Tutorial 1 – Introduction, Chapter 1

1.1. What is Jurisprudence?

Jurisprudence – understanding the social institution of law from a philosophical perspective.

- Common that lawyers rely on an intuitive or unreflective grasp of what makes an issue a legal issue, as opposed, to a moral, religious or political issue.

Jurisprudence questions the distinction between the norms which the legal system provides with the norms prescribed by morality or religion.

- In order to form a more disciplined and deeper understanding of the nature of law.

Note: The terms 'jurisprudence', 'philosophy of law' and 'legal theory' will be used interchangeably.

1.3. Labels, categories and schools of thought.

Positivism v Natural Law – has traditionally been regarded as central to jurisprudence. Two issues arise when confronting these philosophies.

1) Both are broad churches.
- No single positivist/natural law position in the debate.
2) Boundaries between the two have become less clear-cut.
- As theorists of both side have refined their positions and found common ground with opponents.

1.4. Why study jurisprudence?

- "Training is concerned with providing a person with the knowledge and skills to undertake a specific and immediate task. It is focused and utilitarian. Education is concerned with enabling an individual to understand and reflect upon knowledge and processes and to be able to act in a critical and responsible manner. It is concerned with self-awareness." – John Bell.

Jurisprudence plays a key role in educating lawyers.

- It provides a broader perspective on the law than that typically found in legal profession by:
  - giving a general understanding of the relation of law to other institutions that make up our society and its significance in relation to these institutions;
  - and alerting us to a variety of external perspectives on law, such as those by feminists, Marxists and critical race theorists.
- Second, Jurisprudence requires us to think in a self-consciously reflective way about concepts that we normally use unconsciously and take at face value.
- Third, the aim of jurisprudence is 'wisdom', not knowledge.
  - Does not ask students to learn and reproduce different theories, but instead, shows students how to use these theories in critically and reflectively developing positions of their own.

    - Thus, encourages the empowerment of students to continue independent of teachers and of other authority figures.
- Fourth, lawyers have a responsibility to promote justice and fairness in the legal system, and jurisprudence gives lawyers the skills to detect the ways in which the law may fail to reflect the demands of justice and therefore to fulfil this responsibility.
    - Therefore, alerting lawyers of the questions that need to be asked in evaluating proposed laws or undertaking law reform.
- Fifth, an understanding of moral and political theory is not only a prerequisite to evaluating the law and reforming it, but ought to be used when judges decide legal cases.

Tutorial 2, PART A – Justice: Law as Command, Chapter 2

2.2. Austin's Command Theory of Law

Command Theory – that law is distinguished from other social standards, such as morality and religion, by the exercise of force.

Austin's argument stems from Blackstone's perspective of natural law reflective through his treatise on the common law where he presents common law as the embodiment of reason and Christian moral principles. However, Blackstone's work blurred the line between dispassionate analysis and moral evaluation.

Thus, Bentham formed a clear distinction between two terms:

- ***Expository Jurisprudence*** – concerned with analyzing the law, without regard to its justice or injustice.
- ***Censorial Jurisprudence*** – a critical and moral enterprise designed to improve or reform the law.

Austin formed a similar distinction: conceptualizing law as the exercise of power, in turn, revealing that law may not guarantee to embody reason, for power can be exercised for both good and bad ends.

'Laws properly so called' – laws which command as they are supported by a 'sanction' (a threat of harm) if there is non-compliance.

- All commands issue from a superior, that is, a person or group of persons possessing the power to inflict harm.
- *Superior* – signifies *might*: the power of affecting others with evil or pain, and of forcing them, through fear of that evil, to fashion their conduct to one's wishes.
- Austin states that laws are the commands laid down by the sovereign in a state. The *sovereign* is that person (e.g. absolute monarch) or body of persons (e.g. a democratically elected parliament) whose orders are habitually obeyed by the bulk of society and who does not habitually obey any other person or body.
- Therefore, answering the question – 'how can we distinguish legal standards from the many other kinds of standards that regulate and govern human conduct?'
- In order for law to exist, a vertical structure which renders the subjects to show habitual obedience.

