in order to contain the Government," with the understanding that the Sovereign is "a collective being of wonder" (Book II, Chapter I) resulting from "the general will" of the people, and that "what any man, whoever he may be, orders on his own, is not a law" (Book II, Chapter VI) – and furthermore predicated on the assumption that the people have an unbiased means by which to ascertain the general will. Thus the legal maxim, "there is no law without a sovereign."

The rule of law (also known as monocracy) is the legal principle that law should govern a nation, as opposed to arbitrary decisions by individual government officials. It primarily refers to the influence and authority of law within society, particularly as a constraint upon behavior,

including behavior of government officials.[2] The phrase can be traced back to 16th century England, and it was popularized in the 19th century by British jurist A. V. Dicey. The concept was familiar to ancient philosophers such as Aristotle, who wrote "Law should govern".[3]

Rule of law implies that every citizen is subject to the law, including law makers themselves. In this sense, it stands in contrast to an autocracy, collective leadership, dictatorship, or oligarchy where the rulers are held above the law (which is not necessary by definition but which is typical). Lack of the rule of law can be found in democracies and dictatorships, and can happen because of neglect or ignorance of the law, corruption, or lack of corrective mechanisms for administrative abuse, such as an independent judiciary with a rule-of-law culture, a practical right to petition for redress of grievances, or elections.

**(c): Nature and kinds of law and theories of justice**

Law is a system of rules that are enforced through social institutions to govern behavior. Laws can be made by legislatures through legislation (resulting in statutes), the executive through decrees and regulations, or judges through binding precedent (normally in common law jurisdictions). Private individuals can create legally binding contracts, including (in some jurisdictions) arbitration agreements that may elect to accept alternative arbitration to the normal court process. The formation of laws themselves may be influenced by a constitution (written or unwritten) and the rights encoded therein. The law shapes politics, economics, and society in various ways and serves as a mediator of relations between people.

A general distinction can be made between

(a) civil law jurisdictions (including cano and socialist law), in which the legislature or other central body codifies and consolidates their laws, and

(b) common law systems, where judge-made precedent is accepted as binding law. Historically, religious laws played a significant role even in settling of secular matters, which is still the case in some religious communities, particularly Jewish, and some countries, particularly Islamic. Islamic Sharia law is the world's most widely used religious law

The adjudication of the law is generally divided into two main areas referred to as

(i) Criminal law and
(ii) Civil law.

Criminal law deals with conduct that is considered harmful to social order and in which the guilty party may be imprisoned or fined. Civil law (not to be confused with civil law jurisdictions above) deals with the resolution of lawsuits (disputes) between individuals or

organizations. These resolutions seek to provide a legal remedy (often monetary damages) to the winning litigant. Under civil law, the following specialties, among others, exist: Contract law regulates everything from buying a bus ticket to trading on derivatives markets. Property law regulates the transfer and title of personal property and real property. Trust law applies to assets held for investment and financial security. Tort law allows claims for compensation if a person's property is harmed. Constitutional law provides a framework for the creation of law, the protection of human rights and the election of political representatives. Administrative law governs what executive branch agencies may and may not do, procedures that they must follow to do it, and judicial review when a member of the public is harmed by an agency action. International law governs affairs between sovereign states in activities ranging from trade to military action. To implement and enforce the law and provide services to the public by public servants, a government's bureaucracy, military, and police are vital. While all these organs of the state are creatures created and bound by law, an independent legal profession and a vibrant civil society inform and support their progress.

Law provides a rich source of scholarly inquiry into legal history, philosophy, economic analysis and sociology. Law also raises important and complex issues concerning equality, fairness, and justice. There is an old saying that 'all are equal before the law'. In 1894, the author Anatole France said sarcastically, "In its majestic equality, the law forbids rich and poor alike to sleep under bridges, beg in the streets, and steal loaves of bread. Writing in 350 BC, the Greek philosopher Aristotle declared, "The rule of law is better than the rule of any individual." Mikhail Bakunin said: "All law has for its object to confirm and exalt into a system the exploitation of the workers by a ruling class Cicero said "more law, less justice Marxist doctrine asserts that law will not be required once the state has withered away.

Punishment is the authoritative imposition of an undesirable or unpleasant outcome upon a group or individual, in response to a particular action or behavior that is deemed unacceptable or threatening to a norm. The unpleasant imposition may include a fine, penalty, or confinement, or be the removal or denial of something pleasant or desirable. The individual may be a person, or even an animal. The authority may be either a group or a single person, and punishment may be carried out formally under a system of law or informally in other kinds of social settings such as within a family.[ Negative consequences that are not authorized or that are administered without a breach of rules are not considered to be punishment as defined here. The study and practice of the punishment of crime, particularly as it applies to imprisonment, is called penology, or, often in modern texts, corrections; in this context, the punishment process is euphemistically called "correctional process". Research into punishment often includes similar research into prevention.

Justifications for punishment include retribution, deterrence, rehabilitation and incapacitation the last could include such measures as isolation, in order to prevent the wrongdoer's having contact with potential victims, or the removal of a hand in order to make theft more difficult. Of the four justifications, only retribution is part of the definition of punishment and none of the other

justifications is a guaranteed outcome, aside from obvious exceptions such as an executed man being incapacitated with regard to further crimes.

If only some of the conditions included in the definition of punishment are present, descriptions other than "punishment" may be considered more accurate. Inflicting something negative, or unpleasant, on a person or animal, without authority is considered spite or revenge rather than punishment. In addition, the word "punishment" is used as a metaphor, as when a boxer experiences "punishment" during a fight. In other situations, breaking a rule may be rewarded, and so receiving such a reward naturally does not constitute punishment. Finally the condition of breaking (or breaching) the rules must be satisfied for consequences to be considered punishment. Punishments differ in their degree of severity, and may include sanctions such as reprimands, deprivations of privileges or liberty, fines, incarceration, ostracism the infliction of pain, amputation and the death penalty. Corporal punishment refers to punishments in which physical pain is intended to be inflicted upon the transgressor. Punishments may be judged as fair or unfair in terms of their degree of reciprocity and proportionality Punishment can be an integral part of socialization, and punishing unwanted behavior is often part of a system of pedagogy or behavioral modification which also includes rewards.

**THEORIES OF PUNISHMENT**

1. Deterrent Theory
2. Retributive Theory
3. Preventive Theory
4. Reformative Theory
5. Expiatory Theory

## Unit –II: SOURCES OF LAW

### (a)custom

Customs have always been an important source of law. The two bones of contention regarding customs in Hindu Law are however: Its validity under the smriti law. Its relevancy to castes and tribes which are not governed by the smriti law.

Because of the working women belonging to the lower strata of the society, the various castes and tribes had relatively more woman oriented inheritance laws as opposed to the higher castes where women mostly just maintained the household. This is the reason why the efforts were at first made to make laws uniform across Hindu Law.

Among the pagan Arabs before Islam, inheritance rights were confined exclusively to the male relatives. The Koran abolished all these unjust customs and gave all the female relatives inheritance shares:

"From what is left by parents and those nearest related there is a share for men and a share for women, whether the property be small or large --a determinate share"

Muslim mothers, wives, daughters, and sisters had received inheritance rights thirteen hundred years before Europe recognized that these rights even existed. The division of inheritance is a vast subject with an enormous amount of details. The general rule is that the female share is half the males except the cases in which the mother receives equal share to that of the father. This general rule if taken in isolation from other legislations concerning men and women may seem unfair. The view of Muslim Scholars and Law-makers on this issue is however is as follows, in order to understand the rationale behind this rule, it is necessary to keep in mind that the financial burdens on a Muslim male is more than that on a female. During marriage, a Muslim husband is expected to give gifts to his wife whereas there is no such expectation attached to the wife. Also the earnings of the husband are usually earmarked for the maintenance of parents, wife and children and unmarried or widowed sisters if any. The wife on the other hand enjoys all benefits of her property and earnings. She has no liability to maintain anybody. To add to it all, Islam as a faith propagates the idea of marriage, denounces divorce and does not treat celibacy or abstinence as a virtue. Therefore it is the preaching of family life all the way. And hence it is evident that a male member of an Islamic family has more financial liability than a woman, therefore his share in a property distribution should be logically more and therefore inheritance rules are meant to offset this imbalance so that the society lives free of all gender or class wars.

Prior to the uniformisation and codification of laws however, it is the customs or personal laws as we call them, which guided the various religions and also different castes and tribes within the religion. Since ancient times the framing of all property laws have been exclusively for the

benefit of man, and woman have been treated as subservient, and dependent on male support. The right to property is important for the freedom and development of a human being. And irrespective of how much a religion might try to justify the giving of lesser property rights to a woman, it is unfair and absolutely uncalled for in today's society as well as the society in which such laws existed and were passed on through generations.

**Following are the essential elements of a custom:**

**1. Antiquity:**

A custom must be in existence from time immemorial. English law fixed the year 1189 to test the antiquity of a custom. A custom must be in existence prior to 1189, only then it can prove the consideration of antiquary. Under Hindu law also immemorial customs are transcendental law. However India law does not fix any particular year to test the antiquity of custom.

**2. Continuance:**

A custom must be practiced without interruption; continuity is an essential feature of the custom. Continuity does not mean that it should be in operation all the time. It means that there should be a continuous availability of the terms of the customs to deal with particular rule of conduct with which it deals. Presence 6f custom if fact and its enforceability both are essential to prove antiquity. If a custom becomes legally unenforceable even for a short time it would not the recognized as a valid' custom.

**3. Peaceable enjoyment:**

It is essential that custom must have been enjoyed peacefully by the concerned people.

**4. Matter of right:**

Custom must have been enjoyed as a matter of right. This right should be enforceable. Thus custom must result in creating obligatory force at the one hand and related claim on the other hand. If a practice is observed as a courtesy and not as a matter of right then it can be termed a "custom" in legal sense.

**5. Certainty:**

Custom must be certain. If the nature of the custom is not certain then it loses its validity. Custom originate from general consent, it is hard to determine existence of consent, on something which is not certain.

**6. Consistency:**

A custom must not be in conflict with other prevailing customs. The customs must be in consistency with other custom. Difference or inconsistency in custom will amount to different rule of conduct for a given situation; it will negotiate the general consent.

