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JURISPRUDENCE, CONSTITUTIONAL AND ADMINISTRATIVE LAW

SIERRA INNOVATIONS

Chapter: 1

Nature and Sources of Law

#INTRODUCTION

Jurisprudence is derived from the Latin word "Juris prudentia", where 'Juris' means law and 'Prudentia' means knowledge. Therefore, jurisprudence is called knowledge of law. Jurisprudence is the way you can find

1. Source of law
2. Validity of law
3. Subject of law
4. Function of law
5. The effect of the law.

The expression law related to law means basic legal principles.

It is defined as a study of the fundamental legal principles including their philosophical, historical and sociological bases, and an analysis of legal concepts. It is a type of investigation into the essential principles of law and the legal systems (Salmond). It is the science of the first principles of civil law. The legal concepts like contracts, torts or criminal law consist of a set of rules. It has no such legal authority and further it has no practical application. The jurists have a free approach in their investigations. Further, the method of enquiry in jurisprudence is different from other legal subjects.

DEFINITION:

Urian - Law is the observation of human and divine things, the knowledge of justice and injustice.

John Austin - Jurisprudence is a positive law philosophy. Positive law means the law created by the ruler. He was the first legal scholar to practice law as a science. There are two types of law, general law and specific law.

Salmond - Jurisprudence is a first-principles science. There are two types of law: (1) general law and (2) specific law.

Gray - Law is law.

Netherlands - Jurisprudence is a positive law formal science. Formal science means dealing only with the underlying (basic) principles, not the concrete details.
Dr. Allen - Jurisprudence is a scientific integration of the essential principles of law.

Ketan - Jurisprudence is a study and systematic arrangement of the general principles of law.

H.L.A. Hart - Jurisprudence is a scientific study of a coalition of rules, including primary and secondary rules. Primary rules are rules that impose obligations. A secondary rule is a rule that grants authority that a new obligation may be created and a defective obligation may be changed or abolished. Julius Stone Law is an extroversion of lawyers.

Laski - Jurisprudence is the eye of law.

Patterson - Jurisprudence is a social science.

Importance of Jurisprudence:

Jurisprudence does not contain a set of rules as in contracts or torts and also has no practical application. However, it has its own values, unique and distinctive.

1. The subject has its own intrinsic interest
2. Its researches have influenced other subjects in the field of political, medical, and social thinking.
3. It is educative, as it sharpens the lawyers' own techniques.
4. Its method and explanations help resolve the complexities of law. Thus, theory helps law to solve problems and,
5. Professional lawyers may get a glean into the sociology of law i.e., the realities of time, and, make them look-forward with an orientation.

#Types of Jurisprudence:

According to Bentham, there are two types of jurisprudence

1. Expository / Expository: what the law is
2. Evaluative / Censorial: what the law should be

Austin defines two types of jurisprudence

1. General case law
2. Special case law.

According to Salmond, the types of jurisprudence are

1. Generic case law
2. Special case law

IMPORTANT BOOKS OF JURISPRUDENCE

1. Hugo Grotius - De Jure Belli Ec Pacis (on the law of war and peace)
2. Bentham - Definition of the limits of jurisprudence, theories of legislation, introduction to the principles of morality and legislation.
3. Austin - Determination of the province of case law
4. Julius Stone - Redetermined Province of Jurisprudence, Legal System and Lawyer Reasoning
5. Ihering - Law as a Means to an End
6. Book - Case law
7. Hart - The concept of law
8. Fuller - The Morality of Law
9. Maine - Old law
10. Friedman - The law in changing societies
11. Hohfeld - Basic Legal Concept
12. Paton - A textbook of jurisprudence
13. Goodhart - Case law and common law essays
14. Savigny - Das Recht Des Besitzes (The law of possession). Modern Roman law system.
15. Buckland - Some thoughts on case law

SOURCES OF LAW

The major sources of law are:

* Legislation
* Precedents
* Custom.

