University of Zurich[UZH]

Institute of Law

Legal Philosophy & Jurisprudence

Principles of Common Law

13 December 2022

Lecture 13

Prof. Dr. Kern Alexander

Information and Webpage

- Prof. Alexander:
  https://www.ius.uzh.ch/de/staff/professorships/alphabetical/alexander/person.html

- PCL Lecture:
  https://www.ius.uzh.ch/de/staff/professorships/alphabetical/alexander/lv/vorl/hs19/pcl19.html

- UZH login required

Information regarding the Podcast

- Die Veranstaltungen werden aufgezeichnet und als Podcast zur Verfügung gestellt. Einige Sitzplätze ausserhalb des Kameraausschnitts sind vorhanden.
- Es kann vorkommen, dass aufgrund technischer Störungen einzelne Vorlesungen nicht oder nicht störungsfrei aufgezeichnet werden. Studierende verzichten deshalb auf eigenes Risiko auf den Besuch einer Veranstaltung oder auf das Erstellen eigener Notizen.
- Die ständige Verfügbarkeit der Aufzeichnungen kann aus technischen Gründen nicht garantiert werden. Sollte es vorübergehend nicht möglich sein, darauf zuzugreifen, ist dies kein ausreichender Grund für einen Rekurs bei Prüfungen.
- Bei inhaltlichen Widersprüchen haben Skripte oder anderes als prüfungsrelevant deklariertes Material Vorrang vor den Podcasts. Bei Unklarheiten kontaktieren Sie bitte umgehend die Dozentin/den Dozenten.
- Die Aufnahmen dürfen nur für den Privatgebrauch verwendet werden. Eine Weiterverbreitung in welcher Form auch immer, ganz oder in Auszügen, ist ohne Einverständnis der Dozentin/des Dozenten nicht erlaubt und kann disziplinarisch und anderweitig geahndet werden.
- http://www.id.uzh.ch/dl/multimedia/Podcast_Merkblatt_Studierende_v1-2_111215.pdf
- http://www.id.uzh.ch/dl/multimedia.html

- **Translation (English version is not legally binding):**
- The events will be recorded and made available as podcasts. Some seats are available outside the camera angle.
- It may happen that due to technical difficulties individual lectures are not recorded or not without failures/disturbances. Students not attending and/or not taking notes during the lectures in person will do so at their own risk. The constant availability of recordings cannot be guaranteed for technical reasons. The temporary impossibility to access the recordings is not sufficient cause for an appeal against examination. Scripts or other materials declared as examination relevant take priority over the podcasts (Note: recommendation by MELS). In case of ambiguity contact the lecturer immediately. The recordings may be used only for private use. Redistribution in whatever form, in whole or in part, is not permitted without consent of the lecturer and may be punished by disciplinary measures or otherwise.

Natural law theories - historically

- Law must pass a moral test

> no rule can count as law unless what it requires is at least morally permissible. 'unjust law is no law at all' - St Augustine

- People obeyed law traditionally b/c custom, habit or fear
- Moral order part of natural order. Nature has fixed a set of ends or purposes for man in the natural order of things. Virtuous human life required living consistently with these natural functions
- Systems of social control only 'legal' if consistent with such functions

> teleological – views humans role in terms of ends, goals or purposes.

> Moore's naturalistic fallacy – of believing that one can derive a theory of what *ought* to be the case from an account of what *is the case.*

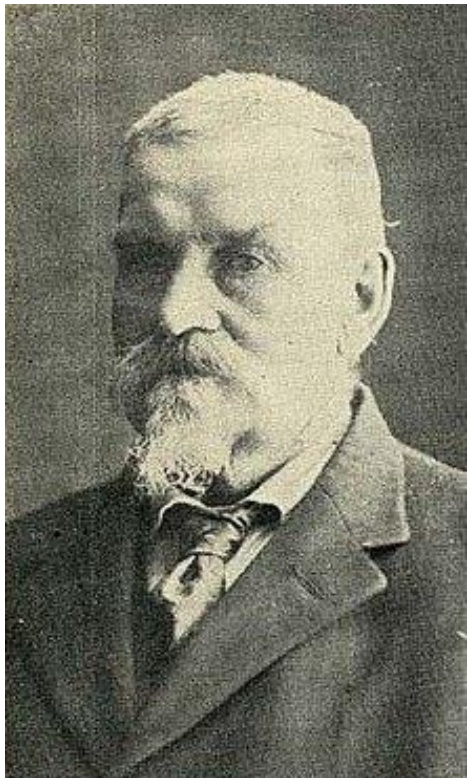
* 'Non-sense on stilts' – Jeremy Bentham

