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JURISPRUDENCE, CONSTITUTIONAL & ADMINISTRATIVE LAW AND IHL

SIERRA INNOVATIONS

UGC NET - LAW

1
CHAPTER

Nature and Sources of Law

Introduction

Like many other branches of knowledge, the study of jurisprudence started among the Romans at first. The word 'jurisprudence' is derived from the Latin word "juris prudentia", where 'juris' means law and 'prudentia' means knowledge. Therefore, jurisprudence is called knowledge of law. Jurisprudence is basically the theoretical aspect of the word law. It refers to a certain type of enquiry or investigation into law.

Jurisprudence is the way you can find

1. **Source of law**
2. **Validity of law**
3. **Subject of law**
4. **Function of law**
5. **The effect of the law.**

The expression law related to law means basic legal principles.It is defined as a study of the fundamental legal principles including their philosophical, historical and sociological bases, and an analysis of legal concepts. It is a type of investigation into the essential principles of law and the legal systems (Salmond). It is the science of the first principles of civil law. The legal concepts like contracts, torts or criminal law consist of a set of rules. It has no such legal authority and further it has no practical application. The jurists have a free approach in their investigations. Further, the method of enquiry in jurisprudence is different from other legal subjects.

Definitions of Jurisprudence by various jurists

Ulpian – 'juris prudenti est divinarum, atque humanarum rerum notitia, justic tque injustic scientia' i.e. Jurisprudence is the knowledge of things divine and human, the science of right and wrong.

Holland – Jurisprudence is "the formal science of positive law". By "formal science" he means that which deals with the various relations which are regulated by legal rules than with the rules themselves which regulate those relations.

Gray – Jurisprudence is a 'science of law' i.e. systematic arrangement of rules followed by courts and principles underlying them. He further stated that 'the relation of jurisprudence to law depends not upon what law is treated but how law is treated.

Prof. Allen – Jurisprudence is a 'scientific integration of the essential principles of law'.

George Paton – He stated that "Modern jurisprudence trenches on the fields of social sciences and of philosophy, it digs into the historical past and tends to create the symmetry of a garden out of luxuriant chaos of conflicting legal system."

Dias & Hughes – "Jurisprudence may tentatively be described as any thought or writing about law, other than the technical exposition of a branch of law itself".

Roscoe Pound – He defines jurisprudence as the 'science of law', where the term 'law' should be used in judicial sense. He further stated that in the study of jurisprudence, relation between law and society is a necessary element.

Patterson – Jurisprudence means 'a body of ordered knowledge, which deals with a particular species of law'.

Julius Stone – Jurisprudence means lawyers extra version. He stated "It is the lawyer's examination of the percepts, ideal and technique of the law derived from present knowledge in disciplines other than law".

John Austin – According to him, the science of jurisprudence is concerned with positive law, with 'laws strictly so called'. He further stated that jurisprudence has nothing to do with the goodness or badness of law.

He divided jurisprudence in 2 kinds -

1. General Jurisprudence: Includes such subject or ends of law as are common to all systems.
2. Particular Jurisprudence: It is confined only to the study of any actual system of law or any portion of it.

Salmond – He defines jurisprudence as 'the science of law'. By law he means the Law of the land or civil law.

In this sense jurisprudence is of 3 kinds -

1. Expository or Systematic, which deals with the contents of an actual legal system, as existing at any time, whether past or present.
2. Legal history, which is concerned with a legal system in its process of historical development.
3. The science of legislation, the purpose of which is to set forth law as it ought to be. It deals with the ideal future of the legal system and with the purposes for which it exists.

Netherlands - Jurisprudence is a positive law formal science. Formal science means dealing only with the underlying (basic) principles, not the concrete details.

Keeton - Jurisprudence is a 'study and systematic arrangement of the general principles of law'.

H.L.A. Hart - Jurisprudence is a scientific study of a coalition of rules, including primary and secondary rules. Primary rules are rules that impose obligations. A secondary rule is a rule that grants authority that a new obligation may be created and a defective obligation may be changed or abolished.

Laski - Jurisprudence is the eye of law.

Importance of Jurisprudence -

Jurisprudence does not contain a set of rules as in contracts or torts and also has no practical application. However, it has its own values, unique and distinctive.

1. It gives an understanding of the nature of law. It helps in the study of the actual rules of law and in tracing out principles underlying therein.
2. It helps in making a scientific development of law.
3. It develops the critical faculties of the mind and gives the proper understanding of legal expressions and terminologies.
4. It throws light on the basic ideas and the fundamental principles of law in a given society.
5. It helps judges and lawyers in ascertaining the meaning of words and expressions in statues.

