Philosophy of Law

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Law and morality - Are two different concepts?

The string between law and morality is kind of subordinated to the **historical background**: many laws have been in step with the prevailing morality of the day (even though nowadays we perceive it as morally wrong), for instance Nazism.
Moral relativists say that as civilization improves, law comes into conflict with the moral values of the time, creating a permanent tension between them.
Legal positivist theories assume that law is one thing and moral another, but it doesn't mean that judges, once they are operating, just have to face norms and laws not concerning morality.
By the way, a law isn't required to be morally approved to be valid.
Sometimes they seem to overlap:

I. In the common law jurisdiction, the legal codes seem to prevail moral values.
II. Criminal law's main purpose is to protect, therefore law appears as an enforcement of the moral code.

SOMETIMES THEY OVERLAP:
In the common law jurisdiction the legal codes seem to prevail moral values, therefore law and morality have a common purpose. And criminal law's main purpose is to protect people, and many of the criminal offenses
SOMETIMES THEY DIVERGE:
Law doesn't require acts of assistance that might be considered as morally obligatory, it just wants restraint and that is it's primary need, while the mortal side is subordinated. You can break the law even though your offense is not morally wrong (non-life-threatening offenses); or in the "duty of care", where contemporary legislation has extended liability to harmful acts or omissions that aren't directly intended; also matter and issues on which there isn't general agreement, hence law can't reflect the prevailing moral code.

What is the law?

Law is the main tool to protect minorities, but its final goal is to protect people who have the power, even if it should protect people who doesn't have it.
Law gives power to the society to use violence in order to protect the population, and we find a monopolistic use of violence by the government.
2 approaches:

1. Is law a set of universal moral principles in accordance to nature.
   Theory of Natural Law
2. Is a collection of largely man-made, valid rules, commands, or norms.
   Legal Positivism (the most followed nowadays)

The idea of law in ancient Greece or Rome was the first approach: law in accordance to nature, so Natural Law theories study an universal principle and universal morals where every law culture descends.
Legal Positivism theories focuses on the laws theirselves and the legal system that sustain them.

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What is the connection between law and morality? Are them same or different concepts? Can morality be found more in society or in nature?

In simple societies is easier to find common values, it's the opposite in complex societies because there are so many ideas.

Natural law is the theory that connects law and morality, while legal positivism separates them, legal systems are less demanding than a moral code.

Approach and flaws of Natural Law:

If law doesn't respect morality citizens aren't due to obey the law, that's why law and morality are to be considered the same thing.
Traditionally morality has benne found in two tools:

- Religions: tried to find connections between morality and law, and for many centuries law could be found in religious scriptures, theologists were also jurists. What went against the morality or the code of God, wasn't a law at all.
- Nature: since the middle ages many theologists were aware that in order to find the FIXED morality of things not written about in scriptures, was also necessary to observe the nature. The goal of the human being was to find this fixed morality, there wasn't discussion that there wasn't fixed morality, the problem to this approach was on HOW to find the natural law.

This was the only interpretation of law from ancient Greece till Enlightenment (1789).

Approach and flaws of Legal Positivism:

Is by this approach that law students, and lawyers don't start by studying the Bible for their law background, but they study norms.
With the legal positivism approach students and lawyers must study the law itself and not morality, because they're two separate things. Some jurists introduced the thought that a legal system is less demanding than a serious moral code. It doesn't mean that law shouldn't be moral, but it means that the validity of law isn't always found in the moral code. After the legal positivism revolution morality is discussed less and less.
With Natural law theory a law that goes against the moral code isn't valid, but with Legal positivism theory a law that isn't in accordance with morality is still valid, whilst citizens that don't respect it accept punishments that comes with not respecting that law. Judges nowadays must concern only with the legal matter, without considering moral issues of law.

- Aristotle believed and justified the institution of slavery, he said that this natural institution was beneficial to both the master and the slave, whom was considered part of the family's property.

Justice

"Something that any cultural group present in a certain nation can agree on."
Justice can be described only in situations involving consciousness and rationality: it's an issue only when there's a purposive activity.
Different PoVs of justice:
The agent: a single individual (it's personal opinion)
The actions: actions that are sensitive to the rights of those affected by it.
State of affairs created by the social action: a society could be labeled as just or unjust by different point of views.
Aristotle's division of justice (he invented legal positivism):

1. Distributive justice
2. Voluntary transaction
3. Absence of violence
4. Corrective justice
5. Involuntary transaction
6. Presence of violence

Today's division of justice:

I. Distributive justice (distribution of property by the State in ancient Rome)
   Social and civil justice and the concept of equity
II. Corrective justice (associated to the correction of an individual who didn't obey a rule)
   Criminal justice and the concept of equality

JUSTICE, EQUITY AND THE SPIRIT OF THE LAW

Equity differs from Equality: the first means that it's not so important that citizens will be treated in the same way, so different situations should be considered in a different way. The second means that citizens should be treated starting from what they did, so whom did the same thing in different situations the outcome should be the same.
!!! Equity could be connected to morality in some situations.
Should the state promote formal or real justice?

Aristotle noticed that there was a problem created by the systemation of justice: its inflexibility didn't leave space for its adaptation to individual cases.
Therefore he introduced the term ''equity'' as a quality deeply connected with justice: its aim was to prevent unfortunate consequences and it allowed judges to temper the severity of justice following the chains of law.
''equity as an integral to law''.
Does it mean that judges cast aside the law in favor of morality or they just follow the spirit of the law (justice/spirit of equity)?
Natural law theory and legal positivism
The heart of the dispute with legal positivism
There are two main mistakes regarding the conflict between the two main theories:

1. the belief that legal positivism only care about law, despite it being just or not, while natural law has a matter with human right.
2. the belief it's just a theoretical topic.

Costs and benefits in

I. Legal Positivism (Rule of Law)
   It should cause the judicial impartiality. It presume the legal certainty and the predictability of the judicial decision.
II. Natural Law
   The inflexibility of the Rule of Law is not useful for the adaption of justice to individual cases. It can produce a legal decision formally correct, but, in fact, unfair.

Aristotle's concept of equity: While is right that rule X should be applied, it does not really apply to case Y.
The appeal to equity as the function to allow justice to temper the severity of law.

