

Week 1: Jurisprudence and the Nature of Law

The word 'jurisprudence' has more than one meaning

- Jurisprudence as a body of judicial decisions (e.g., 'the jurisprudence of the European Court of Human Rights')
- *Iuris Prudentia* = *iuris* (of right, of law) + *prudentia* (wisdom, foresight, knowledge)
- Jurisprudence as the philosophy of law → (general) jurisprudence as a philosophical inquiry into the nature of law
- Denise Meyerson and Brian Bix use the terms 'jurisprudence', 'philosophy of law', 'legal theory', and 'legal philosophy' interchangeably throughout their books

Four kinds of questions

- 1) Doctrinal questions
- 2) Empirical questions
 - a) Explanatory/causal theories vs effects theories
- 3) Conceptual questions
 - a) What is justice?
 - b) First order and second order questions
- 4) Normative questions
 - a) Descriptive vs normative claims
 - b) Justificatory and critical theories

H.L.A. Hart's philosophical project

- "In law as elsewhere, we can *know* and yet not *understand*" (H.L.A. Hart, 'Definition and Theory in Jurisprudence', in his *Essays in Jurisprudence and Philosophy*, OUP, 1983 [1953], p. 21)
- "My aim in this book has been to further the *understanding* of law, coercion, and morality as different but related social phenomena." (H.L.A. Hart, Preface to his *The Concept of Law*, OUP 1994 [1961])
- "The deep perplexity which has kept alive the question ['what is law?'], is not ignorance or forgetfulness or inability to recognize the phenomena to which the word 'law' commonly refers." (H.L.A. Hart, *The Concept of Law*, OUP 1994 [1961], p. 5)

Hart's persistent questions

"We shall distinguish here three [...] recurrent issues, and show later why they come together in the form of a request for a definition of law or an answer to the question 'What is law?', or in more obscurely framed questions such as 'What is the nature (or the essence) of law?'" (H.L.A. Hart, *The Concept of Law*, OUP 1994 [1961], p. 6)

1. How does law differ from and how is it related to orders backed by threats?
2. How does legal obligation differ from, and how is it related to, moral obligation?
3. What are rules and to what extent is law an affair of rules?

Hart on the nature of legal theory

- "My aim in this book was to provide a theory of what law is which is both **general** and **descriptive**." (H.L.A. Hart, *The Concept of Law*, OUP 1994 [1961], p. 239)
- **General** in the sense that it is not tied to any particular legal system or legal culture
- **Descriptive** in that it is morally neutral and has no justificatory aims
- "As a means of carrying out this **descriptive** enterprise my book makes repeated use of a number of concepts such as *duty-imposing rules*, *power-conferring rules*, *rules of recognition*, *rules of change*,

acceptance of rules, internal and external points of view, internal and external statements, and legal validity” (Ibid., p. 240)

The problem about the Nature of Law

According to Joseph Raz, there are three possible perspectives:

1. Linguistic approach
2. Lawyers’ perspective
3. Institutional approach

The doctrine of the nature of law yields **a test for identifying law the use of which requires no resort to moral or any other evaluative argument**. But it does not follow that one can defend the doctrine of the nature of law itself without using evaluative (though not necessarily moral) arguments. (Joseph Raz, ‘The Problem about the Nature of Law’, in his *Ethics in the Public Domain: Essays in the Morality of Law and Politics*, OUP, revised edition 1995, p.208)

Week 1 Lecture 2: Jurisprudence and the Nature of Law

What is law?

- Unending theoretical debate in books vs the ability of most people to cite examples of law
- Consider the “salient features” listed at page 3 of *The Concept of Law* (CL)
- The question “what is law?” expresses perplexities about the *general nature of law*
- Clear/standard/paradigm cases of law (for Hart, “the legal systems of modern states”) vs questionable/challengeable/borderline cases (for Hart, “primitive law and international law”)
- Speculation about the nature of law à a few principal issues
- Confusion about these issues may coexist with a firm *knowledge* of the law

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Looking for a map

“...even skilled lawyers have felt that, though they *know* the law, there is much about law and its relations to other things that they cannot explain and do not *fully understand*. Like a man who can get from one point to another in a familiar town but cannot explain or show others how to do it, **those who press for a definition need a map exhibiting clearly the relationships dimly felt to exist between the law they know and other things**. Sometimes in such cases a definition of a word can supply such a map: at one and the same time it 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.” (CL, 14)

Triangles and elephants

- Triangle (def.) = three-sided rectilinear figure
- Elephant (def.) = quadruped *distinguished from others* by its possession of a thick skin, tusks, and trunk
- These definitions are definitions *per genus et differentiam*
- This type of definition does two things at once:

- It simultaneously provides a code or formula translating the word into other well-understood terms; and locates for us *the kind of thing* to which the word is used to refer, by indicating the features which it shares in common with a wider family of things and those which mark it off from others of that same family

→ A general kind + distinguishing features

- Can we define law *per genus et differentiam*?

