PHILOSOPHY OF LAW

CVL1024

Table of Contents

Introduction to Philosophy of Law

What is law ?

A functional definition of law can be submitted as follows:
'A set of rules and regulations that regulate intersubjective behaviour and tends towards justice.'
No law defines what justice is, yet all our laws seek to create a situation of justice. The inexplicit answers given by legislation shape the way legal systems are built.

Is justice something which is already there waiting to be discover? Or is it created by the law?

Legal philosophers and their idea of law

Legal Philosopher	**Their idea of law**
Plato (424-347 BC)	Plato's theory of justice is elaborated in his vision of the ideal state, where the government was to be exercised by wise, authoritarian, philosopher-kings. To him, the purpose of law was to benefit the entire community, rather than one particular class.
Aristotle, a student of Plato considered justice as the basis of social public order. He viewed justice as a human virtue. In Aristotle's view as Fletcher has pertinently observed: The just man or woman not only does justice to others, but demands that justice be done to him or her. He or she finds the mean between service to others and preoccupation with self. The just person is neither altruist or egoist.	**Aristotle (384-322 BC)**
Cicero (106-43 BC)	Cicero, who was a Roman orator, statesman and lawyers defined law as supreme reason, planted in nature, which commands what should be done and prohibits what is contrary to it. This reason , when it is fixed in the minds of men, and perfected, becomes law.

Aquinas was an Italian Dominican monk, who viewed natural law as the basis of the social order's well-being. To him, human law had to be consistent with natural law, the purpose of which was to lead to virtue. He saw the function of the law as promoting the common good. He believed that the 'law is nothing else than an ordinance of reason for the common good, promulgated by him who has the care of the community.' Thus, the aim of law has to be the common good, whilst its promulgation has to be by the state.	**St Thomas Aquinas (1225 -74)**

DO NOT USE 'IDEOLOGY' - only used in politics ands political philosophy, use ideas/theory / approach instead

What does it take to be a good lawyer?

A good lawyer knows the law. Knowledge of the law lies in the fact that one knows what the law says and can apply it. Thinking about something shapes the way you approach it. It is very important in the law courts to know your judges. One must know what a judge can take.

What is philosophy ?

Philosophy is the discipline and activity of asking fundamental questions about all areas of human activity and trying to answer when systemically. It is a discipline because it requires study, reading, coherence and logic. It is an activity because it forms the way we think about something. Even science with all its precision is always open to research for further truth.

What is jurisprudence ?

Jurisprudence is an imprecise term. Sometimes it refers to a body of substantive legal rules, doctrines, interpretations and explanations that make up the law of a country: thus, English, French or German jurisprudence refers to the laws of England, France and Germany. Jurisprudence may also refer to the interpretations of the law given by a court. We speak in this sense of the constitutional jurisprudence of the US Supreme Court and the High Court of Australia, and the jurisprudence of the European Court of Human Rights. Jurisprudence in this sense is not synonymous with law, but signifies the juristic approaches and doctrines associated with particular courts. According in Suri Ratnapala, jurisprudence consists of scientific and philosophical investigations of the social phenomenon of law and of justice generally.

What makes a law valid?

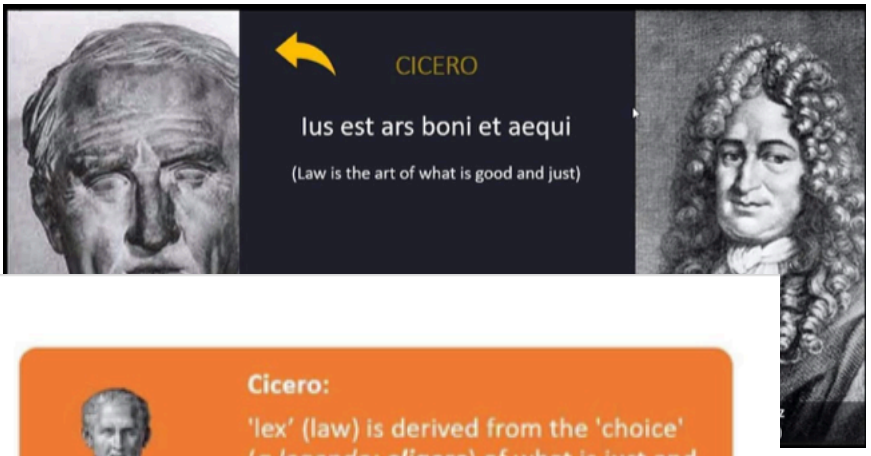
A practising lawyer is restricted, if not by a definition of law, at least by the way law is understood by judges and other officials who enforce the law. A good lawyer is one who knows when to argue strictly from statutes and precedents, when to re-interpret laws or distinguish precedents and when

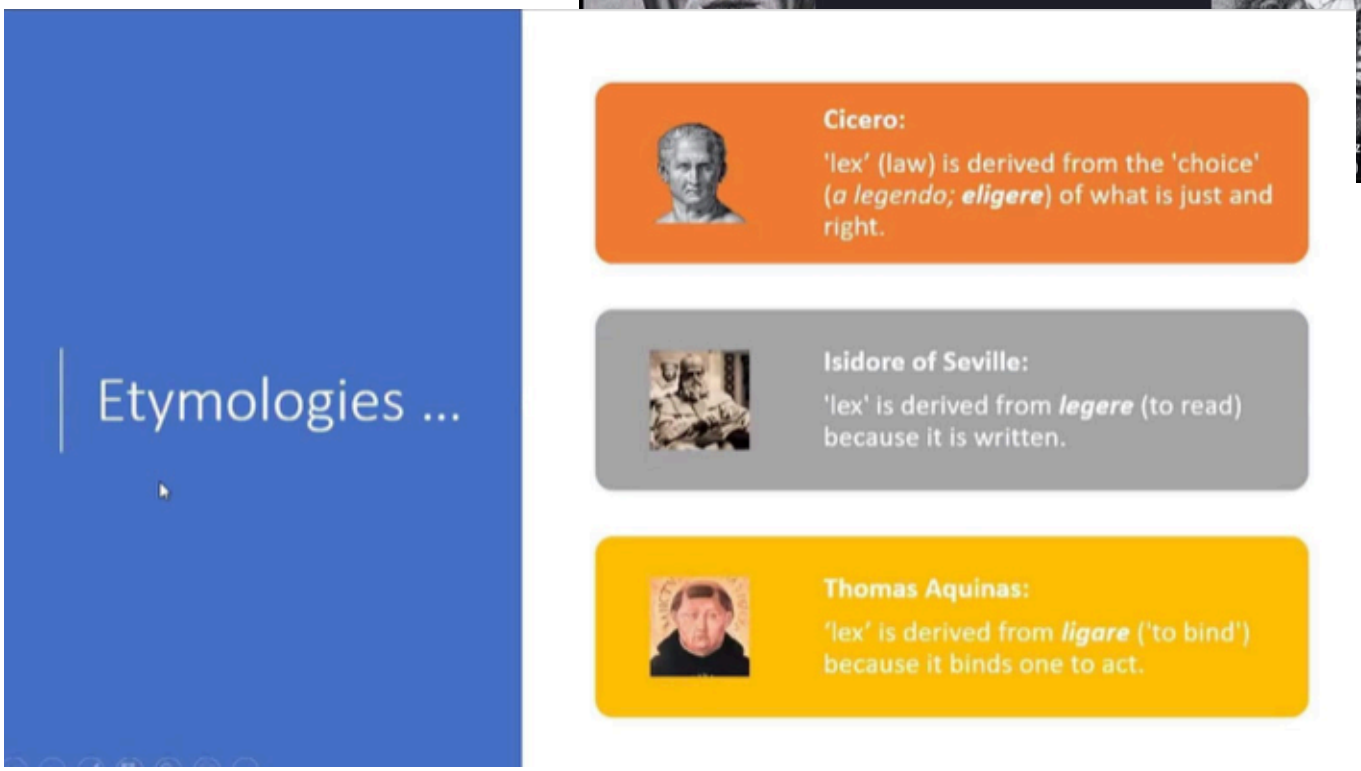
to appeal to policy, justice or the good sense of the judge. Jurisprudence sharpens legal professional skills.

Law is part of the structure of society, whether modern or primitive. Therefore, jurisprudence is of benefit to social scientists and philosophers as well. Law both shapes and is shaped by society. Law impacts on every human activity undertaken within society. In any activity one will find law in attendance – sometimes helping, sometimes hindering.

Aquainas	law' (lex) is derived from ligare ('to bind') because it binds one to act. He says that what the law does is that it binds us; it forces us to do something in a certain way. For him one of the big differences between the moral law and law in a legal way is that the moral law binds us by our conscience and the legal law also threatens us with punishments/sanctions. How
Cicero	lex' is derived from the 'choice' (a legend; eligere) of what is just and right. The word eligere means 'to choose', 'to elect'. The law chooses what is just and what is right. For him, having law means that that society, through the law decides what is just and right. This raises the issue about the link between law and
Isidore of Seville	lex' is derived from legere (to read) because it is written. According to his definition of law, in a juridical sense has to be written. There was a huge sprint of the codification of law in his time. The church was also moving in the same direction by putting together the code of canon law. This might be

ETYMOLOGY





Analytical and Normative Jurisprudence

Some writers have identified two main species of jurisprudence; Analytical and Normative jurisprudence.

Analytical Jurisprudence

- Questions concerning the meaning of law in general and of the major concepts of the law are grouped

  within analytical. Analytical jurisprudence is identified with legal positivism. General analytical jurisprudence is focused on the concept of law generally, and particular jurisprudence on the basic concepts of law that are common to most, if not, all legal systems.
  - The most influential modern exponents of analytical jurisprudence are H.L.A Hart and Joseph Raz.
  - Analytical Jurisprudence has been translated into a particular type of philosophy called **positive law (**given its name by Thomas Hobbes in the Leviathan)
  - Analytical Jurisprudence consists of the scientific analysis of legal structures, concepts and procedure. Positive law comes from the Latin meaning ‘to put. It denotes a structure.

- Analytical jurisprudence seeks the basic elements that make up a legal system. therefore, it seeks the least common denominator. It is also referred to as the 'is question' and is generally called positive law.

Normative Jurisprudence

- Question focused on the moral dimensions of the law are left to normative.

  - Normative Jurisprudence is what the law ought to be. This is the normative/evaluative approach.

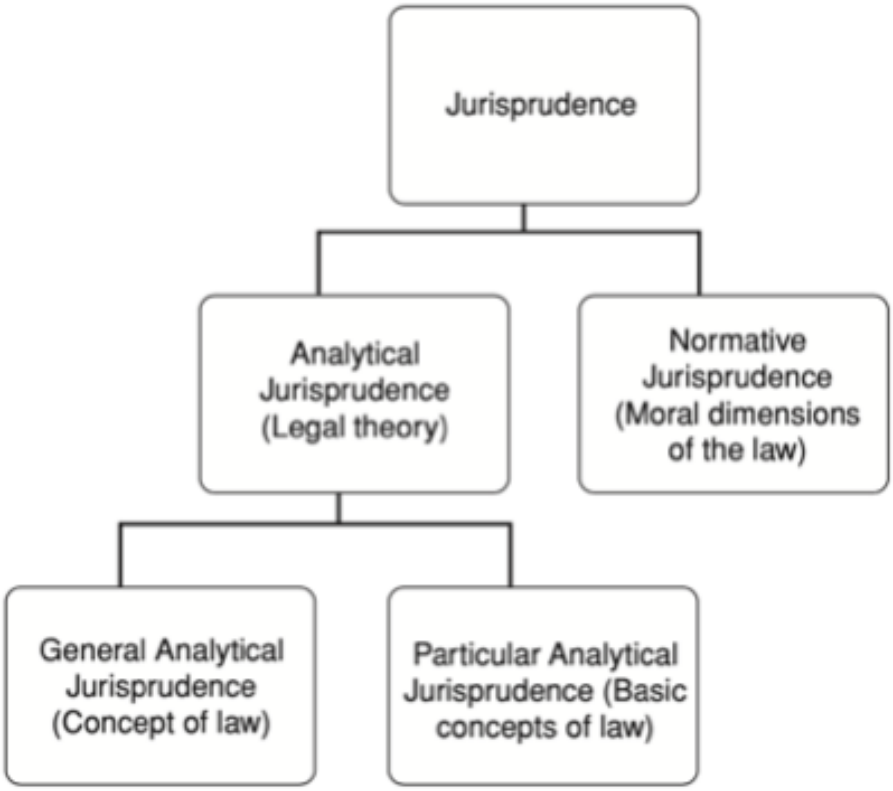
  - The normative approach is first and foremost an analysis, very often, subjective on which a particular standard is determined.

  - This standard is a measure and through this measure we see whether our actions are good or bad.
  - The scope of law is to be able to judge our actions according to the accepted standard which would then find itself translated into laws.

  - **Normative Jurisprudence concerns the ethical effects of action.** It is law used as a tool to enable us to achieve a pre-established standard. We evaluate the phenomenon by analysing the purpose of the law and the legal structure of the law.

  - Normative is described as the 'ought' question because we ask ourselves what we ought to do, while this is
    not the case in analytical jurisprudence where we do not question the laws but just obey them as they are. It is often referred to as **natural law**.

From Jurisprudence, stems analytical (legal theory) and normative jurisprudence (moral dimensions of the law). From Analytical stems particular (basic concepts of law) and general analytical (concept of law)



ANALYTICAL JURISPRUDENCE	NORMATIVE JURISPRUDENCE
ANALYTICAL JURISPRUDENCE IS AN EXPLORATIVE ANALYSIS TO DISCOVER THE ACTUAL STATE OF THE LAW.	EVALUATIVE ANALYSIS
IT STUDIES THE STRUCTURES, CONCEPTS, AND PROCEDURES OF LAW	DECIDES THE BALUE OF SOMETHING AS GOOD OR BAD ON THE BASIS OF SOME PRE-ESTABLISHED CRITERIA OR STANDARD
IT FINDS THE LEAST COMMON DENOMINATOR OF THE LEGAL SYSTEM	DETERMINED BY A GIVEN ONTOLOGICAL PURPOSE OF LAW
CAUSE- IMPACT- CONSEQUENCE	CAUSE-IMPACT CONSEQUENCE
IS	OUGHT
PRINCIPLE OF CERTAINTY (NULLUM CRIMEN SINE LEGE- NO CRIME WITHOUT LAW	STANDARD OF VALUE- MORALS

Natural Law Theory and Legal Positivism

"the theory of natural law is not likely to disappear. In contemporary legal theory, however, legal positivism – the antithesis to natural law – is still in the ascendancy. It is the heart of this dispute that we need first to identify clearly."