**7. Conformity with statute law:**

Custom should be conformity with statute law. A legislative enactment can abrogate a custom. In case of inconsistency between custom and statutory provision, former must give way to the latter. Thus, custom yield legislative enactment.

**Kinds of custom Customs are divided into-**

1. **Local customs-** are confined to a particular locality like a district, town or village.
2. **Class customs –** are the customs of a caste or a sect of the community or the followers of a particular profession or occupation.
3. **Family customs –** are confined to a particular family only, and do not apply to those who are not members of such family

**(b). Precedent**

The precedent on an issue is the collective body of judicially announced principles that a court should consider when interpreting the law. When a precedent establishes an important legal principle, or represents new or changed law on a particular issue, that precedent is often known as a landmark decision.

Precedent is central to legal analysis and rulings in countries that follow common law like the United Kingdom and Canada (except Quebec). In some systems precedent is not binding but is taken into account by the courts.

**Types of precedent**

**Binding precedent**

Precedent that must be applied or followed is known as *binding precedent* (alternately *mandatory precedent*, *mandatory* or *binding authority*, etc.). Under the doctrine of *stare decisis*, a lower court must honor findings of law made by a higher court that is within the appeals path of cases the court hears. In the United States state and federal courts, jurisdiction is often divided geographically among local trial courts, several of which fall under the territory of a regional appeals court, and all regional courts fall under a supreme court. By definition decisions of lower

courts are not binding on each other or any courts higher in the system, nor are appeals court decisions binding on each other or on local courts that fall under a different appeals court. Further, courts must follow their own proclamations of law made earlier on other cases, and honor rulings made by other courts in disputes among the parties before them pertaining to the same pattern of facts or events, unless they have a strong reason to change these rulings.

One law professor has described mandatory precedent as follows:

Given a determination as to the governing jurisdiction, a court is "bound" to follow a precedent of that jurisdiction only if it is directly in point. In the strongest sense, "directly in point" means that: (1) the question resolved in the precedent case is the same as the question to be resolved in the pending case, (2) resolution of that question was necessary to disposition of the precedent case; (3) the significant facts of the precedent case are also present in the pending case, and (4) no additional facts appear in the pending case that might be treated as significant

In extraordinary circumstances a higher court may overturn or overrule mandatory precedent, but will often attempt to distinguish the precedent before overturning it, thereby limiting the scope of the precedent in any event.

**Persuasive precedent**

Precedent that is not mandatory but which is useful or relevant is known as *persuasive precedent* (or *persuasive authority* or *advisory precedent*). Persuasive precedent includes cases decided by lower courts, by peer or higher courts from other geographic jurisdictions, cases made in other parallel systems (for example, military courts, administrative courts, indigenous/tribal courts, State courts versus Federal courts in the United States), and in some exceptional circumstances, cases of other nations, treaties, world judicial bodies, etc.

In a case of first impression, courts often rely on persuasive precedent from courts in other jurisdictions that have previously dealt with similar issues. Persuasive precedent may become binding through the adoption of the persuasive precedent by a higher court.

**Case law**

The other type of precedent is case law. In common law systems this type of precedent is granted more or less weight in the deliberations of a court according to a number of factors. Most important is whether the precedent is "on point," that is, does it deal with a circumstance identical or very similar to the circumstance in the instant case? Second, when and where was the precedent decided? A recent decision in the same jurisdiction as the instant case will be given great weight. Next in descending order would be recent precedent in jurisdictions whose law is the same as local law. Least weight would be given to precedent that stems from dissimilar

circumstances, older cases that have since been contradicted, or cases in jurisdictions that have dissimilar law.

**Critical analysis of precedent**

Precedents viewed against passing time can serve to establish trends, thus indicating the next logical step in evolving interpretations of the law. For instance, if immigration has become more and more restricted under the law, then the next legal decision on that subject may serve to restrict it further still.

Scholars have recently attempted to apply network theory to precedents in order to establish which precedents are most important or authoritative, and how the court's interpretations and priorities have changed over time

**Super stare decisis**

Super-stare decisis are a term used for important precedent that is resistant or immune from being overturned, without regard to whether correctly decided in the first place. It may be viewed as one extreme in a range of precedential power, or alternately, to express a belief, or a critique of that belief, that some decisions should not be overturned.

In 1976, Richard Posner and William Landes coined the term "super-precedent," in an article they wrote about testing theories of precedent by counting citations. Posner and Landes used this term to describe the influential effect of a cited decision. The term "super-precedent" later became associated with different issue: the difficulty of overturning a decision. In 1992, Rutgers professor Earl Maltz criticized the Supreme Court's decision in *Planned Parenthood v. Casey* for endorsing the idea that if one side can take control of the Court on an issue of major national importance (as in *Roe v. Wade*), that side can protect its position from being reversed "by a kind of super-stare decisis."

The issue arose anew in the questioning of Chief Justice John G. Roberts and Justice Samuel Alito during their confirmation hearings before the Senate Judiciary Committee. Before the hearings the chair of the committee, Senator Arlen Specter of Pennsylvania, wrote an op/ed in the *New York Times* referring to *Roe* as a "super-precedent." He mentioned the concept (and made seemingly humorous references to "super-duper precedent") during the hearings, but neither neither Roberts nor Alito endorsed the term or the concept.

**Ratio decidendi**

***Ratio decidendi*** (Latin plural *rationes decidendi*) is a Latin phrase meaning "the reason" or "the rationale for the decision". The *ratio decidendi* is "the point in a case which determines the judgment" or "the principle which the case establishes".

In other words, *ratio decidendi* is a legal rule derived from, and consistent with, those parts of legal reasoning within a judgment on which the outcome of the case depends.

It is a legal phrase which refers to the legal, moral, political, and social principles used by a court to compose the rationale of a particular judgment. Unlike *obiter dicta*, the *ratio decidendi* is, as a general rule, binding on courts of lower and later jurisdiction—through the doctrine of *stare decisis*. Certain courts are able to overrule decisions of a court of coordinate jurisdiction—however, out of interests of judicial comity, they generally try to follow coordinate rationes.

The process of determining the *ratio decidendi* is a correctly thought analysis of what the court actually decided—essentially, based on the legal points about which the parties in the case actually fought. All other statements about the law in the text of a court opinion—all pronouncements that do not form a part of the court's rulings on the issues actually decided in that particular case (whether they are correct statements of law or not)—are *obiter dicta*, and are not rules for which that particular case stands

The *ratio decidendi* is one of the most powerful tools available to a lawyer. With a proper understanding of the *ratio* of a precedent, the advocate can in effect force a lower court to come to a decision which that court may otherwise be unwilling to make, considering the facts of the case.

The search for the ratio of a case is a process of elucidation; one searches the judgment for the abstract principles of law which have led to the decision and which have been applied to the facts before the court. As an example, the *ratio* in *Donoghue v. Stevenson* would be that a person owes a duty of care to those who he can reasonably foresee will be affected by his actions.

All decisions are, in the common law system, decisions on the law as applied to the facts of the case. Academic or theoretical points of law are not usually determined. Occasionally, a court is faced with an issue of such overwhelming public importance that the court will pronounce upon it without deciding it. Such a pronouncement will not amount to a binding precedent, but is instead called an *orbiter dictum*.

*Ratio decidendi* also involves the holding of a particular case, thereby allowing future cases to build upon such cases by citing precedent. However, not all holdings are given equal merit; factors that can strengthen or weaken the strength of the holding include:

- Rank of the court (Supreme Court versus an appellate court)
- Number of issues decided in the case (multiple issues may result in a so-called "multi-legged holdings")
- Authority or respect of the judge(s)
- Number of concurring and dissenting judges
- New applicable statutes
- Similarity of the environment as opposed to the age of the holding

The ability to isolate the abstract principle of law in the pragmatic application of that abstraction to the facts of a case is one of the most highly prized legal skills in the common law system. The lawyer is searching for the principles which underlined and underlay the court's decision.

**Challenges**

The difficulty in the search for the ratio becomes acute when unlike in the decisions of the Court of Appeal or the House of Lords, more than one judgment is promulgated. A dissenting judgment on the point is not binding and cannot be the ratio. However, one will sometimes find decisions in which, for example, five judges are sitting the House of Lords, all of whom purport to agree with one another but in each of whose opinions one is able to discern subtly different ratios. An example is the case of *Kay v Lambeth LBC*, on which a panel of seven of their Lordships sat and from whose opinions emerged a number of competing ratios, some made express by their Lordships and others implicit in the decision.

Another problem may arise in older cases where the *ratio* and *obiter* are not explicitly separated, as they are today. In such a case, it may be difficult to locate the *ratio*, and on occasion, the courts have been unable to do so.

Such interpretative ambiguity is inevitable in any word-bound system. Codification of the law, such as has occurred in many systems based on Roman law, may assist to some extent in clarification of principle but is considered by some common lawyers anathema to the robust, pragmatic, and fact-bound system of English law.

***Obiter dictum***

***Obiter dictum*** (more usually used in the plural, *obiter dicta*) is Latin for a word said "by the way that is, a remark in a judgment that is "said in passing". It is a concept derived from English

common law. For the purposes of judicial precedent, *ratio decidendi* is binding, whereas *obiter dicta* are persuasive only

**Significance of *obiter dicta***

A judicial statement can be *ratio decidendi* only if it refers to the crucial facts and law of the case. Statements that are not crucial, or which refer to hypothetical facts or to unrelated law issues, are obiter dicta. *Obiter dicta* (often simply *dicta*, or *obiter*) are remarks or observations made by a judge that, although included in the body of the court's opinion, do not form a necessary part of the court's decision. In a court opinion, *obiter dicta* include, but are not limited to, words "introduced by way of illustration, or analogy or argument".[2] Unlike *ratio decidendi*, *obiter dicta* are not the subject of the judicial decision, even if they happen to be correct statements of law. The so-called Wambaugh's Inversion Test provides that to determine whether a judicial statement is *ratio* or *obiter*, you should invert the argument, that is to say, ask whether the decision would have been different, had the statement been omitted. If so, the statement is crucial and is *ratio*; whereas if it is not crucial, it is *obiter*.

