UNIVERSITY
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Jurisprudence and legal theory

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This is one of a series of module guides published by the University. We regret that owing to pressure of work the authors are unable to enter into any correspondence relating to, or arising from, the guide.

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Contents

NOTES

Module descriptor

GENERAL INFORMATION

Module title

Jurisprudence and legal theory

Module code

LA3005

Module level

6

Enquiries

The Undergraduate Laws Programme courses are run in collaboration with the University of London. Enquiries may be made via the Student Advice Centre at: https://sid.london.ac.uk

Credit

30

Courses on which this module is offered

LLB, EMFSS

Module prerequisite

None

Notional study time

300 hours

MODULE PURPOSE AND OVERVIEW

Jurisprudence and legal theory is a compulsory module on the LLB course.

Jurisprudence poses fundamental questions about the nature of law, its purpose, its place in society and how a legal system operates as a system of rules and as a social institution engaging with ideals of justice and often conflicting moral codes.

MODULE AIM

The aim of the module is to introduce students to thinking reflectively and critically about the law by familiarising them with some important texts and ideas in legal and political philosophy, largely from the Anglo-American, common law tradition. The module also aims to encourage and enable students to think about doctrinal legal questions from a theoretical perspective. It aims to help students to develop legal reasoning skills by increasing their awareness of their own opinions and training them in constructing coherent and reflective arguments, with an ability to constructively criticise the works they are studying.

LEARNING OUTCOMES: KNOWLEDGE

By the end of this module students should be able to demonstrate:

1. Knowledge of some of the most influential legal and political philosophies and their theses on law;
2. Understanding of a range of topics and debates in legal and political philosophy and especially the main methodological, ontological and normative questions concerning law and its legitimacy.

LEARNING OUTCOMES: SKILLS

Students completing this module should be able to demonstrate the ability to:

3. Construct philosophical argument;
4. Critically assess legal and political theories and question their internal consistency and coherence as well as their foundational assumptions;
5. Apply abstract philosophical argument to real problems and contexts;
6. Present a sustained and well-constructed argument orally and in written form.

BENCHMARK FOR LEARNING OUTCOMES

Quality Assurance Agency (QAA) benchmark statement for Law 2019.

MODULE SYLLABUS

(a) *The nature of jurisprudence*. Subject matter. Philosophical method and analytical philosophy.

(b) *Natural law theory and its critics*. The history of natural law. The natural law theories of Fuller and Finnis.

(c) *Legal positivism and its critics*. Imperative and sanction theories of law, including the theories of Austin and Kelsen. Hart's theory of law. The 'Hart–Fuller' debate. The 'Hart–Dworkin' debate. Raz's theory of law. Practical reason, and authority.

(d) *Interpretivist theories of law and their critics*. Dworkin's theory of law as integrity and its critiques by selected theorists.

(e) *Legal reasoning*. Raz's theory of practical reason and norms, theories of adjudication, in particular that of Dworkin.

(f) *Liberalism and law*.

(g) *Marxist theories of law and state*.

(h) *Feminist jurisprudence*.

(i) *A study in depth of a case prescribed by the examiners on which there will be one compulsory question in the examination*.

LEARNING AND TEACHING

Module guide

Module guides are the students' primary learning resource. The module guide covers the syllabus and provides the student with the grounding to complete the module successfully. It contains the Module Descriptor, which sets out the learning outcomes that must be achieved. It also includes the core, essential and further reading and a series of activities together with sample examination questions, designed to enable students to test their understanding. The module guide is supplemented each year with a pre-exam update, made available on the VLE.

The Laws virtual learning environment

The Laws VLE provides one centralised location where the following resources are provided:

- a module page with news and updates;
- a complete version of the module guides;
- pre-exam update;
- past examination papers and reports;
- discussion forums where students can debate and interact with other students;
- quizzes – multiple choice questions with feedback are available for some modules allowing students to test their knowledge and understanding of the key topics.

The Online Library

The Online Library provides access to:

- the professional legal databases Lexis+ and Westlaw;
- cases and up-to-date statutes;
- key academic law journals;
- law reports;
- links to important websites.

Core reading

Students should use the following textbook. In any jurisprudence course, selected topics are chosen for study and there will therefore be chapters in this core textbook not forming part of our study. There are many other available jurisprudence textbooks that may contain similar or overlapping material, especially extracts of primary source material. However, this is the core textbook this year:

- **Freeman, M. (ed.) *Lloyd's introduction to jurisprudence*. (London: Sweet & Maxwell, 2014) ninth edition [ISBN 9780414026728] (available in the Online Library) .**

Recommended reading

- **Penner, J.E. and E. Melissaris *McCoubrey & White's textbook on jurisprudence*. (Oxford: Oxford University Press, 2012) fifth edition [ISBN 9780199584345] (available in VLeBooks via the Online Library).**
- **Simmonds, N.E. *Central issues in jurisprudence: justice, law and rights*. (London: Sweet & Maxwell, 2022) sixth edition [ISBN 9780414104129] (available in VLeBooks via the Online Library).**
- **Dworkin, R. *Law's empire*. (Oxford: Hart Publishing, 1998) [ISBN 9781841130415].**
- **Hart, H.L.A. *Essays in jurisprudence and philosophy*. (Oxford: Oxford University Press, 1983) [ISBN 9780198253884].**
- **Hart, H.L.A. *The concept of law*. (Oxford: Oxford University Press, 2012) third edition [ISBN 9780199644704] (available in E-book Central via the Online Library).**

ASSESSMENT

Learning is supported through tasks in the module guide, which include self-assessment activities with feedback. There are additional online activities in the form of multiple choice questions. The formative assessment activities will prepare students to reach the module learning outcomes tested in the summative assessment.

Summative assessment is through a timed unseen examination. Students are required to answer one essay question from Part One on the set case and three essay questions from Part Two. Please be aware that the format and mode of assessment may need to change in light of events beyond our control. In the event of any change, students will be informed of any new assessment arrangements via the VLE.

Permitted materials

None.

NOTES

Part I The nature of law and jurisprudence

1 Introduction

Contents

Introduction

This module guide has been written to show you how to lay a solid foundation of knowledge and critical understanding in **Jurisprudence and legal theory**. This will help prepare you, ultimately, for the examination. The guide is not intended as a primary source, or a textbook, and it would be a mistake to treat it this way.

The best way to study is to commit yourself to a **sustained reading and writing programme** from the beginning of the first term. It is typical for an on-campus student at the University of London to spend at least two hours in seminars each week for Jurisprudence throughout the academic year and, in addition, the equivalent of several days' work in the library, reading and taking notes. In the two months before the examination, you would normally begin to formulate coherent thoughts on the subject by practising trial paragraphs, a series of paragraphs and finally essays. The activities and sample examination questions in this guide are designed to help you develop these skills.

If you follow this pattern and, better, if you are able to let someone else read what you write and discuss it with you, you will place yourself in the best possible position for achieving an excellent mark in the examination. Jurisprudence can be enjoyable. The questions it deals with are very important and they constantly impinge upon the consciousness of all lawyers. You really can go a long way with this subject by a relaxed reading of a variety of jurisprudential writing.

Learning outcomes

By the end of this chapter and the relevant reading, you should be able to:

- **state the intended learning outcomes for the module**
- **decide which books to buy and obtain them**
- **locate and distinguish the primary and secondary sources**
- **devise an appropriate structure for an examination answer in Jurisprudence.**

Core text

- **Freeman, Chapter 1, extract from Fuller, L. 'The case of the Speluncean explorers', para. 1–022 (also in (1949) 62(4) *Harvard Law Review* 616).**

Read this before you go on to Chapter 2.

Further reading

- **Hutchinson, A. *Is eating people wrong? Great legal cases and how they shaped the world*. (Cambridge: Cambridge University Press, 2011) [ISBN 9780521593762] Chapter 1 'In praise of great cases: the big, the bad, and the goodly'.**

1.1 How to study jurisprudence

An initial problem in studying jurisprudence is the orientation of the subject.

Come to it with an open mind and do not worry if at first it is not obvious why you should be studying it or what use it will be in your future career. The answers to these questions will become clear to you during the year. If you study properly, you will gain a broad and flexible approach to legal questions of all sorts. Jurisprudence allows you to step back from the minutiae of what you're doing in the core subjects and speculate on more general, but equally pressing, questions of law. In popular language, you will learn how to think **laterally**.

Teachers of jurisprudence understand that for newcomers to the subject, the initial orientation can be hard going. They are also used to the enthusiasm that frequently develops later, and which remains for a very long time. We frequently meet former students, some now distinguished practising lawyers, who at alumni functions tell us that they would 'like to have spent more time studying jurisprudence'. What many consider to be an impractical subject is not unpopular with practising lawyers. Legal employers will not be impressed by interviewees who say 'I hated jurisprudence because it meant less time on commercial law, taxation, etc.' because that can strike just the wrong note. Creativity and breadth in thinking and writing are both sought-after criteria of employability.

You should note early on that facts alone are much less important in jurisprudence than ideas. The focus, instead, is on thinking about facts in light of particular ideas/theories. The subject does have facts and, of course, case law-type subjects are not devoid of ideas. Nevertheless, there is a far greater proportion of abstract, theoretical material in jurisprudence, and the single most common problem is failure to appreciate this. Read Fuller's 'The case of the speluncean explorers' for an enjoyable way to see how a relatively simple set of facts lends itself to vastly different approaches, each characterised by certain abstract ideas. That article, by the way, is used as the introductory reading in jurisprudence in law schools all over the world.

1.2 What is jurisprudence?

Jurisprudence consists of the study of the nature of law and its related ideas. It may be helpful for you to consider the following points.

1. Many of the difficult problems are **philosophical**. The following are such problems and you will be expected to develop **your own** views in relation to them.

   What is a definition? What is a rule? What is law? What is morality? What is justice? What is a critical standpoint?

2. There are also interesting questions of **political morality** that affect our lives. Examples are: should the law enforce conventional morality? What is the relationship between freedom and equality? How should difficult legal cases be decided? How can equality take into account differences between sexes? Should judges be concerned with economic questions? What follows from a person's 'having a right' to something? What is the justification, if any, for punishing people? Should 'hate speech' be a criminal offence? Jurisprudence will help you to formulate your convictions on these vital questions.

3. There are also interesting questions of **sociology and history** such as: what generally shaped the law in Western societies? What were the main claims of legal feminists? What major trends influenced law schools in the USA in the 20th century? What are the effects of law? What events can be shaped by the adoption of laws? Is law of any sort naturally repressive – or liberating?

Jurisprudence is full of outstanding thinkers. Austin and Bentham – both of whom, in their own ways, could be considered the founders of legal education at the University of London – thought law was about power. Hart and Kelsen thought it was imbued with authority – although not **moral** authority as did Fuller, of Harvard Law School, and

Dworkin. Austin thought judges were deputy legislators. Dworkin thought that judges only create law that is largely coherent with existing legal practice. Marxists think that law only serves the interests of the powerful and the rich. Critical legal scholars think law schools provide a veneer of respectability over chaos and conflict. Race and feminist legal scholars highlight how law is structurally biased against people of colour and/or women, respectively. Some jurists believe that courts enforce moral rights; others, such as Bentham, think that this idea is 'nonsense upon stilts'. Where does justice and the liberal democratic and legal framework fit into this?

Some jurists are referred to in court cases. In landmark constitutional cases fought in the highest courts in countries of present or former Commonwealth jurisdictions over the past 60 years, reference has been made, for example, to Kelsen. The 1,000 pages of the 1965 decision of the Rhodesian General Division court in *Madzimbamuto* v *Lardner-Burke* [1965] AC 645 portray a line-up of jurists whose ideas were marshalled both for and against the Rhodesian government's case. The example of the Nazi legal system, too, with its barbaric laws has also raised real, live problems. Did Nazi bureaucrats really have a legal defence of any sort at all when they declared that they were just obeying orders? This was an acute problem at the famous Nuremberg war crimes trials, which took place after the Second World War had ended. It continues to be a live issue.

1.3 Reading

This section is to assist your reading throughout the module, especially as you may initially find these difficult texts and different from your normal law books.

CORE TEXT

- **Freeman, M. (ed.) *Lloyd's introduction to jurisprudence*. (London: Sweet & Maxwell, 2014) ninth edition [ISBN 9780414026728] (available in the Online Library and hereafter referred to as 'Freeman').**

This is your core textbook. Selected chapters and readings from Freeman will be set out for each of the topics/chapters in this guide. The textbook is set out in chapters with analysis then extracts from original primary texts/books/articles by the relevant theorists/scholars. Sometimes these are lengthy so you will be expected to read in conjunction with this guide.

OTHER TEXTS

- **Hart, H.L.A. *The concept of law*. (Oxford: Oxford University Press, 2012) third edition [ISBN Paperback 9780199644704, Hardback 9780199644698] (available in E-book Central via the Online Library) .**

Many jurisprudence scholars consider Hart to be the prominent jurisprudential thinker in the Anglo-American tradition. The book is short and will be studied since it contains Hart's main theory.

- **Cotterrell, R. *The politics of jurisprudence: a critical introduction to legal philosophy*. (London: Butterworths Law, 2003) second edition [ISBN 9780406930552].**

This is particularly usefully on Bentham and Austin and the 'politics of difference', part of which is studied in Part V of this guide.

- **Dworkin, R. *Law's empire*. (Oxford: Hart Publishing, 1998) [ISBN 9781841130415] Chapter 1 'What is law?', Chapter 2 'Interpretive concepts' (particularly pp.76–86), Chapter 3, Chapter 5 (particularly pp.164–75), Chapter 6 'Integrity', Chapter 7 'Integrity in law', Chapter 8 'The common law' and Chapter 10 'The constitution'.**
- **Dworkin, R. *Taking rights seriously*. (London: Bloomsbury, 2013) [ISBN 9781780937564] Chapter 4 'Hard cases' and Chapter 5 'Constitutional cases' (available in Ebook Central via the Online Library).**

Both of these are fundamental to Dworkin's legal theory, which is the subject matter of Part IV. Please note that Freeman is an extensive textbook and most of the readings are found in extracts within it.

- **Simmonds, N.E. *Central issues in jurisprudence: justice, law and rights*. (London: Sweet & Maxwell, 2022) sixth edition [ISBN 9780414104129] (available in VLeBooks via the Online Library).**
- **Penner, J.E. and E. Melissaris *McCoubrey & White's textbook on jurisprudence*. (Oxford: Oxford University Press, 2012) fifth edition [ISBN 9780199584345] (available in VLeBooks via the Online Library).**

You may find these useful supplements to Freeman.

- **Cotterrell, R. 'Why jurisprudence is not legal philosophy' (2014) 5(1) *Jurisprudence* 41–55 (available in HeinOnline via the Online Library).**

Roger Cotterrell draws a distinction between jurisprudence and legal philosophy, arguing that the former is not only the philosophical study of the nature of law but 'an exploratory enterprise aimed at serving an ongoing, ever-changing juristic practice. It is not aimed at finding ultimate truth about law's nature, or timeless, "essential" or "necessary" characteristics of the legal'.

- **Lacey, N. 'Institutionalising responsibility: implications for jurisprudence' (2013) 4(1) *Jurisprudence* 1–19 (available in HeinOnline via the Online Library).**

Nicola Lacey makes a similar argument criticising analytical legal philosophy for paying insufficient attention to actual institutional practices when trying to account for law.

- **Gardner, J. *Law as a leap of faith*. (Oxford: Oxford University Press, 2012) [ISBN 9780198713883] Chapter 11 'Law in general' (available in Ebook Central via the Online Library).**

This is a polemical defence of the idea that it is possible to articulate universal truths about law. For a symposium on this book, see *Jurisprudence: an International Journal of Legal and Political Thought* (2015) 6(3).

- **Green, L. and B. Leiter (eds) *Oxford studies in philosophy of law: Volume 1*. (Oxford: Oxford University Press, 2011) [ISBN 9780199606450].**

This is an interesting collection of essays in the philosophy of law. The first two essays are of most interest for students of this module. 'Reason-giving and the law', by David Enoch, considers the way in which the authoritative directives of the law give reasons for action, thus further exploring the connections Raz first elaborated between the law and practical reason. 'The standard picture and its discontents' by Mark Greenberg aims to show how the positivist characterisation of the law fails to address the way in which the law binds by interacting with the moral norms that would otherwise apply to us to guide our actions.

- **Leiter, B. 'The demarcation problem in jurisprudence: a new case for scepticism' (2011) 31 *Oxford Journal of Legal Studies* 663.**

Leiter makes the claim that all theorists agree that the law is an artefact. According to recent philosophical research, providing an analysis of an artefact in terms of its essential properties is notoriously difficult, yet that is what modern legal philosophers have sought to do. Leiter argues that the project has not been successful, but that that does not really matter, the aim to distinguish law from morality by identifying the essential features of the former is unnecessary, since we can distinguish cases in which the central issue is 'what ought to be done', in any case. Leiter is well known for leading a kind of revival of American legal realism. Those interested in pursuing this 'realist revival' might want to look at the following:

- **Leiter, B. *Naturalizing jurisprudence: essays on American legal realism and naturalism in legal philosophy*. (Oxford: Oxford University Press, 2007) [ISBN 9780199206490].**

When you study Part V, you will see that many scholars critique traditional liberal legal theory and the readings set out in the chapters warrant attention. Major theorists to consider include: MacKinnon; Crenshaw; Douzinas and Gearey.

1.3.1 How to read works in jurisprudence

Appreciate that the subject matter is difficult. You will have to learn to read works that are difficult to understand. This means that you should slow down and contemplate everything carefully. As you know, reading the reports of judicial decisions can be difficult. For example, each chapter of Hart's *The concept of law* requires several hours of sustained effort.

Every so often, ask yourself what you've just read. Put your book down and write down, or speak aloud, what the writer has said. You will find that, if you can do it, you will remember having done it!

The great jurists were straightforward people who spoke naturally and not in jargon. What they have in common is:

- sound moral perception
- the intellectual ability to range from the very abstract to the very practical.

The **primary** sources, it should go without saying, are the best. You must read some of Austin, Kelsen, Dworkin, Fuller and so on. Only in that way will what these people say become real to you. It is relatively easy for an examiner to spot whether or not you have gleaned your knowledge of jurisprudence from a primary source – the extracts are mainly to be found in Freeman. They remain the most important and fruitful of the texts that you should read. As far as secondary texts are concerned, an excellent overview is Simmonds' *Central issues in jurisprudence.*

1.3.2 Learning outcomes for the module

Besides getting to know the syllabus, which is printed in the Regulations, you should regard the following learning outcomes as what the subject will furnish if conscientiously and seriously followed. The assessment in the final examination will be based on your performance.

By the time of the examination you should be able to:

- expound and criticise important ideas of selected jurists in the Anglo-American traditions
- demonstrate an ability to think in a more abstract or general fashion than is usually achieved in the study of specific areas of law
- demonstrate a willingness to question and think independently and to find out more
- demonstrate systematic reading.

These outcomes are related. Reinforcement of what the examiners are looking for will be found by studying past examination papers in which you will spot the familiar forms of questions and format. How well you read around the subject is crucial to how well you do in the examination. The examiners do not want to read parroted pieces of information. Such answers will fail. Topic spotting will not do either. The present syllabus is short enough for all topics to be covered and for all of them to be approached in an intelligent and systematic way.

1.4 Preparing for an examination in jurisprudence

1.4.1 Structure of the examination paper

At the beginning of the academic year, you will be notified of a 'set case', on which you will be asked to answer one out of three questions in the examination in addition to other questions in the second part of the examination paper.

To help you to prepare for the examination, when the case is released you will be directed to study the case in depth from the perspective of particular legal philosophical theories selected from the syllabus. The examination questions will be derived accordingly.

The aim of this assessment exercise is to develop your skills in identifying the relevance, significance and applicability of general theories of law in real contexts of legal practice. You will be able to identify possible clashes between competing theories of law within these contexts and critically to discuss which of these theories best explains the decision. You will also develop the ability to think about the decision, and legal practice in general, by questioning its foundational presuppositions with the help of general legal theories.

Example

To illustrate, suppose the set case is *Donoghue* v *Stevenson* [1932] UKHL 100. This is a seminal case in Scots and English law. It not only significantly influenced the development of delict (in Scotland) and tort (in England and Wales) but also the legal system generally.

For the purposes of the assessment, we are not interested in the substantive questions of law raised in the case but rather in the legal philosophical relevance of the case. For example, the way in which both the majority and the dissenting minority reasoned and the theories of legal reasoning and general theories of law that might best explain and justify the decision; which underlying theory of law the decision or the opinions expressed by judges reveal; which view of society is revealed in the decision; how this view can be challenged from a different perspective.

As you can see, there are many ways in which you might analyse this case, hence the examiner will provide direction to your studies by asking you to consider the case in the context of particular jurisprudential theories. So in this example, the examiner might direct you to consider *Donoghue* v *Stevenson* in the context of theories of legal reasoning, theories of the rule of law and Marxist theories of law.

Accordingly, questions in the examination might be as follows.

1. **Which competing theories of legal reasoning do Lord Atkin's famous 'neighbour principle', on the one hand, and Lord Buckmaster's consequentialist arguments, on the other, reveal?**

   Issues that might be considered include: is the principle best understood in terms of Dworkinian interpretivism? Or is it the case that the principle is extracted from law with the employment of the rule of recognition, as positivists would argue (see for example Neil MacCormick in *Legal reasoning and legal theory*)? Are consequentialist arguments ever permissible in legal reasoning and, if so, under what conditions?

2. **Does the majority or minority opinion best serve the rule of law?**

   To answer this question, recall what the requirements of the rule of law are (Lon Fuller's account will be necessary here). You must then consider whether each side's reasoning observes these basic requirements. To do so, you would need to refer to theories of legal reasoning (see above). If not, what does this tell us about the relationship between the rule of law and law's validity and normativity? For example, if, say, *Donoghue* v *Stevenson* has retroactive effect, does this mean that its status as law is under question? The debate between Fuller and Hart will help you to think about this question in more depth.

3. **Considering the case as a whole, how would you interpret and criticise it from a Marxist perspective?**

   Here you might consider, for example, how Marxism sees social relations generally, and under capitalism in particular, in order to critically rethink the neighbour principle. Moreover, can *Donoghue* v *Stevenson* be interpreted in the light of Marxist theories of law? For example, the neighbour principle seems, at least at first sight, to take some steps towards protecting consumers' rights. How can this be reconciled with the basic Marxist tenet that law reproduces, in one way or another, the capitalist mode and relations of production? The work of Pashukanis (see Chapter 11) as well as accounts of law as ideology will help you to think about this.

To prepare for this part of the assessment, you will need to read the given case in depth and focus on applying general theories of law to real contexts. You are advised to research academic writings on the case (some references may be provided by the examiners) to aid your understanding and ability to critique and evaluate the judgments given in the case.

1.4.2 Content and orientation of your answer

Sample or model answers can be a disastrous way of teaching jurisprudence since they suggest that there is only one right way of answering a question. In fact if each reader displayed real imagination and ingenuity – based on some knowledge, of course – **all the answers would receive firsts, and no two answers would be the same**. But there are some pointers that can be given in the following example. This question appeared in the 2015 Zone B paper. The content here will become more understandable as you progress through the guide:

- **'We will know everything we need to know about the central case of law, once we have grasped that developed legal systems consist of the union of primary and secondary rules.' Discuss.**

Content

Here is an example of the **content** that should be in the answer:

- First, you would need to outline Hart's account of fully developed legal systems in terms of the union of primary and secondary rules. Second, and very importantly, the question calls for a critical discussion of this thesis. A key phrase here is 'central case'. What are central cases of concepts? What general features must the central case of the concept of law have? Does the description of law as the union of primary and secondary rules meet these requirements or must it be replaced (or complemented) by something further? To tackle these issues you would of course need to refer to the relevant literature, namely Hart's *The concept of law*, as well as criticisms levelled against Hart by theorists such as Dworkin and Finnis.

Orientation

What is also required is **an orientation of your own**.

This means stating clearly whether you agree or not, **giving reasons**. Giving reasons is important because it is typical for candidates to say in an examination that they either agree or disagree with some proposition without saying why. In a courtroom, as a future lawyer, would you think it was acceptable, to your client, to the judge, simply to say 'I disagree' with the argument of the other side? Of course not! So, you might say something like the following in this part of your answer:

- **Critics of Hart emphasise** (I have emphasised the crucial elements in the argument in **bold** type) that law is first and foremost a **normative order**, that is, it tells us what we **ought to** do. Accepting this, which Hart does, has one very important upshot. In order to capture law's nature, one would have to account for law's normativity, i.e. law's ability to guide our actions. Thinking of the central case of law in terms of the union of primary and secondary rules does not provide a deeper account of law's normativity. Critics would also insist that the source of normativity is unitary. Therefore, if there is any distinction between legal and moral obligation, it is purely contingent; law and morality are on a continuum. It follows that the central case of law would have to include the reasons for which law is valuable and for which we are under an obligation to follow it. It follows that thinking of law in terms of the union of primary and secondary rules tells us nothing of particular significance about law or, at the very least, it does not capture the **central case** of law. A further implication of this is that, contrary to what Hart argued, law is **never neutral**, i.e. independent from morality. In fact, the objection would continue, Hart implicitly draws a connection between morality and law to the extent that he views the development of secondary rules as solutions to problems caused by governing through primary rules alone. He promotes certainty and clarity as to

what the law is over other values that we might want to pursue (his point about the 'truisms' about human nature and the minimum content of natural law might be relevant here).

- But **there are at least two answers** to this powerful objection. The first is that there is a distinction between **law** and ***the* law**. Hart maintained that he tried to give a neutral description of law as an institution in certain contexts. Disagreement as to the content of the law and why we might or might not be under an obligation to follow it is a separate, substantive enquiry. One could add to this that one would have to accept that modern municipal legal systems consist of the union of primary and secondary rules, independently of what one thinks that the source of law's normativity is (one could go further to argue that this is the only uncontroversial thing that we can say about law). The second answer would be to complement Hart's argument about the central case of law with an account of legal normativity that is independent from morality. Such an argument has been advanced by Marmor, who regards the law as a **constitutive social convention**, which generates obligations independently from the reasons for having the convention in the first place.
- These arguments point in different directions. **Hart's arguments may be preferred** because they are more reconcilable with our intuitions about law than the objections. When talking about law, at least in certain contexts, we do refer to institutions of law, the existence of which is neatly captured by the 'union of primary and secondary rules' idea. Nevertheless, a caveat is necessary. This conception of law does not tell us everything we need to know about law. In order to develop a deeper understanding of law, we need an account of what makes it normative. If the neutrality thesis is to be maintained, further argument is required to complement the 'union of rules' idea.

1.4.3 Structure of your answer

The following remarks concern the way in which your answer should be **structured**.

- An opening paragraph, or set of paragraphs, which should have **impact**. This sets out what you are going to do clearly and succinctly and gets straight into it.
- As in the above argument on the central case of law, the centre section should contain **argument** backing up your views. (You can share views with others, giving reasons; but merely parroting others is certainly not enough.) The point is that **you must back up** these ideas.
- A summing up in which you draw your **conclusion**. This should not be a repetition but a neat summary of your view. This summary shows that your answer forms an argument in which you have set out to do something and that you have done it.

Finally, the following is designed to get you to see what would be very desirable in answering the question.

- A jurisprudence answer must show knowledge, independent thought and the ability to argue. In addition, it must show an ability to cross-reference to other ideas and writers. This last is essentially the ability to think abstractly.
- Use examples. It is always helpful to show your awareness that jurisprudential questions must be tested against real life. In the context of this question, **illustrating** your answer with reference to judicial decisions would not go amiss (but your answer should not be exhausted in this).

Reminder of learning outcomes

By this stage you should be able to:

- **state the intended learning outcomes for the module**
- **decide which books to buy and obtain them**
- **locate and distinguish the primary and secondary sources**
- **devise an appropriate structure for an examination answer in Jurisprudence.**

Good luck!

Reflect and review

Look through the points listed below. Are you ready to move on to the next chapter?

Ready to move on = I am satisfied that I have sufficient understanding of the principles outlined in this chapter to enable me to go on to the next chapter.

Need to revise first = There are one or two areas I am unsure about and need to revise before I go on to the next chapter.

Need to study again = I found many or all of the principles outlined in this chapter very difficult and need to go over them again before I move on.

Tick a box for each topic.

	Ready to move on	Need to revise first	Need to study again
I can state the intended learning outcomes of the module .	☐	☐	☐
I can understand some aspects of the subject.	☐	☐	☐
I can decide which books to buy and obtain them.	☐	☐	☐
I can locate and distinguish the primary and secondary sources.	☐	☐	☐
I can devise an appropriate structure for an examination answer in Jurisprudence.	☐	☐	☐

If you ticked 'need to revise first', which sections of the chapter are you going to revise?

		Must revise	Revision done
1.1	How to study jurisprudence	☐	☐
1.2	What is jurisprudence?	☐	☐
1.3	Reading	☐	☐
1.4	Preparing for an examination in jurisprudence	☐	☐

Part II Natural law

2 Classical and modern natural law theory

Contents

Introduction

From the time of the ancient Greeks up until the 16th or 17th centuries, there really was only one kind of 'legal theory' – natural law. The essence of this legal theory was that the law must be understood as a practical application of morality; hence law and morality are intimately connected. Accordingly, much of natural law theory sought to show how legal authorities such as princes, states and so on, could lay down laws which reflected the true dictates of morality, and were, therefore, just.

Freeman explains that natural law has afforded a moral justification for existing social and economic systems and their legal systems (para. 2-001). If it is argued that what 'is' the law is based on a higher law dictated by reason and therefore is also what the law 'ought' to be, positive law acquires a sanctity that puts it beyond question. This may sounds somewhat conservative.

Natural rights similarly had its origin sanctifying property and the existing order – in Locke's version of the social contract. Yet the emphasis on human equality and the revolutionary potential of natural rights that manifested itself in the American and French revolutions in the late 18th century led to diminished respect for natural law and natural rights during the 19th century. Natural law thinking revived in the aftermath of the Second World War and the horrors of the Holocaust.

Why is natural law no longer the only theory of law? In a word, the answer is **positivism**. Legal positivists deny that the law is simply a matter of 'applied' morality. Positivists note that many legal systems are wicked, and that what is really required by morality is **controversial**. For example, some people view a woman's right to have an abortion as an essential human right, while others think of it as tantamount to a right to murder. Yet the law carries on, laying down rules for behaviour, even when the rules are immoral, or when no one can demonstrate to the satisfaction of all whether a rule is moral or not. What positivists conclude from this is that the law is a kind of **social technology** which regulates the behaviour of its subjects and resolves conflicts between them. The law has no necessary moral character.

The philosophy of law, then, according to positivists, is the **philosophy of a particular social institution**, not a branch of moral or ethical philosophy. In working through this chapter, you must always bear in mind this positivist challenge, and ask yourself whether natural law theory is capable of responding to positivism while keeping its character as a plausible moral philosophy.

Learning outcomes

By the end of this chapter and the relevant reading, you should be able to:

- **describe the origins of natural law in ancient Greece and Rome and the basic ideas which inform the natural law tradition**
- **explain the natural law theory of Aquinas, in particular the relation of natural law to divine law and human law, and the importance of the distinction between *specificatio* and *determinatio* in the generation of law**
- **explain Finnis's modern natural law theory, in particular his employment of the 'focal meaning' or 'central case' to determine the subject matter of legal theory, his reference to self-evident basic values, and his characterisation of practical reason**
- **explain in detail Fuller's 'inner morality of law'**
- **critically assess these various versions of natural law theory in light of the attack on natural law by legal positivists.**

Core text

- **Freeman, Chapter 2 'Natural law'.**

2.1 The rise of natural law in ancient Greece and Rome

The term 'natural law' is misleading, for it sounds as if it denotes some kind of theory of the law, a 'natural' one, whatever that is. It does not. Originally, 'natural law' was a general moral theory which explained the nature of **morality**, not the nature of **law** *per se*. The basic idea was that man,† using his reason, and possibly with the help of the revelation of the gods or God, could come to understand how he should act rightly in respect of his fellow man. This morality of reason and revelation was a morality which purported to take account of man's **nature**, hence the title 'natural'. And because this combination of revelation and reason laid down rules for behaviour, the word 'law' seemed appropriate, hence 'natural law'. Natural law, then, is principally a theory of morality in general, not a theory of law.

† The word 'man' is used here deliberately. Many writers are generally discussing men and not women. Aristotle makes the distinction. Some mean 'human'. The distinction is important if this is representing partial 'nature' or 'morality'. For further interest, you may wish to consider Okin, S.M. *Women in Western political thought*. (Princeton, NJ: Princeton University Press, 2013 [ISBN 9780691158341]. See also Chapter 12 of the module guide.

But part of the project of acting rightly was the project of rulers who laid down law for their subjects, and so the claims of natural law morality applied just as much to them as to individuals generally. A part of natural law (obviously a very important part) explained what it was to rule and legislate and judge cases rightly; so part of natural law was the morality of 'law', narrowly construed as the laws passed by legislation and the legal system of courts, judges and so on. Nowadays, 'natural law' is generally taken to mean only that part of the original moral theory which explains the way that the law, narrowly construed, operates as part of the broader moral life of human beings. As we shall see, however, John Finnis emphasises that the philosophy of law is continuous with general moral or ethical philosophy. That narrowing of focus has to do with the way in which the nature of morality, as explained by natural law theory, was drawn upon to justify existing legal authorities.

It has been argued that in small, close-knit, primitive societies, the inhabitants make no distinction between what is morally right and the way they think it right to do things. They do not stand outside their own practices, looking at them from an external standpoint to judge whether they are correct or not; rather, they just 'do what comes naturally', typically treating their rules as timeless and revealed and enforced by the gods. Whatever the truth of this quasi-anthropological assertion, it is clear that when different cultures come into contact and are forced to live with each other, a clash of customs will almost certainly occur. The philosophical tradition that began with Socrates, Plato, Aristotle and the Stoics, and was carried via Rome throughout the West, was faced with this sort of conflict, as the different city states and empires sought to provide workable rules which might govern everyone within their jurisdictions. This philosophical tradition made one of its central questions 'How ought a man to live?', and the answer was sought not in the particular customs or practices of particular cultures, but in our **common nature**.

The obvious advantage of this approach was that, if successful, all subjects of the state or empire could appreciate the resulting rule of behaviour as appropriate to each of them, rather than constituting the imposition of odd and foreign practices against which they would naturally rebel. Different philosophers adopted different ways of explaining the common nature of man/humans that might deliver a common morality. Very briefly and roughly, Plato believed that those who were properly philosophically instructed might come to grasp – perhaps always imperfectly – the true form or idea of 'justice', and other absolute values. For Aristotle, it was essential to understand man's *telos* (goal, or purpose), which reflected his nature; in particular, Aristotle thought that man was social, political and sought knowledge, and only when in a position to fulfil these aspects of his nature could man flourish and achieve the 'good life'. The Stoics† accorded primacy to man's reason – by reason man could determine those precepts of right conduct which transcended particular cultures, and therefore were universally applicable. The 'law on the books' that most directly resulted from this intellectual activity was the *jus gentium*, which started life as a second-class legal order, a stripped-down Roman civil law which applied to foreigners, but which came to be regarded as a higher or superior legal order, in some sense akin to international law, a kind of common law of citizens which applied throughout the Roman Empire. The single most important theoretical issue which this philosophical tradition generated, and which forms the core issue of the natural law tradition today, is how this critical,

† Stoics: an ancient Greek school of philosophers who believed, among other things, that the mind is a 'blank slate', upon which sense-impressions are inscribed. It may have a certain activity of its own, but this activity is confined exclusively to materials supplied by the physical organs of sense.

universalistic perspective is properly to be employed to judge the laws of any particular society. In its most extreme form, one can adopt the Latin maxim *lex injusta non est lex*, that is, an unjust law (unjust, that is, according to natural law) does not count as a law, is not a law. Thus if the legislature passed a statute that required everyone to kill their first-born, then such a statute would not have the force of law at all. **Notice this point very carefully**: the claim is not that such a statute would provide a very wicked law, but that even though it was validly passed, the statute would provide no law at all, just because the content of the statute was so at odds with natural law.

This most extreme version of the force of natural law theory has been a primary target of positivists; for the positivist, such a statute, assuming it was validly passed, would provide for a perfectly valid law, wicked though it was. One might be morally obliged to disobey such a law, but it would be a law just the same. In just this way, says the positivist, the dictates of morality can be distinguished from the dictates of the law. In the face of this criticism, very few natural lawyers defend the connection of morality and law as being quite so intimate as this. One of this chapter's tasks is to critically examine the different ways in which natural law theorists explain the connection between law and morality. But notice straightaway that you are not a natural lawyer simply because you believe you can criticise the law for being out of step with morality. **Everyone believes that**. It is a common examination mistake to state something along the lines that 'only natural lawyers judge the law by moral standards'. This is incorrect. Legal positivists **do** criticise immoral laws. They simply do not deny that an immoral law **is** a law. The arch-positivist of the modern era, Jeremy Bentham, was a dedicated social reformer who forcefully attacked the laws of England throughout his life. In doing so, however, he attacked them as bad **laws**, and did not claim that they were non-laws because they were bad. The principal task of natural lawyers, since the rise of legal positivism, has been to show a more plausible connection between law and morality. This would need to be a more robust connection than simply saying that one can criticise the law for being immoral.

Self-assessment questions

1. **What is natural law a theory of?**
2. **Why is natural law called 'natural law'?**
3. **Why does natural law theory pay attention to the law of particular states?**
4. **What is the *jus gentium*, and why is it related to the rise of natural law?**
5. **What does *'lex injusta non est lex'* mean? Why is this statement regarded as an extreme expression of natural law?**

Activity 2.1

Read Freeman, Chapter 2 'Natural law', extract by Cicero† 'De republica', para. 2–018 and answer the following:

Cicero says: 'And it is not only justice and injustice that are distinguished naturally, but in general all honourable and disgraceful acts. For nature has given us shared conceptions and has so established them in our minds that honourable things are classed with virtue, disgraceful ones with vice. To think that these things are a mere matter of opinion, not fixed in nature, is the mark of a madman.' He also says: 'And there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and all times, and there will be one master and ruler, that is, God, over all of us, for he is the author of this law, its promulgator, and its enforcing judge. Whoever is disobedient is fleeing from himself and denying his human nature, and by reason of this very fact he will suffer the worst penalties, even if he escapes what is commonly considered punishment.'

Are all the ideas Cicero puts forward in these passages about the nature of natural law consistent with each other?

Feedback: see end of guide.

† Cicero: Marcus Tullius Cicero, Roman statesman, orator and philosopher, 106–43 BC.

Summary

The natural law tradition arose as the application of a theory of morality which emphasised man's common moral nature as underlying the legitimacy of states. The question of the legitimacy of states and their laws became politically important when empires sought to rule over different peoples with different customs, and so natural law seemed ideally placed to provide a universal standard of justice. Different natural law theories arose, however, which did not agree on what the universal basis of morality was; some emphasised human beings' intellect or reason, others their purpose, others revelation of God's will.

Reminder of learning outcomes

By this stage you should be able to:

- **describe the origins of natural law in ancient Greece and Rome and the basic ideas which inform the natural law tradition.**

2.2 The natural law of Aquinas:† structure

† Aquinas: St Thomas Aquinas (1225–74) Italian-born Christian (Catholic) theologian and philosopher.

While the divine was considered by the ancients to be a source of understanding of morality, a brief review of the rough descriptions of Plato's, Aristotle's and the Stoics' theories of natural law given above shows that God was not an obvious central figure in the equation. Following the Christianisation of the Roman Empire, however, a theory of morality could no longer make reference to God's word solely as a rhetorical gesture. It took the genius of Thomas Aquinas to reconstruct the classical natural law tradition of the Greeks and Romans within Christian theology. The central idea is that the grace of God was held not to conflict with or abolish man's nature, but to perfect it, and in this way a Christianised version of natural law could be seen to continue or bring to fruition the natural law tradition. Aquinas modified Aristotle's teleological perspective so that man's end was not only to live socially and seek knowledge, but to live in a Christian community in which one would come to know, and presumably adore, God. Most importantly, however, he described orders of law: eternal, divine, natural and human law, which purported to show the way in which human reason was able to appreciate what was good and godly – according to Aquinas, man, by his reason, was able to **participate** in the moral order of nature designed by God. The orders of law were as follows:

Eternal law: The whole universe is governed by divine providence or divine reason, which is the ultimate order imposed by the Creator.

Natural law: Humans are special creatures in having a special relationship to divine wisdom or providence, in that since they possess reason and free will, they have a 'share' in this divine wisdom themselves. This participation of man in the ordering of his affairs by reason is participation in the rational order ordained by God, and this is natural law.

Human law: Human law consists of those **particular** rules and regulations that man, using his reason, deduces from the general precepts of natural law to deal with particular matters. For example, it is a natural law precept that crimes must be punished with a severity that corresponds with the seriousness of a crime, but it is necessary to specify the actual punishment that, say, a thief will receive under a particular legal system, and the use of reason to provide a punishment of, say, two years is the use of reason called 'human law'. This might also be called 'positive' law, as it is the actual law posited by legal institutions.

Finally, there is **divine law**: This is the law that is revealed by God to man, more or less directly, through the provision of the 10 commandments or through scripture more generally, or via the divinely inspired pronouncements of prophets or the Church fathers or the pope. Divine law most directly concerns man in his relation to God and achieving paradise; it lays down how man is to act in relation to God (in terms of the requirement to take part in rituals such as baptism and Holy Communion, and in forswearing† other gods or idols, for example) and furthermore covers those matters

† Forswearing (from verb 'forswear') = agreeing to have nothing to do with.

of the soul which human institutions are unfit to regulate, such as evil thoughts, which are nevertheless of vital importance to a man's relationship with God. Though much of divine law would be Church or Canon law, to the extent that religious law was also enforced by secular authorities like city states or princes (for example laws against usury or blasphemy or witchcraft), divine law could be instantiated in secular law as well. Furthermore, there is an overlap between this law of revelation and natural law, in such matters as are covered by, for example, the 10 commandments, where the prohibitions against murder, theft, bearing false witness and so on, are declared by divine law but can also be appreciated as natural law precepts as well.

SELF-ASSESSMENT QUESTIONS

1. **According to Aquinas, what is man's *telos*? How does it differ from what Aristotle viewed as man's *telos*?**
2. **What are the different orders of law in Aquinas's scheme? In what ways do they interact or overlap?**

ACTIVITY 2.2

Consider the criminal law of rape, the law of wills and the law of taxation. What order(s) of law under the Aquinean scheme do these belong to, and why?

Feedback: see end of guide.

2.3 The natural law of Aquinas: legal reason, human law and the obligation to obey the law

We have seen from the preceding that, according to Aquinas, law arises from man's participation, via his reason, in the divine wisdom of God. Sometimes human law is simply a deductive conclusion from the general precepts of natural law. But there is a second way in which human law is created in accordance with natural law and Aquinas exploits the analogy of the architect to explain this. To build a house, there has to be a general idea of a house – that it has rooms, doorways, windows and so on – so that there are, as it were, 'natural law' precepts or requirements of house building. However, the idea of a house does not tell the architect whether the doors must be two metres high, how many rooms and so on. The natural law precepts of house building will require that the doorways must be more than 30 cm high, for a doorway this low would not be functional. But no specific workable height is specified by the mere idea of a house; this specification needs to be done by the architect and, in the same way, while natural law requires that thieves be punished, the natural law does not specify what the particular punishment should be, so long as its severity corresponds in some sense or degree to the seriousness of theft. Aquinas rendered this distinction in Latin: what the natural law lays down – or can be deduced from it by reason alone – is *specificatio*, or specified. What man must practically decide about, compatibly with the natural law but not by deduction from it, such as the proper punishment for theft, is a matter of *determinatio*, determination within the boundaries set by natural law.

Human law also has particular tasks and limits which natural law does not. While some subjects of the law are naturally inclined to be virtuous, others are more evil or selfish – which we might perhaps all be in certain moods or times of our life. The law must exert not only a guiding but a disciplinary force to deal with the latter sort of person. The human law must also be general, applying to all subjects, though laws applying to children and perhaps others with limited rational capacity may justifiably differ. The human law cannot be a counsel of perfection; it should attend to the more serious matters of human conduct, and not try to prohibit every vice or insist on every virtue: its task is to ensure a framework of rules which provide for a human community that is capable of **flourishing** – not to create heaven on earth.

Furthermore, since humans are granted only limited reason and insight, human law cannot be treated merely as the laying down and enforcement of rules. There will

always be exceptional cases in which a departure from the strict rule will be justified, and human judges must maintain and nurture this sense of 'equity' in the face of the rules.

Because the human law is a particularisation or determination of concrete rules and principles, which, while they must be in keeping with the natural law, are not fully specified by it, the human law is mutable, and will be different in different times and places. Despite this mutable character, it is unwise, according to Aquinas, to change the human laws too often or too radically, even if within the confines of natural law. Custom is important and, the more laws change, the less legitimacy they appear to have. Consequently, the proper coercive power of the law is diminished. The law should only be changed if the benefits clearly outweigh these drawbacks.

According to Aquinas, a law only 'obliges in conscience' to the extent that it is in keeping with the natural law. An unjust law has more the character of violence than of law. Yet Aquinas does not draw from this the conclusion that an unjust law is not a law – it continues to partake of the character of law in its form, and in this sense participates in the order of law at least in this minimal way. One must always remember that the law is, from the moral point of view, a necessary human institution of communal practical reason. Every person has the duty to support and to act to foster it, which will condition its success. If a law is unjust, this does not provide an absolute licence to disobey it. The consequences of obedience have to be taken into account for the general project of law. Disobedience might, for example, generate a willingness among people to disobey the law for selfish reasons, or make it more difficult for just laws to be administered, and so on.

Self-assessment questions

1. **What are the two ways in which the natural law is a source of human law?**
2. **Explain the difference between *specificatio* and *determinatio*.**
3. **What particular tasks and limitations does human law have?**
4. **What is Aquinas's view on the moral obligation to obey the human law?**

Activity 2.3

Read Freeman, Chapter 2 'Natural law', extract by Aquinas 'Summa theologica', para. 2–020 and answer the following:

What are the strengths and weaknesses of Aquinas's theory of the law?

Feedback: see end of guide.

Summary

Aquinas married Aristotle's natural law theory with the Christian tradition to develop the most refined theory of natural law before the 20th century, and his work is a fundamental reference point for all natural law theorists. Aquinas's natural law theory shows man, because of his reason, to be a participant in divine wisdom, whose purpose is to live in a flourishing Christian community. Law is a necessary institution in such a community, and just laws will reflect directly (*specificatio*) or indirectly (*determinatio*) the universal morality of natural law.

Reminder of learning outcomes

By this stage you should be able to:

- **explain the natural law theory of Aquinas, in particular the relation of natural law to divine law and human law, and the importance of the distinction between *specificatio* and *determinatio* in the generation of law.**

2.4 Laws that uplift human personality

An example of a 20th century figure demonstrating this type of natural law thinking in action is Martin Luther King Junior. King was an African-American civil rights leader, activist and Christian minister. He was murdered in 1968. This quotation is taken from a letter he wrote while in Birmingham, Alabama Jail in 1963 following his arrest on a civil rights peaceful protest. He writes to other Christian leaders:

> There are two types of laws: there are just and there are unjust laws. I would agree with Saint Augustine that 'an unjust law is no law at all'.
>
> Now what is the difference between the two? ...A just law is a man-made code that squares with the moral law or the law of God. An unjust law is a code that is out of harmony with the moral law. To put it in the words of St Thomas Aquinas, an unjust law is a human law that is not rooted in eternal and natural law. Any law that uplifts human personality is just. Any law that degrades human personality is unjust.

If you add 'Critically discuss' you have a sample exam question.

ACTIVITY 2.4

What do you think King means by laws that uplift human personality?

Can you think of any examples?

Can you think of any that degrade it?

Can you think of any other words for 'personality' in this context?

No feedback provided.

In considering natural law and its relationship to our laws and modern states today, it is important to think of how this relates to notions of natural law and law's purpose. Do you think natural law – at least as you currently understand it – has any relevance to modern states: if so, in what ways? Has religion got anything to do with this?

2.5 Social contract and states of nature

From the 16th century – the 1500s onwards until about the 1800s – there were various thinkers who drew on a new way of thinking of the relationship between the human and society or the state. The individual becomes more central with the enlightenment notion that we are all somehow by nature free, equal and possessing the powers of reason. In this sense, we are in a state of nature and voluntarily agree to remove ourselves from that by forming together by way of a contract or social agreement to create a state. This creates a foundation for political and legal power and legitimacy over us. This takes a variety of guises from Thomas Hobbes to John Locke to Jean-Jacques Rousseau and they have different views of what we are like as individuals in the state of nature, which translate into different types of state. Take a look at Locke and Rousseau's own writings in Freeman, paras 2-022 and 2-023.

Think about these methods and theories. You should connect these to Hobbes in Chapter 3 and to Rawls's theory of justice discussed in Chapter 10 of the module guide. Hobbes is considered here as part of the foundation of positivism in law – it is on the creation of the state – Hobbes's Leviathan – that we have the creation of 'just' and 'unjust' laws, and laws that obligate us to each other. For further details, see Chapter 3 of the module guide. John Locke's version of the social contract seeks to ensure the state enshrines already existing natural rights, especially to freedom of the person and by extension property rights. This connects to Nozick and can also be connected to Marx – see Chapters 10 and 11 of the module guide.

Social contract and natural rights theories fell out of fashion with the horrors of the French Revolution, which culminated in dictatorship and mass executions at the end of the 1700s/early 1800s. It is these excesses that Bentham has in mind when he talks about natural rights as 'nonsense on stilts'. Connect this to Chapter 3 of the module guide and your work on Bentham and then Austin in relation to the command theory and classical positivism of the 19th century.

2.6 Modern natural law theory I: Finnis[†]

[†] You may also find it useful to read Hart's introduction to the ideas of natural law in Chapter 8 of his *The concept of law*.

Modern natural law theory is an attempt to sustain the natural law theorist's project of exposing and emphasising the importance of the connections between law and morality, but which has had to face squarely the objections of legal positivists. John Finnis was a student of Hart, and one of the strengths of his natural law theory is how seriously it takes the insights of positivism. He ultimately concludes, however, that positivism is at best a partial, and at worst a fundamentally flawed, theory of law.

2.6.1 Finnis's ethical theory

Two major arguments against natural law theory must be addressed by any modern natural law theorist. The first is **moral scepticism**, which doubts universal moral truths. Moral scepticism has itself been attacked as incoherent or nonsensical, but the debate remains a live one. Clearly, if moral scepticism is right, then natural law theory is hopeless, for there would be no objective moral standards for humans to discern through their powers of reason that could connect with the law. You should remain aware of this issue, in part because it is a necessary backdrop for understanding Finnis's moral theory, but more generally to understand the broader kind of philosophical challenge that a natural law theory might face. It is well beyond the scope of this course to study in detail the arguments of moral sceptics and their respondents.

The second argument concerns the way in which we might know what morality requires. You may have heard of the **fact/value distinction**, which is akin to the distinction between description and prescription, or the factual and the normative. The fact/value distinction is the distinction between statements which **describe** some aspect of reality (e.g. 'Elizabeth II is Queen of England'), and statements which **evaluate** some aspect of reality, or **prescribe** some behaviour (e.g. 'Killing the innocent is wrong' or 'Do unto others as you would have them do unto you'). The leading philosopher of the Scottish Enlightenment, David Hume (1711–76), famously pointed out that one cannot validly infer or derive evaluative propositions from factual ones; the point is typically put thus: 'One cannot derive an "ought" from an "is".' G.E. Moore called this fallacy the 'naturalistic' fallacy. A common example is: 'Because of their biology, women can bear children; therefore, women **ought** to bear children, and it is morally good that they do so, and immoral for them to avoid having children.' It is fallacious to reason from a description of women (that they have the capacity to bear children) to the moral principle that they **ought** to bear children. How does this relate to your natural law theory course? You will have noticed that one of the principal organising ideas of natural law theory is that it looks to the nature of man/humans, or certain aspects of human nature – sociability, powers of reason and so forth. These are all descriptions of humans, albeit intended to be more or less ultimate descriptions of an essential nature. But, from these characterisations, we are supposed to derive moral principles by which humans should guide their lives. But this reasoning, as we have just seen, is fallacious.

The argument, then, is that the natural law tradition is founded on the fallacy of deriving **ought** from **is**, and it is not obvious how this argument can be countered.

John Finnis tackles this issue head-on, denying that the natural law tradition (especially as it is represented by Aquinas) is founded on the derivation of 'ought' from 'is'. Rather, he says, natural law theory is founded on man's ability to grasp values **directly**, not inferring them from the facts of the world. According to Finnis, there are basic values that underlie the human appreciation of the value of any particular thing and all man's purposive activities. As presented in his first major work on the topic, *Natural law and natural rights*, originally published in 1980, these values are life, knowledge, play, aesthetic experience, friendship, religion (not in the sense of any particular religion, but in the value of seeking to understand one's place in the universe) and practical reasonableness (the value of pursuing the other values in a reasonable fashion). These seven values are not inferred from facts about the world or man, but are appreciated directly by humans as valuing beings. While Finnis admits that there can be debates

about the list of basic values, he is insistent that the basic values are irredeemably plural and 'incommensurable', that is, the good of one cannot be directly measured against the good of another on some common scale. Therefore, it is **not** the case that if one is presented with an opportunity to play or enhance one's knowledge, one could detect that one had an opportunity to get seven units of play but only five units of knowledge, and so decide to play. Choosing to pursue one value rather than another is not a simple process of this kind. Furthermore, the seven basic values are not mere manifestations of some more basic or master value, such as pleasure, or utility.

SELF-ASSESSMENT QUESTIONS

1. **What is the 'naturalistic' fallacy? Why does it undermine natural law theory?**
2. **What is Finnis's response to the claim that natural law derives *ought* from *is*?**
3. **What are the basic values that Finnis describes? Can they be reduced to some more fundamental value?**

2.6.2 Finnis's natural law theory of law and the criticism of positivism

The essential claim that Finnis makes about the law is that it is a social institution. Its purpose is crucial, which is to regulate the affairs of people and thus contribute to the creation of a community in which all people can flourish (i.e. a community in which everyone can realise the seven different basic values). In this way, the law is a moral project. Therefore, in order to rightly describe the law, one must take the position of a person who examines the law with this purpose in mind (i.e. the practically reasonable person who grasps the seven basic values and the law's purpose in helping people to realise them). This provides a clear connection between moral philosophy and legal philosophy. Whether one's description of law is correct or not will depend upon whether one's moral views are correct, for one's moral views will inform the way in which one conceives of the project of law. Finnis argues that positivism fails to provide a full or accurate picture of law. While Finnis welcomes the insights into the nature of law that have originated with positivists, in particular the positivism of Hart, he denies that these insights provide a sufficient theory of law.

ACTIVITY 2.6

Read Freeman, Chapter 2 'Natural law', extract by Finnis, J.M. 'Natural law and natural rights, para. 2–025 and answer the following question:

What does Finnis mean by the 'focal' concept of law, and why does he not intend to explain our 'ordinary' concept of law?

Feedback: see end of guide.

REMINDER OF LEARNING OUTCOMES

By this stage you should be able to:

- **explain Finnis's modern natural law theory, in particular his employment of the 'focal meaning' or 'central case' to determine the subject matter of legal theory, his reference to self-evident basic values, and his characterisation of practical reason.**

2.7 Modern natural law theory II: Fuller

Unlike Finnis, Fuller did not aim to produce a morality of law on the basis of a general moral theory in keeping with the ancient natural law traditions; rather, he sought to explain the moral content in the idea of 'the rule of law' (i.e. governance by rules and judicial institutions as opposed to other sorts of political decision-making or ordering, such as military command or bureaucratic administration). The morality he describes is morality as 'legality', meaning morally sound aspects of governing by rules. For this reason, Fuller is often credited with devising a 'procedural' natural law theory, in that he does not focus on the substantive content of legal rules and assess them as to whether they are moral or not, but rather concerns himself with the requirements of just law-making and administration.

Activity 2.7

Read Freeman, Chapter 2 'Natural law', extract by Fuller, L.L 'The morality of law', para. 2–024 and answer the following questions:

a. **What are the problems with Rex's behaviour? What are the eight principles of the morality of law, according to Fuller?**

b. **Do they, in your opinion, capture the morality of the law?**

c. **What do you make of Hart's criticism (*Essays in jurisprudence and philosophy,* p.350) that Fuller's 'principles of legality' 'perpetrate a confusion between two notions it is vital to hold apart: the notions of purposive activity and morality. Poisoning is no doubt a purposive activity, and reflections on its purpose may show that it has its internal principles. ("Avoid poisons however lethal if they cause the victim to vomit", or "Avoid poisons however lethal if their shape, color, or size, is likely to attract notice.") But to call these principles of the poisoner's art "the morality of poisoning" would simply blur the distinction between the notion of efficiency for a purpose and those final judgments about activities and purposes with which morality in its various forms is concerned.'**

Feedback: see end of guide.

Summary

Finnis's natural law theory is based on the direct appreciation of **self-evidently valuable basic goods** – the purpose of law is to provide conditions in which these goods can be realised. His theory is Aquinean in the sense that he follows Aquinas's general theory as regards the *specificatio/determinatio* distinction and its general outlook on the attitude subjects must take to unjust laws. Fuller's natural law theory is concerned to vindicate the notion of 'legality' or the rule of law, to provide a sense in which rule by law, as opposed to executive fiat or administration, is distinctive in a morally significant way.

2.8 The continuing debate over the connection between law and morality

Although working through this chapter will provide you with the basic ideas which underlie natural law thought, the question of the connection between law and morality is a vast one, and perhaps in the Western philosophical tradition, the most important and deeply contested question there is. You should bear this question in mind as you work through the succeeding chapters. Next you will begin to study the legal philosophy of Hart, who, though a positivist, was always sensitive to the natural lawyer's claims, and repeatedly addressed the different connections he saw between morality and law. Similarly, when you study Dworkin, you will examine the work of a theorist, who, like natural lawyers, saw an intimate connection between morality and law, although from a quite different perspective. Dworkin argued that his theory refutes positivism, in part for its failure to account for the role moral theory plays when judges decide cases. There is a mass of literature on this subject, and while we have looked at Finnis's work in detail, there are also modern natural lawyers of different kinds. For further readings, consider the extracts by Mead and Greenawalt in Chapter 2 of Freeman. If you would like to delve further, see the following:

- **Murphy, M. *Natural law in jurisprudence and politics*. (Cambridge: Cambridge University Press, 2006) [ISBN 9780521108089].**

This takes an original approach to the central issues of modern natural law theory, offering an interesting alternative to the work of Finnis. Those interested in pursuing a deeper understanding of Finnis's natural law theory should consult the combined Issues 3 and 4 of Volume 13 (2007) of *Legal Theory*, a special issue devoted to papers on Finnis's work and concluding with a reply by Finnis.

- **Gardner, J. 'Nearly natural law' (2007) 52 *American Journal of Jurisprudence* 1 (available in HeinOnline via the Online Library).**

Gardner provides an exclusive positivist's perspective on the questions natural law theory raises. As preliminary reading one should look at the now classic:

- **Gardner, J. 'Legal positivism: 5½ myths' (2001) 46 *American Journal of Jurisprudence* 199 (available in HeinOnline via the Online Library).**

Not explicitly placed in the natural law tradition, though it relies extensively on Aquinas's thought, is the rather more demanding:

- **Rodriguez-Blanco, V. *Law and authority under the guise of the good*. (Oxford: Hart Publishing, 2014) [ISBN 9781849464499].**

This book argues that we can understand the nature of legal authority and normativity if we understand both how agents exercise their practical reason under legal directives and commands, and how the agent engages their practical reason by following legal rules grounded on reasons for actions as good-making characteristics. This will also allow us to draw distinctions between truly normative legal systems and only seeming, non-genuine ones.

Reminder of learning outcomes

By this stage you should be able to:

- **explain in detail Fuller's 'inner morality of law'**
- **critically assess these various versions of natural law theory in light of the attack on natural law by legal positivists.**

Further reading

- **Coleman, J. and S. Shapiro (eds) *Oxford handbook of jurisprudence and the philosophy of law.* (Oxford: Oxford University Press, 2002) Chapter 1 (John Finnis) 'Natural law: the classical tradition', and Chapter 2 (Brian Bix) 'Natural law: the modern tradition'.**
- **Morrison, W. *Jurisprudence from the Greeks to post-modernism.* Chapter 2 'Origins: Classical Greece and the idea of natural law' and Chapter 3 'The laws of nature, man's power, and God: the synthesis of mediaeval Christendom'.**

Sample examination questions

Question 1 Why is natural law sometimes historically associated with revolutionary movements, and sometimes with social conservatism? Does this varying association detract from its plausibility as a theory of law?

Question 2 Besides its undoubted relevance to the history of legal thought, does natural law theory matter any more?

Advice on answering the questions

Question 1 This question concerns the way in which, under traditional natural law theory, natural law is regarded as a 'higher' law by which positive law is to be judged. Since the natural law is the true dictate of morality, what any person regards as ultimately morally right will provide the content of the natural law, and this vantage point of criticism is available equally to the revolutionary and the conservative. Because of this, the content of natural law will be as controversial as morality is. In one respect, this is just as it should be, for if on the one hand morality is controversial, so should the content of natural law be; but on the other hand, it does seem to detract from the plausibility of natural law's claim that law is intimately connected to morality. For the law seems to be settled at any one time in a way that morality is not, and this would suggest that the connection, if any, is a weak one, and a positivist might claim, as Hart did, that any legal system need only give effect to a minimum content of natural law. In other words, the law must respect basic human nature in so far as it fosters human survival with laws against murder, theft and so on; but beyond that, it is not determined by morality at all. Much can also be said here about Finnis's and Fuller's natural law positions. Finnis tries to render the connection between morality and law in a much more nuanced fashion, which aims to preserve natural law's critical perspective, while giving little comfort to the revolutionary who fails to see the inherent moral project of the law and would seek to overthrow legal structures *per se*. Similarly, the appeal of Fuller's natural law theory, focusing as it does on process rather than content, would not oscillate so dramatically between reform and conservatism over time.