Important Books of Jurisprudence

1. **Hugo Grotius -** De Jure Belli ac Pacis (on the law of war and peace)
2. **Bentham** - The limits of jurisprudence Defined, Theory of legislation, An introduction to the principles of morals and legislation
3. **Austin –** The Province of Jurisprudence Determined

4. **Julius Stone -** The Province and function of Law: Law as logic, The Legal System and Lawyer Reasoning
5. **Ihering -** Law as a Means to an End
6. **Salmond** – Jurisprudence or The theory of the Law
7. **Hart -** The concept of law
8. **Fuller -** The Morality of Law
9. **Maine -** Old law
10. **Friedman -** The law in changing societies
11. **Hohfeld -** Basic Legal Concept
12. **Paton -** A textbook of jurisprudence
13. **Goodhart -** Case law and common law essays
14. **Savigny -** Das Recht Des Besitzes (The law of possession). Modern Roman law system
15. **Buckland -** Some thoughts on case law

Definitions of Law

Almost every jurist has attempted to define law but it has been very difficult to present a universal definition. The main reason why different societies have had various legal development processes is because of their various needs. For the purposes of clarity and better treatment of the subject, we may classify the definitions which we propose to discuss into three broad classes:-

1. **Idealistic definition**
2. **Positivistic definition**
3. **Sociological definition**

Idealistic definition

(Ancient definitions given by Roman and other ancient jurists)

Romans (Justice is the main element of law; they never confused law with justice)

(a) Justinian's Digest defines law as the "standard of what is just and unjust."

(b) Ulpian spoke of law as "the art or science of what is equitable and good."

(c) Cicero said that law is "the highest reason implanted in nature."

Hindu view - (moral and religious injunctions mingled up with legal precepts)

Law is the command of God and not of any political superior (sovereign). The ruler is also bound to obey it and is under a duty to enforce it. Thus, law is a part of 'Dharma.'

Modern idealistic definitions

The above definitions were given at a time when there was no clear cut distinction between law, morals and religion. 'Justice,' in modern definitions, means 'legal justice' and not an 'abstract justice'. It is only on the ground that these jurists has taken 'justice' as an element of law they are considered 'Idealistic', otherwise they are 'Positivist'. The most popular definition of this kind is that of SALMOND.

Salmond's definition of law

He defines law as "the body of principles recognized and applied by the state in the administration of justice."

There are two main implication of this definition -

(a) To understand law one should know it purpose;

(b) To ascertain the true nature of law one should go to the courts and not to the legislature.

Criticism of Salmond's definition

(a) To understand law one should know it purpose

Vinogradoff criticizes Salmond on the ground that his definition of law proceeds from the action of the judges. Although Salmond never means that law is justice but the utmost that he says is that only by law justice can be achieved. From this interpretation, it appears that law has been defined by Salmond in terms of its purpose.

He defined law in terms of its purpose which resulted 'law' only to confine as pursuit of 'justice'.

(b) To ascertain the true nature of law one should go to the courts and not to the legislature.

This statement has been criticised on three grounds:-

(i) According to this definition, conventions shall be excluded from the law because they are not enforced by courts.

(ii) A controversy would arise about the meaning of 'court'.

(iii) According to this definition considerable and important body of rules would not be considered law.

Positivistic definition

Austin definition (Command, Duty and Sanctions are three elements of law**)** [CDS]

According to Austin, "law is the aggregate of rule set by men as political superior, or sovereign, to men as politically subject". In other words, law is the 'command of sovereign'. It obliges a certain course of conduct or imposes duty and is backed by a sanction. Thus law which has [CDS] is called 'positive law'. He distinguishes 'positive law' from 'positive morality' and other kinds of rules which are also called law.

Criticism of Austin definition

1. All law is not command
2. Most of the law is enabling than restrictive (it means it is not duty)
3. Except sanction, there are other factors that make the obedience of law possible.
4. His definition not covers customs and international law as they have not all essentials which 'law' must have according to Austin.
5. He completely ignored the social aspect of the law and he psychological factors which secure its obedience.

After Austin many other jurists gave positivistic definitions although they made their approaches to the study of law from different premises. Kelsen too is a positivist.

Kelsen definition (law is 'depsychologized command')

Though Kelsen defines law in terms of command, he uses it in a sense quite different from Austin's. By command, he simply means that it imposes a duty. Austin's 'sovereign' does not come into picture in Kelsen's definition.

Sociological Definition

As observed earlier, the sociological approach is not a single approach but it includes a number of thoughts. A common heading has been given to them all for the reason that they proceed from the common ground (i.e., they define law in terms of its relation with the society). Here we shall discuss some of these definitions.

