

**JURISPRUDENCE
EXAM NOTES**

(Midsemester Topics 1-4, Final 4-11)

1. Fuller (Speluncean Explorers)
2. Utilitarianism
3. Bentham
4. Legal Positivism
 - a. HLA Hart
5. Dworkin
6. Legal Realism
 - a. Holmes
7. Fish and Alexander (Constitutional Interpretation)
8. Twining (Jurisprudence Education)
9. Natural Law Theory
 - a. Traditional: Aristotle, Augustine, Aquinas
 - b. Contemporary: Fuller and Finnis
10. Evolutionary Law Theory: Charles Darwin; Adam Smith; Friedrich Hayek
11. Feminist Law Theory

(4) Legal Positivism (generally)

Legal positivism: existence and content of law does not necessarily depend on its moral status

- concerned with what the law is, not ought to be (Naturalist)
- Law is – collection of rules recognised as legally binding in community
- Binding character stems from recognised authoritative source

Inclusive/soft legal positivism (Hart)

Legal systems may sometimes incorporate moral standards into tests for legal validity (Hart)

Normal Legal Positivism (Bentham)

It is not only logically possible but morally beneficial to make clear separation between law and morality

Exclusive/Hard Legal Positivism (Austin)

Orders/commands from the sovereign backed by threats

- Austin – traditional positivist

Austin's theory of law

- Law is a command
- Made by a sovereign
- Backed up by sanctions

Sovereign

1. People habitually obey it
2. It habitually obeys nobody else (independence of the legal system – eg. the Queen)

People habitually obey due to fear of sanctions/punishment

Hart on Austin:

- Theory too narrow
- Gunman model doesn't work always
- Austin's theory says certain areas of the law aren't actually law
 - o Constitutional, international, customary legal systems
- No moral component/internal aspect - People feel a sense of obligation, not just obey out of fear of punishment

(4a) Hart

- Writes **as outside martian observer** (not a top judge, as theorists usually do) and **concerned citizen**
- **Doesn't explain how to decide hard cases**
- Theory of how to think about legal systems
- Not an all-pervading theory of law

Theory applicable to any legal system, not just Western democratic legal system

3 Issues in Concept of Law – more insight than 'what is law'?

How does law look same/different from orders backed by threats?

To what extent can you understand law as system of rules?

To what extent does law look similar/different to morality?

Orders Backed by Threats – the Gunman Model

General orders

Backed by threats

Made by someone who is generally/habitually obeyed

Deterrence – Tort law

Deterrence by threats – supported by inefficiency of Compensation in Australia

- Australia – 70% compensation goes to judges, lawyers, insurers
- Have to believe tort law is going more than just compensating
- NZ – pay through taxes and have public liability insurance
- How do you deter where there is no fault?

Gunman Model MOST compelling:

- Criminal law – obligations
 - o Penal statutes most compelling for the model
- Tort law – monetary sanctions

BUT other areas of law show **weakness in the model**

Problems with the Gunman Model

Not all laws impose duties or obligations

- Failure to comply is not a breach
- Consequence is nullity or invalidity, not sanction/punishment

Some laws are secondary laws – power-conferring laws are not coercive orders

- Confer powers on citizens to make contracts, wills, marriage
- Don't deal with conduct directly – merely facilitate social life by conferring power
- Citizens become 'private legislator'
- Or judges exceeding their jurisdiction
 - o Not really a 'breach' or 'violation' followed by punishment or sanction – just end up in nullity or invalidity
- Can't equate nullity with punishment and say it is an inducement to abstain from forbidden behaviour
- Don't fit gunman model
- **Power-conferring rules are the 'test of validity'**

Laws apply to people making laws as well

- The 'Sovereign' doesn't really exist in reality in a legal system – checks and balances, law applies to them as well

- Gunman not subject to his own threats

How could you distinguish paying taxes from paying fines

Some laws don't come from gunmen – eg. customary laws

Persistence of law - Law continues through time

- People don't stop obeying when gunman dies
- Continuity – law continues the same
- Habit induced behaviour vs. rule induced behaviour
- Gunman's command is not a standing order to be followed time after time by classes of persons – dies with the occasion