The Natural Law Theory and Legal Positivism are two theories that have been developed by different people in different ways. These two theories attempt to answer the question 'What is the law?'. In the sense of what makes something the law, a law must be just and fair.

Natural law theories say that even though time passes, the principles of justice should always be referred to in the application and in the making of laws, one should still be able to refer to basic principles, ex; justice, fairness etc.. they remain universal no matter how much time passes . The Key principle - while laws can change over time, these principles remain constant and universal!!! The main formulation of the natural law theory is aquinas.

<u>Natural law</u>

Cicero said that; natural law is the law written in men's heart/mind

Ambrose distinguished between natural law and positive law as stating that natural law is "inscribed in the human heart", whilst positive law is "inscribed on tablets"

Augustine - The sense of a natural law - where did it come from. Augustine's His answer was that it was given by God. Meaning that since god created the universe, in an orderly way, when he created human beings, human beings, unlike other beings, had this ability to recognise right and wrong, good and bad. Human beings are said to make principled decisions. Principled = set by principles. While Augustine did not articulate in much detail, we find the articulation of the natural law in the work of sir Thomas Aquinas

NATURAL LAW

Thomas Aquinas held that natural law derives from the rational nature of human beings. By this reasoning, since human beings are by nature considered to be rational beings it is morally appropriate that they should be considered to be rational beings, it is morally appropriate that they should conduct themselves in such a way that conforms to their nature. Hence, Aquinas derives natural law from the nature of human beings, and to him, a human law is therefore only just a law if it subscribes to the precepts of natural law. (To him, an unjust law is no law at all). This class of laws is said to derive its authority from the relationship between law and morality. All in all, natural law may be said to consist of an unwritten law which is universally applicable and effective, and which emanates from the reason (being natural to a human being) to the sense that it pertains to the rational intelligence of a human being.

Aquinas points out that law is derived from the word 'to bind', and that the measure of human acts is reason.

Natural law however, did not commence with Aquinas himself, as his thoughts were influenced by ideas from the Greek, Roman and Christian philosophers that came before him.

Aquinas' exposition of law and of natural law is found un the *Summa Theologica*. Aquainas sees law as God's instrument for assisting humanity.

In fact, he defines law as:

"An ordinance of reason for the common good of society."

In Aquinas' most important work, the *Summa Theologic*a, he mentions;

"On the contrary, It belongs to the law to command and to forbid. But it belongs to reason to command, as stated above (Question 17, Article 1). **Therefore law is something pertaining to reason."** *Law either commands or forbids*

LEGAL POSITIVISM

As a reaction to natural law, a school of distinguished scholars, such as John Austin (1790-1859), underlined the fact that what made a true law was the state mechanism which would enforce it. This school of thought was called Positivism, and held that only enforced law could be said to be true law. Austin is considered to be the creator of the school of 'Analytical Jurisprudence' or 'the Command Theory', as well as, more specifically, the approach to law known as 'Legal Positivism'.

The word 'positivism' is derived from the word 'positus' which means to postulate. Hence, the law is meaningful only if it is accompanied by a command. The law is described by Austin in terms of 'jurisdictional authority', example, emanating the will fo the state, which is then reinforced by a sanction or penalty in cases of violation of this law.

H.L.A Hart (1907-92), a positivist wrote that:

...the life of the law consists to a very large extent in the guidance of officials and private individuals by determinate rules which, unlike the application of variable standards, do not require from them a fresh judgement from case to case.

Hans Kelsen (1881-1973), an Austrian jurist, also followed the line of legal positivism. He attempted to identify the essence of law. In other words, he tried to identify the common characteristics of the law which distinguish it from any other direction that can exist in society. He called this theory, 'Pure Theory of Law'. And this theory holds that the legal validity of a norm depends on whether boys had been made according to the requirements of another norm - a superior norm within a hierarchal structure of a legal system. Hence, according to Kelsen, all legal norms depend on a norm of a superior status doe their validity.

Aquinas: Quotes on Natural law

Sir Thomas Aquinas - the law for him is purposeful - the law must be purposeful
a natural law theorists would say that principles precede rules .

Aquinas defines law as: "An ordinance of reason for the common good of society."

He also sees reason as the "rule or measure of human acts."

For Aquinas, natural law; "is the eternal law as knowable by sound human reason without the aid of supernatural revelation. The natural law becomes naturally known (and is thus promulgated) to normal human beings as they advance from infancy to fuller and fuller use of reason."

Hence, as a result to the previous statement; "the true plans and laws of lesser governors must be in line with God's plan and law"

In Aquinas' most important work, the *Summa Theologic*a, he mentions;

"On the contrary, It belongs to the law to command and to forbid. But it belongs to reason to command, as stated above (Question 17, Article 1). **Therefore law is something pertaining to reason."** *Law either commands or forbids*

An important quote from Aquinas defined

Ordinance - brings about order and an act of power - the law does precisely that- it orders us to act in a certain way - any order has to be rational - rationality

Of reason - you can't have thew two words not tied together - this ordinance of reason, it has to be rational, according to reason - its rational character. For Aquinas, for a law to be a proper law, it had to have this characteristic of being an order of reason.
One of the famous definition of Aristotle is that man is a "rational being"- Aristotle classified beings in different levels. For Aristotle there was a very clear distinction, between beings and animals - human beings are endowed with reason, animals do no have the ability to reason, to argue, to reason things out - that is specific and basic in human nature - so when we refer to the idea of natural law, the natural law is related to human nature - this rational ability is the basis of human nature - something characterised by reason - for a law to be properly a law, it has to be rational.

For the common good - **"for"** - an intentional thing/ purpose - for = a law has to be purposeful, needs to have a purpose, meaning that a law is never an end in itself (Aristotle - telos - purpose - even for him, everything has a telos - Aquinas is borrowing this reasoning)- the purpose will result in the **"common good"** - the era Aquinas was living in had no laws - aquinas uses this term of the bone commune in order to make a sharp distinction between the good of the people as a whole, and that of the legislator, and that law can be abused, because a ruler can use that to legislate in their favour. Aquinas' idea of a good ruler is to install a common good for all, for the many, the individuals become many - the ruler should legislate for the common goo. Common good doesn't mean that everyone will get what they prefer -

made by him who has care of the community - a law must be made by a legitimate authority - if I don't have authority to rule, I can't force it. This is what distinguish a law from a suggestion. Aquinas in the very definition of law is making connection between legitimate authority - care of the community = legitimate authority must be exercised to the purpose of the law - which is the common good.

Promulgated - the 5th element - a law must be promulgated - a law needs to be promulgated (a law must be made known to those who are being bound by it) is it enough for a law to pass through parliament for it to be into force ? It needs to be promulgated and notified and published in the government gazette. There is a time to adapt when a new law is promulgated - there might be the need to a public campaign to inform the public.

In order to arrive at the proper understanding of what natural law is, Aquinas created a four-fold scheme: (Philosophy of Law, Mark Tebbit)

Eternal Law *(Lex Aeterna)* God's plan for the world, known only to Himself. 'The whole community of the universe is governed by divine reason. Thus the rational guidance of created things on the part of God, as the Prince of the universe, has the quality of law. This we can call the eternal law.' God himself is not subject to eternal law for he himself is eternal law. Only he knows what eternal law is. The human awareness of eternal law is natural law.	**Divine Law** *(Lex Divina)* That part of God's law as made known to us through revelation. This is needed in addition to natural law and human law, because (a) we need guidance towards our salvation; (b) divinely given laws are infallible, whereas human reason is not; (c) enacted laws deal only with external activities; (d) the divine law punishes all manner of sin, not all of which is punishable by human law. (Aquinas 1948: ST 1-2.91.4–12)**Divine Law** (Lex Divina)
Man-made/Human Law *(Lex Humana)* Those laws declared by human authorities that are derived from, or are at least consistent with, natural law. Tyrannical law, which deviates from reason, 'is not law at all, in the true and strict sense, but is rather a perversion of law'.	**Natural Law** *(Lex Naturalis)* That part of God's law accessible to us through the use of Reason. 'The light of natural reason' is 'the impression of the divine light in us'. The 'participation in the eternal law by rational creatures is called the natural law'. As rational beings, we derive from God's reason 'a natural inclination to such actions and ends as are fitting'.

Aquinas, quoting St Isidore, said that;
"Law should be framed for the common good of all the citizens, and not for any private benefit."

When a law is so ordained for the common good, it is just a law. Therefore, when a law confirms to Natural law, it is just.

These philosophers will not be asked for in the exam HOWEVER, we might imply them;

Influential philosophers of modernity

1. Thomas Hobbes
2. Immanuel Kant
3. G.W.F Hegel

Their ideas are really what contributed to shaping the two major and competing theories of law - **natural law theory** and **legal positivism**.

1,Thomas Hobbes

Hobbes is known for his book 'Leviathan' where amongst other things, he gives a definition of natural law. He defines it as the following ;

Natural law is a "precept, or general rule, found out by **reason**, by which a man is **forbidden** to do that which is destructive if his life, or takes away the means of preserving the same; and to omit that by which he thinks it may be best **preserved**."

- This quote explained: This general rule has the force/strength to forbid/prohibit human beings from doing things that are destructive ex. Killing. Ex. If the principle is that life should be preserved, our laws on murder - there are safeguards to our protection, to our basic liberties. Thus principles come before everything else, and are generic. How and what that means is testified through different things you do. Natural law is a generic principle . Opposite of generic is specific . Natural law is a principle is generic, then there are specific laws, which can either lead towards, assist, that general principle or go against it. Hobbes's idea of natural law is by taking it and saying on what it forbids.Hobbes developers a negative view - negative means that he explains natural law by what it doesn't do/ doesn't allow - natural law pushes us/forces us to do certain things - his idea of the law is that the Law forbids . **Hobbes' laws** of **nature** also differ from traditional conceptions, as he does not **believe**, unlike Aquinas, that **natural law** is innate through divine providence and God-given rationality. It is rather that men choose to form an agreement as it is their best chance to escape a miserable life and horrific death.

2. Immanuel Kant

Based on the categorical imperatives, he says that; "**act** only in accordance with that maxim through which you can at the same time will that it becomes a universal law."

- The quote explained: So according to Kant, Natural Law is the foundation lawyers should use to create specific laws? Yes, right ! And to add to that, it is not enough to know the law, but jurists and legislatures should not go against the basic principles of justice, fairness … etc

- Kant makes a distinction between ***is*** and ***ought*** what is and what is ought to be - is foundational in Kantinian ethics

- Ought/should - saying that the law should distribute goods/wealth justly - that is a moral consideration - once you speaking of how things should be, you are making a moral statement on which you are basing on your laws. When saying ought/should- saying the the law should distribute good fairly

3. G.W.F Hegel

Said that Freedom (nature) can only be realised in yer State; "the system of right (legal system) the kingdom of actualised freedom."

- Says that freedom can only be realised in the state. Speaks of the state of as the kingdom of actualised freedom , for him freedom is a vague concept unless you think of it as a legal system.

- A legal system can either guarantee our freedom or limit our freedom. A way in which our freedom is limited is by law.

The 1800s brought about the rise of legal positivism. Two different expressions of positivism were;

- Hans Kelsen
- Utilitarianism (Utilitarianism is an ethical theory from which the theory known as positivism is derived)

Distinction between Positive Law and Positivism

Legal positivism - a commitment - view point - ideology - started at a school of thought in the 1800s, - morality does not come into it

Positive law - existed way before that - referring to man made law - inscribed/present in human nature

---

CLASSICAL NATURAL LAW THEORY: BASIC NOTIONS

- The basic idea in natural law theory is that there is a set of moral principles which precede any manmade law anywhere and everywhere, and that any human law must reflect, or at least not contradict, such as natural law.

- Some people speak of natural law in naturalistic ways, but this is not the only way to understand natural law as it contradicts the second understanding as moral law. It is natural for each human being to have an inclination, an understanding within them that there are things which are right and wrong. This idea has sometimes been referred to as conscience.

Classic Legal Positivism 2: Kelsen

Kelsen and Positive Law

It is a scientific approach to law, however it does not mean Natural Law is not scientific. It is also called the general theory of law.

Hans Kelsen (1881-1973), an Austrian, a jurist and legal philosopher, born in Prague, moved to Vienna when he was young. In 1920, he drafted the constitution of Austria, which was seen as the most advanced constitution of the time. This was quite a feat. He was appointed as a judge on the Constitutional Court for life, the highest court in Austria. Before Germany invaded Austria, he fled to America, settling as a professor, and lived to the age of 93.

'Positive' comes from the Latin word *posito*, to put. He devised a structure and if an entity is to be defined as law, one would immediately know if it fits in a particular structure. If it fits, it is law, if doesn't, it is not law. You are bound to obey the law to avoid punishment. The structure he set up was pyramidal, with Primary Norms at the top and Secondary Norms below.

- Primary norms are statements which establish the sanctions which can be applied in certain conditions. Secondary norms would be the rules specifying certain conduct.
-

Finnis first deals with the image of Natural Law entertained by jurists such as Kelsen, Hart, and Raz. Joseph Raz usefully summarizes and adopts Kelsen's version of this image:

Kelsen correctly points out that according to Natural Law theories there is no specific notion of legal validity. The only concept of validity is validity according to Natural Law, i.e., moral validity. Natural Lawyers can only judge a law as morally valid, that is, just or morally invalid, i.e., wrong. They cannot say of a law that it is legally valid but morally wrong. If it is wrong and unjust, it is also invalid in the only sense of validity they recognise.