An example of an instance where a court opinion may include *obiter dicta* is where a court rules that it lacks jurisdiction to hear a case or dismisses the case on a technicality. If the court in such a case offers opinions on the merits of the case, such opinions may constitute *obiter dicta*. Less clear-cut instances of *obiter dicta* occur where a judge makes a side comment in an opinion to provide context for other parts of the opinion, or makes a thorough exploration of a relevant area of law. Another example would be where the judge, in explaining his or her ruling, provides a hypothetical set of facts and explains how he or she believes the law would apply to those facts.

University of Florida scholars Teresa Reid-Rambo and Leanne Pflaum explain the process by which obiter dicta may become binding. They write that:

"In reaching decisions, courts sometimes quote passages of *obiter dicta* found in the texts of the opinions from prior cases, with or without acknowledging the quoted passage's status as *obiter dicta*. A quoted passage of *obiter dicta* may become part of the holding or ruling in a subsequent case, depending on what the latter court actually decided and how that court treated the principle embodied in the quoted pass Negligence is the failure to exercise the required amount of care to prevent injury to others. For example, if you cause an accident that injures someone or damages their vehicle because you were driving at an unsafe speed, then you could be sued for negligence.

> In some cases, the law imposes absolute liability (aka strict liability) on specific parties without regard to fault, and, therefore, obviates the need to prove fault in court. For instance, manufacturers are held strictly liable for defective products that they manufacture.

Sometimes, the law designates other parties as being responsible, whether they are or not. Imputed negligence results in vicarious liability, where the principal is responsible for the acts of his agents. For example, employers have vicarious liability for the actions of their employees. If an employee injures someone in the course of employment, then it doesn't matter whether the employer could have done anything to prevent it—the employer will be held liable regardless. Other instances of imputed negligence is through the effect of the family purpose doctrine that holds parents responsible for the negligent acts of their children, or the dram shop law, which holds the seller of alcoholic beverages liable for drunken patrons. If a patron drives after drinking at a tavern, and subsequently kills or injures someone with his vehicle, then the tavern owner can be held liable.

## (c)LEGISLATION

**Legislation** (or "statutory law") is law which has been promulgated (or "enacted") by a legislatur or other governing body or the process of making it. (Another source of law is judge-made law or case law.) Before an item of legislation becomes law it may be known as a bill, and may be broadly referred to as "legislation", while it remains under consideration to distinguish it from other business. Legislation can have many purposes: to regulate, to authorize, to proscribe, to provide (funds), to sanction, to grant, to declare or to restrict. It may be contrasted with a non-legislative act which is adopted by an executive or administrative body under the authority of a legislative act or for implementing a legislative act. Under the Westminster system, an item of primary legislation is known as an Act of Parliament after enactment.

Legislation is usually proposed by a member of the legislature (e.g. a member of Congress or Parliament), or by the executive, whereupon it is debated by members of the legislature and is often amended before passage. Most large legislatures enact only a small fraction of the bills proposed in a given session whether a given bill will be proposed and is generally a matter of the legislative priorities of government.

Legislation is regarded as one of the three main functions of government, which are often distinguished under the doctrine of the separation of powers. Those who have the formal power to *create* legislation are known as legislators; a judicial branch of government will have the formal power to *interpret* legislation (see statutory interpretation); the executive branch of government can act only within the powers and limits set by the law.

**KINDS OF LEGISLATION**

1. Supreme Legislation
2. Subordinate Legislation

   i) Municipal Legislation
   ii) Executive
   iii) Colonial
   iv) Autonomous
   v) Judicial

**Unit –III: concepts of law**

**(a)Rights and Duties**

This research considers the issue of rights and duties in the context of social relations based on persistent exchange processes. Rights and duties that acquire a functional nature in such context are characterized in a tentative formal way. A possible connection between functional rights and duties and the issue of morality as a regulation mechanism. Every right has a corresponding duty. Therefore,, there can be no duty unless there is someone to whom it is due. There can be no right without a corresponding duty or a duty without a corresponding right, just as there cannot be parent without a child. . Every duty is a duty towards some person or persons in whom a corresponding right is vested.

**KINDS OF RIGHTS**

1. Perfect and Imperfect rights
2. Positive and Negative
3. Rights in Rem and Rights in Personam
4. Rights in Re Propria and Rights in Re Aliena
5. Proprietary Rights and Personal Rights.
6. Legal and Equitable Rights
7. Vested and Contingent Rights
8. Public and Private Rights
9. Principal and Accessory Rights

**KINDS OF DUTIES**

1. Universal, General and Particular Duties
2. Moral and Legal Duties
3. Primary and Secondary Duties
4. Positive and Negative Duties
5. Relative and Absolute Duties.

**RELATIONSHIP BETWEEN RIGHTS AND DUTIES** It is debatable question whether rights and duties are necessarily co relative. According to one view, every right has a corresponding duty. Therefore,, there can be no duty unless there is someone to whom it is due. There can be no right without a corresponding duty or a duty without a corresponding right, just as there cannot be parent without a child. Every duty is a duty towards some person or persons in whom a corresponding right is vested. Likewise, every right is right against some person or persons upon whom a co relative duty is imposed. Every right or duty involves a vinculum juries or a of legal obligation by which two or more persons are bound together. There can be no duty unless there is someone to whom it is due. Likewise, there can be no right unless there is someone from whom it is claimed. According to Holland, every right implies the active or passive forbearance by others of the wishes of the party having the right. The forbearance on the part of others is called a duty. A moral duty is that which is demanded by the public opinion of society and a legal duty is that which is enforced by the power of the state. The view of salmond is that rights and duties are co relatives. If there are duties towards the public, there are rights as well. There can be no duty unless there is some person to whom that duty is due. Minerva mills ltd v. union of India

The Supreme Court observed that there may be a rule which imposes an obligation on an individual or authority, and yet it may not be enforceable in court of law, and therefore not give rise to a corresponding enforceable right in another person. But it would still be a legal rule because it prescribes a norm of conduct to be followed by such individual or authority. The law may provide a mechanism for enforcement of this obligation, but the existence of the obligation does not depend upon the creation of such mechanism. The obligation exists prior to and independent of, the mechanism of enforcement. A rule of law because there is no regular judicial or quasi-judicial machinery to enforce its command. Such a rule would exist despite any problem relating to its enforcement. Rights and duties are two phases of the same thing. Rights are considered to be essential for the expansion of human personality. They offer to the individual a sufficient scope for free action and thus prepare ground for self-development.

Although rights arc of great significance in a democratic stale yet they become meaningless in the absence of duties. Rights involve obligations as well.

An individual has rights so that he may make his contribution to the social good. One has no right to act unsociably, man's rights imply his claims on society and duties indicate the claim of society on the individual. This means that an individual owes to the society certain duties as he obtains rights.

According to Prof. Laski there is a four-fold connection between rights and duties.

**1. My Right implies Your Duty:**

Every right of an individual involves a corresponding duty of others. For example, my right to life implies that others should give protection and security to my life.

My right to move about freely implies a corresponding duty resting on others that they should not interfere with my free movement.

**2. My Rights imply My Duty to admit a similar Right of others:**

The conditions of life which I need for myself arc also needed by others. This indicates that every right is a duty in itself. If an individual exercises a right, he must bear in mind that the same right belongs to others as well.

If I have the right to freedom of speech, it is my duty to see that I may not be a hindrance in the free exercise of this right by others.

**3. I should exercise My Right to promote Social Good:**

A person He guarantees the rights to the majority in the society to remove the should not abuse the right given to him by the State.

For example, if he uses the right to freedom of speech for spreading communal bitterness or society cannot deprive man of these rights; these are inherent and to preach violence and anarchy, it becomes an act counter to the social alienable rights, good. The state will then be justified in depriving the person of his right if he has abused it.

**4. Since the State guarantees and maintains My Rights; I have the Duty to support the State:**

The state is the agency for social good and it is the duty of an individual to perform ones duties honestly.

The above-mentioned relations between rights and duties, there for clearly prove that rights and duties go hand in hand. A healthy civic li] is impossible without the co-existence of rights and duties. Rights without duties have no meaning and duties without rights have no sense.3

and Duties are, specifically discussed

**CONCLUSION**

Thus, rights and duties are correlatives and there can be no right without a duty like there can be no parent without a child. And in Indian constitution there are many provisions for rights and duties of the individuals as fundamental rights and fundamental duties

**(b) Personality**

Jan Klabbers The international lawyer, if no one else, is occasionally confronted with discussions revolving around the notion of legal personality. This occurred, for instance, when the UN was contemplating, after a UN appointed mediator had been in the Middle East in the late 1940s, whether it could proceedings against a non-member state.1 It occurred in the mid-1980s when the status of the International Tin Council, having gone bankrupt, became an issue for the English courts in trying to figure out to what extent the member states of the Council could bear responsibility for the Council's financial sense of adventure. It occurred in the early 1990s, when an English court loudly wondered about the status, in English law, of the Arab Monetary Fund, whose managing director had taken off with quite a few of the funds of the Fund it occurs as we speak, with the International Law Commission aiming to develop rules on the responsibility of international organizations under international law and its reporter suggesting that personality functions as a precondafter, in the early 1990s, the EU was created at Maastricht as an entity scheduled to have serious and intense activities on the international scene, but without any grant of legal personality - or domestic legal personality, for that matter. As the ILC reporter's approach to the topic of the international responsibility of international organizations suggests, the debates surrounding those incidents usually revolve around one central theme: somehow international legal personality is thought to be a *condition sine qua non* for theition4; and it occurred perhaps most conspicuously possibility of acting within a given legal situation; somehow personality is considered to be a threshold which has to be crossed. Without legal personality, so the implication goes, those entities do not exist in law, and accordingly cannot perform the sort of legal acts that would be recognized by that legal system, nor even be held responsible under international law.6 Long story short: without international legal personality, the UN is thought to be unable to start proceedings under international law against a state; without international legal personality, the EU is not deemed capable to conclude treaties or perform other international legal acts; and without per personality recognized under English law, the Arab Monetary Fund is regarded unable to sue its former managing director. What I will do is take issue with this apparently quiteonality under English law, or at least personality

recognized under English law, the Arab Monetary Fund is regarded unable to sue its former managing director. What I will do is take general position. While I will readily concede that a certain measure of personality may be required before one has standing to sue, I would claim - without further developing it -that this devolves from rules on standing (and the circumstance that standing is granted usually only sparingly) rather than from personality as such.7 This is exemplified by the possibility that other acts are perfectly possible: one does not need legal personality to conclude treaties, or to make unilateral promises, or perform acts of recognition, or Impose conditions on others or, indeed, violate international law. What, then, does legal personality signify, if it does not constitute a threshold condition for performing legal acts? What's the point of legal personality if it seemingly has no discernible practical ramifications, and if one cane issue with this apparently quiperform all sorts of legal acts without it? I will contend that a plea for personality, and the consequent acceptance thereof, has more to do with political recognition of relations between actors and that those relations have some form of relevance, than with anything else. This will be further developed towards the end of the paper, in section Fambivalences inherent in the idea of legal personality, and to briefly discuss (and dismiss) the idea of personality as a threshold for action within a legal system Perhaps as a disclaimer, and at any rate to reveal where I am coming form, even though I was asked to look at Personality generally, I cannot hide the circumstance that my background is in international law and, to a lesser extent, EU law. I am not overly familiar with personality doctrine in domestic law, although my guess is that the difference with international law (if such difference exists to begin with) is one of degree, not of kind. Hence, while my concept of personality is modeled mainly upon international law, it may nonetheless apply to legal personality more generally