Question 2 This question requires an exploration of the contemporary relevance of natural law theory, in particular the natural law theories of Finnis and Fuller, and of people like Moore and George, if you have read more widely. It demands an examination of whether natural law can withstand the central claim of positivism, that it illegitimately glorifies a social institution as necessarily moral, whereas it should be regarded as a human practice, a social technique, which can be put to good or bad ends. You might also consider whether the prevalent moral relativism of a secular age, or philosophical scepticism, has undermined natural law thinking. Finally, does natural law theorising avoid committing, in one way or another, the 'naturalistic fallacy'? Notice how easily this fallacy can be committed – Fuller's description of the principles which make up the 'inner morality of law' commits just this fallacy if Hart is correct in judging him to have mistakenly treated principles of effectiveness as principles of morality.

Reflect and review

Look through the points listed below. Are you ready to move on to the next chapter?

Ready to move on = I am satisfied that I have sufficient understanding of the principles outlined in this chapter to enable me to go on to the next chapter.

Need to revise first = There are one or two areas I am unsure about and need to revise before I go on to the next chapter.

Need to study again = I found many or all of the principles outlined in this chapter very difficult and need to go over them again before I move on.

Tick a box for each topic.

	Ready to move on	Need to revise first	Need to study again
I can describe the origins of natural law in ancient Greece and Rome and the basic ideas which inform the natural law tradition.	☐	☐	☐
I can explain the natural law theory of Aquinas, in particular the relation of natural law to divine law and human law, and the importance of the distinction between *specificatio* and *determinatio* in the generation of law.	☐	☐	☐
I can explain Finnis's modern natural law theory, in particular his employment of the 'focal meaning' or 'central case' to determine the subject matter of legal theory, his reference to self-evident basic values, and his characterisation of practical reason.	☐	☐	☐
I can explain in detail Fuller's 'inner morality of law'.	☐	☐	☐
I can critically assess these various versions of natural law theory in light of the attack on natural law by legal positivists.	☐	☐	☐

If you ticked 'need to revise first', which sections of the chapter are you going to revise?

		Must revise	Revision done
2.1	The rise of natural law in ancient Greece and Rome	☐	☐
2.2	The natural law of Aquinas: structure	☐	☐
2.3	The natural law of Aquinas: legal reason, human law and the obligation to obey the law	☐	☐
2.4	Laws that uplift human personality	☐	☐
2.5	Social contract and states of nature	☐	☐
2.6	Modern natural law theory I: Finnis	☐	☐
2.7	Modern natural law theory II: Fuller	☐	☐
2.8	The continuing debate over the connection between law and morality	☐	☐

Part III Legal positivism

In this part of the module guide, we look at the idea of law as a social construction or fabrication. The chapters are divided into imperative or command theories of law. These highlight the notion of sovereignty and the rise of positivism through the work of Hobbes, Bentham and Austin. The next chapters then focus on more modern positivism in the form of HLA Hart, Hans Kelsen and Joseph Raz.

In the book symposium on Gerald Postema's Legal philosophy in the twentieth century: the common law world (2011) in (2017) 8(3) Jurisprudence:

- There are a number of reviews focusing on different aspects of Postema's book, raising issues relevant to this module in general. This should be considered as further reading to enrich and deepen your understanding of aspects of legal positivism and normativity in particular.
- In addition, you may be interested in Torben Spaak's article 'Jurisprudence, legal positivism, conventionalism and the normativity of law' published online in the same journal on 19 December 2017. His concern, as stated in his abstract, is 'whether we can account for the normativity of law within the framework of legal positivism and whether the idea of a social convention could be of help in this endeavour'.

3 Imperative or command theories of law

Contents

Introduction

This chapter considers what can be regarded as the earliest modern legal theory in England – the imperative or 'command' theory of law, associated with Jeremy Bentham and John Austin. The theory is based in a conception of sovereignty derived from long traditions of political thought to which Thomas Hobbes was a chief contributor, but adapted in significant ways to what Bentham and Austin understood as the political, social and legal conditions of their times. The chapter will first consider the influence of Thomas Hobbes but most attention will be devoted to Austin since his influence on the general course of development of legal theory in the UK has been much greater than that of Bentham, while Hobbes has been strangely neglected.

In reading the material, you are asked to note how Austin's ideas differ from Hobbes' or Bentham's and also to note what each of these writers was reacting **against**. There are also a number of general questions to consider:

- What was it in earlier legal thought that they were so anxious to discard and deny?
- What was the role of utilitarian considerations in their theories?
- Hobbes is considered the father of English political liberalism, while Bentham is usually considered a liberal thinker. How far is this the case with Austin too? Can Austin be considered to offer in some sense an anti-liberal legal theory?
- What is Austin's view of the nature of legal and political authority?
- Why did Austin (as did Hobbes before him) consider that international law was not really law but a form of positive morality? Why did he consider constitutional law in a similar way?
- Are there fundamental problems both with the idea of law as a command and with the Austinian theory of sovereignty?
- How apt are Hart's criticisms of the theory he claims to have discerned from Austin?

In addition, you should reflect on the process of reading and understanding a writer's words, particularly those from an earlier historical period. Should we construct a model based on their writings which we take to have trans-historical meaning, or should we seek to understand their theories in the social, economic and political conditions of their times?

Learning outcomes

By the end of this chapter and the relevant reading, you should be able to:

- **adopt an effective approach to reading original extracts from key writers**
- **critically discuss the emergence of legal positivism and the core meaning of legal positivism**
- **discuss the advantages and disadvantages of a theory of law based on the idea of the commands of the sovereign**
- **analyse the social and political context in which Austin wrote and how Hart has interpreted his project.**

Core text

- **Freeman, Chapter 3 'Bentham, Austin and classical English positivism'.**
- **Freeman, Chapter 2 'Natural law', extract from Hobbes, T. 'Leviathan', para. 2-021.**

Further reading

- **Cotterrell, R. *The politics of jurisprudence: a critical introduction to legal philosophy*. Chapter 3 'Sovereign and subject: Austin and Bentham'.**
- **Morrison, W. *Jurisprudence: from the Greeks to post-modernism*. (London: Cavendish, 1997) [ISBN 9781859411346] Chapter 9 'John Austin and the misunderstood birth of legal positivism'.**
- **Harris, J.W. *Legal philosophies*. (Oxford: Oxford University Press, 1997) [ISBN 9780406507167] Chapter 3 'The command theory of law'.**

3.1 The birth and development of secular or 'positive' theories of law: the case of Thomas Hobbes

3.1.1 Introduction

The work of Thomas Hobbes[†] (1588–1679) constitutes the founding moment for the stream of political philosophy and political orientation we call liberalism. His work provides a transition from the medieval intellectual synthesis – wherein God was seen as the creator of life and God's presence was seen in the organisation and life flows of the earth – to a more secular foundation for government. In many respects Hobbes is the real father of legal positivism, except that he was several hundred years ahead of his time.

In his famous *Leviathan* (published in 1651, just after the English Civil War) Hobbes sought to convince his audience – the country's ruling elite – of a new structure of legitimation for government. Or, to put it another way, he came up with a new way of describing the nature of government and justifying the need to obey it. This theory of legitimacy, or argument for why we (the 'subjects') should give it our obedience, was founded on a narrative or story of mankind's nature – our position in the world – that gave us an understanding of our basic problems of existence. We were meant to see ourselves as actors in this narrative and be led to agree/consent that we would as rational creatures accept the need for a strong government. His legitimating idea for modernity was a **social contract**.

In the midst of a social order facing the chaos of the English Civil War, Hobbes presented a new social ethic, that of individual self-assertion. The world was to become a site for individuals to follow their desires, to plan their personal and social projects and to realise their power. Whatever the final power in the cosmos, it was certain, Hobbes stated, that as we are in charge of civil society, we could fashion a political instrument to allow us to pursue our ends, our interests. Expansion and progress were possible; but only if we could first create the framework of a stable social order: the first and greatest enemy was social chaos. We overcome this through the rational calculation of individual humans based on their experience and understanding of the human condition.

When we read we are subjected to the rhetorical ploys of the writer. Hobbes is still seen as very important, in part because over the centuries since he wrote many people have considered that he captures certain key aspects of the human condition. In approaching his work, as with that of all the other writers covered in this module, we need to become aware of his foundational assumptions, the way he presents the facts, the often subtle way he leads the audience into his way of appreciating things, and then how he makes his conclusions seem to flow logically and naturally from what proceeds.

Hobbes gives a narrative of the 'natural condition of mankind', which, some think, he presented in such a way that almost any government would seem preferable to the 'solitary, poor, nasty, brutish and short' life he gave pre-social-contract man. In this respect Hobbes is sometimes regarded as the father figure of totalitarian government and as presenting an unnecessarily pessimistic and solitary view of the human condition. Also feminists do not like his images for he begins with an idea of **solitary men**, not of people living in families; feminists point out that humans do not begin life as individuals – they begin life as dependent babies and are made into individuals by socialisation). For an interesting take on this and a contrasting view from a feminist perspective, see Held, V. 'Non-contractual society: a feminist view' in Hanen, M.P. and K. Nielsen (eds) *Science, morality, and feminist theory* (Calgary: University of Calgary Press, 1987).

Hobbes certainly highlights the necessity to obey strong government; he argues for a sovereign authority which wields supreme power, to save men from the evils of the 'state of nature' in which man's essentially egoistical nature means that life is a 'war of all on all'. Hobbes is also regarded as the first political philosopher who developed his theory on 'materialist' foundations, which means he took a strictly 'scientific' view of humans and their place in the world.

[†] Hobbes was born when on 5 April 1588 the news that the Spanish Armada had set sail shocked the heavily pregnant wife of his father, also called Thomas Hobbes, a rather disreputable and drunken vicar of Westport, into labour. The new Thomas Hobbes was later to state: 'My mother dear did bring forth twins at once, both me, and fear'. Philosophical liberalism was in a real sense founded upon this emotion, and upon Hobbes' desire to preserve his earthly domain against the prospect of death.
Most of Hobbes' adult life was spent as tutor and secretary to the Cavendishes, Earls of Devonshire. Scholars have noted how the life experiences of Hobbes (as with John Locke) were exempt from the customary familial relationships; Hobbes lived a life more of contract than affection. Although he was courageous in the writing of unpopular ideas, Hobbes took pride in his efforts to escape any form of physical danger. As well as his self-imposed exile in France while the civil war raged in England, he regularly took large quantities of spirits and threw up to 'cleanse the system' (although he despised drunkenness), played tennis, sang at the top of his voice to exercise his lungs and exorcise the spirits, and even washed regularly (a rather unusual habit at the time!). He gave up eating red meat in middle age. And in an age not noted for the length of the average life expectancy, he lived to be 91. Hobbes believed that through knowledge of the real human condition we could prolong individual and social life. Understanding the role of law was crucial and here Hobbes developed the idea of law as convention, and society as an artefact – ideas rather submerged in earlier writings.

3.1.2 Reading a text – *Leviathan* – in context

We say that to study jurisprudence and legal theory you should read the original texts. Below are extracts from *Leviathan*. What should you be looking for?

Hobbes put this text together in the period 1648–51. His target audience was a very small group of people; in particular, members of the exiled Royal English Court in France and other leading individuals in England. What was the background to his writing? Hobbes wrote at the time of the passing of the superordinate authority of the Christian church, where religious authority, instead of being a binding force, had itself become a major source of conflict in Europe. What should replace the claims to loyalty of religious brotherhood (and religiously orientated natural law) or localised feudal relations? The Thirty Years' War, the bitterest European conflict yet seen, had laid waste to much of central Europe and drastically reduced the German-speaking population, among others. Few people thought 'globally' as we mean it today; but, using our current language, the major blocs of that time appear as a divided European Christendom, with the strongest powers being the Chinese Empire, localised in its concerns, and the Islamic Ottoman Empire, somewhat at odds with Islamic Persia. For centuries Islam, not Christian Europe, had been the place of learning, providing a world civilisation, polyethnic, multiracial and spread across large sections of the globe.

This was also a time when the great voyages of European discovery were merging into the imperialist projects that have fashioned much of the political and social contours of the modern world. Christian Spain finally destroyed the last Muslim (Moorish) enclave – the Emirate of Granada – in 1492, in the aftermath of which Columbus was allowed to sail in search of a new route to India. From that time, the ships and military power of Europeans entered into the wider realms of the globe, overwhelming cultures and peoples that could not withstand the onslaught, creating new social and territorial relations in a European image. Driving this world shift in power was an existential perspective on life itself. Hobbes postulated the basis of the social bond – in place of dynasties, religious tradition or feudal ties – as rational self-interest exercised by calculating individuals. As bearers of subjective rationality, individuals were depicted as forming the social order and giving their allegiance to a government, a sovereign, because it was in their rational self-interest to do so; thus the metaphor for the social bond he offered was contractual, not an image of traditional or feudal ties. The sovereign was now to have a particular territory, which many have rather loosely termed the 'nation-state' – you may note that the Peace of Westphalia, usually referred to in international relations or political sociology as beginning the era of the nation state, had been concluded in 1648.

Activity 3.1

Read the extract from *Leviathan* that follows. See also Freeman, Chapter 2, para. 2–021. You may find it difficult to begin with, as the English language has changed a good deal since it was written.

a. **Consider the picture of the human condition that Hobbes presents: do you find it realistic? Why?**

b. **How apt is the idea of a social contract to found the legitimacy of modern government?**

c. **Should ensuring social survival be the basic aim of the law (note later how this influences the 'minimum content of natural law' argument used by Hart) or should the law help direct the conditions for human flourishing?**

Write notes on these questions as you proceed.

No feedback provided.

Leviathan Extract 1: The introduction

NATURE (the Art whereby God hath made and governs the world) is by the *Art* of man, as in many other things, so in this also imitated, that it can make an Artificial Animal. For seeing life is but a motion of Limbs, the beginning whereof is in some principal part within; why may we not say that all *Automata* (Engines that move themselves by springs and wheels as doth a watch) have an artificial life? For what is the *Heart*, but a *Spring*, and the *Nerves*, but so many *Strings*; and the *Joints*, but so many *Wheels*, giving motion to the whole body such as was intended by the Artificer? Art goes yet further, imitating that rational and most excellent work of nature, *Man*. For by art is created that great LEVIATHAN called a COMMON-WEALTH, or STATE (in Latin, CIVITAS) which is but an Artificial Man; though of greater stature and strength than the Natural, for whose protection and defence it was intended; and in which the *Sovereignty* is an Artificial *Soul*, as giving life and motion to the whole body. The *Magistrates*, and other *Officers* of Judicature and Execution, artificial *Joints*; *Reward* and *Punishment* (by which fastened to the seat of the Sovereignty, every joint and member is moved to perform his duty) are the *Nerves*, that do the same in the body natural; the *Wealth* and *Riches* of all the particular members are, the *Strength*; *Salus Populi* (the *people's safety*) its *business*; *counselors*, by whom all things needful for it to know, are suggested unto it, are the *Memory*; *Equity* and *Laws*, an artificial *Reason* and *will*; *concord*, *health*; *sedition*, *sickness*; and *civil war*, *death*. Lastly, the *Pacts* and *Covenants*, by which the parts of this body politic were at first made, set together, and united, resemble that *Fiat*, or the *Let us make man*, pronounced by God in the creation.

To describe the nature of this artificial man, I will consider

First, the *Matter* thereof, and the *Artificer*, both which is *Man*.

Secondly, *How*, and by what *Covenants* it is made; what are the *Rights* and *just Power* or *Authority* of a *Sovereign*, and what it is that *preserveth* and *dissolveth* it.

Thirdly, what is a *Christian Common-wealth*.

Lastly, what is the *Kingdom of Darkness*.

Concerning the first, there is a saying much usurped of late, that *wisdom* is acquired, not by reading of *books*, but of men. Consequently whereunto, those persons that for the most part can give no other proof of being wise, take great delight to show what they think they have read in men, by uncharitable censures of one another behind their backs. But there is another saying not of late understood, by which they might learn truly to read one another, if they would take the pains; and that is, *Nosce te ipsum*, *Read thyself*: which was not meant as it is now used to countenance either the barbarous state of men in power towards their inferiors; or to encourage men of low degree to a saucy behaviour towards their betters; but to teach us that for the similitude of the thoughts, and passions of one man, to the thoughts and passions of another. Whosoever looketh into himself and considereth what he doth, when he does *think, opine, reason, hope, fear,* etc., and upon what grounds, he shall thereby read and know what are the thoughts and passions of all other men, upon the like occasions. I say the similitude of passions, which are the same in all men, *desire, fear, hope*, etc.; not the similitude of objects of the passions, which are the things *desired, feared, hoped*, etc.: for these the individual constitution and particular education do so vary, and they are so easy to be kept from our knowledge that the characters of man's heart, blotted and confounded as they are with dissembling, lying, counterfeiting, and erroneous doctrines, are legible only to him that searcheth hearts. And though by men's actions we do discover their design sometimes, yet to do it without comparing them with our own and distinguishing all circumstances by which the case may come to be altered, is to decipher without a key, and be for the most part deceived by too much trust or by too much diffidence; as he that reads is himself a good or evil man.

But let one man read another by his actions never so perfectly, it serves him only with his acquaintance, which are but few. He that is to govern a whole Nation must read in himself not this or that particular man, but mankind: which though it be hard to do, harder than to learn any language or science; yet, when I shall have set down my own reading orderly and perspicuously, the pains left another will be one to consider, if he also finds not the same in himself. For this kind of doctrine admitteth no other demonstration ...

...whatsoever is the object of any man's appetite or desire, that is it which he, for his part, calleth *Good*: And the object of his hate, and aversion, *Evil*; and of his contempt, *Vile* and *Inconsiderable*. For these words of Good, Evil, and Contemptible are ever used with relation to the person that useth them: There being nothing simply and absolutely so; nor any common Rule of Good and Evil, to be taken from the nature of the objects themselves; but from the person of the man (where there is no Common-wealth); or (in a Common-wealth), from the person that representeth it, or from an Arbitrator or Judge, whom men disagreeing shall by consent set up and make his sentence the Rule thereof ...

So much for the introduction, now for Hobbes' narrative of the natural condition of mankind.

Leviathan Extract 2: CHAPTER XIII

Of the NATURAL CONDITION of Mankind, as concerning their felicity,† and Misery

† Felicity = happiness (from Latin *felix* = happy).

Nature hath made men so equal in the faculties or body and mind as that though there be found one man sometimes manifestly stronger in body or of quicker mind than another; yet when all is reckoned together, the difference between man and man, is not so considerable as that one man can thereupon claim to himself any benefit, to which another may not pretend as well as he. For as to the strength of body, the weakest has strength enough to kill the strongest either by secret machination or by confederacy with others that are in the same danger with himself.

And as to the faculties of the mind, (setting aside the arts grounded upon words, and especially that skill of proceeding upon general and infallible rules called Science; which

very few have and but in few things; as being not a native faculty, born with us; nor attained (as Prudence), while we look after somewhat else). I find yet a greater equality amongst men than that of strength. For prudence is but experience; which equal time equally bestows on all men, in those things they equally apply themselves unto. That which may perhaps make such equality incredible is but a vain conceipt of one's own wisdom, which almost all men think they have in a greater degree than the Vulgar; that is, than all men but themselves and a few others, whom by fame or for concurring with themselves, they approve. For such is the nature of men that howsoever they may acknowledge many others to be more witty, or more eloquent or more learned; yet they will hardly believe there be many so wise as themselves: For they see their own wit at hand and other men's at a distance. But this proveth rather that men are in that point equal, than unequal. For there is not ordinarily a greater sign of the equal distribution of anything, than that every man is contented with his share.

From this equality of ability, ariseth equality of hope in the attaining of our Ends. And therefore if any two men desire the same thing,† which nevertheless they cannot both enjoy, they become enemies; and in the way to their end (which is principally their own conservation, and sometimes their delectation only), endeavour to destroy or subdue one another. And from hence it comes to pass that where an Invader hath no more to fear than another man's single power; if one plants, sows, builds, or possesses a convenient seat,† others may probably be expected to come prepared with forces united to dispossess and deprive him not only of the fruit of his labour, but also of his life or liberty. And the Invader again is in the like danger of another.

† 'Desire the same thing': 'thing' in a material sense, such as an object or asset.

† 'Convenient seat': attractive mansion or estate.

And from this diffidence of one another, there is no way for any man to secure himself so reasonably as Anticipation; that is, by force or wiles, to master the persons of all men he can, so long, till he sees no other power great enough to endanger him: And this is no more than his own conservation required, and is generally allowed. Also because there be some that taking pleasure in contemplating their own power in the acts of conquest, which they pursue farther than their security requires; if others, that otherwise would be glad to be at ease within modest bounds, should not by invasion increase their power, they would not be able, long time, by standing only on their defence, to subsist. And by consequence, such augmentation of dominion over men being necessary to a man's conservation, it ought to be allowed him.

Again, men have no pleasure (but on the contrary a great deal of grief) in keeping company, where there is no power able to over-awe them all. For every man looketh that his companion should value him at the same rate he sets upon himself: And upon all sign of contempt, or undervaluing, naturally endeavours, as far as he dares (which amongst them that have no common power to keep them in quiet, is far enough to make them destroy each other), to extort a greater value from his contemners by dommage; and from others, by the example.

So that in the nature of man, we find three principal causes of quarrel. First: Competition; Secondly: Diffidence; Thirdly: Glory.

The first, maketh men invade for Gain; the second, for Safety; and the third, for Reputation. The first uses Violence to make themselves masters of other men's persons, wives, children, and chattel; the second, to defend them; the third, for trifles as a word, a smile, a different opinion, and any other sign of undervalue, either direct in their persons or by reflexion in their kindred, their friends, their nation, their profession or their name.

Hereby it is manifest that during the time men live without a common power to keep them all in awe, they are in that condition which is called War; and such a war as is of every man against every man. For war consists not in battle only or the act of fighting; but in a tract of time, wherein the Will to contend by battle is sufficiently known and therefore the notion of Time is to be considered in the nature of war; as it is in the nature of weather. For as the nature of foul weather lies not in a shower or two of rain but in an inclination thereto of many days together, so the nature of war consists not in actual fighting but in the known disposition thereto, during all the time there is no assurance to the contrary. All other time is PEACE.

Whatsoever therefore is consequent to a time of war, where every man is enemy to every man; the same is consequent to the time wherein men live without other security, than what their own strength and their own invention shall furnish them with. In such condition, there is no place for Industry because the fruit thereof is uncertain and

consequently no culture of the earth; no navigation nor use of the commodities that may be imported by sea; no commodious building; no instruments of moving and removing such things as require much force; no knowledge of the face of the earth; no account of time; no arts; no letters; no society; and which is worst of all, continual fear and danger of violent death; And the life of man, solitary, poor, nasty, brutish, and short.†

† 'Solitary, poor, nasty, brutish, and short': these are perhaps the most famous words in the history of English political philosophy.

It may seem strange to some man that has not well weighed these things that nature should thus dissociate and render men apt to invade and destroy one another: and he may therefore, not trusting to this inference made from the passions, desire perhaps to have the same confirmed by experience. Let him therefore consider with himself when taking a journey, he arms himself and seeks to go well accompanied; when going to sleep, he locks his doors; when even in his house he locks his chests; and this when he knows there be laws and public officers, armed, to revenge all injuries shall be done him; what opinion he has of his fellow subjects when he rides armed; of his fellow citizens when he locks his doors; and of his children and servants when he locks his chests. Does he not there as much accuse mankind by his actions, as I do by my words? But neither of us accuse man's nature in it. The Desires, and other passions of man are, in themselves, no sin. No more are the actions that proceed from those passions, till they know a law that forbids them: which till laws be made they cannot know, nor can any law be made till they have agreed upon the person that shall make it.

It may, per adventure,† be thought there was never such a time nor condition of war as this, and I believe it was never generally so, over all the world: but there are many places where they live so now. For the savage people in many places of America, except the government of small families, the concord whereof dependeth on natural lust, have no government at all; and live at this day in that brutish manner, as I said before. Howsoever, it may be perceived what manner of life where would be, where there were no common power to fear; by the manner of life, which men that have formerly lived under a peaceful government use to degenerate into, in a civil war.

† 'Per adventure' = perhaps.

But though there had never been any time wherein particular men were in a condition of war one against another; yet in all times, kings, and persons of sovereign authority because of their independence, are in continual jealousies and in the state and posture of gladiators; having their weapons pointing, and their eyes fixed on one another; that is, their forts, garrisons, and guns upon the frontiers of their kingdoms; and continually spy upon their neighbours which is a posture of war. But because they uphold thereby, the industry of their subjects, there does not follow from it that misery which accompanies the liberty of particular men.

To this war of every man against every man, this also is consequent; that nothing can be unjust. The notions of Right and Wrong, Justice and Injustice have there no place. Where there is no common power, there is no law: where no law, no injustice. Force, and fraud are in war, the two cardinal virtues. Justice and injustice are none of the faculties neither of the body nor mind. If they were, they might be in a man that were alone in the world as well as his senses and passions. They are qualities that relate to men in society, not in solitude. It is consequent also to the same condition, that there be no propriety, no dominion, no Mine and Thine distinct; but only that to be every man's that he can get; and for so long as he can keep it. And thus much for the ill condition, which man by mere nature is actually placed in; though with a possibility to come out of it, consisting partly in the passions, partly in his reason.

The passions that incline men to peace, are fear of death; desire of such things as are necessary to commodious living; and a hope by their industry to obtain them. And reason suggests convenient articles of peace, upon which men may be drawn to agreement. These articles are they, which otherwise are called the laws of nature: whereof I shall speak more particularly, in the two following chapters.

In the subsequent chapters Hobbes sets up his key figure of the **sovereign**, who lays down the conditions for human flourishing, or individual pursuit of desire by a set of rules or commands which were laws. But note: Hobbes does not say that the sovereign makes laws because of power alone: 'law, properly, is the word of him that **by right** hath command over others' (*Leviathan*, Chapter 15, emphasis added). Hobbes' narrative of the human condition and the need for man to set up a common authority leads to the social contract which authorises the sovereign. Hobbes combated

divided attention; he argued that people had come to obey too many factors and were swayed by various customs, traditions, religious beliefs, visible powers of their immediate secular rulers, feudal ties and numerous fears. Since these pulled in different directions, chaos resulted. Having given his narrative of the state of nature, Hobbes has us set up a sovereign, a 'mortal God' out of our commonly agreeing to a social contract. The sovereign – or as some more loosely call it, the state – was to make possible the emergence of a new community, one of rational individuals agreeing upon a common power to set the rules of the social games of individualist pursuit of desire and rational self-interest.

3.1.3 Hobbes: context and influence

In Hobbes we have many of the basic characteristics of legal positivism. **Law is something posited by man, it does not flow from God's creation**. Does an enactment or decision by judges need to be moral for it to be accepted as valid law? Hobbes would appear to say no: it is a matter of sanctions, of the power to enforce the positively laid down legal statement (in his lifetime the great common law judge Sir Mathew Hale tried to defend the traditions of the common law against Hobbes by arguing, in part, that the common law contained accumulated wisdom, while the image of law as the commands of the sovereign would encourage *ad hoc* decision-making or grand political agendas. The power of legislative reason emerged really in the 19th century when Bentham and others saw in the law an instrument of rational rule, to be used by the political masters and guided by a secure ethical philosophy – utility).

Many commentators have put the 'Hobbesian problem' as the basic question of social organisation in the 'modern' era. As Stephen Collins puts it:

> Hobbes understood that a world in flux was natural and that order must be created to restrain what was natural…Society is no longer a transcendentally articulated reflection of something predefined, external, and beyond itself which orders existence hierarchically. It is now a nominal entity ordered by the sovereign state which is its own articulated representative…
>
> [40 years after the death of Queen Elizabeth I] order was coming to be understood not as natural, but as artificial, created by man, and manifestly political and social …Order must be designed to restrain what appeared ubiquitous [that is, flux] …Order became a matter of power, and power a matter of will, force and calculation…Fundamental to the entire reconceptualization of the idea of society was the belief that the commonwealth, as was order, was a human creation.
> (Collins, S. *From divine cosmos to sovereign state: an intellectual history of consciousness and the idea of order in renaissance England*. (Oxford: Oxford University Press, 1989) [ISBN 9780195054583] pp.28–29.)

But how is the state going to rule? What should guide the state?

This is the continuing problem of establishing a rational political philosophy. Note that Bentham – and Austin after him – thought they had found the answer in utilitarianism. The question was not so easily solved, however, and is a fertile ground for theorising. You should contrast this with reading contemporary theorists and also the exercise in relation to Hart and his 'minimum content of natural law' (see Chapter 6.)

3.2 Jeremy Bentham

If Hobbes had argued for the idea of legislative rationality – the government taking responsibility for organising the nature of civil society and the structures of everyday interaction and using the law to do so – Bentham assumed both that this was possible and that it was the **responsibility and the duty** of government.

Jeremy Bentham was the son of a London attorney and was first educated at the elite Westminster School before being sent – at the age of 12! – to Oxford University (Queen's College) where he attended lectures on the English common law given by

Jeremy Bentham, as he can be seen today.

William Blackstone, a noted university teacher, lawyer, sometime MP and later judge. From 1763, he studied law at Lincoln's Inn and was called to the Bar in 1772. Bentham later stated that he instantly recognised Blackstone's mistakes in his lectures when **Blackstone** claimed that the common law reflected the liberties of the English subject and was founded upon **ideas of natural rights; these Bentham called 'nonsense on stilts'**. Bentham's major writings on law begin with criticism of the approach taken by Blackstone, which Blackstone had published in his *Commentaries on the laws of England* (first edition published 1765–69). Blackstone hoped the *Commentaries* would provide a map for studying the common law, and whatever the criticisms of his logic he was correct as to the influence of his work: the *Commentaries* were a fantastically successful text, going through over 40 editions, and were largely responsible for the USA remaining a common law country after independence in 1776. Bentham thought Blackstone's analysis was deficient, as it portrayed the common law as growing organically, containing the wisdom of past decisions, and did not consider the social impact of the law nor offer an image of the law as an instrument of governmental power (he considered that Blackstone was an apologist for the *status quo*).

Bentham was a reformer and to this end he differentiated **the question of what the law was** from the **question of what the law ought to be**. The 'ought' part was answered by the key criterion of judging – or as he put it, the 'sacred truth' – that 'the greatest happiness of the greatest number is the foundation of morals and legislation'. 'Enlightened self-interest' provided the key to understanding ethics, so that a person who always acted with a view to his own maximum satisfaction in the long run would always act rightly.

In his *Introduction to the principles of morals and legislation* (1789), Bentham strove 'to cut a new road through the wilds of jurisprudence' so that the greatest happiness of the greatest number was to govern our judgement of every institution and action.

You may also note that Bentham was the proponent of a total institution called the *panopticon*. This was to be an institution of perfect control and visibility; the inmate was to be constantly under the gaze of the overseer. To many this was the perfect emblem of the dangers of the modernist obsession with legislating, defining, structuring, segregating, classifying and recording.

That the modern city of reason would end in a living prison would certainly not have been Bentham's desire, but the reality of the Holocaust, the great imprisonments of the Soviet Union and the re-education camps used elsewhere in the world, testify to the dark side of the attempts to define chaos out of social life and define order with the aim of creating a utopian society. The marriage of modern state power and the claim of acting in defence of the truth needs constant attention.

In his later life a group of people around Bentham tried to create a university to adopt the utilitarian stance and provide a counter to Oxford and Cambridge. These 'Godless heathens of Gower Street' as one critic labelled them, were refused permission, although they founded University College London. In his will Bentham left his body to the institution, on condition that after it was publicly dissected and used for medical display, it would form an 'auto-icon' to be permanently displayed.

3.3 John Austin

3.3.1 Background

As a young man, John Austin's family bought him a junior commission in the army and after five years' service he began to study law in 1812. From 1818 to 1825 he practised, rather unsuccessfully, at the Chancery Bar. Austin was never a practical man but he impressed the circle of people (at the time viewed as philosophical radicals, in part for their programme of reform and their belief in utilitarianism) around Jeremy Bentham with his powers of rigorous analysis and his uncompromising intellectual honesty. In 1826, when University College London was founded, he was appointed its first professor of jurisprudence; at the time legal education was almost entirely practical and it was not possible to pursue a university degree in English law. The common law had been the subject of the lectures of William Blackstone at Oxford, which had resulted in his massive *Commentaries on the law of England*, but even as late as 1874 Dicey could give his inaugural lecture on the theme of 'was English law a fit subject for University education'! To prepare for the classes Austin spent time in Germany studying Roman law and the work of German experts on modern civil law, whose ideas of classification and systematic analysis exerted an influence on him second only to that of Bentham.

Both Austin and his wife Sarah were ardent utilitarians. When much younger, they were friends of Bentham and of James Mill, whose son John Stuart Mill was a student of Austin and later wrote a large review of the full set of lectures Sarah published after Austin's death. The review argued that Austin achieved the application of utilitarianism to law and set out the path for legal reform. A key point for Austin is that to achieve legal reform (and reform of government and social institutions through law) one has to have a very clear understanding of the nature of law itself. The first task was to rid our understanding of law of the confusions and 'mysteries' of the common law tradition. Austin tried to do this by putting 'positive law' into a political framework, taken in considerable part from Hobbes: law was part of the political relations of sovereign and subject. Austin's first lectures, in 1828, were attended by several distinguished men, but he failed to attract students and resigned his chair in 1832. In 1834, after delivering a shorter but equally unsuccessful version of his lectures, he abandoned the teaching of jurisprudence. He was appointed to the Criminal Law Commission in 1833 but, finding little support for his opinions, resigned in frustration after signing its first two reports. In 1836 he was appointed a commissioner on the affairs of Malta. The Austins then lived abroad, chiefly in Paris, until 1848 (when a revolution took place, and they lost most of their money through having to sell their house quickly), after which they settled in Surrey, where Austin became a much more conservative thinker; he died in 1859.

Austin found little success during his life: recognition came afterwards, and in large part is owing to his wife Sarah who gave him great support, both moral and economic (during the later years of their marriage, they lived primarily from her labours as a translator and reviewer). She edited his notes to publish a more complete set of his *Lectures on jurisprudence* (Austin, 1873). As for his style, read on. See also Freeman, Chapter 3 'Bentham, Austin and classical English positivism', extract by Austin 'The province of jurisprudence determined', para. 3–015.

Lecture I

> The matter of jurisprudence is positive law: law, simply and strictly so called: or law set by political superiors to political inferiors. But positive law (or law, simply and strictly so called) is often confounded with objects to which it is related by *resemblance*, and with objects to which it is related in the way of *analogy*: with objects which are *also* signified, *properly* and *improperly*, by the large and vague expression *law*. To obviate the difficulties springing from that confusion, I begin my projected Course with determining the province of jurisprudence, or with distinguishing the matter of jurisprudence from those various related objects: trying to define the subject of which I intend to treat before I endeavour to analyse its numerous and complicated parts.
>
> ...

Laws set by men to men are of two leading or principal classes: classes which are often blended, although they differ extremely; and which, for that reason should be severed precisely and opposed distinctly and conspicuously.

Of the laws or rules set by men to men, some are established by political superiors, sovereign and subject: by persons exercising supreme and subordinate government, in independent nations, or independent political societies. The aggregate of the rules thus established or some aggregate forming a portion of that aggregate, the term law, as used simply and strictly is exclusively applied. But, as contra-distinguished to natural law, or to the law of nature (meaning by those expressions, the law of God), the aggregate of the rules established by political superiors is frequently styled *positive* law, or law existing *by position*. As contra-distinguished to the rules which I style *positive morality*, and on which I shall touch immediately the aggregate of the rules, established by political superiors, may also be marked commodiously with the name of *positive law*. For the sake then of getting a name brief and distinctive at once, and agreeably to frequent usage, I style that aggregate of rules or any portion of that aggregate, positive law: though rules which are not established by political superiors, are also positive, or exist by position; if they be rules or laws in the proper signification…

Closely analogous to human laws of this second class are a set of objects frequently but *improperly* termed *laws*, being rules set and enforced by *mere opinion*, that is, by the opinions or sentiments held or felt by an indeterminate body of men in regard to human conduct. Instances of such a use of the term law are the expressions – 'The law of honour;' 'The law set by fashion;' and rules of this species constitute much of what is usually termed 'International law'.

The aggregate of human laws properly so called belonging to the second of the classes above mentioned, with the aggregate of objects *improperly* but by *close analogy* termed laws, I place together in a common class, and denote them by the term *positive morality*. The name *morality* severs them from *positive law*, while the epithet *positive* disjoins them from the *law of God*. And to the end of obviating confusion, it is necessary or expedient that they should be disjoined from the latter by that distinguishing epithet. For the name *morality* (or *morals*), when standing unqualified or alone, denotes indifferently either of the following objects, namely, positive morality *as it is*, or without regard to its merits; and positive morality *as it would be*, if it conformed to the law of God, and were therefore deserving of *approbation*.

Besides the various sorts of rules which are included in the literal acceptation of the term law, and those which are by a close and striking analogy, though improperly, termed laws. There are numerous applications of the term law, which rest upon a slender analogy and are merely metaphorical or figurative. Such is the case when we talk of laws observed by the lower animals; of laws regulating the growth or decay of vegetables; of laws determining the movements of inanimate bodies or masses. For where *intelligence* is not, or where it is too bounded to take the name of *reason* and, therefore, is too bounded to conceive the purpose of a law, there is not the *will*, which law can work on or which duty can incite or restrain. Yet through these misapplications of a *name*, flagrant as the metaphor is, has the field of jurisprudence and morals been deluged with muddy speculation.

[Having] suggested the *purpose* of my attempt to determine the province of jurisprudence: to distinguish positive law, the appropriate matter of jurisprudence, from the various objects to which it is related by resemblance, and to which it is related nearly or remotely by a strong or slender analogy: I shall [now] state the essentials of *a law* or *rule* (taken with the largest signification which can be given to the term *properly*).

Every *law* or *rule* (taken with the largest signification which can be given to the term *properly*) is a *command*. Or rather, laws or rules, properly so called, are a *species* of commands.

Now, since the term *command* comprises the term law, the first is the simpler as well as the larger of the two. But, simple as it is, it admits of explanation. And, since it is the *key* to the sciences of jurisprudence and morals, its meaning should be analysed with precision.

Accordingly, I shall endeavour, in the first instance, to analyse the meaning of '*command*': an analysis which I fear will task the patience of my hearers but which they will bear with cheerfulness or, at least, with resignation, if they consider the difficulty of performing it.

The elements of a science are precisely the parts of it which are explained least easily. Terms that are the largest and, therefore, the simplest of a series are without equivalent expressions into which we can resolve them *concisely*. And when we endeavour to *define* them or to translate them into terms which we suppose are better understood, we are forced upon awkward and tedious circumlocutions.

...

A command then is a signification of desire. But a command is distinguished from other signification of desire by this peculiarity: that the party to whom it is intended is liable to evil from the other, in case he complies not with the desire.

Being liable to evil from you if I comply not with a wish, which you signify, I am *bound* or *obliged* by your command, or I lie under a *duty* to obey it. If, in spite of that evil in prospect, I comply not with the wish which you signify, I am said to disobey your command, or to violate the duty which it imposes.

Command and duty are, therefore, correlative terms: the meaning denoted by each being implied or supposed by the other. Or (changing the expression) wherever a duty lies, a command has been signified; and wherever a command is signified, a duty is imposed.

Concisely expressed, the meaning of the correlative expressions is this. He who will inflict an evil in case his desire be disregarded, utters a command by expressing or intimating his desire: He who is liable to the evil in case he disregard the desire, is bound or obliged by the command.

The evil which will probably be incurred in case a command be disobeyed or (to use an equivalent expression) in case a duty be broken, is frequently called a *sanction*, or an *enforcement of obedience*. Or (varying the phrase) the command or the duty is said to be *sanctioned* or *enforced* by the chance of incurring the evil.

Considered as thus abstracted from the command and the duty which it enforces, the evil to be incurred by disobedience is frequently styled a *punishment*. But, as punishments, strictly so called, are only a *class* of sanctions, the term is too narrow to express the meaning adequately.

It appears from what has been premised that a law, properly so called, may be defined in the following manner.

A law is a command which obliges a person or persons.

But, as contra-distinguished or opposed to an occasional or particular command, a law is a command which obliges a person or persons, and obliges *generally* to acts or forbearances of a *class*.

In language more popular but less distinct and precise, a law is a command which obliges a person or persons to a *course* of conduct.

Laws and other commands are said to proceed from *superiors*, and to bind or oblige *inferiors*. I will, therefore, analyse the meaning of those correlative expressions; and will try to strip them of a certain mystery, by which that simple meaning appears to be obscured.

Superiority is often synonymous with *precedence* or *excellence*. We talk of superiors in rank; of superiors in wealth; of superiors in virtue: comparing certain persons with certain other persons; and meaning that the former precede or excel the latter in rank, in wealth, or in virtue.

But, taken with the meaning wherein I here understand it, the term superiority 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.

For example, God is emphatically the superior of man. For His power of affecting us with pain and of forcing us to comply with His will is unbounded and resistless.

To a limited extent, the sovereign One or Number is the superior of the subject or citizen: the Master of the slave or servant, the Father of the child.

In short, whoever can *oblige* another to comply with his wishes, is the *superior* of that other, so far as the ability reaches: The party who is obnoxious to the impending evil, being, to that same extent, the *inferior*.

The might or superiority of God, is simple or absolute. But in all or most cases of human superiority, the relation of superior and inferior, and the relation of inferior and superior, are reciprocal. Or (changing the expression) the party who is the superior as viewed from one aspect, is the inferior as viewed from another.

For example, To an indefinite, though limited extent, the monarch is the superior of the governed: his power being commonly sufficient to enforce compliance with his will. But the governed, collectively or in mass, are also the superior of the monarch: who is checked in the abuse of his might by his fear of exciting their anger; and of rousing to active resistance the might which slumbers in the multitude.

A member of a sovereign assembly is the superior of the judge: the judge being bound by the law which proceeds from that sovereign body. But, in his character of citizen or subject, he is the inferior of the judge: the judge being the minister of the law, and armed with the power of enforcing it.

It appears, then, that the term *superiority* (like the terms *duty* and *sanction*) is implied by the term *command*. For superiority is the power of enforcing compliance with a wish: and the expression or intimation of a wish, with the power and the purpose of enforcing it, are the constituent elements of a command.

'That *laws* emanate from *superiors*' is, therefore, an identical proposition. For the meaning, which it affects to impart, is contained in its subject.

If I mark the peculiar source of a given law, or if I mark the peculiar source of laws of a given class, it is possible that I am saying something which may instruct the hearer. But to affirm of laws universally 'that they flow from superiors,' or to affirm of laws universally 'that inferiors are bound to obey them,' is the merest tautology and trifling…

2. According to an opinion which I must notice *incidentally* here, though the subject to which it relates will be treated *directly* hereafter, *customary law*s must be excepted from the proposition 'that laws are a species of commands'.

By many of the admirers of customary laws (and especially of their German admirers), they are thought to oblige legally (independently of the sovereign or state), *because* the citizens or subjects have observed or kept them. Agreeably to this opinion, they are not the *creatures* of the sovereign or state, although the sovereign or state may abolish them at pleasure. Agreeably to this opinion, they are positive law (or law, strictly so called), inasmuch as they are enforced by the courts of justice: But, that notwithstanding, they exist as *positive* law by the spontaneous adoption of the governed, and not by position or establishment on the part of political superiors. Consequently, customary laws, considered as positive law, are not commands. And, consequently, customary laws, considered as positive law, are not laws or rules properly so called.

An opinion less mysterious, but somewhat allied to this, is not uncommonly held by the adverse party: by the party which is strongly opposed to customary law; and to all law made judicially, or in the way of judicial legislation. According to the latter opinion, all judge-made law, established by *subject* judges, is purely the creature of the judges by whom it is established immediately. To impute it to the sovereign legislature, or to suppose that it speaks the will of the sovereign legislature, is one of the foolish or knavish *fictions* with which lawyers, in every age and nation, have perplexed and darkened the simplest and clearest truths.

I think it will appear, on a moment's reflection, that each of these opinions is groundless: that customary law is *imperative,* in the proper signification of the term; and that all judge-made law is the creature of the sovereign or state.

At its origin, a custom is a rule of conduct which the governed observe spontaneously, or not in pursuance of a law set by a political superior. The custom is transmuted into positive law, when it is adopted as such by the courts of justice, and when the judicial decisions fashioned upon it are enforced by the power of the state. But before it is adopted by the courts, and clothed with the legal sanction, it is merely a rule of positive morality: a rule generally observed by the citizens or subjects; but deriving the only force, which it can be said to possess, from the general dis-approbation falling on those who transgress it.

Now when judges transmute a custom into a legal rule (or make a legal rule not suggested by a custom), the legal rule which they establish is established by the sovereign legislature. A subordinate or subject judge is merely a minister. The portion of the sovereign power which lies at this disposition is merely delegated. The rules which he makes derive their legal force from authority given by the state: an authority which the state may confer expressly, but which it commonly imparts in the way of acquiescence. For, since the state may reverse the rules which he makes, and yet permit him to enforce them by the power of the political community, its sovereign will 'that his rules shall obtain as law' is clearly evinced by its conduct, though not by its express declaration.

The admirers of customary law love to trick out their idol with mysterious and imposing attributes. But to those who can see the difference between positive law and morality, there is nothing of mystery about it. Considered as rules of positive morality, customary laws arise from the consent of the governed, and not from the position or establishment of political superiors. But, considered as moral rules turned into positive laws, customary laws are established by the state: established by the state directly, when the customs are promulged in its statutes; established by the state circuitously, when the customs are adopted by its tribunals.

The opinion of the party which abhors judge-made laws, springs from their inadequate conception of the nature of commands.

Like other significations of desire, a command is express or tacit. If the desire be signified by *words* (written or spoken), the command is express. If the desire be signified by conduct (or by any signs of desire which are *not* words), the command is tacit.

Now when customs are turned into legal rules by decisions of subject judges, the legal rules which emerge from the customs are *tacit* commands of the sovereign legislature. The state, which is able to abolish, permits its ministers to enforce them: and it, therefore, signifies its pleasure, by that its voluntary acquiescence, 'that they shall serve as a law to the governed'.

My present purpose is merely this: to prove that the positive law styled *customary* (and all positive law made judicially) is established by the state directly or circuitously, and, therefore, is *imperative*. I am far from disputing, that law made judicially (or in the way of improper legislation) and law made by statute (or in the properly legislative manner) are distinguished by weighty differences. I shall inquire, in future lectures, what those differences are; and why subject judges, who are properly ministers of the law, have commonly shared with the sovereign in the business of making it.

I assume then that the only laws which are not imperative, and which belong to the subject-matter of jurisprudence, are the following: 1. Declaratory laws, or laws explaining the import of existing positive law. 2. Laws abrogating or repealing existing positive law. 3. Imperfect laws, or laws of imperfect obligation (with the sense wherein the expression is used by the Roman jurists).

But the space occupied in the science by these improper laws is comparatively narrow and insignificant. Accordingly, although I shall take them into account so often as I refer to them directly, I shall throw them out of account on other occasions. Or (changing the expression) I shall limit the term law to laws which are imperative, unless I extend it expressly to laws which are not.

…Positive laws, or laws strictly so called, are established directly or immediately by authors of three kinds: by monarchs, or sovereign bodies, as supreme political superiors: by men in a state of subjection, as subordinate political superiors: by subjects, as private persons, in pursuance of legal rights. But every positive law, or every law strictly so called, is a direct or circuitous command of a monarch or sovereign number in the character of political superior: that is to say, a direct or circuitous command of a monarch or sovereign number to a person or persons in a state of subjection to its author. And being a *command* (and therefore flowing from a *determinate* source), every positive law is a law proper, or a law properly so called.

Besides the human laws which I style positive law, there are human laws which I style positive morality, rules of positive morality, or positive moral rules.

Lecture V

The generic character of laws of the class may be stated briefly in the following negative manner: No law belonging to the class is a direct or circuitous command of a monarch or sovereign number in the character of political superior. In other words, no law belonging to the class is a direct or circuitous command of a monarch or sovereign number to a person or persons in a state of subjection to its author.

But of positive moral rules, some are laws proper, or laws properly so called: others are laws improper, or laws improperly so called. Some have all the essentials of an imperative law or rule: others are deficient in some of those essentials of an *imperative* law or rule: others are deficient in some of those essentials, and are styled *laws* or *rules* by an analogical extension of the term.

The positive moral rules which are laws properly so called, are distinguished from other laws by the union of two marks: 1. They are imperative laws or rules set by men to men. 2. They are not set by men as political superiors, nor are they set by men as private persons, in pursuance of legal rights.

Inasmuch as they bear the latter of these two marks, they are not commands of sovereigns in the character of political superiors. Consequently, they are not positive laws: they are not clothed with legal sanctions, nor do they oblige legally the persons to whom they are set. But being *commands* (and therefore being established by *determinate* individuals or bodies), they are laws properly so called: they are armed with sanctions, and impose duties, in the proper acceptation of the terms...

The positive moral rules which are laws improperly so called, are *laws set* or *imposed by general opinion*: that is to say, by the general opinion of any class or any society of persons. For example, some are set or imposed by the general opinion of persons who are members of a profession or calling: others, by that of persons who inhabit a town or province: others, by that of a nation or independent political society: others, by that of a larger society formed of various nations.

A few species of the laws which are set by general opinion have gotten appropriate names – For example, there are laws or rules imposed upon gentlemen by opinions current amongst gentlemen. And these are usually styled *the rules of honour*, or *the laws* or *law of honour* – There are laws or rules imposed upon people of fashion by opinions current in the fashionable world. And these are usually styled *the law set by fashion*. There are laws which regard the conduct of independent political societies in their various relations to one another: Or rather, there are laws which regard the conduct of sovereigns or supreme governments in their various relations to one another. And laws or rules of this species, which are imposed upon nations or sovereigns by opinions current amongst nations, are usually styled *the law of nations* or *international law*.

Lecture VI

...I shall finish, in the present lecture, the purpose mentioned above, by explaining the marks or characters which distinguish positive laws, or laws strictly so called. And, in order to an explanation of the marks which distinguish positive laws, I shall analyse the expression *sovereignty*, the correlative expression *subjection*, and the inseparably connected expression *independent political society*. With the ends or final causes for which governments ought to exist, or with their different degrees of fitness to attain or approach those ends, I have no concern. I examine the notions of *sovereignty* and *independent political society*, in order that I may finish the purpose to which I have adverted above: in order that I may distinguish completely the appropriate province of jurisprudence from the regions which lie upon its confines, and by which it is encircled. It is necessary that I should examine those notions, in order that I may finish that purpose. For the essential difference of a positive law (or the difference that severs it from a law which is not a positive law) may be stated thus. Every positive law or every law simply and strictly so called, 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. Or (changing the expression) it is set by a monarch, or sovereign number, to a person or persons in a state of subjection to its author. Even though it sprung directly from another fountain or source, it *is* a positive law, or a law strictly so called, by the institution

of that present sovereign in the character of political superior. Or (borrowing the language of Hobbes) 'the legislator is he, not by whose authority the law was first made, but by whose authority it continues to be a law'…

The superiority which is styled sovereignty, and the independent political society which sovereignty implies, is distinguished from other superiority, and from other society, by the following marks or characters: 1. The *bulk* of the given society are in a habit of obedience or submission to a determinate and common superior: let that common superior be a certain individual person, or a certain body or aggregate of individual persons. 2. That certain individual, or that certain body of individuals is not in a habit of obedience to a determinate human superior. Laws (improperly so called) which opinion sets or imposes, may permanently affect the conduct of that certain individual or body. To express or tacit commands of other determinate parties, that certain individual or body may yield occasional submission. But there is no determinate person, or determinate aggregate of persons, to whose commands, express or tacit, that certain individual or body renders habitual obedience.

Or the notions of sovereignty and independent political society may be expressed concisely thus. If a *determinate* human superior, *not* in a habit of obedience to a like superior, receive *habitual* obedience from the bulk of a given society, that determinate superior is sovereign in that society, and the society (including the superior) is a society political and independent.

To that determinate superior, the other members of the society are *subject*: or on that determinate superior, the other members of the society are *dependent*. The position of its other members towards that determinate superior, is a *state of subjection*, or *a state of dependence*. The mutual relation which subsists between that superior and them, may be styled *the relation of sovereign and subject*, or *the relation of sovereignty and subjection*.

Hence it follows, that it is only through an ellipsis, or an abridged form of expression, that the society is styled *independent*. The party truly independent (independent, that is to say, of a determinate human superior), is not the society, but the sovereign portion of the society: that certain member of the society, or that certain body of its members, to whose commands, expressed or intimated, the generality or bulk of its members render habitual obedience. Upon that certain person, or certain body of persons, the other members of the society are dependent: or to that certain person or certain body of persons, the other members of the society are subject. By 'an independent political society', or 'an independent and sovereign nation', we mean a political society consisting of a sovereign and subjects, as opposed to a political society which is merely subordinate: that is to say, which is merely a limb or member of another political society, and which therefore consists entirely of persons in a state of subjection.

In order that a given society may form a society political and independent, the two distinguishing marks which I have mentioned above must unite. The *generality* of the given society must be in a *habit* of obedience to a *determinate* and *common* superior: whilst that determinate person, or determinate body of persons must *not* be habitually obedient to a determinate person or body. It is the union of that positive, with this negative mark, which renders that certain superior sovereign or supreme, and which renders that given society (including that certain superior) a society political and independent...

In order that a given society may form a society political and independent, the positive and negative marks which I have mentioned above must unite. The *generality* or *bulk* of its members must be in a *habit* of obedience to a *certain* and *common* superior: whilst that certain person, or certain body of persons, must *not* be habitually obedient to a certain person or body.

But, in order that the *bulk* of its members may render obedience to a *common* superior, *how many* of its members, or *what proportion* of its members, must render obedience to *one and the same* superior? And, assuming that the bulk of its members render obedience to a common superior, *how often* must they render it, and *how long* must they render it, in order that that obedience may be *habitual*? Now since these questions cannot be answered precisely, the positive mark of sovereignty and independent political society is a fallible test of specific or particular cases...

Do Austin's lectures seem rather dry stuff? It is important to read this material in conjunction with Roger Cotterrell's Chapter 3 'Sovereign and subject: Austin and Bentham' and Morrison's Chapter 4 'Thomas Hobbes and the origins of the imperative theory of law: or *mana* transformed into earthly power' to see the location and meaning of Austin's project.

Austin always said that his work in *The province* was 'merely prefatory' to a much wider study of what he termed 'general jurisprudence': this was to be the exposition and analysis of the fundamental notions forming the framework of all mature legal systems. The main part of his full lectures (as said above, they were only published after his death in 1863) was given to an analysis of what he called 'pervading notions', such as those of right, duty, persons, status, delict and sources of law. Austin distinguished this general, or analytical, jurisprudence from the criticism of legal institutions, which he called the 'science of legislation'; he viewed both the analytical and the critical exposition as important parts of legal education. He is largely remembered, however, for the analytical heritage, and his critical exposition (largely influenced by notions of utility) is usually skated over.

3.3.2 Austin and utilitarianism

The young Austin once declared himself to be a disciple of Jeremy Bentham, and utilitarianism is a continuing clear theme (though Austin was a believer in God and made utility the index of God's will or plan for creation, while Bentham was secular) in the work for which Austin is best known today. Austin interpreted utilitarianism so that divine will is equated with utilitarian principles: 'utility is the index to the law of God...To make a promise which general utility condemns, is an offence against the law of God' (Austin, 1873: Lecture VI, p.307; see also Austin, 1995: Lecture II, p.41). This reading of utilitarianism has had no long-term influence, though in his 19th-century review of Austin's *Lectures*, John Stuart Mill was at pains to say that his work represented the application of utilitarianism to law and largely ignored the religious aspects. According to Rumble, most contemporaries saw Austin as a utilitarian and the young Austin certainly shared many of the ideas of the Benthamite philosophical radicals; namely notions of progress, rule through knowledge, political economy, as well as accepting the ideas of Thomas Malthus (see Rumble, 1985, pp.16–17; Morrison, 1997, Chapter 9).

Austin made a lasting impact for at least two reasons.

1. Analytical jurisprudence

Austin argued for an **analytical** analysis of law[†] (as contrasted with approaches to law more grounded in history or sociology, or arguments about law which were secondary to more general moral and political theories). Analytical jurisprudence emphasises the analysis of key concepts, including 'law', '(legal) right', '(legal) duty', and 'legal validity'. Analytical jurisprudence became the dominant approach in analysing the nature of law (see Cotterrell, 2003, for an explanation for this). However (and this is crucial to acknowledging what his project was to correct the misunderstanding of many commentators), it is important to appreciate that in Austin's hands analytical jurisprudence was only one part of an overall project. Many later writers have confused the aim of being analytical with the notion that this is all one has to say about law and thus that law is simply what you can formally reduce it to (this idea is sometimes called 'legal formalism', a narrow approach to understanding the role of law). It is a mistake to see either Austin in particular, or analytical jurisprudence in general, as opposing a critical and reform-minded effort to understand law and its social, political and economic effects. The approach to understanding law that is loosely grouped under the title 'legal realism', for example, argued that law could only be understood in terms of its practical effects (so, for example, law was what the courts actually did...). But realists tended to downplay doctrine and legal categories, seeing them as irrelevant. By contrast, Austin saw analytical jurisprudence as attaining clarity as to the categories and concepts of law; as for the morality of law, its effectiveness, its use and abuse, or its location in historical development, these were

[†] There is some evidence that Austin's views later in his life may have moved away from analytical jurisprudence towards something more approximating the historical jurisprudence school (Hamburger, 1985, pp.178–91).

different questions (and clearly also important to understand how to use law as a technique of rational government).

2. Legal positivism

Austin tied his analytical method to a systematic exposition of a view of law known as 'legal positivism'. The main competitor to legal positivism, in Austin's day as in our own, has been natural law theory. Austin can also be seen as clarifying the study of the common law from the traditional ideas of timeless sources and other vague notions he considered mystifications. Austin, as we have seen in looking at Hobbes, was not the first writer to say that the law within the legal system of a nation state should be seen as something 'posited' by human judgments or processes, but most of the important theoretical work on law prior to Austin had treated jurisprudence as though it were merely a branch of moral theory or political theory: asking how the state should govern, including when governments were legitimate and under what circumstances citizens had an obligation to obey the law. For Austin, however, and for legal positivism generally, law should be an object of 'scientific' study, the identification of something as law or legally valid was determined neither by prescription nor by moral evaluation; law was simply law, and its morality was another issue. Austin's subsequent popularity among late 19th-century English lawyers stemmed in large part from their desire to approach their profession, and their professional training, in a more serious and rigorous manner (Cotterrell, 2003, pp.74–77). Legal positivism asserts (or assumes) that it is both possible and valuable to have a morally neutral descriptive (or perhaps 'conceptual', to take Hart's term) theory of law.

It is always a simplification to generalise;† however, it can be maintained that those who adhere to legal positivism do not deny that moral and political criticism of legal systems is important. Instead, they insist that a descriptive or conceptual approach to law is valuable, both on its own terms and as a necessary prelude to criticism. The similarities between Austin and Thomas Hobbes have been stressed, but David Hume, with his argument for separating 'is' and 'ought' that worked as a sharp criticism for some forms of natural law theory, which purported to derive moral truths from statements about human nature, should also be mentioned as sharing in the intellectual framing of this division. The common theme to Hobbes, Hume, Bentham and Austin is the demand for clarity of conception and separation of different discursive realms.

† Remember Austin's famous formulation of the distinction: '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.' (Austin, Lecture V, p.157)

Summary

Today we remember Austin for his particular version of legal positivism, his 'command theory of law'. However, it should be remembered that Austin clearly stated that his theory drew upon Hobbes and Bentham – both of whose theories could also be characterised as 'command theory'. Austin's work was more influential in this area, partly because Bentham's jurisprudential writings did not appear in even a roughly systematic form until well after Austin's work had already been published (Bentham, 1970, 1996; Cotterrell, 2003, pp.52–53).

3.4 Appreciating Austin's command theory

Both the common law tradition and natural law theories gave an image of law as something that was not at the government's behest to use as the government desired. Instead law was 'other' than governmental power. By contrast, Hobbes, Bentham and Austin identified (positive) law as the creation of government (the sovereign) and as part of government's instruments to achieve (rational, coherent and defendable) rule.

There are always at least two things going on that we can learn from the writers we have looked at in this chapter. Take Austin: he tried to find out what can be said generally, while still capturing the basic form, about all laws, and this was a necessary step for those interested in law (and power) to understand the nature of the instrument that could be used to shape relations in a modern society. Later

commentators have concentrated upon Austin's work as an example of analytical philosophy and have seen it either as a paradigm or a caricature of the analytical method. We have seen from the extracted sections that his lectures were dryly full of distinctions, but are thin in trans-historical argument. To some contemporary critics, Austin's work is very limited and the modern reader is forced to fill in much of the meta-theoretical, justificatory work, which cannot be found in the text. But is this a problem of the text or of our historical appreciation? Austin wrote for an audience; his *Lectures* were simply that – lectures – and thus principally orientated to that purpose.

Thus we may appreciate that where Austin articulated his methodology and objectives he gave them expressions drawing upon the accepted discourses of the times: he 'endeavoured to resolve a law (taken with the largest signification which can be given to that term properly) into the necessary and essential elements of which it is composed' (Austin, Lecture V, p.117).

Austin had been appointed the first professor of law at a body which was attempting to be called the University of London in 1828. This body, which is now University College London (the largest College of the Federal University of London), was founded on secular and utilitarian lines. It was opposed by many, including a rival King's College founded in 1828. In this anonymous cartoon of the time, a clutch of bloated bishops, including the Archbishop of Canterbury, with the added weight of money and interest, are pitted against Brougham (waving the broom, the government minister supporting the proposal for the new university) and Bentham (clad in dressing gown), supported by Sense and Science.

(Image: courtesy of the University of London.)

In another cartoon of the time, King's College was represented as a huge palace with, however, very small windows, since 'no new light is required'. Austin expressly stated his aim was to bring light to the chaos of legal thought.

3.4.1 Austin's analysis of law

As to what is the core nature of law, Austin's answer is that laws ('properly so called') are commands of a sovereign; they exist in a relationship of political superiority and political inferiority. He clarifies the concept of positive law (that is, man-made law) by analysing the constituent concepts of his definition, and by distinguishing law from other concepts that are similar:

- **Commands** involve an expressed wish that something be done, and 'an evil' to be imposed if that wish is not complied with.
- **Rules** are general commands (applying generally to a class), as contrasted with specific or individual commands.

Positive law consisted of those commands laid down by a sovereign (or its agents), to be contrasted to other law-givers, such as God's general commands, or the general

commands of an employer. The 'sovereign' was defined as a person (or collection of persons) who receives habitual obedience from the bulk of the population, but who does not habitually obey any other (earthly) person or institution. Austin thought that all independent political societies, by their nature, have a sovereign. Positive law should also be contrasted with 'laws by a close analogy' (which includes positive morality, laws of honour, international law, customary law and constitutional law) and 'laws by remote analogy' (e.g. the laws of physics) (Austin, Lecture I).

