

Philosophy of Law

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- 1 What is Philosophy of Law? – 360**
- 2 Hart: Law as System – 361**
 - 2.1 Primary and Secondary Rules – 362
 - 2.2 A Chain of Rules – 362
 - 2.3 A Practical Application: EU Law – 364
 - 2.4 Hart as a Legal Positivist – 365
- 3 Dworkin's Criticism – 366**
 - 3.1 An Example – 366
 - 3.2 Hard Cases, Gaps, and Discretion – 367
 - 3.3 The Donut Theory of Law – 368
- 4 Fact and Norm – 370**
- 5 Thomas Aquinas: Positive Law and Natural Law – 371**
 - 5.1 Common Good – 371
 - 5.2 Law and Reason – 372
 - 5.3 Positive Law and Natural Law – 374
 - 5.4 Conclusion on Aquinas – 376
- 6 Thomas Hobbes: Normative Legal Positivism – 377**
 - 6.1 The State of Nature – 377
 - 6.2 The State – 378
 - 6.3 Positive Law and Natural Law – 379
 - 6.4 Review of Rules Against Legal Principles – 380
- 7 Conclusion – 381**
 - Recommended Literature – 382**

1 What is Philosophy of Law?

Unlike private law, constitutional law, or criminal law, philosophy of law does not deal with a particular subfield of law. Philosophy of law is rather a branch of philosophy that deals with philosophical questions about law. Examples of the types of questions raised within the discipline are:

- How the punishing criminals can be justified
- What the essence of the rule of law is
- Whether human rights would still exist if they were not included in a statute or treaty
- Why contracts are binding
- What the nature of law is

In this chapter, it will not be possible to discuss all legal philosophical questions. We will opt instead for the last question, as it is perhaps the most fundamental one: what is the nature of law? Philosophers of law have discussed this question for centuries, and apparently still disagree. This disagreement is partly caused by the fact that the question itself is ambiguous and can be asked with different purposes in mind.

The question about the nature of law is often asked in the context of legal decision-making. For instance, a judge may ask herself how a particular case should be decided. She wants to apply the law, and as such, the question of the true nature of law is in fact a step toward the solution for the case at hand.

The Normative
Question

Riggs v. Palmer, 115 N.Y. 506 (1889)

Francis Palmer made a last will in 1880 in which he left most of his large estate to his grandson Elmer Palmer. After that, Francis Palmer remarried. Elmer knew this and was afraid that his grandfather might change his will. To preclude this possibility, Elmer poisoned his grandfather. For this reason Mrs. Riggs, the daughter of Francis Palmer, sought to invalidate the last will.

New York State law at that time did not contain any written provisions to deal with such cases, and the question that was raised by this case was whether the rule that a convicted murderer cannot inherit from his victim was nevertheless part of the law.

The New York Court of Appeals decided that Elmer could not inherit from his grandfather and invoked the principle that nobody should profit from his own wrongs. Implicitly it also adopted the view that such unwritten principles are part of the law, which is a view about law's nature.

If the question concerning the nature of law is raised in the context of a decision-making procedure, it is a normative

question. It addresses the issue of what is to be done, and the underlying assumption is that the law determines what is to be done. For instance, a judge should apply the law, but not morality, and therefore it is important to know which rules count as *legal* rules.

It is also possible to inquire after the nature of law out of a more theoretical interest. Philosophers are sometimes interested in questions without immediate practical interests. They may want to know the nature of law in terms of how legal norms differ from customs and moral norms, purely to have more insight. From this perspective, the question asking about the nature of law is completely disconnected from the question how to act. It is possible to say «This is prohibited by law, but that does not at all affect what I will do».

This conceptual question aims at giving insight into the nature of law but not at answering the question of what is to be done. An important part of the confusion in the discussion about the nature of law can be explained by the fact that people ask the question from one perspective and receive an answer from another.

In the remainder of this chapter, we will discuss the nature of law in some detail. In the ► Sects. 1 and 2, we address the conceptual approach, while the normative approach is the central topic of the ► Sects. 4 and 5. The chapter is concluded in ► Sect. 6.

The Conceptual Question

2 Hart: Law as System

Ask a modern lawyer what law is, and the most likely answer will be along the line that law consists of rules that are made and enforced by the State. This lawyer will likely consider his answer to be a purely factual observation. *As a matter of fact*, law consists of those rules that have been made, or at least are enforced, by the State.

This view on the law has been elaborated by the English philosopher of law Herbert Hart (1907–1993). His seminal work, and our focus in answering the question about the nature of law, is the book *The Concept of Law*. In order to make the exposition easier to follow, we will simplify Hart's views, sometimes at the cost of a little distortion to Hart's sophisticated ideas.

The title of Hart's book is indicative of the question addressed in it. Hart was not interested in the contents of the law of a particular jurisdiction but rather in the characteristics of law in general. That is why he writes about the *concept* and not about the content of law. Moreover, Hart approaches law

as a social phenomenon. He considers his work to be a study in descriptive sociology. It may be disputed whether Hart's characterization of his own work is correct. This, however, does not subtract from Hart's intention to study the law as a social phenomenon nor from his intention to identify the general characteristics of this phenomenon.