Duguit's definition of law

He defines law as essentially and exclusively as social fact. It is in no sense a body of rules laying down rights. The foundation of law is in the essential requirements of the community life. It can exist only

when men live together. Therefore, the most important fact of social life is the interdependence of men (this Duguit calls as 'social solidarity").

The aim of the social institutions is to safeguard and further it. Only those rules can be called law which furthers this end. The basis of the validity of law is the popular acceptance and not the will of sovereign. The sovereign is not above the law but is bound by it. The law should be based on social realities.

Criticism against Duguit's definition

1. He excluded the notion of 'right', from law. This is not a correct view.
2. He relegated the sovereign to the status of an agency, simply endorsing the popular acceptance, whereas in reality the sovereign is still the 'electron in the atom of the state.
3. The term 'social solidarity" is very vague and it can be interpreted to serve almost any end (as was done by Fascists). There are no rules or tests to determine the 'social solidarity'. It involves a question of 'justice' and ultimately it turns into a principle of 'natural law'. Thus the definition of law as a 'social fact is vague and confusing.

   The later sociological approaches have completely dropped the ethical and abstract notions of justice from the definition of law and have defined law in terms of its utility and actual working

Ihering's definition

He defines law as the 'form of the guarantee of the conditions of life of society, assured by State's power of constraint'. There are three main implications of this definition:

1. In this definition law is treated as only one means of social control.
2. Law is to serve social purpose.
3. It is coercive in character, in other words, the obedience to law is secured by the state through external compulsion.

The definition given by Ihering is very clear and simple. It incorporates in it all the necessary characteristics which the law, in modern times, has.

Ehrlich's definition

He includes in his definition all the norms which govern social life within a given society. This definition goes to include even those fields where the law no longer remains law, but becomes sociology. Thus, the picture which a definition is required to present is blurred.

Roscoe Pound's definition

He defines law as 'a social institution to satisfy social wants. This approach is very valuable. But as a definition it has a number of shortcomings. It does not pay proper heed to the nature and character of law. It speaks much about policy and progammes, and at the same time, is directed towards a theory of justice.

Realist movement (applicable in U.S.A)

Here law is defined in terms of judicial proposes.

Holmes J., the father of Realist Movement, says that the prophesies of what the courts will do, in fact, and nothing more pretentious, a what I mean by law, Jerome Frank, Lewellyn, Cardozo to this belongs to schools.

Accord to them, the formal law is simply a guess as to what the courts would decide and the law is that what the courts actually decide.

In the ultimate analysis all the definitions have to be seen together. The combined effect of all the definitions is as follows -

(1) Low presupposes state. There may be law even without the state, as the primitive law, but law, in modern sense of the term, implies state.
(2) The state makes or authorises to make, recognises or sanctions rules which are called law.
(3) For the rules to be effective there are sanctions behind them.
(4) These rules (called law) are made to serve some purpose. The purpose may be a social purpose, or it may be simply to serve some personal ends of a despot.

In short, these are the characteristics of law and a definition to become universal must incorporate all these elements.

