

Nature and Scope of Jurisprudence

What is Jurisprudence?

There is no universal or uniform definition of Jurisprudence since people have different ideologies and notions throughout the world. It is a very vast subject.

When an author talks about political conditions of his society, it reflects that condition of law prevailing at that time in that particular society. It is believed that Romans were the first who started to study what is law.

Jurisprudence- Latin word '*Jurisprudentia*'- Knowledge of Law or Skill in Law.

-Most of our law has been taken from Common Law System.

-Bentham is known as Father of Jurisprudence. Austin took his work further.

Bentham was the first one to analyse what is law. He divided his study into two parts:

1. Examination of Law as it is- **Expositorial Approach**- Command of Sovereign.
2. Examination of Law as it ought to be- **Censorial Approach**- Morality of Law.

However, Austin stuck to the idea that **law is command of sovereign**. The structure of English Legal System remained with the formal analysis of law (Expositorial) and never became what it ought to be (Censorial).

J. Stone also tried to define Jurisprudence. He said that **it is a lawyer's extraversion**. He further said that it is a lawyer's examination of the percept, ideas and techniques of law in the light derived from present knowledge in disciplines other than the law.

Thus, we see that there can be no goodness or badness in law. Law is made by the State so there could be nothing good or bad about it. **Jurisprudence is nothing but the science of law.**

Definitions by:

1. Austin
2. Holland
3. Salmond
4. Keeton

5. Pound

6. Dias and Hughes

Austin- He said that "Science of Jurisprudence is concerned with Positive Laws that is **laws strictly so called**. It has nothing to do with the goodness or badness of law.

This has two aspects attached to it:

1. **General Jurisprudence**- It includes such subjects or ends of law as are common to all system.

2. **Particular Jurisprudence**- It is the science of any actual system of law or any portion of it.

Basically, **in essence they are same but in scope they are different**.

Salmond's Criticism of Austin

He said that for a concept to fall within the category of 'General Jurisprudence', it should be common in various systems of law. This is not always true as there could be concepts that fall in neither of the two categories.

Holland's Criticism of Austin

He said that it is only the material which is particular and not the science itself.

Holland's Definition- Jurisprudence means **the formal science of positive laws**. It is an analytical science rather than a material science.

1. He defined the term positive law. He said that Positive Law means **the general rule of external human action enforced by a sovereign political authority**.

2. We can see that, he simply added the word '**formal**' in Austin's definition. Formal here means that **we study only the form and not the essence**. We study only the external features and do not go into the intricacies of the subject. According to him, how positive law is applied and how it is particular is not the concern of Jurisprudence.

3. The reason for using the word '**Formal Science**' is that it describes only the form or the external sight of the subject and not its internal contents. According to Holland, Jurisprudence is not concerned with the actual material contents of law but only with its fundamental conceptions. **Therefore, Jurisprudence is a Formal Science**.

4. This definition has been criticized by Gray and Dr. Jenks. According to them, Jurisprudence is a formal science because it is concerned with the form, conditions,

social life, human relations that have grown up in the society and to which society attaches legal significance.

5. Holland said that Jurisprudence is a science because **it is a systematized and properly co-ordinated knowledge of the subject of intellectual enquiry**. The term positive law confines the enquiry to these social relations which are regulated by the rules imposed by the States and enforced by the Courts of law. Therefore, it is a formal science of positive law.

6. Formal as a prefix indicates that the science deals only with the **purposes, methods and ideas** on the basis of the legal system as distinct from material science which deals **only with the concrete details of law**.

7. This definition has been criticized on the ground that this definition is concerned only with the form and not the intricacies.

Salmond- He said that **Jurisprudence is Science of Law**. By law he meant **law of the land or civil law**. He divided Jurisprudence into two parts:

1. **Generic**- This includes the entire body of legal doctrines.
2. **Specific**- This deals with the particular department or any portion of the doctrines.

'Specific' is further divided into three parts:

1. **Analytical, Expository or Systematic**- It deals with the contents of an actual legal system existing at any time, past or the present.
2. **Historical**- It is concerned with the legal history and its development
3. **Ethical**- According to him, the purpose of any legislation is to set forth laws as it ought to be. It deals with the 'ideal' of the legal system and the purpose for which it exists.

Criticism of Salmond- Critics say that it is not an accurate definition. Salmond only gave the structure and failed to provide any clarity of thought.

Keeton- He considered **Jurisprudence as the study and systematic arrangement of the general principles of law**. According to him, Jurisprudence deals with the distinction between Public and Private Laws and considers the contents of principle departments of law.

Roscoe Pound- He described **Jurisprudence as the science of law** using the term 'law' in **juridical sense** as denoting the body of principles recognized or enforced by public and regular tribunals in the Administration of Justice.

Dias and Hughes- They believed **Jurisprudence as any thought or writing about law rather than a technical exposition of a branch of law itself.**

Conclusion- Thus, we can safely say that **Jurisprudence is the study of fundamental legal principles.**

Scope of Jurisprudence- After reading all the above mentioned definitions, we would find that Austin was the only one who tried to limit the scope of jurisprudence. He tried to segregate morals and theology from the study of jurisprudence.

However, the study of jurisprudence cannot be circumscribed because it includes all human conduct in the State and the Society.

Approaches to the study of Jurisprudence- There are two ways

1. **Empirical-** Facts to Generalization.

2. **A Priori-** Start with Generalization in light of which the facts are examined.

Significance and Utility of the Study of Jurisprudence

1. This subject has its own intrinsic interest and value because this is a subject of serious scholarship and research; researchers in Jurisprudence contribute to the development of society by having repercussions in the whole legal, political and social school of thoughts. One of the tasks of this subject is to construct and elucidate concepts serving to render the complexities of law more manageable and more rational. It is the belief of this subject that the theory can help to improve practice.

2. Jurisprudence also has an educational value. It helps in the logical analysis of the legal concepts and it sharpens the logical techniques of the lawyer. The study of jurisprudence helps to combat the lawyer's occupational view of formalism which leads to excessive concentration on legal rules for their own sake and disregard of the social function of the law.

3. The study of jurisprudence helps to put law in its proper context by considering the needs of the society and by taking note of the advances in related and relevant disciplines.

4. Jurisprudence can teach the people to look if not forward, at least sideways and

around them and realize that answers to a new legal problem must be found by a consideration of present social needs and not in the wisdom of the past.

5. Jurisprudence is the eye of law and the grammar of law because it throws light on basic ideas and fundamental principles of law. Therefore, by understanding the nature of law, its concepts and distinctions, a lawyer can find out the actual **rule of law**. It also helps in knowing the language, grammar, the basis of treatment and assumptions upon which the subject rests. Therefore, some logical training is necessary for a lawyer which he can find from the study of Jurisprudence.

6. It trains the critical faculties of the mind of the students so that they can dictate fallacies and use accurate legal terminology and expression.

7. It helps a lawyer in his practical work. A lawyer always has to tackle new problems every day. This he can handle through his knowledge of Jurisprudence which trains his mind to find alternative legal channels of thought.

8. Jurisprudence helps the judges and lawyers in ascertaining the true meaning of the laws passed by the legislators by providing the rules of interpretation. Therefore, the study of jurisprudence should not be confined to the study of positive laws but also must include normative study i.e. **that study should deal with the improvement of law in the context of prevailing socio-economic and political philosophies of time, place and circumstances.**

9. Professor Dias said that *'the study of jurisprudence is an opportunity for the lawyer to bring theory and life into focus, for it concerns human thought in relation to social existence'*.