1. Legislation:

Legislation is a superior source: over Precedent. Legislation is the main source of law. It consists of the declaration of legal rules by a competent authority like the Parliament or the other legislative bodies. It is an enunciation of principles having the force of law. The courts recognize these as law. Legislation also called Statute Law has become the standard form of law. The earlier forms that is precedent,

custom based on religious faith or practice or revelations of men have lost much of their efficacy. The result is that legislation is the most powerful and the latest instrument in legal growth. Advantages or virtues of Legislation

* Abrogative and reformative powers: The first virtue is its abrogative power. It can abolish an existing law or make a new law. But, a precedent has constitutive efficacy; it is capable of producing very good law. But its operation is irreversible. Once it is stated it stands but legislation can bring about reforms. Hence, legislation has destructive and reformative power
* Efficiency: The duty of the judiciary is to interpret the law and apply it. The legislature is superior as its duty is to make the law; administrators operate the law. Thus, there is a division in the labour and hence much efficiency.
* Prospective Operation: Statute declares the law before the commission of any act to which it applies, thus it fulfills the principles of Natural Justice. Law will be known before it is enforced. A judicial precedent creates and declares in the very act of applying and enforcing it (Example: Ryland V. Fletcher).
* Law of future: Legislation can make Acts to meet circumstances not yet arisen. Precedent requires definite circumstances before the court. Legislation can fill up any vacancy i.e., settle any doubt that may come to the attention of the legislature. But, a bad precedent remains until another case comes up before the court for solving the doubt or for overruling it.
* Superiority in form: The legislature produces the law in the Statute form i.e. as Acts which are of standard form. Statute law is brief, clear and easily know-able and accessible. But, case law is hidden deep and buried from sight in the huge records of litigation & Reports. Hence, case law is like gold that is in the gold mine, hidden in the rocks. But, Statute law is like a coin ready for immediate use.

  Salmond appreciates the perfection of the form of Statute Law. Statute Law is authoritative, and it is the duty of the Courts in interpreting the words and their true meanings. But, in applying case law, the courts are dealing with the ideas and principles. Statute law is rigid, but case law has the merit that it appeals to reason and justice and hence flexible and adaptation is possible. Only when the words in the Statute are not clear, that the courts will have to interpret with reference in social purpose.

2. Precedent:

For the purpose of jurisprudence the sources may be divided into 'legal and historical sources. The legal sources are authoritative, have a right in the courts and have helped the course of legal developments. Example the statutes,

precedents writings of eminent jurists like Bentham, Austin etc. The historical sources are not authoritative, cannot have claim as a right in the courts. Precedent therefore is a legal source. The distinguishing characteristic feature of English law is the judicial precedent. The unwritten law or the common law is purely a product of decided cases, from the 13th Century. English judges have contributed considerably for the development of common law. A judicial precedent speaks in England with authority. It is not merely evidence of the law but a source of it, and the courts are bound to follow the law that is so established. Precedent means 'anything said or done furnishing a rule for subsequent conduct'. Judicial decisions speak of truth and hence are followed in later cases. If so followed, such a decision becomes a precedent.

The doctrine of precedent has two meanings. In the first place in a loose meaning, it means that precedents are reported, may be cited and will probably be followed by the courts. In the second i.e. in the strict sense it means that precedents not only have great authority but in certain circumstances they must be followed. Sometimes a precedent may be unsatisfactory. The rule so laid down may be reversed by the Parliament in making the law. Further, the judges have power to reverse their own decisions and correct the mistakes.

Broadly speaking precedents are

1. Authoritative precedent

The decisions given by the superior courts are the authoritative precedents which must be followed. Hence the decisions of the House of Lords are authoritative in England. In India the decisions of the Supreme Court are binding on all the courts and authorities within the territory of India. (Art.141 Constitution of India). A High Court decision is binding on the lower courts under its jurisdiction in that State.

2. Persuasive precedent:

* Persuasive precedents in England are Foreign decisions Example Decisions of U.S. Supreme Court, the decision of other superior courts in the commonwealth countries, Privy council decisions and Judicial dicta (Means observation stated by the way).
* In. India, so far as the Supreme Court is concerned, the decisions of the foreign courts, of the Privy Council and of the U.S. Supreme Courts etc. are persuasive in character. To the High Courts in India, decisions of the

Privy Council, U.S. Supreme Court and decisions of other foreign courts are persuasive.

* An authoritative precedent is one which judges must follow whether they approve of it or not.
* A persuasive precedent is one which the judges are under no obligation to follow, but must take it into consideration and attach such weight as it deserves i.e. it must by itself merit consideration in the eyes of the judges. Hence, it is true to say that authoritative precedents are legal sources of law but persuasive precedents are historical sources.
* When a precedent is referred to in a court, it is accepted or disregarded. But if it is authoritative, it is binding and should be accepted. If it is persuasive the court may accept or disregard it. Disregarding may be of two kinds such as the court may overrule it or it may refuse to follow it.
* Such an overruled precedent is null and void. The courts of equal authority have no power to overrule each other's decisions. If two High Courts have given conflicting opinions a legal anomaly is created. This can be resolved only by the Supreme Court.

