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**Philosophy of law**

first part: what is the law? During different historical times

second part: the reach of law

third part: theories of punishments

book: philosophy of law mark tebbit

EXAM: if u don't attend u give a oral exam on the winter session (all the book), primi appelli 10 dicembre 13 /20/4 gennaio

if u attend you can decide to divide the exam in two written pre-exam ( the first on 21st october, the second pre-exam 20th november) e quindi non fai l'esame totale orale

se fallisci il secondo, fai l'orale solo su quella parte

parti in arancione=integrazioni dal libro

the pre exam si fa su moodle in presenza (con dispositivo elettronico)

23/09/2024

Problem: how law is to be understood in relation to moral values → a modern claim would be the separation of law and morality, also called "the separation thesis", typical of legal positivism.

From a criminal law's point of view, offences such as assault, murder, theft and so on are the representation that law is no more than an enforcement of a moral code. So if it's wrong, it must be illegal, if it is legal, it must at least be morally acceptable.

On one hand, law is less demanding than any moral code, because it doesn't enforce acts of charity or assistance that can be considered moral. But on the other hand law is in some sense more demanding , especially regarding bureaucracy, one can break the law without doing anything morally wrong

On matters such as abortions, euthanasia and so on the law cannot reflect a moral code, since there's no general agreement on what's right and wrong, regarding these matters.

Also, slavery, the Nazi Nuremberg laws, the Us racial segregation can be considered as perfect examples of incongruence between morality and law.

Moralists state that with the advance of civilization, the law comes into conflict with the evolving moral norms, and that law continues to protect outdated moral beliefs until it is reformed.

For positivist law is one thing, and morality is another, and a law doesn't have to conform with any moral standard to be counted legally valid.

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- **What is the law?**

Should law be moral? Is there a connection btw morality and justice?

Two main ideas that influenced the European legal culture, two different point of view:

1) could we consider law as strongly connected with Nature = Theory of Natural law (law relates to universal moral principles that are natural)

2) consider law as man-made, valid rules, commands, written = Legal Positivism

Natural law is the oldest one, and the first time being in ancient Greece. Law that cannot be violated by human beings. Human law cannot violate natural law, because it's more important and the nature law is the limit that cannot be overruled by the human system. And Natural law is strictly connected with morality, and so human law cannot be unjust.

Legal positivism is born during the enlightenment when philosophers started saying that law and morality are two different things on two different levels. So, law and morality are not the same thing.

*What is natural and what is unnatural?*

In legal positivism the answer is given by the state/government. In a natural law approach is more difficult, because it had to decide if something is acceptable on a moral point of view. And if it's approved by morality then it is acceptable from a legal point of view. Because moral and legal are the same thing.

24/09/2024

*Are law and morality two different concepts?*

Government can allow something legal that probably cannot be considered moral (ex. Euthanasia). Legal is less demanding than a serious moral code. (ex. Prostitution, death penalty, abortion, marriage of the same sex).

Natural law says that is a strong connection between legal and morality, especially in the field of criminal law

If we move from a Natural law approach, *what citizens should do in face of an immoral law?* (so the state has unjust act) → they should protest against the law, because it is immoral and so illegal.

*Which criteria should we use to decide what's natural and unnatural?*

If we take seriously Natural law approach→ laws that are immoral, unnatural are not laws at all.

For Legal positivism an immoral law is legal, because connection between law and moral is contingent.

**THE CONCEPT OF JUSTICE**

Justice, as fundamental concept, can only be ascribed(assigned) in situations involving consciousness and so it's an issue only where there's conscious, purposive activity.

main point of view:

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1) Who is just and unjust? → the agent (ex. Just king, just God)

The quality of justice is commonly attributed to individuals, and we also use the term collectively to describe a government.

2) The just actions

Attribute justice to actions and decisions rather than people as such. A just action/decision is one that is sensitive to the rights of those affected by it.

