JURISPRUDENCE

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Objectives of the course

- To introduce the kinds of arguments raised on the nature and source of law
- To enable students to understand the nature and function of law.
- To give a student the insight as to the connection between legal theory and legal practice.
- To show the relation ship between law and other values, such as, morality and justice
- To enable students to reflect and understand on what they would do and what their role is within society.

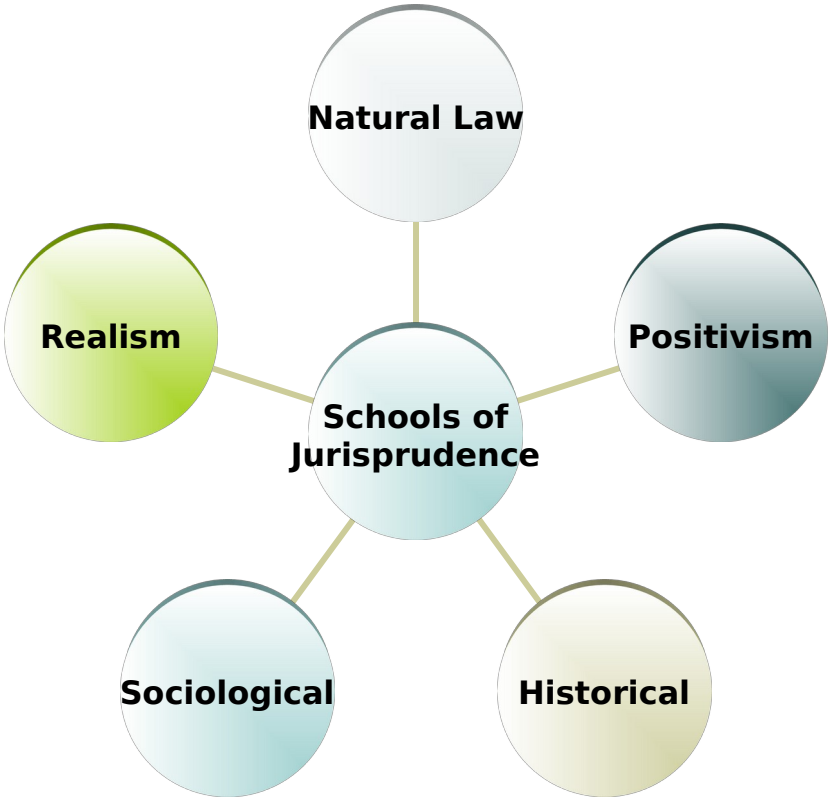
Jurisprudence

Defining jurisprudence

- The word comes from the Latin term *juris prudentia,* which means "the study, knowledge, or science of law.“

Why we study jurisprudence

- the ability to analyze and to think critically
- At a professional level, jurisprudence is the way lawyers and judges reflect on what they do and what their role is within society.
- Finally, for some, jurisprudence is interesting and enjoyable on its own, whatever its other uses and benefits


Natural Law
Realism
Positivism
Schools of Jurisprudence
Sociological
Historical

What is law? Testing the definition

Law is pure reason free from passion

Aristotle

By the way please make a group of ten students and submit the list next class.

Natural Law School

Objective

- **Understand the notion of natural law**
- **Explain the classical approaches to natural law theory**
- **Understand the relation between law and morality, law and justice, and law and religious rules**

Introduction

- Natural law theory advocates that some laws are basic and fundamental to human nature and are discoverable by human reason without reference to specific legislative enactments or judicial decisions.
- In this chapter natural law philosophers like Socrates, Plato and Aristotle from Greek, Cicero and Seneca from Rome, St. Augustine, St. Aquinas, Hobbes, and Locke from medieval period, and Fuller from more recent times shall be discussed.

Notion of the Natural law

THE DILEMMA OF THE CHILD

Let's suppose that a fair-haired child returns from school one day and says to his father

Child: Mr. Smith (the head master of the school) has made a new rule. No children with fair hair are to get arithmetic lessons. They are to do extra woodwork instead. I think it's stupid,

Father: Wow

Child: After all, we're at school to learn aren't we? How can I do what I'm there for if I get arithmetic?

Father: Well, it seems unfortunate, I agree. But Mr. Smith is the head master. He makes the rules. What he says goes.

Child: But surely, he can't make a rule like that? I mean, it goes against what the school is for. The school governors wouldn't allow it. It can't really be a rule at all, can it?

Father: Um!

Child: Well, I don't think it is a rule. It can't be.

Father: And do you intend to disobey it?

Child: Um!

Think also about that

- The Nazis came to power through democratic election and the government was a legitimate one. It has used legitimate rules to prosecute 6 million European Jews to death.
- The South African apartheid government was also a legitimate government which used laws to perpetuate its objectives.
- Before its abolition slavery was a tolerated and legitimated institution.
- Does your heart accept such things irrespective of their legitimacy? The fact that they are backed by the state?

What Natural Law is not

- Natural law doesn’t mean law of nature (law of physical nature)
- Natural doesn’t mean State of Nature (as discussed by Hobbes and Locke)
- Natural law refers to an idea that provides the foundation of human social existence. Why ought to obey that rule?
- Natural law comprises a body of permanent, eternal truths, truths embodying precepts of universal applicability, part of immutable order of things, unaffected by changing human beliefs or attitudes

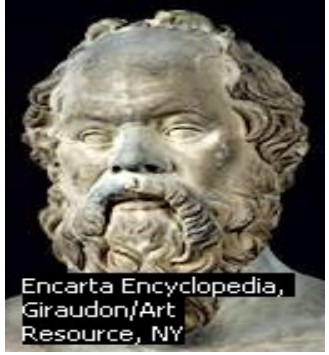
Ancient Greece-Natural law as source of justice and virtue

Socrates

- A Greek philosopher of the 4th BC. At the Age of 70 he was prosecuted for corrupting the youth and in believing I other divinities. His story is found in two Plato's writings: *Apology* and *Crito*.

Apology

- He said it is just to obey the orders of a commander. But if the order was illegal or the laws unjust, then no man shall obey the order or the laws.
- While in duty Socrates was guarding, but when he was ordered to arrest Leon he refused since it was unjust.



- From this argument he had also developed the principle that the command of god is more pious and just and as a result it is above and beyond any other human laws.
- Although the laws prohibited him from teaching philosophy since he was ordered by god he chose the order of the gods.

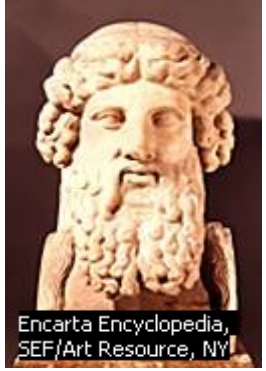
Crito

- While in prison his friend Crito asked him to escape from prison. Socrates gives three reason why he should not escape from prison.
- First, argument based on moral grounds, that it is unjust to return harm for harm; Second, argument based on parenthood, that laws are analogized to parents; third argument based on contract.

Crito continued….

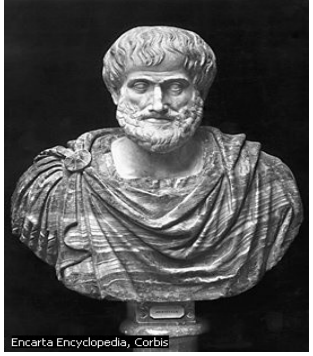
- His conclusion was that irrespective of the injustice of the Athenian laws for the above reasons he would uphold the laws.
- Do you see any conflict between the arguments under both situations?

Plato



- Plato was concerned to redefine the nature of justice by relating it to something far more permanent and absolute than the *nomos* (man-made laws) of the city-state.
- He assigned “reality” to the unchanging archetypal forms—i.e., the ideas—of things rather than to the ephemeral phenomena as superficially and confusedly perceived by individual men unenlightened by philosophy. He says that what for us are abstractions, example redness, square-ness, roundness, sharpness, honor, courage, beauty, equality, justice each had a permanent and unvarying existence, an existence that is independent of the fact that certain things or actions in the world as we know it reflect the qualities themselves. This is Plato’s doctrine of ‘forms’.

Aristotle



- ***There are two sorts of political justice, one natural and the other legal. The natural is that which has the same validity everywhere (as fire burns both in Greek and in Persia are the same) 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 war is one mina (Greece money), or that a goat shall be sacrificed to the gods and not two sheep.***

- ***If the written law tells against our case, clearly we must appeal to universal law,***

Stoics-Natural law as a Reason

Cicero-

- was a Roman orator, philosopher and lawyer.
- He defines law as *"the highest reason, implanted in nature, which commands what ought to be done and forbids the opposite. True law is right reason in agreement with nature. To curtail this law is unholy, to amend it illicit, to repeal it impossible."*

Cicero continue.....

- The Stoics believe in the monism (oneness) of this world. And every body in it is governed by reason. Since reason is common to all men, then there are universal laws that can be derived by reason by which man could live.
- The universality and immutability of natural law or “true” law was indicated in another passage:

  true law is right reason in agreement with nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands, and avert from wrong doing by its prohibition. And it does not lay its commands or prohibitions upon good men in vain, though neither have any effect upon the wicked.
- For Cicero, law is the highest product of the human mind which is in tune with the elemental force of nature. The validity of human law depends upon its harmony with these forces

Seneca

- **In his letter Seneca, another Roman lawyer and Stoic philosopher, wrote:**

  Man is a sprit and his ultimate goal is the perfection of his reason in that sprit. Because man is a rational animal, his ideal state is realized when he has fulfilled the purpose for which he was born. And what is it that reason demands of him? Something very easy – that he live in accordance with his own nature. Yet this is turned into something difficult by the madness that is universal among men; we push one another into vices. And how can people be called back to spiritual well-being when no one is trying to hold them back and the crowd is urging them on?

  What has the philosopher investigated? What has the philosopher brought to light? In the first place, truth and nature; and secondly, a rule of life, in which he has brought life into line with things universal.

Contribution of Stoic legal philosophy

Three important ideas of modern law and legal theory were derived mainly from Stoic philosophy:

- The conception of a universal law for all mankind under which all men are equal;
- The idea of a method of deriving universal principles of law from the observation of the laws of different people;
- And the conception of a law binding upon all states, which has got today the name “international law”.

