CHAPTER 1

Jurisprudence, Nature and Meaning of Law

Contents

Learning Outcomes

After the completion of this chapter, the students will be able to:

- Describe the meaning, nature, essentials and objectives of law along with its multi-faced role
- Define Law and explain the meaning of jurisprudence
- State two rules that shows natural justice is firmly grounded in Articles 14 and 21 of the Constitution
- Write down two points each in favour of and against conviction in Speluncean Explorers Case
- Compare the five schools of law-Natural, Analytical, Historical, Sociological and Realist Schools of Law
- List the distinguishing features and sources of law for each school
- Discuss the need for law in society by assessing the function and purpose of law

I. Introduction

Justitia, a Roman goddess of justice, wore a blindfold and has been depicted with sword and scales. Representations of the Lady of Justice in the Western tradition occur in many places and at many times. Like Justitia, she too usually carries a sword and scales. Almost always draped in flowing robes and mature but not old, she symbolizes the fair and equal administration of law without corruption,avarice, prejudice, or favor.

Source www.commonlaw.com/Justice.html

The law and the legal system are very important in any civilization. In modern times, no one can imagine a society without law and a legal system. Law is not only important for an orderly social life but also essential for the very existence of mankind. Therefore, it is important for everyone to understand the meaning of law.

In layman's language, law can be described as 'a system of rules and regulations which a country or society recognizes as binding on its citizens, which the authorities may enforce, and violation of which attracts punitive action'. These laws are generally contained in the constitutions, legislations, judicial decisions etc.

Jurists and legal scholars have not arrived at a unanimous definition of law. The problem of defining law is not new as it goes back centuries.

Some jurists consider Law as a *'divinely ordered rule'* or as *'a reflection of divine reasons'*. Law has also been defined from philosophical, theological, historical, social and realistic angles.

It is because of these different approaches that different concepts of law and consequently various schools of law have emerged. Jurists hold different perceptions and understanding of what constitutes the law and legal systems.

II. Historical Perspective

Plato (left) is carrying a copy of his *Timeus*, and pointing upwards, which symbolizes his concern with the eternal and immutable forms. Aristotle (384 BC - 322 BC) (right) is carrying a copy of his *Nicomachean* Ethics, and keeping his hand down, which symbolizes his concern with the temporal and mutable world. It depicts different approaches towards law from ancient times.

Source : The Critical Thinker (TM), 'Plato vs. Aristotle: The Classic Philosophical Duel',http://thecriticalthinker. wordpress.com/2009/01/12/plato-vs-aristotle

The Case of the Speluncean Explorers

The Case of the Speluncean Explorers is a *fictitious case created by Lon Fuller in 1949 for the Harvard Law Review*. The case takes place in the equally fictitious 'Commonwealth of Newgarth' in the year 4300. Fuller's article offers five possible judicial responses. Each has a different viewpoint on whether the survivors should be charged for breach of law. Fuller's account has been called a 'classic in jurisprudence' and an example of mid-20th century legal theory.

Facts

Five cave explorers (spelunkers) are trapped inside a cave following a landslide, one of them being Roger Whetmore. They have limited food supplies and no source of food inside the cave. The rescue was difficult, time-consuming, and costly due to the remote location. Ten workmen were killed in the rescue. Approaching starvation, a radio contact is eventually established with the rescue team on the 20th day of the cave-in. The explorers learn that another 10 days would be required in order to free them. After consultation with medical experts, they were told that they are unlikely to survive another

10 days without food. The explorers inquire the doctors about their chances of surviving if they killed and ate one of their own.

The doctors hesitantly stated that they would. No one on the rescue team said yes when asked if they should hold a lottery to decide who to kill and eat. The radio is turned off, and later a lottery is held. The explorers were initially hesitant to use this desperate step, but after hearing the radio chats, they agreed.

Roger Whetmore proposed casting lots, using a pair of dice he happened to have with him. Roger Whetmore backed out of the deal before the dice were rolled, indicating he would wait another week. The other accused him of betraying their trust and continued to cast the dice.

The defendants invited Whetmore to announce any concerns to the fairness of the dice throw before throwing it on his behalf. He didn't raise an objection, and the throw went against him. Whetmore was put to death and devoured.