3) State of affairs created by the social action→ society that could be unjust or unjust depending on the point of view

The institutions are held accountable for the qualities of justice or injustice, in a degree of rule of law and a legal system.

A legal system can be just or unjust, especially with laws that are regarded as injust, because the subjects of law are unable to decide whether or not to obey.

In Natural law they considered justice more from the 1st and 2nd point. The first violation of the law because it was considered unnatural is the Antigone myth (attempts of Antigone, the sister of Eteocles and Polynices, to bury Polynices, going against the decision of her uncle Creon and placing her relationship with her brother above human laws).

The king had the right to enforce the law, but in Antigone's point of view she sees it as unjust, underlining that it is also the will of the gods. It's them who decided that all citizens have a right to be buried→ so the law provided by the king is unnatural. And in the tragedy, when the king doesn't follow the gods' will, he's punished.

In Greek, roman and medieval traditions Natural law was mainly the gods' will. So, it was considered more relevant, more important than the law provided by men. Natural law doesn't change, since it's the gods 'will. What changes is human, so the problem are the citizens and if they're able to interpret them.

Aristotle promoted 2 different types of justice:

- distributive justice: based on voluntary transaction, absence of violence. There's the concept of equity.

-corrective justice: based on involuntary transaction and presence of violence. It's important the strictly application of laws by the justice. There's a concept of equality

Judges are not free to arrive at what they think is right according to their individual wisdom or conscience, but they're constrained to find the right decision within the law.

*Should the judge who applies the law respect the concept of equity or equality? Should the judge consider that human law could be unjust and that there's is a natural law and if he has to apply it ?*
→ that's the connection between the rule of law and natural law.

Rule of law should cause the juridical impartiality. A judge that applies the formal law (human-made and written law) to every different cases. It presumes the legal certainty and predictability of the juridical decision→ the citizens know the consequences of their actions.

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The aspiration of impartiality is an essential feature of the rule of law. This requires formalization, and hence the depersonalization of justice. Moral principles have to be formalized into unbending rules that apply to the act, rather than the actor. When juridical independence is established the idea of impartiality (itself a precondition of equality before the law) can be developed.

Natural law states that the inflexibility of the rule of law is not useful to adapt the justice to single cases. The final goal of Natural law approach is not the formal respect of formal law, but to produce justice. It can produce a legal decision formally correct but in fact, unjust.

Aristotle introduced the concept of *equity*→ while it is right that rule X should be applied, it does not really apply to this case Y. The appeal of equity is to function and temperate the severity of law. If knowing that an application of law will bring injustice, the judge should be able to apply equity.

→For him, the function of the appeal to equity was to allow judges to temper the severity of legal justice, without departing from the constraints of law.

The use of equity is one of the points that strictly divides Natural law approaches and Legal positivism.

Legal positivism→ the production of justice is strictly connected to the application of formal law. The law is a written letter position by a valid legal authority.

Natural law→we need to keep the concept of justice outside of the formal legal system. Because law is the outcome of first principles or natural foundations. The value of law is deeper than a human convention. (This was the only approach to law, until the enlightenment)

25/09/2024

THE NATURAL LAW CLASSICAL PHILOSOPHER

There were a lot of NL philosophers like Aristotle, Cicero, St. Augustine, St. Thomas Aquinas…most of them were religious, so there wasn't really the role of the lawyers and legal system as we know it right now. (NO "philosopher of law")

In these times there's the idea of the laws enacted by the "king" and the natural law. Who had the power to explain to citizens, politicians and a possible king what were the natural laws? Mainly in the Middle Ages the idea of NL works with the idea of Christianity. → during these times the definition of NL was strongly influenced by religion, therefore the "God's will"

Law is the highest reason, and ultimately this reason is found in the will of the one true God (or at least according to Christians). Aquinas stated that a deviation from the law of nature is no longer a law, but the perversion of law. It is in this negative sense that justice is understood to be integral to law, when the connection between law and justice is broken, the law is held to be invalid.