2.1 Primary and Secondary Rules

One of the findings of Hart is that law does not consist solely of rules that prescribe behavior. In this connection, Hart introduces the distinction between primary and secondary legal rules. Primary rules aim to guide behavior. They include rules that prohibit theft, tell us to drive on the right-hand side of the road, or to compensate the damage that results from contractual default.

Next to primary rules, law also contains secondary rules. These rules do not prescribe behavior but have as their function the organization of the legal system itself. In this connection, one may think of rules that point out the organs of the State and their competences, rules that specify which of two conflicting rules has precedence, and rules that govern legal procedures.

For our present purposes, one particular category of secondary rules is most important; these are the rules that indicate which other rules count as law. Indeed, one of the most important conclusions of Hart's theory is that the law itself determines which rules are legal rules and which rules are not. The law does so mainly by pointing out who has the power to make legal rules.

The underlying idea is that most law has been laid down. There are many bodies that can create law; at the EU level States make treaties, while internally there are national legislators, and in common law countries the judiciary, as well as subnational legislators on the level of provinces and municipalities. Further, private persons can create laws for themselves in the shape of contracts or last wills. All these law creators succeed in making laws because they were empowered to do so. They received this power from other legal rules, and in this way, law itself determines what counts as valid law.

2.2 A Chain of Rules

Two comments must be made about the above characterization of valid law as that which has been made by a law creator (also empowered by law). The first comment is that this

characterization is a purely factual statement, which is in principle vulnerable to falsification. Hart did not claim that competently created rules *deserve* to count as legal rules or *deserve* to be obeyed. The only thing he claims is that modern legal systems identify legal rules as rules that were created by somebody who had the legal competence to do so. Whether the law is good or bad is a different issue, an issue that lies beyond the problem field that Hart wants to cover. Hart is—in *The Concept of Law*—concerned not with the question of what we should do or which rules ought to be obeyed, but rather with giving an adequate characterization of law. His presupposition is that such an adequate characterization is given only through focusing on social practices and by avoiding normative issues.

The second comment is that valid legal rules are identified by powers that were themselves conferred by valid legal rules. In other words, the rules that assign the powers required for making valid law must also belong to the law themselves. This means that these power-conferring rules must have been made by persons or bodies who were assigned the competence to do so by power-conferring rules that must have been valid legal rules, meaning that these latter rules ... etc.

Let us consider an example to see what this means in practice. Suppose that the Dutch city of Maastricht has parking regulations for the market place. This regulation is valid law because it has been created by the Mayor and Aldermen of Maastricht. This body received the power to make parking regulations for particular streets and squares from a local bylaw on parking. This bylaw was created by the municipality council of Maastricht, which received the power to make such bylaws from a statute created by the Dutch parliament and government.

So we have a chain of validity in which rules and powers alternate: a valid rule was created on the basis of a power to create rules, and this power was assigned by a valid rule that was created on the basis of a power ... etc. This last «etc.» signals a complication, however. The chain ends with statutory rules. Why are statutory rules valid law then?

According to Hart, the validity of statutory rules is based on the *recognition* of legislation as a source of law. Since legislation and what follows from it is recognized as valid law, it is valid law. The same holds for case law (in common law countries) and for treaties.

One might object to Hart's view by pointing out that most people are not even aware what sources of law are, let alone that they recognize them as sources of valid law. Hart's rebuttal to this objection is that it is not the recognition by «ordinary»

people that is of importance, but the recognition by the «officials» of the legal system. Among these «officials,» judges and other legal decision-makers take a prominent place. If these officials recognize legislation and everything that follows from it as valid law, then legislation and what is directly or indirectly created on the basis of it counts as valid law.

Obviously, this raises the question of why these «officials» are officials with such an important role. The only acceptable answer, based on Hart's conception, is that these officials can play this role because they are recognized as having this role in social life.

This last answer demonstrates why Hart could describe his project as a study in descriptive sociology. It is a social practice, with citizens who recognize officials and officials who recognize the validity sources of valid law, that determines what law is.

2.3 A Practical Application: EU Law

What are the practical implications of the view that social practice determines what law is? The answer to this is illustrated by the difference of opinion between the Court of Justice of the European Union and the German Constitutional Court (*Bundesverfassungsgericht*) about why the law of the European Union directly applies to the citizens of the EU Member States. According to the Court of Justice, this question is governed by EU law; however, according to the German Constitutional Court, German law, and in particular the German constitution, governs this issue.

As it happens, EU law as interpreted by the Court of Justice is in agreement with the German constitution as interpreted by the German Constitutional Court, so no actual problems arise. However, this situation would change the moment when the German Constitutional Court declares a European rule invalid because it conflicts with the German constitution. In that case, the European rule would be valid according to the EU and all Member States that assign the highest authority to the European Court of Justice, while the same rule would be invalid in the eyes of the German Constitutional Court and the German judges who will, most likely, follow the Constitutional Court. According to Hart, this issue would be decided by social practice. If the practice is not uniform within the EU, the law will not be uniform within the EU, not even if the law was created by the EU itself.