Prof. Mifsud Bonnici argues this is completely wrong. The concept of validity is validity itself, validity according to Natural Law. Validity depends on certain rules of law as to how law comes about. Eventually, from the start, it can be morally invalid but legally valid. This is a common occurrence in law. And even though Raz may hold that every law as moral worth, it wrong, there are a whole string of immoral laws beginning from ancient Greece. Finnis says that the root of the misunderstanding seems to be the failure of the modern critics to interpret the texts of Natural Law theorists in accordance with the principles of definition which those theorists have, for the most part, consistently and self-consciously used.

The image of Natural Law theory is closely related, in the mind of Kelsen, with another image. For Kelsen says it is a cardinal point of the historical doctrine of Natural Law over two thousand years that it attempts to found positive law upon a Natural Law delegation. But Kelsen regards the attempt as logically impossible, on the ground that such a delegation would entail ascribing legal validity to norms not because of their justice but because of their origination by the delegate; and this in turn would entail, he says, that the delegate could override and replace the Natural Law, in view of the fact that positive law is not, in principle, subject to limitations of its material validity. Finnis argues this is a contradiction in itself.

Finnis argues that in defining law, one begins by taking the word 'law'. Here, he follows Kelsen's line of thought who says that there is a common element that fully justifies terminology of law, for the word refers to that specific social technique which, despite the vast differences that exist, it is essentially the same for all peoples in time, in place, and cultures.

Ignoring a wide range of meanings and reference (e.g. ‘law of nature’, ‘moral law’, ‘international law’, ‘ecclesiastical law’) and further ignoring alternative ways of referring to, e.g., the ‘negro tribe’s’ social order, one looks at the range of subject-matter signified by the word in the usage which one has selected. One looks for ‘a common element’ which is the criterion of the ‘essence’ of law, and thus the one feature used to characterize and to explain descriptively the whole subject-matter. There is thus one concept, which can be predicated equally and in the same sense of everything.

The noticeably greater explanatory power of later descriptive analyses of law, such as those of H. L. A. Hart and Joseph Raz, is to be attributed to their fairly decisive break with the rather naive methodologies of Bentham, Austin, and Kelsen. This sophistication of method has three principal features, discussed in the following three sections.

ATTENTION TO PRACTICAL POINT

Hart says that unfortunately Kelsen distorts the functions which different kinds of legal rules perform. Hart’s description of law is built up by appealing to the practical point of the components of the concept. Law is to be described in terms of rules for the guidance of officials and citizens alike, not merely as a set of predictions of what officials will do. A legal system is a system in which ‘secondary’ rules have emerged in order to

Mark Tebbit - The Philosophy of law - ON KELSEN

Hans Kelsen (1881–1973) was Hart’s chief rival for the title of leading positivist of his day. An Austrian by birth, he left his homeland to escape the Nazis in 1940 and settled in the USA, where he continued a distinguished academic career. Kelsen had been a jurist and philosopher of international standing since much earlier in the century. His most fully developed work, Pure Theory of Law, was first published in 1934, and this was eventually followed up by an expanded version in 1960. Of all the leading contributions to the history of legal positivism, Kelsen’s stands out as the most uncompromising. Thor- oughly conventionalist in his assumption that all laws are human artefacts, Kelsen refined a ‘pure theory of law’ with its subject matter quite purposefully sealed off from outside influence.

Although he opposed the reduction of law to ‘science’ in the normal sense, he was himself interested in developing a rigorous science of purely legal norms. This was intended to be a science based on norms in contrast to the more typical empiricist conception of natural and social science resting on the observation of causally related facts. So it was in underlying legal norms or ‘oughts’ rather than observed facts that Kelsen situated the reality of law. His jurisprudence, then, was a ‘science’ in his own distinctive sense.

Taking his cue from Hume, and for some time working in parallel with the positivist Vienna school with which he was loosely associated in the 1930s, Kelsen applied the is–ought dichotomy to law in a way that was clear and radical. Keeping facts separate from values was the overriding imperative.

What is the law?

This quite separate moral philosophy, Kelsen subscribed to the emotivist theory, which in his version led to the view of moral ideals – especially ideals of justice – as being essentially subjective

expressions of feeling, grounded in irrational emotion rather than in rational reflection, and hence entirely unsuitable for any kind of legal analysis. For emotivists, there is no such thing as objective moral truth. This moral theory had a decisive impact upon his jurisprudence, the main object of which was for Kelsen the uncovering of the strictly logical form behind the confusion of empirical appearances and sub- jective moral judgements. He conceived this discovery of logical form as a project of rational reconstruction of the law as a unified whole. As an auton- omous and distinctive science the object of study was held to be law as such, rather than any particular legal system; what he was seeking was the purely formal structures of any possible legal system. In this enterprise Kelsen was implacably opposed to any version of natural law theory; justice and the higher law had no place in his kind of scientific jurisprudence. In short, he was attempting to push the positivism of Bentham and Austin to its logical conclusion, to his own pure theory of law, while detaching it from its empiri- cism and objective utilitarian moral basis, and in so doing also to root out the hidden presence of natural law assumptions in modern legal theory.

Kelsen's 'pure' theory of law is pure in two senses:

- The purification of subject matter. In order to establish law as an inde- pendent science, it is necessary to strip it down to what is distinctively legal. To focus on the purely legal dimension of law – specifically legal validity – all the moral, political, sociological and psychological dimen- sions must not just be bracketed out but also displaced from the science. The ideal sought here is a distilled conception of the object of legal science, decontaminated or purged, so to speak, of all subjective elements.

- The purification of the investigation. In order to undertake this scientific investigation effectively, the investigation itself must be value-free. The science of law is 'pure' in the sense that the investigation is free of ideology. In pure theory, there is no approval or disapproval, either implicit or explicit. The ideal sought here is a distilled conception of the investigating subject, the legal scientist, understood as a purely formal rational mind.

In this sense, Kelsen's theory is what we call formalist. It involves the bracketing out and suspension of the concrete content of the laws that link up into a legal system, to concentrate on their pure form. The concrete content – the social function, the political purpose, the supposed justice or injustice of the laws – is irrelevant to the investigation of the formal structure of this system.
So what is Kelsen's image of law? How does he understand the formal legal reality laid bare by this positivist method? When purified of all extraneous elements, what comes into view – in any legal system – is one rationally con- nected structure of norms, in the shape of a pyramid. These 'norms' have to be understood as specifically legal 'oughts', which are distinct from either moral oughts or legal rules. 'Ought' is meant strictly in the legal, not moral, sense. Legal rules as rules are not logically linked with one another. Legal norms are oughts of which legal rules are the visible manifestation

Kelsen and Hart

There are of course clear parallels between Kelsen's basic norm and Hart's rule of recognition as the source of legal validity. They both perform the same vital function in giving the legal system its systemic character, by presenting it as a unified whole. The basic norm, like the rule of recognition, is the linchpin that gives the system unity, and every other norm must be linked with it. The differences, however, are as great as the similarities. Hart's basic rule of recognition is a (secondary) rule of law that can be empirically verified, not a Kelsen-style norm, or 'ought-statement'. As such, it is a social fact to be investigated, rather than a hypothetical norm that is presupposed by all legal activity. As a social fact and a rule of law, it is itself a part of the legal system, whereas the Kelsenian basic norm lies outside of the system. There is also a different reason for its validity being unchallengeable. For Kelsen the basic norm must be assumed but can never be demonstrated. For Hart it is a mere statement of social fact that there is a rule of recognition, and 'no such question can arise as to the validity of the very rule of recognition which provides the criteria; it can be neither valid nor invalid but is simply accepted as appropriate for use in this way' (Hart 2012 [1961]: 109).

Suri Ratnapala

It is what Kelsen called the basic norm that must be presupposed. Kelsen described the basic norm thus:

Coercive acts ought to be performed under the conditions and in the manner which the historically first constitution, and the norms created according to it, prescribe. (In short: One ought to behave as the constitution prescribes.)

(1945, 201)

The key elements of Kelsen's theory are these. Facts consist of things and events in the physical world. Facts are about what there *is*. When we wish to know what caused a fact we look for another fact. A stone thrown in the air comes down because of the force of the Earth's gravity. There are seasons because the Earth's axis is tilted at 23.5 degrees. A norm, unlike a fact, is not about what there is but is about what *ought* to be done or not done. Whereas facts exist in the physical world, norms exist in the world of ideas. Facts are caused by other facts. Norms are imputed by other norms. The requirement that a person who commits theft ought to be punished is a norm. It does not cease being a norm because the thief is not punished. (He may not get caught.) The norm that the thief ought to be punished exists because another norm says so. Not all norms are laws. There are also moral norms. Legal norms are coercive; moral norms are not. Moreover, a legal norm has the quality of 'validity'. A legal norm is valid if it is endowed with validity by another norm. Whereas physical things arise from causation, legal norms arise from validation by another valid norm. A norm that confers validity upon another norm owes its own validity to another norm, and so on. This regression cannot go on infinitely. Kelsen conceived the idea of a basic norm (*Grundnorm*), a kind of First Cause of the legal system beyond which we cannot speculate in a legal sense. The basic norm is presupposed. A legal norm exists because of a chain of validity that links it ultimately to the basic norm. The legal system is a system of legal norms connected to each other by their common origin, like the branches and leaves of a tree. This is only a thumbnail sketch of Kelsen's theory. Its intricacies and implications are considered in the following pages.

Hohfield, Rights and Relations

Important to note that notes on Hohfield were only found in Meli's book. Suri Ratnapala and Mark Tebbit do not mention such philosopher in their books.

Wesley Newcomb Hohfield page 55

Hohfield has made an original contribution to the study of analytical jurisprudence. He tries to discover what law is through a linguistic approach, analysing rights by breaking them down into fundamental constituent elements. His basic contribution is dependant on 2 articles he had published in the Yale Law Journal promised to go much deeper into his specific analysis but that was not to materialise due to his premature death.

Hohfield is an exponent of the Analytical school of Jurisprudence as he appertained to there group og legal thinkers who saw law as a technical body of rules having high degree of internal cohesion and which is applied scientifically without reference to open-ended questions of social policy or morality.

By him studying chemistry, he introduced a new approach to the analysis of law, and for the first time he uses semiotics(the study of signs and symbols and their significance) as a tool to achieve his ends.

Hohfield's Outlook

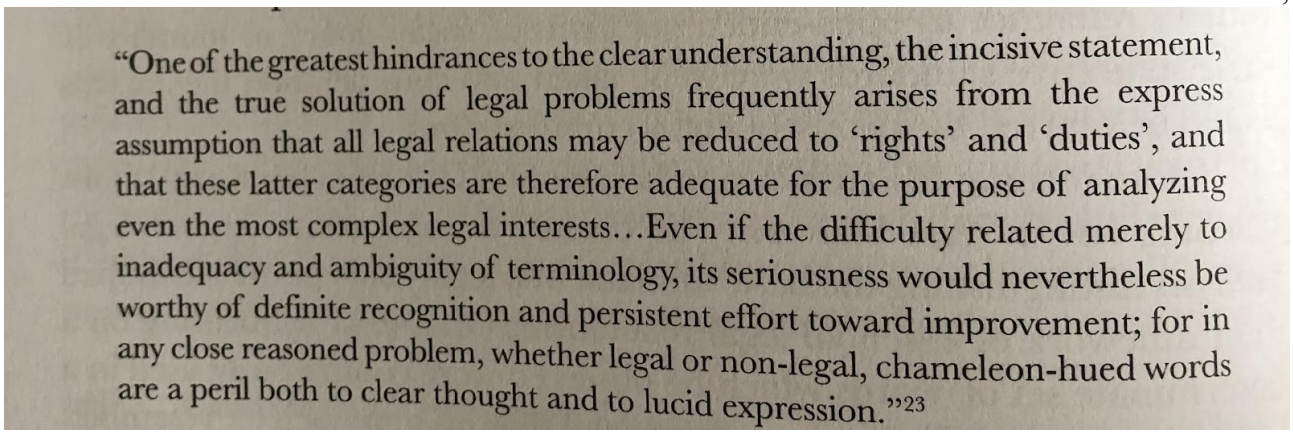
In his article published in 1913, hr introduced a methodology whereby he deconstructed board legal principles unto their actual component elements. He saw that legal elements entered into all types of rural interests, promising that;

"A later article will deal specifically with the analysis of certain typical and important interests of a complex character."

His analysis showed how legal relationships are connected to each other, challenging established traditions of formalistic scholarship. His second article was published in 1917. Hohfield had also promised a fully structured book expanding on his initial ideas, but this never materialised as he died prematurely, as already stated prior.

Hohfield provides a basic analysis if the true essence of law. His aim was to simplify the understating of this phenomenon seeing this as an essential pre-requisite to clearly resolve all issues of interpretation. In postulating his thesis he

w r o t e ;



"One of the greatest hindrances to the clear understanding, the incisive statement, and the true solution of legal problems frequently arises from the express assumption that all legal relations may be reduced to 'rights' and 'duties', and that these latter categories are therefore adequate for the purpose of analyzing even the most complex legal interests…Even if the difficulty related merely to inadequacy and ambiguity of terminology, its seriousness would nevertheless be worthy of definite recognition and persistent effort toward improvement; for in any close reasoned problem, whether legal or non-legal, chameleon-hued words are a peril both to clear thought and to lucid expression."[23]

Hohfield sought clarity, and attempted to create a precise tool first to enable one to distinguish between fundamental legal concepts, and then to identify the framework of relationships that result from these concepts. To achieve the clarity he yearned so much for, he deconstructed legal principles, reducing them to their essential component elements, then subsequently showing both how they are connected to each other , and how they conduct themselves in practical judicial decisions.

This introduced aa novel scientific approach to the analysis of law. It is an outlook which is no longer structuralism in approach like Kelsen's but linguistic or semiotic.

