

## Natural Law

Natural Law's goals are to achieve justice, equity, fairness, and security, among others. When a lawmaker or adjudicator takes a decision, whether it is the enactment of a new general norm or the resolution of a conflict, they have to be consistent with these goal and must provide the reasons for doing so.

Other principles that Natural Law scholars and practitioners hold are that every human being has dignity, that people should be free, that the individual should be empowered, that people should not be forced to do things against their interest unless there is some principled plan for doing so, and that human relationships should be aligned with nature, or science, or reason.

According to Greg Forster, the basic principles of Natural-Law Thought are:

1. Natural law is an eternal moral law revealed to all people through human nature.
2. Natural law influences (but cannot save) even fallen and sinful humanity.
3. Natural law is the proper basis of political authority.
4. Natural law authorizes society to establish a government.
5. Governments are themselves subject to the natural law.
6. Each society's laws should apply the natural law to that society's particular circumstances.

All of these underlying principles are not created out of the legal system, they are the premises on which a legal system should be built.

Natural law resides in human nature itself, as an inherent right grounded in a moral system. It is an objective law, engraved in human reason. It comprises unwritten laws of human nature, as opposed to conventions. It is inalienable, intangible, equally distributed in all individuals of the human species.

## POSITIVISM

A law is a command of the sovereign.

If the command is not followed, there is a sanction, which may be either punitive, such as in criminal law, or privative, i.e., you are deprived of the enforcement power of the state with respect to the transaction in question.

A \_ B

If no B, then S (sanction).

A sovereign is a person or body of persons whose actions define legality.

This conception of law focuses exclusively on state law. So, societies that do not have a state, which is a modern notion, do not have law. This is a very narrow concept of law.

(Hans Kelsen, John Austin, H.L.A. Hart).

Law is an exact science, much like physics, zoology, botany and chemistry. No practical experience, but knowledge gained of pure abstract law, particularly by analyzing "case law" of appellate decisions would assure a scientific understanding of law.

Case law is analyzed through briefs: Issue, Rule, Analysis, and Conclusion.

Judges have little independence in interpreting rules. Constitution, statutes, and/or precedents dictate decision-making processes. Judge has to only look at the facts, decide on the doctrine or principle at play, search for the appropriate rule or precedent(s), and apply it to the case.

### **Formal rationality**

Formally rational: where internal rules are applied to all similarly situated cases in an identical manner. Rules are abstract and general. (Legal brief, consensual contract). Rules are clearly stated and applied to all similarly situated cases in an identical manner. High predictability. Law is rational to the extent that decisions are based on existing, unambiguous rules. Law is formal to the degree that the criteria, the standard used for arriving at a decision is totally internal to the legal system.

## LEGAL REALISM

Realists stipulate that judges determine the outcome of a lawsuit before deciding whether the conclusion is, in fact, based on an established legal principle.' In other words, a judge reviews the facts presented and decides how he or she will rule without first analyzing precedent and statutory law. Once the judge has reached a conclusion, he or she will then look for existing principles in case law or statutory regulations that support the conclusion. Only in unique circumstances where such a premise cannot be found will the judge change his or her conclusion to one which can be justifiably maintained.' Realists flatly reject the idea that "a judge begins with some rule or principle of law as his premise, applies this premise to the facts, and thus arrives at his decision."<sup>3</sup> The Realists present that a judge pursues a suitable foundation for a written opinion in law and fact only after an agreeable conclusion has been reached. The fact that a judge is supposed to be impartial is not sufficient to stifle a jurist's tendencies to follow his or her human predispositions when arriving at a legal conclusion.

Capurso, Timothy J. (1998) "How Judges Judge: Theories on Judicial Decision Making,"  
University of Baltimore Law Forum: Vol. 29: No. 1, Article 2.