Jurisprudence Notes

Contents

Topic One – Natural Law and Positivism

Topic Notes

Introduction

Natural law and positivism are associated with opposed positions on two important issues:

1. Nature of morality – what is morally right or wrong; what is objectively true or false (moral realism) or is it better to the language of truth and falsity (moral anti-realism).
2. What the law *is* and what the law *ought to be* are separate questions (anti-positivists deny this).

One divide is over the nature of morality and the other divide is over the nature of law (in terms of relationship between law and morality). These two divides are actually logically independent of each other.

When being precise it is better to use the terms such as *moral realism* and *anti-realism* when dealing with the first divide of morality, and *anti-positivism* and *positivism* when dealing with the second divide.

An analytical approach seeks to achieve clarity partly by distinguishing between different types of claims and recognising the logical relationships between them. This analytical discussion helps us understand the issue associated with the divide between natural law and positivism. The historical approach looks at how ideas have evolved through prominent figures.

Morality: objectivity and the role of reason

The first divide associated with natural law and positivism is over the nature of morality. To understand what a moral (or *normative*) claim/statement is by distinguishing it from an *empirical* statement/claim.

An *empirical* statement or claim is based on observation – they are concerned with facts.

A *normative* statement is concerned with what is morally valuable – they are concerned with how morally ought to behave.

We cannot identify normative claims simply by seeing if the principal verb is 'ought' or 'should' or has a similar meaning.

Natural law theory is associated with the claim that both empirical and normative positions can be true or false. This is the moral realist position.

By contrast, the moral anti-realist denied the reality of moral 'facts'. There are simply people's beliefs about what is morally right.

For moral nihilists (a type of moral anti-realist), moral argument is a sham – it presupposes moral facts, but no such facts exist.

However, an anti-realist need not view moral discussion as a sham. Moral discussion need not presuppose the existence of moral 'facts'.

Another divide associated with natural law theories and positivism is over the role of reason in moral judgments. A more precise distinction between ethical rationalism and anti-rationalism.

Ethical rationalists claim that it is through the faculty of reason that we discern ultimate moral values. Ethical anti-rationalists claim, by contrast, that reason cannot tell us what ends we should have.

Reason, according to ethical anti-rationalists, cannot be used to demonstrate that the person is wrong. Reason cannot be used to prove that happiness is good.

Relevance of meta-ethical questions to ethical debate

Meta-ethical discussion on reason, emotion and moral judgments can enhance self-awareness in relation to our own responses to ethical dilemmas.

Law and Morality

That suffices for the moment on the first issue – the nature of morality. The second issue on which natural law theorists and positivists are associated with contrasting positions is the relationship between law and morality.

Natural law adherents are identified with the position that we cannot determine whether a law is legal valid without thinking about its morality. This is because legal validity depends on conformity with certain fundamental moral principles. Legal positivists, on the other hand, argue that one can generally identify what law is without inquiring into its morality. One might look to see whether a community has a central authority, and then see what its edicts are. These can be understood as at least some of the laws of the community.

This disagreement over whether legal validity is dependent on conformity with certain moral values arises most acutely when dealing with evil legal systems.

Natural law theory seemed to support the court's approach – laws inconsistent with natural law were not legally valid. The legal positivist HLA Hart, however, argued that the natural law approach excluded from consideration the injustice of retrospectivity.

Of course, judges perceive their role as applying the law rather than engaging in retrospective legislation, so the natural la theorists argue that the legal positivist position will in fact lead to judges applying evil legislation until Parliament repeals it. The positivist, on the other hand, might argue that judges are permitted to make retrospective legislation. And even if judges are not permitted to make such legislation, the positivist might argue that a sharp separation between law and morality makes it clear that determining what is legal does not determine what is moral. Even if it is acceptable that judges lack the legal power to retrospectively legislate, it may sometimes be morally commendable to legislate retrospectively. In doing so, the judge engages in conscientious disobedience of the law.

The readings

Natural Law

The ancient origins of natural law thinking

All you need to know is that Aristotle distinguishes here natural and legal justice, and the former is universal while the latter varies between societies. It is also helpful to consider Aristotle's conception of the natural world. Aristotle said that what we see around us is either there by accident or because it serves a purpose. He favoured the latter explanation. This is referred to as a

teleological approach – things have 'telos' or an end/purpose. Whatever fulfils that telos is natural. What is the telos of man? Aristotle said that 'man is by nature a political animal'.

Aristotle, then, was suggesting that one distinctive human quality is the capacity to articulate what is morally right and wrong. The centrality of this idea is apparent in his statement that a state consists of those who have a moral capacity. This suggests that at least a significant component of man's telos is developing a sense of justice an acting on that. The state also has telos.

Aristotle claims in the prescribed extract that natural justice represents those rules which follow from our nature.

Locke and Blackstone

In order to discover what principles should govern civil society, Locke considered the position of people in a pre-societal state – a state of nature. He suggested that in this state, individuals are bound by laws of nature not to harm life, liberty, health or possessions, but the lack of central authority to decide disputes concerning the contravention of natural law was a significant weakness which impelled the organisation of a political community in with authority is centralised. What this suggests is that the state' justification lies in the protection of natural rights. If the state fails to protect those rights, there is a right of rebellion.

In suggesting that the common law was consistent with natural law, Blackstone, was not arguing that judges should refuse to apply legislation that conflicts with natural law. Thus, while Blackstone said that slavery was contrary to reason and the principles of natural law, and hence was not sanctioned by the common law, he also mentioned that when slavery was introduced, by statute under Edwards VI, this statute was repealed two years later.

Thus, when considering natural law, we must not assume that all claims that we view as fundamental to natural law are necessarily implied by all thinkers using the term 'natural law'. Locke and Blackstone suggested that human laws were inferior to natural law, and they understood natural law as an objective moral code. However, they were not necessarily saying that legislation inconsistent with natural laws lacked legal validity. They were saying that such legislation lacked moral validity.

Textbook Notes

Aristotle

Of political part is natural, part is legal – natural, that which everywhere has the same force and does not exist by people's thinking this or that; legal, that which is originally indifferent, but when it has been laid down is not indifferent.

It is evident which sort of thin, among things capable of being otherwise, it by nature; and which is not but is legal and conventional, assuming that both are equally changeable.

The things which are just not by nature but by human enactment are not everywhere the same, since constitutions also are not the same, though there is but one which is everywhere by nature the best.

Cicero

Ture law is right reason in agreement with nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands, and averts from wrongdoing by its prohibitions.