The purpose of the book

- Is it possible to isolate and characterise a central set of elements which form a common part of the answer the three persistent questions identified at the beginning of *The Concept of Law*?
- The purpose of the book "...is not to provide a definition of law, in the sense of a rule by reference to which the correctness of the use of the word can be tested; it is to advance legal theory by providing an improved analysis of the distinctive structure of a municipal legal system and a better understanding of the resemblances and differences between law, coercion, and morality, as types of social phenomena." (CL, 17)

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Why study jurisprudence?

- David Foster Wallace on the value of the liberal arts: “[I]t isn’t really about the capacity to think, but rather about the choice of what to think about. ... How to keep from going through your comfortable, prosperous, respectable adult life dead, unconscious, a slave to your head and to your natural default-setting of being uniquely, completely, imperially alone, day in and day out.”
- Legal philosophy is here to remind you that you are not a slave to your own (legal) head, that there is an escape from the ‘default setting’ of your own little legal system, however profitable and powerful it may be. It will explain how something that is true ‘legally speaking’ may be utterly false. It will show you the difference between the way things are around here and the way things ought to be. It may even help you envision the way things could well be, if only we cared enough.

John Finnis on law and philosophy

Making, acknowledging, and complying with law involves acts of rational judgment. The reasonableness and justification of these acts cannot be assessed without premises about true human goods, the nature of persons and their acts, and the contours of the common good and human rights. [...] Issues of legal doctrine and interpretation resolvable by technique usually have some intellectual appeal. But legal studies are really attractive and worthwhile because law, and juristic argumentation, is an arena where themes and theses in ethics, political theory, and related philosophical domains all come to bear on – and crystallize out in – legislating and adjudicating to make a difference to human persons.

J. Finnis, *Philosophy of Law: Collected Essays Volume IV* (OUP, 2011)

Legal theory and the real world

Two examples:

- *Dosso v. Federation of Pakistan* – the first constitutional case after the promulgation of the Constitution of Pakistan in 1956 (decided by the Supreme Court of Pakistan in 1958), dealing with the imposition of the first martial law by President Iskander Mirzia
- *R (Miller) v Secretary of State for Exiting the European Union* – UK first case on Brexit (decided by the UK Supreme Court in 2017), considering whether the British Government could withdraw from the European Union without an Act of Parliament giving permission to do so.

Week 2: Law and Coercion

Hart on law and coercion

1. How does law differ from and how is it related to orders backed by threats?
2. How does legal obligation differ from, and how is it related to, moral obligation?
3. What are rules and to what extent is law an affair of rules?

Preface to *The Concept of Law*

- “I am heavily and obviously indebted to other writers; indeed much of the book is concerned with the deficiencies of a simple model of a legal system, constructed along the lines of Austin's imperative theory. But in the text the reader will find very few references to other writers and very few footnotes. Instead, [the reader] will find at the end of the book extensive notes designed to be read after each chapter [...] I hope that this arrangement may discourage the belief that a book on legal theory is primarily a book from which one learns what other books contain.”

Austin’s command theory of law

“To some of it has seemed clear that in this situation where one person gives another an order backed by threats, [...] we have the essence of law, or at least ‘the key to the science of jurisprudence’”

“The clearest and most thorough attempt to analyse the concept of law in terms of apparently simple elements of commands and habits, was made by Austin in the *Province of Jurisprudence Determined*.”

Hart and the gunman situation

A bank robber says: “Handover the money or I will shoot!”

The key aspects of the gunman situation:

- The gunman is giving an order
- Bank clerk is in the gunman’s power
- Coercive orders/backed by threats

Can this situation help us answer the question ‘what is law’?

The gunman situation and the complexity of modern legal systems

Four elements should be added to the gunman situation:

1. Generality
2. Enduring character
3. General habit of obedience
4. Supremacy and independence

Commands and Orders

“Although a suggestion of authority and deference to authority may often attach to the words ‘order’ and ‘obedience’, we shall use the expressions ‘orders backed by threats’ and ‘coercive orders’ to refer to orders which, like the gunman’s, are supported only by threats, and we shall use the words ‘obedience’ and ‘obey’ to include compliance with such orders.” (CL, 19)

“To command is characteristically to exercise authority over men, not power to inflict harm, and though it may be combined with threats of harm a command is primarily an appeal not to fear but to respect for authority. It is obvious that the idea of a command with its very strong connection with authority is much closer to that of law than our gunman’s order backed by threats...” (CL, 20)

Hart’s criticisms

Three groups of objections (Chapter III):

- The content of laws
 - Duty-imposing and power-conferring rules
 - Their range of application
 - Their modes of origin

A more fundamental criticism (Chapter IV):

“...the whole conception of a supreme and independent sovereign habitually obeyed, on which the model rests, is misleading, since there is little in any actual legal system which corresponds to it.” (CL, 27)

