

First lesson of Philosophy of Law

we have:

- 1) Cultural subjects (Philosophy, History, Politics, Sociology, Psychology, Anthropology);
- 2) "Positive" Subjects (Private Law, Corporate Law, Criminal Law, Tax Law). Key words: *subjectivity, symbolism, purpose/aim, impact, tradition, effectiveness.*

Definition of law: we refer to "Law" as "rules". It's better to mention "rules" because we have to reflect about the goal of the Law in discussion, which is not always a positive goal. For sure, a Law is an order that is imposed by an authority to a community of people (e.g. Facebook makes laws for his community). The community must recognise the authority.

What is the difference between an order and a Law? A suggestion is not obligatory; it's up to you to decide whether to follow it or not. Another difference is that if you don't follow a Law, you will have to pay the consequences. A Rule without a consequence is not a rule anymore. Rules are not suggestions or alerts, they are obligatory.

The authority wants to be recognisable by the community; In order to do so, he must:

- 1) has to make the punishments effective. If the punishment is effective, a person will be almost forced to follow that rule even if he/she doesn't agree with that.
- 2) has to convince the community that the law is useful for their lives → the law must be supported by the people to whom that rule is addressed.

But first, in order to convince the community to follow the rule, you have to call the **moral value**.

Definition: The law is a rule made by a recognised authority and shared by the community based on moral values. Law is a prescription that has consequences (it is not a suggestion).

Second Lesson

Why do we obey the Law?

The Law draws limits about what we can do or not do. It has to do with fear as well → people have fear of disobeying the law for the consequences.

Idea of the authority that orders the community to follow the rules, per non andare in contro alle terribili conseguenze.

If a law shares my same moral values, it won't be a problem for me to follow it. Otherwise, it is much harder to obey it. The majority of the time we do not agree completely with the moral value of the law, yet we follow it because we are scared of the consequences.

In an **anarchic system**, laws are just a convention → people only follow their own moral values. People believe in a society organised by its own citizens. There is no obligation to obey the law → only the individual conscience counts.

Henry David Thoreau (1817-1862) was the first man to have an Anarchist approach.

Plato's "Crito"

It's a story in which Plato uses Socrates as a character to face social problems → in this dialogue, Plato shows the problem of deciding whether obeying or disobeying the law.

Socrates refuses to obey the law and he is punished in prison for that → they after he will be killed. Crito tells him that he could save Socrates by giving money to the guards. Socrates decides to face his destiny and go through the consequences of the law he didn't respect, even if he doesn't agree with the Law. Crito doesn't understand his decision. Socrates gives 6 arguments to answer him, which can be summarised in 3: Conceptual Argument, Consequentialism Argument and Contractual Argument. These 3 concepts are at the base of all other law systems.

Socrates tells us that disobeying is out of possibility. The law is an absolute obligation, without any obligation → law is like a dogma (idea to follow the law) → you don't need to give explanation to the law, you just follow it without discussing it or questioning it.

- **Conceptual Argument:** In Ancient Times, there was a **Natural Law**, which was rational and universal, beyond any social or human norms. Socrates shows the differences between the Natural Law (Physis) and the Human Law (Nomos). If you break the law, you are going against nature. The Law is always rational and unbreakable. Socrates doesn't go against the law because he would go against nature.

- However, the Natural Law is not enough. How do you face injustice? Are you obligated to follow the law? → **Consequentialism Argument:** based on the concept of utility (we always choose the best option for ourselves). "Obedience is the consequence of a calculation of the consequences". Following the law gives a person more advantages than disadvantages. On the basis of this Argument, between the XVIII-XIX centuries, it will be founded the Liberal Theory (e.g. J.S. Mill). Indeed, the Liberal Theory is criticised by the Radical Law Theory (the Liberal Theory is more selective).

We have 2 versions of this argument: 1) the Rule consequentialism; 2) the Act consequentialism.

1) the Rule consequentialism (or Rule Utilitarian) → the reason we adopt moral and ethical rules to guide us is that we believe they are the kind of rules that end to produce the best overall consequences for those affected by them. This Rule is still a bit influenced by the Natural Law, bc moral values are taken on count (→even the morality can be considered)

2) the **Act consequentialism:** it is more individualistic. **see slide**

- **Contractual (and utilitarian) Argument:** You have to follow the rules because you are part of a society. In the Social Contract, there are written down the rules to live in the society. The society is rooted on a past agreement (SOCIAL CONTRACT) adopted to overtake the State of Nature. The social Contract imposes a duty to obey the Law. Once u accept the social contract, u also accept the duty to obey the law.

