

Course Name- B.A.LL.B 6th sem

Subject- Jurisprudence

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Concept- Legislation as a source of Law

Introduction

“Legis” means law and “latum” means making. Legislation means lawmaking. It also refers to the law made by the legislature. It may also be defined as the promulgation of legal rules by an authority which has the power to do so. It is the formal declaration of the legal rules by the legislative organ of the body politic.

In a wider sense, it includes all the sources of law, any act done with the effect of adding to or altering the law. When a judge establishes a new principle in a judicial decision, it is possible to say that he has exercised legislative power and it is also legislation. It frames new laws, amends the old laws and cancels existing laws in all countries.

According to Salmond: ‘Legislation is that source of law which consists in the declaration of legal rules by a competent authority.’

According to Austin: ‘There can be no law without a legislative act.’

According to Gray: ‘Legislation means the formal utterance of the legislative organs of the society.’

Analytical Positivist– A typical law is a statute and legislation is the normal source of lawmaking. The majority of exponents of this school do not approve that the courts also can formulate law. They do not admit the claim of custom as a source of law. Thus, they regard only legislation as the source of law.

Historical School of Thought– Legislation is the least creative of the sources of law. The legislative purpose of the legislation is to give better form and more effective the custom which is spontaneously developed by the people. They do not regard legislation as a source of law.

The legislation is generally used in a more limited sense.

It denotes the laying down of legal rules by a sovereign and subordinate legislature. An important distinction between lawmaking by legislature and lawmaking by a court must be clearly understood. When the legislature makes a law, it does not have any actual disputes before it and it lays down general rules for the future, without reference to any actual dispute.

Courts, on the other hand, are engaged in the settlement of disputes and any law making that they may do is only with reference to actual disputes before them and only in so far as is necessary for their solution. Thus we may say that judicial lawmaking is incidental to the solving of legal disputes; while lawmaking is the main function of the legislature.

A legislation is most accurately termed as the enacted law, all other forms being distinguished as un-enacted. However, in a jurisprudential sense, Legislation includes only an expression of the will of the legislature directed to the making of the rules of law.

“Case law is gold in the mine-a few grains of the precious metal to the tons of useless matter-while statute law is a coin of the realm ready for immediate use.” – Salmond

Legislation or “Statutory law” is a law or the process of making a law which is “enacted” by a legislature while the legislature is the body or chamber of people who make, amend or repeal laws. An item or piece of legislation is known as a bill before it becomes a law. The “paramount consideration “in enacting laws in a ‘Welfare State’ should be “the best interests of the people, “particularly women and children, in which a standard is echoed throughout the legal instruments on women and children’s rights, Scheduled Castes, Scheduled Tribes and other backward classes.

Purpose of Legislation

Legislation can have many purposes, for example, to regulate, to authorize, to prescribe, to provide, to sanction, to grant, to declare or to restrict and repeal.

Classification

Legislation may be broadly classified as Supreme, subordinate legislation. It is Supreme when the sovereign authority itself make the law, as the law made by Indian Parliament. It is subordinate when the sovereign power is delegated to any other authority to make law, as the power delegated to a corporation to make law.

Supreme Legislation

The Supreme legislation is by the sovereign power of the state. Therefore, any other authority within the state can, in no way, control or check it. It is considered not only supreme but legally omnipotent. A classical exposition of this principle can be found in Dicey’s book, ‘The Law of the Constitution’. There is no legal limitation on its power. Indian parliament is also supreme. Though there are certain constitutional restrictions upon its power, it is not subject to any other legislative authority within the state. It cannot be repealed, annulled or controlled by any other legislative authority.

Subordinate Legislation

Subordinate legislation is legislation by any other authority than the Supreme authority in the state. It is made under the powers delegated by the Supreme authority. Such legislation owes its existence, validity, and continuance to the Supreme authority. It can be repealed by and must give way to sovereign legislation. Subordinate legislation is subject to parliamentary control. Five different forms of subordinate legislation can be identified. These are:

Colonial Legislation

The countries which are not independent, and are under the control of some other state have no Supreme power to make law. Such countries are of various classes: as colonies, dominions, protected or trust territories etc. The laws made by them are subject to the Supreme legislation of the state under whose control they are. Thus it is subordinate legislation. Britain has had many colonies and dominions. The laws made by them for the self-government are subject to alteration, repeal or supersession by the legislation of the British Parliament. As the colonies are fast achieving independence, and almost all the British dominions have uncontrolled power for legislation, therefore in the near future, we may not have this class of subordinate legislation.

Executive Legislation

When legislative powers are delegated to the executive, it is called executive legislation. Though the important function of the executive is to implement the laws and carry on the administration, it is always entrusted with some subordinate legislation powers also. Today, practically every law enacted by the legislature contains delegation clauses conferring law-making powers on the executive to supplement the statutory provisions.

Judicial Legislation

Powers are given to the judicature to make rules for the regulation of its procedure. In India, the Supreme Court and the high court both have the power to make rules for their respective procedure and administration.

Municipal Legislation

Municipal bodies are given powers to make bye-laws concerning their local matters. Bye-law made by a local body operates within its respective locality. In India, such municipal bodies are Municipal corporations, Municipal Boards, Zila Parishads, etc. There is a move for granting very wide powers to Panchayats. Thus, there is a possibility of expansion of this kind of subordinate legislation in our country.

Autonomous Legislation

When the Supreme authority confers powers upon a group of individuals to legislate on the matters entrusted to them as a group, the law made by the latter is called the autonomic law and the body is known as an autonomous body. A railway is an autonomous body. It makes bye-laws for the regulation of its administration, etc. A university is also an autonomous body.

Delegated Legislation

Delegated legislation is a kind of subordinate legislation. Generally the 'delegation legislation' means the law made by the executive under the powers delegated to it by the Supreme legislative authority. It comes in the form of orders, by-laws etc. The Committee on Minister's power said that the term delegated legislation has two meanings-

1. Firstly, it means the exercise of power that is delegated to the executive to make rules.
2. Secondly, it means the output the output or the rules or regulations etc. made under the power so given.

Sub-Delegation is also a case in Indian Legal system. The power to make subordinate legislation is derived from existing enabling act. It is fundamental that the delegate on whom such power is conferred has to act within the limits of the enabling act. Its purpose is to supplant and not to supplement the law. Its main justification is that sometimes legislature does not foresee the difficulties that will come while enacting the law.

Therefore, Delegated Legislation fills in those gaps which are not seen while the formulation of the enabling act. Delegated Legislation gives flexibility to law and there is ample scope for adjustment in the light of experiences gained during the working of legislation.