2.4 Hart as a Legal Positivist

Positive law is law that has been created or «laid down» (*positus*) by the decision of a competent legislator. In the European continent, this will often be the formal legislator, the legislative body at the State level where national parliaments play an important role. It may also be a cooperation of States in the case of treaties, the European Union in the case of European regulations and directives, or a legislator on a decentralized level such as the council of a municipality. In common law countries, the judiciary is also competent to create law. This means that all positive law stems from an official source of law.

Legal Positivism

Legal positivism is the view that law coincides with positive law: all positive laws are valid law, and there is no valid law outside positive law. It is not hard to see why Hart's views about the nature of law make him a legal positivist. According to Hart, all legal rules stem from an official source. This means that all law is positive law. Moreover, all positive law is law because it stems from an official source. Law and positive law coincide, and this is exactly the point that legal positivists such as Hart want to make.

If all law is positive law and all positive law is law, it only depends on social reality to decide what the law is. Usually, it will be determined by legislation or judicial decisions. Whether a thus created rule is morally just or whether it is prudent to live in accordance with such a rule is, from the perspective of legal positivism, not relevant for the question of whether the rule is a legal rule. This does not mean that morality and reason have no influence on the contents of the law. They have an influence, but it is according to Hart, that morality and reason influence the content at the level of the sources of law, in particular of legislation and case law. Whether a rule is a legal rule is not determined by whether the rule is just or prudent but by whether the rule was created by means of legislation or could be found in a judicial decision.

The Separation of Law and Morality

According to legal positivists, there can be unjust and imprudent laws. In the words of the nineteenth century legal positivist John Austin, «the existence of law is one thing, its merit or demerit another». If law is «merely» a social phenomenon and its validity does not depend on what is just or prudent, it is not obvious that legal rules should be complied with. Paraphrasing Austin, Hart might have said: «the existence of law is one thing, the reason to comply with it another».

3 Dworkin's Criticism

It was Hart's intention to characterize law as it really is, not as it should be. Did he succeed in that endeavor? Is law really, as Hart writes, a union of primary rules that guide conduct and secondary rules that regulate the law itself? Is the legal validity of rules really only determined by their pedigree and not by their content? One of Hart's students, Dworkin, dared to doubt this. In one of his first publications, he attempted to show that Hart's theory about the nature of law is wrong, even if this theory is measured against the standard that Hart proposed himself, the standard that the law should be described as it actually is.

3.1 An Example

In ► Sect. 1 we encountered the case of Riggs versus Palmer. The plaintiffs in that case, Mrs. Riggs and Mrs. Preston, sought to invalidate the will of their father Francis Palmer. The defendant in the case was Elmer Palmer, the grandson of the testator. The will gave small legacies to the two daughters, Mrs. Preston and Mrs. Riggs, but the bulk of the estate went to Elmer Palmer.

The reason why Mrs. Riggs and Mrs. Preston wanted to invalidate the will was because Elmer had murdered his grandfather. The grandfather had recently remarried, and Elmer feared that he would change the will, giving Elmer a smaller inheritance. The plaintiffs argued that by allowing the will to be executed, Elmer would be profiting from his crime. While a criminal law existed to punish Elmer for the murder, there was no statute that invalidated his claim to the estate.

Should Elmer inherit his grandfather's estate given that he murdered his grandfather and also given the fact that there was no statute invalidating his claim to the estate? A yes or no answer to this question would be a legal judgment. Legal judgments need to be justified. In its most basic form, the justification of a legal judgment consists of an argument in which the facts of a case are *subsumed* under a rule formulation and in which the legal judgment is derived from these two premises. An example would be the following argument:

| | |
|-----------------------|--|
| Rule | A person cannot inherit from a person whom he has murdered |
| Facts | Elmer murdered his grandfather |
| Legal judgment | Elmer cannot inherit from his grandfather |

This justification of a legal judgment is nothing more than a logical derivation of the judgment from a rule formulation and a case description.

If the rule formulation can be read off from the available legal sources, the justification of a legal judgment is no harder than producing such a simple argument. However, the rule that «a person cannot inherit from a person whom he has murdered» could not be found in the law of New York when the case appeared before the court. There was a relevant rule that was easy to find, the rule that if someone had been appointed as the beneficiary in a last will of some person, and this last person died, the first-mentioned person inherits the estate. This rule however, which could be found in the available sources, was not the rule that the court applied. The court applied the rule mentioned in the primary justification, a rule that could not be found in any source. How did the court arrive at this «new» rule?

Here another aspect of justification comes into play. The court produced an argument with a conclusion that the rule that «a person cannot inherit from another person whom he has murdered» is a valid rule of New York law. This was not an obvious argument, as we will see later. However, even if the court would have adopted the obvious rule according to which Elmer could inherit, the court should have justified the use of this rule as well.

3.2 Hard Cases, Gaps, and Discretion

According to legal positivists such as Hart, law is a social phenomenon. Law consists of rules, and these rules exist as a matter of fact in social reality for the mere fact that they were created by a person or an institution that was empowered to do so. Moreover, rules attach legal consequences to cases. These legal consequences are as «objective» as the rules themselves. In this way, legal «decision-making» is not really a form of decision-making at all; rather, it is the process of establishing which consequences legal rules already have attached to the case at hand.

