



ANU LAW
STUDENTS'
SOCIETY

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Legal Theory
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Question 2a

70/100

Legal Indeterminacy and the Rule of Law

Legal indeterminacy arises from conflicting views about 'what is law'.

Varying positivist views include 'commands' of a sovereign (Austin), exercise of class and power (Marx) obliged and obligated conduct (Hart), and natural law theories of background moral (Dworkin).

The way these different theories of what law is affect the exercise of rule of law will be discussed.

The Law is indeterminate

Austin's view of law was any 'commands' given by a sovereign backed by sanctions. He believed the law could be good or bad depending on the sovereign Austin's theory, however, does not address efficiency in a large nation; for example, why would somebody stop at a red light at 3am in the morning when no one is around? Surely this could not be fear of sanction.

Marx believes that law is an exercise of power and law is always bad. He believes that it reflects the interests of the privileged at the expense of less privileged.

Hart address the critique of Austin's theory of inefficiency in a large society. He says there are rules which are 1) obliged and 2) obligated. Rules that are obliged are those conformed with due to fear of sanction. Rules that are obligated are those that are accepted by the wider community as good rules.

These rule that are obligated are in the form of primary rules backed by secondary rules.

Primary rules are those which directly regulate one's behaviour, while secondary rules are the rules that govern these primary rules (i.e. Rules to extinguish uncertainty (rules of recognition), rules of change and rules of adjudication).

Hart believes that primary rules need widespread existence by majority of citizens (i.e. if everybody start driving on the right all of a sudden, then there would be no rule to drive on the

left). On the other hand, secondary rules only need majority compliance by officials. It is argued that this may lead to 'alienation' of people of the law.

Hart's theory opens up the existence for 'hard' cases and 'easy' cases. This is due to the open texture of rules. Easy cases are those which can be determined and adjudicated clearly. Hard cases refer to those which the rules of recognition do not properly address.

Additionally, the more precise a rule gets, the less effective it is (e.g. defn =vehicle what is a vehicle? Bus=vehicle but then what about state bond?)

Legal realists argued that 'hard cases' are more common than Hart makes them out to be saying Hart undermines the amount of judicial discretion evident.

Dworkin attempts to address Hart's open texture of rules. He says that when the intention of parliament is clear; go with that intention (as long as if it is not unjust), and where it is not clear, go to 'background' moral principles to come to a decision. He believes that these background principles are just as valid as the legislature.

Dworkin suggests this method to fill in the 'gaps' arising from Hart's open texture of rules which would otherwise call for a judge's personal beliefs.

There is an assumption however that Dworkin makes that the background principles are the same for everyone → he doesn't take into account different beliefs of different societies.

Hunt criticises Dworkin by saying that his theory suggests a 'fear of politics'. He believes that Dworkin wants a 'clear and permanent' boundary of law because he has a 'nightmare' of the subjectivisation that democracy brings. This 'nightmare' however, suggests that the decision of principle is in fact a political decision, and giving judges' authority over it is not justified or legitimate.

These conflicting theories of law show that the law is inherently indeterminate; indeterminacy is inescapable.

Consequences of legal indeterminacy for rule of law

The rule of law fundamentally favours human rights.

Positivists says that the rule of law is just the rules as they are in Hart's model. This may be right for a failed state, however, not enough for a civilised nation.

Krugier argues that a human rights culture is needed; not just common law constitution.

Liberals have a richer notion of what rule of law is, than Positivists. They believe in plurality of subjects (race, gender, culture, etc.) and equality for these citizens. They believe rule of law is the ability to live without interference.

Hobbes says individuals are inherently selfish (influence from English Civil War) and sovereign therefore has power to exercise force in order to manage violence.

This is however, interference in the individual's life.

Democrats argue that risk of having force exerted upon one is not in liberals favour, and the people therefore need to be in control of the law in order to uphold human rights and thus the rule of law.

Dyzenhaus says in order to uphold the rule of law; judges must only stay away from legislation if it is intention is unclear. Also, if they do so, it should be in favour of human rights. However, Dyzenhaus' preference is that the judge resigns instead of exercising discretion in order to show that the rule is not upholding the rule of law (South Africa apartheid case)

Kirby says that if parliament intends to be unjust, it must make the intention clear. Otherwise decide in favour of human rights (e.g. best land goes to white people).

Brian Lighter says judges can construe cases broadly or narrowly (Donoghue & Setverson)

Legal formalism says that there is only one set of facts and a single outcome.

Realist critique however, is that even facts are seen differently by people and a single outcome is not possible. If it were, however, democracy would be unnecessary.

Dicey suggests that a benign sovereign would be able to uphold the rule of law against legal indeterminacy. However, Dicey fails to see what would happen if the sovereign died, or even changed his ways. What would then happen to the rule of law? It would disappear.

Waldron offers a safety net argument saying that a right regime is necessary because case is not enough, there are a lot of uncared for people in the world.

Sandel wants indeterminacy AND rule of law. He believes this is possible by letting judges exercise discretion in the common law where statute is unclear /unjust in order to bring about greater justice.

Oltman has the liberal view of freedom of equality; he believes in fair notice and legal accountability (judges not to pull anything out of their back pocket). People should learn where their freedom lies and what breach they are accountable for.

Iris Marion Young is in favour of a heterogeneous public to uphold the rule of law. That is; a) no one is to be forced into privacy, and b) everyone is allowed to participate equally in policy considerations. She believes women are confined to the private sphere in order to maintain a homogenous and dispassionate unity. This however does not reflect human rights or the rule of law.

The effects of legal indeterminacy or rule of law is very large.

There are competing theories of how the rule of law should be upheld where the law is indeterminate.

Democracy is the most favourable view in upholding equal recognition in participation in policy decisions. This will best uphold the liberal values.

Marker's Comments

This is an impressive essay – you give a good A/C of a wide range of relevant theorists on the issue of indeterminacy. Explicit employment in the second part of the question requirements (statutory/common law). Also, CF a list of theorists and their respective opinions, more effort to build your interests.