Relationship of Jurisprudence with other Social Sciences

1. **Sociology and Jurisprudence**- There is a branch called as **Sociological Jurisprudence**. This branch is based on social theories. It is essentially concerned with the influence of law on the society at large particularly when we talk about social welfare. The approach from sociological perspective towards law is different from a lawyer's perspective. The study of sociology has helped Jurisprudence in its approach. Behind all legal aspects, there is always something social. However, Sociology of Law is different from Sociological Jurisprudence.

2. **Jurisprudence and Psychology**- No human science can be described properly without a thorough knowledge of Human Mind. Hence, Psychology has a close connection with Jurisprudence. Relationship of Psychology and Law is established in the branch of **Criminological Jurisprudence**. Both psychology and jurisprudence are

interested in solving questions such as motive behind a crime, criminal personality, reasons for crime etc.

3. Jurisprudence and Ethics- Ethics has been defined as the science of Human Conduct. It strives for ideal Human Behaviour. This is how Ethics and Jurisprudence are interconnected:

a. **Ideal Moral Code-** This could be found in relation to Natural Law.

b. **Positive Moral Code-** This could be found in relation to Law as the Command of the Sovereign.

c. Ethics is concerned with good human conduct in the light of public opinion.

d. Jurisprudence is related with Positive Morality in so far as law is the instrument to assert positive ethics.

e. Jurisprudence believes that Legislations must be based on ethical principles. It is not to be divorced from Human principles.

f. Ethics believes that No law is good unless it is based on sound principles of human value.

g. A Jurist should be adept in this science because unless he studies ethics, he won't be able to criticize the law.

h. However, Austin disagreed with this relationship.

4. Jurisprudence and Economics- Economics studies man's efforts in satisfying his wants and producing and distributing wealth. Both Jurisprudence and Economics are sciences and both aim to regulate lives of the people. Both of them try to develop the society and improve life of an individual. Karl Marx was a pioneer in this regard.

5. Jurisprudence and History- History studies past events. Development of Law for administration of justice becomes sound if we know the history and background of legislations and the way law has evolved. The branch is known as **Historical Jurisprudence**.

6. Jurisprudence and Politics- In a politically organized society, there are regulations and laws which lay down authoritatively what a man may and may not do. Thus, there is a deep connected between politics and Jurisprudence

Jurisprudence Notes- The Nature of Law

Introduction

We know that Law cannot be static. In order to remain relevant, Law has to grow with the development of the society. In the same manner, the scope of law also cannot be kept static. The result is that the **definition of law** is ever changing with the change in society. The definition of law considered satisfactory today might be considered a narrow definition tomorrow. This view has been put forward by Professor Keeton. He said that **an attempt to establish a satisfactory definition of law is to seek, to confine jurisprudence within a Straight Jacket from which it is continually trying to escape.**

Let us study the views of Austin and Salmon on the Nature of Law.

Austin said that **law is the aggregate of the rules set by men as political superior or sovereign to men as politically subject.** In short, **Law is the command of sovereign.** It imposes a duty and duty is backed by a sanction. He further said that there exists three elements in law:

a. Command

b. Duty

c. Sanction

However, Salmond defined **law as the body of principles recognized and applied by the state in the administration of justice.**

Let us come back to Austin's definition now.

Austin's Theory of Law or Imperative Theory of Law

As we know, according to Austin, there are three elements in law:

a. It is a type of command

b. It is laid down by a political superior

c. It is enforced by a sanction

He goes on to elaborate this theory. For him, Requests, wishes etc. are expressions of desire. **Command is also an expression of desire which is given by a political superior to a political inferior.** The relationship of superior and inferior consists in the power which the **superior enjoys over the inferior** because the superior has ability to punish the inferior for its disobedience.

He further said that there are certain commands that are laws and there are certain commands that are not laws. Commands that are laws are general in nature.

Therefore, **laws are general commands**. Laws are like standing order in a military station which is to be obeyed by everybody.

He goes on to define who is a sovereign. According to him, **Sovereign is a person or a body or persons whom a bulk of politically organized society habitually obeys and who does not himself habitually obey some other person or persons**. Perfect obedience is not a requirement.

He further goes on to classify the types of laws:

1. **Divine Law**- Given by god to men

2. **Human Law**- Given by men to men

a. **Positive Laws**- Statutory Laws

b. **Not Positive Laws**- Non- Statutory Laws, Customs, Traditions etc.

Criticism of Austin's Theory of Law

1. **Laws before state**- It is not necessary for the law to exist if the sovereign exists. There were societies prior to existence of sovereign and there were rules that were in prevalence. At that point of time, **there was no political superior**. Law had its origin in custom, religion and public opinion. All these so called 'laws' were later enforced by the political superior. Thus, the belief that **sovereign is a requirement for law has received criticism** by the Historical and Sociological School of Thought.

However, the above mentioned criticism is not supported by Salmond. Salmond said that the laws which were in existence prior to the existence of state were something like **primitive substitutes of law and not law. They only resembled law**. Salmond gave an example. **He said that apes resemble human beings but it is not necessary to include apes if we define human beings**.

2. **Generality of Law**- The laws are also particular in nature. Sometimes, a Law is applicable only to a particular domain. There are laws which are not universally applicable. Thus, laws are not always general in nature.

3. **Promulgation**- It is not necessary for the existence of the law that the subjects need to be communicated. But, Austin thought otherwise.

4. **Law as Command**- According to Austin, **law is the command of the sovereign**. But, all laws cannot be expressed as commands. Greater part of law in the system is not in the nature of command. There are customs, traditions, and unspoken practices etc. that are equally effective.

5. **Sanction**- The phrase '**sanction**' might be correct for a Monarchical state. But for a Democratic state, laws exist not because of the force of the state but due to willing of the people. Hence, the phrase 'sanction' is not appropriate in such situations. Also, there exists no sanction in Civil Laws unlike Criminal Laws.

6. **Not applicable to International Law**- Austin's definition is not applicable to International Law. International Law represents **law between sovereigns**. According to Austin, International Law is simply Positive Morality i.e. Soft Laws.

7. **Not applicable to Constitutional Law**- Constitutional Law defines powers of the various organs of the state. It comprises of various doctrines such as separation of power, division of power etc. Thus, no individual body of a state can act as sovereign or command itself. Therefore, it is not applicable to constitutional law.

8. **Not applicable to Hindu Law or Mohameddan Law or Cannon Law**- Personal Laws have their origin in religion, customs and traditions. Austin's definition strictly excludes religion. Therefore, it is not applicable to personal laws.

9. **Disregard of Ethical elements**- The moment law is devoid of ethics, the law loses its colour and essence. Justice is considered an end of law or law is considered a means to achieve Justice. However, Austin's theory is silent about this special relationship of Justice and Law. **Salmond said that any definition of law which is without reference to justice is imperfect in nature.** He further said '*Law is not right alone, it is not might alone, it is a perfect union of the two*' and **Law is justice speaking to men by the voice of the State.** According to Salmond, whatever Austin spoke about is '**a law**' and not '**the law**'. By calling 'the law' we are referring to justice, social welfare and law in the abstract sense. Austin's definition lacked this abstract sense. A perfect definition should include both '**a law**' and '**the law**'.

10. **Purpose of law ignored**- One of the basic purposes of Law is to promote Social Welfare. If we devoid law of ethics, the social welfare part is lost. Again, this part has been ignored by Austin.

Merit in Austin's Definition

Not everything is faulty about Austin's theory of law. He gave a clear and simple definition of law because he has excluded ethics and religion from the ambit of law. Thus, he gave a paramount truth that **law is created and enforced by the state.**

Salmond's Definition of Law

According to Salmond '**Law may be defined as the body of principles recognized and applied by the state in the administration of justice**'. In other words, law consists of rules recognized and acted upon by the Courts of Justice.

