

JURISPRUDENCE

***Short Tutorial
For Exit Exam Sitters***

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UNIT ONE: Introduction

- What is Jurisprudence- comes from the Latin term juris prudentia, which means "the study, knowledge, or science of law." This signifies that like any other social study, law can also be studied scientifically or systematically.
- it seeks to analyze, explain, classify, and criticize entire bodies of law.
- It compares and contrasts law with other fields of knowledge such as literature, economics, religion, and the social sciences.
- It raises fundamental questions about the law itself & focuses on even more abstract questions, including, what is law?
- Why we study Jurisprudence- it develops the ability to analyze and to think critically and creatively about the law.
- At a professional level, jurisprudence is the way lawyers and judges reflect on what they do and what their role is within society.

- Schools of Jurisprudence
- 1) Natural Law School
- 2) Legal Positivism (Analytical School)
- 3) Historical School: views law as an evolutionary process and concentrates on the origin and history of the legal system.
- 4) Sociological School: Unlike the Historical School that conceives a nation's law as tied to the primitive consciousness of its people, sociological conception of law locate the law in the present-day institutions of its society.
- 5) Legal Realism- conceives law as judge made and by doing so it puts the court at the center.

UNIT TWO: Classical Natural Law Theory

- The Notion of Natural Law- its adherents believe that beyond, and superior to the law made by man are certain higher principles, the principles of natural law.
- It comprises a body of permanent, eternal truths, truths embodying precepts of universal applicability, part of immutable order of things, unaffected by changing human beliefs or attitudes.

- Ancient Greece: Natural Law as Source of Justice and Virtue
- 1) Socrates - his idea of law as recorded in Apology and Crito, two different writings written by his pupil Plato. Apology is all about Socrates' defense in court, while Crito is a discourse made between Socrates and his friend Crito in prison.
- In his apology , he importantly said that it was good to obey the law and the order of a commander so long as they are just.

- Socrates justified the coercive power of the state laws (positive law) and thereby upholding and respecting the decision of the courts (not to escape from prison) on three grounds.
- * on moral grounds, to do injustice in return for injustice or to return harm for harm is also bad.
- * citizens are not justified to back-harm their country whatever harm the country caused to them.
- * there was a tacit agreement between Socrates (and other citizens for that matter) and the state of Athens

- 2) Plato- concerned to redefine the nature of justice by relating it to something far more permanent and absolute than the nomos (man-made laws) of the city-state.
- 3) Aristotle-There are two sorts of political justice, one natural and the other legal. The natural is that which has the same validity everywhere (as fire burns both in Greek and in Persia are the same) and does not depend upon acceptance; the legal is that which in the first place can take one form or another indifferently.

- The Stoics: Natural Law as a Reason- existed from the life time of its founder Zeno (during the 3rd century BC) down to about the fourth century AD & represented by the writings of Cicero, Seneca, and the Emperor Marcus Aurelius.

- The conception of a universal law for all mankind under which all men are equal;

- The idea of a method of deriving universal principles of law from the observation of the laws of different people;

- And the conception of a law binding upon all states, which has got today the name □international law□.

- Stoics added flesh to the bones of natural law. Tolerance, forgiveness, compassion, fortitude, uprightness, sincerity, honesty □ these were the qualities that the Stoics believed that natural law required of men.

- **Cicero**-Law is the highest reason, implanted in nature, which commands what ought to be done and forbids the opposite.
- **Seneca** has also emphasized the need for rational approach, i.e. that man shall live in harmony with nature.

Christianity: Natural Law as Morality

- **St. Augustine of Hippo**- De Civitate Dei (the City of God), the will of God is then seen as the highest law, eternal law, for all people.
- **St. Thomas Aquinas**- Summa Theologica, (1) Eternal Law; (2) Divine Law; (3) Natural Law; and (4) Human Law

- **Nature of Man and Justification for Law-** The medieval power of the church dissolved with the coming of Renaissance and political writers such as Hobbes, Locke and Rousseau.
- **Tomas Hobbes-** Leviathan, postulates a natural condition of mankind in order to explain the origin and nature of the state and to show the justifications behind a strong sovereign power. He imagined a natural condition of man, termed as State of Nature, in which there was no law and government.