Christianity-Natural law as mo

St. Augustine of Hippo

- In his greatest work, *De Civitate Dei* (the City of God), St. Augustine portrayed the human condition as torn between the attraction of good and evil, with the perfect state being one voluntary submission to the will of God.
- The will of God is then seen as the highest law, eternal law, for all people, playing something of Stoic cosmic reason.
- Thus an unjust law is one which does not concord with the higher (divine) reason and which is thus conceived, or directed, for an improper law.
- Hence, in the eye of St. Augustine, **to the extent that man-made law ran counter to natural law, it is null and void, and unjust governments are equated with criminal gangs**.

St. Thomas Aquina

- Aquinas distinguishes four kinds of laws: (1) Eternal Law; (2) Divine Law; (3) Natural Law; and (4) Human Law
- **Eternal Law:** is comprised of those laws that govern the nature of an eternal universe; "think of eternal law as comprising all those scientific (physical, chemical, biological, psychological, etc.) 'laws' by which the universe is ordered."
- **Divine Law**: is concerned with those standards that must be satisfied by a human being to achieve eternal salvation. One cannot discover divine law by natural reason alone; the precepts of divine law are disclosed only through divine revelation.

Aquinas continue....

- **Natural Law**: is comprised of those precepts of the eternal law that govern the behavior of beings possessing reason and free will.
- Natural law commands that we shall save our life (substance), transmit that life to next generation (living things), care for our offspring (animals), develop our rational and moral capacities by growing in the virtues of intellect (Human)

(The metaphysics of Aristotle opens with these words: All men naturally desire to know)

(The un-examining life is not worth living. Socrates

(man's status in the world is determined by the quality of his thinking…

- **Human Law**: is a dictate of reason made by governors for the administration of the people. But a human law is valid only insofar as its content conforms to the content of the natural law.

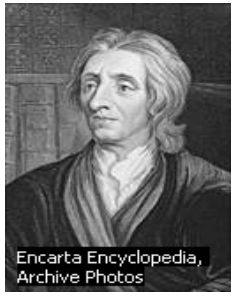
Nature of Man and Justification for Law

- The medieval power of the church dissolved with the coming of Renaissance and political writers such Hobbes, Locke and Rousseau.
- These theorists all sought to base a view of the purpose and authority of law upon a social contract, a covenant that underlines the surrender of the powers of the individual to a state organization, the ‘Sovereign’.
- In order to do they hypothesized a state of conditions where there was no state and law. it is like the primitive stage of society.

Thomas Hobbes

- Perception of man in the state of nature as evil and the life of man is full of war and destitute
- Man was originally entitled with absolute freedom to act, even to take another man's life
- The first rule of nature was to preserve one's life
- In order to do so people compete for wealth and glory and comes war among each other
- To escape from this perpetual war and fear, people agree together to transfer all their rights to an absolute sovereign
- The sovereign is absolute in power
- Man however doesn't pass the right to life and liberty

John Locke



- Another British natural law philosopher, who perceived man's nature as basically good
- In the state of nature men live harmoniously. Each respects his fellow man's life, liberty and property.
- Each had the right to punish any natural law violator
- This caused two problems: one that every person becomes a judge in his own case; and second, the amount of punishment tends to be excessive, which led for blood feud.
- In addition the genesis of private property creates rich and poor people
- Hence conflict becomes inevitable and people agreed to establish a government
- The government, unlike that of Hobbes, is a representative government and limited in authority.

Summary

- The adherents of natural law believe that beyond, and superior to the law of man are certain higher principles, the principles of natural law. These principles are immutable and eternal. Man-made laws may vary from place to place and from community to community.
- And to the extent that man-made law conflicts with natural law, it lacks validity: it is not valid, binding law at all.
- By doing so natural lawyers blended law and other values such as morality, and justice.

By way of conclusion, natural law:

- is not made by human beings;
- is based on the structure of reality itself;
- is the same for all human beings and at all times;
- is an unchanging rule or pattern which is there for human beings to discover;
- is the naturally knowable moral law;
- is a means by which human beings can rationally guide themselves to their good.

Kelsen's criticism on Natural Law

- Kelsen is most famous for his studies on law and especially for his idea known as the pure theory of the law.
- He criticize natural law principle as follows:

✓ Natural law confuses value and reality. He says:

> ***Value is not immanent in natural reality. Hence value cannot be deduced from reality. It does not follow from the fact that something is, that is ought to be or to be done, or that is ought not to be or to be done. The fact that in reality big fish swallow small fish does not imply that the behavior of the fish is good or bad. There is no logical inference from the 'is' to the 'ought', from natural reality to moral or legal value.***

Criticism…

- **Natural Lawyers are insincere**. Kelsen criticizes natural lawyers on the ground of their insincerity: they fail to carry their doctrine to its logical conclusion. Where a law of the state conflicts with natural law do natural lawyers in fact say that a citizen should disobey it? And what is the guarantee against state prosecution? he examines a lot of natural lawyers most of whom prefer silence. Then as Austin once said that natural law is ‘nothing but a phrase’.

Criticism...

- **Absolute values and Relative values.** According to Kelsen values are relative and subjective based on tradition, religion, civilization etc. This view was especially reflected by Democritus: '....we know nothing, for truth is in the depth, and either truth does not exist or it is hidden from us.' The notion of 'truth' and 'knowledge' are thus illusions. What *seems* to each man, *is* as far as he is concerned. Reality exists only in relation to our own feelings and convictions. Kelsen summarizes, 'there is one nature but we have different systems of law; different beliefs of goodness and badness.'

Question for tod
work in pairs

- Give two examples of law (from the penal or civil code) which in your opinion fit to principle of natural law.
- Give another example from either codes which in your opinion is against natural law principle.

Chapter Three
The Revival of Natural

Introduction

- During the nineteenth century natural Law was dominated and overshadowed by the positivist school of thought Chap. 4).
- What does positivism assert? Positivists believe that the only legitimate source of law are those written rules, regulations, and principles that have been expressly enacted, adopted, or recognized by a government body, including administrative, executive, legislative, and judicial bodies.
- And by doing so they separate law and other values of morality and justice.

- However, the massive human delinquencies by the Nazis during the Second World War and the emergence of totalitarian States and dictators stimulate, in the 20th c, the rethinking of natural law theory.
- Jurists raised questions whether positive law is adequate enough to protect mankind. Whether isn’t it wise to rely on some natural principle or not?
- The leading jurists in this school are Lon L. Fuller and Finnis

Gustav Radbruch

The Story of Nazis

- The pivot or at least the common starting-point in the beginning was the attitude taken by Gustav Radbruch (German Professor of law) to the legality of laws passed during the Nazi era in Germany.
- Radbruch had originally been positivist, holding that ***resistance to law was a matter for personal conscience, the validity of a 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 a 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.
- The case of the woman who denounced her husband because he insulted Hitler. The court found that 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 defense, and she was found guilty.
- The case thus illustrated a conflict between positivism and natural law, the latter triumphing. The principle adopted in the decision was followed in many later cases.

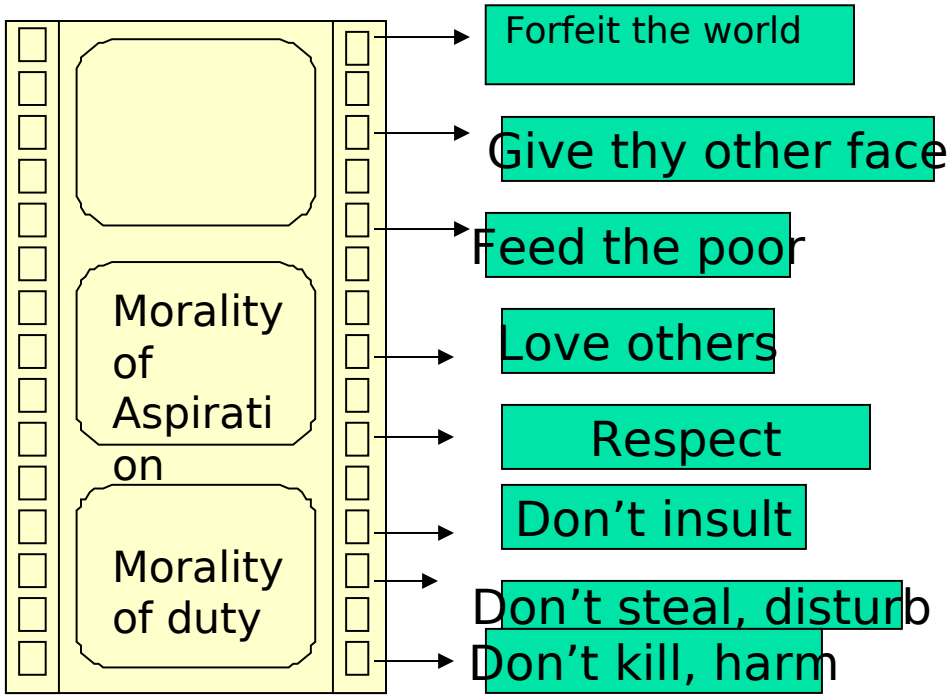
Lon L. Fuller: Procedural Natural Law

Morality of aspiration

- Fuller considered that debate upon the morality of law had become confused in part through a failure adequately to distinguish between two levels of morality which he defined as moralities of ‘aspiration’ and of ‘duty’.

  The morality of aspiration…is the morality of the Good Life, of excellence, of the fullest realization of human powers…Where the morality of aspiration starts at the top of human achievement, the morality of duty starts at the bottom. It lays down the basic rules without which an ordered society is impossible, or without which an ordered society directed toward certain specific goals must fail of its mark.

- The essential difference is indicated by Fuller’s choice of terms. The morality of ‘aspiration’ is a goal of excellence, or even perfection. It is in a sense a maximum goal.
- The morality of ‘duty’ on the other hand is a minimum standard which must be attained before the enterprise can be recognized to have the identity which it claims at all.


