

LAWS 2249 Legal Theory

I Law, Power and Obligation

Early Legal Positivism

Austin

- Descriptive theory of the law (the science of the law) not a normative theory of how the law should be (the science of legislation).
- Viewed the law as a series of **sovereign commands and sanctions or the threat of sanctions**;
 - The **sovereign** is the institution of **supreme political authority**.
 - Law reflects a power to inflict **punishment** in case of non-compliance;
 - Laws require **generality**;
 - Generality to acts required or prohibited and;
 - Generality as to persons addressed by the command.
 - Sanctions may be obligations or a series of obligations, however at the end there must be a sanction.
 - **Procedural rules** facilitate the direct sanctioning processes of law.
- **Duties** are more fundamental than rights;
 - **Command and duty** are correlative terms
 - Thus, **every right presupposes a duty (or command) in someone else not to infringe that right e.g.** “I can claim a right against X because the law has imposed a duty on him towards me.”
- Most significant source of law is **positive law**;
 - Laws set by a political **sovereign** acting in pursuance of legal rights conferred on them by political superiors.
 - Other source of ‘rules’ is **positive morality** which is not bestowed by political superiors in pursuit of legal rights. This sort of rule-making shapes **attitudes, opinions and moral sentiments** also set by **public opinion**.
- Judges;
 - Judges make law by **implementing the sovereign’s tacit commands**.
- Rejects the existence of any natural law derived from human nature.

Conclusions about Austin

- Austin’s theory sets up a model of **centralised governmental power structures**.
 - Discard Hobbes’ social contract theory replacing it with the idea of factual basis of sovereignty in habitual obedience.
 - The sovereign must be **(1) common, (2) determinate and (3) illimitable by law**.
 - Positive morality may constrain the sovereign, but not law.
 - Sovereignty is a **pre-legal concept**.
 - Not a theory of the rule of law but a theory of the law **as an instrument of power**.

Bentham

- Bentham had argued that the goal of any law was to create the greatest happiness for the greatest number of people (**utilitarianism**).
 - Law was judged based on to what extent it served the **common good**.
- **Argues laws should be contained in codes**;
 - Creates a legally rational system where judges decide cases based on the demands of utility in the particular case.

- Rational law could only be constructed through **purposive legislation not be precedent.**
- Rejects natural law.

Hart and Contemporary Legal Positivism

- Viewed an effective legal system as a **system of primary and secondary rules;**
 - Primary rules impose duties and require persons to refrain from certain behaviour
 - Secondary rules confer powers to facilitate the enforcement and enactment of primary rules
- If a society exists with only primary rules it will suffer from three main defects;
 - The rules are uncertain because there is no procedure for addressing doubt as to the scope of a rule
 - The rules possess a static character
 - The diffuse social pressure by which the rules are maintained is inefficient
 - These can be overcome by **supplementing primary rules with secondary rules.**
 - The most important of these is the **rule of recognition which states the criteria for the validity of a law.**
 - Also requires **rules of change and rules for adjudication.**
- **Criteria for a valid legal system;**
 - Those rules of behaviour which are valid must be **generally obeyed**
 - These rules of **recognition, change and adjudication must be accepted as common public standards of official behaviour by its officials.**
- Rules are conceived and spoken of as imposing obligations when the general demand for conformity is insistent and the social pressure brought to bear upon those who deviate or threaten to deviate is great. Characteristics of obligation include;
 - Serious social pressure to conform
 - The rule is believed to be necessary for social cohesion
 - The rule invokes personal sacrifice or renunciation in order to ensure compliance
- Distinction between social habits and social rules;
 - Social habits are followed but not punished however we feel bound to follow social rules
 - The **external aspect of the law** is the observable truth that those who disobey the law will be punished.
 - The **internal aspect of the law** is the way in which people in a society feel a sense of obligation to follow a rule. **It is from this internal aspect that law derives its normative quality.**
- This is more important for officials who must follow the constitutional rules, which if they fit, could ignore without accountability

II Adjudication and the Role of Judges

Key Points for Argument:

- The law is laden by moral claims and political disputes and so the law is inherently indeterminate at the margins.
- Rules based outcomes are mostly predictable
- Judges may act in a discretionary manner, although this discretion is constrained.
- The discretion of judges is constrained by legal rules as well as moral and political principles
- The judge therefore is a decision finder, not necessarily a decision maker.