Jurisprudence from Natural, Positive and Realistic Perspectives

Article · February 2022

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Introduction.

What *is* law? What is its purpose? Does it consist merely of rules? Can anything be law? What has law to do with justice? Or morality? Democracy? What makes a law valid? Do we have a duty to obey the law? Th ese, and many other, 'theoretical' questions suffuse the fabric of jurisprudence and legal theory.[1] Jurisprudence is consequently ubiquitous. Its concerns are an inescapable feature of the law and legal system. But it is more. As will soon be evident, it is both informed by, and has significant implications for, economic, political, and social theory. Drawing the boundaries of this vast terrain is therefore a challenging exercise. Studying jurisprudence means stepping back and reflecting on the ideas and assumptions that underlie and thereby define legal practices and institutions. Whereas in other law courses one studies areas of substantive law, jurisprudence studies law in a much more general way, and asks much more abstract and theoretical questions about law as such.

Jurisprudence has been there from the times of Socrates[2]. Jurisprudence considers general philosophical and theoretical questions about the nature, purpose and operation of law. Jurisprudence can be broken down in to two words which would consist of juris meaning the law and prudence meaning the logic. Therefore, one can say that jurisprudence is about the logic of law or as the science of law. Jurisprudence is only concerned about the nature of law and not a single law such as contract, tort, constitutional, international etc. while many have championed particular subject areas of law, no one has completely championed the jurisprudence since many of the theories that have been advanced by philosophers of their generations have often collided with the ideologies and opinions of others.

Simmonds[3] states that, jurisprudence is the term normally used in English speaking countries to refer to general theoretical reflections upon law and justice. Suri Ratnapala on the other hand opines that, jurisprudence consist of 'scientific and philosophical investigations of the social phenomenon of law and of justice generally. It embraces studies, theories and speculations about law and justice undertaken with the knowledge and theoretical tools of different

1 R Wacks, *Understanding Jurisprudence* (3rd Edn, OUP 2012)
2 S. Ratnapala, *Jurisprudence* (2nd Edn, Cambridge 2013) P1.
3 N. Simmonds, *Central Issues in Jurisprudence: Theory, Law and Rights* (2nd Edn, Sweet and Maxwell 2002) P1.

disciplines – such as law, history, sociology, economics, political science, philosophy, logic, psychology, economics, and even physics and mathematics.'[4] Lord Templeman observes that, jurisprudence is a different sort of subject to study from most aspects of the law which largely deals case law and statutory materials.[5] McCoubrey & White[6]

Bix[7] states that, historically, the question 'what is law?' was the central focal point of jurisprudence. He explains that all most all the legal theories which makes the general body of jurisprudence has tried to answer this central question though with sharp distinctions in ideology. Commenting on the term law, H.L.A. Hart in his seminal work *The Concept of Law*[8] opines that there is no any other question which is more difficult than the question 'what is law?'. For example, we would generally agree that a 'chair' is something that we can sit on and the fact whether the chair is made of wood, stone or steel would not deny it being a chair. In sharp contrast to this, when one speaks about the nature of law, they insist that law should possess such characteristics which are inherent and in the absence of such, no rule or regulation would become a valid law. This is especially true concerning that natural law school, where their central argument is that, there is a necessary connection between law and morality and as such that, where a law fails to adhere with the general notions of morality it would not be considered as being valid. In sharp contrast to natural law we find legal positivism which claims that there is no necessary connection between law and morality and that the arguments put forward by the natural law school are not valid. In complete contrast to both natural law and positivism we find realism which is focused on what happens to law once it has been enacted by the legislature and implemented by the executive. Jurisprudence can be sub divided in to two parts consisting of analytical jurisprudence and normative jurisprudence. Analytical jurisprudence seeks to explain what the law is, and why, and its consequences. normative jurisprudence, on the other hand, are concerned with what the law ought to be. Put differently, analytical jurisprudence concerns about facts; normative jurisprudence is about values.