Hohfield's ideas on Rights pg 58

Hohfield saw rights as capable of changing colour, like a chameleon. To overcome the uncertainty of such a situation, and to properly understand the meaning of essential words that are most commonly used in everyday legal parlance, he devised a system whereby words, specifically chosen for the legal content, were analysed in context and detail. To understand rights are he therefore drew up a new set of definitions, isolating the basic legal concepts involved and analyse them in relation to their functions by examining how they are correlative and opposite to each other

Hohfield distinguished between 2 classes of things;

- *Jura in rem*
- *Jura in personam*

1. *'Jura in rem'* - actual or potential and in relation to things;

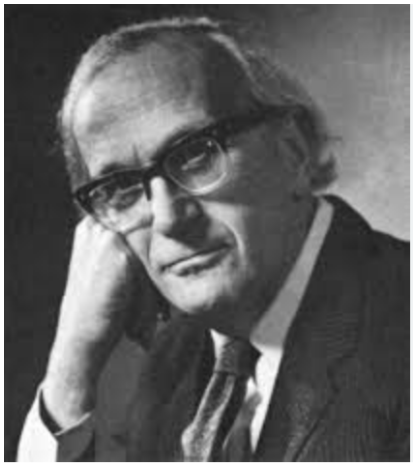
"Residing in a single person (or group of persons) but availing respectively against persons constituting a very large and indefinite class of people."

2. The other class concerns nautical rights - '*Jura in personam*'

"Residing in a person (or group of persons) and availing against aa single person (or single group of persons)."

The owner of these rights may then dispose of these things was one please, or pithing those limits as may be prescribed in the terms of the rights one may possess.Right in *rem* attract what he terms "correlative" negative duty on the part of others to abstain from interfering with the right of the owner to exercise that right. The law enforces this duty on all others - "erga omnes", as at one and the same time it established and protects that right. Right in *personam* have for their subject an act or performance concerning some determinate person as for instance, the delivery of goods to someone. This right also attracts the correlative positive duty in the determinate person to act in the manner prescribed, and, in this case, to deliver the goods in question. Therefore, to find real expression for its exercise or enjoyment, this right depends on the performance of that specific duty and is secured by legal remedies in case of breach of performance. One therefore discovers the true meaning of the word 'right' when one unravels its least common denominator, by identifying the basic legal concepts having any connection with the word 'right'.

To discover the true shades of meaning of the word 'right', in various concrete situations, in which it arises, one then adopts a rigorous analysis of what Hohfield termed 'jural relations'.



H.LA Hart's Theory on Positivism and the Separation of Morals
From his article: Positivism and the Separation of Law and Morals
Author(s): H. L. A. Hart

Positivism is derived from the Latin word *positum*, meaning laid down, coming to mean manmade law, the laws agreed upon by a particular society. Legal Positivism derived in the 1800s.

The most important work of heart is 'The concept of Law' - has become one of the foundational texts of legal positivism

For Hart, the law as is ought to be is it should follow moral principles. It is something that subjugates the law to its principles.

Classical legal positivism, starting with people like Austin, takes as one of its tenants that the law should refer to nothing but the legal system itself. The first part of Hart's text is an overview of his view of positivism. Hart speaks of legal positivism as the history of an idea which argues for the separation of law from morality, law as it is from what it ought to be, the separation thesis (p.594)

"Bentham and Austin, constantly insisted on the need to distinguish ,firmly and with the maximum of clarity, law as it is from law as it ought to be. This theme haunts their work, and they condemnedthe natural-law thinkers precisely be- cause they had blurred this apparently simple but vital distinction" page 594

Utilitarianism is a moral philosophy, a philosophical position about what is good. - q general moral philosophy, ethical theory. On the other hand, legal positivism is the legal phiislopsphy of law - legal positivism is the legal philosophy derived from. Utiliarntianism (as hart is saying)

What happened int he aftermath of ww2? Legal scholars, jurists started treating legal positivism as a legal theory. They were pointing out that for ex. Taxi laws, led to not only discrimination but also genocide, they pointed out that these laws were passed by a regime that was already democratically elected and had the authority to legislate, thus according to the logic of the positivists, there was nothing wrong with them. There was quite a movement that was being critical of legal positivism.

Hart was known as one of the main points of reference in legal positivism (separation of law and morals)

What we're reading is that hart in this article does 2 things at once;

1. Reaffirms legal positivism - will assert legal positivism

2. Working to re-configure/modify/change legal positivism in view of the criticism that was against it

Natural law theorist would say that the law needs to refer to not legal considerations, but moral ones.

Legal positivism looks at not moral principles. that are outside of the law, but social facts. In other words, the existence and the content of law depends on social facts, on things as they are (depends not he cultural, political, historical choices that a society makes).

Some, I know, find the political and moral insight of the Utilitarians a very simple one, but we should not mistake this simplicity for superficiality nor forget how favorably their simplicities compare with the pro- fundities of other thinkers. Take only one example: Bentham on slavery. He says the question at issue is not whether those who are held as slaves can reason, but simply whether they suffer.11 Does this not compare well with the discussion of the question in terms of whether or not there are some men whom Nature has fitted only to be the living instruments of others? We owe it to Bentham more than anyone else that we have stopped discussing this and similar questions of social policy in that form.

So Bentham and Austin were not dry analysts fiddling with verbal distinctions while cities burned, but were the vanguard of a movement which laboured with passionate intensity and much success to bring about a better society and better laws. Why then did they insist on the separation of law as it is and law as it ought to be? What did they mean? Let us first see what they said. Austin formulated the doctrine:

Page 596 - Austin separates the law as it is and as it ought to be;

The existence of law is one thing; its merit or demerit is an- other. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different quiry. A law, which actually exists, is a law, though we happen to dislike it, or though it vary from the text, by which we regulate our approbation and disapprobation. This truth, when formally announced as an abstract proposition, is so simple and glaring that it seems idle to insist upon it. But simple and glaring as it is, when enunciated in abstract expressions the enumeration of the instances in which it has been forgotten would fill a volume.

Austin rejected the natural law theory -

Law as it is - reflects social facts

Law as it ought to be - higher principal’s outside of the law

So is it safe to say that in today's world we have a mixture of both theories? Today we have formulations of the natural law theory.

Hart is quoting Austin;

“But the meaning of this passage of Blackstone, if it has a mean- ing, seems rather to be this: that no human law which conflicts with the Divine law is obligatory or binding; in other words, that no human law which conflicts with the Divine law is a law”

Meaning; Lex iniusta non est lex. (An unjust law is not a law)

Hart criticises Austin's theory - "Austin's protest against blurring the distinction between what law is and what it ought to be is quite general: it is a mistake"

"Bentham insisted on this distinction without characterizing morality by reference to God but only, of course, by reference to the principles o futility. Bentham's gen- eral recipe for life under the government of laws was simple: it was "to obey punctually; to censure freely."13 "

Bentham's views - pg 598

"Bentham the occupational disease of lawyers: "[I]n the eyes of lawyers- not to speak of their dupes -that is to say, as yet, the generality of non-lawyers -the is and ought to be . . . were one and indivisible."

EXPLAINED: Hart is acknowledging already what could be the dangers in democracy. He recognizes that democracy, may in some cases result in wrong decisions, bil actions , etc. He is not rejecting the idea of morality. The problem is in the link between law and morality. Hart is not an anti-moralist, he is not rejecting the idea of morality, nor is he necessarily saying that morality is purely subjective but that the link between law and morality should not exist. his constant concern is that the moment one says that the law should reflect ethical, moral principles, the question that would arise would be more problematic: Who decides what is ethical or moral?

There are therefore two dangers between which insistence on this distinction will help us to steer: the danger that law and its authority may be

dissolved in man's conceptions of what law ought to be and the danger that the existing law may supplant morality as a final test of conduct and so escape criticism."

Pg600

Austin was said by one of his English successors, Amos, "to have delivered the law from the dead body of morality that still clung to it"

In page 601,

"There is, however, one major initial complexity by which criticism has been much confused. We must remember that the Utilitarians combined with their insistence on the **separation of law and morals two other equally famous but distinct doctrines**. One was the *important truth that a purely analytical study of legal concepts, a study of the meaning of the distinctive vocabulary of the law, was as vital to our understanding of the nature of law as historical or sociological studies, though of course it could not supplant them*. **The other doctrine was the famous imperative theory of law - that law is essentially a command."**

---

1. **Hart reminds us the key figures of legal positivism - 3 doctrines - the first one is this; the separation os law and morals.**

2. *The other was the important truth that a purely study - analytical study of legal concepts - A purely analytical study of legal concepts doctrine*

3. **The 3rd doctrine was the famous imperative theory of law - the law that was essentially a command. - the command theory**

There are 3 main doctrines but they are different from one another - he is saying that: “These three doctrines constitute the utilitarian tradition in jurisprudence; yet they are distinct doctrines” , constitute the basis of legal positivism

“It is possible to endorse the separation between law and morals and to value analytical inquiries into the meaning of legal concepts and yet think it wrong to conceive of law as essentially a command.” - he thinks that legal positivism can agree with his kind of legal positivism.

Hart is saying that my version of legal positivism included the separation thesis, the analytical l study of command but not the command theory of law - he rejects the command theory of law. Other legal positivist assumed that to be so you need to accept all, but the is saying that you don’t have to accept the last one in order to be a legal positivist - the idea of legal positivism included all 3 in his time, for a reason he says that you can choose to not accept the last theory, as it is problematic and not fundamental to legal positivism.

So Hart does not see law as something which should command you and thus does not condone the command theory? Yes, for him the law does not simply command, the law teaches us something , is exemplary in that sense. He says that (hart) that the command theory is not essential to legal positivism, it should not be essential.

What hart is saying is that the law is not essentially a command - and legal positivism is not to be understood as requiring a commitment to this particular idea of law as a command.

Overview (Philosophy of Law, Mark Tebbit)

The serious faults and shortcomings that he finds in a typical sovereign-command–sanction theory, in particular Austin's, are linked closely to the key concepts in Hart's own theory, which are explained in order to remedy these defects and to clarify what he sees as the essentials for understanding the law. It should be remembered that Hart was writing from within the legal positivist camp, and that it was his main purpose to rescue this approach from the distortions that he saw in the analysis of law developed by Bentham and Austin.

His intention was not to soften this picture of law, but rather to show that it does not capture what is really important about law, because it obscures distinctions that are absolutely crucial to understanding it. Writing a century after Austin, Hart incorporates all the criticisms made over the years by other critics, transforming them into one powerful critique. With each of the criticisms he aims to show that the command theory falls short as an explanation of the law and the authority behind it.

We can summarise Hart's criticisms as follows:

- 1 Austin conceals the distinction between being obliged or forced to obey and being placed under an obligation to obey.

- 2 He fails to solve the problem of power-conferring rules: those that confer powers on officials to perform legal duties which do not involve commands at all, such as marriages, wills and contracts.

- 3 The sovereign-command–sanction picture does not reflect the ways in which many laws have actually arisen, originating as they do in ancient custom.

- 4 The problem of habitual obedience to the sovereign.

- 5 The problem of the unlimited power of the sovereign.

The most damning criticism is the first of these, which rests upon Hart's rejection of the central notion that the force brought into play by the sanction- backed commands of the sovereign brings with it an obligation upon those commanded to obey.

Legal and Moral Obligation

This is the central point of Hart's critique. Why do people have an obligation to obey the law? What is it and where does it come from? On Austin's account, this is explained solely by the force, the threats of sanctions. On Hart's account, this is not only simplistic, it is wholly wrong and gives rise to many misunderstandings of legal realities. Hart has frequently been criticised for drawing a distinction which does not match common usage, a distinction between being obliged and being under an obligation. He highlights the difference by representing the idea of 'being obliged' as meaning that force or the threat of force is brought to bear on the person thus obliged. Being under an obligation, in sharp contrast, is being in someone's debt and having a certain duty to perform.

Hart's critics have argued that being obliged has a wider range of applica- tion than he allows, as he fixes on the one meaning just given. This criticism misses the point. The way in which Hart draws this distinction is indeed idiosyncratic, but he is still drawing a legitimate distinction which highlights Austin's elision of the crucial features of legal obligation, which involves acceptance of the authority behind the rules. This is what is absent from the gunman scenario. While it is impossible to be definitive about the usage of these terms, Hart's distinction is close enough to be serviceable.

The point he wants to establish is that Austin's sovereign is in effect a larger version of the bank robber who points his gun at the cashier. If we are to believe Austin's account, then the sovereign is doing exactly the same thing on a greater scale as a common criminal or gangster. He gives orders backed by threats, and large numbers of people obey because they fear the consequence of disobedience. Austin's sovereign state, says Hart, must be seen as 'the gunman situation writ large'. As this is so implausible, we must find another way of explaining what the obligation is and where it comes from.

Hart is saying that that there is more to law than exercising the coercion and force that might more aptly describe, on a smaller scale, the behaviour of a gangster with a gun. So we need to look for where the difference really lies.

Hart does not suggest, however, that every example of social rule-following is an instance of internalising an obligation. He also identifies forms of convergent behaviour which do have an internal aspect, but do not involve what anyone would call obligations, either moral or legal. This is a midway category that might be called that of convention. Hart has in mind sets of rules governing correct grammar and speech; the rules of fashion or etiquette; and such activities as ball games like football, or board games such as chess. These sets of rules are commonly meticulous and detailed, laying down conventional rules for correct modes of speech or 'legal' moves in a game of chess, and they often involve criticism and correction of one's own or others' behaviour, along with a certain kind of pressure to conform when the rules are broken, as when a chess player starts to move the pieces any way she likes, or a footballer ignores the offside rule, but it would simply be misleading to say that such conventions involve obligations or duties. These are just the rules of the game that have to be followed if they wish to continue playing.

Conclusion

Any assessment of the ongoing dispute between positivists and their natural law critics must take account of the ways in which these doctrines have evolved since the days of the classic theories of Bentham and Austin. The differences between the modern versions of positivism and those of their predecessors are almost as important as their arguments against natural law. It seems clear today that Hart's largely successful critique of Austin can indeed be questioned, not only in its details, but also on substantial matters. Ultimately, however, his critique and the theory that arose from it did crystallise the issues in a way that lifted positivist theory out of the stagnation into which it had fallen and opened up a new era of Anglo-American jurisprudence. Hart's new concept of law was significant for many reasons, which have only been touched upon here. Other important features of it will be covered in later chapters. The most important of these reasons was his conceptual liberation of legal positivism from the straitjacket of the command theory of law.

