



KLE LAW ACADEMY BELAGAVI

(Constituent Colleges: KLE Society's Law College, Bengaluru, Gurusiddappa Kotambri Law College, Hubballi, S.A. Manvi Law College, Gadag, KLE Society's B.V. Bellad Law College, Belagavi, KLE Law College, Chikodi, and KLE College of Law, Kalamboli, Navi Mumbai)

STUDY MATERIAL

for

LEGAL METHODS

Prepared as per the syllabus prescribed by Karnataka State Law University (KSLU), Hubballi

Compiled by

Dr. Manojkumar V Hiremath, Asst. Prof.

KLE Society's Law College, Bengaluru

This study material is intended to be used as supplementary material to the online classes and recorded video lectures. It is prepared for the sole purpose of guiding the students in preparation for their examinations. Utmost care has been taken to ensure the accuracy of the content. However, it is stressed that this material is not meant to be used as a replacement for textbooks or commentaries on the subject. This is a compilation and the authors take no credit for the originality of the content. Acknowledgement, wherever due, has been provided.

UNIT – I

What is Law? Is Law necessary? Essential functions of legal process, Essence of Law

What is Law

Meaning and Definition of Law

In general parlance law is set of rules and regulations that are meant to regulate the human behaviour. Law is tool in the hands of the State to exercise social control. Man lacks internal control over his behaviour hence law is used to regulate his behaviour. It is one of the tools of social control but strongest among all.

Meaning

- A rule of conduct or action prescribed or formally recognized as binding or enforced by a controlling authority as a command or provision enacted by a legislature.

-Webster

Dictionary

- The enforceable body of rules that govern any society.

- Oxford Dictionary

of Law

- A rule, usually made by a government, that is used to order the way in which a society behaves

- Cambridge

Dictionary

Definitions

"Law is the cement of society and also an essential medium of change."

- **Glanville Williams** "Learning the

Law"

"Law is the formal glue that holds fundamentally disorganised societies together."

- **Thomas**

Hobbes

“Law is a Command of the Sovereign backed by sanctions”

- **John**

Austin

“Law may be defined as the body of principles recognized and applied by the state in the administration of justice”.

-**John Salmond**

“An embodiment of Reason, whether in the individual or the community”

-**Aristotle** (Greek philosopher -

304 BC)

“Law is a Social Engineering”

- **Roscoe Pound**

“The Law of the State or of any organized body of men is composed of the rules which the courts, that is the judicial organ of the body lays down for the determination of legal rights and duties”

- **John Chipman Gray**

“All laws are manifestation of common consciousness / spirit of the people - *‘Volksgeist’*.”

-**Friedrich Carl Von Savigny**

“Law is ideological; it both exemplifies and provides legitimation to the embedded values of the dominant classes”

-**Karl Marx**

Positivist School of Thought

John Austin

- “Law is a Command of the Sovereign backed by sanctions”
- "A rule laid down for the guidance of an intelligent being by an intelligent being having power over him."
- "A body of rules fixed and enforced by a sovereign political authority."

Sovereign is any person or body of persons , whom the bulk of a political society habitually obeys and who does not himself habitually obey some other person or persons.

Prof. HLA Hart "The Concept of Law" (1961) "law is a system of rules, a union of primary and secondary rules"

Salmond's Definition of Law 'Law may be defined as the body of principles recognized and applied by the state in the administration of justice'.

Natural Law School of Thought

Aristotle (Greek philosopher - 304 BC)

"An embodiment of Reason, whether in the individual or the community"

St. Thomas Aquinas (Italian philosopher - 1224) "Summa Theologiae" (Summary of Theology)

"Nothing else than an ordinance of reason for the common good, made by him who has care of the community, and promulgated"

Stoic Philosophers propounded that, man should live according to nature and that since the distinctive feature of man's nature was his endowment with reason, this meant that he should live according to the dictates of the reason.

Cicero – 'De Republica'

" There is indeed a true law (lex), right reason, agreeing with nature, diffused among all men, unchanging, everlasting... It is not allowable to alter this law, nor to derogate from it nor can it be repealed. We cannot be released from this law, either by the praetor or by the people nor is any person required to explain or interpret it. Nor is it one law at Rome and another at Athens, one law to-day another here-after; but the same law, everlasting and unchangeable, will bind all nations at all times; and there will be one common lord and ruler of all, even God the framer and proposer of this law"

Sociological School of Thought

Roscoe Pound

- Law shapes the pattern of social behaviour.
- Sociology of law- the manner in which law works in the society.
- Law is a Social Engineering

- The aim of social engineering is to build as efficient a structure of society as possible, which requires the satisfaction of the maximum of wants with the minimum of friction and waste.
- It involves the balancing of conflicting interests.