The social contract theory really influenced society from the 18th century till nowadays, and 3 main philosophers supported it: **Hobbes, Locke and Kant**.

The social contract organises the society and makes it a peaceful place to live. It's not acceptable in a society in which people do not respect each other.

This argument shares something with the natural Law theory. However, in the natural law theory the subject is God; in the Contractualism, the subject is the social common agreement → there is no more the concept of God.

Contractualism is structured in a pyramid; on the top of the Pyramid we find the Social Agreement.

The difference between the contractual and the natural law is that in the first one people have the faculty to choose, to sign rationally an agreement. While in the Natural Law, people don't have the faculty to choose.

The Contract Law is the one we have today.

In the state of Nature, people lived in a society without any kind of Law. They lived in an "anomic" society (from Greek "a- nomos").

Thomas Hobbes, in the "Leviathan" gives his vision of the State of Nature. Locke gives his vision of the State of Nature in the " "

We could also consider Rousseau for another vision of Giusnaturalismo and Contractualism.

Thomas Hobbes: the State of Nature, for him, is a state of permanent war. → Why? → society is "homo, homini, lupus" → everything that humans want to do is to destroy everything.

Since in the state of nature everyone the humans were all equal, they wanted to get more and prevalere sugli altri per arricchire se stessi (selfishness). This condition created wars.

Locke: from his point of view, in the State of Nature, people respected each other.

However, human beings need a **social contract** to live in a society (in contrast to the animals).

The law must:

1) seek for peace

2) give up "right on everything", unless the right to life (in order to preserve my life, i have to consider that i have to break other laws).

3) In the Social contract there must be an authority that imposes a body of laws → this is the main difference between Natural Law and Contractualism (→ in this one we can find the rationalism and the consciousness).

- What kind of power does a society need?

For **Hobbes**, the society need a Leviathan, a big authority that has all the power in his hands but is able to protect everyone's life. He's not a divinity and he decides what the human beings have or don't have to do. The Leviathan is invisible and his power cannot be delegated to anyone else.

The idea of Locke is the idea of an *Absolute Monarchy*.

For **Locke**, who had a democratic point of view, the authority that a society need must preserve human beings' life, liberty and private property. He says that the power cannot do anything without the consent → pple must consent to a law to obey that → they have the power to not obey the law.

For Hobbes, people cannot disobey the law → this would lead to the destruction of society. Locke has an opposite point of view.

Both Hobbes and Locke think that the Social contract is something practical (it's written → it's official).

Kant considers the Social contract as an hypothetical Status that rational men accept to live in Society. It exists bc it is the most rational thing that we can have for the society (it's just a part of everyone's life). For him, the Social contract is not visible, it's not practical → it's just theoretical.

The social contract is the source of the obligation, but it must be understood not as something that had happened in the past, but as an idea of reason that has influence in the present. The social contract is hypothetical. The rational human would agree to...

How do we go from the concept of legality to the concept of legitimacy?

Justice is something that goes beyond the law. How can we guarantee justice for society?

Law, in many times, is not only just → the formal aspect and the substantial aspect of the law are not always the same.

Rawls and the Theory of Justice

(pag 133 of the book)

resources, in our society, are not unlimited.

(example of the cake: we are at a party and we have a cake that has to be divided in equal parts for the invited ppl)

The nature of human beings is selfish; yet, it is rational enough to understand that it has to put limits on life. Its nature is selfish because it wants the best for itself, but it's not completely selfish (this doesn't mean that its nature is altruistic).

In modern society, the power is given to one authority. How are we sure that the person we give the power to is going to act just?.

1- the person that has the power to cut the cake is the one that will take the last slice left

2- or, we decide the order in which we take the slice of the cake randomly

In a society, we have the Welfare state or the Private State. Same thing with the taxation: Flat-Tax or Gradual Taxation.

John Rawls made the most advanced theory for justice → the **NEO-CONTRACTUALISM**. He founded the idea of equity as a synonym of justice.

1) Everyone should have a minimum and equal degree of liberty, including all the liberties traditionally associated with democracy.

2) Everyone should have an equal opportunity to seek offices and positions that offer greater rewards of wealth, power, status, or other ... copia...

3) see **slide**.

A NON utilitarian vision of justice is the "**Veil of Ignorance**"

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Relationship between Legality and Legitimacy

Legality: formal aspect of the law.

Legitimacy: substantial aspect of the Law.