Legal positivism can be seen as the expression of Utilitarianism in the field of legal theory based on the separation thesis. In Natural Law, for a law to be properly a law, it cannot go against nature, against reason. Our laws should, in some way, refer to a higher law. From Aquinas to the 1800s, Natural Law was the predominant field of legal thought. The philosophers of this time gave different varying views of Natural Law.

Lecture notes

Legal positivism can be seen as the expression of Utilitarianism in the field of legal theory based on the separation thesis. In Natural Law, for a law to be properly a law, it cannot go against nature, against reason. Our laws should, in some way, refer to a higher law. From Aquinas to the 1800s, Natural Law was the predominant field of legal thought. The philosophers of this time gave different varying views of Natural Law.

One of the key ideas of legal positivism is that law depends on social facts and so the will of the people becomes highly important. These ideas in the 1800s were considered much more democratic. Since it was thought that legal positivism led towards this democratic development, it gained currency. By the 20th century in fact it became the predominant legal theory. However, the aftermath of WWII was a time where legal positivism was questioned. Hart attempts to restate and re-enforce it in wake of the war. Many people were accused legal positivism of legitimating the atrocities that took place in Germany. In the Nuremburg trials, the defence said that they were obeying the law of their regime in the context that Hitler was elected democratically.

Hart defends legal positivism but admits there were certain elements of legal positivism he had to do away with. The last part of the article, is a rejection by Hart, of one of the main pillars of classical legal positivism; the command theory put forward by Austin. Austin based legal positivism on the command theory and the separation thesis, the latter which Hart restates. However, the command theory, which says that the law represents solely an imposition, Hart moves away from.

Hart lists the three doctrines of classical legal positivism (p.601 par.2):

- Separation Thesis
  - Analytical study of legal concepts
  - Command Theory

  He says that the first two can stand, but the last cannot.

- The separation thesis argues for the distinction between law and morality. When we refer to morality, we mean moral principles, an idea of what is good and bad outside of the law itself. By the command theory, he understood this theory might have given misinterpretations of legal theory (e.g. Nazi atrocities), but does not concede it is the cause of the legitimisation of what happened. (p.604) Hart puts forward his criticism of the command theory.

  - Hart refers to the Rechstaat, the rule of law, the idea that no one is above the law. This was a great achievement, post-French revolution. The word of a ruler was no longer law. Legal positivism largely aided. They did not like that someone would have the authority to

interpret the law.
- Thinkers like Dworkin ask if the law can really be interpreted just as it is. Can we obey the law if it allows the atrocities undertaken by Nazi Germany? Classical Natural Law theory holds that the concept of justice precedes the written law but it is definitely outside of the written law. The laws should reflect the concept of justice. On the other hand, legal positivism, says justice is what is reflected in the law because it is the will of the people. It constructs the notion of justice from the will of the people, who create the law

A response to Lon L. Fuller's paper between the separation of law and morality

Lon L. Fuller's view

Fuller's natural law theory is sometimes referred to a functionalist theory of law. The word functionalism is used in very different ways in different areas. In this case, it means simply that for Fuller, the law always functions in fulfilment of a purpose. In other words, something cannot be considered a law unless it carries out the function that is essential to law, i.e. guiding human action to achieve social order. This is the purpose of every legal system. Fuller is concerned with the law as a system and every legal system aims to guide human behaviour and subject human conduct in order to achieve social order.

Lecture Notes

Fuller wrote a book called 'The Morality of Law'. - a response to Hart as a book, and of course, what it is focusing on is morality, the morality of law. In an article by Fuller, we will see the latter's response to Hart. What Fuller, a natural law theorist is emphasis on what morality is, the morality of law. To him, law is always purposeful.

The law has within it, what we call morality - that's why fuller calls this the morality of law, as morality is already present within the law - since the law is purposeful, it affects in a very direct way. This purposefulness of law, makes us aware that laws create and change societies in a certain way. One should ask about the law's purpose. The law is an activity with a purpose - the law does something- and it is goal oriented - wants to achieve something, always has a purpose, like any human activity. Law is something which human beings enacts - and according to Fuller, it is no different to a law of human activity - law is goal oriented - to Fuller, law does something always - law does something with a purpose.

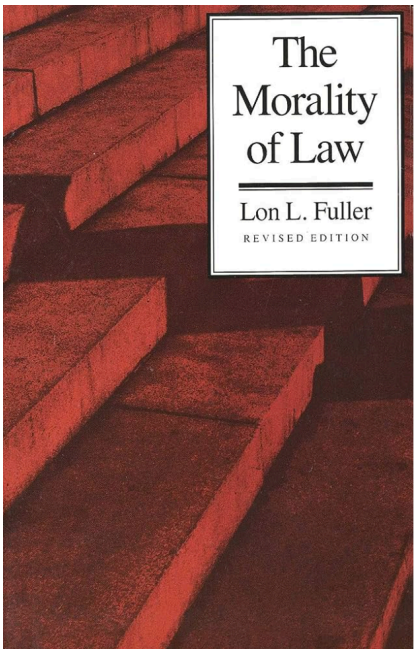
Is Fuller denying the analytical aspect? No, he is adding to it. We should analyse and add to it.

Summary of all this :

While the focus of a Legal Positivist in the creation of law and judgement is on the meaning of the words in the law, in the Natural Law Theory put forward by Fuller, the focus is on the purpose of law.

When St Thomas Aquinas said that law is; ***"an ordinance of reason for the common good, made by him who has care for the community, and promulgated."*** - FOR = A purpose

The purpose is the TELOS - which shattered by Aristotle and quoins continued to define



In the definition of law, which he accepts, he's not just accepting that. Laws are there to be enforced, but even more he is emphasising thaw law is always purposeful. It is that point which places places him in the natural law tradition.

Fuller was an important influence on Ronald Dworkin, who was one of his students at Harvard Law.

Fuller and his rule of book.

Summary on his book

In the morality of law, fuller identifies eight conditions that need to be followed/adhered to for a **legal system (law based social order**) to function well.

These 8 criteria for a legal system to function well ;

1. Rules must be expressed clearly and in general terms
2. Rules must be promulgated and made public
3. Rules must be understandable (by those bound to follow them).
4. Rules must not be retroactive, but prospective, in their effect
5. Rules must be consistent with the rest of the legal system
6. Rules must not command or demand conduct which goes beyond the powers of those subject to them.
7. Rules must not be changed too frequently.
8. The execution and adjudication of rules (laws) should be consistent with the wording of legislation

---

What are these 8 conditions that fuller lists int he morality of law in order for a society to function well ?

Another way is having laws which are not ambiguous; people start interpreting them different - in ant jurisdictions, judges agree on sentencing policies

- 1. laws should be in general terms - no law caters for specific cases - when the law is too specific, it should alarm; that is either a law to favour or punish and it is unjust, and

- 2. Laws must be promulgated and made public - those following it should know it- case in point, government gazette - it would be completely unjust for legislators to pass a law - that people are changed under that law and them not being notified about it. Sometimes the legislator decides to give bought time for those who are to implement the law, and observe it - laws should be known - An important thins

- 3. Laws should be made understandable - some laws are very technical, that is when you seek professional advice, but the laws that apply to everyone should be presented in a clear

manner for people to follow them.

- 4. You can not pass a law today and say that is illegal to take out more than x euros from 2015 - it. Is unjust and unfair - laws should be just- the problems here is that an unjust laws not a law.

- 5. Law must be constituent - to avoid conflicts in legislation - no law conflicts with another — the legal system doesn't work well when there are conflicts win laws and legislations. This point is oe of the point that the legal positivists emphasised a lot, and fuller is saying that they are right

- 6. No crazy laws are permitted - ex. Imposing heavy taxes on people with a law income - you are going beyond their power - the justice of that law is problematic and open to scrutiny -

- 7. Lack of stability is created when laws are changed all the time, it is difficult for people to catch up - a proper process should be done when drafting laws.

- 8. It would be unfair

So, through the moral principles, we mentioned, morality is inbuilt in the law, so all these 8 conditions are built on moral principles. If these conditions are observed, than those moral principles become embodied within the law - morality is inbuilt within the law - if the process fo legislation makes sure that the laws that are being cooked have the right ingredients, the goodness pf the law, is within it. For natural law to exist and achieve purpose, these conditions are necessary, they must be met. This is the internal morality of law of fuller.

The law functions towards an end. Functionalism means different things in different principles. This term is described in Fuller's perspective to define what has been said about law being purposeful. A law must carry a function. It must guide a human action to bring about order. For something to be law it needs to fulfil its purpose. This is the essential character of law according to Fuller. The Rule of Law is the guide that regulates our lives in society, wherever our lives need to be regulated. Laws are there to regulate us and limit our freedom. There may be laws to increase freedom such as the law of the Free Market in Commercial Law and the Schengen Agreement.

In conclusion regarding Fuller, he maintains that when one of these conditions does not function then the law is not working well. These are internal principles and constitute the morality of law (justice, fairness, goodness). Morality of law is not outside of the law. If all the laws within the legal system follow these conditions, then the outcome is that that legal system has morality imbued within it. Then one can say that a particular law is fair and just. For Fuller there is a huge overlap between law and morality which is the totally opposite between the separation theory, which states that there should be a distinction between rules and morality. Fuller argues that laws must be fair and just – therefore moral. Through the moral principles at the basis of these conditions, morality is built in the law. If these conditions are observed, then those moral principles become embodied in the law.

Fuller was an important influence on Ronald Dworkin, who was one of his students at Harvard Law. Fuller contributed a lot to the development of legal theory in the 20th century, especially in the debate between the natural law tradition and legal positivism. In this article, Fuller gives a synthesis of his ideas. Once, again, at this time positivism was under attack by critics, especially after WWII regimes such as the Nazis, who justified some of their atrocities on positive law. Natural Law, in turn, was reborn, especially with birth of the Universal Declaration of Human Rights.

Fuller's definition of law: "Law is the enterprise of subjecting human conduct to the governance of rules."The emphasis he lays in this definition is on the purpose of law, suggesting the law must be purposeful. A law always has a purpose. Fuller identifies the spirit of the law. A judge should interpret the meaning of each word of the law, within the context of the law. Why was it enacted in the first place? This will help the judge reach a contextualised meaning. The law always functions towards an end, towards its purpose. Thus he has been called a functionalist theorist. Fuller identifies 8 conditions or criteria which must be adhered to for a legal system to function well. If in the process of legislation these principles are incorporated into the laws, the result will be a just and a moral law. These eight principles constitute the morality of law and their presence guarantees the morality of law.

For Fuller, morality is built in the law. The key issues start from the definitions of law: the enterprise of subjecting human conduct to the governance of rules. It guarantees social order. The question these theorists are interested in is that which gives law its moral validity. What ensures that the principles of justice are embodied in the law?

For Fuller, the justice, fairness or goodness, is found in the process of administering the law. This emphasis on process places him close to the positivist argument. However, this does not refer to simply the coherence of a particular law to the whole system. Whilst Hart says that as long as it fits in, it is fine, this is not enough for Fuller. He says there is something more basic which refers to moral procedures. It is inconceivable to think of there being a complete distinction between law and morals. He argues that at the moment of legislation there is certainly an overlap. A law which has no moral foundation is null and void.

Jurisprudence, second edition, Suri Ratnapala

Lon Louvois Fuller (1902–78) was Carter Professor of General Jurisprudence at the Harvard Law School. He is best known for the debate with Hart on the connection between law and morality.

Historical roots of Fuller's theory: the closing period of the Nazi regime in Germany

The first of the great 20th-century debates on law and morality arose in the aftermath of World War II, which featured human atrocities on an unimaginable scale in Europe and Asia. The victorious Allied powers (the United States, the United Kingdom, France and the Soviet Union) established international military tribunals in Nuremberg, Germany and in Tokyo, Japan to bring to justice officials of Nazi Germany and Imperial Japan accused of war crimes and crimes against humanity. The common defence of the accused persons was that they were acting under lawful orders and hence their actions were lawful. Any retrospective punishment of these acts, they argued, would violate the basic rule of justice that a person should only be punished for crimes against the law (*nullum crimen, nulla poena sine lege*). The debate was precipitated by the conviction of Nazi officials by the Nuremberg Tribunal.

So although, Fuller and Finnis are both natural law theorists, they look at this theory from very different perspectives. Fuller, from a procedural point of view, and Finnis from a substantive point of view. However, their theories do not go against each other. Justice precedes law: law specify or determine justice in specific circumstances.

The National Socialist German Workers' Party (Nazi Party) came to power through democratic elections under Germany's Weimar Constitution in 1933. The Constitution, though democratic in character, had certain fatal defects, including the president's power to suspend civil liberties in case of emergencies and the legislature's power to amend the Constitution by two- thirds majority. These defects allowed the Nazi Party to transform the Constitution from within. In the short period that it held power, the Nazi Party under Hitler converted the liberal-democratic German state into an unrecognisable abomination of tyranny. At the height of Hitler's powers, the German political system displayed the following features:

- frequent retroactive laws punishing the guiltless or excusing atrocities enforcement of secret (unpublished) laws that denied citizens the guidance of the law

- uncontrolled discretions that identified the law with the momentary wishes of officials
  the fact that a verbal order by Hitler was regarded as sufficient authority to exterminate thousands of people

- frequent lawlessness, seen in the practice of extrajudicial punishment by the state acting through 'the Party in the streets' – a euphemism for party thuggery
  unification of legislative, executive and judicial power in the person of Adolf Hitler (the *Führer* principle)

- total intimidation of courts, which did the bidding of party officials, and the requirement that judges decide cases as the *Führer* would.

- frequent retroactive laws punishing the guiltless or excusing atrocities enforcement of secret (unpublished) laws that denied citizens the guidance of the law

- uncontrolled discretions that identified the law with the momentary wishes of officials
  the fact that a verbal order by Hitler was regarded as sufficient authority to exterminate thousands of people

- frequent lawlessness, seen in the practice of extrajudicial punishment by the state acting through 'the Party in the streets' – a euphemism for party thuggery
  unification of legislative, executive and judicial power in the person of Adolf Hitler (the *Führer* principle)

- total intimidation of courts, which did the bidding of party officials, and the requirement that judges decide cases as the *Führer* would.

