CATHOLIC UNIVERSITY OF EASTERN AFRICA

CLS 103

CONSTITUTIONAL THEORY

TOPIC

THE JURISPRUDENTIAL FOUNDATIONS OF CONSTITUTIONAL LAW

Contents

1. Topic content

- Definition of law
- Brief overview of Legal theory
- Brief overview of the legal systems of the world
- Classification of laws
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2. Introduction

In this topic, we seek to establish the link between legal theory and the normative provisions of the law to enable us understand legal principles and rules from a jurisprudential perspective. This is not an in-depth study in 'jurisprudence' or 'social foundations of law' but an effort to determine how legal theory impacts on constitutional law and the normative provisions of the constitution

The object of legal theory is to investigate the nature and content of legal concepts, to understand the underlying meaning of legal concepts and the essential features of legal systems.

Legal theory seeks to answer the question what does it take for a rule to qualify as an authoritative principle of law and how is law to be distinguished from related concepts such as morality ethics or good manners.

3. Topic Objectives

At the end of this topic, it is expected that the participant should be able to

1. **Define** the term 'law'
2. **Identify** the sources of law in our legal system
3. **Articulate** the major theories of law
4. **Relate** the theories to actual provisions of the constitution and constitutional interpretation
5. **Distinguish** between the different legal systems of the world
6. **Explain** the functions and the limitations of law

4. What is law?

In the field of natural, or, indeed many social sciences, law can be defined as 'a statement of fact, deduced from observation, to the effect that a particular

natural or scientific phenomenon always occurs if certain conditions are present e.g. "the second law of thermodynamics"[1] or 'the law of gravity'

In the field of Law, 'Law' is typically seen as the system of normative prescriptions which may be in the form of rules or principles that a particular community recognizes as regulating the actions of its members and are enforced by the imposition of some sanction. Thomas Hobbes defined law as follows; 'law, properly, is the word of him that by right hath command over others' (Leviathan, Chapter 15,) For John Austin,

An online based definition defines law as 'A body of rules of conduct of binding legal force and effect, prescribed, recognized, and enforced by controlling authority. In U.S. law, the word law refers to any rule that if broken subjects a party to criminal punishment or civil liability.'[2]

4.1. The Making of the law

Laws are typically made by recognised legislative institutions. Laws thus made are referred to as 'statutes'. But even more laws are made by the executive through decrees and regulations. Such laws are referred to as 'subsidiary legislation'. In common law jurisdictions, a substantial body of laws have been established by judges through a system of judicial precedent. Private individuals can create legally binding contracts.

A general distinction can be made between (a) civil law jurisdictions), in which the legislature or other central body codifies and consolidates their laws, and (b) common law systems, where judge-made precedent is accepted as binding law.

Historically, religion played a significant role in shaping the content of secular laws. Religious laws are still used in the settling of secular matters in some religious communities, particularly Jewish and Islamic. Islamic Sharia law is, perhaps, the world's most widely used religious law, and is used as the primary legal system in some countries, such as Iran and Saudi Arabia. Legal systems which are based on religious laws are called 'Theocracies'.

Customary law develops and changes organically, and almost unnoticeably, in communities with no recognised or centralized law making institution and is passed on from one generation to another.

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1 https://www.google.com/search?q=what+is+%27law%27%3F&oq=what+is+%27law%27%3F&aqs=chrome..69i57j0l5.10019j0j8&sourceid=chrome&ie=UTF-8

2 http://legal-dictionary.thefreedictionary.com/What+is+law

4.2. Sources of Law

Most legal systems have a clear formula for determining what is and what is not 'law'; typically, this is done with reference to the source of the prescription .Laws are made by recognised institutions in a community using a recognised process that also provides for amendment and repeal of those laws.

For example, in Kenya the Constitution of Kenya at Article 2(4)(5)&(6) and the Judicature Act, section 3, provide for the sources of Law in Kenya. Section 3 of the Judicature provides for the laws that will be applied in the courts of a country.

