Philosophy of Law

1. Law and morality

Law cannot be considered the reflection of the moral code because:
- there is no previous agreement on what is right or wrong (no moral objectivism)
- legal injustices were hugely allowed throughout history (ex. The Nazi laws)

Moral relativism: the growth of the society brings to an evolution in the social and moral beliefs.

Justice
Formal justice —> rule of law: predictability and juridical impartiality
Real justice —> natural law: adaptation to individual cases and fair legal decisions

Aristotele —> concept of equity
Rules' severity can be tempered based on the particular case the judge is dealing with.
Spirit of the law (justice and equity) VS literalistic legal system

2. Natural law theories

In Ancient Greece, Rome and in the Middle Ages, law was considered to be a set of universal principles based on natural order. Therefore, there was only ONE possible law, and it was unquestionable. State=moral=nature

It is based on the assumption that there is a fundamental moral truth, from which civilization and law come.

The idea of nature being the absolute truth has 2 reasons
1. Nature is in contrast with the "civil" world created by man
2. Nature is rooted in all humans

The aim of natural law is to enhance the natural capability that humans have of rationally contribute to the **common good**. It doesn't end the natural conflict between good and bad but it protects and facilitate the good.
The government being created by humans can't go against the laws of nature so nature becomes what controls the validity of laws. An example is the law of the sea, for which rescuers are required to save people even though it could go against civil laws regarding foreign politics.

Aristotele
The myth of Antigone
- Antigone goes against the wishes of the king not to bury a traitor because it is the Gods' will.

- This is an act of civil disobedience due to the rightfulness of the law of Gods (=nature).
- This shows that law, even if rightfully created by men of power, is questionable if it goes against the natural order. Natural law is the only unquestionable one because it serves a higher purpose.
- The consequences for the king going against it was the loss of everyone he loved and his power.

Cicero
Law can be considered as the highest production of human rationality only when it's in tune with the elements of nature, because otherwise it is considered blasphemous.

St. Thomas Aquinas "Summa theologiae"
- Eternal law —> divine reason of God
- Natural law —> discoverable trough reason
- Divine law —> the scriptures
- Human law —> in the interest of the common good

"Lex ingiusta non est lex"

1. Law that doesn't follow natural/divine order shouldn't be considered as law at all (radical)
2. Human law that is in conflict with natural law is not entitled to blind obedience

To make Aquinas' theories contemporarily valid the process of secularization was attempted. **Secularization** is the act of transition from religious values to universal ones. Grotius attempts to do that with his work "de jure belli ac pacis", where he affirms that natural law would exist regardless the existence of God. For that, he was accused of heresy.

Are natural law theories conservatives?
They are in fact conservatives, because they imply the existence of fixed moral values that are unchangeable, bur they were also used to justify revolutions (such as the French and the American one) because the government of that time was accused of not following natural order.

3. Common law

- Stare decisis: in cases where the facts are the same, previous judicial decisions have to be followed (to stand by the decision)
- Authority of statute: recognised to allow the law to be changed in particular cases (development of case law)

Common law and natural law
- 12th and 13th century: De Glanville and De Bracton, law is strictly connected to justice
- Early modern period: Coke and Hale, law is the accumulation of judicial wisdom, judges are the spokesmen for the community's values

Coke —> common law embodies unchangeable principles, law stands above everyone and is independent, legal knowledge is controlled by the wisdom of the best judicial minds
Hale —> common law is slowly adapting to social changes but its body stays the same

4. Positivism

Positivism is a doctrine based on the belief that human knowledge is confined to what can be observed and deduced through reason. It's main features are empiricism and phenomenalism. Legal positivism is based on the separation of law from social or moral values (objectivity).

William of Ockham - razor's methodological principle
It is illegitimate, for the purpose of explanation, to appeal to entities not strictly required for the explanation itself. The simplesr the explanation is, the more likely it is to be true.

Hume
1. Hume's fork —> investigations should be confined to the reporting of experimental observations and the rational connection between ideas
2. The evaluation of the facts should be independent on subjective evaluation. Reasoning that movies fromn matters of fact to matters of value results in confusion.
3. The human reason is capable of moral neutrality. Any rational investigation can't be led by values and subjective evaluations.

Law as commands: Bentham and Austin
Bentham
Critics to common law
- Indeterminacy (dog's law)
- Unwritten, so vague and uncertain
- Natural law is based on personal opinions

To achieve a clear system: codification, separation from morality, systematic criticism based on utility

There are two types of laws (not all laws are commands)
1. Imperative laws (penal)
2. Permissive laws (civil)

Austin
Refused common law and the idea of natural law
As shouldn't be interpreted through moral values
Divine law doesn't influence human law, which is made by men for men
Law is seen as coercion —> the sanctions are what make beole obey the rules
Laws are all commands
The sovereign is the highest commander, and everyone below his grade has to follow his laws, his power should be unlimited.