Ratio decidendi:

What the Court decides generally, is the ratio decidendi or rule of law in a case before it. What it decides between the parties to the case, is binding on the parties. The parties under Res Judicata are barred from reopening the case after the final Court of authority makes the decision between them. If A sues B for negligent driving, parties A and B are bound by the decision of the final court. There are circumstances, when the judgment will be against all the world i.e, in rem. That is it is binding on all third parties. For example, a nullity declaration of a marriage by the Court, determines the status of the parties, but the decision is binding on all.

The Ratio decidendi or rule of law is produced by the Court in its process of application by the judges. It should have been applied to the parties in respect of live issues, argued on both sides. In the course of his judgment, the judge may refer to hypothetical situations, or may give his general reasoning. These are therefore not binding. They are called obiter dicta (observations made by the way) and hence, have no binding force.

Obiter Dicta:

Means "what is said by the way". This is opposed to ratio decidendi.
It refers to hypothetical situations or reasoning or circumstances referred to by the judge in his decision. These are generally the observations, made by the judge. The significance is that they are not binding. The Courts will not follow these observations. The universal rule is that the obiter dicta are not binding on the later Courts.

3. Custom:

'Salmond' observes that custom is to society what law is to the State'. 'Each is the expression and realization and the measure of the society's insight. The principles commend themselves to the community Custom embodies them, as acknowledged and approved not by the power of the state but by the public opinion of the society at large'. A custom may be legal or conventional. Legal Custom has the force of the law is conventional in usage.

The following are the requirements of a valid custom:

* Immemorial Antiquity: The local custom should be long standing or of a fixed period which can be determined. Immemorial means beyond the memory of any living person. Hence, the custom must have been observed over a period, beyond the memory of any living person, i.e., for over 100 years.
* Continuity: The custom must have been enjoyed continuously. If no living man can contradict the custom setup, it must be presumed to be valid.
* Enjoyment as of right: The custom must have been enjoyed as of right. If the custom has only been mentioned or followed by force or by stealth or with license it can have no claim to stand as a right. It must have been followed openly.
* Certainty: The custom must be certain, clear and definite. That which is vague or not impressive will fail.
* Reasonability: The custom must be reasonable. This is the most complex and difficult of the requirements of a valid custom. What is reasonable or not is to be decided by the court in accordance with the prevailing notions of natural justice and public morality. Custom must not be either immoral or contrary to public utility.
* Conformity with the general law: A local custom will not be admitted if it conflicts with the fundamental principles of the law of the land.
* Conformity with statute law: The local custom must not conflict with any statute or any rule thereunder.

* Compatibility with other customs: It must not be incompatible with other customs within the same locality. The court cannot sanction two hostile rules or customs.

Chapter: 2

SCHOOLS OF JURISPRUDENCE

In order to understand jurisprudence, as Salmond says, "A study of all the schools is essential because the three schools are closely related and interwoven." Here are the different types of jurisprudence schools:

1. School of Natural Law
2. Analytical school
3. Historical school
4. Philosophical school
5. School of Sociology
6. Realistic school

1. School of Natural Law

Natural law derived from Greek thought. Natural law derives its validity from nature. Nature never discriminates. For example, if five people are in the ground in the light of day, the sun will shed its light on everyone equally without discriminating on the basis of religion, race, caste, sex or location. Birth, etc. Natural law is a method of researching humanity. The theme of this school is therefore based on fair and reasonable, uniformity and universality. Law without morality cannot exist. This way he establishes the check and the balance. The rule of law and due process rest on this school. In India, E.P. Royappa (1974) and Maneka Gandhi case (1978) are based on the philosophy of this school. Human rights flow from this thought.

Natural Law School has originated from the following periods:

Ancient Period:

Heraclitus, Socrates, Plato, Aristotle, Cicero are the supporters of Natural Law School. According to Heraclitus reason is one of the essential elements of law. He established the base of natural law. Socrates states that like natural physical law, there is a natural moral law. Person must obey the command of the state, if he does not like it he should go to another State. But the command of the state must be followed. Plato introduced the concept of ideal State which he termed as Republic. According to him only intelligent and worthy people must be a king. Aristotle explains Natural law is a reason free from all passions. Cicero observed that true law is right reason in agreement with nature, it is universally applicable, unchanging and everlasting.

