FACULTYOFJURIDICALSCIENCES

COURSE: LL.M 1Year

Semester: IInd

GROUP: 1. Constitutional and Administrative Law

2. Corporate and Business Law

3. Criminal and Security Law

SUBJECT: : LAW AND JUSTICE IN A GLOBALISING WORLD

SUBJECT CODE: LLM 201

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Lecture-8

LECTURE 8: Theories & Sources of Law

Different legal theories developed throughout societies. Though there are a number of theories, only four of them are dealt with here under. They are Natural, Positive, Marxist, and Realist Law theories. You may deal other theories in detail in your course on jurisprudence.

NATURAL LAW THEORY

Natural law theory is the earliest of all theories. It was developed in Greece by philosophers like Heraclitus, Socrates, Plato, and Aristotle. It was then followed by other philosophers like Gairus, Cicero, Aquinas, Gratius, Hobbes, Lock, Rousseau, Kant and Hume. In their studies of the relation between nature and society, these philosophers have arrived at the conclusion that there are two types of law that govern social relations. One of them is made by person to control the relations within a society and so it may vary from society to society and also from time to tome within a society. The other one is that not made by person but controls all human beings of the world. Such laws do not vary from place to place and from time to time and even used to control or weigh the laws made by human beings. These philosophers named the laws made by human beings as **positive laws** and the laws do not made by human being as **natural laws.**

Natural law is given different names based on its characteristics. Some of them are law of reason, eternal law, rational law, and principles of natural justice.

Natural law is defined by Salmond as "the principles of natural justice if we use the term justice in its widest sense to include all forms of rightful actions." Natural law theory has served different societies in many ways. The Romans used it to develop their laws as *jus civile*, laws governing roman citizens, and *jus gentium*, laws governing all their colonies and foreigners.

The Catholic Pope in Europe during the middle age become dictator due to the teachings of Thomas Aquinas that natural law is the law of God to the people and that the pope was the representative of God on earth to equally enforce them on the subjects and the kings.

At the late of the Feudalism stage, Locke, Montesque and others taught that person is created free, equal and independent by taking the concept of Natural law as the individual right to life, liberty, and security. Similarly, Rousseau's teachings of individual's right to equality, life, liberty, and security were based on natural law. The English Revolution of 1888, the American Declaration of Independence and the French Revolution of 1789 were also results of the Natural law theory.

Despite its contribution, however, no scholar could provide the precise contents of the natural law. As a result, it was subjected to criticisms of scholars like John Austin who rejected this theory and latter developed the imperative called positive law theory.

POSITIVE LAW THEORY

Positive law theory is also called, imperative or analysts law theory. It refers to the law that is actually laid down by separating "is" from the law, which is "ought" to be. It has the belief that law is the rule made and enforced by the sovereign body of the state and there is no need to use reason, morality, or justice to determine the validity of law. According to this theory, rules made by the sovereign are laws irrespective of any other considerations. These laws, therefore, vary from place to place and from time to time. The followers of this theory include Austin, Bentham and H.L.A Hart. For these philosophers

and their followers law is a command of the sovereign to his/her subjects and there are three elements in it: command; sovereign; and sanction. Command is the rule given by the sovereign to the subjects or people under the rule of the sovereign. Sovereign refers to a person or a group of persons demanding obedience in the state. Sanction is the evil that follows violations of the rule.

This theory has criticized by scholars for defining law in relation to sovereignty or state because law is older than the state historically and this shows that law exists in the absence of state. Thus, primitive law (a law at the time of primitive society) serves the same function as does mature law [Paton; 1967: 72-3].

With regard to sanction as a condition of law in positive law, it is criticized that the observance of many rules is secured by the promise of reward (for example, the fulfilment of expectations) rather than imposing a sanction. Even though sanction plays a role in minority who is reluctant, the law is obeyed because of its acceptance by the community "habit, respect for the law as such, and a desire to reap the rewards which legal protection of acts will bring" are important factors the law to be obeyed [Paton; 1967:74]

The third main criticism of definition of law by Austin (positive law theory) is that it is superficial to regard the command of the sovereign as the real source of the validity of law. It is argued that many regard law as valid because it is the expression of natural justice or the embodiment of the sprit of people [Paton; 1967: 77].

