JURISPRUDENCE

SUMMARY

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INTRODUCTION

Jurisprudence is the philosophy of law. It encompasses the study of different theories of the kinds of law that exist, or ought to exist, and the implications of those theories on practical political systems. Many of the concepts referred to will have a number of different definitions and interpretations, such as *democracy* or *justice*. The aim of this summary is to give students an idea of some of the meanings of such terms. In order to do so, it will be necessary to begin each concept with a discussion of some of the *political* as opposed to *legal* interpretations of them. For example, in order to understand some of the legal theories of justice, it will be necessary for the student to understand some of the political notions of redistribution and the minimal state.

Some of the theories discussed in this summary are discussed at great length by the authors and philosophers concerned, and the summary must be seen to be what it is: a *summary*. It cannot operate as a substitute for the actual theories themselves. The aim of this summary is to discuss the theories and clarify them, with further discussion of their implications for society.

NATURAL LAW AND POSITIVISM

Theories of natural law and positivism are concerned not only with where the law comes from, but also with what makes a particular enactment a law. Why should we obey a particular rule or practice?

Natural Law

The purpose of the law is to distinguish nature from society. Society is not a natural phenomenon. It is a creation of human beings and it can be changed. According to the ancient theory of natural law, some laws cannot be changed. For example, intentional killings, to some natural lawyers, will always be wrong.

Natural law links human laws to laws of nature. If someone stood on the roof of a high tower and said they could fly by jumping and flapping, one could say their will conflicts with natural law. Human laws, as expressions of human will, know boundaries. Natural laws do not declare that human laws which violate the laws of nature are *immoral* (like the laws of the Third Reich, for instance); they maintain that it is *impossible* for them to be laws (such as by suggesting that the laws of the Third

Reich were not valid in the first place). A natural lawyer would say that it is impossible to jump off of the building and fly. A legal positivist would reject this approach.

The natural lawyer has a certain view of the status of moral values. The truth or certainty of morality was to be found as a matter of fact. Whether a person was moral could be discovered by experiment. The Third Reich was immoral. We discovered that after it had been destroyed. At the time, its legislators did not consider it immoral, but it always was. Thus, some of the laws of that Government were clearly and immutably wrong at the time they were passed; even though those who passed them could not perceive them to be wrong, like when a medieval scientist was unable perceive the shape of the Earth. This would apply to the Egyptian Government under Nassau in the 1950s, which nationalised the Suez Canal. If a natural lawyer believed in a natural right to property (as most do) it would be considered a violation of natural law for property to be taken from its owners.

According to the natural lawyer, morality is objective. To know a moral fact is to know a truth about an object. This does not mean everyone will perceive an object in the same way: there is no reason that changing the views about genocide will show relativity. The same goes for changing the views about the shape of the Earth. When war criminals are tried, they often argue that there is no 'one' morality. Different people have different ideas of what is moral, and there is no underlying set of facts which underpin what is right or wrong. On this view, morality is not an object; it is a subject.

Natural lawyers identify a certain area of immorality in a society, which is simultaneously illegal. Laws made without authority (*ultra vires*) come into this category. According to St. Thomas Aquinas in the thirteenth century, there is a hierarchy of laws, which distinguishes changing elements of the law from definite elements:

- **Human Law -** At the base of all laws is human law, such as those governing the validity of marriage and regulating traffic. They contain an element that is arbitrary and they vary with societies, such as whether people ought to drive on the left or the right. Such laws can be different in different societies and are equally valid. The force of human law and its ability to bind us derives from

natural law. We start from natural law, and we use reason to discover human laws that combine with natural law. Any human law which is at odds with natural law is invalid and therefore not binding. However, we may be required to obey such a law in order to avoid chaos.

- **Natural Law –** A set of fundamental rules that govern all of the animal world and natural world generally. This type of law does not vary from society to society. Aquinas was aware that certain things that were taken to be part of the hard core of social matters did change because of certain social conditions. He said that natural law does sometimes change. Aquinas said that natural law is the primary rule of reason. Human laws derive from natural laws, and must be in concord with them. He said humans are naturally inclined to be good, and to obey the laws so as not to offend others with whom they must live. Everyone knows what the natural law is, according to Aquinas. We can change natural law in two ways: we can add to it or we can take laws from it.