Chapter IV - Sovereign and Subject

- 1) The idea of a habit of obedience
 - a) Can this idea explain two salient features of most legal systems?
 - i) The continuity of law
 - ii) The persistence of law
- 2) The legally unlimited power enjoyed by the sovereign

3) The position occupied by the sovereign above the law

Habits vs Rules

In both cases we can observe convergence of behaviour. However, according to Hart, there are three salient differences:

1. Deviations from a rule are met with *criticisms*
2. The rule is regarded as a *good reason* for making such criticism
3. (Social) rules have an *internal aspect*

Austin's legal positivism

"The matter of jurisprudence is positive law: law, simply and strictly so called: or law set by political superiors to political inferiors." (J. Austin, *The Province of Jurisprudence Determined*, Lecture I, p. 18)

"The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry. A law, which actually exists, is a law, though we happen to dislike it, or though it vary from the text, by which we regulate our approbation and disapprobation." (PJD, 157)

Law and Coercion

The Gunman situation

"The first, simplest sense in which conduct is no longer optional, is when one man is forced to do what another tells him, not because he is physically compelled in the sense that his body is pushed or pulled about, but because the other threatens him with unpleasant consequences if he refuses. The gunman orders his victim to hand over his purse and threatens to shoot if he refuses; if the victim complies we refer to the way in which he was forced to do so by saying that he was *obliged* to do so. To some it has seemed clear that in this situation where one person gives another an order backed by threats, and, in this sense of 'oblige', obliges him to comply, we have the essence of law, or at least 'the key to the science of jurisprudence'. This is the starting-point of Austin's analysis by which so much English jurisprudence has been influenced." HLA Hart, *The Concept of Law* (OUP, 3rd, ed, 2012) 6

Law as coercive orders

According to Hart, four elements should be added to the gunman situation to have a plausible model for law.

- Generality
 - General type of conduct
 - General class of persons
- Enduring character
- General habits of obedience
- Supremacy and independence
 - "The legal system of a modern state is characterized by a certain kind of *supremacy* within its territory and *independence* of other systems which we have not yet reproduced in our simple model." (CL, 24)

The Gunman situation writ large

"On this simple account of the matter, which we shall later have to examine critically, there must, wherever there is a legal system, be some persons or body of persons issuing general orders backed by threats which are generally obeyed, and it must be generally believed that these threats are likely to be implemented in the event of disobedience. This person or body must be internally supreme and externally independent. If, following Austin, we call such a supreme and independent person or body of persons the sovereign, the laws of any country will be the

general orders backed by threats which are issued either by the sovereign or subordinates in obedience to the sovereign.”

HLA Hart, *The Concept of Law* (OUP, 3rd ed, 2012) 25

John Austin (1790-1859)

- Called to the Bar (1818)
- Married Sarah Taylor (1919)
- Chair of jurisprudence and the Law of Nations, University of London (1826-1835)
- Bonn, Germany (1827-1828)
- *The Province of Jurisprudence Determined* (1832)

Lecture I

- Laws, or rules properly so called, are a species of commands
- A command has two elements:
 - A signification of desire; and
 - The party to whom the command is directed is liable to evil in case they do not comply with the expressed desire
- *Command* and *duty* are correlative terms: wherever a duty lies, a command has been signified; and wherever a command is signified, a duty is imposed
- Evil = sanction, or an enforcement of obedience (note: for Austin, punishments are a class of sanctions)

Laws as commands

According to Austin, there are four kinds of laws (proper and improper):

1. Divine laws
2. Positive laws
3. Rules of positive morality
4. Laws metaphorical or figurative

Austin's definition of 'command'

Three ideas are captured by the term command:

- A wish/desire conceived by a rational being that another rational being shall do or forbear
- An evil to proceed from the former, and to be incurred by the latter, in case the latter comply not with the wish
- An expression/intimation of the wish by words or other signs

Austin's definition of a law/rule properly so called

- A law is a command which obliges a person or persons, and obliges *generally* to acts or forbearances of a *class*
- Laws (and other commands) proceed from superiors and bind/oblige inferiors
- Austin understands superiority to mean *might*: i.e., the power to affect others with evil or pain, and of forcing them through fear of that evil, to fashion their conduct to one's wishes
- Whoever can oblige another to comply with their wishes, is the superior
- Superiority is the power of enforcing compliance with a wish

Lecture VI

How can we distinguish positive laws from other kinds of commands?

Every positive law is set by a sovereign person, or a sovereign body of persons, to a member or members of the independent political society wherein that person or body is sovereign or supreme

Three inseparably connected expressions:

- Sovereignty
- Subjection
- Independent political society

Independent political society

- A given society is a society *political* if (if and only if) the generality of its members is in a habit of obedience to a determinate and common superior
- A given society is a society *political* and *independent* iff that superior does not habitually obey another person or body
- A given society is in a state of nature, or split into two or more independent political societies, unless habitual obedience is "...rendered by the *bulk* of its members [...] to *one and the same* superior..." (PJD, 169)