Medieval Period:

This period was dominated by the Church. It tried to establish the superiority of the Church. They used natural law theory to propagate Christianity. St. Augustine provided religious colour to law. During the dark period, he explained law in a new way. He treated nature and God as a source of law. St. Thomas Aquinas classified law as Law of God, Natural law which revealed through reason, Divine Law, Human law which we now called positive law.

Renaissance Period

Hugo Grotius believed that Natural law was not merely based on reason but on self-supporting reason of man. He propagated equality of States and their freedom to regulate internal as well as external relations.

Hobbes introduced Social Contract theory. Hobbes defines contract as "the mutual transferring of rights." In the state of nature, everyone has the right to everything - there are no limits to the right of natural liberty. The social contract is the agreement by which individuals mutually transfer their natural right.

Modern Period

L.L. Fuller explains that Natural law theory denies rigid separation of law as it is and as it ought to be. Law contains two types of morality

1. External morality of law
2. Internal Morality of Law

He distinguishes morality as it is (Morality of Duty) from morality as it ought to be (Morality of aspiration). He further subdivided moral duty into affirmative duty and negative duty (forbearance). Is' and ought' both are inseparable. According to him, morality of duty includes basic requirements of social living whereas morality of aspiration means a good life of excellence.

2. Analytical School

Main focus of the analytical school was on the source of law. It came in reaction to natural law school. The main object was to bring certainty in law. So Jurist of this school always tried to separate law from morality. That's why they treated the sovereign as a source of law and ignored nature, custom and judge made law as a source of law .Austin was theFather of English Jurisprudence and Analytical school. According to him there can be no law without a legislative act. His view

was that typical law is statute and legislation. He did not approve precedent and custom as a source of law. Positive law is the aggregate of rules set by man as politically superior to man as politically inferior subjects. He attributes Sovereign, command and duty as the three essential attributes of positive law. HLA Hart believed that Law and morality are complementary and supplementary of each other.

3. Historical school

Historical school came in reaction to Analytical School and Natural school. Historical school vehemently criticized both schools and said that without support of custom and usages, if any law is enacted, it would always invite revolt. If law is enacted on the basis of custom and usage, it would be followed by people on their conscience and there would be no need for a police raj. According to this school, the main source of law is custom which develops from the conscience of people. Therefore, law is found and it is not made. It emphasis on the question —How did law comes to be. Montesquieu was the first jurist who adopted historical methods perusing the study of legal institution. He said laws are the creation of climate and local institutions. He propounded the doctrine of Separation of Power.

Savigny was the founder of the Historical School. He is called Darwinian before Darwin because he applied evolutionary principle to the development of the legal system before Darwin. He believed that law develops like language. Savigny opposed codification of German law on the basis of French law because at that time Germany was under control of French Government. He admired Roman Laws. He propounded the national character of law.

Sir Henry Maine was the father of British Historical School. His Main emphasis was on comparative studies of laws. There are two types of societies such as Primitive or Static Society and Progressive Society. In primitive societies ,law developed in four stages (i) Devine Law (ii) Customary Law (iii) Priestly Class as a sole repository of Customary law (iv) Codification. After codification, such societies are called static societies. A society which developed after codification is called as progressive society. In this society, law develops in three ways Legal fiction, Equity and Legislation.

4. Philosophical/ Ethical school

It deals with the general or philosophical part of the science of legislation. The purpose is to set forth the law, not as it is or has been, but as it ought to be. It does not deal with the present but deals with the ideals for the future.

The theory of Justice in relation to law is the concept of this ethical school. Emphasizing the ethical or moral significance of various topics is its main concern. Grotius is called the father of this school. Kant and Hegel followed him, and developed further the ethical concepts.

5. School of Sociology

Main focus of sociological school is on the functioning of law. Purpose of law is to make balance between conflicting interests of individuals and societies. Bentham propounded individual utilitarian theory while Ihring propounded social utilitarian theory. There are three main tenets of this school.

Rudolph Von Ihering is the Father of modern sociological jurisprudence.
According to him

* Law is a result of constant struggle
* Law is to serve a social purpose
* Law alone is not a means to control the society
* Social interest of the society must gain priority over individual interest.

The Supreme Court of India, with the help of this school, has decided several cases when Directive Principles of State policy (social interest) prevails over individual interest (Fundamental rights but not all).

Eugen Ehrlich divided law into two parts

1. Norms of decisions or formal science: These types of law are found in form of statutory law, and judicial decisions. It is mainly directions for public authority to regulate their conduct.
2. Norms of Organization or Living Law: These types of law are found from the inner order of societies. It is extra-legal control which regulates social relations of men.