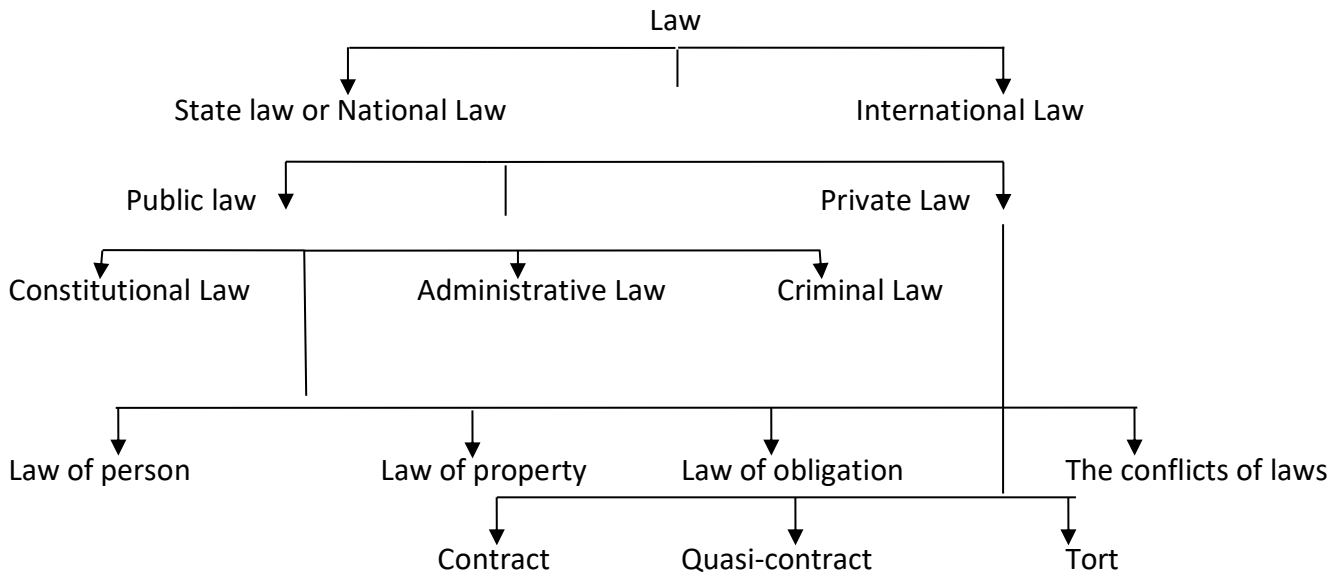
Kinds of law

Law (in its comprehensive sense) is generally of the following kinds:-

1. **Imperative law** - This law means 'a precept or rule of action imposed upon men by some authority which enforces obedience to it'. The enforcement may be secured by physical force or by some other means. In an organised society law tends to become imperative. According to many jurists, only imperative law the proper subject-matter of jurisprudence. They say that the law of a nation or 'civil law' is the command of the sovereign. Thus it is imperative law because there is sanction behind it by the state. The sanction is coercion or compulsion.
2. **Physical or scientific law -** This kind of law signifies those uniformities and regularities which are observable in nature as the laws of light and heat. It includes also those actions of human beings which are uniform such as sleep.
3. **Natural law** - It has various other names such as the 'moral law', 'Divine law', 'law of God', 'universal or eternal law' and 'law of reason' etc. It signifies the principles of natural right and wrong, in other words, the ideal conception of justice. It has often been considered to be different from the positive law or positive justice (the) concept of right, wrong and justice in actual practice.) The idea of natural law and justice is based on moral or religious grounds. Generally, it presents a picture of ideal law or what the law ought to be. A number of 'natural law' principles have been incorporated in the constitutions of various nations and are applied in the administration of justice. Natural law has given a great support to international law and gives it a solid ground to stand upon.
4. **Conventional law –**It signifies those rules or set of rules which are the outcome of an agreement between persons or groups of persons. They agree to observe these rules in the regulation of their conduct towards each other. This agreement is law for the parties to it. The rules of voluntary societies are the examples of such law. Conventional law in some cases is enforced by the state. When it is enforced by the state it becomes a part of the 'civil law'. But in the sense in which we are using it here, it is separate and distinct kind of law different from the civil law. "International law" is a conventional law because it consists of those rules and principles to which states have agreed upon expressly or impliedly and their conduct and relations with each other are governed and regulated by it.
5. **Customary law -** It signifies those rules and principles which have been observed in a particular community in actual practice for a long time To them who observe these rules they are law. They come into existence due to a number of reasons. When some kind of action gets general approval and is generally observed for a long time it becomes a custom. Sometimes they come into being on the ground of expediency. Other reasons for their coming into existence are imitation, convenience etc. When they are recognised by the state they become a part of the 'civil law'.

6. **Technical law-**This law means those rules which are necessary for the attainment of certain ends such as the laws of poetical composition or the laws of health etc. There are certain rules the observance of which is necessary for the composition of poetry. Similarly, there is a set of rules which will have to be followed if one wants health. These rules are sometimes called law and, therefore, they have been put under a separate class.
7. **International law-** By International law we mean the aggregate of the rules by which the states are governed in their conduct towards and relation with each other. The recognition of this kind of law started many centuries ago. In modern times, International law is a very important branch of law. There have been jurists even in the present century who argued that International law is not law but its rapid growth and the important role that the International law plays in modern times, have left this point no longer in controversy and now it is considered to be a very important branch of law. Starke defines International law as 'that body of law which is composed for its greater part of the principles and rules of conduct which States feel themselves bound to observe, and therefore, do commonly observe, in their relations with other state and includes also:
   (a) The rules of law relating to the functioning of International institutions or organisations, their relations with each other, and their relations with State and individuals, and
   (b) Certain rules of law relating to individuals and non-State entities so far as the rights or duties of such individuals and non-State entities are the concern of the International community. International law is generally divided into two parts. One part consists of those rules which are uniform and universal (they apply to all the nations equally) in their application. The other part consists of those rules which are operative only between two or more nations due to their having agreed them.
8. **Civil law-** By civil law is meant the law of the land or municipal law. It is enforced by the courts of the state. In jurisprudence the word 'law' is used to mean mainly this kind of law. Salmond says that "this is law in the strictest and original sense of the term, all other applications of the term being derived from this by analogical extension". He takes this law as the subject-matter of his book on jurisprudence. It is submitted that this is a very narrow meaning of the term.