Historical School of Thought

Friedrich Carl Von Savigny –

- Law is deeply rooted in the past of a nation and its true sources were popular faith, custom and ‘common consciousness of the people’ – ‘Volksgeist’.
- All laws are manifestation of common consciousness / spirit of the people.
- Law is not of universal application.
- Law is a matter of unconscious growth.

Realist School of Thought

What judges, lawyers and law enforcement officers do about disputes is, the law itself

John chipman Gray’s Definition of Law:- According to Gray, “the Law of the State or of any organized body of men is composed of the rules which the courts, that is the judicial organ of the body lays down for the determination of legal rights and duties

Marxist Thoughts

Marx’s ideas about law were expressed mainly in the *Communist Manifesto*,

Marx contends that “law, morality, religion, are so many bourgeois prejudices, behind which lurk in ambush just as many bourgeois interests.”

He criticizes the whole tradition of government under the rule of law as nothing more than a mere expression of “bourgeois” aspirations.

Since the idea of law was interpreted by Marx as invariably an instrument of class domination, he argued that the coming of a classless society implied that all laws would have to disappear.

Because Marx believed that law arises from class conflicts, he concluded that the need for law would cease to exist with the advent of classless communism. Such a promise of lawlessness that leads to “perfect justice” was correctly interpreted by Kelsen as being “a utopian prophecy

IS LAW NECESSARY

Is law expendable (abandoned) and is unnecessary to the creation of just society. Is law necessary evil as it is dangerous impediment to the fulfillment of man's social nature.

The argument that law inherently necessary for man in a properly ordered society receives less support from western philosophers like Plato and Karl Marx, who, in one way or another, have lent their support to the rejection of law.

Hostility towards law was a crucial element in the ideology of the Christian church in its formative period. Marxists supported doctrine of anarchism.

In every generation there will be a class or set of people who feel restlessness against all authority and show their feeling against the law and order. Such people are motivated by vague notion that absence of law leads to a better and happier life for mankind.

What are the ideological foundations of dissatisfaction with the very idea of law and reject it altogether or to regard it as best necessary evil suited to an utterly imperfect state of human society.

Is law necessary evil as it is dangerous impediment to the fulfillment of man's social nature ?

Is law expendable and is unnecessary to the creation of just society?

Is absence of law leads to a better and happier life for mankind?

What are the goals and objectives of man and what he needs to attain them ?

What is the nature of Man ?

- Is man good
- Is man evil
- Is man combination of good and evil

What are the internal and external factors responsible for Man's Nature

Is law necessary to man or not, is not question about physical fact such as whether man cannot live without food and water.

Whether man can live without food and water can be scientifically tested and it can be determined and can be concluded as fact.

Given the man's nature it's difficult to determine whether man can achieve truly human condition with the existence or non existence of law.

What is man's goal or objectives and what he needs for the attainment of those objectives.

Is a man incarnation of evil or at best an amalgam of good and bad impulses constantly in conflict, the bad tending repeatedly to prevail over the good, thus its evident that dangerous forces implanted in man's very nature which need to be sternly curbed and which, if not curbed, will lead to the total destruction of that social order in who's absence man's state would be no higher than that of animals.

Law then, in this view, is indispensable restraint upon the forces of evil, and anarchy or the absence of law the supreme horror to be warded off.

There are two views among who look at law as means of attaining social harmony by curbing the evil passions of man.

One view is that man's nature was intrinsically evil and that no social progress could be attained without restraints of penal law.

Another view is that, man was originally created good by nature but that due to sin, corruption or some other internal weakness, such as avarice (greed for material wealth and gain), man's original and true nature had become distorted and thus required for its control the rigours of a punitive system of law. Those profound this view look back to the Golden age – when man lived simple , happy, and well ordered lives without the need for any external system of legal rules or coercion to restrain their impulses, which were wholly unselfish and directed to the common good of mankind. Writers such as Seneca, Rousseau and others had this view.

Man was Evil

Ancient Chinese School of Legists in 3rd BC claim that man's nature was initially evil and the social environment and particularly teachings of rituals and restraints of penal law made him to act in good way. – It believed that single law enforced by severe penalties is worth more than the words of all sages.

Shastras in India provides that man was by nature passionate and covetous and if left to themselves the world would resemble devil's workshop – where the logic of Big Fish would prevail.

Bodin (16th Century) – original state of man was one of disorder, force and violence

Hobbes (17th Century) - Life of man is solitary, poor, nasty, brutish and short, atmosphere of hate, fear and mutual distrust, everybody is at war with everybody.

Hume (18th Century) – without law, government and coercion human society could not exist and so in this sense law was natural necessity for man.

Man was Good

The earliest solitary humans possessed a basic drive for self-preservation and a natural disposition to compassion or pity.