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Natural Law's Philosophers

Why do you think in the contemporary society we're still talking about Natural Law? Because it roots affect principles of Human Rights.
We're going to talk about philosophers from Ancient Greek and Rome: Aristotle and Cicero; and moving to the middle ages: St. Augustine and St. Thomas.
Ancient natural law: Aristotle and Cicero
In the ancient time there were already elements of natural law theory, such as in Aristotle and Cicero. Even though natural law philosophers believed the source of law was religious, not all of them assumed it came from God.
We talk about Natural Law about what we consider the TRUE law; for these philosophers we have two thoughts:

- Law is what is stated by a government, but also that is rooted in human nature, because all individual are inclined towards the good.
  All the societies are affected by the struggle between God and Evil.
  Society must promote genuine natural law to counter the worst characteristics of humanity.
- In contrast to civil, the actual positive law of a State.
  The objective is to protect what is considered good.

We don't have to think that even if we are talking from philosophers that lived long time ago, they didn't think that humanity was a race of angels. But they were already thinking of common good, something that would benefit everyone in society.
The goal/core of the law is tho counteract the evil and bad characteristics of humans.
So natural law philosophers think that actions should be based on reasons, and not on primary instincts.
!!! Importance on morality associated to different laws. !!!
Natural Law in a Christian PoV is what God thinks is good or bad.
In the Ancient Greek Natural Law was considered in a deeper level of our everyday awareness of right and wrong.
!!! Video on Antigone's myth !!!
What is considered as civil disobedience? The refusal to comply with certain law, considered unjust, as a form of peaceful political protest.

Philosophers and their thought

Aristotle (Ancient Greece**)** pointed to the authority of equity as a paramount characteristic for justice, moreover he underlined that higher law does not change in contrast with the positive law that does (*Rhetorica*).

Cicero (ancient Rome) developed law as the higher production of human rationality along with the elemental forces of nature. He thought that law was the highest human rationality when it is in tune with the elemental forces of nature: when it follows Natural principles (= Natural Law's principles).

St. Augustine (middle ages) said that those emperors who acquired power with the force are not any different than criminals or pirates, to gain authority and legitimacy is based on the justice of the laws they apply to their empire. in *The City of God* related the story of a pirate who defied Alexander the Great: he enunciates those who, through force, have illicitly acquired the trappings of power and are enabled by their plundered wealth to conceal their criminal past. Moreover, he assumed that the mere power of any imperpor (enunciated by the story of the pirate) doesn't itself give him any more authority than that of a criminal: it's only the justice of the laws that gives them authority

St. Thomas synthesized ancient natural law with Christian Theology, so he laid down a distinction between different levels of law:

I. Eternal law: God's plan for the world (known only for himself).
II. Natural law: that part of God's law accessible to us through reason.
III. Human law: those laws declared by human authorities the are derived from, or consistent with, natural law.
IV. Divine law: that part of God's law, made known through revelations (The ten commandments).

St Thomas assumed that the source of reason is divine and the cosmos as an extension of the mind of God, furthermore he synthesized ancient natural law theory with Christian theology.

Since human beings have rationality, they don't have to rely solely on revelation to understand God's will: they can discover it.

What is **good**? The promotion and defense of the **basic goods**, but it seems an abstract issue, because people could point to anything as good according to their criteria, therefore all law must be directed at the **common good** (it must be made by the whole society=**communitarian** philosophy).

His moral philosophy is a version of **intrinsicality**: actions are good or bad in their inherent character, not by something external to them.

They aren't good because **God** has commanded them, but God has commanded them because they are intrinsically good

Evil means can never be justified by the good ends that might come out of them: the means selected must be integrated with the outcomes hoped for.

St Thomas instead, presented the theory of **"double effect"**: he said that we must try to promote good, but it's paramount to accept that there are unavoidable evil side effects that have to be taken for the common good.

Promoting the doctrine of the double effect is connected with the **defense of absolute values:** there are some actions that are bad in every circumstance.

''An evil rather than law'': it was not law at all, rather than merely bad law.

Plus, in many cases there are good pragmatic reasons to accept the authority of a law deemed to be unjust, mainly for the avoidance of social disturbance.

!!! Lex injusta non est lex !!!

I. "Law that fails to conform to natural or divine law is not law at all", as a consequence, the theory should support the right in disobeying an unjust law.
II. human law which conflict with natural law lose its power to blind morality and the subject are not obliged to obey it: they do when "it is a matter of avoiding scandal"

Grotius stated that even if God did not exist, natural law would have the same content: for this thesis he was accused of heresy.

He probably meant that certain things were 'intrinsically' wrong: his treaty is considered the basis for the development of public international law.

Some authors, like Aquinas, are considered as conservative and accused of adopting natural law theories in order to justify the social structure and the distribution of power in the society.

On the threshold of modernity, natural law has been adopted to justify revolutions, such as the French one ('natural right' of mankind) and the American one.

Legal Positivism

David Hume was the first Enlightenment philosopher that started talking about Legal Positivism.
On one side there's the role, functions and power of religions; on the other side we have all about the government. This is the core of Enlightenment: the separation of spiritual and temporal powers, followed by the separation of morality and law. The philosophical revolution that we know with Enlightenment, is characterized by a methodological approach with science (scientific method and finding objective truths other than subjective ones), many sciences born after enlightenment had the idea that they would improve society, so there was the belief that science could improve society itself. Positivism: the idea that science with objective PoV and impartiality can help society to improve.
If, at first, law was founded on theoretical discussion about nature, religion etc...now we have a new idea that all the sciences, in order to be considered real sciences, need to produce evidence about the theories that they introduce: it is the beginning of the methodological approach (we can not say that God exist if we don't have proved it). We have to produce empirical evidence (data, any kind of tool) to prove that natural law exists, but it is impossible to prove morality: it was one of the critics of Legal Positivism against Natural Law.
In absence of evidence, the simplest explanation must be preferred: in this case, that there are many laws.
Methodological Background:

A. *Empiricism, in the production of true. (1)*
B. *Phenomenalism, we can't assume anything beyond the appearances. (2)*
C. *Nominalism. (3)*
D. *In absence of empirical evidence on the contrary the simplest explanation is to be preferred. (4)*

(1) So Impartiality was the key of every old and new science from then on. If law was, in previous years, founded on speculative discussion about theoretical discussion about religion and nature (it was sufficient to produce theories considered acceptable), now the new idea was that all the sciences in order to be considered as real sciences had to produce evidences and fact to be accepted. Methodological empiricism was the key to all the truths. **(2)** In order to prove Phenomenalism you need to produce evidence that accords to Natural Law. But you cannot product evidence that proves a common morality, so a common Natural Law. There's a fixed Natural Law that moves society, nature, exc… If in the past what was truth in society was found in the world of God, from Enlightenment on truth is to be found in evidence, there are many laws and moralities, and the only valid law is the one produced by the State.
Main features of legal positivism:

1. *The denial of a relationship between law and moral.*
2. *Law does not exist without an human enactment.*
3. *The analysis of legal concepts is distinct from sociological and historical enquiries and moral/critical evaluation.*
4. *There's a clear distinction between what is "ought" and what law "is" (the formal law).*

DAVID HUME'S RULES
He was a typical scientist son from enlightenment, he said that every idea should come from experimental observation (relations between ideas/logical connections). And that the evaluation of the facts should be independent from subjective evaluation (separation of fact and values), so facts must not be influenced by values and already existing beliefs.
He had two fundamental purpose:

I. to challenge the traditional framework of moral philosophy in such a way that morality and law would be humanized by becoming more relative to human interest
II. to undermine the overblown pretensions to knowledge of the rationalist philosophers of the enlightenment

In order to speak rationally about any topic, he ascribed two conditions:

I. **Hume's fork**: all investigations should be confined to the reporting of experimental observation ('matters of facts') and the rational elucidation of 'relation between ideas'
II. importance of **objectivity**

The first approach of legal positivism denied the bond between equity and law, in order to produce equality. It was strongly enacted in criminal law, and in other fields, but we started to discuss about equity again in the middle of '900.
Three main approaches of Legal Positivism:

I. Law as commands (Bentham & Austin).
II. Law as social rules (Hart).

III. Law as norms (Kelsen).

From Common Law to modern positivism

Do you know the difference between Civil Law and Common Law?

The legal systems are differentiated by their primary way of thinking, the judge in Civil Law has to apply an abstract law in a concrete case; in Common Law the judge has to compare past cases with the one he has in front of them at the moment.

The Common law model: in the English speaking world and countries that have been under the British empire

Civil law model: it was born in Europe

Socialist law model: China, Cuba, North Vietnam and North Korea

Religious law model: Middle East and North and West Africa

The common law system has his birth from the Norman conquest in 1066 by WIlliam the Conqueror: the law system was based on a recognition of the authority of precedent, such that previous decision for similar cases had to be followed if the offenses were essentially the same (if the past decision had been made by an equal or higher court).

This was known as the doctrine of "stare decisis", which was derived from Roman Law and was used to ensure stability.

Despite it all, the power of the statute was still recognised since a law on a particular issue could be changed by decree from above: in this case the statute was said to be superimposed on case law (its role started from the 13th century)

Nowadays, the common law system recognises the authority of both statute law and case law.

The critics to Common Law

Jeremy Bentham critiqued Common Law for its indeterminacy, that is in his view, endemic (the "dog law"), also because unwritten law is intrinsically vague and uncertain. Natural Law is nothing more than a private opinion of a specific judge, and the only solution to address the Common Law chaos is the codification; but unfortunately his program for a codification in the UK remained a dream.

His approach was shared by one of his scholars: **John Austin**, in his conception he divided the law of God and the human law, this was a separation firstly made by St. Thomas.

He recalls the division from St Thomas and subdivided human law into:

I. Positive Law, enacted by a political superior.
II. Law "Improperly so called", not laid down or enacted by a political superior: for this reason it can't be considered as law.

(Concept of Legitimation)

Types of law "improperly so called":

- **a)** Laws by analogy (constitutional and international law).
- **b)** Laws by metaphor (law of gravity).
- **c)** Laws set by men not as political superiors or in pursuance of legal right.

These are not "subject of jurisprudence" but merely "positive morality".

The utilitarian morality

Bentham and Austin are paramount for **utilitarianism**: critics of values, not so important for a society to pursue some values but it is important that a decision enacted by the society can generate benefits for the whole society: the highest level of happiness for as many people as possible.

Both of them reflect the utilitarian morality: bentham wanna promote a legislation, austin has never promoted a real legislation and a civil law approach in the uk: he wanted to create a science of lae divided from other sciences and in his view that is not a command is not law, hence only commands enacted by sovereign are positive law, the others are laws improperly so called: there is a law connected with a rule enacted by the power. That's why constitutional and international law are not considered law because we don't know the sources.

Bentham

I. He pursue the notion of a single, complete law which express the will of the legislature
II. He aim to propose a "art of legislation" in order to expounds a complex logic of will.
III. He aim to reduce the arbitrary of judges.

Austin

I. He does not search a "complete" law, but he builds a classification of rights

II. He seeks to construct a science of law.

Law as a command

Bentham

I. Commands are merely one of the four methods by which sovereign enacts law.
II. He distinguished between: Imperative laws (prohibit certain things), Permissive laws (permit certain things).
III. All laws are both penal and civil.

Austin

I. Anything that isn't a command isn't a law.
II. Only commands emanating from the sovereign are "positive law".
III. International law and constitutional law can't be defined as positive law, because the author can't be identified.

Command and Sanctions

Bentham said that in a code of law, penal and civil branches should be formulated separately: at the same time he recognized that law includes both punishment and rewards.
Laws which impose no obligation or sanctions are not 'complete laws'.
Bentham disagreed with him: he didn't think that all the laws were in command. He distinguished:

I. imperative law
II. permissive laws

Moreover, he assumed we have both negative and positive sanctions (ex. you find a pocket somebody had lost and you are rewarded).
Austin said that law is a command, therefore we should not obey those commands which are not laws: there are some values that we have (ex. not to be disturbed), but they are "laws improperly so called".
A law without a sanction is a mere expression of a wish, not a command.Furthermore, there must be a realistic probability that it will be inflicted.
Probably he was thinking about criminal law, but it is not always true when it concerns civil law.
He proposed that anything that falls outside of the category of strict law should be excluded from the discipline, hence he singled out the concept of a command and aimed to set it at the explanatory center of law.
The command must be issued by a supreme commander who is not in the habit of obedience to any higher sovereign.
All these commands will always be backed up when necessary by threats or sanctions: he stated that a law must be the expression of a personal will and it must incite the will of another to obey or disobey. Where there is no will, there is no law.
Moreover, he stated that God had long been seen as the supreme commander, but for him, morality is properly speaking law: therefore he has to separate these divine commands from the commands that emanate from the sovereign, because only the latters are the real ones. These authorities can be influenced by religious-inspired moral beliefs and values, but it has nothing to do with determining whether or not they constitute the law.
God applies only moral sanctions.
The legitimation of the power implies that people must know who to refer to (it is determined), there must be no higher power (it is unlimited).