For example, if somebody negligently causes a car accident, this person must compensate the damage. This obligation to pay damages does not depend on the judgment of a court. It comes into existence at the moment the accident took place. If the case nevertheless comes before a judge, it is in the positivist picture of law, the duty of the judge to establish that which was already the case, namely, that the tort-feasor has to

compensate the damage. The court's judgment is not necessary to create the obligation to pay damages; it is only needed to make enforcement of this obligation possible.

Just like other phenomena in social reality, positive law is finite. There are no more rules of positive law than were explicitly created by means of legislation or judicial decision-making. As a consequence, there may be cases that lack an applicable legal rule. If the law has no solution for these cases, then it contains a *gap*.

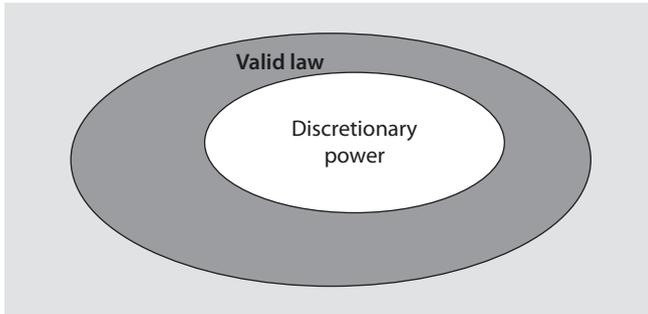
If a judge nevertheless has to take a decision on an issue in a gap, she must by necessity create new law. In taking her decision, she may take all kinds of things into account, such as governmental policies, the demands of morality, or even her personal preferences. However, there is one thing on which she cannot base her decision, and that is the law. She cannot do this because for the case at hand there is no law. Such cases, where there is no law or where the law is hard to discover, are called «hard cases». In such a hard case, the legal decision-maker must exercise discretion in the sense of making a decision that is unbound by law.

Arguably, as soon as a court has taken a decision, there is law for hard cases. First there is law for the concrete case at hand, because the court had the power to create legal consequences for this particular case. Second, there is also law for new cases which are similar because the court decision can function as a precedent for future cases. This means that although a type of case used to be hard, it may become easy after a court decision.

3.3 The Donut Theory of Law

The above account of hard cases in which the law is finite and contains a gap and in which courts must exercise discretion because there is no applicable law was offered by Ronald Dworkin. Dworkin called this account the «donut theory of law»; however, he himself considered this account to be wrong; see ■ Fig. 15.1. The donut stands metaphorically for the law. The opening in its middle symbolizes the space that the law leaves available for a judge to decide on a hard case. Judicial decision-making is confined by law, but the law does not determine the decision. The donut theory was meant to be an account of legal decision-making according to legal positivism, and *it was meant to illustrate why legal positivism is wrong*.

According to Dworkin, legal positivism is wrong because legal decision-making does not work as it should work accord-



■ Fig. 15.1 The donut theory of law

ing to legal positivism. Courts that must deal with hard cases do not take a decision that is unbound by law. They do not exercise discretion. Instead they argue as if the case at hand has one unique solution (one right answer) and as if it were their task to find that single right answer to the case. In producing these arguments, courts invoke more «law» than only the positive law, such as legal principles that were not laid down by an official legislator.

This point can be illustrated by the case of Elmer, who murdered his grandfather in order to inherit. The court which decided this case invoked the legal principle that nobody should profit from his own wrongs. Elmer would profit from the murder if he inherited from his grandfather's estate, and therefore he should not inherit. This principle prevails over the rule that last wills should be honored. Therefore, the court decided that Elmer would not inherit.

The decision made by the New York Court of Appeals was no doubt an attractive one. But why is it problematic for legal positivists such as Hart? Dworkin writes that it is problematic because legal principles such as the principle that «nobody should profit from his own wrongs» are not recognized as part of the law by the legal rules that define the law. The principle does not have the relevant source. In fact, it has no «source» at all because it was not made. And still, as a matter of fact, this principle is a part of law. Dworkin uses Hart's approach to determine law's nature, namely, looking at social reality, and more particularly to examine what courts do; however, in Dworkin's view of social reality, there is more law than what can be identified by means of what has been created by an empowered lawmaker. Social reality contains legal principles that are law, not because they were competently created but because they have the «right» content.

Legal Principles

If this argument is correct, it has profound implications for the nature of the law. It implies that there is more law than positive law alone. Therefore, Dworkin's point about legal decision-making has implications that reach farther than legal decision-making alone. It regards the very nature of law. The crucial point in Dworkin's argument is that the legal decision-makers *as a matter of fact* consider these other materials as legal materials too. This means that, in their eyes, *the Hartian picture of law is wrong*.

4 Fact and Norm

Law finds itself on the borderline in between fact and norm. On one hand, law aims to answer the question of what we should do. From this perspective, law is similar to morality, and legal reasoning is essentially the act of determining what the best thing is to do. On the other hand, law aspires to be factual, something that is the same for everybody and that can be established objectively. From this perspective, legal reasoning is establishing the legal facts.