The difference between these 2 concepts is in the JUSTICE (When should i not obey the Law?).

see **slide**

Principle of equal liberty: there are no differences in basic liberties.

Nature and heritage give us different opportunities.

The difference principle:

It is legal to put in the system "inequalities. For example, a tax system which says that richer people should pay more taxes than poorer people is an unequal law.

So, the law system can not be equal in order to be just. It is like this to give every person the opportunity to reach their desired goals.

The Welfare System: our modern societies are not only based on the system of equal liberties, but they are also unequal in order to be a just system for everyone.

EQUITY=JUSTICE

What happens if i Reckon that a system is unjust?

We need to distinguish the words "Law" and "Rights"- they are not the same thing. - Law refers to the formal aspect (exactly as reality)

- Right refers to the substantial aspect of Law (exactly as Legitimacy)

In the modern age, since the positivism movement (1789-1804) the concept of Modernity begins. Why? because after the French revolution it was created the Civil Code. CODIFICATION is the beginning of the modern age. This concept has been hurt during the II WW, because in that period Totalitarianism was the form of Government.

We thought that Law and Rights were together in Laws and Codes but during totalitarianism there was no space for a legal space.

In order to create a perfect and stable legal system, it is not sufficient to have written down laws.

Kelsen theorised the idea of the **Pure Theory of Law**: everything that is written down in the laws is also legitimate.

The History of Law

The Law system is not autonomous, but it is part of the Social Legal System and is in the border of the social System.

Nowadays, we have the idea that the LAW depends on other forces, like force, politics, economy... Today the Law is not anymore considered a pure thing: it is the product of different balances.

What should we do when the Law does not follow the rights? (unjust law) How should I recall the concept of Justice and Rights?

The POSITIVISTS would answer with the CONSTITUTION HIGH NORMS. The Constitution is the highest norm in the system; all the other norms that are below the Constitution must follow it. That's why in contemporary society we can find many constitutions. The rules set by the government are in line with the constitution.

Our society is structured on a hierarchical system, whose top is the Constitution (a list of RIGHTS, not laws). In order to write down rights, there is the need for a common agreement of those rights, which is never easy to reach in contemporary societies. The Constitution is something that stays inside the Law Positivist System? But what if I don't agree with the Constitution? - I can't use legal arguments: I need to use Morality and moral arguments. I always have to refer to morality if the legal system doesn't give me the opportunity to support my ideas.

Morality -----Legality

The tragedy of Antigone by Sophocles (442 b.C.)

In this tragedy we can find family and political relations, mixed together.

Polinice was killed by his brother Eteocle (who died as well). By the law, Polinice is considered an enemy of the State; while Eteocle is considered a hero by the State (but, unlike Polinice, he is going to receive a funeral). Since Polinice is an enemy, he will not receive a funeral - it is one of the most immoral things that could be done.

Antigone decided to break the Law of Creonte (the King of Totalitarianism) consciously. For this reason, she is considered an enemy of the Kingdom.

Antigone should be sentenced to death (stando alle leggi). But Antigone is the fiancée of Creonte's

son (and that's why he could decide to save her).

Since Creonte is the king, he is the only one with the power of decision. Law is always the result of a choice, and Creonte is the one making it.

Creonte and Antigone created one of the greatest dichotomies of the History: LAW VS HUMANITY

Antigone is forced to confess that she is guilty for breaking the rule - it is not a trial with a defence and an opposition: she can only accuse herself and she cannot be defended.

She also says that she disobeyed the law because it was not the Natural Law, but the Law of the king. She doesn't recognise Creon to have the power to overtake the moral law of God (Zeus- he represents justice). The law of Creon is legal but has no legitimacy because it goes against the eternal law of Nature.

"In my opinion, the criminal is the king, not the accused".

Creonte is also opened up to the possibility of saving her life, but the problem is that she doesn't recognise his power - if she did recognise his power, she would be safe (it would be enough for Creon to save her). Idea of recognition of the system in order to be saved. We call this the "ILLUSION OF LAW": nobody is strong enough to resist the force of law. The law is the instrument that Creon uses to impose himself.

Antigone cannot be simply killed, she must be processed in order to make her change her mind (with force).

Antigone says that the majority of the citizens would agree with her, but Creon answers that it isn't true and that she is just a fool (=dangerous). Creon doesn't consider Antigone seriously.

In Thebe, Antigone was the first one to tell Creon that he was the first wrong one; she was the first person going against the power.