- **John Locke-** The Second Treatise of Civil Government, Unlike the Hobbessian picture of man's natural condition, which was a state of perpetual warfare, Locke depicts the state of nature as one of peace in which most men respect the lives, liberties, and estates of others. These are the natural rights of man, given to him by the law of nature which commands that "no one ought to harm in his life, health, liberty, and possession".

Kelsen's Criticism on Natural Law Theory

- -Natural law confuses **value and reality**- value cannot be deduced from reality.
- -**Good/Bad contradiction**- Natural lawyers justify positive law (man-made or human law) on the ground that these are needed because of man's badness. At the same time their doctrine requires an assumption that man is good, because it is from human nature that the principle of natural law are to be deduced.
- -**Insincerity**- Where a law of the state conflicts with natural law do natural lawyers in fact say that a citizen should disobey it?
- -**Absolute values and Relative values**- knowledge is relative to the person seeking it. Reality exists only in relation to our own feelings and convictions.
- So, there is one nature but we have different systems of law; different beliefs of goodness and badness.

UNIT THREE: The Revival Of Natural Law

- Introduction- the massive human delinquencies by the Nazis during the Second World War and the emergence of totalitarian States and dictators stimulate in the 20th c the rethinking of natural law theory. Jurists raised questions whether positive law is adequate enough to protect mankind.
- **Procedural Natural Law:** Lon L. Fuller- Morality of Law, published in 1963, His first step was to repeal all existing laws and to set about replacing these with a new code.

- In a legal system the laws must be:

Generality (not made ad hoc or for temporary purpose only), Published, Prospective, not retroactive, Intelligible (clear or understandable), Consistent, Capable of being complied with, Endure without undue changes, Applied in the administration of the society

- These qualities make up **the "inner morality of law"**.

- **Substantive Natural Law:** John Finnis - Natural Law and Natural Rights, there is a strong affinity between Finnis' view of natural law and that of Aquinas.
- Finnis' seven basic goods are life, knowledge, play, Aesthetic experience, Sociability or friendship, Practical reasonableness & religion.
- Finnis asserts that these goods are not the result of speculative reason. They are not goods because of anything, they are **just good**.

UNIT FOUR: POSITIVISM

Introduction

- by requiring that all law be **written or somehow communicated to society**, it ensures that the government will explicitly apprise the members of society of their rights and obligations.
- positivism reduces the power of the judge to the application of laws, it does not allow judges to make laws.
- Influence of David Hume- it was Hume who first opened the eyes of positivists who **challenged the close relationship of law and morality**; that law has nothing to do with morality or religion. Law should be investigated beyond any bias of morality.
- Jeremy Bentham- had many specific complaints about common law theory and its practice.

The Command Theory: John Austin's Positivism

- Law is a command of the sovereign enforced by sanction.
- Strongly influenced by Hume and Bentham, Austin wrote that the starting point for the science of law must be clear analytical **separation of law and morality**.
- positive morality is distinguished from positive law; and it is **positive because it is laid down by human beings for human beings**.
- He developed separation thesis, the existence of law is one thing, its merit or demerit is another.

Criticism on Austin by HLA Hart

- - Laws as we know them are not like orders backed by threats
- -Austin's notion of the habit of obedience is deficient, law should not be based on one particular body.
- - Austin's notion of sovereignty is deficient, In Austin's theory of law, there is no legal limit on a sovereign's power
- **Pure Theory of Law:** Hans Kelsen - He declares that law must be studied as a pure science independent of other incidents, like morality and justice.
- The law, according to Kelsen, is a **system of norms**.
- The **basic norm, then, is the most general norm** which is hypothesized as the norm behind the final authority to which all particular valid norms can be traced back.