Morality of Aspiration
Morality of duty
Forfeit the world
Give thy other face
Feed the poor
Love others
Respect
Don’t insult
Don’t steal, disturb
Don’t kill, harm

- *….we may conveniently imagine a…scale…which begins …with the most obvious demand of social living and extends upwards to the highest reaches of human aspiration. Somewhere along this scale there is an invisible pointer that marks the dividing line where the pressure of duty leaves off and the challenge of excellence begins.*

- It is implicit in Fuller's analysis that it is not the business of law to prescribe for excellence but rather to ensure the minimum baseline from which development towards excellence might move.

The Inner Morality of Law

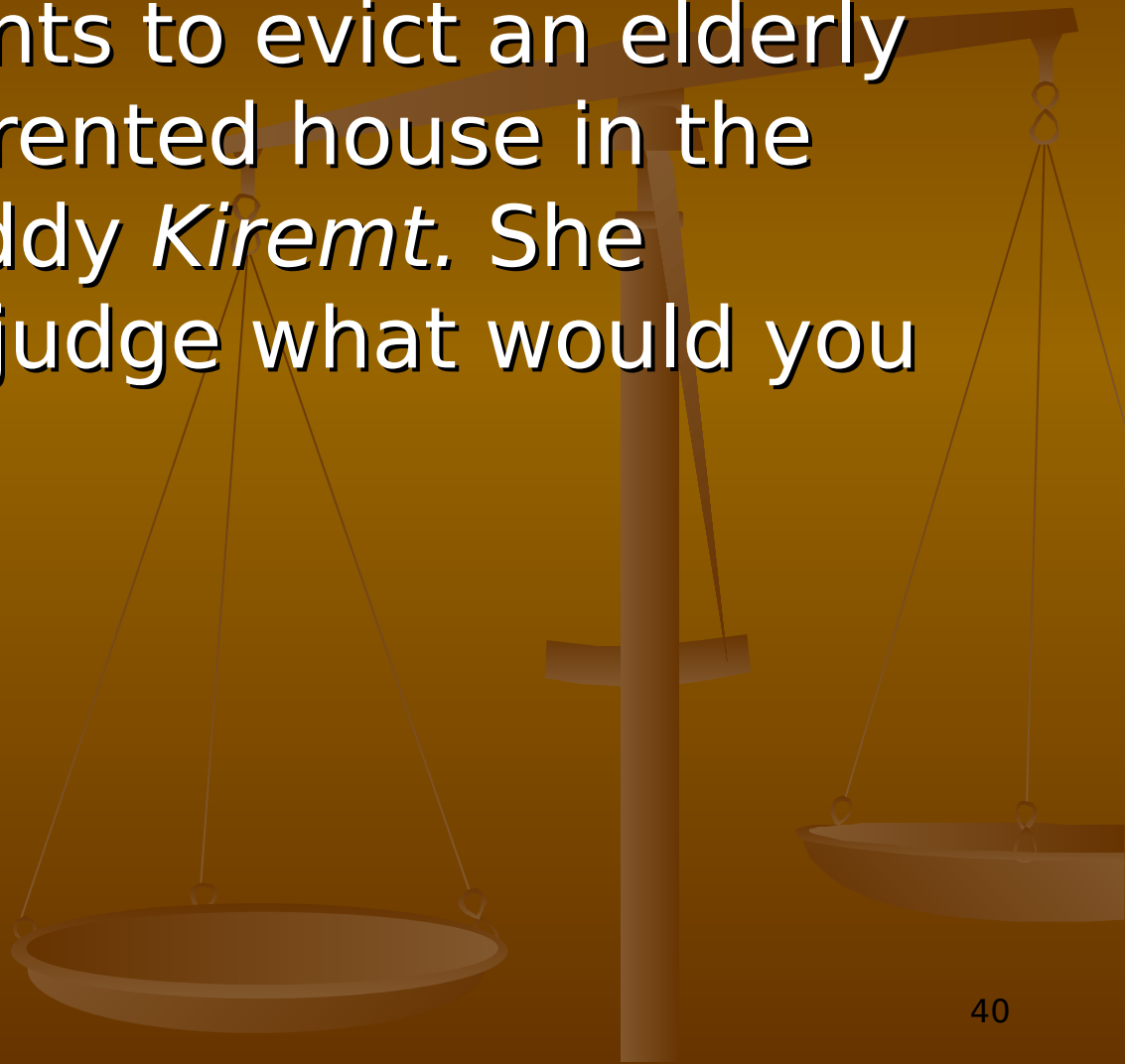
- Generality (not made ad hoc or for temporary purpose only)
- Published
- Prospective, not retroactive
- Intelligible (clear or understandable)
- Consistent
- Capable of being complied with
- Endure without undue changes
- Applied in the administration of the society

Criticism on Fuller

- Hart's well-known criticism of Fuller's equally well known eight principles of the 'inner morality' of law is one we choose as a criticism on this point.
- Hart's criticism is that we could, equally, have eight principles of the 'inner morality' of the poisoner's art ('use tasteless, odourless poison'; 'use poisons that are fully eliminated from the victim's body'; etc). Or we can improve further.
- Fuller's eight criteria are not sufficient enough to have good laws

A case to warm up

- A landlord wants to evict an elderly lady from his rented house in the middle of muddy *Kiremt.* She refused. As a judge what would you decide?



John Finnis: Substantive natural law

- On the defence of natural law
- Finnis tells us that there are two misconceptions about natural law from which he wishes to dissociate himself:

a. Finnis denies that natural law derives from the objectively determinable patterns of behaviour, but instead asserts it is ascertainable from inward knowledge of innate motivations.

b. Natural law does not entail the view that law is not law if it contradicts morality.

- For him Natural law may be the set of principles of practical reasonableness in ordering human life and human community, but he asserts that they are pre-moral. By this he means that they are not the product of logical deduction, nor are they merely passions verified with reference to something objectively regarded as good. The latter position represents the view of the empiricists such as Hume, and is that all moral values are subjective whims that have the extra force of validity because others accept them as being good.

Finnis…

- To the extent that the empiricists and also positivists (see next chapter) criticism of some natural lawyers might be right, he states that there is no inference from fact to value.
- Rather Finnis base his natural law view on human basic goods.
- Instead of speaking, as would Plato, about the Form of the Good, or seeking the Good, he will speak about human desires to pursue "basic *goods*" in life.
- the goods that Finnis speaks of are not moral goods, but they are necessary objects of human striving. Moreover, they are objective since from time immemorial all people strives for them. He argued that they are of innate knowledge.
- His argument is based on consistency of human behavior. Do you think modern man’s desires and behaviors are much different from that of the Biblical period or the Shakespearian times?

The Basic Goods of Human Nature

- All rational agents set out to preserve or obtain things they perceive to be good for themselves.
- Based on the consistent behaviour of human kind he isolates what he calls seven "basic goods" in life, goods that are fundamental, underived from other goods and irreducible to other things that are the motivation and goal of action.

Finnis' seven basic goods are generally the following:

- Life, meaning not merely existence but also the capacity for development of potential. Within the category of life and its preservation Finnis includes procreation.
- Knowledge, not only as a means to an end but as a good in its own right which improves life quality.
- Play, in essence the capacity for recreational experience and enjoyment.
- Aesthetic experience, in some ways related to play but not necessarily so, this is broadly a capacity to experience and relate to some perception of beauty.
- Sociability or friendship, occurring at various levels but commonly accepted as a 'good' aspect of social life. One might add that this 'good' would seem to be an essential aspect of human conducts as social creatures, as put by Aristotle.

basic goods…

- Practical reasonableness, essentially the capacity to shape one's conduct and attitude according to some 'intelligent and reasonable' thought process.
- Religion, this is not limited to, although it clearly includes, religion in the formal sense of faith and practice centered upon some sense of the divine. The reference here is to a sense of the responsibility of human beings to some greater order than that of their own individuality.

Chapter Four Positivism

- People you will study
  - David Hume
  - Jeremy Bentham
  - John Austin
  - Hans Kelsen
  - H.L.A. Hart

Concepts and words you may find:
- Is
- Ought
- Positivism

A case to warm up

- A landlord wants to evict an elderly lady from his rented house in the middle of muddy *Kiremt.* She refused. As a judge what would you decide?

General tenets shared by all positivists…

- legitimate sources of law are those written rules, regulations, and principles that have been expressly enacted, adopted, or recognized by a government body, including administrative, executive, legislative, and judicial bodies.
- Positivism sharply separates law and morality.
- Positivism serves two values:
  - It requires all laws be written, no surprises for litigants
  - Curbs judicial discretions, judges should strictly follow and apply the rules

positivism

- Positivism-stems from the English word ‘posit’, put firmly, or imposed
- Since positivists believe that law is imposed by a higher authority to lower subjects they got their name from the concept.

Hume’s influence

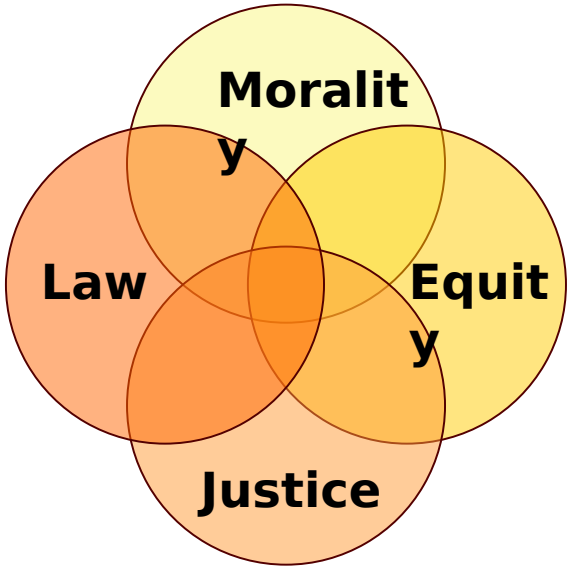
- Although not a jurist, Hume inadvertently contributed to this school a lot.
- In one of his writings he said “all investigation should be confined to the reporting of experimental observation on the one hand (‘matters of fact’) and the rational elucidation of ‘relations between ideas’ (logical connections) on the other.”
- Secondly he asserts that such matters of fact should be understood in complete independence from any subjective evaluation of the factual subject matter (the much quoted ‘separation of fact and value’ or ‘is’ and ‘ought’).
- Reasoning which moves from matters of fact to matters of value results in confusion and nonsense. This is the philosophical source of the separation thesis in jurisprudence.
- In effect, it was Hume first open the eyes of positivists who challenged the close relationship of law and morality. Rational reasoning has nothing to do with morality or religion. Law should be investigated beyond any bias of morality.

