



Session 6

Theories & concepts of law 1

Views on law

Most views on “law” fall under two categories, namely:

- Natural law: laws derived from eternal and unchangeable principles
Example: parental protection of children – CDN [Child protection Act](#); CH - civil code art 315
- Positive law: laws derived by convention or social arrangement
Example: the functioning of registries of commerce

Natural law



Plato

- Law has a moral imperative which has to be respected even in the face of death, by both the individual (through reason) and the state (through law).
- Justice exists when law and reason work together for the good of the whole.
- Justice represents an ideal, a natural moral order that human laws should attempt to achieve – but eventually cannot.

Plato

DISCUSSION 1

... a law is well enacted only if it aims, like an archer, at that unique target which is the only object of legislation to be invariably and uninterruptedly attended by some good result

The problem is that this good result must be known beforehand i.e. tendency to judge a law by its moral effect rather than ascertain the moral effect of a law.

Aristotle

- Humans are endowed with the ability to think and reason.
- True meaning of law as ideal is revealed by means of reason.
- Intention of law is to lead people to virtue.
- Justice includes:
 - general justice (concerns the whole notion of goodness),
 - particular justice (deals with behaving fairly in citizen-state - *distributive justice*, and citizen-citizen relations: *rectificatory justice*),
 - political justice (concerns how the law deals with people as political beings based on enduring principles – *natural justice*, and enactments that are rationally devised – *legal justice*)

Aristotle

DISCUSSION 2:

... the law is reason unaffected by desire

If the law is reason unaffected by desire it is desire and passion that underpin the will for an equitable society.

Cicero

- Natural laws are universal and unchanging, hence a higher law to measure positive law.
- Civil laws should be set aside or disobeyed if the laws conflict with natural laws.

Cicero

DISCUSSION 3:

... the law is the mind and reason of intelligent man (*sic*), the standard by which justice and injustice are measured

If the law is the mind and reason of intelligent man therefore the standard by which justice and injustice are measured what is it that measures the law?

Aquinas

- Identified four types of law:
 - eternal laws (those by which god created the universe)
 - natural laws (those eternal laws in operation in humans via reason)
 - divine positive laws (the part of eternal law revealed in the scriptures)
 - human positive laws (those used for the functioning of society).
- People are to obey a law that is just.
- The purpose of laws is to habituate humans to become virtuous.
- One is not morally obliged to obey a law that conflicts with divine laws.

Aquinas

DISCUSSION 4

... law is nothing other than a certain ordinance of reason for the common good, promulgated by the person who has the care of the community

What about the one who does not care or does not have the care of the community ?