MARXIST LAW THEORY

Marxists believe that private property is the basis for the coming into existence of law and state. They provide that property was the cause for creation of classes in the society in which those who have the means of production can exploit those who do not have these means by making laws to protect the private property. They base their arguments on the fact that there was neither law nor state in primitive society for there was no private property. The theory has the assumption that people can attain a perfect equality at the communism stage in which there would be no private property, no state and no law. But, this was not yet attained and even the practice of the major countries like the former United Soviet Socialist Russia (U.S.S.R.) has proved that the theory is too good to be turn[Beset; 2006]. Nevertheless, this theory is challenged and the theory of private property triumphs.

REALIST THEORY OF LAW [Biset; 2006]

Realist theory of law is interested in the actual working of the law rather than its traditional definitions. It provides that law is what the judge decides in court. According to this theory, rules not put to use to solve practical cases are not laws but merely existing as dead words and these dead words of law get life only when applied in reality. Therefore, it is the decision given by the judge but not the legislators that is considered as law according to this theory. Hence, this theory believes that the lawmaker is the judge and not the legislative body.

This theory has its basis in the common law legal system in which the decision previously given by a court is considered as a precedent to be used as a law to decide future similar case. This is not applicable in civil law legal system, which is the other major legal system of the world, and as a result this theory has been criticized by scholars and countries following this legal system for the only laws of their legal system are legislation but not precedents. This implies that the lawmaker in civil law legal system is the legislative body but not the judge. The followers of this theory include Justice Homes, Lawrence Friedman, John Chpman Gray, Jerom Frank, Karl N. Lewelln and Yntema

Sources of Law

In the modern Jurisprudence the term 'sources of law' is broadly used in two senses. Sometimes it is used in the sense of state or the sovereign from which the law derives its force and validity. In other sense, it is used to denote the causes of law or the contents or matter of which law is composed. Dr C K Allen asserts that the true sources of law are agencies through which the rules of conduct acquire the character of law because of their certainty, uniformity and binding force.

According to Fuller, the 'sources of law' includes the material from which the Judge obtains rules for deciding cases. In this sense, it includes statutes, judicial precedents, customs, opinions of legal experts, jurists etc.

According to natural law philosophers, the 'law' has a divine origin. It is a gift of God contained in Holy Books. Vedas and Smritis are sources of law according to Hindu Jurisprudence as they have originated from the sages. In the same manner, Quran is the word of God and therefore, a positive source of Muslim law. The Hadis contains the precepts of the Prophet as inspired and suggested by God.

John Austin, the exponent of analytical school of Jurisprudence refers to three different meanings of the term 'sources of law'.

1. Firstly, the term refers to the authority from where the law emanates, namely, the sovereign.
2. Secondly, it may refer to historical material from which the existence of rules of law may be known, e.g. the Code of Manu, Commentaries of Yajnavalkya, Code of Justinian.
3. Thirdly, the term sometimes refers to the causes which give the rules of society, the force of law e.g. legislation, custom, equity, law etc.

Thus, Austin's three meanings, of 'sources of law' may include:

a. direct authority;
b. historical documents; and
c. causes.

Duguit rightly pointed out that law is not derived from any single source and the real basis of law is public service.

Ehrlich writes, "At present as well as any other time, the centre of gravity of legal development lies not in legislation, not in juristic science not in judicial decisions, but in society itself."

According to Salmond, "Legal sources are those sources which are recognised as such by the law itself, while historical sources are those sources which lack formal recognition by the law. The legal sources of law are authoritative and historical sources are unauthoritative."

Kinds of Sources of Law

Some of the important sources of law are as follows:

1. Custom

   The term 'custom' has been defined in the Webster's New International Dictionary as a long established practice considered as in written law and resting for authority on long consent, a usage that has, by long continuance has acquired a binding force in law.

   According to Herbert Spencer, "'before any definite agency for social control is developed, there exists a control arising partly from the public opinion of the living and more largely from the public opinion of the dead."

   Thus, it is a tradition passing on from one generation to another that originally governed human conduct. This tradition is called 'custom'.
   According to Salmond, "Custom is to society what law is to the state. Each is the expression and realisation to the measure of men's insight and ability of the principles of right and justice."

   Nature and Origin of Custom
   Custom has its origin in the usage or practice of people in doing certain things in a certain way and one of its characteristics is that it is not consciously formed. Usage developing into customary law is the oldest form of law making and in its early stages depends for its validity on willingness of those who generally follow the usage to submit to it.

   According to Holland, "Usage is the spontaneous evolution by the people or part of them of rules of conduct, the existence and general acceptance of which is proved by their regular observance."