This essay concerning the nature of law is made out with three different jurisprudential theories which includes natural law, positivism and realism. These three theories were selected for two main reasons. Firstly, to show the sharp distinction between theories and secondly to elaborate

4 *Ibid* P4.
5 L. Templeman, *Jurisprudence: The Philosophy of Law, A Textbook* (1st Edn, Old Baily Press 1997) P3.
6 J. E. Penner and E. Melissaris, *McCoubrey & White's Textbook on Jurisprudence* (5th Edn, OUP 2012)
7 B. Bix, *Jurisprudence: Theory and Context* (4th Edn, Sweet and Maxwell 2006) P9.
8 H.L.A. Hart, *The Concept of Law* (3rd Edn, OUP 2012)

the difference of approach taken by each theory in rationalizing their own interpretation as the the nature of law.

Theory of Natural Law

Are gay marriages immoral? Why is racism wrong? Should the law permit abortion? Are we exercising proper stewardship of the environment? Moral questions routinely tug at the sleeve of our legal and political practices. Natural Law school advances the fact that law and morality are interconnected concepts and one cannot speak of law without having recourse to morality. Throughout the history, though I different terms and forms, those who have adhered to the school of natural law have always insisted that there is a necessary connection between law and morality. 'The best description of natural law', according to one natural lawyer, 'is that it provides a name for the point of intersection between law and morals.[9] Natural law is so called because it is believed to exist independently of human will. It is 'natural' in the sense that it is not humanly created. Natural law theories are theories about the relation between the moral natural law and positive human law.[10] The theories called 'natural law theories' place a particular emphasis on the fact that rulers, lawyers and other legal officials are subject to moral standards in the way they make and apply laws: they should do so in ways that contribute to, rather than impair, human flourishing, and it is to those theories we now turn.

Natural Law comes under the normative branch of jurisprudence since its focus is to explain what the law ought to be and not what is law. This is a significant aspect in both understanding and evaluating the nature of law from this perspective. This theory has evolved through time and we can demarcate the time periods in which the broader realm of natural law has developed. Under classical natural law, the purpose was to explain the nature of *morality*, not the nature of *law*[11]. The basic idea was that man, using his reason, and possibly with the help of the revelation of the gods or God, could come to understand how he should act rightly in respect of his fellow man, and this was understood as a kind of 'higher law', a law above and superior to the laws men set for themselves. This 'higher law' morality of reason and revelation was a morality which purported to take account of man's *nature*, hence the title *natural*. The central claim during this period was that, while it cannot be argued that bad laws cannot be made and

9 Passerin D'Entrèves, *Natural Law* (London: Hutchinson, 1970), P116.
10 S. Ratnapala, *Jurisprudence* (2nd Edn, Cambridge 2013) P1.
11 J. E. Penner and E. Melissaris, *McCoubrey & White's Textbook on Jurisprudence* (5th Edn, OUP 2012)

imposed but rather that such laws are and are thus limited or even entirely lacking in their claim to be obeyed as a matter of conscience.[12]

The next phase of natural law is can be termed as the Classical Greco-Roman natural law, which considered 'good' and 'bad' laws, and the appropriate reactions to them, to be discoverable by human reason through the process of rational reflection. Greeks believed in the existence of a higher natural law that human law or human actions must not offend. Natural law is just law, and just law is that which is in harmony with the universal laws of nature. This higher law was taken as the ideal in which the human laws had to comply and when human law did not comply with this higher norm obedience for such could be disregarded by the human kind. In the *Republic,* Plato set out a model for the perfect society, which he founded not upon a rule of laws but upon a form of 'benevolent dictatorship' through the government of 'philosopher kings'. This was an ideal where the philosopher kind would have ideal answers to every questions of law. However, Aristotle the disciple of Plato contradicted this claim and argued that, in all situations rule by law was to be preferred instead of rule by men, even a philosopher king.

The next phase of natural law was the Christian period where both the church and the god played a key role in its development. During this period, the central argument was that human law should comply with the divine will of the god and that the human law could not question the validity of the divine word. Questions of law was to be decided according to the will of the divine and that the church was the key instrument in bringing the divine will and the human kinds together. Classical natural law theory underwent a revolution in the western philosophical tradition under the impact of Christian theologian philosophers, the most important of whom were Augustine and Aquinas. For Aquinas, very clearly, a provision of positive law which facilitates or serves a teleologically good purpose will be binding upon the consciences of those to whom it is addressed, irrespective of their enforcement by agencies of the State.

