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Constitutional Law and Jurisprudence

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Abstract

Constitution is the agreement or law of highest authority in every country. Every single law passed by the legislature has to be in accordance of the Constitutional law of that country, also as Jurisprudence is a philosophy of law which helps to study every law in detail, its scope, ambit, and every concept, it becomes essential for every lawyer or any person with such profession to study the Constitutional Law along with its Jurisprudence. There are many aspects of the jurisprudence which requires our attention and understanding we will study the four aspects of jurisprudence and the fields with which they deal. Here in this article we will study the most philosophical part which can be the base for every law i.e. Constitutional Jurisprudence. We will also study theories given by different jurists of all time along with the Constitutional interpretation and judicial review by the Supreme Court of different countries.

Keywords: *Constitution, Jurisprudence, Theories of Constitutional Jurisprudence, Need for Jurisprudence, Concepts of law, Importance of Jurisprudence, Historical Development, Constitutional Interpretation, Judicial Review, Philosophy of Law, Common Law, Fundamental Rights.*

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INTRODUCTION

The word comes from the Latin term juris prudentia, (the term juris means "law" and the term prudentia means "study or knowledge") which implies "the study, knowledge, or science of law." This signifies that laws are often studied scientifically or systematically like all other social study. If we discuss jurisprudence in modern law it's understood as a term that welcomes number of questions about the character and purpose of law and responses made to them.

Ancient Indian Jurisprudence is mentioned in various Dharmasastra texts, starting with the Dharmasutra of Bhodhayana. In ancient China, the Daoists, Confucians, and Legalists all had competing theories of jurisprudence. In ancient Rome Jurisprudence had its origins with the (periti) - experts in the jus mos maiorum (traditional law), a body of oral laws and customs.

After the 3rd century, juris prudentia became a more bureaucratic activity, with few authors. It was during the Eastern Roman Empire (5th Century) that legal studies were once again undertaken in depth, and Justinian's Corpus Juris Civilis ("Body of Civil Law") was born due to this cultural movement [5].

Jurisprudence has many aspects, with four types being the foremost common. The most prevalent style of jurisprudence is that it seeks to investigate the law, explains it, classifies it into various categories, and criticizes entire bodies of law; it applies to any form of law. Legal encyclopedias, law reviews, and graduate school textbooks frequently contain this sort of jurisprudential scholarship.

The second form of jurisprudence makes the comparison and contrasts law with other fields of data like literature, economics, religion, and also the social sciences. The aim of this interdisciplinary study is to enlighten each field of data by sharing insights that have proved important to understanding essential features of the comparative disciplines. The third form of jurisprudence raises fundamental questions about the law itself. These questions seek to reveal the historical, moral, and cultural background of a selected legal concept. The Common Law (1881), written by

Oliver Wendell Holmes, Jr., could be a well-known example of this sort of jurisprudence [1]. It traces the evolution of civil and criminal responsibility from undeveloped societies where liability for injuries was supported subjective notions of revenge, to modern societies where liability is predicated on objective notions of reasonableness.

The fourth and also the mostly followed body of jurisprudence focuses on even more abstract questions, including, what's law? It focuses on the relation of law with justice and morality, determines the role of a judge. Could be a judge more sort of a legislator who simply decides a case in favor of the foremost politically preferable outcome? What's justice? What does liberty and freedom really mean? Here we treat jurisprudence during this last sense. It's the fastest growing branch of jurisprudence.

Need for Jurisprudence

When we read and participate in jurisprudential discussions at practical level, it develops the ability to analyze and to think critically and creatively about the law. Such skills are always useful in legal practice, especially when facing completely new questions within the law or when trying to formulate and advocate unique approaches to legal problems. So those who need a justification for whatever they do should be able to find reason to read legal theory, this is the where we need such study.

Now when we talk about jurisprudence at professional level, it is the way lawyers and judges act and reflect on what they do and specify their role within society. This is reflected by the way jurisprudence is taught as part of a university education in the law, where law is considered not merely as a trade to be learned but as an intellectual pursuit. For those who spend most of their waking hours working within (or around) the legal system, gives them strong reasons to want to think deeply about the nature and function of law, the legal system, and the legal profession in which they are giving their life.

Jurisprudence is interesting and enjoyable on its own, some people enjoys it along with whatever its other uses and benefits. For many jurists, advocates and who are in legal profession, learning is interesting and valuable in itself, even if it does not lead to greater wealth, greater self-awareness, or greater social progress. So the field of jurisprudence will always be an inseparable part of law which has its own importance.

