



RAMA UNIVERSITY

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FACULTY OF JURIDICAL SCIENCES

Course : LL.B. 1st Semester

SUBJECT: Jurisprudence

SUBJECT CODE: LLB 301

LECTURE: 15

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Lecture-15



Lecture- 15: SIR HENRY MAINE

SIR HENRY MAINE 1822-1888

Maine made a comparative study of legal institution of various communities and laid down a theory of evolution of law. His method was a great improvement upon historical school and yielded fruitful results.

Maine made every valuable contribution to legal philosophy by way of historic comparative method. He was an erudite scholar of law. He started his career as Regis Professor of civil law in the University of Cambridge at an early age of twenty five. He was law member in the council of the Governor General of India between 1861 and 1869. This provided him an opportunity for the study of Indian legal system. From 1869 to 1877 he occupied the chair of historical and comparative jurisprudence in Corpus Christi College, Oxford. After that he held the distinguished post of the master of trinity Hall, Cambridge.

The founder of English historical school of jurisprudence was Maine. His important works are Ancient Law 1861, Village Communities in the East and West 1871, Lectures on the Early History of Institution, 1874, and Dissertation on Early law and Custom, 1883. Maine made a significant contribution to law by indicating that there has been a parallel and alike growth and development of legal institution and law in the societies of the east and west up to a certain stage.

DEVELOPMENT OF SOCIETIES

Sir Henry Maine through his comparative study came to a conclusion that the development of law and other social institution has been more or less as an identical pattern in almost all the ancient societies belonging to Hindu, Roman, Anglo-Saxon, Hebrew and Germanic communities. Most of these communities are founded on Patriarchal pattern wherein the eldest male parent called the Pater familias dominated

the entire family. There were some communities which followed matriarchal pattern in which the eldest female of the family was the central authority to manage the family affairs.

According to Maine, Pater familias constituted the lowest unit of primitive communities. A few families together formed the family group. An aggregation of families constituted gens which in turn led to the formation of tribes and collection of tribe formed the community. The individual member of the family had no individual existence then his status. Maine arrived at his often quoted conclusion that “the movement of the progressive societies has hitherto been a movement from Status to Contract.” Status is a fixed condition in which an individual finds himself without reference to his will and from which he cannot divest himself by his own efforts. It is indicative of a social order in which the group, not the individual, is the primary unit of social life; every individual is enmeshed in a network of a family and group ties. With the progress of civilisation this condition gradually gives away to a social system based on contract. This system is characterized by individual freedom, in that “the rights, duties and liabilities flow from voluntary action and are consequences of exertion of the human will.” A progressive civilisation, in the view of Maine, is manifested by the emergence of the independent, free, and self-determining individual as the primary unit of social life.

Maine’s “status to contract” doctrine is by no means his only outstanding contribution to jurisprudence. He has enriched our knowledge and understanding of legal history in several aspects. Very interesting, for example, is his theory of law and lawmaking. He believed that in the earliest period law was created by the personal commands of patriarchal rulers, who were considered by their subjects to at under divine inspiration. Then followed a period of customary law, expounded and applied by an aristocracy or small privileged class which claimed a monopoly of legal knowledge. The third stage was marked by a codification of these customs as the result of social conflicts. The fourth stage, according to Maine, consists in the codification of strict archaic law by the help of fiction, equity and legislation; these instrumentalities are designed to bring the law into harmony with a progressing society. Finally, scientific

jurisprudence weaves all these various forms of law into a consistent and systematic whole. Not all societies, said Maine, succeed in passing through all these stages, and their legal development in its particular aspects does not show a uniform line. Maine merely wished to indicate certain general directions and trends of development in the evolution of law. Modern research has shown that, on the whole, he has succeeded remarkably well in tracing some of the fundamental lines of a natural history” of the law.

Maine’s comparative analysis of legal evolution was supplemented in the early twentieth century by the historical studies of Sir Paul Vinogradoff. English historical research also produced such ripe fruits as Pollock and Maitland’s’ History of English Law before the time of Edward I and Holdsworth’s History of English Law, as well as a host of specialized treatises and monographs. What is lacking up to this day is a history of English law which closely correlates legal developments with the general political, social and cultural history of England.

