

RMM LAW COLLEGE SAHARSA

JURISPRUDENCE

Part I

Paper -1

Topic-

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Date:- 07/12/20



1. Natural Law:

The law of nature is that portion of morality which supplies the more important and universal rules for governance of the outward acts of mankind. The idealist attitude was prominently displayed by Plato's theory of ideas according to which the physical phenomena of the words are mere manifestations of a superior order laid up in heaven and should be studied only in order to gain insight into the ultimate pattern.

Aristotle recognised the existence of a natural as well as of a legal justice.

Grotius used natural law as the foundation of a new international law to regulate the affairs and warfare of the rising national states. Grotius asserted that human nature is the mother of natural law which would operate even if God did not exist.

2. Analytical School or Analytical Positivism:

According to Austin, the matter of jurisprudence is positive law; law, simply and strictly so called; or law set by political superiors to political inferiors. But positive law (or law, simply and strictly so called) is often confounded with objects to which it is related by resemblance, and with objects to which it is related in the way of analogy; with objects which are also signified properly and improperly, by the large and vague expression of law.

A law, in the most general and comprehensive acceptation in which the term, in its literal meaning, is employed, may be said to be a rule laid down for the guidance of an intelligent being by an intelligent being having power over him. In this largest meaning which it has, without extension by metaphor or analogy, the term law embraces the following objects: Laws set by God to His human creatures, and laws set by men to men.

Austin styled that aggregate of rules, or any portion of that aggregate, positive law; though rules, which are not established by political superiors, are also positive, or exist by position, if they be rules or laws, in the proper signification of the term.

3. Historical School:

Historical jurisprudence examines the manner or growth of legal system, and traces the growth of law from origin with a view to finding out the origin of our legal concepts and the general course of their evolution. It deals with the general principles governing the origin and development of law as also the origin and development of legal conceptions and principles found in the philosophy of law.

According to Allen, “the historical movement in jurisprudence may be called the revolt of fact against fancy. Burke adumbrated it in his warnings not to construct schemes for the future without having first assimilated the lessons of the past.

In its more scientific aspect it directed attention not to the abstract ideal, but to the physical environment of law a theme by no means new, since it formed the core of Montesquieu teaching but one which had been forgotten amid the intense speculation of the eighteenth century.”

(a) Anthropological Approach:

Sir Henry Maine developed the anthropological approach to the historical school and expounded the theory by stating that “the movement of the progressive societies has hitherto been a movement from Status to Contract.” Custom, according to him, naturally played a predominant role in the formulation and evolution of law, justice and procedure.

Sir Henry Maine observes that the earliest notions connected with the conception of a law or rule of life are those contained in the Homeric words, “Themis” and “Themistes”. Themis appears in the later Greek pantheon as the Goddess of Justice.

The movement of the progressive societies has been uniform in one respect. Through its entire course it has been distinguished by the gradual dissolution of family dependency, and the growth of individual obligation in its place.

The individual is steadily substituted for the family, as the unit of which civil laws take account. It is not difficult to see what the tie between men is and man which replaces by degrees those forms of reciprocity in rights and duties which

have their origin in the Family it is Contract. Starting as from one terminus of history, from a condition of society in which, all the relations of Persons are summed up in the relations of family, we seem to have steadily moved towards a phase of social order in which all these relations arise from the free agreement of individuals.

The anthropological approach to the historical school was developed by English Jurists like Holdsworth and Maitland with a view to clarifying the origin of law, and notions of law and equity.

The historical school throws a floodlight on many an unchartered field of legal evolution.

The original idea of Sir Henry that early development of law passed through the successive stages of personal judgments, oligarchic monopoly and code appears to be not quite true about primitive societies. Maine had wrongly assumed a single pattern complex of primitive societies; and primitive societies themselves exhibit a wide range of institutions depending upon the degree of economic development.

Maine's observation that progressive societies develop the law by legal fiction, equity and legislation in this sequence has been discredited to certain extent, inasmuch as legislation has been found to be an early period of law-making with fiction and equity coming in at a later stage. Further, primitive law was not as rigid as Maine had envisaged, and the people were not inflexibly bound by it.

(b) Economic approach to Jurisprudence:

The economic approach of law has, in the recent past, great significance. The doctrines of Karl Marx and Friedrich Engels, the authors of the economic theory, which may be regarded as a variant of the historical approach, have permeated one-third of the peoples of the world in the Soviet Union, China and Eastern Europe who are governed by socialist governments. Marxism is based on the doctrine of the inevitability of the social revolution.

Socialism is a theory of social organization which places the means of production and distribution in the hands of the community, substituting association for competition. Communism, on the other hand, is a theory or condition of things according to which private property is to be abolished and all things are to be held in common.

From each according to his power, to each according to his need, is the principle on which communism is based. As an ideal, it aims at a classless society as a result of common ownership of the means of production and distribution. As a method, communism believes that its ideal can be achieved only by social revolution with dictatorship of the proletariat.

Marx's dialectical materialism attempted to describe the evolution of societies in terms of the class struggle.

The emergence of economic approach to jurisprudence has tended to reshape the nature, quality and procedure of law. Law, according to Marxian doctrine, is a part of the economic interpretation of social evolution and Marxist philosophy being dialectical; it examines the material world in constant motion, development and regeneration.