One of the foremost importance of the study of Jurisprudence is its fundamental value. Jurisprudence mainly comprises of research and also the method to construct and clarify the fundamental concepts of law. Jurisprudence isn't concerned with the making of the new laws; rather, it focuses on existing laws within the system and Jurisprudence, and its theories can help lawyers to make a much better and far more improved practice.

Jurisprudence can even help students. It has its own educational worth within the lifetime of students. Jurisprudence not only focuses on primary legal rules, but it also talks about the social impact of these laws. Jurisprudence combines logical and theoretical analysis of legal concepts. So it increases the analytical methods and techniques of a student. Jurisprudence also focuses on law and its social value. It talks about fairness and also the articulation of law. Jurisprudence deals with the fundamental concepts of the law. It helps someone to grasp the thoughts and divisions of law.

Jurisprudence is additionally the grammar of law. It helps someone to grasp the language and also the grammar of law. Legal language and grammar are very different when put next to ordinary language, so Jurisprudence trains the mind of a lawyer in order that he can use proper legal vocabularies and expressions [2].

Jurisprudence provides the foundations of interpretation and as a result, it helps judges and lawyers in understanding the importance of laws approved by the legislators. Jurisprudence and its relationship with other social sciences provide a wide range to

students in understanding how law is related and connected with other disciplines.

Jurisprudence teaches that a solution to a legal problem isn't hidden within the past or a waiting within the future instead of the solution to a legal problem is hidden around them within the fundamentals of legal studies.

Jurisprudence also talks about political rights and legal rights and the way the system can make every effort to balance them out. A student can even examine it with the assistance of Jurisprudence.

CONSTITUTIONAL JURISPRUDENCE

Jurisprudence is the philosophy of law. In other words it seeks to clarify, what law is all about within the most general way. Philosophy of law examines the nature of law and law's relationship to other systems of norms, especially ethics and political philosophy; it clarifies the relationship between law and morality and defines the criteria for legal validity.

Philosophy of law can be divided in two broad categories that are, analytical jurisprudence and normative jurisprudence. The aim off analytical jurisprudence is to identify law's essential features and define what law is and what it is not. On the other hand normative jurisprudence investigates both the legal norms (that are generated by law) and non-legal norms (that shapes law) and guides the actions of the human.

The Constitution contains both structural and disabling provisions. The structural provisions describe the varied branches of the national government, provide methods for electing or selecting their members, and define the powers of those institutions and officials vis-à-vis the institutions and officials of the varied states. These structural provisions constitute the American style of democracy; they create government by the people. In contrast, the disabling provisions of the bill of rights and also the war amendments, just like the amendment and also the due process of law clause and also the equal protection clause, set limits to the general authority of elected officials. Many people with legal profession and political members believe that these provisions obstruct government by the people and are undemocratic for that reason.

After we discuss and handle the law, ordinarily we discuss specific subjects in law, as an example tax, labour law, family law, service law, legal code and therefore the law of torts. In jurisprudence we don't discuss these specific topics and instead we discuss such questions as: what's law? How did it originate? What's its object? What are its basic concepts? Therefore after we speak constitutional jurisprudence we are going to need to enkindle example: what's a constitution? What's its purpose? What's its position within the system of the country?

A constitution is that the agreement by which the people in an exceedingly country are governed. It's a politico-legal document, unlike ordinary statutes, which are purely legal documents. A constitution is the law of the land, and thus it prevails over all the opposite laws within the legal hierarchy, including statutes made by the legislature. It's the grund norm, as described by the eminent positivist jurist Kelsen.

After all there was a powerful resistance to putting in a constitution by many feudal regimes, as an example in Czarist Russia and in France (before the French revolution). This, however, was really resistance to written constitutions by feudal rulers, who thought that it might diminish their authority. Unwritten constitutions (eg in Britain) prevailed everywhere from ancient to present time, and after all no society can do without a constitution because there must be system of governance in every society [3].

The essential purpose of a constitution, whether written or unwritten, is to line up the law of the land. In other words, the primary purpose of the constitution is to line up the organs of presidency in an exceedingly country and mention their functions and inter - se relation. In feudal monarchies the king was the supreme legislative, executive and judicial

authority. In actual practice, though, he couldn't possibly perform of these functions, and hence he delegated most of those to delegates, who were described as advisors or councilors or judges. These persons performed the routine day to day state functions, but they were accountable to the king and to not any legislative body. The demand for a written constitution really meant that these functionaries should be accountable to a legislative body elected by the people, and to not the king. This was a revolutionary demand of that point, because it meant converting the king into a mere figurehead, a constitutional monarch just like the British monarch who has little powers today. That's why it absolutely was fiercely resisted by the feudal Kings, and sometimes there had to be revolutions to accomplish it. (In England there had to be two Revolutions, one in 1645, and therefore the other on 1688).

