



# *Session 7*

*Theories & concepts of law 2*

*Positive law*



# *Hobbes*

- People aim at always strengthening their own positions and vie for their own interests (natural aspect).
- In the interest of self-preservation, people agree to surrender their power to the state.
- The state can enforce its will through the law (positive aspect).
- Positive law is necessary to reduce the effects of natural law to maintain order.

# *Hobbes*

## DISCUSSION 1

... the law is the public conscience.

... and which is the conscience of the law?

## *Locke*

- If the state violates the natural rights of the people, the latter are justified in rebelling against the state to replace it.
- Natural rights are fundamental and include the right to life, liberty and property; no one person can deny such rights to another.
- To offset the (natural) effects of passion, a civil society is necessary where the state is to guarantee the preservation of natural rights.

# Locke

## DISCUSSION 2:

... all men (*sic*) are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness

It does not take into account women; difficulty proving we are endowed with such rights; the list appears to be utilitarian in perspective (happiness); but if men are endowed by a creator, this is their mother!

# *Austin*

- The purpose of law is to secure happiness of the majority.
- One cannot assess the effect of a law by moral or religious standards.
- Positive law is objective as a measure of judgment, thereby be obeyed; hence the supremacy of the rule of law.
- If the governed is to obey the state, collectively it is superior to the state.

# *Austin*

## DISCUSSION 3:

... the mischiefs inflicted by a bad government are less than the mischiefs of anarchy

Anarchy is not a state of affairs that is viable or sustainable if one considers power: there is a tendency to less turbulence but not to order as this cannot exist so long as power exists.



## Hart

- Law comprises rules of general application, backed by threats given by persons who are generally obeyed
- Law consists of
  - primary rules (dealing with conduct in terms of what must or not be done)
  - secondary rules (that include *rules of recognition* – criteria for recognizing the validity of primary rules, *rules of change* – determining how primary rules may be changed, and *rules of adjudication* – associated with the enforcement of primary rules).
- It is difficult to make rules to determine all manner of human interaction and language prevents the law from always being clear and precise (open texture of law)

# *Hart*

## DISCUSSION 4:

... the open texture of law means that there are, indeed, areas of conduct where much must be left to be developed by courts or officials striking a balance, in the light of circumstances, between competing interests which vary in weight from case to case

If the ideal is a balance how does this translate between the suffering of a parent who has lost a child because of a drunkard and the latter's rights in society?

ACTIVITY: read the extracts on pp94-95 to decide with peer the two schools is in use.

1: NL    2: NL    3: PL    4: NL    5: NL-patriarchy    6: PL    7: NL?  
8: PL-realism    9: NL?    10: PL    11: NL    12:PL    13:PL

Overall: natural law when it expresses values unlikely to be changed; positive law when it expresses processes.

## *Additional views*

- Formalism (conservatism): all law is established and it is the role of courts to discover the appropriate rule and to apply it.
- Realism: law is not the expression of an ideal as that which ought to be, but rather a description of what actually is.
- Marxism: law is the expression of the ruling class and set to preserve its own interest.
- Critical studies: interpretation reflects a particular bias of the interpreter, thus no method of lawmaking can be truly neutral.
- Feminism: the state and its features are viewed as male and thus the law sees and treats women in the way males see and treat women.

## *Context*

- With Fuller a legal system is ineffective in the absence of procedural fairness in terms of guiding behavior to create social order.
- For Selznick, the additional ingredient is restraint of power in terms of balancing and checking what the legislator do.