They differed from animals, however, in their capacity for free will and their potential perfectibility.

As they began to live in groups and form clans they also began to experience family love, which is the source of the greatest happiness known to humanity.

Rousseau criticized Thomas Hobbes for asserting that since man in the "state of nature... has no idea of goodness he must be naturally wicked; that he is vicious because he does not know virtue". On the contrary, Rousseau holds that "uncorrupted morals" prevail in the "state of nature"

Ovid - 1st BC Roman Poet

The golden age was first; when Man yet new,

Golden Age No rule but uncorrupted reason knew:

And, with a native bent, did good pursue.

Unforced by punishment, unawed by fear,

His words were simple, and his soul sincere;

Needless was written law, where none oppressed:

The law of Man was written in his breast:

No suppliant crowds before the judge appeared,

No court erected yet, nor cause was heard:

But all was safe, for conscience was their guard.

Law is Not Necessary

Plato to Marx urged that law is an evil thing which man kind want to rid itself.

But human history and experience shows that law is great civilizing forces in human society and the growth of the society is linked with the gradual development of the system of legal rules and a machinery to enforce them

Laws are not found in vacuum but found along side moral codes

Law may be used as an instrument of tyranny – instances form history or may be used a means to give effect to freedoms that are essential to good life

Plato (427 - 348 BC) : Revolted against this concept of law as produced by the sophists

His philosophy basically resolves around his concept of justice rather than on his concepts of law

According to Plato, we live in an orderly universe.

Justice for Plato is that a man should do his work in the station of life to which he was called by his capacities. It is the knowledge of the class that rules which will show the people the way of justice.

In his ideal commonwealth disputes will be decided by the public authorities. In deciding the disputes the judges should have large amount of discretion. Judges shall not be bound by fixed and rigid rules embodied in a code of laws.

According to Plato, we live in an orderly universe. The basis of this orderly universe or nature are the forms, most fundamentally the Form of the Good, which Plato describes as "the brightest region of Being".

The Form of the Good is the cause of all things, and when it is seen it leads a person to act wisely.

The State is governed by intelligence of the best men rather than by the rule of law. Justice is to be administered without law.

He did not favour State with law for the reason – he said – “Law can never issue an injunction binding on all which really embodies what is best for each; it cannot prescribe with perfect accuracy what is good and right for each member of the community at any time. The differences of human personality, the variety of men’s activities and restless inconsistency of all human affairs make it impossible for any art whatsoever to issue unqualified rules holding good on all questions at all times.”

Principles of law, he believed, consist of abstractions and oversimplifications; a simple principle, however, can never be applied to a state of things which is the reverse of simple.

Hence, the best thing of all is not full authority for laws but rather full authority for a man who understands the art of Kingship and has wisdom.

Thus laws for him were not necessary as they could not take into account the differences in men’s personalities. According to him they (laws) were abstractions and mere simplifications.

It was only in the latter part of his life that Plato acknowledged the lack of individuals with the capacity of being philosopher kings. Thus necessitating the limit of laws on the rulers.

Marxist Thoughts

Marx's ideas about law were expressed mainly in the Communist Manifesto,

Marx contends that "law, morality, religion, are so many bourgeois prejudices, behind which lurk in ambush just as many bourgeois interests."

He criticizes the whole tradition of government under the rule of law as nothing more than a mere expression of "bourgeois" aspirations.

Since the idea of law was interpreted by Marx as invariably an instrument of class domination, he argued that the coming of a classless society implied that all laws would have to disappear.

Because Marx believed that law arises from class conflicts, he concluded that the need for law would cease to exist with the advent of classless communism. Such a promise of lawlessness that leads to "perfect justice" was correctly interpreted by Kelsen as being "a utopian prophecy.

Essential Function of Legal Process

1. Introduction
2. Method adopted by Prof. Alan Watson to identify essential function of legal process
3. Functions of legal process identified by Prof. Alan Watson
4. Identification of essential function of legal process
5. Conclusion

Essence of Law

According to Allan Watson order is the essence of law. However he propounds that legal process is essential part of the law. He opines that though legal process is essential it is not central part of law. Law performs various functions such as regulating the social behaviour, justice,

Although the process is both the distinguishing and the essential feature of law it cannot be considered central feature of law. Because many legal disputes are resolved without

recourse to legal process. Today many legislations are regulatory in character where process is not prominent. However the central to law is recourse to an appropriate process in disputing situations. The possibility or the threat of a process is the central feature of law.

Legal rules backed by the possibility of a process provide a feeling of positive security and regulate behaviour and hence are directly conducive to order. Therefore ultimately order is the essence of law.

