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vpsadv@gmail.com/lecture notes/LLM/What is jurisprudence

WHAT IS JURISPRUDENCE ABOUT?

WHAT IS JURISPRUDENCE ABOUT?

- What is jurisprudence (philosophy of law, legal theory) about:
  - definitions of law (Aquinas, Austin)?
    - genus and difference; necessary and sufficient conditions; types of definitions
  - concepts of law (Hart)?
    - abstract formulation of the point of a social practice on which people agree
  - conceptions of law (Dworkin)?
    - alternative analyses of what is involved in the concept
  - theories of law?

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THEORIES

- **subjects** of jurisprudential theories:
  – law, legal systems, validity, ...
- **aims or purposes** of JT's:
  – to analyse the meaning of terms (semantic theories),
  – to explain (explanatory theories),
  – to predict (predictive theories),
  – to evaluate (evaluative or normative theories)
- **criteria for evaluating** JT's:
  – agreement with facts, comprehensiveness, consistency, coherence, simplicity...

SEMANTIC THEORY

1) **semantic theory**

- provides analyses of meanings or uses of terms

- tries to capture an actual usage of a term

- makes only minimal suggestions for reform

- e.g., semantic analyses of 'legal right', 'obligation', 'contract' ...

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SEMANTIC THEORY

Example (Hohfeld)

"the term 'rights' <u>tends to be used</u> indiscriminately to cover what in a given case may be a privilege, a power, or an immunity, rather than a right in the strictest sense; and this looseness of usage is occasionally recognised by the authorities. As said by Mr Justice Strong in *People* v *Dikeman*: ..." "Recognizing ... the very broad and indiscriminate <u>use of the term</u> 'right', what clue do we find, in ordinary legal discourse toward limiting the word in question to a definite and appropriate meaning? That clue lies in the correlative 'duty', for it is certain that even those who <u>use</u> the word and conception 'right' in the broadest possible way are <u>accustomed to thinking</u> of 'duty' as the invariable correlative."

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EXPLANATORY THEORY

2) explanatory theory

a) conceptual

- tries to increase understanding by showing conceptual relations and differences, providing frameworks for interpreting data

- provides ways of seeing how law differs from morality and coercion, how legal systems are structured, and what makes law valid

- explains by giving reasons

- e.g. Austins's, Kelsen's, Hart's and Raz's theories

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EXPLANATORY THEORY

Example 1 (Hart)

"We found it necessary to distinguish from the idea of a general habit that of a social rule, and to emphasize the internal aspect of rules ... We then distinguished among rules between primary rules of obligation and secondary rules of recognition, change, and adjudication. (...) Our justification for assigning to the union of primary and secondary rules this central place is not that they will there do the work of a dictionary, but that they have great <u>explanatory power</u>."

EXPLANATORY THEORY

Example 2 (Kelsen)

"Law can essentially be distinguished from morality only if ... law is <u>understood</u> as a coercive order, i.e. as a normative order which seeks to bring about certain human behaviour by attaching to behaviour that is contrary to it some socially organised act of coercion, while morality is a social order which does not provide for such sanctions; whose sanctions consist only in approving behaviour which conforms with the norm and in disapproving behaviour that is contrary to the norm, and thus the application of physical force is completely out of the question."

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EXPLANATORY THEORY

2) **explanatory theory**

   b) empirical

      - based on social sciences

      - about why the law is the way it is

      - e.g., a very simple Marxist theory might state that the content of the law can best be explained by the interests of the ruling class

      - e.g., many economic analyses of law (however, some are normative theories)

      - explains by causes

NORMATIVE THEORY

3) normative theory

- one cannot understand what law is prior to some account of what law ought to be

- involves normative, evaluative, and otherwise prescriptive questions about the law (e.g., freedom and the limits of legitimate law, the obligation to obey law, justification of punishment)

- entwined with more general normative theories, e.g. moral or political theories

- justificatory and critical

- e.g., Finnis's, Perry's and Dworkin's theories

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NORMATIVE THEORY

Example 1 (Finnis)

"It is often supposed that an evaluation of law as a type of social institution ... must be preceded by a value-free description and analysis of that institution as it exists in fact. But the development of modern jurisprudence suggests, and reflection on the methodology of any social science confirms, that no theorist can give a theoretical description and analysis of social facts without also participating in the work of <u>evaluation</u>, of understanding <u>what is really good</u> for human persons, and <u>what is really required</u> by practical reasonableness."

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NORMATIVE THEORY

Example 2 (Dworkin)

"The law of a community on this account is the scheme of rights and responsibilities that meet that complex standard: they license coercion because they flow from past decisions of the right sort. They are therefore 'legal' rights and responsibilities." "Rights and responsibilites flow from past decisions and so count as legal, not just when they are explicit in these decisions but also when they follow from the <u>principles of personal and political morality</u> the explicit decisions presuppose by way of <u>justification</u>."

EXPLANATORY VS. NORMATIVE THEORIES

- **explanatory-conceptual theory**
  - ➢ statements distinguishing the legal from the moral
  - ➢ statements about the structure of a legal system
  - ➢ statements of membership of a norm in a legal system

- **normative theory**
  - ➢ theory of obligatory or justifiable law

Thank you for your attention!