

**JURISPRUDENCE:
a
brief story by
Alexander B R Ö S T L**

Košice 2008

- The aim of these lessons is to provide the students of Jurisprudence by a basic and clear analysis of the major and most important theories in this field. The main theories are explained with discussion of their proper context. Contents include:
 -
 - On Jurisprudence in General
 - Classical Doctrine of Natural Law (Plato, Aristotle, Augustine, Aquinas, Hobbes, Locke, Rousseau)
 - Classical Positivism (J. Bentham, J. Austin)
 - Pure Theory of Law (H. Kelsen)
 - Naturalist's Revival (L. L. Fuller, G. Radbruch)
 - The Concept of Law and of the Legal System (H. L. A. Hart)
 - Dworkin's Theory of Principles
 - Justice Theory (J. Rawls)



- **BASICS AND SUGGESTED FURTHER READING**
-
- ARISTOTLE: Politics. London 1981.
- ARISTOTLE: Nicomachean Ethics. Oxford 1908.
- AUSTIN, J.: The Province of Jurisprudence Determined (1832) and The Uses of the Study of Jurisprudence (1863). Indianapolis/ Cambridge 1954.
- BENTHAM, J.: An Introduction to the Principles of Morals and Legislation. 1781.
- BENTHAM, J.: Of Laws in General. London 1970.
- BIX, B.: Jurisprudence: Theory and Context. London 1999 (Fourth Edition 2006).
- BODENHEIMER, E.: Jurisprudence. The Philosophy and Method of the Law. Cambridge (Mass.) – London 1962.
- DWORKIN, R.M.: Taking Rights Seriously. Cambridge (Mass.) 1999.
- DWORKIN, R. M.: Law's Empire. London 1986.
- DWORKIN, R. M.: A Matter of Principle 1985.



- DWORKIN, R. M.: Justice in Robes. Cambridge (Mass.) - London 2006.
- FULLER, Lon L.: Morality of Law. New Haven 1969.
- HARRIS, J. W.: Law and Legal Science. Oxford 1979.
- HART, H. L. A.: The Concept of Law. Oxford 1961 (Second Edition, 1994).
- HART, H. L. A.: Law, Liberty and Morality. London 1963.
- HUME, D.: Political Essays. Cambridge 1994.
- HOBBS, T.: Leviathan. Cambridge 1996.
- KELSEN, H.: Pure Theory of Law. Berkeley 1967.
- LOCKE, J.: Two Treatises of Government. Cambridge – New York – Port Chester – Melbourne – Sydney 1960.
- MacCORMICK, N.: Institutions of Law. Oxford – New York 2007.
- McCOUBREY, H. – WHITE, N. D.: Textbook on Jurisprudence. London 1993.



- PLATO: The Laws. London 1970.
- PLATO: The Republic. London 1987.
- RADBRUCH, G.: Rechtsphilosophie. Studienausgabe. Heidelberg 1999.
- RAWLS, J.: A Theory of Justice. Oxford 1972.
- RAZ, J.: The Authority of Law. Essays on Law and Morality. Oxford 1979.
- RIDDALL, J. G.: Jurisprudence. London, Boston, etc. 1991.
- ROUSSEAU, J.-J.: The Social Contract. Harmondsworth 1968.



○ **Proposed Topics for Essays**



- 1. What is Jurisprudence about?
- 2. On Natural Law
- 3. State of Nature according to Hobbes
- 4. On Legal Positivism
- 5. The Command Theory of Law (Bentham)
- 6. Classical Positivism and the Nazi State
- 7. Right to Disobey the Law
- 8. Law Distinguished from Morality
- 9. Separation of Powers
- 10. Freedom, Rights and Equality as Philosophical Principles of a Constitution



- 11. What is Justice?
- 12. Hart's concept of a legal system
- 13. Legal rules and legal principles according to Dworkin
- 14. Development of the concept of Human Rights
- 15. Free Speech
- 16. Freedom of Religion and Toleration
- 17. Privacy and The Big Brother
- 18. Abortion Rights
- 19. Should Euthanasia Be Legalized?
- 20. The Death Penalty (Defending or Rejecting it)



- Questions (examples of a written test):
-
- What does justice mean for Plato?
- Which is the basic principle valid for all the contract theories?
- What are primary and secondary rules according to Hart?
- Who are the representatives of legal positivism?
- What is natural law by Aristotle?
- Define the sources of law within the natural law doctrine?
- Describe the Hobbesian state of nature.



ON JURISPRUDENCE

- Jurisprudence (juris prudentia = the knowledge, wisdom of law) comes from Ancient Rome. Exclusive power of judgment on facts
- Ulpian means „*Jurisprudentia est divinarum atque humanarum rerum notitia, iusti atque iniusti scientia* (Digesta, 1,1,10,2)“, referring to the ability to distinguish between what law is and what it is not.
- Jurisprudence is not simply to be equalised with legal science; it is the study/ the explanation of the nature of law and the manner of its working. Jurisprudence is aimed at a wise, pertinent and just solution of problems.
-
- The object and end of the science which is distinguished by the name Jurisprudence, is the protection of rights (James Mill, Jurisprudence 1825).