**THEORIES OF CORPORATE PERSONALITY**

1. Fiction theory
2. Concession Theory
3. Realist Theory
4. Bracket Theory

**LEGAL STATUS**

1. Animals
2. Dead Person
3. Unborn Person
4. Artificial person or Juristic person

**(C) Possession, ownership and property**

In law, **possession** is the control a person intentionally exercises toward a thing. In all cases, to possess something, a person must have an intention to possess it. A person may be in possession

of some property (although possession does not always imply ownership). Like ownership, the possession of things is commonly regulated by states under property law

**Intention to possess**

An intention to possess (sometimes called *animus possidendi*) is the other component of possession. All that is required is an intention to possess something for the time being. In common law countries, the intention to possess a thing is a fact. Normally, it is proved by the acts of control and surrounding circumstances.

It is possible to intend to possess something without knowing that it exists. For example, if you intend to possess a suitcase, then you intend to possess its contents, even though you do not know what it contains. It is important to distinguish between the intention sufficient to obtain possession of a thing and the intention required to commit the crime of possessing something illegally, such as banned drugs, firearms or stolen goods. The intention to exclude others from the garage and its contents does not necessarily amount to the guilty mind of intending to possess stolen goods.

When people possess places to which the public has access, it may be difficult to know whether they intend to possess everything within those places. In such circumstances, some people make it clear that they do not want possession of the things brought there by the public. For example, it is not uncommon to see a sign above the coat rack in a restaurant which disclaims responsibility for items left there.

**Importance of possession**

Possession is one of the most important concepts in property law. There are three related and overlapping but not identical legal concepts: possession, right of possession and ownership.

In common law countries, possession is itself a property right. The owner of a property has the right of possession and may assign that right wholly or partially to another who may then also assign the right of possession to a third party. For example, an owner of residential property may assign the right of possession to a property manager under a property management contract who may then assign the right of possession to a tenant under a rental agreement. There is a rebuttable presumption that the possessor of property also has the right of possession, and evidence to the contrary may be offered to establish who has the legal right of possession to determine who should have actual possession, which may include evidence of ownership (without assignment of the right of possession) or evidence of a superior right of possession without ownership. Possession of a thing for long enough can become ownership by termination of the previous owner's right of possession and ownership rights. In the same way, the passage of time can bring

to an end the owner's right to recover exclusive possession of a property without losing the ownership of it, as when an adverse easement for use is granted by a court.

In civil law countries, possession is not a right but a (legal) fact which enjoys certain protection by the law. It can provide evidence of ownership but it does not in itself satisfy the burden of proof. For example, ownership of a house is never proven by mere possession of a house. Possession is a factual state of exercising control over an object, whether owning the object or not. Only a legal (possessor has legal ground), bona fide (possessor does not know he has no right to possess) and regular possession (not acquired through force or by deceit) can become ownership over passage of time. A possessor enjoys certain judicial protection against third parties even if he is not the owner.

There may be varying degrees of rights to possession. For example, if you leave a book that belongs to you at a cafe and the waiter picks it up, you have lost possession. When you return to recover the book, even though the waiter has possession, you have a better right to possession and the book should be returned. This example demonstrates the distinction between ownership and possession: throughout the process you have not lost ownership of the book although you have lost possession at some point.

**Obtaining possession** Possession requires both control and intention. It is obtained from the first moment that both those conditions exist simultaneously. Usually, intention precedes control, as when you see a coin on the ground and reach down to pick it up. Nevertheless, it is conceivable that a person might obtain control of a thing before forming the intention to possess it. If someone unknowingly sat on and therefore had control of a $10 note on the seat of a train, he or she could obtain possession by becoming aware of the note and forming the intention to possess it. People can also intend to possess things left, without their knowledge, in spaces they control.

Possession can be obtained by a one-sided act by which factual control is established. This can take the form of apprehension (taking an object not in someone's possession) or seizure (taking an object in someone's possession). It can also be obtained through a two-sided process of handing over the possession from one party to another. The party handing over possession must intend to do so.

**Possession acquired by consent**

Most property possessed is obtained with the consent of someone else that possessed it. They may have been purchased, received as gifts, leased, or borrowed. The transfer of possession of goods is called delivery. For land, it is common to speak of granting or giving possession.

A temporary transfer of possession is called a bailment. Bailment is often regarded as the separation of ownership and possession. For example, the library continues to own the book

while you possess it and will have the right to possess it again when your right comes to an end. A common transaction involving bailment is a conditional sale or hire-purchase, in which the seller lets the buyer have possession of the thing before it is paid for. The buyer pays the purchase price in installments and, when it is fully paid, ownership of the thing is transferred from seller to buyer.

**Possession acquired without consent**

It is possible to obtain possession of a thing without anyone else's consent. First, you might take possession of something which has never been possessed before. This can occur when you catch a wild animal; or create a new thing, such as a loaf of bread. Secondly, you might find something which someone else has lost. Thirdly, you might take something from another person without their consent. Possession acquired without consent is a property right which the law protects. It gives rise to a right of possession which is enforceable against everyone except those with a better right to possession.

**Forms of transferring possession** There are various forms of transferring possession. One can physically hand over the object (e.g. handing over a newspaper bought at the newsstand) but it is not always necessary for the party to literally grab the object for possession to be considered transferred. It is enough that the object is within the realm of factual control (e.g. leaving a letter in the letterbox). Sometimes it is enough for a symbol of the object which enables factual control to be handed over (e.g. handing over the keys to a car or a house). One may also choose to terminate possession, as one throws a letter in the trash. Possession includes having the opportunity to terminate possession. If this were not the case, then police would be free to plant drugs on innocent people one second and charge them with criminal possession the next.

**Ownership**

Ownership is a complex juristic concept which has its origin in the Ancient Roman Law. In Roman law ownership and possession were respectively termed as ‘dominium’ and ‘possession’. The term dominium denotes absolute right to a thing while possession implied only physical control over it. They gave more importance to ownership because in their opinion it is more important to have absolute right over a thing than to have physical control over it.

In English law the concept of ownership developed much later than possession. The earlier law gave importance to possession on the misconception that possession includes within its ownership as well. Holds worth observed that the English law accepted the concept of ownership as an absolute right through gradual the gradual development in the law of possession.

The concept of ownership consists of a number of claims such as liberty, power and immunity in regard to the thing owned. Ownership is thus a sum-total of possession, disposition and

destruction which includes the right to enjoy property by the owner. The owner has to side by side abide by the rules and regulation of the country.

DEFINITION

**Austin's**

Austin while defining ownership has focused on the three main attributes of ownership, namely, indefinite user, unrestricted disposition and unlimited duration which may be analyzed in detail.

**1. Indefinite User:**

By the right of indefinite user Austin means that the owner of the thing is free to use or misuse the thing in a way he likes. The pawned of a land may use it for walking, for building house or for gardening and so forth. However Austin was cautious enough to use the term "indefinite". He did not use the thing owned infamy way he likes. His use if the thing is conditioned by requirements or restrictions imposed by the law. The owned must not use the things owned as to injure the right of others. The principle is the foundation of the well known maxim 'sie utere taro ut alierum non laedas' the meaning of the maxims is that to use your own property s not to injure your neighbor's right. Again the use of property may be restricted voluntarily e.g. town planning act, slum clearance act, 1955 etc.

**2. Unrestricted Disposition:**

What Austin implies by unrestricted disposition is that the power of disposition of the pawned is unhampered by law meaning thereby that he is absolutely free to dispose it to remove it to anyone This is incorrect. In case of lease of thousand years, servitudes and restricted, covenants, plenary control of a property is not possible. Moreover, in the law of the some of the western countries there is rule re relegitima portis which means that the person cannot dispose of his entire property. He has to keep a certain portion of the property for the members of his family. Under mohamdan law a similar rule prevails namely a person cannot dispose and delaying creditors would be set aside. As under Hindu law government by mitakashara law can't alienate ancestral immovable property without the consent of other co presenters except for legal necessity.

**3. Unlimited Duration:**

It is incorrect since almost under every legal system the state possesses the power to take over the property of any person in public interest.

The abolition of Zamindari system India , the abolition of privy purses, nationalization of Bank etc. are some example of the fact that the ownership can be cut short by the state for public purpose and its duration is not unlimited.

Austin's definition has been followed by Holland. He defines ownership as plenary control over an object. According to him an owner has three rights on the subject owned:
1. Possession

2. Enjoyment

3. Disposition

Planetary control over an object implies complete control unrestricted by any law or fact. Thus, the criticism leveled against Austin's definition would apply to that given by Holland in so far as the implication of the term "plenary control" goes.

**Criticism Against Austin's Definition:**

Austin's definition has been criticized by many writers.
They argue that it is fallacious to think that ownership is a single right; in fact, it is a bundle of rights including the right of enjoyment by the user. Even if the owner gives away his few rights in ownership, the residue are still owned by him. For example, mortgage of property by the owner.

Ownership is not merely a right but also a relationship between the right owned and the person owning it.

Owner having an unrestricted right of disposition has also been criticised. His right of disposition of the property can be curtailed by the state. For example, under article 31(2) of the Indian Constitution the state can take away the property of any person for public purpose.