- *Milirrpu v Nabalco Pty Ltd.* – Aboriginal clans claimed that a mining company had unlawfully interfered with rights they had under Aboriginal customary rules to occupy and enjoy areas of land in Gove Peninsula. Judge found that the clans had a religious basis and connection with the land, however they were not an internal organisation and were not ruled over by a chieftain. This raised the question of whether there was anything recognizable as law in their world. Austin's view would answer 'no' as there was no identifiable sovereign authority with a capacity to enforce the clans' claims to land. However, the Federal Court rejected this view.

Normative Statements – what we have a right to do, what we ought to do and what we ought not to do. Purpose of guiding our conduct and to provide a standard for its appraisal. They 'prescribe' how we should behave.

Descriptive Statements – describe the way the world actually *is*.

- Austin believes that statements of what individuals are legally required to do are factual statements about the giving of orders, habits of obedience, and the likelihood of being punished.

2.3. Can Threats Place Us Under Obligations?

Hart reveals that on Austin's perspective, law is to be found in the 'gunman situation writ large'. Law, for Austin, is coercive in the same way, as the commands can be seen as orders backed up by a threat of harm. Hart first argues that threats are not capable of giving rise to obligations by distinguishing:

- *'being obliged'* – to act as someone desires in order to please them.
- *'being under an obligation'* – to be bound to act, ultimately having no choice.

Hart argues that the sovereign's authority is based on status, whilst the gunman's is temporary authority.

Authority must be legitimate and circumscribed.

Threats supported by sanctions may influence a certain action, however do not create an obligation for a person to comply nor does justify punishment for failure to comply. Thus, law ought to be obeyed not because of the punishment for failure, but just because it is *the law*.

Raises the question of how the law can impose this obligation and what sort of authority to create obligations does the law claim to have?

- Hart – legal obligations, the law need not claim morally legitimate authority.
- Joseph Raz – contrastingly argues that law's claim to authority is a *claim* to (and may not have) morally legitimate authority and that the law therefore claims to impose moral obligations on us.

Note: to say that the law claims authority is not to say that everyone who obeys the law accepts the claimed authority of the law. Some people may obey the law because it happens to coincide with what they independently think is right.

Ultimately, Hart argues that sanctions merely function as a back-up in cases where the system has failed and the law's directives are not accepted as giving rise to a duty to obey.

2.4. Can Austin Account for Certain Familiar Features of Legal Systems?

Hart argues that Austin's account of law imposes a 'spurious uniformity' as it not all laws order people to do or not to do certain things on pain of a sanction. Specifically, laws which confer powers, whether on private individuals or officials. These laws do not reduce freedom, instead they enlarge it.

- E.g. laws that empower us to make a will, or to enter into a contract or a marriage.
- Similarly, laws which confer power on a legislative body to pass laws in accordance with certain procedures, failure of the procedure will not be punished but result in legal invalidity. Sanctions are to discourage certain conduct, whilst legal invalidity does not.
- Difference that it is up to the other party of the contract, to punish not the sovereign.

Habits of obedience cannot in actual fact exist when there is a seamless transfer of authority to the successor lawmaker. Meaning that the first law made by the new lawmaker is already law, even if the new lawmaker has not yet received habitual obedience.

- Additionally, when one lawmaker replaces another there is no reason to fear that all the old laws have disappeared.

Austin's concept of sovereignty does not account for the divisibility of the sovereign's power and the sovereign's legally illimitable status.

- In Australia, there is a written constitution, which not only divides power between the federal parliament and the legislatures of the states, it also prevents legislative interference with certain individual rights and entrenches the separation of powers.
- E.g. s 116 of the Australian Constitution prohibits the federal parliament from interfering with the free exercise of religion. Any attempt to pass a law against this statute will be taken down by the High Court.

2.5. Positivism: Some Preliminary Points

Positivist idea – law is a 'social construction'.

- Law is ultimately a matter of 'social facts'. Social facts are facts about the behaviour, beliefs and attitudes of people in their social interactions.
    - E.g. the fact that the sovereign has issued a command on pain of punishment is a social fact.
- Facts about what social groups find acceptable or unacceptable are non-normative, social facts.

Austin: Law owes its existence to the social facts of commands, habits of obedience and punishment. Laws are the orders of those who have power. Thus, the law's requirement will be an empirical and contingent matter, dependent on what has been ordered by those in power.