   According to Savigny the main founder of German historical school, "Custom is essentially a product of natural forces associated with popular spirit of acceptance by the people. When people repeat the same action again and again, it assumes the form of 'habit' and when habit continues to be in practice for a long time, it becomes custom."

   Kinds of Custom
   It is not necessary that a custom should be practised all over the country. There may be a custom which is practised authoritatively only in a particular locality. Broadly speaking, there are two kinds of custom, namely, legal custom and conventional custom.

   According to Salmond, a legal custom is one which is operating per se as a binding rule of law, independently of any agreement on the part of those subject to it. A legal custom is one whose authority is absolute. A conventional custom is one which operates only indirectly through medium of agreements, whereby it is accepted and adopted in individual instances as conventional law between the parties.

Conventional custom is one whose authority is conditional on its acceptance and incorporation in agreements between the parties bound by it. Usually conventional custom is referred as usage and legal custom as custom simpliciter. A valid legal custom should have existed from time immemorial; such antiquity is, however, not needed to support the validity of usage. Conventional customs are implied, if they are not in conflict with the general law of the land. In case of conflict, however, such usage may be made applicable by the express agreement between the parties.

Legal customs are of two kinds, namely, local custom and general custom. A local custom is a usage which has obtained the force of law and is binding within a particular area. In practice, a plaintiff or defendant relying upon a local custom must plead it and give particulars of it.

Essentials of a Valid Custom
The custom must have existed since time immemorial. The custom must have been continuously in operation without any interruption. This does not mean that custom should have been continuously exercised but that at all times, it must have been possible to exercise it lawfully. If it were legally unenforceable for even a short time it would not be recognised as a valid custom. The custom must have been exercised peaceably, openly and as of right.

The basis of custom is that it is exercised by consent and any secret or forciable exercise cannot be with consent. Furthermore, an exercise of a right which depends on the granting of permission cannot be a valid custom, for clearly, if there had been a right, permission would have been necessary. The custom must not be unreasonable in the eyes of law. The period for ascertaining whether a custom is reasonable is the period of its inception.

The element of certainty evinces the existence of a custom therefore, a custom cannot be said to be in existence from the time immemorial unless its certainty and continuity is proved beyond doubt. A custom to be legally recognised as a valid custom, must be observed as of right. It means that custom must have been followed by all concerned without recourse to force and without the necessity of permission of those who are adversely affected by it.

It must be regarded by those affected by it not merely as an optional rule but as an obligatory or binding rule of conduct. If a practice is left to individual choice, it cannot be treated as a customary law. A custom must not be contrary or inconsistent with a legislative enactment.

A legislative enactment can reject a custom and it must necessarily yield where it militates against or is inconsistent with enacted law. Allen in his 'law in making' observes, "Age cannot whither an Act of Parliament and at no time so far as I am aware has it every been admitted that a statute might become inoperative through obsolescence."

The custom must be consistent with other customs, otherwise they cannot at all be

good. It must not conflict with other established customs. Custom must apply to a definite locality. Local customs apply only to the things or inhabitants.

2. Precedent
   Judicial precedent is another important source of law. It is a distinguishing feature of the English legal system because most of the common law is unwritten and owes its origin to judicial precedents. Precedents have a binding force on judicial tribunals for deciding similar cases in future. A precedent is a statement of law embodied in the decision of a Superior Court, which decision has to be followed by the court and by courts subordinate to it. As such the theory of precedent plays a significant and important role in the jurisprudence of every country.

   According to Salmond, the doctrine of precedent has two meanings, namely, in a loose sense precedent includes merely reported case-law which may be cited and followed by the courts, in its strict sense, precedent means that case-law which not only has a great binding authority but must also be followed.

   Holdsworth supports the doctrine in its loose sense. It is true that in common law countries, new laws and law reforms have increasingly been brought about through Acts of Parliament, usually inspired by the policies of the Government of the day, but even then the development of case law still remains a potent source of law.

   A statement of law made by a judge in a case can become binding on later judges and other subordinate courts and in this way may become the law for everyone to follow. Whether or not a particular decision, i.e. precedent becomes binding depends on two main factors, namely it must have been pronounced by a court which is sufficiently senior. It is only the ratio decidendi i.e. reasoning behind the decision which is binding.

   According to Jeremy Bentham, precedent is a Judge-made law while Austin calls it as judiciary's law. Keeton holds precedents as those judicial pronouncements of the court which carry with them certain authority having a binding force.