**Salmond's Definition:**

According to the Salmond ownership vests in the complex of rights which he exercises to the exclusive of all others. For Salmond what constitute ownership is a bundle of rights which in here resides in an individual. Salmond's definition thus point out two attributes of ownership:

1. Ownership is a relation between a person and right that is vested in him

2. Ownership is incorporeal body or form Salmond's definition does not indicate the content of the ownership. It does not indicate the right, powers etc. which are implied in the concept of ownership. Again, it is not wholly correct to say that ownership is a relation between a person and right that is vested in him. As the most popular and common idea of ownership is a relationship between a person and a thing.

**Criticism against Salmond's Definition:**

Dugit says the thing is what is owned not the right which does not really exist.

According to Cook, there are many rights which a person may possess and to use the term 'owner' to express the relationship between a person and a right is to introduce unnecessary confusion. Ownership is the name given to the bundle of rights.

For several casts and any contravention

MODERN LAW AND OWNERSHIP

Under modern law there are the following modes of acquiring ownership which may be broadly classed under two heads,

1. Original mode

2. Derivative mode

the original mode is the result of some independence personal act of the acquire himself. The mode of acquisition may be three kinds

a. Absolute when a ownership is acquired by over previously ownerless object

b. Extinctive, which is where there is extinctive of previous ownership by an independence adverse act on the part of the acquiring. This is how a right of easement is acquiring after passage of time prescribed by law.

c. Accessory that is when requisition of ownership is the result of accession. For example, if three fruits, the produce belongs to the owner unless he has parted with to the same. When ownership is derived from the previous version of law then it is called derivate acquisition. That is derived mode takes place from the title of s prior owner. It is derived either by purchase, exchange, will, gift etc.Indian Transferee Acts of property rules for the transfer of immovable

property, Sale of goods Acts for the transfer of property of the firm and the companies Act for the transfer of company property.

SUBJECT MATTER OF OWNERSHIP

Normally ownership implies the following:

1. The right to manage;
2. The right to posses;
3. The right to manage;
4. The right to capital;
5. The right to the income.

The owner of a thing has the right to possess it, to the exclusive of all others i.e. the owner has exclusive physical control of a thing or such control possesses the thing but this is not necessary and always so. Thus to cite only a few examples, the owner may have been wrongfully deprived of it or may has voluntarily devised himself of it. If A's watch is stolen by B, the latter has possession but the former remains the owner with an immediately right to possess. In case of lease and mortgage, the owner (i.e. the leaser and the mortgagor) owns the property without possession lies, with the lesser and the mortgagee.

The owner has the right to use the subject matter of ownership according to his own discretion. Here use means personal use and the enjoyment of the thing by the owner. This right of enjoyment or use is not absolute; it can be and is in fact, limited by law. This does not mean that an owner cannot there by disturb the right of others. Suppose A owns a transistor, ha cannot tune it at any time for listening music, for news or for commentary, but in doing so he is to take care that he does not disturb the right of others. Thus he cannot tune it at a high pitch and at an odd time so as to disturb the right of others. Thus he cannot tune it at a high pitch and at an odd time so as to disturb the sleep of others.

The owner has right to manage i.e., he has the right to decide how and by whom the thing owned shall be used. The owner has the power contracting the power to admit others to ones land, to permit others to use one's things, to define the limits of such permission, to create a right of easement over his land in favor of a third person etc.

One who owns things has also the right to alienate the same or to waste, destroy or to consume the whole or part of it. The right to consume and destroy is straightforward liberties. The right to alienate i.e. the right to transfer his right over object to another involves the existence of a power. Almost all legal system provide for alienation is the exclusive right if the owner. A non-owner may have the possession of a thing but he cannot transfer the right of ownership of such thing to another e.g. , in case of lease, a lessee may have the possession of the leased property but he

cannot transfer it because that is the exclusive right of the leaser who only can do so.

The ownership of the a thing has not only the right to possess the thing but also the right to the fruit and income of the things within the limits , if any, laid down by the law. Suppose A' has a land he has not only the right to possess that the land but he can enjoy benefits resulting there from e.g., produce, fruits, crops, etc. sometimes the use or the occupation of a thing to possess that the land but he can enjoy benefits resulting there from e.g. produce fruits, as the simplest way of deriving an income from it and of enjoying it.

CHARACTERISTICS OF OWNERSHIP

**An analysis of the concept of ownership, it would show that it has the following characteristics:**

Ownership ma either be absolute or restricted, that is, it may be exclusive or limited. Ownership can be limited by agreements or by operation of law.

The right of ownership can be restricted in time of emergency. For example, building or land owned by a person can be acquired by the state for lodging army personnel during the period of war.

An owner is not allowed to use his land or property in a manner that it is injurious to others. His right of ownership is not unrestricted.

The owner has a right to posses the thing that he owns. It is immaterial whether he has actual possession of it or not. The most common example of this is that an owner leasing his house to a tenant.

Law does not confer ownership on an unborn child or an insane person because they are incapable of conceiving the nature and consequences of their acts.

Ownership is residuary in character.

The right to ownership does not end with the death of the owner; instead it is transferred to his heirs.

Restrictions may also be imposed by law on the owner's right of disposal of the thing owned. Any alienation of property made with the intent to defeat or delay the claims of creditors can be set aside.

**DIFFERENT KINDS OF OWNERSHIP**

Experience shows that there are many kinds of ownership and some of them are corporeal and incorporeal ownership, sole ownership and co-ownership, legal and equitable ownership, vested and contingent ownership, trust and beneficial ownership, co- ownership and joint ownership and absolute and limited ownership.

**1. Corporeal and Incorporeal Ownership**

Corporeal ownership is the ownership of a material object and incorporeal ownership is the ownership of a right. Ownership of a house, a table or a machine is corporeal ownership. Ownership of a copyright, a patent or a trademark is incorporeal ownership. The distinction between corporeal and incorporeal ownership is connected with the distinction between corporeal and incorporeal things. Incorporeal ownership is described as ownership over tangible things. Corporeal things are those which can be perceived and felt by the senses and which are intangible. Incorporeal ownership includes ownership over intellectual objects and encumbrances.

Trust and Beneficial Ownership

Trust ownership is an instance of duplicate ownership. Trust property is that which is owned by two persons at the same time. The relation between the two owners is such that one of them is under an obligation to use his ownership for the benefit of the other. The ownership is called beneficial ownership. The ownership of a trustee is nominal and not real, but in the eye of law the trustee represents his beneficiary. In a trust, the relationship between the two owners is such that one of them is under an obligation to use his ownership for the benefit of the other. The former is called the trustee and his ownership is trust ownership. The latter is called the beneficiary and his ownership is called beneficial ownership. The ownership of a trustee is in fact nominal and not real although in the eye of law, he represents his beneficiary. If property is given to X on trust for Y, X would be the trustee and Y would be the beneficiary or cestui que trust. X would be the legal owner of the property and Y would be the beneficial owner. X is under an obligation to use the property only for the benefit of Y.

A trustee has no right of enjoyment of the trust property. His ownership is only a matter of form and not of substance. It is nominal and not real. In the eye of law, a trustee is not a mere agent but an owner. He is the person to whom the property of someone else is fictitiously given by law. The trustee has to use his power for the benefit of the beneficiary who is the real owner. As between the trustee and the beneficiary, the property belongs to the beneficiary and not the trustee.

**2. Legal and Equitable Ownership**

Legal ownership is that which has its origin in the rules of common law and equitable ownership is that which proceeds from the rules of equity. In many cases, equity recognizes ownership where law does not recognize ownership owing to some legal defect. Legal rights may be enforced in rem but equitable rights are enforced in personam as equity acts in personam. One person may be the legal owner and another person the equitable owner of the same thing or right at the same time. When a debt is verbally assigned by X to Y, X remains the legal owner of it but

Y becomes its equitable owner. There is only one debt as before though it has now two owners.

The equitable ownership of a legal right is different from the ownership of an equitable right. The ownership of an equitable mortgage is different from the equitable ownership of a legal mortgage.

There is no distinction between legal and equitable estates in India. Under the Indian Trusts Act, a trustee is the legal owner of the trust property and the beneficiary has no direct interest in the trust property itself. However, he has a right against the trustees to compel them to carry out the provisions of the trust.

**3. Vested and Contingent Ownership**

Ownership is either vested or contingent. It is vested ownership when the title of the owner is already perfect. It is contingent ownership when the title of the owner is yet imperfect but is capable of becoming perfect on the fulfillment of some condition. In the case of vested ownership, ownership is absolute. In the case of contingent ownership it is conditional. For instance, a testator may leave property to his wife for her life and on her death to A, if he is then alive, but if A is dead to B. Here A and B are both owners of the property in question, but their ownership is merely contingent. It must, however, be stated that contingent ownership of a thing is something more than a simple chance or possibility of becoming an owner. It is more than a mere spas acquisitionist. A contingent ownership is based upon the mere possibility of future acquisition, but it is based upon the present existence of an inchoate or incomplete title.

**4. Sole Ownership and Co-ownership**

ordinarily, a right is owned by one person only at a time. However, duplicate ownership is as much possible as sole ownership. When the ownership is vested in a single person, it is called sole ownership; when it is vested in two or more persons at the same time, it is called co-ownership, of which co-ownership is a species. For example, the members of a partnership firm are co-owners of the partnership property. Under the Indian law, a co-owner is entitled to three essential rights, namely

Property

Property Law and Social Morality develops a theory of property that highlights the social construction of obligations that individuals owe each other. By viewing property law through the lens of obligations rather than through the lens of rights, the author affirms the existence of important property rights (when no obligation to another exists) and defines the scope of those rights (when an obligation to another does exist). By describing the scope of the decisions that individuals are permitted to make and the requirements of other-regarding decisions, the author

develops a single theory to explain the dynamics of private and common property, including exclusion, nuisance, shared decision making, and decision making over time. The development of social recognition norms adds to our understanding of property evolution, and the principle of equal freedom underlying social recognition that limit government interference with property rights

THOUGH THE Constitution has undergone a number of amendments as listed by the author, it has stood the test of time. Fifty years of democratic rule by several political parties, maintaining the spirit, structure and framework of the Constitution is a really great achievement, which, to a greater extent was possible, thanks to the judiciary and more particularly to the Supreme Court, which has maintained the rule of law and restored the right of the citizens.