Classification of Law



Sources of Law

The major sources of law are -

- Custom Statutory Interpretation
- Legislation Codification
- Precedents

Other than this

- **Morals and equity Opinions of expert**
  1. **Custom**

Origins of custom

Historical jurists (of Germany) say that it originate from the common consciousness of the people. One view is that they come into existence due to necessity or convenience. Any particular conduct, initiated by a group of people for a long time, becomes a custom.

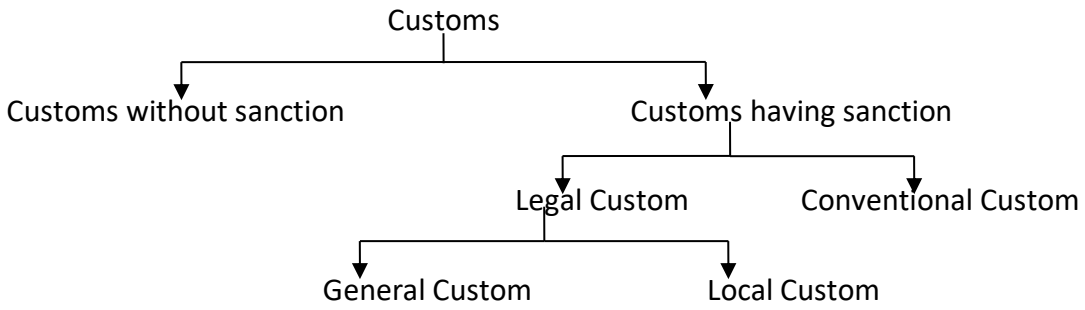
Salmond observes that 'custom is to society what law is to the State'. Each is the expression and realization and the measure of the society's insight. The principles commend themselves to the community Custom embodies them, as acknowledged and approved not by the power of the state but by the public opinion of the society at large'.

Reason for the Recognition of Custom

Salmond has given 2 reasons for it

1. Custom is frequently the embodiment of those principles which have commended themselves to the national conscience as principle of justice and public utility.
2. The existence of an established usage is the basics of a rational expectation of its continuance in the future.

Classification of Customs



Customs without sanction - These customs are non-obligatory. They are observed due to pressure of the public opinion. **Austinian** term for these customs is 'positive morality'.

Customs having sanction -These customs are enforced by the state.

Legal Custom - These customs operate as a binding rule of law. They have been replaced by the courts and have become a part of the law of the land. They are enforced by the courts.

General Custom - These customs prevail throughout the territory of the state. Though by the common use of term 'custom' is meant the local custom, in law, generally, the customs which are treated to be the part of the land are general legal customs.

Local Custom - Those customs which apply only to a defined locality, that is, to a district, or a town. But they do not imply geographical locality only. It also includes custom that certain sects or families take with them wherever they go**.** In India local customs may be divided into (1) Geographical local (2) Personal local custom.

Conventional Customs: These customs which govern the parties to an agreement. These customs are binding "not due to any legal authority independently possessed by them, but because it has been expressly or impliedly incorporated in a contract between the parties to it."

The following are the requirements of a valid custom -

1. Immemorial Antiquity: The local custom should be long standing or of a fixed period which can be determined. Immemorial means beyond the memory of any living person. Hence, the custom must have been observed over a period, beyond the memory of any living person, i.e., for over 100 years.
2. Continuity: The custom must have been enjoyed continuously. If no living man can contradict the custom setup, it must be presumed to be valid.
3. Enjoyment as of right: The custom must have been enjoyed as of right. If the custom has only been mentioned or followed by force or by stealth or with license it can have no claim to stand as a right. It must have been followed openly.
4. Certainty: The custom must be certain, clear and definite. That which is vague or not impressive will fail.
5. Reasonability: The custom must be reasonable. This is the most complex and difficult of the requirements of a valid custom. What is reasonable or not is to be decided by the court in accordance with the prevailing notions of natural justice and public morality. Custom must not be either immoral or contrary to public utility.
6. Conformity with the general law: A local custom will not be admitted if it conflicts with the fundamental principles of the law of the land.
7. Conformity with statute law: The local custom must not conflict with any statute or any rule there under.
8. Compatibility with other customs**:** It must not be incompatible with other customs within the same locality. The court cannot sanction two hostile rules or customs.