Living Law is the law which dominates social life even though it has not been promulgated in the form of enactment or decisions of the court. Living law is wider in scope than the statutory law enacted by the state. A statute which is habitually disregarded is not the part of living law. For example, Dowry Prohibition Act, 1961. Centre of gravity of legal development in the present time or past, lies neither in juristic science nor in the judicial decisions, but in society itself."

Leon Duguit introduced the Doctrine of Social Solidarity. Social Solidarity is a combination of two words, social and solidarity. Here solidarity means interdependence. Combined meaning of social solidarity is that in society every person is dependent on each other. It means a single person cannot produce all things whereby he can fulfil his desire. In the society, if everyone fulfils their duties, no questions arises about duty. Law is a rule which men obey not by virtue of any higher principle because they have to live as a member of societies. Therefore mutual cooperation brings mutual interdependence between individuals, groups and societies according to the principle of division of labour for the purpose of social cohesion.

Roscoe Pound's Social Engineering means balance between competing interests in the societies. We cannot understand what a thing is unless we study what it does. He believed in minimum investment, maximum production. The courts, legislators, administrators and jurists must work with a plan and make an effort to maintain a balance between competing interest in the societies .Three types of interest-(1) Private Interests (2) Public Interests (3) Social Interest. In order to evaluate the conflicting interests in due order of priority, every society has some basic assumptions and according to that assumptions, interest is given priority. He propounded five assumptions (Jural Postulates) which is given preference –

1. Jural Postulate - Security
2. Jural Postulate - Enjoyment of own labour
3. Jural Postulate - Other will perform the contract in good faith
4. Jural Postulate - To perform his work in such a way as not to cause harm to other person
5. Jural Postulate - Others will enjoy things in such a way that it does not cause harm to the other person for example scape of dangerous things (strict liability).

6. Realistic school

According to this school, "law never is but is always about to be." This school further states that law is studied for its social effects. Special stress was given upon the legal decisions. Realistic school is also called the "the left wing of the functional school." Realistic school is less concerned with the ends of law, it concentrates upon study of law as it is in actual working and its effects. This school originated in the USA. Homes and Gray are greatest exponents of the realistic school.

Chapter: 3

Law and Morality

In today's world , law and morality are considered to be unrelated fields and when we use the term 'legal ethics', it refers to the professional honesty of lawyers and judges and it has nothing to do with the 'wrongness' or 'rightness' of any particular law. Law and morality are intimately related to each other. Laws are generally based on the moral principles of society. Both regulate the conduct of the individual in society. Laws, to be effective, must represent the moral ideas of the people.

The study of the relationship between law and morality can be made from three angles namely:

* Morals as the basis of law.
* Morals as the test of positive law.
* Morals as the end of law.

There is a necessary interdependence between law and morality. Morals distinguished rights and wrongs in human behaviour. Its primary aim is the personal improvement and ultimately the attainment of salvation. However the political civil law is aimed at making it possible for the people to live together in community in justice, peace and freedom.

Chapter: 4

CONCEPT OF RIGHTS AND DUTIES

#Introduction:

Rights and Duties are correlative of each other. Hohfeld propounded jural co- relation says that right's jural correlation is duty. One without another cannot exist. For example, without a father (whether known or unknown) son is not possible or without husband, wife is not possible. But Austin says that there are certain exceptional cases when there are duties but no rights. According to Grey , Rights and duties are inseparable and existence of one without the other is impossible.

Rights:

Rights are concerned with 'interests'. Rights are defined as interests protected by moral or legal rules. But yet rights are different from interests. Interests are things which are to a man's advantage. He has interest in his freedom or his reputation. If we say that a person has an interest in his reputation, what we mean is that he stands to advantage of good name in the society, But, if we say that the person has a right to his reputation what we mean is, that others should not take this from him.

Duties:

A duty is an act which one ought to do. Not doing of, amounts to a 'wrong'. A duty may be moral or legal. It is a legal duty not to sell adulterated milk. If a person is curious about his neighbors, there is no legal duty not to be so curious, this is a moral duty and therefore cannot be enforced through the courts. According to Keeton, "Duty is an act or forbearance compelled by the state in respect of a right vested in another and breach of which is a wrong."

Types of duties

1. Absolute and Relative Duties:

Absolute duties are owned only to the state breach of which is generally called a crime and the remedy for it is punishment. Whereas relative duty is owed to any person other than the one who is imposing them the breach of which is called civil injury which is redressible compensation. Absolute duties are those duties which exist without right. Relative Duties are those duties which exist with rights.