4.3. The Judicature Act

Section 3 of the judicature Act provides

(1) The jurisdiction of the High Court, the Court of Appeal and of all subordinate courts shall be exercised in conformity with -

(a) the Constitution;

(b) subject thereto, all other written laws, including the Acts of Parliament of the United Kingdom cited in Part I of the Schedule to this Act, modified in accordance with Part II of that Schedule;

(c) subject thereto and so far as those written laws do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August, 1897, and the procedure and practice observed in courts of justice in England at that date;

but the common law, doctrines of equity and statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary

(2) The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay

4.4. The Constitution

Article 2 (4)(5)&(6) of the Constitution of Kenya 2010 provides

(4) Any law, including customary law that is inconsistent with this Constitution is void to the extent of the inconsistency,

(5) The general rules of international law shall form part of the law of Kenya

(6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.

5. Legal theories

There are four major legal theorem; these are;

- Natural law
- Legal Positivism
- Legal Realism
- Critical Legal Studies

Natural law and Legal positivism are the most dominant of the theories. The others are typically variants of this two

5.1. Natural Law Theory

'Natural law' is the idea that there are rational objective limits to the power of law making. The foundations of law are accessible through human reason and it is from these laws of nature that human created laws gain whatever force they have

According to the 'Natural Law' theory, Law is preordained; there are laws that are immanent in nature. It emanates from superhuman or divine entities and is discoverable by reason. 'Natural Law' is a higher law and is the touchstone of validity of all laws and constitutes an objective moral order. Laws made by humans must conform to this objective moral order. Laws made by humans must have minimum moral content. They must be logical, rational, fair and reasonable. Unjust law is not law as it is contrary to natural law

5.1.1. Proponents of Natural Law

The leading proponent is St Thomas Aquinas. Other proponents include Aristotle, Thomas Hobbes, John Locke, Lon Fuller, and, to some extent, Professor Dworkin. Aristotle in particular is credited with influencing the latter day natural law philosophers.

5.1.1.1. Thomas Aquinas

Thomas Aquinas distinguished between four kinds of law

- Eternal,
- divine
- natural,
- human

Eternal law is the decree of God and governs all creation. Divine law revealed in the scriptures. Natural law is human participation in the eternal law discovered by reason

5.1.1.2. Thomas Hobbes

Thomas Hobbes saw natural law as a precept or general rule, found out by reason by which man is forbidden to do what is destructive to life, or take away the means of preserving the same

Hobbes postulates what life would be like without government, a condition which he calls the state of nature. In that state, each person would have a right, or license, to everything in the world. This, Hobbes argues, would lead to a "war of all against all" (bellum omnium contra omnes, and thus lives that are "solitary, poor, nasty, brutish, and short"

Life without an ordered society is short nasty and brutish .Society exists to save man from self destructive behaviour. The members give up some of their individual rights in exchange for peace and security. Law must gain the consent of the governed- social contractarianism. The idea of the social contract as a basis for law qualifies Hobbes as a natural law theorist. The suggestion that the foundation of government is the will of the governed means that the government loses the legitimacy to govern when it goes contrary to the will of the people.

5.1.1.3. Lon Fuller

Lon Luvois Fuller (June 15, 1902 – April 8, 1978) was a noted legal philosopher, who wrote The Morality of Law in 1964, discussing the connection between law and morality. Fuller was professor of Law at Harvard University

Lon Fuller wrote that law must meet certain minimum standards. The more the law departs from these minimum standards the less the likelihood of its acceptance. On this Fuller differed with his colleague professor Hart. They could not agree on whether Nazi law was in fact law

5.1.1.4. Fuller's Eight Routes of Failure for any Legal System

Fuller contends that the purpose of law is to "subject human conduct to the governance of rules". To do so efficaciously the law must have some internal morality.

Fuller identified eight conditions represent this internal morality of law. Compliance with them leads to substantively just laws and away from evil ones. The Morality of Law is a story about an imaginary king named Rex who attempts to rule but finds he is unable to do so in any meaningful way when any of the eight conditions are not met. The eight conditions are as follows;

- The lack of rules or law, which leads to ad-hoc and inconsistent adjudication.
- Failure to publicize or make known the rules of law.
- Unclear or obscure legislation that is impossible to understand.
- Retroactive legislation.
- Contradictions in the law.
- Demands that are beyond the power of the subjects and the ruled.
- Unstable legislation (ex. daily revisions of laws).
- Divergence between adjudication, legislation and administration of the law

If any of these 8 principles is not present in a system of governance, a system will not be a legal one. The more closely a system is able to adhere to them, the nearer it will be to the ideal, though in reality all systems must make compromises.