In his inimitable style, Justice V.R. Krishna Iyer has written a long foreword quoting great leaders and constitutional experts. He says: "The unique feature of Koteswara Rao is that he blends traditional scholarship on property jurisprudence with the dialectical analysis, contextually appropriate and reverential approach due to the innocent robbed brethren whose subconscious and inarticulate social philosophy unwittingly ooze through the pen that pronounce the law and binds pro tem the people. From this perspective, the book brings freshness rare in the claques of writers competing to praise the Bench. The Koteswara Rao tribe is on the decrease".

Statutes define properties but the interpretation of the Supreme Court in several judgments is given in the first chapter of the book. Discussions about the conflicting ideas on the institution of property, theories of property, occupation theory, labour theory, metaphysical or personal theory, philosophical theory, social trust theory, utilitarian theory and collectivist or socialist theory are all educative and interesting. The author concludes the discussion by pointing out that only a new theory of relativity of right to property can satisfactorily explain the origin, evolution, justification and function of right to property. Right to property has to be based and justified with reference to the time and place in any society. His remark "Throughout history element of force and fraud is always at the back of right of property" is strikingly true.

Chapter three deals with the concept of property and conflict and confusion in the Constituent Assembly. Any reader will be thankful to the author for giving in gist, the discussions that took place in the Constituent Assembly regarding all matters including fundamental rights. The debate though given in nutshell is interesting to read. To use the legal term, intention of the legislature (though not one) can be gleaned by reading this chapter, containing the speeches of historical political and non-political heads.

The hot topic of the 1970s was bank nationalization and the author has given importance to this and a lengthy discussion is there. He says: "The judgment of the Supreme Court in the Bank's case is one of the watersheds in the history of vicissitudes of the right to property as fundamental right under the Constitution of India. The judgment went against the state. The nationalization of

banks by the Union Government was taken as a signal for elimination of the dangerous monopolistic credit control system in the country."

"Though the Government nationalized banks for political expediency as alleged by some people, it is a step towards socialistic pattern of society and in accordance with the Directive Principles of State Policy for the prevention of concentration of wealth."

The judgment attracted bitter criticism of the judicial processes by the government and the leftist parties. Two principal characters are the Parliament and the Supreme Court. The Supreme Court challenged the Parliament for claiming to be omnipotent. The Parliament challenged the Supreme Court for claiming to be omniscient. The Parliament nullified the judgment of the Supreme Court in the Banks' case by passing the 25th Amendment Act, 1971, of the Constitution. In turn the Amendment itself was challenged. The court upheld the validity of the Amendment excepting the proviso to Article 31C.

The entire book is replete with statistics. On the question of education, the author's conclusion is "Out of the six cases decided by the Supreme Court involving educational institutions and right to property only three went in favor of the state. But close analysis reveals that in only one case it was held that an enactment was violative of Article 31 ".

Articles 311 and 310 are important as they safeguard the employees with reference to their services. The views expressed by the author in the preceding chapters find place in 140 pages in the epilogue. But one can appreciate the exercise of the author in giving such a long epilogue stressing and stretching the points discussed in various chapters.

The author gives the statistics of the reported judgment of the Supreme Court including the number of pages, types of cases, and names of the judge. As to how many enactments were held invalid and how many were confirmed can be found in these pages. This book is well illustrated by judicial decisions.

**UNIT –IV: Principles of liability**

**(A).liability and Negligence**

Sometimes, the act itself determines negligence. Under the doctrine of res ipsa loquitur, (Latin term for "the thing speaks for itself"), there are some actions so obviously negligent that the law presumes negligence, such as when a surgeon operates on the wrong side of the body. The defendant, in such cases, must prove that he wasn't negligent

Most cases of negligence cannot be determined absolutely, for it depends on many factors. The main measure used to determine whether an act was negligent is to consider what a reasonably prudent person would do, given the age and knowledge of the tortfeasor, and other relevant factors.

Before a court will award damages, the presumed negligence must satisfy 4 requirements:

1. there must be a legal duty to perform or to use reasonable care;
2. there must have been a failure to perform that duty;
3. the plaintiff must have suffered an injury or a loss;
4. and the negligent act must have been the proximate cause of the injury. The proximate cause is a cause that directly caused the loss or suffering so that if the proximate cause didn't happen, then the harm would not have happened.

   All 4 elements of negligence must be present before a court will award damages

**Defenses against Negligence**

There are various factors that can either prevent a plaintiff from collecting damages or that will reduce the amount awarded.

**Contributory negligence** is negligence that is caused by both plaintiff and defendant. If the plaintiff contributed to his injury, then, in some states, the plaintiff will be prevented from collecting any damages.

**Comparative negligence** allows the plaintiff to collect some damages, but it will be reduced by the amount by which the plaintiff contributed to his own injury. There are 3 major rules, which differ according to state law and according to the amount of contributory negligence, that determine the amount that the plaintiff can collect.

1. The pure rule reduces the plaintiff's damages by the amount that he contributed to his own injury. Thus, if a plaintiff has been judged to be 30% at fault, then his reward will be reduced by 30%.

2. The 49 percent rule requires that the defendant be less than 50% responsible in order to collect any damages, and any damages awarded will be reduced by the plaintiff's contribution. Under this rule, only 1 party can collect where both parties are suing each other.
3. The 50 percent rule permits the plaintiff to collect damages only if his share of the negligence is not greater than 50%. In contrast to the 49 percent rule, both parties can collect 50% of their damages from each other if both are judged to be 50% at fault. However, if the degree of fault is anything but 50%, then only 1 party will be able to collect damages, just as under the 49 percent rule.

The last clear chance rule modifies comparative negligence by allowing the plaintiff to collect damages from the defendant, even if the plaintiff contributed to his injury, if the defendant had a last clear chance to prevent the injury. In other words, could the defendant have prevented the injury regardless of the plaintiff's negligence? If the answer is yes, then the plaintiff will still be able to collect regardless of comparative negligence.

Finally, there is the assumption of risk—one assumes risk by engaging in an activity that is inherently risky, and, therefore, should not be allowed to collect damages if an injury results by engaging in the activity. Thus, if one plays racquetball without wearing goggles, and her opponent hits the ball and injures her eye, she will be prevented from collecting damages from her opponent, because by playing racquetball without wearing goggles, she assumed the risk that she will suffer an eye injury or even lose an eye while playing

**Limitations on negligence liability**

Despite the significance of negligence liability, it is subject to a number of limitations which may restrict its effectiveness in product liability claims. The manufacturer can only be held liable where it has failed to take reasonable care, which the injured party must be able to prove. This may be difficult and expensive.

In some cases, particularly concerning manufacturing defects, the injured party may be able to rely on the principle of 'res ipsa loquitur' - meaning that no explanation other than negligence can be the case. If this applies, it is up to the manufacturer to prove that it did in fact take reasonable care. In cases like this, it may be difficult for the manufacturer to avoid liability unless it can show how the defect occurred. The manufacturer will have to show that it took reasonable care to establish a safe system of production and quality control to avoid defects, and that the employees who implemented that system took reasonable care when doing so.

Where the complaint is a result of negligent design, the injured party's position will be much weaker. Expert evidence will be necessary to establish negligence. The courts may be reluctant to impose liability for negligent design as this would involve 'second guessing' executive decisions on the relative cost and benefit of different design options.

A second difficulty faces the injured party is the need to establish a causal link between the defendant's negligence and his own loss or injury. However, he would also have to do so if his claim was under contract.

Since the action is one for common law negligence, the manufacturer will be able to rely on any of the usual defences available in tort. For example, the manufacturer may be able to rely on the partial defence of contributory negligence if the injured party ignored warnings, misused the goods or continued to use them after a danger becomes apparent.

A further restriction on negligence actions is that, although damages may be awarded for personal injuries or damage to property, damages will generally not be awarded for purely economic losses

**Kinds of Liability**

- Civil or Criminal and can be Remedial or Penal
- Civil Liability: Liability in civil proceedings with a purpose of enforcement of rights vested in plaintiff.
- Criminal Liability: Liability in criminal proceedings with a purpose to punish the wrongdoer.

Penal Liability Liability

- : Aims at punishing the wrongdoer
- Remedial Liability: Aims at enforcement of rights and punishment is unknown to it.
- Criminal Liability is always penal
- Civil Liability is sometimes penal and sometimes remedial

**Theories of Liability**

- Theory of Remedial Liability

Theory of Penal Liability

The words "negligence" and "malpractice" were strangers to fourteenth century common law. Yet through action on the case," medieval physicians were held answerable for professional misfeasance, and it is almost inescapable that the rules through which their liability attached

grew from the same sociopolitical impulses on which the concept of negligence as we know it now rests. 'Conceptually, therefore, medical malpractice actions were from their earliest origins no different from ordinary negligence suits."' That proposition is fundamental to the arguments that follow. However, this proposition is easier to state than prove-it occasions inquiry into jurisprudence of the past. For as Justice Holmes taught, "n law also, doctrine is illuminated by history. The reign of Henry IV offers the first reported recovery brought for damage by a physician's faulty practice. The decision arose from the burgeoning doctrine requiring persons who practiced a "common calling" meaning, probably, a skilled profession) to act as would any reasonably competent person practicing under like conditions or be liable for an action in trespass on the case. Conversely, persons selling services not associated with a common calling were liable for flawed performance only if they had breached an "express" agreement to achieve or avoid a given result. The act*assumpsit* on the case. Under early common law, such cases required the plaintiff to establish that the defendant had expressly promised to avoid the alleged damage. With respect to a common calling, however, the practitioner had a legal duty to exercise care and prudence independent of any express agreement. Hence, in the 1500Fitzherbert averred that "f a smith prick my horse with a nail, I shall have my action on the case against him without any warranty by the smith to do it well; for it is the duty of every artificer to exercise his art rightly and truly as he ought." "Such actions," wrote a fourteenth century court, *"go to a matter . . . beyond*
*.. . Covenant.* ***. . The*** *plaintiffs have suffered a wrong."""* Medicine ion raised in these cases was not trespass on the case but of course, was a "common calling," and careless or inattentive Physicians were thus answerable not for breach of agreement, but for a
"Wrong" per se. 2' They were liable in action on the case, and their patients need not have pled assumpsit.Trespass on the case, is often described as the precursor to negligence, but the two actions are not so tightly tied as is often taught. To the link between the liability early imposed on the careless physician and today's notions of negligence one must first examine certain
of the basic principles from which modern negligence law proceeds and, second, study the medieval common calling rule to ascertain whether it vindicates those principles. **A** negligence action proceeds from two oft-stated premises. The first pertains to *duty* and the Second to the *circumstances* surrounding the at the time of the allegedly negligent conduct. With respect to the first premise, defendants must owe a plaintiff a so-called duty **of** care;' That is, his relationship with the plaintiff must legally oblige them to meet some specified standard of conduct. Unreasonableness, carelessness, neglect, imprudence, and inattentiveness do not of themselves
Create liability for damage they cause. They do so only if, with respect to the plaintiff, the defendant has some legal duty to be reasonable, careful, prudent, and attentive. Such has been the rule since scholars first explained the essence of negligence.' Whether the courts their cues from the commentators or the commentators took theirs from the courts is unclear, but in either event the notion of duty as prerequisite to a negligence action took root early among common law judges and holds fast today in Anglo-American jurisprudence Where the defendant's duty is