Equally important feature of Christina natural law theory lies in the binding together of the virtues of positive lawmaking with the moral concepts of Christianity. For Aquinas the highest moral concept " to do good and avoid evil" is the source from which all the primary and secondary precepts are derived. In short, the meaning of justice and meaning of law are completely interwoven.

Obviously there're differences btw Aristotle pov and St. Thomas, BUT there are common features:

- There's a NL in contrast to the actual law of a State (therefore there's not only the civil law, but also a NL that is above human made laws) = concept called LEGAL PLURALISM → when in a specific society there're different legal systems.

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Which problem could it provoke? Not knowing what laws to follow= which legal system to follow,

- There's the idea that NL is rooted in human nature, so all humans are inclined towards the good.
- All the societies are affected by the struggle btw Good and Evil
- Society must promote genuine NL to counter the worst characteristics of humanity

= a good government must provide good moral, otherwise it's working against NL and therefore against God.

"What are states without justice, but robber bands enlarged?" (quote by St. Augustine) →

1) So how we define justice? He would reply with "the work of god" that you can find in the bible.
2) But also what must do the citizens when the state doesn't respect the work of god? Do they have to obey or to make a revolution? **

ST. Thomas Aquinas has written Summa Theologiae, and it's considered the most important philosopher act of the middle ages. He divided the law in four categories:

1) The eternal law (the divine reason of God). Human beings can't discover eternal law, but they cannot violate it. → they can't really violate it (since they cannot understand it neither know it, but they kinda do so by violating the divine law)
2) Natural Law = it's understandable by humans, and it's made of the rules that rule nature. Humans are able to discover it through ration, to divide what is natural and what isn't and how they do it? By observing nature. → in nature you will find the answer of what natural law is. It doesn't change in time and space.
3) The divine law= it's revealed in the scripture. (difference btw Augustine who said that natural law is also in the scripture)
4) The human law= enacted for the common good, and it cannot violate all the types of law listed before.

** "Lex injusta not est lex" (a law that is unjust in not a law at all) There are 2 interpretations of his theory:

1) More radical. And it says that a law that fails to conform to nature or divine law is not a law at all. So the theory should support the right in disobeying an unjust law
2) The human law which conflicts with natural law lose its power to blind morally. The citizens have the right to disobey only in exceptional cases, they have to obey it also if human law doenst' respect the NL and so disobeying the law will provoke civil disorders (= so it's a matter of avoiding scandal or civil disorders) THESE TWO ARE THE ONLY EXCEPTIONS WHERE HL MUST BE RESPECTED EVEN IF IT DOESN'T RESPECT THE NL. → so it has no morality, but still this statement stands.

**THE FIRST ATTEMPT OF SECULARIZATION OF NATUAL LAW**

It's been made by Grotus with *De jure belli ac Pacis,* which Is considered the basis for the developing of international law. He states that even if god didn't exist, natural law would have the same content.

He was criticized for this statement→ and accused of heresy

He meant that certain things were intrinsically wrong→ it means that there could be NL without the idea of God that decides what's good and evil.

*Are natural law theories conservative? → the answer is: it depends.*

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Some authors like Aquinas can be considered conservative. They've been accused to adopt NL to justify the government, the social structure of their society. But since classical times NL theories has been adopted both to legitimate the power BUT also used to criticized this power..

Obviously in the modern age NL has been used to justify revolutions (French and American revolutions.)

30/09/2024

***THE LEGAL POSITIVISM***

LP is connected to the enlightenment (end of 17th century, it had mainly a philosophical approach → humans are rational actors, separation btw state and power of church, separation btw morality and law.