In the Case of the Speluncean Explorers, the person to be eaten was chosen by throwing a pair of dice.

Following their rescue and recovery, the survivors were charged with murder of Roger Whetmore. In the Commonwealth of Newgarth, the mandatory sentence for murder is death by hanging.

On the facts as found by the jury, the trial judge ruled that the defendants were guilty of murder and sentenced them to be hanged.

Post-trial, both the trial judge and the jury joined in a petition to the Chief Executive of Newgarth, to commute the death sentence of surviving explorers to six months' imprisonment. The Chief Executive waits for the Supreme Court's disposition of the petition of error before making a decision regarding clemency.

Jury involved in Judgement

- Chief Justice Truepenny
- Justice Foster
- Justice Tatting
- Justice Keen
- Justice Handy

In your opinion, should they be acquitted or convicted for murder?

Opinion of Chief Justice Truepenny

Verdict: Guilty

Chief Justice Truepenny holds that in this extraordinary case, the course followed by the jury and trial judge was not only 'fair and wise' but the only one open to them to be taken under the law. He believes that the statute is unambiguous and must be applied by the judiciary. The public opinion and sentiment has no sway over the word of the law.

Moreover, granting mercy falls within the scope of the executive and not the judiciary. The Chief Justice depends on the possibility of executive clemency to mitigate the word of law. He proposes that the Supreme Court petitions the Chief Executive for clemency. Thus, by relying on the executive, justice can be done without violating the letter or spirit of the law.

Thus, Truepenny CJ upholds the conviction but recommends clemency.

Opinion of Justice Foster

Verdict: Innocent

Natural Law

Justice Foster makes two main points in determining whether the convictions should be overturned or not. Firstly, the explorers were not in a 'state of civil society' but in a 'state of nature'. Consequently, the laws of Commonwealth of Newgarth do not apply but laws of nature applied to them. Within the scope of the laws of nature, it is acceptable to sacrifice one person if it means the others (many) can survive.

Secondly, the purpose of the statute should be considered if it is assumed that laws of Newgarth did apply to the facts of the case. Therefore, a 'purposive approach' must be taken to the statute. The judges can find an exception to the law just like the courts had done earlier with self defence. The main aim of criminal law is punishing the criminals, and by that punishment, deterring further offenders. In this case, punishing the offenders will not serve the purpose of deterrence.

It is not necessarily judicial activism, as the judges have a certain leeway in interpretation of the law especially in cases that are extraordinary in nature. The decision made by the judges in this case would not be going against the will of the legislature, but ensuring that the legislative will is effective. Justice Foster concludes that the conviction should be set aside.

Opinion of Justice Tatting

Verdict: Uncertain; Recuses

Justice Tatting is torn between empathy for the defendants and the disgust over the horrible act that they had to commit to survive. Finally, he finds that he is unable to reach a decision. He criticizes the view under natural law that prioritises freedom of contract to kill above the right to life in state of nature.

He also notes the difficulty of applying the purposive approach to the criminal statute which has multiple purposes, including retribution and rehabilitation. He finds that the self-defence exception could not be applied to the present case as it would raise many challenges. The doctrine that is taught in law schools is that 'The man who acts to repel an aggressive threat to his own life does not act wilfully, but in response to an impulse deeply ingrained in human nature'. In the case of the explorers, they not only acted wilfully but deliberated before killing Roger Whetmore.

The judge cites the case of Commonwealth v Valjean, in which starvation was held not to justify the theft of a loaf of bread, let alone homicide (killing of a person). In this case the defendant was charged for theft of a loaf of bread, and he pleaded starving condition as a defense. The court refused to accept it. Thus, raising a question- If hunger cannot justify the theft of food, then how can it justify killing and eating of a man? Justice Tatting rejects J Foster's reasoning but he cannot decide due to competing legal rationales and emotions.

Justice Tatting makes the unprecedented decision of withdrawing from the case.

Opinion of Justice Keen

Verdict: Guilty

Positivism

Justice Keen raises two questions that are not matters for the court: that of executive clemency and that of morality. Justice Keen stated that it is not for the judiciary to decide whether executive clemency

should be extended to the defendants.

