UNIT 5 CONCEPT OF LAW

Structure

5.1 INTRODUCTION

The term 'law' brings the images of courts, lawyers, police, judges, law books etc. to one's mind. Law consists of rules, customs and practices in a society that need to be followed by all the members of the community. Laws are made by the Government. The nature of law is multidimensional. Each school of law gives one dimension. This Unit will critically discuss the category of law. It deals with the various approaches within the discipline of law. It tries to engage with the different aspects of law such as the nature of the law, positive law, natural law school, legal realism, sociological approaches to law, historical approach and critical legal studies and the present-day law.

5.2 LEARNING OUTCOMES

After reading this Unit, you will be able to:

- Define the meaning of law
- Describe the nature of law
- Distinguish between the various schools of law
- Analyse the present-day laws in a critical way

5.3 DEFINITIONS OF LAW

There are many definitions for the word "law." According to Oxford Dictionary law is "the whole system of rules that everyone in a country or society must obey." To break it down further, law is:

- Whole system of rules;
- These rules need to be obeyed
- By everyone living in a country or society

Encyclopedia Britannica defines law as, "the discipline and profession concerned with the customs, practices, and rules of conduct of a community that are recognized as binding by the community. Enforcement of the body of rules is through a controlling authority."

This definition specifies that:

- Law is both a discipline and a profession. Law is a discipline, because it is studied as a distinct course, much like History, Economics and Sociology. Law is a profession comprising of lawyers and judges, who help the people to solve their legal problems.
- Law is concerned with – customs, practices, and rules of conduct of a community. The way in which marriage is performed in a community is based on the customs and practices of that community.
- These rules are recognized as binding by the community. Binding means, the rules are mandatory and need to be followed by the community.
- The rules are enforced through a controlling authority i.e., courts, police.

Check your progress -1

Every family has certain set of rules. These rules differ from family to family. Answer these questions:

1. In your family, who sets the rules to be followed by all the members?

2. Are there separate set of rules for males and females?

3. What are the rules in your family that you feel are weird or silly or unnecessary or bad?

5.4 CASE STUDY

In Kerala, there is a temple in Sabarimala and the deity is Ayyappa Swamy. Women were not allowed into the temple because the temple deity is a "celibate male." This rule was enforced by the Temple Board. Some women groups filed a petition in the Supreme Court on the grounds that the practice is discriminatory against women. There was public debate for and against allowing women into the temple.

Consider these facts:

a. The Constitution of India guarantees non-discrimination on the basis of sex. It implies all are equal before the law and no one can be discriminated because they are women or men.

b. There is nothing in the Hindu religious texts which prohibits the entry of women into the Sabarimala temple.

c. Though the ban on the entry of women into the temple has been practiced for the last few decades, historical records show that women were earlier allowed into the temple.

Irrespective of what the Supreme Court decided in this case, answer whether women should be allowed to enter into the Sabarimala temple and give reasons for your answer.

5.4 NATURE OF LAW

How do you define the words like – friendship, honesty and love? It is defined as per one's own perceptions and experiences in life. Law is explained and understood in many different ways by different jurists, lawyers, philosophers, sociologists and political scientists. The nature of law is so broad and manifold, that no one single explanation suffices. Philosophers since the ancient times from different civilizations have given their idea of law. These ideas have been put together into two broad school of thoughts - positive and natural.

5.4.1 Positive Law

Positive law theorists like John Austin and Jeremy Bentham defines law "as it is," recognizing only the "formal sources of law." For example, legislations like The Indian Penal Code, Right to Information Act and Criminal Procedure Code are considered as law. Informal sources of law like – customs, usages and morals are not considered as law. For the positivists, the source of law should be "posited" formally.

John Austin (1790-1859) was the first professor of Jurisprudence at the University College London. The Province of Jurisprudence Determined (1832) and Lectures on Jurisprudence (1879) are his two main works. He defined law as, "the command of the sovereign, enforceable by sanctions." Due to the importance given on the "command", positive law is also known as "Command Law Theory."

Austin's definition consists mainly 3 aspects:

- Sovereign
- Command
- Sanctions

Sovereign: Sovereign means a person who is supreme and not influenced by external factors. In a monarchy, the King is the sovereign. The King cannot be questioned by any external person. The King takes his own decisions. In a functioning democracy, the people are sovereign and their will is expressed through the Parliament. In a monarchy, whatever are King says becomes the law and no one can violate those commands. In a democracy, the laws are made by the Parliament and is applicable to everyone.