Rationality became a methodological approach. New focus on science, like sociology, science of law (separate law studies from other studies, a field where humans decide what's right or wrong)

It's NOT God that decides what's wrong or right. They're human-made, through rationality. (the idea of social contract is the one where human decide to live together, by "signing" a contract)

Before the enlightenment science was mainly rhetoric, abstract and observation of nature, then there was the need to use empiricism in the production of true (the need of evidence) →we cannot assume anything beyond the appearances (=phenomenalism). If you're not able to produce evidence, you're not arguing anything scientifically.

Positivism is rooted in the empiricist interpretation of the scientific revolution, and its spirit can be understood through Ockham's razor which says that the simpler and more economical the explanation is, the more likely it is to be true.

**<u>Main features of legal positivism</u>**

1) Denial of a relationship btw law and morality (it doesn't mean that morality isn't important, but it's different from law).
2) There's no law without human enactment. The only real law is provided by human beings. Law is a social construction.
3) Legal validity isn't connected with sociological, critical and historical evaluation. Lawyers have to study legal concepts; they're not obliged to evaluate the other aspects of law.
4) Distinction btw what is "ought" and what is the law

The basics of the positivist approach in modern society:

- In the search of knowledge and truth, the evidence of the senses is paramount
- With the doctrine of phenomenalism, we are not entitled to assume the existence of anything beyond the appearances
- Strong tendency towards nominalism in most positivist philosophers.
- The normative principle that, in the absence of empirical evidence to the contrary, the simplest explanation is to be preferred.

David Hume criticized the natural law approach and highlighted that it's important experimental observation and relations btw ideas (logical connections). The evaluation of the facts should be independent from subjective evaluation (separation of fact and values).

Hume stipulated 2 condition for speaking good sense on any subject:

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1) Hume's fork: all investigations should be confined on the matters of fact (so the experimental observations) and on logical connections (s the relations between ideas)
2) The matters of fact should be understood in independence from any subjective evaluation of the factual subject matter.

Hume also stated that human reason is perfectly inert and morally neutral : "it is not contrary to reason to prefer the destruction of the entire world to the scratching of one's little finger" → if reason is morally neutral, the investigation of any kind of human behaviour or institution will make no reference beyond what is either empirically observable or logically demonstrable, because the two cannot be combined.

From David Hume to the middle 18th century, the only approach was legal positivism (no longer natural law). Law is made only by humans, the state becomes a monopolistic approach in the creation of law and in applying it = only approach, that it can be divided in 3 branches:

a) English approach = Law as commands
b) North American approach = law as social rules
c) French approach = law as norms

a) **LAWS AS COMMANDS**→ Jeremy Bentham's critique of common law

He described common law as "dog law" (the dog is not able to know before doing something if it's right or wrong). Citizens don't know if what they're doing is wrong, they do, only after they make mistakes. The problem of common law is its indeterminacy that is endemic. Unwritten law is too vague and uncertain. He also states that natural law is nothing more than a private opinion. The only solution to address the common aw chaos is codification. But his program for codification in the UK remained a dream.

His attack on common law is based on his utilitarianism point of view, according to which all actions and institutions are to be judged solely in terms of their utility. The role of reason is reduced to rationally calculating the external consequences of actions and laws in terms of the aggregate good that will come out of them.

He stated that when law is analyzed in a way where each law represent the embodiment of a Christian principle, the result is vagueness and indeterminacy that is resistant to radical reform on the basis of the utility of the laws.

His idea was influenced by utilitarianism = is generally held to be the view that the morally right action is the action that produces the most good

*THE UTILITARIAN MORALITY:*

- Bentham says that the notion of a single. Complete law which expresses the will of the legislature. He aims to propose an "art of legislation" to expound a complex logic of will. He aims to reduce the arbitrary. He recognized that there're different kinds of commands. *How can we decide if it's a valid command? It's the habit of citizens to respect the law gives the legislation of the sovereign power.*

- John Austin states that law is specifically a command that comes from a juridical superior and it provides punishments/sanction to those who do not follow the rule. Sanction is some pain upon the failure to comply with the wishes of sovereign. A law without a sanction is not

