

RMM LAW COLLEGE SAHARSA

JURISPRUDENCE

Part I

Paper -1

Topic- Science of Positive law

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Date:- 07/12/20

Holland defines jurisprudence as “the formal science of positive law.” It is wrongly applied to actual systems of law, or to current views of laws, or to suggestions for its amendment, but is the name of a science. The science is a formal, or analytical, rather than a material one. It is the science of actual or positive law.

Holland elucidates his statement that jurisprudence is a formal or analytical science as opposed to material one by observing that it deals rather with the various relations which are regulated by legal rules than with the rules themselves which regulate those relations.

Where the laws of every country contain a common element having been constructed in order to effect similar objects and involve the assumption of similar moral phenomena as everywhere existing, then, according to Holland, a scheme of the purposes, methods and ideas common to every system of law framed out of the accumulated materials is a formal science of law, presenting many analogies to grammar, the science of those ideas of relation which are expressed in all the languages of mankind.

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As said above, jurisprudence consists not of a set of rules, the contents or matter of which is of universal application. It is concerned with all those topics dealt with in every system of law however much each may differ from the rest in its mode of dealing with them.

Professor Holland observes that comparative law collects and tabulates the legal institutions of various countries, and from the results thus prepared, the abstract science of jurisprudence is enabled to set forth an orderly view of the ideas and methods which have been variously realized in actual systems.

It is, for instance, the office of comparative law to ascertain what have been at different times and places the period of prescription, or the requisites of a good marriage. It is for jurisprudence to elucidate the meaning of prescription, in its relation to ownership and to actions; or to explain the legal aspect of marriage, and its connection with property and the family.

Jurisprudence is, therefore, not* the material source of those portions of the law which various nations have in common, but the formal science of those relations of mankind which are generally recognised as having legal consequences.

Holland's Definition of Jurisprudence:

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According to Professor Holland, jurisprudence is a formal or analytical science, as opposed to material one and deals rather with the various relations which are regulated by legal rules than with the rules themselves which regulate those relations.

Professor Gray criticises this definition as being too narrow and cryptic. He observes that an attempt to construct, quite apart from all the matter of law, even the most general conception of ownership or contract, would be like trying to make bricks not merely without straw, but without clay as well.

According to Prof. Gray, jurisprudence is merely a formal science, but it is as well a material science. It is a science of legal relations as well as of legal rules.

As to certain practically unchangeable principles of law advocated by Prof. Holland, Prof. Gray observes that the possibility of general jurisprudence as a science of necessary principles rests on a theory of universe which has, in these days, been badly shaken, a theory which supposes permanence in social relations the existence of which is very uncertain.

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Finally, Prof. Gray observes that jurisprudence stands for the scientific treatment of law and it is not desirable that its natural meaning should be limited and restricted in the manner it has been done by Prof. Holland.

Prof. Gray is slightly illiberal in his criticism, for Holland has considerably drawn inferences from matters of law while expounding different principles in his book on Jurisprudence. At any rate he has not altogether excluded them.

Dr. Edward Jenks objects to Holland's definition of jurisprudence as a purely formal science. He observes that it is not a formal science unless the word 'formal' are used in a strained and artificial sense. It is true that a jurist can only recognise a law by its form for it is form which causes the manifold matter of the phenomena to be perceived.

But the jurist, having got the form as it were on the operating table, has to dissect it and ascertain its meaning. He concludes by observing that to say that jurisprudence is concerned only with forms, is to degrade it from the rank of science to that of a craft.

There is confusion in the line of argument of Dr. Jenks for he hardly differentiates a formal science with a formalistic manner of its approach. Jurisprudence, in the view of Prof. Holland, is not confined to mere forms but deals in a formal or abstract way with those relations of mankind which are generally recognised as having legal consequences. It deals with the human relations who are governed by rules of law rather than the material rules them.

Holland's definition of jurisprudence as the formal science of positive law is, therefore, not open to any serious objection. In the words of Salmond, using the word "science" in its widest possible sense, as including the systematized knowledge of any subject of inquiry, jurisprudence is a science of civil law.

The subject of its inquiry is realigns of men living in society clothed with a legal character. Such relations of men are governed by the rules which have actually been imposed by common consent of the organized community and enforced by its courts.

In this sense, jurisprudence is science of positive law. It is again a formal science of positive law, inasmuch as it deals with the various relations which are regulated by legal rules than with, the rules themselves which regulate those relations.

It is not the material science of those portions of the law which various nations have in common but the formal science of those relations of mankind which are generally recognised as having legal consequences.

