RMM LAW COLLEGE SAHARSA

JURISPRUDENCE

Part I

Paper -1

Topic-

Lceture Notes by- Indra Bhushan Singh

Date:- 07/12/20

4. Sociological School:

According to sociological school, the common field of study of the jurist is the effect of law and society on each other. This approach takes law as an instrument of social progress. August Comte pleaded for the scientific method to the science of sociology.

Georges Gurvitch defines law as representing an attempt to realize in a given social environment the idea of justice through multilateral imperative-attributive regulation based on a determined link between claims and duties; the regulation derives its validity from the normative facts which give a social guarantee of its effectiveness and in certain cases execute its requirements by precise and external constraint, but does not necessarily presuppose it.

August Comte (1798-1881) first invented the term ‘sociology’ and his method is termed as ‘scientific positivism’. He pleaded for the application of scientific method to the science of sociology. Come subsequently digressed himself from

his strict scientific approach and laid down that mankind inevitably passed through three stages, viz., the theological, the metaphysical and the scientific or positive. He formulated an authoritarian conception of the character of 'positive society'.

Herbert Spencer (1820-1903) propounded a scientific exposition of the organic theory of society. According to him the slate existed only to further individual freedom, while Comte favored highly collectivist programme. The laissez faire, an economic theory and a philosophy of action in social affairs, derived strength from Spencer's philosophy of applying the organic evolutionary idea in relation to it.

Inhering (1818-1892) observed, "Everybody exists for the world" and "the world exists for everybody." Dependent as he is upon his fellowmen through his need, and the more so as his need grows, man would be the most unhappy being in the world if the satisfaction of his need depended upon accident, and could not count with all security upon the co-operation and assistance of his fellow- men.

Weber (1864-1920) by his sociological studies of legal institutions as produced by economic and social conditions-also influenced legal thought.

Ehrlich (1862-1920) observed that the impulses to create law which result from the distribution of power in society have their source in society. Furthermore, the legal proposition does not owe its existence to any consideration of the interests of individual classes or ranks, but of those of all social strata; and it is immaterial whether actual general interests are involved or merely imagined ones, as in the case of the superstitious belief of the existence of witches… And for most modern

men and women the interest of the utterly neglected and submerged perhaps is but little more than something to be protected against.

In their opinion, the general interest includes protection of the social order against individuals who are beyond the pale of society. This protection may be effected by means of a part of the criminal law, police law, and procedural law.

In reality all of this is a matter of the distribution of power. A decision rendered for the protection of general interest may be said to be a decision based solely upon, consideration of experience. Whether there is no doubt as to where the power plays in a state or where the voice of popular consciousness speaks no uncertain tones the task of jurist is a merely technical one.

The content of the legal proposition is given by society. His function is merely to provide the wording of it and to find the means whereby the interests which are to be secured can be secured most effectively. This technical function, however, must not be underrated.

5. Realist School:

The realist movement, which prefers not to be called a school, is a branch of sociological school. It studies law as it is in its actual working and effects. It has been summed up by its exponent, Professor K. Llewellyn as ‘ferment’.

Allen observes that ‘fermentation is necessary in legal chemistry for without it the liquor of’ the law becomes sour and stale. Grown out of its youthful exuberances and disabused of its hasty conclusion that law is to be found only in facts and deeds, this movement brings to modern jurisprudence a spirit of vigilance and exploration which is capable in the right hands of contributing substantially

to the understanding of law not as a bloodless abstraction but as a living force in society.

According to Georges Gurvitch, the non-realistic school represents a violent reaction against the dominantly technological and moralizing orientation of 'sociological jurisprudence'.

(a) American Realism:

Allen observes that the main trend of the American realist movement has been to call in question legal certainty to attack what he called conceptualism, and to emphasize those many influences which produce accidents of litigation through the variable elements of forensic method and especially of judicial technique. Mr. Justice Holmes played an important role in bringing about a changed attitude to law. "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."

The basic approach of the American Realist Movement in Law was more philosophical and abstract as compared to the basic tenets of realism.

(b) The Scandinavian Realism:

The Scandinavian jurists associated with the realist movement have put forth a philosophical justification of their positivist outlook while eliminating all metaphysics. They are in line with the empirical traditions in English philosophy and jurisprudence and having affinities to the sociological approach which has gained influence in England.

Hager storm, the spiritual father of the movement, rejected the idea of objective value and placed for an examination of the actual use of the legal concepts and an analysis of the mental attitude involved in the conception of law in present times.

It is impossible to maintain that law in a realistic sense is guaranteed or protected by force. The real situation is that law-the body of rules summed up as law-consists chiefly of rules about force, rules, which contain patterns of conduct for the exercise of force.

6. Comparative School:

"Comparative Jurisprudence", observes Professor Kecton, "considers the development of two or more systems of law. The term has more than one meaning, however. The science may have for its object the discovery of these legal rules which are common to the legal systems studied; or again, it may discuss those relations of individuals which have legal consequences, together with an inquiry how those relations and expression in the legal systems considered.

More frequently, Comparative Jurisprudence selects various legal topics, and explains fully their method of treatment in two or more systems of law, seeking thereby to draw conclusions respecting the merits of the two methods of treatment adopted in the legal systems."

According to Bryce, "the Comparative method is concerned with space as the Historical method is with time. It collects, examines, collates the notions, doctrines, rules, and institutions which are found in every developed legal system, or at least in most systems, notes the points in which they agree or differ, and

seeks thereby to construct a system which shall be Natural, because it embodies what men, otherwise unlike, have agreed in feeling to be essential, Philosophical, because it gets below words and names and discovers identity of substance under diversity, description, and serviceable because it shows by what particular means the ends which all (or most) systems pursue have been best attained."

According to Gutteridge, the use of the phrase "Comparative Jurisprudence" is an expression of the belief that the main purpose of the comparative methods of study is to aid the historical or the analytical jurist in tracing the origin and development of concepts common to all systems of law.