Salmond believed that law may arise out of popular practices and its legal character becomes patent when it is recognized and applied by a Court in the Administration of Justice. Courts may misconstrue a statute or reject a custom; it is only the Ruling of the Court that has the Binding Force of Law.

He further said that **laws are laws because courts enforce them**. He drew a lot of emphasis on Administration of Justice by the Courts. He was of firm belief that the true test of law is **enforceability in the courts of law**.

Thus, we see that Salmond has defined law in the abstract sense. His definition brings out the ethical purpose of law. In his definition, law is merely an instrument of Justice.

Criticism by Vinogradoff

Vinogradoff heavily criticized Salmond's definition. He said that the definition of law with reference to Administration of Justice inverts the logical order of ideas. **The formulation of law is necessary precedent to the administration of justice. Law has to be formulated before it can be applied by a court of justice.**

He further said that the definition given by Salmond is defective because he thinks law is logically subsequent to administration of justice. Existence of a Rule of Law because Courts of Justice could apply it and enforce it while deciding cases, vitiates the definition of law.

Natural Law or Moral Law

Natural Law refers to the Principles of Natural right and wrong and the Principle of Natural Justice. Here, we must use the term '**justice**' in the widest sense to include to all forms of rightful action. Natural Law is also called Divine Law or Law of Reason or The Universal Law and Eternal Law. **This law is a Command of the God imposed on Men.**

Natural Law is established by reason by which the world is governed, it is an unwritten law and it has existed since the beginning of the world and hence, is also called Eternal Law. This law is called Natural Law as its principles are supposed to be laid down by god for the guidance of man. It is called Rational Thought because it is based on reason. Natural Law is unwritten as we do not find it in any type of Code. Therefore, Natural law exists only in ideal state and differs from law of a State. Philosophy of Natural law has inspired legislation and the use of reason in formulating a System of law.

Purpose and function of law

Society is dynamic and not static in nature. Laws made for the people are also not static in nature. Thus, purpose and function of law also cannot remain static. There is no unanimity among theorists as to purpose and function of law. Thus, we will study purpose and function of law in the context of advantages and disadvantages.

1. Advantages of law-

a. Fixed principles of law

- i. Laws provide uniformity and certainty of administration of justice.
 - ii. Law is no respecter of personality and it has certain amount of certainty attached to it.
 - iii. Law avoids the dangers of arbitrary, biased and dishonest decisions because law is certain and it is known. **It is not enough that justice should be done but it is also important that it is seen to be done.**
 - iv. Law protects the Administration of Justice from the errors of individual judgments. Individual whims and fancies are not reflected in the judgment of the court that follow the Rule of Law.
- b. Legislature represents the wisdom of the people and therefore a law made by the legislature is much safer because collective decision making is better and more reliable than individual decision making.

2. Disadvantages of law-

- a. **Rigidity of Law**- An ideal legal system keeps on changing according to the changing needs of the people. Therefore, law must adjust to the needs of the people and it cannot isolate itself from them. **However, in practice, law is not usually changed to adjust itself to the needs of the people.** Therefore, the lack of flexibility results into hardship in several cases.
- b. **Conservative nature of law**- Both lawyers and judges favour in continuation of the existing laws. This creates a situation where very often laws become static and they do not respond to the progressive society because of the conservative nature of law.
- c. **Formalism of law**- Most of the times, people are concerned with the technical operation of law and not the merits of every individual case. It creates delay in the Justice Delivery system. It also leads to injustice in certain cases.
- d. **Complexity of law**- Sometimes, the laws are immensely intricate and complex. This causes difficulty in Interpretation of Statutes.

3. Therefore, advantages of law are many but disadvantages are too much- Salmond

Jurisprudence Notes- Administration of Justice

Administration of Justice

A. Views of Theorists on the 'Importance of Justice'

a. **Salmond**- Salmond said that the *'Definition of law itself reflects that Administration of Justice has to be done by the state on the basis of rules and principles recognized'*.

b. **Roscoe Pound**- He believed that it is the court who has to administer justice in a state. Both, Roscoe Pound and Salmond emphasized upon the Courts in propounding law. However, Roscoe Pound stressed more on the role of courts whereas Salmond stressed more on the role of the State.

B. Administration of Justice- There are two essential functions of every State:

a. War

b. Administration of Justice

Theorists have said that that if a state is not capable of performing the above mentioned functions, it is not a state.

Salmond said that the Administration of Justice implies **maintenance of rights within a political community by means of the physical force of the state**. However orderly society may be, the element of force is always present and operative. It becomes latent but it still exists.

Also, in a society, social sanction is an effective instrument only if it is associated with and supplemented by concentrated and irresistible force of the community. Social Sanction cannot be a substitute for the physical force of the state.

Origin and Growth of the concept of Administration of Justice

It is the social nature of men that inspires him to live in a community. This social nature of men demands that he must reside in a society. However, living in a society leads to conflict of interests and gives rise to the need for Administration of Justice. This is considered to be the historical basis for the growth of administration of justice.

Once the need for Administration of Justice was recognized, the State came into being. Initially, the so called State was not strong enough to regulate crime and impart punishment to the criminals. During that point of time, the law was one of Private Vengeance and Self-Help.

In the next phase of the development of Administration of Justice, the State came into full-fledged existence. With the growth in the power of the state, the state began to act like a judge to assess liability and impose penalty on the individuals. The concept of Public Enquiry and Punishment became a reality.

Thus, the modern Administration of Justice is a natural corollary to the growth in the power of the political state.

C. Advantages and Disadvantages of Legal Justice

a. Advantages of Legal Justice

i. **Uniformity and Certainty**- Legal Justice made sure that there is no scope of arbitrary action and even the judges had to decide according to the declared law of the State. As law is certain, people could shape their conduct accordingly.

ii. Legal Justice also made sure that the law is not for the convenience of a particular special class. Judges must act according to the law. It is through this that impartiality has been secured in the Administration of Justice. Sir Edward Coke said that **the wisdom of law is wiser than any man's wisdom** and Justice represents wisdom of the community.

b. Disadvantages of Legal Justice

i. It is rigid. The rate of change in the society is always more rapid than the rate of change in the Legal Justice.

ii. Legal Justice is full of technicalities and formalities.

iii. Legal Justice is complex. Our society is complex too. Thus, to meet the needs of the society, we need complex laws.

iv. Salmond said that *'law is without doubt a remedy for greater evils yet it brings with it evils of its own'*.

D. Classification of Justice- It can be divided into two parts

a. **Private Justice**- This is considered to be the justice between individuals. Private Justice is a relationship between individuals. It is an end for which the court exists. Private persons are not allowed to take the law in their own hands. It reflects the ethical justice that ought to exist between the individuals.

b. **Public Justice**- Public Justice administered by the state through its own tribunals and courts. It regulates the relationship between the courts and individuals. **Public Justice is the means by which courts fulfil that ends of Private Justice.**

E. Concept of Justice According to Law

Justice is rendered to the people by the courts. Justice rendered must always be in accordance with the law. However, it is not always justice that is rendered by the courts. This is because the judges are not legislators, they are merely the interpreters of law. It is not the duty of the court to correct the defects in law. The only function of the judges is to administer the law as made by the legislature. Hence, in the modern state, the administration of justice according to law is commonly considered as **'implying recognition of fixed rules'**.

F. Civil and Criminal Justice

Civil Justice and Criminal follow from Public Justice and Private Justice. Looking from a practical standpoint, important distinctions lie in the legal consequences of the two. Civil Justice and Criminal Justice are administered by a different set of courts.