The current phase of natural law can be identified as the revival which was developed with the ideas of two influential figures of Fuller and Finnis. classical natural law ideas were, from the middle of the nineteenth century onwards, largely overshadowed by the varieties of positivist legal theory. This also happened in other jurisdictions, although to varying degrees. The reasons for this were various and related to the general culture of the period as well as to matters of a specifically jurisprudential nature, but undoubtedly one of the factors was the rise of the

12 H. McCoubrey, *The Development of Naturalist Legal Theory* (1st Edn, Croom Helm 1987)

modern State, which began to regulate society in more and more ways largely through legislation. With the rising popularism of the positivism with its more systematic analysis of law natural law thinking prior to Fuller and Finnis failed to provide a systematic analysis of law which could be objectively ascertained or measured. It was due to this lacuna in the natural law theory that it needed some revival to once again challenge the ideas of positivism and remain relevant. The Hart-Fuller debate aired on Harvard Law review was a classic example of both the friction and the heated debate between the theories of natural law and positivism which was even to that day remained with the explanation of the relationship between law and morality. Fuller divided morality in to two parts as morality of duty and morality of aspiration. He insisted that when laws are made morality of duty should be enshrined and that there are eight principles to be used in order to achieve this. These eight principles are a *sine qua non* in making laws. They are more closely related to the notion of rule of law as we know it today. On the other hand, Finnis in his thesis on natural rights argues that there are seven virtues which are of value and pursuing them is an endeavour. For Finnis these seven basic goods included; life, knowledge, play, aesthetic experience, sociability of friendship, practical reasonableness and religion. According to him, law needs to pave the way for an individual to achieve these virtues.[13]

The natural law has tried to evaluate the existing laws and has provided their insights regarding the ways in which to make them better. They are concerned about the question what the law should be and which is a normative approach instead of the question what the law is which is a pragmatic one. Natural law was more influential to the development of the jurisprudence and its significance faded with the rise of the positivism in the 18th and 19th century where the positive law made its appeal as being more systematic in its analysis of law. However, with such thinkers as Fuller, Finnis and Dworkin the vigour of natural law has reignited and it very much remains relevant and especially in connection to the subject of rights.

Theory of Legal Positivism

In sharp distinction to the natural law we find positivism which is of more recent origin in comparison to natural law. The central thesis of the positivist rests on the premise that there is no necessary connection between law and morality. They argue that the moral validity and the legal validity of a given law are two different things all together and that irrespective of the fact whether a law is moral or immoral it is not the decisive factor in determining its legal

13 J. Finnis, *Natural Law and Natural Rights* (1st Edn, OUP 2011)

validity and the obligation which flows from such law to obey it. According to the positivist the validity of law remains in the way in which a law has come to being. Throughout the development of positivism, they have maintained that when a law is enacted by the manner prescribed in the legal system or accepted in the legal system, irrespective of its moral value such law would be a valid one. Therefore, where Austin[14] claims that, law is the command of a sovereign backed by threats and that the sovereign is someone who gets the habitual obedience of the others and who himself is not under the authority if anyone, the sovereigns will would be the law and irrespective of its moral value the law will be valid. Moving further, in considering the analysis put forward by H.L.A Hart, where according to him the legal system comprise of both primary and secondary rules in which he state that the rule of recognition being the ultimate rule that helps us to determine the validity of any other rule. Therefore, according to Hart where there is a law which is recognized under the rule of recognition as being valid, its moral content would become immaterial in deciding upon its legal validity.

At the outset, it is important to recognize that positivism is not an exclusively jurisprudential approach. Its central claim whether it is logical, scientific, philosophical, sociological, or legal positivism is the view that the only genuine knowledge is scientific knowledge which emerges only from the positive confirmation of theory by the application of rigid scientific methods.[15] Suri Ratnapala observes that, British legal positivists regard the law as 'social fact', by which they mean that law is found in the actual practices or the institutions of society. Legal positivists have their significant disagreements but they share the common aim of helping people understand the law as it is.[16] Whilst positivists would not deny that the creation of functioning legal systems has been a cultural achievement that has delivered many benefits, they would deny that the simple existence of a functioning legal system stands as a moral advance in relation to any other sort of social ordering regardless of the circumstances.[17]