5.2. Challenges of the natural law theory

There is an uncanny link between Natural Law and religion. This is no accident. Most proponents of natural law were deeply religious. That has been the Achilles heel of natural law. There is a strong resistance to using religion or natural law as a basis of social organization. The postulation by natural law as something that is divine ordained and immanent in nature has also turned out to be problematic. If it were so, law would be universal. Yet Law is seen as culture specific not universal as natural law theory implies. To its credit, there appears to be some universal standards in legal prescription. It is difficult to find communities which glorify murder theft, harm or anti-social behaviour. There was always a striking similarity in law even prior to globalization. The rise of international law lends credence to the argument that it is possible to find universal standards in law.

6. Legal Positivism

Leading proponents are Jeremy Bentham, John Austin, Prof. Hart and Prof Dworkin and Hans Kelsen.

John Austin is considered by many to be the creator of the school of analytical jurisprudence, as well as, more specifically, the approach to law known as “legal positivism.”

Austin’s goal was to transform law into a true science. To do this, he believed it was necessary to purge human law of all moralistic notions and to define key legal concepts in strictly empirical terms. Law, according to Austin, is a social fact and reflects relations of power and obedience. This twofold view, that (1) law and morality are separate and (2) that all human-made ("positive") laws can be traced back to human lawmakers, is known as legal positivism. Drawing heavily on the thought of Jeremy Bentham, Austin was the first legal thinker to work out a full-blown positivistic theory of law.

6.1. Thomas Hobbes

There are those who argue that Thomas Hobbes is infact a legal positivist who believed in the divine right of kings as a sine qua non for the avoidance of anarchy. Accordingly the society collectively delegates its sovereignty to the rulers and the delegation is irrevocable. From that point the King, who is supposedly rational, knows what is best for society and any resistance to the will of the King is a crime against society punishable with death

6.2. John Austin

John Austin 1790-1859, English jurist. He served (1826-32) as professor of jurisprudence at the Univ. of London, and his lectures were published (with additional material) as The Province of Jurisprudence Determined (1832, repr. 1967, 3 vol.) and Lectures on Jurisprudence (1869, 5th ed. 1911

According to Austin, Law is a product of a positive conduct by a sovereign. Law does not pre-exist, it must be brought into existence by human beings.Law is the command of the sovereign backed by threats. The sovereign is the person whose commands are habitually obeyed.

Austin argues that laws are rules, which he defines as a type of command. More precisely, laws are general commands issued by a sovereign to members of an independent political society, and backed up by credible threats of punishment or other adverse consequences ("sanctions") in the event of non-compliance. The sovereign in any legal system is that person, or group of persons, habitually obeyed by the bulk of the population, which does not habitually obey anyone else. A command is a declared wish that something should be done, issued by a superior, and accompanied by threats in the event of non-compliance. Such commands give rise to legal duties to obey. Note that all the key concepts in this account (law, sovereign, command, sanction, duty) are defined in terms of empirically verifiable social facts. No moral judgment, according to Austin, is ever necessary to

determine what the law is — though of course morality must be consulted in determining what the law should be. As a utilitarian, Austin believed that laws should promote the greatest happiness of society.

As to what is the core nature of law, Austin's answer is that laws ("properly so called") are commands of a sovereign. He clarifies the concept of positive law (that is, man-made law) by analyzing the constituent concepts of his definition, and by distinguishing law from other concepts that are similar:

- "Commands" involve an expressed wish that something be done, combined with a willingness and ability to impose "an evil" if that wish is not complied with.
- Rules are general commands (applying generally to a class), as contrasted with specific or individual commands
- Positive law consists of those commands laid down by a sovereign (or its agents), to be contrasted to other law-givers, like God's general commands, and the general commands of an employer to an employee.
- The "sovereign" is defined as a person (or determinate body of persons) who receives habitual obedience from the bulk of the population, but who does not habitually obey any other (earthly) person or institution. Austin thought that all independent political societies, by their nature, have a sovereign.
- Positive law should also be contrasted with "laws by a close analogy" (which includes positive morality, laws of honor, international law, customary law, and constitutional law) and "laws by remote analogy" (e.g., the laws of physics).