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a command. The human law is set down by men form men. There's no law without commands. And it can be subdivided in

a) Positive law (laid down by a political superior)
b) if they're not laid down by a political superior then he calls them as law "improperly so called. And there're different types:
    1) laws by analogy (constitutional and international law)
    2) laws by metaphor (ex. international law)
    3) laws set by men not as political superiors or in pursuance of legal right

= these are not the "subject of jurisprudence" but merely positive morality"

LAW AS COMMAND OF THE SOVEREIGN

Bentham:

- commands are merely one of the four methods by which sovereign enacts law
- he distinguishes between imperative laws (prohibit certain conduct), permissive laws (permit certain conduct). All laws are both penal and civil

Austin:

- anything that isn't a command is not law
- only commands emanating from the sovereign are "positive law"

=international law and constitutional law cannot be defined as positive laws because it is impossible to identify the author of the rules.

*COMMAND AND SANCTION*

Bentham:

- laws that impose no obligations or sanctions are not "complete law"
- in a code of law, penal and civil branches should be formulated separately
- he recognizes that law includes both punishments and rewards

Austin:

- sanction is some pain upon the failure to comply with the wishes of the sovereign
- there must be a realistic probability that it will be inflicted
- a law without sanction is a mere expression of a wish, not a command.

For philosophers the sovereignty power and therefore the legitimation is constituted by the habit of the people generally obeying his laws BUT Bentham is favorable to the institution of federalism, and he states that the supreme power may be limited and divided by an express convention.

Whereas Austin states that the sovereign power is unlimited and indivisible; he's contrary to that system that impose constitutional restrictions on the legislative competence.

To sum up → For Austin sovereignty is the habit of obedience adopted by the members of society, nevertheless the sovereignty must be determinate.

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**LAW AS NORMS**

Hans Kelsen → the pure theory of law (it's considered a manifest of the legal positivism), it's considered the basis of the law students training

***Law as a science***

*Kelsen refined a "pure theory of law". He thought that moral ideas are essentially irrational, and hence unsuitable for any kind of scientific analysis → the main object of scientific jurisprudence was the uncovering of the logical form behind the confusion of empirical appearances. As a science, the object of study was held to be law as such, rather than any legal system = justice and higher law had no place in scientific jurisprudence*

*His theory is "pure" in 2 senses:*

1) *the purification of subject matter = to focus on the purely legal dimension of law, all moral, political, sociological dimensions (called impurities) must be displaced from the science*
2) *the purification of the investigation = science of law is pure in the sense that it is free of ideology. In pure theory, there's no approval or disapproval, either implicit or explicit.*

He says that law studies must be independent from all the other science studies. Legal theory is a science no less than others like chemistry or physics. But to be a science it need some features:

- Formal categories to give a clear explanation of what law is
- The topic of legal theory is only the positive law : "ought that declare that if a conduct is performed, than a sanction should be applied by an official to the offender".
- To do so, we need to separate law theory from impurities of morality, psychology, sociology, political theory and philosophy.

In the past, law students were trained by mainly studying sociology, philosophy etc → after Kelsen no more.

*Which is the difference btw the real law and "other laws"?*

The legal laws are provided by a special institutions that we call the "state". Therefore the monopolization of force, with the final goal of providing social order. After the French revolution, the idea that only one organization can use violence/force came to life → force that is given by the state to the police for example.

Legal norms differ from other norms in that they prescribe a sanction ( argument to Kelsen's idea: if you insult the teacher, you're going to get a note, that can be considered a sanction) → but he would replying by saying that the legal sanction is an institutional sanction, because it comes from an institution which is the state.

The objective legitimation is what differ a robber from a tax collector: they both use the force to obtain money, but the tax collector has the state authority to do so.