2. Legislation -

Legislation is a superior source: over Precedent. Legislation is the main source of law. It consists of the declaration of legal rules by a competent authority like the Parliament or the other legislative bodies. It is an enunciation of principles having the force of law. The courts recognize these as law. Legislation also called Statute Law has become the standard form of law. The earlier forms that is precedent, custom based on religious faith or practice or revelations of men have lost much of their efficacy. The result is that legislation is the most powerful and the latest instrument in legal growth. Advantages or virtues of Legislation Abrogative and reformative powers: The first virtue is its abrogative power. It can abolish an existing law or make a new law. But, a precedent has constitutive efficacy; it is capable of producing very good law. But its operation is irreversible. Once it is stated it stands but legislation can bring about reforms. Hence, legislation has destructive and reformative power.

Efficiency - The duty of the judiciary is to interpret the law and apply it. The legislature is superior as its duty is to make the law; administrators operate the law. Thus, there is a division in the labour and hence much efficiency.

Prospective Operation - Statute declares the law before the commission of any act to which it applies, thus it fulfills the principles of Natural Justice. Law will be known before it is enforced. A judicial precedent creates and declares in the very act of applying and enforcing it (Example: Ryland V. Fletcher).

Law of future - Legislation can make Acts to meet circumstances not yet arisen. Precedent requires definite circumstances before the court. Legislation can fill up any vacancy i.e., settle any doubt that may come to the attention of the legislature. But, a bad precedent remains until another case comes up before the court for solving the doubt or for overruling it.

Superiority in form: The legislature produces the law in the Statute form i.e. as Acts which are of standard form. Statute law is*brief, clear and easily know-able and accessible. But, case law is hidden deep and buried from sight in the huge records of litigation & Reports. Hence, case law is like gold that is in the gold mine, hidden in the rocks. But, Statute law is like a coin ready for immediate use. Salmond appreciates the perfection of the form of Statute Law. Statute Law is authoritative, and it is the duty of the Courts in interpreting the words and their true meanings. But, in applying case law, the courts are dealing with the ideas and principles. Statute law is rigid, but case law has the merit that it appeals to reason and justice and hence flexible and adaptation is possible.

Only when the words in the Statute are not clear, that the courts will have to interpret with reference in social purpose.

3. **Precedent -**

   For the purpose of jurisprudence the sources may be divided into 'legal and historical sources. The legal sources are authoritative, have a right in the courts and have helped the course of legal developments. Example the statutes, precedents writings of eminent jurists like Bentham, Austin etc. The historical sources are not authoritative, cannot have claim as a right in the courts. Precedent therefore is a legal source. The distinguishing characteristic feature of English law is the judicial precedent. The unwritten law or the common law is purely a product of decided cases, from the 13th Century. English judges have contributed considerably for the development of common law. A judicial precedent speaks in England with authority. It is not merely evidence of the law but a source of it, and the courts are bound to follow the law that is so established. Precedent means 'anything said or done furnishing a rule for subsequent conduct'. Judicial decisions speak of truth and hence are followed in later cases. If so followed, such a decision becomes a precedent.

   The doctrine of precedent has two meanings. In the first place in a loose meaning, it means that precedents are reported, may be cited and will probably be followed by the courts. In the second i.e. in the strict sense it means that precedents not only have great authority but in certain circumstances they must be followed. Sometimes a precedent may be unsatisfactory. The rule so laid down may be reversed by the Parliament in making the law. Further, the judges have power to reverse their own decisions and correct the mistakes.