The idea that the ruler's will is law recurs throughout the history of Western political thought. It was particularly influential in the 16th and 17th centuries, during which the feudal kingships of western Europe were transformed into absolute monarchies. Thomas Hobbes in his book *Leviathan* postulated the king as an ultimate being to whose will all had to surrender. Austin in slightly modifying this view asserted that, it is the sovereign, who is either a single entity or an

14 J, Austin, *The Province of Jurisprudence Determined* (1st Edn, J. Murray, 1832)
15 R Wacks, *Understanding Jurisprudence* (3rd Edn, OUP 2012)
16 S. Ratnapala, *Jurisprudence* (2nd Edn, Cambridge 2013)
17 J. E. Penner and E. Melissaris, *McCoubrey & White's Textbook on Jurisprudence* (5th Edn, OUP 2012)

institution would be the supreme being and that all had to obey his command. Austin explained the nature and the obligation to obey the law through the sovereign.

In his lectures entitled *The Province of Jurisprudence Determined*, published in 1832, Austin attempts to give an empirical account of law, that is, an account of law in terms of observable occurrences. Austin begins by distinguishing 'laws properly so called' from 'laws by analogy' (such as the laws of fashion or honour) and 'laws by metaphor' (these being the laws of science). He then turns in more detail to the category of laws properly so called and proceeds to make further distinctions within this category. All laws properly so called are commands, says Austin, a command being an order backed up by a 'sanction' (a threat of harm) in the event of non-compliance with the command. Some commands are general – being directed to classes of persons and prescribing types of conduct – whereas some commands are directed to individual people. Furthermore, while all commands issue from a superior (a person or group of persons who has the power to inflict harm) – 'the term *superiority*', says Austin, 'signifies *might*' (Austin, 1832, p 30, Austin's emphasis) – some commands issue from God, while others issue from humans. And of those which issue from humans, some are laid down by the sovereign in a state, while others (like the commands of a father to his child) are not.

The command theory could not hold water with the evolvement of the society and its central notion of sovereign's will came into serious criticism. This theory was lacking in logic since coerciveness alone could not be used to explains as to why people obey law. In a classic example, Hart tells us a story of a thief and a tax collector. It is true that we give our money to both out of fear. We are fearful of the thief and the tax collector since they both demand for our money. While we feel obliged to give money to the tax collector not necessarily we fear him but due to our sense of obligation towards him which is recognized in law unlike the situation in which we give our money to a thief not out of obligation but out of fear for our life and limb. Though the result is the same they are arrived at by different reasons. We pay our taxes out of obligation and we give our money to the thief out of fear and for self -preservation. The obligation to pay the tax collector is an obligation imposed by the law and this law is recognized by an external factor to be valid. Hard saw this external factor as being embedded under the rule of recognition. In a country with a written constitution, the rule of recognitions would be manifested in the constitution itself and it will be used to recognize the applicable rules and laws. Legal positivism to a large extent has tried to formalize the law and to make it more systematic. Hence, positivism is firmly rooted in the analytical school of jurisprudence which is concerned with the proposition 'is' instead of 'ought'. Modern positivist does not

claim or try to deny the relationship between law and morality. Instead they argue that moral validity and legal validity are two distinct concepts and all that the legal positivism is concerned with is the legal validity of a law, meaning that the law was enacted or was given birth in accordance with the established and recognized methods of the legal system.

Theory of Realism

In complete contrast to natural law and positivism, realism in general is concerned with what happens to law once it is enacted by the legislature and implemented by the executive. Essentially, realist jurists envisage a science of law as built upon a study of law in action. 'Law is as law does.' The philosophical roots of this approach are to be found in the teachings of the American writers, *William James* (1890–1922) and *John Dewey* (1859–1952). In broad terms, the basis of 'realism' rests on the belief that when we perceive, we are aware of things existing independently of us; implicitly, therefore, this belief involves a rejection of the view that what is perceived is no more than private sense-data. The investigation of a phenomenon such as law necessitates an application of objective procedures uninfluenced by sentiment or idealism. One central argument of the realist is that a judge plays a significant role in both forming and shaping the law and they go to the extent in which they assert that the law is what the judge says it is.