   Kinds of Precedents
   Broadly speaking, precedent may either be authoritative or persuasive. An authoritative precedent is one which has a binding force and the judge must follow it whether he approves it or not. Authoritative precedents are the decisions of superior court of justice which are binding on subordinate courts.

   Persuasive precedent, on the other hand, is one which the judges are under no obligation to follow, but which they may take into consideration. Thus, authoritative precedents are the legal sources of law while persuasive precedents are merely historical sources.

   Persuasive precedents may be of various kinds, namely:
   Foreign judgments, Decision of superior courts to other parts of British Empire, Judgments of the Privy Council when sitting as the final court of appeal from the

colonies, Judicial dicta, Authoritative text books and commentaries.

Binding Force of Judicial Precedents

Once a decision is overruled by any subsequent ruling, it loses all its binding authority. But there are certain other circumstances which also destroy or weaken the binding force of judicial precedents either partially or totally. They are as follows:

1. Ignorance of Statute:
   A precedent is not binding, if it be rendered in ignorance of any statute or any other rule having the force of statute. It is also not binding, if the court had the knowledge of the existence of the statute, but it failed to appreciate its relevance to the matter in hand due to negligence or ignorance.

2. Inconsistency between Earlier Decision of the Court of the Same Rank:
   A court is not bound by its own earlier decisions which are conflicting with each other. The conflict may arise due to inadvertence, ignorance or forgetfulness in not citing earlier decisions before the court. In such a case the earlier decisions are not binding on the court.

3. Inconsistency between Earlier Decision of Higher Court:
   A precedent loses its binding force completely, if it is inconsistent with the decision of a higher court. Thus, the Court of Appeal in Young v. Bristol Aeroplane Corporation limited, observed that it is bound to follow its own previous, decisions as well as those of courts of co-ordinate jurisdiction. However, the court is bound to refuse to follow a decision of its own which, though not expressly overruled, cannot, in its opinion, stand with a decision of the House of Lords or if it finds that there is inconsistency between its earlier decision.

4. Decision of Equally Divided Court:
   There may be cases where the Judges of Appellate Court are equally divided. In such a case, practice is to dismiss the appeal and hold that the decision appealed against is correctly decided. But, this problem does not arise nowadays because Benches are always constituted with uneven number of judges.

   In India, however, where the judges in a Division Bench of a High Court are equally divided, the practice is to refer the case to a third judge whose decision shall be treated as final unless it is set aside by the Supreme Court.

5. Precedent Sub Silentio:
   A decision is said to be sub silentio when the point of law involved in it is not fully argued or not perceived by the court. The decision in Gerard v. Worth of Paris Ltd, is a good illustration to explain a precedent sub silentio.

6. Erroneous Decisions:
   The decisions which are founded on misconceived principles or in conflict with the fundamental principles of law lose their binding force totally.

7. Affirmation or Reversal on a Different Ground:

When a higher court either affirms or reverses the judgment of the lower court on a ground different from that on which the judgment rests, the original judgment is not deprived of all the authority, but the subsequent court may take a view that a particular point which the higher court did not touch, is rightly decided.

8. Abrogated Decisions:
   A decision ceases to be binding, if statute inconsistent with it is subsequently enacted. So, also it ceases to be binding if it is reversed, overruled or abrogated. If a decision is wrong or irrational, it may be abrogated by a subsequent enactment or decision of a higher court.

Binding Elements in Precedents
The Ratio Decidendi
Each judge in a case will give his judgment and it is not that every part of the judgment that acts as judicial precedent. It is therefore important that a judge who is using a case as a precedent should be able to recognise that part of the previous judgment which is binding upon him. The portion of a previous judgment that is binding is called the 'ratio decidendi' (the reason for deciding). This consists of the portion of law which was essential to the judge in coming to his decision. Thus, three shades of meaning can be attached to the expression 'ratio decidendi', which are as follows:

a. The first is the translation of it, it is the reason for deciding.
b. Secondly, it may mean the rule of law preferred by the judge as the basis of his decision.
c. Thirdly, it may mean 'the rule of law' which others regard as being of binding authority.

Obiter Dicta
Pronouncements of law, which are not part of the ratio decidendi, are called as 'obiter dicta' and they are not authoritative or binding on subordinate courts. Obiter dicta may be defined as more casual expressions by the court which carry no weight. In the course of judgments, a judge may make various observations which are not precisely relevant to the issues before him. For instance, he may illustrate his reasoning by reference to hypothetical situations.

