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Chapter 1 : Law and Morality | calendrierdelascience.com

The objective of jurisprudence is to achieve a systematic and general understanding of law. Law aims to organize and order human communities, as well as protect and regulate human beings as members of communities.

This is a consequence of the loss of the sense of any "truth" about man, and of the banishment of the idea of the natural law. It undermines any sense of true human rights, leaves the individual defenseless against unjust laws, and opens the way to different forms of totalitarianism. Moral law distinguishes right and wrong in free human actions. It is aimed above all at personal improvement and ultimately at salvation. Political-civil law is aimed at making it possible for people to live together in community: Its concern is not directly supernatural, although in creating the conditions for true justice and truly human behavior, it indirectly favors it. Human civilization is not possible without law and morality, standing in right relationship. The growing modern crisis of the West, shaking its culture and civilization to its foundations, stems from separating both, seeing no necessary relationship between them. But this is to relativise justice and truth in human relations, and to reject any concept of objective truth capable of uniting men. The bond of unity between men is tenuous when they simply share material interests; this is an association of self-interests always prone to clash. Unity goes deeper and is stronger against potential divisions when people have common values to look up to: Law "Law", according to the Encyclopedia Britannica, "refers to the specialized form of social control familiar in modern, secular, politically organized societies". The thomistic and christian view understands law otherwise: The purpose of human law is the common good more than the good of individuals I-II, q. It is to establish a certain order, so as to protect social living. Without law, there is no society, only the jungle, the rule of might "If there is justice, and if law is based on a discernment of what is just, dialogue can begin and benevolence can appear; so we come to what is ours in common. The first form of culture is law. Its effectiveness means that barbarism has been overcome: Morality Ethics or morals is the study of what we ought to do; i. Fundamental moral concepts such as right and wrong are necessarily universal. If they are treated as relative and subjective, then they become inapplicable to the social sphere; and hence to the whole area of human law. If what is wrong to me may legitimately be right to someone else, then one may perhaps debate the opportuneness of this or that law, but not its justice. Without an interior sense of a moral order, there can be little respect for the law; for this can only come from feeling oneself bound from within to observe the law. Here we note that the almost universal modern concept of law as a system of rules created by the state - which ensures its application through a system of courts and a coercive power - leaves the law without any interior appeal or authority, except insofar as one may recognize the need for some minimum of common rules. It also exposes the individual to the tendency to regard the law as purely external imposition to be evaded, if one can, whenever it is considered personally inconvenient. The purpose of morality is to ensure the uprightness of individual conscience the law cannot force a conscience to be upright. Yet christian morality is not individualistic; it leads one into community. Law and freedom Both law and morality imply human freedom. Clearly, without freedom one cannot speak of morality. But the same holds for law, for if it were automatically and not freely obeyed, men would be mere robots. Law is not a simple indication of what happens, such as the law of physics; it is an admonition to free persons about what they are required to do if they wish to live freely and responsibly in society; and it normally carries with it a sanction or punishment to be imposed on whoever is shown to have acted against given norms of conduct. Just law, properly understood, appeals to freedom. Nevertheless one of the most generalized liberal ideas is that law is by nature the enemy of freedom. Servais Pinckaers holds that Catholic moralists have gone through many centuries under the influence of this mentality which has led, by reaction, to the anti-law approach of much of contemporary moral theology. In this view, law and freedom were seen as "two opposed poles, law having the effect of limitation and imposing itself on freedom with the force of obligation. Freedom and law faced each other as two proprietors in dispute over the field of human actions. The moralists commonly said, "Law governs this act, freedom governs that one Today we witness a strong tendency to invert the roles; the moralists now regard themselves as defenders of freedom and of personal conscience" [as against the law] [3]. Law and justice Law cannot attempt to

regulate the purely interior sphere of personal conduct; morality can. Human or civil law is connected with external actions, precisely insofar and because they impinge on the rights or lawful actions of others. Hence the necessary connection of law with justice. For the regulation of interpersonal relations must work from the basic principle of justice: Hence arises the fundamental question of what is due to each one, and from this the further question of human rights. To each his due. Something is due to each. This is the sense of equality before the law. If there is an expression of the unity of the human race and of equality between all human beings, this expression is rightly given by the law, which can exclude no one from its horizon under pain of altering its specific identity" [4]. Even for those who see law and freedom in mutual opposition, the whole concept of law is essentially connected with that of justice. The ancient principle lex iniusta non est lex an unjust law is not a law , is at the basis of so many modern protests in the name of freedom. But justice is a moral concept; so these protests bear out the intrinsic connection between law and morality, "There is another crucial link between the virtues and law, for knowing how to apply the law is itself possible only for someone who possesses the virtue of justice" [5]. Justice must remain the norm, and sometimes the law must regain ground for justice. Basis and justification of law and authority Social harmony, among persons capable of free choice, and hence of justice or injustice towards each other, is not possible without law. But whence do we derive the authority of the law? The first view has been proposed since ancient times. In this view, law loses all interior force, it becomes essentially coercive; its force deriving mainly from the threat of its sanctions. This view is held by those who profess an extreme positivism, rejecting any concept of a natural law binding on all men. In a well-known lecture in , Oliver Wendell Holmes [6], then a justice of Supreme Court of Massachusetts, sought to reduce the whole function of the law to a simple indication of what the courts will do, or a person may have to suffer, in the event of a particular mode of conduct. The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it - and nothing else" [7]. This immanent view makes the law justify itself. What is enacted in law must be obeyed. There is no common court of higher appeal. An apparently "democratic" version of this is that the authority of the law comes from the people: But this still leaves minorities with no basis for any rights except those that the majority or the manipulators of the majority grant them [8]. Natural Law The only true alternative to positivism is the view that the authority of the law derives from what man is; and that man can find within himself a measure of the rightness or wrongness of the law. This view of the law goes back to the most ancient times; it has been the common wisdom of the ages. Among the Romans, Cicero taught: If in some respect it diverges from the natural law, it is no longer a law but a corruption of the law" [10]. The Nuremberg trials after World War II seemed to promise a revival of the notion of the Natural law, standing higher than any state law. But this tendency was soon strongly countered by the positive school dominant in modern jurisprudence, perhaps because it was realized that the natural law necessarily points to a higher authority than man himself, governing all the affairs of mankind. The Encyclopedia Britannica, in an article entitled "Law, morality and natural law", treats of the natural law very marginally and almost dismissively. For man, this means what he is when the powers and qualities distinguishing him from other creatures, namely, his reason and his impulse to social living, are fully developed. A major difficulty presented by this attempt to develop normative standards appears to be that it is very difficult to demonstrate, let alone create a sense of obligation towards values that are only immanent". One simply cannot prove by any empirical means the worth of values nor can one demonstrate which are higher among them. Either one holds that any scale of values is entirely subjective, or else allows that certain immanent values or norms the desire for truth or justice, the sense that the truth can only be one, and that justice means "to each his due" are present, however submergedly, in all men. The whole history of law shows that law loses its stability and its moral authority The tragic consequences of disregard for truth have been especially evident in our own century, in regimes which have sought systematically to suppress the truth, presuming to deprive people of their inalienable rights in the name of some higher justice, or showing a readiness to sacrifice the rights of individuals to the rights of the State and its programmes" [11]. To quote Servais Pinckaers again: From that time on, rights refer not to what I owe others, but to what others, and society, owe me. Rights have changed hands: I think now in terms of my own rights, not those of others.

