RAMA UNIVERSITY

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FACULTY OF JURIDICAL SCIENCES

Course : LL.B. Ist Semester

SUBJECT: Jurisprudence

SUBJECT CODE: LLB 301

LECTURE: 11

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Lecture-11

Lecture- 11: ANALYTICAL SCHOOL OF JURISPRUDENCE

Positivism

The French mathematician and philosopher Augste Comte (1798-1857), who may be regarded as the philosophical founder of modern positivism, distinguished three stages in the evolution of human thinking. The first stage, in his system, is the theological stage, in which all phenomenons are explained by reference to supernatural causes and the intervention of a divine being. The second is the metaphysical stage, in which thought has recourse to ultimate principles and ideas, which are conceived as existing beneath the surface of things and as constituting the real moving forces in the evolution of mankind. The third and last stage is the positivistic stage, which rejects all hypothetical constructions in philosophy, history, and science and confines itself to the empirical observation and connection of facts under the guidance of methods used in the natural sciences.

The emergence of the modern state as the more and more exclusive repository of political and legal power not only produced class of civil servants, intellectuals and others, but it also demanded more and more organisation of the legal system, a hierarchical structure of legal authority and the systematization of the increasing mass of legal material. The task of organizing and systematizing legal system can nonetheless be attributed to one of the vital school of jurisprudence, namely, analytical' which set for itself a task of separating the law as 'it is' and the law as it 'ought to be'. The separation of law as 'it is' and the law as 'it ought to be' is the most fundamental philosophical assumption of legal positivism. It represents a radical departure both from the scholastic hierarchy of values in which positive law is only an emanation of a higher natural law, and from the fusion of the philosophy of law and the science of law. Separation of 'is' and 'ought' does not imply any contempt from the importance of values in law, as is manifest from the work of Austin, Kelsen and others.

The mission throughout of the analytical jurisprudence has been to isolate from the great mass of available legal material, the enduring elements which recur endlessly in the concrete legal

phenomenon and to analyse and arrange these elements into an abstract system or classification. While the chief function of analytical jurisprudence has been, as the name suggests, analysis or decomposition of the subject matter of law into irreducible elements, that is not its only function. The other purpose of formal or analytical jurisprudence is to ascertain the exact relation and points of contact between the larger parts of our jural system, for example, law and equity. A quite similar object under consideration is, of course, to understand, to explain and to improve, if necessary, the leading sub-divisions of the whole field of law considered as an integral, harmonious and symmetrical body of doctrines. This sort of study is of great value if we are to bring order out of chaos and develop something like a real system out of the present conglomerate of judicial precedents and piecemeal statutes, partly with the immediate purpose of making new legislation fit in more harmoniously and partly with a view to what has been called 'tacit codification' and finally, perhaps 'legislative codification'. The chief exponents of the positivist or Analytical School in England are Bentham, Austin, Sir William Markby, Sheldon Amos, Holland, Salmond and Professor H.L.A Hart.

In the United States, John Chipman Gray, Wesley N. Hohfeld, and Albert Kocourek made contributions to analytical jurisprudence. Gray, in an influential work, modified the Austinian theory by shifting the seat of sovereignty in lawmaking from the legislative assemblies to the members of the judiciary. "The law of the state or of any organised body of men," he maintained, "is composed of the rules which the courts, that is the judicial organ of that body, lay down for the determination of legal rights and duties". It was his opinion that the body of rules the judge lay down was not the expression of pre existing law but the law itself, that the judges were creators rather than the discoverers of the law, and that the fact must be faced that they are constantly making law ex post facto. Even the statutory law laid down by a legislature gains meaning and precision, in his view, only after it has been interpreted by a court and applied in a concrete case. Although the judges, according to Gray, seek the rules laid down by them not in their own whims, but derive them from sources of a general character (such as statutes, judicial precedents, opinions of expert, customs, public policies and principles of morality), the law becomes concrete and positive only in the pronouncements of the courts. Judge-made law thus was to Gray the final and most authoritative form of law, and this conviction led him to the sweeping declaration that "it is true, in the civil as well as in the common law, that the rules laid down by the courts of a country state the present law correctively."

SELF-TEST QUESTIONS

S.NO	Question	Option (a)	Option (b)	Option (c)	Option (d)
1	Social Contract theory.	Hobbes	St. Thomas Acquinas	Socrates	Plato
2	General Will Theory.	J.Rousseau	St. Thomas Acquinas	Socrates	Plato
3	Principle of Hedonism (Pain and pleasure theory)	Bentham	St. Thomas Acquinas	Socrates	Plato
4	Utilitarian Theory	Bentham	St. Thomas Acquinas	Socrates	Plato
5	Greatest happiness of greatest number	Bentham	St. Thomas Acquinas	Socrates	Plato

Answers: 1-(a),2-(a), 3-(a),4-(a),5-(a)