Whatever said by the court by the way of statements of law which lay down a rule, but which is unnecessary for the purpose in hand, are called 'obiter dicta'. These dictas have the force of persuasive authority and are not binding upon the courts. The courts may seek help from them but they are not bound to follow them. Obiter dicta literally means something said by the judge by the way, which does not have any binding authority. Goodhart defines obiter dictum as, "A conclusion based on a fact the existence of which has not been determined by the court."

Legislation
The term 'legislation' is derived from Latin words, legis meaning law and latum which means 'to make' or 'set'. Thus, the word 'legislation' means 'making of law'. The term 'legislation' has been used in different senses. In its broadest sense, it includes all methods of law-making. However, in its technical sense, legislation includes every expression of

the will of the legislature, whether making law or not.

Thus, ratification of a treaty with a foreign State by an Act of Parliament shall be considered law in this sense. But in strict sense of the term, legislation means enacted law or statute law passed by the supreme or subordinate legislature. Jurists have expressed different views about legislation as a source of law. According to Gray, "Legislation includes formal utterances of the legislative organs of the society."

TE Holland has interpreted the term 'legislation' in its widest sense and observed, "The making of general orders by our judges is as true legislation as carried on by the crown." Blackstone pointed out that the law that has its source in legislation which may be most accurately termed as enacted law and all other forms may be distinguished as unenacted law. In England, the former is called statute law while the latter as common law.

Blackstone prefers to call them written and unwritten law. According to Austin, legislation includes activities which result into law-making or amending, transforming or inserting new provisions in the existing law. Thus, there can be no law without a Legislative Act.

Salmond observed that legislation is that source of law which consists in the declaration of legal rules by a competent authority. According to him, the term 'legislation' as a source of law is used in three different senses. In its strict sense, it is that source from where the rules of law declared by competent authority are framed. In its widest sense, legislation includes all methods of law-making. In this sense, legislation may be either direct or indirect.

Kinds of Legislation
Supreme Legislation:
Supreme legislation is that which proceeds from supreme power of state, which is incapable of being repealed, annulled or controlled by any other legislative authority. In England, the British Parliament is Supreme in every sense. However, in India, the Parliament is not supreme because its laws can be questioned in the court of law, which may declare them ultra vires.

Subordinate Legislation:
Subordinate legislation is that which proceeds from any authority other than the sovereign power, and it therefore depends for its continued existence and validity on superior authority.

Kinds of Subordinate Legislation
Colonial Legislation: The British colonies and other dependencies were conferred limited power of self-government in varying degrees by the imperial legislature. The colonies in exercise of this power, enjoyed limited power of law-making. But, the laws so made by colonial governments could be repealed, altered or superseded by the imperial legislature, namely the British Parliament. However, after the passing of the Statute of Westmister of 1931, the self-governing Dominions under the Crown have been given power to make law

independently subject to nominal supremacy of the British Crown.

Executive Legislation: The Parliament delegates its rule-making power to certain departments of the executive organ of the government. The rules made if pursuance of this delegated power have the force of law.

Keeton suggests that these species of subordinate legislation have given rise to a vast body of rules known as administrative law, which is commonly called 'public law' because it describes the nature of the activity of the executive department of the government in action. In France, it is known as droit administratif. According to Sir Ivor Jennings, administrative law is defined as, "The law relating to administration which determines the organisation, powers and duties of administrative authorities in the State.

Judicial Legislation:In some cases, legislative power of rule-making is delegated to the judiciary and the superior courts are authorised to make rules for regulation of their own procedure in exercise of this power. It is also called 'judicial legislation' and it should not be confused with judicial precedents, The Constitution of India has conferred the power of rule-making to the Supreme Court under Article 145 and the similar power is conferred on the High Courts under Article 227.

Municipal Legislation: The municipal authorities are allowed within their areas to make bye-laws for limited purposes such as water-tax, land urban cess, property-tax, town planning, public health, sanitation etc.

Autonomous Legislation: The state may sometimes allow private entities or bodies, like universities, corporations, companies etc. to make bye-laws for regulating the conduct of their business. These bye-laws are framed in exercise of the rule-making power conferred on these bodies by the state. For example, Railways have their own rules for the conduct of their business.

SELF-TEST QUESTIONS

S.NO	Question	Option (a)	Option (b)
1.			
2.			
3.			
4.			
5.			

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