Complete LAWS110 Notes

Topic One: Positivism and Naturalism

<u>Introduction</u>

The aim of this course is to get a basic understanding of:

- The contested nature of the concept of law
- The history of legal systems and the place of the modern New Zealand system within them
- The NZ Constitution including the Treaty of Waitangi and its role in NZ society

Module One: The Concept of Law

What is the law? Brainstorm: system of order, regulate society, enforced set of rules, provide protection, morally correct, product of dominant group.

There is an important distinction between what is law and what is not law.

Step back and think about the law not as something that relates to New Zealand, but to everyone as a whole. This learning is vital to the importance of being a good lawyer. We must understand law at this simple level.

Different systems of social order in different societies. Important to note that social orders are not laws. The label of "law" comes from western social order, so we must be careful when dumping our systems of law onto other societies.

We are trying to step back out of any proper system and think it about law as an abstract concept in general rules. Law is changing continually, and it is difficult to pin it down. System of order is very complex. Legal systems themselves differ distinctively around the world.

Common law – NZ, Australia, Canada, South Africa, England vs civil law – France, large parts of Europe, Japan, China, South America.

What is conceptual theory?

A concept is a generalized idea of an actual thing. A non-concrete idea. A conceptual claim is non-falsifiable. A conceptual basis of law can be completely objective and people can have differing opinions that are both correct.

If people agree on a conceptual definition of law, then we can claim that something within the category law is false and "not law" because we agree on the conceptual basis of law. In law, we are trained to accept a shared concept of law so that we can all agree that yes, certain things are law, and certain things are not. We must accept what we are dealing with is law in order to achieve anything in this field. You cannot engage with another person who has a fundamentally different definition of conceptual law.

In simple terms, a conceptual idea is important to define because it ensures that we are talking about the same thing when we are engaging with each other.

Over the next three weeks we will look at three different perspectives on what is law:

- Natural law (naturalism). A deeply moral perspective. Morality is engrained in the law.

- Formal perspective (positivism)
- Sociological perspective (realism)

They each approach the concept of law in conflicting and different ways. We will contrast these different views. These all appear to be answering the questions: "what is law?" But they end up arguing "What should law be?" This is instead a normative question, not a descriptive question. They arguing what a specific norm ought to be, not what it actually is.

Natural Law

Based on a belief that there are higher principles that enforce the law. They cannot be changed by human society. They are above the law, fundamental and overarching. When the human law begins to deviate from these principles, the law begins to fail to be the law. These higher principles are derived from nature, perhaps human nature.

Laws can be legitimised when referenced to these external principles, and therefore give people a tangible reason to follow them – because their human nature supports it. "Rests on a foundation which is justifiable in accordance with our common understanding of what is proper".

Assumes that there is a universal moral code that is "intrinsic" to all humans, that we all naturally agree and abide by.

Summary of principles

- The validity of man-made laws should be tested by reference to 'absolute values'.

- These absolute values are universal and eternal (transcendental).

- These absolute values are not just matters of belief – they can be deduced by reason from the observation and comprehension of nature.

- That which is in accordance with nature is 'good'; that which is contrary is 'evil'.

- It follows that laws lacking moral validity are 'wrong' and 'unjust'….and may not even be laws at all!

But how can one tell that these principles always reflect our natural morals?

David Hume (arguing against natural law): we cannot derive was "ought to be" based on what something "is". You cannot argue that just because of the way humans do something should be the way we ought to do it, therefore you shouldn't base laws on higher value principles because of the way things ought to be.

The facts of life do not determine how we ought to be. We shouldn't have laws enforcing typical human behaviour and then saying this behaviour is how we ought to be. These are just matters of belief, and can not be determined by facts. Conclusion: natural law can not be derived from the facts of life. It is derived from belief.

Counter-arguments against David Hume:

- Aristotle. Humans are developing towards something in our nature. We are moving towards the purpose of good. The law should, as a result, make this goal possible. The law should advance human good.
- Aquinas. Laws are rationally divined because they have good purposes. Natural law is revealed to us through natural exercise of reason. Natural law depends on the thesis that we

act as we should because it is rationally good for us. (Aquinas also then believed that this came from god).
- Fuller. Argued for procedural naturalism. Believed that the law needed to be used in the proper way in order for it to be useful in society.
- Finnis. Law does have a rational basis that rests upon certain basic goods – life, knowledge, friendship etc. Argues that we don't need a factual basis to prove this, every human knows it to be inherently true. Self-evident.

Conclusion: do natural lawyers cross the line between what life is and what the law ought to be?

Law is a means of social control, it is a set of rules that can be used to control and regulate "the conduct of the members of a society" "in accordance with the wishes of the law makers."

Law and morality are related but not the same. Many laws seek to reflect popular moral beliefs. Some are more controversial than others, and it can be debated whether they truly reflect peoples different perceptions of morality. Laws can also be used to instigate change in people's morality by making certain things legal and encouraging them. But should the law be used to impose a moral code? Is it the laws job to try and improve people's morals, and not just prevent tangible harm? Is it okay for the law to outlaw something just because it is "immoral"?

"It is clear that the government does make laws that enforce the prevalent moral attitude of society. However, the amount of interference which people consider appropriate in private affairs is diminishing." When is it okay for the government to attempt to introduce social change through changing laws that do not reflect the current moral standards of that society? Most of the time, these changes are made for people's own good, but is this an infringement on the liberty of an individual? Is this an example of the government essentially claiming they know more about what will increase a person's wellbeing more than the person themselves?

Validity of Law

What makes law law? How is the law distinct from other methods of social control and rules?

Positivist theories of law: the law is what a recognised authority states is the law. The law is amoral. "Positivism identifies that the law is dependant very much on compliance with rules about how law is made." Laws must go through the proper process. A law is a law if it is created in the appropriate system in a given sovereign.

Natural law theories: "in contrast to positivism, the natural law approach provides that law is justifiable by recourse to some logical or moral rule that stands apart from the system itself." Law is founded on an unchanging factor outside of law itself.

Realism: considers that "far wider matters ought to be taken into account in predicting the way in which a court will decide a matter." Real life facts and social values. It is law in action, not law in the books. Claim that law is "indeterminate."

A Formal Perspective - Positivism:

Problem: many people obey the law for more reasons than just because they will be punished if they don't. We feel as though we have a moral obligation to obey the law.

Positivism also falls problem to circular reasoning. Why are the rules about making rules binding? How are these rules about the proper way to make rules law? Authority cannot authorize itself.