

JURI 1106 Law as Social Science



Nature and notions of Law

What is Law?

- No single answer. Complex question.
- Many competing notions of Law.



Nature of Law

- Normative nature of law, whether a legal enactment or a moral commandment.
 - It does not describe a fact, but lays down directions for our behaviour.
 - Law means commandment, prescription, rule, directive, order, requirement, obligation to do or to leave something, ought, norm.
- It can be broken.
- It can be enforced by individual/s.
- It is alterable.

Nature of Law

- Differences between *lex et ius*, *loi et droit*, *ley y derecho*.
 - law and Law.
- *Lex* from which law is derived means enacted statutes, statutory law, case law.
- *Ius* is the entire legal order and also the (legal) discipline which studies the legal system.

The content of law

What is the content of Law? What are the elements of law? What does the Law work with?

- Facts or actual behaviours (reality)
- Rules or norms (expressed in language)
 - Substantive (or primary)
 - Order
 - Sanction or secondary
 - Punitive: punishment, e.g., go to prison or pay a fine.
 - Privative: you are deprived of a right for not following the rule.
 - Procedural (rules about substantive rules, how to interpret, apply, and enforce procedural rules.

Law and Reality

- Laws are formulated in a way that they can be applied to reality. As a norm of behaviour, the law corresponds to reality. Laws are enacted so that life conforms to them.
- Reality has an impact on the formation of law. Relevant aspects of reality are transcribed by abstract notions. The legal consequence is also formulated in an abstract manner.
- Applying the law, the judge searches in reality (facts) for what corresponds with the abstract notion of the law.

Law and language

- Laws are formulated in language. And language permits the formulation, interpretation, and application of the laws.
- Language also permits to identify and describe reality (the facts).
 - The language itself permits using abstract notions to explain real situations.
- Like in literature, language serves as a necessary unifier to understand one another in daily life and in applying laws.

Application of the law

The application of the law is conditional upon the answering of two interdependent questions:

- What are the facts (behaviours) of the case?
- How does a law (rule) apply to this case?

Positivism

- A law is a command of the sovereign.
 - A sovereign is a person or body of persons whose actions define legality.
- If the command is not followed, there is a sanction.
- A _ B
- If no B, then S (sanction).

Sanctions 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.

Positivism

- 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.
- Method: Formal rationality.
 - The judge has to only look at the facts, decide on the applicable rule, and apply it to the case.

Legal Realism

- The Realists attacked the notion that law is an exact science.
- Rather than relying on mechanical deductive reasoning from given rules, decision makers should be result-oriented, i.e., concerned with probable consequences of their decision.
- Rule skepticism: there is a difference between paper rules and real rules. The decision of a case is based more on hunches, feelings, intuition, conviction or unconscious processes –extralegal factors. After the fact justifications or rationalizations can always be based on some theory, doctrine, rule, etc. Conclusions are first made on some extra- legal factor; and then the judges work backward for its justification.

Legal Realism

- It is not the rule of law that is central but the law through people.
- The reasoning one finds in court opinions is just **window dressing**, i.e., formal clothes in which the judges dress up their thoughts.

Critical Legal Studies

- Rule and fact skepticism carried over from the Legal Realism. The traditional formalism, reliance on neutral and linear logical reasoning, and the belief in neutrality, objectivity, predictability and the stability based on stare decisis are a **Big Lie**.
- The notion of legitimacy is central in CLS critiques. People are led to believe that they are governed by the rule of law, not people. They argue **law is ideology, which is shaped by the help of law**.

Critical Legal Studies

- **Deconstruction method:** a critical examination of underlying, unstated assumptions that inhere in case opinion. These are made visible and traced to particular groups.
- **Reversal of hierarchies:** Any value position becomes dominant and the other one repressed, so one is privileged as present; and the other one is repressed and is rendered absent. So, we should start with the idea that any term (presence) always implies a hidden one (absence). The trace is the part that exists in each and maintains the relation.

Anthropological Jurisprudence

- It is the actually followed body of rules which governs the behaviour of members of a social group (the living law).
 - The essential element of the concept of law is not that it is created by the State, or that it constitutes the basis for the decisions of the courts.
- In other words, law comprises: (a) regularized conducts; (b) disruptions; and (c) social reaction to disruptions.
- Malikowski.