The morality of the defendants' actions is not something that the courts should concern themselves with or judge, as this falls outside their scope and ambit and is in violation of the doctrine of separation of powers. The Chief Executive should be petitioned for clemency and the decision should be left up to him. Keen J states that the difficulties in deciding the case arise from a failure to separate the legal and moral aspects of the case.

Justice Keen maintains that he does not concern himself with questions of 'right' and 'wrong'. He agrees that the defendants have gone through extreme suffering, but that is his opinion as an individual and not a Judge.

Judges are not to apply their conceptions of morality, but to apply the 'law of the land'. In this case, the sole question before the court to decide is purely one of applying the legislation of Newgarth and determining whether the defendants willfully took the life of Roger Whetmore. Everything outside of that is outside their consideration.

He criticises his fellow judges because he believes that they are being influenced by their personal emotions and prioritizing that over the word of the law and he is determined to put personal views aside. He is averse to Justice Foster's purposive approach to statutory interpretation that would allow the court to justify a result it considers proper. He emphasizes that laws may have many possible purposes, with difficulties arising in divining the actual "purpose" of a piece of legislation.

The actions of the defendants clearly fall within the scope of the statutory provision. A hard decision is never a popular decision. Justice Keen affirms the conviction.

Opinion of Justice Handy

Verdict: Innocent

Legal Realism; Common Sense

Justice Handy holds the case to be one of application of practical wisdom. As per him, court should take account of public opinion and 'common sense'. For him, it is a simple decision. He is aware that a vast majority want the sentence to be mitigated or pardoned. He criticizes his fellow judges for hiding behind the technical wording of the law. He emphasizes the need for the courts to maintain public confidence, which requires them to follow 90% majority opinion. Government is 'a human affair' in which people 'are ruled well when their rulers understand the feelings and conceptions of the masses'. Judiciary is one branch of the government that is most likely to lose its contact with the common man. Justice Handy states that to preserve the harmony between the judiciary and public opinion, the defendants should be declared innocent. If these men are pardoned no one will think that the statute was stretched any more than our ancestors did when they created the excuse of self-defence. He is aware that his fellow judges will without doubt be troubled by the suggestion of taking into account the emotional public opinion.

Justice Handy taking a common-sense approach, concludes the defendants are innocent and states that the conviction should be set aside.

Verdict by the Court:

The Supreme Court, divided evenly, affirmed the conviction. Fuller provides no further details as to the outcome.

Both the trial judge and members of the jury petition the Chief Executive to commute the sentence of the surviving spelunkers from the death penalty to six months' imprisonment.

Activity

Activity 1: Write a paper in 500 words on *'Killing an innocent life to save one's own does not justify murder even if it's under extreme necessity of hunger' in light of the judgment in Rv Dudley and Stephens case.*

Activity 2: In the Plank of Carnedaes thought experiment, the scenario envisioned was the following-

- *There are two shipwrecked sailors, A and B. They both see a plank that can only support one of them and both of them swim towards it. Sailor A gets to the plank first. Sailor B, who is going to drown, pushes A off and away from the plank and thus, causes A to drown. Sailor B gets on the plank and is later saved by a rescue team.*
- Do you think Sailor B can be tried for murder because if B had to kill A in order to live, then it would arguably be in self-defence? Explain your reasoning in 500 words.

Activity 3: *Read the following case study from sinking of William Brown Ship-*

Trial of Alexander Holmes:

- Holmes knew that killing people was wrong, but he faced a dilemma. Holmes was a member of the crew onboard the ship The William Brown, which sailed from Liverpool to New York in early April 1842. During its Atlantic crossing, 'The William Brown' ran into trouble. The crew and half the passengers managed to escape to a lifeboat. Once there, tragedy struck again. The lifeboat was too laden with people and started to sink. Something had to be done.
- The captain made a decision. The crew would have to throw some passengers overboard, leaving them to perish in the icy waters, but raising the level of the boat. It was the only way anyone was going to get out alive. Holmes followed these orders and was complicit in the death of 14 people. But the remaining passengers were saved. Holmes and his fellow crew were their saviours. Without doing what they did, everyone would have died.

What is your opinion on this paradoxical case? Do you think the captain's decision was justified or not? Explain your reasoning within 500 words.