- **H L A Hart- The Concept of Law** (1907- 1992)- He distinguishes first between **social rules** which constitute mere regularity from **social habits**.
- **Primary rules of law** are said to be those which are essential for any kind of social existence, those which prescribe, prevent or regulate behavior in every area with which the law is concerned. These are all the rules constraining anti-social behavior; rules against theft, cheating, violence and so on.
- **secondary rules** are those that stipulate how, and by whom, such primary rules may be formed, recognized, modified or extinguished. The rules that stipulate how parliament is composed, and how it enacts legislation. . .

Dworkin's criticism on Hart/Positivism

- Legal positivism envisaged, Dworkin claimed, that the law consists of rules only. However, this is a serious mistake, since in addition to rules, law is partly determined by legal principles.

UNIT FIVE: Historical And Sociological Legal Theory

- **Historical School**

- 1)The Spirit of the People: Savigny- the principles of law derive from the beliefs of the people.
- 2)The Changing process of Ancient Law: Henry Maine- Maine departed from Savigny in two important respects: he believed in **stages of legal evolution**, in which the primitive ideas might be discarded; and he sought to discover by **comparative studies** of different systems of law the ideas which they had in common.

- **Sociological School**

- 1) Living Law: Eugen Ehrlich- earlier legal theories that recognize law as **a sum of statutes and judgments gave an inadequate view of the legal reality** of a community.
- 2) Law in Action: Roscoe Pound- saw a legal system as being **a phenomenon** which intimately interacts with the prevalent political, economic, and social circumstances in a given society and which constantly alters with them in a living process of development.

UNIT SIX: LEGAL REALISM

- Introduction- it attempts to describe the law without idealizing it, to portray the law as it is □ not how it should be.
- **American Realists**
- 1)Pragmatist approach- Oliver Wendell Holmes and John Chipman Gray are the two **mental fathers** of the American Legal Realism.
- Its theme is how the rule of law works, not what they are on paper. Focus on the practice

- 2) Law as prophecy of the court: Oliver W. Holmes- The actual life of the law has not been logic: it has been **experience**.
- But, This approach disregards the rules and laws that establish the judiciary itself.
- 3) Centrality of the judge: John Chipman Gray- it is not a law until it had been interpreted by the courts, for "the courts put life into the dead words of the statutes."

UNIT SEVEN: Radical Legal Theories

- **1)Critical Legal Studies**-The critical legal studies movement, was initially emerged in the United States in the 1970s in part as a successor to the American realist movement,
- The overall aim of critical theory is **to destroy the notion that there is one single 'truth'**, and that by disclosing the all-pervasive power structures and hierarchies in the law and legal system, a multitude of **other possibilities** will be revealed, all equally valid.

- The Critique of the **Liberal Legal** Tradition from critical legal scholars - The law is portrayed as rational, coherent, necessary and just by liberal legal scholarship, when in fact, according to the critical legal scholars, it is **arbitrary, contingent, unnecessary and profoundly unjust**.

- **2)Critical Legal Studies and Feminist Legal Theory-** Feminist legal theories represent the most important modern development in the analysis of law, concerned with the **treatment of women by the legal system** and the perception, or lack of perception, of women's experience and needs in legal provision.

- Feminism and critical legal studies are, of course, **two entirely different creatures**. Feminism is only partially and peripherally concerned with academic theorising. It is motivated by the dissatisfactions of a wide spectrum of ... women and by the everyday experience of such women.
- The value of critical methodologies in the display and analysis of such gender distortions in law and legal administration should be evident.

- **3)Postmodern Legal Theory-** the latest radical theory to challenge the liberal orthodoxies that **society has a natural structure and that history is simply a process of evolution towards that truth.**
- Liberalism and capitalism are not the end of the road but are simply the major components of what the postmodernists call 'modernity'.