Anthropological Jurisprudence

- The “**living law**” is the law which dominates life itself even though it has not been posited in legal propositions.
 - A social association is a plurality of human beings, who in their relations with one another, recognize certain rules of conduct as binding, and generally, at least, actually regulate their conduct according to them.
 - Law is thus found in actual usages, not in court decisions or statutes.
 - There is no society without law.
- Method: Observation.
 - In order to study law, you must observe the rules of custom as they function in actual life.

Other conceptions of law

- Conventionalists
 - Law cannot be defined
- Essentialists
 - Law has an essence of its own and it is possible to specify the conditions that must be met in order to assert that law as well as its legal system, exists. This can be done by analyzing its components.
- Divine law: given by God through creation or revelation.
- Natural law dictated by reason or common sense.

Sociology of law

- An order will be called law if it is externally guaranteed by the probability that coercion –physical or psychological- will be applied to bring about conformity or avenge violation by specialized personnel.
- (i) pressures to comply with the law come externally in the forms of actions or threats of action by others;
- (ii) these actions involve coercion;
- (iii) those who apply coercion are officials whose official role is to enforce the law.

Sociology of law

- Law can be analyzed following the method that is predominant in Sociology, which focuses on social processes rather than on the interpretation of norms.
- Law can be studied as a social process, instrumented by individuals during social interaction.
- Sociologically speaking, law consists of the behaviors, situations, and conditions for making, interpreting and applying legal rules that are backed by the state's legitimate coercive apparatus for enforcement.
- It also studies social norms and the effects of the law and the legal system on society.

Sociology of law

- It analyzes the impact, positive and negative, of law on race, class, gender and other social factors.
- Law needs to be understood as part of social institutions
- It is important to critically analyse how law and society interact with each other.
- Legal categories and legal reasoning interact with social hierarchies based on race, class, gender and sexuality.
- It is important to analyze relations between law and social control and social change.

Functions of Law

- Social control
- Dispute resolution
- Social change

Functions of Law: Social control

- There are two basic processes of social control: formal social control and the internalization of group norms.
- Formal social control is characterized by: (i) explicit rules of conduct, (ii) planned use of sanctions to support the rules, and (iii) designated officials to interpret and enforce the rules, and often to make them. But Law does not have a monopoly on formal mechanisms of social control.
- Control through law is usually exercised by the use of negative sanctions and not by positive rewards. A person that obeys the law does not receive an award.

Functions of Law: Social control

- Mechanisms of social control through law: (i) Criminal sanctions, (ii) civil commitment and sanctions, and (iii) administrative licenses.
- Criminal sanctions: the purpose of sanctions:
 - Retribution (denounce unlawful conduct)
 - Deterrence (both specific and general),
 - Rehabilitation of the offender.
- Civil commitment: medicalization of social problems, such as drug abuse, alcoholism, etc. Compensation.
- Administrative law: administrative regulations is used as a means of social control.

Dispute resolution

- By the parties themselves: physical violence, family feud, bearing it, avoidance, etc.
- By adjudication: a formal method of conflict resolution, where a third party –the courts- intervenes –even if not wanted by the parties- and renders a decision which is enforceable.
 - Case and controversy: there must be standing (before in Canada a pecuniary, proprietary or economic claim or one to personal property, now these requirements were relaxed and there must be a genuine interest), the dispute must be ripe (not moot) and there must be jurisdiction (and justiciability, e.g., no political questions). Also, the claim has to be within the statute of limitations.
- Alternative Dispute Resolution (ADR): negotiation (without the help of any third party), mediation (third party helps disputants), and arbitration (third party makes a final and binding decision, which is enforceable).

Social change

- Law is both a dependent and an independent variable, i.e., an effect and a cause of social change. The question is not whether law changes society or whether social change alters law, but rather, what level or under what circumstances change is produced.
- Examples of social changes as causes of legal changes: Soviet Union, China, and other radical revolutions.
- Examples of legal changes as causes of social changes: abolition of adultery, same sex marriage, sexual assault rules.

Dysfunctions of law

- Tendency toward conservatism.
- Social changes often precede changes in the law.
- Need for authority.
- Discrimination.

Branches of Law (Positivism)

The Conceptual Divisions of Law

- There are several classifications of law. While these are not absolute categories, and there is sometimes some overlapping, they are useful as they permit us to understand all dimensions of law.