Austin also wanted to include within 'the province of jurisprudence' certain 'exceptions' – items which did not fit his criteria but should nonetheless be studied with other 'laws properly so called': repealing laws, declarative laws and 'imperfect laws' (laws prescribing action but without sanctions, a concept Austin ascribes to 'Roman [law] jurists') (Austin, Lecture I, p.36).

In the criteria set out above, Austin succeeded in delimiting law and legal rules from religion, morality, convention and custom. (These exclusions alone would make Austin's theory problematic for most modern readers.) However, also excluded from 'the province of jurisprudence' were customary law (except to the extent that the sovereign had, directly or indirectly, adopted such customs as law), public international law and parts of constitutional law.

Within Austin's approach, whether something is or is not 'law' depends on which people have done what: the question turns on an empirical investigation, and it is a matter mostly of power, not of morality. Of course, Austin is not arguing that law should not be moral, nor is he implying that it rarely is. Austin is not playing the nihilist or the sceptic. He is merely pointing out that there is much that is law that is not moral, and what makes something law does nothing to guarantee its moral value:

> The most pernicious laws, and therefore those which are most opposed to the will of God, have been and are continually enforced as laws by judicial tribunals. (Austin, Lecture V, p.158)

While Bentham was an opponent of judicial law-making, Austin had no objection to it, describing it as 'highly beneficial and even absolutely necessary' (Austin, Lecture V, p.163). Austin simply incorporated judicial law-making into his command theory: by characterising that form of law-making, along with the occasional legal/judicial recognition of customs by judges, as the 'tacit commands' of the sovereign, with the sovereign's affirming the 'orders' by its acquiescence (Austin, Lecture I, pp.35–36).

3.4.2 Criticisms of Austin

Many readers come to Austin's theory mostly through the criticisms made of it by other writers. Many of the current textbook references to Austin appear to accept the validity of Hart's criticisms developed against a model of the imperative theory of law based on Hart's reading of Austin and presented in the first four chapters of *The concept of law*. Both Cotterrell and Morrison, conversely, argue that Hart's treatment may be analytically pleasurable but is based on an abstracted model and not in keeping with a historical understanding of Austin's project. As a result, the weaknesses of the theory are almost better known than the theory itself – many answers to examination questions on the command theory or the work of John Austin are full of the criticisms but leave the examiner uncertain as to whether the student knows the theory about which they have just listed the criticisms!

Some of these criticisms only make sense when we apply an analytical critique to Austin; thus it is often claimed that in many societies, it is hard to identify a 'sovereign' in Austin's sense of the word (a difficulty Austin dismissed when discussing Mexico, for example, by saying it was a matter of factual analysis; but we may note that he had to describe the British 'sovereign' rather awkwardly as the combination of the King, the House of Lords and all the electors of the House of Commons). In other places Austin talked even more loosely about using 'sovereign powers'. Putting the focus on a 'sovereign' as the source of law makes it difficult to explain the continuity of legal systems: a new ruler will not come in with the kind of 'habit of obedience' that Austin sets as a criterion for a system's rule-maker. However, one could argue (see Harris, 1997)

that the sovereign is best understood as a constructive metaphor: that law should be viewed **as if** it reflected the view of a single will (a similar view, that law should be interpreted as if it derived from a single will, can be found in Ronald Dworkin's work (1998)). It is also a common criticism that a 'command' model seems to fit some aspects of law poorly (e.g. rules which grant powers to officials and to private citizens – of the latter, the rules for making wills, trusts and contracts are examples), while excluding other matters (e.g. international law) which we are not inclined to exclude from the category 'law'. More generally, it seems more distorting than enlightening to reduce all law to one type. For example, rules that empower people to make wills and contracts perhaps can be recharacterised as part of a long chain of reasoning for eventually imposing a sanction (Austin spoke in this context of the sanction of 'nullity') on those who fail to comply with the relevant provisions. However, such a recharacterisation as this misses the basic purpose of those sorts of laws – they are arguably about granting power and autonomy, not punishing wrongdoing.

A powerful criticism is that a theory which portrays law solely in terms of power fails to distinguish rules of terror from forms of governance sufficiently just that they are accepted as legitimate by their own citizens. Austin was aware of some of these lines of attack, and had responses ready; it is another matter whether his responses were adequate. Austin also did not go into a discussion of his methodology; he was rather concerned to get his message across to his audience. Austin, however, laid out the structure for modern legal positivism and when Hart revived legal positivism in the middle of the 20th century, he did it by criticising and building on Austin's theory. In some respects Hart followed the legal pluralism obvious from Austin's first lecture: for example, Hart's theory did not try to reduce all laws to one kind of rule, but emphasised the varying types and functions of legal rules. Moreover, Hart was still conscious of the varying relationships between individuals and the legal order, for his theory, grounded partly on the distinction between 'obligation' and 'being obliged', was built around the fact that some participants within legal systems 'accepted' the legal rules as reasons for action, above and beyond the fear of sanctions; others, however, obeyed because of sanctions or simply habit.

In more recent decades, there has been something of a revival of interest in Austin's theoretical claims: the *Canadian Journal of Law and Jurisprudence* published a selection of papers from a conference on Austin's work held at University College London in December 2010 under the direction of Professor Michael Freeman, in Volume 24 (2011), from p.411.

- **Schauer, F. 'Was Austin right after all? On the role of sanctions in a theory of law' (2010) 23 *Ratio Juris* 1.**

Here, Schauer questions whether the move of modern positivists like Hart and Raz to sideline the imposition of sanctions for breaches of the law, as merely 'contingent' features of the law, has been the theoretical success it is often taken to be.

- **Halpin, A. 'Austin's methodology? His bequest to jurisprudence' (2011) 70(1) *CLJ* 175–202.**

Turning to methodology, Andrew Halpin argues that Austin may be partly responsible for the fact that different ways of addressing the question of law are disengaged from each other (and why legal theory is largely disengaged from practice). Nevertheless, Halpin argues that Austin did not bring about this disengagement axiomatically but rather by building on intuitions that everyone could accept but were still open to contestation at that initial stage. His strategy therefore leaves open the possibility of engagement.

3.4.3 A contemporary view?

Austin's work was highly fashionable in the late 19th century and for part of the 20th. Then came a period of deprecation. Today he is reassessed. Put in his historical context, Austin can be seen as all too trusting of centralised power and his writing as a strange mixture of analyticism and realism. Certainly Austin kept the political nature of law and the connection of law and power at the centre of his analysis.

When circumstances seem to warrant a more critical, sceptical or cynical approach to law and government, Austin's equation of law and force will be attractive, as with Yntema, who simply stated in 1928 (at p.476): 'The ideal of a government of law and not of men is a dream.' Such a reading may today be from Austin's own mixture of liberal/conservative-utilitarian views at the time of his writing, and his even more conservative political views later in his life. In our contemporary times, as we see the failed states of Iraq and various other nations, the message of Hobbes that security comes before all else is treated as a commonplace. Whether law could be used as a rational instrument of government is another matter.

Reminder of learning outcomes

By this stage you should be able to:

- **adopt an effective approach to reading original extracts from key writers**
- **critically discuss the emergence and core meaning of legal positivism**
- **discuss the advantages and disadvantages of a theory of law based on the idea of the commands of the sovereign**
- **analyse the social and political context in which Austin wrote and how Hart has interpreted his project.**

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Sample examination questions

Question 1 Has Austin's theory contributed to our understanding of law?

Question 2 What are the advantages and disadvantages of seeing law as a set of commands?

Advice on answering the questions

Question 1 Clearly explain to the examiner what Austin's theory is. Think of how it is helpful to consider definitions of what law is and to separate those from what law ought to be. Further, Austin's definition of law as the command of a sovereign backed by a sanction, who is the sovereign and how it is identified, all need to be covered and analysed. It will be useful to draw on Cotterrell's reading of Austin and link his theory to power and coercive force and its relation to law.

Question 2 Explain that 'set of commands' refers to those of the sovereign. It is important **who** is commanding. Explore aspects of Austin's theory with a focus on this coercive nature. Advantages include clarity, certainty, how convincing it is to consider law as a coercive regulation on us. Disadvantages include the exclusion of international law, identifying the sovereign, failure to account for laws that are not criminal (Hart's criticisms).

Reflect and review

Look through the points listed below. Are you ready to move on to the next chapter?

Ready to move on = I am satisfied that I have sufficient understanding of the principles outlined in this chapter to enable me to go on to the next chapter.

Need to revise first = There are one or two areas I am unsure about and need to revise before I go on to the next chapter.

Need to study again = I found many or all of the principles outlined in this chapter very difficult and need to go over them again before I move on.

Tick a box for each topic.

	Ready to move on	Need to revise first	Need to study again
I can adopt an effective approach to reading original extracts from key writers.	☐	☐	☐
I can critically discuss the emergence and core meaning of legal positivism.	☐	☐	☐
I can discuss the advantages and disadvantages of a theory of law based on the idea of the commands of the sovereign.	☐	☐	☐
I can analyse the social and political context in which Austin wrote and how Hart has interpreted his project.	☐	☐	☐

If you ticked 'need to revise first', which sections of the chapter are you going to revise?

		Must revise	Revision done
3.1	The birth and development of secular or 'positive' theories of law: the case of Thomas Hobbes	☐	☐
3.2	Jeremy Bentham	☐	☐
3.3	John Austin	☐	☐
3.4	Appreciating Austin's command theory	☐	☐

4 Introduction to Hart's *The concept of law*

Contents

Introduction

Hart's *The concept of law* forms a pillar around which much of contemporary legal theory revolves. You will soon realise that it is impossible to understand the work and ideas of many other authors, especially those tackling the question of the nature of law, without having appreciated and understood Hart's arguments, not least because many of these authors set up their theories explicitly as objections to Hart's. This book's importance in the field of jurisprudence means that it is likely to appear in the examination paper as a specific question in some form and/or as relevant to other questions, which may be phrased in general terms or specifically focused on other theorists whose work relates to Hart's. For detailed guidance on the structure of the examination paper see section 1.4.1 of this module guide.

You will soon become aware that Hart's work touches on many of the most significant questions about law. Whether or not you disagree with what he says, his work is an excellent starting point for getting deeper into jurisprudence. The immediate aim is to encourage you to obtain a very good working knowledge of a theory of law that is not only widely accepted, but which is very frequently the starting point for other significant theories of law. The way Hart produces his theory is also of great interest, since it is a very 'lawyerlike' approach, one that pays very close attention to the subtleties in our use of language. Professor Hart, who was the Professor of Jurisprudence at the University of Oxford from 1954 to 1969, personally taught many of the English and Commonwealth judges of the present time, and also ran a successful commercial law practice in Lincoln's Inn. As an introduction, you should read a very helpful account of Hart's life and work by Joseph Raz, 'H.L.A. Hart (1907–1992)'. Of particular importance, this overview includes a clear account of Hart's views about definition and the purpose of the study of legal language, and his role and status as a philosopher of the linguistic school.

This chapter introduces Hart's book and looks particularly at the development of his arguments from his initial discussion of the problem of definition, through his analysis of the idea of a rule, and how rules much better explain law than the idea of an 'order backed by threats' implicit in Bentham and Austin, to his claiming that it is in the 'union of primary and secondary rules' that the 'key' to jurisprudence is to be found. Chapter 5 will examine the importance he attached to the role of his 'rule of recognition' and in Chapter 6 Hart's important defences of his theory against criticisms of the natural law school will be examined.

Learning outcomes

By the end of this chapter and the relevant reading, you should be able to:

- **explain what Hart means by a 'simple' definition**
- **explain the difference between an 'internal' and an 'external' point of view**
- **outline the main steps in Hart's criticism of the 'orders backed by threats' theory**
- **provide an analysis of the concept of a rule**
- **explain the major components of Hart's 'union of primary and secondary rules'**
- **outline what Hart meant by the 'rule of recognition'.**
- **consider critically Hart's 'construction' of the secondary rules from a 'pre-legal society'**
- **offer some comments on Perry's criticism of Hart's methodology**
- **give a critical account of Hart's views on theorising about law**
- **explain Hart's 'practice' theory of rules and its deficiencies**
- **describe how trying to understand how we follow rules can give rise to a philosophical paradox, what rule scepticism is, and explain how Wittgenstein's ideas might contribute to resolving these problems.**

Core text

- **Freeman, Chapter 5 'Modern trends in analytical jurisprudence', paras 5–002 to 5–006 inclusive and 5–019.**

Essential reading

- **Hart, H.L.A. *The concept of law*. All chapters but particularly the Preface, Chapters 1 to 6 and Chapter 9 (available in E-book Central via the Online Library).**

Further reading

- **Hart, H.L.A. *Essays in jurisprudence and philosophy*. Essay 1.**
- **Hart, H.L.A. *Essays on Bentham*. (Oxford: Clarendon Press, 1982) [ISBN 9780198254683] Chapter 10.**
- **Simmonds, N.E. *Central issues in jurisprudence*. Chapter 5 'Hart' (available in VLeBooks via the Online Library).**
- **Dworkin, R. *Taking rights seriously*. Chapter 2: 'The model of rules I' and Chapter 4 'Hard cases'.**
- **Finnis, J. *Natural law and natural rights*. Chapter 1 'Evaluation and description of law'.**
- **MacCormick, N. *Legal reasoning and legal theory*. (Oxford: Oxford University Press, 1994) [ISBN 9780198763840].**
- **Raz, J. 'H.L.A. Hart 1907–1992' (1993) 5 *Utilitas* 145–56 (available in Cambridge Core).**
- **Perry, S. extracts in Freeman, paras 5–022 and 5–023.**

4.1 Studying Hart

4.1.1 A short summary

Hart's theory is a modern restatement of the theory of legal positivism first expounded in the 19th century by Jeremy Bentham and John Austin. Hart believed that the ideal model of law was that of a 'modern municipal legal system' in which laws were to be identified according to the sources of law that judges accepted. Since what the judges accepted was a matter of empirical fact, it would not 'necessarily' be the case that law had a moral content. Although this seems a relatively simple and, to many, an appealing idea, the route to this conclusion is a long one and this chapter is designed to make the journey easier.

4.1.2 How to read *The concept of law*

There are some chapters of Hart that warrant closer reading than others. The topic of definition and methodology is discussed by Hart in the Preface and Chapter 1. The criticisms that Hart makes of what he calls the 'orders backed by threats theory writ large', which is really an attack on Austin's and Bentham's command theory of law, are fully contained within Chapters 2, 3 and 4. The main thesis, that law consists of a 'union of primary and secondary rules', is contained in Chapters 5 and 6, and his all-important theory of the 'rule of recognition' is also discussed at length in Chapter 6. Apart from these chapters, it is only Chapter 9 that you need to read very closely, since this is where Hart defends his thesis of legal positivism against possible attacks by natural lawyers. A discussion of Chapter 9, because it concerns such large topics, is linked to Part II of this module guide. However, there is a brief summary of what is contained in the other chapters of *The concept of law*, all of which you need to read, since they all contribute something to understanding Hart's overall thesis. However, it is also true that they need not be read in the same depth as the Preface, Chapters 1 to 6 and Chapter 9.

Take the book bit by bit, making notes as you go. You will find it difficult at first but you will get used to it. It is essential to do this early on in your studies, so that you get a flavour of what intellectually rigorous jurisprudence is about. One way of thinking about how you should go about reading Hart's book is to think of each of its 10 chapters as equivalent to a large and difficult case you might have to know thoroughly in a common law subject. The secret is to break down the work into manageable parts. You should make careful notes on each chapter – perhaps four or five pages of notes – and then you should at a later stage go back to these notes and summarise them further. One of the advantages of *The concept of law* is that there are no wasted words, and each paragraph provides an argument in itself. An accumulation of note-taking and careful reading, pursued throughout the first and second terms of your study, will give you not only a wealth of ideas and argument, but the confidence and background – for Hart's work has great breadth as well as depth – to write clearly and knowledgeably in the final examination.

You will be expected to know in some detail the major theses contained in *The concept of law*, including Hart's methodology; that is, the reasons why Hart argued for his conclusions in the way that he did. Since there are some doubts as to whether his methodology was clear – for at times it seems that Hart is ambiguous in his arguments – it is necessary to pay great attention to what he says early on in the work about the nature of definition.

Once you have grasped Hart's theory, you should become acquainted with the very well-known criticism of it by Ronald Dworkin contained in Chapter 2 of Dworkin's *Taking rights seriously* (2013) in which Dworkin claimed that Hart's theory gave an account of law as rules which could not take into account the controversial nature of legal argument. Hart was troubled intellectually by Dworkin's criticisms and the Postscript is largely a result of his later thoughts about *The concept of law* in the light of these criticisms. (See Chapter 9 of this module guide.)

4.1.3 Hart's methodology

For a real insight into what Hart thought about methodology in jurisprudence, you should read Chapter 9 of *The concept of law* carefully, making notes whenever you think Hart is making a methodological point. You will note that he spends much time debating the merits of choosing a 'wide conception of law' over a 'narrow conception of law', this latter being the natural law conception. You might have noted in passing that he has moved from talk about 'the concept' of law, to two rival conceptions. Then he makes the give-away remark, on p.209, that 'Plainly we cannot grapple adequately with this issue if we see it as one concerning the proprieties of linguistic usage'.

Seen against the background of Hart's whole approach in the first part of the book, where he refers to 'linguistic usage', for example, to distinguish the gunman situation from the legitimate tax inspector situation (the gunman merely 'obliges'; the tax inspector 'imposes an obligation') this is a striking thing to say.

Hart, in one of the most important paragraphs of his work, says that the main reason for identifying law independently of morality – in other words, his justification for legal positivism – is to preserve individual conscience from the demands of the state:

> What surely is most needed in order to make men clear-sighted in confronting the official abuse of power, is that they should preserve the sense that the certification of something as legally valid is not conclusive of the question of obedience, and that, however great the aura of majesty or authority which the official system may have, its demands must in the end be submitted to a moral scrutiny. (p.210)

You should note, too, Hart's retrospective admission in the Preface to his *Essays in jurisprudence and philosophy*, at pp.5 and 6, that it is a mistake to think that all questions can be solved with reference to the way we **actually** speak.

4.1.4 Discussion groups

An excellent way to learn the prescribed text would be to find one or two other students who are studying it. (If you are not able to work with other students, simply spend some time thinking about these discussion questions and note down your responses.) The questions that follow each chapter summary below are an ideal basis for a 1–1½ hour discussion group. Students should take turns to introduce the question and give their answers to it, with a view to discussion. In this way you could get through, say, three or four questions, and since each of you would concentrate on one question, this would be an efficient way of sharing work. You will find that Hart's work lends itself well to discussion (there is no 'waffle' in it) and that often it is only when you hear the argument being put orally that you really grasp his point. You may find that Hart's ideas are powerful and that it is very difficult to formulate criticisms against them. But try to do so! Hart is consistent and intelligent in his thought; so trying to engage with his thoughts by attempting some criticism is an intellectual exercise that can only benefit you.

Do not attempt to answer the questions following each summary until you have read the relevant chapter of Hart. The questions are not there to test your understanding of the summaries. You will go seriously wrong if you imagine that at this stage you can get away without reading *The concept of law*.

Preparing for an hour's 'peer-assisted learning' on Hart

An ideal number of students would be three. Each should prepare one chapter of Hart with a view to giving a 5–10 minute introduction – no more – to the other two students. This introduction should isolate about three or four main points to discuss.

4.2 Hart's aims

Hart is clear about his aims in the early part of his work, particularly in the very short Preface (read the Preface now). It follows that you should read it carefully. He expands on his aims in his discussion of the nature of definition in Chapter 1. It is common for the examination to have questions on the definitional – methodological – aspects of Hart's thesis and the Preface and Chapter 1 should be taken together as a topic in their own right. An article to read in conjunction with Chapter 1 is Hart's inaugural lecture, 'Definition and theory in jurisprudence', which predates the publication of *The concept of law* by nine years and contains some helpful and interesting comments, especially in the first part, although the argument is essentially that to be found in the Preface and Chapter 1 of his later book. It can be found as Chapter 1 of Hart's *Essays in jurisprudence and philosophy*.

The Preface

Hart famously said it was his intention to produce what he described as an 'essay in descriptive sociology' and this phrase has bedevilled both academics and examination candidates ever since he wrote his book. It is fairly clear that he intended to describe for us how we understand our shared 'concept' of law, and he was going to do this by describing the 'social phenomenon' of law. It is important to note two assumptions that Hart appears to make at this point. First, that there is a 'concept' of law that 'we' share, and second, that discovering this concept is a matter of description only. His project – at first sight, at least – seems to be in accordance with common sense. After all, we do seem to share a 'concept' of law such that we know in some sense what we are all talking about when we talk about law, and it seems sensible that, to find out more about this 'concept', we need to describe in more detail what this 'concept' is. Perhaps it is unfortunate that Hart used the word 'sociology' since that word invites us to ask why we do not find in *The concept of law* anything that passes for standard sociological, empirical enquiry into legal systems.

Hart also says in his Preface that he will pay great attention to the importance of examining language and the meaning of words, with the object of finding out what the social phenomenon of law is. He is clear, however, that his endeavour is not one of mere semantics, about the way we use words alone; instead he aims to give an account of law through the increased attention to legal-related language. In his lectures in Oxford in the 1950s, he used to draw an analogy with a captain on a ship who concentrates on focusing his telescope while his main object is to find land, since there is no other way to find out in which direction to steer his ship. Likewise, Hart says, it is only by focusing on legal language that we use that we can find out more about our real object: the social phenomenon of law to which the language refers. In other words, Hart's aim is to pay attention to the language of the law although only to find out more about the social phenomenon itself.

The third and final point that Hart emphasises in the Preface is the distinction between the internal and external points of view. He says that we cannot understand properly what a social practice such as rule-following, and hence law, is unless we can understand what the practice is like 'from the internal point of view', that is to say, from the point of view of someone who **accepts** that practice as a guide to conduct. The 'external' point of view is manifested by someone who does not accept the practice in question. This point of Hart's is very important for understanding his analysis of the concept of a rule, in his Chapter 4, and is important in general for appreciating what is involved over and above the mere recording of regularity of behaviour in explaining rule-governed human practices.

The analysis of rule-following

Hart says that there are vital differences between merely habitual behaviour, that is, doing things **as a rule**,† and rule-following (i.e. making it a rule to do something). He says that it is wrong to describe rule-governed behaviour as merely regular and habitual behaviour. Instead, there must be acceptance that the fact that people do things regularly is a reason or standard for behaving in that regular way. Statements which appeal to standards are to be contrasted with these 'external' statements about the law, which do not signify that the speaker themselves accepts them. In this sort of case, according to Hart, we do not say 'It is the law that...' but instead we say such things as 'In the United Kingdom, **they** recognise as law...'. Hart says that this is an external statement because it is the natural language of an external observer of the system who, without necessarily accepting its rule of recognition themselves, states the fact that others accept it.

† Colloquially, **as a rule** means 'usually, but not necessarily always', as in: 'When I go to London, as a rule I take the train'.

Self-assessment questions

1. **What are the three main points emphasised in Hart's Preface?**
2. **What does it mean to 'describe law'?**
3. **Is describing law analogous to describing, say, the geographical contours of an island?**
4. **What is 'sociology'?**
5. **What is 'legal-related language'?**

Questions for discussion

You may like to discuss these questions with tutors or fellow students.

1. **Is the analogy with the captain's focusing his telescope a good one?**
2. **What are the 'internal' and 'external' points of view? Is the following a manifestation of the 'internal' point of view? A person who, while not accepting the rules of the Nazi legal system, recognises that clearly a lot of people once did.**
3. **Do you think that knowing whether people accept rules in their society is important? If so, why?**

Summary

Hart aims to produce a **descriptive** theory of law by paying attention to legal-related language and to the internal attitude of people towards the law.

4.3 Definition and theory in *The concept of law*

Chapter 1

In this chapter, Hart isolates three questions of importance to be considered in jurisprudence:

- What is the difference between law and coercion?
- What is the relationship between legal and moral obligation?
- What does it mean to say that a social rule exists in a particular society?

In order to answer these three questions, he then sets up a method for understanding the concept of law by exploring the idea of definition. Consider his 'simple' definition of a triangle as 'a three-sided rectilinear figure'. Such a definition is very useful since it breaks down what a triangle is into simpler ideas and allows us to substitute 'three-sided rectilinear figure' wherever the word 'triangle' is used. But he concludes that such a definition is not possible for law because of the existence of 'difficult cases', by which he means in particular international law and primitive law. International lawyers have long debated the vexed question of whether international law is 'really' law since there is no world court, nor world legislature, nor an internationally agreed form of systematically applied sanctions against those states that do not follow international law. Similarly, the law of primitive tribes does not seem to share certain institutions, such as formally constituted courts and legislatures, that seem to be part of the concept of law. There does not seem to be a 'simple' definition of law that could settle these questions once and for all.

Hart therefore abandons the idea of a 'simple' definition for law and adopts instead what can be described as a model of law, one against which the 'difficult cases' of international and primitive law might be compared. The construction of this model of law occupies him for most of the rest of his book, and his conclusion (outlined in detail in Chapters 5 and 6 of *The concept of law*) is that the model of law is constituted by a 'central set of elements' that describes a 'modern municipal legal system'. By looking at the model (what he calls the 'union of primary and secondary rules') a comparison can be made with the difficult cases of international and primitive law. Since the modern municipal legal system has courts, and has a legislature as well as involving the application of rules, it is then possible to say: 'international law is law to the extent that it shares similarities with this central case (e.g. it involves legal argument employing rules), and **not** law to the extent that it does not (e.g. there is no court of general jurisdiction).' The same arguments can be advanced for primitive law.

Hart returns to the question of the status of international law in his final chapter, Chapter 10, and so there is a return to the idea of definition in that chapter, too. The aim of Chapter 10, which is not essential to the main thesis of the book, is to demonstrate the breadth of his theory: Hart abandons 'simple' definition in the early part of the book partly because of the existence of the phenomenon of international law, proceeds to construct a 'central set of elements' in Chapters 5 and 6, and then returns to international law in the final chapter to show the extent of the similarities and dissimilarities to a modern municipal legal system.

Questions for discussion

You may like to discuss these questions with tutors or fellow students.

1. **What is simple about a 'simple' definition? Would a triangle imposed on a sphere be as simply defined as Hart suggests? If not, why not? Although Hart abandons the idea of simple definition, is it clear that what he proposes instead is different in kind, rather than degree? After all, a triangle imposed on a sphere**

would in some respects be within the simple definition (if you looked at it two-dimensionally) but in other respects not.

2. **Austin thought that the 'difficult' cases for law were 'international law' and 'constitutional law' (see Chapter 3 of this module guide). Hart, however, thinks that international law and primitive law are difficult cases. Is there any reason for the difference between Austin and Hart here?**
3. **Why should Hart (and the history of jurisprudence) be concerned with the differences between law and coercion, and legal and moral obligation? These concerns seem focused more on questions of legitimacy and the limits of law, than on mere description.**
4. **By what criteria should one choose a 'central set of elements' constituting law? Could one choose on other than descriptive grounds? For example, could one say that the morally best model of law would be that which served certain moral purposes? (John Finnis argues along these lines: see Chapter 2 of this guide.)**

REMINDER OF LEARNING OUTCOMES

By this stage you should be able to:

- **explain what Hart means by a 'simple' definition**
- **explain the difference between an 'internal' and an 'external' point of view.**

4.4 Criticism of the 'orders backed by threats' (OBT) theory

In Chapters 2, 3 and 4, Hart provides a classic criticism of a theory he calls the 'orders backed by threats' (OBT) theory of law, which is fairly closely based on Austin's theory of law as the command of the sovereign (see Chapter 3 of this guide). The main criticism of the OBT theory is that it ignores the concept of rule-following because it concentrates on thinking of law as only a set of predictions of the likelihood of punishment from someone who gives an order, and this idea cannot explain what it means to follow a rule. If we cannot understand what it means to follow a rule, says Hart, then we cannot understand the important distinction between those rules that impose duties and those that confer powers, nor can we understand the important idea of sovereignty.

Chapter 2

In this chapter, Hart considers linguistic differences between orders and laws and this introduces the reader to what is often called 'the linguistic method' or the 'method of linguistic philosophy'. It is common for a student new to this subject to suppose that something rather strange is being done here, but this is not the case at all. All law students soon learn that there are standard uses of legal words, and that a large part of learning legal technique requires paying careful attention to words. For example, there is a very important difference in statutory language between the use of 'will' and 'shall' such that 'shall' indicates a mandatory requirement. (The use of this example should spark other examples in your mind.) Hart just applies this technique to understanding not the meaning of particular laws, but of law in general. Famously, Hart in this chapter draws a linguistic distinction between our standard use of the term 'being obliged' (that is, being coerced) to do something and 'being under an obligation' (that is, being under a duty)[†] to do something, saying that in the former case, no obligation was implied.

This seems a reasonable remark to make since it allows us to distinguish between two cases that on the face of it are very similar: the case where a gunman points a gun at a bank teller and tells them to hand over cash, and the case where a tax inspector orders someone to pay a particular amount of money to the government. In the former case, we would have great difficulty in saying that the teller was under an obligation to hand the money over just because a gun was pointed at their head; but in the latter case, it is clear that the tax inspector has a legal right to make a demand, and that this creates an obligation on the part of the citizen to pay. Going from our actual use of language

[†] The being obliged/being under a duty distinction depends on our interpreting 'obligation' as a duty, that is, something that we **ought** to do, rather than something that we are **forced** to do. We may have an obligation to perform a duty such as doing jury service, but we are not forced to do so: we may find an excuse, or simply refuse, and accept the consequent penalties.

to understanding the differences in social conduct is therefore not at all dissimilar to what lawyers are doing all the time. It is important not to be bedevilled by the way this method of Hart's is labelled 'linguistic philosophy'; it is common enough and, indeed, the method was dominant in Oxford philosophy for at least a decade from the early 1950s.

Activity 4.1

Of particular note in this chapter is the use made of Hart's method of picking out distinctions in the meaning of words and then assuming that these words reflect significant differences in the phenomena of law.

Select three examples of Hart's use of this method, and explain what, if anything, is brought out that is significant about our understanding of law.

Feedback: see end of guide.

Questions for discussion

Would it be at all sensible, or legitimate, for Austin to reply to Hart, on learning of Hart's drawing attention to a distinction in our language between 'being obliged to do something' and 'being under an obligation', that 'he was not interested in distinctions that we *in fact* draw in our language, perhaps mistakenly, only in what is of importance to understanding law'? Consider whether Austin could be read as encouraging us to stop thinking of legal obligation as anything more than just our 'being obliged' by the force of sanctions to do things that the legislature wants us to do. Read like this, Austin's theory would have a lot of force to some people. Further, by commanding someone to do something, is it possible that we could thereby create a right, or a power in someone else? Think of some examples.

Chapter 3

In this chapter, Hart considers what law would be like if we took it as represented by the model, as he says, of 'orders backed by threats writ large', in other words, if we assumed that law really consisted of orders directed to us by the legal sovereign. He makes three main criticisms.

First, the model of orders is much closer to the idea that all laws impose duties, as though all laws were really of the sort that we find most common in criminal law and tort. Quite apart from the difficulty that merely ordering a person to do something only 'obliges' a person to do something, and does not impose a duty on them, Hart says that the model does not take into account the existence of rules that **confer powers** on people to do things. A large part of our laws does not require us to do things, but only declares that, if we want to achieve certain goals, such as make contracts, marry, form companies, acquire property and so on, there are 'power-conferring' rules that can 'facilitate' our activities.

Second, the idea of ordering a person to do something ignores an important feature of law – that it can just as easily and readily apply to those who make the laws; and so the model of orders as a 'top-down' one cannot adequately account for it.

Finally, the model of law as orders implies that there is a time and place in which the law was created, when the order was 'made'. But Hart again points out that with law it is not necessary in every case to be able to locate the time and place of the coming into force of the order. In the common law, for example, it is clear that it is possible to identify law without having to locate when, and from which body, it came into being. In particular, Hart points to the legal status of local custom. Such customs, if reasonable, and existing from 'time immemorial', are legally valid and enforceable, yet it is of the essence of customs that they arise over time and not as the result of a particular sovereign order.

Self-assessment questions

1. **List the main criticisms that Hart makes of the OBT theory.**
2. **What are the differences, if any, between Austin's command theory, and the OBT theory?**

3. **Can power-conferring rules be recast as duty-imposing rules that are merely hypothetical, as Hart suggests? What are the disadvantages, if any, of seeing the law in this way?**
4. **Can the possibility that a will could be declared null and void have the same motivational force as a sanction?**
5. **What is it about custom that creates difficulties for the OBT theory? Is there any way of getting around the problem? (Hint: see what Austin says about 'tacit' commands, in Chapter 3 of this guide.)**

Chapter 4

Hart continues his criticism of the OBT theory by criticising the idea of legal sovereignty as brute force. Such an idea, he says, cannot cope with the problems of the continuity of sovereignty because it overlooks the part played by rules. A habit of obedience is fundamentally different from the important concept of rule-following, which includes the idea of standards against which conduct may be appraised. Therefore any idea that sovereignty can be identified as a 'person or group of persons' (Austin's description of the sovereign) that relied for its existence on the continued 'habits of obedience' to it would meet severe difficulties when there was a change of sovereignty. In such a case, the new sovereign would have to wait and see whether a habit of obedience occurred and at the very least there would be a period of uncertainty – an interregnum. But, Hart says, if we use the idea of rule-following rather than a habit of obedience we can see that the rule-related idea of a 'right to sovereignty' is possible, such that a succeeding sovereign (which he calls 'Rex II') gains the right to succession. The sovereign itself is constituted by rules, in any modern and sophisticated legal system, and so the appropriate people are seen as occupying offices of the sovereign rather than being the sovereign themselves. This is why, for example, in the United Kingdom, the sovereign is 'Crown-in-Parliament' and is not 'a person or group of persons' but a complex set of rules. Like a corporation, there is an existence, without a specific body of persons, in the rule-created institution itself. In sum, the OBT model, where those orders issue from a determinate body of people, must fail because it ignores the corporate nature of the legal sovereign.

Discussion topic

If we refer to the OBT theory sovereign as 'a person or group of people' we might not have difficulty in agreeing with Hart about the Rex I/Rex II scenario where we think of the sovereign as an individual person. But if the sovereign consists of a 'group of people' we might think that the word 'group' would independently characterise the sovereign, and so independently allow some form of legal continuity.

What do you think? Assess the arguments for and against such a move. It would be useful to read Tony Honoré's article 'Groups, laws and obedience' in Simpson, A.W.B. (ed.) *Oxford essays in jurisprudence: second series* (Oxford: Oxford University Press, 1973) [ISBN 9780198253136].

Summary

Hart says that social rules involve a standard accepted by some members of a social group, and the idea of a rule is better at explaining the law than the hierarchical, one-off nature of an order. Rules allowing for the distinction between legal duties and powers can account for the fact that laws apply to the institutions that make them, and explain why there are some laws that do not appear to have any particular origin, such as customary law.

4.5 The 'union of primary and secondary rules'

Chapters 5 and 6 are the heart of *The concept of law*, and in them, having dealt with the problems of definition and the inadequacies of the OBT model, Hart sets out what he thinks are the central features of law.

Chapter 5

Here Hart creates his own model of law as opposed to the Austinian model. Law includes the idea of obligation and that idea implies the existence of strongly supported social rules. But law also includes, in addition to obligations, rules that confer powers, permitting people to do things, and this was one of Hart's criticisms of the OBT theory. In this chapter, Hart produces a more direct argument to say why it is that the law consists also of power-conferring rules, and this argument generates reasons why the power-conferring rules are of different types. Hart imagines a society in which there are only duty-imposing rules and in which there are no power-conferring rules at all. He says that this would not be a truly legal society: it would only be 'pre-legal', because it would suffer from what he calls certain 'social defects'. Such a society, he says, would be 'static', 'inefficient' and would create undesirable 'uncertainty'. It would be static because no one would have the power to change the rules to suit changing social circumstances, and so the society would not be able to 'progress'. It would be inefficient because no one would have the power to adjudicate on disputes of law and fact, or have the power to enforce the law. It would be 'uncertain' because no one would have the power to identify what the law was in any disputed case.

To cure these defects, Hart constructs three power-conferring rules, which he now calls the 'secondary rules':

- First, there are the rules of change that introduce private and public powers of legislation and repeal and 'cure' the defect of lack of progress (i.e. of being 'static').
- Second, he introduces the rules of adjudication and these 'cure' the defect of inefficiency by introducing the courts and other institutions of law enforcement.
- Finally, there is the rule of recognition which, by conferring power on people to identify the law for certain through the institution of criteria of legal validity, 'cures' the 'defect' of uncertainty.

The result of this construction from duty-imposing to power-conferring rules creates Hart's well-known 'union of primary and secondary rules' which forms the central 'set of elements' that constitutes law. From his criticism of the OBT theory (and implicitly of Austin and Bentham) he has analysed law in terms of rules, and in terms of a distinction between duty-imposing and power-conferring rules. From this Hart has created the idea of law as a set of rules instituting law as we know and see it around us, with its public legislature, its 'private power-conferring rules', which enable people to make wills and contracts, marry, etc., its courts and law enforcement institutions – and, above all, its criteria of recognising valid law through the rule of recognition. No wonder Hart thought that in the union of primary and secondary rules he had found 'the key to the science of jurisprudence'.

Questions for discussion

In what sense do you think Hart uses the terms 'defect' and 'cure'? These terms connote disease! What is the 'defect' of uncertainty? Is it a defect, for example, of the law of tort that it is very uncertain?

On the one hand, perhaps it is not so important that we know for sure whether we will obtain compensation in any given set of circumstances, but important only that we know that compensation is possible when there is negligently caused injury or damage. On the other hand, being certain about what the law requires seems important for the criminal law, and for property law.

Chapter 6

This consists of an examination in greater detail of the rule of recognition[†] and its role in constitutional law. The rule of recognition is identified as a matter of empirical fact and this proposition is one of the most important in the whole book, for it is by his special means of identifying law that Hart establishes the positivistic nature of his thesis, in which law is to be seen as something independent from morality. In this chapter, Hart returns to the distinction he drew in his Preface, between the internal point of view and

[†] Definition of the rule of recognition: Hart says that 'The simplest form of remedy for the *uncertainty* of the regime of primary rules is the introduction of what we shall call a "rule of recognition". This will specify some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts.' (*The concept of law*, p.94)

the external point of view, this time applying the idea to the point of view from which the rule of recognition is understood by the 'officials' or judges of the system: the internal point of view refers to the point of view of the officials who accept the rule. In this chapter, Hart also defines what it means when we say that a legal system exists. He says there is a legal system in existence when (a) the rules issuing from it are 'by and large effective' and (b) even if people in general need not accept the rules (that is, they need not adopt the 'internal point of view' towards them) the officials **do** accept certain standards, through their acceptance of the rule of recognition as setting up the criteria of legal validity of the system. More will be said about the rule of recognition, which is the most difficult, and most significant, idea in *The concept of law*, in Chapter 5 of this guide.

Reminder of learning outcomes

By this stage you should be able to:

- **provide an analysis of the concept of a rule**
- **explain the major components of Hart's 'union of primary and secondary rules'**
- **consider critically Hart's 'construction' of the secondary rules from a 'pre-legal society'**
- **outline what Hart meant by the 'rule of recognition'.**

Questions for discussion

What is the relationship between what are called 'the sources of law' and the rule of recognition?

What use does the rule of recognition have in legal argument? (See also Chapter 5 of this guide.)

Hart talks of the 'necessary' conditions for a legal system. What do you think he means by 'necessary'? Logically necessary? Is Roman law valid law according to his theory, even though it has not been enforced for a millennium?

Summary

Chapters 5 and 6 of *The concept of law* contain Hart's central thesis that the 'central set of elements' constituting law consists of 'the union of primary and secondary rules'. These rules are the duty-imposing and power-conferring rules respectively, and the three power-conferring rules are the rules of change, adjudication and recognition. These rules set up legislatures, public and private powers of legislation, courts and criteria of legal validity. In particular, the rule of recognition is accepted by the officials – the judges – of the system. To say that a legal system exists means that it is by and large effective, and at least the officials of the system accept a rule of recognition that identifies what is legally valid within the system.

4.6 Other chapters

Chapter 7

This chapter is relatively little read but is a very important chapter in relation to Hart's view of legal reasoning. He stresses the open-ended, unclear and ambiguous character of many legal rules and discusses his famous distinction between the **core** and **penumbra** of settled rules of the legal system (see also Section 4.8.2 and the introduction to Part IV of this module guide). He attacks the view that law can be reduced to a set of propositions about what judges will do, and this constitutes a criticism by him of a school of jurisprudence in the USA that existed mostly in the first half of the 20th century – 'American legal realism'. This school took the view that statements of law were no more than predictions of what judges and juries would do in any particular case, leading to a call for an examination of law 'beyond the stated rules' and into the sociological conditions that surrounded law. Hart, naturally enough, given his analysis of rule-following as something distinct from the mere predictions of the likelihood of the application of a sanction, as the OBT theory seemed to require, is critical of the American realists' lack of emphasis on the existence of **standards**

of conduct against which actual conduct should be compared. Such 'normative' standards, of course, are what Hart thought was essential to understanding law. His discussion of the various ways in which judges come to their decisions is very valuable, and this chapter can be read very profitably in connection with understanding how Hart might defend himself against Dworkin's criticisms of Hart's rule of recognition.

Chapter 8

This and the following chapter concern themselves with questions of morality that arise in relation to law. In Chapter 8, Hart considers why law and morality have so much to do with each other but nevertheless can be distinguished in the way his theory of legal positivism requires. The most valuable discussion is his brilliantly clear introduction to the idea and history of the development of doctrines of 'natural' law. It is one of the best introductions anywhere to this difficult subject, and is very useful to read in conjunction with Chapter 2 of this module guide. In particular, Hart distinguishes between the sort of justice that attaches to law (procedural justice, or justice 'according to law'), and justice that attaches to substantive law (or justice 'of the law'). He says that it is the latter concept which is more important from the moral point of view.

Chapter 9

This is discussed separately in Chapter 6 of this module guide.

Chapter 10

This chapter has already been discussed. It is best understood as a kind of summing up of both Hart's theory of definition in the form of the setting up of a 'central set of elements' constituting law, and how international law is to be understood in terms of his general thesis that law consists of a union of primary and secondary rules.

Summary

The chapters that you can afford to read in less depth are Chapters 7, 8 and 10. Chapter 7 is Hart's account of legal reasoning, Chapter 8 is his classic introduction to natural law, and Chapter 10 is his discussion of the status of international law.

4.7 A return to the 'internal' point of view

One of the central themes of *The concept of law* is the very important idea of the 'internal point of view'. A way of understanding Hart, as well as a way of getting into a frame of mind where you can really try to criticise Hart's very well thought-out theory, is constantly to ask yourself what the 'internal point of view' is. In Hart's terms, it means 'acceptance': the 'internal point of view' means nothing more than that when a person has an internal point of view towards a set of rules, they accept those rules. But the idea of 'acceptance' is not unproblematic. Is there any room for investigation into **why** anyone would accept the rule of recognition, for example? The rule of recognition is crucial to identifying the law for Hart, and at the same time, we see that the distinction between the 'external' and 'internal' points of view is similarly crucial. What if we felt inclined to say that judges – who are required to adopt the internal point of view – should only commit themselves by their judicial oath to criteria of legal validity that have some moral decency (e.g. a commitment of allegiance to the Nazi party would not be proper)? If we did think that, it would mean that we would not identify any rule as valid law unless it complied with a rule of recognition that embodied some moral decency (e.g. was democratic). This would entirely demolish Hart's theory of legal positivism since it would have to hold that there was necessarily some connection between legal validity and moral decency.

- **Kramer M., C. Grant, B. Colburn and A. Hatzistavrou (eds) *The legacy of HLA Hart: legal, political, and moral philosophy*. (Oxford: Oxford University Press, 2008) [ISBN 9780199542895]**

is a collection of essays on Hart's work. The essays by Finnis, Waldron and Ryan are of particular relevance.

- **Toh, K. 'Raz on detachment, acceptance and describability' (2007) 27 *Oxford Journal of Legal Studies* 403**

is a demanding, but illuminating, discussion of the best way of understanding Hart's 'internal point of view'.

4.7.1 Perry on Hart's methodology

Stephen Perry has written an influential article on Hart's methodology in which he takes the line that Hart's theory cannot be purely 'neutral' and 'descriptive', as Hart maintained in his Postscript. It is a difficult read, but well worth the effort. In 'Hart's methodological positivism' (extracts of which appear in Freeman, para. 5–023) Perry argues that there is a difficulty in Hart's use of a 'descriptive-explanatory' approach implicit in Hart's Preface. Under this methodology, explanatory power is determined by 'meta-theoretical' criteria such as predictive power, coherence and an attempt at 'covering' all the available phenomena. Hart, of course, appears to be attempting this, for example, when he self-describes *The concept of law* as an 'essay in descriptive sociology'. Perry rejects this sort of method. He says that Hart instead relies on 'evaluative judgments' in his choice of a 'central case' of law. In other words, Hart **privileges** the 'modern municipal legal system', and so Hart's claim to generality is lost. Further, a description could only explain why people **regard themselves** as under obligations, but not **why** they are under obligations. If the aim of a description is 'accuracy', then it should report inconsistencies and different views about what obligations people are under, but these too can only be understood by addressing the central question of whether people **actually are** under obligations. This requires moral argument, not just a description of 'how things are'. Perry therefore concludes that an internal account is required to understand the normativity (the 'rule-governed nature') of law.

ACTIVITY 4.2

a. What is the difference between 'being under an obligation' and 'believing you are under an obligation'? Is 'being under an obligation' only a matter of 'feeling' or 'belief'? Think of examples where you are under an obligation but do not believe you are, and conversely, examples where you only believe you are under an obligation but are not actually so.

b. Is there any reason why Hart should not 'privilege' 'the modern municipal legal system'? Think of three examples where the question of whether a person has an obligation to do something is controversial.

c. Is Perry right to say that we cannot understand the rule-governed nature of law without an internal approach that would resolve controversial disputes?

Feedback: see end of guide.

Summary

The internal point of view is the point of view of a person who accepts some standard for their own and/or another's conduct such that we can say that conduct is 'rule-governed'. Difficulties arise over whether it is possible to say that mere acceptance is sufficient to explain rule-following adequately, since there will always be some controversy over what standard of conduct is to be applied.

REMINDER OF LEARNING OUTCOMES

By this stage you should be able to:

- **offer some comments on Perry's criticism of Hart's methodology**
- **give a critical account of Hart's views on theorising about law.**

4.8 Following rules

Rules are one of the most important means by which people coordinate their activities. Complex activities with a particular value or point, such as games, or bureaucratic administration, essentially depend upon rules to function at all. Obviously, the law too relies heavily upon rules to function. Indeed, prior to the humanist reorientation of morality that occurred during the Renaissance and the Enlightenment, there was no 'rights'-based way of looking at morality or law which would have served as the basis for legal reasoning. Rules, principles, orders and so on, were the only tools upon which a legal system could draw.

In Chapter 8 we will consider rules from the perspective of Raz's theory, as **exclusionary reasons**, which reflect the balance of reasons that apply to a situation (or type of situation). The following of these rules constitutes the executive phase of practical reason, which comes after the deliberative phase, which results in laying down the rule. Here we look at two other perspectives on rules: Hart's practice theory of rules, and the question of understanding what rules require us to do. You are advised to reread and reconsider this content once you have studied that chapter.

4.8.1 Rules as reasons and the 'practice theory' of rules

Rules play a central role in Hart's theory. Hart emphasised that the following of a rule could not be treated merely as a behavioural regularity. It is a rule that we stop at red traffic lights, but not a rule that we go to the cinema every Friday, even if we go through red lights more frequently than we fail to go to the cinema Fridays. The difference, Hart pointed out, lay in our. attitude towards them. There is social pressure to conform with rules, and we criticise people for breaking them, whereas no such similar pressure or criticism attends a failure to, say, go to the cinema each Friday. Thus, reasoned Hart, rules can be distinguished from mere behavioural regularities because rules are 'practices' of a particular kind, practices which are attended by social pressure to conform and criticism when people deviate. According to Penner, this 'practice' theory of rules fails on several counts.

Further reading

- **Penner, J., D. Schiff and R. Nobles (eds) *Introduction to jurisprudence and legal theory*. (Oxford: Oxford University Press, 2002) [ISBN 9780406946782] pp.653–55, where you can find the three reasons Raz gives for rejecting the practice theory of rules.**

4.8.2 Understanding and following rules: the influence of Wittgenstein

The question to be addressed here is, how do we know we are following a rule correctly, and how do we criticise others for failing to follow a rule? This might seem like a trivial question but consider the following case. You and I sit down to play chess, as we have done many times in the past. But this time my behaviour seems strange to you, because I start moving the bishop as we formerly moved the knight, and I move the knight as I used to move the bishop. You ask me to stop that and play by the rules. But I reply that I am. I say that these are the rules of chess: when you are under 25 years of age, one moves the knight and bishop as we did before, but when you are over 25, one moves them as I am now doing, and I turned 25 yesterday. How are you to respond to that?

Here's the paradox of rule-following this example generates. There is nothing in our past behaviour which shows that this was not the rule we were following, because before today playing with the knight and the bishop in the former way was perfectly right under my understanding of the rule as well as yours. You might try to avoid the problem by reformulating the rules of chess to avoid this result, by offering a new interpretation of the rule and so on, but as Wittgenstein demonstrated, this is hopeless, for one follows rules in interpreting formulations and interpretations, and I could just as easily avoid the intention that lies behind your reformulations by interpreting them as I wish (interpreting your words as having different meanings and

so on). Of course, you could provide further interpretations of these interpretations, but that will just go on for ever.

Because of these sorts of considerations – and all philosophers regard these points raised by Wittgenstein as points which have to be addressed – some people become rule sceptics, i.e. they do not believe that rules actually guide people's behaviour. There have been legal theorists who are rule sceptics of various kinds, most notably some American legal realists and, more recently, some critical legal scholars. Certain American legal realists argued that judges are not really bound by rules, and that they could manipulate rules in such a way as to get the results that they thought provided the best result in the case. You should realise something of the plausibility of this perspective, for in reading legal cases you will have come across occasions where different judges interpret a statutory rule or a rule of the common law in very different ways, yet all claim that they are giving effect to the rule. The considerations above could provide a philosophical basis for pointing out that rules are flexible and can be manipulated to generate the result one desires. However, we do notice that rules seem to have some effect, and rule sceptics generally try to show why the decisions of judges tend to be reasonably consistent even though this consistency cannot be put down to the constraint of following rules; critical legal scholars, for example, typically argue that whatever consistency there is in the case law can be attributed to the fact that lawyers and judges share the same ideological, i.e. socio-economic and political, outlook. They bring this shared outlook to the cases they decide, and it is because of that, they claim, the law has remained reasonably coherent.

Wittgenstein, however, was no rule sceptic. He argued, rather, that following a rule did not consist of extending a string of past applications of the rule each time we apply the rule, nor in our following some bullet-proof formulation or interpretation of what the rule required. The philosophical details are quite complicated (and controversial) but the general approach is to point out that following a rule reflects something akin to an **ability**. To understand a rule and be able to follow it is primarily a matter of knowing **how** to do something, rather than knowing **that** this string of past cases exists, or knowing this or that formulation of the rule. We are capable of following rules and understanding what they require in a particular case because we share the same judgments about what counts as doing something in the 'same' way, what counts as a relevant similarity and what counts as a relevant difference.

On this 'knowing how' view of rules, the paradox dissolves. The considerations that seem to make rule-following paradoxical arise because we are looking in the wrong place to see how we follow rules.

Understanding rules this way, however, does not merely dissolve the paradox. It also tells us something about the nature of rules. In particular, it emphasises that rules are devices of practical reasoning, which are used to do things with a purpose in mind. Therefore, rules do not apply in every sort of circumstance that may arise. Rather, rules serve a purpose in those situations in which it makes sense to follow them. Rules are **defeasible**.† Hart, who was aware of the work of Wittgenstein, also made this point when he talked about rules having a core area of application, and a **penumbra**† of uncertainty. Thus, a rule which states 'No vehicles in the park' applies perfectly well to bar cars and lorries from the park, which is the sort of traffic the makers of the rule had in mind when the rule was instituted. But it may not apply easily at all to other cases; the case of scooters, the case of emergency vehicles on the way to a rescue, the case of citizens who wish to mount a vintage car as a statue. Wittgenstein would say that it is part of a mistaken 'mythology' of rules that they should 'self-apply' in every possible circumstance. **We apply** rules, and we can see where their application is doubtful or problematic.

† Defeasible: capable of being defeated, overturned or made void.

† Penumbra: a less distinct region surrounding a core area. The word derives from the Latin word for 'shadow'.

(Note: accepting this point **does not** resolve the dispute between Hart and Dworkin in Hart's favour, on the basis that Wittgenstein showed that there were gaps in the law, i.e. those areas where rules do not apply straightforwardly. For Dworkin does not claim that there is never uncertainty or doubtfulness in the application of legal rules, but rather that a judge may always determine a right answer in a case, not by showing the 'true meaning' of any particular rule, but rather by showing that there is, in the

principles and theoretical resources of the law, a true answer to the question 'what is the law on this point?')

Summary

Hart's practice theory of rules, by which a rule is said to exist where there is a practice of acting, deviation from which attracts criticism, is deficient for not being able to distinguish rules from generally accepted reasons, and for failing to reproduce the normativity of rules, which does not depend upon whether they are practised or not. Wittgenstein's consideration of rule-following denies that rules are standards which are logically dictated by past precedents, or by unmisinterpretable formulations of what a rule requires; rather, we follow rules and understand deviations from a rule because we share a practical understanding of what counts as going on in the same way given the context and our purposes. Rules are defeasible in the sense, roughly, that they do not apply to cases that lie outside the context in which the rules achieve the practical purpose we intended.

Reminder of learning outcomes

By this stage you should be able to:

- **explain Hart's 'practice' theory of rules and its deficiencies**
- **describe how trying to understand how we follow rules can give rise to a philosophical paradox, what rule scepticism is, and explain how Wittgenstein's ideas might contribute to resolving these problems.**

Activity 4.3

There has been much controversy as to whether corporations, as legal persons, can be criminally liable for murder or manslaughter. Assume you are a judge faced with the issue of whether a railway corporation can be criminally tried for the death of passengers in an accident caused by a broken rail, which resulted from the deliberate decision of the directors not to invest more money in track maintenance. What considerations would you bring to bear in making your decision?

Feedback: see end of guide.

Sample examination questions

The following questions are about methodology. Good responses to each of them, will provide some answer to the question of what the theorist is trying to do.

Question 1 What lessons can we learn about positivism from Hart's discussion of the Nazi grudge informer case?

Question 2 Discuss the role of the 'rule of recognition' in Hart's theory of law. Does it achieve what he hopes?

Question 3 How did Hart define legal positivism and what were his arguments for it?

Question 4 Hart famously claims that *The concept of law* is an exercise in sociological description. What features of his theory support this claim?

ADVICE ON ANSWERING THE QUESTIONS

Question 1 You should read Chapter 6 of the module guide before trying to answer this. But the question requires you to think about why that particular case, discussed by Hart in some depth in Chapter 2 of Essays in jurisprudence and philosophy, and again in Chapter 9 of *The concept of law*, should have been decided as Hart says. Given that the better decision, in Hart's view, would have been the one that was inspired by an acceptance of his own theory of law, a good answer would consider whether Hart was judging his theory of law according to whether it would produce better judicial decision-making. If this is what Hart was doing, then it suggests he thought that moral judgment is what you judge legal theories by.

Question 2 Besides describing and discussing what the rule of recognition is, you should show the examiner:

- that you 'cure the defect' of uncertainty in a pre-legal world of primary rules alone; to achieve a distinction between empirical factual statements about the concordant practice of 'officials' of the system and morally evaluative statements, etc.
- that there might be a difficulty in reconciling description of law with endorsing a desirable function of law
- that you have a view about this.

You will be interested to know that only a few candidates will discuss these final two points. Good marks in jurisprudence start here and it is where jurisprudence starts to become interesting.

Question 3 This would require you to pay special attention to:

- Hart's method of linguistic analysis
- his construction of the secondary rules in response to the 'social defects' of a regime of primary rules alone, since this looks 'practical' rather than 'descriptive'
- his arguments for the 'wider' conception of law over the 'narrower' conception of law in Chapter 9.

Question 4 This question requires discussion of Hart's methodology. Sociological evidence is strikingly absent from *The concept of law* and you must confront the question of whether this matters, especially since Hart described his book as 'an essay in descriptive sociology'. Can a description of a legal system adequately be provided in an examination of the way people, predominantly English lawyers, speak about the law? You should look at what Hart says about the relevance of linguistic analysis, and give examples. You should **then form an opinion of your own**. Clearly, we do not need 'sociological evidence' to find out a great deal about a legal system. Hart's analysis of rule-following is full of insights, yet 'sociological' evidence does not seem relevant. You should consider how Hart builds up his concept of law out of the shortcomings of an imaginary regime of primary rules, and also how he justifies the same concept, in Chapter 9 of *The concept of law*, in its ability to settle certain sorts of problems (which we deal with in Chapters 5 and 6 of this module guide).

Reflect and review

Look through the points listed below. Are you ready to move on to the next chapter?

Ready to move on = I am satisfied that I have sufficient understanding of the principles outlined in this chapter to enable me to go on to the next chapter.

Need to revise first = There are one or two areas I am unsure about and need to revise before I go on to the next chapter.

Need to study again = I found many or all of the principles outlined in this chapter very difficult and need to go over them again before I move on.

Tick a box for each topic.

	Ready to move on	Need to revise first	Need to study again
I can explain what Hart means by a 'simple' definition.	☐	☐	☐
I can explain the difference between an 'internal' and an 'external' point of view.	☐	☐	☐
I can outline the main steps in Hart's criticism of the 'orders backed by threats' theory.	☐	☐	☐
I can provide an analysis of the concept of a rule.	☐	☐	☐
I can explain the major components of Hart's 'union of primary and secondary rules'.	☐	☐	☐
I can outline what Hart meant by the 'rule of recognition'.	☐	☐	☐
I can consider critically Hart's 'construction' of the secondary rules from a 'pre-legal society'.	☐	☐	☐
I can offer some comments on Perry's criticism of Hart's methodology.	☐	☐	☐
I can give a critical account of Hart's views on theorising about law.	☐	☐	☐
I can explain Hart's 'practice' theory of rules and its deficiencies.	☐	☐	☐
I can describe how trying to understand how we follow rules can give rise to a philosophical paradox, what rule scepticism is, and explain how Wittgenstein's ideas might contribute to resolving these problems.	☐	☐	☐

If you ticked 'need to revise first', which sections of the chapter are you going to revise?

		Must revise	Revision done
4.1	Studying Hart	☐	☐
4.2	Hart's aims	☐	☐
4.3	Definition and theory in *The concept of law*	☐	☐
4.4	Criticism of the 'orders backed by threats' (OBT) theory	☐	☐
4.5	The 'union of primary and secondary rules'	☐	☐
4.6	Other chapters	☐	☐
4.7	A return to the 'internal' point of view	☐	☐
4.8	Following rules	☐	☐

NOTES

5 A master rule for law: Hart's rule of recognition

Contents

Introduction

This chapter pays particular attention to what is probably the major focus of Hart's theory: the set of criteria through which laws are identified. Hart is very specific about how we identify the rule of recognition, namely, that its existence is a question purely of empirical **fact**. It is therefore appropriate in this chapter to see what he says about legal method in his now well-known Postscript to *The concept of law,* because there he affirms that his aim all along in his work was just to give a factual account of law, one that did not import any moral judgment.

LEARNING OUTCOMES

By the end of this chapter and the relevant reading, you should be able to:

- **describe the rule of recognition in detail**
- **describe what Hart calls 'the necessary and sufficient conditions of the existence of a legal system'**
- **explain the significance of the rule of recognition for Hart for establishing his particular form of legal positivism**
- **discuss critically Hart's claim that the rule of recognition is identified as 'a matter of fact'**
- **outline the main arguments put by Dworkin in his criticism of the rule of recognition theory**
- **express your own opinion about the 'ultimate' criteria of legal validity, supported by reasons**
- **describe in general terms the position that Hart takes in the Postscript**
- **give an account of the significance of the Postscript (a) for interpreting the main doctrines of *The concept of law* and (b) for understanding law generally.**

ESSENTIAL READING

- **Hart, H.L.A. *The concept of law.* Postscript (available in Ebook Central via the Online Library).**
- **Dworkin, R. *Taking rights seriously.* Chapter 2 'The model of rules I' (available in E-book Central via the Online Library).**

FURTHER READING

- **Finnis, J. *Natural law and natural rights.* Chapter 1 'Evaluation and description of law'.**
- **Guest, S. 'Two strands in Hart's theory of law: a comment on the postscript to Hart's *The concept of law*' in Guest, S. (ed.) *Positivism today.* (Aldershot: Dartmouth, 1996) [ISBN 9781855216891] p.29.**
- **Hart, H.L.A. *Essays in jurisprudence and philosophy,* pp.62–72 (on the 'core' and the 'penumbra' of legal rules).**
- **MacCormick, N. *Legal reasoning and legal theory.* Appendix, p.275.**
- **Cases: *Registrar of Births, ex parte Smith* [1991] 2 QB 393; *Riggs* v *Palmer* 115 NY 506 (1889).**

5.1 Identifying the rule of recognition

Essential reading

- **Hart, H.L.A. *The concept of law*. Chapter 6 'The foundations of a legal system', pp.94–110, Chapter 7 'Formalism and rule scepticism', pp.147–54, and Postscript, pp.246–68, 292–95 (available in Ebook Central via the Online Library).**

While you are studying Hart, you should distinguish a narrower, professional question from the general question – 'What is law?' – that Hart sets himself at the very beginning of *The concept of law*. This narrower question is 'What is **the** law?' and it is narrower because it leads to a more precise specification of the issue on which knowledge of the law is required, and (most importantly) a specification of the legal system to which the question relates. Someone who asks, for example, 'What is the law concerning mortgages in England?' will be disappointed by the reply that 'it is the union of primary and secondary rules' (the answer to the 'general question'), considering it to have no practical relevance.