Command: For Austin, command are those formal declarations issued by the King or legislations passed by the Parliament.

Sanctions: Sanctions are consequences for violating the commands or law. It could be penalties, fines or other forms of punishments. If a certain law is not followed, the Government imposes a punishment. For example, the traffic police impose a fine if a person does not wear a helmet while riding his two-wheeler. The element of punishment brings an enforcement value to the law. Sanctions are believed to have a prevention value i.e., a belief that without sanctions, violations of command will be routine which has to be prevented. Sanctions compel citizens to follow the law.

Jeremy Bentham (1748-1832) was a legal philosopher. Much of the England's law was not codified, but it was all scattered in the decisions of several courts. This body was collectively known as "common law" in England. In his famous work *A Fragment on Government* (1776), Bentham criticized the Common Law of England as being vague. Bentham said that the laws had to be systematically codified to avoid confusions. He defined law as, "an assemblage of signs declarative of a volition conceived or adopted by the sovereign of a state." Much like Austin, this definition of Bentham says that the laws are made by the sovereign.

Recap:

- The proponents of positive law are not concerned with the morals and other informal sources of law.
- Positive law is concerned only with the formal and codified/legislated sources of law. For example: Indian Penal Code.
- Positive laws are made by the sovereign of a country.

5.4.2 Natural Law School

- The main proponents of Natural law are Thomas Aquinas, Socrates, Aristotle, Cicero, John Finn. For natural law theorists' law is the law of nature, divine law and should be based on
- Reason
- Knowledge and truth
- Universal applicability
- Immutable i.e. applicable over a long period

Natural law proponents believe that law is not supreme and are subject to change if it does not appeal to reason and is not rational. When laws do not resolve the issues of the society or in fact harm certain section of society, they can be changed and improved to address the issue.

- Rational people usually "reason out" why a particular law is bad and how it can be made better.
- People who are religious rely on the "religious sources" and ask for the man-made laws to follow the rules given in the religious texts.
- People who believe in nature, look at nature to find the "perfect law" needed for a situation.

Case Studies

1. In the year 1930, Mahatma Gandhiji did "salt satyagraha," in response to the exorbitant tax imposed by the British on the salt produced in India. This tax made the trading of salt non-profitable for the Indian salt traders. Gandhiji "reasoned out" that this tax was morally bad and protested against the tax law through satyagraha.

2. In USA, there has been a long struggle and debate about abortion following which abortion is legally allowed. Even now, religious fundamentalists argue that aborting a fetus violates the law of God! These religious fundamentalists feel that the law of God is higher than the law made by man.

3. In Ireland, prior to 2018, abortion was not allowed due to religious reasons. A case in 2018 angered the public and women groups when a woman, Savitha Halappanavar died from complications during her delivery. After a lot of pressure from the citizens, Ireland finally allowed abortion from December 2018.

4. In the year 2013, the Indian State of Uttarkhand had floods and wreaked havoc. Environmentalists analysed the situation and blamed the unbridled human interference into nature as the cause for these floods. The presence of religious places in that area led to construction of too many buildings on the ecologically sensitive hills and affected the course of the naturally flowing river. Environmentalists said that nature has its own rules and these rules should not be violated.

The philosophers of Greek civilization discussed about man's reasoning abilities. Aristotle said that "man is a rational animal." According to Aristotle (384 to 322 BCE), man is distinguished from animals due to the "reasoning power" he possesses. Man-made laws have to follow the nature. Man is a part of the nature, hence the man-made laws should be based on "human reason."

During the medieval times, some Christian fathers promoted the idea of natural law by using the religious texts. Saint Thomas Aquinas is a prominent theologist who said that the laws of God could be discovered by man by applying his reasoning power.

In the Renaissance times, philosophers like Hobbes, Locke and Rousseau promoted the idea "reason" in their theories, which laid the foundation for the modern theories of natural law. In the modern times, Finnis is a prominent jurist whose idea of natural law has been appreciated. According to Finnis, the content of natural law should be made up of "basic forms of good" necessary in ordering human life. He lists out seven forms of good:

- Life
- Knowledge
- Play
- Aesthetic experience
- Sociability of friendship

- Practical reasonableness
- Religion

Recap:

1. Natural law is the standard of supreme law based on reason.
2. Natural law helps man to evaluate man made laws from a higher standard
3. Natural law provides an avenue to rebel against unjust laws.