Activity 4: *Two movies, Souls at Sea and Seven Waves Away, based on similar theme can be shown to students.*

III. SCHOOLS OF LAW

The various schools of law are as follows:

Natural Law School

Natural law is generally explained as the 'law of nature, divine law, a law which is eternal and universal'. However, it has been given different meanings at points in time. For instance, it was considered to be associated with theology but at same it was also used for secular purposes. Natural law is believed to exist independent of human will.

It is considered natural in the sense that it is not created by man but is found through nature. Natural law theory varies in its aims and content but there is one central idea. This central idea states that, there is a higher law based on morality against which the moral or legal validity of human law can be measured. At the heart of the natural law theory is a belief that there are certain universal moral laws that human laws may not go against, without losing legal or moral force.

Natural law theory asserts that there is an essential connection between law and morality. The law is not simply what is enacted in statutes, and if legislation is not moral, then it is not law. St. Thomas Aquinas called law without moral content, as 'perversion of law'.

Exponents of natural law believe that law and morality are linked. This view is expressed by the maxim Lex iniusta non est lex (an unjust law is not a true law). It was also asserted that, if it is not a true law then there is no need to follow it. According to this view, the notion of law cannot be fully articulated without some reference to morality.

While it appears that the classical naturalists believed that the law necessarily includes all moral principles, this argument does not mean that the law is all about moral principles. This is only to substantiate that the legal norms that are promulgated by human beings are valid only if they are consistent with morality.

The principles of Natural law were rejected by Jurists such as Bentham and Austin in the 19th century because of its vague and ambiguous character. However, undue emphasis on morality as an element of law reduced the law into a command of a gunman and therefore, failed to satisfy the aspirations of the people. It was realised that over-emphasis on the historical approaches to law had led to the rise of fascism in Italy and Nazism in Germany.

The change in socio-political conditions of the world, like the rise of materialism after the First World War, shook the conscience of the western society. It compelled the twentieth century western legal thinkers to ponder over the existing legal regimes, so as to provide some alternatives based on value-oriented ideology and to check moral degradation of the society. These factors led to the revival of natural law theory in its modified form, which is different from its traditional form.

RULE OF LAW AND PRINCIPLES OF NATURAL JUSTICE

'Rule of Law' essentially means that law carries supremacy over all individuals,even those in the position of power. The notions of equality and non-arbitrariness are also important and non-detachable components of rule of law.

The rule of Law is one of the basic and general principles of the Constitution. It is characterized in the words of Max Weber as "legal domination as an idea of government of law rather than an idea of men''.

So, in essence rule of law means that everyone from the government to its officials, together with citizens should act according to the law.

The doctrine of rule of law has been described as supremacy of the law. This means that where there is rule of law no person can be said to be above the law, even the functions and actions of the executive organ of the state shall be within the ambit of law.

Rule of law imposes a duty on all citizens in a parliamentary democracy to obey the law and for such obedience the law itself must be just law and not arbitrary or oppressive law.

Principles of Natural Justice:

Natural Justice in simple terms means the minimum standards or principles which the administrative authorities should follow in deciding matters which have the civil consequences. In India, the principles of natural justice are firmly grounded in Article 14 & 21 of the Constitution. With the introduction of the concept of substantive and procedural due process in Article 21, fairness, which is included in the principles of natural justice, can be read into Article 21. The violation of the principles of natural justice results in arbitrariness; therefore, violation of natural justice is a violation of the equality clause of Article 14.

The principle of natural justice encompasses the following two rules: -

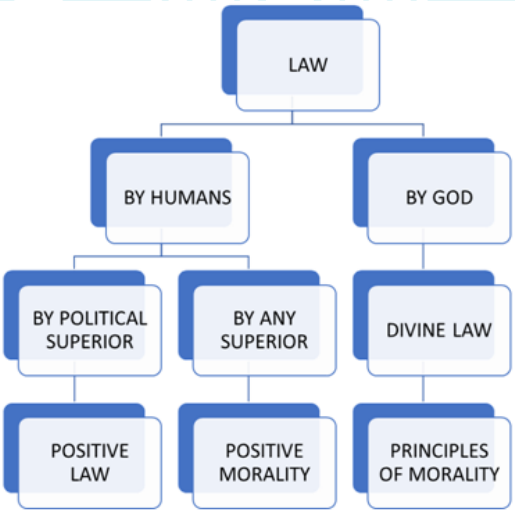
1. *Nemo judex in causa sua* - No one should be a judge in his own cause or, the rule against bias.
2. *Audi alteram partem* - Hear the other party or, the rule of fair hearing or, the rule that no one should be condemned unheard. Generally, the *'rule of law'* and *'due process of law'* are considered as new incarnations of natural justice in the twentieth century.