- According to the official syllabus the Jurisprudence course in Oxford „*affords an opportunity to reflect in a disciplined and critical way on the structure and functions of law and legal institutions and systems, on the nature of legal reasoning and discourse, and/or on the connections between law and morality and/or between law and other human relationships and characteristics. In some places it would be called theory of law or philosophy of law.*“
-
- John Austin stated in his work on the uses of Jurisprudence that „*the appropriate subject of Jurisprudence, in any of its different departments, is positive law: Meaning by positive law (or law emphatically so called) law established or ‚positum‘ in an independent community, by the express or tacit authority of its sovereign or supreme government*“ (p. 365)



- *The word Jurisprudence itself is not free from ambiguity; it has been used to denote*
- *The knowledge of Law as a science, combined with the art or practical habit or skill of applying it; or secondly*
- *Legislation; – the science of what ought to be done towards making good laws, combined with the art of doing it.*
-



- It is maybe helpful to think of Jurisprudence as a sort of jigsaw puzzle in which each piece fits with the others in order to construct a whole picture. The picture in this sense would be a complete model of law.
-
- The issues belonging to the content of jurisprudence are not „*puzzles for the cupboard, to be taken down on rainy days for fun*“, they „*nag at our attention, demanding an answer*“. (Dworkin, Taking Rights Seriously, p.14-15).
- The form of jurisprudence offered here focuses on finding the answer to such questions as „What is law?“, „What are the criteria for legal validity?“ „What is the relationship between law and morality?“ How do judges (properly) decide cases? There is a classic debate over the appropriate sources of law between *positivists* and *natural law schools* of thought.



- Positivists argue that *there is no connection between law and morality* and the only sources of law are *rules that have been enacted by a governmental entity or by a court of law*.
- Naturalists, or proponents of natural law, insist that the rules enacted by government are not the only sources of law. They argue that moral philosophy, religion, human reason and individual conscience are also integrate parts of the law.
- Naturalists recognise the existence (and the need for) man-made law , but regard this as inferior to natural law.



NATURAL LAW

- Classical Natural Law Theory



PLATO (C. 427 – 347 B. C.)

- Most important contributions to classical Greek legal philosophy were made by Plato (c. 427 - 347 B. C.) and Aristotle (384 – 322 B. C.). Plato was an idealist and in his *Republic* he set a model for the perfect society. The *Laws* were a more practically oriented proposal to set out a legal code.
-
- If one reasons rightly, it works out that the just is the same thing everywhere, *the advantage of the stronger* (to tou kreittonos sympheron).



- The genesis and essential nature of justice – a compromise between the best, which is to do wrong with impunity and the worst, which is to be wronged and be impotent to get one's revenge
-
- Justice is to tell the truth and return back what one has received.
-
- Justice is rendering each what befits him
-
- Justice is the advantage of the stronger



ARISTOTLE (384 – 322 B. C.)

- The word „natural“ in natural law refers to the following idea: Man is part of nature. Within nature man has a nature. His nature inclines him towards certain ends – to procreate children, to protect his family, to protect his survival. To seek such ends is natural to him. (JP, p.53).



- Aristotle (384 – 322 B. C.) is often said to be the father of natural law. The best evidence of Aristotle's having thought there was a natural law comes from the *Rhetoric*, where Aristotle notes that, "*there are two kinds of law, particular and general. By particular laws I mean those established by each people in reference to themselves (...); by general laws I mean those based upon nature.*"



- *In fact there is a general idea of just and unjust in accordance with nature, as all men in a manner divine, even if there is neither communication nor agreement between them. This is what Antigone in Sophocles evidently means, when she declares that it is just, though forbidden, to bury Polynices, as being naturally just (Rhetoric, 1373b 2-8, book 1.13.1).”* Aside from the “particular” laws that each people have set up for themselves, there is a “common” law that is according to nature.



- In Chapter 5 of the Nicomachean Ethics, in which Aristotle discusses the nature of justice, he says:
 - *“There are two sorts of political justice, one **natural** and the other **legal**. The natural is that which has the same validity everywhere and does not depend upon acceptance; the legal is that which in the first place can take one form or another indifferently, but which, once laid down, is decisive: e g that the ransom for a prisoner of the war shall be one mina, or that a goat shall be sacrificed and not two sheep... Some hold the view that all regulations are of this kind on the ground that whereas natural laws are immutable and have the same validity everywhere (as fire burns both here and in Persia), they can see that notions of justice are variable. But this contention is not true as stated, although it is true in a sense. Among the goods, indeed, justice presumably never changes at all; but in our world, although there is such a thing as natural law, everything is subject to change; but still some things are so by nature and some are not, and it is easy to see what sort of thing, among that admit of being otherwise, is so by nature and which is not, but is legal and conventional. ...Rules of justice established by convention and of the ground of expediency may be compared to standard measures; because the measures used in the wine and corn trades are not everywhere equal: they are larger in the wholesale and smaller in the retail trade. Similarly laws that are not natural but man-made are not the same everywhere, because forms of government are not the same either; but everywhere there is only one natural form of government namely that which is best ”*



TWO KINDS OF JUSTICE ACCORDING TO ARISTOTLE:

DISTRIBUTIVE JUSTICE

- Existence of a morality higher than that embodied in „good laws“. (Nicomachean Ethics).
- Distributive justice concerns distribution of honours or of money or all of values that it is possible to distribute among citizens.
- Criterion - Personal value
- Democracy = freedom
- Oligarchy = wealth, riches
- Aristocracy = mental values
- Justice is something proportional (geometric prop.





CORRECTIVE JUSTICE

- This kind is that which “*supplies a corrective principle in private transactions. This corrective justice again has two divisions, corresponding to the two classes of private transactions, those which are voluntary and those which are involuntary. Examples of voluntary transactions are selling, buying, lending at interest, pledging, lending without interest, depositing, letting for hire; these transactions being termed voluntary because they are voluntarily entered upon. Of involuntary transactions some are furtive, for instance, theft, adultery, poisoning, procuring, enticement of slaves, assassination, false witness; others are violent, for instance, assault, imprisonment, murder, robbery with violence, maiming, abusive language, contumelious treatment.*”



MARCUS TULLIUS CICERO

(106 – 43 B. C.)