5.4.3 Legal Realism

Legal Realism is an approach to law that considers the "real factors" to understand the nature of law. The approach by positive law theory focused on the formal rules. Whereas the natural law theory focused on the moral aspects. Legal realism suggests that that apart from the formal rules and morals, one more aspect needs to be taken into consideration and that aspect is the "human factor."

Laws are applied by humans. No matter what the rules are given in the books, the person applying those laws are judges. Judges are human beings and they have their own personal views, upbringing, influences and ideologies. These personal aspects do influence the way in which the judges apply the law while deciding the cases.

Legal Realism developed in the American legal system, where the judges play an important role in the interpretation of law and their judgments are a source of their interpretations of law. For example, the interpretations of law by two Judges of the US Supreme Court – Antonin Scalia and Ruth Bader Ginsburg in their judgments revealed their approaches to law.

Scalia had delivered several decisions that are said to be "conservative." These are some of his viewpoints based on his judgements and interviews:

1. He believed that same sex marriage was bad.
2. He opposed abortion laws
3. He supported death penalty
4. He did not support affirmative action
5. He supported gun rights for individuals

Ginsburg on the other hand, delivered several decisions that were said to be "liberal." These are some of the rights she ensured through her decisions:

1. She opposed gender discrimination in Virginia Military Institute's recruitments
2. She supported abortion rights of women
3. She supported affirmative action
4. She ruled that "invasive" searching of female students for drugs was bad in law

A corrupt person usually approaches a lawyer with the intention to escape from the law. Such a person is neither interested to know what is unethical, nor wants to know what is the law written in the law books. They are only interested to know if the judge would acquit him. Legal realism takes into consideration the existing corruption and bribery of the judges.

Justice Holmes and Justice Gray were the two pioneers of the legal realism. Both served on the Supreme Court of USA as judges. Justice Gray suggested that whatever the judges declare is the law. Justice Holmes believed in "telling it as it really is." He said that to find the truth of law, it was necessary to examine the "law in action", as opposed to the law in the books. Holmes made the famous statement of "the prophecies of what courts will do in fact, and nothing more pretentious is what I mean by law," Holmes believed that law does not work in mathematical accuracy.

Another Jurist – Jerome Frank supported the view that law does not work in mathematical accuracy. He said that "certainty of law is a myth." For example, if we approach a lawyer with a case in hand, he will tell us the chances of winning. But he cannot with all accuracy predict the outcome of a case. Many times, lawyers will tell the clients that the outcome of the case depends on the judge who would decide it!

5.4.4 Sociological approach to law

The beginning of 19th century saw many changes. There was industrialization and rapid urbanization. This resulted in communal existence, growth in population and inequalities. Health, welfare, education and economy became the concern of the welfare State. Regulation of many new sectors by the Government became necessary. The old methods of law were insufficient and did not address the concerns of the poor and the marginalized sections of the society. It brought to fore the imperative for law and society to integrate and address the concerns of the society.

Friedmann, in his book *Law in a Changing Society* discusses the paradox of whether law influences the society or the society influences the law. The answer to this question is quite nuanced and the examples below show that both influence each other.

To stem the widespread practice of the social evil of dowry, the government passed a law making it illegal to give and take dowry. This legal measure initiated through interaction with a society, although did not eliminate the practice of dowry, was instrumental in reducing its prevalence considerably. Same is true about the child marriage prohibition. These are ways in which the law and society interact and influence mutually.

Jhering, a German Jurist discussing the origins of laws and legal institutions, states, "law is an instrument for serving the needs of a society." For example, Company Law exists because it serves the needs of businesses. Jhering rightly believed that the purpose of law is to further and protect the interests of the society. Human beings have both selfish and unselfish purposes in life and law has to suppress the selfish purposes of man. For example, the selfish purpose of killing for money is prohibited by law. Law does not exist for the

individual alone, but for the society as a whole.

There are three types of interests – individual interests, societal interests and State interests. Jhering believed that these three interests had to be balanced. For example, in India Free Speech is a Fundamental Right for the individuals. However, the State Interest allows the Government to restrict the free speech of individuals when it becomes "hate speech." When law is applied in service of social good it is necessary to reward the good and deter the bad.

Jurist Ehrlich from Austria contributed to the "impact of laws on society." He believed that formal sources of law give inadequate picture of society. There is divergence in the law as it has existed in the books and as it is applied in the society. He proposed the idea of "living law", which is the law as it works in the society. To discover the living law, one has to go beyond the formal sources and check the judicial decisions, modern business documents and observe the people's behaviour.

