LEGAL THEORY NOTES

Week One: Thinking about Law

Grounding legal theory in its context and as future legal professionals. Key question: how should you conduct yourself? Three facets:

1. Office
2. Institution
3. Values

Office: a term of character or institution

Wesley Pue, 'Educating the Total Jurist?'

Note two things:

- change from moral based to technical based
- almost complete absence of ideals / morals in today's law schools

How does Pue characterise the rival accounts of legal education?

Somewhat critical of modern legal education. Needs a more moral-based education. Total jurist is a good starting point.

Anxiety regarding the total jurist. Problems with being a technical lawyer. Utility is not the only thing. Technique as such is not the problem, it is when technique is detached from morals.

Selfishness vs decency. Pue believes that thinking technically is corrupting.

How does your experience of legal education compare to R.W. Lee's vision that "[Law school should instil the vision of a divine justice transcending the imperfections of human justice ... Enlarging the 'mental horizon'" [Pue 212]?

Pue claims "Morality" went out of fashion at some point, leaving utility as the only credible measure of educational aspiration' [215]. Do you think this is in fact true? If you were to name a supplement to utility in your own experience of legal education, would it be "morality", or something else?

There are still values, although we may not talk that often about 'morality'.

Roman Law formed the basis for legal thinking. Used as a source of argument NOT as law itself. Basic form of education. Core teaching until 1960s. Statutory interpretation was developed back when things were written down on skins…

Basic legal classifications formed around 4th century AD by Roman scholars.

What are we being trained for? See Graduate Attributes. Is training to be an 'English Gentleman' appropriate? Not here. We can have professional values. The language of calling brings us back to religion.

What is the core argument of law? Is it technical or value-driven? Think of it as training and conduct: what are you training to be, and how is this done?

A good lawyer must be technically competent!! But the oaths for admission show that more than technical ability is required.

Three sources: religious ("Total Jurist"), scholarly, intellectual/worldly

Contrast between legality and justice. Governor Davey's cartoon — first legal document in Australia.

Common rule of law — equality/fairness.

Indigenous conceptions of law

Christine Black, 'The Land is the Source of the Law'

SUMMARY NOTES:

- Aboriginal conceptions of jurisprudence. Call for new definitions: jurisprudence and indigenous
- Not about indigenous law but indigenous thought
- Do we have an obligation to recognise indigenous legal traditions?
- Patterns herself into land, into family
- Situates an audience
- Offers an account of the different levels or layers in thinking of jurisprudence. Relationship as maintaining a balance (reciprocity).
- Complex cosmology (requires a person to understand a cosmos, not just state law).
- Feeling for law: what is the appropriate relationship with law? What is the experience of law? Universe as flux.
- Obligation to have cosmic harmony.
- Question for non-indigenous people: what does it mean to have a relationship with indigenous law?

Week Two: Law and Force

Last week recap:

- the idea of having an office
- common law traditions (e.g. Wesley Pue)
- responsibilities of an Aboriginal jurisprudence

The common law tradition is older than the modern state. There is a contention or conflict between Australia as a state and this tradition.

Authority: the structure or ordering of the legal sphere. It gives a reason to obey or enforce obligation. It is separate from force (do it or else) and conviction.

Legal theorists struggle with the definition of authority. How do we construct a concept of authority without being entirely force or conviction?

Legal authority gives reasons to obey the law; making it worth following as law. Law is neither force nor morality. (There may be ethical reasons for obeying the law but these are not moral ones.)

Note: the legal method in the first year is uncompromising: primarily statutory interpretation and case law. The legal tradition is much more complex!

The positivist position (analytical jurisprudence). Think about the style of analysis! It allows one to assert the basic kinds of responsibility. The core story of law is one of the duty to act and to obey; it is not one of human rights or something similar.

Sketch by Thomas Hobbes Leviathan (1651): contains a sword (war and civil peace) and crosier (the pastoral / spiritual idea); the sovereign as a go between. Note the (possibly empty) city in the foreground.

'Since authority always demands obedience, it is commonly mistaken for some form of power or violence. Yet authority precludes the use of external means of coercion: where force is used, authority itself has failed. Authority, on the other hand, is incompatible with persuasion, which pre-supposes equality and works through a process of argumentation. Where arguments are used, authority is left in abeyance. Against the egalitarian order of persuasion stands the authoritarian order, which is always hierarchical. If authority is to be defined at all, then, it must be in contradistinction to both coercion by force and persuasion through argument. (Hannah Arendt, 'What is Authority?')'

In this understanding, law is not about equality but about liberty: it sets up the space for equality to flourish. But others say the law is precisely about liberty directly.

The naturalist tradition joins human action to divine action. It says that we need to be able to judge law ethically. It comes through the Christian church and is linked to theology.

Since the 17th century, the state has separated away from thinking that its public life is essentially about theology. It is largely concerned with civil peace and good government ('political economy').

The positivist tradition thinks of law in terms of the positive laws made by and the positive values established through the state. Born in the intense and destruction religious warfare in Europe at the time. The argument went that the because the soul is at stake, the killing of the body could be for the soul's good. Essentially the view became that the state should simply secure the peace of the people (note the UN's responsibility to protect).

The obligation of the state is to secure civil peace. It is not a high moral value. Positivism seeks to find an account of law that allows us to live with that assertion.

John Austin (1790-1859). Offered to write Constitutions for both Malta and Australia (but both declined). He was conservative but detached from religion; one of the first democratic thinkers about law. That didn't prevent him from being authoritarian.

Analytical jurisprudence seeks to finds an objective description of what is and isn't law.

"Legal positivism is a theory about the nature of law, by its self-characterization a descriptive or conceptual theory. By its terms, legal positivism does not have consequences for how particular disputes are decided, how texts are interpreted, or how institutions are organized." Brian H. Bix, "Legal Positivism," in Martin P. Golding & William A. Edmundson, eds., The Blackwell Guide to the Philosophy of Law and Legal Theory (Oxford: Blackwell Publishing, 2005), PP. 29-49, at p. 31

The use of classification / taxonomy: public vs private law has its origins in Roman law. But it is possible to study common law without using those schemes. The common law divided the aspects of law by which court you went to (unlike those broader concepts).

Denise Meyerson, 'Essential Jurisprudence'

Austin's command theory of law

"If you express or intimate a wish that I shall do or forbear from some act, and if you will visit me with an evil in case I comply not with your wish, the expression or intimation of your wish is a command. … Being liable to evil from you if I comply not with a wish which you signify, I am bound or obliged by your command, or I lie under a duty to obey it" (PJD 14)

Theory: Laws are commands backed by the threat of sanctions which are habitually obeyed. The commands are made by a sovereign who is not under any commands and is habitually obeyed.

This sounds true in criminal law. The 'sovereign' is a political system. But e.g. in tort law it isn't so satisfying. There is no talk of justice in that definition of law. Hart, in disagreeing, distinguishes between 'being obliged' and 'having an obligation'.

The sovereign is crucial to Austin's theory. He was writing after the French and American revolutions. For him it is about keeping order and control. This is not necessarily conservative. Think about what consequences this would have!

It seems to remove that which is most valuable in law; i.e. human rights. It is simply about law subordinating or putting people under a duty.

Does this describe all of legal existence? Is this a good thing? Austin is essentially neutral but says it is simply about definition and observation. If he was writing about the US Constitution, the 'sovereign' is parliamentary sovereignty.