A Civil Proceeding usually results in a judgment for damages or injunction or restitution or specific decree or other such civil reliefs. However, a Criminal Proceeding usually results in punishment. There are myriad number of punishments ranging from hanging to fine to probation. Therefore, Salmond said that *'the basic objective of a criminal proceeding is punishment and the usual goal of a civil proceeding is not punitive'*.

G. Theories of Punishment

a. **Deterrent Theory**- Salmond said that the deterrent aspect of punishment is extremely important. The object of punishment is not only to prevent the wrongdoer from committing the crime again but also to make him an example in front of the other such persons who have similar criminal tendencies.

The aim of this theory is not to seek revenge but terrorize people. As per this theory, an exemplary punishment should be given to the criminal so that others may take a lesson from his experience.

Even in Manu Smriti, the Deterrent Theory is mentioned. Manu said *"Penalty keeps the people under control, penalty protects them, and penalty remains awake when people are*

asleep, so the wise have regarded punishment as the source of righteousness". However, critics believe that deterrent effect not always leads to a decrease in crime.

b. Preventive Theory- This theory believes that the object of punishment is to prevent or disable the wrongdoer from committing the crime again. Deterrent theory aims at giving a warning to the society at large whereas under Preventive Theory, the main aim is to disable the wrongdoer from repeating the criminal activity by disabling his physical power to commit crime.

c. Reformatory Theory- This theory believes that Punishment should exist to reform the criminal. Even if an offender commits a crime, he does not cease to be a human being. He might have committed the crime under circumstances which might never occur again. Thus, the main object of Punishment under Reformatory theory is to bring about a moral reform in the offender. Certain guidelines have been prescribed under this theory.

i. While awarding punishment, the judge should study the characteristics and the age of the offender, his early breeding, the circumstances under which he has committed the offence and the object with which he has committed the offence.

ii. The object of the above mentioned exercise is to acquaint the judge with the exact nature of the circumstances so that he may give a punishment which suits those circumstances.

iii. Advocates of this theory say that by sympathetic, tactful and loving treatment of the offenders, a revolutionary change may be brought about in their character. However, the Critics say that Reformatory Theory alone is not sufficient, there must be a mix of Deterrent Theory and Reformatory Theory in order to be successful. Critics believe that in a situation of deadlock between the two theories, the Deterrent Theory must prevail.

Distinction between Deterrent Theory and Reformatory Theory

1. Reformatory Theory stands for the reformation of the convict but the Deterrent Theory aims at giving exemplary punishment so that the others are deterred from following the same course of action.

2. Deterrent Theory does not lead to a reformation of the criminal as it imposes harsh punishments. Whereas, Reformatory Theory believes that if harsh punishment is inflicted on the criminals, there will be no scope for reform.

3. Deterrent Theory believes that the punishment should be determined by the character of the crime. Thus, too much emphasis is given on the crime and too little on the criminal. However, Reformatory Theory takes into consideration the circumstances under which an offence was committed. Reformatory Theory further believes that every effort should be made to give a chance to the criminal to improve his conduct in the future.

d. **Retributive Theory**- In primitive societies, the punishment was mostly retributive in nature and the person wronged was allowed to have his revenge against the wrongdoer. The principle was “**an eye for an eye**”. This principle was recognized and followed for a long time. Retributive theory believes that it is an end in itself, apart from a gain to the society and the victim, the criminal should meet his reward in equivalent suffering.

e. **Theory of Compensation**- This theory believes that punishment should not only be to prevent further crime but it should also exist to compensate the victim who has suffered at the hands of the wrongdoer. However, critics say that this theory is not effective in checking the rate of crime. This is because the purpose behind committing a crime is always economic in nature. Asking the wrongdoer to compensate the victim will not always lower the rate of crime though it might prove beneficial to the victim. Under this theory, the compensation is also paid to the persons who have suffered from the wrongdoing of the government.

H. Kinds of Punishment

a. **Capital Punishment**- This is one of the oldest form of punishments. Even our IPC prescribes this punishment for certain crimes. A lot of countries have either abolished this punishment or are on their way to abolish it. Indian Judiciary has vacillating and indecisive stand on this punishment. There have been plethora of cases where heinous and treacherous crime was committed yet Capital Punishment was not awarded to the criminal.

b. **Deportation or Transportation**- This is also a very old form of punishment. It was practised in India during the British Rule. The criminal is put in a secluded place or in a different society. Critics of this punishment believe that the person will still cause trouble in the society where he is being deported.

c. **Corporal Punishment**- Corporal punishment is a form of physical punishment that involves the deliberate infliction of pain on the wrongdoer. This punishment is abolished in our country but it exists in some Middle Eastern Countries. Critics say that it is highly inhuman and ineffective.

d. **Imprisonment**- This type of punishment serves the purpose of three theories, Deterrent, Preventive and Reformative.

i. Under Deterrent Theory, it helps in setting an example.

ii. It disables the offender from moving outside, thus serving the purpose of Preventive Theory.

iii. If the government wishes to reform the prisoner, it can do so while the person is serving his imprisonment, thus serving the purpose of Reformative Theory.

e. **Solitary Confinement**- Solitary confinement is a form of imprisonment in which a prisoner is isolated from any human contact. It is an aggravated form of punishment. It is said that it fully exploits and destroys the sociable nature of men. Critics say that it is inhuman too.

f. **Indeterminate Sentence**- In such a sentence, the accused is not sentenced for any fixed period. The period is left indeterminate while awarding and when the accused shows improvement, the sentence may be terminated. It is also reformative in nature.

Jurisprudence Notes- The Sources of Law

Sources of Law

Analytical Positivist School of Thought- Austin said that the term '*source of law*' has three different meanings:

1. This term refers to immediate or direct author of the law which means the **sovereign in the country**.
2. This term refers to the **historical document** from which the body of law can be known.
3. This term refers to the causes that have brought into existence the rules that later on acquire the force of law. E.g. customs, judicial decision, equity etc.

Historical Jurists- Von Savigny, Henrye Maine, Puchta etc. – This group of scholars believed that **law is not made but is formed**. According to them, the foundation of law lies in the common consciousness of the people that manifests itself in the practices,

usages and customs followed by the people. Therefore, for them, customs and usages are the sources of law.

Sociological Jurists- This group of scholars protest against the orthodox conception of law according to which, **law emanates from a single authority in the state**. They believe that law is taken from many sources and not just one.

Ehrlich said that *at any given point of time, the centre of gravity of legal development lies not in legislation, not in science nor in judicial decisions but in the society itself.*

Duguit believed that law is not derived from any single source as the basis of law is public service. There need not be any specific authority in a society that has the sole authority to make laws.

Salmond on Sources of Law- Salmond has done his own classification of sources of law:

1. Formal Sources- A Formal Source is as that from which rule of law derives its force and validity. The formal source of law is the **will of the state** as manifested in statutes or decisions of the court and the authority of law proceeds from that.

2. Material Sources- Material Sources are those from which is derived the matter though not the validity of law and the matter of law may be drawn from all kind of material sources.

a. Historical Sources- Historical Sources are rules that are subsequently turned into legal principles. Such sources are first found in an Un authoritative form. Usually, such principles are not allowed by the courts as a matter of right. They operate indirectly and in a mediatory manner. Some of the historical sources of law are:

i. Unauthoritative Writings

ii. Legal Sources- Legal Sources are instruments or organs of the state by which legal rules are created for e.g. legislation and custom. They are authoritative in nature and are followed by the courts. **They are the gates through which new principles find admittance into the realm of law.** Some of the Legal Sources are:

a. Legislations

b. Precedent

c. Customary Law

d. Conventional Law- Treatises etc.