Broadly speaking precedents are

1. **Authoritative precedent -**
   The decisions given by the superior courts are the authoritative precedents which must be followed. Hence the decisions of the House of Lords are authoritative in England. In India the decisions of the Supreme Court are binding on all the courts and authorities within the territory of India. (Art.141 Constitution of India). A High Court decision is binding on the lower courts under its jurisdiction in that State.
2. **Persuasive precedent -**
   Persuasive precedents in England are Foreign decisions Example Decisions of U.S. Supreme Court, the decision of other superior courts in the commonwealth countries, Privy council decisions and Judicial dicta (Means observation stated by the way). In. India, so far as the Supreme Court is concerned, the decisions of the foreign courts, of the Privy Council and of the U.S. Supreme Courts etc. are persuasive in character. To the High Courts in India, decisions of the Privy Council, U.S. Supreme Court and decisions of other foreign courts are persuasive. An authoritative precedent is one which judges must follow whether they approve of it or not. A persuasive precedent is one which the judges are under no obligation to follow, but must take it into consideration and attach such weight as it deserves i.e. it must by itself merit consideration in the eyes of the judges. Hence, it is true to say that authoritative precedents are legal sources of law but persuasive precedents are historical sources.
   When a precedent is referred to in a court, it is accepted or disregarded. But if it is authoritative, it is binding and should be accepted. If it is persuasive the court may accept or disregard it. Disregarding may be of two kinds such as the court may overrule it or it may refuse to follow it. Such an overruled precedent is null and void. The courts of equal authority have no power to overrule each other's decisions. If two High Courts have given conflicting opinions a legal anomaly is created. This can be resolved only by the Supreme Court.
3. **Ratio decidendi -**
   What the Court decides generally, is the ratio decidendi or rule of law in a case before it. What it decides between the parties to the case, is binding on the parties. The parties under Res Judicata are barred from reopening the case after the final Court of authority makes the decision between them. If A sues B for negligent driving, parties A and B are bound by the decision of the final court. There are circumstances, when the judgment will be against the entire world i.e., in rem. That is it is binding on all third parties. For example, a nullity declaration of a marriage by the Court, determines the status of the parties, but the decision is binding on all.
   The Ratio decidendi or rule of law is produced by the Court in its process of application by the judges. It should have been applied to the parties in respect of live issues, argued on both sides. In the course of his judgment, the judge may refer to hypothetical situations, or may give his general reasoning. These are therefore not binding. They are called obiter dicta (observations made by the way) and hence, have no binding force.
4. **Obiter Dicta** (“what is said by the way") -
   This is opposed to ratio decidendi. It refers to hypothetical situations or reasoning or circumstances referred to by the judge in his decision. These are generally the observations, made by the judge. The significance is that they are not binding. The Courts will not follow these observations. The universal rule is that the obiter dicta are not binding on the later Courts.

4. **Statutory Interpretation -**

The law which comes into being through legislation is called enacted or statute law. It is laid down in the form of authoritative formulae on the paper. It is for the courts to apply these formulaes to specific cases. The court has to ascertain the meaning of the letters and expressions of the enactment for its application. This process of ascertaining the meaning of letters and expressions by the court is called 'interpretation'. It is not a mechanical process but is dynamic and creative one.

Interpretation is mainly of two kinds

1. Literal 2. Liberal

1. **Literal interpretation -** Also known as 'grammatical interpretation'. The principle of this kind of interpretation is that the judge should not go beyond the letters of the law (litera legis). The whole task before the court is to gather the intention of the legislature and this intention should be gathered only from the words they have used. When the words of the statute are clear, they must be given effect to. The judge should not add anything to it on the ground that the true sentential legis is not completely or correctly expressed in the words.

   The literal interpretation confines itself to the words of law. If the words are clear, the judges do not go to determine the idea behind them with the help of parliamentary debates, reports of the commission (if one was appointed), policy of the statute, or any other extraneous source.

Defect in Literal Interpretation

(i) A word cannot be properly understood without putting in the context in which it was used.

(ii) The 'words are but poor substitutes of our thought', therefore, a strict adherence to this principle may cause injustice, and sometimes, it may give results which are quite contrary to the general intention of the statute and common sense.

- **Liberal Interpretation**

  This rule says that the judges should go beyond the letter of the statute in order to ascertain the true intention (of the statute) or the ratio legis. According to this rule, the historical facts, the needs of the society and the necessity of the statute, etc., should also be taken into consideration in interpreting a statute. The application of this rule, to a limited extent, may give good results, but undue extension of it may lead to absurdity.

5. **Codification**

   According to oxford dictionary, 'code' means 'a systematic collection of statutes, body of laws, so arranged as to avoid inconsistency and overlapping'. It means promulgation, completion, collection and systematization of the body of law in a coherent for by an authority in a state competent to do so.

Codification in India

India is an undeveloped and economically backward country and is facing numerous problems. For the national unity and integrations, which are very grave problems of the country, the uniformity of the laws is very necessary, which can be achieved only through codification. Perhaps it was keeping this objective in view that Article 44 of the Indian constitution was framed and was placed in Part IV of the Indian Constitution, that is, 'Directive Principles of State Policy'. It run as -

'The state shall endeavour to secure for the citizens a uniform civil code throughout the territory of India.'

Thus, in India, though much has been done towards codification, there still remains more to be done. Many of the codes, such as Indian penal code, are more than a century old and have become outdated

Codes may be classified in following kinds -

1. **Creative -** These are the code which makes a law for the first time without any reference to any other law. It is law-making by legislation. The Indian Penal Code is a code of this kind.
2. **Consolidating -** These are the code which consolidates the whole law-statutory, customary and precedent, on a particular subject and declare it. This is done for simplifying and systematizing the law. The Indian Transfer of Property Act, 1882 also belong to this class.
3. **Creative & Consolidating:** These are the code which makes law as well as consolidate the existing law on a particular subject fall under this class. The recent Hindu Legislation is an example of this kind.