Hart: Law is a 'social practice' – things that people do together, that there is a degree of systematic unity to their activity. Law owes its existence to official agreement on the criteria for

identifying valid laws and to the fact that members of the population generally obey the rules that are valid according to the criteria of legal validity.

- Legal officials follow a 'social rule' in identifying and applying the law, and he calls this rule the 'rule of recognition'.

Natural law theorists: argue that law (or 'true' law) derives its authority not from human choices, or not solely from human choices, but from being reasonable – it 'comes to [us] from something outside and bigger than [ourselves]'.

'Separability thesis' – view that law and morality are conceptually 'separable' as moral standards are subjective and relative, whilst the law is objective. However, theories of objective morality have risen by distinguishing two classes:

- *'Popular morality'* – the moral beliefs of a particular group or society regardless whether or not they are sound.
- *'Critical Morality'* – sound moral principles, whether or not these are accepted by a particular group or society.

Positivists believe that law and morality are separable, meaning that there is no requirement for laws to pass a moral test to be valid. However, there are two perspectives:

1. *'Inclusive Positivist'* – that law *may* be identifiable without recourse to moral reasoning.
2. *'Exclusive Positivist'* – that law *must* be identifiable without recourse to moral reasoning.

Austin Summary:
Provides a scientific theory of law where he views it from an external perspective, in terms of regularities in observable behaviour, leading him to believe that legal authority is derived from habitual behaviour. Moreover, he identifies 'being under a legal obligation', to be likely to suffer a punishment from failure to do a lawmaker's commandment. Thus, making no reference to the mental states and attitudes of those who participate in legal institutions. Ultimately, providing a behaviorist's account of law.

Hart Summary:
Hart does not deny that some or even most individuals may view the law from an external perspective, complying with law's demands not because the law requires compliance but because they fear sanctions. However, he observes that this leaves out the fact that at least the officials of a legal system, and especially judges who have to apply the law, treat law as authoritative. Rather, such officials are *guided* by legal rules, i.e. they follow laws because they *are* laws. Hart ultimately believes that the law must be independent from morality and instead be grounded by contingent matters of social fact.

Tutorial 3: Law as Social Practice, Chapter 3

3.2. The Concept of a Social Rule

Hart urges that in order to completely understand the conceptual nature of the law, the external view is not merely enough, and that the internal view must be recognised to avoid a distorted and incomplete perspective.

- ***Hermeneutic*** – an approach which stresses the difference between the ways in which we understand natural and social phenomena.

He believes that attention must be had to the way in which the legal concepts are used (internally) to cast light on the central characteristics of the institution of law. By understanding the central features of a legal system, pre-theoretical grasp of the concept of law will be cleared.

- E.g. by revealing what it implicitly presupposes or by giving us reason to revise it.

Hart believes that both habits and social rules involve convergent behaviour, however a habit, is *only* a matter of convergent behaviour.

- E.g. People putting on both socks before putting on their shoes. This is an observable behaviour requiring no rule. Meaning that the habit does not justify the behaviour nor does it criticize any deviation from this habit (e.g. putting one sock and shoe before the other foot).

A social rule is differentiated if the regular behaviour is *perceived* in a certain way. Ultimately, that 'rules' prescribe conduct, rather than describing it, and are thus expressed in normative vocabulary ('ought', 'must', 'should' etc.).

- ***'Internal aspect of rules'*** – social rules involve not only external conformity or regular conduct, but also 'a distinctive attitude to that conduct as a standard'.
- ***'Social practices'*** – things that people do together in the sense that there is some sort of systematic unity to their activity.

Taking an internal view, means that they take the regular pattern as a guide to behaviour and a standard of criticism.

Hart believes that an adequate account of the nature of law will need to be built around the concept of rules rather than habits of obedience.

Summary:

Hart addresses the people's motivations – people do not conform to law out of unreflective habit any more than out of fear. People may accept the rules as supplying general standards of conduct and thus comply to them willingly. The external view disregards those who willingly do what the law requires.

Secondly, Hart believes that obligations formed out of habitual obedience do not impose a normative significance as they are merely facts about how people *do* behave. It is the fact that they regard the law as laying down rules that leads judges to speak of legal rights and obligations.

Thirdly, that social rules are a *precondition* for the existence of law. That at the foundation of all legal systems is a particular kind of social rule, namely, one that is used by law-applying officials to identify all the other legal rules of the system.