Even if she has a last possibility to save herself by recognising the authority of Creon, she doesn't and she decides to face death. She prefers to die than to accept the system. when Creon's son will find out that Antigone was dead, he will commit suicide. This is a tragedy for Creon.

this is a tragedy without a winner: everybody destroys him/her-self

So, in breaking the law we all have negative consequences.

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2 questions:

1) **The question of rights:** if there is something beyond the law.

2) **The question of Civil Disobedience**

The difference between right and law corresponds to the difference between moral and legal aspects.

This difference goes against the, so called, "Positivism" = the beginning of the Modern Age (from

the French Revolution). Creon is a symbol of what Positivism is.

Antigone is doing something illegal but at the same time moral.

see SLIDES

Right= is an entity, a MORAL POWER, given to human beings

The positivism legal system built itself out of something that already existed. **Can I recall the existence of a Right against the Law?**

Even in a democratic modern society there can be unjust law. Sometimes the LAW is not enough to make a society just and equal.

At the end, the Law is a general Agreement that we should all agree to the law. see Slide of

Jeremy Bentham

It is dangerous saying that there is something moral that goes beyond the law, because this could lead to Anarchy, Tyranny and Chaos.

Indeed, the existence of moral rights is dangerous and only useful to justify tyranny and discretionary power; to open the door to Anarchy, Tyranny and Chaos; to threaten the certainty of law.

In claiming moral values in threats of the **law** there is the "**certainty of law**". A democratic system needs Certainty; without it there would be Anarchy, Tyranny and Chaos. At the same time, allowing morality and subjectivity would break the certainty of law and lead into Chaos. In the LAW system, morality and subjectivity are synonymous. This is why we can't consider Creon as a tyrant, because he didn't put subjectivity in the law.

Legal Systems are based on **Validity**: the norms became "legal" only when they became "valid" because they follow particular procedures and/or they are adopted by certain authorities with power (e.g. Parliament), pointed out by the Positivist.

Slide "rights-skepticism"

Positivist point of view: The law is legal when it is respected, or, at least, when there is a sanction for those who don't respect the law.

Antigone, for sure, was doing something good, but, from the positivist point of view, she was doing simply something of nonsense.

Moral rights are also an obstacle to utility and rationality. there is no presumption at all in favor of rights prevailing over other interests. everything that goes beyond the legal system is irrational.

Dworkin demonstrates the compatibility between utilitarianism and the concept of right. Because he thinks of the legal system as a balance between legal rules, principles and policies. So it is perfectly acceptable to find rights both moral and legal. Dworkin says that in the end, the positivist idea of putting morality outside the Law is simply not true, because in every legal system we find some moral law. so, it's nonsense to say that the legal system is a totally different thing from morality. it's better to say that in some cases, the legal system is a balance between legal rules,

principles and policies.

Even if you are in trouble, you always have a trump card to play, and this Trump Card is the Moral Value. A right is like a trump card that defeats competing considerations. *Rights are best understood as trumps over some back-ground justification for political decisions that states a goal for the community as a whole.* It will always be possible that there will be cards of a higher value to be played.

Even in a Legal system it is not possible that the 2 legal rules conflict: I cannot find in a legal system 2, or more, laws that are one the opposite of the other.

However, two principles/rights can conflict and both can be valid (since morality is personalistic and individual). For example, in Antigone, both Antigone and Creon are right, they just stand for 2 different, and acceptable, moral values.

The legal system must use discretion. So, sometimes, we have to choose between 2 moral values that are in conflict (and the legal system won't help us to decide because they are both right).

Critics of Positivism: I need to go beyond the positivistic system and recall Principle and Policy: they must govern our society. The positivistic modern vision of codifying everything collapses. Principle and Policy are not the same thing.

Austin: law/obligation is "subjection on the threat of force" – emphasis on sovereignty...then what would be the difference between the decision of a judge and the command of a gang-leader).

H.L. A. Hart: distinction between primary and secondary rules – so called rule of recognition - rule is binding because (a) it is accepted ; (b) it is valid, decided following an accepted secondary rule.

In deciding how to act we also follow different standards than "positive" rules, called *principles* and *policies*.

Principle: something that is in the background of us.

Policy: something that is in front of us.

If you need a Principle, you also need a Policy. *Principles describe rights, policies describe goals.*

Principles are the standard to be observed, not because they will advance or secure economic, political or social situations, but because there is a requirement of justice or fairness or some other dimension of morality.

Policy is that kind of standard that sets out a goal to be reached, generally an improvement in some economic, political or social feature of the community

Principles have a dimension that rules do not have: the dimension of *weight* and importance. If two rules conflict, one of them cannot be a valid rule. However, two principles can conflict and both be valid!