Laws improperly so called
- Laws by analogy —> constitution/international law
- Laws by metaphor —> law of gravity
- Laws set by men who are not the sovreign —> marriage, contracts, wills

Human rights are not laws because they don't provide a sanction, in his view they are moral principles. God's commands are morally binding but not legally recognized.

Hart - "law as a social phenomenon"
In his work "The concept of law" he aims to demolish the command theory and demonstrate his theory of the social phenomenon.
Law, as a result of the social practices, can be understood only through sociological studies.
There is a set of fundamental laws that he calls "minimum content of natural law", but they are not necessarily fair. These are needed because humans lack:
- altruism
- Resources
- Strength of will
- Equality

Obligation
1. Being obliged —> forced, compelled (gunman at the bank robbery)
2. Being under obligation —> law that imposes an obligation, requires the acceptance of the legal authority (critique to Austin's system, which creates fear of the punishment)

Internalization and understanding of the rules in place brings to more acceptance and likely hood of following

<u>Conventions and obligations</u>
Conventions
1. Rules that govern activities or sports

2. They don't involve obligations, but a more internal aspect
3. The concequences to their breaking are not legal but social

Obligations

1. Prominent appeal to shame, remorse and guilt
2. Involve punitive sanctions (primitive laws)
3. Need to be thought necessary for the social life
4. Involve sacrifices
5. Come from the legal system

<u>Primary and secondary rules - rule of recognition</u>

Primary

- constraint people's behavior
- Impose an obligation

Secondary

- rule of change: they confer legislative power and facilitate legislative changes
- Rule of adjudication: they confer judges the power to apply the law and punish
- Rule of recognition: source of legal recognition, it requires public power to follow certain rules, it has to be recognized by the citizens (ex. Rule of recognition)

Opposed to the utilitarianism because he recognizes an internal pov.

5. Normativism

Hans Kelsen
1934 “Pure theory of law”
He enacts a purification of law’s definition through pure rationality
He is against:

- divine: legal system must be secularized cause it is a human artifacts
- empiricism: law is a precise science that needs formal categories
- morality: subjective, legal differs from values
- pluralism: the pure theory of law is universal, separated from moral, psychological, sociological and political influence -> this explains any kind of legal system

Monopolization of force —> objective legitimation of the use of force from the State, that uses sanctions and legal norms to provide social order

Pyramid of law —> Hierarchical structure of legitimation

What legitimates the highest for of law (Constitution)? The Grundnorm
The Grundnorm is a metaphysical concept, a norm that is already present as “juristic consciousness) whose validity has to be presupposed

6. Nazism

- Austin: rules were put in place by recognized power = valid
- Kelsen: there were basic norms and logically connected legal system = valid
- Hart: concrete rules were so inhuman that people were not morally obliged to comply
- Radbruch: conflict between legality and morality is too strong in this case

Gustave Radbruch (critique to Kelsen's theory)
Betrayal thesis —> when the conflict between law and justice is intolerable, laws become invalid
Problems:
- What should law stand for?
- How widely can this theory be applied to abuses of law around the world since 1945?
- When can a judge decide that a law is unjust and overrule it? What is the criteria?

Nuremberg war trial
- crimes against peace
- Crimes against humanity
- War crimes
- Conspiracy to any of the previous crimes

The Nazi legal system was considered "contrary to the sound conscience and justice of all decent human beings"

Fuller
Naturalistic approach, connected to religione
If the aim of a legal system is to provide social order, a connection between law and morality must exist. He provides 8 principles that cannot be violated by formal law (criteria to legitimate a legal system). He aims to create a new natural law theory.

7. Legal realism

They take up Aristotele's view that judges must use equity to solve cases
It comes from a distrust of the official jurisprudence of the time
The concept is that a concrete law system doesn't exist because legal power is in the hands of the judges' decision.
Main features:

- Pragmatic conception of law
- Critic to legal positivism and natural law theory
- Bring to the light the reality of legal processes
- Legal discipline is strictly connected to sociology and economy
- Law studies should be based on concrete legal processes

<u>The reality of law</u>
The real law is the one made by the judges decision, formal law is just a source of law. Law consists in the best prediction a lawyer can make of a judge decision. This allows the system to easily adapt to social changes (versatile)

Criticism to the formalistic approach, that believes that law can be studied and applied no matter the specific case.