The fundamental orientation of justice has been reversed: Justice no longer implies a quality of soul, a movement outward toward others; it concentrates on the defense of external rights. In this sense it is a matter of taking rather than giving. This was no longer based on a natural human inclination but became instead an artificial creation, set up to meet human needs and to prevent destructive rivalry. Under these conditions the relation between justice and charity degenerated, with consequent serious problems. Since the two were now moving in opposite directions, the one giving and the other taking, these virtues could no longer operate harmoniously. Justice, with its stronger, more immediate claims, left little to charity but a supplementary generosity, which could easily be included among the duties of justice as far as the law allowed. As a result, Christian terms such as charity, bounty, mercy, benevolence, and almsgiving were considerably devalued" [12] Pope John Paul II, in Evangelium Vitae , says that in order to save true democracy and freedom, "there is a need to recover the basic elements of a vision of the relationship between civil law and moral law, which are put forward by the Church, but which are also part of the patrimony of the great juridical traditions of humanity" no. The denial of any common natural law utterly undermines any philosophy of human rights. Pope John Paul insisted that it can lead to "totalitarianism [which] arises out of a denial of truth in the objective sense. If there is no transcendent truth, in obedience to which man achieves his full identity, then there is no sure principle for guaranteeing just relations between people. Their self-interest as a class, group or nation would inevitably set them in opposition to one another. If one does not acknowledge transcendent truth, then the force of power takes over, and each person tends to make full use of the means at his disposal in order to impose his own interests or his own opinion, with no regard for the right of others" Centesimus Annus, , This type of liberalism has in it the roots of democratic totalitarianism. Alistair McIntyre says that any sincere claim that the institutions of law embody the virtue of justice "represents the appeal to an absolute standard that lies beyond all secular and particular codifications. On this medieval view, as on the ancient, there is no room for the modern liberal distinction between law and morality, and there is no room for this because of what the medieval kingdom shares with the polis, as Aristotle conceived it. Both are conceived as communities in which men in company pursue the human good and not merely as - what the modern liberal state takes itself to be - providing the arena in which each individual seeks his or her own private good" After Virtue, p. Right or wrong have to be proposed, proved, judged upon.

Chapter 2 : Morality, Positive and Critical - Stanford Scholarship

Hart views jurisprudence as primarily a branch of philosophy in which philosophical ideas and methods are applied both to the criticism of law and to the conceptual analysis of law, legal systems, and legal concepts.

Development and Influence Legal positivism has a long history and a broad influence. It has antecedents in ancient political philosophy and is discussed, and the term itself introduced, in mediaeval legal and political thought see Finnis The modern doctrine, however, owes little to these forbears. Its most important roots lie in the conventionalist political philosophies of Hobbes and Hume, and its first full elaboration is due to Jeremy Bentham whose account Austin adopted, modified, and popularized. For much of the next century an amalgam of their views, according to which law is the command of a sovereign backed by force, dominated legal positivism and English philosophical reflection about law. By the mid-twentieth century, however, this account had lost its influence among working legal philosophers. Its emphasis on legislative institutions was replaced by a focus on law-applying institutions such as courts, and its insistence of the role of coercive force gave way to theories emphasizing the systematic and normative character of law. The most important architects of this revised positivism are the Austrian jurist Hans Kelsen and the two dominating figures in the analytic philosophy of law, H. Hart and Joseph Raz among whom there are clear lines of influence, but also important contrasts. Although they disagree on many other points, these writers all acknowledge that law is essentially a matter of social fact. Their discomfort is sometimes the product of confusion. It is doubtful that anyone ever held this view; but it is in any case false, it has nothing to do with legal positivism, and it is expressly rejected by all leading positivists. Among the philosophically literate another, more intelligible, misunderstanding may interfere. Legal positivism is here sometimes associated with the homonymic but independent doctrines of logical positivism the meaning of a sentence is its mode of verification or sociological positivism social phenomena can be studied only through the methods of natural science. While there are historical connections, and also commonalities of temper, among these ideas, they are essentially different. The view that the existence of law depends on social facts does not rest on a particular semantic thesis, and it is compatible with a range of theories about how one investigates social facts, including non-naturalistic accounts. To say that the existence of law depends on facts and not on its merits is a thesis about the relation among laws, facts, and merits, and not otherwise a thesis about the individual relata. The only influential positivist moral theories are the views that moral norms are valid only if they have a source in divine commands or in social conventions. Such theists and relativists apply to morality the constraints that legal positivists think hold for law. The Existence and Sources of Law Every human society has some form of social order, some way of marking and encouraging approved behavior, deterring disapproved behavior, and resolving disputes. What then is distinctive of societies with legal systems and, within those societies, of their law? Before exploring some positivist answers, it bears emphasizing that these are not the only questions worth asking. While an understanding of the nature of law requires an account of what makes law distinctive, it also requires an understanding of what it has in common with other forms of social control. Some Marxists are positivists about the nature of law while insisting that its distinguishing characteristics matter less than its role in replicating and facilitating other forms of domination. Though other Marxists disagree: They think that the specific nature of law casts little light on their primary concerns. But one can hardly know that in advance; it depends on what the nature of law actually is. According to Bentham and Austin, law is a phenomenon of large societies with a sovereign: It has two other distinctive features. The theory is monistic: The imperativalist acknowledges that ultimate legislative power may be self-limiting, or limited externally by what public opinion will tolerate, and also that legal systems contain provisions that are not imperatives for example, permissions, definitions, and so on. But they regard these as part of the non-legal material that is necessary for, and part of, every legal system. Austin is a bit more liberal on this point. The theory is also reductivist, for it maintains that the normative language used in describing and stating the law -- talk of authority, rights, obligations, and so on -- can all be analyzed without remainder in non-normative terms, ultimately as concatenations of statements about power and obedience. Imperatival theories are now without