- Cicero was strongly influenced by the works of the Greek stoic philosophers. Most of the themes of traditional natural law are already present in his thought: natural law is unchanging over time and every person has access to the standards of this higher law by use of reason. Cicero states in his *Laws* that “only just laws really deserve the name law” and “in the very definitions of the term ‘law’ there inhere the idea and principle of choosing what is just and true.”



In his work *On Duties* (De officiis) he states:

“Indeed this idea that one must not injure anybody else for one’s own profit / is not only natural law, but an international valid principle: the same idea is also incorporated in the statutes which individual communities have framed for their national purposes. The whole point and intention of these statutes is that one citizen shall live safely with another.



ST AUGUSTINE (345 – 430)

CHRISTIAN PLATONISM

- St Augustine was well qualified to attempt to reconcile the Christian and Hellenistic thought. In his great work *The City of God* (De Civitate Dei).
- The will of God is seen as the highest law, the *lex aeterna* (eternal law), for all people, something in the sense of Stoic cosmic reason.
- Positive law, the *lex temporalis* ...



- This opens the question of laws which are not 'good'. Certain statements of St Augustine out of context, have served to fuel the naturalists-positivists debate. The best known of all these statements is the dramatic assertion of that *'lex iniusta non est lex'*.(De Libero Arbitrio, 1. 5. 33)
- According to St Augustine nothing which is just is to be found in positive law (lex temporalis).



ST THOMAS AQUINAS

CHRISTIAN ARISTOTELISM

- It was in the work of St Thomas Aquinas (1225-1274), principally in the *Summa Theologica* that the final and most completed synthesis of the doctrine of natural law was achieved.
- Law is nothing but a rational regulation for the good of the community, made by the persons having powers of government and promulgated.
- For Aquinas natural law consists of participation by man in the eternal law.



- Aquinas considers that a provision of positive law may be bad in two ways, it might contravene the *lex aeterna*, or it might be humanly ‘unfair.’
- „*A tyrannical law made contrary to reason is not straightforwardly a law but rather a perversion of law.*“
- Aquinas argues that the moral obligation to obey the law fails in the case of a, humanly, bad law, unless greater ‘scandal’ would result from disobedience. This point is spelt out by him also in his *Of the Government of Princes* (De Regimine Principium): here it is urged that some degree of unjust government should be tolerated.



- The theories called „naturalist“ contend in a variety of ways, that law is to be identified by reference to moral or ethical, as well as formal, criteria of identification and in this are criticised for confusing the categories of „is“ and „ought to be“. The roots of this argument in Austin:
- *„The most pernicious laws... are continually enforced as laws by judicial tribunals. Suppose an act [that is] innocuous... be prohibited by the sovereign under the penalty of death; if I commit this act, I shall be tried and condemned, and if I object... that [this] is contrary to the law of God ..., the Court of Justice will demonstrate the inconclusiveness of my reasoning by hanging me up, in pursuance of the law of which I have impugned the validity. (John Austin, The Province of Jurisprudence Determined, In: McCoubrey-White, JP, p. 55)*



- From this kind of view a so-called „naturalist-positivist“ debate has developed, which may be named a sterile argument founded upon a simple misunderstanding. The root of the misunderstanding lies in the idea that the two forms of theory are advancing different answers to the same question about the nature of law.
- In fact, naturalism and positivism are giving different answers to different questions.



THE COMMANDS THEORY OF LAW

- The commands theory had antecedents earlier than Bentham. **Thomas Hobbes** in **Leviathan**, published in 1651 wrote:



- :“Civill law [as opposed to international law] is to every Subject, those Rules, which the Common-wealth has Commanded him, by Word, Writing or other sufficient Sign of the Will, to make use of, for the Distinction of Right, and Wrong. That is to say, of what is contrary and what is not contrary to the Rule.

...

- The Legislator in all Common-wealths, is only the Sovereign, be he one man as in a Monarchy, or one Assembly of men, as in a Democracy or Aristocracy. For the Legislator is he that maketh the Law. And the Common-wealth only praescribes, and commandeth the observation of those rules, which we call Law: Therefore the Common-wealth is the Legislator. But the Common-wealth is no Person, nor has capacity to doe any thing, but by the Representative. (that is the Sovereign;)and therefore the Sovereign is the sole Legislator...



- *The Sovereign of a Common-wealth, be it an Assembly, or one Man, is not Subject to the Civill Laws. For having power to make, and repeale Laws, he may when he pleaseth, free himselfe from that subjection, by repealing those Laws that trouble him, and making of new; and consequently he was free before. For he is free, that can be free when he will: Nor is it possible for any person to be bound to himselfe; because he that he can bind, can release; and therefore he that is bound to himselfe onely, is not bound...*



- And before Hobbes, Jean Bodin (*Six Books of the Republic*) published in 1576 had written: *... it is the distinguishing mark of the sovereign that he cannot in any way to be subject to the commands of another, for it is he who makes law for the subject, abrogates law already made, and amends obsolete law No one who is subject either to the law or to some other person can do this.*



JEREMY BENTHAM (1748 – 1832)

- Jeremy Bentham, English jurist, philosopher, legal and social reformer, was one of the most influential utilitarians, partially through his writings. At the beginning of his studies in Oxford he became disillusioned by the lectures of the leading authority, Sir William Blackstone (1723 – 1780). Instead practising law, Bentham decided to write about it. He was influenced by the philosophers of the Enlightenment (such as Beccaria, Helvetius, Diderot, D'Alembert and Voltaire) and also by Locke and Hume.