First phase: 1890s - early 1900s —> Oliver Holmes (supreme court justice USA) and John Gray
Second phase: 1919 - 1941 —> Karl Llewellyn and Jerome Frank (lawyer)

The "Bad Man" POV
People follow rules because they fear the consequences

<u>Attack on certainty</u>

- John **Gray**: the reality of law is constituted by the judge's decision, the rest is just source of law
- Oliver **Holmes** : law is based on the probable bad consequences, indeterminate and uncertain
- Jerome **Frank**: uncertainty makes law more adaptable to the single case and to social changes
- C.S. **Pierce**: human knowledge could be right now but could turn up to be mistaken later on

<u>Revolt against formalism</u>
Christopher Columbus Langdell: Case Method —>legal studies should be based on the single cases

The syllogistic approach oversimplifies the real factor, influencing judicial decision. Being too attached to the letter of the law eliminates concepts like equity assessing individual cases
Formalistic approach is based on the form, realistic approach is based on the substance of the law

Rule-skepticism
They argue that the outcome of cases is not only based on legal rules
- Minimal: judges can break out the framework of laws and appeal to laws in order to justify their decision
- Moderate: rules can be fully operative in some cases, in others they could not (Llewellyn)
- Maximal: judges have full discretion in every level of law, outcome is unpredictable and random (Jerome Frank)

Hard cases
1. Hart
A certain amount of discretion is necessary to avoid a too rigid legal system, but if we find ourselves in an unprecedented case, what do we do?
The nightmare: judges become legislators and judicial impartiality is actually a lie
The noble dream: judgments are a mere application of the law already in place, never bent to specific cases
The reality is in the middle

2. **Dworkin** - law integrity
The dimension of law has to include "standard of law", which are principles of justice, rights and perception of good social policies. That is what constitutes a legal system.
A legal rule is a one that is applicable to a given case, so if a valid rule exists it should be applied automatically. When a rule is not in place, the judge has to balance it through the legal standards (implicit values of the legal system).
He is against the concept of law as a hierarchical system.
- Legal rules are put in place by recognized institutions and applied wether they are considered inherent to the cases
- Moral principles depend on solely their content
- Legal principles are justice, rights and good social policies

Riggs VS Palmer (New York 1889)
1. Best fit: provide the best solution through existing legal materials
2. Best light: reveal the law in its best light, taking into account moral and political soundness, judges have to consider the final aim of law

MacCromick
He agrees that law embodies certain values, but a positivistic approach can exist if there is a system free off judgement that can be explained through the political and social references involved.

8. Modernity

Kant's manifesto of modernity
"Humanity emerging from is childhood , a process of reaching maturity, the ability to reason independently"
This was an age where everybody was promised happiness, satisfaction, and every possible goal through the use of knowledge, but in the end those goals weren't reached.

Marx
Liberalism has failed to deliver emancipation and equity because it centered the interest of the bourgeoise, a particular social group (not the whole society). The consequence is an impoverishment of the working class and, inevitably, a revolution.
As long as the society is unjust, the law will always be unjust, because the economic power is directly linked to the legislative power (not impartial).
The utopistic goal is a society without state and law.

Postmodernism attack on modernity
To make sense of the chaos, modernity has tried different roads that led nowhere by addressing them as attempts to the common good (meta narratives).

Foucault
- Power: scattered throughout society —> to understand it, we need to study its sources
- Knowledge: linked to power —> pure knowledge doesn't exist because it is controlled by politics

PART 2

OBEDIENCE

Should we obey the law as law?
-legitimated by the choice of legislative power in democratic countries
Natural theory—> disobey unjust law
Positivism—> obey law because it is law (they feared poor judgment on what laws to obey)
Modern age —> civil disobedience has been urged (racial equality)

Socrate—> one must never do wrong, even when wronged, but should we obey a law that forces us to do wrong?

From legality to legitimacy
Thoreau—> there is no obligation, i just follow my conscience. If the law goes against it, it has no authority
Plato's "**Crito**" three main arguments

- **conceptual** —> the duty to obey is built in the concept of law
- **Consequentialism** —> obedience is a consequence to a rational calculation
- **Contractual** —> the obligation stands on "the social contract" between citizens and state

Hobbes

The **social contract** aims to safeguard the "state of nature" (a state of war and poverty) so it aims to create a civil society. State of nature remains a threat and returns when the government collapses. (Equality=selfishness=war). To seek peace, we're brought to give up they "right to everything" and create the social contract. There is a need for an authority to impose a unique will. The aurthority is irrevocable, absolute, and invisible (leviathan's will??)