established, he is required to exercise the care that would be given **by** a reasonable person. To the modern legal mind, the importance of "surrounding circumstances" is nearly self-evident,
For it means that conduct is reasonable or unreasonable depending on the situation in which it is undertaken. Yet this was not obvious to lawyers of the nineteenth century, and some conscientious courts took
Trouble to make it plain:
The issues **. . .** involve the question of the exercise of ordinary care and prudence.... The solution of these questions depends upon the peculiar facts and circumstances of each case,
the state and condition of the parties; the manner in which, and the circumstances under which, the injury was received or inflicted; in short, all the circumstances surrounding the transaction which in any way reflect upon either the *degree of care* or the *manner* in which, in the particular case, it should have been exercised. The circumstances are all relevant, and may be given to the jury. **. . .** They form, so to speak, a part of the *res gesta* of the transaction; they are the circumstances under which it occurred, and indicate the agencies which caused *A. "Duty" and the*
,

**(b). Absolute Liability**

Our country being a pioneer in industrial development and demography of such development soaring high each day, also with complexity in both life and geography, it is necessary to have a stricter and more absolute principle of liability with respect to no- fault liability. Moreover the principle so established in Rylands v. Fletcher of strict liability cannot be used in the modern world, as the very principle was evolved in 19th century, and in the period when the industrial revolution has just begun, this two century old principle of tortuous liability cannot be taken as it is in the modern world without modifications. The present condition of our country when it is on the verge of being one of the most globalised countries of the world, inclusion of multinational corporations (MNCs) in the jurisdiction of our country raises both points of appreciation and concern. The technological complexity and the nature of industrial development, being increasing at a high rate and also industrial sector being a major contributor to our GDP, the protection of the very human rights and lives of people should be taken into consideration. Thus the rule of strict liability cannot be still considered as the only redressed principle. Also pointed out by Bhagwati J. in M. C. Mehta v. Union of India, paragraph 31 of the case that “This rule evolved in the 19th Century at a time when all these developments of science and technology had not taken place cannot afford any guidance in evolving any standard of liability consistent with the constitutional norms and the needs of the present day economy and social structure. We need not feel inhibited by this rule which was evolved in this context of a totally different kind of economy. Law has to grow in order to satisfy the needs of the fast changing society and keep abreast with the economic developments taking place in the country. As new situations arise the law has to be evolved in order to meet the challenge of such new situations. Law cannot afford to remain static. We have to evolve new principles and lay down new norms which would adequately deal with the new problems which arise in a highly industrialized economy. We cannot allow our judicial thinking to be constricted by reference to the law as it prevails in

England or for the matter of that in any other foreign country". Also the fact that the industrial development cannot be done without the existence of hazardous and in responsibility on the shoulders of such industries for the protection of the people from any type of accidents etc.

Justice Bhagwati also contended that "Such hazardous or inherently dangerous activity for private profit can be tolerated only on condition that the enterprise engaged in such hazardous or inherently dangerous activity indemnifies all those who suffer on account of the carrying on of such hazardous or inherently dangerous activity regardless of whether it is carried on carefully or not. This principle is also sustainable on the ground that the enterprise alone has the resource to discover and guard against hazards or dangers and to provide warning against potential hazards" also observing. Thus from the above mentioned points it is a key necessity for such a principle to be evolved as it will not only shape our jurisprudence but also will help us to not carry the absolute principle of Strict liability in modern society.

Thus the necessity factor as discussed in the above section clearly helps us to understand as to the principle of absolute liability is not only required to protect the basic human rights of the people, but also to develop tort law in India and to expand our own countries jurisprudence.

**Analysis of** erectly dangerous industries, it is very much necessary to put **of M. C. Mehta V. Union of India:**

It is very important to analyze this case, as to know whether in actual sense the principle of Absolute liability exists or not. It was this case in which justice Bhagwati contented the above discussed preposition. The facts of the case are that there was leak of oleum gas from one of the units of Shriram Foods and Fertilizers Industries, on 6th December,1985, in the aftermath of the Bhopal gas tragedy, the application was filed to get compensation to the persons who had suffered harm on account of leak of the oleum gas. The important question before the court was that whether as to continue with the principle of strict liability for the compensation or to evolve our very own principle which is more strict and binding. SC in the above case apart from dealing with the point of law regards the ambit of Art. 12 and 34, also gave a new rule of absolute liability, where by giving various features of the same and clearly differentiating between the earlier existing principle and the new principle.

Although there is a difference between obiter and ratio of a case, and as the case of M.C. Mehta reads, it is clearly stated that the ratio of the case is "Courts shall order authorities for enforcement of fundamental rights of citizens and to protect fundamental rights of people." The principle of absolute liability is to be considered here as a obiter, as it was justice Bhagwati with 4 other respected judges, constituted this rule, it is not cited under the ratio of the case. Going by the common law practice and the judicial interpretation, the absolute liability principle is not binding on the courts and not on SC itself. The observation just made has two fold consequences, one that their does not exist a principle called absolute liability in India if we go by strict common law terms, as the principle was so given by judges in the oleum gas leak case was an orbiter, then we cannot accept the very fact that it is binding concept. On the other hand the very recognition of the rule by SC in different cases and also by various high courts in their judgments, it is clear that to an extent judiciary in India has recognized this very concept, also

SC in Indian Council for Environmental Legation v. Union of India held that the rule of absolute liability established in M.C.Mehta case was not obiter and is appropriate and suited the conditions of our country. Thus we can conclude that although going by a technical sense, the very rule comes under obiter, but by SC interpretation it makes absolute liability principle an established principle. The above preposition and key finding will be supported by analysis of relevant case laws in the next section.

**Recognition of principle of Absolute liability by Judiciary in India**

This section is in reference to the point dealt in the earlier section, and with the help of precedents or case laws, both of Supreme Court and High courts, the point will be analyzed, whether the observation is correct or not.

In the case of Charan Lal Sahu v. Union of India, this case was in accordance with the Act formulated for the protection of the victims of Bhopal gas tragedy, is valid or not, doubts were expressed by Mishra C.J as to correctness of rule as it was held that Mehta case was an obiter and was differentiated from the western countries. The doubts so expressed in the above case were no accepted in Indian Council for Environmental Legal Action v. Union of India and Mehta case rule was not called to be an obiter. This case related to hazardous chemical industries, releasing highly toxic sludge and toxic untreated waste water which had percolated deep into the oil rendering the soil unfit for cultivation and water unfit for irrigation, human or animal consumption resulting in untold misery to the villagers of surrounding areas. SC directed the government determine and recover the cost of remedial measure from the private companies which polluted the environment by attaching all their assets and further use to restore soil, forest etc. These industries were characterized by the SC as 'rouge industries' and were ordered to be closed down. In recognition of the principle of absolute liability, the concept mentioned above is based on 'polluters pay'. Considering the position of high court on the principle of absolute liability, division bench of the Madhya Pradesh High Court applied the rule in the cas33, where due to negligence of electricity board a person died of electric shock, high court recognized the principle of absolute liability here as it was due to negligence on the part of the board as it failed to maintain the wires properly. SC in the case of Madhya Pradesh Electricity Board v. Shail Kumari, applied the same rule, in this case a cyclist was entrapped and electrocuted by a live-wire. The board tried to defend by stating that the wire on the ground was a wire diverted b a stranger to misuse the energy. The court held that the particular responsibility to supply electric energy is statutory conferred on the board. If the energy so transmitted causes injury, it is the primary liability to compensate the sufferer is that of the supplier of the electric energy. The court also stated that a person undertaking an activity involving hazardous or risky exposure to human life is liable under law of torts to compensate for the injury, irrespective of any negligence or carelessness on the part of the managers of such undertakings. In an important case of Union Carbide Corporation v. Union of India clearly states that in determining the compensation payable to Bhopal gas victims, absolute liability principle was adopted. The inappropriateness of compensation given to the victims, being a different issue all together, the

Relevant factor here is that of recognition of the concept of absolute liability while paying compensation.

Prior to conclusion of this section a very recent case needs to be discussed in here, which is of Mushtaq Ahmend v. State of Jammu and Kashmir, in this case the state was negligent in maintaining electricity wire and the victim died due to electric shock. The court held that state being engaged in undertaking the activity of electricity supply is liable under the law of torts to compensate the petitioners for the death of the victim irrespective of any negligence or carelessness on their part. Strict liability principle was held here, although the principle so used was not of absolute liability, but the compensation provided by court was in accordance with it.

This part of the project being of great importance as to it helped us to determine the very existence of principle of absolute liability, we can see that to an extent the judiciary in India has recognized the principle and clearly stated the principle is not merely an orbiter but suits to the current situations in the country. not merely an orbiter but suits to the current situations in the country.

**Conclusion and Suggestions**

The principle of Absolute liability so stated in M.C.Mehta, oleum gas leak case, has been extensively discussed and arguments formulated in the paper were solely based on the question and hypothesis formulated in the chapter. It is necessary to conclude the project, as researcher believes that there is a need to formulate findings and provide for suggestions.