Natural law theory – classical definition

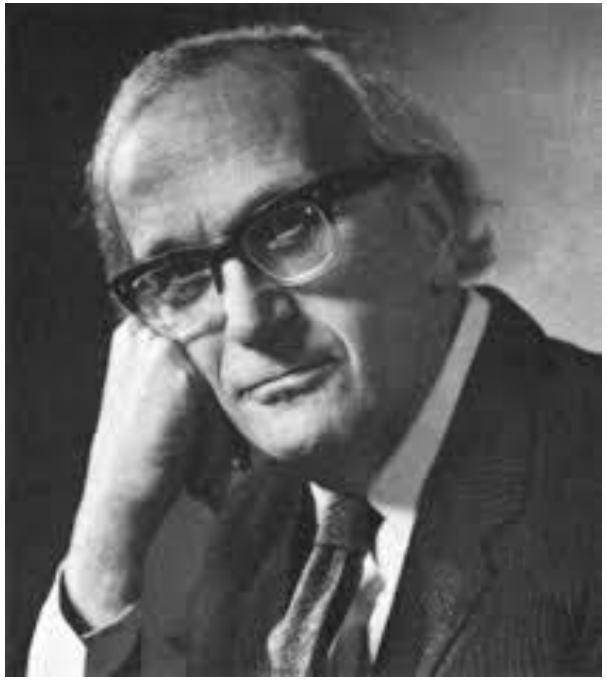
- 1) Moral validity is a logically necessary condition for legal validity – an unjust or immoral law being no law at all; and
- 2) the moral order is a part of the natural order – moral duties are ‘read-off’ from essences or purposes fixed (perhaps by God) in nature.

The Legal Positivists

John Austin



H.L.A. Hart



Legal positivism – John Austin *Province of Jurisprudence Determined* (1832) Lectures (1885)

- 'Command theory of law'
- Normative jurisprudence – claim about 'law as it ought to be' (moral theory of utilitarianism to legal issues)
- Analytical jurisprudence – analysis of concepts and structures of 'law as it is'. Positive law because it is posited by human authority
- Command defined as 2 concepts: 1) signification of desire, 2) ability to inflict evil or harm (a *sanction)* for non-satisfaction of the desire
- a person so commanded is *bound, obliged* or *under a duty* to do what is commanded. Legal duty to obey based on habit of obedience and actual enforcement (empirical)
- Must all laws have sanctions? (Kelsen the law need only 'stipluate' or 'provide for a

Legal positivism – H.L.A. Hart

***The Concept of Law* (1961)**

Accepted Austin's separation of law from morals, but rejected the theory of law as a 'gunman writ large'. Difference between being 'obligated by law' and 'obliged by law' (the gunman or bully). Legality or a legal system is a cure for social pathologies in a pre-legal or non-legal world

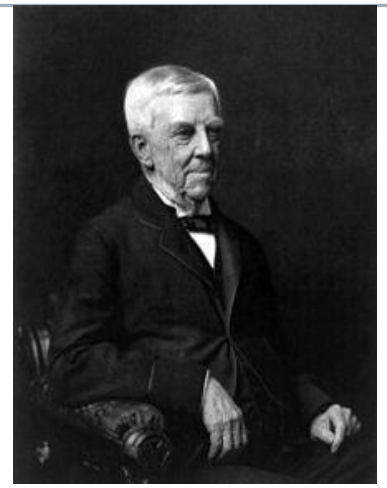
> 'law as a union of primary and secondary rules' or a system of primary and secondary rules

> 'Primary rules' directed to all individuals in social group and tells how to act – a standards of criticism or justification. 'Internal view' towards the rules of their legal order. Problems of *uncertainty, static/rigid* nature, and *inefficiency (state of nature)*

> 'Secondary rule' – 'rules about rules': 1) rules of recognition, 2) rules of change, and 3) rules of adjudication

Rule of recognition allows one to identify or recognize the actual rules of one's society.

Legal realism (1920s-1930s)



Oliver Wendell Holmes

- 'Life of the law has not been logic' (Holmes)
- Criticized positivist view that judicial decision-making is best understood as the application of rules.
- Role of judge more discretionary and creative
- Judge's psychology, temperament, social class & values
- Law is a 'prediction of what courts will decide'

Lon Fuller (1963) – Modern Natural Law theory

- A necessary connection between law and morality based on two insights
  - > Legal theory should focus on 'legal systems' and not particular laws
  - > Legal systems are (at least sometimes) viewed as systems of rules
- Agrees with positivists that a particular rule can still be Law even if immoral, ***but***
- Could such rules still be valid laws if they were part of an *entire system* that was deeply immoral?
- Fuller: a system that was immoral in certain ways will fail to be a legal system because *it will fail to be a system of rules*. To be a valid legal system of rules it must conform to the rule of law:
  - > advance notice of prohibited conduct (don't keep the rules private)
  - > like cases treated alike (no arbitrary enforcement of rules)
  - > no *ex post facto* application of rules. *Prospective* legislation
  - > laws should not changed on case-by-case basis
  - > not be vague and ambiguous

Fuller's *legal system of rules* and natural law theory

* These rules demand the moral values of *justice* or *fairness*

  > *treating like cases differently would be unjust*

  > *a valid system of rules* – vast majority of its rules satisfy certain procedural moral demands of justice or fairness – impartial enforcement, fair notice etc.