2 CHAPTER SCHOOLS OF JURISPRUDENCE

In order to understand jurisprudence, as Salmond says, "A study of all the schools is essential because the three schools are closely related and interwoven." Here are the different types of jurisprudence schools -

1. **Analytical school**
2. **Historical school**
3. **Sociological school**
4. **Realistic school**
5. **Pure theory of law**
6. **Philosophical school**
7. **School of Natural Law**

1. **School of Natural Law**

   Natural law derived from Greek thought. Natural law derives its validity from nature. Nature never discriminates. For example, if five people are in the ground in the light of day, the sun will shed its light on everyone equally without discriminating on the basis of religion, race, caste, sex or location. Birth, etc. Natural law is a method of researching humanity. The theme of this school is therefore based on fair and reasonable, uniformity and universality. Law without morality cannot exist. This way he establishes the check and the balance. The rule of law and due process rest on this school. In India, E.P. Royappa (1974) and Maneka Gandhi case (1978) are based on the philosophy of this school. Human rights flow from this thought.

Natural Law School has originated from the following periods

Ancient Period

Heraclitus, Socrates,Plato, Aristotle,Cicero are the supporters of Natural Law School. According to Heraclitus reason is one of the essential elements of law. He established the base of natural law. Socrates states that like natural physical law, there is a natural moral law. Person must obey the command of the state, if he does not like it he should go to another State. But the command of the state must be followed. Plato introduced the concept of ideal State which he termed as Republic. According to him only intelligent and worthy people must be a king. Aristotle explains Natural law is a reason free from all passions. Cicero observed that true law is right reason in agreement with nature, it is universally applicable, unchanging and everlasting.

Medieval Period

This period was dominated by the Church. It tried to establish the superiority of the Church. They used natural law theory to propagate Christianity. St. Augustine provided religious colour to law. During the dark period, he explained law in a new way. He treated nature and God as a source of law. St. Thomas Aquinasclassified law as Law of God, Natural law which revealed through reason, DivineLaw, Human law which we now called positive law.

Renaissance Period

Hugo Grotius believed that Natural law was not merely based on reason but on self-supporting reason of man. He propagated equality of States and their freedom to regulate internal as well as external relations.

Hobbes introduced Social Contract theory. Hobbes defines contract as "the mutual transferring of rights." In the state of nature, everyone has the right to everything - there are no limits to the right of natural liberty. The social contract is the agreement by which individuals mutually transfer their natural right.

Modern Period

L.L.Fuller explains that Natural law theory denies rigid separation of law as it is and as it ought to be. Law contains two types of morality

1. External morality of law
2. Internal Morality of Law

He distinguishes morality as it is (Morality of Duty) from morality as it ought to be (Morality of aspiration).He further subdivided moralduty into affirmative duty and negative duty(forbearance). Is' and ought' both are inseparable. According to him, morality of duty includes basic requirements of social living whereas morality of aspiration means a good life of excellence.

2. **Analytical School** (Imperative, positive, teleological, English or Austinian School)

   The analytical school considers most important aspect of law to be its relation to state. It takes the law as given by the state, whose authority is unquestionable.

   The jurists of this school are concerned with analysis of first principles of the law as they exist in the legal system. This school has made a strict distinction between positive law and ideal law and has analysed the concept of civil law and established its relationship with other forms of law.

   Austin is considered to be the father of analytical or positivist thought. However, Jeremy Bentham whose many works have lately come to light appears to be the founder of this approach. *Jeremy Bentham* (1448-1832) heralded a new era in the history of legal thought. He laid the foundation of positivism in the modern sense of the term.

Bentham's Definition of Law

According to him "A law may be defined as an assemblage of signs declarative of a volition conceived or adopted by the sovereign in a state, concerning the conduct to be observed in a certain case by a certain person or class of persons, who in the case in question are or are supposed to be subject to his power such volition trusting for its accomplishment to the expection of certain events which it is intended such declaration should upon occasion be a means of bringing to pass, and the prospect of which it is intended should act as a motive upon those whose conduct is in question."

Bentham's legal philosophy is called 'utilitarian individualism'. He was an individualist. He said that the function of law is to emancipate the individual from the bondage and restraint upon his freedom.

Once the individual was made free, he himself shall be looking after his welfare. The purpose of law is to bring pleasure and avoid pain. Pleasure and pain are the ultimate standards on which a law should be judged. All considerations of justice and morality disappear from this approach.