Branches of Law (Positivism)

- National vs International Law
- Public vs Private Law
- Substantive vs Procedural Law

Branches of Law (Positivism)

- National
 - National or domestic law regulates issues within a state.
 - Domestic law can be further classified into public or private and substantive and procedural.
- International Law
 - International Law governs the relationship among states and other international actors.
 - International law can be further classified into public or private and, to a lesser extent, substantive and procedural.

Branches of Law (Positivism)

Examples of international Law

- International Criminal Law
- International Business Law
- International Aviation Law
- International Space Law
- International Trade Law
- International Tax Law

Branches of Law (Positivism)

- Public Law
 - It is concerned with the structure of government, the duties and powers of officials, and the relationship between the individual and the state.
 - It is focused on public, state interests.

Examples

- Constitutional Law
- Criminal Law
- Administrative Law
- Immigration and Refugee Law
- Tax law

Branches of Law (Positivism)

- Private Law
 - It is concerned with the regulation of private matters between individuals, or between corporations, or between individuals and corporations.

Examples

- Contractual
- Torts
- Corporate/commercial
- Real estate
- Family
- Labor
- Wills and Trusts

Common law: sources

- Constitution
- Precedents
- Statutes/Codes
- Regulations
- Contracts
- Publications

Civil law

Sources

- Constitution
- Codes
- Statutes
- Precedents or court decisions
- Regulations
- Contracts

Scholarly publications (books and articles by legal scholars)

Charter rights

- Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
- It applies to all governments – federal, provincial and territorial.

Charter rights

- Fundamental freedoms
 - freedom of conscience and religion;
 - freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
 - freedom of peaceful assembly; and
 - freedom of association.
- Democratic rights of citizens.
- Mobility rights.

Charter rights

Legal rights

- Life, liberty and security of person
- To be secure against unreasonable search or seizure.
- Not to be arbitrarily detained or imprisoned.
- Not to be arbitrarily detained or imprisoned.

Charter rights

- On arrest or detention
 - To be informed promptly of the reasons for arrest or detention;
 - To retain and instruct counsel without delay and to be informed of that right; and
 - To have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful.

Charter rights

- If charged with an offence, the right
 - To be informed without unreasonable delay of the specific offence;
 - To be tried within a reasonable time;
 - Not to be compelled to be a witness in proceedings against that person in respect of the offence;
 - To be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;
 - Not to be denied reasonable bail without just cause;
 - Trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;

Charter rights

- Not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law.
- No double jeopardy.
- If found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

Charter rights

- Not to be subjected to any cruel and unusual treatment or punishment.
- The right against self-discrimination.
- The right to an interpreter if a party or witness in any proceedings.

Charter rights

Equality rights

- Equality rights for all
 - Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Charter rights

- The official languages of Canada
- Minority language education rights
- Canada's multicultural heritage
- Indigenous peoples' rights
 - The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including: any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

Charter rights

- The rights and freedoms in the Charter are not absolute. They can be limited to protect other rights or important national values. For example, freedom of expression may be limited by laws against hate propaganda or child pornography.

Charter rights: Oakes test

- The objective of the law must be very important
- The means adopted to attain that objective must be reasonable and demonstrably justified (proportionality test)
 - the measures adopted must be rationally connected to the objective;
 - the measures adopted should cause minimal impairment to the right or freedom in question; and
 - there must be a proportionality between the *effects* of the measures limiting the right or freedom and the objective identified as being sufficiently important.

Legal research

- Searching and analyzing primary legal sources.
- www.canlii.org

CanLII

Français | English

Search all databases

Document text

?



Case name, document title, file number, author or citation

?

Noteup/Discussion: cited case names, legislation titles, citations or dockets

?

Primary law

Canada (Federal)

British Columbia

Alberta

Saskatchewan

Manitoba

Ontario

Quebec

New Brunswick

Nova Scotia

Prince Edward Island

Newfoundland and Labrador

Yukon

Northwest Territories

Nunavut

Commentary

Books, articles, reports and more...

Methods of legal data collection

Case report (a written decision of a judge).