DEVELOPMENT OF LAW

LAW MADE BY THE RULER UNDER DIVINE INSPIRATION OR DIVINE LAW OR DOOMS OR

THEMESTERS: In the beginning, law originated from themes which meant the Goddess of justice.

It was generally believed that while pronouncing justice the king was acting under the divine inspiration of Goddess of justice to be executed by the king as custodian of justice under divine inspiration.

Themesters are the awards pronounced by judges as divinely dictated to him.

Themesters are not laws but judgments or dooms. The king happened to be the administrator of judgments -of course he was not the maker of law as the themester were divinely inspired by Goddess of justice.

CUSTOMARY LAW: The next stage was reached when the office of the king or judge was inspired by the councils of chiefs. The priest became the depositories of

law who circumscribed the king's power and claimed the sole monopoly of knowledge. Therefore, the priestly class attempted to preserve the customs of the race or caste intact. Since the art of writing had not been invented so customs of the community became law for the people who were united by blood relationship. Thus we notice a particular important phenomenon. Maine's theory of legal development conception of customs emerging posterior to that themester or judgments.

KNOWLEDGE OF LAW IN THE HANDS OF PRIEST: In the next stage of development of law, the authority of the king to enforce and execute law inspired by the priestly class claimed themselves to be learned in law as well as religion. The priestly class claimed that they memorized the rules of customary law because the art of writing had not developed till then.

ERA OF CODES (CODIFICATION): The era of codification marks the fourth and perhaps the final stage of development of law. With the discovery of the art of writing, a class of learned men and jurists came forward to denounce the authority of priests as law givers. They advocated codification of law to make it accessible and easily knowable. This broke the monopoly of priest class in matters of administration of law. most important codes of the era were Twelve Tables of Rome, Manu's code which were mixture of moral, religion and civil laws, Twelve Tables in Rome, Solon's Attic code, Hebrew Code, the Codes of Hammurabi etc.

TYPES OF SOCIETIES

According to Maine, there are two types of societies, Progressive Societies and Static societies According to Henry Maine, when the primitive law has been embodied in a code, there is an end to its spontaneous development and such communities or societies which do not progress or go beyond the fourth stage are called static societies. Those societies which go beyond the fourth stage as developing their laws, by new methods are called progressive societies. There are three methods by which progressive societies develop their laws. They are;

LEGAL FICTION:

According to this method, legal fictions, changes the law according to the changing needs of the society without aiming any change in the latter of law. Maine defines legal fiction as any assumption which conceals or affects to conceal the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified. Legal fiction satisfies the desire for improvement but at the same time they do not offend the superstition, fear and dislike of change. At a particular stage of social development they are invaluable expedients of social progress for overcoming the rigidity of law.

EQUITY:

Equity consists of principles which are considered to be invested with a higher sacredness than those of the positive law. Equity belongs to a more advanced stage than fictions. The interference with the law is open and avowed. It is a body of law existing by the side of the original civil law, founded on distinct principles claiming incidentally to supersede the civil law by virtue of a superior sanctity inherent in these principles.

LEGISLATION:

Legislation is the most effective method of law making, it is considered to be the most systematic and direct method of introducing reform through new laws. The power of the legislature to make laws has been widely accepted by the courts and the people all over the world.

SELF-TEST QUESTIONS

S.N O	Question	Option (a)	Option (b)	Option (c)	Option (d)
1	Who known as Social Darwinist.	Sir Henry Maine	Edmund Burke	Austin	Bentham
2	Theory of Status to contract , contract to status	Sir Henry Maine	Edmund Burke	Austin	Bentham
3	Who known as Father of British Historical Schoool	Sir Henry Maine	Sir Henry Maine	Edmund Burke	Austin
4	Theory of Social Utilitarianism	Rudolph Von Ihering	Sir Henry Maine	Edmund Burke	Austin
5	Interest Theory	Rudolph Von Ihering	Sir Henry Maine	Edmund Burke	Austin

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