Charles Allen said that Salmond has attached inadequate attention to historical sources. According to him, historical sources are the most important source of law.

Keeton said that state is the organization that enforces the law. Therefore, technically State cannot be considered as a source of law. However, according to Salmond, a statute is a legal source which must be recognized. Writings of scholars such as Bentham cannot be considered as a source of law since such writings do not have any legal backing and authority.

Legal sources of English Law- There are two established sources of English Law:

1. Enacted Law having its source in legislation- This consists of statutory law. **A Legislation is the act of making of law by formal and express declaration of new rules by some authority in the body politic which is recognized as adequate for that purpose.**

2. Case Law having source in Judicial Precedence- It consists of common law that we usually read in judgments and law reporters. Precedent could also be considered as a source of law as a precedent is made by recognition and application of new rules by the courts whilst administering justice. Thus, Case Laws are developed by the courts whereas enacted laws come into the court *ab extra*.

3. Juristic Law- Professional opinion of experts or eminent jurists. These are also sources of law. Though, they are not much accepted.

Sources of Law: Are they sources of Right too?

A Legal Right means a fact that is legally constitutive of a right. A Right is the *de fact* antecedent of a legal right in the same way as a source of law is *de facto* antecedent of a legal principle.

Legislation- '*Legis*' means law and '*latum*' means making. Let us understand how various jurists have defined legislation.

1. Salmond- Legislation is that source of law which consists in the declaration of legal rules by a competent authority.

2. Horace Gray- Legislation means the formal utterance of the legislative organs of the society.

3. John Austin- There can be no law without a legislative act.

Analytical Positivist School of Thought- This school believes that typical law is **astatute** and legislation is the normal source of law making. The majority of exponents of this school **do not approve that the courts also can formulate law**. They do not admit the claim of customs and traditions as a source of law. Thus, they regard **only legislation as the source of law**.

Historical School of Thought- This group of gentlemen believe that **Legislation is the least creative of the sources of law**. Legislative purpose of any legislation is to give better form and effectuate the customs and traditions that are spontaneously developed by the people. Thus, **they do not regard legislation as source of law**.

Types of Legislation

1. **Supreme Legislation-** A Supreme or a Superior Legislation is that which proceeds from the sovereign power of the state. It cannot be repealed, annulled or controlled by any other legislative authority.

2. **Subordinate Legislation-** It is that which proceeds from any authority **other than the sovereign power** and is dependant for its continual existence and validity on some superior authority.

Delegated Legislation- This is a type of subordinate legislation. It is well-known that the main function of the executive is to **enforce the law**. In case of Delegated Legislation, executive frames the provisions of law. This is also known as executive legislation. The executive makes laws in the form of orders, by laws etc.

Sub-Delegation of Power to make laws is also a case in Indian Legal system. In India, the power to make subordinate legislation is usually derived from existing enabling acts. It is fundamental that the delegate on whom such power is conferred has to act within the limits of the enabling act.

The main purpose of such legislation is to supplant and not to supplement the law. Its main justification is that sometimes legislature does not foresee the difficulties that might come after enacting a law. Therefore, Delegated Legislation fills in those gaps that are not seen while formulation of the enabling act. Delegated Legislation gives flexibility to law and there is ample scope for adjustment in the light of experiences gained during the working of legislation.

Controls over Delegated Legislation

Direct Forms of Control

- 1. Parliamentary Control**
- 2. Parliamentary Supervision**

Indirect Forms of Control

- 1. Judicial Control-** This is an indirect form of control. Courts cannot annul subordinate enactments but they can declare them inapplicable in special circumstances. By doing so, the rules framed do not get repealed or abrogated but they surely become dead letter as they become *ultra vires* and no responsible authority attempts to implement it.
- 2. Trustworthy Body of Persons-** Some form of indirect control can be exercised by entrusting power to a trustworthy body of persons.
- 3. Public Opinion** can also be a good check on arbitrary exercise of Delegated Powers. It can be complemented by antecedent publicity of the Delegated Laws.

It is advisable that in matters of technical nature, opinion of experts must be taken. It will definitely minimize the dangers of enacting a vague legislation.

Salient Features of Legislation over Court Precedents

- 1. Abrogation-** By exercising the power to repeal any legislation, the legislature can abrogate any legislative measure or provision that has become meaningless or ineffective in the changed circumstances. Legislature can repeal a law with ease. However, this is not the situation with courts because the process of litigation is a necessary as well as a time-consuming process.
- 2. Division of function-** Legislation is advantageous because of division of functions. Legislature can make a law by gathering all the relevant material and linking it with the legislative measures that are needed. In such a process, legislature takes help of the public and opinion of the experts. Thus, public opinion also gets represented in the legislature. This cannot be done by the judiciary since Judiciary does not have the resources and the expertise to gather all the relevant material regarding enforcement of particular principles.

3. Prospective Nature of Legislation- Legislations are always prospective in nature. This is because legislations are made applicable to only those that come into existence once the said legislation has been enacted. Thus, once a legislation gets enacted, the public can shape its conduct accordingly. However, Judgments are mostly retrospective. The legality of any action can be pronounced by the court only when that action has taken place. Bentham once said that *“Do you know how they make it; just as man makes for his dog. When your dog does something, you want to break him off, you wait till he does it and beat him and this is how the judge makes law for men”*.

4. Nature of assignment- The nature of job and assignment of a legislator is such that he/she is in constant interaction with all sections of the society. Thereby, opportunities are available to him correct the failed necessities of time. Also, the decisions taken by the legislators in the Legislature are collective in nature. This is not so in the case of Judiciary. Sometimes, judgments are based on bias and prejudices of the judge who is passing the judgment thereby making it uncertain.

5. Form- Enacted Legislation is an abstract proposition with necessary exceptions and explanations whereas Judicial Pronouncements are usually circumscribed by the facts of a particular case for which the judgment has been passed. Critics say that when a Judge gives Judgment, he makes elephantiasis of law.

Difference between Legislation and Customary Law

1. Legislation has its source in theory whereas customary law grows out of practice.
2. The existence of Legislation is essentially *de Jure* whereas existence of customary law is essentially *de Facto*.
3. Legislation is the latest development in the Law-making tendency whereas customary law is the oldest form of law.
4. Legislation is a mark of an advanced society and a mature legal system whereas absolute reliance on customary law is a mark of primitive society and under-developed legal system.
5. Legislation expresses relationship between man and state whereas customary law expresses relationship between man and man.
6. Legislation is precise, complete and easily accessible but the same cannot be said about customary law. Legislation is *jus scriptum*.
7. Legislation is the result of a deliberate positive process. But customary law is the outcome of necessity, utility and imitation.

Advantage of Court Precedents over Legislation

1. Dicey said that *“the morality of courts is higher than the morality of the politicians”*. A judge is impartial. Therefore, he performs his work in an unbiased manner.

2. Salmond said that *“Case laws enjoys greater flexibility than statutory law. Statutory law suffers from the defect of rigidity. Courts are bound by the letter of law and are not allowed to ignore the law.”*

Also, in the case of precedent, **analogical extension** is allowed. It is true that legislation as an instrument of reform is necessary but it cannot be denied that precedent has its own importance as a constitutive element in the making of law although it cannot abrogate the law.

3. **Horace Gray** said that *“Case law is not only superior to statutory law but all law is judge made law. In truth all the law is judge made law, the shape in which a statute is imposed on the community as a guide for conduct is the statute as interpreted by the courts. The courts put life into the dead words of the statute”*.

4. **Sir Edward Coke** said that *“the function of a court is to interpret the statute that is a document having a form according to the intent of them that made it”*.