The sovereign power

For both Bentham and Austin (the sovereign power) is constituted by the habit of the people generally obeying his law, but **Bentham** is favorable to the institution of federalism, and that the supreme power may be limited by an express convention (government, parliament, jurisdiction).
Austin, on the other hand, states that the sovereign power is unlimited and indivisible, and he's contrary to that systems that impose constitutional restrictions on the legislative competence.
If law is a command personal addressed to other persons, we have to consider:

I. Laws issued by previous sovereigns
II. There are at any given time laws that the sovereign would not be aware of.

His answer is that not all commands are explicit: there are in fact some implicit or tacit commands.
tacit commands:
The sovereign must be a human individual or a number of individuals in an assembly such as Parliament or Congress and the commands must be personal, therefore the authority of the sovereign would seem to

depend on their own success in their own lifetime in commanding the obedience of the population
The king has been appointed by divine right, which is actually in odds with his idea of God and power.
He assumed that many commands are not explicit and hence we should understand them as implicit.
After a radical change in society, usually, we have a change in Constitutions, because citizens need to define a new social frame, including everything new or that changed, for their own safety.

Law as Norms / Normativism

Kelsen said that law is a science and lawyers are scientists. He stated that all laws are human artifacts and he refined a "pure theory of law": he was purely interested in developing a rigorous science of purely legal norms.
Especially, it was intended to be a science based on norms in contrast to the more typical empiricist conception of natural and social science resting on the observation of causally related facts.
He observed law in 'oughts' or legal norms rather than by observing facts.
Keeping facts separated from values was the overriding imperative: moral ideals are subjective expressions (matter of emotivists) of feelings and irrational emotions, hence unsuitable for any kind of legal analysis.
He was looking for the purely formal structures of any possible legal system: opposed to any natural law theories.
He moved from the idea to introduce in the legal studies a pure theory of law: pure because it is against many approaches that have many theories of law. So Normativism is based on 4 concepts:
Divine: All laws are human artifacts. Legal system must be secularized.
Empiricism: A rigorous scientific method must be applied to law. Law is a science non less than others like physics or chemistry. In order to understand law, we need formal categories able to give a clear explanation of what law is.
Morality: Morality is subjective, the legal analysis must be "logical" and "objective". Keeping facts separate from value.
Pluralism: Kelsen's theory could become the pure structure of any possible legal system, because law is an autonomous and distinctive science. We need to separate law theory from impurities of morality, psychology, sociology, political theory.
In his theory Kelsen is able to explain any type of legal system, so in his view we have to separate between the science of law, and other impurities (sociology, psychology, exc…)
Only in the last 30 years this model got criticized, but before and for many years students studied positive law, so not studying other sciences other than law (what were considered impurities, but aren't anymore).

Kelsen's pure theory of law:

I. **The purification of subject mat**ter: in order to establish law as an independent science, it is necessary to strip it down to what is distinctly legal (no influence from outside).
II. **The purification of the investigation**: the investigation must be value-free (judge does not decide on approval/disapproval).

They both are the leading stings of formalism.

The monopolization of force:

In Kelsen's view we have to consider that the State is the only subject legitimated in the use of force/violence.
As in the middle ages we knew many people legitimated in the use of force, with the born of the modern State we are noticing a great revolution, the State becomes the only one with the right of the use of force.
So one of the main features of the legal system is that legitimate coercion by official who represent the State (Robber and Tax collector). If you don't pay taxes the State can use violence against you, but any-other individual, or group cannot. The objective legitimation of violence distinguishes for example a tax collector (legitimized by the state) from a robber (not legitimized by the state).
Legal norms provide social order and they differ from other norms in that they prescribe a sanction. He provided a juridical and hierarchical system: each level got his validity from the superior one and all. The legal system is a succession of interconnected norms advancing from the most general (ex. constitution) to the most particular (ex. Contract).

The *Grundnorm*

Where is the legitimation of the **Constitution**?
The validity of the Grundnorm is the final legitimation of a system, it must be presupposed, it exists in the "juristic consciousness" and it is an assumption that make possible the comprehension of the legal system by the legal scientist, judges, or lawyers.
!!!Unconscious legitimation of the legal system as a science by something metaphysical as the Grundnorm!!!

What are its functions?
I. distinguish between legitimate and not legitimate coercive order
II. what is law and what cannot be considered as law
III. it explains the coherence and unit of legal order
IV. all valid norms may be interpreted as a non-contradictory with the legal system as a whole.

Legal order effectiveness

For the very existence of the legal system is implicit the fact that its laws are generally obeyed. Plus, the pure theory of law refuses sociological inquiries on the legal system's effectiveness.
More in general, when the basic norms lose general support, all the legal systems miss legitimation: this is the case of a successful revolution.
Where can we find the legitimation of the police, of the tax collector, or the prison system?
In the Grundnorm.

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Law as Social Rules

Kelsen acknowledged that the morality of laws was a problem, but he intended that morality itself shouldn't affect Lawyers, Jurists, and Judges, because they have to be apply law without considering morality, because have only to apply the correct general law for every specific case. He said that you have to do an evaluation of the law, so apply only valid laws, but the validity of a certain law isn't connected to morality, but with the formalistic approach (pyramid of norms).
In the concept of Law (part of the book by H. L. A. Hart) the author introduced his idea of legal positivism in a more complex concept than others, he introduced the idea of law a social rule. Hart said that law is a written letter, sometimes laws are clear and in other cases the letter is not so clear, because the letter may give the opportunity to give different interpretations. The letters are in a sort of "penumbra". Of course in order to give the interpretation when the law is not clear, judges have to consider the law as a social phenomenon, and to understand its social value and situations, to have a correct interpretation of the law. The general idea behind these criticisms is that there are many familiar rules in society which it would be highly eccentric to deny the title of legality to, which are simply not allowed by Austin's command model (ex. the laws in place when the sovereign comes to power...). Hart's criticism:
I. Being obliged or being under an obligation
II. Power conferring rules such as marriage
III. The sovereign command sanction picture doesn't reflect the ays in which many laws have risen
IV. The problem of **habitual obedience** to the sovereign
V. The problem of the **unlimited power** of the sovereign

He used an idea excluded by Kelsen, assuming that:
I. **Language** is an open texture where we can find several 'preambular' case.
II. Since law is a social **phenomenon**, it can be misunderstood only describing the social practises of a community.