*A response to **Lon L. Fuller**'s paper between the separation of law and morality*

I must confess that when I first encountered the thoughts of Professor Hart's essay, his argument seemed to me to suffer from a deep inner contradiction. On the one hand, he rejects emphatically any confusion of "what is" with "what ought to be." He will tolerate no "merger" of law and conceptions of what law ought to be, but at the most an antiseptic "intersection." Intelligible communication on any subject, he seems to imply, becomes impossible if we leave it uncertain whether we are talking about "what is" or "what ought to be." Yet it was precisely this uncertainty about Professor Hart's own argument which made it difficult for me at first to follow the thread of his thought. At times he seemed to be saying that the distinction between law and morality is something that exists, and will continue to exist, how- ever we may talk about it. It expresses a reality which, whether we like it or not, we must accept if we are to avoid talking non- sense. At other times, he seemed to be warning us that thereality of the distinction is itself in danger and that if we do not mend our ways of thinking and talking we may lose a "precious moral ideal," that of fidelity to law. It is not clear, in other words, whether in Professor Hart's own thinking the distinction between law and morality simply "is," or is something that "ought to be" and that we should join with him in helping to create and maintain.

It is a cardinal virtue of Professor Hart's argument that for the first time it opens the way for a truly profitable exchange of views between those whose differences center on the distinction between law and morality. Hitherto there has been no real joinder of issue between the opposing camps. On the one side, we en- counter a series of definitional fiats. A rule of law is - that is to say, it really and simply and always is - the command of a sovereign, a rule laid down by a judge, a prediction of the future incidence of state force, a pattern of official behaviour, etc. When we ask what purpose these definitions serve, we receive the answer, "Why, no purpose, except to describe accurately the social reality that corresponds to the word 'law.'" When we reply,"But it doesn't look like that to me," the answer comes back, "Well, it does to me." There the matter has to rest.

Without any inquiry into the actual workings of whatever remained of a legal system under the Nazis, Professor Hart assumes that something must have persisted that still deserved the name of law in a sense that would make meaningful the ideal of fidelity to law. Not that Professor Hart

believes the Nazis' laws should have been obeyed. Rather he considers that a decision to disobey them presented not a mere question of prudence or courage, but a genuine moral dilemma in which the ideal of fidelity to law had to be sacrificed in favor of more fundamental goals. I should have thought it unwise to pass such a judgment without first inquiring with more particularity what "law"itself meant under the Nazi regime.

John Finnis

Fuller's version of Natural Law is different to that of Finnis. Finnis is interested in seeing whether a law is in itself, good or bad. One has to have good reasons to follow the law. We are morally bound to follow good laws. He is interested in the substance of the law, i.e. it is a substantive law theory. Fuller has a procedural law theory. According to Fuller, every law comes into being through a very similar procedure (enacted, or made through delegation). Therefore, what law ought to be, according to Fuller, is that in the making of the law, certain moral principles are observed, making the law a product of moral procedure, therefore it would be moral by nature.

e.g., Criminal Law which gives lots of importance to intent, the mens rea, is evidence of the moral foundation the law has. For Finnis, the written law/positive law must refer to a higher law, to the Natural Law, which is outside of the law. He's closer to the ideas of Aquinas, centuries' earlier, who said that the written/positive law is hierarchically inferior to Natural Law, in such a way that it cannot contravene or transgress Natural Law. The law is a specification of justice so it doesn't make sense for it to go

---

He says a law might be a strict legal sense, valid, but that in itself, does not give you a good reason to follow it - and for him, the answer to the question 'why should I obey the law?' Is 'because the law is good', because the purpose of the law for him is to be just and be good. We face this often when you ask someone, there is something unfair about this law, the answer 'because the law says so', is a typically positivist answer - for Finnis that is not enough.

There must be good reasons to obey the law - **for Finnis**

When one might finds that the law is unjust, or in certain respects, unfair - Finns is recovering the old idea in the natural law theory of Aquarians, that an unjust law is not fully a law

(An unjust law is not a law) - *lex iniusta non est lex* - **Finnis doesn't use this term himself - it was associated with Aquinas - the very phrase is self contradictory from a natural law perspective, as you shouldn't have an unjust law.. For the legal positivists, justice is a construct, in other words, what is just results from the law.**

The article "On the Incoherence of legal positivism' by Finnis

The first sentence of the article says that **"Legal positivism is an incoherent intellectual enterprise."-**

This is a very strong idea and during the rest of his work he proves his argument.

This is the definition of legal positivism according to Finnis. This definition is important as the article itself is about the incoherence of legal positivism.

Definition of legal positivism

"*Legal* positivism is in principle a more modest proposal: that state law is, or should systematically be studied as if it were, a set of standards originated exclusively by conventions, commands, or other such social facts."

- This is the definition of legal positivism according to Finnis. This definition is important as the article itself is about the incoherence of legal positivism.

- He gives an overview of legal positivism

- For a legal positivist , the law is simply the result of agreements and commands - he gives its a history of legal positivism

From article;

"As developed by Bentham, Austin, and Kelsen, legal posi- tivism was officially neutral on the question whether, outside the law, there are moral standards whose directiveness (normativity, authority, obligatoriness) in deliberation is not to be explained entirely by any social fact. Bentham and Austin certainly did not think that the utilitarian morality they promoted depended for its obligatoriness upon the say-so of any person or group, even though Austin held that the whole content of utilitarian moral requirements is also commanded by God Kelsen's official theory,until near the end of his life, was-at least when he was doing legal philosophy-that there may be moral truths, but if so they are completely outside the field of vision of legal science or legal philosophy. His final position, however, was one of either complete moral scepticism or undiluted moral voluntarism: moral norms could not be other than commands of God, if God there were. These final positions of Kelsen are the consummation not only of the seam of voluntarism running through all his theorising about positive law, but also of every earlier theory which took for granted that law and its obligatoriness are and must be a product of the will and coercive power of a superior. "

Modern Law Theory - *from article* - serious of philosophers which were mentioned in previous lectures

What is often called "modem natural law theory" exemplifies, in large part, such a theory. This tradition emerges clearly by 1660, Uni*versalJurisprudence.* Characteristic features of this kind of natural law theory can be studied there, or in John Locke's long-unpublished *Questions Concerning the Law of Nature*[6] (c. 1660-1664). Both writers are clearly derivative in some ways from Hugo Grotius and in other ways from Thomas Hobbes. Very tellingly, Pufendorf describes Hobbes's *De Cive* (1642) (On Being a Citizen), a work announcing the main moral and jurisprudential theses of Hobbes's more famous *Leviathan* (1651), as "for the most part extremely acute and sound.

From Grotius's massively influential *On the Law of War and Peace* (1625), Locke and Pufendorf take the well-sounding but quite opaque idea that morality and the law's basic principles are a matter of "conformity with rational nature." The questions how this nature is known, and why it is normative for anyone, these writers never seriously tackle. Such fundamental questions are confronted and answered by Hobbes. But his answers treat our practical reasoning as all in the service of motivating sub-rational passions such as fear of death and desire to surpass others- motivations of the very kind identified by the classical tradition as in need of direction by our reason's grasp of more ultimate and better ends, of true and intrinsic goods, of really intelligent reasons for action.

"[N]o law without a legislator." No obligation without subjection to the "will of a superior power."

"Law's formal definition is: the declaration of a superior will." "The rule of our actions is the will of a superior power."' Law is in vain without (the prospect of) punishment'. These definitions and axioms (Locke's) are meant by the founders of modem natural law theory to be as applicable to natural law, the very principles of morality, as to the positive law of states. So obligation is being openly "deduced" from fact, the fact that such and such has been willed by one who has power to harm. To be sure, when natural law (morality) is in issue, the superior, God, is assumed to be wise.

But the idea of divine wisdom is given no positive role in explaining why God's commands create obligations for a rational con- science. God's *right* to legislate is explained instead by the analogy of sheer power: "Who, indeed, will say that clay is not subject to the pot- ter's will and that the pot cannot be destroyed by the same hand that shaped it?"'[1]

Locke, like Hobbes, is uneasily though dimly aware that "ought" cannot be inferred from "is" without some further "ought." That is to say, he is uneasily aware that the fact that conduct *was* willed by a superior, or indeed by a party to a contract, does not explain why that conduct is *now* obligatory. So he sometimes thinks of supplementing his naked voluntarism (oughts are explained by acts of *will)* by the rationality of logical coherence: fundamental moral principles are tautologies, norms which it would be *self-contradictory* to deny.
had ventured a similar account of the obligatoriness of contracts (such as his fundamental social contract, of subjection to the sovereign). Still, his official and prominent explanation was of the form, "clubs are trumps" (will backed by superior force, i.e. capacity to harm).' Such an appeal to coercion tacitly admits that the fact that someone else has *willed* or *ordered* me to do something provides of itself no reason for me to act, no normativity or directiveness for my deliberations. Moreover, as Kelsen argues, reliance upon the will of a superior to explain law and its normativity leaves, in the

end, no room for a requirement of logical consistency in the law, or for any attempt to reason from a general rule ("murder is to be punished") to a normative conclusion ("Smith, having murdered Jones, is to be punished").who wish to be positivists: the only source of normativity, and there- fore of the normativity of a particular norm, is positivity, that is, the actual willing of that norm by a superior. On this assumption, even the rationality of logic and uncontroversial legal reasoning can never yield normativity: nothing but a will-act can do that.

Kelsen's final positions cannot be written off as eccentricities, of merely biographical interest. Still, the legal positivism-sometimes called "exclusive legal posiivism"-defended today by legal philosophers such as Joseph Raz, is very different. While affirming that all *law* is based upon and validated by social-fact sources-the affirnation which makes it exclusive legal positivism-it accepts also that judges can and not rarely do have a legal and moral obligation to include in theirjudicial reasoning principles and norms which are applicable be- cause, although not legally valid (because not hitherto posited by any social-fact source), they are, or are taken by the judge in question to be, morally true.

II Classical Natural Theory - from article

Classical natural law theory does not reject the theses that what has been posited is positive and what has not been posited is not posi- tive. (Indeed, the very term "positive law" is one imported into philosophy by Aquinas, who was also the first to propose that the whole law of a political community may be considered philosophically as *positive* law.) But the theses need much clarification. What does it mean to say that a rule, principle, or other standard "has been posited by a social-fact source?" Does it mean what Kelsen finally took it to mean, that nothing short of express articulation of the very norm in all its specificity-and no kind of mere derivation (inference) or derivability-will suffice? Virtually no other positivist can be found to follow Kelsen here. But if not, which kinds of consistency-with-what-has- been-specifically-articulated by a social-fact source are necessary and sufficient to entitie a standard to be counted as "posited"? By what criteria is one to answer that last theoretical question?

Clearly, then, legal theorists have little reason to be content with any notion that legal theory should merely report the social facts about what has and has not been expressly posited, by actual acts of deliberate articulation, in this or that community. Raz himself goes well beyond so confined a project when he affirms that courts characteristically have the legal and/or moral duty to apply non-legal standards.

Now consider the judicial or juristic process of identifying a moral standard as one which anyone adjudicating a given case has the duty to apply even though it has not (yet) been posited by the social facts of custom, enactment, or prior adjudication. This specific moral standard will usually be a specification of some very general principle such as fairness, of rejecting favourable or unfavourable treatment which is arbitrary when measured by the principles that like cases are to be treated alike, unlike cases differently, and that one should do for others what one would have them do for oneself or for those one already favours. But such a specification-a making more specific-of a general moral principle cannot proceed without close attention to the way classes of persons, things, and activities are already treated by the indubitably posited law. Without such attention one cannot settle what cases are alike and what different, and cannot know what classes of persons, acts,

or things are already favoured, or disfavoured, by the existing positive law. The selection of the morally right standard, the morally right resolution of the case in hand, can therefore be done properly only by those who know the relevant body of posited laws well enough to know what new dispute-resolving standard really fits them better than any alternative standard. This selection, when thus made judicially, is in a sense making new law. But this judicial responsibility, as judges regularly remind themselves (and counsel, and their readers), is significantly different from the authority of legislatures to enact wide measures of repeal, make novel classifications of persons, things, and acts, and draw bright lines of distinction which could reasonably have been drawn in other ways. This significant difference can reasonably be signalled by saying that the "new"judicially adopted standard, being so narrowly controlled by the contingencies of the existing posited law, was in an important sense *already part* of the of speaking is unwarranted and inadequately motivated. Exclusive legal positivism's refusal to countenance such a way of speaking is unwarranted and inadequately motivated.

III- "For a judge, and for a lawyer trying to track judicial reasoning, the law has a double life."

Finnis wants to distinguish between the exclusivist (hard core legal positivist) and on the other hand, the softer version of legal positivism which is referred to as inclusivity (inclusive legal positivist), who still admits some reference to morality. - for him, it is a pointless discussion

When judges apply the law, what are they applying? - they apply a law that is generic in its very nature. Thus they see the merits of the case and they see what law to apply and in what way. Thus judges have discretionary powers, and when judges deliberate they make considerations - by excreting wisdom in saying what is good and bad, bringing in a moral dimension - considering what is just - justice is a moral category - Finnis is saying that this insistence of separation law and morals does not make sense, it is incoherent - not in the way morality comes in.

- ONE WAY OF SEEING THE LAW - is to consider that its existence - this is what he is calling legal positivism - in other words, that the law exists in such a way, simply because

For him, legal positivism on page 1598 as he defined it, is incoherent, and that is what he is mostly concerned with - !!Imp

Imp - "One may, however, consider law and the law of a particular com- munity precisely as (ii) good reasons for action." **Page 1604**

"One may, however, consider law and the law of a particular community precisely as ***(ii) good reasons for action****. But, when deliberation runs its course, the really good and only truly sufficient* ***reasons*** *we have for action (and forbearance from action) are moral reasons: that is what it is for a reason to be moral, in the eyes of anyone who intends to think and act with the autonomy, the self-determination and conscious"*

1602- 1603 - one way of seeing the law - an overview of legal positivism and not - how to see the law - inclusive - exclusive (not important)

1604 - another way of seeing the law the main idea of Finns - good reasons for action - he explains what he means by good reasons for action.