Hart's reply would depend on his **theory of legal validity**. Briefly, his answer is that the law on a particular topic in a particular legal system is that which is **according to the rule of recognition in that system**. We need, therefore, to examine more closely what Hart means by his rule, or rules, of recognition.

Incidentally, if you are wondering whether there is only one rule of recognition, or whether there are several, Hart was asked this very question. Hart's reply was that there is no importance in the issue. We can loosely refer to several rules, such as, in the United Kingdom, 'What Crown-in-Parliament enacts is law', or 'What the common law courts decide is law' and so on, or we can simply bundle them all together in one more complicated rule such as 'What Crown-in-Parliament enacts and what the common law courts decide and...is law'. Hart's definition occurs on p.94 of *The concept of law*. The rule of recognition is defined as specifying:

> some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts.

5.1.1 The supreme criterion and the ultimate rule

A rule of recognition, therefore, is simply a rule whose function is to identify whether or not another rule is part of the legal system. Hart further distinguishes between what he calls a supreme criterion and an ultimate rule of recognition:

- The **supreme criterion** is part of the rule of recognition and is the part which dominates over the rest. So the supreme criterion in the United Kingdom legal system is Parliamentary enactment, and if the common law, or local or general custom, conflicts with Parliamentary enactment, that enactment prevails.
- The **ultimate rule** of the system is the rule of recognition itself because you cannot go back further than that. It is ultimate in the sense that Kelsen's basic norm is, because we cannot trace validity back any further. (For a discussion of Kelsen's basic norms see Chapter 7 of the module guide.) So we can trace back the root of title or validity of a bylaw to an Act of Parliament but here, says Hart, we are brought to a stop in inquiries concerning validity.

Hart uses this distinction between a supreme criterion of validity and the ultimate rule of recognition to criticise Austin's attempt to say that all law is the result of legislation (remember Austin's theory of the tacit consent of the sovereign). He claims that this sort of confusion is caused by supposing that the supreme criterion of validity within the rule of recognition is the rule of recognition itself, that is, in the case of the United Kingdom, supposing that the only rule of recognition is: 'What Crown-in-Parliament enacts is law'.

The existence of the rule of recognition is a matter of empirical fact, to be determined by looking to the actual practice of the officials of the system. But Hart says that this does not mean that the rule of recognition is explicitly declared, saying that in the day-

to-day life of a legal system its rule of recognition is very seldom expressly formulated as a rule and that for the most part the rule of recognition is not stated, but its existence is shown in the way in which particular rules are identified.

ACTIVITY 5.1

As you read the text, ask yourself the following questions and note down your thoughts:

a. **What is the importance, if any, of the rule of recognition?**

b. **What is the importance, if any, of a distinction between identifying law itself, as opposed to identifying particular laws of particular legal systems?**

c. **Is Hart's definition of a legal system convincing?**

d. **Distinguish what Hart means by 'supreme' criterion and 'ultimate' rule.**

Feedback: see end of guide.

5.1.2 The definition of a legal system

The definition of a legal system (as opposed to 'law') is important for understanding the relationship between effectiveness and validity in Hart's theory. He says that it is pointless to talk of legal validity unless the legal system is generally effective.

The criteria for the existence of a legal system are that:

- The officials of the legal system must have the internal attitude towards the rule of recognition of the system, and it is not necessary (although it might be true) that private citizens have the internal attitude towards the rules. Hart says that what is crucial is that there should be a unified or shared official acceptance of the rule of recognition containing the system's criteria of validity.
- The valid legal rules of the system must generally be obeyed by both officials and the private citizens.

Note that Hart says that sometimes there might be a point in talking **as though** a legal system was in existence, as when teaching a subject like Roman law. The Roman legal system is no longer effective, yet, he says, a vivid way of teaching it is to discuss the validity of the particular rules in that system as if the system were still effective. Nevertheless, **because** it is no longer effective, no one thinks that Roman law is currently valid.

Summary

The rule of recognition answers the question 'what is the law of a particular system?' It is found by recording the actual practice of judges and other officials of a legal system. It is the 'ultimate rule' but it comprises both 'supreme' and 'subordinate' criteria of legal validity. The rule of recognition is also pivotal in defining what a legal system is.

REMINDER OF LEARNING OUTCOMES

By this stage you should be able to:

- **describe the rule of recognition in detail**
- **describe what Hart calls 'the necessary and sufficient conditions of the existence of a legal system'**
- **explain the significance of the rule of recognition for Hart for establishing his particular form of legal positivism**
- **discuss critically Hart's claim that the rule of recognition is identified as 'a matter of fact'.**

5.2 Criticism of the rule of recognition

5.2.1 Finnis's critique

You should note two important criticisms of Hart's rule of recognition. One is Finnis's criticism in *Natural law and natural rights,* Chapter 1. A shorter version is to be found in his 'Revolutions and continuity of law' in the *Oxford essays in jurisprudence: second series*. His criticism is that Hart leaves insufficiently specified the sort of attitude towards the rule of recognition that the officials have. Finnis says that there are a number of attitudes that could be described by this phrase and that – here he employs Hart's own definitional technique (see Section 4.3 of this module guide) – there must be a central set of elements that constitute an official's acceptance of the rule of recognition.

Finnis's own view, which is a complex variant of natural law, is that the central set of elements constituting an official's acceptance of a rule of recognition, is a **moral** acceptance of the rule. In this way, Finnis claims to have found a conceptual, logical link between validity and morality. A similar sort of criticism of the rule of recognition is to be found in the final Appendix to MacCormick's *Legal reasoning and legal theory*.

You might note, too, that there is a strong connection between Finnis's thesis and Dworkin's thesis that a proper legal theory must explain the moral force of law and that a proper interpretation of law requires us to make the best moral sense of our legal practices.

The other criticism is from Dworkin in Chapter 2 of *Taking rights seriously*. You should read this in conjunction with Chapter 9 of this module guide, particularly Sections 9.2 and 9.3.

5.2.2 Dworkin's criticism of the rule of recognition

Dworkin's theory of judicial integrity is important and the difficulty is that, although he writes in the same rigorous intellectual mould of Bentham, Kelsen, Hart and so on, he is not a legal positivist. You have to be prepared for some very different ideas! The best way to start is to read Chapter 2 of his *Taking rights seriously*, because it sums up in a very neat analysis what the rule of recognition is, before going on to give a very well-known and much argued about criticism of Hart's theory.

The argument in a nutshell is as follows. If we take Hart at face value, the point of the rule of recognition, which we identify as a matter of 'empirical fact', is 'to cure the defect of uncertainty' in a society of primary rules alone. It follows that any rule purporting to be a rule of law can be identified with certainty (by applying the test of identification of the rule of recognition). It follows that any rule purporting to be a rule of law that **cannot** be identified with certainty is **not a rule of law at all**. And so all 'hard cases', in other words all those cases in which it is controversial what the law is, and almost all those cases that come before appellate judges, do not concern law at all. To take an example, if a statutory provision prohibits 'vehicles' from a park, a purported rule of law that is relied on, say, by a prosecutor, to contend that rollerskates are prohibited from the park (this is Hart's example, incidentally, from Chapter 2 of his *Essays in jurisprudence and philosophy*), is not a rule of law at all, just because it is controversial. Dworkin says three things follow from this:

- the judge has to act as a legislator to make new law for the future on whether rollerskates are prohibited or not, and this is contrary to what we suppose the judicial role to be (judges are not elected to legislate)
- the judge characteristically then applies that law to the defendant, and so this would be retrospective legislation, which is unfair and not how we think judges act
- judges must continually be mis-describing what they are doing, because they talk as if they were 'finding' the law, rather than 'legislating' (and lawyers, law students, etc., also talk in this way). So, concludes Dworkin, there must be something wrong with the positivistic picture because it is useless when it comes to giving an

account of legal argument. And since legal argument clearly plays a central role in all matters legal, positivism fails.

You need to get a firm grasp of what Dworkin is getting at in the idea of interpretation before you can criticise him. He argues that there is no 'descriptive' sense of what a rule means independent of making an interpretation of that rule. It is very common to suppose that 'vehicles are prohibited from the park' says something very clear. Certainly, Hart was of that opinion, and he usefully distinguished between the 'core' meaning of a rule – the uncontroversially clear meaning – and the 'penumbra' in which there is a degree of uncertainty about what the law requires (see Chapter 2 of Hart's *Essays in jurisprudence and philosophy*). For understanding Dworkin two points need to be borne in mind:

- Clear meanings are themselves only 'clear' **because** of some interpretation. So in the above example, to say that these words 'prohibit', say, 10-ton trucks, is to apply some understanding of the 'point' of the words in question, and understanding the idea of a right to prohibit means seeing the author of those words in a particular light. After all, if you or I write on pieces of paper 'vehicles are prohibited from the park', this does not create a legal prohibition. So, to understand the words in a particular way is not merely to **read** them, but to **interpret** them, because we have assigned **point** to them.
- Unclear meanings really bring out the above. There is no answer to the question 'what does "vehicles" include?' in advance of an actual example and an argument.

Consider s.51 of the Adoption Act 1951. This section states:

> If any person applies in the prescribed manner for his or her birth certificate, the Registrar-General shall supply that person with the required certificate.

Now ask yourself what that statutory provision means. Does it apply to everyone? Does it place an absolute duty upon the Registrar of Births to supply a birth certificate to whoever applies for one in the correct manner? Or do you have to know the precise facts first?

Now read *Registrar of Births, ex parte Smith* [1991] 2 QB 393. Smith was a mentally disordered person who was in Broadmoor psychiatric hospital because he believed that his 'troubles' were caused by his natural mother in placing him for adoption and he had tried to murder one person, and successfully murdered another, because in both cases he mistakenly thought his victims were his natural mother. (Broadmoor is a secure psychiatric hospital situated about 70 km west of London.) He applied for his birth certificate in order to find out who she was and, of course, there was clearly evidence that he might cause serious harm to her. When you are faced with this situation it seems much more difficult to say that s.51 clearly gives Smith a right to his birth certificate, despite what the words say, because it is difficult to suppose that Parliament intended to place the natural mother at such risk. After all, Parliament had also declared the aiding, abetting, procuring and counselling of criminal offences to be illegal, and handing this birth certificate to Smith would have been like handing a gun and ammunition to someone who has made it clear that they intend to commit a crime (this would be a classic case of procuring a criminal offence).

Summary

Finnis criticises Hart's rule of recognition for its over-emphasis on identification through empirical fact, raising the question whether some evaluative criteria are required; if a moral evaluation (that, for example, the rule of recognition must serve some moral function such as enabling us to lead our lives in a better way) is required, then there will be a 'necessary' link between law and morality. Dworkin criticises the rule of recognition because it leaves judicial reasoning outside the realm of law. Since legal reasoning in hard cases is controversial, he says, the rule of recognition cannot adequately identify the law to be applied.

Reminder of learning outcomes

By this stage you should be able to:

- **outline the main arguments put by Dworkin in his criticism of the rule of recognition theory**
- **express your own opinion about the 'ultimate' criteria of legal validity, supported by reasons.**

5.3 The Postscript

Essential reading

- **Hart, H.L.A. *The concept of law*. Postscript (available in Ebook Central via the Online Library).**

Further reading

- **Guest, S. 'Two strands in Hart's *The concept of law*'.**

This section concentrates on the detail of the Postscript to *The concept of law* in which Hart counter-attacks Dworkin's attack on legal positivism and his perceived attack on Hart's method of legal theory.

5.3.1 Hart versus Dworkin

Hart affirms that his theory was intended to be both descriptive and general, in the sense that it is not tied to any one particular legal system. By 'descriptive' he says that he intended it to be morally neutral and with no justificatory aims. He says that this is a radically different enterprise from that envisaged by Dworkin which, he says, is in part evaluative and justificatory and addressed to a particular legal culture. Then he says that because of these differences, he and Dworkin are not in conflict (Finnis has maintained they **are** in conflict); it is just simply, so it seems, that they are each writing with different aims in mind.

Further, Hart takes exception to Dworkin's having labelled him as one of those linguistic theorists guilty of the 'semantic sting'. (The 'semantic sting' criticism, to be found in Chapter 1 of *Law's empire*, is that no adequate account of law can be based on a description solely of how people speak (the truth conditions of law linguistic practices).)

Hart denies that he ever had such a theory and says that the charge confuses the meaning of a concept with the criteria for its application. He clearly means by this the distinction that Dworkin often makes between the **elaboration of a concept** and a **conception**, with the clear implication that he (Hart) thinks that his theory allows for the elaboration of a conception of law. This is interesting particularly in the way the first four chapters of *The concept of law* develop, for there one would certainly be led to believe that Hart's aim was in fact to capture linguistic practices that are a plain fact about the world. However, it becomes clear by the end of the book, especially in the very important Chapter 9, that Hart is choosing between concepts (note the telling sentence in that chapter when he discusses the Nazi grudge informer case: plainly, we cannot grapple adequately with this issue if we see it as one concerning the proprieties of linguistic usage).

Hart disagrees with Dworkin that the point or purpose of law or legal practice is to justify coercion: 'it certainly is not and never has been my view that law has this as its point or purpose' (p.248). He refers, for example, to his invocation of the pre-legal world and says that the proposed introduction of the secondary rules, of adjudication, of recognition and of change, was not intended to answer any question about the justification of the application of the coercive powers of the state.

Hart maintains the view that the Nazi-type legal system, while undeniably of moral wickedness, was nevertheless law since the various features it shares with other modern municipal legal systems are too great for a universal-descriptive legal theory to ignore. He points to Dworkin's suggestion that such a legal system might be described as such in his pre-interpretive sense and then says that Dworkin's

concession there about the flexibility of legal language strengthens rather than weakens the positivist's case:

> ...it does little more than convey the message that while he insists that in a descriptive jurisprudence the law may be identified without reference to morality, things are otherwise for a justificatory interpretive jurisprudence according to which the identification of the law always involves a moral judgment as to what best justifies the settled law. (p.271)

Consequently, in line with what Hart argues at first in his Postscript, that he is about universal description and Dworkin is about justification of state coercive powers, Hart rather reasonably concludes that, in characterising the Nazi legal system, he and Dworkin are really talking at cross-purposes.

You should think about the following problem with this account. To what extent can you make sense of a human practice without being a person who is (as it were) part of that practice? Let us take mathematics. Could you produce a descriptive account of mathematics (what mathematics is; what it can achieve; what sorts of problems it deals with; etc.) without yourself being a mathematician of some sort? It is easy to imagine that the more versed in mathematics a person is, the better account that person will give. Why? Because what is interesting about mathematics is what it is that people who are engaged in it are doing – who better to give an account, then, than someone engaged in mathematics? (Assuming they are capable of communicating it!) There is a quicker way to this point: could a person who was unable to do even the simplest arithmetical sums tell us anything at all about mathematics? Could a person who was tone-deaf give us an adequate description of what music is? Well, in the case of law, the more detached a person is (in Hart's terms, the more external), the less rich the explanation will become. Imagine that you suddenly find yourself in the role of a Nazi judge. Nazism is contrary to your moral beliefs; how would you fare, do you think, in interpreting immoral laws? It might not just be hard to get yourself into the Nazi mindset, it might be **impossible**. What do you think? Does the analogy with engaging in mathematics work?

5.3.2 Principles and the rule of recognition

Hart also thinks that Dworkin is wrong to suppose that there is such a sharp distinction between rules and principles. Hart concedes there to be a difference in specificity and, perhaps, weight. But he thinks Dworkin exaggerates the differences and refers to the *Riggs* v *Palmer* decision which Dworkin famously uses to show how principles decide cases (see *Taking rights seriously,* Chapter 2). Hart thinks this decision shows clearly not a clash between two principles but between a rule and a principle. Here you must make up your own mind. Hart just asserts that there was a clear rule of succession that a murderer could not inherit from the estate of the person they murdered; Dworkin denies that there was any such rule but that there was a general principle (outweighed in that case by another – that no person should profit from their own wrong) that the clear words of a valid will should be closely adhered to.

Hart thinks that while large theoretical differences exist between Dworkin and himself on this point, nevertheless they both share the view that there are certain basic facts of legislative history which each of them thinks limit the application of law by judges: '...his explanation of the judicial identification of the sources of law is substantially the same as mine' (p.267). But the main difference, he says, lies in the fact that there are few legal systems outside the USA and the UK in which legal reasoning takes the form of the all-embracing kind (holistic) that Dworkin says is involved in the idea of constructive interpretation.

ACTIVITIES 5.2 AND 5.3

5.2 Provide and compare examples of legal rules and legal principles.

5.3 Read *Riggs* v *Palmer*. Was this a clash between a principle and a principle, or a rule and a principle? Try to come to a conclusion about what is the better way to

explain the decision, giving reasons. In coming to your conclusion, make it clear what the principles are, and, if you think a rule is involved, say what the rule is.

Feedback: see end of guide.

5.3.3 Judicial discretion

Hart addresses the question of the difference between himself and Dworkin on the question of how best the unregulated cases (as Hart appears to call hard cases) should be resolved. His answer is straightforwardly assertive: he thinks that there are cases where judges exercise their judicial discretion by acting as judicial law-makers and he does not think that this poses a great threat to democracy. You must make up your own mind: see, for example, whether you agree with the following statement: '...the delegation of limited legislative powers to the executive is a familiar feature of modern democracies and such delegation to the judiciary seems a no greater menace to democracy' (p.275). I find this remark disappointing in drawing insufficient attention to the very great differences of role and function between the executive and the judiciary. The executive must govern the community as a whole but we do not think that judges are like that at all. We think that they should concern themselves with the merits of the dispute relating to the respective rights and duties of the parties before them.

Hart also takes Dworkin to task for saying that it is a defect of legal positivism that it supposes that judicial discretion in unregulated cases is retrospective in effect (which Hart must concede happens if he allows for judicial law-making). He simply says that if there were law there – in the cases, or the arguments, or whatever – as Dworkin supposes, it would not be retrospective, true, but a decision made by the judge would be just as surprising to the defendant as where the law is made by the judge (the positivist position). A possible insight into the issue of whether judges make or only apply the law is to suggest that they can do both: like a pianist playing a piece by Beethoven but doing so creatively. (The score is always the same but the performance is always different.)

Consider the following defence of Dworkin. Surely, if we are to choose between two theories of adjudication, we must choose the one which says that, characteristically, the judge is punishing (or awarding compensation or whatever) for acts which at the time that they were done were against or within the law. The defendant who is surprised by a decision that is the result of retrospective legislation is worse off in this sense than the defendant who is surprised at a decision about the law existing at the time they did the act. It is a simple matter of the rule of law: no one should be punished, or whatever, unless there is a law which prohibited (or whatever) the act at the time that it was done. This principle is frequently referred to as the *nulla poena sine lege* principle ('no punishment without law'). We could remember in this connection that it was this principle which Hart so effectively invoked in the important Chapter 9 of *The concept of law*.

Summary

In the Postscript, Hart repeats the line that is apparent in the early part of *The concept of law*, that is, that legal theory involves a descriptive account of the concept of law. He specifically denies that legal theory is interested in any questions of justification and distinguishes himself from Dworkin on this ground. He also reaffirms his belief that evil legal systems are as much law as moral legal systems.

Self-assessment questions

Test your understanding of Hart's positions by making brief summaries of:

1. **The main line that Hart takes in his Postscript.**
2. **Hart's views on:**
   a. **the nature of legal theory**
   b. **the idea of interpretation**

c. **the relationship between the rule of recognition and principles**

d. **the relationship between law and morality.**

Reminder of learning outcomes

By this stage you should be able to:

- **describe in general terms the position that Hart takes in the Postscript**
- **give an account of the significance of the Postscript (a) for interpreting the main doctrines of *The concept of law* and (b) for understanding law generally.**

Sample examination questions

Question 1 Explain the role of the rule of recognition in Hart's theory.

Question 2 '...the rule of recognition exists only as a complex, but normally concordant, practice of the courts, officials, and private persons in identifying the law by reference to certain criteria. Its existence is a matter of fact' (Hart, *The concept of law*).

Discuss.

Question 3 'Dworkin's theory is fundamentally a normative theory of law, offering guidance to the judge as to his judicial duty. Hart's is a descriptive theory, offered to historians to enable a discriminating history of legal systems to be written.' (Finnis)

Discuss.

Question 4 'Judges are not elected and so they should not make law.'

Discuss.

Question 5 How effective is Hart's Postscript in meeting the objections of his various critics?

Advice on answering the questions

Question 1 This requires looking at the reasons Hart gives for the rule of recognition in terms of certainty (see Section 4.5 of this guide). What 'defect' was the rule of recognition supposed to 'cure'? In Chapter 9 of *The concept of law* it is clear that Hart wants the law to be distinct from morality for a practical purpose of a perhaps different kind: he wants people to be able to see that the fact that some rule is legally valid is 'not conclusive of the question of obedience'. So the rule of recognition, by defining law by reference to 'actual empirical facts', is pivotal in establishing Hart's legal positivism.

Questions 2 and 3 The focus of both of these questions is on the extent to which Hart's theory, particularly the rule of recognition (because it identifies the laws of a legal system), is descriptive only. Obviously there are different emphases (in Question 2 it is more on the rule of recognition; in Question 3 it is more on Hart's linguistic-descriptive method) but each question is fundamentally about the same point. Both questions are relevant to a discussion of Dworkin's discussion of interpretivism (see Chapter 9 of this module guide).

Question 4 This is pretty straightforward but a start would be Dworkin's criticisms of the rule of recognition.

Question 5 To prepare for this question you should read thoroughly the Postscript (best done towards the end of your year's study in jurisprudence, so that you have absorbed by this time other approaches to jurisprudence). Only at that point should you consider whether Hart's claims in the Postscript meet the criticisms (mainly Dworkin's). You might particularly concentrate on the way Hart argues for legal positivism in his discussion of the Nazi informer case (and here you could refer to the debate he had with Fuller (see Chapter 6 of this guide)).

Reflect and review

Look through the points listed below. Are you ready to move on to the next chapter?

Ready to move on = I am satisfied that I have sufficient understanding of the principles outlined in this chapter to enable me to go on to the next chapter.

Need to revise first = There are one or two areas I am unsure about and need to revise before I go on to the next chapter.

Need to study again = I found many or all of the principles outlined in this chapter very difficult and need to go over them again before I move on.

Tick a box for each topic.

	Ready to move on	Need to revise first	Need to study again
I can describe the rule of recognition in detail.	☐	☐	☐
I can describe what Hart calls 'the necessary and sufficient conditions of the existence of a legal system'.	☐	☐	☐
I can explain the significance of the rule of recognition for Hart for establishing his particular form of legal positivism.	☐	☐	☐
I can discuss critically Hart's claim that the rule of recognition is identified as 'a matter of fact'.	☐	☐	☐
I can outline the main arguments put by Dworkin in his criticism of the rule of recognition theory.	☐	☐	☐
I can express my own opinion about the 'ultimate' criteria of legal validity, supported by reasons.	☐	☐	☐
I can describe in general terms the position that Hart takes in the Postscript.	☐	☐	☐
I can give an account of the significance of the Postscript (a) for interpreting the main doctrines of *The concept of law* and (b) for understanding law generally.	☐	☐	☐

If you ticked 'need to revise first', which sections of the chapter are you going to revise?

		Must revise	Revision done
5.1	Identifying the rule of recognition	☐	☐
5.2	Criticism of the rule of recognition	☐	☐
5.3	The Postscript	☐	☐

NOTES

6 The Hart–Fuller debate

Contents

Introduction

This chapter introduces you to positivist defences against the idea that moral judgments are an integral part of the law. It is therefore a chapter closely connected to Chapter 2 and you should reread that chapter.

LEARNING OUTCOMES

By the end of this chapter and the relevant reading, you should be able to:

- **describe the main arguments of the Hart–Fuller debate**
- **describe the realist criticism of positivism**
- **discuss Hart's methodology in Chapter 9 of *The concept of law***
- **discuss the so-called 'grudge informer' case**
- **appreciate the significance of Fuller's eight principles of procedural justice.**

CORE TEXT

- **Freeman, Chapter 5 'Modern trends in analytical jurisprudence', paras 5–014 and 5–015 and Chapter 2 'Natural law', para. 2–014.**

FURTHER READING

- **Hart, H.L.A. *The concept of law*. Chapters 8 and 9.**
- **Fuller, L. *The morality of law*.**
- **Hart, H.L.A. *Essays in jurisprudence and philosophy*. Essay 2: 'Positivism and the separation of law and morals' (available in (1958) 71 *Harvard Law Review* 593) and Essay 16: 'Lon L. Fuller: the morality of law' (available in (1965) 78(6) *Harvard Law Review* 1281).**

6.1 The Nazi grudge informer and legal positivism's virtue of clarity

Core text

- **Freeman, Chapter 5 'Modern trends in analytical jurisprudence', paras 5–014 and 5–015 and Chapter 2 'Natural law', para. 2–014.**

Essential reading†

- **Hart, H.L.A. *The concept of law*. Chapter 9 'Laws and morals' (available in Ebook Central via the Online Library).**
- **Hart, H.L.A. *Essays in jurisprudence and philosophy*. Essay 2 'Positivism and the separation of law and morals'. Originally published in (1958) 71 *Harvard Law Review* 593 (available in the Online Library).**

The grudge informer case arises in the well-known debate between Professor Hart and Professor Lon Fuller of the Harvard Law School in 1958. The debate is a classic of modern jurisprudence, Hart taking the positivist line and Fuller the anti-positivist natural law line.

Hart takes on the criticism of positivism of a German jurist called Gustav Radbruch. The history of Radbruch's thought about law was that he was originally a positivist. After his experience of the Germany of the 1930s and during the war, his views radically changed and he became convinced that legal positivism was one of the factors that contributed to Nazi Germany's horrors. Among other things, he said, the German legal profession failed to protest against the enormity of certain laws they were expected to administer. In the light of this, Radbruch claimed that a law could not be legally valid until (a) it had passed the tests contained in the formal criteria of legal validity of the system, and, more importantly, (b) it did not contravene basic principles of morality.

This doctrine meant that, according to Radbruch, every lawyer and judge should denounce statutes that contravened basic principles of morality not just as immoral, but as **not having any legal character**, that is, being legally invalid, and therefore irrelevant in working out what the legal position of any particular plaintiff or defendant was.

A general argument was used in several West German criminal cases involving allegedly criminal acts of informing on other people during the Nazi period and thereby securing their punishment by the Nazis. The form of the defences to these alleged offences was that such actions were not illegal according to Nazi laws in force at the time they took place. Hart refers to one of these cases and you can see an account of it in (1951) 64 *Harvard Law Review* 1005.

You should be clear about the decision and the facts in this case, because it is often completely misunderstood. The facts were that in 1944 the defendant denounced her husband to the Gestapo for having said something insulting about Hitler when the husband was home on leave from the German army. She had a 'grudge' against him – such cases were not uncommon at the time. The husband was arrested and sentenced to death in accordance with a Nazi statute that made it illegal to make statements detrimental to the German government. In 1949, the wife was charged, in a West German court, with having committed the offence of unlawfully depriving a person of his freedom which was a crime under the German Criminal Code of 1871, which had remained in force continuously since its enactment. (The Nazi statute that had made it illegal to make disparaging statements about the German government had been repealed by 1949.)

The defendant pleaded in defence that what she had done was lawful when she did it in 1944. That is, she had not unlawfully deprived her husband of freedom, because it was made lawful by the Nazi statutes in force then. When the case came to the appeal court, although the defendant was allowed her appeal on other grounds, the court accepted the argument that the Nazi statute would not have been valid if it were so contrary to the sound conscience and sense of justice of all decent human beings. If

† As you read the texts, ask yourself – and make notes on – the following questions:

- What are the assumed, or hypothetical, facts of the grudge informer case? (This is very important: see *The concept of law,* p.254, and the note relating to p.204.)
- What is the *nulla poena sine lege* principle? Is it a moral or a legal principle, or both?
- Why does Hart think that retroactive legislation is the better decision in the Nazi grudge informer case?
- What is the 'Radbruchean position'?
- What does Hart's response to the grudge informer case tell you about Hart's methodology?

so, it would have followed that this statute did not make it lawful to deprive people of their freedom when they denounced Hitler, so that, at the time the defendant informed the Gestapo about her husband's remarks, she could have committed an offence under the German Criminal Code of 1871.

This reasoning is along the lines proposed by Radbruch. The Nazi statute had met the formal tests laid down by the criteria of legal validity of the Nazi legal system, but was nevertheless not law because it contravened fundamental principles of morality. Hart is critical of the argument, which was apparently followed in a number of similar cases. His short criticism, to be found in Chapter 9 of *The concept of law*, is that this is too crude a way to deal with delicate and complex moral issues. The better way, he says, to deal with the problem of punishing the Nazi informers under the law would have been to do this by retrospective law declaring the Nazi statute to be invalid. Then the defendant in this particular case would have been criminally liable not because when she did what she did it was illegal, but because a later statute made it illegal retrospectively.

This way of looking at the problem of legally justifying punishing the defendant, Hart says, brings to view the full nature of the moral issues involved. His suggested way of dealing with the matter brings another element into the equation of justification. This is that, although he thinks it was wrong to do what the defendant did, he also thinks it wrong to punish a person when what they did was permitted by the state, that is, was lawful. The moral principle here, and one endorsed by many legal systems, is that of *nulla poena sine lege* (Latin for 'no punishment without law'). The rationale of this principle is that if you are acting within the law at any one time then it should not be later declared that what you were doing was against the law.

Make sure you understand that Hart is not saying that this principle can never be sacrificed to some other moral principle, but rather that a transgression of that principle is part of the equation, and must be taken into account in determining whether the defendant should be punished. Hart says, for example:

> Odious as retrospective criminal legislation and punishment may be, to have pursued it openly in this case would at least have had the merits of candour. It would have made plain that in punishing the [defendant] a choice had to be made between two evils...

Hart's arguments can be summed up in his own words. What follows are his moral reasons for preferring the wider, positivist conception of law that separates law from morality by declaring all rules formally identifiable by reference to the factual test of the rule of recognition. These quotations are also to be found in Chapter 9 of *The concept of law*:

> What surely is most needed in order to make men clear sighted in confronting the official abuse of power, is that they should preserve the sense that the certification of something as legally valid is not conclusive of the question of obedience…A concept of law which allows the invalidity of law to be distinguished from its immorality enables us to see the complexity and variety of these separate issues; whereas a narrow concept of law which denies legal validity to such rules may blind us to them.

It is important to note how this section in *The concept of law* gives insights into Hart's approach, his methodology (see Chapter 4 of this module guide). The title of his book *The concept of law*, and his Preface (in which he claims he is writing an essay on descriptive sociology), suggest he aims to **describe**. But this section indicates that, whether he is aware of it or not, he has other than descriptive grounds for choosing the wider conception of law over the narrow. Perhaps he should have called his book *A conception (or theory) of law*.

You should also be aware of the remainder of the *Harvard Law Review* debate, which continues on the theme of Hart's minimum content of natural law. Also you should be aware of Fuller's reply, well covered in the secondary sources, although well worth reading in the original if you can obtain a copy. Fuller's book *The morality of law* is not long, and provides insights and, above all, is readable. You should be aware of the internal and external aspects of what he terms the law's morality.

Further reading

- **Epstein, R. 'The not so minimum content of natural law' (2005) 25 *Oxford Journal of Legal Studies* 219.**

In a useful discussion, Richard Epstein expands the idea of the 'natural minimum' to go well beyond maxims that tend towards human survival.

- **Green, L. 'The morality in law' in Duarte d'Almeida, L., J. Edwards and A. Dolcetti (eds) *Reading H.L.A. Hart's* The concept of law. (Oxford: Hart Publishing, 2013) (a version is also available here: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2223760).**

Leslie Green states, in relation to Hart's argument, that all law contains a minimum moral content. He argues that where there is a legal system, it will provide institutional support to morality through rules 'oriented to a wide range of morally important concerns'. Failing to do so, however, does not amount to a failure to be a legal system altogether (therefore the minimum moral content argument does not undermine the basic positivist thesis regarding the separation of law from morality).

The *New York University Law Review* ((2008) 83 *NYULR* 993) has published the papers from a symposium: *The Hart–Fuller debate at fifty.*

- **Cane, P. (ed.) *The Hart–Fuller debate in the twenty-first century.* (Oxford: Hart Publishing, 2010) [ISBN 9781841138947]**

is another collection of interesting essays on the debate and its extensions in light of developments over the past 50 years.

In fact, Fuller's jurisprudence has enjoyed somewhat of a resurgence. Kristen Rundle has produced a detailed account of Fuller's work on the rule of law (also drawing on biographical data).

- **Rundle, K. *Forms liberate: reclaiming the jurisprudence of Lon L Fuller.* (Oxford: Hart Publishing, 2012) [ISBN 9781849461047].**

She also defends Fuller's theses on the basis that, for Fuller, the rule of law flows from respect for law's subjects as moral agents with the capacity to reason practically.

- **Green, L. 'Positivism and the inseparability of law and morals' (2008) 83 *NYULR* 1035.**

This discusses how law and morality are related.

Summary

According to positivism, the grudge informer acted legally but immorally. According to natural law, her immoral action did not afford her a legal defence. Hart says the positivist way of understanding the position is better because it rightly allows the grudge informer a defence. If that defence is morally weak in comparison with a moral requirement that she be punished, a retrospective law will be necessary to remove the defence altogether. The advantage of doing it this way will show that something – the rule of law – is being breached in doing what, overall, is morally right. This argument suggests that Hart thinks positivism must be justified by reference to its producing in practice morally better results than natural law. If so, that implies that there is a moral basis to his theory of positivism.

6.2 The eight principles of the 'inner morality' of law

Core text

- **Freeman, Chapter 2 'Natural law', para. 2–014.**

Further reading

- **Fuller, L. *The morality of law,* pp.33–44; 91–151; 187–95.**
- **Guest, S. 'Why the law is just' (2000) *Current Legal Problems* 31.**

- **Hart, H.L.A. *Essays in jurisprudence and philosophy*. Essay 2: 'Positivism and the separation of law and morals' and Essay 16: 'Lon L. Fuller: the morality of law'.**

As you are doing the reading:

Constantly ask yourself if Hart is really understanding the spirit of Fuller's theory. If you go through each of the eight (plus one) principles below, consider whether there is a moral principle underlying each one. For example, why should laws be general? Here is a suggested answer: if laws are general, then no person gets 'special treatment' and so there is a principle of equality behind it. Try this with all of Fuller's principles and then try to formulate a general principle that encompasses them all. Does that principle accord with any sense you have about the relationship between law and justice (see Guest's article, 'Why the law is just')? Does it say anything about the proper relationship between the governors and the governed?

Hart's well known criticism of Lon Fuller's equally well known eight principles of the inner morality of law must be understood. These principles, which loosely describe requirements of procedural justice, were claimed by Fuller to ensure that a legal system would satisfy the demands of morality, to the extent that a legal system which adhered to all of the principles would explain the all important idea of fidelity to law. In other words, such a legal system would command obedience with moral justification.

Fuller's key idea is that evil aims lack a logic and coherence that moral aims have. Thus, paying attention to the coherence of the laws ensures their morality.

To remind you of the eight principles of the 'inner morality of law'; laws should:

- be promulgated
- not be retroactive
- be general
- be clear
- not be inconsistent
- not require the impossible
- be 'congruent' (consistent) with official action
- be reasonably stable (that is, not change too frequently).

We have added a ninth article of our own, which takes the line that:

- in the end, law is a scheme of justice.

6.2.1 Hart's rejoinder to Fuller

ESSENTIAL READING

- **Hart, H.L.A. *Essays in jurisprudence and philosophy*. Essay 16: 'Lon L. Fuller: the morality of law'. Originally published in (1965) 78(6) *Harvard Law Review* 1281 (available in the Online Library).**

Hart's criticism is that we could, equally, have eight principles of the inner morality of the poisoner's art (use tasteless, odourless poison; use poisons that are fully eliminated from the victim's body; etc.). Or we can improvise further. We can talk of the principles of the inner morality of Nazism, for example, or the principles of the inner morality of chess. The point is that the idea of principles in themselves with the attendant explanation at a general level of what is to be achieved (racial cleansing as a means to an end, the end being to enable the German race to 'fulfil its destiny') and consistency is insufficient to establish the moral nature of such practices. The eight principles are, says Hart, 'compatible with great iniquity'.

What is unfortunate about Hart's criticism is that it obscures Fuller's point. This is that there is an important sense of legal justification that claims made in the name of law are morally serious. At the least, the person who makes a genuine claim for legal justification of an immoral, Nazi-type legal system, must believe that there is some moral force to their claim. At its best, we believe that when we make some claim

about our law our claim carries some moral force. It is not enough simply to deny this. At least some explanation is required for our belief that this is so if, in fact, we are wrong.

Activity 6.1

In the extracts from Hobbes (see Chapter 3) we looked at his version of the natural condition of humanity. Hobbes presents a strictly materialist conception of mankind and then a narrative of the 'natural condition of man' that served to found his political philosophy. Hart develops a modern version influenced by Hobbes (and also the 18th-century Scottish philosopher David Hume) in Chapter 9 of *The concept of law*.

Read Hart *The concept of law*, Chapter 9, particularly pp.193–200 and make notes on the following questions as you do so:

a. **How successful is Hart's invocation of the minimum content of natural law?**

b. **How convincing do you find his 'truisms'?**

c. **To what extent does Hart simply follow Hobbes and where does he add to Hobbes' narrative of the human condition?**

Feedback: you will find all the feedback you need in Section 6.2.2. (Do not read on until you have finished reading Hart's chapter and making the notes for this activity.)

6.2.2 Understanding Hart's analysis of the human condition

Many have offered their own narratives of the basic human condition.

Note that Hart follows Hobbes in putting the survival of human society as the necessary and basic aim: 'Our concern is with social arrangements for continued existence, not with those of a suicide club'. He continues:

> We wish to know whether, among these social arrangements, there are some which may be illuminating ranked as natural laws discoverable by reason, and what their relation is to human law and morality…Reflection on some very obvious generalisations – indeed truisms – concerning human nature and the world in which men live, show that as long as these hold good, there are certain rules of conduct which any social organisation must contain if it is to be viable. Such rules do in fact constitute a common element in the law and conventional morality of all societies…where these are distinguished as different forms of social control. With them are found, both in law and in morals, much that is peculiar to a particular society and much that may seem arbitrary and a mere matter of choice. Such universally recognised principles of conduct which have a basis in elementary truths concerning human beings, their natural environment, and their aims, may be considered the minimum content of Natural Law.' (*The concept of law*, pp.192 and 193)

There are a number of interesting points in this passage:

1. Hart constantly brackets law with ('conventional') morality, meaning by morality here what Austin called positive morality (as we saw in Chapter 3).
2. Having indicated conventional morality logically, Hart assumes that there is an unqualified morality, which he calls natural law, and it is the **common content** (i.e. a common factor) both of the various positive moralities and of the various systems of law.
3. Hart tells us that there is this common content and tells us what it is; he also offers an **explanation** of how he knows what it is. (It is 'discoverable by reason'.)
4. His explanation (or discovery) of the connection between the basic and necessary aim, the truisms and his conclusions, is founded upon two fundamental principles, namely:
   - that societies **survive** (they are not 'suicide clubs')
   - that there are certain characteristic features of human beings as a species of organism on the earth, and certain features of our earthly environment, that we all share (the 'truisms').

5. His conclusion, or justification of the necessity for rules, takes the form of a logical demonstration, such that, given those features of human beings and the environment, human society **cannot survive unless** human beings accept certain constraints on their behaviour. These constraints are what Hart terms the **minimum content of natural law**. Given the truisms, certain restraints and rules are a necessary condition of the survival of human society.

What of the so-called truisms themselves – what is meant by calling them truisms? Three things: (1) they are true; (2) they are self-evidently true; but (3) they may be either so obvious that we simply take them for granted and do not see their significance, or they are not at first sight **obvious**; in both cases we need to state them clearly.

The truisms that lead to Hart's 'minimum content of natural law' can be classified as biological, behavioural and environmental. Hart lists five, but only two of these lead to any particular **content** in morals; the other three lead to various other features of morality, which may be called 'formal' for the present. The two that lead to a specific content are human vulnerability and limited resources.

Human vulnerability

Human vulnerability can be said to exist in a dialectical relation with a complementary feature, namely **destructive power**: a human capacity and readiness to hurt. Humans are capable of receiving, and of inflicting, serious bodily injury and death. This is said to be connected with the universally prevalent prohibitions on killing and injuring, except in closely specified circumstances. The necessity for the connection can be understood if we imagine a very different natural condition for man: if, for instance, we were heavily armour-plated and so incapable of being damaged; or if we were immobile and so incapable of wielding weapons or moving to attack. Rules against killing or maiming might still exist in these altered conditions but they would no longer be **necessary**.

Limited resources

The fact that the basic necessities of life are always in short supply makes inevitable some form of property institution (not necessarily an individualist or capitalist property system), together with a set of rules governing the exchange of property, that is, contracts and promises. Again, the necessity of this can be understood by imagining natural conditions in which human beings never needed to labour to produce and conserve their resources to survive.

The other three truisms

Hart's other truisms do not lead to any particular content:

- **Approximate equality** (no man is enormously stronger than another), which makes generally acceptable a common system of mutual forbearances and compromise. (Morality does not operate between nations, just because nations are not even approximately equal; and it operates very imperfectly in political relations, for the same reason: as in the case of electoral promises.)
- **Limited altruism** (men are not devils but neither are they angels) explains the necessity of restraints and, at the same time, their possibility.
- **Limited understanding and strength of will** makes it necessary to apply sanctions, including here the informal sanctions of moral disapproval, as an artificial incentive to conformity for those whose own reason or self-control are insufficient.

To evaluate Hart's thesis of a minimum content to natural law, one must be careful to see just what it is claiming. In one respect it is quite modest, in another ambitious. It is modest in scope because it is explicitly concerned only with what it calls the **minimum** content of morality; as far as we have seen, it seems to be restricted to rules governing matters of life and death, injury, property and contracts. Further, these rules are all **prohibitive**: there is no positive inducement to act in virtuous ways, only inhibitions against wrongdoing. Finally, only **primary** rules are dealt with;

nothing is said about those special circumstances in which it may be permissible, or even mandatory, to destroy life, inflict bodily harm, deprive of possession or break a promise; and all or most of these things are generally sometimes held to be morally justifiable.

The reasons for these limitations are fairly obvious. The first limitation – the restricted range of topics – is explained by the fact that only one basic aim – that of survival – is considered. Any moral rules that are not directly concerned with survival will not be covered. Survival is the **basic** aim because if this aim is not achieved, no others can be. Only survivors can do good. But it is quite open to the natural law theorist to introduce other, less basic, aims to explain other areas of moral control – and still remain within the area of universally recognised principles, rather than regional variations. An obvious case would be the moral (and legal) controls on mating and procreation. It is noticeable that there are no sexual restraints in Hart's list, even though such restraints are in fact universal in all societies. The reason why they are not in Hart's list is because such things as sexual promiscuity, incest or adultery are not obviously incompatible with survival, as promiscuous killing would be.

However, this may be a reflection of the limited sociology of Hart's account in *The concept of law*. Most anthropologists have put the incest prohibition at the foundation of 'natural' morality. From Levi Strauss to the reflections of Freud, the prohibition is seen as the starting point of social organisation, trade and inter-group interaction.

Activity 6.2

At this stage, try drafting an answer to this past examination question:

'Hart says that all legal systems will contain a "minimum content" of morality. Why did he think it was necessary to concede this to the natural lawyers? Are his arguments for the minimum successful?'

Feedback: see end of guide.

Further reading

- **Morrison, W. *Jurisprudence: from the Greeks to post-modernism*. (London: Cavendish Publishing Ltd, 1997) [ISBN 9781859411346] Chapter 4 'Thomas Hobbes and the origins of the imperative theory of law: or *mana* transformed into earthly power'.**

Reminder of learning outcomes

By this stage you should be able to:

- **describe the main arguments of the Hart–Fuller debate**
- **explain the realist criticism of positivism**
- **discuss the so-called 'grudge informer' case**
- **discuss Hart's methodology in Chapter 9 of *The concept of law***
- **appreciate the significance of Fuller's eight principles of procedural justice.**

Self-assessment questions

1. **What are the main arguments of the Hart–Fuller debate?**
2. **What is the realist criticism of positivism?**
3. **What is the connection between the hard cases and the core/penumbra distinction?**
4. **What was Radbruch's solution to Nazi laws?**
5. **What is the *nulla poena sine lege* principle?**
6. **Discuss Hart's methodology in Chapter 9 of *The concept of law*.**

SAMPLE EXAMINATION QUESTIONS

Question 1 Is the law necessarily moral? Compare Fuller's view (the 'internal morality' of the law) to Hart's (the 'minimum content of natural law').

Question 2 What, if any, is the point of Hart's Nazi grudge informer example?

The following questions are about methodology. A good response to each of them will provide some answer to the question of what the theorist is trying to do.

Question 3 What lessons can we learn about positivism from Hart's discussion of the Nazi grudge informer case?

Question 4 How did Hart define legal positivism and what were his arguments for it?

Advice on answering the questions

Question 1 This is a general question about the relationship between law and morality, and so bears directly on the point of legal positivism and the methodology involved. You obviously need to be acquainted with the 'minimum content of natural law' thesis of Hart. But the question also requires an understanding of why Fuller advances his 'internal morality' thesis, and so you need to try to get the sense of Fuller. This is best done by being as critical as you can of Hart's criticisms discussed above. Does Hart's 'minimum content of natural law' theory have any moral point to it? We think not, but you must form your own view.

Question 2 This question, fairly common in one form or another, requires you to consider the practical and moral reasons why Hart is so keen in the grudge informer case to preserve the *nulla poena sine lege* principle. Obviously, the hypothetical facts of that case must be spelt out, and then a thorough and sympathetic understanding of what Hart says in the latter part of Chapter 9 of *The concept of law* is required. Hart's argument is on the laboured side, and there is plenty of room for comment.

Question 3 This question requires you to think about why that particular case, discussed by Hart in some depth in Chapter 2 of *Essays in jurisprudence and philosophy* and again in Chapter 9 of *The concept of law*, should have been decided as Hart says. Given that the better decision, in Hart's view, would have been the one that was inspired by an acceptance of his own theory of law, a good answer would consider whether Hart was judging his theory of law according to whether it would produce better judicial decision-making. If this is what Hart was doing, then it suggests he thought that moral judgment is what you judge legal theories by.

Question 4 This would require you to pay special attention to:

- Hart's method of linguistic analysis
- His construction of the secondary rules in response to the 'social defects' of a regime of primary rules alone, since this looks 'practical' rather than 'descriptive'
- His arguments for the 'wider' conception of law over the 'narrower' conception of law in Chapter 9 of *The concept of law*.

Reflect and review

Look through the points listed below. Are you ready to move on to the next chapter?

Ready to move on = I am satisfied that I have sufficient understanding of the principles outlined in this chapter to enable me to go on to the next chapter.

Need to revise first = There are one or two areas I am unsure about and need to revise before I go on to the next chapter.

Need to study again = I found many or all of the principles outlined in this chapter very difficult and need to go over them again before I move on.

Tick a box for each topic.

	Ready to move on	Need to revise first	Need to study again
I can describe the main arguments of the Hart/Fuller debate.	☐	☐	☐
I can describe the realist criticism of positivism.	☐	☐	☐
I can discuss Hart's methodology in Chapter 9 of *The concept of law.*	☐	☐	☐
I can discuss the so-called 'grudge informer' case.	☐	☐	☐
I can appreciate the significance of Fuller's eight principles of procedural justice.	☐	☐	☐

If you ticked 'need to revise first', which sections of the chapter are you going to revise?

		Must revise	Revision done
6.1	The Nazi grudge informer and legal positivism's virtue of clarity	☐	☐
6.2	The eight principles of the 'inner morality' of law	☐	☐

7 Kelsen

Contents

Introduction

This chapter introduces you to the influential theory of law of the Austrian lawyer and philosopher Hans Kelsen (1881–1973). Although he was not of Anglo-American birth, the idea of the 'purity' of Kelsen's account of law, his views on legal structure and on the general form that all laws took, and his theory of legal validity, have all become part of the Anglo-American tradition of **legal positivism** (see Chapter 3 of this guide). Studying his theory gives us insight into this theory and, through careful comparison, into both the command theory and Hart's theory. In particular, Hart's rule of recognition has some significant similarities with, but also substantial differences from, Kelsen's famous *Grundnorm*. (*Grundnorm* just means 'ground norm' or 'foundation norm' in German, and because it is a proper noun, in the German fashion, it takes a capital letter 'G'.)

Useful insights into methodology arise from studying Kelsen, and many scholars are resistant to what they see as a formal, morally cold and over-descriptive account. Fans of Kelsen think that what he says about law's structure rightly emphasises how law is at its best, which is in being rigorously clear, guiding and independent of anything controversial, such as moral statements.

Learning outcomes

By the end of this chapter and the relevant reading, you should be able to:

- **describe in detail each of the two major parts of Kelsen's theory: law as a 'specific technique of social organisation' and the theory of the *Grundnorm***
- **explain the following Kelsenian terminology: *Grundnorm*, 'transcendental', 'epistemological', 'norm', 'ethical-political postulate'**
- **compare and contrast Kelsen's *Grundnorm* with Hart's rule of recognition**
- **explain Kelsen's theory of validity and its relationship to effectiveness**
- **explain Kelsen's theory of revolution, applying that theory to some constitutional cases of illegal change of government**
- **explain Kelsen's views on the unity of the legal system**
- **comment, using your own view, on the general usefulness of Kelsen's theory.**

Core text

There is nothing like reading Kelsen himself. There are good extracts in Freeman. The best commentaries on Kelsen are by Hart, Raz and Harris.

- **Freeman, Chapter 4 'The pure theory of law'.**

Essential reading

- **Harris, J.W. *Legal philosophies*. (London: Butterworths Law, 1997) second edition [ISBN 9780406507167] Chapter 6 'Kelsen's pure theory of law' (available on the VLE).**

Further reading

- **Raz, J. *The concept of a legal system: an introduction to the theory of legal system*. (Oxford: Clarendon Press, 1980) second edition [ISBN 9780198253631] Chapter 5 'Kelsen's theory of legal system' .**
- **Raz, J. *The authority of law*. Chapter 7 (also useful is Raz's 'The purity of the pure theory', sufficiently extracted in Freeman, Chapter 4 'The pure theory of law', para. 4–020).**
- **Hart, H.L.A. *Essays in jurisprudence and philosophy*. Chapters 14 and 15 (available in (1963) 10(4) *UCLA Law Review* 709). You should read the comparison drawn by Hart between his rule of recognition and Kelsen's *Grundnorm* at p.292.**
- **Also, there is commentary in Morrison, W. *Jurisprudence: from the Greeks to post-modernism,* Chapter 12.**

- **Paulson, S. 'J.W. Harris's Kelsen' and Dickson, J. 'Interpreting normativity' in Endicott, T., J. Getzler and E. Peel (eds) *Properties of law*. (Oxford: Oxford University Press, 2006) [ISBN 9780199290963]**

are two essays for those interested in pursuing Kelsen in greater detail.

- **Duxbury, N. 'Kelsen's endgame' (2008) 67 *Cambridge Law Journal* 51.**

Duxbury has written a short essay on Kelsen's switch from holding that the basic norm was a 'presupposition' of legal thinking to a kind of 'fiction'.

- **Ross, A. (trans. H.P. Olsen) 'The 25th anniversary of the pure theory of law' (2011) 31 *Oxford Journal of Legal Studies* 243**

is a translation and reprint of Alf Ross's 1936 tribute and critique of Kelsen's pure theory of law. It makes very interesting reading, giving a sense of the way Kelsen's theory was viewed by an important scholar in the early part of the last century.

- **Heidemann, C. 'Facets of "ought" in Kelsen's pure theory of law' (2013) 4(2) *Jurisprudence* 246**

is a historical and theoretical account of Kelsen's conception of the 'ought'.

7.1 Background to Kelsen's theory

7.1.1 The 'pure theory'

Kelsen's theory presents a consistent and coherent whole. (You should read some Kelsen. The style is often a little unwieldy, but this is partly because much of his work is translated from German.) He was a practising lawyer of great distinction, drafting the new Austrian Constitution in 1921, and writing the first detailed (and still authoritative) guide to the United Nations Charter. His theory is complex, and difficult to criticise, though it is subject to the criticisms that are directed at legal positivism in all its forms. Many of the criticisms in the secondary sources are fairly superficial, and sometimes they are clearly not based on what Kelsen said at all.

Kelsen's main works on legal theory are *The pure theory of law*, which was first published in German in 1934, and in English in 1960, and *General theory of law and state*, first published in 1945. There is considerable overlap between these works. Kelsen's aim in producing what he called his 'pure theory' was to enable us to think of law independently of any ideological content. Thus Kelsen would have objected to the statement 'Tory law is not law' made by Arthur Scargill, leader of the National Union of Mineworkers, during the long and bitter miners' strike in the UK in 1984–85, justifying breaches of recently enacted law relating to trade unions. He would have had similar objections to claims by the German Nazis that 'Jewish liberal law is not law'.

Among the key points to note in Kelsen's ideas are these:

1. Kelsen says that the **description of law**, even though it is a set of 'ought-propositions', is something different from saying **what the law ought to be**; that is, it is something different from prescribing the 'content' of law. Kelsen draws a clear distinction between the content and the form of the law. So his view is that, although the description of law is a description of 'oughts', these certainly do not describe what the moral content of the law ought to be. So, in a well-known affirmation of the 'purity' of his theory, he defined his legal positivism in the following terms:

   > Legal norms may have any kind of content. There is no kind of human behaviour that, because of its nature, could not be made into a legal duty corresponding to a legal right.

2. A norm, in Kelsen's terms, is in essence action-directing, and should not be thought of only as imposing a duty, but also as including the idea of a permission or power, as where the norm permits or empowers the judge to do something. For example, the law may permit a judge, but does not place a duty on them, to impose a prison sentence up to a maximum defined by law.

3. Kelsen distinguishes between legal, moral and other norms. Moral norms are merely, in his view, propositions describing our **subjective** preferences for behaviour, and he is critical of 'natural lawyers' who think that morality is something objective. Kelsen actually said that he thought that all of our moral judgments are **irrational**, because they could do no more than express our feelings or intuitions. In other words, and by his own admission, Kelsen is a **moral relativist**.
4. Kelsen is also concerned with drawing a clear line between fact and norm, because the former cannot generate the latter. This is why he is averse to Hart's idea that law is reducible to a social practice (the rule of recognition). In other words, he tries to establish law **as a normative order** in a way that is independent both from morality (because he thinks that there is no such thing as objective morality) and fact (consider here the difficulties that Hart faced in accounting for law's normativity).

ACTIVITY 7.1

To remind yourself of important concepts that we dealt with in earlier chapters, write down a brief definition of legal positivism.

Feedback: see end of guide.

7.1.2 Mythology and obscurity in Kelsen

It is important to remove the mythology surrounding Kelsen. Although parts of his work – such as his famous *Grundnorm* – might seem obscure at first, even these can be successfully 'demythologised'. The rest of the difficulties are mostly due to his occasional use of technical terms of German philosophy. You can understand anything in Kelsen if you can understand the following. He said of his *Grundnorm* that 'since it [the *Grundnorm*] is only the transcendental-logical condition of this normative interpretation, it does not perform an ethical-political but an epistemological function'. (This quotation comes from his *The pure theory* (1978) at p.218). See also Section 7.2.3.

The following should make it clearer and take the 'mythology' out:

- 'transcendental' means 'outside' and independent from experience, facts
- 'normative' means 'a matter of rules'
- 'performing an ethical-political function' means for Kelsen 'making an evaluative statement of morality or politics'
- 'epistemological' (coming from 'epistemology', which means 'a theory of knowledge') means in this context 'making clear how we can know something'.

And so the *Grundnorm* is an assumption that stands outside the law that shows us how we can know what is law. Even at this early stage of this chapter you should be able to see what Kelsen is driving at. To use his example, the tax inspector acts in accordance with law because we ultimately **assume** that their acts have legal validity. We can contrast this case with that of someone with a gun raiding a bank. We make **no** such assumption that such an act is within the law. Another example is that to make sense of what we are doing, say, in a criminal law tutorial, we must have assumed that the Theft Act 1968, for example, is valid law. You have to admit that this is not a particularly difficult idea. Now have another look at how Kelsen expressed it.

Apart from my point above about 'transcendental epistemological postulates', I suggest that you do not worry too much about words such as 'norm', either, since for our purposes here, it can be used interchangeably with 'rule'. Kelsen's terminology sometimes follows the philosophic tradition created by the great German philosopher Immanuel Kant and the ideas can be reasonably translated into clear English.

ACTIVITY 7.2

Define *Grundnorm*, using your own terms, as clearly as you can.

No feedback provided.

Summary

Kelsen represents Continental legal positivism.† He argued that law could be identified solely by its form and not its content, and so his theory, as he said, was 'pure'. Furthermore, finding the law was a matter of 'objectively' describing a set of 'action-directing' rules of behaviour, or 'norms', which would impose duties or confer powers on people. Morality, he said, was a matter of 'mere subjective opinion'. Some of his language is difficult because of (a) its translation from German and (b) the technical terms used in German philosophy, but these can be easily 'decoded'. The *Grundnorm* is, straightforwardly, an assumption that a set of laws is valid.

† 'Continental' = in the European continent rather than the English tradition.

7.2 How Kelsen characterises law

7.2.1 The legal norm

It is important to note how Kelsen characterises law in general. It is necessary first to look at how Kelsen views the legal phenomena that he sets out to describe. His views are clearly laid out in the first chapter of *General theory of law and state*, the first sentence of which states that 'Law is an order of human behaviour' which 'designates a specific technique of social organisation'. By this he means that law is a mechanism for making people do things.

Kelsen has views about the form this 'specific technique of social organisation' takes. It is that the technique is essentially one of **coercion**, by the systematic use of sanctions, and is applied by **agents or officials** authorised by the legal order to apply sanctions. He says that these two attributes – coercion and officialdom – mark out what is 'unique' about law and is what is common to all uses of the word 'law' (when that word is used in connection with legal systems). This, Kelsen says, enables the word 'law' to appear as the expression of a concept with a 'socially highly significant meaning'. As a result he gives us a very specific characterisation of what a legal rule (in his jargon, 'legal norm') is. This is that a legal norm is **a direction to an official to apply a sanction when certain circumstances arise**.

The key to the whole of Kelsen's theory is to understand that law consists of directions to officials to apply sanctions. An immediate objection to this view would be that we do not ordinarily think of laws as being directed to the officials of a system. For example, we think of the criminal law as imposing duties upon citizens to do, or forbear from doing, certain kinds of things. Or we think of laws – those governing the creation of wills, say – as conferring powers upon citizens to make wills. Kelsen's answer to this is simply that he is bringing to light something in the legal phenomena of which we are not normally aware, namely, that law is essentially a form of social control that proceeds by way of imposing duties or conferring powers upon officials to apply sanctions.

7.2.2 The delict

In fact, a citizen, according to Kelsen, does not strictly speaking have a norm directed at them at all. If a citizen does something which gives rise to the circumstances under which an official ought (or may) apply a sanction, that citizen has not done anything contrary to that norm, simply because it is directed at the officials. The citizen has instead committed what Kelsen calls, borrowing from Roman law, a 'delict'.† Kelsen says that if we take a law such as 'one shall not steal' then everything contained in the meaning of that law is contained in the meaning of 'if somebody steals, they shall be punished'.

† 'Delict' = an infraction of a law or rule. See also the Latin phrase *in flagrante delicto*, meaning 'in the act of committing an offence'.

It is thus not necessary to refer to 'one shall not steal' at all. Kelsen nevertheless says that it 'greatly facilitates matters' if we do, although he emphasises that it is not a 'genuine' legal norm. He says that he prefers to express the first norm rather as the 'secondary' norm, and the second norm – the 'genuine' legal norm – as the 'primary norm'. Thus, he says, only officials can genuinely break the law, because when we are speaking of the citizen we are only talking of them committing a delict, which is fulfilling the condition for the application of a sanction by an official. (In sum, law

applies to officials not to citizens. The citizen merely creates circumstances (e.g. commits theft) that 'trigger' the legal power, or duty, of a judge to punish.) So, in one of the most famous statements of jurisprudence in the 20th century, he says:

> Law is the primary norm, which stipulates the sanction, and this norm is not contradicted by the delict of the subject, which, on the contrary, is the specific condition of the sanction.

ACTIVITY 7.3

Hart famously criticised Kelsen's theory of law in the following way: Kelsen regarded the basic form of law as a permission to officials (e.g. judges) to impose a sanction upon individuals when they committed a delict. He therefore held a 'sanction' theory of law. But, argued Hart, on this basis, one cannot distinguish a tax from a fine. Look at the distinction between norms arising by operation of law and the operation of powers in the chapter on Raz (Chapter 8 of this module guide), and try to explain Hart's criticism.

Feedback: see end of guide.

7.2.3 The basic norm (*Grundnorm*)

Going up the chain of validity, or hierarchy, of law in order to find its root of title, we must at some point come to an end, says Kelsen. If we were to continue the process, then we would never be able to establish the validity of any norm, because we would have to go on to infinity. But, since we **can in fact** establish the validity of legal norms, then we must be able to get back to some ultimate norm that confers validity upon all other norms. This norm – and it must be a norm, because only norms can confer validity on norms – Kelsen calls the *Grundnorm*, or the basic norm. How do we come across it in practice? We get to it, says Kelsen, when we cannot, in principle, trace our chain of validity back any further. (Kelsen's argument here is a *reductio ad absurdum*: since we can do X, then the assumption that we go on to infinity is false.) For example, if we try to trace the root of title of a bylaw, then we eventually get back to a point beyond which we can go no further, namely, to the point where we find that the bylaw was ultimately validated by Crown-in-Parliament. What is the reason for the validity of the enactments of Crown-in-Parliament? His answer is that this is just what we assume.

7.2.4 Comparison of Kelsen with Austin

ACTIVITY 7.4

Write a brief summary of Austin's theory (see Chapter 3 of this module guide). Try to get it down to its 'bare bones'. Now divide up what you have written in terms of an answer to each of the following questions:

a. **What is law (for Austin)?**

b. **What is the law of a particular legal system (for Austin)?**

No feedback provided.

Kelsen's theory is arguably more plausible than Austin's theory because the notion of a norm is much more like that of a rule than that of a command. You might consider, therefore, whether the following two advances are made on the command theory:

a. the idea of a norm, imposing duties or conferring powers upon officials, replaces Austin's crude idea of a predictable sanction with the psychological element of fear, which cannot distinguish the social phenomenon of **being obliged** from that of **being under an obligation**

b. the source of validity of the norm rests, for Kelsen, not on the fact that it is issued by a habitually obeyed and determinate person or group of persons, but upon another norm.