People can behave 'as a rule' but not because they are under rules

- People don't wear hats in church
- Stand up when singing national anthem

How do laws look the same? 'if-clauses'

Can think of power-conferring laws as 'if-clauses' – if meet criteria, valid instrument

Criminal law – 'if X commits murder apply sanction'

- But this reduces apparently distinct varieties of legal rule into simple form
- This is purchasing uniformity at too high price
- Conceals the way they operate and manner in which people use them to guide their behaviour

Preferable to look at laws through eyes of citizen because that is how it is applied

- Criminal law – citizens left to apply rules to themselves, with motive to conform

Law as a means of social control

- Paying taxes vs paying fines
 - Tax may be revenue raising or to discourage course of conduct
- Exercise of powers conferred – use those rules for purpose completely different from performance of duty or submission to control

Customary Law

In many societies, customs which form no part of law

Subordinate source of 'law' in modern society

- Eg. Taking off hat in church

Gunman Model believers:

- Non-interference by legislature when they could have interfered to stop a custom is a 'tacit order'

Judges make decisions incorporating customary law – customary rules receive legal recognition

Sovereign tacitly orders that subjects obey them through judge decision

Criticisms:

Tacit orders don't make sense

Absurd to say courts apply custom just as they apply statute

- Before applied by court, statute has already been 'ordered' but a custom has not

Chapter 1-3 Summary:

1. Even penal statutes impose duties on those who make it as well as others

2. Some statutes do not require persons to act but confer powers on them – not duties but facilities for creation of legal rights and duties within coercive framework of law
3. Although enactment of statute is in some ways similar to giving order, some customary rules do not owe legal status to any conscious law-creating act

The threat of 'evil/sanction' has been stretched too far to include nullity
Notion of legal rule narrowed to exclude rules which confer powers
Notion of order extended from verbal to 'tacit' expression of will
Model of orders backed by threats obscures more law than it reveals
Effort to reduce law to single simple form imposes spurious uniformity

Prediction Theory of Law

Guessing what a judge is going to do

Law – not what judges say it is

Can see when separate application of rule and those to whom it applies

Rule Scepticism

Cannot predict High Court decision – cases they get are balanced and could go either way

Only good arguments litigate to top court

Top judges only see uncertain cases – in very uncertain circumstances then what judges say IS the law

- This is a cost of running a legal system – no solution to deal with
- Societies are still more efficient by delegating power to group of people to change or make rules
 - o This agrees with Bentham

"Prediction Theory of Law" – in top cases (penumbral cases), speculate on what judges likely to do

- interpretive outlook, political outlook = judicial outcomes
- may be no point even arguing case to judge, would make same decision
- Prediction Theory only where law not clearly dictating answer

Some laws delegate to judge to decide on case-by-case basis (eg. what is 'in the interests of the child')

- Better hit rate for good outcomes than blanket rule (same as Bentham)

- Judges add their own moral content here
- But more moral content = more uncertainty of outcome

Open texture of law (limits inherent in language) = this uncertainty

- BUT wouldn't want rules so detailed to apply to all cases, not able to apply to future facts – we are ignorant of future facts and our aims are indeterminate
 - o **Tradeoff between certainty and flexibility**

Law has no necessary connection to morality except judicial discretion:

But **open texture of language leaves judges with discretion** in deciding cases = RULE SKEPTICISM

Grey areas (penumbral cases) – where judicial discretion plays decisive role

- Not clear cut
- Discretion to decide as they see fit
- Public policy considerations, morality
- Hart doesn't like – effectively acting as unelected delegate of legislature to fill in the gaps

Some rules also incorporate moral content eg. 'best interest of the child' – **creates penumbral cases** as not certain

Hart on Judicial Interpretation - Moral evaluations in law

How far should we let judges blend moral evaluations?