(Austin 1832: Lecture I)

In the criteria set out above, Austin succeeded in delimiting law and legal rules from religion, morality, convention, and custom. However, also excluded from "the province of jurisprudence" were customary law (except to the extent that the sovereign had, directly or indirectly, adopted such customs as law), public international law, and parts of constitutional law

Though Austin's brand of legal positivism was greatly influential in the late 19th and early 20th centuries, it is widely seen as overly simplistic today.Critics such as H. L. A. Hart have charged that Austin's account fails to recognize that: Most legal systems include rules that do not impose sanctions, but rather empower officials or citizens to do certain things (e.g., to make wills), or specify ways that legal rules may be identified or changed. In many modern legal systems, such as that of the United States, lawmaking power is dispersed and it is very difficult to identify a "sovereign" in Austin's sense. Defining legal duties in terms of "habits of obedience" to a determinate sovereign makes it hard to explain why laws remain in force

when one government replaces another. Mere threats do not give rise to obligations. If they did, there would be no essential difference between a gunman's threat ("Your money or your life") and an ordinary piece of legislation.

6.3. Herbert Lionel Adolphus Hart (1907–1992)

Prof Hart was an influential legal philosopher of the 20th century. He was Professor of Jurisprudence at Oxford University. He authored *The Concept of Law* and made major contributions to political philosophy

Hart is a critique of John Austin's theory that law is the command of the sovereign backed by the threat of punishment. According to Hart, law is a system of norms and rules- 'the normative theory of law'. But it has no necessary link with morality.Law must therefore be kept 'pure' and free from the 'impurities' of ethics morality politics

In his book, the concept of law, Hart distinguishes between Primary and Secondary Rules in a legal system

- A primary rule governs conduct and
- A secondary rule allows of the creation, alteration, or extinction of primary rules

The concern of the jurist is to know the law as it is, not as it ought to be.

6.3.1. The Rule of Recognition,

The rule of recognition is a social rule that differentiated between those norms that have the authority of law and those that do not. Hart viewed the concept of rule of recognition as an evolution from Hans Kelsen's *Grundnorm* The 'rule of recognition' is the touchstone of validity of laws in a legal system

6.4. Hans Kelsen

Hans Kelsen was born Oct. 11, 1881, Prague, Bohemia, Austria-Hungary [now in Czech Republic] died April 20, 1973, Berkeley, Calif., U.S.

Kelsen was a professor at Vienna, Cologne, Geneva, and the German university in Prague. He wrote the Austrian constitution adopted in 1920 and served as a judge of the Austrian Supreme Constitutional Court (1920–30). After immigrating to the United States in 1940, he taught at Harvard, the University of California at Berkeley,

Kelsen struggled with the difficulty of legitimising and validating positive law. Kelsen saw law as a system of normative prescriptions organised in a

hierarchical order. According to Kelsen, the validity of law is based on another law, 'the grundnorm' or the basic law which is presupposed. The 'grundnorm' is the touchstone of normativity. The grundnorm is extra-legal and is changed extra legally. A revolution takes place when there is a sudden and unanticipated change in the constitutional order.It leads to a change of the grundnorm. Revolutionaries are heroes if they succeed traitors when they fail. The grundnorm is not entirely the product of positive human intervention. But positive law is still made up of normative prescriptions (ought propositions). All owe their validity to the hypothetical basic norm

6.5. Strengths of Positivism

Positivism promotes certainty and predictability in determining what is and what is not Law. Positivism makes it easier to identify the authoritative sources of legal precepts. It makes the work of those who interpret and administer the law easier. It is an efficient way to define what is and what not law is. It is practical and pragmatic

6.6. Challenges of positivism

Positivism excludes important value judgments in teleological interpretations of the law. It ignores policy considerations in the interpretation of the law. Law and society are dynamic phenomena that evolve with time. It ignores legitimacy issues in law making. It ignores the socio-economic content of the law

Not all laws are backed by threats e.g. marriage laws. Definition of sovereign is problematic-includes the wielder of brute force. Some laws are merely facilitative.Kelsens Grundnorm is itself extra legal. Positivism places too much emphasis on validity and efficacy has no regard for legitimacy. Positivism is not interested in justice morality or ethics and led to Fascism, Nazism, and Apartheid. Positivism can legitimize dictatorship.