- *„Nature has placed mankind under the governance of two sovereign masters, pain and pleasure. It is for them alone to point out what we ought to do, as well as to determine what we shall do. On the one hand the standard of right and wrong, on the other hand the chain of causes and effects, are fastened to their throne. They govern us in all we do, in all we say, in all we think: every effort we can make to throw off our subjection, will serve but to demonstrate and confirm it. In words a man may pretend to abjure their empire: but in reality it will remain, subject to it all the while. The principle of utility recognizes this subjection, and assumes it for the foundation of that system, the object of which is to rear the fabric of felicity by the hands of reason and of law.“ (The Principles of Morals and Legislation, 1789).*



- Bentham's definition of law is usually summarized as *'the command of a sovereign backed by a sanction'*. In fact it is a simplification of his view. Bentham defined 'a law' (singularity is important here) as *"an assemblage of signs declarative of a volition conceived or adopted by the sovereign in a state, concerning the conduct to be observed... by persons, who are or are supposed to be subject to his power, ..."* (Of Laws in General), concerning conduct and supported by a sanction.



- We see here the elements of:
 - a) ‘command’ – the will conceived by the sovereign is manifestly imperative,
 - b) ‘sovereignty’ and
 - c) ‘sanction’, in the attachment of motivations to compliance in the form of anticipated consequences.



STRUCTURAL THEORY OF LAW OR NORMOLOGIC ATOMISM

- Bentham tries to show that each legal institute (institution) each legal field, and legal order is composed of nothing else than smallest further not divisible imperatives, i. e. it is just an aggregate of such „imperative atoms“. These atoms Bentham calls LAWS, and LAWS are elements to construct STATUTES of positive law (OLG 12).



- According to Bentham there are 8 dimensions of a LAW which may be observed: its source, its addressees, the behaviour which is to be influenced, the distinction of command, prohibition, permission, non-command, in connection with the question whether LAW can enforce or let free certain behaviour, or motivating means as threatened sanctions.



JOHN AUSTIN (1790 – 1859)

- Bentham's views about law and jurisprudence were popularized by his student John Austin.
- Austin in 1819 married Sarah Taylor: the Austins became neighbours in London of Bentham and the Mills, and for twelve years they lived at the intellectual centre of the movement for reform. Austin was the first holder of the chair of jurisprudence since 1826, when the new University of London was founded. In preparation of his lectures he spent two years in Germany, mainly in Bonn.



- There he read the newly discovered Institutes of Gaius, the Pandects, the works of Hugo, Thibaut and Savigny. His opening lectures in jurisprudence in 1828 were attended by John Stuart Mill and many others of the Benthamites circle, but after the initial success he failed in attracting new students and in 1832 he resigned the chair. The first part of the lectures was published in autumn 1832, entitled *The Province of Jurisprudence Determined*. A second edition of this work was published by Sarah Austin in 1861. From her husband's notes she also reconstructed the main *Lectures on Jurisprudence or the Philosophy of Positive Law*, publishing them in 1863.



- Austin insisted that the science of „general Jurisprudence“ consists in the „clarification and arrangement of fundamental legal notions“.
- Basic building-stones of Austin’s theory of law are, that law is “*commands backed by threat of sanctions; from a sovereign, to whom the people have a habit of obedience* (The Province of Jurisprudence Determined, 1832).”
- Before giving a definition of law, Austin identifies what kind of law he is seeking to define. He says, that there are various kinds of law in the broadest sense; for example God’s laws, and the laws of science.



- At the head of the tree comes a signification of desire (a desire for example, that somebody should not travel faster than a certain speed). Two kinds / a request (admonition) and a command, in which a power exists to inflict evil or pain in the case the desire be disregarded.
- Commands of two kinds:
- Where a C obliges generally to acts or forbearances of a class, a command is a law, but where it obliges to a specific act or forbearance, a command is occasional or particular. Thus C are either general or particular. Law - order.
- Law's set by God to human creatures and law set by men to men. Human laws / 2. Not as political superiors. Parent / children.



- For Austin, law strictly so called consists of a command given by a sovereign enforced by sanction.
- The aspects of his concept are:
- (1) The common superior must be **‘determinate’**. A body of persons is, ‘determinate’ if, all the persons who compose it are determined and assignable’. Determinate bodies are of **two kinds**. (a) In one kind the, body is composed of persons determined specifically or individually
- (2) The society must be in, ‘the habit of obedience’. If obedience, be rare or transient’ and not, ‘habitual or permanent’ the relationship of sovereignty and subjection is not created and no sovereign exists.



- (3) Habitual obedience must be rendered by the generality or bulk of the members of a society to ... one and the same determinate body or persons'.
- (4) In order that a given society may form a political society, the generality or bulk of its members must habitually obey a superior determinate as well as common.
- (5) The common determinate superior to whom the bulk of the society renders habitual obedience must not himself be habitually obedient to determine human superior.
- (6) The power of the sovereign is incapable of legal limitation. 'Supreme power limited by positive law is a flat contradiction in terms'.



- Law strictly so called into two.
- Law set by man to man in pursuance of legal rights. Civil law such as in the law of contract, or tort, and property. The sanction here took a form of an obligation in the shape of an order of the court, e.g. to pay damages or to restore property, coupled with the sanction of imprisonment if the obligation was disregarded.
- **Law is a command given by a determinate common superior to whom the bulk of the society is in the habit of obedience and who is not in the habit of obedience to a determinate human superior, enforced by sanction.**



HANS KELSEN (1881 – 1973)

- Hans Kelsen was an influential Austrian legal theorist, since 1919 professor of public and administrative law in Vienna, who spent the last decades of a productive life in the United States of America, having escaped from Europe at the time of Hitler's rise to power. His work was important in jurisprudence as well as international law. Kelsen was a central figure in drafting the Austrian constitution after World War I. Many of his students became important legal theorists: Adolf Merkl, Felix Kaufmann, Alf Ross, Luis Legaz y Lacambra, Adolf Verdross, Erich Voegelin, Charles Eisemann, František Weyr.