- If don't allow – no point having adjudication
- But don't want to allow bias to infiltrate decision making, if completely use moral discretion then too much power to judges, law is ad hoc, unpredictable, uncertain

Judges using discretion makes them useful as interpreters

Hart prefers CL over Statute/code

Says CL can produce law as determinate as statute (even though complex to determine from precedent)

- Rule scepticism – laws sometimes don't provide clear binding answers
- Important that discretion from courts for penumbral cases
- We all work under rules but if stakes get high enough, can't trust not to abuse rules (eg. soccer grand final), need someone to come in and apply the rules
- Overwhelming **majority of cases fall in settled meaning**
- In cases where don't know, judges might appeal to morality, policy – not a problem

Blackstone/traditional idea [rule formalism] – law always gives answer

Modern critical [rule scepticism] – law is what judges say, never gives answer

Hart: somewhere in between (closer to formalism though)

- Law almost always provides an answer
- In HC judges have discretion to 'guess' though
 - o **Judges do whatever they can get away with**
 - o **Judges make law**
- Legal system is not inherently uncertain – only seems so because those are the cases we focus on and hear about

The Habit of Obedience of Sovereign

Criticism of Orders Backed by threats

Habits are not sufficient to explain

- **continuity** of authority to make law possessed by succession of different legislators and
 - o habitual obedience to old law maker doesn't guarantee habitual obedience to new
- **persistence** of laws long after law maker dead

- o People don't stop obeying when gunman dies
- o Continuity – law continues the same
- o Gunman's command is not a standing order to be followed time after time by classes of persons – dies with the occasion
- o Austin would argue tacit order by new legislator if they don't repeal old legislation – but this doesn't really work

More complex than habit: acceptance (of the rules under which law makers are entitled to succeed)

- Social habit – enough that behaviour converges, observable similar behaviour

- Social rule – people do things 'as a rule'

Difference between social habit and social rule

- Social rule – deviation open to criticism, pressure for conformity
- People regard as a standard to be followed, but not because they are under 'rules'
 - o Standing up to sing national anthem
 - o Taking hat off in church

Internal Aspect of Rules

- Sense within us where we feel compelled to obey the rules

Obliged (feel obliged) vs. Obligation (have an obligation)

But NOT 'a mere feeling'

- Psychological experience/compulsion, higher metaphysical claim on you/understanding (Kant), **not what it is**
- **Critical reflective attitude** – criticism (including self-criticism), demands for conformity, acknowledgments that criticism and demands justified

- o Humans are vulnerable at some stage to each other
- o Sense of obligation to each other not to do harm
- o Feel protected in turn by the law
- o Existence of social rules and in context of social coordination – feel obligation to abide by certain rules

NOT so far as a moral obligation by virtue of being human beings

BUT Hart doesn't offer any alternative of what 'it is'

So in terms of obedience

- Generally accepted rule by group that person whose word is to be obeyed not limited to person X but to person who for a time is qualified in a certain way (continuity)
- Rules specifying class of persons whose word is standard of behaviour for society (the legislative operation of a future legislator as well as a past one)

Example: where feel no risk of punishment or risk not enough to deter

- Pickpocketing – but may feel obligation to shopowner not to
- Adultery (when it was illegal) – may feel obligation not to
- Not parking in wheelchair parks

Rule of Recognition (involving secondary rules)

To distinguish moral obligations from the law (legal from non-legal)

Legal system – core settled meaning and outside penumbra (shadows) of uncertainty or doubt

- Use to distinguish legal rules from all other standards
 - Officials can recognise primary rules from other standards
- RoR is a type of secondary rule - instruct citizens on when a pronouncement or societal principle constitutes a rule of obligation
- arises out of a convention among officials whereby they accept the rule's criteria as standards that empower and govern their actions as officials
 - a bit circular

Certainty – rule which determines which rules are binding

Each legal system has a rule of recognition – a test of validity and binding nature of laws

Existence and content determined by practice of members of a group taking internal point of view towards a standard of conduct and using it to evaluate the validity of norms and behaviour

- Official practice of recognising such characteristic as making a rule valid law
- Example: **judges share collective social practice of following and applying case law and regard it as an obligation – feel it is mandatory to follow precedent – this is RoR**

Give power to certain groups not because good at deciding but efficient rather than everyone arguing all the time