Legal realism refers mainly to two schools of thought. One is known as American realism and the other as Scandinavian realism. Scholars of both traditions reject the more formal descriptions of the law given by legal positivists, but differ in what they see as the chief defects of positivist theory. The American realists claim that the law in real life is very different from the law stated in the law books. The real law, they say, depends on how appellate courts interpret written words and how trial courts determine the facts in cases. There is uncertainty at both ends. Realist refer to this phenomenon as rule scepticism and fact scepticism.

One of the early proponents of realism, Justice Holms has once observed that, the prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law[18] Essentially, therefore, the object of jurisprudential study is no more than the prediction of the incidence of public force through the instrumentality of the courts. When we study the law, we are not studying a mystery but a well-known profession. We are studying what we shall want in order to appear before judges, or to Advise people in such a way as to keep them out of court.

18 O, Holmes, *The Path of Law* (Reprint, The Floating Press, 2009)

Realism offers a radically different account of adjudication. It holds that it is not *possible* to evaluate judicial decisions in the light of their justifiability in terms of legal standards. Judges cannot be criticised for departing from standards of correct decision-making because no such standards exist. Judicial decision making is therefore not capable of being *rationally justified* but only *causally explained* in terms of *extra-legal* or *non-rational* factors operating, whether consciously or unconsciously, on the minds of judges.

Llewellyn[19] a major figure under realism argues that realism is a technology, not a philosophy. Its principles are: law is never static; it is to be considered as a means to a social end; continuous examination of law is essential; 'is' and 'ought' must be divorced for purposes of legal study; traditional concepts are rarely an adequate explanation of law in action; law has to be evaluated in terms of its social impact. In relation to dealing with a legal problem, the advice which Llewellyn gives is 'see it fresh', 'see it clean', and 'come back to make sure'. 'The fresh look is always the fresh hope; the fresh inquiry into results is always the needed check-up.' Llewellyn emphasised that legal rules are not as important as some legal theorists assume them to be. It is how a rule works that determines its significance; a rule of law thought of solely in terms of a verbal formula is mere emptiness. In 1959, during an address to the annual meeting of the Conference of Chief Justices, Llewellyn unveiled his views about the Grand Style or manner of reason. He believed that the appellate courts of the United States were at their glorious best during the first half of the 19th century, when the Grand Style of judicial reasoning was dominant. The judicial lustre began to fade in the latter part of that century and by 1909 its practice was all but dead. Llewellyn saw a revival of the tradition at the time he spoke, and used his address to encourage its restoration.

Realism is concerned with the applicable law to a given situation and this application is made by the judges who are vested with the ultimate authority to interpret the laws enacted by the legislature and implemented by the executive. The crux of their argument is based upon the notion that, law only comes to alive once it has been scrutinized by the courts. They form the view of a living law being capable of providing answers to complex questions of the society through a process of judicial interpretation of the enacted and implemented laws. Realism tries to explore the truth where it is primarily concerned with the real ways in which law is applied and administered. The great champions of American realism initially were highly respected

19 Karl N. Llewellyn*, Jurisprudence: Realism in Theory and Practice* (Revised, Transaction Publishers, 2011)

serving judges such as Holmes, Cardozo and Hutcheson, who were justifying their own judicial philosophy.

Conclusion

From the above analysis it could be seen that the three theories that have been discussed concerning the different perspectives that have been provided with regard the nature of law are indeed very different. While natural law has emphasized on the inherent relationship between law and morality and has considered the obligation to follow law from being flowing from the moral validity of law, its core arguments are focused on the premise as to what the law is ought to be. On the other hand, positivist have argued that the morality and the validity of law are two different questions all together. They are of the view that once a law is formulated in the manner provided for by the legal system, such law would become valid irrespective of its moral value. The obligation to follow them would stem from the fact that such has been promulgated in accordance with the practices and procedures stipulated in the legal system which is recognized to be valid by the society. In total contrast to the natural law and positive thinking, realism form the view that, laws are brought to life by the judicial scrutiny. They argue that the real law is not the law that is enacted by the legislature but the law that is interpreted and applied by the courts whenever such laws have been questioned. It becomes evident that no single theory in jurisprudence is the same. They all try to give a different perspective and idea about the nature of law.

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