Reasons Arbitrary

There are some who think that these two aspects of law cannot be reconciled. They emphasize the gap between fact and norm. Facts are objective, the same for everybody, but these facts do not tell us what we should do. Admittedly, facts do play a role in deciding what to do. If your house is on fire, this fact is of utmost importance for the decision of whether you will leave the house. Theoretically, however, you might decide to stay in the house. Facts by themselves cannot determine what you should do; they can only do so if they are given meaning as reasons for behavior. Whether they have that meaning is not given with the facts themselves; it is a matter of choice. Reasons are, in this view, arbitrary.

If law were purely a matter of fact, it would be an open question whether it provides us with reasons for acting. Someone might, for instance, ask himself: «According to the law I must pay taxes, but should I really do so»? This person then treats valid law as if it were the law of a foreign country or from the far past.

Reasons Nonarbitrary

There are others who think that facts, including facts concerning law, can by themselves provide us with reasons for acting. According to them, it is not an arbitrary matter whether we assign facts meaning as reasons for behavior. If you are wise, they argue, you *know* what meaning the facts have for you. No sane person remains in a house that is on fire

unless he believes that he can extinguish the fire. It is not good for humans to suffocate in smoke or—possibly even worse—to burn alive. It is part of human nature that we want to stay alive, do not want to suffer pain, and in general want to be happy. For this reason, it is good for human beings—objectively good—that they want to live, to avoid pain, and to pursue happiness. Maybe there are circumstances in which this is not the case, but such circumstances are exceptional. There are things that are normally good for humans, and it would be a fallacy to use the existence of exceptions to argue that the main rule that people want to live, to avoid pain, and to pursue happiness does not hold.

This last line of thinking, which assumes that some things are objectively good and others are objectively bad, can be found in the work of, among others, Thomas Aquinas.

5 Thomas Aquinas: Positive Law and Natural Law

Thomas Aquinas was a Dominican priest, who lived from 1225 to 1274. In that time, continental Western Europe still had a feudal system. Members of the higher nobility were the local rulers, and although they were officially the subordinates of the German Emperor or the King of France, they were for most practical purposes independent. Most law in those days was customary law. The role of legislation was limited, and its function was mostly to codify existing customs. In the Middle Ages, Aquinas formulated a theory about the nature of law that has remained influential even in the present day. According to this theory, law is an ordinance of reason for the common good, made and promulgated by he who has care of the community.

5.1 Common Good

A first characteristic of law is that it concerns the common good and not merely the interests of individual persons. There are also guidelines for behavior that only concern the individual good. A modern example is the guidelines for living in a healthy way, for instance, eating healthy food. Since the consequences of unhealthy eating habits mostly affect the eating person alone, this is a matter of individual interest and not a topic for the law.

One can have a different opinion on this and it is very possible nowadays that a State introduces a tax on fattening foods. (As a matter of fact, Denmark briefly had such a tax.) This does not show that Aquinas' distinction does not hold true, but rather that as almost everything touches the interests of others, they thereby become issues concerning the common good.

5.2 Law and Reason

A second characteristic of law is, according to Aquinas, that law is an ordinance of reason. The content of the law is determined by reason (in Latin, *ratio*), and therefore the law can be known by reasoning about the best way to organize human society. We will refer to this kind of law as *rationalist law*. The modern counterpart of this view would be that the content of what the law should be is a matter of science. However, most present lawyers are legal positivists according to whom the law can be known by studying and interpreting authoritative texts, such as legislation and case law.

Natural Law

For many centuries, the view that law can be established by means of reason went in the form of a belief in natural law. Natural law theory assumes that there is a kind of law, *natural law*, for which the contents can be obtained by means of reasoning from human nature. Perhaps the most important representative of this view was Thomas Aquinas. According to Aquinas, human nature determines what the best way to organize society is. Following the Greek philosopher Aristotle (384–322 BCE), Aquinas assumed that there is such a thing as human nature and that this nature determines what the best way is for a human being to live. Since human beings are social by nature, the best way to live is in a society with other human beings. Such a society should allow human beings to flourish; consequently human nature also determines what a good society is. The law that governs such a society should be based on human nature, and given this link with human nature, it is called *natural law*. As we have already seen, Aquinas held the opinion that the content of this natural law can in principle be established by human reason.

15

Customary Law

This rationalist foundation of law can be contrasted with two alternatives, custom and will. Both alternatives assume that law exists purely as a matter of fact. In the time of Aquinas, most law was still customary law: rules that were generally accepted and often assumed to have existed for time immemorial. Customary law and rationalist law have in common the fact that they both see law as independent of the will of the reigning monarch. An important difference between the two

is that customary law is in a sense arbitrary. Its content might just as well have been different from what it actually is, and at different times and in different places customary law is different. Rationalist law, on the contrary, tends to be the same everywhere and always unless different circumstances make different things rational.

This last clause should be taken seriously. Even if human nature is always and everywhere the same, the circumstances under which human beings live vary considerably with time and place. This would imply that even if the most abstract principles of natural law are universal, its concrete elaborations would still exhibit important differences.

The other alternative for rationalist law is law that has been made by the sovereign, the content of which is determined by the sovereign's will. This sovereign would, in the time of Aquinas, have been an emperor, king, or a member of the higher nobility. Nowadays, the people are often taken to be the sovereign. Regardless of who the sovereign may be, the view of the law is the same: the law corresponds to the will of the sovereign, the content of the law in this sense is arbitrary. Aquinas explicitly considers this alternative for his rationalist view of law. He recognizes that the will is one the factors that determine what we should do. Reason tells us how we can reach our goals, while the will determines what our goals will be. But, writes Aquinas, if the will is to have the authority of law, it must be rational. Only then can the will of the sovereign be the law. If the will is not rational, it is not law but evil.

