RMM LAW COLLEGE SAHARSA

JURISPRUDENCE

Part I

Paper -1

Topic- Administration of Justice

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Natural Law

Natural Law started with the ancient Greeks and suggested that there was a higher power in control of human existence. Natural law deals with the combination of law and morals and is sourced from religion, culture, and reason. It is the means by which human beings can rationally guide themselves to their good and it is based on the structure of reality itself.

All human beings possess a basic knowledge of the principles of natural law. Naturalists believe 'an unjust law is not a law'. Doherty said 'One of the classical theories of natural law is that there are certain principles of human conduct, awaiting discovery by human reason, with which man-made laws must conform if it is to be valid' [2] Natural law is what 'ought' to be. Some natural law thinkers were Hobbes, Locke, Finnis, Fuller, and Aquinas. Aquinas set the pattern of modern natural law thinking. He divided law into four categories-eternal law, divine law, natural law, and human law.

The first precept of the natural law, according to Aquinas, is imperative to do good and avoid evil. 'Aquinas believed that human laws that do not correspond to the natural law are corruptions of law. These are human laws that lack the character of law that binds moral conscience' [3]. The term 'natural law' is ambiguous in that it refers to a type of moral theory as well as a legal theory.

Legal Positivism

Legal positivism has to do with the separation of laws and morals. 'Legal positivism is a philosophy of law that emphasizes the conventional nature of law that it is socially constructed. According to legal positivism, 'law is synonymous with positive norms, that is, norms made by the legislator or considered as common law or case law' [4] Some positivists were Bentham, Austin, Hart, and Kelsen and they all had different theories. Bentham- utility, Austin- commands, Hart- rules, Kelsen- norms. Legal positivism is of the view that morality is irrelevant to the identification of what is valid law.

Bentham referred to natural law is 'nonsense on stilts'. He said the test of good or evil in an act is its utility and that the 'greatest happiness of the greatest number' is the social test of what is moral conduct. Austin's particular theory of law is often called the 'command theory' The three basic points of Austin's theory were- the law is a command issued by the uncommanded commander, the commands are backed by threats and a sovereign is one who is habitually obeyed. Kelsen was of the view that the only law is positive law, which is the product of the will of the people, there are no natural laws, therefore.

Positivists believe that law is linked with sovereignty. 'According to Bentham and Austin, the law is a phenomenon of large societies with a sovereign: a determinate person or group who have supreme and absolute de facto power –they are obeyed by all or most others but do not themselves similarly obey anyone else' [5] Positivists say 'ought' is important but should be separate and one should avoid trying to derive an ought from an is. Natural lawyers believe that law is necessarily connected to morality, whereas legal positivists deny that. This is the major difference between positivist and natural law thinkers.

Natural law is the combination of laws and morals while legal positivism is the separation of laws and morals. Legal positivism declares that morality is irrelevant to the identification of what is valid law and that the criteria for the validity of a legal rule of law in a society is that it has the warrant of the sovereign and will be enforced by the sovereign and its agents. Raz, a positivist, stated that 'the validity of a law can never depend on its morality' [6]

Positive law or positivism is different from natural law because ' it calls for a certain measure of regularity of observance for without this feature, it would hardly be entitled to rank as law at all. A natural law, on the other hand, may still be held to be valid even if it is never or scarcely even observed. [7] Legal positivism will only work in a community where it is widely accepted. Hart suggested that the legal system is a 'closed' logical system where decisions may be deduced by logic. For natural lawyers- laws will be morally correct. For positivists- the moral aspect is a social standard for people to aspire to.

Another major difference between the principle of natural law and the principle of legal positivism is that natural law is not constructed by human beings while legal positivism is constructed by human beings through the state draws from lawmakers and the process of lawmaking. There are two aspects, therefore, that emphasize the contrast between positivism in its caricatured form and natural law theories. First, the law is exclusively the premise of the legal caste (including legislators). This deprives the law of any spurious claims of intrinsic morality and ensures the individual's right to his own conscience while reserving the legal system's right to punish him for transgressing. Secondly, it allows for precise statements about the nature of valid law which approximate the lawyers' experience. [8] Natural law is unwritten while legal positivism consists of the written rules and regulations by the government- codes, acts. Another distinction is that natural law is 'the order of conviviality (literally, the order of living together)' [9] - the conditions of conviviality are universal. Legal positivism on the other hand is specific to a particular area. 'While positivism states that the concept of law is simply what the legal system in a given society recognizes as law, naturalization considers law to be an ideal, commonly shared by human societies' [10] Natural law follows a test.

If it fails the moral test, then it is not good law. Positivism doesn't follow that test. Some laws may lack in morals but still be 'good' law. Despite the distinctions between natural law and

legal positivism, there is a necessary connection between the two principles. Natural law flows into legal positivism indirectly because it is impossible to have a legal system without fidelity to the rule of law and formal justice. ‘The connection between law and critical morality is necessary for that it is not contingent. It applies to every law and every legal system.

The proposed interpretation of every law in every legal system can easily be challenged on the ground that it is not morally defensible, whether the challenge succeeds or fails in a particular instance’ [11]. Any positive law that conflicts with natural law is not really law at all. As a result of this, there is no moral or legal obligation to obey it. People will not follow a law that they think is morally repulsive. A rule is legally valid if there’s a moral right to enforce it. If people do not have morals or reason, it will be factually hard to have a legal system.

Radbruch said ‘law could not be legally valid until it had passed the tests contained in the formal criteria of legal validity of the system and did not contravene basic principles of morality’ [12]. Natural law and legal positivism are undoubtedly intertwined and inter-related. ‘The values of fairness, equity, justice, honesty, humanity, dignity, prudence, abstention from violence and a host of other values that conduce to cooperation and coexistence play a prominent role in the law even when they are not incorporated in any formal source of law. [13]

In conclusion, ’in order to know what your legal rights are, you need to look at what laws your society has. In order to know what your moral rights are, you need to figure out what is true morality.