6.7. Strands of Positivism

There are two strands of positivism

- Exclusive positivism the legal validity of a norm can never depend on its moral correctness
- Inclusive positivism moral considerations may determine the legal validity of a norm but it is not necessary that this be the case always

6.8. Convergence of natural law theory and legal positivism

There are legal theorists who have identified possible convergences between the two theories

6.8.1. John Finnis

John Finnis identified several convergences between natural law and positive law and was of the view the two are not mutually exclusive

6.8.2. Prof Ronald Dworkin

Dworkin took the view that must not lose sight of the fact that law is an interpretive concept and this imports moral evaluations.Dworkin's theory of law as integrity is amongst the most influential contemporary theories about the nature of law. He advocates a "moral reading" of the United States Constitution

7. The Marxist Leninists

7.1. Vladimir Ilyich Ulyanov 1870 - 1924),

As a politician, Vladimir Lenin was a persuasive orator, as a political scientist his extensive theoretic and philosophical developments of Marxism produced Marxism–Leninism, the pragmatic Russian application of Marxism

Economic and material conditions determine ideological phenomena. Society is in a constant class struggle determined by the relationship of its members to the means of production and the factors of production. Communism is inevitable-economic determinism

Law is a product of class struggle. Remove the class struggle and there is no need for the law. Ideological phenomena such as law and the state are superstructures built an material substrata. The content of the law is a function of socio-economic relationships.

Marxist-Leninism identified three main classes in society

- The bourgeoisie
- The proletariat
- The peasants

31.1. Strengths of Marxist-Lenninism

- It recognizes the socio-economic foundations of the law
- It recognizes the class content of law
- It recognizes the social historical geographical influences in law making

- It explains legal norms and can facilitate comparative studies of the law
- It explains why legal norms change and vary from place to place, time to time

31.2. Challenges of Marxist-Leninism

- Determination of classes is problematic
- Problem of path dependence-what is the relationship between law and economics?
- It is utopian
- Encourages revolution as a means of achieving utopia
- The law and the state can be fairly autonomous from economic conditions

31.3. The Realists

Realism was popularized in the Scandinavian countries and in the US. Leading proponent is Oliver Wendell Holmes. Others are Roscoe Pound, Karl Llewellyn and Justice Benjamin Cardozo

Law is a prediction of what those who are tasked with administering it say it is. Law is a prediction of what the judges say it is. Law is made by human beings and subject to human imperfections

31.4. The principle of Legality

The principle of legality is the legal ideal that requires all law to be clear, ascertainable and non-retrospective. It requires decision makers to resolve disputes by applying legal rules that have been declared beforehand, and not to alter the legal situation retrospectively by discretionary departures from established law. It is closely related to legal formalism and the rule of law

The principle has particular relevance in criminal and administrative law. In criminal law it can be seen in the general prohibition on the imposition of criminal sanctions for acts or omissions that were not criminal at the time of their commission or omission. The principle is also thought to be violated when the sanctions for a particular crime are increased with retrospective effect. In administrative law it can be seen in the desire for state officials to be bound by and apply the law rather than acting upon whim. As such advocates of the principle are normally against discretionary powers

The principle can be varyingly expressed in Latin phrases such as

- *Nullum crimen, nulla poena sine praevia lege poenali* (no crime can be committed, nor punishment imposed without a pre-existing penal law),

- *Nullum crimen sine lege* (no crime without law
- *Nulla poena sine lege* (no penalty without law) and

31.5. Legal Systems of the world

A 'system' is a collection of elements.The concept 'Legal system' therefore refers to a procedure or process for making, identifying, interpreting and enforcing the law. It includes the political, social and economic organization of a state It speaks to the system of government, the sources of law, the structure and jurisdiction of the courts

From the above definition of a 'legal system', there could probably be hundreds of legal systems in the world. All countries legal systems have certain unique features that distinguish them from the systems found in other countries. But broadly speaking, it is safe to say that all the legal systems can be grouped into four major ones, namely;