In modern constitutions, which are the majority written except in Britain and possibly some other jurisdictions, all state authorities are accountable to the people; the legislators, because they need to face elections, and therefore the ministers because they're accountable to the legislature. The constitutional authorities having a set tenure of office, like the president and judges, may be removed by the legislature through the method of impeachment, and thus they too are accountable to the people.

Thus we see that the primary purpose of the written constitution is to line up state organs which are accountable to the people. In other words, the most aim of a contemporary written constitution is to set up a democratic kind of government.

But that's not its only purpose, there are other purposes too, and to grasp them we've to understand some theories in political science.

THEORIES OF SOME JURISTS

The Sociological approach to the study of law is the most important characteristic of our age as it focuses on the practical aspects of law. Jurists belonging to this school of thought are anxious more with the working of law rather than its abstract content. The principal premises are that the law must be studied in action and not in textbooks. Sociological school of jurisprudence has emerged as a result of mixture of various juristic thought. The exponent of this school considered law as a social phenomenon and social contract theory. This theory emphasize that the jurist should focus their attention on interest served by law and social purposes of law rather than on individuals and their rights.

The theories of Hobbes, Locke and Rousseau were all social contract theories. Social contract theories were all secular theories. In other words there was no place for God in them. They were thus in contrast to the divine right theories (eg the divine right theory of King of England) which said that the king should be obeyed because he was the viceroy of God, and hence disobedience to king was disobedience to God.

All the social contract theories had no place for God in them, and that they were thus secular in nature. However there have been sharp differences between them. We may consider the foremost important, that's the social contract theories of Hobbes, Locke and Rousseau.

The theory of British thinker Thomas Hobbes was the speculation of absolutely the sovereignty of the king; that of John Locke was of limited sovereignty of the king; that of Rousseau of no sovereignty (not even limited sovereignty) of the king.

Hobbes was of the view that individuals are basically of evil nature. They require some higher authority to test their evil impulses, otherwise they'll be in an exceedingly state of perpetual war with one another, and can steal, kill, rape, etc. Thus peaceful lives are impossible. Hence a king is required to take care of law and order, which is why a king is important and he must be obeyed.

Although ostensibly this theory gave absolute power to the king, there was after all a catch which came to be noticed soon. Since, per Hobbes, a king was needed as an authority to

take care of law, order and peace in society, it follows that if a king by his deeds or omissions fails to take care of law and order the people have a right to get rid of him. Thus, the proper of revolution was inherent in Hobbes' theory, though not expressly mentioned, which is why the king's supporters, who initially acclaimed the speculation, later became critical of it as they realized its revolutionary potential.

The theory of the British thinker John Locke (as started in 1690 in his Second Treatise on Civil Government) is that though the king is sovereign, his sovereignty is restricted and not absolute (as Hobbes had proclaimed). Limited by the natural rights which each individual has because of the explanation that they are human being. The king cannot encroach on, or interfere with, these natural rights which include freedom of speech, freedom to practice one's religion, freedom to have or acquire property, and liberty.

The theory of the French thinker Rousseau is that each one's sovereignty belongs to the people, who exercise it through an agent, whether he's called a king, or Parliament, or minister or whatever. Of these agents, per Rousseau, is nothing but the servants of the people and thus will be removed by them. The desire of the people is termed the general will, and it's supreme. Thus, per Rousseau, it's the people, not the king, who are supreme.

We have mentioned these theories of government because we've now to return to the second purpose of the constitution, that is, to safeguard the people from the state authorities when the latter act arbitrarily or in oppressive manner.

Locke had raised the problem of natural rights within the people, which even the king couldn't validly violate. These natural rights, which were only political slogans at just one occasion (eg the slogan "Liberty, equality, fraternity" within the revolution or "No taxation without representation" within the American Revolution), were later incorporated as legal rights within the constitutions of several countries. Examples include the Bill of Rights within the US Constitution, or the fundamental Rights of the Indian Constitution.

It was realized that while ordinarily the elected representatives would (or should) work for the welfare of the those who elected them, there could also be occasions where they will not, and should even start oppressing the people, and hence people must be protected even from them by making their fundamental rights inviolable.