Discuss in pair

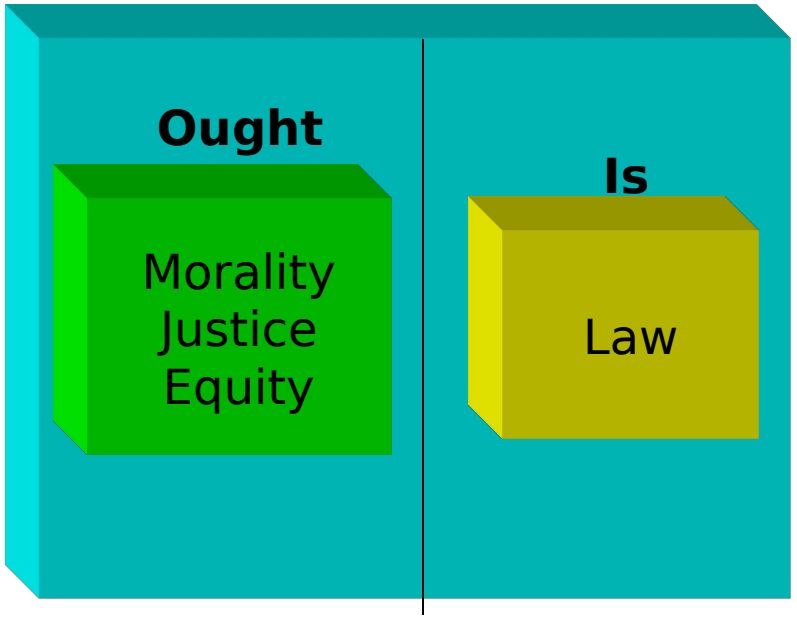
- The separation thesis
- What do you understand by “is” and “Ought”

Separation theis

Natural Law



Positivism



Bentham

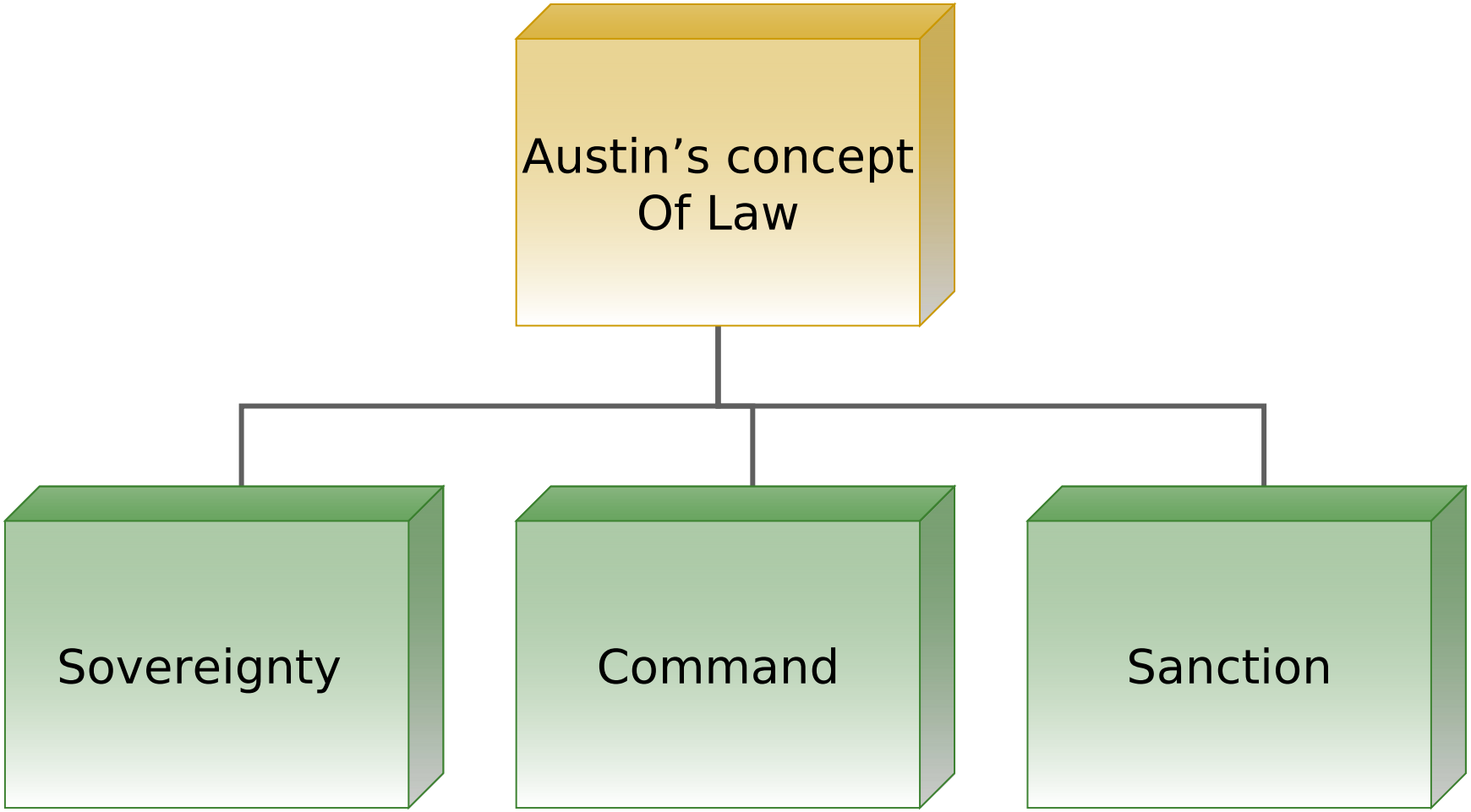
- A jurist and philosopher of the 19th c, he had many complaints against the common law which was heavily based on natural law.
- English law- as dog law
- The common law is un codified, highly relied on courts, decisions are unpredictable and subject to the feelings and prejudices of judges.
- The common law also lacks clarity for it confuses law with other values
- This clarity, Bentham believed, could only be achieved with a rigorous separation of law and morality.

John Austin Positivism

- ***Law is a command of the sovereign enforced by sanction***. *Austin*

Three elements

- Sovereign
- Command
- sanction


Austin’s concept
Of Law
Sovereignty
Command
Sanction

Sovereign

- Austin says, where the bulk of a given political society are in the habit of obedience to a determinate common superior, and that common superior is not habitually obedient to a determinate superior.
- Sovereign may be a king or a parliament: The common superior must be ‘determinate’. A body of persons is ‘determinate’ if ‘all the persons who compose it are determined and assigned’.
- Society must obey the sovereign: The society must be in ‘the habit of obedience’.
- Obedience only to Sovereign: ‘…habitual obedience must be rendered by the generality or bulk of the members of a society to…one and the same determinate person (king) or determinate body of persons (parliament).’

- Sovereign obeys to no one else: the common determinate superior to whom the bulk of the society renders obedience must not himself be habitually obedient to a determinate human superior.
- Supreme in power: the power of the sovereign is incapable of legal limitation. Austin says: ‘Supreme power limited by positive law is a flat contradiction in terms.’
-

Command

- Austin’s theory is known as well “command” theory or Imperative theory.
- For Austin law is a set of rules in the form of commands given by determinate higher body to its subjects.
- Command is explained by the power and purpose of the party commanding to inflict an evil or pain in case his order be disregarded’.
- Austin’s theory of law is different from the others because he emphasizes on the command, while others tend to see law as a set of rules whose purpose should be to mark out a general sphere of liberty of the individual guaranteed against the risk of arbitrary state power.
- Austin, by contrast, sees law as a technical instrument of government or administration, which should, however, be efficient and aimed at the common good as determined by utility.

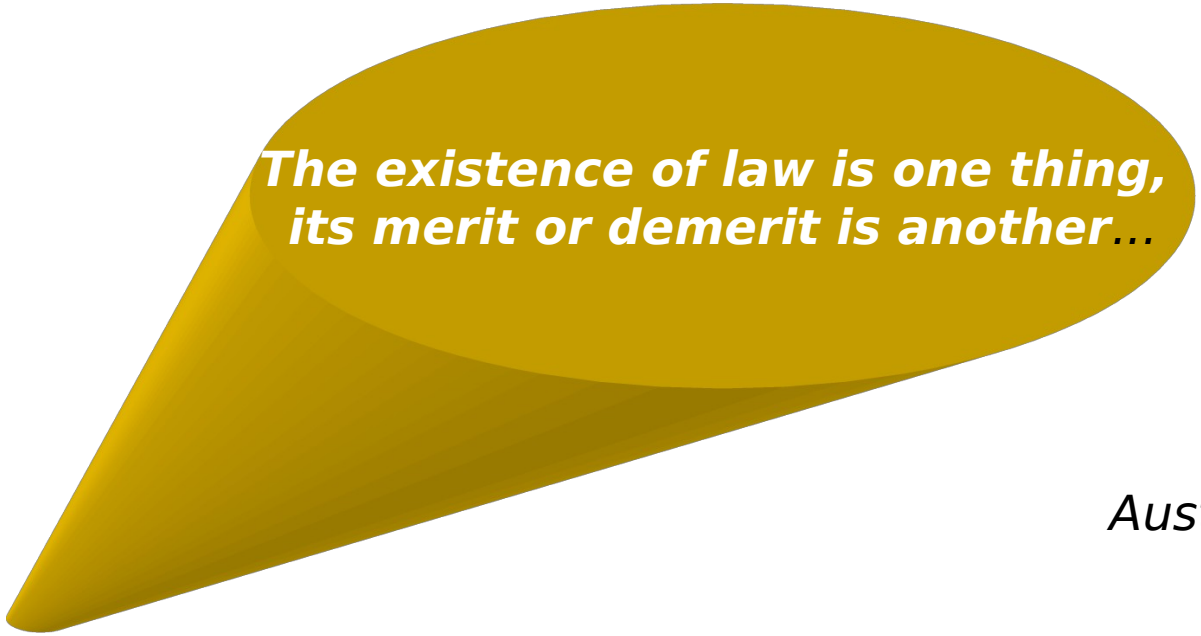
Sanction

- Austin's view of law is also reflected clearly in the emphasis he attaches to punitive sanctions in the structure of a law.
- Since sanctions are essential for the existence of commands, they are, for Austin, essential to the existence of laws.
- There must be, he said, 'a power to inflict an evil to the party' in case of non compliance.
- He claimed that there is sanction behind every kind of legal rule.
- The sanction may be of different form: Mere inconvenience or the fact that a transaction or document is rendered null and void by law would count as sufficient sanction. A sanction can also be a further legal obligation. Thus, breach of one law (say, a traffic offence) might lead to a further obligation (to appear in court to answer charges). Chain of legal obligation is possible.