influence in legal philosophy but see Ladenson and Morison. What survives of their outlook is the idea that legal theory must ultimately be rooted in some account of the political system, an insight that came to be shared by all major positivists save Kelsen. It is clear that in complex societies there may be no one who has all the attributes of sovereignty, for ultimate authority may be divided among organs and may itself be limited by law. Obedience is a normative concept. To distinguish it from coincidental compliance we need something like the idea of subjects being oriented to, or guided by, the commands. Explicating this will carry us far from the power-based notions with which classical positivism hoped to work. Treating all laws as commands conceals important differences in their social functions, in the ways they operate in practical reasoning, and in the sort of justifications to which they are liable. For instance, laws conferring the power to marry command nothing; they do not obligate people to marry, or even to marry according to the prescribed formalities. Nor is reductivism any more plausible here: Moreover, we take the existence of legal obligations to be a reason for imposing sanctions, not merely a consequence of it. On his view, law is characterized by a basic form and basic norm. On this view, law is an indirect system of guidance: Thus, what we ordinarily regard as the legal duty not to steal is for Kelsen merely a logical correlate of the primary norm which stipulates a sanction for stealing , p. The objections to imperatival monism apply also to this more sophisticated version: The courts are not indifferent between, on the one hand, people not stealing and, on the other, stealing and suffering the sanctions. But in one respect the conditional sanction theory is in worse shape than is imperativalism, for it has no principled way to fix on the delict as the duty-defining condition of the sanction -- that is but one of a large number of relevant antecedent conditions, including the legal capacity of the offender, the jurisdiction of the judge, the constitutionality of the offense, and so forth. Which among all these is the content of a legal duty? Might does not make right -- not even legal right -- so the philosophy of law must explain the fact that law is taken to impose obligations on its subjects. Moreover, law is a normative system: For the imperativalists, the unity of a legal system consists in the fact that all its laws are commanded by one sovereign. For Kelsen, it consists in the fact that they are all links in one chain of authority. For example, a by-law is legally valid because it is created by a corporation lawfully exercising the powers conferred on it by the legislature, which confers those powers in a manner provided by the constitution, which was itself created in a way provided by an earlier constitution. But what about the very first constitution, historically speaking? Nor can it be a social fact, for Kelsen maintains that the reason for the validity of a norm must always be another norm -- no ought from is. It follows, then, that a legal system must consist of norms all the way down. It bottoms in a hypothetical, transcendental norm that is the condition of the intelligibility of any and all other norms as binding. There are many difficulties with this, not least of which is the fact that if we are willing to tolerate the basic norm as a solution it is not clear why we thought there was a problem in the first place. One cannot say both that the basic norm is the norm presupposing which validates all inferior norms and also that an inferior norm is part of the legal system only if it is connected by a chain of validity to the basic norm. We need a way into the circle. Moreover, it draws the boundaries of legal systems incorrectly. The Canadian Constitution of was lawfully created by an Act of the U. Parliament, and on that basis Canadian law and English law should be parts of a single legal system, rooted in one basic norm: If law cannot ultimately be grounded in force, or in law, or in a presupposed norm, on what does its authority rest? The most influential solution is now H. For Hart, the authority of law is social. The ultimate criterion of validity in a legal system is neither a legal norm nor a presupposed norm, but a social rule that exists only because it is actually practiced. Law ultimately rests on custom: It exists only because it is practiced by officials, and it is not only the recognition rule or rules that best explains their practice, it is rule to which they actually appeal in arguments about what standards they are bound to apply. Thus for Hart too the legal system is norms all the way down, but at its root is a social norm that has the kind of normative force that customs have. Law is normally a technical enterprise, characterized by a division of labour. And this division of labour is not a normatively neutral fact about law; it is politically charged, for it sets up the possibility of law becoming remote from the life of a society, a hazard to which Hart is acutely alert , p. Although Hart introduces the rule of recognition through a speculative anthropology of how it might emerge in response to certain deficiencies in a customary social order, he is not committed to the view that law is a cultural achievement. The objection embraces the error it seeks to avoid. It imperialistically