Roscoe Pound, a professor from Harvard Law School gave importance to take into account "social facts." He said that it was necessary to make social investigations before making the laws. France in the year 2010 passed a law banning veils, burkhas and dresses covering entire body. This law faced opposition from citizens and international bodies as being discriminatory towards women and certain religions. In India, the Farm Laws passed in 2020 without consultation with the farmers has resulted in widespread protests from the farmers.

5.4.5 Historical approach

Historical approach to law deals with the importance of using historical experiences for making laws. Savigny is credited with making prime contributions to this approach. Savigny, an expert in Roman Law was a professor at the University of Berlin in Germany. When there were complex legal problems, the lawyers and law makers looked to Roman Law for solutions. Roman Law was well developed in the ancient and medieval times, particularly the law of possession.

Savigny was not in favor of legal reforms without taking into consideration the history. He made the famous statement, "the nature of any particular system of law, was a reflection of the spirit of the people who evolved it." Savigny believed that the laws of a nation could be seen in the "spirit of the people" and it was manifest in the customary rules. Law grew with people and nation. He was of the opinion that customs were more important than the legislations.

Savigny's idea of giving history and customs more importance was criticized by many because he tried to transplant the thousand-year-old Roman Law to Germany. It is difficult to ascertain historical facts with precision. If Savigny's ideas were to be implemented literally, old customs will gain importance in law even if they are discriminatory making social reformsdifficult. For example, slavery was a custom followed throughout history, and if laws were based in history of slavery would have continued.

5.4.6 Critical Legal Studies (CLS)

Critical Legal Studies (CLS) is a relatively new approach in Jurisprudence. It had its birth during 1970s in Harvard Law School of America. CLS is considered to be a radical approach to law. CLS is critical of the old beliefs of law. It questions the natural order of things. The chief exponents of critical legal studies are: Robert Gordon, Peter Gabel, Mark Kelman,

Clare Dalton, Duncan Kennedy, R.M. Unger.

CLS puts forward critical ideas contrary to conventional beliefs in law. It is understood for example that the judiciary is an institution independent of legislative and generally politics. CLS however affirms that law is influenced by politics. The anti-conversion laws passed in states of Rajasthan, Madhya Pradesh and Gujarat, the Supreme Court decision on the Babri mosque dispute in 2019, the decision of the Karnataka high court upholding the ban on wearing hijab in schools, are examples of politics influencing laws and judiciary.

On paper the constitution guarantees equality before law but CLS exposes biases of law. Despite equality of law, it does not in fact achieve the objective of equality. For example, the law provides for any person accused of a crime to be let out on bail. However, while this rule applies to all, it is not so in reality. Posting of bail requires money or property. Consequently, many poor people and women who cannot afford the bail money are languishing in jails.

CLS explores the role of capitalism, meta narratives, patriarchy and conception of race to how and who law serves. CLS suggests that the ideals of capitalism are built into the legal system which are the root cause of legal biases against the poor that leaves them without protection of law. For example, the contract law assumes that there is free consent while making contracts. However, in reality many workers who sign contract of employment have no choice, but to agree to the wages dictated by the employers. Consequently, CLS conclude that the "free choice and free market" promise of capitalism is a sham.

Patriarchy in the society is more powerful and the inability of the legal system to tackle patriarchy results in discrimination and inequality. There are several patriarchal elements found in the laws. Women are unable to enforce property laws, do not have equal rights to property in law, counselling cells of family courts counsel women to stay in abusive marriages for the sake of the family, women face many hurdles to get justice to their complaints of domestic and sexual violence. These critiques of patriarchy have emerged from CLS. CLS encourages a critical look at the law and examine whether the laws really serve the most vulnerable in the society.

5.5 LET US SUM UP

The concept of law is varied and multidimensional. These variations are captured well by the various schools of legal thought. Natural law focuses on the ethical aspects of law. Positive law focuses on the law books and formal sources of law. Legal realism looks at the court and judges for knowing the real law. Sociological approach to law is all about the interaction of law with

social issues. Historical approach deals with the importance of historical facts in making the present-day laws. CLS helps us to think critically about the existing laws. Every approach of legal thought has shortcomings. All these approaches however provide the wholesome picture on the nature of law.

5.6 UNIT END QUESTIONS

1. Define the word law.
2. What is the meaning of "superior law" as per natural law school?
3. How do judges influence the law?
4. What is the role of society in the making of laws?
5. Is the promise of equality in law real?

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