- Common Law and Equity
- Civil Law
- Theocracies
- Customary Law

35.1. Civil Law Systems

Civil law systems should not be confused with civil law- a group of legal subjects in contradistinction with "Criminal Law". In "Civil Law Systems" the sources of law recognised as authoritative are, primarily, legislation—especially codifications in constitutions or statutes passed by government—and custom. Codifications date back millennia, with one early example being the Babylonian Codex Hammurabi. Modern "Civil Law Systems" essentially derive from the legal practice of the Roman Empire whose texts were rediscovered in medieval Europe

35.2. Common Law and equity

Common law and equity are legal systems where decisions by courts are explicitly acknowledged to be legal sources. The "doctrine of precedent", or stare decisis (Latin for "to stand by decisions") means that decisions by higher courts bind lower courts. Common law systems also rely on statutes, passed by the legislature, but may make less of a systematic attempt to codify their laws than in a "civil law" system. Common law originated from England and has been inherited by almost every country once tied to the British Empire

39.1. Theocracies

Religious law is explicitly based on religious precepts. Examples include the “Jewish Halakha” and “Islamic Shariah”—both of which translate as the "path to follow"—while “Christian Canon Law” also survives in some church communities. Often the implication of religion for law is inalterability, because the word of God cannot be amended or legislated against by judges or governments. However a thorough and detailed legal system generally requires human elaboration through interpretation.

40. Customary law systems

Customary law systems were and are was found in traditional African society. An essential characteristic is of the system is that there are no formal sources of law and no law makers. Knowledge of the law is socially constructed. However, there are persons who are presumed to know the law-the elders and the older, the more knowledgeable they are presumed to be.

41. Classification of the law

All legal systems deal with the same basic issues, but each country categorizes and identifies its legal subjects in different ways.

42. Public Law and Private Law

A common distinction is that between "public law" (a term related closely to the state, and including constitutional, administrative and criminal law), and "private law" (which covers contract, tort and property). In “Civil Law Systems”, contract and tort fall under a general “Law of Obligations”,

42. Public law

The distinguishing factor is that it is the law that defines the relationship between the governed and the governors. Examples are Treaties, customary international law constitutional law tax law, criminal law, administrative law.

43. Private law

The distinguishing feature is that it defines the relationship between the governed *interse*. Examples are Family law-(Marriage, divorce, succession) and law of contract, law of tort etc

44. Civil and Criminal Law

In our system used to distinguish between laws the breach of which leads to penal sanctions and those that lead to no penal sanctions such as damages for breach. The distinction roughly corresponds to the distinction between public and private law.

45. Other classifications

- Written law and unwritten law
- Constitutions and statute law
- Substantive and procedural law
- International law and national (domestic or municipal) law

What is the function of law?

Law is supposed to be an instrument of social and political engineering. It shapes politics, economics and society in numerous ways and serves as a primary social mediator of relations between people

- Balances conflicting interests
- Provides a system of dispute resolution
- Organizes social economic and political institutions
- Regulates behavior
- Secures social economic and political justice

46. St Paul

The apostle Paul once posed the rhetorical question, 'Why then the law?' . And provided the answer; "It was added because of transgressions, till the offspring should come to whom the promise had been made..." (Galatians 3:19). In the eyes of Saint Paul, human imperfection makes law indispensible.

47. The Milgram Obedience Experiments

In the 1960s psychologist Stanley Milgram conducted the famous Milgram Obedience Experiments. The experiment sought to demonstrate the conflict between obedience to authority and personal conscience. He examined justifications for acts of genocide offered by those accused at the World War II, Nuremberg War Criminal trials. His findings were startling; the average American could have done anything the NAZI war criminals on trial at Nuremberg were on trial for. Milgram concluded that humans have an incredible capacity for evil. We cannot trust in the inherent goodness of humans. We need laws to reign in on this inbuilt potential for evil.

48. Thomas Hobbes

Law makes society possible. It helps as escape from a state of nature where life was short nasty and brutish. It legitimizes actions of the society that may infringe on potentially destructive individual preferences.

49. Limitations of the law

Despite its obvious indispensability, law has many shortcomings.

- Law is ill suited to deal with basic moral and ethical problems

- It often fails to deliver on its promises on social justice
- It does not deliver equity and often stands in the way
- Laws can be applied selectively

CHARLES B G OUMA

LECTURER