- In Kelsen's development (according to Stanley Paulson) at least four periods can be distinguished:
 - a) the constructivist phase,
 - b) the strong neo-Kantian phase (1920-mid of 1930),
 - c) the weak neo/Kantian phase, and
 - d) the will theory of law.

- *The legal order is not a system of coordinated norms of equal level, but a hierarchy of different levels of legal norms.*

- According to Kelsen a norm is valid if it has been “posited” (issued) in accordance with a “higher” norm.



- In 1934 Kelsen published the first edition of *The Pure Theory of Law (Reine Rechtslehre)*. However, Kelsen was not the first one to seek such a pure theory. H. Grotius (1625) in his Prolegomena to *De Iure Belli ac Pacis* had written: „*With all truthfulness I aver, just as mathematicians treat their figures as abstracted from bodies, so in treating law I have withdrawn my mind from every particular fact.*“
- Kelsen is considered to be the inventor of the modern European model of constitutional review. In 1931 he published *Wer soll der Hüter der Verfassung sein? What is Justice?*



- His legal theory is a very strict and scientifically understood type of legal positivism. It is based on the idea of a basic norm (Grundnorm), a hypothetical norm on which all subsequent levels of a legal system are based (such as constitutional law, „simple“ law). Kelsen has various names for the basic norm (Ursprungsnorm, presupposed norm, juristic hypothesis, thought norm, transcendental-logical condition of the interpretation).
- On „purity“ : no methodological syncretism
- *„The pure theory of law...establishes the law as a specific system independent even of*



- **Gustav Radbruch (1878 – 1949)**
- Gustav Radbruch was a German law professor. His main works are *Legal Philosophy*, *Five Minutes of Legal Philosophy*, *Statutory Non-Law and Suprastatutory Law*.
- He establishes the foundation for his theory in his work *Rechtsphilosophie* (1932). Radbruch asserts that law, as a cultural concept, „*is the reality the meaning of which is to serve the legal value, the idea of law.*“ He argues that the idea of law may only be Justice, appealing to an idea of distributive justice. This Justice appeals to an ideal social order that directs relationships between moral beings. The essence of Justice is equality; thus „*Justice is essential to the precept in its meaning to be directed toward equality.*“



- To complete the concept of law Radbruch uses three general percepts: purposiveness, justice, and legal certainty. Therefore he then defines law as *„the complex of general percepts for the living-together of human beings“* whose ultimate idea is oriented toward justice or equality.
- Radbruch's formula has according to him a limited scope of application only to extraordinary times.
- *„Where statutory law is intolerably incompatible with the requirements of justice, statutory law must be disregarded in justice's favour.“*
- *„Preference is given to the positive law... unless its conflict with justice reaches so intolerable a level that the statute becomes, in effect, ‚false law‘ and must therefore to yield to justice.“*



- *„Where there is not even an attempt at justice, where equality, the core of justice, is deliberately betrayed in the issuance of positive law, than the statute is not merely ‚false law‘, it lacks completely the very nature of law.“*
- In 1968 the German Constitutional Court held that *„legal provisions from the National Socialist period can be denied validity when they are so clearly in conflict with fundamental principles of justice that a judge who wished to apply them or to recognize their legal consequences would be handing down a judgement of non / law rather than law.“*
- The Court continued to use this formula: *“In this law, the conflict with justice has reached so intolerable a level that the law must be deemed null and void.“*



- **Lon Luvois Fuller (1902 – 1978)**
- Lon Fuller as professor of Jurisprudence at the Harvard University published many works in legal philosophy, such as *The Problems of Jurisprudence* (1947), *Anatomy of Law* (1968) or *The Principles of Social Order* (1981). The most well-known is his *Morality of Law* (1964).



- Lon Fuller rejects the conceptual naturalist idea that there are necessary substantive moral constraints on the content of law. But he believes that law is necessarily subject to a procedural morality. On Fuller's view, human activity is purposive or goal-oriented in the sense that people engage in a particular activity because it helps them to achieve some end. Insofar particular human activities can be understood only in terms that make reference to their purposes and ends. Thus, since lawmaking is essentially purposive activity, it can be understood only in terms that explicitly acknowledge its essential values and purposes:



- „*The only formula that might be called a definition of law offered in these writings is by now thoroughly familiar: **law is the enterprise of subjecting human conduct to the governance of rules.** Unlike most modern theories of law, this view treats law as an activity and regards a legal system as the product of a sustained purposive effort* (The Morality of Law. New Haven 1964, p.106).“
-
- Fuller’s functionalist conception of law implies that nothing can count as law unless it is capable of performing law’s essential function of guiding behaviour. And to be capable of performing this function, a system of rules must satisfy the following principles:



○ The rules must be

1. expressed in general terms;
2. generally promulgated;
3. prospective in effect;
4. expressed in understandable terms;
5. consistent with one another;
6. not requiring conduct beyond the powers of the affected parties;
7. not changed so frequently that the subject cannot rely on them;
8. administered in a manner consistent with their wording.