Dworkin considers "discretion" in its 'strong' meaning. When a decision is not controlled by

standards furnished by any particular authority, principles are extra-legal standards influencing the judge's decision, without being binding.

Principles cannot be considered as "higher rules" otherwise they would binding the judge's decision.

PRINCIPLES HELP US TO DECIDE ON "HARD CASES" (no legal or unclear legal provisions)

Are moral values always balanced in our legal system?

About Torture

Imagine that a terrorist has placed a bomb in some public place such that, if detonated, many lives will be lost. Further imagine that police has just arrested responsible for the bomb; the terrorist knows the details that could lead to its defusing; absent the terrorist's confession, there is no other way to defuse the bomb; if the information is provided, defusing is certain; absent torture, the terrorist will not divulge the relevant details; and, given torture, he might divulge those details.

What should the police do? Is torture permissible? Impermissible? Obligatory? We have to consider different things before taking a decision:

- 1) Does time change our decision?- if the bomb is going to explode in 20 minutes or in 2 hours, does our decision change?
- 2) Does damage change our decision? like the place where the bomb is collocated(e.g. a shopping mall or a garage...);
- 3) effectiveness: are we sure that the person is going o talk if we torture him/her? It's not sure if that person is going to tell the truth;
- 4) Purpose: trying to understand the purpose of the terrorist

ART. 3 ECHR Prohibition of torture

No one shall be subjected to torture or to inhuman or degrading treatment or punishment

ART 5 ECHR. Right to liberty and security

Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

- a. the lawful detention of a person after conviction by a competent court;
- b. the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
- c. the lawful arrest or detention of a person affected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
- d. the detention of a minor by lawful order for the purpose of educational supervision or his lawful

detention for the purpose of bringing him before the competent legal authority;
 e. the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants; f. the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

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- *What should we do, theoretically and practically, when we do not agree with the Law?* (one of the many other themes that Antigone underlines)

In order to go beyond the law (disobey the law) we need a justification (in juristic terms it is called "Accounts").

However, deciding to follow the law (following the legality) doesn't mean that we cannot be critics about the law (e.g. protesting, making satire, litigating, going on strike). The law allows us to criticise (in a democratic system).

For example, Montesquieu said that every modern democracy needs: legislation, a government and a judge.

The constitutions of the Democratic societies allow all of us to oppose the law because they give us political rights. This is also why people that live in democratic societies have the possibility to vote; indeed, voting is a way to make critics (it is a political instrument that gives us the possibility to criticise the law).

Antigone decided to do an unlawful thing: she didn't follow the law because she didn't agree with that (she decided to pass the line of legality).

Antigone made a thing that we call "**Civil disobedience**". Ghandi is considered the first one that introduced Civil Disobedience in our lives as a possible thing when we disagree with a law. We also have other examples of illustres figures in history that committed civil disobedience: Nelson Mandela, Rosa PArks, Martin Luther King...

Characteristics of the Civil Disobedience:

- it is deliberate;
- it is based on values (that can be social or moral);
- it must be peaceful in order to avoid violence; and that's why it is called "Civil" and this is also the thing that distinguishes it from terrorism.

The Monopoly of Force (State authorities) is the only one that can use force. This condition follows the "Rule of The Strongest", which is a rule that is typical of the Natural World.

Common people (non authorities) can use violence only when they are under attack for self defence.

So, Civil disobedience must respect the Monopoly of Force.

- *What if anyone uses violence when going against the Law?*

This is, for example, the situation in which Wars, Conflicts and Revolutions are born. These actions are much stronger than Civil Disobedience and they are not anymore "Civil" because they use violence.

The use of Violence is a natural thing but it is a thing that doesn't belong to the Modern State.

The **Iran Protest** going on right now is the biggest example of Civil disobedience nowadays. **10/10**

How far can the State go in Citizens' lives?

see slide

We must talk about **Civil Liberty**, which is different from political/social liberty. Until the XIII-XIX century, this question wasn't even taken into consideration.

Emmanuel Kant was the first to consider Liberty as Autonomy. He introduced the concept of self-determination: the idea of citizens having the same liberty and not being subordinated (= not following orders by authorities). For E. Kant, subordination is something not natural, but it is a consequence of a decision of the society.

He states that the society is based on 3 forces:

- 1) The Morality: from the political point of view, our system must be based on morality; 2) The Liberty: citizens must be free;
- 3) The categorical imperative (social contract)

So, the relationship between authority and citizens is based on the concept of morality, on citizens' liberty and on the social contract.