assumes that it is always a bad thing to lack law, and then makes a dazzling inference from ought to is: If one thinks that law is a many splendored thing, one will be tempted by a very wide concept of law, for it would seem improper to charge others with missing out. Positivism simply releases the harness. Law is a distinctive form of political order, not a moral achievement, and whether it is necessary or even useful depends entirely on its content and context. Societies without law may be perfectly adapted to their environments, missing nothing. A positivist account of the existence and content of law, along any of the above lines, offers a theory of the validity of law in one of the two main senses of that term see Harris, pp. Kelsen says that validity is the specific mode of existence of a norm. An invalid marriage is not a special kind of marriage having the property of invalidity; it is not a marriage at all. In this sense a valid law is one that is systemically valid in the jurisdiction -- it is part of the legal system. This is the question that positivists answer by reference to social sources. It is distinct from the idea of validity as moral propriety, i. For the positivist, this depends on its merits. One indication that these senses differ is that one may know that a society has a legal system, and know what its laws are, without having any idea whether they are morally justified. For example, one may know that the law of ancient Athens included the punishment of ostracism without knowing whether it was justified, because one does not know enough about its effects, about the social context, and so forth. No legal positivist argues that the systemic validity of law establishes its moral validity, i. Even Hobbes, to whom this view is sometimes ascribed, required that law actually be able to keep the peace, failing which we owe it nothing. Bentham and Austin, as utilitarians, hold that such questions always turn on the consequences and both acknowledge that disobedience is therefore sometimes fully justified. Hart thinks that there is only a prima facie duty to obey, grounded in and thus limited by fairness -- so there is no obligation to unfair or pointless laws Hart The peculiar accusation that positivists believe the law is always to be obeyed is without foundation. Moral Principles and the Boundaries of Law The most influential criticisms of legal positivism all flow, in one way or another, from the suspicion that it fails to give morality its due. A theory that insists on the facticity of law seems to contribute little to our understanding that law has important functions in making human life go well, that the rule of law is a prized ideal, and that the language and practice of law is highly moralized. It is a curious fact about anti-positivist theories that, while they all insist on the moral nature of law, without exception they take its moral nature to be something good.

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Introduction to second edition -- Hart: moral critic and analytical jurist -- Hart's conception of law -- Social rules -- Morality - positive and critical -- Obligation, duty, wrongdoing -- Powers and power-conferring rules -- Rights -- The legal order I: primary elements of law -- The legal order II: secondary rules -- Judicial discretion and.

Etymology[edit] The term positivism is derived from ponere, positum, meaning, "to put". The "merits" of a law are a separate issue: The Stanford Encyclopedia of Philosophy summarises the distinction between merit and source like so: According to positivism, law is a matter of what has been posited ordered, decided, practiced, tolerated, etc. Indeed, the laws of a legal system may be quite unjust, and the state may be quite illegitimate. As a result, there may be no obligation to obey them. Moreover, the fact that a law has been identified by a court as valid provides no guidance as to whether the court should apply it in a particular case. Legal positivists believe that intellectual clarity is best achieved by leaving these questions to a separate investigation. Legal positivism and legal realism[edit] Legal positivism should be distinguished from legal realism. The differences are both analytically and normatively important. Both systems consider that law is a human construct. Unlike the American legal realists, positivists believe that in many instances, the law provides reasonably determinate guidance to its subjects and to judges, at least in trial courts. Niklas Luhmann asserts "We can reduce As for the moral validity of law, both positivists and realists maintain that this is a matter of moral principles. Central to the empiricism is the claim that all knowledge of fact must be validated by sense experience or be inferred from propositions derived unambiguously from sense data. Further, empiricism stands in opposition to metaphysics; for instance, Hume rejected metaphysics as mere speculation beyond what can be learnt from sense experience. Further, law and its authority is seen as source-based; i. Thomas Hobbes and Leviathan Thomas Hobbes , in his seminal work Leviathan , postulated the first clear notion of law based on the notion of sovereign power. In An Introduction to the Principles of Morals and Legislation, Bentham laid the groundwork for a theory of law as the expressed will of a sovereign. Bentham made a sharp distinction between the following types of people: Expositors â€” those who explained what the law in practice was; and Censors â€” those who criticised the law in practice and compared it to their notions of what it ought to be. The philosophy of law, considered strictly, was to explain the real laws of the expositors, rather than the criticisms of the censors. Bentham was also noted for calling natural law "nonsense upon stilts. The criterion for validity of a legal rule in such a society is that it has the warrant of the sovereign and will be enforced by the sovereign power and its agents. Austin considered the law as commands from a sovereign that are enforced by threat of sanction. This sovereign can be a single person or a collective sovereign such as Parliament, with a number of individuals, with each having various authoritative powers. Insofar as non-sanctioned rules and laws that allow persons to do things, such as contract law , Austin said that failure to obey the rules does result in sanctions; however, such sanctions are in the form of "the sanction of nullity. Whereas British legal positivists regard law as distinct from morals, their Germanic counterparts regard law as both separate from both fact and morals. The most famous proponent of Germanic legal positivism is Hans Kelsen, whose central thesis on legal positivism is unpacked by Suri Ratnapala , who writes: 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 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. The legal system is therefore a system of legal norms connected to each other by their common origin, like the branches and leaves of a tree. For Kelsen, "sovereignty" was a loaded concept: These disciples developed "schools" of thought to extend his theories, such as the Vienna School in Austria and the Brno School in Czechoslovakia. In English-speaking countries, H. Hart later addressed Austin. In the book The Concept of

Law , Hart outlined several key points: Among the many ideas developed in this book are: A distinction between primary and secondary legal rules, such that a primary rule governs conduct, such as criminal law, and secondary rules that govern the procedural methods by which primary rules are enforced, prosecuted and so on. Hart specifically enumerates three secondary rules; they are: The Rule of Recognition , the rule by which any member of society may check to discover what the primary rules of the society are. In a simple society, Hart states, the recognition rule might only be what is written in a sacred book or what is said by a ruler. The Rule of Adjudication, the rule by which the society might determine when a rule has been violated and prescribe a remedy. Joseph Raz Main article: Joseph Raz A pupil of H.