*The norms must be understood as specifically "legal oughts", which are different from either moral ones or legal rules. The formal-logical connections that five the legal system its unity apply to norms rather than rules, and it is these connections that the formal analysis reveals. The language of law is formalized by recasting every rule in terms of a legal ought, each of which is expressed as an "imputational connective" (if X conditions obtain, then Y sanctions ought to be applied.)*

*Each law is only validated by referring it to a higher norm (higher in the sense of general) = pyramid of law*

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*The formal connection, hence the validity, abstracts from the concrete content of the norm. (ex. A norm which requires an execution for anyone who insults the government, would be validated by a more general norm according to which all the enemies of the state should be executed)*

*But who gives the power the power to the state?* Kelsen replied by using the pyramid of law.

The pyramid of norms is made by:

-constitution (top)

- legislation

-secondary legislation

-private orders

-private legal norms (bottom)

Legitimation is a hierarchical system, each level takes the legitimation from the upper ones, where the most general norm gives legitimation to the more specific one.

The problem: if it's hierarchical, it is a system that never ends, because who gives the legitimation to the constitution?

*So, the real answer is*: THE GRUNDNORMS → most people don't know the legal language, but as they use the legal system as a tool in their everyday lives, the validity of the norm exists in the jurisdiction consciousness and it is an assumption that makes possible the comprehension of the legal system by the legal scientist…

The Grundnorm is the abstract norm that gives legitimation to the whole system, we do not need to find evidences in the validity of the norms, because with the existence of the grundnorms it s already explained.

Grundnorm helps us to distinguish btw legitimate and non-legitimate coercive order, it divide btw what is law and what cannot be considered law. It explains the coherence and unit of legal order, and it must be non-contradictive with the legal system.

Legal order effectiveness:

- For the very existence of the legal system is implicit the fact that its laws are generally obeyed
- Kelsen states that " every by and large effective coercive order can be interpreted as an objectively valid normative order
- But, at the same time, the pure theory of law refuse sociological inquires on the legal system effectiveness
- More in general when the basic norms lose general support, all the legal system miss legitimation. This is the case of a successful revolution.

*The Grundnorm is the most general norm hypothesized as the norm behind the final authority to which all particular valid norms can be traced back. This is the only norm that cannot itself be questioned or validated. The basic norm is not an actual constitution. Kelsen insists that it can only be an act of thinking, and as such cannot be regarded as a norm of positive law*.

*Kelsen is at least explicit in his declared intention to separate legal validity from any moral connotations. He's committed to legal positivism, to the strict separation of law and morality in the relevant senses.*

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**LAW AS SOCIAL RULES**

Theory published by H.L.A Hart → the linguistic philosophy of law

*He aimed to show that it was both possible and necessary to detach positivism from command theory to reveal its true explanatory strength. He wanted to show that Austin's analysis was misguided and that the command theory didn't reflect the reality of nay or possible or actual legal system.*

Hart stated that law is a social phenomenon, and so it needs to be considered around other social phenomenon. Therefore, it is a social construction and to understand it we need to move from the social practices of a community.

*He states that we have to distinguish between obligations based on prevailing moral code, which are enforced only by social approval and disapproval, and obligations that take the form of rules of law and are enforced by physical sanctions*

If we take seriously Kelsen's approach of law, we need to consider the judge role (and so the interpretation of the law)→ so literal application of the law and it implies that the written law is so clear that can solve all the specific cases that judges will meet in their every day's work.

Hart says that law is an open texture. He states that law contains several "penumbral" cases, where the meaning and application of the law is not so clear, defined and undoubtable. There're a lot of cases where the language of the law is too vague and undefined. (ex. In the Italian code there's the expression "good father of the family", which is too vogue to be defined) > there're concepts that are going to change in the span of time (ex. Italian criminal law punishes who violates the common sense of modesty, which changed with the passing of time)

The judge cannot only applicate literally the law, but he needs to consider all the changes and the aspects like social change and bioethics. (ex. The Marco cappato's case regarding euthanasia). Hart asks how can a lawyer be able to do so, if he's not trained, by studying for example sociology?