Sometimes law is clear and there are no doubts on interpretation, but in other cases it may be misunderstood: in these cases judges are more or less free in order to interpretation the meaning of the law: when it is not clear they must consider it as a social phenomenon, hence he accepted the idea of penumbral situations.
He knew there were easier cases, but also harder where law was not so easy to apply, interpreting it a social phenomenon.
Also Hart created the concept of "minimum content of natural law", human beings need fundamental rules for a set of social phenomena, but they're not always moral and don't ensure a fair society:

I. Human vulnerability
II. Approximate equality
III. Limited altruism: in order to produce the obligation of a kind of equity, because humans are not altruist by nature (they try to improve they power: we must limit egoism).
IV. Limited resources: the goal of law is to produce a distribution of the resources.
V. Limited understanding and strength of will

Hart states that the minimum content of natural law is that law as to face with these social phenomena, law that doesn't provide these features isn't law at all.

Legal and moral obligation

I. Being obliged:
   A. Austin would say that we obey by force.
   B. It means forced, compelled.
   C. The example of the gunman that obliges the bank clerk to obey its orders.
II. Being under an obligation:
   A. It means to have a legal rule that imposes an obligation.
   B. It needs the acceptance of the legal authority: if you don't accept it, it reaches the same level of the gunman (it depends on an interior point of view).

Conventions and obligations

He identifies forms of convergent behavior which do have an internal aspect, but do not involve what anyone would call obligations, either moral or legal: they are a midway category called **convention** (ex. rules of etiquette, chess, football), such as rules of the game that have to be followed if people still want to play.
How can we distinguish obligations from the conventional rules?
It is only in the areas where the social **pressure** to stay within the rules becomes greater that we can begin to speak about obligations, when the appeal to shame becomes prominent we can begin to identify a social morality and speak about obligations created by the rules. Moreover, when this pressure to conform involves **punitive sanctions**, we can identify these as primitive law, as legal obligations.
Three more elements to distinguish obligations and conventional rules:
I. Pressure
II. The rules have to be thought of as **necessary** for the maintenance of social life
III. Obligations usually involve serious **sacrifice** or **renunciation** on the part of those controlled by them.

Law as a system of rules

He also defined the difference between primary rules and secondary rules:
I. They are the rules that prescribe or impose a certain obligation (ex. The prohibition to use violence, to theft etc.). Primitive society usually know only Primary rules.
II. When society become more complex it need rules to adjudicate on breaches and to identify which rules are actually obligation rules.

It is not necessarily a formal law, but citizens must accept it from an interior point of view: that is the distinction between the grundnorm and Hart's theory.

a) A type is the rule of change, a rule that give the power to the government or to the parliament to do legislative changes, but only following some specific rules (iter legis).
b) Without the rule of adjudication the jurisdiction doesn't have the power to make punishments to those that don't follow norms.
c) The most important in our view if the rule of recognition; in Hart's view the validity of the legal system falls under this rule:
   (1) It determines the criteria by which the validity of all the rules of a legal system is decided (ex. Constitution).
   (2) It requires those who exercise public power to follow certain rules (Judges, police).
   (3) Rules are valid members of the legal system only if they satisfy the criteria laid down by the rule of recognition.

When does a legal system exist?
I. when citizens generally obey the primary rules
II. when official accepts the rules of change and the rules of adjudication
III. they must also accept the rule of recognition 'from the internal point of view'

This last point in particular divides Hart's position from utilitarianism, as he states that the 'internal' aspect distinguishes rules and a habit.

The rule of recognition

It is a secondary rule and it determines the criteria by which the validity of all the rules of a legal system is decided (ex. Constitution), hence is the source of legal validity from which the legality of any law is ultimately derived. The basic rule can appear in any number or forms or guises (written, unwritten, spoken etc...), anyway it is a socially accepted fact in any given legal system.
This fundamental role of recognition plays the same role in theoretical terms as Austin's sovereign and it states at the apex of the legal system, conferring validity on any and every specific law in question, while the moral or political quality of it does not come into play.

BUT WHAT GIVES VALIDITY TO THE RULE OF RECOGNITION?

Hart says that this rule is valid as it is accepted by citizens from an internal PoV.

As far as people who use the legal system in their everyday life from an internal PoV it is accepted, if the legal system doesn't satisfy legal workers it can be changed (Statuto Albertino->Costituzione), so we can state that legal system is always changed after revolutions or events that change the vision of society.

When does a legal system exists?

I. When citizens generally obey the primary rules.
II. When official accepts the rules of change and the rules of adjudication .
III. They must also accept the rule of recognition "from the internal point of view".
IV. This last point in particular divide Hart position from utilitarianism, as he state that the 'internal' aspect distinguishes rules and a habit.

Hart's approach is a critique of utilitarianism and is the first case where we have the introduction of law and morality with legal positivism.
It does not mean that law must accept one single idea of morality, but implies that when jurists use law, they apply law accepting the legal system from an internal point of view.
It does not imply that they accept all the specific law, but if they accept in the whole the validity of the legal system, the legal system is valid.
When citizens refuse the legal system as a whole, there is the beginning of the rule of recognition: judges can not disagree with a specific rule they need to apply, but as they accept the validity of the whole legal system, the system is still valid and they have to apply that law.

10-10

Rise and Fall of Natural Law

The fall and rise of natural law

The only way to discuss law from the 19th and so on has been a legal positivist way, while it was impossible to find natural law jurists.
From the middle of the 20th century something started to change for several reasons: legal realism. In Europe before and during the 2nd world wars many crimes against humanity have been committed (apartheid, russian laws, jewish etc...), but where murders and isolation happened, were the racial laws valid laws?
Yes they were: all the crimes have been committed applying the law, not violating law, they had a bureaucracy and administration.
What can we do when law acts against human rights?
Should we obey and apply the law?
The **Nuremberg** trial was only for the offenders, the ones who had persecuted and oppressed, while there were more and different trials for doctors and judges.
There was the problem of the language which had been solved by using translation through headphones.
The **20th** century rise of natural law:

I. the 20th century witnessed a **renaissance** of natural law theories
II. atrocities committed during the 2nd world war, with the support of strictly legal law, focused the attention on the risks of the **"tyranny of law"**
III. After the war, we witnessed a growth of international declaration of **human rights** aimed to set boundaries to the omnipotence of the legislator
IV. in the 20th century Natural law is not conceived as a **"higher law"** but as a benchmark against which to measure positive law

Was Nazi law genuine law?

