Judging Skills: Art, Craft and Science of drafting Judgements

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Conceptual thinker

- H.L.A HART and DWORKIN Debate on judicial adjudication
- Hart had said that judges must legislate when the rules do not determine their decision in a particular case
- Dworkin ; judges work on set of principles
- Judge as a conceptual thinker
- He need to have wide knowledge of law and general reading

- Eternal questions
- what is law?
- Who makes law?
- What is the essence of law?
- What is justice?

- Law` on empire Ronald dworkin
- Elmers case
- California divorce law
- Legislators have respect to traditional principles of justice unless expressed contrarily
- Elmers case – premise – no one should benefit from his own wrong
- Rule of law – norm assigned by the court

- Dworkin Justice in Robes – discuss constraints of legal reasoning
- Hard cases
- Filling the gap
- It instructs judges to seek an interpretive equilibrium between the legal structure as a whole and the general principles that are best understood as justifying the structure

- Basic structure theory – constitution
- Dissenting judgment of Justice H.R Khanna in habeas corpus case
- Privacy case judgment
- Principles of good conscience and equity
- Inherent of power to do justice

- Development of common law
- Body of customary law based on judicial decision
- Holmes says life of law is experience and not logic
- Development of principles of liability under common law
- Domestic and wild animal- owner`s liability
- Torts ,trespass and negligence
- Origin of mercantile law- custom and usage
- The rise of merchant guild – determining their code of conduct

- Austin defined law as command of sovereign , threat and sanction, is the foundation
- No botheration for ends of law
- Salmond define law for promotion of justice within frame work of law
- Justice is the aim of law according to salmond
- Elmers case can be distinguished based on Austin s view and Salmond view

- Greek philosphers treated justice as individual virtue
- Plato regarded justice as a supreme virtue one required to profess for maintaining social order
- Aristotle Distributive justice .. feature equality according to merits…
- Apportionment of liability in Tort
- principles of proportionality
- Corrective justice
- Golf cart case (casey Martin) US SC
- question Riding cart would fundamentally alter the nature of the game?

- According to Kelsen there can not be a formal science of justice since even if a theory of justice were logically constructed, it would be based on emotive premises. It is not possible to identify in a scientific way the supreme values that a just order of social life should attempt to provide. It therefore, appears that the concept of justice is not amenable to rational determination.(see kelson pure theory of law)

- Utilitarianism: Bentham and Mill
- The theory believes that man is social by nature and is always motivated in life chiefly by the desire to obtain happiness and avoid pain and that the happiness of each individual involves relations with other individuals which necessitates state regulation of mutual relations of men by legislation.

- Utilitarian philosophy is thus closely associated with practical ethics and practical politics. The object of legislation of the state is to promote and secure the greatest happiness of the greatest number.
- Based on hedonist principles , values sensibilities and feelings

- Rawls theory of justice
- Foundational idea that justice has to be seen in terms of demand of fairness
- Rawls sees primary goods including rights ,liberties and opportunities, income ,wealth and social base of self respect
- advocates idea of distributive justice and justice as a virtue of social institution
- Truth and justice are uncompromising
- Contraction theory and constitutional democracy ....

- Nozick's writings develop a theory of justice which reinforces a radical free market approach and fits a so-called minimal or night watchman state. It is no surprise that he concludes: "The minimal state is the most extensive state than can be justified. Any state more extensive violates peoples rights. Nozick develops an entitlement theory of justice, whereby economic goods arise in society already encumbered with rightful claims to their ownership.

- Paradigm shift in judicial process in India from colonial period to Globalization and from globalization to technology
- Justice dispensation during colonial period
- Post constitution
- Advent of globalization
- Era of technology
- Super national norms creating economic order
- IT Act, Arbitration Act , IP laws , sales of goods law
- Dimension from closed door justice to political and social justice , marching to economic justice
- Legal system and judicial system

PROCESS OF LEGAL REASONING

- Analogical reasoning
- Judges have to react primarily to facts
- Lawyers tend to present the case depending up on the needs of the client
- Deductive reasoning
- Syllogism – all human are mortal- Socrates is an human- therefore Socrates is mortal
- Inductive reasoning. Conclusion need not necessarily be true

Developing skill

- Self confidence
- Perseverance
- Believe in self
- Self affirmation – I can and I will
- Eschew false pride
- Motivation – I want to be successul
- Feed backs

- Neutrality and impartiality
- Neutrality means absence of all preconceptions and personal preference – blank slate- empty mind
- Impartiality does not require judge to rise above all values- judges also likely to be influenced by personal values
- It is difficult for judge to be neutral
- Judges must strive to become neutral
- Requires to cultivate a mind to imagine all values in different perspective

- Six C`s
- Clarity ,completeness, conciseness, confidence, correctness and courtesy
- Never lose your temper
- You should maintain eye contact
- Do not hesitate ask questions to counsel for clarification

Fundamental legal conceptions as applied in judicial reasoning and other legal essays by Hohfeld

Jural opposites

- Right –no right
- Privilege – duty
- Power – disability
- Immunity - liability

Jural correlatives

- Right –duty
- Privilege- no right
- Power –disability
- Immunity - disability

Art of judging

- Judging is an art
- Methodology is science
- Judges like artist think what they shall include and what shall not
- What shall I depict and what shall I emphasize
- Cardozo`s definition on judicial process what court do and should do and how judges reason and should reason
- Focus on Rule of law
- Broad enquiry on law and purpose of law
- Example specific performance – weighing bargaining power in contract-party autonomy

Science of drafting judgment

- In general
- Judgment must show application of mind
- Judge devoid reasons cannot be sustained
- Court must ensure miscarriage of justice is avoided
- Judgement must be lucid with clear cut finding
- Judgement is appreciated not in terms of sheer length but quality
- Judgement involves two things
- 1 The public act of judging and an act of communication
- 2 Reasons which the judge gives for the public act

- A judgment in civil matter
- Rules 4 and5 of order XX C.P.C Rule 31 of order 41 ofC.P.C
- Concise statement of material facts
- Issues for determination
- Decision of each of the issues with reasons for decision
- And find final decision

- Framing issue of facts
- Framing issue of law
- Mixed questions
- Final decision
- conclusion

Seven steps in clear judgment writing by hon`ble Justice Linda Dessaua Australia

- Step 1 start before beginning
- Step 2 Use the first page setting out the foundation and maps the course of the judgment
- Step 3 Deal with history and facts
- Step 4 set out the law
- Step 5 state the conclusion
- Step 6 choose an appropriate style , using plain language
- Step 7 edit the judgment

Plain language

- Judgement must be in plain language
- It must convey reasons and conclusion in a way ordinary person can understand
- Avoid Latin expressions if possible
- Avoid redundancy
- Use active voice rather than passive
- For example it was reported by the advocate commissioner suit property was lying at low level
- Active voice Advocate commissioner reported that....