

## HART

### 1) THE CLARIFICATION PRINCIPLE

- **the purpose of legal theory** is the clarification of the general framework of legal thought
  - to procure greater awareness and deeper insights about 'our' everyday, familiar, legal reality primarily by solving the manifold puzzles arising from 'our' shared beliefs about phenomena which are non-controversially perceived and classified as belonging to law
- **clarification**
  - focusing on the concept of law, but also on the related concepts of legal obligation, legal right, legal duty, legal power, legal rule, legal validity, legal sanction, nullity...
  - focusing on the connections of the abovementioned concepts with the more general concepts of rule, obligation, coercion, morality...
  - clarification can only be brought about by way of speculation on the conceptual webs revealed by both ordinary and specialist usages of legal words
- **jurisprudence (philosophical study of law)**
  - *legal theory*
    - 3 basic standards:
      - generality of scope
      - concern with structure
      - descriptive (value-neutral and explanatory elucidation of law's conceptual apparatus)
  - *legal policy*
    - evaluative, prescriptive
    - Bentham's 'censorial jurisprudence'; Austin's 'science of legislation'
    - a) evaluation from the standpoint of acceptability of a legal system to any rational person
      - must contain rules concerning the basic conditions of social life (violence, property, contract)
      - the rules must satisfy the procedural requirements (general, determinate, publicly promulgated, not retroactive) and principles of natural justice (impartial judges and fair trials)
    - b) evaluation from the standpoint of the principles drawn from some moral or political philosophy (what is good and just for the members of a society to be granted by law)
    - evaluation can lead to recommending the status quo, promoting legal reform, etc.
- **doctrinal study of law, legal history, legal sociology**

- **subject-matter of legal theory**
  - in a trivial sense: law
  - in a non trivial sense: a linguistic phenomenon
    - sentences, words, and concepts, variously connected to institutional structures, collective practices, and psychological attitudes

## 2) THE CONCEPTUAL ANALYSIS PRINCIPLE

- analysis of legal language and legal concepts
- solving 'familiarity puzzles'
- bridging the gap between (superficial) knowing and (thoughtful) understanding
- linguistic tools
  - a theory of natural languages
    - the meaning of words and sentences is determined by their use
    - natural languages are fairly efficient tools of human communication, even if their words and sentences are characterized by indeterminacy (ambiguity and vagueness)
  - a theory of definitions
    - several forms of definitions (*per genus et differentiam specificam*, contextual definition, central-case definition)
    - contextual and central-case definitions more suitable to define legal terms
    - a good definition is an explanatory definition
      - it instructs us about how the term is used and about the thing to which the term refers!
      - definitions 'may make explicit the latent principle which guides our use of a word, and may exhibit relationships between the type of phenomena to which we apply the word and other phenomena'
    - rejection of 'definitional fallacy'
      - no theory should be 'built on the back' of definitions
  - a theory of concepts
    - concepts are a matter of either convention or stipulation
    - stipulated concepts are neither true or false
      - stipulations are to be assessed in terms of whether they are pragmatically justified
    - legal-theoretical concepts should be stipulated concepts informed by an overall explanatory goal

- 'weak' stipulations: not departing altogether from ordinary concepts, but providing improved, puzzle-solving, versions of them
- hermeneutic tools
  - distinction between the 'internal' and 'external' points of view as to social systems of norms
    - an observer should also take into account the participants' normative concepts and *use* of normative language in order fully to understand their normative structures as *they* themselves understand them
  - distinction between descriptive statements *about* a normative system ('external' factual statements about the rules and about the rule-oriented actions and attitudes of a normative system's officials and subjects) and normative statements *grounded on* (what is taken to be) the content of the system ('internal' statements of what duties, rights, liabilities, etc. one has under that system)
- metaphysical tools
  - the principle of methodical distrust
    - familiarity with words and objects often goes along with confusion and delusion
    - thus: 'common sense' views about the law must be subject to relentless critical scrutiny if they are to serve as adequate starting points for fruitful philosophical inquiries
  - anti-reductionism
    - resisting the tendency to present legal systems as structurally simple phenomena, to overlook, disregard, or underappreciate their actual complexity
  - philosophical imagination
    - suitably devised thought-experiments may throw much light on our actual conceptual and institutional structures, by comparing them to alternative imaginary situations