The historical period in which Emmanuel Kant states these things is a period of Economical changes: the rising of Economic Liberalism, which provided liberty and private property in a system with a limited influence of authority, different from protectionism. Since Liberalism was rising, the systems had to deal with different moral values (they had to have a more open vision of the moral values, since the economic system was worldwide). This idea is called Political Liberalism.

Liberal Philosophers

Jeremy Bentham: he bases his philosophy on the concept of happiness. The State must seek the maximum utility for the highest number of people in order to give happiness to a citizen. Consequentialism/utilitarianism.

The existence of moral rights is dangerous and only useful to:

- 1) Justify tyranny and discretionary power;
- 2) Open the door to anarchism/individualism/chaos;
- 3) Threat the "certainty of law".

see slide

If we assume that a citizen's life is rational, we must assume that liberty and private property are the main elements of happiness (you cannot be happy if you are not free and rich) and the State must protect them. Everytime that the legislation imposes moral choices to the citizens it is ineffective. The legal system has nothing to do with the morality of the citizens.

John Stuart Mill

He supports a strong division between Legislation and Morality. If the legislation wants to impose something on citizens' morality, it is really dangerous.

The happiness of citizens goes through the respect of their moral values.

In a liberal system, liberty is the most important value that must be preserved, but it doesn't mean that it has no limits. Liberty wouldn't have any limit if we were in an anarchic system.

Paternalism or Liberalism?

Paternalism imposes moral values to the citizens; liberalism doesn't.

Ex: the fact that Euthanasia is not legal in many countries, it is a paternalistic imposition— citizens are not free to follow their own moral values.

Ex: having sex with people under 14 yo is always illegal.

Ex: in some countries it is forbidden to drink until 21 yo.

Some systems are more liberal; others are more paternalistic (Ex: in Iran, now, there is a very strong paternalistic system).

Mill, in his most famous book "On Liberty", points out the "**Dangerous Bridge**" dilemma: *if I see a person walking on a dangerous bridge, what would I do?*

I need to:

1) Know if the person is aware of the danger he/she of his/her action— is that person doing that voluntarily or not? Is that person conscious or not?

Mill says that the Liberal System works only if there is consciousness. So, the legal system must impose a rule to consider when the age of consciousness starts: ex. For the State, when you are not majorage, you are not fully conscious of your actions. *The Liberal Legal Theory can only be applied on conscious people* (ex: it cannot be applied on underage people or on mental ill people).

2) What are the consequences behind that action?

3) Is the bridge certainly going to fall down or not? If it is not certain, then I don't even have to question myself about saving that person's life. If I don't know the answer, I am still allowed to intervene for prevention. I should stop him/her (paternalistic approach) but only if there are 3 conditions:

- The bridge is certainly dangerous
- There is no time to inform that person about the dangerousness, because he/she is already walking on the bridge (still actual danger)
- The person doesn't want to fall from the bridge. If that person WANTS to fall from that bridge to commit suicide, I cannot stop he/she, because it is a right to commit suicide and I cannot stop it.

11-10

Hard Anti- Paternalistic approach to Legislation. Mill states the “**non-harm principle**”

2 points of this principle are needed to be taken into account:

1) If there is no threat to others, there is no justification for legal intervention.

There must be legal intervention when a specific action harms someone, ex. The consumption of drugs is illegal because if a person goes on overdose, the State would pay the consequence for that by providing a place at the hospital for the rehabilitation

2) If the action is only a threat to the agent, there is no justification for legal intervention. Those who decide to go against the “dominant culture” are called *free-riders* (or *non conformists*). Mill says the majority of them will fail or, at least, will remain unhappy. **Should the Law stop the free-rider?**

In this point, Mill says that, in our society, we can decide to be free riders= people who use their liberty to go against the dominant culture (the dominant culture influences people’s lives much more than what the Law does – free riders decide to go against them). Democracy has a problem with free-riders: it doesn’t know how to act with them.

Mill says that the non-harm principle must be respected. So, the free-riders are part of the society, but, even if they know that going against the dominant culture they will probably fail, they are still free to do that. Indeed, the Legal system is not allowed to say what is good or not for people’s choices– Mill says that a person **MUST** be free to be a free-rider.

Mill has an opposite point of view from Paternalism; he has a strong liberal vision. **Does society really need Conformity?**

In order to govern a community, it is better to control a common group of people= conformist people. That is why dictatorships are scared of people who go against conformity, because they are not able to have control over them. This is why the Liberal Theory is a revolution: it says that the difference is accepted in the society and people should not be scared of that.