- On Fuller's view, no system of rules that fails minimally to satisfy these principles of legality can achieve law's essential purpose of achieving social order through the use of rules that guide behaviour.
- „*What I have called **the internal morality of law** is... a procedural version of natural law... [in this sense that it is] concerned, not with the substantive aims of legal rules, but with the ways in which a system of rules for governing human conduct must be constructed and administered if it is to be efficacious and at the same time remain what it purports to be* (The Morality of Law. 1964, p. 96-



○ Herbert Lionel Adolphus Hart (1907 – 1992)

- Hart studied classics and ancient history, and philosophy at the University of Oxford. After World War II he taught philosophy since 1952 when he got the Chair of Jurisprudence in Oxford after A. L. Goodhart, until 1968. His inaugural speech was on *Definition and Theory in Jurisprudence*.
- Instead of building theories on the back of definitions, he argued, jurists must work at analysing the use of legal language in the practical workings of law. In this respect Hart also revitalized British analytical jurisprudence „by recasting it in the mould of linguistic philosophy“ (N. D. McCormick). His approach to legal theory can be seen as a reaction to the *command theory*, and he presented a critical view, that Austin's theory is unable to distinguish pure



- *The Concept of Law* by H. L. A. Hart was published in 1961. The book presented a new view of law and dealt with a number of other jurisprudential topics, as the nature of justice, moral and legal obligation, natural law. Second edition, first published in 1994, is concerned first of all with Dworkin's arguments against Hart's theory.
- In 1963 he published his *Law, Liberty, and Morality*, later on Essays in the Philosophy of Law under the title *Punishment and Responsibility* (1968).



- **Hart's objections against the command theory of John Austin**
- 1. Laws as we know them are not like orders backed by threats
- 2. The notion of the habit of obedience is deficient
- 3. The notion of sovereignty is deficient



1.

- a) According to Hart the content of law is not like a series of orders backed by a threat. Some laws (criminal laws) do resemble orders backed by threats. But there are many types of law that do not resemble orders backed by threats (laws that prescribe the way in which valid contracts, wills or marriages are made do not compel people to behave in a certain way). The function of such laws is different.
- The itch for uniformity in jurisprudence is strong, but the fact is that there is no head under which it is possible to bring laws such as criminal laws and power-conferring rules.
- b) The range of application of law is not the same as the range of application of an order backed by threat.



- 2. Hart tells a story to explain his opinion and the ways in which he finds the notion of the habit of obedience to be deficient.
- Suppose there is a country in which an absolute monarch has ruled for a long time. The population has generally obeyed the orders of the king, Rex, and are likely to continue in doing so. Rex dies leaving a son, Rex II. There is no knowing on Rex II's accession, whether the people will obey the orders he begins to give when he succeeds to the throne. Only after we find that Rex II's orders have been obeyed for some time can we say that the people are in a habit of obedience to him. During the intervening time, since there is no sovereign to whom the bulk of society are in the habit of obedience, there can, according to Austin's definition to be no law. Only when we can see



- 3. Austin's theory of law the sovereign does not obey any other legislator. Thus, if law exists within a state, there must exist a sovereign with unlimited power.
- The conception of the legally unlimited sovereign according to Hart misrepresents the character of law in many modern states. To understand the true nature of a legal system and how law comes into existence we need **to think in terms of rules**
- In any society there are *rules* that influence human behaviour. These can be divided into two categories,
 - **social habits** and
 - **social rules.**
- If something is a social rule, such words as „ought“, „must“, „should“ are used in connection



- **Social rules are of two kinds:**
- a) Those which are no more than **social conventions** (rules of etiquette or rules of correct speech). These are more than habits, as a group strives to see that the rules are observed and those who break them are criticised.
-
- b) Rules which constitute **obligations**. A rule falls into this second category when there is an insistent demand that members of the group conform.



- Rules which constitute obligations may be subdivided into two categories:
- (i) Rules which form a part of the moral code of the society concerned: these rules are therefore **moral obligations**
- (ii) Rules which take the form of **law** – even if a rudimentary or a primitive form of law.
- In the case of both mentioned rules there is *serious* social pressure to conform to the rule, and it is this which makes the rule an obligation (as opposed to a mere social convention, or even a habit).



- Legal rules are of two kinds, **primary rules** and **secondary rules**.
- *„Under the rule of the one type, which may well be considered the basic or primary type, human beings are required to do or obtain from certain actions, whether they wish to or not.*
- Rules of the second type *are in a sense parasitic upon or secondary to the first; for they provide that human beings may by doing or saying certain things introduce new rules of the primary type, extinguish or modify old ones, or in various ways determine their incidence or control their operations. Rules of the first type **impose duties**; rules of the second type **confer powers**, public or private. Rules of the first type concern actions involving physical movement or changes; rules of the second type provide for operations which lead not merely to physical movement or change, but to*



- This arguments, Hart says, are of crucial importance in jurisprudence. **Law can be best understood as a union of these two diverse types of rules.**
-
- **Rule of recognition**
- The concept of a rule of recognition is general to Hart's theory, which he considers as a set of criteria by which the officials decide which rules are and which rules are not a part of a legal system.
- (Similarities and differences between Hart's rule of recognition and Kelsen's „Basic Norm“ should be discussed.)
- Persistence of Law: in 1944 a woman was prosecuted in England and convicted for telling fortunes in violation of the Witchcraft Act, 1735.