7.2.5 Comparison of Kelsen with Hart

Kelsen's basic norm is not identified as a matter of fact but is, rather, a **presupposition** that certain rules are valid. Kelsen explains the ultimate test of validity by saying that we, or possibly the legal scientist or jurist, **presuppose laws to be valid**. This leaves open the possibility of **not** presupposing the validity, say, of a revolutionary regime. We can simply decide not to interpret the laws of the new revolutionary regime as legally valid, whether or not they are effective, and whether or not they have general support. This cannot happen with Hart. In his view, if the officials of a legal system use a rule of recognition to identify valid law, then that is the test of validity of that particular system.

The rule of recognition need not be presupposed to be valid. Hart thinks that is a waste of time. All we need do is to point to the rule of recognition's **factual existence** as a test of validity. We just say that it is **in fact** accepted as the test of validity by the officials of the United Kingdom legal system. In a sense the basic norm always has the same content. It is that the constitution should be obeyed or, in the Kelsenian way of expressing it, coercive acts ought to be applied in accordance with the constitution. Kelsen, however, is loath to reduce the *Grundnorm* to a social practice, because one of his primary concerns is to keep norm and fact (as well as law and morality) separate. By contrast, Hart's rule of recognition sets out the factual test of legal validity in any particular system, so it will differ in content from legal system to legal system.

Consider these two general principles for understanding Kelsen:

1. The basic norm is that (coercive) acts ought to be done (by officials) in accordance with the historically first constitution; it is not the fact of the first constitution. (You should be careful not to say that the constitution itself is the basic norm, because the constitution is a fact, not a norm. Rather, the basic norm is: acts ought to be done in accordance with the constitution.)
2. Effectiveness is not a sufficient condition for the validity of a legal order, but it is a necessary condition (had it been a sufficient condition, then norm would be reduced to fact).

Activity 7.5

Both of the propositions above are necessary for understanding Kelsen's famous theory of legal revolution. Answer the following questions about them:

a. Give an example of a 'historically first constitution'.

b. Give an example of a 'historically second constitution'. How would it relate to the first?

c. Could an unwritten constitution ever be the 'historically first'?

d. Why does Kelsen insist that the *Grundnorm* is not the same thing as the 'historically first constitution'?

e. What is the difference between a 'sufficient' and a 'necessary' condition? (You can answer this question by using common sense examples, drawing upon the ordinary meanings of these terms.)

f. Could a legal system exist in any meaningful or useful sense even though it is no longer effective? (Think of Roman law.)

No feedback provided.

Summary

Kelsen characterises law in a very idiosyncratic way. Law tells officials when and how they should apply sanctions, and so it is officials who disobey laws, not citizens, who only commit 'delicts'. Kelsen's theory of validity requires a 'chain' of validity ultimately resting on a norm, the *Grundnorm*, that relies only on an 'assumption' of validity. Kelsen's theory of validity is thus different from Austin's and Hart's, since these two jurists pose criteria of legal validity that rest on facts, not assumptions. Nevertheless, Kelsen says that effectiveness, which is factually determined, is a 'necessary condition' of the existence of a legal system.

REMINDER OF LEARNING OUTCOMES

By this stage you should be able to:

- **describe in detail each of the two major parts of Kelsen's theory: law as a 'specific technique of social organisation' and the theory of the *Grundnorm***
- **explain the following Kelsenian terminology: *Grundnorm*, 'transcendental', 'epistemological', 'norm', 'ethical-political postulate'**
- **compare and contrast Kelsen's *Grundnorm* with Hart's rule of recognition**
- **explain Kelsen's theory of validity and its relationship to effectiveness.**

7.3 Legal revolution

7.3.1 Revolution and validity

This could be a full-scale bloody social revolution, perhaps with a period of civil war, or a simple and bloodless *coup d'état* whereby a new government, or an old government in a new guise, introduces a new constitution not in accordance with the previously existing one.

Kelsen's theory of revolution cannot be understood unless the second general principle for understanding Kelsen's basic norm is understood. It is that the effectiveness of a legal system is a necessary condition for saying it is valid: Kelsen calls this 'the principle of legitimacy'. When a revolution occurs, Kelsen says that all the old laws in force under the old regime lose their validity because the basic norm that validated them can no longer be presupposed because the old regime is no longer effective (see Kelsen's *General theory of law and state,* pp.117–21).

Thus, he says:

> A revolution...occurs whenever the legal order of a community is nullified and replaced by a new order in an illegitimate way, that is in a way not prescribed by the first order itself...From a juristic point of view, the decisive criterion of a revolution is that the order in force is over-thrown and replaced by a new order in a way which the former had not itself anticipated. (*General theory*, p.117)

Be careful that you appreciate that Kelsen's theory of revolution arises from his theory of the relationship between validity and effectiveness: the old laws are no longer effective; therefore, we cannot, logically, presuppose the existence of a basic norm (*Grundnorm*) that makes them valid.

Equally, you should note that the new regime does not automatically have validity. It is effective, *de facto*, but that is not sufficient to make us presuppose that a new basic norm exists. We actually have to **assume** the new basic norm, even if unconsciously.

Note that Kelsen has to explain why it is that a lot of laws that exist under the old regime will appear to continue to exist under the new legal order. He does this by employing the idea of a 'tacit' vesting of validity of the content of the old laws, by the new basic norm, if it is presupposed. Let us say that we presuppose the norms of the new order – that is, the directions given to officials by the new revolutionary government to apply sanctions in certain circumstances – to be valid. If we assume that certain of the old laws are valid, then Kelsen says we can only do so – meaningfully – by thinking of them as being validated by the new basic norm. So he says:

> If laws which were introduced under the old constitution 'continue to be valid' under the new constitution, this is possible only because validity has expressly or tacitly been vested in them by the new constitution…
>
> …the laws which, in the ordinary inaccurate parlance, continue to be valid are, from a juristic viewpoint, new laws whose import coincides with that of the old laws. They are not identical with the old laws, because the reason for their validity is different...Thus, it is never the constitution merely but always the entire legal order that is changed by a revolution. (*General theory*, pp.117–18)

7.3.2 Kelsen's theory of revolution applied in practice

There are several important cases in which significant reference is made to Kelsen's theory of revolution. You are not expected to read them (one of them, *Madzimbamuto*, for example, is well over 1,000 pages long!) but you will be able to glean sufficiently from the secondary sources what the main facts are. You should, however, be able to use the basic facts and basic decisions in them to work out for yourself whether Kelsen was properly described in these cases and whether Kelsen's theory has any relevance at all to the proper resolution of these cases. Remember that the subject is jurisprudence and not constitutional law, and if you were asked a question on Kelsen you should not try to answer it case-law style. You only need be aware of the basic facts and the use that was made of Kelsen in the cases.

The main case you should know is the first one, which was *The State* v *Dosso* PLD (Pakistan Legal Decisions) 1958 SC 533. This case may be difficult to get hold of but the facts given below should be sufficient for your purposes. Some variation on these facts was repeated in all subsequent revolution cases.

In 1958, the President of Pakistan, by simply issuing a Proclamation, declared the 1956 Constitution to be null and void, dismissed the Cabinet and dissolved Parliament. Shortly afterwards, he promulgated the 'Laws Continuance in Force Order' which purported to validate all laws other than the 1956 Constitution. There were no other claims to power. The Chief Justice, Muhammad Munir, referred to Kelsen's *General theory of law and state* and said (539):

> If the revolution is successful in the sense that the persons assuming power under the change can successfully require the inhabitants of the country to conform to the new regime, then the revolution itself becomes a law-creating fact because thereafter its own legality is judged not by reference to the annulled constitution but by reference to its own success.

Apply the second principle of understanding Kelsen and you see immediately that the Chief Justice is mistaken because he equates effectiveness ('successfully requiring the inhabitants…to conform') with validity ('…becomes a law-creating fact…').

A similar series of events arose eight years later in Uganda in *Uganda* v *The Commissioner of Prisons, ex parte Matovu* [1966] EA (East African Reports) 514 and there was a similar decision. And again in Rhodesia, in *Madzimbamuto* v *Lardner-Burke* 1966 RLR (Rhodesian Law Reports) 756 it was almost the same, except that the judges said the revolution was not clearly effective and so they said the revolutionary government was 'illegal' but that they would recognise that government's acts as enforceable on the grounds of what they called the 'principle of necessity' since someone had to govern and an illegal government was better than no government at all. Eventually, in *R* v *Ndhlovu* SA 1968 (4) 515 (South African law reports), the Rhodesian courts accepted that the illegal government had become 'legal' through effectiveness.

The point in both *Dosso* and *Uganda*, as far as Kelsen's theory is concerned, is that each case decided a question of fact: did, in each case, the revolutionary government control? Each court referred to the doctrine of effectiveness in Kelsen as though, for Kelsen, the mere fact of effectiveness was sufficient for legal validation of the revolutionary government's acts. But this interpretation was contrary to what Kelsen actually said. Remember that he said that while effectiveness was necessary for validity, it was not **sufficient**, meaning that the mere fact of control was not enough.

Activity 7.6

Consider the following revolutionary scenarios, and decide what conclusions Kelsen's theory of revolution would have for them:

a. **A rebel army seizes power and elects its commander Head of State. All opponents are killed. The commander of state rules by general decree for five years before being deposed.**

b. **Rebels within government illegally depose the prime minister, and impose their own 'constitution'. The balance of power is unclear for three months, until a**

majority of the judges clinch the matter by declaring the rebel constitution to be the 'valid' constitution. A significant number of judges remain opposed.

c. **A former colony breaks away from an imperial power by declaring a 'constitution' that is contrary to the constitution of the imperial power. The imperial power threatens sanctions, but nothing comes of it.**

d. **After 80 years of communism, capitalism returns in State A. X, an heiress in A, offers up 120-year-old government bonds for redemption.**

Feedback: see end of guide.

7.3.3 Harris on legal revolution

There is an interesting view taken by J.W. Harris on all this. In *Legal philosophies* Harris says that the mere fact that a set of norms can be characterised in Kelsen's form as a set of norms validated by a possible *Grundnorm* provides 'suggestive force' for a judge to make that decision. In his article 'When and why does the *Grundnorm* change?' ((1971) *Cambridge Law Journal* 125, at 132), Harris argues that Kelsen's theory 'assumes that legal science is a socially useful activity'. One argument against Harris's view is that this assumption might not be allowed within Kelsen's theory. Kelsen might well have taken a strictly positivist line that recognising revolutionary governments is an impure 'political' act and so legal science **by design** cannot make that move. To recognise such a government might have been to 'dress up an essentially political decision in legal garb', as several commentators said at the time. The alternative, favoured by Kelsen, is that where law is silent, it should be **seen** to be silent, so that it is crystal clear to all that what is happening is politics, and not law.

7.3.4 Later cases on revolution

You could note later cases in which the 'Kelsenian principles' have been expressly disapproved of. Perhaps the most important one is *Jilani* v *The Government of Punjab* PLD 1972 SC 139 in which the Pakistan Supreme Court overruled *Dosso* and said that Kelsen's theory of legal revolution was merely a 'jurists' proposition about law' and did not authorise or lay down any legal norms, which were 'the daily concerns of judges, legal practitioners or administrators'. For a similar comment you should note *Lakanmi* v *AG (West)* (1970) 5 *Nigerian Law Quarterly* 133 in the Nigerian Supreme Court.

REMINDER OF LEARNING OUTCOMES

By this stage you should be able to:

- **explain Kelsen's theory of revolution, applying that theory to some constitutional cases of illegal change of government.**

7.4 Criticisms of Kelsen

7.4.1 The 'unity' of Kelsen's theory

The unification of civil and criminal law

According to Kelsen, all laws are directed to officials, who are required to apply sanctions, and so no distinction is drawn between the criminal and civil law. He says on p.50 of his *General theory of law and state* that '...the difference between civil and criminal sanction – and, consequently, between civil and criminal law – has only a relative character...' and on the next page, 'in spite of the difference which exists between the criminal and the civil sanction, the social technique is in both cases fundamentally the same'. To use the one term – or notion – to link punishing a person for committing a murder with making a person pay damages is, as Kelsen said critically: 'to purchase the pleasing uniformity and pattern to which it reduces all laws, at too high a price.'

All laws directed at officials

In practice laws do not seem to be primarily directed to officials. Kelsen realises this because he allows for the existence of a 'secondary, non-legal, norm directing citizens how to behave'. Remember, he says (*General theory*, p.61), that 'One shall not steal' is 'contained in' the norm 'if somebody steals they shall be punished' and then says 'Law is the primary norm, which stipulates the sanction'. On the same page, he says: 'the representation of law is greatly facilitated if we allow ourselves to assume also the existence of the first norm.' But if it 'greatly' facilitates the representation of law to talk of this 'first norm', why did Kelsen say it was not a true law?

Activity 7.7

Write three or four paragraphs commenting on the two criticisms in Section 7.4.1. You should consider carefully what possible advantages there could be in seeing law in these two 'unified' ways.

Feedback: see end of guide.

7.4.2 The idea of a legal system in Kelsen's theory

We do not think of legal systems as changing every time there is an unconstitutional change. We do not believe that past laws continue by virtue of a 'tacit' testing of their validity (this view is confirmed in *Sallah* v *AG* (1970) in Ghana, incidentally). The criticism here is that there is no logical relationship between legal systems, at least as we ordinarily think of them, and Kelsen's legal orders, which are, simply, the sum total of all the laws authorised by one, unique, basic norm. For example:

- We can think of two legal systems (states) which are nevertheless dependent, in Kelsen's theories, on one *Grundnorm* for their validity. The United Kingdom and New Zealand legal systems are separate and distinct legal systems, yet the New Zealand legislature gained its legislative powers from the UK.
- We can think of one legal system where, nevertheless, according to Kelsen's theory, there should be two. The law-making powers of the revolutionary Rhodesian legislature were not 'derived from' the 1961 Constitution. But there seems no oddity or difficulty in just saying that there was an unconstitutional change of legislative powers **within the one legal system**, at least where, as in the Rhodesian case, the changes were initially very few.

You should note that there are some unconstitutional changes that seem to change the whole identity of the legal system, such as, for example, the Bolshevik revolution of 1917. There, it would be difficult to say that the Tsarist legal system was the same one as the Communist one. Kelsen's concept of law is really of the sum total of valid laws in a particular society and it is clear that this ignores questions unrelated to questions of validity, such as the history of laws, their purposes and the way that they relate to a particular society's culture and general way of living. In other words, while concentrating on laws themselves raises questions of validity, concentrating on legal systems raises questions rather of identity with particular societies, and the history of these societies.

Discussion topic

The following question would be ideal for a short discussion among three or four jurisprudence students:

What is a legal system?

Is the idea of a legal system a significant one? If so, is it significant to practical lawyers?

When we think of the English legal system, we do not first think of questions of legal validity. It is more natural to think of 'the jury system', the *Magna Carta*, the notion of the 'fair trial' or 'the Englishman's day in court', or the position of the Crown and its battle with Parliament over the centuries – that is, the way the system works as a whole.

By contrast, international lawyers need to be able to identify states, and it seems natural to equate states with legal systems. (A goldmine of analysis of what we mean by 'legal

system' is Joseph Raz's work *The concept of a legal system*. This book generally takes the line that 'legal system' is not a lawyer's concept, but a concept belonging more naturally to history or sociology. Do you agree?) And, also, when we think of courts, we think of the question of what counts as legal jurisdiction, which is surely a question of validity. There is another set of questions, too, where we ask (as Fuller asked) whether it makes any sense at all to suppose that an inherently evil and wicked legal system (perhaps such as the Nazi legal system) really deserves to be called a 'legal system' as it will lack, in Fuller's terms, the moral 'aura' and 'majesty' that law should have.

7.4.3 The possible redundancy of the *Grundnorm*

1. Could the *Grundnorm* help us to identify (i.e. distinguish between) legal systems? It does not do so if the points noted in Section 7.4.2 above are correct.
2. Could the *Grundnorm* tell us what the valid laws of that legal system are? It might, because, as you will remember, all laws, after a root-of-title search, must be traced back to one *Grundnorm*. But this is a little general, since pointing to the *Grundnorm* of the United Kingdom, which is 'coercive acts ought to be applied by officials in ways from time to time determined by custom', does not take us far. If we try to work the other way, from the laws themselves, we need some means of identifying first what the 'laws' are. It is difficult to see how the *Grundnorm* helps in relation to identifying legal systems here.
3. Perhaps the basic norm explains for us – unlike Austin's theory – what it means to follow a rule. Remember that Kelsen thought that Austin's theory wrongly derived 'oughts' of law from the 'is's' of the fact of habitual obedience to a sovereign. His answer was to invent the concept of a norm and to say that, since norms only exist in the world of norms, they must therefore only be validated by norms. This, of course, led him to postulate a hierarchy of norms, which led him in turn, in order to avoid an infinite regression, to postulate a basic norm. Thus, the whole idea of the 'oughtness' or normativity of law is bound up in the idea of the basic norm. Perhaps the basic norm is the 'ultimate justification': certainly Kelsen is led towards this by the 'root-of-title' nature of his theory. That is, at the very end of any process of justifying criticising someone's deviation from a norm, according to Kelsen you can justify it by pointing to an ultimate or basic norm that says that 'you ought to do this (i.e. apply coercive acts) in accordance with...'.

Raz's article, 'Kelsen's theory of the basic norm' in Raz, *The authority of law,* p.122, is helpful for discussing this problem and for linking Hart and Kelsen's work on validity. Raz says that Kelsen's theory of the basic norm is a theory of 'justified normativity', that is, that ultimately any statement which any person makes about law must be in their own terms ultimately justified in terms of an assumption made by them that, legally, this thing ought to be done. Raz says that he sees no reason why we should accept this theory since we can more simply say that laws are normative because they consist of rules. These rules do not have any ultimate justification but are merely identified by the fact that some people – say, judges and lawyers – **in fact** identify them as laws: all we have to do in order to identify what the laws are is look to the social facts of what judges and lawyers do to identify them. Such a better theory, in order to explain how it is that legal rules arise, Raz calls a theory of 'social normativity' and he says that Hart has such a theory.

Hart makes the same point in *The concept of law*. There he says that no question of validity can arise about his rule of recognition because it is the test of what is valid. All that is necessary to do is to point to **the fact that it exists**. According to his theory that means to point to the factual existence of a social rule among the officials of a system which identifies what the valid rules of the system are. And, as Hart says:

> To express this simple fact by saying darkly that its validity is 'assumed but cannot be demonstrated', is like saying that we assume, but can never demonstrate, that the standard metre bar in Paris which is the ultimate test of the correctness of all measurement of metres, is itself correct. (*The concept of law*, p.109)

These objections might be addressed if we think differently about what Kelsen means when he says that the *Grundnorm* is a 'transcendental presupposition'. The argument would go roughly as follows: (i) we form knowledge of valid legal norms, for example, we cognise that, say, s.1 of the Theft Act 1968 is law (i.e. has objective normative force); (ii) for this to be possible, we must presuppose the category of the basic norm (iii) because we must presuppose it, then the basic norm is true. If this argument (which is neo-Kantian in orientation but you do not need to worry too much about the intellectual history of it) works, then many of the objections would disappear. The *Grundnorm* would be established as independent from experience, independent from morality, and uncontroversial in the sense that no one who does have cognition of law would be able to reject it. There are, however, some basic problems with it, which do not quite allow it to get off the ground. The most important of these problems is that it relies on premises that one does not necessarily have to accept. This reading of the *Grundnorm* can be quite demanding because it relies on philosophical literature, with which you will not be familiar. Nevertheless, read the following piece for a clear account of it: Paulson, S. 'The neo-Kantian dimension of Kelsen's pure theory of law' (1992) 12 *Oxford Journal of Legal Studies* 311–32, reprinted as the 'Introduction' in Kelsen, H. *Introduction to the problems of legal theory.* (Oxford: Clarendon Press, 1992).

Activity 7.8

You will find it useful to read Raz's article 'Kelsen's theory of the basic norm' before tackling this activity.

a. What is the difference between 'social normativity' and 'justified normativity'?

b. In Raz's theory, who precisely is supposed to 'do the justification'?

Feedback: see end of guide.

Reminder of learning outcomes

By this stage you should be able to:

- **explain Kelsen's views on the unity of the legal system**
- **comment, using your own view, on the general usefulness of Kelsen's theory.**

Sample examination questions

Question 1 Consider carefully Laski's famous dismissal of Kelsen's theory as 'an exercise in logic with no application in real life'. Do legal theorists have a social obligation?

Question 2 Examine critically Kelsen's theory of legal validity. Is the basic norm a 'fiction', as he once said it was?

ADVICE ON ANSWERING THE QUESTIONS

Question 1 Harold Laski, the famous British historian, once said critically of Kelsen's theory that it was 'an exercise in logic, not in life'. All too often in answering a question like this, candidates do not consider what the question is getting at. It is not enough just to consider what the practical use of Kelsen's theory is. You need to analyse a question like this. There are in fact three distinct questions here:

1. Is Kelsen's theory of no application to 'real life'?
2. Are theories of legal positivism in general of no application to 'real life'?
3. Do legal theories have to have practical value to be successful?

In questions like these, you will gain marks for making the examiner aware that you can unpick the various strands, as we do above. (There are other strands, too. For example, could a theorist perform a 'social obligation' in producing something of 'no application to real life', as when a brilliant mathematician solves a very difficult problem which has no obvious application?) But whatever approach you take to these questions, it is necessary to give a short and accurate account of Kelsen's theory. You should put the main focus on the 'purity' aspect of Kelsen's theory, since that is the bit that most people, following Laski, take to be more closely connected to 'logic' than anything concerning 'real life'. You might make a comment that logic does, of course, relate to 'real life'. After all, it is logicians who are mainly responsible for the Boolean logic behind the computer language driving the robots in car factories, for example. But it would be wise to structure your answer around the three questions above.

Q1 Examine whether Kelsen's theory makes sense of some laws with which you are acquainted. Does the 'root-of-title' theory of legal validity make some sense of aspects of the judicial review of administrative action? It seems to explain what we mean when we say someone has acted *ultra vires*, for example. Then it would be sensible to investigate what Kelsen means by 'ultimate validity' and that would bring you naturally into a discussion of the *Grundnorm*. A reasonable conclusion might be that the idea of ultimate validity in Kelsen is too obscure to have application in 'real life'.

Q2 Here you need to broaden out. Legal positivism clearly offers a solution in revolution cases (and other cases, too) because it allows for a sharp distinction to be drawn between 'political' and 'moral' questions of allegiance to a revolutionary government and questions of legal validity. An account of how Kelsen's theory works here, by referring to some of the constitutional cases in which his theory was mentioned, would be helpful, although there would be no need to dwell at great length on them. Perhaps some reference to the doctrine of 'necessity' would suggest that legal systems can cope with such situations because there are 'principles of revolutionary legality' (see Eekelaar, 'Principles of revolutionary legality' in Simpson (ed.) *Oxford essays in jurisprudence: second series*. (Oxford: Oxford University Press, 1973)) that can bridge a gap of constitutional illegality.

Q3 This question is a fundamental one about the methodology of legal theory and is difficult. But you could give a brief account of the criticisms made of legal positivism by the natural lawyers Fuller and Finnis and you could also mention Dworkin's idea of interpretivism. Their general criticism is that any theory of law that attempts just to 'describe' the legal phenomenon assumes a picture of law and its relation to the world that is simply not true. These theorists think that reasoning about law requires that what we see to be law must be a result of our striving to see what would be the most socially useful way of viewing law. Fuller thinks it is in terms of compliance with certain procedural values, Finnis is concerned with problems of social coordination and Dworkin with seeing law as the assertion of individual rights. This third question is the most difficult, but it is only part of the more specific question about Kelsen's theory, and so this section need not be very long (three or four paragraphs at most) but a succinct account of Kelsen's methodology, with some comment, would certainly gain good marks.

Question 2 This question divides into two parts. The essential bit of the first part is in the word 'critically'. It requires a clear and accurate account of Kelsen's theory of validity, and so there is no need to refer to his general characterisation of law as a 'specific technique' of 'social organisation' and, indeed, you would lose marks for doing so since it is irrelevant to the question asked. Then you should, of course, tell the examiner what it is about Kelsen's theory that you find persuasive, and why, and/or conversely what it is that you find unpersuasive and why. Do not fall into the trap of supposing that you are meant (by the word 'critically') to show the theory's failings. 'Critically' means that you should adopt a particular attitude whereby you stand outside the theory and appraise it. It is not inconsistent with this attitude to find that Kelsen's theory makes a lot of sense to you. (And, clearly, there is a lot of sense to Kelsen's theory. It is not that different from Hart's theory, for example.)

Reflect and review

Look through the points listed below. Are you ready to move on to the next chapter?

Ready to move on = I am satisfied that I have sufficient understanding of the principles outlined in this chapter to enable me to go on to the next chapter.

Need to revise first = There are one or two areas I am unsure about and need to revise before I go on to the next chapter.

Need to study again = I found many or all of the principles outlined in this chapter very difficult and need to go over them again before I move on.

Tick a box for each topic.

	Ready to move on	Need to revise first	Need to study again
I can describe in detail each of the two major parts of Kelsen's theory: law as a 'specific technique of social organisation' and the theory of the *Grundnorm*.	☐	☐	☐
I can explain the following Kelsenian terminology: *Grundnorm*, 'transcendental', 'epistemological', 'norm', 'ethical-political postulate'.	☐	☐	☐
I can compare and contrast Kelsen's *Grundnorm* with Hart's rule of recognition.	☐	☐	☐
I can explain Kelsen's theory of validity and its relationship to effectiveness.	☐	☐	☐
I can explain Kelsen's theory of revolution, applying that theory to some constitutional cases of illegal change of government.	☐	☐	☐
I can explain Kelsen's views on the unity of the legal system.	☐	☐	☐
I can comment, using my own view, on the general usefulness of Kelsen's theory.	☐	☐	☐

If you ticked 'need to revise first', which sections of the chapter are you going to revise?

		Must revise	Revision done
7.1	Background to Kelsen's theory	☐	☐
7.2	How Kelsen characterises law	☐	☐
7.3	Legal revolution	☐	☐
7.4	Criticisms of Kelsen	☐	☐

8 Raz

Contents

Introduction

You will recall from your study of Hart that one of the ways in which the law is not simply the 'gunman' situation writ large is that the law is regarded as having authority over its subjects, while the gunman has no authority over their victims. Joseph Raz is probably Hart's most important intellectual heir, and much of his work has been on the nature of authority and the authoritative character of law. This work has been revolutionary in political and moral philosophy as well as in the law, but in the law its particular importance owes to the fact that, according to Raz, once the authoritative nature of the law is appreciated, then the connections between morality and law can be drawn more clearly, and this serves to vindicate many positivist theses about the law, in particular Hart's claim that judges exercise discretion in hard cases.

Joseph Raz has recently had published an article offering a new account of the rule of law, revising his previous view and criticising some alternatives. It focuses on the rule of law's aim to avoid arbitrary government, and on its relation to the essential functions of government. In it, he argues that the rule of law requires that government action will manifest an intention to protect and advance the interests of the governed. As such, it is almost a necessary condition for the law's ability to meet other moral demands, and it facilitates coordination and cooperation internally and internationally. This is further reading for those who would like to know more:

- **Raz, J. 'The law's own virtue' (2019) 39(1) *Oxford Journal of Legal Studies* 1–15.**

Learning outcomes

By the end of this chapter and the relevant reading, you should be able to:

- **explain the paradox of authority and why Raz's service conception of authority seems to point the way to a solution of the paradox**
- **explain Raz's 'normal justification thesis' of authority, and say how authorities may be justified in issuing directives to their subjects, and how they may fail to justify authority over them**
- **say what an 'exclusionary' reason is, and explain how it works as a device of practical reasoning**
- **using examples, explain how one can draw a distinction between the deliberative and executive phases of practical reason, and explain the force and scope of exclusionary reasons**
- **describe in step-by-step fashion how applying Raz's theory of authority to the law results in the claim that the law cannot depend on moral truths, and that typical legal systems empower judges to exercise a discretion to make new law when the law makes reference to moral standards**
- **explain how, if Raz's theory of the authority of the law is correct, soft positivism and Dworkin's theory of law are undermined, and explain what possible responses soft positivists and Dworkin might make.**

Core text

- **Freeman, Chapter 5 'Modern trends in analytical jurisprudence' and extract from Raz, J.'Practical reasons and norms', para. 5–020.**

Further reading

- **Coleman, J. and S. Shapiro (eds) *Oxford handbook of jurisprudence and the philosophy of law*. (Oxford: Oxford University Press, 2004) [ISBN 9780199270972] Chapter 3 (Andrei Marmor) 'Exclusive legal positivism', Chapter 4 (Kenneth Himma) 'Inclusive legal positivism', and Chapter 10 (Scott Shapiro) 'Authority'.**
- **Dworkin, R. 'Thirty years on; a review of Jules Coleman, *The practice of principle'* (2002) 115 *Harvard LR* 1655–87.**
- **Penner, J.E. 'Legal reasoning and the authority of law' in Meyer, L. et al. (eds) *Rights, culture and the law*. (Oxford: Oxford University Press, 2003) [ISBN 9780199248254] pp.71–97.**

- **Raz, J. *The authority of law*. Especially Chapter 1 'Legitimate authority' and Chapter 2 'The claims of law'.**
- **Raz, J. *The morality of freedom*. (Oxford: Clarendon Press, 1986) [ISBN 9780198248071] Part I 'The bounds of authority'.**
- **Green, L. 'Three themes from Raz' (2005) 25 *Oxford Journal of Legal Studies* 505.**

Green discusses Raz on discretion.

- **Raz, J. 'Incorporation by law' (2004) 10 *Legal Theory* 1.**

Joseph Raz here returns to his account of legal positivism, often called 'hard positivism' because it denies that law can be identified by use of moral judgment in any case. He defends it against the 'incorporationists' who, while claiming that they are legal positivists, concede that there are occasions when the law has to be identified by moral judgment when some authorising legal instrument has 'incorporated' moral judgment into the criteria for identifying law. Raz sums up his thesis in the following sentence (p.17): 'If morality applies to people and courts alike anyway, then we are all, courts included, bound by it even before its incorporation.'

- **Himma, K. 'Just 'cause you're smarter than me doesn't give you a right to tell me what to do: legitimate authority and the normal justification thesis' (2007) 27 *Oxford Journal of Legal Studies* 121.**

Kenneth Himma tackles Raz on the way in which the 'normal justification thesis' works. Roughly, Himma argues that the 'pre-emptive' nature of authoritative directives cannot be justified by the normal justification thesis. Rather, at least in the normal case, they at most justify giving authoritative directives great weight; giving them pre-emptive weight is not justified in light of the loss of autonomy involved.

- **Priel, D. 'Trouble for legal positivism?' (2006) 12 *Legal Theory* 225.**

You might also have a look at this article, which argues that moral considerations are the most plausible candidates for the evaluative considerations that positivists acknowledge underpin the identification of legal norms.

- **Raz, J. *Between authority and interpretation: on the theory of law and practical reason*. (Oxford: Oxford University Press, 2010) [ISBN 9780199596379].**

Raz's collection of essays contains much of his recent thought on law, morality and authority, and the particularly important essay 'The problem of authority: revisiting the service conception' (originally published in (2006) 90 *Minnesota Law Review* 1003).

- **Sherman, J. 'Unresolved problems in the service conception of authority' (2010) 30 *Oxford Journal of Legal Studies* 419.**
- **Darwall, S. 'Authority and reasons: exclusionary and second personal' (2010) 120 *Ethics* 257.**
- **Smith, D. 'Must the law be capable of possession authority?' (2012) *Legal Theory* 1.**
- **Raz, J. 'On respect, authority, and neutrality: a response' (2010) 120 *Ethics* 279.**

The debate between Raz and his critics continues apace. For enthusiasts, these are some of the more recent offerings.

8.1 The paradox of authority and Raz's 'service' conception of authority

8.1.1 The paradox of authority

Authorities claim the right to tell us what to do or believe. A practical authority, like the law, tells us what to do (e.g. stop at red lights). A theoretical authority, like a physicist, tells us what to believe (e.g. that the universe is expanding). Often authorities have a mixed role of telling us both what to believe and what to do,

because, for obvious reasons, how we act will often turn on what we believe. Thus a medical doctor is both a theoretical and practical authority, in that if you are unwell they will tell you both what is wrong with you (what to believe) and what drugs to take (what to do). Religious authorities are also typically mixed authorities, telling you what to believe about your God and what they want, and therefore guiding your action. The **paradox of authority** claims that following an authority is irrational, and goes like this: if the authority tells you the right thing to do/believe, then you should do/believe that anyway for the reasons which make it the right thing to do/believe. So the authority's **saying** it is the right thing makes no difference. And if the authority tells you to do/believe something wrong, then you should not follow the authority for that would lead you astray. The result is that the authority seems to make no difference in any case: if the authority tells you the right thing, it is redundant, for what is right is right independently of anything the authority says, and if the authority tells you the wrong thing, then you should not listen to it. If this is right, then there is never a justification for following an authority. (People who accept this argument are called 'philosophical anarchists'.)

8.1.2 The service conception of authority

The traditional solution to the paradox of political authority resorts to an idea about the legitimacy of power, but this solution is not very satisfactory in overcoming the paradox. The justification for political authority is thought to arise because, it is supposed (**political** anarchists would disagree with this), that things would be much, much worse if there were no political authority at all. The most famous of these defences of political authority is that of Hobbes (see Chapter 3 of this guide), who founded the legitimacy of the state on the supposed social contract by which men could escape the state of nature, the 'war of all against all'. But even the legitimacy of democratic states, on this view, does not derive from the idea that the directives of democratic states are any less redundant when they tell us the right thing to do, and any less irrational to follow when they tell us the wrong thing to do. Although we may believe that democratic states are likely to get it right more often than autocratic states, the foundation of their legitimacy as authorities again turns on the idea that they are the least bad way of keeping social order, and perhaps of enhancing people's life prospects. This is why these sorts of solutions are unsatisfactory; none touches the basic issue, which is the **rationality** of following authorities.

Now, as an attentive reader, you might point out that the same sort of problem does not seem to attend the case of **theoretical** authorities. The reason you listen to a doctor is that they know medicine and you do not. Thus the doctor has an understanding of the facts about your condition that you do not, and so it would seem perfectly rational for you to believe what they say about your condition. Indeed, it would be **irrational** of you to ignore the doctor's advice, because you are serving your interests by learning what is wrong with you and how to deal with it. To ignore the doctor would be equivalent to ignoring what a medical textbook, which summarises centuries of laborious investigations by many people, says. Thus, if you are to act rationally in the case of your illness, you will have to rely on knowledge and understanding, which you cannot acquire all by yourself. In this way, listening to the authority **serves your interests** in the only way your interests can be served, and to take advantage of the authority in this way is perfectly rational. This is the **service** conception of authority which Raz capitalises on to explain the rationality of following practical authorities like the law. For if the authority serves you by solving a problem that you are not able or likely to solve yourself then it is obviously not irrational to follow that authority, and this is so even if the authority sometimes gets it wrong, so long as it is likely to get it right more often than you are yourself.

8.2 The 'normal justification thesis'

8.2.1 The balance of reasons

Normally, when we reason about what to do (reason practically), we look at all the reasons to act one way rather than another, and decide on the 'balance of reasons'. I may be hungry, and there is a restaurant on the corner, which together indicate that I should get something to eat there – but then the restaurant is expensive, I do not have much money this week and furthermore I am trying to eat healthily, and the restaurant only serves various combinations of grease, starch and ground meat. I weigh up these opposing reasons, and decide what to do. Of course this is a simplified example, but the model of practical reason seems impeccable. The essence of Raz's theory of authority is that an authority serves you by helpfully mediating between you and the balance of reasons that apply to your situation.

8.2.2 The normal justification thesis

A doctor mediates between you and the facts that medical science has revealed and which indicate how to handle your illness – the doctor does not give you a short lesson in medicine, revealing all those facts to you (though a good doctor tells you what is wrong with you and gives you some idea of the nature of your condition); rather, they give you a prescription. Similarly, a legislature considers all the reasons that apply in deciding, say, whether or not wills should be formalised by being written, signed and attested by two witnesses, and then passes a law one way or another, which everyone must now follow. An authority is legitimate when it actually serves you by mediating between you and the reasons that apply to you in this helpful way, and this is the normal justification thesis: **an authority is justifiably an authority for you when you are more likely to act correctly on the balance of reasons that apply to you if you follow the directives of the authority than if you were to act on your own assessment of the balance of reasons**.

Activity 8.1

It is clear how a theoretical authority like a doctor meets the normal justification thesis, for the doctor's authority lies in their expertise. But the application of the thesis is not so straightforward in the case of the authority of the law. On what basis might the law be justifiably an authority over you? On the basis of expertise? On some other basis? One of the things the law is said by many theorists to do is to solve 'coordination problems' by creating 'conventions' (i.e. to lay down a common rule where no one particular rule is required but a common rule is, such as the rules requiring one to drive on the left side of the road in some countries, but on the right in others). What might give the law authority to criminalise rape and theft? To punish crimes like rape and theft? To make traffic regulations? To impose taxes? To require the wearing of safety belts?

Make notes on these questions.

Feedback: see end of guide.

Summary

The 'paradox of authority' states that it is irrational for anyone to follow an authority, because what is right to do or believe is never determined by what an authority says. Raz's 'normal justification' thesis purports to dissolve the paradox, by pointing out that it is rational to follow an authority if the authority is in a better position than you to understand the reasons that apply to you, an obvious example being the case of a doctor and patient.

8.2.3 The scope of authority

It is one of the features of Raz's account of legitimate authority that the law does not have equally justified authority over all of its subjects in all areas of law. It would, for example, have no justified authority over a road safety expert regarding the wearing of safety belts. And it may have very little authority over any of us when it purports to lay down laws concerning sexual morality. Some view this as a defect of Raz's account, for the law appears to claim equal authority over all in all areas that it regulates, and this would suggest that the legitimacy of an authority is an all-or-nothing proposition. But others find this aspect a virtue of Raz's account. The law, by its nature, claims authority in all it does, but it is also generally believed that the law does not have equal authority in all the areas it chooses to regulate. For example, many people do not think the state has any authority to deny people pleasures that cause no harm to others, such as gambling, using prostitutes or taking drugs, while perfectly accepting the law's authority to punish crime and regulate traffic.

REMINDER OF LEARNING OUTCOMES

By this stage you should be able to:

- **explain the paradox of authority and why Raz's service conception of authority seems to point the way to a solution to the paradox**
- **explain Raz's 'normal justification thesis' of authority, and say how authorities may be justified in issuing directives to their subjects, and how they may fail to justify authority over them.**

8.3 Exclusionary reasons: the deliberative and executive phases of practical reason

The notion of authority fits into a broader, more general picture of practical reasoning which Raz constructs. The core element of that picture is the 'exclusionary' reason. Recall that normally, when reasoning what to do, we act rationally if we decide on the balance of reasons. We have seen, however, that sometimes we should follow the directive of an authority rather than decide on the balance of reasons ourselves. When we do this, we take the authority's directive as an 'exclusionary reason'. By that, we mean that we follow the directive, not the balance of reasons as we have assessed it – the authoritative directive is a reason for acting which **excludes** our acting on the balance of reasons directly.

8.3.1 Separating the deliberative and executive phases of practical reason

What exclusionary reasons[†] do is provide a means to allocate the deliberative and executive phases of practical reason to different occasions or different people or both. The 'deliberative' phase of practical reason is the consideration and weighing up of the reasons that bear on the issue, and coming to a decision about what to do. The 'executive' phase is acting on the basis of that decision. Consider the procedures of a body like a student law society deciding how much to subsidise tickets to its summer ball. Various factors are considered, such as how much money the society has, what other projects the money could be spent on, how many extra students a subsidised ticket price will attract and so on, and a subsidy is decided on, perhaps by majority vote. This decision ends the deliberative phase of the practical reasoning process.

[†] Think of exclusionary reasons as a certain technique of practical reason which is employed in committee decisions, judicial decisions and much else.

Now we pass to the executive phase: the various officers of the society organising the ball must now treat the issue of the subsidy as decided, and implement the society's decision. They must treat the society's decision as an **exclusionary** reason governing their behaviour; they must not reconsider all the factors that went into the decision and then act on what they themselves would decide. If they did that, the society's decision would have been pointless, for it would not, practically speaking, have decided anything. Exclusionary reasons work in the same way in respect of judicial decisions. Lawyers for the parties are entitled to make representations to the judge,

but once the judge decides, the deliberative phase is over, and the parties must then act on what the judge orders, taking their decision as an exclusionary reason. If the parties were free to act on what they thought was the right result in law, it would defeat the whole purpose of bringing the dispute to court. Similarly, when Parliament passes a law following debate, the law must henceforward be taken as an exclusionary reason for action by the subjects of the law. In this way, the separation of the deliberative and executive phases of practical reason and the issuing of exclusionary reasons provides for the coordination of behaviour by different people who share general goals and values but where it is unlikely that this coordination can be achieved by people acting on their own assessment of all the relevant facts.

Activity 8.2

How does the notion of an exclusionary reason explain the binding force of promises?

Feedback: see end of guide.

8.3.2 The force and scope of exclusionary reasons

Authorities have the right to issue authoritative directives based upon their deliberation on the relevant facts. They are justified in doing so (often they are not – not all *de facto* authorities are justified, or *de jure*, authorities) when their directives are more likely to reflect the balance of reasons than are their subjects deliberating on their own. But it is important to notice the nature of exclusionary reasons in order to understand their force and scope.

In the first place, exclusionary reasons **replace** all the reasons that would otherwise be balanced in coming to a decision, because the exclusionary reason **represents** those reasons as the conclusion of a deliberation which took those reasons into account. Thus it is wrong to think that an authority's directive is just another reason for a subject of the authority to **add** to the balance of reasons as they consider. That would be to double-count reasons – the authoritative directive has already taken all the reasons into account, and so cannot be added to them in any rational fashion by a further balancing exercise. This explains the 'peremptory' force of exclusionary reasons – they are meant alone to determine what is to be done.

But exclusionary reasons concern **action**, not thinking. Nothing in the exclusionary reason stops a subject from considering the balance of reasons, or speaking about them, so long as the subject accepts that they are not entitled to act on those deliberations. This is clear in the way that politicians accept the authority of the law. Opposition parties often continue to criticise a law long after it has got on to the statute book, but they do not, typically, counsel the subjects of the law to break the law because they believe it is wrong. And when, rarely, they do so, it is regarded as defying the authority of the law, and this is taken extremely seriously.

Finally, exclusionary reasons have scope. They only cover those reasons which were considered in the deliberative process. This is why the discovery of significant new evidence is grounds for upsetting a trial decision, though obviously it is no easy matter to decide what counts as significant. No trial could be determinative if its decision could be upset by pointing out insignificant or minor facts which were not brought to the court's attention. Similarly, exclusionary reasons are not exclusionary to the extent that the process of deliberation was somehow faulty, if, for example, the judge was drunk, or a clear error of reason is evident. (A clear error is not the same thing as a great error – a clear error is one in which it is obvious that something has gone wrong, as, for example, if a judge applied a statute that had been repealed.)

Reminder of learning outcomes

By this stage you should be able to:

- **say what an 'exclusionary' reason is, and explain how it works as a device of practical reasoning**
- **using examples, explain how one can draw a distinction between the deliberative and executive phases of practical reason, and explain the force and scope of exclusionary reasons.**

Summary

Practical reasoning can be broken down into two stages, the deliberative and the executive (i.e. the stage at which a decision is made what to do, and the stage at which that decision is implemented). Decision-making bodies like committees are authorities in that the results of their deliberations are taken as exclusionary reasons which are meant thereafter to govern the actions of those people subject to them. This analysis shows how authorities are an important kind of technique or device of practical reasoning in social contexts. The directives of authorities have the force of the balance of reasons their deliberations represent, and have a scope limited by those reasons. Directives lose their exclusionary force due to faults in the procedure by which they were arrived at.

8.4 What is a norm?

A 'norm' in the broadest sense is nothing more or less than a standard against which human behaviour or some other event is assessed. In statistics, one speaks about a norm as a 'central tendency' in a data set, or of a 'normal' distribution. In law and morality, however, norm has a more particular meaning: a 'norm' is a standard with which we expect someone to **comply** and by which we **judge** someone's behaviour in moral or legal terms. Thus norms have a dual aspect, though an internally related one, of both guiding behaviour and being used as a standard for judging behaviour.

8.4.1 Rules and orders

The most obvious cases of norms are rules and orders. Although the distinction is vague at the borderline, rules are usually conceived of as general directives that apply to more than one instance, such as the law requiring income earners to pay income tax. They are obviously normative, in that they guide the behaviour of subjects of the legal system, who are in turn judged by whether or not they comply with the rule. In contrast, orders are usually 'one-off' norms that guide the behaviours of one or a defined set of persons on one occasion, as, for example, a judge's order to a defendant to pay the plaintiff £1,000, or a lieutenant's order to their platoon to charge the enemy's position. In Razian terms, both rules and orders are to be taken as exclusionary reasons by the persons to whom they are directed.

8.4.2 Rights

Rights are norms expressed from the perspective of the individual. It is possible in some cases to translate a norm framed in terms of a right or power into a rule: for example, the right to life is easily treated as equivalent to a rule prohibiting killing. Yet the formulation of norms in terms of rights has a point, not only because it allows for simpler descriptions of the way particular norms guide behaviour and serve as standards for judging behaviour, but because rights frame norms in terms of the interests of individuals which **justify** the existence of those rights. Unlike rules, then, rights tend to name the interest or value which is the reason why the right exists, as in the right to life or free speech, or to be paid £10 for services rendered under a specific contract.

Rights are normative in an obvious way, in that rights correlate with duties. If I have a right, then someone must be under a duty to guide their behaviour in some respect of the interest the right names. Thus my right to life entails that others are under a duty to act taking into account my interest in life; typically, by not taking my life. Notice that because rights tend merely to name an interest, they rarely specify on their face the exact contours of the right–duty relationship that defines what the right really amounts to. The right to free speech is not a right to say anything you want at any time, for there are laws of secrecy and laws of defamation and laws against speech which incites racial hatred. Your right, then, does not extend to a correlative duty on the government to respect your speech when you break any of these laws, and so a right to free speech does not encompass a right to defame someone. In general, then, we see the normativity of rights in terms of the normativity of their correlative duties.

Indeed, this must be the case in terms of those rights which do not protect anything the right-holder might do, but rather a state or position they are in, such as being alive (the right to life) or being unharmed and unrestrained (the right to bodily security). You cannot exercise your right to life as you can your right to free speech. Of course, there may be good moral as well as legal reasons for doing this – can you think of any? Hint: consider the value of autonomy.

But in regard to those rights which can be exercised, rights to free speech or religion or assembly, and so on, which are all rights to **liberties**, rights can be normative in another way, in that they can be seen to establish a standard on the behaviour of the right-holder, which can guide their behaviour and by which they can be judged. Because rights are instituted to protect the interests of individuals, they entitle individuals to act in reference to their own interests. In particular, to return to Razian terms, they **entitle** (though they do not require) individuals to decide to act solely on the basis of their own interests, rather than on a more general 'balance of reasons' which takes into account the interests of others. This is particularly clear in the case of legal rights. On the balance of reasons, it might be immoral for you to post naked pictures of yourself on the internet, but nevertheless you have the legal right to do it. It is in this sense that exercising your rights can appear to be selfish or at least self-centred, and it also explains the idea of having a 'right to do wrong'. In this sense, the normative impact of the institution of rights to liberties is to lower the standard by which people must act, and would otherwise be judged, from that of acting on the whole balance of reasons, to acting only on the balance of reasons that affect their own interests.

As we have seen with the right to free speech, the existence of the right does not mean it is an unlimited right. Specific restrictions upon a right may be instituted for the very reason that an unlimited entitlement to act only on the basis of your own interests is incompatible with social order – note that we did not say 'incompatible with the rights of others' – this is a common but mistaken formulation. We could all have equal rights to kill each other. The problem in such a situation is not that our rights are not equal, but that it would give rise to complete social disintegration. All systems of rights reflect some general sense of the limits that must be imposed on allowing individuals to act purely on their own sense of their own best interests, in order to preserve a working or, more hopefully, flourishing, social order.

8.4.3 Powers

A power is a normative capacity or ability to create, alter or abolish the norms (rights, rules, duties or other powers) that would otherwise apply to oneself or others. A legislature has the power to make new laws, or amend or abolish old ones. A judge has the power to make orders. Individuals have the power to enter into (and agree to terminate) contracts, make wills and so on. Unlike rights, which can relate to states of affairs such as being alive, powers are always powers to **do something**; powers are exercised. Powers are often confused with rights to liberties, but they are very different. One may have certain powers in respect of which one has no entitlement to consider one's own interests at all – some powers are entirely governed by one's duties. A judge has the power to issue orders, but this power is governed entirely by the duties of the office.

8.4.4 Duties

The normativity of duties is obvious. Duties are exclusionary reasons, in Razian terms. Notice that duties can correlate to rights, or can be imposed simply by rules for a host of reasons. Many of the duties we have under the law are not clearly associated with any particular rights. For example, duties under the road traffic laws can, in one sense, be thought of as correlating to the rights of others not to be injured, and while of course road safety is an important concern, these duties can also just be seen as the result of putting in place a reasonable scheme to facilitate traffic flow. The facilitation of traffic flow is in everyone's interests, but we do not organise our thinking on this issue in terms of the public's or any particular person's 'right' to a working road network.

SELF-ASSESSMENT QUESTIONS

1. **What is a norm?**
2. **Explain the normativity of rules, rights, powers and duties.**
3. **In what respect are rights to liberties norms which suggest self-interestedness or selfishness?**
4. **Explain the difference between the normative effect of powers and the way in which norms may arise by operation of law.**

8.5 The authority of law and the limits of law

As we have seen, Raz's theory of authority and the normal justification thesis explain how the paradox of authority can be overcome, so that it can be rational to follow an authority's directives. We have also looked at some of the bases upon which the law might claim to have authority, such as expertise, the ability to solve coordination problems by setting conventions and so on. Now we must look at how this theory of the authoritative nature constrains what counts as a good theory of the law.

8.5.1 The law claims authority

You will recall that a theory of law must take into account how the officials and subjects of the law conceive of the law, for the law is an intentional practice, and what people think they are doing is part of what defines what they are doing: explaining what chess is involves explaining that the players understand the moves as moves in a game, as opposed to, say, pushing oddly shaped figures around a chequered board to make pretty patterns. It is indisputable that the law claims authority (i.e. it claims the right to lay down rules which subjects of the law are expected to comply with, whether or not those subjects believe the law is just or unjust, wise or foolish). This claim is reflected every day in the practices of legislators, judges, lawyers and legal subjects. Under Raz's theory of authority, this is a claim by the law to mediate between the balance of reasons and its subjects, by deliberating on the balance of reasons and laying down rules for its subjects to follow. Different legal systems manifest different attitudes to, and procedures for dealing with, civil disobedience, but when the law treats civil disobedience differently from normal criminal behaviour, it claims to decide this for itself – this is an expression, not a self-denial – by the law of its supreme authority.

8.5.2 The limits of law

Because the law has this authoritative character, the law is limited by the bounds on what can constitute an authority. In particular, the law is a body of authoritative directions. Thus a law cannot serve as a law unless it can serve as an authoritative direction. From this apparently straightforward consequence of the authoritative nature of law, Raz draws a very significant conclusion – what the law is on any particular point cannot depend upon moral arguments or what morality would dictate to be the right answer. The argument proceeds as follows:

1. In order for an authority to be an authority at all, it must be capable of mediating between the balance of reasons and its subjects.
2. The way an authority mediates in this way is to deliberate over the balance of reasons, and then lay down a directive (which can be more or less vague, e.g. a rule or a more general principle) which guides the behaviour of its subjects.
3. An authoritative directive does not work (i.e. cannot be authoritative), if it does tell the subjects what they are to do; in particular, it does not work if its effect is merely to make them weigh up the balance of reasons by themselves. So, for example, when one is faced with a moral dilemma, such as whether to take up a career opportunity that will take one away from one's family a great deal, a moral directive to 'do the right thing' is useless as an authoritative directive, because it does not provide any guidance to the subject as to what to actually do. It merely

instructs the subject to weigh the balance of reasons. Authoritative directives must make a **practical difference** to their subjects.

4. With respect to the law, the law is only authoritative when it tells its subjects in more or less specific terms what to do. If a directive requires the subject to determine for themselves what 'the law' requires, then the law is not being authoritative, and such a directive would not count as law. It follows that a law which requires the subject to act according to what morality dictates is not authoritative, nor really a legal directive, because morality is controversial, and in order to sort out what this 'law' is the subject will have to weigh all the relevant considerations themselves to determine what to do.

5. Nevertheless, there are directives of this kind in the body of law. The law may require its subjects to act 'fairly and reasonably' in certain circumstances, or perhaps in a bill of rights, state that a law will be ineffective in so far as it violates the right to life, for example. Most commentators accept that determining what these directives demand will require resort to moral argument, and thus in Raz's view these cannot be authoritative demands imposing duties on subjects of the law to act in certain ways. How, then, are they to be understood – as power-conferring laws? Irrespective of the form in which they are stated, what these laws authoritatively direct, or authoritatively accomplish, is to confer powers on judges to make orders based upon their understanding of what these moral requirements are, and if the system treats judicial decisions of higher courts as sources of law, then judges in these higher courts will lay down specific laws as a result of exercising this power to decide on the basis of the judge's grasp of morality.

6. The basis of this argument is the truism that 'you can't do what you can't do'. Try as it might, an authority cannot direct behaviour if the behaviour it wants to direct cannot be specified. The problem is not peculiar to the controversial nature of morality – the law could be made to turn on whether Goldbach's conjecture (that every even number greater than two is the sum of two primes) is correct, or whether the universe is expanding, although it is difficult to envisage such cases. Thus the problem is the general one of the law's making reference in its authoritative directives to issues or matters which can only be dealt with **by further deliberation**. Such directives necessarily fail to allow the subject to proceed to the executive phase of practical reason; in which case, they are not truly authoritative directives. The most such directives can do in a system of regulation such as the law is to empower judges to make actual orders in cases or, if they are entitled to make law, lay down actual, workable, directives within the constraints of the power (e.g. so long as the order or new law is reasonably within the bounds of what is 'just and fair').

Activity 8.3

Read Freeman, Chapter 5 'Modern trends in analytical jurisprudence', extract by Raz, J. 'Authority, law and morality', para. 5–021. Explain in your own words how Raz applies his theory of the authority of the law and concludes that judges have discretion. Can you think of any ways in which this conclusion might be challenged?

Feedback: see end of guide.

8.6 The debate with soft positivists and Dworkin

Soft positivism is the view that while the law need not ever incorporate moral criteria into the law, it **can** do so. Notice this claim is not Raz's claim, that law can make reference to morality and so empower judges with a discretion to resolve cases; rather, it is the claim that the law **incorporates** what is morally right. Thus soft positivism is also sometimes called 'incorporationalism' or 'inclusive legal positivism'. It has clear affinities with the theory of Dworkin,[†] though Dworkin believes that the law is **always** ultimately dependent on what is morally right, such that any apparent law might turn out not to direct the subjects in the way it apparently does, for it is always theoretically possible that a new legal argument drawing upon a superior Herculean moral/political theory of justice could show the law always to have been mistakenly understood in the past.

[†] For detail of Dworkin's theories, and his ideal 'Judge Hercules', see Chapter 9 of this guide.

If Raz is right about the authoritative nature of the law, then both these theories are thwarted for, according to Raz, the law cannot be authoritative in so far as the law is not specified to its subjects prior to their getting to court, and because morality is controversial, reference to morality ensures that the law is unspecified. In order to decide what to do, the subjects of the law must deliberate themselves and, furthermore, their conclusions must be uncertain, for there is no guarantee that the court will decide the same way. For these reasons, such laws can only be construed as conferrals of power on judges to decide cases based on their own views as to what is morally right.

One might respond to this by taking very seriously the form in which laws are cast. The law typically directs its subjects to act justly or reasonably, and it would violate the sense of these laws to construe them as giving powers to judges. If this argument is taken up, it leads one to suspect that Raz's theory of authority has gone wrong somewhere, and a critic should try to specify where.

More recently Dworkin (in his article 'Thirty years on', 2002) has attacked Raz's theory of authority with the following argument: Raz is wrong to claim that, in our ordinary understanding of authority, an authoritative directive cannot incorporate a moral standard, and that issuing such a directive would not make a practical difference to the behaviour of its subjects. For they would now be required to reflect carefully on the moral standard the law imposes before they act; thus the law would make a practical difference to their behaviour, and they would claim they were following the law when they acted on the basis of this reflection. Presumably Raz would reply in the following way: True, the directive in this case has made a practical difference, but not the right one. The law did not require its subjects to reflect on morality before acting, such that if they did so they would be regarded as complying with the law; rather, the law required them to act on the moral standard as correctly understood. There is nothing the subject can do to ensure that they comply with that. They are not relieved of liability if they prove that they reflected on the standard before acting, and so the practical difference in their behaviour is not matched by what the law tells them to do. Therefore to treat this law as an authoritative directive must be mistaken.

As a conclusion, Raz's general antipathy to the position of the soft positivists and Dworkin can be framed in this way: Raz thinks it is absurd to say that what the law is (i.e. what it is right now and what binds the subject of the law), may be something no one has ever thought of before, including the legislature and all the judges. It might be something completely unpredictable from the point of view of the legal subject. Yet this is what the soft positivists and Dworkin believe, for in tying what the law is to what the truth of morality is, the law is as open-ended as the ultimate moral truth is. It would be as absurd to say that the law right now might be what science may discover the ultimate truth of the universe to be. No one can direct their behaviour on this speculative basis, no matter in what way laws are framed. By pointing to the facility of judges to decide all cases before them, though constrained by moral and other values, Raz attempts to show how typical legal systems normally empower judges not only to apply the law, but to modify or expand it or otherwise make new law to meet particular cases.

Summary

For an authoritative directive to be valid, it must be possible to follow it according to its terms without having to resort to deliberating about the problem the directive was created to solve. According to Raz, laws which make reference to what morality requires are invalid as authoritative directives, for they require subjects of the law to 'solve the problem' themselves, for they will themselves have to weigh up the moral reasons in play. Thus laws making reference to what morality requires can only be understood as directives empowering judges to give concrete orders in particular cases, or to create concrete laws, orders or laws which can be followed by people without further deliberation. Since it seems all legal systems contain laws of this kind, it follows that all legal systems empower judges to do this, which vindicates Hart's claim that judges typically have the power to exercise their discretion to make law in certain cases.

Reminder of learning outcomes

By this stage you should be able to:

- **describe in step-by-step fashion how applying Raz's theory of authority to the law results in the claim that the law cannot depend on moral truths, and that typical legal systems empower judges to exercise a discretion to make new law when the law makes reference to moral standards**
- **explain how, if Raz's theory of the authority of the law is correct, soft positivism and Dworkin's theory of law are undermined, and explain what possible responses soft positivists and Dworkin might make.**

Sample examination questions

Question 1 'Raz's theory of authority completes Hart's project, for it explains the importance of Hart's secondary rules, in particular the rule of recognition, as devices of practical reasoning that makes the institution of law effective.' Discuss.

Question 2 What are the reasons for and against the claim that judges typically have a discretion to make new law in 'hard' cases?

Advice on answering the questions

Question 1 This question requires a brief recapitulation of Hart's theory of law, in particular as framed as the union of primary and secondary rules, and his explanation of the difference between duty-imposing and power-conferring rules. This should be followed by an examination of how this fits with Raz's theory of authority as a device of practical reason, showing how the analysis of practical reason into deliberative and executive phases illuminates the way legislatures and judges act, and how their directives can be taken as exclusionary reasons for action. As the question suggests, the rule of recognition should be given particular attention: contrasting with Hart's original claim that the rule of recognition is power-conferring, Raz claims it imposes a duty upon officials to identify laws of the system. Given the peculiar nature of the rule of recognition, as essentially a matter of fact but at the same time the chief rule of the legal system, the rule can be seen to embody, or be the clearest manifestation of, the claim to authority that the law makes (i.e. that it determines what shall be regarded as an authoritative directive applying to its subjects).

Question 2 This will involve a discussion of Hart's and Dworkin's views, and the views of any theorist, like Coleman, who has argued in detail for the soft positivist position, and will require a weighing of these views against those of Raz. The general structure of Dworkin's theory, including his reference to the 'rights thesis', the 'right answer thesis' and the role that moral and political theory plays in Hercules's adjudicatory technique should be discussed. Raz's theory of authority should be presented in outline, but his argument that judges typically have the power to make law where the law is unsettled should be presented in detail.

Reflect and review

Look through the points listed below. Are you ready to move on to the next chapter?

Ready to move on = I am satisfied that I have sufficient understanding of the principles outlined in this chapter to enable me to go on to the next chapter.

Need to revise first = There are one or two areas I am unsure about and need to revise before I go on to the next chapter.

Need to study again = I found many or all of the principles outlined in this chapter very difficult and need to go over them again before I move on.

Tick a box for each topic.

	Ready to move on	Need to revise first	Need to study again
I can explain the paradox of authority and why Raz's service conception of authority seems to point the way to a solution to the paradox.	☐	☐	☐
I can explain Raz's 'normal justification thesis' of authority, and say how authorities may be justified in issuing directives to their subjects, and how they may fail to justify authority over them.	☐	☐	☐
I can say what an 'exclusionary' reason is, and explain how it works as a device of practical reasoning.	☐	☐	☐
I can, using examples, explain how one can draw a distinction between the deliberative and executive phases of practical reason, and explain the force and scope of exclusionary reasons.	☐	☐	☐
I can describe in step-by-step fashion how applying Raz's theory of authority to the law results in the claim that the law cannot depend on moral truths, and that typical legal systems empower judges to exercise a discretion to make new law when the law makes reference to moral standards.	☐	☐	☐
I can explain how, if Raz's theory of the authority of the law is correct, soft positivism and Dworkin's theory of law are undermined, and explain what possible responses soft positivists and Dworkin might make.	☐	☐	☐

If you ticked 'need to revise first', which sections of the chapter are you going to revise?