- ‘Imperative laws’, lacking sanctions completely, are not laws in the Austinian sense.
- Neither are declaratory nor repealing ‘laws’, since they command nothing.
- For example, most of the rules in the civil code are with out sanction and hence, according to Austin, they are no laws.

- Discuss on the role of law based on modern legal and political philosophy and that of the classical one, such as the Austinian one.

The Separation thesis



Austin

- Since ancient Greece all the way up to early Christian times, it had been widely considered that a relationship existed between the validity of a law and its moral content.
- This notion is totally rejected by Austin. For Austin, a law is valid law if it is set by a sovereign. It is valid if it exists, regardless of its moral content. If it is commanded by the sovereign, if the law is decreed, placed in position, posited, then it is valid law.
- Thus, what he called as ‘positive law’ is a law what ever its source or contents. A positivist is, hence, one who regards a law as being valid not by reference to some higher law or moral code, but by reason of no more than its existence.

Austin specifically declares that:

The existence of law is one thing, its merit or demerit is another. Whether it be or be not [i.e. whether law exists or does not exist] is one enquiry; whether it be or be not conformable to an assumed standard [such as morality or justice], is a different enquiry.

- It is no problem to enquire the two kinds of law but it is no more than that.
- For Austin, the fact that the law, according to some higher principle, is not what it ought to be is no reason for saying that it is not.
- Eg. Abortion, prostitution, cloning
- Therefore, for positivist, the subject matter of jurisprudence is positive law. The scientific investigation and analysis of law must be revolve around or concentrate on the positive law, law created by sovereign power.

Criticisms by Hart

- Laws as we know them are not like orders backed by threats [The content of law is not like a series of orders backed by a threat. Imperative, permissive, declaratory laws
- Austinian sovereign is not bound by any law, which makes his principle unfit from modern constitutional law perspective
- Austinian sovereign is the sole author of laws. But in reality we have laws makers of different kind. Eg, besides to the legislature we have courts, administrative bodies
- Austinian laws are not based on institutional strength.

Questions for today

- What does positivism signify? Discuss the meaning and its view on laws?
- What do you understand by law as ‘Is’ and ‘ought’?
- Do you agree on Austin’s definition of law, particularly as it being a command and on the sovereign power?

PURE THEORY OF LAW

Hans Kesen

Learning outcomes

By the end of the session you will be able to:

- Explain the concept of pure theory of law
- Identify the law as the proper jurisdiction of jurisprudence
- Comprehend the idea of *grundnorm*
- Compare the concept of grundnorm with constitution
- Determine whether it fits to reality or not

Overview

Pure theory of Law

The *Grundnorm*

Session Review

Pure theory of law

- Kelsen firmly believed in Hume's distinction between ‘is’ and ‘ought’, and in the impossibility of deriving ‘ought’ conclusions from factual premises alone.
- kelsen found out that natural law has flaws and it contaminates law with other standards,
- This makes it impossible for scientific study of the subject matter.
- Hence, instead, Kelsen suggested a ‘pure’ theory of law which would avoid contamination of any kind.
- He argued that legal theory must be isolated from psychological, sociological, and ethical matters.

The Basic Norm (Grundnorm)

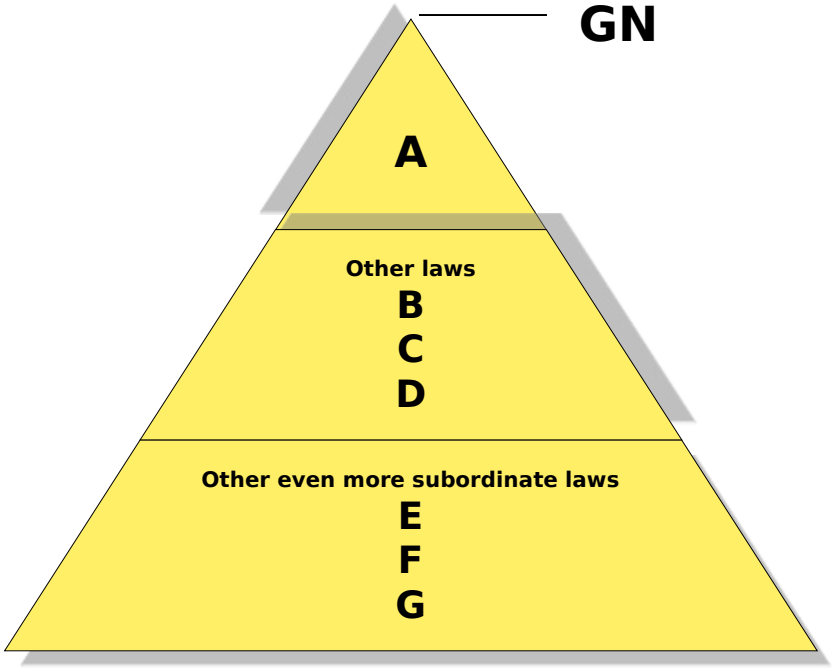
- **The law, according to Kelsen, is a system of norms. Norms are 'ought' statements, prescribing certain modes of conduct.**

- **Unlike moral norms, however, Kelsen maintained that legal norms are created by acts of will .**

- **purity of method permits the analyst to see that every legal system is in essence a hierarchy of norms in which every proposition is dependent for its validity on another proposition. The justification for describing any particular rule as law thus depends on whether there is some other proposition standing behind it, imparting to it the quality of law. This regression is continued until the Grundnorm, or "basic norm," is arrived at. The basic norm derives its validity from the fact that it has been accepted by some sufficient minimum number of people in the community.**

G is valid if conforms to F,
F is valid if = to E
D is valid if = to C etc

All laws are valid if conforms to GN



H.L.A Hart

The Concept of Law

Session Objectives

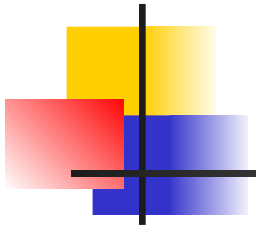
By the end of this session you will able to:

H L A Hart- The Concept of Law

- Having rejected the command theory of Austin's, as discussed in the Austin's part, now, Hart develops and rebuilds his own positivist theory of legal validity.
- In order o understand the system of rules he generally classified rules into:

Social Habits v. Social Rules

- An example of social habit might be the habit of a group to go to the cinema on Saturday evening.
- An example of social rule might be a rule that a man should take his hat off in church.



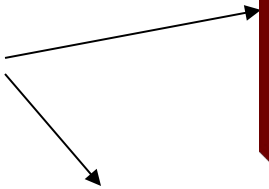
- Social Habit:
  - ✓ Are not rules
  - ✓ Violation is not considered as fault
  - ✓ Violation doesn’t cause criticism
  - ✓ Although observable from an outsider perspective, it does not consciously bind inside members
- Social Rules
  - ✓ Violation causes fault and criticism
  - ✓ Members must feel the binding nature of it

Internal and External aspect of rules

- A statement about a rule made by an outside observer may be said to be made from an external *point of view*; a statement made by a member of the group who accepts and uses the rules as a guide to conduct may be said to be made from an internal *point of view.*
- Since social habits are observable by an outsider, but the group is not aware of them, they have an external aspect, but not an internal one. Social rules have both an external and internal aspect.
- Internal point of view signifies that the rule would be taken as binding by members of society and serves as standing point for evaluation of ones and others actions. Violation which may resulted in social protest…reprimand or disapproval

Social Rules

- If something is a social rule, then we would find that such words as ‘ought’, ‘must’, ‘should’ are used in connection with it.
- Social Rules



Those social conventions of simple nature, such as rules of etiquette or rules of correct speech.

Those are rules which constitute obligations. There must be insistence that members should follow or threat to make them follow

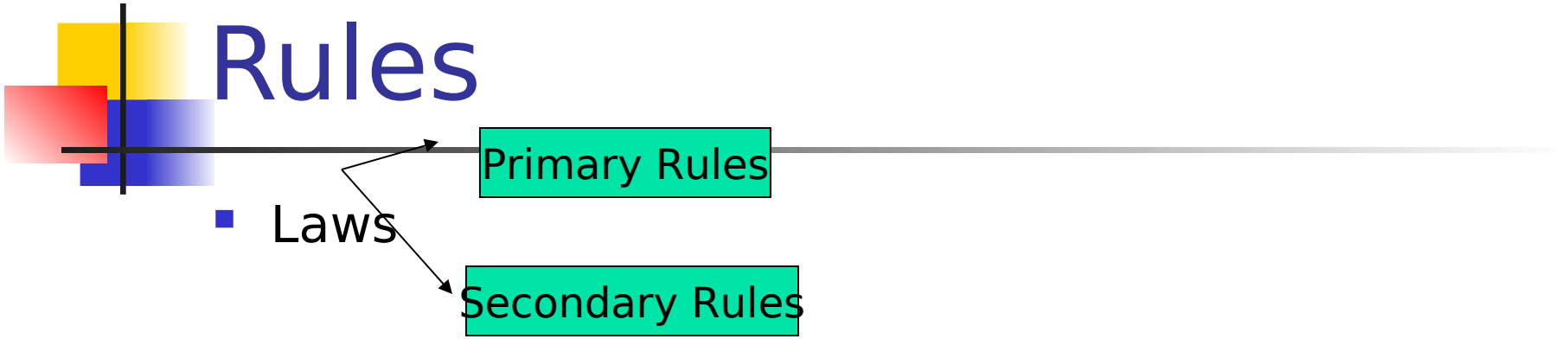
- Rules of this second kind are regarded as important because they are believed to be necessary to maintain the very life of the society, or some highly prized aspect of it. Example are rules which restrict violence or which require promise to be kept.