- The rule of recognition may have a huge variety of forms, simple or complex. Hart says, that in a developed legal system the rules of recognition are more complex:
- *„Instead of identifying rules exclusively by reference to a text or list they do so by reference to some general characteristic possessed by the primary rules. This may be the fact of their having been enacted by a specific body, or their long customary practice, or their relations to judicial decisions.“* (Hart, *The Concept of Law*, p. 92)



○ **Ronald Dworkin**

- Ronald Myles Dworkin (born 1931) succeeded Herbert Hart to the chair of jurisprudence at Oxford University. To a certain extent, he built his theories on criticism of his predecessor, just as Hart's theory starts with a critique of John Austin:

- *„I want to make a **general attack on positivism**, and I shall use Hart's version as a target. My strategy will be organised around the fact that when lawyers reason and dispute about legal rights and obligations, particularly on those **hard cases** when our problem with these concepts seem most acute, they make use of **standards** that do not function as **rules**, but operate differently as **principles, policies**, and other sorts of standards. **Positivism**, I shall argue, is a model of and for a **system of rules**, and its central notion of a single fundamental test*



- Dworkin argues that Hart, by seeing law solely as a system of rules, fails to take account of general principles. In a hard or unclear case the judge does not revert to policy and act as a lawmaker, but applies legal principles to produce an answer based on law.



- The right answer thesis.
- „Suppose the legislation has passed a statute stipulating that ,sacrilegious contracts shall henceforth be invalid.‘ The community is divided as to whether a contract signed on Sunday is, for that reason alone, sacrilegious. It is known that very few of the legislators had the question in mind when they voted, and that they are now equally divided on the question of whether it should be so interpreted. Tom and Tim have signed a contract on Sunday, and Tom now sues Tim to enforce the terms of the contract, whose validity Tim contests. Shall we say that the judge must look for the right answer to the question of whether Tom’s contract is valid, even though the community is deeply divided about what the right answer is? Or is it more realistic to say that there simply is no right answer to the question? (Is



- The „Third Theory“
- A response to legal positivism (Hart).
-
- Hard cases: According to Dworkin, in hard cases judges often invoke moral principles, that they believes do not derive their legal authority from the social criteria of legality contained in a rule of recognition (Dworkin, Taking Rights Seriously 1977, p.40).



- Dworkin believes that a *legal principle* maximally contributes to the best moral justification if and only if it satisfies two conditions:
- the principle coheres with existing legal materials; and
- the principle is the most morally attractive standard that satisfies (1).
- The correct legal principle is the one that makes the law the moral best it can be. Accordingly, on Dworkin's view, adjudication is and should be interpretive:
- *“Judges should decide hard cases by interpreting the political structure of their community in the following, perhaps special way: by trying to find the best justification they can find in principles of political morality, for the structure as a whole, from the most profound constitutional rules and arrangements to the details for example, the private law of tort or contract (Dworkin, 1982, p.165) ”*



- **John Bordley Rawls (1921 – 2002)**
- John Rawls was born in Baltimore (Maryland). He studied in Princeton and he became one of the most important political philosophers of the 20th century. As a Fulbright Fellow during 1952-1953 in Oxford he dealt with legal and political philosophy, especially this of H. L. A. Hart and Isaiah Berlin. He took up the professorship of philosophy at Harvard University in 1962, and he sets out principles of justice. Rawls' starting point is an idea of 'justice as fairness', which he developed since his "*Justice as Fairness*" 67 Philosophical Review 164.
- One of his highly influential articles is the article „*Two Concepts of Rules*“, from 1955.



- The conception which conceals from us the significance of the distinction I am going to call the *summary view*. It regards rules in the following way: one supposes that each person decides what he shall do in particular cases by applying the utilitarian principle; one supposes further that different people will decide the same particular case in the same way and that there will be recurrences of cases similar to those previously decided. Thus it will happen that in cases of certain kinds the same decision will be made either by the same person at different times or by different persons at the same time. If a case occurs frequently enough one supposes that a rule is formulated to cover that sort of case. I have called this conception the summary view because rules are pictured as summaries of past decisions arrived at by the direct application of the utilitarian principle to particular cases. Rules are regarded as reports that cases of a certain sort have been found on other grounds to be properly decided in a certain way (although, of course, they do not say this).



- The other conception of rules I will call the *practice conception*. On this view rules are pictured as defining a practice.
-
- The Original Position according to Rawls follows up the social contract tradition in western political philosophy. By contrast with classic presentations, such as John Locke's *Second Treatise of the Civil Government* (1690), where the social contract is describe as if it were an actual historical event, Rawls's social contract device is of frankly and completely hypothetical. He carries the familiar theory of the social contract to a higher level of abstraction than we know it from Locke, Rousseau or Kant.



○ Neil MacCormick

○

- Neil MacCormick is professor at the University of Edinburgh and he set up an institutional theory of law, which has been taking shape since 1973 „*Law as Institutional Fact*“. The summary of it may be newly seen in his *Institutions of Law. An Essay in Legal Theory (2007)*.



- Law as institutional normative order is dependent on human customs and on authoritative decisions, and in this sense a ,posited‘ or ,positive‘ phenomenon. As such it is conceptually distinct from morality. This distinctiveness however does not entail that there are not moral limits to what it is conceptually reasonable to acknowledge as ,law‘ in the sense of ,institutional normative order‘. There are such limits. Extremes of injustice are incompatible with law.
- Law is institutional normative order, and the law of the contemporary state is one form of law.
- In seeking to clarify the understanding of law according to the explanatory definition offered by the institutional theory, it is desirable to clarify three notions: that of the ,normative‘, that of



In 1949 a woman was prosecuted in a West German court for an offence under the German CC of 1871, that of depriving a person illegally of his freedom, the offence having been committed, it was claimed, by her having denounced her husband to the war-time Nazi authorities as having made insulting remarks about Hitler, while on leave from the army. (The husband was found guilty and sentenced to death, but not executed, and sent to the eastern front.) The woman in defence claimed, that her action had not been illegal, since her husband's conduct had contravened a law prohibiting the making of statements detrimental to the government – a law that having been made according to the constitution in place at the time, was valid. The court found the Nazi statute, being “contrary to the sound conscience and sense of justice of all decent human beings”, did not have a legality that could support the woman's defence, and she was found guilty. The case illustrated a conflict P-NL