Locke

The **state of nature** is a state in which humans are obliged by the natural law to respect others' right to life, liberty and property. The social contract just serves as a "safeguard" (democratic vision) social contract still implies to respect the fundamental rights of each person. The power needs to have the consent of the majority (legitimated)

Kant

The social contract is hypothetical, it stands because the **human rationality** would agree to follow such rules.

Rawls: neocontractualism and distributive justice
Pluralism dictated by nature (different projects and wishes) the veil of ignorance ??

1. **Principle of equality** —> each person has the same indefensible claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all.
2. **Principle of fairness** —> social and economic inequalities should satisfy 2 conditions 1-attached to offices open for all under conditions of fair equality and opportunity 2-they have to be to the greatest benefit of the least-advantaged

Everyone should have a **maximum and equal degree of liberty**, equal opportunity to seek office that offer greater rewards, the distribution of wealth should advantage those who are least well-off, even if it becomes unequal.

ANTIGONE

Example of civil disobedience

- unlawful
- Not violent (weak boundary between disobedience and revolution)
- Inspired by moral or ethical values
- Public
- Contrasted by the authority

THEORY OF RIGHTS

Right: a right is a particular kind of strong moral claim (a sort of natural property), giving people actual power to enforce it, and it always has a correlated duty
it is an entity, moral power given to human beings as citizens
If they are MORALLY valid, do they pre-exist their codification?

SCEPTICISM - **Bentham's** utilitarianism

Rights are dangerous

- they justify tyranny
- They justify anarchy, individualism and chaos
- They threat the certainty of the law

They are nit considered law because they do not follow the process of validity other laws follow
The only possible rights are LEGAL rights (reductionist) —> a legal duty, the law transforms an "interest" into "instruments protected by a sanction"
They are protected as long as they follow the common utility (the majority)

MILL —> the majority can be wrong
The moral respect of individual human rights is a UTALITARIAN concept because it contributes to society's wellbeing.

DWORKIN

The legal system is a balance between rules principles and policies —> rights are principles so they are part of the legal system

They are considered a **"Trump card"**: they overrule other laws in difficult cases because they embody the interest of the community, but there is always a way to "play a higher card" (two rights that conflict can both be valid —> **DISCRETION**)

He criticized positivism

- Austin's legitimation of force (judge=gang boss)
- Hart "Positive" rules that follow the rule of recognition —> no principles or policies

Principles and policies

A principle is a standard that needs to be observed because there is a requirement of justice or fairness or mortality.

They have the dimention of weigh and importance, they can conflict so they have to be balanced

They are not necessarily morally binding, they help the exercise of the law

A policy is a standard that sets a goal to be reach (an improvement in a feature of the community)

PRIVACY

Paternalism or Liberalism?

Can citizens decide for their own good or should the state do so?

John Stuart **Mill**

No-harm principle

- no legal intervention if there is no threat to others (future criticism: what is a threat to others?)
- No legal intervention is the action is only a threat to the agent

The law should not intrude in one's freedom to choose how to live his life

Free-riders are people who go against the dominant culture: should they be stopped by the law?

Mill: nonconformity is a source of development in a society (no)

Patrick **Devlin**: the law has to be used to discern between good or bad for the lasting of the society (yes)

Hart: society has the right to prevent its citizens to harm each other or themselves, but not to enforce conformity or collective moral standards.

Liberalism —> the individual is capable of reasoning and taking its own decisions
Considered untrue because it came from the “elite” and not the whole humanity, the concept of “individual self” shouldn’t be considered the only true explanation
A new “identity” bearer of legal authority and fundamental rights, but in reality that is not true
Claiming universal rights that are not truly rooted in the historical and cultural context is worthless (contextualism)
Rights have to be adapted to the society to be respected and valued in the eyes of the people, otherwise they become irrelevant to the actual people who need them

Marx
Universal rights aim to make differences disappear. Individual people, who are different and unequal in their own characteristics, are expected to be treated as “universally equal”, imposing a veil of generality. (Theoretical abstraction of individuals)
He proposes a more realistic subject, more in tune with real human individuals.
Universality=emptiness of value
Nudging —> softly manipulating society

MENS REA AND INCAPACITATION
actus rei —> offense
Reus —> offender
The criminal trial must prove the offender guilty beyond any reasonable doubt
The question of incapacity —> the accused has a defect of reason due to a disease of mind that altered their capacity to foresee the consequences of their actions or understand them entirely
New concept: institutionalization to safeguard the society (from ships of fools - classical age- to modern asylums)
Intention and recklessness are punished by criminal law, negligence is punished by civil law (English law)