Chapter 4 : The Principles Of Morals And Legislation Great Books In Philosophy | Download PDF EPUB eB

Show Summary Details Preview. This substantially revised second edition delivers an introduction to the life and works of H. L. A. Hart, noted Professor of Jurisprudence at the University of Oxford from to

His influential friends who included Jeremy Bentham, James Mill, John Stuart Mill and Thomas Carlyle were impressed by his intellect and his conversation, and predicted he would go far. Austin was born to a Suffolk merchant family, and served briefly in the military before beginning his legal training. He was called to the Bar in , but he took on few cases, and quit the practice of law in Austin shortly thereafter obtained an appointment to the first Chair of Jurisprudence at the recently established University of London. However, attendance at his courses was small and getting smaller, and he gave his last lecture in A short-lived effort to give a similar course of lectures at the Inner Temple met the same result. Austin resigned his University of London Chair in He later briefly served on the Criminal Law Commission, and as a Royal Commissioner to Malta, but he never found either success or contentment. Some scholars have argued that Austin may have moved away from analytical jurisprudence see below towards something more approximating the historical jurisprudence school; cf. Much of whatever success Austin found during his life, and after, must be attributed to his wife Sarah, for her tireless support, both moral and economic during the later years of their marriage, they lived primarily off her efforts as a translator and reviewer , and her work to publicize his writings after his death including the publication of a more complete set of his Lectures on Jurisprudence Austin It is the staple of jurisprudence in all our systems of legal education. Hart, looking back nearly a century later: This particular reading of utilitarianism, however, has had little long-term influence, though it seems to have been the part of his work that received the most attention in his own day Rumble First, he was arguably the first writer to approach the theory of law analytically as contrasted with approaches to law more grounded in history or sociology, or arguments about law that were secondary to more general moral and political theories. The American legal realists saw Austin in particular, and analytical jurisprudence in general, as their opponents in their critical and reform-minded efforts e. In this, the realists were simply mistaken; unfortunately, it is a mistake that can still be found in some contemporary legal commentators Bix Austin specifically, and legal positivism generally, offered a quite different approach to law: Legal positivism does not deny that moral and political criticism of legal systems is important, but insists that a descriptive or conceptual approach to law is valuable, both on its own terms and as a necessary prelude to criticism. I do not think anything turns on whether the term is used more broadly or more narrowly, as long as it is clear which sense is being used. There were theorists prior to Austin who arguably offered views similar to legal positivism or who at least foreshadowed legal positivism in some way. The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry. 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. Hart , or speaking about the topic at length, but treating the issue as sharply separate from his theory of the nature of law. The modern reader is forced to fill in much of the meta-theoretical, justificatory work, as it cannot be found in the text. Where Austin does articulate his methodology and objective, it is a fairly traditional one: He clarifies the concept of positive law that is, man-made law by analyzing the constituent concepts of his definition, and by distinguishing law from other concepts that are similar: Austin thought that all independent political societies, by their nature, have a sovereign. In the criteria set out above, Austin succeeded in delimiting law and legal rules from religion, morality, convention, and custom. Of course, Austin is not arguing that law should not be moral, nor is he implying that it rarely is. Austin is not playing the nihilist or the skeptic. He is merely pointing out that there is much that is law that is not moral, and what makes something law does nothing to guarantee its moral value. Nor did Austin find any difficulty incorporating judicial lawmaking into his command theory: Hart; see also Kelsen A few responses are available to those who would defend Austin. Secondly, one could argue see Harris that the sovereign is best understood as a constructive metaphor: There is, the claim goes, entities or factions in society that are not effectively constrained, or could act in an unconstrained way if they so chose.

For one type of example, one could point out that if there was a sufficiently large and persistent majority among the United States electorate, nothing could contain them: A different sort of example and some would say that there are recent real-life examples of this type would be a President who ignored the constraints of statutory law, constitutional law, and international treaty commitments, while the public and other officials lacked the will or the means to hold that President to the legal norms that purported to constrain his or her actions. However, such a re-characterization misses the basic purpose of those sorts of lawsâ€”they are arguably about granting power and autonomy, not punishing wrongdoing. Austin was aware of some of these lines of attack, and had responses ready; it is another matter whether his responses were adequate. As discussed in an earlier section, in many ways, Austin was blazing a new path. Some modern commentators appreciate in Austin elements that were probably not foremost in his mind or that of his contemporary readers. Such a view may be considered realistic or merely cynical. But it is, in its broad outlines, essentially coherent. Cambridge University Press, John Murray; reprint, Bristol: Oxford University Press, Theory and Context, 7th edition, London: A Comment on Austin, Cambridge: New York University Press. Cotterrell, Roger, , The Politics of Jurisprudence: John and Sarah Austin, Toronto: University of Toronto Press. Hobbes, Thomas, , Leviathan, Richard Tuck ed. Leiter, Brian, , Naturalizing Jurisprudence, Oxford: A Reassessment of H. Hart and the Positivist Tradition, Oxford: Austin, The Province of Jurisprudence Determined, pp.

Chapter 5 : Legal positivism - Wikipedia

If this book has one particular message, it is a message about method in legal study. Law is an aspect of human society, and 'human society is a society of persons' (p. below) whose activities and institutions are understandable only through interpretation of their meaning to those engaged in them. the method of understanding legal and other human institutions by reference to their meaning.