Sovereign's Will

Suppose you are walking in a forest, and have become thirsty. You would like to drink something and you know that there is a brook in the neighborhood with potable water. It is rational to walk to the brook and to drink some water. This example illustrates that what you should do depends on both what your goal is (to drink) and on reason, which tells you how you can reach your goal (go to the brook). But how can the will be irrational? The following adaptation of the example can show this. Suppose that you know that the brook's water has been polluted and is not potable. But your thirst is so great that you nevertheless want to drink the water. Should you then drink the water from the brook? You should not, because in this version of the example your will is not rational.

In the rationalist view of how to act and on the content of law, like the view of Aquinas, reason is not only a tool to find the means to reach a pre-given goal but also a standard to evaluate

Reason as Standard

goals with. An unreasonable will should not guide our actions. Already during the Middle Ages, Aquinas' views on this subject were controversial. Particularly, there was a discussion on whether law was the manifestation of God's will. In that age, nobody disputed that the natural law was commanded by God, but the discussion was concerning to what extent God was autonomous in commanding natural law. One view, defended by Aquinas, was rationalist: reason determines what is good law, and God has prescribed this law because it is rational. So, the law depends on the will of God, but this will depends on reason because God is rational.

The other view on the nature of law is voluntaristic (*voluntas* is Latin for will). In this view, the content of natural law depends on the will of God, and it is good *because God willed it*. In this connection, it would not matter whether God's will and the law are rational. It is this voluntaristic view of law that, in a secularized version, has gained prominence in the legal positivist account of law.

5.3 Positive Law and Natural Law

Another characteristic that Aquinas attributed to law is that law is promulgated by he who is charged with the care of the community. This third characteristic has two aspects. The first aspect is that the person who has the power to make laws is the one who has the care for the community as a whole. Aquinas opposes this explicitly to the head of a family, who can only make rules for family life. Such rules are not laws, because they do not concern the common good, but only the good of the family.

The second aspect is that this person who is charged with the care of the community has the power to make laws. According to Aquinas, human beings are social beings. No single person on his own possesses the capabilities that are necessary to lead a full human life. That is why human beings need to live together with other human beings. Given the differences between humans and their interests, a society could easily fall apart if there were not a person who directs the society toward the general interest. So there must be a monarch who furthers the common good. The existence of a society governed by a monarch therefore fits in the natural order in which human beings partake. Such a society is not something that is outside or opposed to natural law but is rather required by natural law. In order to promote the common good, the monarch should make law, positive law.

Positive law must be in service of the common good and therefore should not conflict with natural law. This raises the question of why there should even be positive law. Does natural law not suffice? The answer to this question is that natural law must be supplemented by positive law because natural law is very abstract and needs to be made concrete. One example would be that the natural law in principle prohibits the killing of human beings, but that it does not inform us about the sanctions that should be applied to those who violate this prohibition.

Moreover, there are some issues that need to be regulated, but reason does not tell us what the correct law is, because these are too arbitrary. An example is whether we should drive on the right- or the left-hand side of the road. It is reasonable that there must be a rule for this, but both solutions seem to be equally good. In short, there are a large number of issues that need regulation, but where the content of that regulation cannot be determined by reason alone. There is a need for decision-making and for positive law next to, or—even better—within the framework of, natural law. In fact, it can be determined purely on the basis of reason that there is a need for positive law and therefore natural law prescribes that there must be positive law. The duty to comply with this positive law follows from the facts that human beings need to live together in a society and that such a society can only exist if it has positive law.

In the view of Aquinas, natural law and positive law would ideally supplement each other and would together constitute a coherent set of guidelines for how humans should live in accordance with their nature. It is possible however that positive law and natural law conflict; then the difficult question arises of how such a conflict should be dealt with.

At first sight, the issue seems easy to solve. Law has, in Aquinas' view, the function to let human beings lead their lives in accordance with their nature. If positive law does not fulfill this function, if it is counterproductive, then it would not be law. This simple solution can be summarized by the slogan «Positive law that conflicts with natural law is not law at all».

Taken to its extreme, this slogan is too simple. If people are given the possibility to invoke natural law as a reason to disobey positive law, there is a serious risk that chaos will result. Indeed, anybody who disagrees with a rule might argue that the rule is not binding because it is in conflict with natural law. Moreover, there can be disagreement about the content of natural law because not everybody's «reason»

Why There Must Be
Positive Law

When Positive Law and
Natural Law Conflict

Law that Is a Little Wrong

is to the same extent rational. The chaos that threatens if an (alleged) conflict with natural law is a sufficient ground not to comply with positive law is against the idea of natural law itself because natural law aims at making human society possible.