- In essence, postmodernism is not anti-modernism, for as Lyotard's example illustrates 'a work can only become modern if it is first postmodern', so that postmodernism is definitely **'a part of the modern'**, not a historical period beyond modernity.
- **Identity and the 'Other'- the 'other'** (eg women and racial minorities) appears to be the individual who is outside the system, who is disadvantaged by it.
- postmodernism is **inclusive** in that it purports to embrace the 'other'. the postmodernist concern with the 'other', the **law should seek to accommodate their claims** but to what extent and in what manner cannot be determined.

UNIT EIGHT: JUSTICE

- **Introduction-** Justice concerns the **proper ordering of things and persons** within a society.
- **John Rawls:** Justice as Fairness- □Theory of Justice□ (1972), Rawls makes a distinction between the **concepts of justice and conception of justice**. He claims that any theory of justice must deal with both of these.

- **By a concept of justice**, Rawls means the **role of its principles** in assigning rights and duties and in defining the appropriate division of social advantage.
- The **conception of justice** for Rawls can be stated in the form of **two principles** as follows: first, each person participating in a practice, or affected by it, has an equal right to the most extensive **liberty** compatible with a like liberty for all, providing everyone with basic human freedoms such as freedom of thought, religion, belief, expression□etc. and

- Second, inequalities are arbitrary unless it is reasonable to expect that they will work out for everyone's advantage, **equal distribution** of primary social resources to everyone and inequalities are arbitrary.
- The first principle has absolute priority over the second

- **Will Kymlicka:** Justice and Minority Rights- forms of group-specific rights:
- One mechanism for recognizing claims to self-government is federalism, which divides powers between the central government and regional subunits.
- **polyethnic rights** - are intended to help ethnic groups and religious minorities **express** their cultural particularity and pride without it hampering their success in the economic and political institutions of the dominant society.

- unlike self-government rights, polyethnic rights are usually intended to **promote integration** into the larger society, not self-government.
- **The Equality Argument-** ethnic and national minorities are needed to ensure that all citizens are treated with genuine equality.
- equality-based argument will only endorse special rights for national minorities **if there actually is a disadvantage** with respect to cultural membership, and if the rights actually serve to rectify the disadvantage.

CHAPTER NINE: LIBERTY

- Introduction- Liberty is generally considered as a concept of political philosophy that identifies the condition in which an **individual has the ability to act according to his or her own will.**
- liberty and equality are principles of justice

- **Isaiah Berlin: Two Concepts of Liberty**
- the 'negative' sense, is involved in the answer to the question 'What is the area within which the subject - a person or group of persons - is or **should be left** to do or be what he is able to do or be, **without interference** by other persons?'
- The second, 'positive' sense, is involved in the answer to the question 'What, or who, is the **source of control or interference** that can determine someone to do, or be, this rather than that?'

CHAPTER TEN:EQUALITY

- Equality: Defining the Concept- "Equality" (or "equal") signifies **correspondence between a group of different objects, persons, processes or circumstances** that have the same qualities in at least one respect, but not all respects, i.e., regarding one specific feature, with differences in other features. distinguished from "identity"

- Principles of Equality and Justice
- **1) Formal Equality-** When two persons have equal status in at least one normatively relevant respect, they must be treated equally with regard to this respect.
- **2) Proportional Equality-** proportional or relatively equal when it treats all relevant persons **in relation to their due**. Just numerical equality is a special case of proportional equality. Numerical equality is only just under special circumstances, viz. when persons are equal in the relevant respects so that the relevant proportions are equal.

- **3)Moral Equality-** This principle is too abstract and needs to be made concrete if we are to arrive at a clear moral standard.
- **4)Presumption of Equality-** requires that everyone, regardless of differences, should get an equal share in the distribution unless certain types of differences are relevant and justify, through universally acceptable reasons, unequal distribution.