The research questions has two parts first being is there a need for recognition of concept of absolute liability and other being whether judiciary has recognized the same principle. Dealing with the first part, the conclusion is that there is an urgent and inherent need for a principle of absolute liability as, the rule of strict liability which is followed in most of the countries, cannot be taken as the sole principle to provide for compensation, it being formulated about two centuries ago, when the level of technological development was nearly nothing in comparison with today's development. For the purpose of providing better remedy under civil law and broadly development of our own jurisprudence, to suit our own needs we require a principle which will be just to both the wrongdoer and the sufferer. Absolute liability is in accordance with the prevailing situation in our country, we are destination for globalization and large investments and when the nature of industries is mostly hazardous.

Second part of the question deals with the existence of the principle of absolute liability in India or recognition of principle by our judiciary. A very important finding here is that yes to a extent their exist a principle of absolute liability and judiciary recognizes, and the principle so given by court in the case of M.C.Mehta is not merely an orbiter but is an important aspect which suits our present day conditions. The word extent used above is of great significance, researcher believes that although the judicial recognition has been done, but it is not in accordance with the required level which is very much required looking at prevailing situations in our country. Also the principle of absolute liability, according to the researcher, should not pay compensation to the sufferers on the basis of the paying capacity of the industries. Agreeing with the SC explanation of the very point that, it will help one to get exemplary damages and also larger the industries

more the compensation can be provided to the sufferers, the consequences will be that if the industry is small, then the compensation will be paid to the victim not in accordance with the damage suffered, which is the basic principle of tortuous liability, but in relation to the paying capacity of the wrongdoer. Thus according to the researcher the element of paying capacity should be restricted to the large industries and for the rest the quantum of damages suffered should be used which is in accordance with tort law.

Concluding, the research question formulated before, the findings are mix as the first part stands true that there is a need for recognition of concept of absolute liability and the later part is not true as, and judiciary has recognized the principle to an extent. The hypothesis is so dealt also has the same reply as, the first part of it stands false and the second part of it stands true. Thus there is a need for.

**(C). Immunity**

The Old and archaic concept of Sovereign immunity that "King can do no wrong" still haunts us, where the state claim immunity for its tortuous acts and denies compensation to the aggrieved party.

The doctrine of sovereign immunity is based on the Common Law principle borrowed from the British Jurisprudence that the King commits no wrong and that he cannot be guilty of personal negligence or misconduct, and as such cannot be responsible for the negligence or misconduct of his servants. Another aspect of this doctrine was that it was an attribute of sovereignty that a State cannot be sued in its own courts without its consent.

The point as to how far the State was liable in tort first directly arose in **P. & O. Steam Navigation Co. vs. Secretary of State**. The facts of the case were that a servant of the plaintiff's company was proceeding on a highway in Calcutta, driving a carriage which was drawn by a pair of horses belonging to the plaintiff. He met with an accident, caused by negligence of the servants of the Government. For the loss caused by the accident, the plaintiff claimed damages against the Secretary of State for India. Sir Barnes Peacock C. J. (of the Supreme Court) observed that the doctrine that the "King can done wrong", had not application to the East India Company. The company would have been liable in such cases and the Secretary of State was thereafter also liable. The Court also drew the distinction between sovereign and non-sovereign functions, i.e. if a tort were committed by a public servant in the discharge of sovereign functions, no action would lie against the Government – e.g. if the tort was committed while carrying on hostilities or seizing enemy property as prize. The liability could arise only in case of "non-sovereign functions" i.e. acts done in the conduct of undertakings which might be carried on by private person-individuals without having such power.

The aforesaid judgment laid down that the East India Company had a twofold character:

(a) As a sovereign power and

(b) As a trading company.

The liability of the company could only extend to in respect of its commercial dealings and not to the acts done by it in exercise of delegated sovereign power. As the damage was done to the plaintiff in the exercise of non-sovereign function, i.e. the maintenance of Dockyard which could be done by any private party without any delegation of sovereign power and hence the government cannot escape liability and was held liable for the torts committed by its employees.

Distinction between Sovereign and Non-sovereign functions followed in subsequent cases:

The aforesaid case was of pre-constitution era, making the distinction between sovereign and non-sovereign function of state and holding the state liable in case of non-sovereign functions was followed by the Hon'ble Apex Court in its subsequent judgments. The point as to how far the state was liable in tort first directly arose after independence before the Hon'ble Supreme Court in **State of Rajasthan v. Mst. Vidyawati, AIR 1962 SC 933.** In that case, the claim for damages was made by the dependants of a person who died in an accident caused by the negligence of the driver of a jeep maintained by the Government for official use of the Collector of Udaipur while it was being brought back from the workshop after repairs. The Rajasthan High Court took the view-that the State was liable, for the State is in no better position in so far as it supplies cars and keeps drivers for its Civil Service. In the said case the Hon'ble Supreme Court has held as under:

"*Act done in the course of employment but not in connection with sovereign powers of the State, State like any other employer is vicariously liable*."

In the aforesaid case, the Hon'ble Apex Court while approving the distinction made in Steam Navigation Co.'s case between the sovereign and non-sovereign function observed that the immunity of crown in the United Kingdom was based on the old feudalistic notions of Justice, namely, that the King was incapable of doing a wrong. The said common law immunity never operated in India.

Another case in which the principle laid down in Steam Navigation case was followed was **Kasturi Lal Ralia Ram Vs. State of UP AIR1965SC1039**. In this case partner of Kasturilal Ralia Ram Jain, a firm of jewellers of Amritsar, had gone to Meerut for selling gold and silver, but was taken into custody by the police of the suspicion of possessing stolen property. He was released the next day, but the property which was recovered from his possession could not be returned to him in its entirety inasmuch as the silver was returned but the gold could not be

returned as the Head Constable in charge of the Malkhana misappropriated it and fled to Pakistan. The firm filed a suit against the State of U. P. for the return of the ornaments and in the alternative for compensation. It was held by the Apex Court that the claim against the state could not be sustained despite the fact that the negligent act was committed by the employees during the course of their employment because the employment was of a category which could claim the special characteristic of a sovereign power. The court held that the tortuous act of the police officers was committed by them in discharge of sovereign powers and the state was therefore not liable for the damages caused to the appellant.

Initially aforesaid principles laid down by Apex Court were followed in MV Act cases also:

How far sovereign immunity is available in motor accident cases has however, been the subject-matter of consideration in a large number of cases of various High Courts as well as of the Supreme Court. It would be interesting to note that the aforesaid distinction of the sovereign & non-sovereign functions of state and denying the compensation in case of sovereign functions were extended to Motor Vehicle Accident cases also. The cases were mostly those involving government vehicles, mainly Military Vehicles or paramilitary force vehicles. The trend of the judgments revealed that the court basically examined the question whether the military vehicle was engaged in the act which can alternatively be exercised by the private parties or the act is of purely sovereign nature, like act of war, movement of troops and armaments which cannot be delegated to the private parties. Let us now notice the relevant case laws on the subject:

In **Satyawati v. Union of India, (AIR1957Delhi98)** an Air Force vehicle was carrying hockey team of Indian Air Force Station to play a match. After the match was over, the driver was going to park the vehicle when he caused the fatal accident by his negligence. It was argued that it was one of the functions of the Union of lndia to keep the army in proper shape and tune and that hockey team was carried by the vehicle for the physical exercise of the Air Force personnel and therefore the Government was not liable. The Court rejected this argument and held that the carrying of hockey team to play a match could by no process of extension be termed as exercise of sovereign power and the Union of lndia was therefore liable for damages caused to the plaintiff.

In **Union of India v. Smt. Jasso, AIR 1962 Punj 315 (FB)** a military driver while transporting coal to general head-quarters in Simla in discharge of his duties committed an accident. It was held that the mere fact that the truck happened to be an army truck and the driver was a military employee cannot make any difference to the liability of the Government for damages for the tortious acts of the driver as such things could be obviously done by a private person also.

In **Union of India v. Sugrabai , (AIR 1969 Bom 13)** The Bombay High Court overruled the plea of sovereign immunity when a military driver driving a motor truck carrying a Records Sound Ranging machine from military workshop to military school of artillery killed a cyclist on

the road. It was held that the driver was not acting in exercise of sovereign powers. The Bombay High Court observed in following words:

In **Baxi Amrik Singh v. Union of India, (1972 Punj LR 1)** The truck was part of an Army Division which had moved to the Front during the 1971-Indo-Pak War. It was during the movement of this Division back to its permanent location after the war, that the accident took place. The truck was at that time carrying Jawans and rations. It was held by P&H High Court that the accident occurred during the exercise of sovereign functions of the State and consequently the Union of India could not be held liable for the tort committed by its servant-the driver of the military truck.

In **Mrs. Pushpa v. State of Jammu & Kashmir, 1977 ACJ 375**, a truck under the use of the army knocked down a cyclist causing his death. At that time the truck was loaded with crushed barley for being used as a feed for the mules. It was held that the truck could not be said to be engaged in the performance of the act of sovereign function.

In **Fatima Begum v. State of Jammu & Kashmir, 1976ACJ 194**, the same High Court rejected the defence plea of sovereign immunity when a truck belonging to the Government Transport Undertaking had knocked down a cyclist while it was engaged in transporting police personnel from the place of duty to their barracks.

- **Usha Aggarwal and Ors. Vs. Union of India & Ors. cited as AIR 1982 PH 279:** In this case the appellant's husband Sushil Kumar Aggarwal died as a result of the injuries he sustained when the motor-cycle, he was travelling on met with an accident with the ITBP truck which had been deputed to fetch arms from the Railway Station at Ambala and was returning with these arms when the accident occurred. The Tribunal vide its order declined compensation to the claimants on the ground that the offending Indo-Tibetan Border Police truck DHL-79 was engaged in the performance of the sovereign functions of the State when the
- when the accident occurred. The appellant appealed in the P&H High Court. The Hon'ble P& H High Court followed the decision of SC in Pushpa Thakur and rejected the contention of Mr. H. S. Brar, appearing for the Union of India in that case who attempted to press in the judgment of the Full Bench in **Bakshi Amrit Singh v. Union of India 1974 Acc CJ 105** in the following words:

REFRENCE BOOKS.

1. SALMOND JURISPRUDENCE

2. R.W.D DIAS, JURISPRUDENCE

3. PROF NOMITA AGGARWAL, JURISPRUDENCE

4. WWW. WIKIEPEDIA.