		Must revise	Revision done
8.1	The paradox of authority and Raz's 'service' conception of authority	☐	☐
8.2	The 'normal justification thesis'	☐	☐
8.3	Exclusionary reasons: the deliberative and executive phases of practical reason	☐	☐
8.4	What is a norm?	☐	☐
8.5	The authority of law and the limits of law	☐	☐
8.6	The debate with soft positivists and Dworkin	☐	☐

Part IV The integrity and interpretation of law

Morality in the 'penumbra' of law

Hart produces several defences of positivism against the charge that it is impossible for questions of legal validity not to be infiltrated by arguments about morality (one of which, his 'minimum content of natural law' thesis, we encountered in Chapter 6.)

Hart's argument against 'legal realism'

The first important defence to be discussed here concerns Hart's argument against an American school of thought known as legal realism, which expressed a particular view about the nature of legal reasoning. It accused the positivists of being formalistic and of ignoring the facts of adjudication and judicial law-making. The jurists of this school said that the real law occurred in the courts, and that to insist upon a rigid distinction between law and morality as positivism does simply ignores what judges are doing when they come to their decisions. In these hard or difficult cases, where litigants argued opposing points of view as to how a judge should decide, the realists argued that there was a merger or intersection of law and morality. As you read the texts, consider whether there is a difference between what the law **is**, and the words that express it. It is a serious point that words, generally speaking, cannot put you in prison, but law can! Take the case of *Riggs* v *Palmer* (see Chapter 5 of this module guide, particularly Section 5.3.2, and Dworkin's discussion of the case in Chapter 2 of *Taking rights seriously*). The beneficiary of the will murdered his grandfather to obtain the benefit of the will, since he thought his grandfather was about to disinherit him. Was there a 'core' meaning of the will that said he was the beneficiary? In one sense there was. However, once we learn that he **murdered** the testator, does it not seem as though:

- we are no longer talking about the meanings of words, but the rights those words have a bearing upon, and
- the case is one that raises a penumbra of doubt?

Hart says that it was a central insight of the realist school to draw attention to these hard cases. Hart's famous example is that of a legal rule which forbids us to take a vehicle through the park. In the absence of judicial or statutory definitions of the word 'vehicle', such a rule plainly forbids a car, but does not plainly forbid or plainly permit bicycles, rollerskates, toy cars or even helicopters. But as Hart says:

> if we are to communicate with each other at all...that a certain type of behaviour be regulated by rule, then the general words we use like 'vehicle' must have some standard instance in which no doubts are felt about its application.

Hart says that there must be a core of settled meaning, as well as a penumbra of debatable cases which will share some similarities but not others with the core. He agrees that judicial decisions made in penumbral cases cannot be made as a matter of logical deduction, because a decision has to be made whether to classify the item as coming within the language of the enactment.

Hart sides with the realists in their denunciation of formalistic, deductive reasoning in hard cases. But, he says, it does not follow from the fact that formalistic reasoning is wrong in these areas of the law that judges do in fact, or ought to, decide morally. It is possible to make rational choices within the penumbra of rules in a legal system dedicated to evil aims. He gives the example of sentencing in criminal cases. Here there seem to be good grounds for saying that the judge must exercise moral judgment in coming to their decision, for example, the judgments that society should be protected from violence, that too much suffering should not be inflicted upon the victims, that efforts should be made to enable defendants to reform themselves, and so on.

You should note the addendum to this argument. Hart suggests that we perhaps ought to be prepared, in the light of what the American realists say, to revise our conception of what a legal rule is. Perhaps we should, he says, include in the idea of a legal rule all the various aims and policies in the light of which all the penumbral cases are to be decided, simply because their aims have as much right to be called law as in the case of legal rules whose meaning is settled. We would then, he says, not talk of judges coming to decisions in penumbral cases as **debating what the law ought to be** and then **deciding what the law should be** for the future, but consider them as **discovering what the law is** by drawing out of the settled meaning of the legal rule what is already latent in it.

This gives us a view of judicial decision-making that was essentially the same as deciding what the settled meaning of a rule was, although involving a more complicated process of extrapolating the law from the settled meaning. Hart rejects this idea, however. Hart's argument here, often overlooked, is useful to bear in mind when reading Dworkin on legal argument in hard cases (see Chapter 9 of this module guide, below).

A question to ponder:

The sign on the escalator to the London tube (underground railway) at Chancery Lane station instructs passengers that they 'must carry dogs on the escalators'. Do people who do not carry dogs because they do not have any dogs act contrary to this instruction? If not, why not?

Summary

Hart says the American realist insistence that morality intrudes into the law through judicial decision-making is mistaken because, although it often does, it does not do so necessarily. Just as often, **immoral** aims can intrude into the law in precisely the same way.

9 Dworkin's interpretive theory

Contents

Introduction

This chapter sets out the points over which candidates have in previous years had most difficulty. The important point with Dworkin is not to underestimate his subtlety and intellectual power. His theory directly contradicts legal positivism and he spent much of his career attacking that theory, which he thinks cannot do justice to the power of legal argument. One of Dworkin's problems is that nowadays legal positivism, as a theory of law, has an appeal arising from its simplicity. Dworkin's theory of law has no 'master rule' such as the *Grundnorm* or Hart's rule of recognition, or something like 'what the Sovereign commands', and this makes the theory hard. It is much easier, too, for someone to be told that 'the law' is that which is identified by 'what the judges say' than, as Dworkin says, by 'the best theory of what our existing legal practices justify'. And legal positivism has a simple appeal in practice, too. We can argue both sides of the abortion debate from the moral point of view, but the legal debate is fairly simple. We just need to read what the Abortion Act 1967 says to learn that, whatever the moral position, in some circumstances, abortions are legally permissible.

But simplicity is not the only criterion of a successful theory. Perhaps law is not so simple that a simple theory is possible. The moral of this is that throwaway lines in the examination such as 'Dworkin cannot be taken seriously because he says that there is only one right answer in all law cases and where would you find it?', which are all too common, are superficial. Dworkin is attacking the sort of theories that provide 'places' which tell you what the law is, such as the *Grundnorm* or rules of recognition. Dworkin **is** difficult, but very rewarding.

Learning outcomes

By the end of this chapter and the relevant reading, you should be able to:

- **state the difference between the pre-interpretive, interpretive and post-interpretive stages of legal argument**
- **describe the role of Hercules as the ideal judge**
- **show the distinction between arguments of principle and arguments of policy**
- **show the distinction between arguments of fit and arguments of substance**
- **state the various interpretations of the House of Lords case of *McLoughlin* v *O'Brian***
- **explain and define integrity as a virtue of law and legal argument**
- **understand the conception of law as primarily about justifying legal arguments**
- **discuss Dworkin's arguments against the 'social sources' theory of law**
- **explain the purely defensive nature of the one right answer thesis.**

Core text

- **Freeman, Chapter 7 'Dworkin and interpretivism'.**

Further reading

- **Dworkin, R. *Taking rights seriously.* (London: Bloomsbury, 2013) [ISBN 9781780937564] Chapter 4 'Hard cases'.**
- **Dworkin, R. *Law's empire*. (Oxford: Hart Publishing, 1998) [ISBN 9781841130415] Chapter 7 'Integrity in law'.**
- **Dworkin, R. *Justice in robes*. (Cambridge, MA: Harvard University Press, 2006) [ISBN 9780674027275] Chapter 19.**

Justice in robes, although largely made up of essays published previously, is worth looking at. In this, the author lays out a new series of 'stages' in which a theory of law is supposed to operate, so as to guide judges when they decide cases. The stages are: a 'semantic stage', a 'jurisprudential stage', a 'doctrinal stage' and an 'adjudicative stage'. These stages would appear to refine or replace the pre-interpretive, interpretive and post-interpretive stages described in *Law's empire*.

9.1 The idea of interpretation

9.1.1 Dworkin's definition of interpretation

Essential reading

- **Dworkin, R. *Taking rights seriously*. Chapter 13 'Can rights be controversial?' and pp.134–36 (available in E-book Central via the Online Library). This is useful on the distinction between concepts and conceptions.**

Further reading

- **Dworkin, R. *Law's empire*. Chapter 2 'Interpretive concepts' (Chapter 3 'Jurisprudence revisited' and Chapter 9 'Statutes' are also very useful).**
- **Guest, S. *Ronald Dworkin*. Chapter 2 'Law as plain fact'.**

It was through a dissatisfaction with the rigidity of the distinction between 'descriptive' and 'normative' accounts of law that Dworkin introduced into his theory the methodology of the 'interpretive concept'. (Note that Dworkin opts for the spelling 'interpretive' rather than the more classically correct 'interpretative'.) Dworkin says that the essential idea in interpretation is '**making the best of something that it can be**' and this very abstract idea is to be applied to the idea of law.

The idea of making the best of something can be described in a number of ways. The quickest way to the idea is through the notion of a thing having a point, for example. Ask yourself what the **point** of the thing you are interpreting is, the way you might ask yourself 'what is the point of the prohibition of vehicles in the park?' in the course of producing a legal argument about roller skates. But another metaphor is that of placing a thing in its 'best light', whereby we assume that the thing has some point and we examine it as thoroughly as we can to see what is the most sensible way of viewing it.

All these questions are deep questions of methodology in general but you should think about them particularly in formulating your approach to jurisprudence. You should be aware of them since they will help you to steer your way through the various theories and adopt an attitude. If you can lift yourself in thinking about jurisprudence from merely saying 'what other people said' to '**what I think**', you have oriented yourself correctly. You should not be deterred by the eminence of these theorists, or by the apparent abstraction of these ideas. You should be able to say something of interest and sense to an examiner and thinking about these things will help your own approach to legal argument as a lawyer because it will make you think about the methodology you are employing **yourself** in constructing legal arguments.

Dworkin gives a good account of his views on interpretation in Chapter 2 of *Law's empire*. You will discover that he is primarily talking about 'constructive' or 'artistic' interpretation, and you should carefully distinguish this from 'scientific interpretation' (which you can largely ignore) and 'conversational interpretation'. The latter is important, since it is Dworkin's criticism of the use of this form of interpretation for law that forms the backbone of his arguments about interpreting legislation.

It is useful to start with Dworkin's description of the simple social practice of 'courtesy'. His account is intended to show that we adopt an 'interpretive' attitude towards social practices, by which he means the attitude of looking for the **point** of the practice. Courtesy changes when interpretation, as he says, 'folds back into itself' (see next section). He claims that the concept of interpretation is itself an interpretive concept and that the interpretation of social practices is:

- **like** artistic interpretation, which interprets the thing created by people as separate from them
- **unlike** scientific interpretation, which interprets things not created by people
- and **unlike** conversational interpretation, which interprets what people say (see *Law's empire,* pp.422–25).

In order to interpret a practice, Dworkin says, one must **engage** in it in a committed way. Otherwise it is only a report of various opinions that those engaging in the practice have. So interpreting a practice is the report of neither individual nor group opinions.

9.1.2 Analytical attitudes

Dworkin says that we may understand a social practice in three analytical attitudes: the 'pre-interpretive', the 'interpretive' and the 'post-interpretive'. These important ideas can be described by the use of a simple example.

Take the pre-interpretive attitude, first. Imagine a society in which there is a social practice requiring that men doff† their hats to women. In this society, no attitude is struck towards the value of the rule. No point is ascribed to it. An interpretive step may now be described. We can now imagine that, after a while, people begin to ask questions about this practice of courtesy and what the reasons are for conforming to it. It is easy to imagine, too, that people will differ about their understanding of it and will argue among themselves about what the practice requires in particular cases.

† 'Doff': this old-fashioned word means to remove the hat as a courteous salute.

It is useful to refer here to games, such as cricket, in which a description of the rules can be distinguished from a discussion of its point. We may establish its point by asking questions like: Is it fun? Does it test skill? Is it competitive? Is it educational? Does it make money? By contrast, when we want to know about how the different rules are interpreted we ask questions like: Does bowling include throwing? Or underarm bowling? and so on.

Dworkin says there is a third, post-interpretive phase where interpretation 'folds back into itself' and has the effect of changing the original rule. So, in our example, some people, perhaps through argument and discussion, will come to have an altered perception of the original hat-doffing rule and this altered perception will lead them to modify it. Imagine there arises a general agreement that the point of the hat-doffing rule is that it is a mark of respect. There then might be a dispute about whether the rule should be extended, so that it also becomes a requirement to doff the hat to others in the society to whom respect was due – say, those who were great jurists. Conversely, hat-doffing might be withdrawn from certain people in the first group who were considered not to deserve respect.

These three phases of interpretation make it clear that Dworkin thinks there is a lot more to understanding a rule than merely 'describing' it. You have, as it were, to 'get under the skin' of the rule, and determine its point. When you've done that, you will discover that the point you ascribe to the rule will supply various principles of interpretation. Note the sceptical possibility in Dworkin that such principles could destroy the rule. Thus it is possible to imagine someone arguing that respect, properly understood, perhaps as 'equality of respect', was inconsistent with anything so deferential as 'hat-doffing', thinking that 'hat-doffing' was a male form of curtseying, as if to the Queen. Such an argument could easily conclude by saying that the rule on hat-doffing should be abandoned. Dworkin calls this sort of argument 'internal scepticism' (see *Law's empire,* Chapter 2).

ACTIVITY 9.1

a. What does 'get to the point of something' mean? Try to express this idea in at least three different ways, writing if necessary a paragraph to explain it, and using a least one example.

b. Consider our understanding of the 'hat-doffing rule' at the 'pre-interpretive' phase. Is it possible to understand a rule if we do not know its point?

No feedback provided.

FURTHER READING

There are various critics of Dworkin's idea of interpretation. You will gain a lot by reading anything that Stanley Fish has written on the subject. See his *Doing*

what comes naturally **(1989) Chapters 4 and 5. Perry's article 'Interpretation and methodology in legal theory' is very good: and you should read something by Marmor. See the list of Further reading later in the chapter.**

Note should also be taken of the following articles:

- **Endicott, T. 'Adjudication and the law' (2007) 27 *Oxford Journal of Legal Studies* 311**

which looks again at the power of judges to create law by imposing a new liability upon a defendant.

- **Green, L. 'Does Dworkin commit Dworkin's fallacy?' (2008) 28 *Oxford Journal of Legal Studies* 33**

which critically analyses the semantic theory lying behind Dworkin's interpretivism.

- **Bix, B. 'Global error and legal truth' (2009) 29 *Oxford Journal of Legal Studies* 535**

in which Bix questions whether the law is objective in the sense that all lawyers could be mistaken about what the law is, a possibility which seems to be required on one reading of Dworkin. This is a short piece which sets out the question very clearly.

- **Allan, T.R.S. 'Law, justice, and integrity: the paradox of wicked laws' (2009) 29 *Oxford Journal of Legal Studies* 705**

claims that on Dworkin's characterisation of authority, properly understood, no truly wicked law could really be a law. Therefore Dworkin should not endorse the view that one has only a *prima facie* obligation to obey the law, which would be over-ridden in the case of wicked laws. Rather, if a legal system shows integrity, one has an obligation to obey its laws, because a system with integrity would not include wicked laws.

- **Leiter, B. 'Explaining theoretical disagreement' (2009) 76 *University of Chicago Law Review* 1215.**

Leiter asks whether the theoretical disagreement identified by Dworkin is really prevalent in the law; the article is interesting for the attention it focuses on the reasoning of the judges in *Riggs* v *Palmer*.

- **Dworkin, R. *Justice for hedgehogs.* (Cambridge, MA: Belknap Press, 2011) [ISBN 9780674046719].**

Dworkin sets out his latest views on law, politics and morality, and furthers his project of giving an interpretive account of the fundamental value of human dignity which gives them their shape.

Dworkin largely based his theory of law on the facts of disagreement and argumentation in legal practice. This remained a constant in his work from the beginning to its final stages.

- **Melissaris, E. 'A social and legal theory of re-enchantment: interpretivism, argumentation, and law' (2012) 19(4) *Constellations* 609–23.**

These two articles take issue with Dworkin's account. In the former, it is argued that Dworkin misunderstands the nature of disagreement in law and the latter that argumentation is constitutive of the character of modern law rather than an indication that law has a context-independent subject matter.

- **Dworkin, R. 'A new philosophy for international law' (2013) 41(1) *Philosophy & Public Affairs* 2–30.**

Ronald Dworkin died in February 2013. Shortly after his death this article of his on the grounding of international law was published. This essay is not only of interest to theorists of international law but also to students of general jurisprudence. Rejecting positivism in international law (which he considers as animating consent-based theories), Dworkin applies his interpretivist theory of law to the international sphere. He addresses specifically the obvious problem that in international law there is no uniform institutional structure in the same way as one is identifiable in sovereign states (recall that an already existing institutional structure is the first step in the process of interpretation). Dworkin addresses this by introducing the principle of salience:

> If a significant number of states, encompassing a significant population, has developed an agreed code of practice, either by treaty or by other form of coordination, then other states have at least a prima facie duty to subscribe to that practice as well, with the important proviso that this duty holds only if a more general practice to that effect, expanded in that way, would improve the legitimacy of the subscribing state and the international order as a whole. (p.19)

The 'principle of mitigation' compels sovereign states to adjust their practices when these are shown to fall short of standards of moral rightness. This will gradually lead to a cosmopolitan moral and legal integration (Dworkin also makes some tentative remarks as to how this may be institutionalised).

A symposium on Dworkin's *Justice for hedgehogs* was published in *Jurisprudence: An International Journal of Legal and Political Thought* (2015) 6(2).

Summary

Dworkin's methodology in legal theory is explicit. He thinks law consists of human practices and that the theorist's job is to interpret them. 'Interpret' means, to him, 'to make best sense of a practice' so that we bring out its point; he calls this form of interpretation 'constructive' or 'artistic' interpretation as opposed to 'scientific' interpretation which interprets **things**, and 'conversational' interpretation which interprets **what people mean**. If a practice is placed in its best light, and no point to it can be discerned, this, to him, is the best argument for its abolition.

REMINDER OF LEARNING OUTCOMES

By this stage you should be able to:

- **state the difference between the pre-interpretive, interpretive and post-interpretive stages of legal argument.**

9.2 Judge Hercules

You should be particularly careful in understanding this part of Dworkin's theory (see particularly, Chapter 4 of *Taking rights seriously*). Many people, in particular lawyers, who are introduced to Hercules in Dworkin's article 'Hard cases' simply dismiss him by saying that no such judge ever existed. But why cannot we hypothesise the existence of an ideal judge, against whom we can measure bad or distorted legal arguments? Here a bad argument is one that, in the ideal world, a judge would not have made; a good argument is one that Judge Hercules would have made.

It is necessary for Dworkin to posit an ideal judge because his theory is about law as an **argumentative attitude**. He has to provide a scheme of argument which, among other things, is sufficiently abstract to allow for controversial argument. The model of Hercules is intended to point the way to correct legal argument. It is not that there is a method which will come up with the right answer. If a problem is raised about whether there could be such a right answer, it is one about the objectivity of legal argument, not a criticism of the ideal model of Hercules.

The key to what Hercules does is in the following idea:

> If a judge accepts the settled practice of his legal system – if he accepts, that is, the autonomy provided by its distinct constitutive and regulative rules – then he must accept some general political theory that justifies these practices. (Dworkin, *Taking rights seriously*)

What does Hercules do when constructing the arguments in all the hard cases put before him? We can assume, says Dworkin, that he accepts most of the settled rules of his jurisdiction, rules which lay out for us what are the familiar characteristics of the law. For example, the constitutive and regulative rules that grant the legislature the powers of legislation give judges the powers of adjudication and the duty to follow previous cases, as well as all the settled rules of the various areas of law, such as tort, contract and so on.

According to Dworkin, Hercules can produce theories underlying all these rules. Democracy, in some form, clearly underlies the legal jurisdictions of the USA and the United Kingdom. So we have there a basic justification for judicial coercion in accordance with what the legislature has required. But this is only the beginning. The justification for the common law doctrine of precedent lies in the idea of fairness, the idea of treating people in a consistent way. The justification for particular applications of statutes and the common law lies within more elaborately worked out theories, or reasons, such as (to give some examples at random):

- a theory of responsibility in the criminal law (and attendant theories about *mens rea* and the idea of recklessness)
- a theory of relevance in the law of evidence
- a theory of the division of capital and income in the law of taxation
- a theory of consideration in the law of contract.

The list is huge and is familiar to anyone who has studied law for long enough.

Activity 9.2

Would it matter for Dworkin's theory if no judge had ever existed with Hercules' powers?

Feedback: see end of guide.

Reminder of learning outcomes

By this stage you should be able to:

- **describe the role of Hercules as the ideal judge.**

9.3 Principles and policies

Dworkin is well known for the distinction he drew between legal arguments of principle, which are arguments about a person's rights, and arguments of policy, which are arguments about community goals. The distinction is important to Dworkin:

- it is intended to be largely descriptive of the distinctions that in fact are drawn by lawyers
- it represents for him the line to be drawn between the legitimate jurisdictional activities of judges and the decisions of government as required by a properly understood democratic separation of legislative and judicial powers
- it represents his main assault on the most popularly understood version of utilitarianism.

Dworkin gives definitions for principles and policies in Chapters 2 and 4 of *Taking rights seriously* and in *Law's empire* he accepts these definitions without modification. (You should read these chapters of Dworkin and make a note of his definitions.)

Policy causes difficulties for different reasons, none of which strikes at Dworkin's thesis. Is the following such an absurd thing to say, however? Judges (and lawyers, and law students) know they should not decide, or argue, on the kinds of grounds that Dworkin calls policy grounds. They know that judges have a function specific to the litigants, and specific to determining the rights of those litigants. They know that the kinds of arguments relevant to making such determinations are different from those which aim at some goal independent of the litigants' rights. For example, it is clear that a person has a right not to be assaulted, and it is also clear that they have no right that the government pursue a goal of decreasing expenditure on defence. His arguments regarding policies relate to the realist tradition in the American common law system from such judges and scholars as Oliver Wendall Holmes, Karl Llewellyn and Jerome Frank. This tradition is often seen as a precursor to the critical legal studies movement. You will see a realist position set out in one of the judgments in 'The case of the speluncean explorers', which you may want to revisit in terms of considering

the way judges reason and why and how this compares, particularly in the light of Dworkin's work, with how they should reason.

9.4 Arguments of 'fit' and 'substance'

For Dworkin, legal argument in most hard cases will develop as the result of a tension between two dimensions of an argument, one that argues towards a fit with what is accepted as settled law, the other that argues towards substantive issues of political morality. For example, a decision to allow damages for negligently caused injury 'fits' the common law precedents, but where there are no precedents, a 'substantive' argument – one based on fairness, justice, reasonableness, etc. – would be advanced for a particular decision. In a nutshell, 'fit' means 'consistent with the settled law in both statutes and past cases'. While it is the twin abstract injunctions to make the best sense of law and to treat people as equals that propel Dworkin's legal and political philosophy, it is the distinction between substance and fit that forms the cutting edge, for him, of legal argument.

It is necessary to follow Dworkin's analysis of a case decided in the House of Lords, that of *McLoughlin* v *O'Brian* [1983] 1 AC 410. In Dworkin's view, substantive arguments (relating to the people's right to be treated as equals) have to be selected to fit (the already existing case law). Mrs McLoughlin learned that her husband and children were involved in a car accident. She set out for the hospital some miles away, and when she got there she was told her daughter was dead and she saw that her husband and other children were seriously injured. She suffered severe shock and she sued, among others, the driver of the vehicle, whose negligence caused the accident.

Dworkin says that Judge Hercules might begin by considering the following six possible interpretations of the case law:

1. Success (for the plaintiff) only where there is physical injury. (We can rule this out immediately because it does not fit the law of tort. It is clear from the case law that damages may be obtained for nervous shock.)
2. Success only where the emotional injury occurs at the accident, not later. (But, says Dworkin, this would just draw a morally arbitrary line.) 'Morally arbitrary line': here Dworkin is attacking the idea that there is law **plus** moral principle. He thinks finding out what the law **is**, as opposed to what it **ought to be**, includes the relevant principle.
3. Success only where a practice of awarding someone like Mrs McLoughlin would be economically efficient. (This, Dworkin says, is a matter of government **policy**, and so is irrelevant to the question of the plaintiff's rights.)
4. Success only where the injury, whether physical or emotional, is the direct consequence of the accident. (He rules out this interpretation because it is 'contrary to fit', contradicting the clear case law, where there is a test of foreseeability which limits the liability of the person who causes the accident.)
5. Success only where the injury is foreseeable (by the defendants).
6. Success for foreseeable injury, except where an unfair financial burden is placed on the person who causes the accident. (By 'unfair', Dworkin means that the compensation would be disproportionately large compared with the moral blame in causing the accident.)

According to Dworkin, 5 and 6 are the best contenders. To develop the analysis further:

- 1 and 4 are ruled out because they contradict the requirement of 'fit'. The claim that psychological trauma is not recoverable in a negligence action simply contradicts the line of decisions. Thus the claim does not 'fit' the law. The same goes for the claim that Mrs McLoughlin cannot succeed because her injury was 'indirectly' caused, since it is clear that many actions in negligence have succeeded where the injury was indirectly caused (most nervous shock cases, in fact).

- 2 is ruled out because it is an interpretation that relies on an arbitrary assertion that only people at the scene can recover. It is 'morally irrelevant' to draw a distinction between what happened in the case and the same scenario occurring at the scene of the accident, since this was obviously in the 'aftermath' of the accident (as the Court of Appeal said) and, of course, it was not as if Mrs McLoughlin was a stranger to the victims.
- 3 is ruled out because it relies on policy, not principle.

Summary

Dworkin illustrates his interpretive method for judges. The method is ideal; that is to say, it is designed to illustrate what **the best** judging would be and so he employs the idea of an ideal judge, whom he calls Hercules. Judges should ideally not assume the role of the legislator as that is not right, since judges, among other things, are not elected to represent the community; they must not, therefore, decide issues of policy because these aim at community goals. Their decisions should therefore 'fit' the present law, and where there is controversy, they should resolve those controversies in favour of what treats people with equality of respect.

Reminder of learning outcomes

By this stage you should be able to:

- **show the distinction between arguments of principle and arguments of policy**
- **show the distinction between arguments of fit and arguments of substance**
- **state the various interpretations of the House of Lords' case of *McLoughlin* v *O'Brian*.**

9.5 Concepts and conceptions: law as an argumentative attitude

Dworkin argues that there are important contrasts between different levels of abstraction. A 'concept', he says, is something that can be described more or less without controversy. A concept is understood to be where 'agreement collects around discrete ideas that are uncontroversial employed in all interpretations' (*Law's empire*, p.71). A 'conception' is where 'the controversy latent in this abstraction is identified and taken up' (p.71). The conception is much more interesting in Dworkin's view, because it represents what the interpreter brings to it, as an exercise of judgment.

Activity 9.3

Being as exact as you can, try to describe 'the concept' of law as Dworkin claims it to be, that is, absent of controversy. Again, in Dworkin's terms, what is Kelsen's 'conception' of the concept, and what is Hart's 'conception' of the concept?

Feedback: see end of guide.

9.5.1 Scepticism about interpretation

Dworkin then discusses scepticism about interpretation. A major challenge is that there is no right answer because we cannot ascribe truth to what are essentially non-provable matters of opinion. But, he says, there is no difference between saying 'My opinion is that slavery is wrong', 'slavery is wrong' and 'that slavery is wrong is true'. Only what he calls 'global' internal scepticism[†] threatens the enterprise of interpretation of law because 'external' scepticism is 'disengaged'. In Chapter 3 of *Law's empire*, entitled 'Jurisprudence revisited', Dworkin famously declares that the point of law is to restrain governmental coercion. Coercion should only be used as licensed by individual rights flowing from past political decisions (see the 'rule' of law, p.93). There are three rival conceptions of law under this abstract banner:

- **conventionalism**, which enhances predictability and procedural fairness. When convention is spent, forward-looking grounds must be sought
- **pragmatism**, which is 'sceptical' because it looks always to the future

[†] 'Global internal scepticism' (see *Law's empire*) means being sceptical about the point or purpose of law in general.

- **integrity**, which secures equality among citizens and makes community more genuine. Dworkin concludes that the relationship between law and morals is not semantic but interpretive, arguing that, because we assume that the most general point of law is to establish a justifying connection between past political decisions and present coercion, the argument is just a debate among rival conceptions of law. He further considers whether Nazi law is law. His answer is that interpretations are directed towards particular cultures, and so we:

  > have no difficulty in understanding someone who does say that Nazi law was not really law, or was law in a degenerate sense, or was less than fully law. For he is not then using 'law' in that sense; he is not making that sort of pre-interpretive judgment but a sceptical interpretive judgment that Nazi law lacked features crucial to flourishing legal systems whose rules and procedures do justify coercion. (pp.103–04)

In other words, Dworkin thinks that Nazi law can be called 'law' as long as we understand that Nazi law is not law in its fully developed sense, which includes a moral content.

9.5.2 The argumentative attitude

A very abstract account of Dworkin's approach to law is to think of his characterising a way of thinking about law that is fundamentally **argumentative**. Dworkin urges us not to think of law as nothing more than a huge quantity of **rules**. He urges us, rather, to think of law as an **attitude of mind**, that attitude being one of argumentativeness. This is an important and attractive feature of Dworkin's work in legal philosophy. In the final chapter of *Law's empire*, he says:

> Law is not exhausted† by any catalogue of rules or principles, each with its own dominion over some discrete theatre of behaviour. Nor by any roster of officials and their powers each over part of our lives. Law's empire is defined by attitude, not territory or power or process.

† 'Exhausted': here the word means 'completely described', in the same sense as to do something 'exhaustively'.

The sense Dworkin is getting at is the following. Observe some real, live, practical-minded lawyers at work. Arguments are what make or break their day. The invention of a new argument that makes sense, that works, is what an advocate thrives on, what a judge understands and – very importantly – what a law student studies.

Summary

Dworkin's interpretive account of law, coupled with his use of a difference between 'conceptions' and 'concepts', allows him to assess different candidates for law. He dismisses pragmatism because it does not make sense of rights, and conventionalism because it lacks an adequate account of community. He thinks integrity makes best sense: it accounts for rights, unites the community and allows a 'rich' account of legal reasoning.

Reminder of learning outcomes

By this stage you should be able to:

- **understand the conception of law as primarily about justifying legal arguments.**

9.6 The 'one right answer' thesis

Essential reading

- **Dworkin, R. *Taking rights seriously*. Chapter 13 'Can rights be controversial?' (available in E-book Central via the Online Library).**
- **Dworkin, R. *Law's empire,* pp.76–86 (available on the VLE).**

Further reading

- **Cohen, M. *Ronald Dworkin and contemporary jurisprudence.* (London: Duckworth, 1984) [ISBN 9780715618134] Chapter 8 and pp.173–81.**

- **Dworkin, R. *Taking rights seriously,* pp.248–53.**
- **Dworkin, R. 'On interpretation and objectivity' in *A matter of principle* (1985) pp.167–80.**

This topic has to be treated carefully. Dworkin in fact never produced such a theory, as he believes that everyone thinks there **are** right answers to questions, even though they cannot be proved to be right. You have to make up your own mind. But consider this: that most of what you assert, claim and argue consists of your **stating what you believe to be true**. Thus even when you deny the 'one right answer' thesis, you are claiming that the following statement is true: 'there are no right answers'. So you will always contradict yourself. You do not have to agree with Dworkin, but you must be fair to his point which is that most people act, talk, argue, speak, write, claim, assert, etc. (particularly lawyers, he adds) as if there **were** right answers even where there is no possible means of proving them to be right, or of satisfying all sides. Here are some common responses, none of which on close examination is any good in his view:

- 'To say something is true, or right, is just a matter of opinion.'

Dworkin says the answer is yes, but presumably this is an opinion about what is true or right, and so this is perfectly consistent with there being a right or wrong of it.

- 'There aren't true or right answers, only "better" answers, or "best" answers.'

The answer to this, in a legal case, is that if the better arguments favour the defendant, why is not the right answer that the defendant wins?

- 'There aren't true or right answers when you can't prove them.'

The answer to this (as stated above) is that anyone who says this does not think they can prove that there are only true or right answers **when you can prove them**. (This takes a bit of thinking; but just try to prove the truth or rightness of the first sentence of this bulleted paragraph.)

- 'If you ever **say** that what you say is "true" or "right" you are only doing it to persuade or convince people, but there is no real truth or rightness there.'

But why would they ever be persuaded, or convinced, if they thought that what you said could not possibly be true, or right? And would you not be more convincing if you really believed that what you said was true?

Activity 9.4

If you are not convinced by the view that there is a right answer for controversial questions, write down as many reasons as you can in favour of the view that there are no right answers in such situations.

Feedback: see end of guide.

After having answered the questions in the last sentence of the feedback, ask yourself whether murder is wrong because 100 per cent of people think it wrong. Is there any fundamental difference in meaning between the statement 'abortion is wrong' and 'in my opinion, abortion is wrong'? If there is, what is it? Is there a difference between a 'judgement', say, that abortion is wrong and a matter of 'taste', say, that white wine goes well with trout? If so, what is the difference?

Reminder of learning outcomes

By this stage you should be able to:

- **explain the purely defensive nature of the one right answer thesis.**

Further reading

- **Dworkin, R. *Life's dominion*. (London: HarperCollins, 1993) [ISBN 9780006863090] pp.207–08.**
- **Waldron, J. 'The irrelevance of moral objectivity' in George, R.P. (ed.) *Natural law theory*. (Oxford: Clarendon Press, 1992) [ISBN 9780198248576] especially pp.176–78.**

9.7 Evil legal systems

FURTHER READING

- **Dworkin, *Law's empire*. Chapter 3 'Jurisprudence revisited', particularly pp.101–13 and the notes at pp.429–30.**

Dworkin distinguishes between what he calls the **grounds of law** and the **force of law**. The grounds of law are obtained by looking interpretively at the legal practices of some community from the point of view of a participator in those practices. It would be possible, from this standpoint, to work out how a judge in Nazi Germany might decide a case. We can call him Siegfried J. Imagine some horrific hard case under the Nuremberg laws,[†] say, to do with sexual relations between a Jew and a 'true' German national. We could take account of theories of racial superiority – widely believed in Germany at the time – to provide detailed arguments about which way the case should be decided. We could learn how to argue a case by learning the ground rules, as it were, of an evil legal system. To do this means accepting that 'evil law' is still law.

[†] The Nuremberg Laws on Citizenship and Race: on 30 September 1935 the Nazi regime in Germany brought into force these laws, which deprived Germans of Jewish origin of their citizenship rights and gave legal backing to discrimination against them.

But to produce an argument from the grounds of law is not thereby to endorse it. A full-blooded political theory, according to Dworkin, requires an explanation not only of grounds, but also of the moral force of law. He adds that philosophies of law are usually unbalanced because they are usually only about the grounds of law. So, we can judge Nazi law from Siegfried J's point of view, in the sense that we can predict what he will do, in the same way as we might imagine how a magistrate, in Roman times, would decide a point of Roman law.

Do not fall into traps here. Some critics, Hart notably, have supposed that Dworkin had merely created an amended, and confused, form of positivism. Thus, with some vehemence, Hart says (*Essays on Bentham,* p.151):

> If all that can be said of the theory or set of principles underlying the system of explicit law is that it is morally the least odious of morally unacceptable principles that fit the explicit evil law this can provide no justification at all. To claim that it does would be like claiming that killing an innocent man without torturing him is morally justified to some degree because killing with torture would be morally worse.

Dworkin's reply to this is difficult and involves several strands of argument. His main idea, I think, is an appeal to the fact that one problem of law is that we **do** have some duties, sometimes, to obey laws which we believe to be morally bad. Why? Because almost any structure of community power will have some moral force:

> ...the central power of the community has been administered through an articulate constitutional structure the citizens have been encouraged to obey and treat as a source of rights and duties, and that the citizens as a whole have in fact done so.

Is Dworkin a natural lawyer? If the question is whether Dworkin believes that making moral judgments is partly about determining whether the community has a right or duty to use its coercive powers, then he is a natural lawyer. If the question is whether he believes immoral legal systems are not law, then he is not a natural lawyer. If the question is whether he thinks that there is a natural answer out there, one which supplies objectivity to moral and legal argument, he certainly is not a natural lawyer.

9.8 Dworkin on Hart's Postscript

Dworkin's general response is critical of Hart's approach in the Postscript and his criticism mainly focuses on Hart's statement there that:

> My account is **descriptive** in that it is morally neutral and has no justificatory aims: it does not seek to justify or commend on moral or other grounds the forms and structures which appear in my general account of law…

Dworkin says that this remark sums up legal positivism by affirming that moral judgments are not needed to identify law. Even though the law thus identified might

have moral content, or may allow officials to incorporate their own moral judgments, this is what is common to all theories known as 'legal positivism'.

A noted representative of legal positivism is Hart's student Joseph Raz, together with a number of Raz's own students. Dworkin says that Raz's account of law – that law is identified ultimately by reference to 'social sources' – is not supported by legal practice in the real world because, as you would expect Dworkin to say, lawyers characteristically debate **substantive** (that is evaluative and moral) claims of law. Lawyers clearly do, Dworkin says, argue for and against the claim, for example, that certain commercial practices are unfair and **therefore** contrary to law. But the social sources method for identifying law clearly tells lawyers that unfair practices are **not** contrary to law, because there is **no** social source – a statute or a judicial decision – that prohibits them. In other words, the consequences of the social source theory **are** normative, for they direct a result impinging upon people's interests; namely, they tell people that it is not contrary to law to engage in certain unfair practices. It is difficult to see how Raz could answer this argument, except by denying that lawyers argue about what the law is.

In developing this point, Dworkin considers three senses in which legal theory might be descriptive.

- Legal theory may be 'semantically' descriptive.

Dworkin says that Hart's claim could be read semantically as a project to find what criteria of application of language rules lawyers would agree to be the rules they actually follow in speaking about law's prohibitions and permissions. But this project, he says, would fail because the semantic claim assumes that there are 'shared criteria' for ascribing 'the law prohibits, requires, etc.' and there simply are no shared criteria of application, for example, in the unfair commercial practices case.

- There may be a 'natural kind' or 'type' for law, as there are natural kinds in science, such as the DNA molecule, or tigers.

But, Dworkin says, Hart cannot be looking for the equivalent of a gene or 'tigerhood' for law. It seems really odd to think of there being the equivalent of a DNA molecule, for example, for any evaluative proposition, say, such as liberty. And if there is no DNA for liberty, then it would seem that there is none for law, either.

- Hart may be engaging in empirical generalisation.

No, says Dworkin, Hart cannot have been making an empirical generalisation in the sense of making discoveries from empirical studies of the patterns and repetitions in collected data. In any case, if he were, this poses an initial stumbling block, since clearly neither Hart, nor any of his followers, has engaged in the amassing of such data. There is no empirical investigation in *The concept of law*. More importantly, if there were empirical generalisations they would fail to account for the empirical data constituted by lawyers' characteristic behaviour in arguing for and against legal propositions.

'Soft positivism'

There are also the so-called 'soft positivists', such as Jules Coleman. They defend the social sources thesis for identifying law in the opposite direction to Raz, whose theory is sometimes known as 'hard' or 'exclusive' positivism. Their view engagingly addresses the phenomenon of moral disagreement about which legal rules apply in particular circumstances by saying – in general agreement with Hart's remark that the social sources that identify the US Constitution 'incorporate moral standards' – you make a moral judgment to identify the rules identified by the social sources. In short, you resolve the unclarity apparent in the Eighth Amendment's prohibition against 'cruel and unusual punishments' by making a moral judgment as to what the social sources criterion requires. Dworkin says that this is vacuous because, first, it means only that 'judges should decide cases in the manner that judges should decide cases' (which, in *Law's empire*, he says 'collapses into integrity') and second, in any case, it supposes wrongly, for example in the USA, that there has to be a convention among judges that this is the way they should decide cases.

To sum up these points, Dworkin says it is 'deeply unclear' to him how Hart, or his followers, could:

- suppose that propositions about the 'sources' thesis could be of a different logical character from ordinary propositions of law
- think that their project was 'descriptive'.

(These issues are discussed in greater depth in Dworkin's article reviewing Coleman's book *The practice of principle: in defense of a pragmatist approach to legal theory*. (Oxford: Oxford University Press, 2001) [ISBN 9780198298144] which appears in Volume 115 (2002) *Harvard Law Review* 1655. In particular, you will find Dworkin's account of what he regards as mistaken interpretations of his work in his Appendix to this Review, entitled 'Points of personal privilege'.)

Activity 9.5

Consider 'soft positivism' and Dworkin's argument against it. Then check Hart's famous definition of legal positivism on the first page of Chapter 9 of *The concept of law* and ask yourself whether 'soft positivism' and that definition are reconcilable.

No feedback provided.

Summary

Dworkin thinks there are right answers to legal and moral questions because that makes sense of the way lawyers – and indeed all of us – act and speak. Further, since evil and moral legal systems share common characteristics, it makes no sense to say that evil legal systems are 'not law', although evil legal systems will lack moral justification for coercive acts done in their name. It follows that Dworkin is not a natural lawyer, since he does not think that there is a 'natural morality' that determines what law is, and he thinks that evil legal systems exist. But it does not follow from this that he is a positivist. In answer to Hart's claim in the Postscript to *The concept of law*, and Raz's claim that law is identified by a social source alone, Dworkin says that without a reference to what the **point** of identifying law with a social source is, it is impossible to find what that social source is. It could not be identified by the meanings of words, since we disagree about these; nor could it be identified as some sort of common element, like a DNA molecule, as there is clearly none for law; nor, finally, can Hart or Raz be making empirical generalisations because they offer no empirical evidence. Hart's further claim that moral principles can be part of the law – what is known as 'soft positivism' – would require, Dworkin says, making moral judgments in identifying the law, and so would be contrary to Hart's definition of legal positivism.

Reminder of learning outcomes

By this stage you should be able to:

- **discuss Dworkin's arguments against the 'social sources' theory of law.**

Further reading

- **Guest, S. '*Law's empire*' (1988) 104(Jan) *Law Quarterly Review* 155.**
- **Marmor, A. *Interpretation and legal theory*. (Oxford: Hart Publishing, 2005) [ISBN 9781841134246] Chapters 3 and 4 (especially pp.47–64).**
- **Perry, S. 'Interpretation and methodology in legal theory' in Marmor, A. (ed.) *Law and interpretation: essays in legal philosophy*. (Oxford: Clarendon Press, 1995) [ISBN 9780198258759].**
- **Cohen, M. *Ronald Dworkin and contemporary jurisprudence*. Chapters 5, 6 and 9 (and see the replies by Dworkin at the back of this book to these three articles).**
- **MacCormick, N. *Legal reasoning and legal theory*. Chapters 4 and 11.**
- **Dworkin, R. *A matter of principle*. (Oxford: Oxford University Press, 1985) [ISBN 9780674554603] Chapter 1 'Political judges and the rule of law'.**

- **Fish, S. *Doing what comes naturally*. (Oxford: Clarendon Press, 1989) [ISBN 9780198129981].**
- **Waldron, J. *Law and disagreement*. (Oxford: Oxford University Press, 2001) [ISBN 9780199243037].**
- **Dworkin, R. 'Hart's Postscript and the character of political philosophy' (2004) 24 *Oxford Journal of Legal Studies* 1**

is a long and important article that remarks on Hart's approach to jurisprudence and focuses on how the Postscript to *The concept of law* should be understood. In particular, he repeats his line that Hartian legal philosophy, as expounded in *The concept of law*, is best understood as a morally committed construction of a conception of law that served certain practical purposes. Another important discussion is to be found in Dworkin's development of the idea of legality (pp.23–37). Immediately after this article in the same issue of the journal is one by David Dyzenhaus taking up the same general theme ('The genealogy of legal positivism', p.39). Dyzenhaus argues here that the 'positivist tradition' is best understood as a political tradition that is at odds with the way in which some contemporary positivists interpret that tradition. These two articles are powerful, clear and readable. They should not be missed.

- **Patterson, D. 'Dworkin and the semantics of legal and political concepts' (2006) 26 *Oxford Journal of Legal Studies* 545.**

Here, Patterson considers Dworkin's treatment of concepts in the above article and argues forcefully for the conclusion that it undermines his theory of law as integrity. The argument is straightforward and the writing accessible.

- **Schauer, F. 'The social construction of the concept of law: a reply to Julie Dickson' (2005) 25(3) *Oxford Journal of Legal Studies* 493.**

Schauer argues that there is no 'fixed' concept of law, only a shifting variable which is chosen with reference to its instrumental value.

Sample examination questions

Question 1 What does Dworkin mean by 'integrity'? How does integrity in legal decision-making serve the ends of justice?

Question 2 Is there any sense in the idea that there are right answers to legal cases? Discuss with reference to a case that you think was wrongly decided.

Question 3 What do you understand the difference to be between 'principle' and 'policy'? Can cases be decided solely on the ground of policy?

ADVICE ON ANSWERING THE QUESTIONS

Question 1 Pay attention to the two separate questions here. The first asks straightforwardly for an explanation of Dworkin's account of integrity, but the second is a more difficult question. Discuss the two senses of 'integrity' that Dworkin uses: 'legislative integrity' and then 'judicial integrity'. It is easier to start by describing 'legislative' integrity since you can then contrast justice and fairness with integrity (remember Dworkin's derivation of integrity as a form of 'internal' compromise between the requirements of justice in the ideal world and the requirements of fairness in the real world). Then it is a matter of showing that 'judicial' integrity is the virtue that judges should have in interpreting law: they should 'make sense' of the law by assuming that the law 'speaks with one voice'. If you approach the question this way, you are in a position to comment on whether 'integrity in legal decision-making' (in other words, 'judicial' integrity) can 'serve the end of justice'. The question is hard, as it is problematic in Dworkin what the precise relationship between justice and integrity is. At one stage in *Law's empire* he appears to take the view that if integrity suggests a result that justice does not, judges may have to 'lie' in order to bring about the 'right result'. It is problematic to suppose that judges should sometimes lie. Waldron in his *Law and disagreement* takes the view that integrity is a useful way of reconciling different conflicting views of justice. It is doubtful if Dworkin would like this since his view is presumably that only right perceptions of justice count, and so there should not be a reconciliation effected with anything that is unjust.

Question 2 The marks for this question are in the second part. You should not attempt a question like this unless you can think of a wrongly decided case. There is an argument for being bold in an examination. Do not assume that you can only display your intelligence and knowledge by drawing upon prepared answers (indeed, this can be a recipe for disaster, where the examiner can discern you are merely parroting an essay you had previously written). Think of a case that was, in your view, wrongly decided. Say why you think so, and then consider the implications of what you say if you did not think that what you said was true. It will be the way you handle this idea that will produce good marks for you. Here are some points to consider:

- What does it mean to say that the court 'got the law wrong' when that court's decision is final? You could refer to the distinction Hart drew in Chapter 1 of his *Essays in jurisprudence and philosophy* (his inaugural lecture, entitled 'Definition and theory in jurisprudence') between a statement of the law made by a judge and one made by anyone else.
- Is there any sense in which you could **prove** or **demonstrate** to the satisfaction of all that the court got the law wrong?
- By what means would you attempt to persuade, convince or otherwise bring round anyone who thought that the court was right in its judgment?

Question 3 This question requires some subtlety in addressing the difference between how **you** understand policy arguments, and whether the way you understand them is the same as the way Dworkin understands them. Dworkin's definitions of principle and policy are **technical**, which is to say they do not rely on the way these terms are ordinarily used. Much the best way of answering this sort of question is to use examples from decided cases. You can start with *McLoughlin* v *O'Brian* since Dworkin uses that case, and it was a case where the Court of Appeal addressed the question whether courts, as opposed to Parliament, should decide on the ground of policy; but you will make a better case for the examiner that you have a good grasp of this area if you produce cases of your own.

Reflect and review

Look through the points listed below. Are you ready to move on to the next chapter?

Ready to move on = I am satisfied that I have sufficient understanding of the principles outlined in this chapter to enable me to go on to the next chapter.

Need to revise first = There are one or two areas I am unsure about and need to revise before I go on to the next chapter.

Need to study again = I found many or all of the principles outlined in this chapter very difficult and need to go over them again before I move on.

Tick a box for each topic.

	Ready to move on	Need to revise first	Need to study again
I can state the difference between the pre-interpretive, interpretive and post-interpretive stages of legal argument.	☐	☐	☐
I can describe the role of Hercules as the ideal judge.	☐	☐	☐
I can show the distinction between arguments of principle and arguments of policy.	☐	☐	☐
I can show the distinction between arguments of fit and arguments of substance.	☐	☐	☐
I can state the various interpretations of the House of Lords' case of *McLoughlin* v *O'Brian*.	☐	☐	☐
I can explain and define integrity as a virtue of law and legal argument.	☐	☐	☐
I can understand the conception of law as primarily about justifying legal arguments.	☐	☐	☐
I can discuss Dworkin's arguments against the 'social sources' theory of law.	☐	☐	☐
I can explain the purely defensive nature of the one right answer thesis.	☐	☐	☐

If you ticked 'need to revise first', which sections of the chapter are you going to revise?

		Must revise	Revision done
9.1	The idea of interpretation	☐	☐
9.2	Judge Hercules	☐	☐
9.3	Principles and policies	☐	☐
9.4	Arguments of 'fit' and 'substance'	☐	☐
9.5	Concepts and conceptions: law as an argumentative attitude	☐	☐
9.6	The 'one right answer' thesis	☐	☐
9.7	Evil legal systems	☐	☐
9.8	Dworkin on Hart's Postscript	☐	☐

NOTES

Part V Liberalism, justice and critical perspectives on law

10 Liberalism and law

Contents

Introduction

This chapter introduces you to the general topic of what liberalism is, and how ideas of liberalism interact with law. It begins by looking at the modern versions of utilitarianism, in particular rule-utilitarianism, and its criticisms, and so it builds on the reading that you will have done for Chapter 3 of this module guide, since the origins of utilitarianism are to be found in the works of Jeremy Bentham. Utilitarianism is a liberal doctrine. It aims at happiness, or in more modern terms, preference satisfaction or welfare, and this idea fundamentally gains its power from its emphasis on liberty. In turn, since one person's liberty is another person's lack of freedom, a moral principle of equality can be uncovered that regulates each person's relationship with each other. This relationship particularly comes out in the idea of the marketplace, where we expect people in the ideal world to be as far as possible free to bargain without the constraints created by inequalities of bargaining power. Also discussed in this chapter are criticisms of utilitarianism and alternative groundings for liberal theories of justice, especially from John Rawls. The chapter further discusses is the idea that moral disagreements can sometimes be resolved by rational means.

Learning outcomes

By the end of this chapter and the relevant reading, you should be able to:

- **explain modern utilitarianism**
- **outline your attitude towards the idea of liberty**
- **describe Lord Devlin's, Hart's and Mill's views on liberty**
- **discuss the idea that the criminal law should be used to enforce morality**
- **comment on the nature of moral disagreement**
- **comment on the importance of moral equality**
- **discuss critically Rawls's theory of justice.**

Core text

- **Freeman, Chapter 6 'Theories of justice', paras 6–001, 6–002 and 6–009.**

Further reading

- **Dworkin, R. *Taking rights seriously.* (London: Bloomsbury, 2013) [ISBN 9781780937564] Chapter 9 (generally on reverse discrimination but particularly his distinction between treating people as equals and equal treatment) and Chapter 10 (particularly the section 'The concept of a moral position').**
- **Dworkin, R. *A matter of principle.* (Oxford: Clarendon Press, 1985) [ISBN 9780198255741] Chapter 12 'Is wealth a value?' and Chapter 13 'Why efficiency?' (the classic criticisms of the Chicago School).**
- **Fletcher, G. *Basic concepts of legal thought.* (Oxford: Oxford University Press, 1996) [ISBN 9780195083361]. See the final part, 'Morality in the law', particularly Chapter 10. This provides an excellent account of the economic concepts in frequent use.**
- **Glover, J. *Causing death and saving lives.* (London: Penguin, 1990) [ISBN 9780140134797] Chapter 2 'The scope and limits of moral argument'.**
- **Harris, J. *Legal philosophies.* (London: Butterworths, 1997) second edition [ISBN 9780406507167] pp.45–52 (and see the very useful reading list on pp.51 and 52).**
- **Mill, J.S. *On liberty.* (1859) (many editions are available, and the famous 'harm principle', which you should know, is widely described online).**
- **Raz, J. *The morality of freedom.* Chapters 4, 14 and 15 (particularly Chapter 15, for a re-interpretation of Mill's 'harm principle').**

10.1 Thinking about theories of justice

The main theories of justice are:

- **Virtue ethics**, which are character-based – things will be just depending on behaving virtuously.
- **Consequentialist** – for example, utilitarianism is a consequentialist theory. What is morally right or the morally right thing to do depends on the consequences of that action, it is therefore 'outcome-based'.
- **Deontological** – originating from Immanuel Kant. This is a view of ethics and what is just that depends on the primacy or the priority of the individual person or agent – their agency and autonomy is of primary importance. Therefore, it is said to be 'agent-based'. We are going to look at aspects of this in terms of a liberal theory of equating justice with fairness by looking at Rawls, J. *A theory of justice*. Rawls presents individual persons as ends not means – following Kant. Individual freedom is paramount. It starts with a perspective that we have natural talents and these are ours by luck and therefore undeserved. We will compare Rawls's position with an extreme liberal one (known as libertarianism) by looking at Robert Nozick. His position is that, if our individual freedom or agency is paramount, our right to property arising from that freedom (i.e. by mixing our labour/using our natural talent) is mine and mine alone or yours and yours alone.

Self-assessment question

The tram problem

As you can see from Figure 10.1, there is a dilemma and urgent issue to be resolved. A tram driver, or a trolley car or train driver, is coming down the track, as they are supposed to. They are allowed to be there. They find four people are trapped on the track they are supposed to go down and one person trapped on an alternative line. They can swerve/change track and that will kill one person or they can stay on the original track and that will kill four people. What is the right thing to do?

Answer as immediately as you can and write down your response.

Then think why you have decided that.

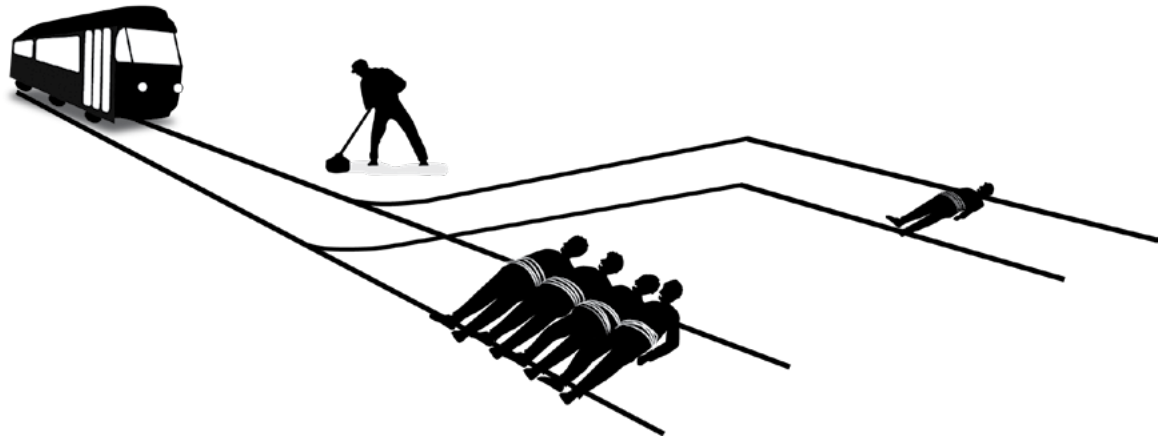

Figure 10.1

The aim of the exercise is for you to focus on your instinctive reaction and what it might tell you about your preference for one of the approaches to justice set out above.

10.2 Utilitarianism

CORE TEXT

- **Freeman, Chapter 6 'Theories of justice', para. 6–002.**

ESSENTIAL READING

- **Simmonds, N.E. *Central issues in jurisprudence.* Chapter 1 'Utilitarianism' (available in VLeBooks via the Online Library).**

FURTHER READING

- **Smart, J.J.C. and B. Williams *Utilitarianism: for and against*. (Cambridge: Cambridge University Press, 1977) [ISBN 9780521098229]. This is most comprehensive – a long but very useful read. The Williams reply is difficult but is regarded by many as the classic attack on utilitarianism.**
- **Shaver, R. 'The appeal of utilitarianism' (2004) 16 *Utilitas* 235.**

This explains what it is about utilitarianism that continues to appeal even though it can be criticised so readily. Shaver argues that it is because the theory places so much weight on welfare (happiness and wellbeing).

- **Nussbaum, M. 'Rawls's *Political liberalism*: a reassessment' (2011) 24 *Ratio Juris* 1.**

This is a concise and insightful overview of Rawls's later views on the nature of liberalism and the issues to which it gives rise.

A frequent criticism of Rawls's liberalism is that it draws too sharp a distinction between political relations between citizens and our relations in different capacities (as friends, relatives, etc.) which often involve a face-to-face mutual recognition and an emotional bond. In the following book, Martha Nussbaum tries to reconcile the two:

- **Nussbaum, M.C. *Political emotions: why love matters for justice.* (Cambridge, MA: Harvard University Press, 2013) [ISBN 9780674724655].**

This section looks at the modern discussion of utilitarianism.

Utilitarianism is a moral theory, first written widely about by Jeremy Bentham, who is often acknowledged as the father of English jurisprudence – see Chapter 3 of this guide. It is therefore included in the syllabus partly for historical reasons. But utilitarianism has had an enormous effect on English (and Commonwealth) practical life. Note, in particular, its effect on the growth of liberalism ('each man to count as one, no one to count for more than one') and economics. It is difficult for law to get right away from addressing moral questions, and utilitarianism, in its various forms, is widely accepted. The extract from Rawls will set you on the right path. Some jurisprudence students really get into utilitarianism, because it is a good way of working out what your own ideas are. It is, in fact, the easiest and most fruitful way to begin to discover what moral philosophy is about. Some of the best answers ever given in a jurisprudence examination have been on utilitarianism. One of the things that has marked out the answers is a display of reasoned commitment to a view, thus satisfying one of the most important objectives of your study: to adopt a critical approach.

It would be a serious mistake to suppose that utilitarianism ended with Bentham: there are modern variants. You should also be aware that a common complaint by committed utilitarians is that critics of the idea (often called, as you will discover, the 'deontologists') misunderstand how subtle utilitarianism can be. So, make sure that in writing examination answers you are strictly fair to the account of utilitarianism you give. If you fail to provide a good model of utilitarianism to criticise (if you are so minded) then your arguments will seem much weaker because you will be open to the criticism that you 'missed the point'. An example of a strengthened version of utilitarianism, designed to forestall objections based on the idea that people have **rights**, is 'rule' utilitarianism, invented, incidentally, by lawyers wishing to explain legal rights in utilitarian terms.

Self-assessment questions

1. **What is the difference between act and rule utilitarianism?**
2. **What is 'preference' utilitarianism?**

10.3 Criticisms of utilitarianism

There are many criticisms and it will be instructive to list the main lines of thought, which you should follow up in your reading:

- utilitarianism relies too much on describing people's actually existing desires and so is insufficiently aspirational to be a good moral theory
- utilitarianism relies on the consequences of an act, rather than an act's inherent rightness (i.e. it ignores people's rights – see the 'tramp' example below)
- utilitarianism's implicit idea of maximisation mistakenly assumes people's different values to be commensurable (e.g. it can equate poetry with drinking beer).

A clear and comprehensive account of arguments both for and against utilitarianism is to be found in the Smart and Williams debate, Professor Smart taking the pro-utilitarian line and Professor Williams taking a famous anti-utilitarian line.

Consider the following example. You come across a tramp unconscious through drugs. You recognise him as someone you have treated as a doctor and you know that he has not long to live, has no dependants and suffers severe depression. You are a utilitarian and so you think you know your duty. You inject the tramp with £1's worth of a sleeping drug, sufficient to kill him. What is the upside? The tramp suffers no pain, and no more depression. You are happier, as you feel you have done your utilitarian duty. No one finds out and so no one feels threatened (you do this secretly, and it is easy to do, as the tramp was in an alley). The evidence is that the tramp, if he had not been killed, would have continued living for another six months committing various petty crimes, and so a stop has been put to these. The tramp's burial is cheap, and no more social security expenditure or hospital expenditure is needed for him. Now consider the following questions. It is important that you know where you stand on all this, so try to form a view:

- Even if everyone is better off, including the tramp, was the killing justified?
- If it was not justified, why not?
- Could it be that it is justified, but we feel irrational 'squeamish' feelings (see Williams, above) that we should learn to suppress because this was the right act?
- Would a rule utilitarian approach produce a better result? Why?

If you think that the answer may come from the perspective of the tramp, you have identified a central weakness of utilitarianism: it cannot take the individual perspective into account. Consider the extracts from Freeman, Chapter 6 'Theories of justice'. Rawls's approach criticises utilitarianism for failing to take the separateness of persons seriously. It is based on a Kantian notion of the person, the importance of free will and the ability to make choices and plans for one's life: an essential liberal notion.

Summary

Utilitarianism judges acts by their outcomes for the general good. Sometimes it takes a rule-oriented approach, allowing that people should be treated in certain sorts of ways because, although the short-term outcome is not for the general good, the long-term outcome is. The major criticism of utilitarianism is that it ignores the perspective of the individual. This perspective is generally characterised in terms of rights. So even if the general good were enhanced by the unconsented-to killing of an individual, this would not be sufficient to overcome our feelings that this would be wrong.

10.4 Rawls's *A theory of justice*

CORE TEXT

- **Freeman, Chapter 6 'Theories of justice', paras 6-009 and 6-011.**

Our focus is *A theory of justice* by the highly regarded American moral and political philosopher John Rawls. Rawls's method is a hypothetical social contract. He does not argue that any of this happened historically. He has a method called the original position (the OP). In that OP everyone is behind a veil of ignorance.

According to Rawls, people in the OP generate two principles of justice (we will see what these are in a moment).

10.4.1 Rawls's aim

Rawls aims to define, through his theory of justice, the terms of human association.

His theory rejects utilitarianism as fatally flawed. In his view, liberty of the person is non-negotiable. Utilitarianism fails to respect persons as ends in themselves. Such respect is a Kantian notion. In this sense, he argues that justice is prior to happiness.

Rawls assumes that all people are:

- Self-interested ('mutually disinterested')
- Free and rational
- In an initial position of equality.

10.4.2 In the orginal position

Who are the people in the OP? People in the OP/behind the veil **do not** know who they are – that is:

- Their place in society
- Their nationality or the country they live in
- Their class
- Their sex/gender
- Their race
- Their other beliefs/intelligence/physical characteristics.