The end of part 5 V

The incoherence of positivism-its inherent and self-imposed in- capacity to succeed in the explanatory task it sets itself-is nicely illustrated by Coleman and Leiter's effort to explain "the authority of the rule of recognition." Since they preface this explanation with the remark that "we all recognize cases of binding laws that are morally reprehensible"

This incoherence he is referring to is simply inherent and self-imposed — legal positivism is incoherent because it does not manage to explain fully adequately what the law is - does not manage to give a full account of what the law is —

He says that "The incoherence of positivism- its inherent and self-imposed incapacity to succeed in the explanatory task it sets itself", meaning that positivism does not misname to give a full account of what the law is.

"In jurisprudence, there is a name for a theory of law that undertakes to identify and debate, **openly and critically**, the moral principles and requirements which respond to *deliberating persons'* requests to be shown why a legal rule, validly enacted, is binding and authoritative *for them,* precisely as law: That name (for good and ill) is "natural law theory." Page 1610

"**openly and critically" =** Democracy, democratic process

Finns emphasises or deliberating in reason - deliberating on the grounds of reason - he says that the best laws/decisions are those which which result from the best kind of deliberation, open critical about principles. So this section which is pointed out is a very imp part of this paper.

One last consideration - another thing Finnis says here, which is important is - lets assume that the legal positivists ideal of not including any reference to morality in the process of law making, legislation - happens. So you have laws that are not the result of deliberation, on what is good and what is bad, but simply on what is popular or whoever is in power can force down everyone's throats. When it comes to adjudication, judges deciding, would moral considerations come into the picture? The answer Finns says is yes, judges will bring in their consideration of what is rights and wrong, good and bad. Thus, at the tail end of things, when it comes to applying the law in judgement (the process of adjudication) at that point, you have a situation where morality is coming into the picture through decisions that individual judges make. (Further example of incoherence of those who say that morality should be kept out of the picture)-thus considerations should be kept out of the picture, because at some point, it will come innate the stage of judgement.

Page 1611

Finnis says that if we are looking for good reasons for a law to be obeyed, then the process of law making (legislation) should be characterised by open, critical debate which is a deliberative process. A process of deciding together, which is best placed to yield the best positive law - this is really the core of what Finns is saying.

"Positivism does no more than repeat (1) what any competent lawyer-including every legally competent adherent of natural law theory-would say are (or are not) intra-systemically valid laws, imposing "legal requirements," and (2) what any street-wise observer would warn are the likely consequences of non- compliance. It cannot explain the authoritativeness, for an official's or a private citizen's conscience (ultimate rational judgment), of these alleged and imposed requirements, nor their lack of such authority when radically unjust. Positivism is in the last analysis redundant"

Overview of Finnis

By mentioning other thinkers on like Hobbes and Aquinas (pg. 135), Finnis explains that positivism has its roots in Natural Law. At the very root of natural is the theory that law and its obligatoriness are and must be a product of the will and coercive power of a superior. Locke takes the opaque idea that morality and the law's basic principles are a matter of conformity with rational nature. Law is the declaration of a superior will and is vain without punishment. However, this idea of divine wisdom is given no positive role in explaining why God's commands create obligations for a rational conscience. His answers treat our practical reasoning as all in the service of motivating sub-rational passions such as fear .

Someone like Hobbes in particular, is also a Natural Law theorist but the difference is between 17th century Natural Law and earlier Natural Law, is that with these thinkers there is an emphasis on will, voluntarism. In the Natural Law tradition of Aquinas, we find the primacy of reason. He holds fundamental moral principles are tautologies, norms which it would be self-contradictory to deny. The fact that someone else has willed or ordered me to do something provides itself no reason for me to act, no normativity or directiveness for my deliberations.

Finnis points out the huge contradiction of legal positivism. He argues that in principle, positivism refuses to take the good into consideration but should reflect social facts only. He distinguishes between exclusive positivism (makes no reference to morality) and inclusive pluralism (admits a reference to moral standards especially in judgments). Even Raz, the most important proponent of positivism says that judges have a legal and moral obligation to include in their judicial reasoning principles and norms which are applicable because, although not legally valid (because not posited by any social-fact source), they are, or are taken by the judge in question to be, morally true.

Finnis describes two ways of looking at the law (p.137):
1. Law as a reason for action. Why should you pay taxes? Because the law orders you to do so. Legal Positivism.
2. Law as giving good reasons for action. Natural Law. These are two very different ways of seeing the law.

Finnis holds that this classical natural law theory is primarily concerned with this second kind of inquiry. However, it has every respect for descriptive, historical, sociological considerations of the first kind, and seeks to benefit from them. Classical natural law theory also offers reasons for judging that general descriptions of law will be fruitful only if their basic conceptual structure, is self-consciously of good reasons which enquiries of the second kind seek to reach by "open debate and critical assessment."

Finnis argues that natural law agrees with many of the concerns of positivism – but it goes beyond them – it is a step further. By referring to open debate and critical assessment – he is referring to the democratic process. This is because after post-WWII Nazi authoritarian regimes based their control very much on positivist law, natural law became the more democratic theory. He argues that through open debate they should argue what these good reasons are. Finnis has a problem with democracy when it excludes what is right and what is good. Democracy is not just about people doing what they like - freedom - but it is an opportunity for people to come together and make good laws.

"Positivism never coherently reaches beyond reporting attitudes and convergent behaviour. It has nothing to say to officials or private citizens who want to judge whether, when, and why the authority and obligatories, claimed and enforced by those who are acting as officials of a legal system, and by their directives, are indeed authoritative reasons for their own conscientious action. Positivism does no more than repeat:

1. what any competent lawyer would say are intra-systematically valid laws imposing legal requirements; and

2. what any street-wise observer would warn are the likely consequences of non-compliance.

It cannot explain the authoritativeness, for an official's or a private citizen's conscience of these alleged and imposed requirements, nor their lack of such authority when radically unjust."

Finnis

The central task that Finnis set himself was to persuade readers that there are universal basic values or goods that may be discerned through practical reason, and from which we may derive our moral rules. Finnis agreed with Hume that it is not possible logically to infer the 'ought' from the 'is', meaning that we cannot derive a principle of how we ought to behave from observed facts of how things are. Finnis argued, however, that not every natural law theorist – and certainly not Aquinas – is guilty of that error (2011, 33). He pointed out that according to Aquinas the first principles of natural law that specify basic forms of good and evil are self-evident and indemonstrable. Finnis asserted, following Aquinas, that the basic goods may be non-inferentially grasped by persons who are old enough to reason. He pointed out that human intelligence operates in different ways when determining: (a) what is the case; and (b) what is the good to be pursued. In determining what the case is, we use inferential logic to derive conclusions from observed facts. In deciding what ought to be done, we engage in practical reasoning. Practical reasoning enables us to understand the basic self-evident principles (*prima principia per se nota*) from which we may infer what is right and wrong.

Finnis' defence of classical natural law Basic values

The starting point of Finnis' theory is the assertion that there are seven basic values or goods that are self-evident and that cannot be reasonably denied. They are also irreducible in the sense that they cannot be broken down to more basic goods.

Basic values are not the same as basic human urges. Finnis asserted that there are seven basic values that can be objectively established. They represent forms of 'human flourishing'. They are: (1) life, (2) knowledge, (3) play, (4) aesthetic experience, (5) sociability (friendship), (6) religion (in a broad sense), and (7) practical reasonableness. (Germain Grisez, a Catholic theologian, adds marriage and harmony with God to this list (Grisez 2001, 8, 16).) Why are these values basic? According to Finnis, they are basic and universal because: (a) they are self-evidently good; (b) they cannot analytically be reduced to being a part of some other value or to being instrumental to the pursuit of any other; and (c) each one, when we focus on it, may seem the most important (Finnis 2011, 92). Liberty, one would think, is a primary good because without it we cannot pursue knowledge or the preservation of life, or, for that matter, any of the other basic values. Yet Finnis argued that liberty in itself is not a basic value in the sense of being an irreducible good, because liberty is a means to ends. But so is knowledge, which Finnis considers to be a basic value. It is hard to conceive knowledge as a good at all except for its instrumental value, despite the saying 'knowledge for knowledge's sake'. There is no reason to think that a good is not a basic good simply because it is a means to other goods. As Grisez said, 'people may wish to stay alive and healthy so as to care for their loved ones and fulfil other commitments' (Grisez 2001, 5). Enlightenment thinkers like Hobbes and Locke considered liberty to be a primary good inherent in the very idea of living as a human being.

L.H.A Hart (Legal positivist)

For Hart, one should obey the law, **because the law says so**; morality as such is not a concern because lawmaking refers to 'social facts.'

That is why 'Justice' is a construct (what is just results from the law/ the law 'makes' justice) (legal positivism)

Fuller (Natural law theorist 1)

Legal validity overlaps strongly with **moral obligations** (i.e. good reason to obey) because the conditions for legal validity are inherently moral conditions. The justness of laws

Fuller's version of natural law, we refer to it as a Procedural Natural Law Theory.(in order to distinguish it from Finnis) -looking at the process of law making (that is why it is procedural) and saying that if that process if followed, the outcome is good because mortality is imbued within it. Presumably if one of the conditions is not satisfied, the result in law would be unjust. EX; A law that is retroactive is in that sense unjust, thus morality there is not inbuilt in the law. He is looking at the process. For fuller, morality precedes law.

Finnis (Natural law theorist 2)

FINNIS - An unjust law may be legally valid, but it does not give us good (moral) reason to follow it - which is what legal authority should be all about in terms of its purpose. Thus, we call his theory SUBSTANTIVE NATURAL LAW THEORY.

The obligation to obey that law does not depend on being legally valid. There must be something else more compelling and not just because the law says so. It must be good. Why should we obey the law ? The answer is because the law is good.

Lex iniusta non est lex - an unjust law is not a law. - This quote from Aquinas is used a lot by Finnis. A positive law must not go against the principle of justice.

If you ask a legal positivist what exists first, justice or the law? A legal positivist would tell you that in legal terms, it is the law that built, determines what is justice - spa the law creates justice. Thus logically, that comes first is law, then justice follows

Whilst a national law theorist, justice precedes law, in other words justice exists before law. It is there as a principle before law.

While for hart, the answer to the question 'why should I obey the law?' , he answers because the law says so for Finns he answer saying that he follows the law because the law is good

Ronald Dworkin - Theory of law

For Dworkin, legal validity stems from case law. Each interpretation builds up consistency. New interpretations give direction to future application of the law. This is known as **'Interpretivism'**.

- He was a student and studied Law in a context of Hart and Legal Positivism.
- He was deeply immersed in Legal Positivism, and grew to become one of its most formidable critics. Not like Fuller or Finnis however.
- Dworkin is not a Natural Law theorist.
- Dworkin's theories are extensive, he wrote numerous works. However, we will be focusing on two main theories

Dworkin is the philosopher who dominates legal theory in the last 50 years or so. He dies a few years ago. He goes beyond the dichotomy of natural law theory and legal positivism. He studied law in a context which was very much dominated by legal positivism - was deeply immersed in legal positivist, who grew to become one of his critics.

Just because his very much a critic of legal positivist, doest mean that he falls under the category of a natural law theorist. He is not a natural law theorist even though there are some aspects of the natural law theorist.

Two of his main doctrines;

1. The law as Interpretation
2. Law as Integrity

For Dworkin, reflecting about the Law is drafted in Case Law. For him, the Law, its interpretation, and the Law's philosophical approach are all drafted in Case Law. Its important for one to understand the principles behind the Law.

The Law gives principles, and the Courts interpret the Law in accordance to the case. When the Law is not specific, the principle remains, the Courts shall interpret the principles.

Judgements don't make Law, but judgements show over time the principles behind a law which are being interpreted in specific circumstances. It is this constant work of interpretation which then becomes over time part of the history of the work of that Courts. For Dworkin, philosophy of Law, is a reflection of the work of Case Law.

According to Dworkin, a Judge is an interpretor of the Law itself, against the background of principles, those of justice and fairness, which are interpreted and expressed in the body of previous judgements.
The Law can never cater for all possible cases that fall under it. Hence, why one should choose wise members of the Judiciary, this will bring about a good interpretation of the Law.

The Judge sees the complete picture of the case before the judiciary, and he would exercise a discretion within the parameters of the Law. The Judge interprets the way in which the legislator sees what is just, and applies the principles within the case.

These principles emerge in the way which they are interpreted and expressed in the body of previous judgements. Which is the reason why judgements refer to previous cases. This is what guarantees the integrity of Law and interpretation, that somehow a Judge knows that even though the Jury's interpretation is following on the work of the Courts.

Ronald Dworkin 'The Model of Rules'

The title 'The Model of Rules' in the article by Dworkin, mentions:

This article is one of the most anti-positivist arguments in the legal theory of Dworkin. A positivist like Hart speaks of the rule of recognition meaning a law is valid if it is made according to the procedures laid down by the law itself. In Dworkin's view, at the point where positivists feel the law has reached the level of coherence, it becomes incoherent. Ultimately, he says that it relies on judicial discretion. This is the ultimate criticism Finnis and Fuller give. Whilst positivists hold that law and morality are distinct, they hold that a judge may adjudicate with moral judgment. Yet this moral judgment is going to be of no one but the judge himself. Dworkin is neither a positivist nor Natural Law theorist, and he tries to find a third way, which is, however, not a compromise. It is a rethinking. Together with this anti- positivism, is a disagreement with Finnis and the natural law theorists.

The idea of law as integrity and interpretation define his legal theory. His defining book is 'Law's Empire'. Dworkin constantly refers to case law, which is uncharacteristic of law philosophers. His legal theory is concerned mostly with the judgments of the courts, the process of adjudication, rather than law-making.

The key idea is that the law is made up of what he calls a constellation of principles and rules. The working law is not just about rules, the law is not just about the written law. A competent judge can never stick exclusively to the letter of the law; this is the distinction between the letter and the spirit of the law. The letter of the law is black on white, yet the spirit of the law is much vaster. This can be the idea behind the promulgators, the interpretation of the law, and the historical mind-set. However, a sitting judge is unlikely to refer to debates in parliament, for e.g., and is more likely to follow case law.