I. despite the horror they had perpetrated, the Nazism legal system seem genuine and many important lawyers works for the government;
II. From an **Austin's** point of view there were a recognized power (Hitler), and the great majority of the population had the habit to obey the rules enacted by the sovereign;
III. From **Kelsen** theory there was a basic norm and a logically connected system of norms (legal system), hence it was formally valid, but it means that jurists should apply it;
IV. **Hart** concludes that there was a real law system, but too wicked for any person of conscience to obey: he assumed to divide the formal to the social point of view, because by the formal point of view,

the Nazi legal system was a valid legal system, but he stated that this legal system is so wicked that any people of conscience should disobey.

It is a way to introduce a less radical approach to legal positivism.

Moreover, this legal system did not respect the minimum content of natural law to respect human rights.

Nuremberg trial

I. it was very important in regenerating the **natural law** ideals;
II. the judges applied the principle that certain acts constitutes' crimes against humanity even if they do not violate provisions of positive law;
III. although judges did not appear explicitly to the natural law theory, the judgment represent a recognition of the principle that the law is not necessarily the sole determinant of what is right;
IV. In particular, the court stated that the defendants were guilty because the Nazi legal system was contrary to the sound conscience and justice of all decent human beings.

After the 2nd world war many jurists started to be close to the natural law theories accepting its approach.

Constitution of new crime: crimes against humanity and problem of **rule of law** (i can't be sentenced for a crime that before i made the crime did not exist).

Was the Nazi law real law? **Hart** said:

I. legal validity concerns only the identification of formal criteria;
II. he stamp of legal validity does nothing to content moral legitimacy to a legal system
III. legal validity does not confer moral legitimacy to a legal system.

Radbruch (legal positivist judge, against nazism that had studied Kelsen accusing him for being one of the cause of what had happened during the 2nd world war by saying that many judges did not consider the morality of law also because in their legal culture the task of the jurist only had to apply law) said:

After the WW2 he announced his conversion to natural law positivism, arguing in two different ways:

I. **''intolerability thesis"**: it says that when the conflict between positive law and justice reaches so intolerable, the statute becomes *Unrichtiges Recht* (false law)
    1. as consequence, the false law could be legitimately overridden in the name of natural justice by authorized judges: the idea is that there is a threshold and any law that breaks through it becomes intolerable;
    2. At the height of the 20th century, in the **USA** similar accounts of the natural law perspective are to be found
II. **''Betrayal thesys"**: it says that where equality is deliberately betrayed, then the statute is not merely *Unrichtiges Recht*, but it lacks completely the very mature of law:
    1. Radbruch's position here recalls the ones of **Cicero and Aquinas** who said that tyranid was no law at all and that lex iniusta non est lex, but he also said that when the violation of law could provoke disease, they had to obey, on the other hand Radbruch's position is more radical.

Radbruch has a natural law position, plus he says there are some rights violated by the State and therefore that's not law at all.

When judges can decide not to apply the law because they think it is unjust?

What is law?

For natural lawyers it was morality and justice.

for legal positivism was an artefax made by human, pure science.

16-10

Legal Realism

Is an approach with law that has been very influential mainly in the USA, but also in Swedish, Norway, Denmark and partially in Italy.

They think that law is the judge's decision.

There are two phases of legal realism:

1. The 1st between 1890 and early 1900s
   Holiver Wendel Holmes (1841-1935): he was a very influential judge in the US supreme court John Chipman Gray (1839-1915)

2. The 2nd from 1919 to 1941
   Karl Llewellyn (1839-1962)
   Jerome Frank (1889-1957): he was a lawyer who worked in the US court during the 2nd world war.

The main features:

A. a **pragmatic conception** of law: in their view the discussion about law is a theoretical discussion and it does consider that the real law is the law produced by the judges in the courts, furthermore it offered a legal opinion that was considered scandalous for the time;
B. a **critic** both to the orthodox **legal positivism** and to the **natural law** theory: they state that the law studied should be the one studied on the everyday legal process;
C. a radical revision of the basis of legal theory to bring into line with the actual realities of the legal process, since they believed that the theories and doctrines as they were taught did not reflect the reality of the law as it was practiced in the courts;

Legal theory needs to **open to the rising discipline** of economy and sociology: lawyers, judges should know about the social changes (Kelsen instead talked about law as a pure science).
The reality of law:

1. the actual reasoning and practical justice handed down by real judges was the appropriate starting point for theory and it must be preferred to the *a priori* deduction of the meaning of law;
2. **the judge's decision**: nothing more is the real law, because it is what will be enforced (Gray): if i steal a laptop and nobody sees me, am I a thief?
3. **Hart** stated in all the laws there are some penumbral cases, where the decision process is partially free;
4. **Kelsen** had an opposite point of view;
5. In this view, the formal laws are sources of the law, upon which the judges laying down the law can draw, if they so choose;
6. In other words, the law consists in the best prediction that lawyers or jurists can make about the judges decisions, but even the decisions themselves will rapidly become no more than the basis for future prediction;
7. Realist programs need to recognise the fluidity of society and therefore the futility of fixed rules, because these letters can not recognise social changes: the only ones who can are judges when they make the decision.
   Law changes are not so fast as social changes: example of euthanasia in Italy.
   We should obey law as we agree with the legal system and so, even if we do not agree with a law, we still obey.
   Holmes assumed that men usually obey when they know the consequences of their bad actions, according to the "bad man" point of view, which says that people are interested only in finding out how they can stay out of jail and avoid fine, rather than the "honest man" point of view for whom conscience is paramount.

Law changes are not so fast as social changes: example of euthanasia in Italy.
We should obey law as we agree with the legal system and so, even if we do not agree with a law, we still obey.

What is law for legal realism? The judge decision.

Formal law (written laws) for a legal realist isn't real law, because it's too much theoretical, because it doesn't see society's problem. And they also believe that law should change as society changes so a partial view of (Natural Law), so for a legal realist, jurists, must know how society works, in order to apply formal laws in the most correct way.

THE "BAD MAN" POINT OF VIEW

If you know that you'll not be punished after violating a law, you'll most likely violate it.
White collar crimes (John ma che fai???!) are crimes committed by the middle/high class, they take advantage of their legal knowledge in order to find how to escape justice.