THE HART – FULLER DEBATE

The pivot, or at least the common starting point in the debate was the attitude taken by Gustav Radbruch to the ***legality of laws*** passed during the Nazi era in Germany. Radbruch had originally been a positivist, holding that resistance to law was a matter for personal conscience, the validity of law depending in no way on its content. However, the atrocities of the Nazi regime compelled him to think again. He noted the way in which obedience to posited law by the legal profession had assisted the perpetration of the horrors of the Nazi regime, and reached the conclusion that:

no law could be regarded as valid, if it contravened certain basic principles of morality.





A Theory of Justice (1971)

- Justice is that which prevails in a just society. A just society is one that people would agree to be members of if they had the choice.
- *“My aim is to present a conception of justice which generalizes and carries to higher level of abstraction the general **theory of the social contract.**”*
- The good
- The veil of ignorance
- Primary goods
- The original position
- Justice as fairness



INCLUSIVE versus EXCLUSIVE LEGAL POSITIVISM

In contemporary English-language legal positivism, much recent discussion has been on an internal debate between

“inclusive legal positivism” (also sometimes called “soft” or “incorporationist” legal positivism) and

“exclusive legal positivism” (also known as “hard” legal positivism).

The debate between the two camps involves a difference in interpreting or elaborating of one central point of legal positivism:

that there is no *necessary* or “conceptual” connection between law and morality.



The veil of ignorance

- The choice of what laws are to prevail, what system of government, must be made, Rawls, says, behind a ‘veil of ignorance’, since only if people make the choice with no knowledge of where they will stand can they be counted on to decide on a system that is just for all.
- PRIMARY GOODS
- But while people are not allowed to know of anything that could influence them in their decision, there are some things there are some things that it is necessary, if a rational choice is to be made, for them to know. Thus they know that if people are going to live, they have got to eat. They know they want “primary goods”.



Primary goods

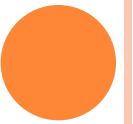
- Certain of them are of a social nature: of this kind Rawls mentions rights and liberties, powers and opportunities, income and wealth. These are the primary goods that are at the disposition of the society. Other primary goods are of a natural character and these are, according to Rawls: health and vigour, intelligence and imagination.



The original position

- The original position is purely a hypothesis used to reach the answer to the question – what is justice? We have to imagine people in the original position and then consider what principles they would choose to govern their society. Because this is justice – the body of principles that a person in a original position would choose, since the person making the choice will make sure that the principles he chooses are fair.
- Rawls then explains JUSTICE as Fairness begins with the choice of the first principles of a conception of justice which is to regulate all subsequent criticism and reform of institutions.





PRINCIPLE OF RECIPROCITY

- This principle is implicit in any well ordered society. Rawls suggested to accept the principle that society should be so ordered as to produce the greatest good for the greatest number (as the utilitarian view holds).
- THE JUST SAVINGS PRINCIPLE
- FIRST FUNDAMENTAL PRINCIPLE - Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all



SECOND FUNDAMENTAL PRINCIPLE

- Social and economic inequalities are to be arranged so that they are both:
 1. reasonably expected to be to everyone's advantage, and
 2. attached to offices and positions open to all
- 3. **THE DIFFERENCE PRINCIPLE**
- 4. The principle that people should be treated differently only if this is to the advantage of those so treated
- 5. **THE PRIORITY RULE**
- 6. It might occur that the application of the first and second principles could run counter to each other. The order of priority (1st takes precedence



SOME PRINCIPLES

- Pacta sunt servanda = Agreements are to be kept
- Nemo iudex in causa sua = No man may be a judge in his own cause
- Nullun crimen sine lege = No crime without a law
- Ignorantia iuris non excusat = Ignorance of the law is no excuse
- Ne bis in idem = Not twice in the same case
- Quieta non movere = Nobody should disturb the enjoyment of property(the quiet state)
- Nemo est heres viventis = No one is the heir of a living person
- Audi alteram partem – Hear the other side



PRINCIPLES – RULES – DIFFERENCE

- Riggs v. Palmer (1889)
- The New York Court had to decide, whether the heir mentioned in the testament of his grand father can inherit his property despite the fact, that he killed his grand father, in order to get his heritage.
- Argumentation of the Court: „It is undoubtedly true, that on the basis of laws concerning testaments (drawing up, proving and executing them), when we interpret them literally and if it is impossible to change their effects, this property will transcede to the murderer.”
- But the Court had continued:



NO ONE SHALL PROFIT FROM HIS OWN WRONG

- *“the effects of all laws may be influenced by by general, principal maxims of common law. Nobody should be allowed to make profit from his own fraud (cheat), own criminal behaviour, or to get property by an own offence.”*
- *Dissenting opinion*
- *1. The Court is bound by the wording of law and it is not bound by the :sphere: of conscience.*
- *2 It is not possible to revoke, annul the will by no authoritx*
- *3Doing it the Court would have the competence of a correcting institution. A will must stay a will,*



ANOTHER TYPE OF PUMISHMENT?

- The Court is practically requested to make an other testament: the laws do not justify such a step of the Court. But to acknowledge the opinion of the would mention an amending punishment. Which competence do Courts have to strip the defendand of his property as an appendix of his punishment? The law had punished him for his offence and we cannot say it was not a sufficient punishment.