5. **Salmond** said that *“the expression will of the legislature represents short hand reference to the meaning of the words used in the legislature objectively determined with the guidance furnished by the accepted principles of interpretation”*.

Precedent as a Source of Law

In India, the judgment rendered by Supreme Court is binding on all the subordinate courts, High Courts and the tribunals within the territory of the country.

In case of a judgment rendered by the High Court, it is binding in nature to the subordinate courts and the tribunals within its jurisdiction.

In other territories, a High Court judgment only has a persuasive value. In *Indo-Swiss Time Ltd. v. Umroo*, AIR 1981 P&H 213 Full Bench, it was held that *“where it is of matching authority, then the weight should be given on the basis of rational and logical reasoning and we should not bind ourselves to the mere fortuitous circumstances of time and death”*.

Union of India v. K.S. Subramaniam- AIR 1976 SC 2435- This case held that when there is an inconsistency in decision between the benches of the same court, the decision of the larger bench should be followed.

What is the meaning of Precedent as a source of law?

Till the 19th Century, Reported Court Precedents were probably followed by the courts. However, after 19th century, courts started to believe that precedence not only has great authority but must be followed in certain circumstances. William Searle Holdsworth supported the pre-19th century meaning of the precedence. However, Goodheart supported the post-19th century meaning.

Declaratory Theory of Precedence- This theory holds that judges do not create or change the law, but they 'declare' what the law has always been. This theory believes that the Principles of Equity have their origin in either customs or legislation. However, critics of this theory say that most of the Principles of Equity have been made by the judges and hence, declaratory theory fails to take this factor into regard.

Types of Precedents

1. **Authoritative Precedent-** Judges must follow the precedent whether they approve of it or not. They are classified as Legal Sources.

2. **Persuasive Precedent-** Judges are under no obligation to follow but which they will take precedence into consideration and to which they will attach such weight as it seems proper to them. They are classified as Historical Sources.

Disregarding a Precedent- Overruling is a way by which the courts disregard a precedent. There are circumstances that destroy the binding force of the precedent:

1. **Abrogated Decision-** A decision when abrogated by a statutory law.

2. **Affirmation or reversal by a different ground-** The judgment rendered by a lower court loses its relevance if such a judgment is passed or reversed by a higher court.

3. **Ignorance of Statute-** In such cases, the decision loses its binding value.

4. **Inconsistency with earlier decisions of High Court**

5. Precedent that is *sub-silentio* or not fully argued.

6. **Decision of equally divided courts-** Where there is neither a majority nor a minority judgment.

7. **Erroneous Decision**

Custom as a Source of Law

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

Keeton said that "*Customary laws are those rules of human action, established by usage and regarded as legally binding by those to whom the rules are applicable, which are adopted by the courts and applied as a source of law because they are generally followed by the political society as a whole or by some part of it*". However, Austin said that Custom is not a source of law.

Roscoe Pound said that Customary Law comprises of:

1. Law formulated through Custom of popular action.
2. Law formulated through judicial decision.
3. Law formulated by doctrinal writings and scientific discussions of legal principles.

Historical School of Jurisprudence- Von Savigny considered that customary law, i.e. **law which got its content from habits of popular action recognized by courts, or from habits of judicial decision, or from traditional modes of juristic thinking**, was merely an expression of the *jural* ideas of the people, of a people's conviction of right – of its ideas of right and of rightful social control.

However, it is the Greek historical School that is considered as the innovator of custom as source of law.

Otto Van Gierke, a German Jurist and a Legal Historian, said that "*every true human association becomes a real and living entity animated by its own individual soul*".

Henry Maine believed that custom is the only source of law. He said that "*Custom is a conception posterior to that of themselves or judgment.*"

Ingredients of Custom

1. Antiquity
2. Continuous in nature.
3. Peaceful Enjoyment

4. Obligatory Force
5. Certainty
6. Consistency
7. Reasonableness

Jurisprudence Notes- Legal Concepts (Rights and Duties, Ownership and Possession)

Legal Rights and Duties

Legal rights are, clearly, rights which exist under the rules of legal systems or by virtue of decisions of suitably authoritative bodies within them.

According to positivists, legal rights are essentially those interests which have been legally recognized and protected. John Austin made a distinction between legal rights and other types of rights such as Natural rights or Moral rights. By legal rights, he meant *rights which are creatures of law, strictly or simply so called*. He said that other kind of rights are not armed with legal sanction and cannot be enforced judicially.

On the other hand, Salmond said that a legal right is an interest recognized and protected by rule of law and violation of such an interest would be a legal wrong. Salmond further said that:

1. A legal duty is an act that obliges to do something and act, the opposite of which would be a legal wrong.
2. Whenever law ascribes duty to a person, a corresponding right also exists with the person on whom the duty is imposed.
3. There are two kinds of duties: **Moral Duty and Legal Duty**.
4. Rights are said to be the benefits secured for persons by rules regulating relationships.

Salmond also believed that no right can exist without a corresponding duty. Every right or duty involves a bond of legal obligation by which two or more persons are bound together. Thus, there can be no duty unless there is someone to whom it is due; there can be no right unless there is someone from whom it is claimed; and there can be no wrong unless there is someone who is wronged, that is to say, someone whose right has been violated.

This is also called as *vinculum juris* which means “**a bond of the law**”. It is a tie that legally binds one person to another.

On the other hand, Austin said that Duties can be of two types:

a. **Relative Duty** – There is a corresponding right existing in such duties.

b. **Absolute Duty** – There is no corresponding right existing.

Austin conceives this distinction to be the essence of a right that it should be vested in some determinate person and be enforceable by some form of legal process instituted by him. Austin thus starts from the assumption that a right cannot vest in an indeterminate, or a vague entity like the society or the people. The second assumption with which Austin starts is that sovereign creates rights and can impose or change these rights at its will. Consequently, the sovereign cannot be the holder of such rights.

According to Salmond, there are five important characteristics of a Legal Right:

1. It is vested in a person who may be distinguished as the owner of the right, the subject of it, the person entitled, or the person of inherence.
2. It avails against a person, upon whom lies the correlative duty. He may be distinguished as the person bound, or as the subject of duty, or as the person of incidence.
3. It obliges the person bound to an act or omission in favour of the person entitled. This may be termed the content of the right.
4. The act or omission relates to something (in the widest sense of that word), which may be termed the object or subject matter of the right.
5. Every legal right has a title, that is to say, certain facts or events by reason of which the right has become vested in its owner.

Some jurists hold that a right may not necessarily have a correlative duty. They say that legal rights are legal concepts and these legal concepts have their correlatives which may not necessarily be a duty.

Roscoe Pound also gave an analysis of such legal conceptions. He believed that legal rights are essentially interests recognized and administered by law and belong to the 'science of law' instead of 'law'. He proposed that such Rights are conceptions by which interests are given form in order to secure a legal order.

Hohfeld's System of Fundamental Legal Concepts or Jural Relations

	1	2	3	4
Jural Opposites	Right	Privilege	Power	Immunity
	–	–	–	–
	No Right	Duty	Disability	Liability
Jural Correlatives	Right	Privilege	Power	Immunity
	–	–	–	–
	Duty	No Right	Liability	Disability

Jural Correlatives represent the presence of in another. Thus, right is the presence of duty in another and liability is the presence of power in another.

Jural Opposites represent the absence of in oneself. Thus, no right is the absence of right in oneself and disability is the absence of power in oneself.

Conclusion derived from Hohfeld's System

a. As a person's right is an expression of a wish that the other person against whom the right or claim is expressed has a duty to obey his right or claim.

b. A person's freedom is an expression of a right that he may do something against other person to change his legal position.

c. A person's power is an expression of a right that he can alter other person's legal position.

d. A person's disability is an expression of a wish that another person must not alter the person's legal position.