His father was a Jewish tailor of German and Polish origin; his mother, of Polish origin, daughter of successful retailers in the clothing trade, handled customer relations and the finances of their firm. Hart had an elder brother, Albert, and a younger sister, Sybil. He took a First in Classical Greats in Hart worked at Bletchley Park and was a colleague of the mathematician and codebreaker Alan Turing. Another incident of life at Blenheim which Hart enjoyed recounting was that he shared an office with one of the famous Cambridge spies, Anthony Blunt , a fellow member of MI5. Hart wondered which of the papers on his desk Blunt had managed to read and to pass on to his Soviet controllers. Hart did not return to his legal practice after the War, preferring instead to accept the offer of a teaching fellowship in philosophy, not Law at New College, Oxford. Austin as particularly influential during this time. He was president of the Aristotelian Society from to In fact her work as civil servant was in fields such as family policy and so would have been of no interest to the Soviets. Nor was her husband in a position to convey to her information of use, despite vague newspaper suggestions, given the sharp separation of his work from that of foreign affairs and its focus on German spies and British turncoats rather than on matters related to the Soviet ally. In fact, Hart was anticommunist. The marriage contained "incompatible personalities", though it lasted right to the end of their lives and gave joy to both at times. Jenifer published her memoirs under the title Ask Me No More in The Harts had four children, including, late in life, a son who was disabled, the umbilical cord wrapped around his neck having deprived his brain of oxygen. The boy was, despite his handicap, capable of remarkable observations on occasion. As a philosopher, Hart had long been interested in the mind-body problem , and he was thus in some sense professionally interested in his son, as well as emotionally invested, if only because his child was first-hand proof of the complex and unpredictable nature of the relationship between mind and body. The description appears in her book The Spiral Staircase. He subsequently became Principal of Brasenose College, Oxford. Hart died in Oxford in , aged He is buried there in Wolvercote Cemetery. Hart also had a strong influence on the young John Rawls in the s, when Rawls was a visiting scholar at Oxford shortly after finishing his PhD. Also, conspicuously, Peter Hacker , who took his D. Philosophical method[edit] Hart strongly influenced the application of methods in his version of Anglo-American positive law to jurisprudence and the philosophy of law in the English-speaking world. Influenced by John Austin , Ludwig Wittgenstein and Hans Kelsen , Hart brought the tools of analytic, and especially linguistic, philosophy to bear on the central problems of legal theory. Significant in the differences between Hart and Kelsen was the emphasis on the British version of positive law theory which Hart was defending as opposed to the Continental version of positive law theory which Kelsen was defending. This was studied in the University of Toronto Law Journal in an article titled "Leaving the Hart-Dworkin Debate" which maintained that Hart insisted in his book The Concept of Law on the expansive reading of positive law theory to include philosophical and sociological domains of assessment rather than the more focused attention of Kelsen who considered Continental positive law theory as more limited to the domain of jurisprudence itself. In the paper on international law, he sharply attacked the many jurists and international lawyers who had debated whether international law was "really" law. This approach was to be refined and developed by Hart in the last chapter of The Concept of Law , which showed how the use in respect of different social phenomena of an abstract word like law reflected the fact that these phenomena each shared, without necessarily all possessing in common, some distinctive features. Glanville had himself said as much when editing a student text on jurisprudence and he had adopted essentially the same approach to "The Definition of Crime". The book emerged from a set of lectures that Hart began to deliver in , and it is presaged by his Holmes lecture, Positivism and the Separation of Law and Morals, delivered at Harvard Law School. The Concept of Law developed a sophisticated view of legal positivism. Among the

many ideas developed in this book are: A distinction between primary and secondary legal rules, such that a primary rule governs conduct, such as criminal law, and secondary rules govern the procedural methods by which primary rules are enforced, prosecuted and so on. Hart specifically enumerates three secondary rules; they are: The Rule of Recognition , the rule by which any member of society may check to discover what the primary rules of the society are. In a simple society, Hart states, the recognition rule might only be what is written in a sacred book or what is said by a ruler. The Rule of Change, the rule by which existing primary rules might be created, altered or deleted. The Rule of Adjudication, the rule by which the society might determine when a rule has been violated and prescribe a remedy. A concept of "open-textured" terms in law, along the lines of Wittgenstein and Waisman, and "defeasible" terms later famously disavowed: As a result of his famous debate with Patrick Devlin, Baron Devlin , on the role of the criminal law in enforcing moral norms, Hart wrote Law, Liberty and Morality , which consisted of three lectures he gave at Stanford University. He also wrote The Morality of the Criminal Law Despite this, Hart reported later that he got on well personally with Devlin. Hart considered himself to be "on the Left, the non-communist Left", and expressed animosity towards Margaret Thatcher.

Chapter 6 : Hart: Moral Critic and Analytical Jurist : H.L.A. Hart, Second Edition - oi

Law and Morality in H.L.A. Hart's Legal In order to understand Hart as a critical, moral philoso- it is important to understand the analytical basis of Hart's.