People in the OP/behind the veil **do** have a certain basic knowledge of science, psychology and world facts.

What would they choose?

- Rawls says principles would be chosen that guarantee the worst outcome is the least undesirable of all the alternatives
- We need therefore to focus on the worst outcome **and** have the 'best' worst outcome we can.

Why? Because you do not know if the worst-off person may be you and (because you are rational) you would not risk a terrible outcome for yourself.

10.4.3 The two principles of justice

The people in the OP choose these two principles of justice:

1. **Right to individual freedom/liberty** This is logically – what Rawls calls 'lexically' – prior. This means it is first and cannot be negotiated: 'Each person has an equal right to the most extensive system of equal basic liberties, compatible with a similar system of liberty for all'.

   Rawls says no-one would risk their freedom in the OP.

2. **Equality – to a certain extent.**

The second principle has two parts. Social and economic inequalities are to be arranged so that:

a. They benefit the least advantaged as much as possible, subject to a just savings principle and

b. Inequalities are attached only to statuses open to everyone under conditions of fair equality of opportunity.

This is 'the difference principle'.

> The difference principle represents, in effect, an agreement to regard the distribution of natural talents as a common asset and to share the benefits of this distribution whatever it turns out to be. (p.101)

In terms of **the method** is there implied empathetic reasoning by the persons in the OP?

Why do they care about increasing the position of the worst off?

There are many critiques of Rawls's theory of justice. However, his theory cannot be ignored when discussing distributive justice and it is the main point of reference for all who engage with the topic. Some critics focus on the method and some on the principles chosen.

10.4.4 Method

Who are the persons in the OP?

How would **you** be **you**? Remember, you do not know who you are, what country you are from, your family, your way of life. Are the people in the OP Rawls himself? Brian Barry, for example, asks: 'Is bargaining inapplicable? …[Rawlsian choosers] are clones. We might as well talk of computers having the same programme and fed the same input reaching an agreement.'

Think about and note down your answers to the following questions:

- Are we talking about seeing the perspective of another person? One who is a specific or particular real person or are we talking about everyone in general?
- Are we listening to the 'real' person concerned?
- Are we imagining what they may say or be like?
- Is this the same as doing unto others as we would have them do unto us? ('the Golden Rule' – see, for example, Matthew 7:12 and other religious writings with the same 'rule')
- Is this the same as putting ourselves in someone else's shoes?
- If we are mutually disinterested, why would we do this?
- Whose shoes are we in or can we put ourselves into someone else's shoes in this empathetic way of thinking?

10.4.5 Sandel's communitarian critique

Sandel argues we are intricately interwoven: our attachments and ends or our conception of the good constitute who we are. This is a notion of self-discovery – of finding out who you already are (see Alasdair MacIntyre). This contrasts with a liberal view of the person as one who is capable of self-determination – of being a free chooser making their own plan of life. This could be very different to that of community or family or it could be the same.

Sandel argues, as do many other communitarian critics of liberal rights approaches, that 'unencumbered persons' – those whose rights are asserted in competition with other rights/rights' holders – encourage egotistic, solipsistic, atomistic and implausible

ideas of who we are. Communitarians say this is what Rawls presents – the self-interested, detached, unencumbered person.

ACTIVITY 10.1

Search for Michael Sandel under 'the Public Philosopher' lectures on BBC Radio 4 and similar to delve deeper into his work.

No feedback provided.

What is deserved?

Rawls says that the natural talents we are born with **are not deserved**. They are arbitrary and the distribution of them at birth is arbitrary from a moral point of view. Consequently:

- This is no better than a lottery
- No-one deserves to be endowed with intelligence
- Nor do they deserve to be born into a wealthy or powerful family (see Rawls, J. *A theory of justice* pp.73 and 74).

Rawls says the difference principle determines a truly just distribution of social and economic resources, arguing that it would be unjust to permit a social system where those endowed with:

- social and economic advantages – such as wealth, power, status **or**
- natural advantages – such as talents, abilities

benefit more than those who lack them.

10.4.6 Nozick's critique

Robert Nozick's libertarian or ultra-liberal perspective is set out in *Anarchy, state and utopia*. (Oxford: Blackwell Publishing, 2003) [ISBN 9780631197805]. He challenges state and legal over-regulation and the social welfare state. His argument is that our natural talents are our own. Any redistribution of what we produce is in general akin to, or the same as, theft. His is an interpretation of Lockean property rights based on John Locke's theory. To delve deeper – see Nozick, R. *Anarchy, state and utopia* and Freeman, Chapter 6, extract from Nozick, R. 'Anarchy, state and utopia', para. 6–011.

10.5 Liberalism: liberty and equality

CORE TEXT

- **Freeman, Chapter 5 'Modern trends in analytical jurisprudence', para. 5-013.**

ESSENTIAL READING

- **Devlin, P. *The enforcement of morals*. (Oxford: Oxford University Press, 1965) [ISBN 9780192850188] Chapter 1 (available on the VLE).**
- **Hart, H.L.A. *Law, liberty and morality*. (Oxford: Oxford University Press, 1963) [ISBN 9780192850171] Chapter 1 'The legal enforcement of morality' (available on the VLE).**

FURTHER READING

- **Devlin, P. *The enforcement of morals*. (Oxford: Oxford University Press, 1965) [ISBN 9780192850188] Chapters 5 and 7.**
- **Hart, H.L.A. *Essays in jurisprudence and philosophy*. Essay 11: 'Social solidarity and the enforcement of morality'.**
- **Mill, J.S. *On liberty*. (Cambridge: Cambridge University Press, 1989) [ISBN 9780521370158] Chapters 1 and 4.**

The development and acceptance of the twin ideals of liberty and equality have been a hallmark of the last 500 years. Do not be put off by the apparently wide scope of this topic, as there is also great scope for original contribution by you. Try to form your own opinion on these matters. In all probability you will find that you have one already and your reading will help you to refine your ideas. **Do not be afraid to exercise your imagination**.

Liberty: the Hart–Devlin debate

Lord Devlin's view is that morality is that which the ordinary man 'on the Clapham omnibus' thinks, and those moral views that man has for which he has very strong feelings of indignation are, just for that reason, enforceable by criminal sanction. Hart does not think that the ordinary man's reactions are a criterion of moral rightness, nor does he think that doing wrong is strong ground for criminal sanction. Rather, he takes the line of John Stuart Mill that society should only prevent people from doing those things that interfere with the freedom of others, thus extending Mill's idea of 'harm to others' to 'interfering with the freedom of others'.

Constantly test yourself as you read, in order to find out what you think of the quality of the debate between Devlin and Hart. Do you agree with Devlin? If so, why? Or do you agree with Hart? If so, why? You cannot agree with both. One way to compare the two jurists is to think up an example where there are no obvious harmful social consequences of a person's conduct, but where you are inclined to think that the behaviour is, nevertheless, immoral in some way. The usual sort of case is where the conduct displays lack of self-discipline (e.g. extreme laziness, the taking of hard drugs), or is disrespectful to people or to life (e.g. hate speech or some motivations for abortion), or is indulgent (e.g. laziness again, or obsession with pornography) or tasteless (again, pornography). Should any of this conduct be criminally punishable by the community? Why? You should constantly keep in mind the different variables. What is the precise duty, if any, of the community? Should it extend to criminal punishment for these activities, as opposed to education or remonstration? Should it have any say? Is homosexual conduct 'tasteless' or 'abhorrent'? Should people be required to conform externally to a code of conduct they genuinely and honestly do not believe in?

Self-assessment questions

Test yourself by trying to work out what is:

1. **Devlin's position on each of the above questions**
2. **Hart's positions on the questions**
3. **Your own position.**

10.6 Disagreements about morality: can they be resolved rationally?

Core text

- **Freeman, Chapter 1 'The relevance of jurisprudence', paras 1–015 and 1–016.**

Essential reading

- **Dworkin, R. *Taking rights seriously*. (London: Bloomsbury, 2013) [ISBN 9781780937564] Chapter 10 (particularly the section entitled 'The concept of a moral position'). Available in E-book Central via the Online Library.**
- **Glover, J. *Causing death and saving lives*. (London: Penguin, 1990) [ISBN 9780140134797] Chapter 2 'Moral disagreements' (available on the VLE).**
- **Also see the reading on the 'one right answer' thesis in Chapter 9.**

Both Dworkin and Glover discuss the nature of moral reasoning. They are easy to read, not long, and full of examples. Ronald Dworkin outlines what he calls 'the concept

of a moral position'. He takes up the point, arising from the Hart–Devlin debate (see previous section), that the ordinary man's reactions can be irrational, or prejudiced, or lacking in evidence, or a mere 'gut reaction', or just repeating ('parroting') the views of others. None of this amounts to having a wrong moral point of view but rather to not even being in the position of saying that this is a moral view **at all**. Jonathan Glover takes a similar line. He says that moral disagreement can be factual (e.g. 'laws cause misery') or non-factual (taking human life is wrong – full stop). He says that in resolving disagreement in morals, we can go back to ultimate 'axioms', although these can often be 'blurred or incoherent' (e.g. that homosexuality is 'unnatural'), or logically inadequate (e.g. animals do not suffer because they are not rational), and they can just be logically inconsistent (e.g. the person who says that taking human life is always wrong, but says they believe in the 'just war'). What comes out of these two articles is a thesis that arguing about morality is not just arguing about matters of 'purely subjective opinion' but about matters that can be debated rationally. Not every view that someone puts forward as a valid moral view, however strongly that person feels about it, **is** a moral view. People can be mistaken, and have **wrong** beliefs, if their views fail to reach a certain threshold of rationality.

Activity 10.2

Consider the truth of the following statements, held by someone or other at some time, and write one sentence as to why you think it is true or false:

- **homosexuality is wrong because my parents told me so**
- **homosexuality is wrong because the Bible says so**
- **homosexuality is wrong because it causes earthquakes (apparently the Emperor Justinian believed this)**
- **wearing clothes is unnatural**
- **pornography causes mental harm**
- **capital punishment is justified because it stops people committing crimes.**

No feedback provided.

10.7 Equality

Core text

- **Freeman, Chapter 6 'Theories of justice', paras 6–003 to 6–006 and 6–011 to 6–014 inclusive.**

Essential reading†

- **Raz, J. *The morality of freedom*. Chapter 4 'The authority of states' (available in VLeBooks via the Online Library).**
- **Williams, B. 'The idea of equality' in Laslett, P. and W.G. Runciman (eds) *Philosophy, politics and society*. (Oxford: Blackwell, 1962) [ISBN 9780631048800] p.125 (a famous and classic introduction to the idea of equality). Available on the VLE.**

Bernard Williams argues that equality has a special meaning in morality to strike at unjustified statuses and hierarchies. One of the reasons we approve of 'equality of opportunity' is that we think that everyone, because of their common humanity, should have the same sorts of chances in life, even though some do not, perhaps cannot, take them up. But there are problems with the idea. Some people are for more freedom and less equality. They say they oppose equality because it is 'uneconomic' and stifles human endeavour, enterprise and creativity, having in mind 'equality' as it was interpreted in the former Soviet bloc countries. Others say we should have more equality and less freedom, and these people are usually for more state support and intervention, particularly in the real marketplace. The enemy for these people is the society in which those who are capable of exercising freedom come out on top. Not everyone can exercise freedom to the same extent. But healthy and intelligent people

† You should consider the following questions as you read the material on equality.

- What, if anything, are people equal in?
- Equality is a comparative idea, comparing at least two things. What is the comparison between when it comes to judging people equally?
- Is there a difference between treating a person 'as an equal' and 'treating two people equally'? If there is, what significance, if any, does the difference have?
- Is there a relationship between a moral principle of equality and the maxim of the New Testament that you should 'do unto others as you would they do unto you'?
- If people should be treated as equals, what follows about the distribution of wealth? Does it mean that each person is entitled to the same-sized share?

who have – let us say – an entrepreneurial spirit may take freedom away from others by manipulation and exploitation.

You should consider where **you** stand on all this. But it is useful to have some tools at your disposal. One is that you should note a famous difficulty with the idea of equality, which is that it is claimed to be an empty ideal. Note first the comparative nature of equality. Someone is **equal to** someone else; someone is **unequal to** someone else. It requires a judgment about the extent to which one state of affairs matches up to, or compares with, another. Obviously, the idea of comparing human beings with one another is, in many respects, absurd and that is one reason why so many have rejected the idea altogether. That was why Jeremy Bentham, in his work *Anarchical fallacies* (1796), said that if we really were to regard people as equal:

> The madman has as good a right to confine anybody else, as anybody else has to confine him. The idiot has as much right to govern everybody, as anybody has to govern him. (See Waldron, J. *Nonsense upon stilts*. (London: Methuen, 1987) [ISBN 9780416918908] pp.29 *ff* and particularly p.42.)

A reasonable answer to Bentham's remark is that what is common to all people is their humanity – everyone is a human being – and it is that in respect of which each person is equal. But it then seems possible, as a number of philosophers have argued (see Raz, *The morality of freedom*, Chapter 4), to drop the equality idea from this and just say that 'all people should be treated as human beings'. Please consider the idea of luck and chance in relation to one's natural assets or talents and the consequences for equality of outcome given the differences among people. When reading the sections in Freeman on this, note down your own instinctive responses to the points of view of Rawls, Nozick, Sen and Nussbaum, and Dworkin.

Summary

Perhaps, if you want to hold on to equality, equality should be seen as a quality of our acts towards others, measured in how we treat them and not by the amount that people are 'equalised'. If the focus is turned this way, it is possible to see that equality might be implied in the common sort of complaint that goes 'I'm a person, too', or 'Try to see it from my point of view', or 'Be fair to me' – all of which relate to ideas of justice as fairness.

Reminder of learning outcomes

By this stage you should be able to:

- **explain modern utilitarianism**
- **outline your attitude towards the idea of liberty**
- **describe Lord Devlin's, Hart's and Mill's views on liberty**
- **discuss the idea that the criminal law should be used to enforce morality**
- **comment on the nature of moral disagreement**
- **comment on the importance of moral equality.**

Sample examination questions

Question 1 Are the values of equality and freedom opposed to utilitarian values?

Question 2 Does utilitarianism provide solutions that we could adopt when we are considering what, morally, to do?

Question 3 What difficulties, if any, are there in the idea that people should act to increase the happiness of the greatest number of people?

Question 4 Are there justifications for the state enforcing conventional morality through (a) the criminal law or (b) the civil law?

ADVICE ON ANSWERING THE QUESTIONS

Question 1 The success in answering this sort of question lies in showing that you have adopted a stance towards utilitarianism. If you have a view about whether utilitarianism is right or wrong, then using the 'tramp' example above should guide you to the positions that the question is asking you to evaluate. Do you treat the tramp as an equal (whatever that means) when you inject them without their consent? Note the relationship between consent and freedom, too.

Question 2 This is pleasingly straightforward on the surface (in a sense, it is obvious that utilitarianism provides solutions that we **could** adopt), but it is really asking you whether you think that the sorts of solution that utilitarianism commends are ones that commend themselves to **you**. Again, the question is trying to elicit your views about the doctrine. An excellent way to answer the question would be to consider whether you should suppress your feelings about the consequences of some act (the killing of the tramp, for example) and try not to be 'squeamish' as Williams says. This raises the question of the relationship between a theory of what morally we ought to do (utilitarianism is one such theory) and our intuitive reactions to what that theory proposes we do.

Question 3 This is straightforward, and requires you to engage in a critical account of utilitarianism. Again, the expression of your own view is crucial.

Question 4 This requires a discussion of Mill's principle, and the Hart–Devlin debate, which is reasonably straightforward. However, it requires some independent thinking about the civil law (because, of course, the context of the Hart–Devlin debate was a criminal law concerning homosexual activity). But there is no great difficulty here. It just means a bit of independent thought. What is the difference between the criminal and the civil law? One could argue that provided, say, enough people disliked an activity then it would be possible to outlaw non-conventional conduct through legislation. But it would not follow that the only way to outlaw the conduct would be through the criminal law. For example, homosexuals would not be fined, or put in prison, but homosexual partners could be denied the rights of married people, or prevented from applying for certain types of jobs. Would this sort of approach be any more acceptable than outlawing homosexual conduct by means of the criminal law? It is difficult to see how.

Reflect and review

Look through the points listed below. Are you ready to move on to the next chapter?

Ready to move on = I am satisfied that I have sufficient understanding of the principles outlined in this chapter to enable me to go on to the next chapter.

Need to revise first = There are one or two areas I am unsure about and need to revise before I go on to the next chapter.

Need to study again = I found many or all of the principles outlined in this chapter very difficult and need to go over them again before I move on.

Tick a box for each topic.

	Ready to move on	Need to revise first	Need to study again
I can explain modern utilitarianism.	☐	☐	☐
I can outline my attitude towards the idea of liberty.	☐	☐	☐
I can describe Lord Devlin's, Hart's and Mill's views on liberty.	☐	☐	☐
I can discuss the idea that the criminal law should be used to enforce morality.	☐	☐	☐
I can comment on the nature of moral disagreement.	☐	☐	☐
I can comment on the importance of moral equality.	☐	☐	☐

If you ticked 'need to revise first', which sections of the chapter are you going to revise?

		Must revise	Revision done
10.1	Thinking about theories of justice	☐	☐
10.2	Utilitarianism	☐	☐
10.3	Criticisms of utilitarianism	☐	☐
10.4	Rawls's *A theory of justice*	☐	☐
10.5	Liberalism: liberty and equality	☐	☐
10.6	Disagreements about morality: can they be resolved rationally?	☐	☐
10.7	Equality	☐	☐

NOTES

11 Marx, Marxism and Marxist legal theory

Contents

Introduction

This chapter will provide an introduction to Marxist jurisprudence. First, we will look at Karl Marx's ideas on law, economy and society, and see that they emerged from his criticisms of other philosophers. Then we will turn to scholars who work within a Marxist tradition, and see how these writers attempted to build a Marxist theory of law. In the latter part of the chapter, we will look at some more recent Marxist scholars who, it will be suggested, are developing a Marxist jurisprudence that is relevant to our times. (Marx lived from 1818 to 1883.)

Learning outcomes

By the end of this chapter and the relevant reading, you should be able to:

- **outline Marx's ideas of ideology, economy and society**
- **identify the philosophical tradition out of which Marx's thought emerges**
- **describe Marx's ideas of law and of the state**
- **describe the characteristics of Soviet jurisprudence**
- **explain the development of Marx's theories of ideology, economy and law by Louis Althusser**
- **indicate how Marx's thought might be relevant to a contemporary theory of international law.**

Core text

- **Freeman, Chapter 12 'Marxist theories of law and state'.**

Further reading

- **Douzinas, C. and A. Gearey *Critical jurisprudence: the political philosophy of justice.* (Oxford: Hart Publishing, 2004) [ISBN 9781841134529] Chapter 8 'Letter to a wound: Marxism, justice and the social order'.**
- **Morrison, Chapter 10 'Karl Marx and the Marxist heritage for understanding law and society'.**
- **Penner and Melissaris, Chapter 13 'Marxist and post-Marxist theories of law'.**

11.1 Marx's basic ideas of ideology, economy and society

In a sense, it is difficult to read Marx today, though you will usually find that his writings are more accessible than those, say, of Kelsen. His thought is seen to be largely discredited by the Soviet system in what was the USSR. With the fall of the Berlin Wall in 1989 and the collapse of 'communism', it appeared that the epoch of Marxism had come to an end. However, it is possible that these events actually allow us to start to read Marx properly for the first time. Further, since the financial crash in 2007/8, there has been a revival in Marxist interpretations of capitalism. We need to appreciate that Marx was a philosopher, and his work is more important, and less simplistic, than what has been taken to be 'Marxism'. Perhaps it is necessary to discount, from the beginning, Marxism as a political movement, and to stress that we are concerned with a way of thinking; and in particular a way of thinking about law. Furthermore, when editorials on the 'essentially correct' nature of Marx's thinking on the economy can appear in a heavyweight journal such as *The Economist*, we cannot afford to dismiss Marx as a discredited thinker of the 19th century.

11.1.1 Marx and Hegel

Marx has to be read as a philosopher, whose ideas come out of his own rereading of important philosophers. Marx was himself a scholar of jurisprudence; but he approached the theory of law in a particular way:

> The first work which I undertook to dispel the doubts assailing me was a critical re-examination of the Hegelian philosophy of law…My inquiry led me to the conclusion that neither legal relations nor political forms could be comprehended whether by themselves or on the basis of a so-called general development of the human mind, but that on the contrary they originate in the material conditions of life, the totality of which Hegel…embraces within the term 'civil society'; that is, the economy. (Preface to *A critique of political economy* (1859))

This passage introduces a number of key themes. Marx is relating the form of the law not to the 'development of the human mind', but to 'material conditions of life'. We will return to these themes presently, but at this stage we can point out that this is rooted in Marx's criticisms of the German philosopher Hegel. To understand what Marx means, we must thus return to the text, and try to isolate what Marx means when he refers to the 'human mind', 'civil society' and 'economy'.

For the moment, we can focus on the key idea. What is meant by 'the material conditions of life'? This is stressed in the following extract, which is also an important provisional outline of some of Marx's key ideas.

> I was led by my studies to the conclusion that legal relations as well as the forms of State could neither be understood by themselves, nor explained by the so called general progress of the human mind, but that they are rooted in the material conditions of life, which are summed up by Hegel after the fashion of the English and French writers of the eighteenth century under the name of civil society, and that the anatomy of civil society is to be found in political economy…The general conclusion at which I arrived and which, once reached, continued to serve as the guiding thread in my studies may be briefly formulated as follows: In the social production which men carry on they enter into definite relations that are indispensable and independent of their will; these relations of production correspond to a definite state of development of the material powers of production. The totality of these relations of production constitute the economic structure of society – the real foundation, on which legal and political superstructures arise and to which definite forms of social consciousness correspond. The mode of production of material life determines the general character of the social, political and spiritual processes of life. It is not the consciousness of men that determines their being, but, on the contrary, their social being determines their consciousness. (Preface to *A critique of political economy* (1859))

Perhaps the most important feature of this famous passage is that Marx presents law as part of a total picture of society. We can describe this total picture as a totality. It is necessary to see law as related to other social and political elements; in other words, to understand law, you have to look outside the law. But Marx's argument goes much further:

> At a certain stage of development, the material productive forces of society come into conflict with the existing relations of production or – this merely expresses the same thing in legal terms – with the property relations within the framework of which they have operated hitherto. From forms of development of the productive forces these relations turn into their fetters. Then begins an era of social revolution. The changes in the economic foundation lead sooner or later to the transformation of the whole immense superstructure. In studying such transformations it is always necessary to distinguish between the material transformation of the economic conditions of production, which can be determined with the precision of natural science, and the legal, political, religious, artistic or philosophic – in short, ideological forms in which men become conscious of this conflict and fight it out. Just as one does not judge an individual by what he thinks about himself, so one cannot judge such a period of transformation by its consciousness, but, on the contrary, this consciousness must be explained from the contradictions of material life, from the conflict existing between the social forces of production and the relations of production. (*Ibid*)

The key to understanding society, and hence to understanding law, is to look to economy, and any given society's economic organisation. Marx uses a special term for his analysis of economy; he refers to the **means of production**. He is referring to the ways in which people make their living – ways of producing social wealth. More fully, we could refer to 'means of production, distribution and exchange' to refer to all kinds of economic activity. Marx also makes a reference to the mode of production determining the 'general character of society': economic organisation is thus fundamental. To a certain extent this is accurate. If one looks at medieval society in Western Europe, for example, one finds that modes of economic organisation did have an important effect. For instance, if wealth is bound up with land, then those with land are powerful. Those without land have to work for those with land: one does indeed find a rural peasantry who were legally tied to the land of their masters. Of course, there was also a merchant class; merchants had the social and financial power that comes from trade, and certainly did not have to sell their labour on the land.

Marx argues that your sense of your self, or your view of the world, is determined by your material position in society. If you have to sell your labour to survive, your view of the world will be very different from that of a merchant or a lord or lady. Marx refers to these material positions as **class** positions. More formally, class is determined by an individual's relationship to the means of production.

Marx describes such ideas or beliefs about the world as 'ideologies'. An ideology is a world view that contains assumptions about how the world works, what one's place is in the world, and how one views others. Thus, a peasant's ideology will include a belief in deference to established authority, their lord or lady and the Church; it may also include ideas about their relationship to family or community. The ideology of a peasant will be very different to that of a landowner. A landowner's view of the world will be determined by the need to maintain their authority. Of course, this analysis is crude, but it is only meant to suggest the broad outline of Marx's ideas.

The second important strand of Marx's idea of ideology is that it **mystifies**. Thus, a peasant will 'believe' in the authority of the lord or lady, but will not appreciate that this belief is ultimately based on no more than the lord or lady's wealth and power. If, as we will see, law has an ideological aspect, then it is used primarily to preserve or further the interests of a particular class. This is thus a very different approach from that of theorists who stress the law's social neutrality.

To have a good grasp of Marx's theory of the law, it is necessary to see it in this context. Law is part of a social totality. Before we turn to the law, it is necessary to make sure that we understand these fundamentals of Marx's thought.

Self-assessment questions

1. **What is a social totality?**
2. **What are the means of production?**
3. **What role does economy play in Marx's theory of social totality?**
4. **What is class?**
5. **What is Marx's basic insight into the nature of law?**

Let us now look in some more detail at Marx's understanding of the law. The following extract is an analysis by Bankowski and Mungham (1976) of a statement by Marx about the nature of jurisprudence or legal theory:

> '…your jurisprudence is but the will of your class made into law for all' (Marx, 1884). But, though it is this signature of a society, you cannot know a society by looking at its law. For that gives undue importance to the law, in that it assumes that law can be an object of study unconstituted by any theory. For us, however, law is an object of study only in so far as it is constituted by Marxist theory.

Let us try to develop these themes. Law as an object of study is to be constituted as an object of an expressly political theory; robbed of its autonomy, law is to appear in its nakedness as an instrument of class power. In other words, law is no longer the guardian of freedom, neutral and above direct political influence. Law is part of a social structure that is ultimately reducible to its economic organisation. This analysis follows the 'guiding thread' of Marx's analysis announced in the *Critique of political economy*. Law's relationship to society is explained in the famous metaphor of the **base and superstructure**. At the base (or 'foundation', as Marx called it in the extracts above) is the mode of production, the organisation of the economy; all other social institutions can be understood by reference to this essential determinant. Any economy passes through a number of stages of organisation, and a pattern of development can be plotted with the same certainty that a natural science can describe the development of phenomena.

So, according to Bankowski and Mungham, a philosophy of economy can provide the necessary insight into law. Although law may have its own particular 'form', its own discourses and practices, these can only be understood by reference to a more fundamental truth that remains 'beyond' it, in economy. However, this view can be criticised: it is a restricted way of thinking about law. An attempt to produce a general jurisprudence thus degenerates into reductive thinking. It is no wonder that this version of Marxism is seen by many to represent an intellectual dead-end. We need to ask further critical questions. Of course, there are many difficult issues here; but we could broadly sketch the contours of the problem. We need to return to Marx's own writing.

We will see that Marx does attempt to think of law as part of a total picture of a society, but that this cannot just be related to economy in a simplistic way. We need to look at Marx's understanding of history, and then return to the issue of the relationships between law and economy.

Activity 11.1

What view of jurisprudence and law is provided by Bankowski and Mungham?

No feedback provided.

11.1.2 Marx's critical reading of Hegel

Marx's key writing on Hegel† and law is his *Contribution to a critique of Hegel's philosophy of law* in Vol. 3 of *Marx and Engels: collected works* (Moscow: Progress Publishers, 1975). The most basic problem with which Marx grapples in his critique is Hegel's presentation of law as located in history and social experience. What intrigues Marx about Hegel's thought is an element of his dialectical method – that history develops through the resolution of contradictions. Law is given as an exemplar of this process:

> …in Hegel's philosophy of law, civil law superseded equals morality, morality superseded equals the family, the family superseded equals civil society, civil society superseded equals world history.

Hegel argues that the state law comes out of the contradictions that exist in forms of social arrangement that pre-date the modern, secular state. Society only becomes modern and rational when it is ordered by law. This kind of thinking is important because it is not simplistic. To understand the law one has to place it within a complex historical and social totality.

† Friedrich Hegel: Georg Wilhelm Friedrich Hegel 1770–1831, German philosopher. 'Of all the major Western philosophers, Hegel has gained the reputation of being the most impenetrable. He was a formidable critic of his predecessor Immanuel Kant, and a formative influence on Karl Marx. Through his influence on Marx, Hegel's thought has changed the course of…history.' (*The Oxford companion to philosophy*, 1995, p.339)

ACTIVITY 11.2

Summarise Hegel's view of law and society.

No feedback provided.

But what if Hegel was wrong? What if he did not understand that law, and indeed other social phenomena, can be traced to economic relationships? We need to look at a significant paragraph:

> Under the patriarchal system, under the caste system, under the feudal and cooperative system, there was a division of labour in the whole of society according to fixed rules. Were these rules established by a legislator? No. Originally born of the conditions of material production, they were raised to the status of laws only much later.

In denying that law can be understood by reference to a legislator, there is, of course, a denial of the positivist theory of law. But we need to remember that this is also part of the critique of Hegel, and hence also part of the question of method. Law is born of 'the conditions of material production'. To return to the critique of Hegelian method, this cannot be thought of as a progression of historical schemas; rather there is another possibility.

Marx is not only critical of Hegel's understanding of history. He is critical of the way in which Hegel confuses different historical forms. Let's trace this problem with reference to the law. Marx observes that the Hegelian state is held together by property. It is not the ethical life of the family, the life of 'love' that is central to the state; there is something more: something that must preserve objectivity and continuity. Behind the form of law is **private property**. Marx is able to suggest an analogy between sovereignty and property: just as the state is expressed in its generality as the monarch, property is 'the supreme objectivity of the state…its supreme law' (*Critique*, p.108). However, not all states are built on private property. Consider Roman law. Here the roots of the law of private property are found in civil law. By contrast with German law, though, this civil law does not become the law of the state. Public power, furthermore, was not seen as resting on private power. Like property it is based on a fact: the 'sovereignty of empirical will' (*Critique*, p.110). Private property relationships were not the apotheosis of the state, but merely one set of relationships that composed the public bond.

Law, then, is not of a piece. The law of the rational, Prussian absolute state (i.e. that with which Hegel was most familiar) is not that of the Roman Republic or Empire; nor indeed is it identical with the law of the early German communities. The point here is not so much that each of these modes of law relates directly to modes of production; although Marx does not deny this possibility. Rather, he says, the form of law is determined more broadly by historical and material circumstances. Marx goes on to criticise the Hegelian method, which reduces history to an ideal pattern or schema. Marx also resists Hegel's idea that law reaches its most perfect form in the Prussian state!

ACTIVITY 11.3

a. Why is Marx critical of Hegel's theory of history?

b. What is Marx's view of legal history?

Feedback: see end of guide.

As a consequence of this it would be wrong to see Marxist legal theory as based on a schema that simply repeats this scheme and describes a movement from primitive law, through feudal law to an apotheosis in the capitalist form of law.

One has to appreciate that what Marx is describing here is the way that **capital** can take a juridical form that changes over time. Indeed, the definition of capital with which one of the sections of Marx's 'Paris Manuscripts' (written in 1844) opens makes precisely this point: 'Even if capital itself does not merely amount to theft or fraud, it still requires the cooperation of the legislation to sanctify inheritance.' The most important thing to grasp is that economy is a set of relationships that have to be seized as a dynamic totality. How does the state function within this totality?

Summary

Marx develops his thought based on a critique of Hegel's ideas. These presented a broad picture of human history and development, and the mechanisms that Hegel believed drove history in progressive directions. Marx rejected Hegel's idealism (particularly the view that the culmination of history was in the state of Prussia), and instead tried to locate social institutions such as the law within a materialist understanding of the social and economic context.

11.2 The Marxist theory of the state

For Marx, the state reflects a particular historical fact:

> Through the emancipation of private property from the community, the State has become a separate entity, beside and outside civil society; but it is nothing more than the form of organisation which the bourgeois necessarily adopt both for internal and external purposes, for the mutual guarantee of their property and interests. The independence of the State is only found nowadays in those countries where the estates have not yet completely developed into classes, where the estates, done away with in more advanced countries, still have a part to play, and where there exists a mixture; countries, that is to say, in which no one section of the population can achieve dominance over the others. (*The German ideology*, written 1845–46 but not published until 1932.)

What is the central factor in the modern form of the state?

The state has fallen entirely into the hands of those who own property – a class that Marx called the bourgeoisie.† The bourgeoisie organises itself politically and takes control of the state. The state (and its institutions) therefore come to serve the interests of this property-owning class.

† Bourgeois, bourgeoisie: French words meaning literally 'dwellers in a town (*bourg*)'. Marx used 'bourgeois' to refer more narrowly to the 'middle' class who lived by investing their capital in manufacturing and commerce. They were a middle class because they were in between the aristocracy (owners of land) and the peasantry and proletariat (owners of nothing except their labour power).

How is this elaborated?

> Since the State is the form in which the individuals of a ruling class assert their common interests, and in which the whole civil society of an epoch is epitomised, it follows that the State mediates in the formation of all common institutions and that the institutions receive a political form. Hence the illusion that law is based on the will, and indeed on the will divorced from its real basis – on free will. Similarly, justice is in its turn reduced to the actual laws. (Marx, *The German ideology*)

How does law relate to the state?

Marx argues that the state rests on class interest. If a class controls the state, then those aspects of the state that are used to regulate society will reflect those interests. Thus, the law reflects the interests of the bourgeoisie; the prevailing ideas of justice and equality, likewise, will reflect those interests.

How can this be demonstrated?

> With modern peoples, where the feudal community was disintegrated by industry and trade, there began with the rise of private property and civil law a new phase, which was capable of further development. The very first town which carried on an extensive maritime trade in the Middle Ages, Amalfi, also developed maritime law. As soon as industry and trade developed private property further, first in Italy and later in other countries, the highly developed Roman civil law was immediately adopted again and raised to authority. When later the bourgeoisie had acquired so much power that the princes took up its interests in order to overthrow the feudal nobility by means of the bourgeoisie, there began in all countries – in France in the sixteenth century – the real development of law, which in all countries except England proceeded on the basis of the Roman Codex. In England, too, Roman legal principles had to be introduced to further the development of civil law (especially in the case of movable property). (It must not be forgotten that law has just as little an independent history as religion.)

This is a theory of the history of law as an expression of class power. The forms of law are not neutral and universal, but reflect the needs of a particular (ruling) class to

achieve certain ends. This is both coherent with Marx's general thesis that we look to material history to understand the law, and with the notion that the state ultimately becomes the most rational and efficient way of achieving this end.

11.3 Marx's theory of law in *Capital*

Marx's account of the operation of the capitalist mode of production in *Capital* is seen as his most mature and complex work. We cannot consider in detail what is a major work of both philosophy and economy, but we can look at one of the sections where Marx does explicitly discuss the law, and ask how it fits into the ideas that we have outlined so far in this chapter.

In Volume 1 of *Capital*, Marx analyses the way that legislation[†] was used in the 19th century to regulate the length of the working day in factories in Western Europe and the USA:

> The passion of capital for an unlimited and reckless extension of the working-day, is first gratified in the industries earliest revolutionised by water-power, steam, and machinery, in those first creations of the modern mode of production, cotton, wool, flax, and silk spinning, and weaving. The changes in the material mode of production, and the corresponding changes in the social relations of the producers gave rise first to an extravagance beyond all bounds, and then in opposition to this, called forth a control on the part of Society which legally limits, regulates, and makes uniform the working-day and its pauses.

[†] The first British factory legislation (the Health and Morals of Apprentices Act) appeared in 1802. This, like subsequent statutes, was restricted to the textile industry. Not until 1860 was any other industry legislated for (in the Bleach and Dye Works Act).

In Marx's opinion, class interests lie behind the struggle for the regulation of the working day. This struggle is fought out between the representatives of capital, who want to increase their profits, and those who work in factories and mills, and whose labour is a major source of those profits. Technological changes bring about the promise of increased productivity. This leads, first of all, to changes in society in favour of the requirement to leave the working day unregulated; in other words, to allow factory and mill owners to determine how long a worker should work. There is then a call to regulate the time spent working through law.

Marx adds detail to this account of the regulation of the working day:

> This control appears, therefore, during the first half of the nineteenth century simply as exceptional legislation. As soon as this primitive dominion of the new mode of production was conquered, it was found that, in the meantime, not only had many other branches of production been made to adopt the same factory system, but that manufacturers with more or less obsolete methods, such as potteries, glass-making, &c., that old-fashioned handicrafts, like baking, and, finally, even that the so-called domestic industries, such as nail-making, had long since fallen as completely under capitalist exploitation as the factories themselves. Legislation was, therefore, compelled to gradually get rid of its exceptional character, or where, as in England, it proceeds after the manner of the Roman Casuists, to declare any house in which work was done to be a factory.

What does this tell us about the law?

Law attempts to keep pace with social and technological change. At first, attempts to regulate the working day are exceptional pieces of legislation. However, as the impact of the new technologies increases, and has a profound influence on forms of industries that had previously been differently organised, the law must respond to this fact as well. Thus the legal definition of 'factory' has to be expanded to cover 'any house in which work was done'. This allows an insight into the form of law. Legal definitions are driven, in part, by the requirement that law should regulate the world of economy.

Marx draws the following conclusion:

> The creation of a normal working-day is, therefore, the product of a protracted civil war, more or less dissembled, between the capitalist class and the working-class.

What does this tell us about the ability of the law to achieve social justice?

Marx seems to be cynical about the law's role. Any achievement of the regulation of the working day is driven not by the law, but the way in which the organised working class uses the law. This is entirely coherent with Marx's general theory of the law. If what is central is the relation to the means of production, then social change can only be achieved by those who are universally exploited joining together. This is the 'civil war': it goes beyond trade unionism. Marx seems to be suggesting that the only way in which social justice will be achieved is to sweep away an economic order, and hence an order of the state and of law. Social justice is achieved through revolution.

Summary

Marx's complex work of social and economic theory, *Das Kapital* (to give it its original German title) contains a theory of law. Law is determined by the economic interests that it serves. Marx seems to suggest that if those exploited by the economic system were able to organise themselves, they may be able to use law in their interests. However, social justice could only be achieved through a transformation of the economy.

Reminder of learning outcomes

By this stage you should be able to:

- **outline Marx's ideas of ideology, economy and society**
- **identify the philosophical tradition out of which Marx's thought emerges**
- **describe Marx's ideas of law and of the state.**

11.4 Soviet Marxism and the law

The Russian revolution of 1917 is one of the key points in the development of Marxist thought, and hence also in the Marxist theory of the law. If we accept that 1917 was indeed a successful socialist revolution, then the ultimate fate of the Soviet Union must suggest that there was something badly wrong in the way that Marx's thought was understood and 'applied'. This is the next problem with which we will grapple. We will look briefly at Soviet writers, and examine whether or not the revolution does achieve social justice, and a new form of law.

11.4.1 Lenin and the state

What is the fate of the state?

> We have already said above, and shall show more fully later, that the theory of Marx and Engels of the inevitability of a violent revolution refers to the bourgeois state. The latter cannot be superseded by the proletarian state (the dictatorship of the proletariat) through the process of 'withering away', but, as a general rule, only through a violent revolution. (Lenin, *The state and revolution*)

In this extract, Lenin is referring to a particular development of the Marxist notion of the state. If it follows from Marxist theory that the state is the agent of the ruling classes, then the revolution must destroy the state, and put in its place a socialist state. This is only one element in a complete reworking of society. Remember, this is an argument about social justice.

Law cannot achieve equality and justice unless it is linked to an economic order that ensures communal ownership of the means of production. 'Bourgeois law' will only ever reflect private property ownership; that is, it must reflect the fact that social order is based on the private ownership of the means of production. Lenin goes on to argue that:

> And so, in the first phase of communist society (usually called socialism) 'bourgeois law' is not abolished in its entirety, but only in part, only in proportion to the economic revolution so far attained, i.e. only in respect of the means of production. 'Bourgeois law' recognises them [the means of production] as the private property of individuals. Socialism converts them into common property. To that extent – and to that extent alone – 'bourgeois law' disappears. (*Ibid*)

This is a practical argument. Bourgeois law is 'swept away' to the extent that it relates to private ownership. But this is a gradualist approach. In the first phase of the achieved utopia, other forms of bourgeois law may remain.

11.4.2 Evgeny Pashukanis

We are not concerned in this chapter so much with the practical work of reconstruction that Lenin and the Bolsheviks achieved. We are more concerned with the theory of law that they promulgated. In keeping with this argument, we turn to one of the most celebrated Soviet writers on law: Evgeny Pashukanis. Pashukanis's legal theory reflects the fact that there had been a successful overthrow of the old government, and a socialist system was being put in place. This makes his work very different from that of Marx himself, who was offering a theory or philosophy of law prior to any successful socialist revolution.

What are Pashukanis's main themes? Like Lenin, Pashukanis argues that with the triumph of the planned economy and the destruction of private property, law will cease to have a function. However, Pashukanis is also providing a history and philosophy of 'bourgeois' law, and it is in this sense that he goes further than Lenin. Law is derived from the form of private property. To extend this argument would mean that the legal form is seen as reaching its most developed state in a certain historic epoch: with the rise of bourgeois capitalism. Capitalism presupposes a market, where goods can be freely exchanged. This contrasts with feudalism. Pashukanis argues that in medieval times, the relationship of subservience and dominance is not legally articulated: 'the slave is totally subservient to his master'. In the capitalist epoch, economic relations are 'mediated' through particular economic forms, the contract, for example:

> The economic relation of exchange must be present for the legal relation of contracts and purchase to be able to arise. Political power, can with the aid of laws, regulate, alter, condition and concretise the form and content of this legal transaction in the most diverse manner. The law can determine in great detail what may be bought and sold, how, under what conditions and by whom. (Pashukanis, *A general theory of law*)

If bourgeois law is linked to the regulation of the market, how should law operate in a society that has rejected the market? The failure to answer this question is the great failure of Soviet Marxism. Indeed, the Soviet state became a monolithic body. Law served to regulate and enforce the state's *dictats*, rather than providing any real limits on the state's power to plan and shape economy and society. Let us consider this point a little further. Pashukanis's critique was:

> …fraught with theoretical and political problems. Since Pashukanis saw law as based on exchange relations and since he equated capitalism simply with the generalisation of exchange (rather than with exploitative relations of production which derive from the exchange of labour power), he could only conclude that all exchange was capitalist exchange and all law was bourgeois law. The result was a one-sided critique which excluded the possibility of socialist legality and neglected any question of democratising and socialising the law. This played into the hands of the evolving Stalinist regime, which deployed his theory of the primacy of technical regulation under socialism to justify the power of the bureaucracy and its disregard for legal constraints. (Fine, R. and S. Picciotto, 'On Marxist critiques of law' in *The critical lawyer's handbook*.)

ACTIVITY 11.4

What criticisms can be made of Pashukanis's work?

Feedback: see end of guide.

11.5 Setting Marx the right way up: Western Marxism

11.5.1 Marxist critiques of Soviet Marxism

The demise of the socialist dream in Soviet Russia should not be seen as exhausting the Marxist project. We can refer to a later phase of Marxism that was as critical of Western societies as it was of 'state socialism'. Fine and Picciotto argue that:

> The revival of Marxism in Western Europe in the 1960s and 1970s was a reaction against the failures both of Stalinism, which supported the dogmas and tyrannies of state socialism, and of complacent liberalism, which ignored or tolerated the inequalities and oppressions of capitalism. Consequently Marxist critiques of law and the state have had a twofold dynamic, focusing on the limits both of bourgeois freedom in systems based on private property, and of 'socialist' freedom in systems based on state property.

Perhaps the most interesting and relevant contemporary forms of Marxism are developed by French, German and Italian writers, attempting to update Marx's insights to describe modern, Western capitalism. We will look at the work of the French Marxist philosopher Louis Althusser (1918–90).

Althusser poses the question: 'Is there a different way of reading Marx?' To achieve this we would have to return to the central contribution of Marx's theory: an account of economy.

Perhaps Marx's account of economy has been misunderstood. Marx was careful to point out that superstructural development cannot be plotted in the same way as economic change. In other words, one cannot make a simple link between economic forms like capitalism or feudalism and forms of law. There is a **differential** development between base and superstructure. What does this mean? At any given moment there will be a complex relationship between the economic system and the other institutions that compose the social structure.

11.5.2 How can one begin to reread Marx?

The key is to turn to the theory of economy that Marx presents. Marx is not arguing that a given mode of economic production will necessarily produce a given legal form. It is necessary to think in terms of the base and the superstructure developing in different ways.

To develop these ideas, we will turn to the writings of Louis Althusser in the seminal text *Reading capital*.

Althusser builds on Marx. At the heart of Althusser's system is the economic, or the mode (or relations) of production. Althusser's thinking moves from the economic through to a positing of the entire social totality; thus to describe the social totality is to 'define' the economic, just as defining the economic will allow a positing of the social totality. For example, a feudal means of production will result in a society that is organised 'feudally'; a 'capitalist' mode of production a 'capitalist' society.

Activity 11.5

a. In what ways are Marxists critical of both Western liberalism and Soviet communism?

b. What criticisms of the law are made by Fine and Picciotto?

c. In what ways does Althusser's work build on Marx's basic theory?

Feedback: see end of guide.

This approach would be entirely coherent with the basic tenets of Marxist theory as outlined above. It displays both the strengths and weaknesses of the Marxist account. It can present a total image of a social structure: a way of thinking of the relationships between various aspects of society; it also carries the risk that one looks to economy to understand society.

In *Reading capital*, Althusser is suggesting that it is too simplistic to describe the inherently complex set of relationships and inter-relationships that characterise social

being in terms of isolated instances: even dividing up the social into 'economy', 'law' and 'culture' imposes a crude analytical device that posits definable and isolatable 'instances' – parts of a complex whole, that can be divided off from each other and labelled by the observer. Furthermore, the very idea that the social can be modelled on the basis of a 'whole' – a coherent assembly in which the parts fit together – is also too simplistic.

However, one needs to remember that this is an analytical language. We must not abandon Althusser too soon. How can we think about the law, the 'legal instance' in this complex conjugation? Can we build a model of complexity, or does it fall back into a crude distinction between base and superstructure?

Althusser makes a distinction between production, or economy, and the 'legal-political and ideological superstructure' (*Reading capital,* p.177). In each of these instances, law and economy, we would have to find a differentiation; a complexity. In other words, a combination of law and economy would characterise economy, just as it would law. Sure enough, in economic production, there is a distinction between the objects of production, such as land, and the instruments of production. Agents of production (human beings, that is) are split into direct agents, whose labour is directly used in production, and another group who own the means of production, but do not labour in it directly. Economic 'formations' are thus defined by the result of different combinations that are at once economic and legal.

Following Althusser's theory, we could see law as essential to the structuring of economy, and economy as therefore inseparable from law. We would thus be able to produce an account of the law that can take into consideration the law's specific form, while allowing that this form also enters into relationships with economic concepts and practices.

What are the key elements of Althusser's rereading of Marx?

Althusser is breaking down the distinction between base and superstructure, to produce a theory of the economic determination of the social as one of complex conjugation. Alongside this rethinking of economy, we can see Althusser producing a new theory of ideology.

As we have seen, the Marxist tradition understands the state as an instrument of the ruling class. The instruments at its disposal are not just the repressive institutions such as the police and, in emergencies, the army. A full list of the state apparatus is open-ended, but would include: 'the Government, the Administration, the Army, the Police, the Court [and] the Prisons'. Merely as a point of clarification at this stage, it is arguable that these 'repressive' state apparatuses (RSAs) do not all operate through physical repression, even though this may be true in the last instance. 'Administration', for instance, works through bureaucratic structures that regulate and distribute resources. Moreover, it is a commonplace of political theory that rule through physical repression alone is inefficient, and encourages resistance.

Accounting for the law through violence, though, is not enough. Clearly the modern state does not **justify** itself through its control over the monopoly of violence. Capitalism is a social formation that must reproduce the conditions of its own production (Althusser, 1984). That is to say that both the productive forces and the relations of production must renew themselves. This is a global operation that places together the various sectors of the economy. It also produces the double requirement of ideology, which must reproduce the skills necessary to work, manage and coordinate and, at the same time, reproduce subjection to the ruling order.

In what ways does Althusser build a new theory of law and ideology?

Althusser argues that law is central to the creation and continuation of ideology. He characterises law as an 'ideological state apparatus' (ISA). ISAs are far more subtle than the repressive apparatus of the state (RSAs) that we considered above. They actually create the world in which we live. This is a real development of Marx's theory of ideology.

Instead of the notion that ideology is a veil that separates the real from the unreal, it becomes the very 'point' or a 'hinge' that connects the subject to the real world. Ideology is thus a way of describing the mechanism through which the subject is inserted into a given material reality. In its most extended form, it is a materialist theory of the subject as 'made' by material circumstance. Thus 'subjective' states are not to be seen as 'essences', 'ideas' or 'spiritual substances', but the very complexes that attach the subject to an external world; in a sense the private, inner world of the separate self disappears. Consciousness, freely formed, and belief are thus the points when the subject is the least free, when the subject is 'inscribed into material practices'. Of course, these material practices relate finally to the reproduction of the means of production.

So 'we' are created by our relationship to the means of production. What Althusser is suggesting is that your sense of 'self' is ultimately explicable by the role you play in the economy. Law lends support to this creation of the self. Law positions us as buyers or sellers of goods, criminals, fiduciaries, husbands and wives. In other words, you are not what you think you are. You 'are' to the extent that law and economy allow you to be!

Activity 11.6

What are Althusser's ISAs and how do they operate?

Feedback: see end of guide.

Summary

Althusser produces a sophisticated rereading of Marx that relates social being to economy in a more subtle way than was implied by Marx's rather deterministic notion that the economic 'base' drives the social and ideological 'superstructure'.

11.6 Marxism, law and international economy

One of the most interesting contemporary readings of Marx comes from the work of those scholars who are trying to understand the operation of law and global economy.

In some senses, the focus of study shifts from questions of class and the nation state, to issues of global governance. Perhaps Althusser's notion of ideology can help us understand how people are positioned in networks of global exchange, and new identities are created. In other words, maybe ideology plays a part in determining those 'selves' who are positioned as economic migrants or managers, bankers or refugees. Moreover, perhaps world trade and the law that regulates world markets, for instance, can be understood in terms of the perpetuation of relationships of dominance and subservience between developing and developed nations.

We can make a distinction between developed metropole and undeveloped satellites. This division is based on a global division of labour, a requirement that production is for the market. To borrow the language of Baran (1957, p.142) the 'unilateral transfers' of wealth from the colonised nations to those of Western Europe can be seen as a primary reason why intense industrial development in developed nations was accompanied by the traumatic dislocation of agricultural societies forced to service the requirements of their colonial masters. This interference in the process of capital accumulation could be seen as having a serious impact on the development of the colonised territories (Kiely, 1995, pp.40–47).

A total critique of the very terms in which the global framework operates can be found in Wallerstein's (1974) world systems theory. The underpinnings of the disequilibria in world economy can be related to the interaction of certain key factors. World economy can be seen as a product of the geographical expansion of Western power from the 16th century onwards. This process is coupled with a zoning of the world; a specialisation of different areas in the production of materials and labour for manufacture. In turn, this zoning relates to interactions between colonial expansion and economic development along capitalist lines. The process is accompanied by an institutional logic that locates the development of strong states at the centre

of economic networks that can ensure the ongoing transfer of resources to the developed economies.

How can we read this into the law? We could look at international trade law. Conventional accounts present the efforts of governments and international organisations to 'bring some order into the chaos of international trade' (Jackson, 1999, p.2). Indeed, the American desire to create a regime based on free trade and non-discrimination remains one of the principles underlying GATT (Dam, 1970). The defenders of this approach raise the argument that trade tends towards the most rational organisation of resources, and the legal regulation helps to achieve this end.

However, could we not see international trade and trade law as a historical phenomenon, as bound up with the creation of the nation state, colonialism and the post-colonial? We need to appreciate a power dynamic that runs through the operation of trade and financial systems.

WTO figures show that between 1990 and 2002, although developing nations may have maintained their share of world trade, they remained on the margins of the world trade system as a whole. How has this persistent problem been approached? Development was put firmly on the agenda in 1999 with the failure of the Seattle Ministerial Conference (amid large-scale protest demonstrations) to agree another round of talks. Seattle led to another questioning of the ability of the WTO to coordinate world trade; in particular the consensus-orientated approach was criticised by developing nations.

The WTO's own version of affairs contrasts this stalemate with the 'breakthrough' that was achieved at the next ministerial meeting in Doha, 2001, with the publication of the Doha Development Agenda (DDA). This document stressed the need for developing nations to achieve greater access to world markets, and initiated a work programme to push forward the development initiative. The WTO acknowledged 'the particular vulnerability of least-developed countries and the special structural difficulties they face in the global economy'.

Can these problems be resolved by law? It would be possible to argue that the law should not be concerned with issues of international social justice, but has a narrower role as a formal tool to regulate world markets. Might it be possible to suggest then, that if those markets operate to the benefit of certain parts of the world, and to the marginalisation of others, the Marxist insight into the nature of capital is still relevant? Moreover, the basic Marxist jurisprudential insight remains accurate. To understand the law, you must look to the economic forms that underlie the law: to understand globalised law, one has to understand the global market.

ACTIVITY 11.7

To what extent is a Marxist approach to trade law useful?

Feedback: see end of guide.

Conclusion: If you tolerate this, your children will be next†

After the fall of the Berlin wall and the breakup of the Soviet Union in the late 1980s, early 1990s, Marxism was seen as an outdated 19th-century theory, discredited by world events or simply irrelevant. However, in more recent years, especially in the aftermath of the sub-prime mortgage lending crisis and the subsequent bailouts of big banks globally in the late 2000s, Marxism has become more popular again in academic circles and in popular discourse. For example, the growth of major multinational conglomerates, tech companies and billionaire owners has been deeply problematic for many. This is happening at the same time as governments propose and implement austerity cuts on its citizens. Think about these issues in relation to all of the chapters in Part V of this guide. Large contracts awarded to friends and family of government ministers in the aftermath of the onset of the COVID-19 pandemic have left many questioning the current capitalist structure and its ability to deliver justice and equality before the law.

† 'If you tolerate this, your children will be next': originally a Republican slogan from the 1936–39 Spanish Civil War; latterly a song by the radical British group Manic Street Preachers.

Reminder of learning outcomes

By this stage you should be able to:

- **describe the characteristics of Soviet jurisprudence**
- **explain the development of Marx's theories of ideology, economy and law by Louis Althusser**
- **indicate how Marx's thought might be relevant to a contemporary theory of international law.**

References

- **Althusser, L. *Essays on ideology*. (London: Verso, 1984).**
- **Bankowski, Z. and G. Mungham *Images of law*. (London: Routledge, 1976).**
- **Baran, P. *The political economy of growth*. (New York: Monthly Review Press, 1957).**
- **Bottomore, T. and P. Goode *Readings in Marxist sociology*. (Oxford: Oxford University Press, 1983).**
- **Dam, K.W. *The GATT: Law and international economic organization*. (Chicago: University of Chicago Press, 1970).**
- **Jackson, J.H. *The jurisprudence of GATT and the WTO: insights into treaty law and economic relations*. (Cambridge: Cambridge University Press, 1999).**
- **Kiely, R. *Sociology and development: the impasse and beyond*. (London: Routledge, 1995).**
- **Wallerstein, I. *The modern world system: capitalist agriculture and the origins of the European world-economy in the sixteenth century: Vol. 1*. (New York: Academic Press, 1974).**

Reflect and review

Look through the points listed below. Are you ready to move on to the next chapter?

Ready to move on = I am satisfied that I have sufficient understanding of the principles outlined in this chapter to enable me to go on to the next chapter.

Need to revise first = There are one or two areas I am unsure about and need to revise before I go on to the next chapter.

Need to study again = I found many or all of the principles outlined in this chapter very difficult and need to go over them again before I move on.

Tick a box for each topic.

	Ready to move on	Need to revise first	Need to study again
I can outline Marx's ideas of ideology, economy and society.	☐	☐	☐
I can identify the philosophical tradition out of which Marx's thought emerges.	☐	☐	☐
I can describe Marx's ideas of law and of the state.	☐	☐	☐
I can describe the characteristics of Soviet jurisprudence.	☐	☐	☐
I can explain the development of Marx's theories of ideology, economy and law by Louis Althusser.	☐	☐	☐
I can indicate how Marx's thought might be relevant to a contemporary theory of international law.	☐	☐	☐

If you ticked 'need to revise first', which sections of the chapter are you going to revise?

		Must revise	Revision done
11.1	Marx's basic ideas of ideology, economy and society	☐	☐
11.2	The Marxist theory of the state	☐	☐
11.3	Marx's theory of law in *Das Kapital*	☐	☐
11.4	Soviet Marxism and the law	☐	☐
11.5	Setting Marx the right way up: Western Marxism	☐	☐
11.6	Marxism, law and international economy	☐	☐

12 Feminist legal theories

Contents

Introduction

In this chapter, the terms feminist jurisprudence, feminist legal theory and feminist legal theories will be used to cover a variety of feminist legal positions and will generally be denoted by the abbreviation FLT.

There are a variety of feminist approaches in law. It is helpful, however, at this stage to summarise similarities. In general, feminist legal theorists take an interdisciplinary approach, showing how law operates in creating, reflecting and sustaining an unfairly gendered world arranged to women's disadvantage. One of the main areas of FLT is therefore critical analysis of important aspects of the conceptual framework of modern law. FLT is often seen as containing a strong normative, reconstructive, transformative, or even utopian, element. This means that it not only **analyses** and **critiques** or **deconstructs** current law and jurisprudence but it also contains **reformist** or **imaginative** arguments as to how law, society and politics can change to improve lives, particularly by reference to their impact on making women's lives better.

FLT has made a vibrant, important and, many would argue, vital contribution in the field of law, particularly since the 1980s. The scholarship in this area has developed into a large body of literature that can defy organisation in its wide-ranging scope and complexity. Feminist theorising in legal scholarship draws widely from, and interconnects with, feminist theory in other disciplines – literature, sociology, political science and history to name a few. It intersects with other types of critical theory, most notably that of critical race theory (CRT) and queer studies.

A note of caution: feminism has been described as a movement with many projects; there is not just one feminist view on everything, so, it is generally assumed, not just one feminist legal theory (Catharine MacKinnon argues that radical legal feminism is the feminist jurisprudence – see Section 12.5.3). Although it is difficult to accurately classify and categorise alternative views in FLT, for the purposes of studying this course, as is common in most jurisprudence courses, we have categorised feminist approaches to the state into a variety of political orientations: liberal; cultural; radical; black/critical race feminism and postmodern feminism. FLT seeks to uncover the reality of women's lives and improve them. At the same time, it seeks to enable changes for a better future, often putting forward programmes to do so. This can cause problems in an unequal and hierarchical world – to protect women's rights while seeking to avoid entrenching stereotypes and existing inequalities – as you will discover.

Learning outcomes

By the end of this chapter and the relevant reading, you should be able to:

- **identify central themes in feminist jurisprudence**
- **discuss the work of several key scholars**
- **give an account of the history of theorising in this area**
- **identify and understand the commonly categorised orientations in FLT**
- **apply feminist scholarship to certain key examples of legal practice.**

Core text

- **Freeman, Chapter 14 'Feminist jurisprudence'.**

Essential reading

- **Make sure you have studied at least two writers in depth. Choose from the sections in Freeman and investigate those authors further.**

There is a large range of feminist literature and several collections of essays that focus on particular aspects of contemporary legal structure. Much of the literature originated in the USA or Western Europe. As this is a University of London course with a focus on Anglo-American jurisprudence for this level of study, that is the origin of the majority of the readings here. Of course, these issues are of global concern and examples are welcome from other parts of the world.

Further reading

- **Nussbaum, M.C. *Sex and social justice*. (Oxford: Oxford University Press, 1999) [ISBN 9780195112108] in particular, Chapter 1 'Women and cultural universal' and Chapter 2 'The feminist critique of liberalism' (available in VLeBooks via the Online Library).**

This is an excellent commentary on the intersection of liberalism and social justice for women.

- **Barnett, H. *Introduction to feminist jurisprudence*. (London: Cavendish, 1998) [ISBN 9781859412374] (available in VLeBooks via the Online Library).**
- **Davies M and V.E. Munro *The Ashgate research companion to feminist legal theory*. (Farnham: Ashgate, 2013) [ISBN 9781409418597] (available in VLeBooks via the Online Library).**

The editors' introduction in this volume is a brief but useful account of the state of play in feminist legal theory.

- **Davies, M. 'Law's truths and the truth about law: interdisciplinary refractions', Chapter 4 of Davies and Munro. This provides interesting recent analysis of current debates.**
- **Hunter, R. 'Contesting the dominant paradigm: feminist critiques of liberal legalism', Chapter 1 of Davies and Munro. This maps important debates between feminist critiques and liberal legalism.**
- **Jackson, E. and N. Lacey 'Introducing feminist legal theory', Chapter 16 of Penner, J. et al. (eds) *Jurisprudence and legal theory: commentary and materials*. (Oxford: Oxford University Press, 2002) [ISBN 9780406946782] (available on the VLE).**

You may be interested in a recent difference of opinion between Green and Conaghan on the question of feminist analysis of the concept of law.

- **Green, L. 'Gender and the analytical jurisprudential mind' (2020) 83(4) *MLR* 893–912.**
- **Conaghan, J. 'Gender and the analytical jurisprudential mind: a response to Leslie Green' [2020] *MLR Forum* 006.**

12.1 Central common themes of FLT

Freeman at para. 14–001 explains FLT as seeking to:

> analyse the contribution of law in constructing, maintaining, reinforcing and perpetuating patriarchy and it looks at ways in which this patriarchy can be undermined and ultimately eliminated.

Feminist legal scholars' common themes include a wish to:

- show how law defines what is male/female/masculine and feminine, reinforcing the position of men and women in society to men's advantage
- analyse how the differences between women and men should or should not be reflected in legal rules, institutions and structures
- place the lived experiences of women at the centre of their scholarship
- stress ideals of women's self-determination and freedom: for women to be treated as fully human. This draws upon themes of liberalism and we can ask if this is a critique of liberalism or a better realisation of liberalism (see especially Nussbaum)
- bring change and transformation to society, including the legal system, to improve people's lives.

Power, oppression, emancipation, freedom, equality, justice and what it means to be human, and how these are captured in law, are central general themes. Although FLT has now become a vast topic, this chapter aims to steer you through some of these themes and the abstracts in the core reading.