Considerations like the ones above brought Aquinas to conclude that positive law that is only «a little» wrong should still be obeyed. The disruption of social order that results from non-compliance with positive law is worse than that which derives from the compliance with law that is unreasonable. However, if the violation by positive law of natural law is sufficiently serious, the duty to comply with positive law ends. Obviously, it is far from simple to draw a clear line where a violation of natural law is serious enough to warrant disobedience of positive law. The German legal philosopher Radbruch stated it as follows:

- » The conflict between justice and the reliability of the law should be solved in favor of the positive law, law enacted by proper authority and power, even in cases where it is unjust in terms of content and purpose, except for cases where the discrepancy between the positive law and justice reaches a level so unbearable that the statute has to make way for justice because it has to be considered 'erroneous law'.

5.4 Conclusion on Aquinas

According to Thomas Aquinas, law consists of rules that tell us what kinds of actions serve the common good. In his view, the question of what promotes the common good can be answered by means of reason. Law is therefore a matter of *ratio*, reason.

It may be tempting to oppose natural law theories such as the one proposed by Thomas Aquinas to views according to which law is positive law, the work of human beings. However, we have seen that even from a natural law point of view, it is in general wise to comply with positive law. The practical differences are therefore not as big as they might seem at first sight. Yet the fundamental difference is huge. According to Aquinas, law is ultimately not a matter of rules that exist in social practice, but a matter of knowing which rules lead to the common good. The reason why we should comply with positive law is not that it is by definition the law, but because it is rational to do so.

6 Thomas Hobbes: Normative Legal Positivism

According to Thomas Aquinas, positive law constitutes an important part of law, but in last instance natural law determines how we should act. Thomas Hobbes held a fundamentally different view on this issue. With Aquinas, he shared the normative approach to law: law is an answer to the question of how we should act. Even though he has the same starting point, Hobbes arrives at an answer that is quite different from that of Aquinas.

Thomas Hobbes lived from 1588 to 1679, mostly in England, but also for some time in Paris. During this period, England was divided by civil wars. Hobbes' seminal work, the *Leviathan*, was named after a monster that was mentioned in the Bible. The Leviathan about which Hobbes writes is the State, which is more powerful than individuals.

Leviathan

In the *Leviathan*, Hobbes addresses many themes. Here we focus on the way in which Hobbes answers the question pertaining to the nature of law. Law is in the first place an answer to the question of how we should act. According to Hobbes, this question can be answered by means of reason. Much more than Aquinas, Hobbes focuses on the certainty offered by law and on the fact that law can be enforced, even to the extent that he prefers positive law above rational law if an effective State organization exists.

The reason why Hobbes is so strongly attached to the enforceability of law and to legal certainty is that he was rather pessimistic about human nature and the possible consequences if an effective State authority is lacking. This pessimism might very well be the result of the civil wars that Hobbes experienced.

6.1 The State of Nature

As starting point for his theory about the nature of law, Hobbes sketches a picture of how the world would look if there were no State. Hobbes calls this situation the *state of nature*. Although according to Hobbes, people differ from each other, these differences are relatively small; even the weakest person is capable to kill the strongest in a rash moment. Therefore, in the state of nature, nobody has a claim to something that cannot also be claimed by somebody else. This equality gives everybody an equal hope to realize his

desires. The consequence of this is that two people who want the same thing will become enemies if they cannot both have it. To realize their own desires, they will try to destroy or at least to subject the other. (We are talking about a situation without a State.) Further, everybody knows that everybody else will try to realize their own desires, and as such, they will distrust one another.

War of Everybody
Against Everybody

By way of precaution, people will try to safeguard their positions by means of double-crossing one another until there is nobody left who might constitute a danger. According to Hobbes, this is permitted in the state of nature because it is necessary for everybody's survival. The result of this is an all-out war of everybody against everybody. This war may consist not only of actual fights, but in particular of the preparation for possible future fights, like a kind of cold war. While such a war continues, there can be no good opportunities to develop agriculture, industry, or trade. Combined with the continuous fear of actual fights, this makes life disagreeable. In the famous words of Hobbes:

«(...) the life of man [is] solitary, poor, nasty, brutish, and short».

Laws of Nature

The state of nature is disagreeable, but the feelings and reason of human beings make it possible to escape from it. The fear of death, the desire for a pleasant life, and the hope to achieve such a life through diligence provide the inclination to strive for peace. Reason tells man under which conditions peace can be achieved. Hobbes calls these conditions the *laws of nature*.

The first and most fundamental law of nature that Hobbes mentions is that everybody should strive for peace as long as there is hope to achieve it, but that one should fall back on the advantages of the state of nature if peace turns out to be unattainable.

From this first law follows a second. Everybody should be prepared to give up their rights and to be content with as many rights against others as one allows others to have against them. This should be followed to the extent that it is required for peace and self-preservation, on the condition that the others are prepared to do the same.

15

6.2 The State

Contracts

A renunciation of rights as recommended by the second law of nature is a kind of contract. In the state of nature, contracts are problematic. In many contracts, parties promise to do something in the future. One of the parties must perform, and

then wait for the other party to perform. Performance is uncertain however, as in the state of nature there is nobody to enforce the contract. In the state of nature, everybody is entitled to do anything, including nonperformance of agreements. Not only is it risky to perform as the first party, no contract party is obligated to do so. It then makes little sense to engage in contracts at all. Hobbes' conclusion is therefore that in the state of nature all contracts are void.