The judge interprets the law with all his autonomy, within a context; the court itself and the court which has a history. It is for such a reason that judgments are pronounced in the name of the Court. The Court is greater than the judge. This is what Dworkin means by law as integrity (integer=whole number). It forms part of this greater whole. The judgment itself has this strong element of integrity

because it must be consistent with past judgments. This is freeing the judge from the unfair burden the positivist places on a judge to exercise his discretion.

Dworkin differs considerably from Finnis. On one hand, Finnis holds that judges, in interpreting the law, refer to principles which are there, which are self - evident and which can be discovered objectively through right reasoning. Dworkin is a constructivist, because he holds that principles a judge refers to are constructed over time. However, they both agree judgments should not be arbitrary and that law and morality are linked.

Dworkin's idea is that each judge is there as part of the court adjudicating with reference the history of the court. If the sense of coherence and consistency is lacking, it brings to question the effectiveness of the justice of the courts.

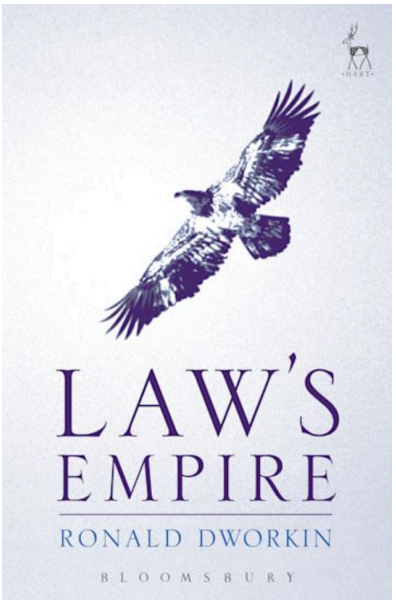
article - by Dworkin in 1967 - the. Model of rules

One of the key points about this paper is the distinction between rules and principles - rule-principle distinction which is really a central part of that paper of the model of rules - it can be described as the disrticmtion between legal rules and legal standards

Page 25 of the article - he explains the difference between legal principles and legal rules

Page

An interesting book on Dworkin's thought



His books on philosophy of law are full of long lists of cases and an important point can be drawn, that reflection on the law is grounded in case law not only methodologically but also fundamentally – the interpretation of law is grounded in cases. It is through the history of case law and the work of the courts over time, over decades and even centuries, that one really understands the principles of law.

This is also reflected on judgments nowadays because in many sentences given, the sitting judge very often mentions previous judgments of similar cases.

For Dworkin the law is not reducible to simple conventions and social facts. For the legal positivist, the law is reduceable to social facts and simple agreements.

- Dworkin disagrees with this, for him the obligation to obey thew law, legal validity requires something stronger

- The reference to his constructive referencism- theory of interpretivism - something that is built over time - his principles emerge over time - not reducible to social facts

Some other important points, Dworkin's right thesis of Dworkin - in a book in 1977 'taking rights seriously in his rights thesis, Dworkin makes the point that judges are obliged to recognise and protect pre-existing individual rights - it is the role of judges, he says to recognise and protect pre existing individual rights. This basic consideration is then developed in his thesis as law as integrity. The idea of the integrity of the work of judges/law as integrity stems mainly from the rights thesis that judges should protect individual rights.

Law as interpretation - The role of the judge is that of an interpreter of the law against the backdrop of principles of what is just, as it has been interpreted and expressed in the body of previous judgements. This is what he calls **'principled consistency'**.

Law as integrity - Each judgement goes hand in hand with the purpose of case law. Communal moral principles - principles that are common and emerge through previous judgements. This is his approach to philosophy of law.

Dworkin's Interpretivism differs from Legal Positivism:

1. For Dworkin, the law is not reducible to simple conventions and social facts. For him the obligation to obey the law (and therefore, legal validity) requires something stronger than obeying law because it is law. The law for him is a construction on the basis of practice with reference to principles. This has been called **'Constructive Interpretivism'**.
2. For Dworkin, although there are differences between morality and law, there is no separation between the two. He rejects the separation thesis of Legal Positivism (even in Hart's reconfiguration). For him, principles and rules go hand in hand.

Dworkin's Interpretivism differs from Natural Law:

1. For Dworkin, the law is not self-evident or immanent (philosophical term that means 'arises from within') but constructed. The law does not in and of itself reflect fully the moral principles. Moral principles are not evident in the law. The morality of law is a construct that develops over time.
2. For Dworkin, the principles to which the law refers do not exist independently of the practice of the law itself. Whereas the Natural Law theorists see the moral principles that should guide the law as being independent/universal/pre-existing/unchanging, for Dworkin those principles which are of value in interpreting the law, emerge from the practice of law, from their application over time in judgements.

For Dworkin, the principles of justice are an essential ingredient of the law. You cannot think about the law or practise it well without referring to the principles of justice. There cannot be a separation between law and morality.

Dworkin is not so much concerned with the concept of law, but with historically-specific legal systems. This makes him a **'pragmatist'**.

Dworkin's 'Rights Thesis' - 'Taking Rights Seriously' (book published in 1977):
In it he makes a point that judges are obliged to recognise and protect pre-existing individual rights. This theory/principle is then developed in his thesis of 'law as integrity'. What he means in practice is that one of the most important things that judges have to consider is that their work is consistent (not 'the same') just so that they do not create a situation where certain individuals' rights are upheld and others' are not. Parties must have the right to be treated justly, not in an arbitrary way, not on a whim of a judge that is assigned to their case. There is room for discretion (Dworkin is a strong advocate for discretion) and different interpretations or applications, but discretion must be within limits.

Dworkin's article on VLE - 'The Model of Rules':
One of the key ideas is the distinction between rules and principles - **'rule-principle distinction'**. This can be explained as the distinction between legal rules and legal standards (principles). Rules are specific and standards are general. Standards are what rules should measure up to. This distinction and the fact that it exists lies at the heart of Dworkin's objections to legal positivism.

For Austin and Hart (Legal Positivists), the law is an elaborately developed system of rules and there is no place for morality. According to Dworkin, this is only one dimension of law. He is not denying that it is an elaborate system of rules or that laws should not be in conflict with one another (consistency in law is concerned with the analytic study of jurisprudence), but his criticism of Legal Positivism is that the Positivists' account of law is insufficient. In order to go beyond that too simple definition of law, Dworkin introduces standards/principles into the equation.

Laws are strictly legal rules. Standards for Dworkin are based both on legal practice and philosophical arguments. Philosophy and law are very intimately intertwined. He shows that, for instance, the standard of justice arises from legal practice and also from philosophical arguments.

While Legal Positivists argue for a complete separation between rules and principles, i.e. law and morality, Dworkin says that they are not only not antagonistic, but intertwined, and therefore, in no way separate. Hence, he rejects the separation thesis.
Legal standards are at once legal and moral standards. They include mainly 3 principles:

1. Principles of justice

2. Rights (N.B. Discussed in 'Taking Rights Seriously')

3. Ideas on good social policy

These emerge most clearly in courts' interpretations of 'public interest', which can be understood differently. E.g. Land can be expropriated in public interest and it is the Courts that make decisions on whether it is truly in the public interest to do so.

According to Dworkin there is a logical distinction between rules and principles.
Rules - either apply or do not apply to specific cases.
Principles - principles carry moral weight/seriousness/gravitas. Unlike rules, the application of principles depends on how they relate to other principles (e.g. justice and the competing ways of how justice can be applied in different jurisdictions or within the same one).
When you apply a rule wrongly it is a procedural mistake, whilst if you do not apply a principle properly, which results in that a judgment is called unfair, it is much worse.
Principles therefore, give a more substantive character to judgements. It is the principles that are applied that make a judgement substantially just or unjust.

On pages 29,30 of the article Dworkin outlines 2 positions:

1. Principles can be considered as part of the law/integrated in the law, and are therefore binding as law. Some Positivists (Finnis calls them 'Inclusive Legal Positivists'), say that principles are integrated in the laws.

2. Other Positivists deny that some principles are not binding, whilst rules are. If one acknowledges that principles somehow exist outside of the law, then one would have to consider that judges interpret those rules/laws and apply them by seeking principles outside of strictly legal principles.

'...we think of the judges of a community as a group'

Because Interpretivism is concerned with the combination of case law and the philosophy of law, different jurisdictions may interpret what is right and wrong differently and apply the law according to previous judgements. According to Interpretivism, they may both still be valid if they are consistent in following rules and principles.

N.B. In writing about Dworkin, always put him in the context of Natural Law and Legal Positivism. Discuss his 'Constructive Interpretivism' in the light of law as 'interpretation' and law as 'integrity'.
Refer to Ratnapala's book for research on Dworkin.

The idea of law as integrity and interpretation define his legal theory. His defining book is 'Law's Empire'. Dworkin constantly refers to case law, which is uncharacteristic of law philosophers. His legal theory is concerned mostly with the judgments of the courts, the process of adjudication, rather than law-making.

The key idea is that the law is made up of what he calls (p.45) a constellation of principles and rules. The working law is not just about rules, the law is not just about the written law. A competent judge can never stick exclusively to the letter of the law; this is the distinction between the letter and the spirit of the law. The letter of the law is black on white, yet the spirit of the law is much vaster. This can be the idea behind the promulgators, the interpretation of the law, and the historical mind-set. However, a sitting judge is unlikely to refer to debates in parliament, for e.g., and is more likely to follow case law. A string of similar judgments contains pattern. He is trying to avoid arbitrary judgment. It is not fair for the judges to be burdened, especially in hard cases, to make law.

What comes out from the workings of the court is the constellation of principles and rules. What principles come in and to what does he refer to? The judge interprets the law with all his autonomy, within a context; the court itself and the court which has a history. It is for such a reason that judgments are pronounced in the name of the Court. The Court is greater than the judge. This is what Dworkin means by law as integrity (integer=whole number). It forms part of this greater whole. The judgment itself has this strong element of integrity because it must be consistent with past judgments. This is freeing the judge from the unfair burden the positivist places on a judge to exercise his discretion.

Dworkin differs considerably from Finnis. On one hand, Finnis holds that judges, in interpreting the law, refer to principles which are there, which are self-evident and which can be discovered objectively through right reasoning. Dworkin is a constructivist, because he holds that principles a judge refers to are constructed over time. However, they both agree judgments should not be arbitrary and that law and morality are linked.

Dworkin's idea is that each judge is there as part of the court adjudicating with reference the history of the court. If the sense of coherence and consistency is lacking, it brings to question the effectiveness of the justice of the courts.

Past paper Questions

1. L . H . A
   H a r t

1. Outline the main principles of legal positivism with reference to the philosophy of H.L.A. Hart.

2. Outline the main elements of H.L.A. Hart's thesis on the separation between law and morals, and explain why and how legal theorists such as Fuller and Finnis have objected to it.

1. H.L.A. Hart placed the 'separation thesis' at the centre of legal positivism. Explain this thesis and explain how other legal theorists objected to it.

2. In 'Positivism and the Separation of Law and Morals', H.L.A. Hard discusses legal positivism 'as part of the history of an idea' (p. 594). How did this idea develop over the centuries, and why did Hart feel the need to both defend and reconfigure legal positivism following World War II? In your answer, explain in detail his formulation of the 'separation thesis'.

K e l s e n

2. The "Pure Theory of Law" represents Kelsen's positivist outlook to law. Discuss the salient features thereof; also addressing any loopholes that may be observed.

F i n n i s

4. Finnis insists that for a legal system to be "in good shape", it must reflect the basic tenets of the Rule of Law. Illustrate these basic tenets and discuss how they may be reflected in a legal system.

1. Finnis's work is concerned with the concept of the Rule of Law and with what is required of a legal system for it to be "in good shape". Discuss with reference to his formulation of the basic goods and the requirements of practical reasonableness.

3. How did legal philosophers such as Fuller and Finnis apply the classical natural law theory in the 20th century?

1. "'Rule of Law' is the term commonly attributed to that state of affairs in which a legal system is deemed to be legally in good shape." (John Finnis, *Natural law and Natural Rights*, 2nd ed., p. 270). Discuss.

3. "In jurisprudence, there is a name for a theory of law that undertakes to identify and debate, openly and critically, the moral principles and requirements which respond to deliberating persons' requests to be shown why a legal rule, validly enacted, is binding and authoritative for them, precisely as law: That name (for good and ill) is 'natural law theory'." (J. Finnis, 'On the Incoherence of Legal Positivism', p. 1610). Outline Finnis' main contributions to the revival of the natural law theory, and explain his main objections to legal positivism.

F u l l e r / D w o r k i n

3. Discuss in detail the main aspects of the legal philosophy of *either* Lon Fuller *or* Ronald Dworkin.

Theory of Judicial Personality

4. "The notion of juridical personality gradually evolved to enable humanity to act in unison, manipulate its surroundings, and determine who the subject of law is." Discuss this statement in the light of the various theories that evolved to justify and rationalize this notion.

2. The notion of juridical personality may be regarded as a 'legal fiction' that assigns to corporations certain rights, responsibilities, liabilities and privileges which are similar to those pertaining to natural persons.

4. "The gradual development of the notion of juridical personality is mankind's response to the economic and administrative realities faced." Discuss and criticise the salient philosophical justifications that have been developed in order to realize this important juridical institute.

4. The notion of 'Juridical Personality' has proved essential in determining who the subject of law is. Discuss the main aims underlining the establishment and development of this notion.

General Past Paper Questions

1. Discuss in detail the main aspects of the legal philosophy of any one of the following authors: Lon Fuller, H.L.A. Hart, John Finnis, or Ronald Dworkin.

3. Give an overview of the context leading to the rise of Legal Positivism and its subsequent crisis (especially in the aftermath of World War II), and discuss some key objections that have been raised against it.

4. Legal theorists have suggested different definitions of the Rule of Law, relating it to concepts such as authority, legitimacy and equality. What are the desirable qualities required for a legal order to qualify as a Rule of Law?

3. Illustrate how the law's authority and legitimacy, and it relation to the principles of justice and fairness, have featured among the major questions raised in the history of legal thought. Do so by referring to any classical and/or contemporary philosophers and legal theorists of your choice.