The attack on certainty

The first was Holmes, who recognized the natural impulse to "certainty and repose" in every area of thought. He says that we have to accept that legal system is indeterminate and uncertain and he explained that in the legal system (as a valid, real and complex system,) the decision of the judge is only partial. Holmes says that when judges make decisions they use the law as a justifications for the decisions that are produced by other influences, like social values of the judges or their considerations about the solution of the cases or

awareness of judges about social changes. So many topics influence the judges' decisions. So, law is an uncertainty.
According with Frank, whose attack on the basic myth of certainty was more polemical and uncompromising, law needs to be creative, the single case could be solved only by the judge that gas to consider social changes. So, it becomes explicit that legal certainty is as undesirable as it is unattainable. The judges have to renounce about every certainty and should find the better solution for any case. For him the absence of certainty is, not only inevitable, but also desirable.
Why was this belief in legal certainty so strong? For Holmes, this required no more explanation than that the craving for certainty was a natural impulse. Uncertainty leads to deep unease, which the human animal finds very difficult to live with.
The criticisms developed by the realists were essentially that the formalist case method leads inevitably to a preoccupation with the outward forms of the law as it is written. The central point is that law is interpreted as a formally closed system, governed by strict rules of inference and demonstrative proof.
The revolt against formalism is based on two points:

1. The critics against deductive syllogism and the belief that all the legal problems can be solved by framing them in syllogistic form; syllogistic reason often disguise the real factor influencing the judicial decision.
2. The critics against the idea that law is closed off to outside influences (political, economic, social etc.); the obsession on the letter of the law produce the consequence of the elimination of equity in the assessment of individual cases.

The essential criticism is that the formalist approach makes the mistaken assumption that the law can be completely understood by studying and applying deductive formal logic to principles and cases. With syllogistic reason placed at the centre of law as a formally closed system, it becomes possible to resolve every problem in such a way that it leaves no room for doubt. The structure of the legal syllogism is such that the truth of the conclusion does not depend to any degree on the substantial content of any of the premises.
The judge decision is often predictable, not because the legal system is completely able to give solution to all the cases, but because in the facts judges represent what we call juridical culture. Judges work in groups, and they tend to give the same solution to different cases, cause they influence each other. So the judges decision for Holmes are predictable. And for this reason the great majority of cases are predictable. For frank that's not true, for him judges decision is not always predictable cause the judges decide the solutions to the cases following their personal ideas. To be sceptical about legal rules it does not means that legal rules don't exist. It only means that they don't play the kind of role that formalists believe they do. Legal realist recalled Aristotle's idea of law where the judge has to apply also equity. In legal realism we can find different forms of scepticism. The minimal form of scepticism states that judges can frequently break out of the framework of the rules, in this sense they make new rules and the complete codification for this reason is neither possible and desirable. On the other hand there is the maximum form of scepticism, for this current of thinking the judges have full discretion in every area of law and there is nothing to stop them in effective legislation, so the judges decide case by case randomly. The versions of rule-scepticism promoted by most of the realists fell somewhere between these two positions, stronger than the minimal, weaker than the maximal. According to the moderate thesis, the role of rules in every area of law is radically suspect. Sometimes the rules are fully operative, sometimes they are not. In reality judges at every level are able to select or disregard precedent to suit the conclusion already arrived at. Frank's position as a rule-sceptic was more ambiguous, seeming to oscillate between the moderate and the maximum thesis. What is instructive here is Frank's understanding of the status of rules. He sees every rule as a formalised description of the past, as a useful abbreviated general description of the way previous courts have reacted and decided various cases. The rulings of judges often depended on their moods and what they had eaten for breakfast.

17-10

Law and Jurisprudence in contemporary philosophy of law

SHOULD WE ACCEPT THE REALISTIC APPROACH, THAT THE JUDGE HAS HIS DECISION MAKING PROCESS, OR ON THE CONTRARY, WE NEED SOMEONE WHO HAS TO APPLY THE LAW?

I. Realistic approach: if we accept it, we accept that the judge has his own decision.
II. If we accept Kelsen, we accept the judge to be someone who only has to apply the law.

Two philosophers started a debate about this topic, Hart and Dworkin. They debated if there was an acceptable solution that the judge can make, on hard cases, or on the contrary where there's only one solution.
Sometime norms are express without ambiguity and it's easier to apply them, other times there are penumbral cases as language is open texture.
In many laws there are undefined definitions, in this penumbral cases the judge has the possibility to use his creativity to apply the law. Is important that after legal realism the debate about legalistic approach has became very important; two of the most prominent philosophers of law started a debate in two different positions: on one side we have Hart and on the other we have Dworking. Their debate was around the question: are there for the hard cases several acceptable solutions that the judge can make or is there only one right solution to the case?
Hart to solve the problem introduced the concept of hard cases. In his idea law is a linguistic message, and sometimes rules are expressed without any case of doubt; sometimes is easy to understand the law, but in some other cases the laws are hard to be understood cause language is an open texture. There is a core of cases that are more or less clear, around of these cases there is a sort of penumbra where is acceptable the creativity of the judge. In Hart's opinion the lawyer has to try to find what is the law or the past legal decision applicable in the case.
In jurisprudence we need to accept that society is gonna change and we need to introduce the laws thinking about the changing of society. In other view, moving from Hart, in the penumbral cases the several solution could be taken as acceptable, if not the legal system would be too rigid.
At this point Hart made the distinction between the nightmare, the freedom of judges, and the noble dream, the apply of law, in law. According to the nightmare the judge is like a legislator, a politician, that makes his own laws. So it means that the image of judicial impartiality is a complete fraud. Instead, according to the noble dream judges never make new law and never determinate what the law shall be. So, judgements are mere applications of law.
Dworking have a mixed ideas, he was a positivist but in his vision of legal system he introduced some concepts typical of natural law theory. One of these concepts is that law and morality work together. It is needed to be introduced what he calls the standards of law, cause he thinks that an elaborate system of rules expresses just a limited dimension of law. The legal system in his view needs to be considered as a consternation of standard of law, that are the values, goals, rights and perceptions that were been accepted when the legal system was built. When the judges apply the law have to take this standards seriously. Often the application of written law is in order to solve the cases, but when the specific rules seems to be not clear in order to solve the cases the judges have to take seriously the standard of law. The judge has to balance the standards of law.
One of the most famous hard cases is Riggs vs Palmer. The case is: should the guys benefit of the inheritance of the grandfather after killing him? Elmer Palmer was a sixteen-year-old who successfully prevented his grandfather from changing his will, of which he himself was the main beneficiary, by murdering him. After serving a very lenient prison sentence, there appeared to be no legal obstacle to prevent Palmer from claiming his inheritance. This was challenged in court by relatives (who were minor beneficiaries), but the judge upheld Palmer's claims because the formalities of law in relation to the will had been satisfied. This decision was overturned by a majority decision in the Court of Appeal, depriving Palmer of his inheritance, on the grounds that no one should profit from their own wrongdoing.
First, it seems intuitively obvious that anyone who murders for profit thereby forfeits their right to the proceeds. Nobody would suggest that a man convicted for armed robbery should keep the money he had hidden before serving his sentence. The difference with Palmer, of course, is that he appeared to be legally entitled to it. Second, two judges did not find it intuitively obvious that he should forfeit the right to inherit. One dissenting judge declared that it would be bad social policy to punish someone twice for the same crime. Third, many still believe that unworthy claims like these have to be upheld for the sake of legal consistency. Consider now how the advocates of the main theoretical positions might react to and deal with a case such as Riggs vs Palmer.