- 'Internal morality of law' – or 'the morality that makes law possible'
- Procedural in nature – do not impose limits on the content of law
- Hart: satisfaction of Fuller's moral criteria could still result in 'iniquity'

for example, a moral legal system could still adopt laws allowing slavery

Ronald Dworkin and natural law theory

- *Taking Rights Seriously* (1977)
- uses actual legal cases in his analysis – that legal philosophy analyse judicial decisions is a legacy of legal realism
- Critic of legal positivism
- Argud that Hart's model of judicial decisions in 'hard cases' overly focuses on 'rules' and misses the way decisions often *necessarily* and *essentially* involve principles that are moral in nature
- Moral appeals in judicial decisions are based on legal history, tradition, and "moral principles that underlie the community's institutions and laws". Not just any moral principle has a 'necessary' place in judicial decisions; only those moral principles that form a part either explicitly or latently of the moral traditions of the system are legally legitimate.
- But Dworkin does accepts Hart's notion of 'pedigree' as one important element of legal validity.

Principles v Rules in the legal system

- Professor Ronald Dworkin developed a theoretical framework for how principles of law can be used to interpret how rules of law should be applied to social phenomena.

- ***Principles of Law**:* Principles inform decisions injecting direction and values, but essentially depend upon taking into account a broader set of considerations which itself are not rooted in law, but in experience and life and often expressed by other fields.

- ***Rules of Law:*** Rules are by nature more precise than principles. Ideally, they respond to the syllogism, i.e. they can be applied to a set of facts and offer a response defined by legislation, implemented by government and reviewed by courts. Without reference to principles to guide the interpretation of rules, rules can be interpreted in an all-or-nothing way. Principles allow for a balancing of diverging interests and thus allow for flexible solutions (Dworkin, Laws Empire, 1987, 22).

Social contract theories

- Hobbes (1650), Locke (1688) and JS Mill (Utilitarianism – greatest happiness for the greatest number)
- Contractualist theories based on tradition of individualist (liberal) philosophy – all activity ok short of the 'harm principle'
- Joseph Raz (1986) - 'presumption of liberty' – 'the principle that there is a presumption against any political action which denies or restricts anyone's freedom in any way'
    - > works well for a society where all start from an equal base
    - > what about pre-existing inequalities?

* Mill – (1867) 'Whenever there is an ascendant class, a large proportion of the morality of the country emanates from its class interests and its feelings of class superiority'

John Rawls – A Theory of Justice (1973)

- Rawls believed that 'deep inequalities in initial chances in life . . . Are inevitable in the basic structure of any society'.
- 'Justice as Fairness' - principles to govern this 'just society' are to be arrived from 'behind a veil of ignorance', that is, 'no-one knows his place in society, his class position or social status,, nor does anyone know his fortune in the distribution of natural assets and abilities, his intelligence, strength and the like'. The *'original position'*
- Rawls postulates that the choice would be in favour of two principles: (1) 'the first requires *equality* in the assignment of basic rights and duties, while (2) holds that social and economic inequalities (ie., wealth and authority) are *just* only if they result in compensating benefits for everyone, and in particular for the least advantaged members of society'. ***Difference principle*** (rejects utilitarianism)
- 'a system of markets decentralizes the exercise of economic power'
- 'inequalities in distribution may not only remain but be regarded as just on the basis of the difference principle, *inequality is justified if it benefits the worst off in society.*

Critical Legal Studies (CLS)
Catherine MacKinnon

- Attack on the idea of neutral principles in law and morality – agreed to by rational beings in liberal tradition.
- Criticized general principles of justice, fairness and equality - Dworkin's idea that each person is owed equal respect is a cover to protect existing social and economic inequalities.
- Liberal consensus a hopeless and dangerous illusion.
- Legal and moral theories protect those with power and wealth and justify inequalities.
- Ridicule the idea of objectives principles
- Origins of legal values derive from power relations
- Feminist jurisprudence – 'utmost resistance' requirement in the common law of rape