He states that human beings need minimal fundamental rules. And why so?

- Human vulnerability = it's necessary to find a way to protect human beings from all the violence that other can inflict
- Approximate equality = there's no society where all the people are equal, the law's goal is to promote a legal equality and to protect who has less equality
- Limited altruism = in order to protect human beings from egoistical approach
- Limited resources = need rules to applicate a distributive justice
- Limited understanding and strength of will = rationality of human beings is limited, so they need social rules.

In penumbral cases, the bias of the judge will affect the final decision.

Austin, Kelsen and Hart agreed on the legitimation of the order/the law and on the question: how can we state the legal order is more valid than another social order?

Kelsen answered the question with the Grundnorm; Hart proposed another way of thinking by expanding the difference btw being obliged and being uder an obligation.

Being obliged: it means forced, compelled (ex. A robber who wants money and threatens me with a gun if I don't give him it→ so it's an obligation, but it doesn't have a legal authority that you're not accepting)

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Being under an obligation: it means having a legal rule that imposes an obligation. It needs the acceptance of legal authority.

You're accepting authority believing that's legitimate and legal, but why?

According to Hart, there's a difference btw primary and secondary rules.

Primary rules prescribe or impose a certain obligation (ex. The prohibition to use violence, to theft, etc..). Primitive societies usually know only primary rules. They are essential for any kind of social existence. But problem: modern society is a lot more complex, and it needs secondary rules. *They bring primary rules into being, they revise them, they uphold them, or they charge them completely. Without them the essential function to create, identify and confer legitimacy on the primary rules, there would be no way to resolve doubts, disputes, changing or adapting them to new circumstances and no one to authorize punishment for breaking them.*

They are divided in 3 main kinds of rules:

1) Rule of change→ they facilitate legislative or juridical changes to the both the primary rules and certain secondary rules. They confer power to individual or groups to enact legislation in accordance with certain procedure (ex. Parliament)
2) Rule of adjudication → they confer authority to pass judgement, they give power to punish, they give the power to the force, judges, authority to apply sanction.
3) Rule of recognition → it could be interpreted like the grundnorm, since they're "Basic norms", but in fact Hart's view is more concrete. They give the valifity of all the rules of a legal system, so as Kelsen the basic norm is at the top of the system and gives validity to all of it. (ex. Constitution → bc it doesn't need another legitimation since it's been recognized by the citizens). Rules are valid members of the legal system only if they satisfy the criteria laid down by the rule of recognition.
   *It settles doubts and uncertainties and provides the authority to resolve them. As such, it is the all-important source of legal validity from which the legality of any law is ultimately derived. Whatever form the rule of recognition takes, it is essentially a socially accepted fact in any given legal system*.

In Hart's view we can find the modern idea of constitutionalism, because the state is legitimated by a historical moment when the citizens decided to give recognition and therefore validity, to this document.

*Hart and Kelsen → the rule of recognition, like the Grundnorm is the linchpin that gives the system unity, and every other rule must e referred to it. But there's also a difference : hart's basic rule is a (secondary) rule of law, not a Kelsen-style norm. As such it is a social fact, rather than a hypothetical norm that is presupposed by all legal activity.*

If the rule of recognition is smth we need to prove, could it happen that citizens do not recognize the rule of recognition? For Hart, it's necessary to test if the legal system exists. And he does it by identifying conditions that legal system must have to exist:

- Citizens generally obey the primary rules
- Acceptance of the rule of changes and rules of adjudication (obeying the secondary rules)
- They must accept the rule of recognition "from an internal point of view" (citizens have to accept the legal system as a whole, and recognize it) → at th9is point we can state that the legal system exists. He states that the internal aspect distinguishes rules and habit (division btw Hart and utilitarism)

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In a civil war we have a part of the citizens that don't recognize the rule of recognition and want to change the general principle of the state.

Is the Hart theory too idealistic? YES.

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