Analytical School

This school mainly aims to create a scientifically valid system of law, by analyzing legal concepts and ideas on the basis of empirical or scientific methods. It is also referred to, as the positive or imperative school of jurisprudence. It came as a reaction against the school of natural law. Most of the founders of this school like *Jeremy Bentham* (1748-1832), an English philosopher and jurist and John Austin (1790-1859), an English jurist and a student of Bentham (also popularly credited for founding the analytical school of jurisprudence) discarded and rejected natural law as 'vague and abstract ideas'.

The idea of positivism emphasizes the separation of law and morality. According to the exponents of this school, law is man-made, or enacted by the legislature. Natural law thinkers proposed that if a law is not moral, no one is under any duty to obey it, while positivists believe that a duly enacted law, until changed, remains law and should be so obeyed.

John Austin propounded that law is the command of the sovereign, backed by threat of punishment. In his work, *'The Province of Jurisprudence Determined'* published in 1832, Austin made an effort to explain the distinction between law and morality. According to him, natural law doctrines were responsible for blurring the distinction between law and morality. To get rid of this confusion he defined law as *'species of command of sovereign'*.



Austin held that command is an expression of desire by a political superior (e.g. king, Parliament etc.) to a political inferior (eg. subjects, citizens). The political inferior shall commit or omit an act, under an obligation to obey the command and if, the command is disobeyed, then, the political inferior is liable for punishment. Commands are prescribed modes of conduct by the 'sovereign'. He further viewed sovereign as a person or group of persons, to whom a society gives habitual obedience and who gives no such obedience to others.

This idea of command and punishment for disobeying the command is the most prominent and distinctive character of *'positive law'*. It differentiates positive law from the *'principles of morality'*, which consider law as *'law of God'*, and from 'positive morality', which considers law as man-made rules of conduct, such as customary rules and international law, etc. *'Principles of morality'* and

'*positive morality*' do not originate from a sovereign.

With passage of time, analytical school was rejected by jurist such as Dworkin, Fuller and Finnis because it gave too much emphasis on 'law as a command' and rejected morality and custom as a source of law. It failed to give morality its due importance.

Historical School

History is considered as the foundation of knowledge in the contemporary era. According to the followers of the historical school, laws are the creation of interactions between the local situation and conditions of the people. The historical school suggests that the law should conform to the local needs and feelings of the society. It started as a reaction against natural law and positivism to grow as a form of law that emphasized the irrational, racial and evolutionary character of law.

According to Friedman, a noted jurist, the main features of *Savigny's historical* school of jurisprudence can be summarized as follows:

- Law should be a reflection of the common spirit of the people and their custom.
- Law is not universal; it is particular like the language of a particular society.
- Law is not static; it has relationship with the development of the society.
- Law is not given by a political superior, but is found or given by the people.

Sir Henry James Sumner Maine (August 15, 1822 - February 3, 1888), a British jurist and legal historian, who pioneered the study of comparative law, primitive law and anthropological jurisprudence, is the main exponent the of British Historical School of Jurisprudence.

Even the historical approach is not free from criticism. There are many problems with this approach and it was rejected on the ground of its vague, parochial and unscientific explanation of the law.

Sociological School

Exponents of this school consider law as a social phenomenon. It visualizes law from the perceptions of people in the society. This approach emphasizes on balancing the conflicting interests in society. The sociological school considers law as a *tool for social change*. Followers of this school insist on the fact that law exists for the needs of the society. The philosophy of the sociological approach provides an opportunity to social and legal reformers. Roscoe Pound (1870-1964), an American jurist, was considered as the chief exponent of sociological jurisprudence in the United States.