Salmond on Rights and Duties

Salmond said that a perfect right is one which corresponds to a perfect duty and a perfect duty is one which is not merely recognized by law but also enforced by law. In a fully developed legal system, there are rights and duties which though recognized by law are not perfect in nature. The rights and duties are important but no action is taken for enforcing these rights and duties. The rights form a good ground for defence but duties do not form a good ground for action. However, in some cases, an imperfect right is sufficient to enforce equity.

Salmond gave following classifications of rights.

1. Positive and Negative Rights
2. Real and Personal Rights
3. *Right in rem* and *right in personam*
4. Proprietary and Personal Rights
5. Inheritable and Uninheritable Rights

Salmond's Classification of Positive and Negative Rights

	Positive Rights	Negative Rights
1	A positive right corresponds to a corresponding duty and entitles its owners to have something done for him without the performance of	Negative rights have negative duties corresponding to them and enjoyment is complete unless interference takes place. Therefore, majority of negative

	which his enjoyment of the right is imperfect.	rights are against the entire world.
2	In the case of positive rights, the person subject to the duty is bound to do something.	Whereas, in case of negative rights, others are restrained to do something.
3	The satisfaction of a positive right results in the betterment of the position of the owner.	Whereas in case of a negative right, the position of the owner is maintained as it is.
4	In case of positive rights, the relation between subject and object is mediate and object is attained with the help of others.	Whereas in case of negative rights, the relation is immediate, there is no necessity of outside help. All that is required is that others should refrain from interfering case of negative rights.
5	In case of positive rights, a duty is imposed on one or few individuals.	In case of negative rights, the duty is imposed on a large number of persons.

Salmond's Classification of Real and Personal Rights

	Real Rights	Personal Rights
1	A real right corresponds to a duty imposed upon persons in general.	A personal right corresponds to a duty imposed upon determinate individuals.
2	A real right is available against the whole world.	A personal right is available only against a particular person.
3	All real rights are negative rights. Therefore, a real right is nothing more than a right to be left alone by others. It is merely a right to their passive non-interference.	Most personal rights are positive rights although in a few exceptional cases they are negative.
	In real right, the relation is to a thing. Real rights are derived from some special relation to the object.	In personal right, it is the relation to other persons who owe the duties which is important. Personal rights are derived from special relation to the individual or individuals under the duty.

4	Real rights are <i>right in rem</i> .	Personal rights are <i>right in personam</i> .
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Salmond's Classification of *Right in rem* and *Right in personam*

	<i>Right in rem</i>	<i>Right in personam</i>
1	It is derived from the Roman term ' <i>actio in rem</i> '. An <i>action in rem</i> was an action for the recovery of dominium.	It is derived from the Roman term ' <i>action in personam</i> '. An <i>action in personam</i> was one for the enforcement of <i>obligato</i> i.e. obligation.
2	The right protected by an <i>action in rem</i> came to be called <i>jus in rem</i> .	A right protected by <i>action in personam</i> came to be called as <i>jus in personam</i> .
3	<i>Jus in rem</i> means a right against or in respect of a thing.	<i>Jus in personam</i> means a right against or in respect of a person.
4	A <i>right in rem</i> is available against the whole world.	A <i>right in personam</i> is available against a particular individual only.

Salmond's Classification of Proprietary and Personal Rights

	Proprietary Rights	Personal Rights
1	Proprietary rights means a person's right in relation to his own property. Proprietary rights have some economic or monetary value.	Personal rights are rights arising out of any contractual obligation or rights that relate to status.
2	Proprietary rights are valuable.	Personal rights are not valuable.
3	Proprietary rights are not residual in character.	Personal rights are the residuary rights which remain after proprietary rights have been subtracted.
4	Proprietary rights are transferable.	Personal rights are not transferable.
5	Proprietary rights are the elements of wealth for man.	Personal rights are merely elements of his well-being.

6

Proprietary rights possess not merely judicial but also economic importance.

Personal rights possess merely judicial importance.

Salmond's Classification of Inheritable and Uninheritable Rights

Inheritable Rights	Uninheritable Rights
A right is inheritable if it survives the owner.	A right is uninheritable if it dies with the owner.

Ownership

Salmond on Ownership

Ownership denotes the relationship between a person and an object forming the subject-matter of his ownership. It consists in a complex of rights, all of which are rights in rem, being good against the entire world and not merely against specific persons[4].

Incidence of Ownership

1. The owner has the right to possess things that he owns.
2. The owner normally has a right to use or enjoy the thing owned, the right to manage it, the right to decide how it shall be used and the right of income from it. However, Right to possess is not a right *strictu sensu* because such rights are in fact liberties as the owner has no duty towards others and he can use it in any way he likes and nobody can interfere with the enjoyment of his ownership.
3. The owner has the right to consume, destroy or alienate the things. The right to consume and destroy are again straight forward liberties. The right to alienate i.e. the right to transfer the existing rights involves the existence of power.

4. Ownership has the characteristic of being '**indeterminate in duration**' and Ownership has a **residuary character**. Salmond contrasted the rights of the owner with the lesser rights of the possessor and encumbrancer by stating that "*the owner's rights are indeterminate and residuary in a way in which these other rights are not*".

Austin's Concept of Ownership

Ownership or Property may be described accurately enough, in the following manner: '***the right to use or deal with some given subject, in a manner, or to an extent, which, though is not unlimited, is indefinite***'.

Now in this description it is necessarily implied, that the law will protect or relieve the owner against every disturbance of his right on the part of any other person. Changing the expression, all other persons are bound to **forbear** from acts which would prevent or hinder the enjoyment or exercise of the right.

Austin further said that "**Ownership or Property, is, therefore, a species of *Jus in rem*. For ownership is a right residing in a person, over or to a person or thing, and availing against other persons universally or generally. It is a right implying and exclusively resting upon obligations which are at once universal and negative**".

Dias on Ownership

After referring to the views of Salmond and other Jurists, Dias came to the conclusion that **a person is owner of a thing when his interest will outlast the interests of other persons in the same thing**. This is substantially the conclusion reached by many modern writers, who have variously described ownership as the 'residuary', the 'ultimate', or 'the most enduring interest'.

According to Dias, an owner may be divested of his claims, etc., to such an extent that he may be left with no immediate practical benefit. **He remains owner nonetheless**. This

is because his interest in the thing, which is ownership, will outlast that of other persons, or if he is not presently exercising any of his claims, etc., these will revive as soon as those vested in other persons have come to an end.

In the case of land and chattels, if the owner is not in possession, **ownership amounts to a better right to obtain the possession than that of the defendant**. It is 'better' in that it lasts longer. It is apparent that the above view of Dias substantially agrees with that of Salmond. According to Dias it is the outlasting interest and according to Salmond, ownership has the characteristic of being indeterminate in duration and residuary in nature[5].

Types of Ownership

Corporeal Ownership	Incorporeal Ownership
<ol style="list-style-type: none"> 1. Corporeal Ownership signifies ownership in a physical object. 2. Corporeal things are things which can be perceived by senses. 	<ol style="list-style-type: none"> 1. Incorporeal Ownership is a right or an interest. 2. Incorporeal things cannot be perceived by senses and are intangible.
Sole Ownership	Co-Ownership
When an individual owns, it is sole ownership	When there is more than one person who owns the property
Trust Ownership	Beneficial Ownership
<ol style="list-style-type: none"> 1. There is no co-ownership. 2. The person on whom the responsibility lies for the benefit of the others is called the Trustee. 3. The trustee has no right to the beneficial enjoyment of the property. 4. Ownership is limited. A trustee is merely an agent upon whom the law has conferred the duty of administration of property. 	<ol style="list-style-type: none"> 1. There can be co-ownership. 2. The person for whom the trust is created is called the Beneficiary. 3. The Beneficiary has the full rights to enjoy the property. 4. Ownership is complete.