The start of 19th century might be taken as the mark of the beginning of the positivist movement. Positivism flourishes in stable conditions. This was finished more or less in , but remained unpublished till when Prof. He is considered as the Father of English Jurisprudence. He was elected to the chair of Jurisprudence in the University of London in He avoided metaphysical method, which is a German characteristic. To him, law is the command of a sovereign requiring his subjects to do or forbear from doing something. Laws set by men to men also fell into 2 categories â€" the first consisted of laws set by political superiors to political inferiors. The second category consisted of laws set by men to men neither as political superiors nor in pursuance of rights conferred upon them by such superiors, e. In the same way, there r certain other rules which r called law metaphorically â€" laws of nature. They are laws improperly so called. Jurisprudence is the general science of positive law. Laws properly so called are species of commands. But being a command, it flows from a determinate source or emanates from a determinate author. The key to understanding law properly so called lies in duty which is created by the command of a sovereign. According to him, there r 3 kinds of laws, which, though not commands, r still within the province of jurisprudence: Austin does not regard them as commands because they r passed only to explain laws already in force, e. These too r not commands but r rather the revocation of a command. These laws have no sanction attached to them. Thus, there is a duty, but in case of non-compliance, there is no sanction, e. For Austin, law is the command of sovereign. In the early times, not the command of any superior, but customs regulated the conduct of the people. Even after coming of State into existence, customs continued to regulate the conduct. Therefore, customs should also be included in the study of jurisprudence, but he ignored them. Customs have been in existence since old times. Customs hv also bn an important source of law. As per Austin, customs can only be a law if the sovereign accepts them as law, while customs provide the basis on which the law can be based. There is no place for judge-made law. Though an Austian would say that judges act under the powers delegated to them by the sovereign, therefore, their acts r the commands of the sovereign. Command presupposes a commander. No indeterminate party can command, expressly or tacitly or can receive obedience or submission. The question is whether he can be discovered, who might be regarded as having commanded the whole corpus of law. In democratic system, it is not possible that one person commands. As per Austin, it is the sanction alone which induces the man to obey law, while it is open to criticism from many points of view as there r many other considerations such as reasoning, logic, love, etc. The so-called law of nations consists of opinions or sentiments. It, therefore, is no law properly so called. The main ingredient of law lacking in Intl. Law is sanction, but this alone will not deprive from being called law. Hence, nobody will accept that Intl. Law is not law. Therefore, according to Austin, a very imp. Law is not an arbitrary command, but it is a growth of an organic nature. Hence, morals hv always bn an integral part of law. Austin does not cover procedural laws, e. He also does not talk about laws conferring privileges, e. Though the President has the supreme power, but the same is exercised by the Prime Minister. Though DPSP r non-justiciable, yet they r important as they govern the guidelines for the society. Laws are still laws even though supported by moral or religious sanctions or they may even be accompanied by rewards. He, thus, had no need to resort to a sanction by nullity. Hart, a British Philosopher and an eminent jurist, is considered as the significant exponent of Analytical Positivism. According to Hart, the law is a system of rules. In other words PRs impose duties obligations on individuals in primitive community. Under PRs, human beings r required to do or abstain from certain action, whether they wish or not. SRs r in a sense parasitic upon or secondary to PRs. While PRs impose duties, SRs confer powers. According to Hart, a rule is: The removal of defects will transform a primitive society, i. If we consider the structure which results from the combination of PRO with the SRs of RCA, we have a systematic legal system to meet the requirements of the society. ROR may be simple or complex. They describe the heart of a legal system in combination with PRs. The statement that a particular rule is valid means that it satisfies all the criteria provided by the ROR. The efficacy of the

rule means that a PRO, which requires certain behaviour, is obeyed more often than not. But where a rule is not efficacious in the sense that it is not obeyed by anybody, then a serious challenge can be posed on its validity also. Rule of Recognition as an ultimate rule: The ROR, which provides the criteria by which the validity of other rules of the system is assessed, is an ultimate rule. While the first contention is one which only private citizens need to satisfy, the second condition must be satisfied by the officials of the system. The officials should observe ROR from internal as well as external point of view, while the private citizens need not have an internal point of view. It is taken by those who r concerned with the rules merely as an observer who does not himself accept them. There r other varieties of law, such as laws conferring legal powers to adjudicate public powers or legislate or to create or vary legal relations private powers. There is difficulty in finding ROR. The idea of obligation: According to Austin, it illustrates the notion of obligation or duty in general. Here, the meaning of obligation lies in the fact that B, if he obeyed, was obliged to hand over money. B had an obligation or duty to hand over money. A person had an obligation, e. The statement that he had an obligation is quite independent of the question whether or not he in fact reported for service; the statement that someone was obliged to do something normally carried the implication that he actually did it. Kelsen was a Prof. He owes his fame mainly due to his Pure Theory of Law. According to him, a theory of law must deal with law as it is actually laid down not as it ought to be. A theory is something, which has universal application. Thus, he devised a pure theory, which would have the ingredient of only one discipline, i. He insisted that a theory of law must be free from ethics, politics, sociology, history, etc. Though their value is not denied, but Kelsen insisted that a theory of law must not have such considerations. There must be a pure theory of law. He wished his science to be really objective. It is a norm that directs an official to apply force under certain circumstances. Thus, his theory of law is a theory of positive law. Every body of facts has two distinguishable elements: This is the external manifestation of the fact. Its meaning is that a statute is being passed, that a law is being created. The subjective meaning of this act is a testament. Objectively, however, it may not be a testament due to non-observance of some legal formalities, etc. However, Kelsen rejects the idea of command as it introduces a psychological element into a theory which should be pure. In other words, norm is the meaning of an act of will by which certain behaviour is commanded or permitted or authorised. It is different from moral norm. In this process, Kelsen achieved two objectives: It is essential that it should command a minimum of support. The highest norm in the hierarchy is called the basic norm or the Grundnorm.

Chapter 7 : Jurisprudence - Wikipedia

Hart: Moral Critic and Analytical Jurist 3. Hart's conception of law 4. Social rules 5. Morality - positive and critical 6. Obligation, duty, wrongdoing 7.