Obligations

- Rules of this nature again is classified in to two

1. Rules which form part of the moral code of the society concerned: obligations of customary nature to which there is no organized system to enforce.
2. Rules which take the form of law – even in the primitive stage there were such kind of rules which basically necessary for the continuity of society. If not gov. society enforces them collectively.

Primary and Secondary Rules



- Primary rules of law are said to be those which are essential for any kind of social existence, those which prescribe, prevent or regulate behavior in every area with which the law is concerned.
- These are all the rules constraining anti-social behavior; rules against theft, cheating, violence and so on.
- Eg. All the substantive law that prescribes rights and duties, such as criminal law, civil law

Primary rules....

- Basically primary rules are rules that govern primitive society.
- These rules are not legislated or made rather they evolve through the process of practice and acceptance.
- Their validity is to be verified by checking whether they are accepted substantially by all members of the community.
- Works well in a community of small in number and closed in system.
- Such simple rules are no more effectively serving modern society

Defects of primary rules

1. If doubts arose as to what the primary rules were, there would be no means of resolving the uncertainty. There would be no procedure for determining what the rules were (e.g. by referring to some authoritative text, or asking guidance from an official whose function it was to decided such matters).
2. There would be no means of altering the rules according to changing circumstances. The rules would be static.
3. There would be no means of settling a dispute as to whether a rule has been broken. (This is the most serious defect of all.)
4. There would be no one with authority to impose punishments for breaches of the rules. Conformity with the rules would only be secured by defuse social pressure, or by punishments meted out by the group as a whole. This would be an inefficient way of ensuring that the rules were observed. Unorganized efforts by the group to catch and punish offenders would waste time: punishment inflicted by individuals might lead to vendettas.

Secondary rules

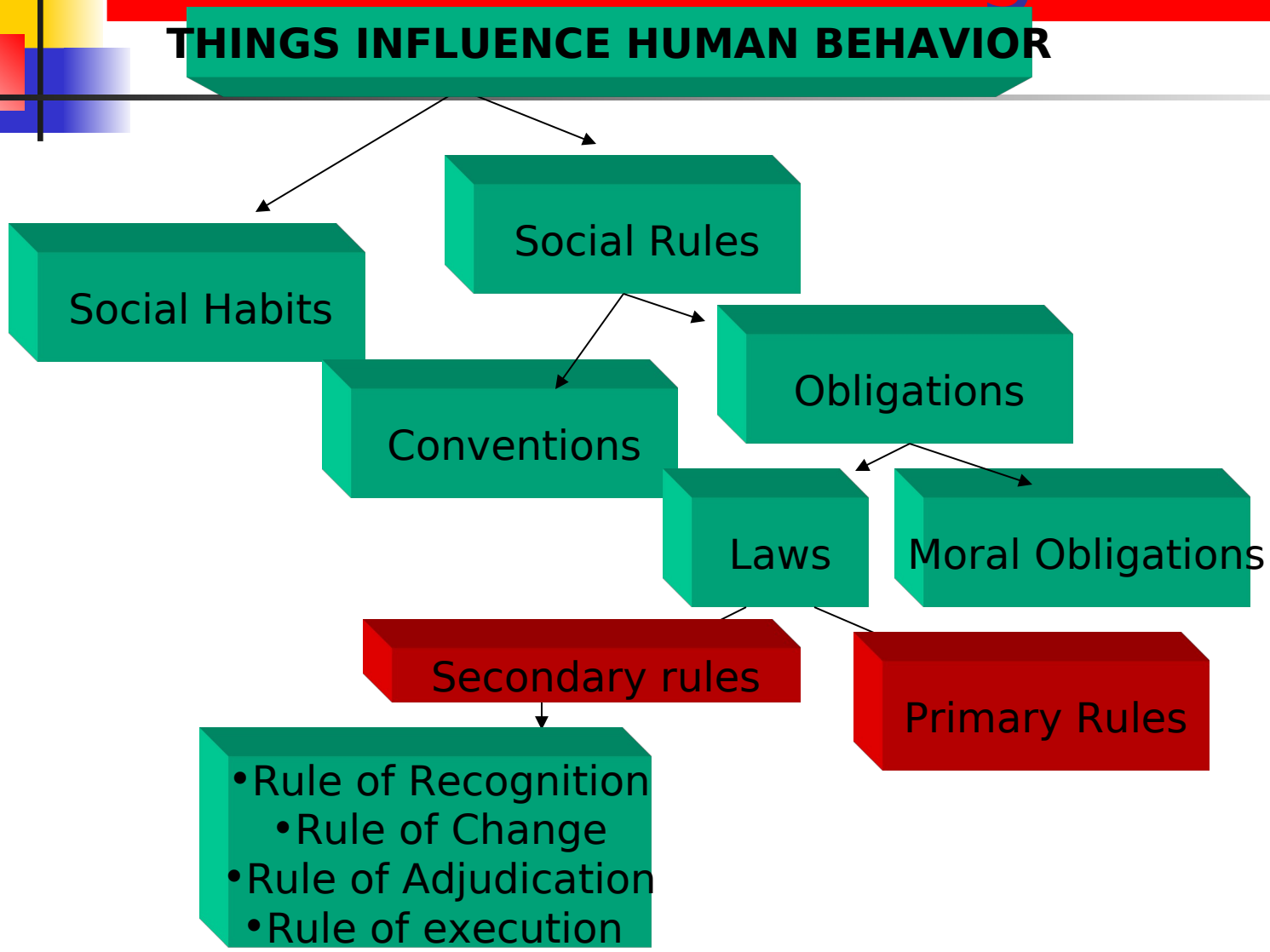
- All these defects can be rectified by supplementing primary rules by other rules of different kind, rules already referred to as secondary rules.
- Primary rules are concerned with what people must do or must not do. Secondary rules are concerned with the primary rules in that they lay down the ways in which primary rules may be introduced, varied, and abandoned;
- In essence, secondary rules provide remedies to the defects of the primary rules. Look the following

Remedies

PRIMARY RULES	SECONDARY RUL
Problem of uncertainty	Rule of Recognition
Problem of being Static	Rule of Change
Problem of Dispute settlement	Rule of adjudication
Problem of enforcement	Rule of Execution

- In effect, all rules concerning composition of parliament and rules of enactment of laws, procedural laws (civil and criminal), and some constitutional rules concerning amendment and repeal of laws are grouped under secondary rules.
- The most important of all those secondary rules is the “rule of recognition”
- Rule of recognition is about ascertaining the validity of a certain rule, is this rule valid? Or not?
- There are many ways in which this can be achieved. For example it may become accepted that the rules are as written in some text (e.g. statute). Or the secondary rule may be that a primary rule is to become a rule of group if it is enacted by a certain body (e.g. parliament) or it is decreed by a judge.
- Eg. The parking rules are valid, b/c the municipality was authorized by the regional gov. which has the right to do so as per the Regional constitution, which is again valid since it was allowed by the FDRE constitution.

Hart's chain of legal rules



Dworkin’s criticism

- Dworkin is neither positivist or naturalist
- He criticize the sharp separation thesis, he said value and facts (is and ought are blurred)
- The Assumption that laws are only rules is false, for there are also other legal principles that can be applied
- Eg. The case of *Riggs v Palmer*
- *…all laws as well as all contracts may be controlled in their operation and effect by general, fundamental maxims of the common law. No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime.*

Summary

- All positivists insist on analytical separation of law from morality.
- In no case, however, this implies that morality is unimportant.
- But it does entail the claim that clear thinking about the nature of law necessitates treating it as a distinct phenomenon capable of being analyzed without invoking moral judgment.

Question of the week

- Morality or ethical judgment is subjective. Give me an example that proves this statement.

CHAPTER FIVE Historical school

- **Savigny:** law as the spirit of the people
- Savigny was a German jurist and roman law scholar. He started the German Historical school of jurisprudence.
- His arguments:
  - Law originates in custom which expresses national uniqueness. The principles of law derive from the beliefs of the people.
  - At the next stage, juristic skills are added, including codification which does no more than articulate the Volkgeist but adds technical and detailed expression to it.
  - Decay and sets in.

Savigny…

- For him the law of a nation, like its language, originates in the popular spirit, the common conviction of right, and has already attained a fixed character, peculiar to that people, before the earliest time to which authentic history extends.
- This popular spirit (*Volksgeist*) is the foundation of all of a nation’s subsequent legal development.

Savigny…

- But Savigny knew that the popular spirit did not create the complex system of rights in land in Roman law or in any other advanced culture.
- Accordingly, he supplemented his ‘popular spirit’ origin with the theory that the jurists (legal scholars including professors and judges), who become legal specialists with the advance of civilization, are the representatives of the community spirit and are thus authorized to carry on the law in its technical aspects.
- Then after, law has a two fold existence: First, as part of the aggregate life of the community, and, secondly, as a distinct branch of knowledge in the hands of the jurists.
- Thus legal history has the ‘holy duty’ of maintaining a lively connection between a nation’s present and its primitive state; to lose this connection will deprive the people of the best part of their spiritual life.

- In short, his three stage developmental process is that fist he sees principles of law deriving from the conviction of the people; second, law reaches its pinnacle, with juristic skills which what he calls the “political element in law” added to these convections. It is at his stage that codification is desirable, to retain the perfection of the system. The third stage is one of decay

Sociological schools

- The sociological school of jurisprudence is largely a product of the 20th century. Its approach to the analysis of law differs from that of the other schools in that it is concerned less with the nature and origin of law than with its actual functions and end results.
- The sociological questions in jurisprudence are concerned with the actual effects of the law upon the complex of attitudes, behaviour, organization, environment, skills, and powers involved in the maintenance of a particular society.
- The main propagators of this school of jurisprudence are Eugen Ehrlich and Roscoe Pound

Eugen Ehrlich

- Ehrlich is from the former Austro-Hungarian empire.
- Sociological school and Historical school are similar in that they locate the source of law within the society.
- But Unlike the Historical School that conceives a nation's law as tied to the primitive consciousness of its people, Ehrlich's sociological conception of law located the law in the present-day institutions of its society.
- In this regard Ehrlich says:

  At present as well as at any other time, the center of gravity of legal development lies not in legislation, nor in juristic science (jurisprudence), nor in judicial decision, but in society itself.

