Annexure on Terms and Clarifications

Law

Law as a theory and concept has been the subject of endless discussion. However the various theories of law put forward by the different schools of jurisprudence do not allow us to understand law. Harold Berman (1988) elaborates on this question by suggesting that each of the three main schools of jurisprudence (which are the historical school, the legal positivist school and the natural law school) have isolated an important dimension of law, and what one requires is an integrative jurisprudence. The positivist school as mentioned previously treats law being a body of law laid down by the state. Legal rules are thus divorced from morality and history and is analysed independently of moral considerations and social consciousness. The historical school treats law as a manifestation of the historical consciousness of a society, and interprets law according to manifest social representations. The natural law school treats law as an embodiment of legal rules which arises from moral principles and concepts derived from reason and conscience. Berman identifies one of the causes behind these differences as the definition of law. Positivists define law as official rules made by the state, naturalists define law as official rules but they also test positive law by moral principles and standards. Historicists are more concerned with customary law than enacted law, and are more concerned with moral principles that correspond to the character of a given society.

Berman (1983,4-5) suggests that law cannot be understood merely as a body of rules but also as modes of governance including how orders have been issued, officials have been appointed, and the pronouncement of judgments. Law is a living process of allocating rights and resolving conflicts, it consists of not just legal rules but legal activity. It consists of people legislating, adjudicating, administering and negotiating various legal activities. This broad concept of law is needed in order to understand the various legal systems that have
existed in the West. He points out that the differences between the schools arose only in the
eighteenth and nineteenth centuries after the Enlightenment when legal philosophy became
divorced from theology. Prior to that it was accepted that it was God who was the source of
law, and since justice and human destiny were derived from the same source it was possible
to reconcile the moral, political and historical dimensions of law. Locke, Aquinas and
Blackstone may be characterised as natural law theorists but they were also positivists and
historicists (Berman 1988). They believed that God had implanted reason and conscience in
the hearts of men, but they also believed that God had ordained earthly rulers with the power
to make and enforce laws and that the history of law was the providential will of God. For
the positivists it was the state, for the natural law theorists it was the human mind, and for
historicists it was the people or the nation.

Berman’s study provides us with hints as to what a theory of law could possibly be. He
suggests that modern law today has its roots in the Papal Revolution of the twelfth century
where law became an identifiable discourse separate from religion and politics. Prior to the
Papal Revolution there was no clear separation of law from other social processes. Law could
not be identified from general, local or tribal custom. The law of the church as well was
diffused and took customary or regional forms rather than centralised or enacted modes.
However as Harold Berman (1983) has shown, this changed in the Papal Revolution when
law became disembedded from other structures in society. For the first time strong central
authorities both ecclesiastical and secular emerged. Their control extended from the centre to
local levels. Europe’s first law schools emerged during this period along with a new class of
jurists and professional lawyers. What was more important was that a new science of law was
invented by canonists. Such a science of law adopted the scholastic dialectic already
employed in theology.\(^1\) This science of law treated law as an integrated body of knowledge and employed techniques of interrelating universals and particulars, cases and concepts in order to create levels of generalisation. This emphasis on the synthesis of conflicting authoritative texts was needed to reconcile the conflicting elements which competed within the social structure.

There are other characteristics of western law which sets it apart from other legal systems. It is an integrated body of knowledge made possible by the science of the canonists. It has a capacity of organic growth—changes have an internal logic as they are part of a pattern of changes. Such changes do not occur at random but are due to the reinterpretation of the past. Another distinctive characteristic is the co-existence and competition of diverse jurisdictions and diverse legal systems. There is also a tension between ideals and reality which has often led to violent revolutions in the system.

Berman (1983) further points out that the distinguishing character of western law is its disembedded nature which one cannot find in legal systems around the world i.e. the Islamic, the Chinese, the African etc. where law is conceived primarily as a mediating process and a mode of communication rather than as a process of rule making. He criticises certain views that pronounce the non existence of law in certain cultures where there are no defined rules of conduct that are enforced by a central authority. If there are systems of social control that do not have distinct governmental institutions or words in their language for “law” it does not mean that we cannot call them law.

This brings us to the question of what is law, and how does one recognise something called law across cultures. As one can see there has been no satisfactory theory of law in the western

\(^1\) An elaborate discussion of the modalities of this science is provided in the Chapter titled “The Origin of Western Legal Science” in Berman (1983).
context due to the lack of recognition of the theological foundations of law. One can also see that there is a difference between the modes of governance and the resolution of disputes in the West and the non-West. This difference lets us identify law as being the forms of governance and the resolution of disputes. In doing so we arrive at naming law as an identifiable entity that all of us can recognise. However our understanding of law has been shaped by concepts in Western law due to the fact that a Western epistemic framework is used to study law (as has been outlined the earlier section). I would like to further expand on this question by suggesting that if one wants to further understand this difference we have to understand law as not being merely as an expression of norms as being reasons for action, but a reflection of modes of dispute resolution that are developed over long term ways of seeing and doing in contexts that are results of long term actions. These modes of dispute resolution need to be understood as forms of adaptation leading to certain kinds of expectations which are sometimes transmitted over generations and where explanatory priority is given to the concept of learning.

The purpose of clarifying law as a term as I have done above is to explicate my method and usage of legal materials within this thesis. I use Berman’s understanding of law in order to explain the legal material and expressly show how historicist, positivist or current socio-legal perspectives are unhelpful.

**Legal Categories**

I use Berman’s concept of law to conceptualise legal categories. If law is not legal rules but a living process of allocating rights and resolving conflicts and that it consists of people legislating, adjudicating, administering and negotiating various legal activities, legal categories must be considered as sets of descriptions of these processes which are held
together by a particular conceptual framework. The legal category of the place of worship is thus a set of descriptions held together by a conceptual framework.