12.2 A brief history of feminist legal theory

12.2.1 First wave

Enlightenment feminists, like Mary Wollstonecraft, writing at the time of the French Revolution, asserted that women, like men, possessed the innate capacity for reason. Such feminists argued that women's capacity for rational thought had been suppressed by their upbringing, since they were forced into a stereotypically dependent, subservient, 'feminine' type of socialisation process, being discouraged from developing, or at least not encouraged to develop, their own intellectual faculties as they were perceived, provided with an inadequate or disadvantaged education. Women were prevented from engaging in public life, through an emphasis on supposedly 'womanly' private domestic responsibilities, denied the opportunities to engage in political processes and formally excluded from decision-making. (The division of the public and the private spheres has been a recurring theme in FLT – have a look at the analysis in Freeman on this.) Such a situation was lamentable said enlightenment feminists, but they were hopeful the situation could be changed by a different socialisation of the two sexes – effectively providing both boys and girls/men and women with similar upbringings/conditions/opportunities. The rhetoric of liberalism (of equality, freedom, the rights of man) and particularly John Stuart Mill's work specifically discussed the unfairness of the subjection of women and argued in favour of women's rights.

Mid-19th to early 20th century suffragists arguing for the rights of women to vote and other legal rights are known as the **first wave** of feminism. Their argument was that, if men have certain rights and can do particular things, women should be able to do these too. Women should be equally protected by the law and the law should apply to all – men and women – equally by according men and women equal treatment. During much of the 20th century, incrementally in different nation states governed by different domestic laws, women gained the vote and obtained formal equality before the law.

12.2.2 Second wave

The modern (1960s and onwards) women's liberation movement, often known as the **second wave** of feminism, emerged out of the civil rights, and then often more radical, movements in the 1960s seeking freedom and equality for women, particularly in areas of employed work outside the home, reproductive rights with freedom over their own bodies, sexuality and life choices in general. Some **activists** were **female lawyers** or legally trained and many lawyers developed feminism's general view of treating women as equals, or enabling women to be free, into a more specific focus of the legal world on what was happening in universities, in legal training and in legal practice. A variety of legal scholars working in different areas with diverse perspectives and concerns began to focus on feminist issues or on how the law affected the lives of women; how law related to women; whether it in fact treated men and women as equals: formally and substantively.

It is generally considered that the first feminist movement was a liberal concern arguing for **equality**, which sought to have the same status and protections given to women as men enjoyed under the law. However, this encountered the problem of the standard being a 'male standard': women having to live up to standards set by men for men, which may suit (certain) men's lives – on this see Section 12.5. This changed in feminist analysis of the law to a concern for asserting **difference** or trying to get the law to treat men and women as equal but different. This approach, however, risked returning to the arguments of natural subordination. An alternative is to be more reflective and constantly **ask the woman question** (see Sections 12.4 and 12.5.2). It seeks to fully understand the role of gender in constituting legal and social relations and, conversely, the role of legal relations in constituting gender.

NB: FLT is part of feminist thought in general. Sometimes you will hear references to first-wave feminism. This refers to the period 1790 until the suffrage. Then 'second-wave' feminism refers to post-1960s. Some refer to 'third-wave' feminism as a postmodern 2000s onwards era but many dispute there have been any other 'waves' since the second.

12.3 Dealing with equality and difference

A debate that has been central to FLT since the 1970s has important effects in law in practice. The early push for feminists was for equality with men. However, this led to many queries, including: do women want to be treated like men? Does equality for women require **different** treatment? Are there more important values than equality? These questions are common within equality and justice debates in general. Freeman explains these as issues of **how feminists should define and respond to sexual difference**. Which approach needs to be taken?

- Ignore or emphasise sex or gender differences?
- If emphasise, how should affirmative action be used to achieve more substantive equality?

Certain feminists are critical of a traditional, liberal, approach to equality: one which should be familiar to you from liberalism and law, the traditional liberal jurisprudence prevalent in democratic states **including in the theories of Dworkin and Hart**. However, **Wendy Williams** argued that feminists have two strategic choices: either **equality on the basis of similarities** between the sexes or **special treatment** on the basis of sexual differences. She favoured the former. Others say that an equal treatment approach may work for women who meet male norms, whose lives conform more with male ways of living but is this really what feminists seek? **Christine Littleton** calls instead for a reconstruction of thinking about equality. To accept women's difference, society needs to do more than accommodate difference. She gives examples of consequences including paying mothers the same wages as soldiers or not paying soldiers. Her aim is to challenge 'phallocentrism'.

12.4 Critiquing law's supposed universal scope

Core text

- **Freeman, Chapter 14 'Feminist jurisprudence', extracts by Bartlett, K.T. 'Feminist legal methods', para. 14-012 and Finley, L.M. 'Breaking women's silence in law: the dilemma of the gendered nature of legal reasoning', para. 14-013.**

The wave of feminism that developed in the 1960s and 1970s was concerned, among other things, to demolish what many writing within this 'wave' saw as the myths of universality in concepts of political and legal theory. This involved analysing the 'classic works' of the European past and demonstrating their patriarchal character (for a definition of patriarchy, see Section 12.5.3) – one may argue that this work also needs to be done for the non-Western past as well.

This was often a **deconstructive** process – that is, criticising law's failures. Many have felt that it would be a harder task to **reconstruct** concepts in political and legal theory in a new way that was relevant not only to the **freedom and inclusion of women** but that also advanced **emancipation and equality for all**. Concepts such as power, freedom, authority, privacy, democracy and citizenship are to be rethought and feminist writers brought in concepts not traditionally part of the liberal canon of political and legal theory – for example, care. But a lasting question may be: 'is a post-patriarchal society conceptually imaginable and practically feasible?' Feminist methods have been suggested to address this. Bartlett emphasises three feminist legal methods:

1. Asking 'the woman question'.
2. Feminist practical reasoning.
3. Consciousness-raising.

The key, Bartlett argues, is to see beyond one's own limited perspective. In Finley, we see examples of the way law sees women as refracted through the male gaze rather than through women's own experiences and definitions.

These critiques focus on the 'epistemology of jurisprudence', i.e. the theory of knowledge expounded in law and thinking about what law is. The assertion is that within traditional jurisprudence some writers claimed the title of objective science for generalisations that have been assertions from the masculine mode of thought. Some feminist scholars claim that such prevailing positions are not 'objective' but only limited and biased; hence any perspectives arrived at are only partial. Instead, all scholars must recognise the embeddedness of their own assumptions within a specific historical context. By drawing on other disciplines, we are now asking if not only the practice of law silences women's aspirations and needs and, conversely, privileges those of men but whether the **very construction** not only of the legal discourse, but representations of the discourse in the academy (the construction of our understanding and knowledge of law), is the product of patriarchal relations at the root of our society.

ACTIVITY 12.1

Read in Freeman, Chapter 14 'The inquiries of feminist jurisprudence', para.14–002 the discussion of Heather Wishik's list of feminist inquiries into law.

How does Wishik list feminist inquiries into law? (When answering, rewrite Wishik's questions in your own words.)

Feedback: see end of guide.

12.5 Feminist political orientations

CORE TEXT

- **Freeman, Chapter 14 'Feminist jurisprudence', extract by Cain, P.A. 'Feminism and the limits of equality', para. 14–009.**

We will look briefly in this section at influential views: the liberal; ethic of care; radical feminist; black feminism, and the poststructuralist or postmodernist. NB: these are not set categories; there is overlap between positions but this is a useful way to introduce you to the study of FLT.

12.5.1 The liberal view

The principal aim of the **liberal** view of law is to uphold the rule of law: i.e. that all people are equal before the law. On this view, the law is neutral and impartial among persons. In law, sex or gender (also colour, ethnicity, etc.) are irrelevant.

Wollstonecraft and Mill and the first wave of feminism, mainly from the 19th century and into the 20th century, set out a liberal feminist perspective. Further, the aim of much early second-wave legal feminism, from the 1960s onwards, was to show how women were **not** treated equally. These arguments emphasise that girls or women should be given the same rights to education and opportunities as boys/men: see Wollstonecraft, M. *A vindication of the rights of woman* (1792). The use of law is therefore a vital reform tool. If law in the liberal tradition is to bring justice, fairness and equality to all and freedom for the individual, liberal feminism shows how law is failing to live up to its own standards of justice and fairness, equality for over half of the population by failing to give women equal rights. Law can be used – through (better) interpretation or new legislation – to reform existing law to live up to its own liberal standards. Using this approach, sometimes called the **'sameness' approach** – deriving from the idea that this involves treating men and women the same – it was better to view gender or sex differences as legally irrelevant. The approach meant that women should be given the same rights and entitlements as men: give women equal treatment; dispense justice even-handedly; try to live up to the ideal of neutrality between persons and gender justice would be achieved.

Despite its promise of a better future, cracks appeared in this approach. Many saw it as **women having to become like men** – becoming equal meant movement in a one-way direction towards the male standard, trying to live up to public standards and systems and laws already created by men for men, in the male image.

Such an approach was criticised for removing the **'feminine'** from the law, or continuing to prevent its inclusion (except for stereotypes of womanly images in the law). Was it reinforcing existing biases? Would it not always be more difficult for women to live up to the standards if they were standards made in the male image? How could this approach help in areas where men either cannot, or usually do not, feature – such as pregnancy, abortion or sexual violence?

Criticisms of the 'sameness' approach came from various other feminist approaches – in particular, from **ethic of care** or **cultural feminist** legal theories and **radical** legal feminists.

12.5.2 Ethic of care

This approach argues that there are genuine, somehow relevant, differences between men and women that should be celebrated. Women have their own moral perceptions that are either more valid than, or at least as valid as, men's.

Much of this work comes from a development of the work of psychologist Carol Gilligan, who identified two distinct moral codes that correspond to gender when she carried out research on various groups of girls/boys/men/women, including asking about the Heinz dilemma: should Heinz steal a drug he cannot afford to save his wife's life? Gilligan's work provides counterarguments to previous research by Lawrence Kohlberg, who identified five stages of moral development, with impartial thought being the highest, at stage 5.† Kohlberg's research appears to show that women never got higher than stage 3. On the basis of her new findings, Gilligan then argues in *In a different voice: psychological theory and women's development*. (Cambridge, MA: Harvard University Press, 1982) [ISBN 9780674970960] for a re-evaluation of the feminine.

†Gilligan had worked with Kohlberg on his research and queried the results.

The two moral codes or voices identified are:

1. **A feminine mode** based on caring – the maintenance of relationships, a web of communications and networks; concern for the particular needs of others in their particular contexts.

This is the **ethic of care**. Gilligan argued that women placed greater emphasis on context and the concrete effects of their decisions on other people:

> The elusive mystery of women's development lies in the recognition of the continuing importance of attachment in the human life cycle. Women's part in man's cycle is to protect this recognition while the developmental litany [that is the doctrine whereby higher modes of moral reasoning entail greater abstraction] intones the celebration of separation, autonomy, individuation and natural rights.
>
> (1982, p.23)

2. **A masculine mode**: objective, impartial, impersonal, unemotional, thinking of obligations, justice, rights and rules. That is, the generally idealised form of the legal and political system.

This is the **ethic of justice**. As Gilligan summarises it (1982, pp.19 and 20) Kohlberg's developmental psychology rests on a concept of justice rooted in a 'rights conception of morality', which 'is geared to arriving at an objectively fair or just resolution to moral dilemmas upon which all rational persons could agree'.

But what are the consequences of the ethic of justice? According to Benhabib, in Benhabib, S. *Critique, norm and utopia: a study of the foundations of critical theory*. (New York: Columbia University Press, 1986) [ISBN 9780231061650]):

> This results in a corresponding inability to treat human needs, desires, and emotions in any other way than by abstracting away from them and by condemning them to silence... Institutional justice is thus seen as representing a higher stage of moral development than interpersonal responsibility, care, love, and solidarity; the respect for rights and duties is regarded as prior to care and concern about another's needs: moral obligation precedes moral affect; the mind, we may summarize, is the sovereign of the body, and reason, the judge of inner nature.
>
> (1986, p.342)

Instead of care and this approach being repressed and undervalued, ethic of care, sometimes referred to as cultural feminism argues that this approach ought to be heard together with the ethic of justice or 'male voice', which is historically dominant and particularly prevalent in law. The feminine voice is just as rational and potentially public in scope; it is not just for use in the home, the private sphere, etc.

In terms of methods, it is useful here to connect this orientation in FLT to what has been referred to as 'asking the woman question'. This is linked to the critique of 'abstract masculinity' as the organising force of social thought.[†]

This argument holds that the ideals of Western rationality, notably the rule of law but including scientific thought, distort and leave partial our understanding of nature and social relations. These ideals devalue contextual modes of thought and emotional components of reason. The issues that have dominated the task of governing and deciding on new legislation have been issues that have most concerned men; the potential for an alternative woman's perspective has been systematically ignored. Thus we find it argued that modernity has privileged male thought on ethics as superior morally to feminine modes of understanding.

Many queried Gilligan's findings – how could a small sample be translated into a world view of the way men and women think? Even if accurate on that front, some are more concerned as to why women may care more than men and why they appear to value relationships more. Gilligan appears neutral on this point. If women do care more, is it because of the different socialisation processes in boys and girls? Is it for psychological reasons relating to identification with your primary carer in early life – usually the mother (i.e. do girls gain their identity by a connection or similarity with their mothers, while boys gain their identity as a separation or difference from their mothers)? Or is it because of women's biology – are women somehow more connected to other life because of their reproductive capacity? In legal feminism, this is an uncommon stance to take but Robin West in 'Jurisprudence and gender' (1988) (see extract in Freeman, para. 14–010) illustrates it well conceptually. West asked '[w]hat is a human being?' She said this was an important question for legal theorists to answer because 'jurisprudence, after all, is about human beings.' West concluded that, as far as legal theory is concerned, women are not human beings. West sets out a table of the official and unofficial stories of what it means to be human and how those differ in law, depending on one's perspective.

This is often called 'difference feminism'. However, difference feminism can include postmodernist positions too.

[†] As Rich, A. *Of woman born: motherhood as experience and institution*. (London: Virago, 1977) [ISBN 9780393312843] argues in response to her reading of the mind–body distinction that has relegated women's reasoning to the status of the naturally irrational: 'Female biology – the diffuse, intense sensuality radiating out from clitoris, breasts, uterus, vagina; the lunar cycles of menstruation; the gestation and fruition of life which can take place in the female body – has far more radical implications than we have yet come to appreciate... We must touch the unity and resonance of our physicality, our bond with the natural order, the corporeal ground of our intelligence.' (p.21)

ACTIVITY 12.2

One of Gilligan's research methods involved posing the 'Heinz dilemma'. She asks her research subjects: should Heinz steal a drug he cannot afford in order to save his wife's life?

Please answer this – it is instinctual reactions that matter. Then give reasons for your answer.

Feedback: see end of guide.

ACTIVITY 12.3

Read Freeman, Chapter 14 'Feminist jurisprudence', extract by West, R. 'Jurisprudence and gender', para. 14–010.

a. **What is her argument?**

b. **In what ways do women crave intimacy and connection with others, rather than the separation and autonomy that are one of the main values in liberal legal theory?**

c. **How are women severely disadvantaged by liberal legal jurisprudence?**

d. **What are the particular recurrent experiences in women's lives that emphasise connection?**

e. How convincing do you find these – as always provide evidence for your position.

No feedback provided.

12.5.3 Radical feminism

The most prominent radical feminist working in law and FLT is Catharine MacKinnon. MacKinnon dislikes the sameness and difference approaches as she believes that both try to make women live up to standards set by men. The equality standard is criticised as being based on men's lives. The difference and ethic of care approach is also criticised as valuing care because women give it to men: that image or construction of women is favourable to men or patriarchy. Affirming difference therefore means affirming powerlessness. MacKinnon says that such differences between men and women are **hierarchically socially constructed** to best suit men and to keep women oppressed. She has famously compared feminism with Marxism. Sexuality in its relation to feminism is analogous to the relations between work and Marxism: that which is most one's own is that most taken away or 'alienated' by the social construction of a false identity. The gender system itself is a **power system**, unequally structured to suit men's lives. Law's supposed neutrality only reinforces this inequality. When law is at its most neutral and objective, it is at its most masculine.

Despite the strong critique of law and its role in the construction of the current configurations of sex or gender differences to men's advantage, MacKinnon argues that law can be used as a tool to empower women to change both their circumstances and the legal system itself. Much of MacKinnon's early work focused on pornography and sexual abuse. Pornography is seen as exploitative and degrading of women.[†]

[†] MacKinnon stated in 1989 that in the USA almost 50 per cent of all women are raped or are the victims of attempted rape sometime in their lives (see MacKinnon extract in Freeman, 14–011). MacKinnon argues that notions of 'consent' and 'choice' are invoked to conceal force and that the notion of consent is often invoked in rape trials as a way of legitimising what has in reality been an act of force. For MacKinnon rape is the defining paradigm of sexuality but force is pervasive in many areas of gender relations.

Patriarchy

Carol Johnson described 'patriarchy' as:

> a system of male domination that involves the subordination of women. Patriarchy takes different forms in different societies and different historical periods. It interacts with other forms of oppression, such as class, race and sexuality, in very complex ways.
>
> Johnson, C. 'Does capitalism really need patriarchy? Some old issues reconsidered' (1996) 19 *Women's Studies International Forum* 193, 201 (available in the Online Library)

Patriarchy is a system of hierarchical power; it oppresses and devalues femaleness, the feminine and, therefore, women in general in intersectional and contextually sensitive ways. Definitions of the human that mean 'man' contribute to that system. Definitions of 'woman' that represent one monolithic view that results in a partial and specific woman who is white, propertied, Western and so forth also do this. In post-patriarchy, feminists argue, these issues and problems will be overcome.

This inquiry into the legal system is feminist because it is grounded in women's concrete personal lived experiences: one of the rallying calls of second-wave feminism was that the personal is the political. MacKinnon describes feminist method as **consciousness-raising**: i.e. the collective critical reconstruction of the meaning of women's social experience as women live through it: see Freeman, extract by Bartlett, K.T. 'Feminist legal methods' (para. 14–012) and re-read this when you have considered the other political orientations below.

Activity 12.4

What is patriarchy?

Give some examples of it in action from your country.

Activity 12.5

What is meant by 'consciousness raising'?

No feedback provided.

Many criticised MacKinnon's theory for presenting women as a group of passive victims, created and positioned by men or the patriarchal structure. Indeed, both ethic

of care/cultural feminism and radical feminism came to be criticised as producing a common standard for all women to live up to. In the same way that feminists had originally criticised the common standard women had to achieve for being a male standard, now it was criticised as producing one feminist standard for women. This is often described as 'essentialising' women and being a reductionist position. These criticisms came particularly from black feminists and postmodern feminists.

12.5.4 Black feminist thought/critical race feminism

Following developments in US scholarship in the realist tradition, critical legal realism and critical race theory (see Chapters 13 and 16 of Freeman), feminist race scholars argued that many feminists over-emphasised gender classification at the expense of other social factors, particularly here, race. Certain feminists ignored, or seemed oblivious to, the diversity among women and how that affects experiences of oppression. Kimberlé Crenshaw† coined the term 'intersectionality' to highlight the multiple forms of overlapping oppression experienced by non-white women. Since the late 1980s, many have sought to integrate issues of race, ethnicity and nationality into feminist theory. See, for example, hooks, b. 'Theory as liberatory practice' (1991) 4(1) *Yale Journal of Law and Feminism* 1 – available in the Online Library.

† See Crenshaw, K. 'Demarginalizing the intersection of race and sex: a black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics' (1989) *University of Chicago Legal Forum* 138–67 and Crenshaw, K. 'Beyond racism and misogyny' in Matsuda, M., C. Lawrence and K. Crenshaw (eds) *Words that wound: critical race theory, assaultive speech, and the First Amendment*. (Boulder, CO: Westview Press, 1993) [ISBN 9780813384283].

Black feminists stress the importance of asserting rights, of creating a sense of self-determination through narrative storytelling of life experiences and taking 'a subject position'. The scholarship of black American law professor Patricia J. Williams† is a prominent example of this type of work. Often when people are socially powerless, their freedom – starting with that in their own heads and then the sharing of their views with others through the narrative method – can in itself lead to a sense of empowerment.

† Williams, P.J. *The alchemy of race and rights: diary of a law professor*. (Cambridge, MA: Harvard University Press, 1992) [ISBN 9780674014718.]

Williams deliberately seeks to escape the traditional forms of clear, logical writing in the name of being true to real experience. She uses reflections on personal experiences as the focus for exposing general themes. As she explains in her writing:

> I am interested in the way in which legal language flattens and confines in absolutes the complexity of meaning inherent in any given problem; I am trying to challenge the usual limits of commercial discourse by using an intentionally double-voiced and relational, rather than a traditionally legal black-letter, vocabulary. For example, I am a commercial lawyer as well as a teacher of contract and property law. I am also black and female, a status that one of my former employers described as being 'at oxymoronic odds' with that of a commercial lawyer... On the one hand, my writing has been staked out as the exclusive property of constitutional law, contract, African-American history, feminist jurisprudence, political science, and rhetoric. At the same time, my work has been described as a 'sophisticated frontal assault' on laissez-faire's most sacred sanctums, as 'new-age performance art', and as 'anecdotal individualism'. In other words, to speak as black, female, and commercial lawyer has rendered me simultaneously universal, trendy, and marginal.
>
> (1992, pp.6 and 7).

Another perspective relates how the 'feminine mystique' uncovered by Betty Friedan in the early 1960s of the disenchanted suburban American housewife – the confinement of women in domestic circumstances in the modern family – overlooks the role of the racial ethnic 'domestic help'.

In Freeman, extract by Okin S.M. 'Is multiculturism bad for women?' (para. 14–015) there is a discussion of potential conflicts between feminism and cultural pluralism. What if some minority cultural value systems appear to Western feminists as detrimental to women? How should a Western legal system respond, for example, to polygamy or female genital mutilation?

Activity 12.6

The following extract comes from the beginning of Williams, P.J. *The alchemy of race and rights: diary of a law professor* (1992). Read it and then answer these questions:

a. **What is 'subject position' and why does Williams appear to consider it fundamental in her analysis of the law?**

b. **What difficulties can you see in following through the logic of 'subject position' or 'standpoint theory'?**

Diary of a law professor

Since subject position is everything in my analysis of the law, you deserve to know that it's a bad morning. I am very depressed. It always takes a while to sort out what's wrong, but it usually starts with some kind of perfectly irrational thought such as: I hate being a lawyer. This particular morning I'm sitting up in bed reading about redhibitory vices. A redhibitory vice is a defect in merchandise which, if existing at the time of purchase, gives rise to a claim allowing the buyer to return the thing and get back part or all of the purchase price. The case I'm reading is an 1835 decision from Louisiana, involving the redhibitory vice of craziness.

The plaintiff alleged that he purchased of the defendant a slave named Kate, for which he paid $500, and two or three days after it was discovered the slave was crazy, and ran away, and that the vices were known to the defendant... It was contended [by the seller] that Kate was not crazy but only stupid, and stupidity is not madness; but on the contrary, an apparent defect, against which the defendant did not warrant...The code had declared that a sale may be avoided on account of any vice or defect, which renders the thing either absolutely useless, or its use so inconvenient and imperfect, that it must be supposed the buyer would not have purchased with a knowledge of the vice. We are satisfied that the slave in question was wholly, and perhaps worse than, useless.

As I said, this is the sort of morning when I hate being a lawyer, a teacher, and just about everything else in my life. It's all I can do to feed the cats. I let my hair stream wildly and the eyes roll back in my head.

So you should know that this is one of those mornings when I refuse to compose myself properly; you should know you are dealing with someone who is writing this in an old terry bathrobe with little fringes of blue and white tassels dangling from the hem, trying to decide if she is stupid or crazy.

Feedback: see end of guide.

12.5.5 Postmodernist feminism

Criticisms of 'totalising' and then 'governance feminism' are made by critical theorists and postmodernists about any attempts to find a universal truth or standard of justice for women, or for anyone or anything else. They argue that not only is such a search undesirable – for example, it could be seen as neo-colonial or evidence of some sort of new imperialism – it is also impossible to do. They argue that any so-called 'quest' for a universal feminist jurisprudence is unattractive and even potentially dangerous. If 'woman' has a socially constructed false consciousness with a real essence to be uncovered somewhere within her, this 'essentialism' fixes identities, excludes those women who have other experiences, and is reductionist and potentially reactionary.

This postmodern development can in turn be critiqued for weakening feminist politics because feminism as a political movement, with the aim of alleviating women's oppression, depends on some unified notion of what is right and just and of an oppressed group. This has led to criticisms that the postmodern perspective poses problems for any radical political theory that presents certain ways of life or existence as better than others. If each claim to truth is valid, who is to say which is better? While much postmodern work does not disintegrate into nihilistic relativism, some does. Janet Halley's call to take a break from feminism describes 'governance feminism' as institutionalising feminist ideas in law and formal power, which she sees in a variety of areas.[†]

[†] Halley, J. *Split decisions: how and why to take a break from feminism*. (Princeton, NJ: Princeton University Press, 2008) [ISBN 9780691136325].

12.6 FLT and the future

FLT often aims to offer alternatives to make women's lives fairer and better in the present, while also proposing reforms for a better future. In most work, this involves setting out agendas for change with positive effects for society in general. Sometimes, this can lead to tensions. If the current position is patriarchal and oppressively structured to women's disadvantage, will this position be reinforced by providing more help or support?

The question is frequently raised whether FLT can really make any practical difference. As a result of much of these theorists' work, cultural shifts have taken place and laws have been changed. The feminist judgments project, which is underway in a number of countries around the world, has led to many reworkings of legal judgments. Rather than only critiquing existing judgments, the participants have put 'theory into practice' by engaging in a practical, 'real world' exercise of judgment-writing, subject to the same constraints that bind appellate judges. In doing so, they have pioneered a new form of critical sociolegal scholarship, which seeks to demonstrate in a sustained and disciplined way how judgments could have been written and cases could have been decided differently. For further reading and development of your analysis, feel free to explore these projects.

Within Anglo-American feminism, more recent work has argued for a return to progressive political programmes – as feminism has traditionally pointed out injustices, the wrongness of the violation or exploitation of women, and the need to make women's lives better. This is particularly important in regard to human rights, especially at an international level. Human rights law rests on the notion that all individuals – regardless of where they live, their sex, gender or race, etc. – are equally entitled to rights simply because they are human. It has been argued that violations of men's human rights better fit the model of human rights violations that have been based on male experiences of what a violation is. The more feminised victims become, therefore, the less likely it is that international human rights will be found to be violated. But women need to be sure that their rights not to be violated are upheld – including not being sold or deceived into slavery or being treated as sex objects; to have economic security and a voice in public life; to have control over their own bodies. MacKinnon and others have been active in the international arena and development of this body of law, including international criminal justice and sexual violence in conflict. Viewed in this way, feminism is part and parcel of human rights discourse; women are, and should be treated as, equal human beings.

It seems that the liberal emphasis on rights, freedom and equality is again being revisited by many feminists. There is a recognition that there is still a need, now more than ever, for change, transforming links between theory and practice, and at least some type of universal truth – perhaps at the most mundane or common level, a global acceptance that treating women as less human than men is wrong. This all presupposes a binary system of male and female, which is increasingly being called into question in the 21st century. That important issue is beyond the scope of this chapter.

REMINDER OF LEARNING OUTCOMES

By this stage you should be able to:

- **identify central themes and approaches in feminist jurisprudence**
- **discuss the work of several key scholars**
- **give an account of the history of theorising in this area**
- **identify and understand the commonly categorised orientations in FLT**
- **apply feminist scholarship to certain key examples of legal practice.**

Self-assessment questions

(Also remember to look at past exam questions and reports.)

Question 1 Discuss at least two contributions that you consider feminism has made to jurisprudence.

Question 2 Is there such a subject as feminist jurisprudence, or is feminist jurisprudence merely what feminist lawyers point out is illiberal in the law?

Question 3 'Traditional jurisprudence has been the thoughts of men reflected in a legal system built by men for men; it is only the ideology of the masculine.' Does this claim have any validity?

Question 4 In what ways, if any, does the law systematically discriminate against women?

Question 5 Are there general arguments to support the notion that a feminist legal theory is possible?

Sample examination questions

Question 1 Critically evaluate the contribution to legal thought of any two feminist legal scholars.

Question 2 'Feminist scholars reject dominant masculine assumptions and have succeeded in removing them in law.' Discuss.

ADVICE ON ANSWERING THE QUESTIONS

Question 1 You can choose whichever feminist legal scholars you wish, as long as they have been the subject matter of this chapter and essential readings and are therefore covered by the course.

In your introduction, which you must have, set out which two scholars you have chosen. You should explain why you have chosen them: is it, for example, because you strongly agree or disagree with them; is it because you are of the opinion they bring something important to the debate, something stimulating and reflective? Also set out in your introduction the structure your essay will take. An excellent answer will have **themes**. These could be: power, law's supposed neutrality, women's freedom, and so forth, which may be used as headings in your essay with description, analysis and evaluation – what you think of the theorist's position and why. All of this must be set out in your essay in response to the question. It is not advisable to write in a list-like fashion, as this appears descriptive and report-like, as opposed to being a proper essay written in good prose with evaluation and evidence. You should draw on other legal theorists who may criticise the two you have chosen. This can be wider than within FLT itself but, as ever, avoid overlap with other essays you choose in the examination paper.

Question 2 Some claim that feminist writings offer critiques of the truth of the existing state of affairs but, if that is so, what guarantee of 'truth' can they offer? For example, in MacKinnon's work, she defines our present situation and modes of thought as inescapably imbued with masculine domination. If that is the case, how can her analysis escape the grip of this domination and actually create unbiased or true new ideals? Drucilla Cornell (Cornell, D. *Beyond accommodation: ethical feminism, deconstruction, and the law*. (New York: Routledge, 1991) [ISBN 9780415901062]) identifies this as the problem of false consciousness in the writing of MacKinnon:

> For MacKinnon, what women desire now under patriarchy is by *definition* false consciousness. So we think that we want love and intimacy? For MacKinnon, we only think that way because that's how they want and need us to think so that we will continue to be available to them. Women's expressed desire is only an ideology... Because we think we want love and intimacy, we put up with 'them' in a way we would not otherwise. ...no matter what I or any other woman says or writes about the legitimacy, and indeed value, of love, we do so only to the degree that we are deluded and, in spite of ourselves, complicit in our degradation. (p.133)

In this there is no way out, there is no level of the 'other' other than desires, thoughts, modes of intellectual development which 'they' (i.e. the structures of masculinity), have allowed. Women are wrapped in the desire/power of men, their reality 'silence'; therefore, how can women, and MacKinnon, break from that silence? What about 'consciousness raising'? What will that reveal?

Moreover, in the process of pointing out the partiality of modern social theories and legal perspectives, feminists have frequently employed generalising categories like 'masculinity' and 'femininity' in problematic ways. While demanding a situational critique of previous theory, feminists often talk as if their own theory could escape such a self-critique.

A reductionism in locating 'the cause' of women's oppression, such as production, sexuality, child rearing or language, is sometimes apparent. Susan Brownmiller and Andrea Dworkin, for example, locate the biological roots of patriarchy in man's capacity to rape. Thus male power is ultimately reduced to coercion, but this reduction is at the expense of acknowledging complex cultural elements which require more diverse forms of analysis. While rejecting universalist forms, the critique often becomes itself universalist.

Reflect and review

Look through the points listed below:

Are you ready to start revising this guide?

Ready to move on = I am satisfied that I have sufficient understanding of the principles outlined in this chapter to enable me to go on to revise the whole subject.

Need to revise first = There are one or two areas in this chapter I am unsure about and need to revise before I go on to wider revision.

Need to study again = I found many or all of the principles outlined in this chapter very difficult and need to go over them again before I move on.

Tick a box for each topic.

	Ready to move on	Need to revise first	Need to study again
I can identify central themes in feminist jurisprudence.	☐	☐	☐
I can discuss the work of several key scholars.	☐	☐	☐
I can give an account of the history of theorising in this area.	☐	☐	☐
I can apply feminist scholarship to certain key examples of legal practice.	☐	☐	☐

If you ticked 'need to revise first', which sections of the chapter are you going to revise?

		Must revise	Revision done
12.1	Central common themes of FLT	☐	☐
12.2	A brief history of feminist legal theory	☐	☐
12.3	Dealing with equality and difference	☐	☐
12.4	Critiquing law's supposed universal scope	☐	☐
12.5	Feminist political orientations	☐	☐
12.6	FLT and the future	☐	☐

NOTES

Feedback to activities

Contents

Chapter 2

Activity 2.1

Notice the two very different sources of natural law (i.e. our understanding of morality in these passages): first, our shared reason – our 'shared conceptions' given us by nature by which we all classify things in the same way, evil with evil, good with good, and so on; but second, God, the 'author' of the natural law. Is it not possible for our reason to conflict with what we learn from the revelation of God's will? This tension between reason and revelation was a source of doubt throughout the Renaissance:† was the moral law as revealed by God good just because God willed it, or was it willed by God because it was good? Grotius† famously denied that right conduct was good just because God willed it, holding that natural law would be valid even if God did not exist. One of the questions these passages raise is this: does the natural law tradition provide a plausible theory of morality in the first place? After all, for a natural law theory to move on fruitfully to consider the moral character of the law, it must be sound in its fundamentals. But have you any faith that morality can be successfully derived from man's reason alone, or from revelation, or from some combination of the two? A utilitarian would adamantly oppose this sort of characterisation of morality. So does natural law theory's claim that law and morality are at some level connected depend upon the sort of theory of morality you espouse?

† Renaissance (French for rebirth): the upsurge of cultural, philosophical and cultural life that spread from Italy to the rest of Europe beginning in the 14th century. It was triggered by the rediscovery of classical Greek, Islamic and Roman texts.

† Grotius: Hugo Grotius, Dutch legal scholar, 1583–1645.

Activity 2.2

Assuming that forcible assault and sexual intercourse among citizens is universally regarded as wrong (which, on the anthropological evidence, is a fair assumption), laws prohibiting rape can be seen to reflect the basic precepts of natural law, a prohibition which is universally understood by all with reason. However, various passages in the Bible also testify to the wrongness of rape, and so one can also conclude that the evil of rape is revealed to us by God, and thus forms part of the divine law as well. Note, however, that the particular legal requirements for criminal conviction, such as the rules regarding *mens rea* and consent, the rules on evidence and the punishments imposed, are matters of human law. These specific rules are not spelled out by the divine law or natural law. The law of wills is an interesting case, for if the law of wills is the law which concerns looking after one's dependants on one's death, then this might be seen to draw upon both scripture and natural law. It is interesting to note that the law of wills was, in England and elsewhere, originally part of the canon law jurisdiction. Of course, the particular formalities, requirements and much else in the law of wills are clearly determined by human beings and form part of the human law. Almost all of the law of taxation, despite drawing in very abstract terms, upon the divine law and natural law – as the law which concerns and specifies our obligations to support our fellow man and provide resources for the public good which underpin a flourishing community – seems clearly to fall within the province of human law.

Activity 2.3

This is very similar to a general examination question focusing on Aquinas. Aquinas is justly famous for taking the ancient natural law tradition and 'Christianising' it in a way that provides genuine insights into the nature of the relations between law and morality that many people find compelling. In the first place, notice how his theory of the connection between law and morality is often portrayed as **indirect**, but in such a way that this indirect connection is nonetheless quite robust. For example, his characterisation of the orders of eternal, natural and human law emphasises the rational and guiding functions of order and law, so that human law seems naturally to fit within a larger structure. His distinction between *specificatio* and *determinatio*, and his emphasis on the latter as the way in which much human law is created, makes the supreme morality of natural law a constraint upon human law. This seems much more plausible than treating human law as somehow directly ordained by morality.

You should also note the various tasks which must be accomplished by the human law, and the limitations on what it can do, that Aquinas points out, once again explicating the indirect relation of human law to natural law. However, the theory

is unavoidably complicated by Aquinas's religious purposes, his sourcing of law in divine wisdom and his characterisation of the eternal law. These cannot be regarded as credible features of a theory of law in a secular age. Furthermore, it is arguable that Aquinas talks around, rather than giving a straight answer to, the central question of our moral obligation to follow the law whether the particular rule in question is just or not. Look at the formulations he gives of the way that human law partakes of the order of eternal law, and of the way law obliges in conscience. Could the guidance he provides about disobeying the law not equally be provided by a positivist: do what is morally right when the law says so, just because it is morally right; conversely, you have no obligation to obey the law if it is morally wrong, but obviously you should take into account the consequences of disobeying the law if that will cause more harm, morally speaking, than obeying, as when it might lead to civil unrest and violence, for example?

Activity 2.4

No feedback provided.

Activity 2.5

The 'focal' concept of law that Finnis describes is a theoretically narrowed, multifaceted conception of law as the rules and institutions which flow from working out of the requirements of practical reasonableness in its quest to provide a community in which the basic values can be realised. It is not the ordinary concept of law, which is much more diffuse, and that allows 'law' to be used to describe the anthropologist's primitive 'legal' culture, or describe the rules of a tyrant's coercive regime or the rules of the Mafia. Finnis is claiming to provide the best concept of law for the theoretical purposes of understanding law. The difficulty with this view is that it looks too 'stipulative', that is, Finnis decides upon his theoretical approach to law, one in the natural law mould, and then argues that the concept of law which differs from the ordinary concept of law is most suited to explaining law; but the sceptic might claim that having at the outset found value in the natural law tradition, Finnis just matches his concept of law to it. The point here is that we are not generally free to choose how we will define our concepts, whatever our theories of the things the concept represents. Our 'ordinary' concept of law is what it is because it reflects what we all share in terms of what counts as law and what does not; and no one is entitled simply to say that our ordinary concept of law is too diffuse or mistaken. The positivist would respond that our ordinary concept of law, which treats wicked legal systems of law as legal systems nevertheless, and wicked laws as laws despite their wickedness, is the concept of law we must explain. It does no good to tailor a concept to match our moral interests, as Finnis arguably does here, for that is simply to change the subject of the inquiry; by doing so, the positivist will respond, Finnis fails to address the phenomenon of law as it is understood by people generally. This sort of criticism cannot be blunted by appealing to the norms of reason of natural science, for example by saying that for the purposes of physics, it does not matter what our ordinary concept of, say, mass is, for physics is sound when it gets the nature of mass right, not because there is some kind of social acceptance of the physicist's theory of mass. The positivist would respond by saying that in the case of social institutions like the law, part of what makes them what they are is what people understand them to be, for institutions like law are made up of intentional human practices, ways of behaving, and so one cannot ignore the concept of the participants themselves in the practice when examining what the practice actually is. Bear these points in mind when you look at Hart's *The concept of law*.

Activity 2.6

According to Fuller, in order for the law to acquire the value of 'legality', the law must (1) operate by general rules, which (2) must be published to the subjects of the law, and (3) must operate prospectively rather than retrospectively, and (4) which are reasonably clear and intelligible, and (5) which are not contradictory, and (6) which do not change so often and radically so as to make it impossible for a subject of the law to follow the law, and (7) do not require the impossible of the subjects of the law, and finally (8) must be administered in accordance with their meaning and purpose.

Notice that these requirements of 'legal morality', which Fuller sometimes refers to as the 'inner morality of the law', are explained in terms of eight ways in which the law can fail to be made or administered in a just way. This might lead one to question whether these eight principles fully capture the morality of law, for they are all about avoiding doing wrong **rather** than achieving any valuable purposes. Even in procedural terms, it might be argued that Fuller does not capture obvious moral principles. Consider the two principles of 'natural justice' which deeply inform administrative law; *audi alteram partem* ('hear the other party' – the principle that a decision is not fair if both parties to a dispute are not given fair opportunity to present facts and make representations as to the law), and the principle that a tribunal must not be biased (i.e. that the decision-maker cannot have any interest in the proceedings or be related to either party so as to bring them into a conflict of interest). Are these not obvious principles of 'legality'? Can they easily be fitted into Fuller's eight principles? Hart's criticism is famous, and at first glance seems decisive, for it does indeed look as if Fuller's principles of legality are principles of **effective law-making**, not morality, which could be turned either to wicked or good purposes. The Nazis would have needed to follow Fuller's principles if they wanted to succeed in using the law to get their subjects to do what they wanted. There is, however, a possible response to this, though it is questionable whether it vindicates Fuller's view as a 'natural law' view. It might be said that retrospective legislation, legislation setting impossible tasks, or a failure to observe the *audi alteram partem* rule, are not just matters of ineffectiveness, but are obvious instances of unfairness, and thus immoral. While this seems right, it does not seem to establish a necessary connection between law and morality. All it seems to establish is that **if** you have a legal system in operation, then there are new and different ways of acting immorally than there would be if there was no legal system in place. So the existence of different social institutions, like law, the family, marriage or schools, give rise to new and different occasions for wrong-doing. If there were no examinations there could be no cheating in examinations; if there were no authors or books there could be no cases of plagiarism. But this does not establish that taking examinations is a moral enterprise, or that writing books is. Similarly, the fact that the law provides new and different occasions for acting wrongfully does not seem to establish any necessary connection between law and morality.

Chapter 3

Activity 3.1

No feedback provided.

Chapter 4

Activity 4.1

The famous example is the difference between 'being obliged' and 'being under an obligation' and you should think and comment on three other examples. This distinction is one that Hart discerns in the language. He then says that, characteristically, 'being obliged' applies to situations, such as the gunman demanding money from the bank teller. Here, he says, there is only physical coercion. But a situation where there is an obligation to do what is demanded would be where a tax inspector makes a legitimate demand. Hart then argues that we 'characteristically' associate naked coercion with lawlessness and that the tax inspector and the citizen relationship is one governed by law. So, he concludes, an insight into our use of language gives us an insight into the legal system.

Activity 4.2

a. This requires the use of imagination: can you be under an obligation to someone (say, to carry out your promise to them to go and see them) when, unbeknown to you, they have died? Would you then feel you had an obligation when, in fact, you had not?

b. Some international lawyers say that international law is more important than state law. How could Hart counter their views with his primary/secondary rule thesis that places the 'modern municipal legal system' at the centre of his theory?

c. This question goes to the heart of Hart's methodology. It asks you to consider what having an 'internal attitude' to law means. For example, could our 'internal attitudes' be settled by reference to a question of fact about what other people accept? If not, how, as Perry asks, could we resolve differences between us about what legal obligations there are?

ACTIVITY 4.3

The question is whether a corporation can be liable as a 'legal' person for a crime. From the Wittgensteinian perspective, it is hopeless to think that the fact that a corporation is a legal person answers the question, since because the criminal law applies to the conduct of individuals, we normally do not think of corporations as having the attributes of 'persons' which makes criminally prosecuting them sensible: for example, it is difficult to know what to do with the requirement of *mens rea* for criminal liability, for corporations do not have minds or intentions, or at least, if they do, not in the same way as individuals do. Nevertheless, one might argue that the criminal liability of corporations in such a case might serve some of the functions of criminal law, such as deterrence or the expression of strong social disapproval. If you are a Hartian, then you would regard a judge as having to exercise best judgment in such a case, weighing up the different purposes that criminal liability would serve, and considering the possible drawbacks. A Dworkinian would regard it as necessary for the judge to make their decision appear to put the law in its best light, fitting the decision within a broader theory of the underlying values of the legal system.

Chapter 5

ACTIVITY 5.1

Read what John Finnis has to say in his *Natural law and natural rights,* Chapter 1, pp.6–9. Finnis says that Hart constantly appeals to the 'practical point' of the components of his theory. What 'practical point(s)' do you think the rule of recognition serve(s)? You should refer back to Section 4.4 of this module guide. The point of reading this is to encourage you to consider whether reference to 'actual facts' is an easy thing to do. Facts come in all guises, and to find out what some facts are it is necessary to do something more than just record 'what is the case'. Hart's reference to function suggests that the task of merely recording 'facts' will require evaluation of some sort. 'What is the function of law?' is not a question that can easily be answered by reference to 'actual facts'.

ACTIVITY 5.2

Distinguish rules from principles as Dworkin does. Then try to provide and compare your own examples of legal rules and principles. Are you convinced that there is a distinction? Or that, if there is a distinction, it is of any importance?

ACTIVITY 5.3

The distinction is important to Dworkin since the application of principles requires a judgment of value, which will often be controversial among judges, and since the rule of recognition is defined as a matter of **fact** about what judges uncontroversially recognise, principles must be identified in some other way. In *Smith* it seems difficult to suppose that the words of the statute 'really' said, in an 'all or nothing' sense, that Smith had a right to knowledge that would enable him seriously to injure a person. But take Dworkin's example of the speed-limit traffic rule. He says that it applies in an all-or-nothing sense in that you are either driving over 30 mph or you are not. What about a person who drives at 50 mph on their way to hospital as their child needs urgent medical assistance? How should we view the situation if a judge, as a judge might well, decided that that person had not broken the law because they had the defence

of necessity? Do we say the rule is that no one can drive over 30 mph but a judge has discretion to waive the rule in accordance with a general principle of necessity, or do we say that a proper understanding of the rule is that necessity is implied into its meaning? Dworkin thinks that the latter kind of understanding is what is important as it preserves the idea that the judge is not acting as a legislator.

Chapter 6

Activity 6.1

No feedback provided.

Activity 6.2

This is a good example of an examination question which has a core subject matter that comes from one section of the module but in which to answer the question properly you need to draw upon your understanding gained from the module as a whole. You need to understand what sort of claims were made in the name of natural law and the aim of the positivist project. How far do you agree with the student who commented towards the end of their answer:

> Living in a Muslim country where parts of our law are Sharia laws that come from the Quran, I find it difficult to accept Hart's theory of the minimum content of law, and like Finnis, I feel that his theory is too minimal. The overlaps in law and morals stated are too little. Since some of our laws are divined from religious sources which not only states laws but also gives guidance on moral conduct, there is a lot of overlap between laws and morals and a lot of laws can be said to have a moral content. Even though the five truisms given by Hart are true for my society and I can relate to them, there are many others that are ignored by Hart and not covered in his theory…

Here is another from the same batch of scripts:

> Reading about the minimal content of natural law as a woman in a Muslim society I find the emphasis on a shared minimum the only realistic answer for interacting between cultures and different social groups. I am a sincere Muslim but when I read the Quran I can not often see all the rules imposed on Woman that male interpreters claim are there…
>
> I think that the Prophets were concerned to give both a minimum and then guidance for the times they appeared. I understand that there have been others in the English history that have said similar things to Hart – Hobbes, Hume and Adam Smith (?) – and there are many who say that one has to include more – Fuller and Finnis (?). So we see the same thing. Do we accept the minimum or are we told what to accept to become the bigger thing? The better Muslim, the better Christian the flourishing legal order… But when we put all the rules in and say that all these rules are backed by true morals then we get a powerful group imposing their image on us. It is better if we can agree on a minimum and then leave it up to each group to voluntarily accept the more rules, that way different groups can live side by side…

Chapter 7

Activity 7.1

Hart defines legal positivism, as we saw in Chapter 5, as an account of law in which it is not necessary to make a moral judgment in identifying law. Kelsen takes exactly the same line. We do not need to make a judgment of morality – about the **content** of law – to work out what the law requires. There is initial sense in this idea. We can identify that the Abortion Act 1967 is law merely by showing that it is an Act of Parliament, and this appears not to require any moral judgment at all. The question whether the Act is morally right to permit abortions in particular circumstances is an entirely different question.

Questions to put to yourself:

- Is it true that we can identify that something is law merely because it takes the particular form of a statute?

- Do we make a moral judgment when we say 'that is an Act of Parliament'?

Consider what Kelsen means when he says that we can 'describe' a set of 'ought-propositions'. He thinks we can describe a set of rules, which independently 'tell' people what to do. At first sight, this seems OK. After all, we can describe 'the rules of chess' and they 'tell' people what they 'ought' to do to play chess. In fact, the analogy with chess is helpful, since Hart used an analogy with games on many occasions in *The concept of law*: you can describe the rules of a game without making any judgment about the morality of the game. Well, can you? What if there were a 'game' of torturing people, with its own set of rules saying what those playing the 'game' ought to do in order to play it. If you are not willing to call this a 'real' game, is it because you think that in any human activity there is implicit some reference to a morally good human purpose? If so, you might start rethinking your position if you are convinced by legal positivism.

Activity 7.2

No feedback provided.

Activity 7.3

The point to explain here is the difference in the normative intention lying behind rules which give rise to taxes and those that give rise to fines. If, like Kelsen, you only look at rules from the perspective of 'if A does this, the court may impose such and such a sanction, e.g. the payment of £100', then you cannot distinguish the case where the law imposes a £100 fine on A for driving above the speed limit from the case where the law demands £100 in tax because A earns £500 of income. In both cases it looks like the law is punishing A. But of course this is not true. In the first case, a true case of a sanction, A is fined £100 because they breached a duty not to speed. In the second case, however, A breached no duty by earning income. The intended normative impact of the taxing rule is not to discourage A from earning money, imposing upon A a duty not to earn money. Rather, the liability to tax arises by operation of law as part of a system for raising revenue. The example points out that the normative impact of a rule cannot be determined just by looking at the consequences which flow from its operation, any more than one can treat the liability to pay damages for a tort as a consequence of the exercise of a power to benefit someone by injuring them. In both cases one can only make sense of the norms in question by looking at the standards of behaviour the law intends to institute.

Activities 7.4 and 7.5

No feedback provided.

Activity 7.6

In (**a**) ask yourself at what point has effectiveness ceased, and what is the implication for validity.

In (**b**) at what point, and why, would a new *Grundnorm* come into being? This problem requires you to consider the position of the judges and the difficult and obscure question of 'who assumes the *Grundnorm*?'

Part (**c**) raises a question about the identity of legal systems; if there is only one *Grundnorm* for each legal system, what if a new state is created? Is there automatically a new *Grundnorm* that gives it legal status?

Part (**d**) asks a question that is the mirror image of (c): can a legal system 'revive' after a return to the old state before the revolution took place (think of the Russia–USSR–Russia historical change)?

Activity 7.7

Try to suggest your own ideas. For example, when you consider how technical some laws are (e.g. Law of Property Act 1925), perhaps it is reasonable to suppose that law is a matter for technically skilled officials, about how to conduct their business, rather

than a matter for private citizens. Or you might consider whether a distinction can be made between civil and criminal law and still remain within the Kelsenian framework.

Activity 7.8

a. 'Social normativity', according to Raz, explains rule-following by stating that the standards are social, meaning that we identify them by referring to actually accepted standards. 'Justified normativity', also according to Raz, explains rule-following by stating that the standards are inherently justified, whether or not there is a social practice.

   Consider the following two ways of arguing. Killing animals is wrong: (a) because it is actually accepted by people to be wrong; and/or (b) because it violates animal rights. Here (a) depends on social facts (people's acceptance) but (b) does not, since a vegetarian could maintain their stance even though most people disagreed with them. (Can you think of two other examples where what most people accept is different from what is right?)

b. There are several possibilities. Is it the 'legal scientist' who describes the law? If so, in what sense is their description also a justification? It is very difficult to see how just describing what the law is at the same time justifies it. However, in Hart's theory, the rule of recognition is discovered by straightforwardly engaging in an empirical description of what judges and officials 'in fact' recognise as law, and Hart, at any rate, was happy enough with this as a justification of a statement of what you or I **ought** to do according to law. But maybe it is you – the individual – who accepts the *Grundnorm* and so 'justifies' it? But that suggests that the law can exist for one person but not another just by the process of accepting, like a sort of private 'justifying', which seems odd. Clearly, though, 'justified' cannot mean 'morally justified' in Kelsen's terms because he specifically rules out morality here (otherwise his theory is not 'pure' and so not one of legal positivism). Is there a point of view from which the law is not morally justified, but is publicly justified? It is difficult to think of one, unless we just read Kelsen as Hartian, but this seems impossible since Kelsen is insistent, as Hart was not, that the law was **not** to be equated with any description of social fact: there had to be, through the *Grundnorm*, a transcendental 'assumption' of validity.

Chapter 8

Activity 8.1

The first thing to notice is that there is not a sharp line between conventional explanations of the law and expertise-based explanations. Requiring the wearing of seat-belts looks like a classic expertise-based law. The state has scientific and other resources to assess whether the wearing of safety-belts reduces death and injury in road accidents, and can plausibly be said to be in a better position to guide the subjects of the law on this issue than the subjects themselves. Again, traffic regulations are largely conventional (we could devise a different workable set) but may also be based on expert understanding of traffic flow, driving behaviour, etc.

But treating either convention or expertise as the ground for authority looks less compelling in the case of creating the crimes of rape and theft, for we do not treat these rules as simply conventional, but as demanded by morality, and as to special knowledge, we believe that every normal person can be presumed to understand that these are wrong. However, one might notice that the law creates technical definitions of rape and theft, specifying the elements of *mens rea* and *actus reus*, for example, and this can be looked at as the laying down of conventions, the purpose of which is to provide more precise guidance to judges and juries to ensure the fair application of the law; this might draw upon the expertise of the law in framing workable legal definitions. The authority of the law to punish might derive from a different source. While criminals deserve punishment, arguably this should not be left to victims or those close to them or citizens generally because the punishments inflicted may

be too haphazard or excessive, because of the strength of the emotions involved. Taxation might be regarded as a case of a solution to a kind of coordination problem. Assume that all citizens have a moral obligation to contribute a fair share of their wealth to the state in order for its functions to be performed. It would be unfeasible if everyone was left to decide how much each of them should individually contribute; in particular, a fair result would be unlikely.

So the law has authority to set a workable set of rules which achieves this result better than citizens left to their own devices would be able to do. In *The morality of freedom* (p.75) Raz suggests five bases for legitimate authority: (1) wisdom or expertise; (2) the authority has a steadier will, is less likely to be biased or impetuous (consider the punishment case); (3) individuals should follow an indirect strategy of doing what they should, and this strategy is provided by following the authority (consider the obligation to help the poor – this might be better done through taxation and social services than by people acting on their own); (4) deciding for oneself may be too costly or inefficient or cause anxiety (this would seem to apply to the case of trying to deal with one's own severe illness); and (5) the solution of coordination problems, broadly construed, by the provision of conventions (e.g. the road traffic case).

Activity 8.2

When you promise, you treat the promise as an exclusionary reason guiding your future behaviour. You first deliberate about whether to make the promise, but once you make the promise to another person, you enter the executive phase of practical reason, taking the promise as an exclusionary reason which alone will guide your behaviour. Afterwards, you are not entitled to breach the promise simply because you change your mind and do not think making it was a good idea any more. Clearly, the separation of the deliberative and executive phases of practical reason accomplishes a different task here than in the case of the judicial decision or the committee decision, because as promiser you are the sole participant in both phases, and so the purpose is not to coordinate the activities of different people in the obvious way that these do. But in another sense, the exclusionary reason of a promise does coordinate the activities of people, by allowing a practice of promising to develop, by which people can count on others to do the things they said they would and coordinate their activities in that way. If a person who promised you something was free to reassess whether they would carry out the promise when the time came to keep it, you would not be able to plan with certainty on their doing so, and so you would, in response, have to plan in the face of uncertainty. Think how different the world would be if no one could expect others to keep their commitments.

Activity 8.3

In describing how Raz applies his theory, it is important to say how the central features of his account of authority – the service conception of authority; the way authorities mediate between their subjects and the balance of reasons that apply to them; the normal justification thesis; the distinction between the deliberative and executive phases of practical reason and the nature, force and scope of exclusionary reasons – all fit together to explain the nature of law. It must be acknowledged that Raz's theory is very tightly argued, so that if you find his account of authority illuminating, then you will find his account of the authoritative nature of the law illuminating. You might challenge the account of authority itself, say by preferring one of the more traditional 'power'-based accounts of authority. Or you might deny that morality is as controversial as he seems to think, so that directives making reference to morality really do make a practical difference. Note, however, that Raz only says that **to the extent** a directive is controversial it is not law. This might be clear in some cases and not others, but in recognising this Raz does no more than describe another case where a rule is not authoritative, in the same way that Hart said that the law runs out, as it were, where a statute using a vague word like 'vehicle' is sought to be applied to a difficult case, such as 'rollerskates'; there Hart, just like Raz, would say that a judge has a power to exercise their discretion to resolve the case. You should also consider a variant of this argument, which Dworkin makes, and which is given in Section 8.6 of this guide.

Chapter 9

Activity 9.1

No feedback provided.

Activity 9.2

The question is testing whether you appreciate that Hercules is an ideal judge. He need not therefore exist, in the same sense that the ideal economic market does not exist. However, both ideal ways of judging and the perfect market exist in the sense that they are present always, guiding judges and economists to better decisions. For example, you canot have a 'market imperfection', such as a monopoly, unless you have some idea of a perfect market in mind. See the summary after Section 9.4.

Activity 9.3

We can differ in our 'conceptions' of something and it is reasonable to think that we differ in our perceptions of a concept of that thing. Positivists have a positivistic conception of the concept of law; natural lawyers have a natural law conception. Indeed, Hart talks in Chapter 9 of *The concept of law* of 'wider' and 'narrower' conceptions of law. What, then, is 'the concept' of which differing conceptions differ? Here is another way of looking at the matter: what is common to what Dworkin, Hart and Kelsen think about law? There is something there, to do with rules, officials, central coercive power. Dworkin's point is that conceptions are controversial, but concepts are relatively not. To test what he says, try to think what elements of law would be constant to all differing views of it.

Activity 9.4

Here are several thoughts that you should take into account:

- Can we ever be certain of anything?
- Do lawyers think that there are right answers to the points of law they argue in court?
- What would the consequence be if there were no right answers to the question whether abortion was right?
- Is there a right answer to the question 'is murder wrong?'
- If there is, what argument makes it certain, if any?
- If 100 per cent of people thought that Nazism was right, or that abortion was wrong, or that slavery was justified (including the slaves themselves), would that be a sufficient reason for saying that slavery was right?

Activity 9.5

No feedback provided.

Chapter 10

Activity 10.1

No feedback provided.

Activity 10.2

No feedback provided.

Chapter 11

ACTIVITY 11.1

No feedback provided.

ACTIVITY 11.2

No feedback provided.

ACTIVITY 11.3

a. Marx is critical of Hegel because his philosophy reduces history to a pattern.

b. Marx is trying to create a more nuanced theory of the social world. A phenomenon like law can be understood in its historical context; but this does not mean that history has any eventual pattern or meaning.

ACTIVITY 11.4

As Pashukanis argued that all exchange was capitalist exchange, he came to the conclusion that all law was bourgeois law. The consequence of this argument is 'a one-sided critique which excluded the possibility of socialist legality and neglected any question of democratising and socialising the law'. These criticisms are more broadly criticisms of the Soviet system. Pashukanis's legal theory 'played into the hands of the Stalinist regime, which deployed his theory of the primacy of technical regulation under socialism to justify the power of the bureaucracy and its disregard for legal constraints'.

ACTIVITY 11.5

a. Criticisms are aimed at the Stalinist Soviet regime, which had turned into tyranny, and 'complacent liberalism', which had itself failed to resolve the exploitations of a capitalist mode of production. Fine and Picciotto are arguing, then, that the Western political order is responsible for political oppression despite the fact that it subscribes to democracy.

b. They build on the views of Karl Renner to suggest that the formal equality and neutrality of the law hide the fact that it continues to serve the interests of those who hold economic power. This is to reaffirm a faith in socialism, but to connect this with an idea of the rule of law: 'the rule of law could only be fully realised under socialism, since under capitalism it is distorted and corrupted by private interests'. The rule of law now means that state institutions must be democratised, and that legal regulation must continue into the private sphere to ensure 'the nationalisation of industry, but also by welfare legislation on employment, social security and child protection'.

c. Althusser argues that there is no simple relationship between economic base and social superstructure. Rather, there could be 'differential' relations between base and superstructure. For example, a capitalist economy may still retain 'feudal' legal mechanisms (the trust, for instance).

ACTIVITY 11.6

The ideological state apparatus is defined as a form of power operating in the interests of the state. The very plurality of the ISAs makes them distinguishable from the more fixed and located RSAs. The ISAs also infest the private realm to a far greater extent. The ISAs, despite their plurality, are organised 'beneath the ruling ideology'.

ACTIVITY 11.7

It depends on what 'useful' means! Clearly, if one is only concerned with elaborating the structure of trade law, and arguing it is coherent and able to regulate world trade, then Marxism, as a critique of a capitalist organisation of world economy, is not particularly useful. However, if one wants to understand trade law in a critical way, then one might

find Marxism useful. Rather than accepting that trade law can be accounted for in arguments about efficient use or regulation of resources, a Marxist account might argue that trade law is unable to regulate the inequalities that exist in the world marketplace. To be understood, trade law must be related to the creation and sustenance of world markets in such terms as primarily benefit the developed world.

Chapter 12

Activity 12.1

When answering, rewrite Wishik's questions in your own words.

Activity 12.2

Gilligan identified similarities to answers divided along gendered lines when she asked boys and girls this question. She represents these in Amy's answer and Jake's answer. She explains that Jake's answer represents the traditional view that life is more important than material property and equates to the ethic of justice. However, Amy's answer contains equally important perspectives of interconnection and creative thinking. See an analysis of aspects of Gilligan in Freeman at 14–002.

Activity 12.3

No feedback provided.

Activity 12.4

Definition of patriarchy:

> [A] system of male domination that involves the subordination of women. Patriarchy takes different forms in different societies and different historical periods. It interacts with other forms of oppression, such as class, race and sexuality, in very complex ways. (Johnson).

Examples: no feedback provided.

Activity 12.5

No feedback provided.

Activity 12.6

a. The 'subject position' refers to lived subjective experience. Williams appears to consider itfundamental in her analysis of the law to prevent the erasure of the person concerned. Williams continues to weave together personal narrative and commentary on social reality. Her attack is also on what critical legal scholars call **reification** (the ability of the legal system to only consider social issues when they have been turned into objects of legal discourse and fitted into the concepts allowed by legal doctrine).

   What sort of process is it when courts can talk of a **person** only in the language of 'redhibitory vices'? How does this discussion of a woman, Kate, boil down to whether or not the buyer can get their money back – which in turn depends on whether the court finds Kate stupid or crazy? And what does it say about the law if a person can be bought and sold into slavery to become an object and not a person/subject with rights? Williams plays on this, asking us to ponder if Williams herself is either stupid or crazy for getting upset.

b. Some may see difficulties in following through the logic of 'subject position' or 'standpoint theory' because it makes it difficult for anyone other than the individual subjected to the unique experience being able to speak to its truth.

NOTES

Notes