Ehrlich continue...

- **In his sociological study he observed that what the law-books said and what actually followed by the people as well as by courts are different.**
- **He argued that there was a living law independent of legal propositions and that this living law is a proper study of the science of law.**
- ***This then is the living law in contradistinction to that which is being enforced in the courts and other tribunals. The living law is the law which dominates life itself even though it has not been posited in legal propositions.***
- ***The source of our knowledge of this law is, first, the modern legal document; secondly, direct observation of life, of commerce, of customs, and usages, and of all associations, not only those that the law has recognized but also of those that it has overlooked and passed by, indeed even of those it has disapproved.***

Ehrlich…

- To strengthen his study of this line of approach he studied many institutions or associations of the society. Eg. Marriage, inheritnce, or other of religios or political nature.
- All these associations have ‘inner order’ which has a character of law, but developed long ago before the creation of the positive law.
- People follow different practices and rules in these associations which are completely different from the positive law.
- Courts need to consider these ”inner orders” or the ”living law” in giving decision. Statute and case laws are never enough nor sufficient by themselves.

Roscoe Pound

- **Pound was the principal advocator of sociological based study of the law in the United States.**
- **His concern was to examine law in action as opposed to the topic of law in books.**
- **If we compare sociological jurisprudence with the concept of the three other (Natural, Analytical, and Historical) schools the following characteristics may be emphasized:**
  - **It is concerned more with the working of the law than its abstract content.**
  - **It regards the law as a social institution capable of improvement by intelligent human effort, and it considers that it is the sociologist jurist's duty to discover the best means of aiding and directing such effort.**
  - **It emphasizes the social purposes which law sub serves rather than its sanction.**
  - **It looks upon legal doctrines, rules and standards functionally and regard the form as a matter of means only.**

On legal education

- *The modern teacher of law should be a student of sociology, economics, and politics as well. He should know not only what the court decide and the principles by which they decide, but quite as much the circumstance and conditions, social and economic, to which these principles are to be applied.....and the state of popular thought and feeling which makes the environment in which the principles must operate in practice. Legal monks who pass their lives in an atmosphere of pure law, from which every worldly and human element is excluded, cannot shape practical principles to be applied to restless world of flesh and blood.*

Encarta Encyclopedia, Hans Strand/Getty Images

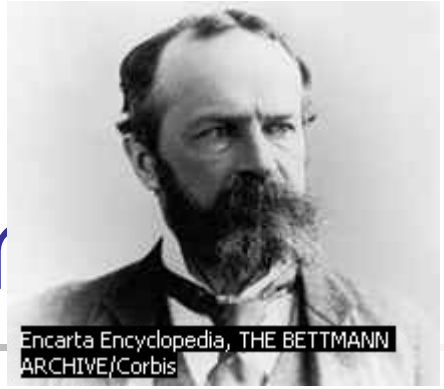
Encarta Encyclopedia, Brian Vikander/Corbis

Chapter Six: Legal Realism

- The focus of this course is the American realism, as opposed to the Scandinavian one.
- The American legal realism has its origins in the twentieth century.
- Legal realism attempts to describe the law without idealizing it, to portray the law as it is.
- American legal realists were concerned to portray actual practice: the centrality of the court and the unimportance of rules in statute books for predicting what courts do
- Realists reject natural law theory, and they are not either positivists for they do not embrace the command theory.

- Oliver Wondel Holmes and John Chipman Gray are greatly considered as the two mental fathers of the American Legal Realism. We shall also discuss, Karl Llewellyn and Jerome Frank.
- As with many new attitudes and schools of thought, the American brand of realism was a reaction to an earlier school.
- Realism attempted to be both practical and pragmatic, rejecting theoretical and analytical approaches to jurisprudential questions, and attempting to look at what it perceived to be the reality in the question: how does law work in practice?

Influence of pragm



- American realism found its source in the teaching of William James' Pragmatism
- Pragmatism, philosophical movement that has had a major impact on American culture from the late 19th century to the present.
- Pragmatism calls for ideas and theories to be tested in practice, by assessing whether acting upon the idea or theory produces desirable or undesirable results.
- According to pragmatists, all claims about truth, knowledge, morality, and politics must be tested in this way.
- Pragmatism has been critical of traditional Western philosophy, especially the notion that there are absolute truths and absolute values.

Pragmatism...

- In the words of James:
- *A pragmatist turns away from the abstraction and insufficiency, from verbal solutions, from bad a priori reasons, from fixed principles, closed systems, and pretended absolute and origins. He turns towards concreteness and adequacy, towards facts, towards actions and towards power.*
- Pragmatism has, thus, stimulated a new approach to law, that “of looking towards last things, fruits, consequences or results. Generally speaking, how the rule of law work, not what they are on paper, is the theme of pragmatic approach to legal problems.

Law as prophesy of the court: Oliver W. Holmes

- ***The prophesies of what the court will do in fact, and nothing more pretentious, are what I mean by the law.***
- ***The life of the law has not been logic, it has been experience***

Justice Oliver Wendell Holmes

Holmes on the role of the judge

- In a word judges are influenced by legal or extra legal conditions prevalent within the society.
- Like all realists Holmes as well gives the central place to courts. Realists believe in judge made laws.
- For legal realism the two most influential Holmes' ideas were his prediction concept of law and his view that policies and prejudices have more to do with judicial decisions than the logical application of rules.
- In his famous quotation he says:
- *The prophesies of what the court will do in fact, and nothing more pretentious, are what I mean by the law*

- *Take the fundamental question, what constitutes the law? You will find some text writers telling you that it is ….a system of reason, that it is deduction from principles of ethics or admitted axioms or what not, which may or may not coincide with the decisions. But if we take the view of our friend the bad man we shall find that he does not care two straws for the axioms or deductions, but that he does want to know what the Massachusetts or English court are likely to do in fact. I am much of his mind. The prophesies of what the court will do in fact, and nothing more pretentious, are what I mean by the law.*

Holmes...On the nature of law

- Holmes was a pragmatist in that he recognized the relevance of **extra-legal factors**. Holmes attacked the view that the Common Law was an entirely valid manifestation of higher reason
- ***The actual life of the law has not been logic: it has been experience. The felt necessities of the times, the prevalent moral and political theories, institutions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-me, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.***

Riggs vs. Palmer

- Concerning the role of the judge and the things that can influence the judge read attachment reading case between Riggs v. Palmer.
- A young man named Elmer E. Palmer living in New York State in 1882 who decided to kill his grandfather was the bad man. Of course, murder was clearly defined as a crime, but Elmer thought that by committing the act he would inherit under his grandfather’s will. Perhaps he calculated that a long prison term plus eventual parole was worth the money. In any event, there was no law on the New York books that said that a murderer could not inherit under the terms of a will if he kills the testator.

Criticism

- This approach disregards the rules and laws that establish the judiciary itself.
- It also left out multitude rules particularly in the field of public administrative law that are properly described as law but which do not lie in the field of litigation and therefore are not matter of prediction.

Centrality of the judge: John Chipman Gray

- In his book, *The Nature and Source of the Law,* Gray defines law as follows:

The law of the state or of any organized body of men is composed of the rules which the courts … lay down for the determination of legal rights and duties.

- For Gray every law is judge made, Statutes (legislations made by parliament) are not laws by virtue of their enactment. They only become law when applied by a decision of the courts. Only then does a legislative enactment spring to life and acquire actual force
- Legislation is therefore no more than a source of law. According to his view, it is not a law until it had been interpreted by the courts, for "the courts put life into the dead words of the statutes."
- Hence by removing statutory legislation from the center of the law and putting it as one form of source of the law, he puts the judge in the center, instead.

- Gray distinguishes ‘the law’ from ‘a law’.
- ‘A law’ ordinarily means a statute passed by the legislature of a state. ‘The law’ is the whole system of rules applied by the courts.
- Thus, Gray considered ‘a law’, that is, a statute passed by the legislature (as well as precedents, custom, and morality) as source of the law not the law itself. Thus, statute, precedent, custom, and morality are on Gray’s view, the basis for the rules that the courts lay down for making their decision. Means all of them are not binding. The judge’s choice is what matters.

- Gray offers two lines of evidence in support of this argument.
- First, he points to the common circumstances where a situation before the court is entirely novel. In the absence of statutes, precedents, or custom on the issue, there is absolutely no doubt but that the court will still come to a conclusion and state ‘the law’ governing the matter.
- Second, Gray points to the mutability of law itself through judicial decision making. Both through review of trial court decisions at the appellate level, and through appellate reconsideration of its own prior decisions, the ‘law’ becomes very much a product of judicial function.