According to Roscoe Pound, the main features of the sociological school can be summarized as follows:

- It highlights the purpose and function of law rather than its' content.
- Law is a social institution designed for social need.
- Law is a tool to balance conflicting interests of society.

Realist School

Realists consider laws made by judges as the real law. They give less importance to the traditional rules and concepts as real sources of law. Realism is contrary to idealism. It is a combination of analytical positivism and sociological jurisprudence. Realists do not give much importance to laws enacted by legislative bodies and consider the judge-made laws as the actual law.

Realists place great emphasis on the role of judges in the implementation, interpretation and

development of law. Realists believe that the social, economic and psychological background of a judge plays an important part in his decision-making.

A prominent American jurisprudential scholar *Karl Llewellyn* (1893-1962), who was associated with the school of legal realism, had identified some of the main features of the realist school which are as follows:

- Law is not static as it keeps on changing.
- Law is a means to a social end.
- Society changes faster than the law.
- Law cannot be certain. Decisions of the courts depend on many factors like the psychological, social and economic background of the judges.
- Case studies are important and the court room is a laboratory of law.

Conclusion

From the above description of the major approaches or schools of law, it may be interpreted that these approaches can neither be accepted in totality nor rejected completely. Every school has its own approach of understanding and explaining law. These theories are products of certain times and places, which are relevant only in a given setting.

Some part or parts of the above enlisted theories might have become outdated or unacceptable in the present day scenario, but all of those cannot be totally rejected.

The various schools of law are represented diagrammatically in the following manner.

Schools of Law

Natural Law School Jurists/ philosophers: Aristotle, plato, Thomas Aquinas, Hobbes Montesquieu, Rousseau etc.	Analytical School of Law Jurists/ philosophers: Bentham, Austin, Kelsan, HLA Hart etc.	Historical School of Law Jurists/ philosophers: Savigny, Henry Maine etc.	Sociological School of Law Jurists/ philosophers: Roscoe Pound, Duguit, Ihering, Ehrlich etc.	Realist School of Law (American & Scandinavian Realism) Jurists/ Philosophers: Jerome Frank, O W Holmes Alf Ross, Olivecrona, Hangerstorm etc.
Distinguishing features/source of Law: • Nature • Human Reasons • Divine Sources	Distinguishing features/source of Law: • Command of the sovereign • Morality ignored	Distinguishing features/source of Law: • Custom • Common spirit of the people	Distinguishing features/source of Law: • Purpose of law is to balance conflicting interests in the society	Distinguishing features/ source of Law: • Judicial decisions are the prime source of Law

IV. Function And Purpose of Law

After discussing and understanding the meaning of the term 'law', it is natural to ask the following questions: Why is there law in the society? What is the need for law? Can a society be governed smoothly without any kind of law? What is the function and purpose of law? etc.

Functions and purpose of law have been changing with time and place. They depend on the nature of the state. However, at present in a welfare and democratic state, there are several important functions of law.

It can be stated that law starts regulating the welfare and other aspects of human life, from the moment a child is conceived in her mother's womb. In fact, the State interacts with and protects its citizens throughout their lives, with the help of law.

Some of the major functions and purposes of law are listed below:

i. To deliver justice
ii. To provide equality and uniformity
iii. To maintain impartiality
iv. To maintain law and order
v. To maintain social control
vi. To resolve conflicts
vii. To bring orderly change through law and social reform

V. Exercises

Based on your understanding, answer the following questions:

Q-1 Provide one point of difference between the following-

1. Natural law school and Analytical school.
2. Sociological school and Realist school
3. Original and revived Natural Law School

Q-2 Answer the following questions briefly-

1. On what grounds historical approach to law was criticized?
2. What do you understand by the maxim "lex iniusta non est lex"?
3. State the two important rules of natural justice principles.
4. State two examples of the principles of natural Justice grounded in the Constitution of India.

Q-3 Answer the following questions in detail-

1. Explain the purpose of law.
2. Explain the viewpoint of analytical Law School. Also state the reasons for its rejection.

Q-4 Imacia, a country follows laws which appeal to the conscience of people only. They strongly believe in the principles of natural justice and due process of law. Which school of law do they follow? Explain the school.