Procedural ruling vs. decision on the merits of the case

- The caption: the name of the case.
- The case citation: year of decision, court, reporter (CanLII).
- The headnote: summary of legal principle or rule, summary of the legal issue of the judgment and information of other relevant cases.
- The authoring judge.
- The facts of the case.
- Procedural history and appeals (good law).
- References to other cases.
 - Cited to.
 - Distinguished from
 - Cited by.

Methods of legal data collection

- Legal principles and other authoritative sources.
 - Legislation, common law precedents.
 - Justification of reasoning, e.g., public policy.
- The outcome.
 - Holding (or disposition).
 - Majority decision.
 - Concurring decision.
 - Dissenting opinion.
 - Court of appeals: affirm, revert, remand.

Good law

Checking that a case has not been appealed or overruled.

- Decisions of the Supreme Court of Canada.
- Links from CanLII within the decision.
- Run a search in CanLII using the name of the case (document text, case name, and noteup).

Activity

Can the police search and seize your cell phone in Canada without a warrant?

- What keywords and operators will you use?
- How can you narrow down your search?
- How can you search by highest court?
- What cases did you find?
- Is R v. Fearon still good law?
- Find a commentary for Search of Mobile Phone Incident to Arrest. Who wrote this commentary? When? How can you update this commentary?

Reading academic texts

- When you read an academic text, you recreate or co-create the meaning of the text, together with the author. In other words, you negotiate the meaning with the author.
- Reading is a process shaped partly by the text, partly by the reader's background, and partly by the situation the reading occurs in.
- Reading an academic text does not simply involve finding information on the text itself.
- You need to work with the text. You can only achieve this if you can use a series of categories of analysis, some of which are specific to each academic discipline.
- Thus, working with a text and recreating its meaning entail both non discipline-specific and specific strategies.

Strategies to reading academic texts

- Understand why you read the text.
 - Why do you read the text? What is the purpose of your reading?
 - What do you need this text for? Try to formulate the purpose in the form of questions.
 - What information are you looking for in the text?
- Understand the context of the text.
 - Who is the author? Is she a critical author? Does the author's opinion reflect the mainstream school of thought?
 - When was the text written?
 - Where was it published? US? Canada? Europe?
 - Who is the audience?

Strategies to reading academic texts

- Find the thesis of the text and the main claims of the text.
 - What are the main claims dealing with the issues you are interested in?
 - What does the author intend to do? Does she intend to challenge an existing position? Does he want to consider a variable that previous researchers have missed? Apply a theory or a concept in a new way?
- Find the arguments used to support these claims.
 - What are the different positions used by the author?
 - What are the arguments used to hold these positions?
- Find any –explicit or implicit- counter-arguments.
 - What are the counter-arguments?

Strategies to reading academic texts

- Deconstruct the assumptions hidden in the text.
 - Are there any assumptions hidden in the text?
 - Are there any concepts taken for granted? If so, look for these concepts in the textbook, an encyclopedia, or other reference book.
 - Are there some debates that are taken for granted?
 - Is the author responding to another article or book? If so, briefly read that other article or book.
- Assess the strength or validity of the author's argument.
 - What is the strength or validity of the author's argument?
 - Don't take the author's argument at face value. Try to evaluate the argument's effectiveness in making its claims.
 - What evidence does the author offer in support of her claim? How convincing is the evidence?
 - What logical reasoning, if any, does the author use?
 - Is there consistency of thought?
 - Are the examples and evidence relevant?

Strategies to reading academic texts

- Analyze the policy implications and social consequences of the author's thesis and claims. Figure out the non-immediate consequences of the arguments used by the author.
 - What are the non-immediate consequences of the arguments used by the author?
 - What are the implications of the author's thesis?
 - What are the applications of the author's thesis?
- Make connections to other texts.
 - What connections can you make to other texts?
 - How does this relate to other topics you learned about?
 - Can you relate the author's thesis or arguments to your own experience?

Categories of analysis for academic legal texts

- Determine the approach to the legal argument (e.g., positivism, socio-legal, etc.).
- If positivist, determine the validity (e.g., look at the jurisdiction) and currency of the argument (e.g., law repealed).
- Evaluate the structure or rationality of the reasoning behind the legal argument (e.g., authority, logical, none).
- Identify the legal theory underlying the argument.
- Legal tradition (e.g., common law, civil law, Islamic law, etc.).
- Contrast the thesis to the solutions in Comparative law.
- Analyze the policy implications and social consequences of the author's thesis and claims.
-