H. Simon’s bounded rationality. From *homo economicus* to *homo euristicus fallax* and Critics of the Liberal theory

The idea of *homo economicus* collapsed during the 20th century. Sigmund Freud, for the 1st time, said that we both have a conscious and an unconscious part of ourselves, and the unconscious one really influences our life. From the 20th century, ppl actually start thinking that people are not totally rational and that it is a normal thing to make mistakes.

Simon, in 1957 wrote “Models of man: social and rational” in which he says that we don’t have a full rationality, but only a **bounded rationality**.

Why? : We live in a social context – we have a social identity– which influences our rationality. You cannot consider yourself free if you live in a social context. Moreover, everyone has cognitive limitations – our brain has limits (cognitive bias).

There is a change in the idea of citizens.

What are the main limitations that make our decisions irrational?

- 1) Time limits
- 2) Incoherent information on the situation (too many or too few). I cannot be rational in my actions because I don't know the consequences.
- 3) Problems with probability. We never calculate the probability of the problems that there could be from our actions.
- 4) Not realistic optimism/pessimism.

The cognitive bias: psychologies tell us that we have hundreds of *biases* that influence us (they are prejudices). This is a proof of the fact that individuals are not rational. - Each person tries to assess present situations on the basis of past experience, omitting the differences, in order to be able to reuse the same criteria adopted in a similar past situation. Omitting such differences may be decisive in invalidating the final assessment.

- Moreover, individuals tend to omit certain parameters if in their culture of belonging these aspects are seen as taboo, while they tend to exalt the role of those who are considered positive values.
- Also, the brain acts on the basis of valid cards or mental schemas to cope with much of the situation. There are, however, a number of situations that can only be properly addressed by stepping out of the established mind maps. The individual who merely uses such maps falls into error when facing new scenarios.
- The fear of making the wrong decision can lead to the wrong decision, for the famous paradox of self-fulfilling prophecy.

The Paternalist Instruments

What can a legislator do? (resources to study: additional material on moodle) 2 options:

Command and control order or Deregulation (strong paternalistic point of view) (Strong liberal point of view)

But there is a third possible way theorised by Richard H. Thaler and Cass R. Sunstein in the book "Nudge". The way works on people's cognitive bias by suggesting the best possible option for you. For example, we can find this third way on the cigarette packages: there are pictures and sentences that show you that smoking causes death and you are the one responsible for your actions— you are free to smoke, nobody is stopping you from that, but the State shows you that it is dangerous.

There is no kind of obligation in this third possible way: it is only shown the best option for you. You can choose the best options or not; nobody is forcing you. Example: you can choose between an A+ or a B kind of tv. Example: you can choose to eat a salad or a fat fast-food. Example: the phone application that shows you the lost kcal and the number of steps. Example: the default choice – you are not allowed to make your own decisions and the State makes them for you.

This way is really influencing our economy and our society. You preserve the Liberal legal theory,

but, at the same time, you also avoid a too free society. This is a way that, at the end, promotes conformism but not in the same way of paternalism.

Is there the right to be silly?

Should the Law stop the free-riders?

Mill's answer: Society should not use the force of the law to repress criticism or non-conformity, because individual freedom of expression and lifestyle, and the conflict that these engender, are the real sources of dynamic development in any society. This doesn't mean society could use instruments such as intolerance, indignation or disgust.

Patrick Devlin's answer: The society must retain the right to pass moral judgement, to approve or condemn, distinguishing between good and evil, using the law. If the society has no agreement about good and evil, society will collapse

H.L.A. Hart "mediation": To distinguish between society's moral norms and agent's own good. Society does have the right to prevent its members from harming themselves as much as from harming others, but it does not have the right to enforce conformity with collective moral standards. This is a mediation between the paternalistic conservative Devlin's point of view and Mill's liberal point of view.

The critics to Liberal Theory

Main object of critics is the concept of individual/agent: Liberal Theories imagines human beings as Free, Equal, Fully conscious and Rational (as result of the Enlightenment). This idea of "individual subjects", "owner" of rights and sovereignty, made the difference between pre-modernity and modernity. see slide.

Carl Marx: Radical Critic of liberal theories – the Conflictualism

From his point of view, individuals are not "monads", but part of a "social class" (individuals are part of a social context, not as an abstract entity).