This becomes different if there is a government with the power to enforce performance. Then the party who performed first can count on the fact that the other party will also perform. On the basis of that certainty, there can be an obligation to perform on the first party, meaning that in civil society (if there is a government) contracts are binding.

This example about contracts illustrates why enforceability is, according to Hobbes, essential for law. Law can only bind people if it is prudent to comply. Because people are approximately equal in strength, it is not prudent to comply with rules in the state of nature because one cannot assume that others will do the same. The most important function of the State is to make it prudent to comply with the rules. If everybody complies, out of fear of government enforcement or for other reasons, then everybody is better off than if nobody complies with the rules. It is in everybody's interest if everybody is forced to obey the law.

According to Hobbes, there can only be law within the context of a State. The reason is because law imposes duties and obligations and that duties and obligations can only exist if it is prudent for people to comply with them. Given the equality of human beings, under which people cannot force each other, a superhuman entity is necessary to force people to obey the law. This entity is the State.

Law and State

Following up on this, Hobbes defines law as what the State has ordered its subjects. The government is the legislator but is itself not bound by law. Indeed, it can revoke laws if it desires to do so.

The laws of nature that hold in the state of nature merely indicate what is required for a safe and pleasant life. They do not obligate. However, as soon as there is a State that enforces the law, the laws of nature become binding too.

6.3 Positive Law and Natural Law

It is remarkable that in Hobbes' view, natural law plays a much more limited role than in Aquinas' view. According to Aquinas, natural law and positive law constitute a coherent whole that

must guide man to his natural destination. Both kinds of law have a single purpose in common, and the major difference between the two kinds is the source from which they originate. Natural law is embodied in creation and amenable to being known through reason, while positive law is man-made.

According to Hobbes, natural law in the shape of the laws of nature almost only plays a role in the state of nature. Moreover, it does not indicate how man can achieve his natural destination but only how it is possible to escape from the misery of the state of nature. As soon as the State exists, the State determines the law. More specifically, natural law no longer plays a role in combination with positive law. Natural law is the foundation for positive law because it recommends the formation of a State and to obey positive law when there is a State. However, as soon as an effective State exists, the only law is positive law, which is created and enforced by the State.

This difference between Thomas Aquinas and Thomas Hobbes can be explained by their different views of mankind. Aquinas assumes that something like human nature exists and that it is possible to establish on its basis what is good for mankind. That is the foundation for natural law. According to Hobbes, the only thing that humans have in common is that they pursue their own interests; what these interests constitute is different for everybody. A natural foundation for legal rules is lacking; such a foundation must be created. It is the task of the State to create this foundation—and to enforce it—in the form of positive law.

6.4 Review of Rules Against Legal Principles

Let us have another look at the case *Riggs versus Palmer*. The New York Court of Appeals decided this case by reviewing the statutory rule about inheritance and last wills against the legal principle that nobody should profit from his own wrongs. The difference between the views of Thomas Aquinas and Thomas Hobbes is well illustrated by this example. The principle against which the judges reviewed the statutory rule was unwritten; it only held because it is reasonable. Although Aquinas would plead for caution when reviewing positive law (legislation) against what is reasonable, reason would in his view be the ultimate standard for what is law. Arguably, therefore, the decision by the New York Court of Appeals to deny Elmer his inheritance would be supported by Aquinas.

Hobbes would probably not have supported that decision. If written rules can be reviewed against what is considered to be reasonable, this opens the way to cast doubt on all law. The result is uncertainty and possibly endless litigation about cases in which parties disagree on what is reasonable. It is the function of positive law to end uncertainty, and therefore reviewing statutory law against unwritten principles is undesirable.

7 Conclusion

In this chapter, we focused on a central question of legal philosophy, the question of the nature of law. We have seen that this question can be asked with different intentions in mind. It may be a normative question, aimed at guidelines for behavior. It may also be a purely conceptual question: what is the nature of this social phenomenon that we call «law»?

Hart answered the conceptual question, and his answer was that law consists completely of positive law, made by rule makers (including judges) who derive their power to create law from positive law. Whether a rule is a legal rule depends only on whether this rule was made by a competent law creator; the content of the rule does not play any role. In this way, Hart emphasized the legal positivist view that there are no moral requirements for the validity of legal rules.

Dworkin also answered the conceptual question, but he pointed out that judges use substantive arguments in taking their decisions. Moreover, they do so to determine the content of the law and not merely when there is a gap in the law and they are in need of creating new laws. Apparently, the content of the rules does play a role in determining what the law is. Dworkin arrived at a non-positivist view of law on the basis of the conceptual question of the nature of law.

Both Thomas Aquinas and Thomas Hobbes answered the normative question of the nature of law. They both assumed that natural law determines what is good for mankind. However, Hobbes did not see much that humans have in common, and the role of natural law was therefore confined to prescribing the need for a State. The «real» law would then be the rules that are created and enforced by the State. Hobbes therefore arrived at a legal positivist conclusion on the basis of the normative question of the nature of law.

Thomas Aquinas assumed that human nature could constitute the foundation for substantive natural law. There is a need for positive law, but positive law should always function

within the framework of natural law. As such, Aquinas arrived at a non-positivist view of law on the basis of the normative question of the nature of law.

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