UNIT – II

Typical attributes of Law and Legal Process; Legal Rules and Society;

Typical Attributes of Law and Legal Process

Legal Rules and Society

Legal rules and society are inter-related. The jurists like Savigny, Roscoe Pound and Karl Marx have described law setting it in the context of society. From their propositions it becomes evident that society and legal rules are intrinsically interwoven with each other. Allan Watson has emphasised on the mutual impact of law and society and he also points out the causes for divergence between law and society.

Relation between legal rules and society :

Friedrich Carl von Savigny founder of Historical School of Thought defined law as – “All laws are manifestation of common consciousness / spirit of the people”

Law is deeply rooted in the past of a nation and its true sources were popular faith, custom and ‘common consciousness of the people’ – ‘Volksgeist’.

Law is found and not made as it develops as a matter of unconscious and organic growth in the society. Law is like language, is not a product of arbitrary and deliberate will but of a slow, gradual and organic growth. Law grows with the growth and strengthens with the strength of the people and finally dies away as the nation loses its nationality.

The most prominent philosopher from sociological school of thought Roscoe Pound described that “ Law is a social engineering”

It involves- The aim to build as efficient a structure of a society as possible. Satisfaction of maximum of wants with minimum of friction & waste. And involves the balancing of competing interests in the society.

According to Karl Marx law is a tool in the hands of ruling class or capitalist in the society who use it to exploit the working or labour class in the society. He argues that law is invariably an instrument of class domination and it reflects the economic advantage of ruling class.

Impact of Law on Society :

Law being one of the tools of social control, due to the force behind it or due to advantages attached to it is obeyed in the society. Since it’s an effective tool to mend human behaviour it is predominantly put to use by the State to bring changes in the society. Many laws have brought positive change in the society. some stringent criminal enactments are responsible for reduction in the crime rate,

Eg- Prevention of SC/ST Atrocities Act, Dowry Prohibition Act, Pre-Natal Diagnostic Techniques Act, 1994,.

Some enactments have brought transparency in administration of the State that in turn benefits the citizens. Eg: Right to Information Act, 2005, The Karnataka Transparency in Public Procurements Act, 1999.

Impact of Society on Law :

Allan Watson argues that inevitably the growth, history, and the social, political and religious outlook of a society will have some influence on the legal rules.

The changes in the society that are triggered by the cultural impacts and modernisation may demand for change in the existing law. Yet a times change in the outlook of the life and living pattern makes the society to demand for change or creation of law. Eg: Same Sex Marriage Law, Decriminalizing Sec.377, recognising live-in relationship,

Sometimes new problems that arise in the society or aggravation of existing social and economic problems stimulate the general public to agitate, protest, revolt against the State and demand for a law to curb the menace. The State may heed to the demand may bring change in the law or make a new law altogether to meet the demands of the people. Eg: Criminal law Amendment after Nirbhaya incident, Enactment of Lokpal Act after Anna Hajare and Civil Society movement, enactment of Domestic Violence Act, etc.

Causes for divergence between law and society

Though the law and society has mutual impact yet there exists divergence between law and society. The reasons for divergence could be attributed to legislator or rule maker and also certain other factors.

Law reform many time does not take place because legislature has no sufficient time.

Eg- a clause was skipped during debate on Defamation Bill 1952 in UK, because parliament dint had time to Third reading, hence the clause that gave opportunity to defendant place evidence on record about the character of the plaintiff to mitigate the damages was deleted without considering. The absence of that clause became reason for unfair conviction of the defendant in many cases.

Legislators may not reform the law because it may offend their followers and it affects their future. Eg: In India – Women Reservation in Legislatures Bill, Muslim Law Reform, Repealing or amending laws providing for reservation, are not passed in the legislature as they are detrimental to their own interest or it offends their followers.

Few legislations are enacted as a ‘ gut reaction’ to particular event, and such law to some extent may respond to what was needed at that time but it may not hold good in long term. Because of the lack of interest on the part of legislature or such law if changed may affect their interest hence such law may not be changed for very long time and that continues to bother the society.

Sometimes pressure groups may push through some legislations that are not beneficial to society at large or the State. Circumstances may change, pressure groups may disappear but law continues to exist with divergence.

Private factors in the life of members of the ruling class may result in legislation that meets the particular short term desires but that grossly ignores general needs. Eg: Amendment of the constitution during the regime of Mrs. Indira Gandhi to save her election.

IN AD 49, Roman Emperor Claudius wished to marry his brother's daughter, Agrippina. Then the marriage between uncle and niece was prohibited and was regarded as incestuous but the senate passed a decree permitting marriage with a brother's daughter

Conclusion

The relation that exists between legal rules and society could be understood through their interaction with each other. Though they have mutual impact and responsible for mutual change yet there exist some divergence between them due to various factors that are attributable to legislators, pressure groups and system as a whole.