Framework 1.3 – Theories and Concepts of Law

Jurisprudence

Jurisprudence is the philosophical consideration of law. It includes defining law itself, the purpose of law, the characteristics of a good law, the definition of crime, and the distinction between law and justice.

Natural Law vs. Positive Law

Natural law theories are based on the idea that law is derived from unchanging, universal principles of morality and, as such, can be determined simply through the use of reason. Positive law theories hold the view that law originates from and is formulated by the state in order to facilitate its proper functioning; laws are therefore based on facts and circumstances as opposed to morality.

Natural Law

The Greek philosopher Socrates (470-399 BCE) subscribed to the theory of natural law believing that the point of law was to encourage people to lead good lives by doing what is right and avoiding what is wrong.

Plato (428-347 BCE) was Socrates' pupil and also believed in the principle of natural law. His notion of **justice** could be applied to both individuals and states. Justice for an individual required that all of their powers; physical, mental, and spiritual; were working in harmony. An individual could achieve this through the use of reason. For the state, justice required all members to perform their functions properly without interfering in the functions of others. Justice for the state required laws derived from the natural law of the universe.

Aristotle (384-322 BCE) was Plato's pupil, but disagreed with him in one respect. He did not believe that the individual could be counted on to live a just life only through the use of education and reason. He believed that many individuals are vulnerable to being controlled by their passions and that laws were necessary to coerce them into following their reason instead.

Cicero (106 BCE-43 BCE) believed in a universal natural law that could be derived through reason and from the inherent social nature of human beings. Law should therefore not be determined by the ruling peoples or even by a majority in a given jurisdiction; it should be the same everywhere, for all people, and for every nation.

St. Thomas Aquinas (1224-1274) also believed that law had a moral purpose, but emphasized the notion that the state should not have the last word in making law because it has the potential to make laws that are unjust which should not be followed. Aquinas believed that the law should serve the spiritual needs of humans and so in areas of conflict the state should be subordinate to the church, namely the Roman Catholic Church.

Martin Luther King, Jr. (1929-1968), American civil rights activist, wrote: "A just law is a manmade code that squares with the moral law or the law of God. An unjust law is a code that is out of harmony with the moral law."

Ronald Dworkin (born 1931) is known for his theory of Law as Integrity, which is based on the notion that legal decisions must be made by constructively interpreting previous decisions as having been made based on principles of morality.

Positive Law

Thomas Hobbes (1588-1679) did not subscribe to the view that law was simply a recognition of the natural law of the universe. He had been witness to the brutality of the English Civil War and believed that war was the natural state of humans wherein the strong take advantage of the weak and actions are typically motivated by fear or greed. The imposition of laws by a strong leader was therefore necessary to maintain law and order.

John Locke (1632-1704) also believed in the positive law view that without laws humans would devolve into a state of war. However, he blended this with the natural law view that laws must be just and respect the rights of the people. If through reason it is determined that the laws of a government were unjust then the people should have the right to replace it.

Jeremy Bentham (1748-1832) put forth the philosophy of **utilitarianism** which is the notion that laws should be written with the purpose of providing the greatest good for the greatest number of people. Utilitarianism can be distinguished from natural law since it may lead to the persecution of the individual in the process of achieving happiness for the majority.

John Austin (1790-1859) followed Bentham's view of utilitarianism but separated law from morality. He viewed morality as subjective as opposed to an unchanging set of natural laws. Therefore law must not be subject to moral judgment. Once a law is passed for the good of the majority, it must be strictly followed by all.

Max Weber (1864-1920) was a German sociologist who defined the state as an entity with "a monopoly on the legitimate use of physical force". Politics then dealt with the delegation and distribution of such power. To Weber, a law would be valid if it was part of a system that provided order and if there was a reasonable expectation that it would be enforced by the state. It did not need to be derived from morals or ethics. This is sometimes referred to as rational-legal authority.

H.L.A. Hart (1907-1992), as a legal positivist defined a "Rule of Recognition" to be underlying a particular legal system and would differentiate between laws that were valid and those that were invalid. A Rule of Recognition would arise from the practices and conventions of officials in a particular legal system. It would serve to validate and unify the laws of the jurisdiction to which it applied.

Legal Realism

Legal realists believe that the focus should not be on broad unifying theories about the nature of law but instead should be on how judges are actually making their decisions. Different judges might interpret and apply the law differently depending on who they are and where they come from; their temperaments and powers of creativity have real

impacts on the development of the law. Legal realists would recommend a very cautious approach to appointing judges.

Marxism

Karl Marx (1818-1883) was a German philosopher who eventually settled in England. He was witness to the Industrial Revolution during which there were great demographic shifts from rural to urban communities and from farming to industrial ways of life. His political theory, now known as Marxism, stated that the law is merely an instrument by which the ruling class oppresses the working class.

Feminism

Feminist jurisprudence is based on the notion that law has historically been structured in a way that oppresses women on behalf of men. This oppression has taken three forms; laws that discriminate against women, the failure of law to respond to the needs of women, and legal institutions that are biased against the advancement of women to positions of power. Although it was difficult for female legal scholars or feminist philosophers to push their work to the forefront in the days of Socrates and even up to the mid-20th century, they have enjoyed much more attention in recent decades. One well-known Canadian feminist legal scholar is Susan B. Boyd, currently teaching at the UBC Faculty of Law. She has focused much of her writing on how gender inequality has affected the development of family law.

Procedural Fairness

Harvard law professor Lon Fuller (1902-1978) brought attention to the concept of procedural fairness which requires the structure and rules involved in the administration of a legal system to make sense so as to promote social order. For example, procedural fairness requires laws and legal decisions to be well-known, consistent, realistic, and compatible.

Restraint of Power

Stanford law professor Philip Selznick (born 1919) developed a standard to assess the quality of any legal system. To him, it was imperative that there be an independent body or branch of government that had the power to challenge and limit laws made by those in power. In Canada, the judicial branch of government, namely the court system, serves this function and restrains the power of the executive and legislative branches of government. Today, most court challenges against government laws or actions are brought under the Canadian Charter of Rights and Freedoms, but even before 1982 courts often made it clear that no government or leader is above the law. Since making use of the court system is expensive, effective restraint of the power of government through legal means is often supported by independent organizations and lobby groups. One example is the Association in Defence of the Wrongfully Convicted (AIDWYC).

Interventionism

Canadians have a tradition of accepting intervention from a strong central government. This is best illustrated by contrasting with the Americans during and after the American Revolution. The American colonies rebelled against the paternalistic rule of the British

Empire, whereas the citizens of the colony of New France, including the United Empire Loyalists who fled north to join them, accepted British rule. Today, the role of the federal government in Canada is much broader than that in the United States; in Canada there are more restrictions on freedoms to ensure security for its citizens, there is greater taxation in order to provide more services, and there have been more instances of the federal government using extraordinary powers when deemed necessary. The acceptance of a strong central government and interventionism may be seen as positive law ideals, as arguably unnecessary laws are put in place to ensure that the state runs smoothly.