Hart also provides a descriptive analysis of the law, as he states how the law *is*.

3.3 Law as a Combination of Primary and Secondary Rules

Primary Rules – Impose duties and permit people to behave in certain ways. Primary rules can be both a legal and non-legal rule.

A primary rule will be a valid legal rule if it was made in a way that conforms to certain criteria of validity laid down in a secondary rule or higher-order rule – being ***'the rule of recognition'***, therefore, underpinning the concept of legal validity.

- Secondary rule – provides the authority for a primary rule.
- Sovereign can only make law in respect to the secondary rules, no limitless power.

Secondary rules – rules that govern primary or secondary rules; power conferring rules; legal rules that allow for the creation, extinction, and alteration of primary rules.

- ***Rule of Recognition*** – tells us what counts as law in a particular society.
  - 'signature of a legal system'.
  - E.g. in Australia it would be the constitution.
- ***Rule of Change*** – make it possible to change the primary rules by specifying who or what body has the power to create new legal rules and specify any procedures that must be followed.
  - Provides individuals with a means of realizing their wishes.
- ***Rules of Adjudication*** – adjudicates where disputes are heard giving certain institutions jurisdiction to hear over certain matters. Disputes about what the primary rules are.
  - Recognises the exclusive power of judges to impose penalties for violation of the rules.
  - As there are often gaps in the law, confers power to interpret what statutes might mean – certain instances where judges must *make* the law.

The most fundamental rule is the rule of recognition; Hart explains what gives the rule its authority such that it would be followed.

'The rule of recognition' itself is not valid, however it exists simply because it is practiced and its existence is therefore a matter of social fact.

- Legal officials see rules of recognitions as obligating them to assess conduct in terms of the primary rules that it validates.
- Judges accept that they are bound by these rules, thereby rendering such rules, customs.

Thus, the legislature's authority to make law is a judicial customary rule constituted by the social facts of a regular form of behaviour and an attitude of acceptance.

Hart circumvents the issue of infinite cycling, by arguing that the secondary rules are because they are a social fact.

Separability thesis: that law and morality is distinct from each other.

Hart believes that although morality and law overlap, there is no necessary requirement for law to have morality.

Where there are gaps in the law, lawmakers should look towards moral values to form new laws.

Law as What Is, Chapter 4

4.2. Some Misconceptions About the Positivist Separation of Law and Morality

In spite of the disagreements between Austin and Hart, both affirm that laws do not have to pass moral tests to be valid.

- 'A law which actually exists, is a law, though we happen to dislike it'. – Austin.
- 'It is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality'. – Hart.

1. Legal positivism and logical positivism

Non-cognitivism – all moral judgments are subjective and that there are no right and wrong answers to moral questions. Asserts that what ought to be the case cannot be derived from what is the case.

Hume argues that moral 'ought' statements expresses a subjective attitude of approval and disapproval, whereas factual 'is' statements describe the way the world objectively is.

- Therefore, moral statements cannot be derived from factual statements, ultimately making them incapable of being a rational defence. (i.e. ***logical positivism***)

However, ***legal positivism*** must not be confused with this. Legal positivism insists on the distinction between the law as it is and the law as it ought to be.

- Positivism is about the nature of law, not about the nature of moral judgments.
- That from a descriptive perspective, law and morality are separated. x
- All law is 'posited' – that law owes its existence ultimately to human decisions or practices.

Bentham (positivist) accepted cognitivism, as he believed that the standards of right conduct are to be found in the 'greatest happiness principle'. Thus, laws that do not serve the end of maximum human happiness are therefore objectively unjust, however are not barred of their legal status.

2. Disregard to Moral Standards.

Positivists are not indifferent to the justice or injustice of law, instead, they believe that though laws need not be just, they *should* be just, and that unjust laws should be criticized and if needed, reformed.

3. Law and Morality Must be Separate or Diverged.

Positivists believe that many legal systems are in fact morally legitimate and that many laws are morally defensible from the perspective of critical morality. They argue that this does not disprove positivist thesis, as they merely state that the nature of law does not *necessitate* such convergence.

- ‘A legal system will be unable to serve the minimum purpose of survival which men have in associating with each other, unless it includes rules that, for instance, restrict the use of violence and protect property.’ – Hart.