But who would make sure that the fundamental rights of the people were protected against invasion by the chief and even the legislature? This task was given to the judiciary, either expressly vide Article 32 of the Indian constitution, or by necessary implication, as within the US constitution, vide judgment of the US Supreme Court in Marbury v Madison. Since the constitution was the very best law of the land, and since these rights were placed within the constitution itself, any law or act which violated these rights became void. But who could declare it void? Obviously the legislature wouldn't declare its own act void. Only the judiciary acting as a neutral umpire could do so. As jurist Marshall of the US Supreme Court observed in Marbury v Madison: "It is emphatically the duty of the court to declare what the law is." When there's a conflict between a constitutional provision and a statute, it's the previous, being the upper law, which can prevail, and therefore the latter are declared by the court as ultra vires. The court is thus the guardian of the rights and liberties of the citizen, and it'll be falling in its duties if it doesn't protect them.

CONSTITUTIONAL INTERPRETATION AND JUDICIAL REVIEW

We may conclude by moving on to the principles of interpretation of constitutional provisions and also the principles regarding review of statutes. As observed by judge Marshall of the US Supreme Court in Mc Mulloch v Maryland, a constitution could be a living document, intended to endure for ages to come back. Hence, the principles of its

interpretation differ to some extent from the principles of ordinary statutes.

As observed by the Supreme Court within the Haj act case, constitutional principles shouldn't be interpreted too literally. As held by Justice Holmes of the US Supreme Court (referred to within the above decision) the machinery of the govt. wouldn't work if some play isn't allowed at the joints. Thus the rule of strict interpretation, utilized in interpreting taxing or criminal statutes, isn't applied in interpretation of constitutional provisions. As an example, in interpreting the entries within the seventh schedule, a good interpretation is given (see decision of the Indian Supreme Court upholding the validity of state act regarding financial establishments which duped innocent investors).

No doubt the court has the correct to declare a statute to be unconstitutional, but every effort should be made to uphold its validity, as invalidating a statute could be a grave step since it amounts to thwarting the need of a coordinate organ of the state (vide Government of Andhra Pradesh v P Laxmi dev) [4]. For this purpose the court can read down the language of a statute (see Sri Indra das v State of Assam within which the Supreme Court read down the Terrorist and Disruptive Activities Act and also the Unlawful Activities Act, and held that mere membership of a banned organization won't make one a criminal).

Judicial review is the most important feature of the judiciary in any country. It means that judiciary has the power to amend the constitutional law or any other law which is ultra vires to the basic principles. If we compare this feature of judicial review in India and USA we can notice that judicial review in India is narrower than that of USA. In the US Constitution there is no mention of the concept of judicial review in any of its provision but even though they exercise it in wider scope. This power was used before 1787 by courts in several of the American states to overturn laws which are conflicting with the provisions of state constitutions. In 1789 the Congress of the US passed the Judiciary Act, which gave federal courts the power of judicial review over acts of state government in USA. The first time when judicial review was used by US Supreme Court was in the case Hilton v. Virginia (1796).

In India the separation of power is strictly followed it means judiciary can strike out any provision of law and issue the guidelines (as of in Vishakha v. State of Rajasthan) [4] but cannot form a new law on its place but in US the judge made laws are very common and the judges can formulate any new law on the place of prior law, such function of the judiciary is also known as the judicial activism.

CONCLUSION

Constitutional jurisprudence is the foremost abstract and philosophical element of constitutional theory. We may divide the subject into general areas or departments, although these areas are densely interconnected. The important choice judges and other interpreters of the Constitution must make, therefore, isn't between the initial understanding and some other method of interpretation but between reductive and abstract versions of the initial understanding. Many proponents of the original-understanding method haven't made this choice coherently; they believe the equal protection clause outlaws separatism and social policy quotas, but doesn't outlaw laws discriminating against women or homosexuals, for example. Lawyers and judges must not only choose between the reductive and abstract versions coherently but also on principle, that is, with adequate support in foundational jurisprudence. The passivist interpretive method, which supports the choice of reductive understanding of the framers' intention, relies on the statistical conception of democracy and, accordingly, fails if this conception is rejected. The tactic of integrity, which presupposes an abstract understanding, relies on a communal conception during which individual rights don't seem to be subversive, but constitutive of genuine democracy. Even at the sensible level of adjudication, constitutional law is deeply embedded in political philosophy.

So in this article, we saw how Jurisprudence is so interconnected with the constitutional law and is so unlike from the law we practice in common. Jurisprudence helps lawyers and judges to find the real sense of law and interpreting the constitutional law as it can benefit the large number of people and society. We came across various legal theories in jurisprudence and how they have exaggerated society and the law. Jurisprudence is an important part of the constitutional law and it can never be separated from it.

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