On analytical

- Irrespective of the centrality of the judge as differ from the centrality of the sovereign, Gray warmly accepts the separation of the study of law from other values. He said:
- *The great gain in its fundamental conceptions which jurisprudence made during the last century was the recognition of the truth that the law of a state or other organized body is not an ideal, but something which actually exists. It is not that which is in accordance with religion, or nature, or morality; it is not that which it ought to be. But that which it is.*

Criticisms

- His definition of law leads him to the curious position that the rules laid down by a court in deciding a case are “the law” for the case but are only sources of the law for the “next case.”
- By classifying law as the law and a law, Gray puts legislations and judicial statutes with the lesser sources of law such as custom, tradition, religion and morality
- He denies the facilitative function of the law, such as procedral laws, institutional laws etc

Karl Llewellyn
On the nature of law

- Karl Llewellyn is another realist jurist in the American realism movement. In his book, *The Bramble Bush,* he explains the concept and nature of law in the following manner:
- *This doing of something about disputes, this doing of it reasonably, is the business of law. And the people who have the doing in charge, whether they be judges or sheriffs or clerks or jailors or lawyers, are officials of the law. What these officials do about disputes is, to my mind, the law.*
- *Holmes and gray gave the power of making law to the judges of higher courts, but Llewellyn widens it to all officers of the law.*

Rule Skepticism

- Llewellyn is described as “rule skeptic” in that he distrusts rules as laws.
- For Llewellyn, legal rules do not describe what the court are purporting to do nor do they describe how individuals concerned with the law behave.
- Legal rules as found in books and emphasized in judicial decisions do not accord with reality. Rules, as described in books and judicial decisions, have essentially taken on a life of their own, and as such bear little resemblance to the actuality of legal process.
- Hence, the judge uses his own reasoning and references to render decision

Jerome Frank

- Judge Jerome Frank categorizes the whole realist movement into “rule skepticism” and “fact skepticism.”
- As shown above, Llewellyn and others grouped under the former class, and Frank himself in the latter.
- According to rule skepticism, those formal rules found in judicial decisions and in books, were unreliable as guides in the prediction of decisions.
- Frank says that judges do not explore all the corpus of the law to decide a case. They decide the case first by themselves and then search a law that supports their argument.

- Thus the main thrust of Frank's attack was directed against the idea that certainty could be achieved through legal rules.
- This, in his view, was absurd. If it were so, he argued, why would anyone bother to litigate?
- He gave examples from the US supreme court decisions where same issue was decided differently by different judges in different periods.

On Fact skepticism

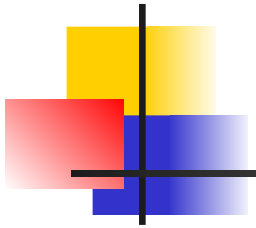
- Judge Frank has persuasively argued that the greatest uncertainties of the judicial process are not in the law-finding but in the fact finding part; or at least, primarily in the witness-jury part.
- In the guise of finding truth opposite parties fight in courts, interrogating witnesses and their by distorted facts.
- Hence, the chief reason why legal rules do not more adequately perform the principal tasks they are supposed to do –guide and predict the decisions of trial courts-is, he maintains, because of the uncertainty as to what facts the *trier* of fact (especially the jury) will find as the ones to which the legal rule or principle is to be applied.

- A man in possession of real property has a right to use “reasonable” force in repelling willful intruders, but how can he tell, when confronted with an intruder, what a jury will subsequently find to be “reasonable” force? Thus, one of the supposedly securest of legal rights in American law, a basic part of the ownership of real property, is rendered insecure by the uncertainty as to what the trier of fact will find.
- The major cause of uncertainty is not the legal rule, but the uncertainty of the fact finding process. Much depends on witness, who can be mistaken as to their recollections; and on judges and juries, who bring their own beliefs, prejudices and so on, in to their decisions about witness, party etc. It is not unusual for the jury to give a decision (guilty or non-guilty) which is not expected and sometimes surprisingly.

- Further, the uncertainty can also be found in the process by which a judge determines a particular fact to be a material fact. This means whenever the judge decides a case he weighs facts and chooses the material or very relevant one for his decision. Hence, the argument is that different judges may come to different outcomes of same case because of application of different facts.

Summary

- Realism is a theory of law that focuses on judge made law. Laws are not some higher principles but the beliefs of the judge.
- Realists also believe in the separation thesis
- Focus on the conception of law as a means to social ends not as an end in itself
- Laws and society are influx and the task of the judge is to meet the laws with societal demand



- *Brown* v. *Board of Education of Topeka*, landmark court case of 1954 in which the Supreme Court of the United States unanimously declared that it was unconstitutional to create separate schools for children on the basis of race. It reverses previous decision which supports separation of schools but equal facility

- In the 1973 case of *Roe* v. *Wade*, the Court overturned state prohibitions on abortion—concluding that the Constitution guarantees every woman a right to choose an abortion, at least during early stages of a pregnancy

Assignment 20%

- Make a group of 8 or 9 people

- Group 1 Natural Law
- Group 2 Positivism
- Group 3 Realism
- Group 4 Judges

Task

- You will have a debate (moot court) in which you will present you case in favour of one of the theories and criticizing the others.
- Group 4 will be judging and will give points
- You will be graded on the strength of your debates, points you raise, criticism made
- Group 4 will be graded on the points it notes, on the weights it made and reasons for its judgments

Chapter Seven Enforcement of morality

- The relationship between law and morality, or more accurately between legal validity and moral quality, has posed major questions for jurisprudence over the centuries.
- The moral criteria for the evaluation of positive law and the implication of their application are particular concern of naturalist theories but have at various times troubled positivists also.
- A particular interest in this section is the famous debate made between Lord Devlin and H.L.A. Hart on the issue of enforcement of morality, whether the law should enforce morality or not.
- The reason for the debate was the Wolfenden Report.

The Wolfenden Report

- In 1957 the Wolfenden Committee made two reports to the government:

1. private prostitution should remain legal, and public soliciting be outlawed
2. male homosexual acts in private between consenting adults over the age of 21 should be legalized.

- It concluded

Unless deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality which is, in brief and crude terms, not the laws business.

- Any private individual activities that presented no threat to other citizens, or to the maintenance of public order and decency, should remain beyond the reach of the criminal law.

Influence of J.S. Mill

- John Stuart Mill, English utilitarian and philosopher has written an interesting book entitled *On Liberty* which has a great influence in the Committee's report.
- In one of the most influential statements in modern political and legal philosophy, Mill had declared that:

The sole end for which mankind is warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or mental, is not a sufficient warrant.

- If the action doesn't cause harm on others or if the action causes harm only on the agent himself, society has no right to interfere.

An attack by Lord Patrick Devlin

- Lord Devlin was by that time a high court judge in the English courts system. He attacked the findings of the committee.
- The two requirements in the homosexuality reasoning were consent and Age (21 years and above)
- Means as far as the act s committed in private between consenting adults, society or the law should not interfere.

On Consent

- Devlin’s attack begins and concentrates on the first element, consent.
- According to Devlin, consent is not a sufficient ground for an action to be private morality and thereby a private issue, not the law’s (or the society’s) concern.
- If so it means consent can prevail any immoral act.
- But this is inconsistent with modern criminal laws.
- If we allow homosexuality on the basis of consent, then consistency will demand us to allow incest, suicide, attempt suicide, euthanasia (mercy killing), abortion, duel etc which are committed based on consent as well.
- This shows, according to Devlin, that the criminal law is based on moral grounds and the function of the law is enforcement of moral principles and nothing else.

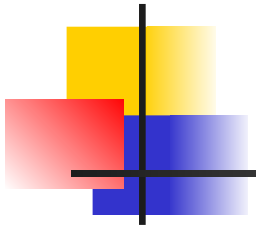
Justifications for legal enforcement of morality

- What are the reasons for the enforcement of morals by laws? Why is that private morality becomes public issue?
- In attempt of answering this question Devlin frames three questions.

1. Has society the right to pass judgment at all on matters of morals? Ought there, in other words, to be a public morality, or are morals always a matter for private judgment?
2. If society has the right to pass judgment, has it also the right to use the weapon of the law to enforce it?
3. If so, ought it to use the weapon in all cases or only in some; and if only in some, on what principles should it to distinguish?

1. Does society has the right to pass judgment on private morality?

- The answer for this question is given in the positive.
- The reason is because there is shared morality which are basis, foundations or bondages to the unity of society
- He gives marriage as example. For example, in the western Christian society marriage is concluded between one man and one woman.
- The moral background which emanated from Christianity forbids bigamy or polygamy. So the idea of this morality, which is adopted by the couple, serves as a base for the continuity of the marriage institution. One cannot remove this morality without bringing down the marriage itself.



- *…without shared idea on politics, morals, and ethics no society can exist. Each one of us has ideas about what is good and what is evil; they cannot be kept private from the society which we live. If men and women try to create a society in which there is no fundamental agreement about good and evil they will fail;*
- *For society is not something that is kept together physically; it is held by the invisible bonds of common thought. If the bonds were too far relaxed the members would drift apart. A common morality is part of the bondage. The bondage is part of the price of society; and mankind, which needs society, must pay its price.*

2. Has society the right to use the weapon of law to enforce morality?

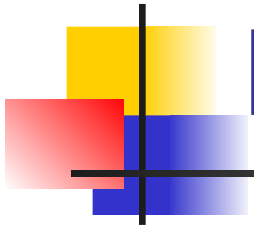
- *…If society has the right to make a judgment and has it on the basis that a recognized morality is necessary to society as, say, a recognized government, then society may use the law to preserve morality in the same way as it uses it to safeguard anything else that is essential to its existence.*
- *But what is the rational behind? Means why should society be given this power? Devlin analogizes morality to a government, and immorality to treason.*
- An established government is necessary for the existence of society. Treason (conspiracy to overthrow the government) is in effect against the security of the society. An established morality is as necessary as a good government to the welfare of the society.
- In conclusion, Devlin says that there is no sphere of private morality which is not the concern of the society or the criminal law.

C. In what circumstances that state should exercise its power?

- Devlin prefers to be selective for it is not possible to forbid every immoral act by the criminal law. eg. Helping thy neighbor
- But how are the moral judgments of society to be ascertained? Who decides that an act is immoral so as to condemn it to illegality? In whose eye is an act to be immoral? What are the clues for the legislature?
- Devlin takes the judgment of a reasonable man.
- The reasonable man ‘is not expected to reason about anything and his judgment may be largely a matter of feeling’.
- ‘Immorality then, for the purpose of law, is what every right-minded person is presumed to consider being immoral.’

Clues...

- Nothing should be punished by law that does not lay beyond societal tolerance.
- Devlin says an immoral act which is tolerated by the society need not to be outlawed.
- Devlin puts three kinds of feelings that can lead us to the conclusion: intolerance, indignation, and disgust.
- It is nevertheless a vague and highly subjective standard that he is proposing,
- Eg. Cruelty on donkeys in Ethiopia
- Homosexual marriage in England
- Public flogging in Somalia by Islamic authorities
- Stoning a raped girl in Nigeria
- Cannibalism in Congo
- Which of the actions are intolerable, indignant or disgusting for you?



Harts Reply to Devlin