- Hart has a Utilitarian view

Union of primary and secondary rules is at centre of any legal system

- In order to live in society, need rules (even if appalling, just need something)
- If no legal rules, only customary rules of obligation with no way to change or adjudicate - problems

Society with only primary rules would have 3 defects

No authorised people to interpret, nobody can enact new laws, nobody to interpret the rules

1. Uncertainty in identifying rules
2. Static nature of rules/inability to change primary rules
3. Inefficiency, difficulty adjudicating primary rules

RoR in Australia

- ROR gives Power to legislate to Parliament subject to processes
- Judges are also RoR in Australia
- Difficult to identify RoR in liberal democracies – numerous forms of authority

Shortcomings of RoR

Does not guarantee absence of bad laws

RoR doesn't mean law has to have moral content

RULE OF RECOGNITION CONTINUED

Legal System's Ultimate test of Legal Validity

Find out RoR by observation (look at what officials recognise)

RoR doesn't have to be morally good

Rule tells you what law is valid, not whether a good/moral rule

Criticism: only focus on officials – why not citizens?

- Hart: that question works in a liberal democracy, but doesn't make any sense to ask what citizens of North Korea accept as a valid legal rule?
- Hart wants his theory to be applicable to all legal systems
- Still problematic for Hart – only at what officials accept - looks like the gunman model Hart spends so long disproving

In Order for there to be legal system need:

1. General obedience by citizens
2. Rule of Recognition – accepted by officials

Accept vs approve – don't have to approve (morally)

Can probably run legal system entirely on fear (see next column)

RELATIONSHIP BETWEEN LAW AND MORALITY

Dworkin:

Top judge in majority = your understanding of 'right answer' becomes law

Morality comes from the precedent materials

Hart:

Certain principles of true morality discoverable

4 Cardinal Features of Morality (moral rules)

1. Moral rules are important
 - Without them, lack of social coordination
2. Moral rules are immune from deliberate change
 - Hard to change moral attitudes
 - Cannot deliberately change morality like you can rules
 - Legislature can 'saturate airwaves' try to persuade people something good or bad
3. When someone acts immorally, not a strict liability offence
 - Moral offences have voluntary character
 - Morality connected to intention
4. Enforce moral rules only by moral pressure
 - Punishment very informal

Justice (treating cases alike)

Most legal/public of moral virtues

You can have just application of substantively bad law

There is a connection between law and morality in most democracies

- Politicians in given democracy have similar moral views

Hart and Natural Law – agrees to minimum (but he is not a natural law theorist)

- Certain principles human conduct which manmade laws must conform to or don't get tick of validity (digresses to natural law briefly)
- Only when rules are SO deficient (eg Nazi German) that didn't count as law

People at least want to survive (assumption)

- Leads to minimum content of natural law

5 empirical observations of human beings

1. **Humans are vulnerable**
 - Need to live in groups
 - Need rules against theft, violence, deception
2. **Humans are approximately equal**
 - Can enforce the rules through sanction
 - Not true at international level even though international law pretends it is
3. **Limited altruism – people have some mix of selfishness and solicitude (care for others)**
4. **Limited resources**
 - Economic system affects human behaviour
5. **Humans want to survive (short term)**
 - Limitedness of peoples' understanding of their strength and will leads people to favour short term interests at expense of long term interests

Hart on Understanding:

'There is a necessary connection between law and morality'

1. Legal system to some extent must rest on moral obligations

- You can probably run a legal system wholly on fear
- Orders backed by threats don't require sense amongst population that they approve of rules (ie North Korea)
- But accept vs approve
- Can accept system, it is official, apply rules without morally liking (approving) of system

2. Causal connection of morality on law

- Influence of people's morals through democracy – voting means your moral values get enacted as law

3. When it comes to interpreting rules in penumbra of doubt, judges appeal to morality

- Morality offers answer where law unclear

4. When we judge legal systems, evaluate based on morality

5. Minimum of justice realised where moral laws control social living

- Procedural rule of law
- Laws general, known, forward-looking/not retrospective

6. Valid laws vs wicked laws

- Hart: **should separate law and morality**