5. Trusteeship may change hands.	5. Beneficial Owners remain the same.
Legal Ownership	Equitable Ownership
Legal ownership is that ownership which has its basis in common law.	Equitable ownership comes from equity divergence of common law. Thus, distinction between legal and equitable ownership is very thin.
Vested Ownership	Contingent Ownership
1. Ownership is vested when the title is perfect. 2. Vested ownership is absolute.	1. Ownership is contingent when it is capable of being perfect after fulfilment of certain condition. 2. Contingent ownership becomes vested when the conditions are fulfilled.
Absolute Ownership	Limited Ownership
Ownership is absolute when possession, enjoyment, disposal are complete and vested without restrictions save as restriction imposed by law.	Limited Ownership is subjected to the limitations of use, disposal or duration.

Possession

Salmond on Possession

Salmond said that in the whole of legal theory there is no conception more difficult than that of possession. The legal consequences which flow from the acquisition and loss of possession are many and serious. Possession, for example, is evidence of ownership; the possessor of a thing is presumed to be the owner of it, and may put all other claimants to proof of their title. The transfer of possession is one of the chief methods of transferring ownership.

Salmond also said that possession is of such efficacy that a possessor may in many cases confer a good title on another, even though he has none himself.

He also made a distinction between possession in fact and possession in law.

1. Possession may and usually does exist both in fact and in law. The law recognizes as possession all that is such in fact, and nothing that is not such in fact, unless there is some special reason to the contrary.

2. Possession may exist in fact but not in law. Thus the possession by a servant of his master's property is for some purposes not recognized as such by the law, and he is then said to have detention or custody rather than possession.

3. Possession may exist in law but not in fact; that is to say, for some special reason the law attributed the advantages and results of possession to someone who as a matter of fact does not possess. The possession thus fictitiously attributed to him is termed *constructive*.

In Roman law, possession in fact is called *possessio naturalis*, and possession in law as *possessio civilis*.

Corporeal and Incorporeal Possession

Corporeal Possession is the possession of a material object and Incorporeal Possession is the possession of anything other than a material object.

Corporeal possession is termed in Roman law *possessio corporis*. Incorporeal possession is distinguished as *possessio juris*, the possession of a right, just as incorporeal ownership is the ownership of a right.

Salmond further said that "*corporeal possession is clearly some form of continuing relation between a person and a material object. It is equally clear that it is a relation of fact and not one of right*".

What, then, is the exact nature of that continuing *de facto* relation between a person and a thing, which is known as possession?

According to Salmond, *the possession of a material object is the continuing exercise of a claim to the exclusive use of it.*

It involves two distinct elements, one of which is mental or subjective, the other physical or objective.

The mental element comprises of the intention of the possessor with respect to the thing possessed, while the physical element comprises of the external facts in which this intention has realised, embodied, or fulfilled itself.

The Romans called the mental element as *animus* and the subject element as *corpus*. The mental or subjective element is also called as *animus possidendi*, *animus sibi habendi*, or *animus domini*.

The *Animus Possidendi* - The intent necessary to constitute possession is the intent to appropriate to oneself the exclusive use of the thing possessed. It is an exclusive claim to a material object. Salmond made following observations in this regard.

1. It is not necessarily a claim of right.
2. The claim of the possessor must be exclusive.
3. The *animus possidendi* need not amount to a claim of intent to use the thing as owner.
4. The *animus possidendi* need not be a claim on one's own behalf.
5. The *animus possidendi* need not be specific, but may be merely general. It does not necessarily involve any continuous or present knowledge of the particular thing possessed or of the possessor's relation to it.

The *Corpus Possessionis* – The claim of the possessor must be effectively realized in the facts; that is to say, it must be actually and continuously exercised. The *corpus*

possessionis consists in nothing more than the continuing exclusion of alien interference, coupled with ability to use the thing oneself at will. Actual use of it is not essential.

Immediate and Mediate Possession

The possession held by one man through another may be termed *mediate*, while that which is acquired or retained directly or personally may be distinguished as *immediate* or *direct*.

There are three kinds of Mediate Possession:

1. Possession that is acquired through an agent or servant who claims no interest of his own.
2. The direct possession is in one who holds both on the actual possessor's account and on his own, but who recognizes the actual possessor's superior right to obtain from him the direct possession whenever he choose to demand it.
3. The immediate possession is in a person who claims it for himself until some time has elapsed or some condition has been fulfilled, but who acknowledges the title of another for whom he holds the thing, and to whom he is prepared to deliver it when his own temporary claim has come to an end.

Concurrent or Duplicate Possession

1. Mediate and Immediate Possession co-exist in respect of the same thing as already explained above.
2. Two or more persons may possess the same thing in common, just as they may own it in common. This also called as *compossessio*.

3. Corporeal and Incorporeal Possession may co-exist in respect of the same material object, just as corporeal and incorporeal ownership may.

Incorporeal Possession

In Incorporeal Possession as well, the same two elements required, namely the *animus* and the *corpus*. In the case of incorporeal things, continuing non-use is inconsistent with possession, though in the case of corporeal things it is consistent with it.

Incorporeal possession is commonly called the possession of a right, and corporeal possession is distinguished from it as the possession of a thing. The distinction between corporeal and incorporeal possession is clearly analogous to that between corporeal and incorporeal ownership.

Corporeal possession, like corporeal ownership, is that of a thing; while incorporeal possession, like incorporeal ownership, is that of a right. In essence, therefore, the two forms of possession are identical, just as the two forms of ownership are.

Hence, Possession in its full compass and generic application means the continuing exercise of any claim or right.

Paton on Possession

Paton said that even though Possession is a concept of law still it lacks a uniform approach by the jurists. Some jurists make a distinction between legal and lawful possession. Possession of a thief is legal, but not lawful. In some cases, where possession in the popular sense is meant, it is easy to use some such term as physical control. Possession is also regarded as *prima facie* evidence of Ownership.

According to Paton, for English law there is no need to talk of mediate and immediate possession. The Bailee and the tenant clearly have full possession: Salmond's analysis may be necessary for some other systems of law, but it is not needed in English law.

Oliver Wendell Holmes and Von Savigny on Possession

Savigny with other German thinkers (including Kant and Hegel) argued that **possession, in the eyes of the law, requires that the person claiming possession intend to hold the property in question as an owner rather than recognize the superior title of another person, so that in providing possessory remedies to lessees, Bailees, and others who lack such intentions, *modern law sacrifices principle to convenience.***

To this Holmes responded that he *“cannot see what is left of a principle which avows itself inconsistent with convenience and the actual course of legislation. The first call of a theory of law is that it should fit the facts. It must explain the observed course of legislation. And as it is pretty certain that men will make laws which seem to them convenient without troubling themselves very much what principles are encountered by their legislation, a principle which defies convenience is likely to wait some time before it finds itself permanently realized[6].”*

Holmes also criticised Savigny and other German theorists by saying that “they have known no other system than the Roman”. In his works, Holmes proved that the Anglo-American Law of Possession derived not from Roman law, but rather from pre-Roman German law.

One of Holmes's criticisms of the German theorists, signally including Savigny, is that they "have known no other system than the Roman, ' .6 and he sets out to prove that the Anglo-American law of possession derives not from Roman law, but rather from pre-Roman German law.