- Christian natural law: given their standpoint on the necessary connection between law and morality, a decision for Palmer would be contrary to the requirements of right reason. This is to say that a natural law judge would have been more inclined to apply principles of natural justice.
- Austinian positivism: according to Austin's command theory, judges apply the orders or rules authorised by the sovereign, and in situations that require clarification they act as delegated 'temporary commanders' to resolve ambiguity or vagueness. In a case like Riggs v. Palmer, however,

the rules have run out; there is no relevant rule to apply. Judge Earl, who found against Palmer, stated that: it could never have been their intention that a done (un donatario) who murdered the testator to make the will operative should have any benefit under it.

- Hartian positivism: Hart's approach is essentially the same as Austin's. Hart's response is that it is in cases like these that judges have genuinely free discretion to formulate an appropriate rule and create new law. According to Hart, the 'noble dream' of complete determinacy breaks down in cases like this.
- Realism and rule-scepticism: as we have seen, there is no easily identifiable 'realist' position, and there are many degrees of rule-scepticism. The case would indeed have been seen by Frank as corroboration of their criticism of the false certainties of mechanical jurisprudence. They might also have seen the outcome of this particular case as a vindication of their belief in the ability of the best judges to reason their way intuitively to the just and equitable solution to the most difficult of hard cases. The important point here is that this kind of solution does not require the 'equitable construction' of the intentions of the original lawmaker. The Aristotelian 'equity' is in the hands of the judges, not the legislators.
- Dworkin's theory: he took this case as a paradigm because he believed that it brought into sharp focus the shortcomings of every version of positivism. The central point is that, the rules may have run out but the law has not. Dworkin's argument is that the decision finally reached by the majority of judges in the Court of Appeal was the right one. The decisive principle of common law in this case was, as we saw at the outset, the principle that no one should profit from their own wrongdoing. This is why the relevant rules did not prevail. The decision reached in this case was legally sound because it took account of the relevant rules, principles and social policies.

How far does the outcome of Riggs v. Palmer support Dworkin's theory of law as integrity? In the first place, it does seem to confirm the proposition that common law moral principles, distinct from legal rules, are themselves an integral part of the law.

18-10

Critical approaches to the mainstream theories

Critical approaches have common features: addressing fundamental questions of social justice, legal system and legal theory contribute to perpetrate social justice, the critics about modernity and of the enlightenment. At the end of XVIII century there was the born of many sciences, that gave a common knowledge that was able to critic the mainstream philosophical theory. The focus of the critics that move from these several theories is enlightenment and the values introduced by it. With modernity we mean the new structure of social relationships that organize our modern society after the industrial revolution.
Everybody can use their knowledge in solve a problem.
There are a lot of several critic approaches, and they are very different from one to an other, but they all have some common feature:

A. addressing fundamental questions of social justice: this critical approach usually moves leaving the typical legal positivist approach to use social sciences' approach
B. the legal system and legal theory contribute to perpetuating social injustice: that's one of the main criticisms of the legal system which is supposed to produce equity, equality and social order
C. the critics against modernity and of the Enlightenment and the values introduced by it, moreover one of the consequence, which is the modern society structure: "modernity"= new structure of social relationships that organize our modern society after the Enlightenment and the Industrial Revolution with its goals and effects.

At the end of 19th century had born new science and those participated to give a new vision of law, and produced critics. The legal system are not able to produce a real equality in society but they produce social injustice, for some critics approaches. The focus of the critics is that the enlightenment and the values introduced with it failed to deliver their promise of emancipation and equality. The modernity concern the new structure of social relationship that organize our modern society after the industrial revolution. The promises of social equity introduced by enlightenment aren't so achievable and true. The globalization, with migration and poverty, have showed us all the contradictions of modernity. The promise of social equality introduced by the Enlightenment isn't so achievable: Kant said it was the ability to reason independently. We

still live in a society where there isn't social equality and some of the contractions have emerged after globalization: has the legal system failed too?
Karl Marx stated that the legal system is only a tool adopted from the economic power in order to organize society, even if he admits that the French revolution has been a revolution, he says that it has failed to deliver its promises of emancipation and equality since it has been guided by the bourgeois' interests and goals which are not universal.
The morality shared is a specific morality of the bourgeois that represents only the interest of a little part of the society, hence the legal system doesn't represent a real equality and all the values that are in a society, but just the values of the social group that has much power in society. So he states that the promises of equality and a new society are false. This situation will produce a progressive impoverishment of the working class and this will lead to a revolution. For Marx the parliament is the administration of the bourgeois society and hence protects mainly them.
Hence we need to separate the concept of formal equality and opportunity from the real inequality of law and opportunities: law is unjust since society is unjust (law represents social injustice). Moreover, the legal system contributes to promoting social injustice because it doesn't help minorities, but it is a tool used by the most powerful to keep the power and law produced in order to favour powerful society since they themselves produce it (ma è uno strumento utilizzato dai più potenti per mantenere il potere e la legge prodotti al fine di favorire la società potente poiché sono loro stessi a produrli).
The new society built after the revolution doesn't have any social class or division and the legal system will disappear.
Part of the critics introduced by him has been confirmed by the studies of Michel Foucault, who said that power is decentred through society and if we want to understand power we need to study the place where it is practiced. He is convinced that represent an objective true is impossible. The power is strictly linked with the knowledge, and knowledge themselves could be understood as a manifestation of power. All claims to genuine knowledge is fraudulent because they are the product of the political regime of the day.