He looks at the reality and writes his theories on the basis of his observations of the reality. Reality is considered an empirical environment. Even moral values are linked with history and culture. By looking at the reality, Marx observes groups of citizens (not the singular individuals).

Marx strips away the moral rhetoric of "universal rights" to reveal the mechanism of political power. As a consequence, Law and Rights are not useful to apply and demonstrate rights, but they are useful to preserve those relationships between classes. Law and Rights are just a way to increase the difference of the society and to give more power to the ruler class. So, Law is an instrument of the "dominant class" to control and submit the "under class".

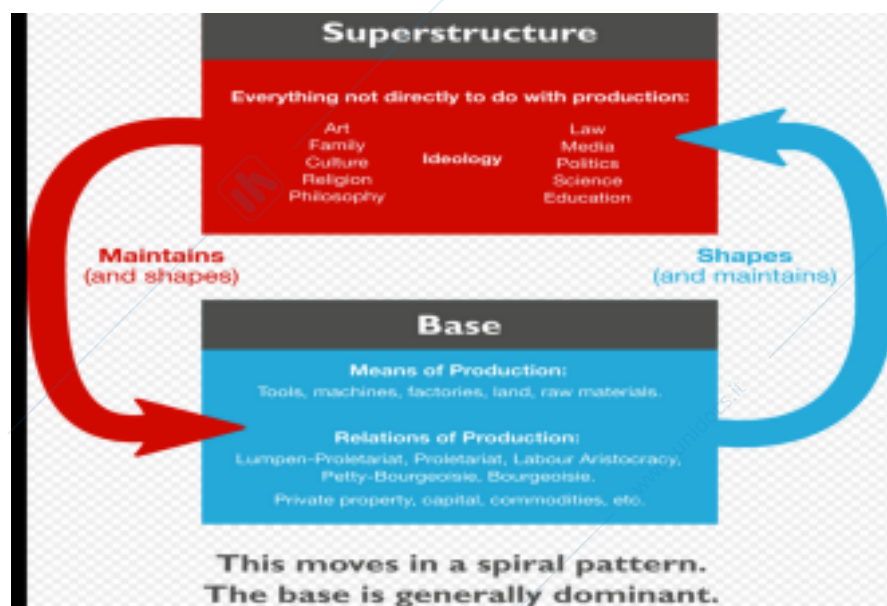
Civil rights are only an expression of the dominance of the Ruling class. They only consider the bourgeois class, reproducing the illusion of homogeneity ("veil of equality"). All the laws are covered by a "veil of equality", but, if we remove this veil, we discover the real aim of the Law: social justice. Revolution becomes a struggle and social justice. The answer to change this system

is not the anarchic way, but the Revolutionary way.

Radical Critics of Liberal theories: the social structure in Marx based on subordination

Base: it is the structure of the society. We have the Means of production (tools, machines, factories...). They are the base of the relations of productions (the more means of production you own the more relations of production you have – you are a powerful subject). We have different social classes. The bourgeoisie are the most powerful ones and they are the ones that own the means of production. They are the ones that have the power to shape the society and its law (the Superstructure).

Superstructure: in the superstructure, all the social classes differences are maintained. The superstructure is made out of: Art, Family, Culture, religion, philosophy, Law, Medias, Politics, Sciences and Education; and they are all shaped by the Dominant class (the bourgeoisie). In the superstructure it is impossible to change the law, the only way to have a different superstructure, we need a Social Relivolution, which has to be done not by the singular individuals (“monads”), but by the whole group of people.



CRITICAL LEGAL STUDIES (CLS)

Welfare State ('60s - '70s): Complex of public policies put in place by a State that intervenes, in a market economy, to guarantee the assistance and the well-being of citizens, by changing in a deliberate and regulated way the distribution of income generated by market forces. Therefore, welfare includes the complex of public policies aimed at improving the living conditions of citizens. The Welfare state is the basis of Social Justice. The CLS strongly supports the idea of law as an instrument of social justice.

The Welfare state is not in line with the Liberal system.

CLS has been rising in the US since '70s. There is the idea that all "law is politics". This means that legal decisions are a form of political decision, but not that it is impossible to tell judicial and

legislative acts apart. Rather, CLS have argued that while the form may differ, both are based around the construction and maintenance of a form of social space. The argument takes aim at the positivist idea that law and politics can be entirely separated from one another. A more nuanced view has emerged more recently. This rejects the reductionism of 'all law is politics' and instead asserts that the two disciplines are mutually intertwined. There is no 'pure' law or politics, but rather the two forms work together and constantly shift between the two linguistic registers.