- **Eternal Law –** Aquinas said eternal law never changes. Divine Will is small but unchangeable. What makes racism wrong anywhere in the world is that it can logically follow from the basic rule of God: love thy neighbour as you love thyself. Applying eternal law to such situations explains how natural law flows from it.

Aquinas said:

> 'Man is bound to obey secular Rulers to the extent that the order of justice requires. For this reason if such rulers have no just title to power, but have usurped it, or if they command things to be done which are unjust, their subjects are not obliged to obey them; except, perhaps, in certain special cases when it is a matter of avoiding scandal or some particular danger.' [1]

When a jurist is considering whether a positive human law can violate natural law, there is a fork in the road: there is tension between a 'will-based' and a 'content-based' view of moral authority. Moralists, lawyers and citizens will sometimes refer to the will of legislators. Eternal law would come from the 'will of God'. A Constitution would derive from the 'will of the people'. The laws of nature, some would say, cannot be captured by looking at the will of the legislators, but come from looking

[1] From *Aquinas St T. Selected Political Writings* (D'Entreves (ed), Dawson trans, 1959) pp. 121, 179. Cited in J. W. Harris, *Legal Philosophies*, 2nd edn. (Butterworths, 1997), p. 9.

inherently at the content and by considering its purpose. This is the content-based view. It places much more onus on people to work things out between each other and it appeals to reason. Aquinas and others believed it was possible to see whether something was moral or immoral by asking whether it fits in with nature. If one wants to know what a leaf is, he asks how it helps the tree. To understand the leaf is to understand its *function*, what it does to preserve the whole. This is the same with morality. The chain of reasoning, for example, would be: what is the function of marriage? If the answer is procreation, any act that is not aimed at procreation is not marriage. This process involves linking back the act and institution to its function: Does it fit in with the healthy reproduction of society? If we allowed promise-breaking to go unpunished, what would the effect be on society?

The approach to social institutions in *Kevin and Jennifer v. Attorney General for the Commonwealth* (discussed below) was not functional. The court did not try to fit marriage into a narrow set of principles like the functional approach.

Social contract theorists, such as John Locke, Rousseau and Thomas Hobbes, feature natural law arguments. They are based on what the theorist believes man would necessarily agree to. Rousseau said that man would be 'forced to be free'. Hobbes famously discussed life in the State of nature, saying that man would be in a perpetual state of fear and danger. In such a State there would be no concept of right and wrong and every man would be at war with one another. Their lives would be 'solitary, poor, nasty, brutish, and short'. We would use our reason and decide that we wish for peace. This is why we would enter into a social contract. We would follow two rules: to pursue peace and to act in a peaceable way with the rest of society and to defend ourselves by any means. Hobbes says we must be contented with as much liberty against other men as we would allow other men against ourselves. Hart echoes this in saying that survival is our chief objective. According to Hart, communication is what makes us human and it is the means by which we survive.

In his *Institutes*, the Roman Emperor of the East, Justinian, said:

> 'The civil law is distinguished from universal law as follows. Every people which is governed by laws and customs uses partly a law peculiar to itself, partly a law common to all mankind. For the law which each people makes for itself is peculiar to itself, and is called the civil law, as being the peculiar law to the community in question. But the law which natural reason has prescribed for all mankind is held in equal observance amongst all peoples and is called

> universal law, as being the law which all peoples use. Thus the Roman people uses a law partly peculiar to itself, partly common to all mankind.
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> …
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> The laws of nature which are observed amongst all people alike, being established by a divine providence, remain ever fixed and immutable, but the laws which each State makes for itself are frequently changed either by tacit consent of the people, or by a later statute.' [2]

We can therefore summarise the key features of natural law theory as follows:

- Law is immutable (fixed) and universal.
- Morality is objective.
- Natural law places an emphasis on 'functions'.
- It is important to be able to differentiate between human law, natural law and eternal law (the latter comes from God).
- Natural law is a forerunner to other legal theories including 'natural rights'.

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[2] From *Institutes*, pp. 41-43; 1. 2 [translated, R. W. Lee]. Cited in M. D. A. Freeman, *Lloyd's Introduction to Jurisprudence*, 6th edn. (Sweet & Maxwell Ltd., 1994), P. 131.