He is the foremost classical proponent of natural theology , and the father of the Thomistic school of philosophy, for a long time the primary philosophical approach of the Roman Catholic Church. The work for which he is best known is the Summa Theologica. Consequently, many institutions of learning have been named after him. Aquinas distinguished four kinds of law: Eternal law refers to divine reason, known only to God. Man needs this, for without it he would totally lack direction. Natural law is the "participation" in the eternal law by rational human creatures, and is discovered by reason. Human law is supported by reason and enacted for the common good. All other precepts of the natural law are based on this School of Salamanca[edit] Main articles: School of Salamanca and ius gentium Francisco de Vitoria was perhaps the first to develop a theory of ius gentium the rights of peoples , and thus is an important figure in the transition to modernity. He extrapolated his ideas of legitimate sovereign power to society at the international level, concluding that this scope as well ought to be ruled by just forms respectable of the rights of all. The common good of the world is of a category superior to the good of each state. This meant that relations between states ought to pass from being justified by force to being justified by law and justice. Working with already well-formed categories, he carefully distinguished ius inter gentes from ius intra gentes. Ius inter gentes which corresponds to modern international law was something common to the majority of countries, although, being positive law, not natural law, was not necessarily universal. On the other hand, ius intra gentes, or civil law, is specific to each nation. Thomas Hobbes In his treatise Leviathan, , Hobbes expresses a view of natural law as a precept , or general rule, found out by reason , by which a man is forbidden to do that which is destructive of his life, or takes away the means of preserving the same; and to omit that by which he thinks it may best be preserved. He believed that society was formed from a state of nature to protect people from the state of war between mankind that exists otherwise. Life is, without an ordered society, "solitary, poor, nasty, brutish and short". The English Civil War and the Cromwellian dictatorship had taken place, and he felt absolute authority vested in a monarch, whose subjects obeyed the law, was the basis of a civilized society. Fuller defended a secular and procedural form of natural law. He notably emphasised that the natural law must meet certain formal requirements such as being impartial and publicly knowable. To the extent that an institutional system of social control falls short of these requirements, Fuller argues, we are less inclined to recognise it as a system of law, or to give it our respect. Thus, law has an internal morality that goes beyond the social rules by which valid laws are made. John Finnis Sophisticated positivist and natural law theories sometimes resemble each other more than the above descriptions might suggest, and they may concede certain points to the other "side". In particular, the older natural lawyers, such as Aquinas and John Locke made no distinction between analytic and normative jurisprudence. But modern natural lawyers, such as John Finnis claim to be positivists, while still arguing that law is a basically moral creature. His book Natural Law and Natural Rights , is a restatement of natural law doctrine. But as a matter of pure logic, one cannot conclude that we ought to do something merely because something is the case. So analysing and clarifying the way the world is must be treated as a strictly separate question to normative and evaluative ought questions. The most important questions of analytic jurisprudence are: Historical School[edit] Historical jurisprudence came to prominence during the German debate over the proposed codification of German law. In his book On the Vocation of Our Age for Legislation and Jurisprudence, [26] Friedrich Carl von Savigny argued that Germany did not have a legal language that would support codification because the traditions, customs and beliefs of the German people did not include a belief in a code. The Historicists believe that the law originates with society. Sociology of Law The effort to inform jurisprudence systematically with sociological insights developed strongly from the beginning of the twentieth century, as sociology began to establish itself as a distinct social science, especially in the United States and in continental Europe. Ernst Fuchs, Hermann Kantorowicz and Eugen Ehrlich encouraged the use of sociological insights in judicial development of law and juristic theory. In the s a

significant split between the sociological jurists and the American legal realists emerged. In the second half of the twentieth century sociological jurisprudence as a distinct movement declined as jurisprudence came more strongly under the influence of analytical legal philosophy but with increasing criticism of dominant orientations of Anglophone legal philosophy in the present century it has attracted renewed interest. Legal positivism Positivism simply means that law is something that is "posited": The positivist view on law can be seen to cover two broad principles: Firstly, that laws may seek to enforce justice, morality, or any other normative end, but their success or failure in doing so does not determine their validity. Provided a law is properly formed, in accordance with the rules recognized in the society concerned, it is a valid law, regardless of whether it is just by some other standard. Secondly, that law is nothing more than a set of rules to provide order and governance of society. No legal positivist, however, argues that it follows that the law is therefore to be obeyed, no matter what. This is seen as a separate question entirely. What the law is lex lata - is determined by historical social practice resulting in rules What the law ought to be lex ferenda - is determined by moral considerations. Bentham and Austin[edit] Main articles: Bentham was an early and staunch supporter of the utilitarian concept along with Hume , an avid prison reformer, advocate for democracy , and strong atheist. Austin was the first chair of law at the new University of London from Hans Kelsen Hans Kelsen is considered one of the prominent jurists of the 20th century and has been highly influential in Europe and Latin America, although less so in common-law countries. His Pure Theory of Law aims to describe law as binding norms while at the same time refusing, itself, to evaluate those norms. Hart[edit] Main article: Hart In the Anglophone world, the pivotal writer was H. Hart , who argued that the law should be understood as a system of social rules. Hart revived analytical jurisprudence as an important theoretical debate in the twentieth century through his book The Concept of Law. Rules, said Hart, are divided into primary rules rules of conduct and secondary rules rules addressed to officials to administer primary rules. Secondary rules are divided into rules of adjudication to resolve legal disputes , rules of change allowing laws to be varied and the rule of recognition allowing laws to be identified as valid. The "rule of recognition" is a customary practice of the officials especially barristers and judges that identifies certain acts and decisions as sources of law. A pivotal book on Hart was written by Neil MacCormick [29] in second edition due in , which further refined and offered some important criticisms that led MacCormick to develop his own theory the best example of which is his recently published Institutions of Law, In recent years, debates about the nature of law have become increasingly fine-grained. One important debate is within legal positivism. One school is sometimes called exclusive legal positivism, and it is associated with the view that the legal validity of a norm can never depend on its moral correctness. A second school is labeled inclusive legal positivism, a major proponent of which is Wil Waluchow, and it is associated with the view that moral considerations may determine the legal validity of a norm, but that it is not necessary that this is the case. Joseph Raz Some philosophers used to contend that positivism was the theory that there is "no necessary connection" between law and morality; but influential contemporary positivists, including Joseph Raz, John Gardner, and Leslie Green, reject that view. As Raz points out, it is a necessary truth that there are vices that a legal system cannot possibly have for example, it cannot commit rape or murder. Any categorisation of rules beyond their role as authority is better left to sociology than to jurisprudence.

Chapter 8 : H. L. A. Hart - Wikipedia

Legal positivism is the thesis that the existence and content of law depends on social facts and not on its merits. The English jurist John Austin () formulated it thus: "The existence of law is one thing; its merit and demerit another.

Chapter 9 : Legal Positivism (Stanford Encyclopedia of Philosophy)

Grave of H. L. A. Hart at the Wolvercote Cemetery in Oxford Hart's students [edit] Many of Hart's former students became important legal, moral, and political philosophers, including Brian Barry, John Finnis, John Gardner, Kent Greenawalt, Neil MacCormick, William Twining, Chin Liew Ten, Joseph Raz and Ronald Dworkin.